

EXHIBIT LIST

IN THE MATTER OF ZDO-276: Minor and Time Sensitive Comprehensive Plan and Zoning and Development Ordinance Amendments (FY 2020)

<i>Ex. No.</i>	<i>Date Received</i>	<i>Author or Source</i>	<i>Subject & Date of Document (if different than date received)</i>
1	5/20/2020	Mitch Jones, West Linn Resident	Email in support of ½ mile notice radius increase
2	6/1-2/2020	Michael Budd, Mt. Hood Cannabis Company	Email correspondence with Planning Staff, including 6/1/2020 email in support of repeal of County’s marijuana retail operating hours
3	6/1/2020	Historic Downtown Oak Grove (HDOG)	Emailed letter in support of manufacturing of edible or drinkable products retailed on site in C-2 and C-3 Districts
4	6/7/2020	Greg Norman, Oak Grove Resident	Email in support of allowing bakeries and brewpubs
5	6/8/2020	Alvia and Justin Cetas, Oak Grove Residents	Email in support of allowing bakeries and, potentially, brewpubs
6	6/8-9/2020	Meridee Pabst	Email correspondence with Planning Staff, including 6/8/2020 suggested additional amendments to ZDO Section 835, <i>Wireless Telecommunication Facilities</i>
7	6/15-16/2020	Martin Meyers, Redland-Viola-Fischers Mill CPO Chair	Email correspondence with Planning Staff concerning existing farm crop processing requirements
8	6/16/2020	Paul Slotemaker, Tilson Senior Site Acquisition Specialist	Email correspondence with Planning Staff, including 6/16/2020 comments on proposed amendments to ZDO Section 835, <i>Wireless Telecommunication Facilities</i> and recommending setback exemptions for small wireless facilities and certain other changes
9	6/19/2020	Joseph Edge, Oak Grove Community Council Chair	Emailed letter in support of manufacturing of edible or drinkable products retailed on site in C-2 and C-3 Districts, and recommending future parking standard amendments
10	6/19/2020	Meridee Pabst	Emailed letter from ‘Wireless Policy Group’ on behalf of AT&T with comments on proposed amendments to ZDO Section 835, <i>Wireless Telecommunication Facilities</i> and recommending additional ZDO amendments related to wireless telecommunications
11	6/29-30/2020	Suzanne Wolf, Historic Downtown Oak Grove (HDOG)	Email correspondence with Planning Staff concerning additional types of manufacturing in commercial zoning districts

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12	7/6/2020	Mario Mamone, President, Maritime Café	Emailed letter dated July 2, 2020, in support of allowing longer marijuana retailing operating hours
13	7/13/2020	Joseph Edge, Oak Grove Community Council Chair	Email concerning small-scale manufacturing, with a document titled 'Made in Place'
14	7/28/2020	Susan Wolf, Historic Downtown Oak Grove (HDOG)	Emailed letter dated July 28, 2020, in support of proposed amendments, but also suggesting allowing other types of businesses in downtown Oak Grove and offering a definition of "artisan/craft product manufacturing"
15	7/28/2020	Clackamas County DTD	2019-2021 Long-Range Planning Work Program (document dated June 10, 2019)
16	7/28/2020	Clackamas County Transportation Engineering Division	Current County Roadway Standards Section 715 standards small wireless facilities in County rights-of-way
17	7/28/2020	Federal Communications Commission	Declaratory Ruling and Third Report and Order related to small wireless facilities (adopted September 26, 2018)
18	7/28/2020	Glen Hamburg, DTD Senior Planner	Memo to Planning Commission dated June 30, 2020, addressing Planning Commission questions from June 22 hearing
19	7/28/2020	Karen Buehrig, DTD Long-Range Planning Manager	Memo to Planning Commission dated July 6, 2020, addressing Planning Commission questions related to FILO payments for required frontage improvements from June 22 hearing
20	7/28/2020	City of San Diego	February 2019 City of San Diego Wireless Communication Facility (WCF) Guidelines

Hamburg, Glen

From: mej5225@aol.com
Sent: Wednesday, May 20, 2020 10:41 AM
To: Hamburg, Glen
Subject: Re: Notice requirements, CPO NOTICE - Clackamas County Long Range Planning #1

Thanks Glen

-----Original Message-----

From: Hamburg, Glen <GHamburg@clackamas.us>
To: mej5225@aol.com <mej5225@aol.com>
Sent: Wed, May 20, 2020 10:21 am
Subject: RE: Notice requirements, CPO NOTICE - Clackamas County Long Range Planning #1

Good morning Mitch,

I'll be sure that your comments are included in the record for ZDO-276 and provided to the Planning Commission and Board of County Commissioners ahead of their scheduled hearings.

Regards,

Glen Hamburg

Senior Planner
Clackamas County Planning & Zoning
150 Beaver Creek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm



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From: mej5225@aol.com [mailto:mej5225@aol.com]
Sent: Wednesday, May 20, 2020 9:26 AM
To: Hamburg, Glen <GHamburg@clackamas.us>
Subject: Notice requirements, CPO NOTICE - Clackamas County Long Range Planning #1

Warning: External email. Be cautious opening attachments and links.

Glen,

I am in support of extending the 500 foot notice requirements to 1/2 mile per below.
I am currently in Luba appeal on lack of notice for the WUFC soccer complex in our RRRF5 property.
I think the notification procedures need to be strengthened to protect Clackamas Rural residents.
Please enter into the hearing record

Clackamas County is going to review 24 actions that are summarized on page 2 of the linked PDF document. Among them, #1, which increases the required distance that the County must 'notice' when a development or land use proposal is submitted. It is currently set at 500 feet. In rural areas where a property might be 500 feet in itself, neighbors don't always have an opportunity to be alerted to a proposal in their area. This action would be extended to 1/2 mile in certain zoning designations.

Mitch Jones
Resident
West Linn
Oregon

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Hamburg, Glen

From: mbudd@mediaworksonline.com
Sent: Tuesday, June 2, 2020 10:13 AM
To: Hamburg, Glen
Cc: Blessing, Ben
Subject: Re: ZDO-276: FY 2020 Minor Amendments

Warning: External email. Be cautious opening attachments and links.

Glen,
Nineteen dispensaries have their fingers crossed. Thank you.
Michael

Michael Budd
President

Mediaworks

PO Box 2597 | Bloomington, IN 47402
812.333.8099 | Cell: 812.345.2416
www.mediaworksonline.com

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On Jun 2, 2020, at 8:26 AM, Hamburg, Glen <GHamburg@clackamas.us> wrote:

Good morning Michael,

Among other things, Ordinance ZDO-276 proposes to repeal the County's own limitations on marijuana retailing operating hours, which currently are 10:00am to 9:00pm. If this proposed repeal were to be approved by the Board of County Commissioners following their public hearing on the ordinance in August, a retailer's operating hours would be restricted only to those set by the state.

A copy of the ordinance's proposed text amendments are available online [here](#) under the 'Documents' drop down under the ZDO-276 heading. A public notice that lists the dates and times of two scheduled public hearings and that summarizes the ordinance's various proposed amendments is available [here](#).

Regards,

Glen Hamburg

Senior Planner
Clackamas County Planning & Zoning
150 Beaver Creek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm

<image001.png>

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From: Blessing, Ben
Sent: Tuesday, June 2, 2020 8:06 AM
To: mbudd@mediaworksonline.com
Cc: Hamburg, Glen <GHamburg@clackamas.us>
Subject: RE: ZDO-276: FY 2020 Minor Amendments

Sorry about the delay michael.

Glen Hamburg in our office is working on this project so I have copied him. Here is his contact for future reference:

GHamburg@clackamas.us

Thanks,

Ben Blessing
Planner, Customer Service Desk
Clackamas County Planning and Zoning;

Feel free to contact us at zoninginfor@clackamas.us
Phone: 503-742-4500

Due to COVID19, our offices are physically closed, but we are still working. Please check Planning's home page out for information on how to submit Applications, obtain planning information, etc.:
<http://www.clackamas.us/planning/>

From: mbudd@mediaworksonline.com <mbudd@mediaworksonline.com>
Sent: Monday, June 1, 2020 11:06 AM
To: ZoningInfo <ZoningInfo@clackamas.us>
Subject: ZDO-276: FY 2020 Minor Amendments

Greetings,
There was discussion about including a change to the opening hours for dispensaries in Clackamas County. How is this proceeding?
respectfully,
Michael Budd
Mt Hood Cannabis Company

Michael Budd
President

Mediaworks
PO Box 2597 | Bloomington, IN 47402
812.333.8099 | Cell: 812.345.2416

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To: Planning Commission
Re: ZDO-276; Action #3
Date: June 1, 2020

On May 28, 2020, Historic Downtown Oak Grove (HDOG) held a General Membership meeting to, among other things, discuss the proposed amendment to the Clackamas County Zoning and Development Ordinance 276 specific to Action #3 which would **allow the manufacturing of edible or drinkable products retailed on-site in districts C2 (Historic Downtown Oak Grove) and C3 (McLoughlin corridor)**. This would be a change that HDOG, in partnership with the Oak Grove Community Planning Organization, has been advocating for since 2017 in response to community interest to have a bakery and brewpub in the downtown area. Currently, these types of businesses are prohibited in districts C2 and C3. The Board of Historic Downtown Oak Grove is in **favor** of the proposed amendment **ZDO-276; Action #3**.

Thank you for your consideration.

Suzanne Wolf, President
Historic Downtown Oak Grove (HDOG)
contact.hdog@gmail.com

Hamburg, Glen

From: Hamburg, Glen
Sent: Wednesday, June 3, 2020 11:22 AM
To: 'Suzanne Wolf'
Cc: Joseph Edge
Subject: RE: ZDO-276 Amendment

Thank you, Suzanne. I'll be sure to include this letter with the record and provide it to the Planning Commission and BCC prior to their hearings.

Hoping everyone in Oak grove is well,

Glen Hamburg
Senior Planner
Clackamas County Planning & Zoning
150 Beaver Creek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm

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-----Original Message-----

From: Suzanne Wolf [mailto:sznnwolf@gmail.com]
Sent: Wednesday, June 3, 2020 10:27 AM
To: Hamburg, Glen <GHamburg@clackamas.us>
Cc: Joseph Edge <joseph.edge@gmail.com>
Subject: ZDO-276 Amendment

Warning: External email. Be cautious opening attachments and links.

Hello Glen,

Below you will find a letter of recommendation for the ZDO-276 amendment.

Thank you,

Suzanne Wolf, President
Historic Downtown Oak Grove (HDOG)

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BEGIN-ANTISPAM-VOTING-LINKS

Teach CanIt if this mail (ID 042KFrbs3) is spam:

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Phishing Email: <https://mhub.clackamas.us/canit/b.php?c=p&i=042KFrbs3&m=6e11698be2eb&rlm=base&t=20200603>

END-ANTISPAM-VOTING-LINKS

Hamburg, Glen

From: Hamburg, Glen
Sent: Wednesday, June 10, 2020 7:07 AM
To: 'Greg Norman'
Subject: RE: ZDO-276 Small Bakerys and brew pubs

Good morning Greg,

I'll be sure to include your comments with the record and to provide them to the Planning Commission and Board of County Commissioners ahead of their hearings.

Regards,

Glen Hamburg

Senior Planner
Clackamas County Planning & Zoning
150 Beavercreek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm



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From: Greg Norman [mailto:normgr00@yahoo.com]
Sent: Sunday, June 7, 2020 6:45 PM
To: Hamburg, Glen <GHamburg@clackamas.us>
Subject: ZDO-276 Small Bakerys and brew pubs

Warning: External email. Be cautious opening attachments and links.

Regarding ZDO-276. Please do legalize small bakeries and brew pubs. Both would be great.

Greg Norman
13116 SE Briggs St.
Oak Grove, OR 97222

[Spam Email](#)
[Phishing Email](#)

Hamburg, Glen

From: Hamburg, Glen
Sent: Tuesday, June 9, 2020 9:09 AM
To: 'Alivia Cetas'
Subject: RE: ZDO-276

Good morning,

Thank you for your comments. I'll be sure to include them with the record and to provide them to the Planning Commission and Board of County Commissioners ahead of their scheduled hearings.

Regards,

Glen Hamburg

Senior Planner
Clackamas County Planning & Zoning
150 Beavercreek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm



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From: Alivia Cetas [mailto:acetas@gmail.com]
Sent: Monday, June 8, 2020 12:21 PM
To: ghamburg@clackamas.us
Subject: ZDO-276

As residents of the Oak Grove community, we would welcome and support small bakeries. We would also welcome a restaurant/cafe. We are less interested in a brewpub however that could be nice if family-friendly. More businesses that serve as anchors in the Oak Grove community will encourage more of the residents to spend their money as well as time in the community. This also promotes more walkable options which is important as many are spending more time at home during the COVID19 quarantine. Many people are choosing to drive less for a variety of reasons, and it is beneficial to be able to support eateries that provide take-out options. Goods from such businesses could be consumed in the consumer's home or possibly at open air tables that allow for social distancing. If the businesses are successful, residents from nearby communities may also choose to come and appreciate these businesses which brings more funds to Oak Grove. Let's work together to spend our money and our time in this beautiful community through supporting community business anchors in our midst.

Best,

Drs. Alivia & Justin Cetas

River Forest Drive
Oak Grove, Oregon

--
Alivia Cetas

Hamburg, Glen

From: Hamburg, Glen
Sent: Tuesday, June 9, 2020 8:48 AM
To: 'Meridee Pabst'
Cc: 'Ken Lyons'; 'Karen Manske'
Subject: RE: ZDO-276 (Including Wireless Section Amendments)

Oh, and the packet for the Planning Commission will be finalized by Monday, June 15.

Best,

Glen Hamburg

Senior Planner
Clackamas County Planning & Zoning
150 Beaver Creek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm



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From: Hamburg, Glen
Sent: Tuesday, June 9, 2020 8:47 AM
To: 'Meridee Pabst' <meridee.pabst@wirelesspolicy.com>
Cc: Ken Lyons <ken.lyons@wirelesspolicy.com>; Karen Manske <manske.k@hughes.net>
Subject: RE: ZDO-276 (Including Wireless Section Amendments)

Good morning Meridee,

Thank you for your comments. I'll be sure to include them with the record.

Some of the suggested additional amendments to ZDO Section 835 might be outside the scope of this ordinance project and what we've noticed the public about, but could always be considered with future code amendments. To the extent this package is concerned with wireless telecommunications facilities, we'll be focused only on what is necessary to comply with the recent FCC mandate on *small wireless facilities*, adopting certain ZDO standards for those facilities on private property, and exempting from the ZDO standards small wireless facilities in public rights-of-way or County easements. Correct me if I'm wrong, but these suggested changes might exceed that narrow, publically-noticed scope:

- Changing the criteria for adjustments for any wireless communication facility (not just small wireless facilities), as currently provided in Subsection 835.06;
- Changing the County's definition of "collocation", as it applies to all wireless communication facilities;

EXHIBIT 6

ZDO-276: FY 2020 Minor and Time Sensitive Amendments

Page 1 of 20

- Adding provisions for “Eligible Facilities Requests”; and
- Changing the criteria for ‘Level Two Placement on a Utility Pole’ to provide certain exceptions on a “building” (not just a utility pole).

I don't think it would be necessary to add the clause “located outside of public rights-of-way and easements under Clackamas County jurisdiction” to proposed Subsection 835.06(E), because small wireless facilities outside of public rights-of-way and County easements would already be explicitly exempted from the standards in 835.06(E), as well as from other provisions, by proposed Subsection 835.03. We don't want to exempt them from the exemption.

Finally, I have some hesitancy with adding the phrase “to the extent technically feasible” to the Planning Commission's recommended standard that small wireless facilities match the colors of the portions of a building they're mounted on or attached to. In order to meet the FCC shot-clocks and their mandate that the County's rules for what would or would not be allowed be published in advance, the proposed amendments would subject small wireless facilities to a ministerial ‘Type I’ review process, which evaluates proposals only according to *clear and objective standards*. Evaluating whether or not it was “technically feasible” to match a color in one particular instance, and without a definition of what “technically feasible” means/includes/doesn't include, would require a subjective determination by staff, warranting public notice and opportunity for appeal. The limited Type I review process does not provide for public notice or appeal, so the public would not have the opportunity to weigh in on whether they agree something is/isn't “technically feasible”; providing public notice and appeal would exceed the shot-clocks.

To be sure, the proposed standard does not require that small wireless facilities necessarily be “painted” or “shrouded”; it just requires that they be the same color as whatever portions of a building a carrier desires to attach them to. The standard allows for other applications (e.g., decals) to cover the facilities so they match in color, and also for their component parts themselves to be made of materials that match in color, without any painting, shrouding, or decals.

To answer your question about proposed Subsection 835.03(A), yes, small wireless facilities would be exempt from design review. Small wireless facilities would be a type of ‘wireless telecommunications facility’. The proposed amendments are intended to clarify even if the small wireless facility is providing essential communication services in the zoning districts listed in Subsections 1102.01(A) through (C), it is still not subject to design review. We might be able to use wording in that subsection that makes things clearer.

If I've misunderstood any of your suggestions, certainly let me know.

Regards,

Glen Hamburg

Senior Planner
Clackamas County Planning & Zoning
150 Beaver Creek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm



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From: Meridee Pabst [<mailto:meridee.pabst@wirelesspolicy.com>]
Sent: Monday, June 8, 2020 11:03 AM
To: Hamburg, Glen <GHamburg@clackamas.us>
Cc: Ken Lyons <ken.lyons@wirelesspolicy.com>; Karen Manske <manske.k@hughes.net>
Subject: Re: ZDO-276 (Including Wireless Section Amendments)

Warning: External email. Be cautious opening attachments and links.

Good morning, Glen,

On behalf of AT&T, we have attached a redline with some suggested clarifications and changes to the County's proposed zoning code amendments, for greater clarity and consistency with federal law. Please let me know if you would like to discuss any of the suggestions.

What is your timing for preparing and issuing the Planning Commission packet?

Thank you very much,

Meridee Pabst
425-628-2660 Direct

From: "Hamburg, Glen" <GHamburg@clackamas.us>
Date: Tuesday, May 19, 2020 at 9:04 AM
To: Meridee Pabst <meridee.pabst@wirelesspolicy.com>
Subject: ZDO-276 (Including Wireless Section Amendments)

Good morning Meridee,

Two public hearings have been scheduled for proposed ordinance ZDO-276, which include amendments to Zoning and Development Ordinance Section 835 to address **small wireless facilities**. A summary of all the ordinance package's proposed amendments, and copies of the proposed amendments themselves, are available online [here](#); Item 1 under 'Documents' is [the summary](#) and Item 12 are the amendments to [ZDO Section 835](#) concerning small wireless facilities.

As the linked-to summary explains, the public hearings will take place via the Zoom platform, with details on how to attend/participate posted online one week prior. The hearings dates and times are:

- Planning Commission: No earlier than 6:30 p.m., Monday, June 22, 2020
- Board of County Commissioners: No earlier than 9:30 a.m., Wednesday, August 5, 2020

You can also send written testimony ahead of time directly to me at this email address or mailed and address to me at the address in my signature below.

Kind regards,

Glen Hamburg

Senior Planner
Clackamas County Planning & Zoning
150 Beaver Creek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm



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835 WIRELESS TELECOMMUNICATION FACILITIES

DEFINITIONS

The following definitions apply to Section 835:

A Antenna: A transmitting or receiving device used in telecommunications that radiates or captures electromagnetic waves, including, but not limited to, directional antennas, such as panel and microwave dish antennas, and omnidirectional antennas, such as whip antennas.

~~B Collocation: (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; provided that, for purposes of evaluating an Eligible Facilities Request under 47 CFR 1.6100, "collocation" is as defined in that section.~~

~~B The use of a single support structure by more than one wireless~~

~~C telecommunications provider.~~

D Essential Public Communication Services: Police, fire, and other emergency communications networks.

E Equipment Shelter: A structure that houses power lines, cable, connectors, and other equipment ancillary to the transmission and reception of telecommunications.

F Existing Wireless Telecommunication Facility: A wireless telecommunication facility that received land use approval prior to March 14, 2002.

G . Small Wireless Facility: A wireless telecommunication facility that enables provision of wireless services and meets the conditions in Subsections 835.02(A)(1) through (4).

FG Support Structure: A wireless telecommunication tower, building, or other structure that supports an antenna used for wireless telecommunications.

GH. Wireless Telecommunication Facility: An unmanned facility for the transmission of radio frequency (RF) signals, consisting of an equipment shelter, cabinet, or other enclosed structure containing electronic equipment, a support structure, antennas or other transmission and reception devices. Freestanding point-to-point microwave dishes, high-power television and FM transmission facilities, AM facilities, amateur (Ham) radio antennas and towers, and citizen band transmitters and antennas are not wireless telecommunication facilities.

HI. Wireless Telecommunication Tower: A freestanding support structure, including monopole and lattice tower, designed and constructed primarily to support antennas and transmitting and receiving equipment. Wireless telecommunication

Commented [MOU1]: Suggest updating for consistency with the FCC definition, found in 47 CFR 1.6002(g).

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towers include:

- 1 Lattice tower: A tower characterized by an open framework of lateral cross members that stabilize the tower; and

835-2

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

2 Monopole: A single upright pole, engineered to be self-supporting, that does not require guy wires or lateral cross supports.

H. Wireless Telecommunication Tower Height: The distance from the finished grade at the antenna tower base to the highest point of the tower, including the base pad, mounting structures, and panel antennas, but not including lightning rods and whip antennas.

02 SMALL WIRELESS FACILITIES

A . Small wireless facilities, consistent with 47 CFR 1.6002(l)(1), are facilities that meet each of the following conditions:

1 . The facilities:

a. Are mounted on structures 50 feet or less in height including their antennas as defined in 47 CFR 1.1320(d); or

b. Are mounted on a structure no more than 10 percent taller than other adjacent structures; or

c. Do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

2 . Each antenna associated with the deployment, excluding associated antenna equipment, is no more than three cubic feet in volume;

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

4 . The facilities comply with Federal Communications Commission (FCC) requirements for registration, as well as FCC radio frequency emissions standards specified in 47 CFR 1.1307(b) and other applicable standards in 36 CFR 800.16(x) related to location on Tribal Lands.

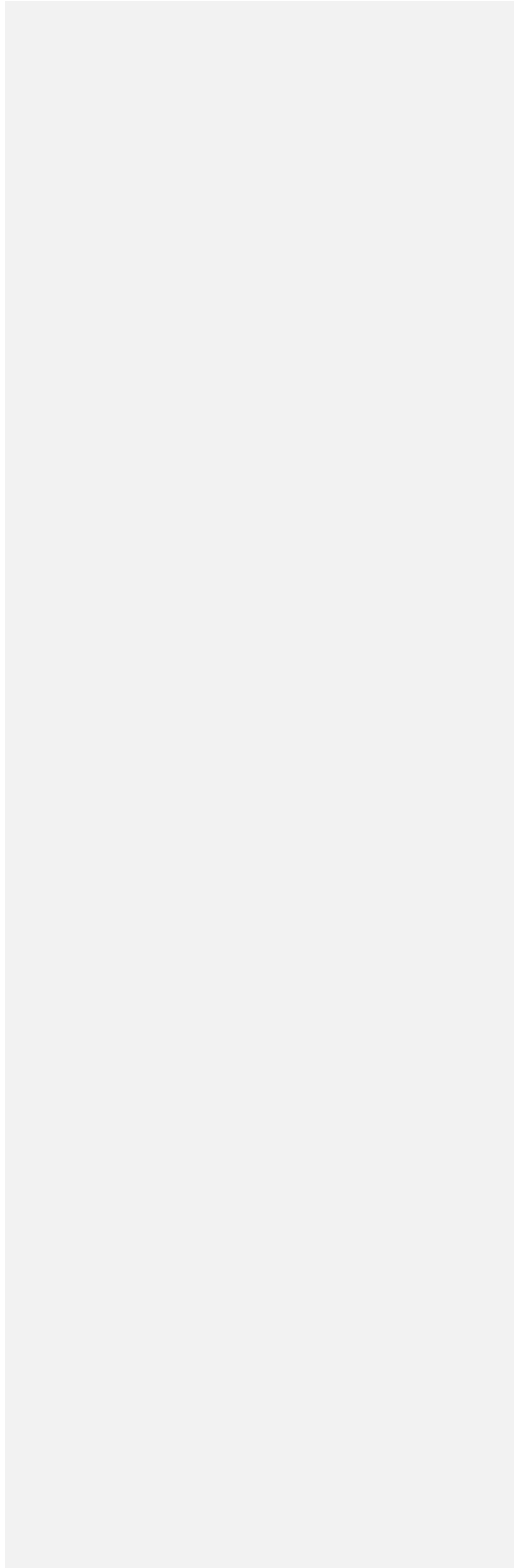
B . Notwithstanding any otherwise applicable definition in Section 202 or Subsection 835.01, terms used in Subsection 835.02 have the meanings provided in 47 CFR

1.6002, which includes the following definitions:

1 . Antenna: Consistent with 47 CFR 1.1320(d), an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to FCC authorization, for the provision of personal wireless service and any commingled information services. For

Commented [MOU2]: This isn't needed because the code will restate the relevant definition below.

purposes of this definition, the term antenna does not include an unintentional



radiator, mobile station, or device authorized under Part 15, Radio Frequency Devices of CFR Title 47, Telecommunication.

- 2 . Antenna equipment: Consistent with 47 CFR 1.1320(d), 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.
- 2 . Deployment: Placement, construction, or modification of a personal wireless service facility.
- 3 . Structure: 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).

835.0203 EXEMPTIONS

A . Except for essential public communication services not provided by small wireless facilities in zoning districts listed in Subsections 1102.01(A) through (C), small wireless facilities and other wireless telecommunication facilities are exempt from Section 1102, Design Review.

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Commented [MOU3]: This is confusing. AT&T understands that SWF will be exempt from design review, correct?

B . Small wireless facilities in public rights-of-way or in easements under Clackamas County jurisdiction are regulated by the Clackamas County Roadway Standards and are not subject to Subsection 835.04, Subsections 835.06, through Subsection 835.08, or Table 835-02.

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C Eligible Facilities Requests meeting the requirements of 47 CFR 1.6100.

Commented [MOU4]: Suggest the County update the code with reference to the FCC's rule for an EFR/Section 6409 modification and adopt an application form for the same.

835.0304 SUBMITTAL REQUIREMENTS

An application for a Type I permit for a wireless telecommunication facility shall include the submittal requirements identified in Subsection 1307.07(C). In addition to the submittal requirements identified in Subsections 1203.02 (for conditional uses only) and 1307.07(C), an application for a Type II or conditional use permit for a wireless telecommunication facility, or for an adjustment pursuant to Subsection 835.0607, shall include:

- A. A site plan, drawn to scale, that includes:
 - 1. Existing and proposed improvements;
 - 2. Adjacent roads;
 - 3. Parking, circulation, and access;

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

4. Areas of vegetation to be added, retained, replaced, or removed;

835-6

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

5. Setbacks of all existing and proposed structures; and
 6. If an adjustment is proposed pursuant to Subsection 835.06, the distance from the proposed location of the wireless telecommunication tower to off-site structures that are closer to the proposed location than a distance equal to the height of the proposed tower.
- B. A vicinity map showing lots, land uses, zoning, and roadways within 500 feet of the proposed antenna site;
- C. Elevations showing antennas, wireless telecommunication towers, equipment shelters, area enclosure, and other improvements related to the proposed facility;
- D. For all new antennas, color simulations of the site after construction;
- E. A map of existing wireless telecommunication facilities within one mile of the subject property; and
- F. An alternatives analysis demonstrating compliance with Subsection 835.0506(D)(1)(a).

835.0405 USES PERMITTED

- A. The types of wireless telecommunication facilities permitted in each zoning district are listed in Table 835-1, *Permitted Wireless Telecommunication Facilities*. Except for essential public communication services and small wireless facilities, wireless telecommunication facilities are classified as level one or two.
- B. As used in Table 835-1:
1. “P” means the classification of wireless telecommunication facility is a primary use.
 2. “C” means the classification of wireless telecommunication facility is a conditional use, approval of which is subject to Section 1203, *Conditional Uses*.
 3. “X” means the classification of wireless telecommunication facility is prohibited.
 4. Numbers in superscript correspond to the note that follows Table 835-1.
- C. Wireless telecommunication facilities that are not small wireless facilities are subject to the applicable provisions of Subsections 835.05-06(A-D) and 835.0708, and an adjustment may be approved pursuant to Subsection 835.0607. Small wireless facilities are not subject to Subsections 835.06(A-D) or 835.08, but are subject to the provisions of Subsection 835.06(E); small wireless facilities are not eligible for an adjustment pursuant to Subsection 835.07.

835-4

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

Table 835-1: Permitted Wireless Telecommunication Facilities

Use	FU-10, HR, MRR, and Zoning Districts Regulated by Section 315	AG/F, EFU, FF-10, NC, RA-1, RA-2, RR, RRF-5, TBR, and VCS	Commercial and Industrial Zoning Districts except NC, VCS, and SCMU	SCMU	Review Process pursuant to Section 1307
Essential Public Communication Services	P	P ¹	P	P	Type I ²
Level One Collocation	X	P	P	P	Type I ³
Level One Placement on a Utility Pole	P	P	P	P	Type I ³
Level Two Collocation	P	P	P	X	Type II ³
Level Two Placement on a Utility Pole	P	P	P	X	Type II ³
Level Two Wireless Telecommunication Facilities not included in any other category	C	C ¹	P	X	Type II if use is P ³ , Type III if use is C
Small Wireless Facilities	P	P	P	P	Type I⁴

¹ In the AG/F and TBR Districts, the use is subject to Subsection 406.05(A)(1).

² In the AG/F, EFU, and TBR Districts, essential public communication services require review as a Type II application pursuant to Section 1307.

CLACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

- 3 If an adjustment is proposed pursuant to Subsection 835.0607, the wireless telecommunication facility requires review as a Type III application pursuant to Section 1307, *Procedures*.
- 4 Small wireless facilities in public rights-of-way or in easements under Clackamas County jurisdiction do not require review through a Type I process.

835-6
File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

EXHIBIT 6

835.0506 STANDARDS

- A. Level One Collocation: A level one collocation of antennas on a previously approved wireless telecommunication facility shall be subject to the following standards:
- 1 Collocation proposals involving an existing wireless telecommunication facility must have an approved and implemented landscaping plan that complies with Subsection 835.0506(D)(5).
 - 2 There shall be no increase in the height of the existing wireless telecommunication support structure.
 - 3 The proposed collocated antennas shall be no more than 20 feet higher than the existing support structure.
 - 4 All collocation improvements shall be located within a previously approved fenced lease area.
 - 5 The collocation shall not involve the removal of any previously approved landscaping or buffering.
- B. Level One Placement on a Utility Pole: Level one placements of wireless telecommunication facilities on utility poles (electric, cable, telephone, etc.) shall be subject to the following standards:
- 1 The wireless telecommunication facility shall be placed on an existing utility pole or, if it is necessary to replace the existing pole with a pole that is suitable for wireless telecommunication, the new pole shall be no taller than the pole that is being replaced.
 - 2 The existing utility pole shall be within a public right-of-way, and, if the pole is to be replaced pursuant to Subsection 835.0506(B)(1), the replacement pole shall remain within the public-right-of-way.
 - 3 Any equipment shelters for the wireless telecommunication facility shall be located on the utility pole and within the public right-of-way.
- C. Level Two Placement on a Utility Pole: Level two placements of wireless telecommunication facilities on replacement utility poles (electric, cable, telephone, etc.) shall be subject to the following standards:
- 1 The height of the replacement utility pole shall not exceed the height of the pole being replaced by more than 20 feet.
 - 2 The existing utility pole shall be within a public right-of-way, and the replacement pole shall remain within the public-right-of-way.

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

D. Level Two Wireless Telecommunication Facilities: A level two wireless telecommunication facility (including a level two collocation or placement on a utility pole) shall be subject to the following standards:

- 1 New Towers: If a new wireless telecommunication tower is proposed:
 - a. No new tower will be permitted unless no existing support structure can accommodate the proposed antenna. All proposals for new wireless telecommunication facilities must be accompanied by a statement from a qualified person that the necessary telecommunication service cannot be provided by collocation for one or more of the following reasons:
 - i. No existing support structures, or approved but not yet constructed support structures, are located within the geographic area required to meet the applicant's engineering requirements;
 - ii. Existing support structures are not of sufficient height to meet the applicant's engineering requirements;
 - iii. Existing support structures do not have sufficient structural strength to support the applicant's proposed antenna and related equipment;
 - iv. The applicant's proposed antenna would cause electromagnetic interference with the antenna on the existing support structure, or the existing antenna would cause interference with the applicant's proposed antenna; or
 - v. The applicant demonstrates that there are other limiting factors that render existing support structures unsuitable.
 - b. If the tower is inside the Portland Metropolitan Urban Growth Boundary, it shall be a monopole.
 - c. The tower shall be designed and built to accommodate collocation or additional loading. This means that the tower shall be designed specifically to accommodate no less than the following equipment, in addition to the applicant's proposed equipment:
 - i. Twelve antennas with a float plate wind-loading of not less than four square feet per antenna;
 - ii. A standard mounting structure, standoff arms, platform, or other similar structure designed to hold the antennas;
 - iii. Cable ports at the base and antenna levels of the tower; and
 - iv. Sufficient room within or on the tower for 12 runs of 7/8-inch coaxial cable from the base of the tower to the antennas.

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

- d. The tower shall be painted or coated in a manner that blends with the surrounding area. The finished coloring shall result in a non-reflective surface that makes the tower as visually unobtrusive as possible unless state or federal regulations require different colors.
 - e. If the proposed wireless telecommunication facility requires approval of a conditional use permit, placement of the tower in an alternate location on the tract may be required, if the alternate location would result in greater compliance with the criteria in Section 1203, *Conditional Uses*, than the proposed location. In order to avoid relocating the proposed tower, the applicant shall demonstrate that the necessary wireless telecommunication service cannot reasonably be provided from the alternate location.
- 2 Equipment shelters shall be entirely enclosed. They may be painted or coated with a finish that best suits the operational needs of the facility, including the ability to reflect heat and to resist accumulations of dirt. If there is a conflict between acceptable colors and the operational needs of the facility, the use of architectural screen panels may be required.
 - 3 No lighting shall be permitted on a wireless telecommunication tower, except as required by state or federal regulations. If lighting is required, the light shall be shielded or deflected from the ground, public rights-of-way, and other lots, to the extent practicable.
 - 4 Unless the wireless telecommunication facility is located entirely on a utility pole or building, it shall be located within an area that is enclosed on all sides. The enclosure shall be a minimum of six feet tall and sight-obscuring.
 - 5 Landscaping shall be placed outside of the enclosed area required pursuant to Subsection 835.0506(D)(4) and shall include ground cover, shrubs, and trees that are reflective of the natural surrounding vegetation in the area. However, if a portion of the wireless telecommunication facility is screened from points off-site by a building with a height of at least eight feet, landscaping is not required for the screened area. In addition, Subsection 1009.10 applies.
 - 6 Noise generated by the wireless telecommunication facility shall not exceed the maximum levels established by the Oregon Department of Environmental Quality (DEQ). If lots adjacent to the subject property have a lower DEQ noise standard than the subject property, the lower standard shall be applicable.
 - 7 Dimensional Standards: Dimensional standards applicable to wireless telecommunication towers that are not solely for small wireless facilities are listed in Table 835-2, *Dimensional Standards for Wireless Telecommunication Towers* *Not Solely for Small Wireless Facilities*.
- E. Small Wireless Facilities: Small wireless facilities located outside of public rights-of-way and easements under Clackamas County jurisdiction, including all related equipment and appurtenances, shall:

835-9

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

- 1 . To the extent technically feasible, if attached to or mounted on a building, have the same color or colors as the portions of the building they are attached to or mounted on; and
- 2 . Not be affixed to trees, shrubs, or other vegetation.

Commented [MOU5]: Some SWF antennas may not be painted or shrouded, depending on the frequency used. Suggest clarifying that this requirement will apply to the extent technically feasible.

835-10

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

**Table 835-2: Dimensional Standards for Wireless Telecommunication Towers Not Solely f
or Small Wireless Facilities**

Zoning District	Maximum Height	Minimum Tower Separation	Minimum Front, Side, and Rear Setbacks
All zoning districts inside the Portland Metropolitan Urban Growth Boundary (UGB), HR, MRR, RR, and RTC	100 feet	1000 feet	The minimum setbacks generally applicable in the subject zoning district, or a distance equal to the height of the tower, whichever is greater
FF-10, RA-1, RA-2, RC, RI, and RRRF-5, provided that the tower is outside the UGB	150 feet	2000 feet	
AG/F, EFU, and TBR, provided that the tower is outside the UGB	250 feet	2,640 feet	

835.0607 **ADJUSTMENTS**

Adjustments to the standards of Section 835 for wireless telecommunication facilities that are not small wireless facilities may be granted under either of the following circumstances:

- A. A gap in t~~The applicant demonstrates that's compliance with this Section's standards would materially inhibit its ability to provide wireless service, and the adjustment is narrowly tailored to allow the carrier to meet its service objective, such that the wireless telecommunication facility conforms to this Section's standards to the greatest extent possible, exists and that gap can only be alleviated through the adjustment of one or more of the standards of this section. If an adjustment is to be approved, the applicant must demonstrate the following:~~
- ~~1. A gap in coverage or capacity exists in the wireless telecommunication provider's service network that results in network users being regularly unable to connect, or maintain connection, with the provider's network;~~
 - ~~2. The proposed wireless telecommunication facility will fill the existing service gap. Filled means the proposed facility would substantially reduce the frequency with which users of the network are unable to connect, or maintain connection, with the provider's network; and~~

Commented [MOU6]: Suggest updating the adjustments section for consistency with the most recent FCC interpretation of when a local regulation has the effect of prohibiting wireless service. See 2018 FCC Order, *Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018).

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CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

~~3. The gap cannot be filled through collocation on existing facilities, or establishment of facilities that are consistent with the standards of this section~~

835-12

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

~~on properties other than the proposed site or on the proposed site in a manner which does not require an adjustment.~~

- B. The proposed adjustment would utilize existing site characteristics to minimize demonstrated or potential impacts on the use of surrounding lots. Site characteristics include, but need not be limited to, those identified in Subsection 1203.03(B). The adjustment must result in a lower level of impact on surrounding lots than would result if the standard were not adjusted. In considering the requested adjustment, the following may be considered:
1. Visual impacts;
 2. Impacts on view;
 3. Impacts on property values; and
 4. Other impacts that can be mitigated by an adjustment so that greater compliance with Subsection 1203.03(D) occurs.

835.0708 ABANDONMENT

- A. Wireless telecommunication facilities that are not small wireless facilities will be considered abandoned when there has not been a provider licensed or recognized by the ~~Federal Communications Commission~~FCC operating on the facility for a period of 365 consecutive days. Determination of abandonment will be made by the Planning Director, who shall have the right to demand documentation from the facility owner regarding the tower or antenna use.
- B. Upon determination of abandonment, the facility owner shall have 60 calendar days to reuse the facility or transfer the facility to another owner who will reuse it within 60 calendar days of the determination of abandonment.
- C. If the facility is not reused within 60 calendar days of the determination of abandonment, county authorization for the use shall expire. Once authorization for the use has expired, the facility operator shall remove the facility from the property within 90 calendar days. If the facility operator does not remove the facility within 90 calendar days, the county may remove the facility at the expense of the facility operator, or, in the alternative, at the property owner's expense.

[Amended by Ord. ZDO-224, 5/31/11; Amended by Ord. ZDO-248, 10/13/14; Amended by Ord. ZDO-268, 10/2/18]

835-13

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

Hamburg, Glen

From: Hamburg, Glen
Sent: Tuesday, June 16, 2020 7:38 AM
To: 'Martin & Wendy meyers'
Subject: RE: Proposed changes to Zoning Ordinance
Attachments: HB 2844 - Farm Processing.pdf

Good morning Martin,

This is an existing requirement under state law. For at least as long as I'm aware, in order for the processing of farm crops to be permitted on agricultural land under the 'Type II' review procedures, a quarter of the farm crops to be processed (be they strawberries, milk, or whatever else) must come from the same farm. The rule prohibits a sometimes-industrial-like processor from opening up on farm land and processing only crops brought in from elsewhere.

ZDO-276 would not change this existing requirement. Rather, the ordinance would simply relocate the rule currently in [ZDO Subsection 401.05\(B\)\(1\)](#) to Subsection 401.03(G) so that the text of the ZDO more closely mirrors the layout of the enabling text in Oregon Revised Statutes (ORS) chapter 315.141, as amended by HB 2844 (attached here). Having the County's land use code more closely match the order and specific wording of relevant state laws, which apply regardless of the County's code, makes it easier to track and include amendments adopted by the state in the future.

There are a number of these "housekeeping" amendments that are proposed but not explained individually in the summary notice. To be sure, the only substantive amendments proposed in ZDO-276 (i.e., those that would change existing standards, approval criteria, or policies) are those specifically mentioned in the notice.

Regards,

Glen Hamburg

Senior Planner
Clackamas County Planning & Zoning
150 Beaver Creek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm



The Clackamas County Department of Transportation and Development is dedicated to providing excellent customer service. Please help us to serve you better by giving us your [feedback](#). We appreciate your comments and will use them to evaluate and improve the quality of our public service.

From: Martin & Wendy meyers [mailto:martinwendymeyers@gmail.com]
Sent: Monday, June 15, 2020 10:13 AM
To: Hamburg, Glen <GHamburg@clackamas.us>
Subject: Proposed changes to Zoning Ordinance

Warning: External email. Be cautious opening attachments and links.

EXHIBIT 7

ZDO-276: FY 2020 Minor and Time Sensitive Amendments

Page 1 of 2

Mr. Hamburg;

I am Chair of the Redland-Viola-Fischers Mill CPO and part of its subcommittee set up to review and comment on the County's proposed zoning changes.

I am curious about proposed ZDO 401.03 G concerning facilities for processing farm products and the standard it proposes in subsection 1 that allows processing operations including for biofuels "if at least one quarter of the farm crops come from the farm operation containing the facility."

Can you tell me the source of this test, and whether it differs from current practice or allowance.

Our CPO is late to this issue. As it was not outlined in the notice to the CPOs, we may wish yet to submit materials to the Commission in advance of its meeting on July 22nd. A prompt answer to this question and a follow up question or two will help us decide if any further action is needed.

Thanks, please call if that is easier.

Martin Meyers
Chair
Redland-Viola-Fischers Mill CPO
503 754 1616
503 631 8830

[Spam Email](#)
[Phishing Email](#)

Hamburg, Glen

From: Hamburg, Glen
Sent: Thursday, June 18, 2020 12:43 PM
To: 'Paul Slotemaker'
Subject: RE: ZDO-276 (Including Wireless Section Amendments)

Hi Paul,

I'll make sure your comments are included with the record and provided to the Planning Commission and Board of County Commissioners.

Regards,

Glen Hamburg

Senior Planner
Clackamas County Planning & Zoning
150 Beaver Creek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm



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From: Paul Slotemaker [mailto:pslotemaker@tilsontech.com]
Sent: Thursday, June 18, 2020 12:33 PM
To: Hamburg, Glen <GHamburg@clackamas.us>
Subject: RE: ZDO-276 (Including Wireless Section Amendments)

Warning: External email. Be cautious opening attachments and links.

Hi Glen,
I finally had a chance to review the proposed small cell wireless amendments.

I only had one comment recommending to call out the small cell development standards under Section 835.06(E) (see attached).

Thanks for all your work and let me know if there are any questions.

Thanks again!

TILSON

Paul Slotemaker, AICP | Senior Site Acquisition Specialist

pslotemaker@tilsontech.com

(c) (503) 421-2258

From: Paul Slotemaker

Sent: Wednesday, May 20, 2020 12:29 PM

To: Hamburg, Glen <GHamburg@clackamas.us>

Subject: RE: ZDO-276 (Including Wireless Section Amendments)

Thanks Glen! I'll take a look and plan on attending the Zoom public hearings.

TILSON

Paul Slotemaker, AICP | Senior Site Acquisition Specialist

pslotemaker@tilsontech.com

(c) (503) 421-2258

From: Hamburg, Glen <GHamburg@clackamas.us>

Sent: Tuesday, May 19, 2020 9:10 AM

To: Paul Slotemaker <pslotemaker@tilsontech.com>

Subject: ZDO-276 (Including Wireless Section Amendments)

Good morning Paul,

Two public hearings have been scheduled for proposed ordinance ZDO-276, which include amendments to Zoning and Development Ordinance Section 835 to address **small wireless facilities**. A summary of all the ordinance package's proposed amendments, and copies of the proposed amendments themselves, are available online [here](#) under 'Documents', but a direct link to the summary is [here](#) and to the Section 835 amendments concerning small wireless facilities [here](#).

As the linked-to summary explains, the public hearings will take place via the Zoom platform, with details on how to attend/participate posted online one week prior. The hearings dates and times are:

- Planning Commission: No earlier than 6:30 p.m., Monday, June 22, 2020
- Board of County Commissioners: No earlier than 9:30 a.m., Wednesday, August 5, 2020

You can also send written testimony ahead of time directly to me at this email address or mailed and addressed to me at the address in my signature below.

Kind regards,

Glen Hamburg

Senior Planner

Clackamas County Planning & Zoning

150 Beaver Creek Rd

Oregon City, OR 97045

Tel: 503.742.4523

General Schedule: Tuesday-Friday, 7am-5:30pm



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[Phishing Email](#)

835 WIRELESS TELECOMMUNICATION FACILITIES

835.01 DEFINITIONS

The following definitions apply to Section 835:

- A. Antenna: A transmitting or receiving device used in telecommunications that radiates or captures electromagnetic waves, including, but not limited to, directional antennas, such as panel and microwave dish antennas, and omnidirectional antennas, such as whip antennas.
- B. Collocation: The use of a single support structure by more than one wireless telecommunications provider.
- C. Essential Public Communication Services: Police, fire, and other emergency communications networks.
- D. Equipment Shelter: A structure that houses power lines, cable, connectors, and other equipment ancillary to the transmission and reception of telecommunications.
- E. Existing Wireless Telecommunication Facility: A wireless telecommunication facility that received land use approval prior to March 14, 2002.

F. Small Wireless Facility: A wireless telecommunication facility that enables provision of wireless services and meets the conditions in Subsections 835.02(A)(1) through (4).

~~FG.~~ Support Structure: A wireless telecommunication tower, building, or other structure that supports an antenna used for wireless telecommunications.

~~GH.~~ Wireless Telecommunication Facility: An unmanned facility for the transmission of radio frequency (RF) signals, consisting of an equipment shelter, cabinet, or other enclosed structure containing electronic equipment, a support structure, antennas or other transmission and reception devices. Freestanding point-to-point microwave dishes, high-power television and FM transmission facilities, AM facilities, amateur (Ham) radio antennas and towers, and citizen band transmitters and antennas are not wireless telecommunication facilities.

~~HI.~~ Wireless Telecommunication Tower: A freestanding support structure, including monopole and lattice tower, designed and constructed primarily to support antennas and transmitting and receiving equipment. Wireless telecommunication towers include:

- 1. Lattice tower: A tower characterized by an open framework of lateral cross members that stabilize the tower; and

2. Monopole: A single upright pole, engineered to be self-supporting, that does not require guy wires or lateral cross supports.

H. Wireless Telecommunication Tower Height: The distance from the finished grade at the antenna tower base to the highest point of the tower, including the base pad, mounting structures, and panel antennas, but not including lightning rods and whip antennas.

835.02 SMALL WIRELESS FACILITIES

A. Small wireless facilities, consistent with 47 CFR 1.6002(l)(1), are facilities that meet each of the following conditions:

1. The facilities:

a. Are mounted on structures 50 feet or less in height including their antennas as defined in 47 CFR 1.1320(d); or

b. Are mounted on a structure no more than 10 percent taller than other adjacent structures; or

c. Do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

2. Each antenna associated with the deployment, excluding associated antenna equipment, is no more than three cubic feet in volume;

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

4. The facilities comply with Federal Communications Commission (FCC) requirements for registration, as well as FCC radio frequency emissions standards specified in 47 CFR 1.1307(b) and other applicable standards in 36 CFR 800.16(x) related to location on Tribal Lands.

B. Notwithstanding any otherwise applicable definition in Section 202 or Subsection 835.01, terms used in Subsection 835.02 have the meanings provided in 47 CFR 1.6002, which includes the following definitions:

1. Antenna: Consistent with 47 CFR 1.1320(d), an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to FCC 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, Radio Frequency Devices of CFR Title 47, Telecommunication.

2. Antenna equipment: Consistent with 47 CFR 1.1320(d), 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.
2. Deployment: Placement, construction, or modification of a personal wireless service facility.
3. Structure: 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).

835.~~02~~03 EXEMPTIONS

- A. Except for essential public communication services not provided by small wireless facilities in zoning districts listed in Subsections 1102.01(A) through (C), small wireless facilities and other wireless telecommunication facilities are exempt from Section 1102, *Design Review*.
- B. Small wireless facilities in public rights-of-way or in easements under Clackamas County jurisdiction are regulated by the Clackamas County Roadway Standards and are not subject to Subsection 835.04, Subsections 835.06 through 835.08, or Table 835-02.

835.~~03~~04 SUBMITTAL REQUIREMENTS

An application for a Type I permit for a wireless telecommunication facility shall include the submittal requirements identified in Subsection 1307.07(C). In addition to the submittal requirements identified in Subsections 1203.02 (for conditional uses only) and 1307.07(C), an application for a Type II or conditional use permit for a wireless telecommunication facility, or for an adjustment pursuant to Subsection 835.~~06~~07, shall include:

- A. A site plan, drawn to scale, that includes:
 1. Existing and proposed improvements;
 2. Adjacent roads;
 3. Parking, circulation, and access;
 4. Areas of vegetation to be added, retained, replaced, or removed;

5. Setbacks of all existing and proposed structures; and
 6. If an adjustment is proposed pursuant to Subsection 835.06, the distance from the proposed location of the wireless telecommunication tower to off-site structures that are closer to the proposed location than a distance equal to the height of the proposed tower.
- B. A vicinity map showing lots, land uses, zoning, and roadways within 500 feet of the proposed antenna site;
 - C. Elevations showing antennas, wireless telecommunication towers, equipment shelters, area enclosure, and other improvements related to the proposed facility;
 - D. For all new antennas, color simulations of the site after construction;
 - E. A map of existing wireless telecommunication facilities within one mile of the subject property; and
 - F. An alternatives analysis demonstrating compliance with Subsection 835.~~05~~06(D)(1)(a).

835.~~04~~05 USES PERMITTED

- A. The types of wireless telecommunication facilities permitted in each zoning district are listed in Table 835-1, *Permitted Wireless Telecommunication Facilities*. Except for essential public communication services and small wireless facilities, wireless telecommunication facilities are classified as level one or two.
- B. As used in Table 835-1:
 1. “P” means the classification of wireless telecommunication facility is a primary use.
 2. “C” means the classification of wireless telecommunication facility is a conditional use, approval of which is subject to Section 1203, *Conditional Uses*.
 3. “X” means the classification of wireless telecommunication facility is prohibited.
 4. Numbers in superscript correspond to the note that follows Table 835-1.
- C. Wireless telecommunication facilities that are not small wireless facilities are subject to the applicable provisions of Subsections 835.~~05-06~~06(A-D) and 835.~~07~~08, and an adjustment may be approved pursuant to Subsection 835.~~06~~07. Small wireless facilities are not subject to Subsections 835.06(A-D) or 835.08, but are subject to the provisions of Subsection 835.06(E); small wireless facilities are not eligible for an adjustment pursuant to Subsection 835.07.

Table 835-1: Permitted Wireless Telecommunication Facilities

Use	FU-10, HR, MRR, and Zoning Districts Regulated by Section 315	AG/F, EFU, FF-10, NC, RA-1, RA-2, RR, RRRF-5, TBR, and VCS	Commercial and Industrial Zoning Districts except NC, VCS, and SCMU	SCMU	Review Process pursuant to Section 1307
Essential Public Communication Services	P	P ¹	P	P	Type I ²
Level One Collocation	X	P	P	P	Type I ³
Level One Placement on a Utility Pole	P	P	P	P	Type I ³
Level Two Collocation	P	P	P	X	Type II ³
Level Two Placement on a Utility Pole	P	P	P	X	Type II ³
Level Two Wireless Telecommunication Facilities not included in any other category	C	C ¹	P	X	Type II if use is P ³ , Type III if use is C
<u>Small Wireless Facilities</u>	<u>P</u>	<u>P</u>	<u>P</u>	<u>P</u>	<u>Type I⁴</u>

¹ In the AG/F and TBR Districts, the use is subject to Subsection 406.05(A)(1).

² In the AG/F, EFU, and TBR Districts, essential public communication services require review as a Type II application pursuant to Section 1307.

- ³ If an adjustment is proposed pursuant to Subsection 835.~~06~~07, the wireless telecommunication facility requires review as a Type III application pursuant to Section 1307, *Procedures*.
- ⁴ Small wireless facilities in public rights-of-way or in easements under Clackamas County jurisdiction do not require review through a Type I process.

835.~~0506~~ STANDARDS

A. Level One Collocation: A level one collocation of antennas on a previously approved wireless telecommunication facility shall be subject to the following standards:

1. Collocation proposals involving an existing wireless telecommunication facility must have an approved and implemented landscaping plan that complies with Subsection 835.~~0506~~(D)(5).
2. There shall be no increase in the height of the existing wireless telecommunication support structure.
3. The proposed collocated antennas shall be no more than 20 feet higher than the existing support structure.
4. All collocation improvements shall be located within a previously approved fenced lease area.
5. The collocation shall not involve the removal of any previously approved landscaping or buffering.

B. Level One Placement on a Utility Pole: Level one placements of wireless telecommunication facilities on utility poles (electric, cable, telephone, etc.) shall be subject to the following standards:

1. The wireless telecommunication facility shall be placed on an existing utility pole or, if it is necessary to replace the existing pole with a pole that is suitable for wireless telecommunication, the new pole shall be no taller than the pole that is being replaced.
2. The existing utility pole shall be within a public right-of-way, and, if the pole is to be replaced pursuant to Subsection 835.~~0506~~(B)(1), the replacement pole shall remain within the public-right-of-way.
3. Any equipment shelters for the wireless telecommunication facility shall be located on the utility pole and within the public right-of-way.

C. Level Two Placement on a Utility Pole: Level two placements of wireless telecommunication facilities on replacement utility poles (electric, cable, telephone, etc.) shall be subject to the following standards:

1. The height of the replacement utility pole shall not exceed the height of the pole being replaced by more than 20 feet.
2. The existing utility pole shall be within a public right-of-way, and the replacement pole shall remain within the public-right-of-way.

D. Level Two Wireless Telecommunication Facilities: A level two wireless telecommunication facility (including a level two collocation or placement on a utility pole) shall be subject to the following standards:

1. New Towers: If a new wireless telecommunication tower is proposed:
 - a. No new tower will be permitted unless no existing support structure can accommodate the proposed antenna. All proposals for new wireless telecommunication facilities must be accompanied by a statement from a qualified person that the necessary telecommunication service cannot be provided by collocation for one or more of the following reasons:
 - i. No existing support structures, or approved but not yet constructed support structures, are located within the geographic area required to meet the applicant's engineering requirements;
 - ii. Existing support structures are not of sufficient height to meet the applicant's engineering requirements;
 - iii. Existing support structures do not have sufficient structural strength to support the applicant's proposed antenna and related equipment;
 - iv. The applicant's proposed antenna would cause electromagnetic interference with the antenna on the existing support structure, or the existing antenna would cause interference with the applicant's proposed antenna; or
 - v. The applicant demonstrates that there are other limiting factors that render existing support structures unsuitable.
 - b. If the tower is inside the Portland Metropolitan Urban Growth Boundary, it shall be a monopole.
 - c. The tower shall be designed and built to accommodate collocation or additional loading. This means that the tower shall be designed specifically to accommodate no less than the following equipment, in addition to the applicant's proposed equipment:
 - i. Twelve antennas with a float plate wind-loading of not less than four square feet per antenna;
 - ii. A standard mounting structure, standoff arms, platform, or other similar structure designed to hold the antennas;
 - iii. Cable ports at the base and antenna levels of the tower; and
 - iv. Sufficient room within or on the tower for 12 runs of 7/8-inch coaxial cable from the base of the tower to the antennas.

- d. The tower shall be painted or coated in a manner that blends with the surrounding area. The finished coloring shall result in a non-reflective surface that makes the tower as visually unobtrusive as possible unless state or federal regulations require different colors.
 - e. If the proposed wireless telecommunication facility requires approval of a conditional use permit, placement of the tower in an alternate location on the tract may be required, if the alternate location would result in greater compliance with the criteria in Section 1203, *Conditional Uses*, than the proposed location. In order to avoid relocating the proposed tower, the applicant shall demonstrate that the necessary wireless telecommunication service cannot reasonably be provided from the alternate location.
2. Equipment shelters shall be entirely enclosed. They may be painted or coated with a finish that best suits the operational needs of the facility, including the ability to reflect heat and to resist accumulations of dirt. If there is a conflict between acceptable colors and the operational needs of the facility, the use of architectural screen panels may be required.
 3. No lighting shall be permitted on a wireless telecommunication tower, except as required by state or federal regulations. If lighting is required, the light shall be shielded or deflected from the ground, public rights-of-way, and other lots, to the extent practicable.
 4. Unless the wireless telecommunication facility is located entirely on a utility pole, it shall be located within an area that is enclosed on all sides. The enclosure shall be a minimum of six feet tall and sight-obscuring.
 5. Landscaping shall be placed outside of the enclosed area required pursuant to Subsection 835.0506(D)(4) and shall include ground cover, shrubs, and trees that are reflective of the natural surrounding vegetation in the area. However, if a portion of the wireless telecommunication facility is screened from points off-site by a building with a height of at least eight feet, landscaping is not required for the screened area. In addition, Subsection 1009.10 applies.
 6. Noise generated by the wireless telecommunication facility shall not exceed the maximum levels established by the Oregon Department of Environmental Quality (DEQ). If lots adjacent to the subject property have a lower DEQ noise standard than the subject property, the lower standard shall be applicable.
 7. Dimensional Standards: Dimensional standards applicable to wireless telecommunication towers that are not solely for small wireless facilities are listed in Table 835-2, *Dimensional Standards for Wireless Telecommunication Towers Not Solely for Small Wireless Facilities*.

E. Small Wireless Facilities: Small wireless facilities, including all related equipment and appurtenances, shall:

1. If attached to or mounted on a building, have the same color or colors as the portions of the building they are attached to or mounted on; and
2. Not be affixed to trees, shrubs, or other vegetation.

Recommend clearly calling out the small cell development standards:

- Must meet the standards in Section 835.02
- Setbacks: Clearly call out the setback requirements. I recommend treating small cells similar to parking lot light poles and exempting them from the base zone setback requirements.
- Height: Refer to small standards in Section 835.02(A)(1)

Table 835-2: Dimensional Standards for Wireless Telecommunication Towers Not Solely for Small Wireless Facilities

Zoning District	Maximum Height	Minimum Tower Separation	Minimum Front, Side, and Rear Setbacks
All zoning districts inside the Portland Metropolitan Urban Growth Boundary (UGB), HR, MRR, RR, and RTC	100 feet	1000 feet	The minimum setbacks generally applicable in the subject zoning district, or a distance equal to the height of the tower, whichever is greater
FF-10, RA-1, RA-2, RC, RI, and RFFF-5, provided that the tower is outside the UGB	150 feet	2000 feet	
AG/F, EFU, and TBR, provided that the tower is outside the UGB	250 feet	2,640 feet	

835.0607 ADJUSTMENTS

Adjustments to the standards of Section 835 for wireless telecommunication facilities that are not small wireless facilities may be granted under either of the following circumstances:

- A. A gap in the applicant’s service exists and that gap can only be alleviated through the adjustment of one or more of the standards of this section. If an adjustment is to be approved, the applicant must demonstrate the following:
 - 1. A gap in coverage or capacity exists in the wireless telecommunication provider’s service network that results in network users being regularly unable to connect, or maintain connection, with the provider’s network;
 - 2. The proposed wireless telecommunication facility will fill the existing service gap. Filled means the proposed facility would substantially reduce the frequency with which users of the network are unable to connect, or maintain connection, with the provider’s network; and
 - 3. The gap cannot be filled through collocation on existing facilities, or establishment of facilities that are consistent with the standards of this section

on properties other than the proposed site or on the proposed site in a manner which does not require an adjustment.

- B. The proposed adjustment would utilize existing site characteristics to minimize demonstrated or potential impacts on the use of surrounding lots. Site characteristics include, but need not be limited to, those identified in Subsection 1203.03(B). The adjustment must result in a lower level of impact on surrounding lots than would result if the standard were not adjusted. In considering the requested adjustment, the following may be considered:
1. Visual impacts;
 2. Impacts on view;
 3. Impacts on property values; and
 4. Other impacts that can be mitigated by an adjustment so that greater compliance with Subsection 1203.03(D) occurs.

835.~~0708~~ ABANDONMENT

- A. Wireless telecommunication facilities that are not small wireless facilities will be considered abandoned when there has not been a provider licensed or recognized by the ~~Federal Communications Commission~~FCC operating on the facility for a period of 365 consecutive days. Determination of abandonment will be made by the Planning Director, who shall have the right to demand documentation from the facility owner regarding the tower or antenna use.
- B. Upon determination of abandonment, the facility owner shall have 60 calendar days to reuse the facility or transfer the facility to another owner who will reuse it within 60 calendar days of the determination of abandonment.
- C. If the facility is not reused within 60 calendar days of the determination of abandonment, county authorization for the use shall expire. Once authorization for the use has expired, the facility operator shall remove the facility from the property within 90 calendar days. If the facility operator does not remove the facility within 90 calendar days, the county may remove the facility at the expense of the facility operator, or, in the alternative, at the property owner's expense.

[Amended by Ord. ZDO-224, 5/31/11; Amended by Ord. ZDO-248, 10/13/14; Amended by Ord. ZDO-268, 10/2/18]



June 19, 2020

Re: ZDO-276

Chair Pasko and Planning Commissioners,

The Oak Grove Community Council (OGCC), is a Goal 1 community planning organization (CPO) in Clackamas County, whose mission is to advise the Planning Division, Planning Commission, and the Board of County Commissioners on local land-use issues. We strive to represent the interests of the approximately 20,000 residents and businesses in our area of unincorporated Clackamas County. We are writing to request that you recommend approval of the proposed amendments to the Zoning and Development Ordinance included in ZDO-276, specifically with respect to *Action 3: Allow manufacturing of edible or drinkable products retailed on-site, and related wholesale distribution, in [specified Commercial Districts]*, as proposed by staff.

In 2017, a local community organization (now known as *Historic Downtown Oak Grove*) held the first Trolley Trail Festival in the historic downtown district of Oak Grove. That first event featured a suggestion box with comment cards for visitors from the local community to write ideas for things they'd like to see in Oak Grove that are missing. The most frequently mentioned suggestions were bakeries and brewpubs. Our volunteers went out and had discussions with local commercial land owners, bakers and brewers in the region, and prospective investors looking to open a microbrewery *in our neighborhood* to find out what they needed to succeed. Along the way, we found out that the Zoning and Development Ordinance does not permit these types of businesses to locate in the district where our community is asking for these types of businesses and where investors are looking to create these businesses. With the approval of our members, we then set out on a campaign to *Legalize Bakeries and Brewpubs in Oak Grove*.

In late 2017 and 2018, we submitted requests to the Planning Division to include a project in the following year's *Long Range Planning Work Program* to implement changes to the ZDO in support of our campaign to *Legalize Bakeries and Brewpubs in Oak Grove* (officially titled *Small scale manufacturing and production in the Community Commercial and General Commercial districts*). Each of the following springs, when considering the proposed work program, the Planning Commission recommended prioritization of this project. In 2019, the Board of County Commissioners accommodated our community's request and the Planning Commission's

recommendation by including it in the scope of minor and time-sensitive ZDO amendments, now before you today. These minor amendments are the result of that grassroots, community-led campaign to *Legalize Bakeries and Brewpubs in Oak Grove*.

The specific amendments proposed by staff to implement this change are informed through our discussions and interviews with commercial landowners, Historic Downtown Oak Grove, OGCC members, owners and operators of bakeries and brewpubs in the region, and prospective investors who were scouting sites in the historic downtown Oak Grove area for a brewpub. Representatives from the OGCC board and Historic Downtown Oak Grove met with Planning Division staff in late 2019 to discuss these details and ensure that the proposed amendments would provide a regulatory environment where small-scale bakeries and brewpubs could be successful. We believe that the amendments, as proposed, satisfy this objective with only one exception: the current minimum parking requirements will continue to deter investment in our area because it is a hurdle that can introduce significant costs to development in land-constrained, built-out, urban areas like our community. Given the sustained trend of increased walking and bicycling in our community and the high-quality pedestrian and bicycle connections to the surrounding community and region, we have heard interest expressed in relaxing minimum parking standards and allowing for “district parking” where excess parking is available nearby. Also, we believe staff’s proposal to include commercial districts other than C-2 and C-3 is reasonable and appropriate, but the intent of our request would be satisfied if the amendment affected only the C-2 and C-3 districts, in the event there are concerns about permitting these uses in any of the other commercial districts.

We look forward to future opportunities for discussions with staff to explore solutions to the challenges presented by the minimum parking standard that would mutually benefit residents, investors, patrons, and employees of new businesses that want to locate in our community, and that are responsive to the unique features of our community compared to other areas of the county. We also look forward to opportunities to expand the permitted small-scale manufacturing uses of certain non-edible/drinkable products, such as hand-built bicycles, for which production processes are low-impact, and can easily coexist in an area surrounded by a residential community.

In closing, we want to express our gratitude to Planning Division staff, the Planning Commission, and the Board of County Commissioners for being responsive to our request and providing opportunities for dialog to ensure the proposed amendments are consistent with the wishes of the community. We believe they are, and we respectfully request that you recommend approval of the amendments for *Action 3* of ZDO-276 to the BCC.

Sincerely,

Joseph P. Edge
Chair, Oak Grove Community Council

Hamburg, Glen

From: Joseph Edge <joseph.edge@gmail.com>
Sent: Friday, June 19, 2020 12:06 PM
To: Hamburg, Glen
Cc: Renhard, Darcy; Hughes, Jennifer
Subject: OGCC Comments for ZDO-276
Attachments: OGCC ZDO-276 Comments.pdf

Warning: External email. Be cautious opening attachments and links.

Hi Glen,

Please find attached the OGCC comments in support of the amendments proposed in ZDO-276. Please distribute to the Planning Commissioners for their review prior to or during the meeting on Monday evening.

Please let me know if you have any questions or suggestions.

Thank you,

Joseph

[Spam Email](#)
[Phishing Email](#)



June 19, 2020

Brian Pasko, Chair
Clackamas County Planning Commission
150 Beaver Creek Road
Oregon City, OR 97045

SENT VIA EMAIL: ghamburg@clackamas.us; drenhard@clackamas.us

Re: Small Wireless Facilities – Revised ZDO Section 835
June 22, 2020 Agenda Item 4(a)

Dear Chair Pasko and Commissioners:

Thank you for the opportunity to comment on the proposed code amendments applicable to small wireless facilities (“SWF”), revised ZDO Section 835, which you are considering in a public hearing Monday night. These comments are submitted to Clackamas County (“County”) on behalf of AT&T.

AT&T supports the County’s efforts to update its wireless code for greater consistency with federal law and advancements in technology, and it suggests the changes shown in the enclosed redlined copy of the code.

In addition to updates for consistency with the Federal Communications Commission’s 2018 Order¹ as it relates to small wireless facilities, which are addressed on page 6 of the staff report, AT&T suggests that the County update its zoning code more broadly for consistency with other changes in federal law, including provisions of the FCC Order and shot clock rule (47 CFR §1.6001, *et seq.*) that apply to wireless facilities of any size. If the County concludes that these additional changes are beyond the scope of this pending code update, AT&T asks that these suggested changes be considered in the next available “clean up” effort or Work Program.

In particular, AT&T asks that you consider the following changes to proposed Section 835.

Color of Small Wireless Antennas

AT&T suggests that the proposed requirement that small wireless antennas be colored the same as a building to which they are attached be written to apply “to the extent technically feasible.” See Section 835.06(E)(1). The feasibility of painting, shrouding, or covering an antenna with tinted film can be limited by the frequency at which the antenna will operate, and the insertion of this phrase will allow approval of a similar color instead of an exact match. Under the FCC Order, aesthetic regulations for SWF apply to the extent they are reasonable, technically feasible,

¹ *Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018)(“FCC Order”).

objective, no more burdensome than those applied to other types of infrastructure deployments, and published in advance.² Each SWF standard must be technically feasible for all carriers. As a result of this federal limitation, many jurisdictions are adopting small wireless standards to apply “to the extent technically feasible.” For example, the County’s new Roadway Standards provide in Section 715.6(a):

To the extent technically feasible, a small wireless telecommunication facility, including all related equipment and appurtenances, shall be a color that is similar to the support structure and use non-reflective materials.

In the alternative to adding “to the extent technically feasible,” the County might revise the standard to require “similar” or “compatible” coloring.

Other Consistency with Federal Law

It does not appear that ZDO Section 835 has been updated for consistency with federal laws governing Eligible Facilities Requests under 47 CFR §1.6100, other FCC definitions, or the FCC’s interpretation of when a wireless standard has “the effect of prohibiting” the provision of wireless service under federal statutes (47 U.S.C. §253(a); 47 U.S.C. §332(c)(7)(B)(i)(II)). AT&T has suggested in its redline additional changes to Section 835 for such consistency.

Eligible Facilities Requests. With regard to Eligible Facilities Requests, which are permitted modifications to existing wireless facilities, AT&T suggests the County adopt an exemption from zoning review in Section 835.03. Eligible Facilities Requests are governed by 47 USC §1455 (“Section 6409”), 47 CFR §1.6100, and a new FCC Order released this month, *Implementation of State and Local Governments’ Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, Declaratory Ruling, WT Docket No. 19-250 (released June 10, 2020). The applicable federal rules require approval of modifications to existing wireless facilities so long as they do not substantially change the physical dimensions of the existing support structure. Prior to adopting a code change, the County may ease review of these requests by adopting an application checklist similar to the one published by the National Association of Counties, the National League of Cities, and other organizations.³

Other FCC Definitions. Together with the definition of small wireless facility, the FCC adopted various definitions applicable to wireless facilities more generally in the FCC Order and 47 CFR §1.6002. As a result, the County’s definition of “collocation” is outdated. AT&T suggests that the County update its definition of collocation for consistency with FCC definitions.

“Materially Inhibit” Replaces “Significant Gap.” The FCC Order clarified the applicable test of when a local regulation has “the effect of prohibiting” wireless service, concluding that a regulation does so when it materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.⁴ The test is met *not*

² FCC Order at paras. 86-87.

³ <https://www.naco.org/sites/default/files/Model-Ord-NACo.pdf>

⁴ *Id.* at para. 35.

June 19, 2020
Page 3

only when a carrier is filling a coverage gap, but also when it is densifying a wireless network, introducing new services, or otherwise improving service capabilities.⁵ The County's current code uses the outdated "significant gap" test in its section allowing adjustments to standards (Section 835.07), and AT&T suggests that the County update this section to reflect the latest interpretation of federal statutes.

We appreciate your consideration of AT&T's comments and for all of the efforts by the County's leaders and staff to establish workable policies for the wireless industry, including AT&T, and the people living and working in the Clackamas County community.

Thank you for your consideration of these comments.

Sincerely,



Meridee Pabst
meridee.pabst@wirelesspolicy.com

Enclosure: Redlined ZDO Section 835

cc: Glen Hamburg, Senior Planner

⁵ *Id.* at para. 37.

835 WIRELESS TELECOMMUNICATION FACILITIES

DEFINITIONS

The following definitions apply to Section 835:

- A Antenna: A transmitting or receiving device used in telecommunications that radiates or captures electromagnetic waves, including, but not limited to, directional antennas, such as panel and microwave dish antennas, and omnidirectional antennas, such as whip antennas.
- B Collocation: (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; provided that, for purposes of evaluating an Eligible Facilities Request under 47 CFR 1.6100, “collocation” is as defined in that section.
- ~~C The use of a single support structure by more than one wireless~~
- ~~D telecommunications provider.~~
- E Essential Public Communication Services: Police, fire, and other emergency communications networks.
- F Equipment Shelter: A structure that houses power lines, cable, connectors, and other equipment ancillary to the transmission and reception of telecommunications.
- G Existing Wireless Telecommunication Facility: A wireless telecommunication facility that received land use approval prior to March 14, 2002.
- H . Small Wireless Facility: A wireless telecommunication facility that enables provision of wireless services and meets the conditions in Subsections 835.02(A)(1) through (4).
- FG Support Structure: A wireless telecommunication tower, building, or other structure that supports an antenna used for wireless telecommunications.
- GH. Wireless Telecommunication Facility: An unmanned facility for the transmission of radio frequency (RF) signals, consisting of an equipment shelter, cabinet, or other enclosed structure containing electronic equipment, a support structure, antennas or other transmission and reception devices. Freestanding point-to-point microwave dishes, high-power television and FM transmission facilities, AM facilities, amateur (Ham) radio antennas and towers, and citizen band transmitters and antennas are not wireless telecommunication facilities.
- HI. Wireless Telecommunication Tower: A freestanding support structure, including monopole and lattice tower, designed and constructed primarily to support antennas and transmitting and receiving equipment. Wireless telecommunication

Commented [MOU1]: Suggest updating for consistency with the FCC definition, found in 47 CFR 1.6002(g).

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

towers include:

- 1 Lattice tower: A tower characterized by an open framework of lateral cross members that stabilize the tower; and

835-2

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

- 2 Monopole: A single upright pole, engineered to be self-supporting, that does not require guy wires or lateral cross supports.

H. Wireless Telecommunication Tower Height: The distance from the finished grade at the antenna tower base to the highest point of the tower, including the base pad, mounting structures, and panel antennas, but not including lightning rods and whip antennas.

02 SMALL WIRELESS FACILITIES

A . Small wireless facilities, consistent with 47 CFR 1.6002(l)(1), are facilities that meet each of the following conditions:

1 . The facilities:

- a. Are mounted on structures 50 feet or less in height including their antennas as defined in 47 CFR 1.1320(d); or
 - b. Are mounted on a structure no more than 10 percent taller than other adjacent structures; or
 - c. Do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
- 2 . Each antenna associated with the deployment, excluding associated antenna equipment, is no more than three cubic feet in volume;
 - 3 . All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume; and
 - 4 . The facilities comply with Federal Communications Commission (FCC) requirements for registration, as well as FCC radio frequency emissions standards specified in 47 CFR 1.1307(b) and other applicable standards in 36 CFR 800.16(x) related to location on Tribal Lands.

B . Notwithstanding any otherwise applicable definition in Section 202 or Subsection 835.01, terms used in Subsection 835.02 have the meanings provided in 47 CFR

1.6002, which includes the following definitions:

- 1 . Antenna: Consistent with 47 CFR 1.1320(d), an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to FCC authorization, for the provision of personal wireless service and any commingled information services. For

Commented [MOU2]: This isn't needed because the code will restate the relevant definition below.

purposes of this definition, the term antenna does not include an unintentional

835-4

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

radiator, mobile station, or device authorized under Part 15, Radio Frequency Devices of CFR Title 47, Telecommunication.

2. . Antenna equipment: Consistent with 47 CFR 1.1320(d), 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.
2. . Deployment: Placement, construction, or modification of a personal wireless service facility.
3. . Structure: 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).

835.0203 EXEMPTIONS

A. Except for essential public communication services **not provided by small wireless facilities** in zoning districts listed in Subsections 1102.01(A) through (C), **small wireless facilities and other** wireless telecommunication facilities are exempt from Section 1102, *Design Review*.

B. Small wireless facilities in public rights-of-way or in easements under Clackamas County jurisdiction are regulated by the Clackamas County Roadway Standards and are not subject to Subsection 835.04, Subsections 835.06, ~~through~~ Subsection 835.08, or Table 835-02.

C. Eligible Facilities Requests meeting the requirements of **47 CFR 1.6100**.

835.0304 SUBMITTAL REQUIREMENTS

An application for a Type I permit for a wireless telecommunication facility shall include the submittal requirements identified in Subsection 1307.07(C). In addition to the submittal requirements identified in Subsections 1203.02 (for conditional uses only) and 1307.07(C), an application for a Type II or conditional use permit for a wireless telecommunication facility, or for an adjustment pursuant to Subsection 835.0607, shall include:

- A. A site plan, drawn to scale, that includes:
 1. Existing and proposed improvements;
 2. Adjacent roads;
 3. Parking, circulation, and access;

835-5

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

Commented [MOU3]: This is confusing. AT&T understands that SWF will be exempt from design review, correct?

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Commented [MOU4]: Suggest the County update the code with reference to the FCC's rule for an EFR/Section 6409 modification and adopt an application form for the same.

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

4. Areas of vegetation to be added, retained, replaced, or removed;

835-6

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

5. Setbacks of all existing and proposed structures; and
 6. If an adjustment is proposed pursuant to Subsection 835.06, the distance from the proposed location of the wireless telecommunication tower to off-site structures that are closer to the proposed location than a distance equal to the height of the proposed tower.
- B. A vicinity map showing lots, land uses, zoning, and roadways within 500 feet of the proposed antenna site;
- C. Elevations showing antennas, wireless telecommunication towers, equipment shelters, area enclosure, and other improvements related to the proposed facility;
- D. For all new antennas, color simulations of the site after construction;
- E. A map of existing wireless telecommunication facilities within one mile of the subject property; and
- F. An alternatives analysis demonstrating compliance with Subsection 835.0506(D)(1)(a).

835.0405 USES PERMITTED

- A. The types of wireless telecommunication facilities permitted in each zoning district are listed in Table 835-1, *Permitted Wireless Telecommunication Facilities*. Except for essential public communication services and small wireless facilities, wireless telecommunication facilities are classified as level one or two.
- B. As used in Table 835-1:
1. “P” means the classification of wireless telecommunication facility is a primary use.
 2. “C” means the classification of wireless telecommunication facility is a conditional use, approval of which is subject to Section 1203, *Conditional Uses*.
 3. “X” means the classification of wireless telecommunication facility is prohibited.
 4. Numbers in superscript correspond to the note that follows Table 835-1.
- C. Wireless telecommunication facilities that are not small wireless facilities are subject to the applicable provisions of Subsections 835.05-06(A-D) and 835.0708, and an adjustment may be approved pursuant to Subsection 835.0607. Small wireless facilities are not subject to Subsections 835.06(A-D) or 835.08, but are subject to the provisions of Subsection 835.06(E); small wireless facilities are not eligible for an adjustment pursuant to Subsection 835.07.

835-4

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

Table 835-1: Permitted Wireless Telecommunication Facilities

Use	FU-10, HR, MRR, and Zoning Districts Regulated by Section 315	AG/F, EFU, FF-10, NC, RA-1, RA-2, RR, RRRF-5, TBR, and VCS	Commercial and Industrial Zoning Districts except NC, VCS, and SCMU	SCMU	Review Process pursuant to Section 1307
Essential Public Communication Services	P	P ¹	P	P	Type I ²
Level One Collocation	X	P	P	P	Type I ³
Level One Placement on a Utility Pole	P	P	P	P	Type I ³
Level Two Collocation	P	P	P	X	Type II ³
Level Two Placement on a Utility Pole	P	P	P	X	Type II ³
Level Two Wireless Telecommunication Facilities not included in any other category	C	C ¹	P	X	Type II if use is P ³ , Type III if use is C
<u>Small Wireless Facilities</u>	<u>P</u>	<u>P</u>	<u>P</u>	<u>P</u>	<u>Type I⁴</u>

¹ In the AG/F and TBR Districts, the use is subject to Subsection 406.05(A)(1).

² In the AG/F, EFU, and TBR Districts, essential public communication services require review as a Type II application pursuant to Section 1307.

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

³ If an adjustment is proposed pursuant to Subsection 835.0607, the wireless telecommunication facility requires review as a Type III application pursuant to Section 1307, *Procedures*.

⁴ Small wireless facilities in public rights-of-way or in easements under Clackamas County jurisdiction do not require review through a Type I process.

835.0506 STANDARDS

- A. Level One Collocation: A level one collocation of antennas on a previously approved wireless telecommunication facility shall be subject to the following standards:
- 1 Collocation proposals involving an existing wireless telecommunication facility must have an approved and implemented landscaping plan that complies with Subsection 835.0506(D)(5).
 - 2 There shall be no increase in the height of the existing wireless telecommunication support structure.
 - 3 The proposed collocated antennas shall be no more than 20 feet higher than the existing support structure.
 - 4 All collocation improvements shall be located within a previously approved fenced lease area.
 - 5 The collocation shall not involve the removal of any previously approved landscaping or buffering.
- B. Level One Placement on a Utility Pole: Level one placements of wireless telecommunication facilities on utility poles (electric, cable, telephone, etc.) shall be subject to the following standards:
- 1 The wireless telecommunication facility shall be placed on an existing utility pole or, if it is necessary to replace the existing pole with a pole that is suitable for wireless telecommunication, the new pole shall be no taller than the pole that is being replaced.
 - 2 The existing utility pole shall be within a public right-of-way, and, if the pole is to be replaced pursuant to Subsection 835.0506(B)(1), the replacement pole shall remain within the public-right-of-way.
 - 3 Any equipment shelters for the wireless telecommunication facility shall be located on the utility pole and within the public right-of-way.
- C. Level Two Placement on a Utility Pole: Level two placements of wireless telecommunication facilities on replacement utility poles (electric, cable, telephone, etc.) shall be subject to the following standards:
- 1 The height of the replacement utility pole shall not exceed the height of the pole being replaced by more than 20 feet.
 - 2 The existing utility pole shall be within a public right-of-way, and the replacement pole shall remain within the public-right-of-way.

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

D. Level Two Wireless Telecommunication Facilities: A level two wireless telecommunication facility (including a level two collocation or placement on a utility pole) shall be subject to the following standards:

- 1 New Towers: If a new wireless telecommunication tower is proposed:
 - a. No new tower will be permitted unless no existing support structure can accommodate the proposed antenna. All proposals for new wireless telecommunication facilities must be accompanied by a statement from a qualified person that the necessary telecommunication service cannot be provided by collocation for one or more of the following reasons:
 - i. No existing support structures, or approved but not yet constructed support structures, are located within the geographic area required to meet the applicant's engineering requirements;
 - ii. Existing support structures are not of sufficient height to meet the applicant's engineering requirements;
 - iii. Existing support structures do not have sufficient structural strength to support the applicant's proposed antenna and related equipment;
 - iv. The applicant's proposed antenna would cause electromagnetic interference with the antenna on the existing support structure, or the existing antenna would cause interference with the applicant's proposed antenna; or
 - v. The applicant demonstrates that there are other limiting factors that render existing support structures unsuitable.
 - b. If the tower is inside the Portland Metropolitan Urban Growth Boundary, it shall be a monopole.
 - c. The tower shall be designed and built to accommodate collocation or additional loading. This means that the tower shall be designed specifically to accommodate no less than the following equipment, in addition to the applicant's proposed equipment:
 - i. Twelve antennas with a float plate wind-loading of not less than four square feet per antenna;
 - ii. A standard mounting structure, standoff arms, platform, or other similar structure designed to hold the antennas;
 - iii. Cable ports at the base and antenna levels of the tower; and
 - iv. Sufficient room within or on the tower for 12 runs of 7/8-inch coaxial cable from the base of the tower to the antennas.

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

- d. The tower shall be painted or coated in a manner that blends with the surrounding area. The finished coloring shall result in a non-reflective surface that makes the tower as visually unobtrusive as possible unless state or federal regulations require different colors.
 - e. If the proposed wireless telecommunication facility requires approval of a conditional use permit, placement of the tower in an alternate location on the tract may be required, if the alternate location would result in greater compliance with the criteria in Section 1203, *Conditional Uses*, than the proposed location. In order to avoid relocating the proposed tower, the applicant shall demonstrate that the necessary wireless telecommunication service cannot reasonably be provided from the alternate location.
- 2 Equipment shelters shall be entirely enclosed. They may be painted or coated with a finish that best suits the operational needs of the facility, including the ability to reflect heat and to resist accumulations of dirt. If there is a conflict between acceptable colors and the operational needs of the facility, the use of architectural screen panels may be required.
 - 3 No lighting shall be permitted on a wireless telecommunication tower, except as required by state or federal regulations. If lighting is required, the light shall be shielded or deflected from the ground, public rights-of-way, and other lots, to the extent practicable.
 - 4 Unless the wireless telecommunication facility is located entirely on a utility pole or building, it shall be located within an area that is enclosed on all sides. The enclosure shall be a minimum of six feet tall and sight-obscuring.
 - 5 Landscaping shall be placed outside of the enclosed area required pursuant to Subsection 835.0506(D)(4) and shall include ground cover, shrubs, and trees that are reflective of the natural surrounding vegetation in the area. However, if a portion of the wireless telecommunication facility is screened from points off-site by a building with a height of at least eight feet, landscaping is not required for the screened area. In addition, Subsection 1009.10 applies.
 - 6 Noise generated by the wireless telecommunication facility shall not exceed the maximum levels established by the Oregon Department of Environmental Quality (DEQ). If lots adjacent to the subject property have a lower DEQ noise standard than the subject property, the lower standard shall be applicable.
 - 7 Dimensional Standards: Dimensional standards applicable to wireless telecommunication towers that are not solely for small wireless facilities are listed in Table 835-2, *Dimensional Standards for Wireless Telecommunication Towers* Not Solely for Small Wireless Facilities.

E. Small Wireless Facilities: Small wireless facilities located outside of public rights-of-way and easements under Clackamas County jurisdiction, including all related equipment and appurtenances, shall:

835-9

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

- 1 . To the extent technically feasible, if attached to or mounted on a building, have the same color or colors as the portions of the building they are attached to or mounted on; and
- 2 . Not be affixed to trees, shrubs, or other vegetation.

Commented [MOU5]: Some SWF antennas may not be painted or shrouded, depending on the frequency used. Suggest clarifying that this requirement will apply to the extent technically feasible.

835-10

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

**Table 835-2: Dimensional Standards for Wireless Telecommunication Towers Not Solely f
or Small Wireless Facilities**

Zoning District	Maximum Height	Minimum Tower Separation	Minimum Front, Side, and Rear Setbacks
All zoning districts inside the Portland Metropolitan Urban Growth Boundary (UGB), HR, MRR, RR, and RTC	100 feet	1000 feet	The minimum setbacks generally applicable in the subject zoning district, or a distance equal to the height of the tower, whichever is greater
FF-10, RA-1, RA-2, RC, RI, and RRRF-5, provided that the tower is outside the UGB	150 feet	2000 feet	
AG/F, EFU, and TBR, provided that the tower is outside the UGB	250 feet	2,640 feet	

835.0607 ADJUSTMENTS

Adjustments to the standards of Section 835 for wireless telecommunication facilities that are not small wireless facilities may be granted under either of the following circumstances:

- ~~A. A gap in the applicant demonstrates thats compliance with this Section's standards would materially inhibit its ability to provide wireless service, and the adjustment is narrowly tailored to allow the carrier to meet its service objective, such that the wireless telecommunication facility conforms to this Section's standards to the greatest extent possible. exists and that gap can only be alleviated through the adjustment of one or more of the standards of this section. If an adjustment is to be approved, the applicant must demonstrate the following:~~
 - ~~2.1. A gap in coverage or capacity exists in the wireless telecommunication provider's service network that results in network users being regularly unable to connect, or maintain connection, with the provider's network;~~
 - ~~3.2. The proposed wireless telecommunication facility will fill the existing service gap. Filled means the proposed facility would substantially reduce the frequency with which users of the network are unable to connect, or maintain connection, with the provider's network; and~~

835-11

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

Commented [MOU6]: Suggest updating the adjustments section for consistency with the most recent FCC interpretation of when a local regulation has the effect of prohibiting wireless service. See 2018 FCC Order, *Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018).

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

~~4.3. The gap cannot be filled through collocation on existing facilities, or establishment of facilities that are consistent with the standards of this section~~

835-12

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

CL/ACKAMAS COUNTY ZONING AND DEVELOPMENT ORDINANCE

~~on properties other than the proposed site or on the proposed site in a manner which does not require an adjustment.~~

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- B. The proposed adjustment would utilize existing site characteristics to minimize demonstrated or potential impacts on the use of surrounding lots. Site characteristics include, but need not be limited to, those identified in Subsection 1203.03(B). The adjustment must result in a lower level of impact on surrounding lots than would result if the standard were not adjusted. In considering the requested adjustment, the following may be considered:
1. Visual impacts;
 2. Impacts on view;
 3. Impacts on property values; and
 4. Other impacts that can be mitigated by an adjustment so that greater compliance with Subsection 1203.03(D) occurs.

835.0708 ABANDONMENT

- A. Wireless telecommunication facilities that are not small wireless facilities will be considered abandoned when there has not been a provider licensed or recognized by the ~~Federal Communications Commission~~FCC operating on the facility for a period of 365 consecutive days. Determination of abandonment will be made by the Planning Director, who shall have the right to demand documentation from the facility owner regarding the tower or antenna use.
- B. Upon determination of abandonment, the facility owner shall have 60 calendar days to reuse the facility or transfer the facility to another owner who will reuse it within 60 calendar days of the determination of abandonment.
- C. If the facility is not reused within 60 calendar days of the determination of abandonment, county authorization for the use shall expire. Once authorization for the use has expired, the facility operator shall remove the facility from the property within 90 calendar days. If the facility operator does not remove the facility within 90 calendar days, the county may remove the facility at the expense of the facility operator, or, in the alternative, at the property owner's expense.

[Amended by Ord. ZDO-224, 5/31/11; Amended by Ord. ZDO-248, 10/13/14; Amended by Ord. ZDO-268, 10/2/18]

835-13

File ZDO-276, Proposed Amendments to ZDO Section 835, Draft Date 05/18/2020

Hamburg, Glen

From: Hamburg, Glen
Sent: Friday, June 19, 2020 5:32 PM
To: 'Meridee Pabst'; Renhard, Darcy
Cc: Ken Lyons; Karen Manske
Subject: RE: Small Wireless Facilities – Revised ZDO Section 835

Good evening Meridee,

I'll make sure these additional comments are included in the record and provided to the Planning Commission and BCC.

Have a great weekend,

Glen Hamburg

Senior Planner
Clackamas County Planning & Zoning
150 Beaver Creek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm



The Clackamas County Department of Transportation and Development is dedicated to providing excellent customer service. Please help us to serve you better by giving us your [feedback](#). We appreciate your comments and will use them to evaluate and improve the quality of our public service.

From: Meridee Pabst [mailto:meridee.pabst@wirelesspolicy.com]
Sent: Friday, June 19, 2020 4:08 PM
To: Renhard, Darcy <DRenhard@clackamas.us>; Hamburg, Glen <GHamburg@clackamas.us>
Cc: Ken Lyons <ken.lyons@wirelesspolicy.com>; Karen Manske <karen.manske@wirelesspolicy.com>
Subject: Small Wireless Facilities – Revised ZDO Section 835

Warning: External email. Be cautious opening attachments and links.

Good afternoon,

On behalf of AT&T, we have attached a comment letter to the Planning Commission, as well as a reformatted redline of suggested changes. (The content of the redline is the same as in the version we submitted to Glen Hamburg last week, but I have reformatted it to make the suggestions easier to read.)

Glen, we really appreciate your assistance in tracking this code change. The attached letter provides some additional background regarding the federal rules cited in AT&T's redline and a new Declaratory Ruling released by the FCC last week.

Thank you for your consideration of these suggestions.

Meridee Pabst

Vice President, Land Use

Wireless Policy Group LLC

meridee.pabst@wirelesspolicy.com

425-628-2660 Direct

360-567-5574 Wireless

[Spam Email](#)

[Phishing Email](#)

Hamburg, Glen

From: Suzanne Wolf <sznnwolf@gmail.com>
Sent: Tuesday, June 30, 2020 10:33 AM
To: Hamburg, Glen
Subject: Re: Follow-Up

Thank you, Glen, for sending ZDO Section 510 along with a map.

Much appreciated,

Suzanne

On Jun 30, 2020, at 7:46 AM, Hamburg, Glen <GHamburg@clackamas.us> wrote:

Good morning Suzanne,

Thank you all for touching base on this follow-up.

The uses currently allowed in the C-2 and C-3 zoning districts are identified in Table 510-1 of ZDO Section 510 online [here](#). Only the uses listed in the table are potentially allowable in those zones, and only according to the terms identified in the table with the abbreviations explained in Subsection 510.03 and by the relevant footnotes to the table. If someone is thinking of a use that is not listed anywhere in the table for one of these zones, or is listed with an 'X', the use is not allowed in either of these zones.

All areas of the County zoned C-2 or C-3 are shown in the North Urban Area Zoning Map online [here](#).

Regards,

Glen Hamburg

Senior Planner
Clackamas County Planning & Zoning
150 Beaver Creek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm



The Clackamas County Department of Transportation and Development is dedicated to providing excellent customer service. Please help us to serve you better by giving us your [feedback](#). We appreciate your comments and will use them to evaluate and improve the quality of our public service.

From: Suzanne Wolf [<mailto:sznnwolf@gmail.com>]
Sent: Monday, June 29, 2020 7:53 AM
To: Hamburg, Glen <GHamburg@clackamas.us>
Cc: Joseph Edge <joseph.edge@gmail.com>
Subject: Re: Follow-Up

Good morning, Glen!

Thank you for restating what the planning commission wants to know. This past Wednesday, our Board met to discuss the allowance to manufacture and wholesale products other than edible/drinkable ones. It was a lively discussion! At this time, the Board is in consensus to stick with artisanal businesses, such as bakeries and brewpubs.

However, the Board thinks this question is worthy of further consideration. They want a better understanding of current ordinances and raised concerns about the impact of the COVID-19 virus, seeing the future as hard to predict. They do not want to limit the business opportunities in our neighborhood. The Board requested links to the current ordinance(s), along with maps of the C2 and C3 districts to aid their discussion.

We appreciate your attention to these matters. If you have any other questions, please let me know.

Suzanne Wolf
President
HDOG (Historic Downtown Oak Grove)

On Jun 23, 2020, at 11:31 AM, Hamburg, Glen <GHamburg@clackamas.us> wrote:

Hi Suzanne,

Thank you again for your patience and participation yesterday evening.

The Planning Commission closed verbal testimony on ZDO-276, but will continue to accept written testimony up to their continued hearing scheduled for July 13th. That means that anyone can submit additional written comments before the Planning Commission votes on what to recommend to the BCC.

We will be finalizing the printed packets for the Planning Commission's July 13th by June 30. If you, HDOG, OGCC, would like to have additional written comments included in that packet, be sure to provide them to me prior June 30. If additional written comments are submitted after June 30, they will still be passed to the Planning Commission, but likely not until the very day of their continued hearing (July 13).

The Planning Commission was curious whether there is an interest in allowing the manufacture and wholesale distribution of on-site retailed goods other than just edible/drinkable products. If your community hopes to allow manufacturing/wholesaling of other types of products retailed on-site, rather than just edible and drinkable products, you might identify: what those additional products would be; which zones the manufacturing should be allowed; and potential associated land use impacts.

For example, is there an interest in allowing manufacturing/wholesaling of garments (e.g., shirts, hats) that are retailed on-site in the C-2 and C-3 Districts? How about jewelry, watches, or eye glasses? Is there anything that the community would NOT want to see manufactured/wholesaled in these commercial zoning districts? Would the community be OK with the manufacturing of things like fertilizer, furniture, automotive parts, sports equipment, soap/detergent, paper, cement, or electronics/robotics, if end-users could directly purchase these products from the manufacturer (either in-person or online)? If so, how would manufacturing of these types of products forward the community's long-term goals?

I should be clear that it *may* not be possible to allow additional types of manufacturing with this particular ordinance (ZDO-276), given the limited amount of time for additional analysis and the scope of proposals already publically noticed. However, depending on what additional suggestions are provided, we may be able to include them.

Kind regards,

Glen Hamburg
Senior Planner
Clackamas County Planning & Zoning
150 Beaver Creek Rd
Oregon City, OR 97045
Tel: 503.742.4523
General Schedule: Tuesday-Friday, 7am-5:30pm

The Clackamas County Department of Transportation and Development is dedicated to providing excellent customer service. Please help us to serve you better by giving us your feedback. We appreciate your comments and will use them to evaluate and improve the quality of our public service.

-----Original Message-----

From: Suzanne Wolf [<mailto:sznnwolf@gmail.com>]

Sent: Tuesday, June 23, 2020 10:58 AM

To: Hamburg, Glen <GHamburg@clackamas.us>

Subject: Follow-Up

Warning: External email. Be cautious opening attachments and links.

Good morning Glen!

I partially missed out toward the end of the meeting last night the part about “next steps” before the July 13th meeting. I thought I heard you say something about following up with Oak Grove. Would you share what that was with me? I have a board meeting tomorrow morning at 10:00 AM and would like to update the Board with what I heard.

Thank you,

Suzanne

--

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Maritime Café, Inc.
17417 SE McLoughlin Blvd.
Gladstone, OR 97267
503 305-8307

July 2, 2020

Clackamas County Commissioners
150 Beaver Creek Rd.
Oregon City, OR 97045

Dear Commissioners,

Last year we asked the other Clackamas County Commissioners to extend the operating hours of cannabis dispensaries in unincorporated Clackamas County (attached letter, Dec 6, 2019). We requested that our operating hours be extended so they are the same as the dispensaries in Oregon City, and the other cities of Clackamas County. Currently, dispensaries within unincorporated Clackamas County operate from 10:00 am to 9:00 pm. Whereas, cannabis dispensaries within the cities of Clackamas County operate from as early as 7:30 am and close at 10:00 pm.

At the above-mentioned meeting, the Commissioners were not ready to take up our request. However, at that meeting, Chair Bernard suggested that we bring our request to the Board in 2020. Thus, with more urgency than ever, we are again presenting our request for extending the operating hours for cannabis dispensaries in unincorporated Clackamas County.

Governor Brown has identified cannabis dispensaries as essential businesses that can stay open during the coronavirus pandemic. We at Maritime Café carefully reviewed the Governor's executive order; Oregon Liquor Control Commission (OLCC) requirements for dispensaries during the pandemic; Oregon Health Authority (OHA) guidance; directions from Oregon Department of Agriculture; and guidance from the Centers for Disease Control.

Our review was guided by the desire to ensure as an 'essential' business we can fulfill the need of our customers and keep our employees safe and employed during the pandemic. After our review, we determined that keeping Maritime Café open is in the best interest of our community. However, staying open requires we have a pandemic operational plan to keep our employees, customers and vendors safe, which we developed. Daily we implement the requirements of our plan to ensure a safe environment for everyone working at and entering Maritime Café. Our operational plan includes all the requirements OLCC has identified for dispensaries and the guidance from OHA.

The major steps we have taken include: (1) we allow only five customers at a time into the store; (2) we have marked locations on the floor to show where customers should stand to be served; (3) we marked walkways on the floor for customers to use to maintain distancing requirements; (4) we control customer access and movement in and out of the store to maintain proper distancing; (5) we prevent customers from touching any products; (6) customers cannot touch the counter; (7) employees are required to wear masks and gloves when assisting customers; (8) customers are required to wear masks; (9) employees regularly spray disinfectant and wiping down surfaces; (10) we provide customers with hand sanitizer; (11) we encourage customers to pre-order online; and (11) we allow customers to use curbside pickup so they do not need to enter the store.

Yet, we know we can do better! We believe that opening earlier and closing later will improve safety for customers, employees, vendors, and owners. Extended operating hours allows us to spread out our customers over three additional hours a day. We have many customers that would prefer to come earlier, e.g., at 8:00 am rather than 10:00 am, or to shop later. Extended hours for all the dispensaries in unincorporated Clackamas County will provide for safer operations County-wide. There is little doubt that maintaining social distancing is a primary way for businesses to keep safe our staff, customers, and vendors.

Maritime Café, and the owners of cannabis dispensaries in unincorporated Clackamas County are in agreement on the need for extending our operating hours. As with any other 'essential' business that stays open during the pandemic, we need the support of our elected officials to succeed. We need your assistance now so we can provide the safest shopping environment for our customers, and the safest working environment for our employees that risk their personal safety to serve the residents of Clackamas County. We need the flexibility in operating hours so we can function in the safest manner possible.

The pandemic is not a short-term problem but is here for the foreseeable future. This will require that we find immediate solutions to urgent, immediate problems created by the coronavirus. This is one of those times when action is required! By extending operating hours of dispensaries in unincorporated Clackamas County, the Commissioners are sending a strong message that you care about the health and safety of Clackamas County residents. We ask you to seriously consider this, our second request, for extended operating hours. In our humble opinion approving our request is a necessity for public safety and merits your urgent attention.

Sincerely,

Mario Mamone
President, Maritime Cafe

Hamburg, Glen

From: Joseph Edge <joseph.edge@gmail.com>
Sent: Monday, July 13, 2020 1:06 PM
To: Hamburg, Glen
Cc: Renhard, Darcy
Subject: ZDO-276 Supplemental Comments
Attachments: made-in-place-small-scale-manufacturing-neighborhood-revitalization.pdf

Warning: External email. Be cautious opening attachments and links.

Hello Glen,

Please provide a copy of this email and the attached PDF file to the Planning Commissioners for this evening's deliberations.

In 2017 (and again in 2018), the original Oak Grove Community Council request for amending the ZDO to permit small-scale manufacturing (including bakeries and brewpubs) within the Community Commercial zoning district was based upon the report titled *Made in Place: Small-scale manufacturing and neighborhood revitalization* (attached) published by Smart Growth America (SGA) at around the same time as our friends at HDOG were processing community input from the first Trolley Trail Festival. In responding to the community input, we found the regulatory challenges and our objectives and proposed solutions for permitting bakeries and brewpubs in the C-2 district are consistent with the findings and recommendations presented in the SGA report.

The focus of discussions so far has largely been upon the compatibility specifically of bakeries and brewpubs in small commercial districts surrounded by residential neighborhoods, and there are plenty of local examples throughout the region that prove these uses can be compatible and complementary. So, while bakeries and brewpubs have been the prime examples of the *types* of businesses the community wants to see, these are also representative of *objectives* the community has for its small-scale commercial center. We want to revitalize the neighborhood center, spur job creation, provide affordable opportunities for local artisans and entrepreneurs to incubate their businesses and connect with the community, and create opportunities for the community to access services locally.

What kind of spaces does small-scale manufacturing require?

Small manufacturing integrates well with existing community development, but also has unique needs within its sector. Economic development staff will need to understand who these businesses are and their needs within the community in order to support their space and growth needs.

Most small-scale manufacturers fall into one of three categories:

Artisan industry	Small production	Small production
A business using small tools, light machinery, and hand tools. These businesses are most often consumer-facing and sell through a variety of channels, including online, at craft fairs or pop-up markets, and/or in a	These businesses might provide contract production services to other designers and producers alongside production of their own items. These businesses may or may not be interested in scaling from this size. These	A scalable business with shared ownership that can grow. These businesses are often found in textiles, hand-dyed goods, beverage, with a focus on small production or these businesses

In the context of land use regulations and development standards, we've largely been focused on one recommendation from the SGA report: *Ensure that existing commercial zones and building codes allow artisan manufacturing businesses.* This is an essential step and we thank you for supporting the proposed changes.

Additionally, to address the specific question before us (are there other small-scale manufacturing uses that should be permitted in commercial districts?), the following recommendation from the SGA report is directly applicable:

Add an artisan manufacturing definition to the local land-use code if needed.

These are businesses that produce little to no vibration, noise, fumes, or other nuisances. An example of a definition for Artisan Manufacturing can be found in the city of Nashville, Tennessee, zoning ordinance:

the shared or individual use of hand-tools, mechanical tools and electronic tools for the manufacture of finished products or parts including design, processing, fabrication, assembly, treatment, and packaging of products; as well as the incidental storage, sales and distribution of such products. Typical artisan manufacturing uses include, but are not limited to: electronic goods, food and bakery products; non-alcoholic beverages; printmaking; household appliances; leather products; jewelry and clothing/apparel; metal work; furniture; glass or ceramic production; paper manufacturing.

Another recommendation from the SGA report relates to incentives to encourage the reuse of existing and/or historic structures "central to the community." While today we may not be looking at tax incentives or more substantive changes to the ZDO, consistent with trying to create low-cost opportunities for business incubator spaces, sparking job creation, and revitalizing the neighborhood center, we again are forced to look at the parking requirements and wonder if the minimum parking standard can be reduced or eliminated in cases where a change of use or other improvement to an existing structure triggers a Design Review or other land use application.

The basis for the OGCC's original request is that it is a logical extension of the community's desire for bakeries and brewpubs to also allow for other types of similar uses that will help to revitalize EXHIBIT 13

neighborhood center, spur job creation and support business incubator spaces, enliven street-level activity, and encourage walking and biking to neighborhood destinations. As stated previously, we will be very pleased with a recommendation from the Planning Commission to the BCC to adopt the amendments as presented from staff. We would also be supportive of the addition of another land use category for Artisan Manufacturing that could also be permitted in the Community Commercial zoning district.

Respectfully

Joseph P Edge
Chair, Oak Grove Community Council

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Made in **PLACE**



Small-scale manufacturing and neighborhood revitalization



Smart Growth America
Improving lives by improving communities

ZDO-276 FY 2020 Minor and Time Sensitive Amendments

EXHIBIT 13

Page 4 of 25

About this report

Technological and economic changes have created new opportunities in small-scale manufacturing and the “maker” economy, presenting a chance for communities to make progress on several important economic development issues. Small-scale manufacturing can grow local entrepreneurship and small business, develop or enhance new and existing economic sectors, and revitalize downtowns and business districts. Using tools and case studies, this whitepaper builds the case for why economic development practitioners should be thinking about working with small-scale manufacturers, how to grow the sector, and the particular synergies that are created when locating these businesses in downtowns and mixed use centers.

This report is produced as part of a broader technical assistance program which includes the provision of direct assistance to communities. Funded by the U.S. Economic Development Administration, and conducted in partnership with Recast City, the assistance guides communities in reviewing existing policies and programs that support local producers to grow their businesses in target neighborhoods. Specifically, the selected communities received a community assessment, during which the project team conducted fieldwork in the local subject area, held in-depth interviews with small-scale manufacturers, and led discussions to coordinate efforts with local stakeholder groups. The four communities that received technical assistance are:

- Knoxville, Tennessee
- Lowell, Massachusetts
- Twin Falls, Idaho
- Youngstown, Ohio

The overall goal of this initiative is to help communities grow their small-scale manufacturing and help their community revitalization efforts. It takes explicit advantage of the fact that small-scale manufacturing can help downtown revitalization and in turn, small-scale manufacturing can benefit from and thrive in downtown locations. This whitepaper brings together lessons from the technical assistance cities and lessons from around the country and identifies **four actions** to put these ideas into practice in your community.

Table of contents

Introduction	3
How do small-scale manufacturing, downtowns and neighborhood centers support each other?	4
The benefits of small-scale manufacturing in neighborhood centers	4
What kind of spaces does small-scale manufacturing need?	9
How can your community encourage and grow small-scale manufacturing?	14
1. Find, connect and support small scale manufacturers	14
2. Identify funding sources	16
3. Encourage small, light industrial space in local developments	18
4. Create cross-sector partnerships	19
Conclusion	20
Acknowledgements	21

Introduction

Throughout the 19th century, small-scale manufacturing grew in cities, towns and villages all around the United States. For these businesses, location and resources mattered: power sources, natural resources, and access to markets and people. These local assets created a manufacturing environment that was human in scale, and integrated into the fabric of their communities.

In the 20th century manufacturing transformed into a predominantly large-scale enterprise and moved out of neighborhoods and downtowns. Large-scale manufacturing became an incompatible use for neighborhoods and downtown areas due to its large physical scale, noise, significant freight requirements, and pollution. These factors ensured manufacturing's separation from neighborhoods and commercial centers into standalone facilities or industrial parks. This change also created high barriers to entry in the manufacturing sector because production only occurred in high-cost, large scale plants and produced thousands of units at a time.

Now, recent technological and economic shifts—such as access to online marketplaces, the ability to process sales on mobile devices, and affordable access to tools for smaller production runs—have lowered those barriers. These trends are changing what is possible in manufacturing, and point the 21st century economy back to this *new old* trend: small-scale manufacturing.

This new face of manufacturing allows many more people to produce and sell their own goods: costs of production are lower, tools are more accessible, space needs are smaller, production runs can be small and on-demand, and sales can start overnight. And similar to 19th century manufacturing, these entrepreneurs often benefit from being embedded in downtowns and neighborhood centers—and these areas also stand to benefit greatly from their presence there. Production is compatible with neighborhood uses, is interesting to see, and fits into small spaces. For communities, this presents a dual opportunity to simultaneously grow this business sector and contribute to neighborhood revitalization efforts.

Many local economic development strategies include support for growing and launching small businesses such as retail shops and professional services. However, small-scale manufacturing is often overlooked by local economic development practitioners—but can be an important piece of any economic development strategy and downtown redevelopment initiative. Similarly, the typical practice of mixed-use development includes retail, office, and residential to promote downtown revitalization, but rarely considers small production businesses as a complementary use. Plans often expel industrial uses outside of downtowns to suburban auto-oriented industrial parks.

But there are examples from around the country that are now turning this notion on its head, demonstrating that manufacturing businesses are not only thriving as a result of being on main street and in mixed-use districts, but are contributing to the character, appeal, and success of walkable neighborhoods.

How do small-scale manufacturing, downtowns and neighborhood centers support each other?

Small-scale manufacturing is emerging as an innovative strategy in today's neighborhood revitalization and economic development toolbox. And, these same businesses are finding that these locations can help them thrive. How are small-scale manufacturers and makers fitting into these spaces, and how can these same areas be fertile locations to grow the sector and reap economic benefits?

Communities that locate these manufacturers within existing downtowns or walkable retail areas benefit in many ways.

First, small-scale manufacturers can draw foot traffic and help to fill retail spaces that are difficult to lease or are vacant. The entrepreneurs that start these businesses quite often become powerful brand ambassadors for their cities and towns, highlighting the innovation and benefit of local production. The small scale-manufacturing sector is integral in building the small business community. Furthermore the sector provides an inclusive pathway and an opportunity for jobs for individuals that may have difficulty finding them in other sectors.

The benefits of small-scale manufacturing in neighborhood centers

Advancements in industrial technologies make small-scale manufacturing a strong alternative use in mixed-use corridors and centers. Small-scale manufacturers are cleaner and quieter, and more compact compared to traditional heavy manufacturing and thus can physically fit and be good neighbors. The small manufacturers benefit from existing infrastructure investments, access to retail customers, and proximity to transit, retail, housing, and a robust diversity of businesses and workers. For instance, a small manufacturer who fills a vacant storefront both attracts neighborhood residents to walk by and see production, and benefits from any existing foot traffic from other retailers or local transit stops. Additionally, manufacturing businesses benefit from being near each other. Small manufacturing business owners can help build a steadier supply of skilled labor, attract more competing suppliers, and encourage knowledge spillover between firms. This critical mass can only be achieved by allowing firms to locate in close proximity of one another, and near existing housing and commercial centers.

Small-scale manufacturing is an umbrella term that refers to all types of small businesses that produce tangible goods. This includes textiles, hardware, woodworking, metalworking, and 3D-printing. It also includes hardware prototyping, consumer product design and prototyping, breweries and distilleries, and local food production and packaging. The businesses may be consumer-facing or provide products to other businesses and often have 1-30 employees.

(Source: Recast City)

Small-scale manufacturers are also drawn to strong, dynamic places. These businesses often market and brand themselves by using the city, town, neighborhood, or even the building where they produce. Small-scale manufacturers, like many entrepreneurs, increasingly want to be in downtown or comparable areas to attract talent. They value quality of place as a critical factor when choosing their location.¹ The places they locate are not accidental—they identify strongly with the communities in which they work, sometimes developing locally made brand platforms such as Made In Baltimore and Cincinnati Made, becoming strong ambassadors for a place. Conversely a community's own brand can benefit when the city or community is associated with a cool, innovative, or original brand and product.

Creating a foothold for future growth

Communities around the country are changing zoning and city policies to accommodate these businesses downtown and in commercial centers because they are not only employers, they are destinations in themselves. Small-scale manufacturers can be among the first businesses in target areas for redevelopment before it's feasible for traditional retail to survive. Many of these businesses have more diverse revenue sources than traditional retailers—including online sales, business to business, or specialty orders. While most of these businesses are not necessarily dependent on foot traffic to be financially feasible, they can serve to help draw people to an area. Some small-scale manufacturers, like breweries, can also serve as stand-alone destinations, drawing an experience-oriented crowd.

Small-scale manufacturers create a unique amenity that can attract people to a new place. In addition to retail, restaurants, and cultural venues, small-scale manufacturers can give residents and visitors new reasons to come spend time in a neighborhood. As local products such as food, wood products, and textiles are made in core neighborhoods for the first time in decades, these businesses are destinations for customers to see firsthand where their products come from, and add to the connection with customers that is already driving the buy local movement.

Providing another attractive option to fill retail space

Many cities encourage ground-floor retail through zoning to support active street frontages and promote human-scale urban design. Yet there is not always adequate demand from existing retailers or service businesses to support ground floor retail, especially in the initial years of lease up in new development.

National changes in retail trends are exacerbating retail vacancies. Taken as a whole, the U.S. has more square feet of retail than demand. Traditional retailers closed hundreds of stores in the last few years, and analysts believe more will do the same over the next decade.² Meanwhile, online retailers like Amazon and other e-commerce platforms show no signs of slowing down.³

This changing retail landscape represents an opportunity for small-scale manufacturing to fill the gap in mixed-use districts and neighborhood main streets. Small-scale manufacturers are a different tenant type than traditional retailers or service providers, as hybrid businesses that can simultaneously be producers and main street retailers. They can thrive in locations that are not prime retail frontage, shapes, or sizes. A business may sell wholesale online, but can draw attention on a block through a formerly vacant store

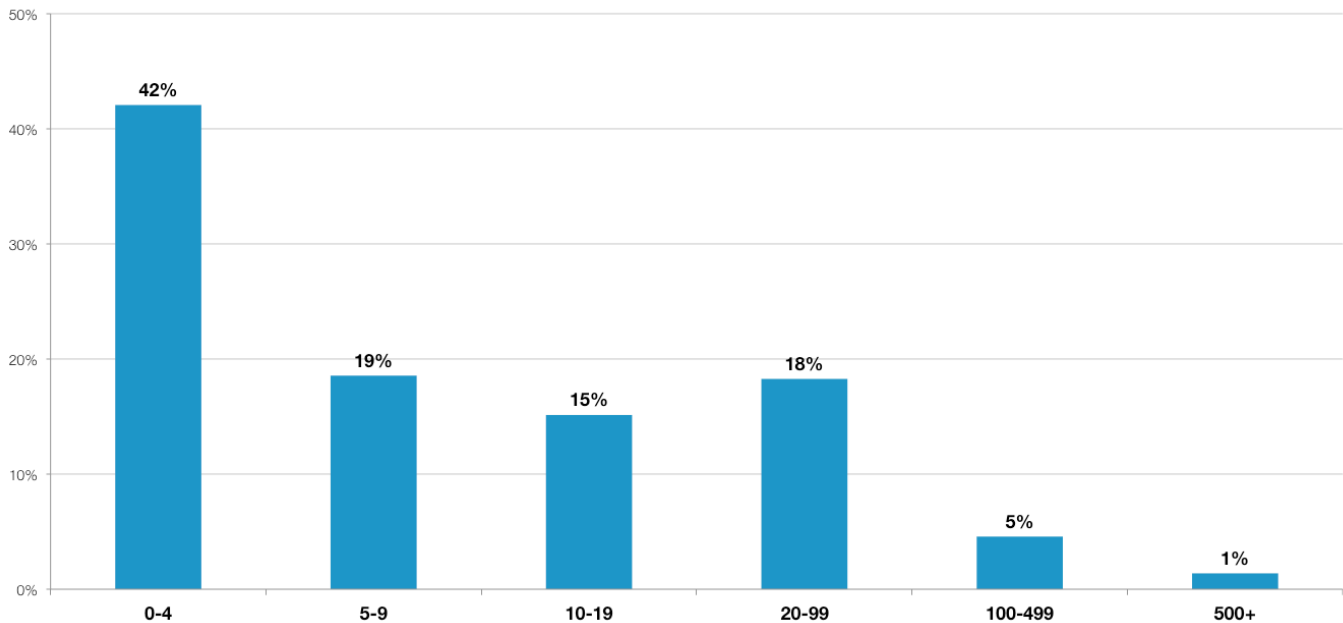
that now shows machinery and people at work. A collection of businesses can help to attract other retail investment in an area that has been neglected. In some cases, these businesses become an experience and destination of their own, anchoring the block or development.

Growing small-scale manufacturing creates a resilient small business environment

Small business is key to not just local economic success, but national prosperity, accounting for two out of three net new jobs created in the U.S.⁴ Supporting a diverse variety of small businesses, across industry sectors, creates jobs for a diverse range of skill sets and wages, and helps buffer local economies from dramatic fluctuations in any one individual industry. Additionally, small businesses tend to keep money within local economies longer: local businesses reinvest nearly 50 percent of their revenue in the local community, versus about 14 percent reinvested from large chains.⁵ Strategies that seek to grow local economies from within by nurturing local businesses, often referred to as economic gardening, support local entrepreneurs to create companies and bring new jobs and business to a region. Nationally, strong regional economies are correlated with having many small businesses rather than a few large ones.⁶

Small-scale manufacturing businesses are a key piece of building the local small business sector. According to data from the Manufacturing Institute, over 75 percent of manufacturing businesses in the U.S. had fewer than 20 employees in 2014, as illustrated in the graphic below. Communities will benefit from strategies that include these small manufacturing businesses in local small business programming and placement efforts.

Percentage of manufacturing firms by number of employees



Source: Manufacturing Institute; Bureau of Labor Statistics

Building a more inclusive business community

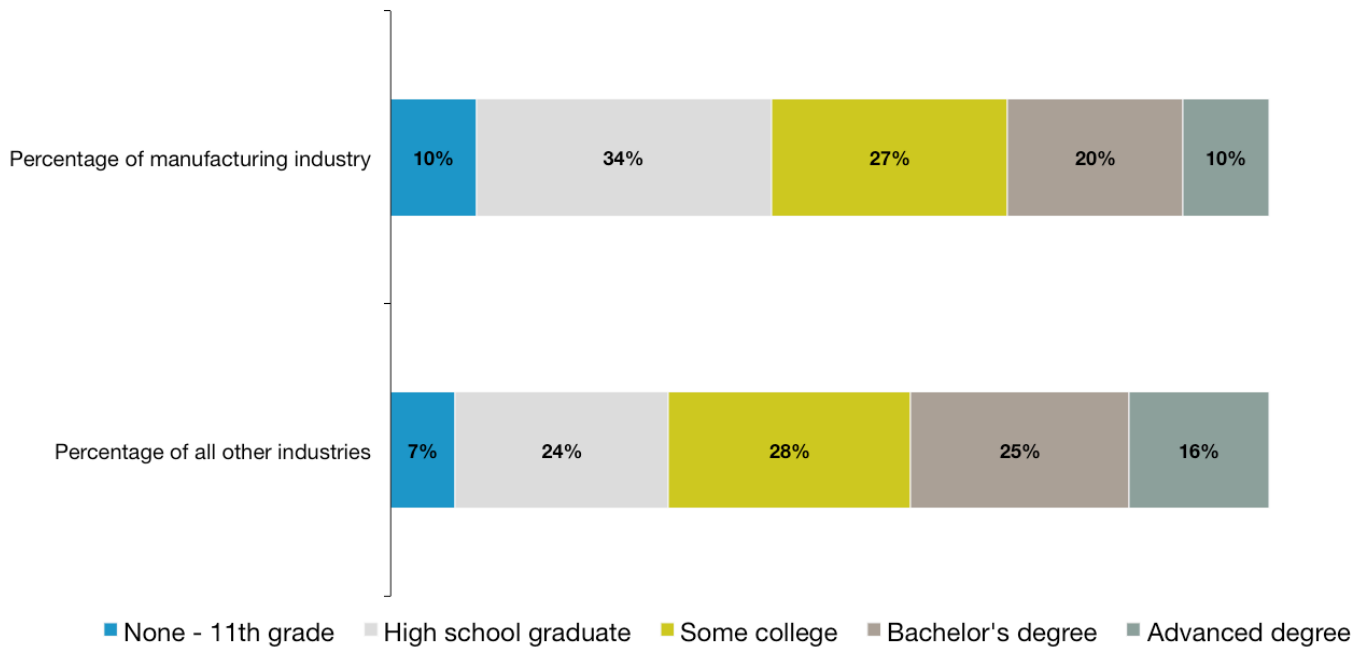
In addition to diversifying a local business ecosystem, small-scale manufacturing firms have the added benefit of expanding economic opportunity to a diverse range of residents. As a sector, small-scale manufacturing represents a diverse demographic population. Data show that small-scale manufacturing entrepreneurs come from a range of ethnic and racial backgrounds, and include men and women. For example, on Etsy, one of the largest platforms for makers and micro-manufacturers, 87 percent of sellers are women.⁷ Additionally, there is a growing trend of entrepreneurialism in immigrant communities: 28.5 percent of new entrepreneurs in 2014 were immigrants, up from 13.3 percent in 1999.⁸

Yet the outreach and assistance offered by local government often miss many of these business people. Additionally, the lack of access to capital sources is a major barrier to minority entrepreneurs. Local governments are recognizing the importance of bringing resources and assistance to underrepresented entrepreneurs from diverse cultural and demographic backgrounds, who may not know about programs, points-of-contact in local government or existing capital programs for small business. With continued public sector support and strong public-private partnerships, small-scale manufacturing can continue to serve as an entry point to capitalize on skills in the community, and empower residents to turn their skills into a business.

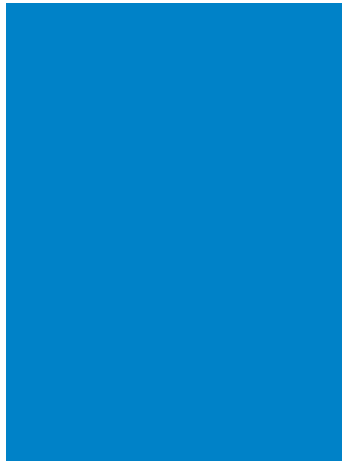
Job accessibility

Small-scale manufacturers also provide jobs with economic mobility across a variety of education levels. On the whole, the manufacturing industry employs an outsized share of workers without a college education. Such jobs are accessible to workers who are unable to access, or choose not to pursue, higher education. In addition, research from the Brookings Institution shows that advanced industries (which is inclusive of small-scale manufacturing) pay more than retail at every education level.⁹ In particular, for individuals without a college degree, manufacturing jobs pay higher wages than other industries when compared to retail, casino, call center or other service jobs.¹⁰ At the same time, new training programs are helping to build the pipeline of skilled employees who can jump into this field with exposure to different types of small and scalable production tools. With targeted support, the sector can help interrupt the cycle of poverty many families and communities face. A national survey of kitchen incubators, for example, revealed that a significant percentage of their tenants are women (61 percent), an ethnic or racial minority (32 percent), and/or come from low-income backgrounds (28 percent).¹¹ Even when facilities do not intentionally seek to build wealth in lower-income communities, they often do so de facto.

Percentage of educational attainment, by industry



Source: U.S. Census, 2016 American Community Survey



What kind of spaces does small-scale manufacturing need?

Small manufacturing integrates well with existing community development, but also has some needs specific to its sector. Economic development staff will need to understand who these businesses are within the local community in order to support their space and growth needs.

Most small-scale manufacturers fall into one of three categories:

Artisan industry

A business using small tools, light machinery, and hand tools. These businesses are most often consumer-facing and sell through a variety of channels, including online, at craft fairs or pop-up markets, and/or in a small storefront.

Small production

These businesses might provide contract production services to other designers and producers alongside production of their own items. These businesses may or may not be interested in scaling from this size. These businesses produce goods for both consumers and other businesses, and may sell direct to consumers and/or wholesale.

Small production and scaling

A scalable business with ownership that wants to grow. These businesses often work in textiles, hardware, or food/beverage, with some or all production on site. Some of these businesses may have a dispersed production model and use multiple contract manufacturers for specialized items.

EXHIBIT 13

Each category of businesses is often left out of local economic development strategies. These businesses hire locally, purchase supplies locally, and their owners or employees generally live within the community. While their space needs vary depending on product and business model, they all benefit from being closer to existing neighborhood centers and main streets. Additionally, some of the infrastructure small-scale manufacturers need fit well into community redevelopment projects.

Many local economic development departments provide services to help find space, address moving costs, and sometimes defray the first few months of rent or a major capital improvement for new local businesses to help get settled. Local government staff, chambers of commerce and community development corporations may serve this role. Each should consider how different spaces may be well suited for small-scale manufacturing businesses, and mesh this sector’s needs into existing planning and economic development efforts:

Small storefronts for retail and production space

Some consumer-facing producers lease small workshops where the business can sell products and also do production on site. Many of these micro-retailers produce high value items with small equipment and choose to locate within neighborhoods. These businesses complement other storefront uses such as retail-only shops and restaurants, add vibrancy to the street front as people can walk by and watch products being made, and fill vacant spaces in commercial corridors.

Example: The Art Walk in Washington, D.C. leases micro-retail spaces to local artisan industries.¹² The 400-800 square feet spaces provide a low-cost option for businesses that want a storefront for both production and retail. The development includes apartments above the micro-retail, on a pedestrian walkway to a subway station. Businesses, such as textile producer Stitch & Rivet, can grow from smaller units to larger ones as their staff and production needs grow, all while adding energy and foot traffic to the area.



The Art Walk at the Brookland Metro station in Washington, DC. Photo courtesy of Monroe Street Market. <http://www.monroestreetmarket.com/>

Shared kitchen

Shared commercial-grade kitchens, or kitchen incubators, rent shared-use food processing and storage space to multiple food production tenants. These tenants are in the food processing, catering, wholesale or food retail sector. Shared kitchens allow food production businesses (like food trucks, small-scale catering businesses, or pop-up eateries) to launch with lower risk, and can significantly reduce the barrier to entry for low-income business owners. Expensive food production equipment and facilities are owned and maintained by the kitchen operator (for-profit and non-profit) and producers pay a fee to use the facilities.



Food being prepared inside the Common Wealth Kitchen Incubator in Youngstown, OH.

These facilities allow food producers to avoid the heavy costs of a brick and mortar location, to scale up, and also to comply with health department regulations. Over 50 percent of kitchen incubators are less than 5,000 square feet.¹³ Some kitchen incubators also offer assistance with business planning, marketing, and licensing. Many are mission-driven NGOs that promote business ownership in low-income populations.

Example: The Common Wealth Kitchen Incubator in Youngstown, Ohio grew out of a local community development corporation that previously focused on housing.¹⁴ The kitchen incubator is a non-profit and offers hourly leasing for tenants interested in using food processing and storage equipment. The facility also has a specialty thermal canning system that attracts users from around the country. The incubator is located in a 1930's building on a historic corridor within a residential neighborhood. The facility is clean and quiet, and is a good neighbor to the apartments on the second floor of the building and the residential neighborhood around it.

Industrial cowork buildings

Some multi-tenant industrial buildings provide workspace to small producers of varying size on a monthly or annual lease basis. Unlike usual shared-office or cowork models, these spaces are zoned to allow production uses. Such buildings are a key part of the local infrastructure for small producers. By offering built-out and safe space with flexible lease terms, tenants can expand their space along with the growth of their business. Industrial coworking spaces offer unique amenities like loading docks, freight elevators, and high ceilings to support small-scale manufacturing. They may also include shared conference rooms, office suites, and other business services specific to production-based businesses. They are often located near residential areas, on commercial corridors, or in transition areas between residential and heavier industrial uses.

Example: The Western Ave Lofts and Studios in Lowell, Massachusetts used an artist district zoning overlay to accommodate live-work space for over 300 small-scale manufacturers and artists in a historic fabric mill building.¹⁵ The mill has five floors of flexible use space where jewelry makers, textile production, soap makers, a local brewery/tap room and a mix of other businesses produce goods. This built-out space is essential for the city to retain these businesses and jobs within the community.

Makerspaces

Makerspaces offer a range of production and fabrication tools to work in wood, metal, textiles, electronics, 3D printing, and more for a membership or class fee. Makerspaces may focus on attracting the existing hobbyists in a community, provide tools and space for workforce training, or grow in response to a burgeoning artisan business community that needs access to more tools at a lower cost. Business models vary greatly in size and user type. Some makerspaces are large, for-profit ventures and others are community-based and fit into libraries and community centers. Users of makerspaces could be complete beginners to 3D printing, and others might be professional woodworkers who are looking to grow their business. In many cases, a makerspace can become a neighborhood focal point and community gathering space for youth and adults.



A 3D printer in the Knox Makers space, assembled inside of an old vending machine case.

Example: Knox Makers, in Knoxville, Tennessee is a non-profit makerspace that provides equipment and tools to members for a small fee.¹⁶ It provides tools to work with wood, metal, electronics, 3D printing, textiles, leather and laser cutting to its members. The space also hosts discussions and events on maker techniques and technology. Its goal is to be a community gathering place for engineers, entrepreneurs and hobbyists.

Incubator or co-op for industry-specific businesses

Some small-scale manufacturers graduate from a makerspace or a startup program and need a specialized place to produce a product at larger quantity. Accelerators and incubators are a key piece of the infrastructure to support them. They may offer production advice and business counseling in a specialized sector, similar to other incubators. They may also provide access to industrial-grade production equipment that allows these businesses to scale more rapidly and stay local. These facilities help to lower the cost and risk to scale, and offer expertise to increase the likelihood of success.

Example: Peabody Heights Brewery in Baltimore, Maryland is a facility that works with independently owned brewers to help them brew, bottle, label, and scale up their business.¹⁷ Brewers may have outgrown their garages or other smaller scale brewing facilities. The co-op has a master brewer with experience in large-scale brewing operations. The facility, a former soda bottling plant, has industrial grade equipment, delivery service, and charges contract brewers a fee per barrel of beer they produce. While the 50,000 square foot facility is the size of a standard industrial production facility, it fits well into the neighborhood and features a taproom that hosts events for neighbors and visitors.

EXHIBIT 13

ZDO-276: FY 2020 Minor and Time Sensitive Amendments

Page 15 of 25

Mixed-use production space

Small-scale manufacturing businesses often scale from micro-retail or coworking space to their own facilities. Such businesses often mix well with other uses such as educational institutions and offices, or serve as a strong neighbor in retail districts. Businesses assume their own risk to lease space, renovate and operate as they grow.

Example: Shinola in Detroit, Michigan is housed in the same building as the College for Creative Studies.¹⁸ The design work, watch and watchband fabrication, and headquarters all operate in this shared use building. Shinola's work is complementary to the College's and they partner on student design workshops. The business helps bring more jobs to the neighborhood while also supporting the neighboring educational institution.



A group touring the watch-making floor at Shinola in Detroit, located in the same building as the College for Creative Studies. Flickr photo by the Center for Positive Organizations. <https://www.flickr.com/photos/positiveorgs/22911094602/>



How can your community encourage and grow small-scale manufacturing?

Based on experience with this relatively nascent sector there are four actions that local economic development agencies, chambers, local governments and others can take:

1. Find, connect, and support small scale manufacturers
2. Identify funding sources
3. Encourage small, light industrial space in local developments
4. Create cross-sector partnerships

1. Find, connect, and support small scale manufacturers

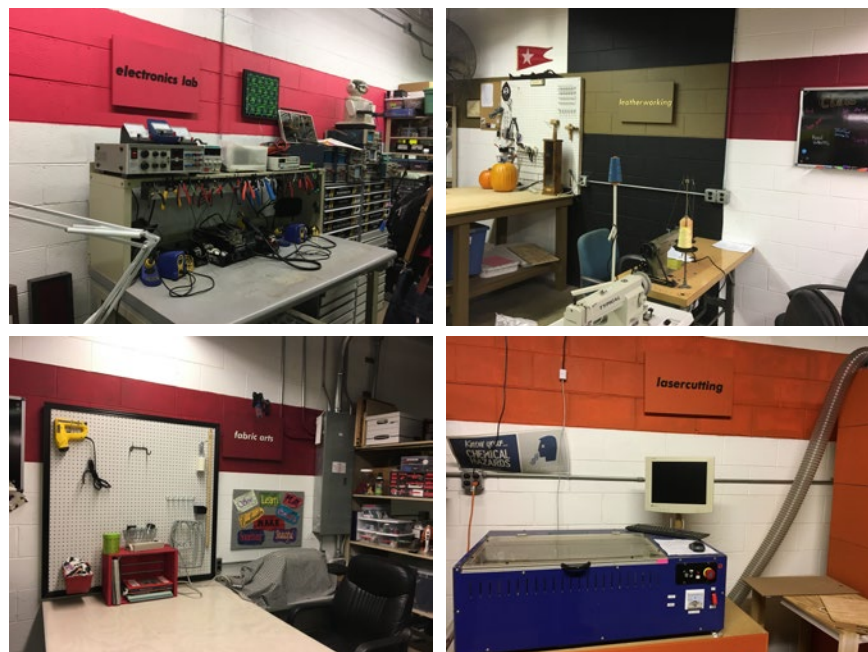
Many jurisdictions do not have a readily accessible list of small-scale manufacturing businesses or know who owns these enterprises. Economic development practitioners can build a database of small-scale manufacturing business owners to understand the locations as well as the types and sizes of spaces the businesses need. Communities will need to invest in purposeful outreach to identify business owners who are people of color, women, and from local immigrant populations, since these businesses are often not tied into the existing business networks. Outreach such as this will ensure that small-scale manufacturers know who to contact for financing, space needs, infrastructure issues, and city permits. Local attention also increases their likelihood of remaining in the community.

The community’s economic development team can provide a number of different types of support and connections:

- Identify local, small production businesses through local fairs, markets, ethnic and religious institutions, and by hosting informal networking events in target neighborhoods.
- Recruit small-scale manufacturers to target retail locations in the community to support reinvestment and build up the attraction and energy in an area. Provide matchmaking services for potential tenants with local developers interested in this sector.
- Connect business owners to resources like commercial shared kitchens or makerspace facilities to expand their production at low risk.
- Provide small business training and entrepreneurship programs specific to the needs of production businesses, similar to those provided to other types of local businesses.
- Create a marketing brand for locally made products, with an online directory of participating manufacturers and products.
- Establish a one-stop shop either within the local government or at a partnering non-profit to ensure that small producers know where to go for help.

Case study – Knoxville, Tennessee

The Mayor’s Maker Council was formed in 2016, designed to develop a shared vision for the region’s diverse maker community; raise awareness of Knoxville’s local maker movement and associated micro-economies; promote local goods and services; and address government policies and regulatory issues that impact maker businesses.¹⁹ The 15 members of the Maker Council are appointed by the Mayor, and represent maker businesses, developers, and community non-profits in the city. The Mayor sends a representative to all Council meetings, and the Council hosts an annual Maker City Summit to connect with maker business owners and support their work. The city partners with the Knoxville Entrepreneur Center and the Knoxville Urban League to create a one-stop shop of resources for small manufacturing business owners, startup trainings, a local Maker City brand, and to work together to connect with minority and women-owned businesses.^{20,21}



Spaces set aside for particular areas of focus in the Knox Makers space in Knoxville, TN.

2. Identify funding sources

Often local and regional economic development agencies lack funding programs to support small-scale manufacturing businesses. Lenders, both public and private, may not be familiar with businesses that manage supply chains and product delivery, or micro-enterprises with small margins. Community development corporations may not be familiar with how to finance coworking facilities for multiple small manufacturing businesses.

Local governments can create programs that connect small producers to micro-lending, and invest in buildings that provide low-cost space for local producers or a product-based incubator or accelerator. Local and national banks' small business banking sectors can also be valuable partners. These partners can work together to create a series of funding programs:

- Create or repurpose a municipal revolving loan program to offer small businesses low-cost loan terms that they may not receive with a short credit history.
- Leverage federal community development block grants (CDBG) to fill financing gaps in shared production facilities or startup training programs that benefit under-represented populations.
- Build a network of local banks that are committed to local small business growth and connect successful small-scale manufacturing businesses to this group.
- Initiate an entrepreneur loan fund targeted to minority- and women-owned production businesses, potentially in partnership with business training or financial literacy programs where needed.
- Employ U.S. Department of Agriculture programs in small towns to fund food business incubators and makerspaces. Consider programs such as the Value-Add Producer Grant or other Rural Development program funding sources.
- Utilize the U.S. Economic Development Administration Public Works and Economic Adjustment Assistance Program to fund infrastructure improvements, site acquisition, rehabilitation and equipment for small manufacturing. These funds have been used to fund "Made In" branding programs, business incubators, and commercial kitchens.
- Provide Tax Increment Financing (TIF) or Payment in Lieu Of Taxes (PILOT) awards for a development's commitment to below market lease rates for small manufacturing businesses in target locations.
- Help to connect Community Development Finance Institutions (CDFIs) with small-scale manufacturers. CDFIs have experience funding unconventional borrowers to help small businesses meet their goals.



Case study – Lowell, Massachusetts

While local banks are often interested in funding local small businesses, they are not always able to do so. The City of Lowell, MA brought several local banks together to create the Lowell Development & Financial Corporation (LDFC).²² The structure of the LDFC allows local banks to reduce their risk by pooling funds to support local businesses, including small-scale manufacturers. Companies are only considered for LDFC funding once they graduate from the University of Massachusetts Lowell's iHUB accelerator or the EforAll small business training program in order to provide the banks with a vetted pool of businesses.^{23,24}

3. Encourage small, light industrial space in local developments

Small-scale manufacturing businesses need affordable space to produce their goods. This often means that jurisdictions must be proactive to protect existing light industrial space in target locations and to encourage new small production space in redevelopment and new construction projects. Local land use policy and financing must support this outcome. Communities will benefit from policies that keep small production within neighborhoods to retain good middle-income jobs and the vibrancy that comes with this business type.

- Ensure that existing commercial zones and building codes allow artisan manufacturing businesses. Add an artisan manufacturing definition to the local land-use code if needed.
- Create an incentive in target zoning areas to develop a minimum square footage of ground floor micro-enterprise space for small manufacturing businesses. For example, an incentive might be to provide a density bonus in exchange for development of affordable space for production within a new mixed-use project or reuse of older industrial properties central to the community.
- Develop an overlay zone to protect existing industrial buildings from conversion to other uses, or create a district designation that both protects these uses and allows for live-work space and some commercial development.
- Consider zoning that allows office and retail development on vacant industrial properties if new development includes a minimum square footage of new light industrial development as well.
- Work with private developers to redevelop surplus city-owned properties with a requirement to include a minimum square footage for small-scale manufacturing businesses.
- Connect community development corporations or private developers to new market tax credits (NMTC), historic preservation tax credits (HPTC) to reduce the cost of redevelopment for a project.

Case study – The Production, Distribution, and Repair zone in San Francisco, California

The Production, Distribution, and Repair zone allows new office construction in underutilized industrial lots when new light industrial is built as well.²⁵ The city developed this policy to address the lack of light industrial properties left in the city, and created a financial incentive for developers to add to the building stock. The first project using this zoning is 100 Hooper, a partnership between private developer Urban Green Devco and SFMade's non-profit real estate development arm, PlaceMade.^{26,27,28}

4. Create cross-sector partnerships

For small-scale manufacturing to succeed, partnerships need to be forged throughout the private, philanthropic, and non-profit sectors. Economic development professionals can convene these stakeholders and develop goals to support small-scale manufacturing, identify training needs, and bring additional partners to the table. Anchor institutions, community colleges, local Urban League chapters, workforce development programs, and cultural and ethnic institutions can all serve key roles in this process.

- Engage local non-profit organizations that work directly with businesses owned by people of color, women, and local immigrant populations to build an inclusive network and services.
- Build a partnership with anchor institutions that commit to purchasing a minimum percent of supplies or services from the local small-scale manufacturing community.
- Convene local philanthropy and corporate investors to support makerspaces, apprenticeships, and workforce training programs with placements in local manufacturing jobs.
- Partner with community colleges to offer vocational training that includes industrial manufacturing tools as well as entrepreneurship programs for the trades.
- Work with workforce development programs to help small-scale manufacturers find local hires, and showcase manufacturing employment opportunities through internships, events, and school trips.

Case study – Twin Falls, Idaho

When Chobani announced it would be bringing hundreds of jobs to its \$100 million dollar yogurt facility the College of Southern Idaho's (CSI) workforce development team sprang into action. The region already had low unemployment rates and difficulty filling positions in the booming manufacturing and food-processing sector. To get ahead of the incoming jobs, CSI's Applied Technology & Innovation Center (ATIC) partnered with manufacturers to identify and design applied curricula and facilities that would prepare students for positions in local industries.²⁹ The ATIC is now home to classrooms and labs equipped with state-of-the-art manufacturing and food processing facilities and provides students with hands-on training with the same equipment they use on the floor in their future careers.

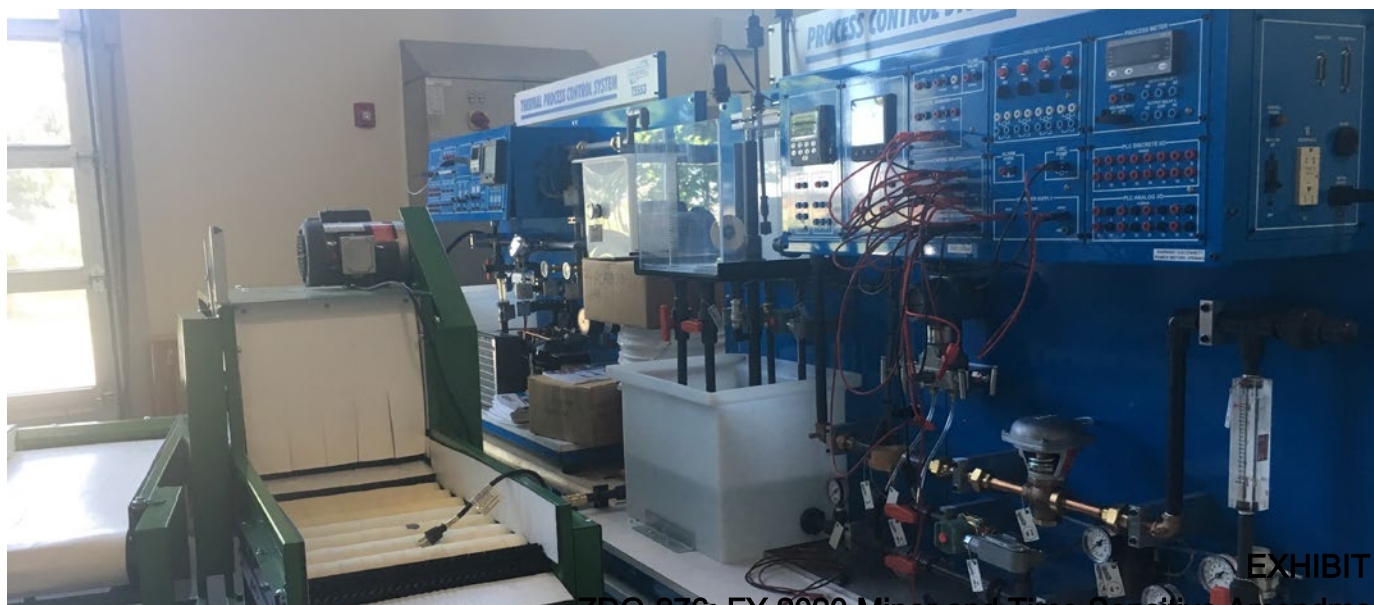


EXHIBIT 13
ZDO-276: FY 2020 Minor and Time Sensitive Amendments

Conclusion

Small-scale manufacturing has emerged as a way to tie opportunity to place, and can fill a key missing piece in local economic development.

Every place has its own history of skills and capacity. Understanding how to build on that legacy, while keeping up with a dynamic labor market and a changing built environment, are critical challenges facing communities in the 21st century. The tools in this paper represent a range of solutions to better integrate small-scale manufacturing into existing economic growth and revitalization efforts. Communities of diverse sizes, industries, and market conditions can find success by aligning manufacturing with neighborhood revitalization—but regardless of context, these efforts will be more successful if they include an explicit and deliberate focus on including and harnessing the talents of all their residents including communities of color and different ethnicities who may not be connected to traditional economic development infrastructure.

Finally, while this paper is intended to provide guidelines for local action, the small-scale manufacturing sector continues to grow. New practices will continue to emerge that can be added to the local toolbox. In the meantime, communities in the vanguard need to establish a framework that connects manufacturing opportunities with other local goals and priorities. They will also benefit from collecting data to measure performance, where possible, to empower their efforts. Continued action can support an environment conducive to a healthy, independent local manufacturing community.

Notes:

- 1 <https://higherlogicdownload.s3.amazonaws.com/NMSC/14414aa6-cd92-4a60-83bc-d336e4720b8b/UploadedImages/projects/Excerpted-Resource-Guide-SOW-1216.pdf>
- 2 <https://www.theatlantic.com/business/archive/2017/04/retail-meltdown-of-2017/522384/>
- 3 https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf
- 4 <https://fas.org/sgp/crs/misc/R41523.pdf>
- 5 <https://www.amiba.net/resources/multiplier-effect/>
- 6 <http://journals.sagepub.com/doi/10.1177/0891242411407312>
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- 9 https://www.brookings.edu/wp-content/uploads/2015/02/AdvancedIndustry_FinalFeb2lores-1.pdf
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- 11 http://www.econsultsolutions.com/wp-content/uploads/2013/08/ESI-SharedKitchenReport_2013.pdf
- 12 <http://www.monroestreetmarket.com/arts/>
- 13 <http://www.econsultsolutions.com/report/us-kitchen-incubators-industry-update/?wpdmml=38523>
- 14 <https://www.cwkitchenincubator.org/>
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- 24 <https://www.uml.edu/Innovation-Hub/>
- 25 <http://oewd.org/industrial>
- 26 <http://www.kilroyrealty.com/property/100-hooper>
- 27 <http://www.urbangreen.net/>
- 28 <http://placemade.org/>
- 29 <http://www.opsisarch.com/blog/project/applied-technology-innovation-center/>

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This project was made possible by the generous support of the US Economic Development Administration.

Smart Growth America is the only national organization dedicated to researching, advocating for and leading coalitions to bring better development to more communities nationwide. From providing more sidewalks to ensuring more homes are built near public transportation or that productive farms remain a part of our communities, smart growth helps make sure people across the nation can live in great neighborhoods. For additional information visit smartgrowthamerica.org.

Recast City is a national consulting firm that works with real estate developers, city and other civic leaders, and business owners to integrate manufacturing space for small-scale producers into redevelopment projects. Recast City brings together small-scale manufacturers and community developers to strengthen our neighborhoods, build value in our real estate, and create more job opportunities for residents. We help landowners, developers, and city leaders understand this growing business sector and how to incorporate it into real estate products. We help maker industry entrepreneurs and small manufacturing business owners get the support and exposure they need. And we help communities create more good paying jobs for our local residents. Learn more at www.recastcity.com.



Smart Growth America
Improving lives by improving communities

Smart Growth America
1152 15th Street NW Ste. 450
Washington, DC 20005

(202) 207-3355
www.smartgrowthamerica.org



To: Clackamas County Board of County Commissioners
CC: Clackamas County Planning Commission
Re: ZDO-276; Action #3
Date: July 28, 2020

On July 23, 2020, Historic Downtown Oak Grove (HDOG) held a General Membership meeting to, among other things, discuss *again* the proposed amendment to the Clackamas County Zoning and Development Ordinance 276 specific to Action #3 which would **allow the manufacturing of edible or drinkable products retailed on-site in districts C2 (Historic Downtown Oak Grove) and C3 (McLoughlin corridor).**

It is now our request that the Board of County Commissioners add an *artisan* manufacturing definition to the local land-use code. This addition will allow for other types of businesses other than bakeries and brewpubs in our downtown. The HDOG Board has created a definition for your consideration. The definition could read . . .

Artisan/Craft Product Manufacturing: Establishments manufacturing and/or assembling small products primarily by hand and/or small-scale, light (produces little-to-no vibrations, noise, fumes or other nuisances) mechanical and electronic tools for the manufacturing of finished products (non-food and food/beverage) or parts including design, processing, fabrication, assembly, treatment and packaging of products; as well as the incidental storage, sales and distribution of such products. Also includes manufacturing establishments producing small products not classified in another major manufacturing group.

Thank you for your consideration!

Suzanne Wolf, President
Historic Downtown Oak Grove
Contact.hdog@gmail.com

This would be a change that HDOG, in partnership with the Oak Grove Community Planning Organization, has been advocating for since 2017 in response to community interest to have a bakery and brewpub in the downtown area. Currently, these types of businesses are prohibited in districts C2 and C3. The Board of Historic Downtown Oak Grove is in **favor** of the proposed amendment **ZDO-276; Action #3**.

Thank you for your consideration.

Suzanne Wolf, President
Historic Downtown Oak Grove (HDOG)
contact.hdog@gmail.com

Hamburg, Glen

From: Suzanne Wolf <sznnwolf@gmail.com>
Sent: Tuesday, July 28, 2020 11:57 AM
To: Hamburg, Glen
Subject: Re: BCC Meeting
Attachments: Letter of Recommendation 7272020.pdf; ATT00001.htm; image001.png; ATT00002.htm

Warning: External email. Be cautious opening attachments and links.

Hello Glen!

Thank you for sending the date to submit the letter for the first hearing. Please find our letter attached below.

Suzanne

[Spam Email](#)
[Phishing Email](#)



Clackamas County Long-Range Planning Work Program for 2019-2021

Effective July 1, 2019 – June 30, 2021

The Long-Range Planning Work Program is a multi-year plan of major projects to be implemented over two years, structured around the need to update the Comprehensive Plan.

- The work program projects, listed by Comprehensive Plan chapter, were chosen after seeking suggestions from the public, county departments and other jurisdictions. The Board of Commissioners approved the plan based upon:
- A. Board of County Commissioners and Planning Commission priorities
 - B. Alignment with the County's *Performance Clackamas* strategic plan and goals: 1) Grow a vibrant economy; 2) Build a strong infrastructure; 3) Ensure safe, healthy and secure communities; 4) Honor, utilize, promote and invest our natural resources, and 5) Build public trust through good government.
 - C. Availability of staffing and funding for consultants

A description of each project is on page 2, after the table. The shaded boxes show the planned timeframe for the project; the pencil icon means an issue paper will be written before any action is taken.

COMPREHENSIVE PLAN CHAPTER	PROJECT	FY 2019-2020				FY 2020-2021				FY 21-22	FY 22-23	FY 23-24	
		July-Sept 2019	Oct-Dec 2019	Jan-Mar 2020	April-June 2020	July-Sept 2020	Oct-Dec 2020	Jan-Mar 2021	April-June 2021	July 2021-June 2022	July 2022-June 2023	July 2023-June 2024	
Housing	H-1: Update Comprehensive Plan Chapter 6: Housing , taking into consideration the following topics: <ul style="list-style-type: none"> • H-1A Low-Density Residential Zoning Policies • H-1B: Housing Strategies • H-1C: Protect Neighborhood Character and R-10 Zoning • H-1D: Temporary Dwellings for Care 												
Transportation	H-2: Short-term Rentals in Residential Areas												
	T-1: Damascus Area Transportation Needs												
	T-2: Arndt Road Goal Exception												
	*T-3: Stafford Area Preliminary Infrastructure Assessment												
	T-4: Rhododendron Sidewalks												
	T-5: Barton Park Complex Master Plan												
	T-6: Oak Grove-Lake Oswego Pedestrian/Bicycle Bridge Feasibility Study												
	T-7: Transit Development Plan												
	T-8: Transportation Futures Study												
	T-9: Fee In Lieu of (FILO) Sidewalks Review												
Economics	E-1: Update Comprehensive Plan Chapter 8, Economics												
	E-2: Park Ave Development and Design Standards												
Natural Resources and Energy	NR-1: Update Comprehensive Plan Chapter 3, Natural Resources												
Other	O-1: Minor and Time-Sensitive ZDO Amendments												
	O-2: Completion of ZDO Audit												

*T-3, Stafford Area Preliminary Infrastructure Assessment, has been removed from the list because funds that Metro had on hold for this project are no longer available.

KEY	
Comp Plan	The Clackamas County Comprehensive Plan is made up of policies, implementing strategies and standards that guide general land use and transportation in the county. See the Comprehensive Plan online at www.clackamas.us/planning/comprehensive .
	Issue papers will be prepared to provide details on implementation issues such as costs, direct and indirect effects, community response, and consistency with local and regional standards. Projects are grouped with the related Comprehensive Plan chapter and will be evaluated as a part of the issue paper. This will provide the Planning Commission and Board of Commissioners more information about the project before deciding whether to move forward.
ZDO	Clackamas County Zoning & Development Ordinance – the requirements and standards that are applied to determining land use in the county. See the ZDO online at www.clackamas.us/planning/zdo .

HOUSING: H-1. Update Comprehensive Plan Chapter 6: Housing, including, but not limited to, considering the following topics:

- **H-1A: Low-Density Residential Zoning Policies** – Based on the housing needs analysis, amend policies to apply different low-density residential zones (R-2.5 -- R-30).
 - **H-1B: Housing Strategies**
 - Amend Comprehensive Plan and ZDO to address results of the housing needs analysis, implement recommendations expected from the Housing Affordability and Homelessness Task Force, and respond to Senate Bill 1051 (2017) and any housing legislation passed by the 2019 Oregon Legislature.
 - Consider restricting manufactured dwelling parks from being redeveloped with a different use.
 - Address the need to amend the ZDO to extend the transitional shelter community regulations, which will otherwise sunset August 28, 2019.
 - **H-1C: Protect Neighborhood Character and R-10 Zoning**
 - Modify the ZDO to better protect neighborhoods from up-zoning and incompatible development.
 - Amend the ZDO to implement the Comprehensive Plan goal of protecting the character of low-density neighborhoods and require that development be compatible with the identified neighborhood character.
 - Adopt a local overlay area that freezes R-10 zoning and has higher standards for zoning approvals, or a limitation on the amount of development or infill allowed in the overlay area.
 - **H-1D: Temporary Dwellings for Care** – Allow temporary dwellings for care only for property owners or heritage landowners. Require removal of temporary dwellings for care prior to title change or sale.
- H-2: Short-term rentals in residential areas** – Allow short-term rentals (e.g., Airbnb, VRBO, etc.) in dwellings.

TRANSPORTATION

- T-1: Damascus Area Transportation Needs** – Review current plans for transportation projects on county roads in the unincorporated area formerly in the city of Damascus and outside Happy Valley’s planning jurisdiction, and identify or develop needed projects to include in the county’s Transportation System Plan (TSP)
- T-2: Arndt Road Goal Exception** – Explore alignment options and undertake, as necessary, development of a Statewide Planning Goal exception to support the crossing of the Molalla River in relation to the Board of Commissioners’ goal to provide access from I-5 to the city of Canby.

~~**T-3: Stafford Area Preliminary Infrastructure Feasibility Assessment**— This project has been removed from the list because funds that Metro had on hold for this project are no longer available. Work with adjacent cities and the Stafford community to study potential demands various levels of urban growth would have on infrastructure in the Stafford area, and how those demands would impact neighboring cities.~~

T-4: Rhododendron Sidewalks & Pedestrian Crossings – Seek funds to address Oregon Department of Transportation design concerns in Mt. Hood Villages Pedestrian & Bicycle Implementation Plan, Appendix 3, for sidewalk / pedestrian capital projects.

T-5: Barton Park Complex Master Plan – Develop a master plan to ensure coordination and best use of facilities and amenities to meet the long-term needs of users.

T-6: Oak Grove – Lake Oswego Pedestrian/Bicycle Feasibility Study – Work with regional, state and federal partners to determine scope and special studies needed, and to identify appropriate project roles and contributions.

T-7: Transit Development Plan – Seek funding to develop strategies, actions and tools to make transit more usable in the county.

T-8: Transportation Futures Study – Develop long-term plan to identify top priority transportation improvements needed on state, regional and local systems in Clackamas County over the next 50 years. Forecast major population, economic, environmental and technology changes to inform what investments or actions are required to meet those needs.

T-9: Fee In Lieu of (FILO) Sidewalks Review – Amend fee-in-lieu-of-improvement provisions in ZDO 1007.

ECONOMICS: E-1: Update Comprehensive Plan Chapter 8, Economics

E-2: Park Ave Development and Design Standards – Develop and implement public outreach on commercial design and development standards, assess the livability of adjacent residential neighborhoods, and draft proposed design and development standards to support community goals.

NATURAL RESOURCES: NR-1: Update Comprehensive Plan Chapter 3, Natural Resources

OTHER:

O-1 Minor and Time Sensitive ZDO Amendments will be presented for action to the Planning Commission and the Board of County Commissioners once a year, every year, as needed. Includes, but is not limited to, dog daycare/boarding, small-scale manufacturing (limited changes only) and increasing the distance for property owner notice of land use applications in rural areas.

O-2 Audit of Zoning and Development Ordinance – Continue and complete multi-year Zoning and Development Ordinance audit.

The Clackamas County Long-Range Planning Work Program is implemented by Land Use and Transportation Planning staff in the Department of Transportation & Development located in the Development Services Building, 150 Beaver Creek Road, Oregon City, OR 97045. More information is available on the County website at www.clackamas.us/planning or by calling the Planning & Land Use Division at 503-742-4500.

715 SMALL WIRELESS FACILITIES

The following governs the installation of small wireless facilities within right-of-way or easements under Clackamas County jurisdiction. The installation of small wireless facilities requires a Utility Permit. In some cases, the installation of small wireless facilities is further governed by the *ZDO*. In those cases, land use approval is required before the application for a Utility Permit. *County Code* Section 7.03 provides additional requirements.

715.1 Application

An application for a small wireless facilities shall not be complete until the following elements have been provided to the County:

- a) Land use approval, if required.
- b) Utility Permit application which requires:
 - 1) Evidence of land use approval, if required.
 - 2) For location on existing traffic signal appurtenances or illumination poles, written authorization or agreement from the owner of those structures.
 - 3) Plans illustrating the proposed installation that is compliant with the standards of Section 715. Plans for new structures shall include the right-of-way, public utility easements, location of edge of pavement, curbs, sidewalks, landscape strips, curb ramps, driveways, and other structures within the vicinity of the proposed installation.
 - 4) Provide dimensions of all above ground structures.
 - 5) Structural engineering calculations for any modifications to County owned infrastructure.
 - 6) Photographs illustrating the existing site conditions that will be impacted.
 - 7) An RF certification report per Section 715.9.

715.2 Review and Approval Period

Small wireless facility installations shall comply with regulations and documentations/permissions as set forth by federal, state, and these Standards. The review period for applications will be a maximum of 60 days on existing structures and will be a maximum of 90 days on new structures following receipt of an application per Section 715.1 with one restart after the initial completeness review.

715.3 Location Requirement

Small wireless facilities shall not be located on County owned street illumination poles or on County owned signal infrastructure unless it can be established that the small facilities cannot be placed on other existing, replacement or new support structures.

715.4 Other Siting Requirements

- a) New small wireless support structures shall not be sited within 50 feet longitudinally of an existing or approved utility pole, illumination pole or small wireless support structure.
- b) Locations for new support structures shall be as near as possible to property lines to avoid interference with building faces, views and business signage.
- c) NOC (Network Operation Center) and RF Signage should be placed on same side of cabinet and/or pole as disconnect switch. If NOC contact information cannot be read from ground level without visual aid, it is required to mount an additional NOC sign eight feet above ground level.
- d) Any placement shall not impede, obstruct, or hinder operation of any emergency service, maintenance operations, pedestrian or vehicular access or travel including to or from private properties and of legally parked vehicles or permitted items within a public right-of-way.
- e) If proposed within the clear zone and a new small cell wireless facility is deemed a fixed object per Section 245, the new small wireless facilities shall be placed as far as possible from the edge of the roadway including within public utility easements unless there is an existing alignment of support structures and such placement would be technically infeasible. In such cases, the small wireless facilities shall be placed within substantially the same alignment as the existing support structure(s).
- f) Small wireless facility installations shall comply with the sight distance standards of Section 240, the National Electric Safety Code (“*NESC*”), and *PROWAG*.
- g) All electrical, fiber optic or other related infrastructure shall be located within conduits not owned by the County.
- h) Any placement shall not impact any existing or planned bridges, retaining walls or guardrail.
- i) The small wireless facility placement shall cause no physical, electrical, or radio interference with the operation of traffic signal appurtenances or emergency control devices.
- j) When a small wireless facility is installed on a County-owned traffic signal pole, the facility may only be installed on a traffic signal pole without a luminaire.

715.5 Access Requirements

- a) All small wireless facilities shall be installed and operated in compliance with Federal Communications Commission (FCC) regulations and guidelines, including placement of appropriate signage.
- b) County and/or other qualified workers and contractors shall have the ability to easily shut off radio signals and power while working on the pole where a small wireless facility is installed or in the vicinity of a radio frequency (RF) emitting device. Each installer shall provide a small wireless facility shut-off switch and shut-off/turn-on instructions.

715.6 Aesthetics

- a) To the extent technically feasible, a small wireless telecommunication facility, including all related equipment and appurtenances, shall be a color that is similar to the support structure and use non-reflective materials.
- b) The highest point of an antenna shall not exceed FCC standards and the height needed to meet safety requirements.
- c) The size of above ground infrastructure shall be as small as technically feasible.
- d) If technically feasible, equipment shall be placed on or within the support structure or underground.
- e) Lighting should be shrouded to the extent possible from nearby properties.

715.7 Abandonment and Removal

A small wireless facility that is not operated for a continuous period of 12 months, shall be considered abandoned and the owner of the facility shall be responsible for the removal of the facility, including its antenna(s) and equipment, within 60 days of receipt of written notice from the County notifying the owner of such facility abandonment.

715.8 Clackamas Regional Center Design Plan Area Requirements

Within the Clackamas Regional Center Design Plan Area, new support structures shall be black in color and galvanized to match other street lighting poles of the area.

715.9 Inspection

Comply with the requirements of Section 180.

715.10 Expiration

Comply with the Utility Permit requirements of Section 130.3.7.

715.11 Radio Frequency (RF) Certification Report

All new small wireless facilities proposed in County rights-of-way shall be accompanied by a Radio Frequency Certification Report, prepared by a qualified professional, which certifies that the small wireless facility will be installed and operated in compliance with FCC regulations and guidelines. The report shall provide protocols for small wireless facility shut-off and turn-on.

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

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

DECLARATORY RULING AND THIRD REPORT AND ORDER

Adopted: September 26, 2018

Released: September 27, 2018

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

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION.....1
II. BACKGROUND.....14
A. Legal Background.....14
B. The Need for Commission Action.....23
III. DECLARATORY RULING.....30
A. Overview of the Section 253 and Section 332(c)(7) Framework Relevant to Small
Wireless Facilities Deployment.....34
B. State and Local Fees.....43
C. Other State and Local Requirements that Govern Small Facilities Deployment.....81
D. States and Localities Act in Their Regulatory Capacities When Authorizing and Setting
Terms for Wireless Infrastructure Deployment in Public Rights of Way.....92
E. Responses to Challenges to Our Interpretive Authority and Other Arguments.....98
IV. THIRD REPORT AND ORDER.....103
A. New Shot Clocks for Small Wireless Facility Deployments.....104
1. Two New Section 332 Shot Clocks for Deployment of Small Wireless Facilities.....105
2. Batched Applications for Small Wireless Facilities.....113
B. New Remedy for Violations of the Small Wireless Facilities Shot Clocks.....116
C. Clarification of Issues Related to All Section 332 Shot Clocks.....132
1. Authorizations Subject to the “Reasonable Period of Time” Provision of Section
332(c)(7)(B)(ii).....132
2. Codification of Section 332 Shot Clocks.....138
3. Collocations on Structures Not Previously Zoned for Wireless Use.....140
4. When Shot Clocks Start and Incomplete Applications.....141
V. PROCEDURAL MATTERS.....148
VI. ORDERING CLAUSES.....151
APPENDIX A -- Final Rules
APPENDIX B -- Comments and Reply Comments
APPENDIX C -- Final Regulatory Flexibility Analysis

I. INTRODUCTION

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

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

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

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

5. Many states and localities have acted to update and modernize their approaches to small cell deployments. They are working to promote deployment and balance the needs of their communities. At the same time, the record shows that problems remain. In fact, many state and local officials have urged the FCC to continue our efforts in this proceeding and adopt additional reforms. Indeed, we have

¹ See Accenture Strategy, Accelerating Future Economic Value from the Wireless Industry at 2 (2018) (Accelerating Future Economic Value Report), <https://www.ctia.org/news/accelerating-future-economic-value-from-the-wireless-industry>, attached to Letter from Scott K. Bergmann, Senior Vice Pres., Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed July 19, 2018).

² See Accenture Strategy, Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities, (2017) <http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf>; attached to Letter from Scott Bergmann, Vice Pres. Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-421, (filed Jan. 13, 2017).

³ Accelerating Future Economic Value Report at 2.

⁴ Letter from John T. Scott, Counsel for Mobilitie, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2-3 (filed Sept. 12, 2018).

heard from a number of local officials that the excessive fees or other costs associated with deploying small scale wireless infrastructure in large or otherwise “must serve” cities are materially inhibiting the buildout of wireless services in their own communities.

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

7. Although many states and localities support our efforts, we acknowledge that there are others who advocated for different approaches.⁶ We have carefully considered these views, but nevertheless find our actions here necessary and fully supported. By building on state and local ideas, today’s action boosts the United States’ standing in the race to 5G. According to a study submitted by Corning, our action would eliminate around \$2 billion in unnecessary costs, which would stimulate around \$2.4 billion of additional buildouts.⁷ And that study shows that such new service would be

⁵ See, e.g., Letter from Brian D. Hill, Ohio State Representative, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Aug. 31, 2018) (“While the FCC and the Ohio Legislature have worked to reduce the timeline for 5G deployment, the same cannot be said for all local and state governments. Regulations written in a different era continue to dictate the regulatory process for 5G infrastructure”); Letter from Maureen Davey, Commissioner, Stillwater County, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 18, 2018) (“[T]he Commission’s actions to lower regulatory barriers can enable more capital spending to flow to areas like ours. Reducing fees and shortening review times in urban areas, thereby lowering the cost of deployment in such areas, can promote speedier deployment across all of America.”); Letter from Board of County Commissioners, Yellowstone County, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 21, 2018) (“Reducing these regulatory barriers by setting guidelines on fees, siting requirements and review timeframes, will promote investment including rural areas like ours.”); Letter from Board of Commissioners, Harney County, Oregon, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 5, 2018) (“By taking action to speed and reduce the costs of deployment across the country, and create a more uniform regulatory framework, the Commission will lower the cost of deployment, enabling more investment in both urban and rural communities.”); Letter from Niraj J. Antani, Ohio State Representative, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 4, 2018) (“[T]o truly expedite the small cell deployment process, broader government action is needed on more than just the state level.”); Letter from Michael C. Taylor, Mayor, City of Sterling Heights, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Aug. 30, 2018) (“[T]here are significant, tangible benefits to having a nation-wide rule that promotes the deployment of next-generation wireless access without concern that excessive regulation or small cell siting fees slows down the process.”).

⁶ See, e.g., Letter from Linda Morse, Mayor, City of Manhattan, KS to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 13, 2018) (City of Manhattan, KS Sept. 13, 2018 *Ex Parte* Letter); Letter from Ronny Berdugo, Legislative Representative, League of California Cities to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 18, 2018) (Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter); Letter from Damon Connolly, Marin County Board of Supervisors to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 17, 2018) (Damon Connolly Sept. 17, 2018 *Ex Parte* Letter).

⁷ See Letter from Thomas J. Navin, Counsel to Corning, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1, Attach. A at 2-3 (filed Sept. 5, 2018) (Corning Sept. 5, 2018 *Ex Parte* Letter).

deployed where it is needed most: 97 percent of new deployments would be in rural and suburban communities that otherwise would be on the wrong side of the digital divide.⁸

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

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

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

11. Second, we note, as numerous courts and prior FCC cases have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can unlawfully prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress’s limits in Sections 253 and 332. We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision.⁹ Namely, fees are only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality’s reasonable costs. In this section, we also identify specific fee levels for the deployment of Small Wireless Facilities that presumptively comply with this standard. We do so to help avoid unnecessary litigation over fees.

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

⁸ *Id.*

⁹ “Small Wireless Facilities,” as used herein and consistent with section 1.1312(e)(2), encompasses facilities that meet the following conditions:

- (1) The facilities—
 - (i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or
 - (ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or
 - (iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
- (2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;
- (3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;
- (4) The facilities do not require antenna structure registration under part 17 of this chapter;
- (5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and
- (6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).

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

II. BACKGROUND

A. Legal Background

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

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

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

¹⁰ *Sprint Telephony PCS LP v. County of San Diego*, 543 F.3d 571, 575 (9th Cir. 2008) (en banc) (*County of San Diego*) (quoting *Cablevision of Boston, Inc. v. Pub. Improvement Comm’n*, 184 F.3d 88, 97 (1st Cir. 1999)).

¹¹ 141 Cong. Rec. S8197 (daily ed. June 12, 1995).

¹² H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. (100 Stat. 5) 124.

¹³ S. Rep. No. 104-230, at 126 (1996) (Conf. Rep.).

¹⁴ Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996); see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (noting that the 1996 Act “fundamentally restructures local telephone markets” to facilitate market entry); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997) (“The Telecommunications Act was an unusually important legislative enactment . . . designed to promote competition.”).

¹⁵ 47 U.S.C. § 253(a).

¹⁶ *Puerto Rico Tel. Co. v. Telecomm. Reg. Bd. of Puerto Rico*, 189 F.3d 1, 11 n.7 (1st Cir. 1999).

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

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

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

¹⁷ *California Payphone Ass’n*, 12 FCC Rcd 14191, 14206, para. 31 (1997) (*California Payphone*).

¹⁸ 47 U.S.C. § 332(c)(7)(B)(i).

¹⁹ 47 U.S.C. § 332(c)(7)(B)(ii).

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

²¹ 47 U.S.C. § 332(c)(7)(B)(v).

²² 47 U.S.C. § 332(c)(7)(B)(v).

²³ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14016, para. 56 (2009) (*2009 Declaratory Ruling*), *aff’d*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012) (*City of Arlington*), *aff’d*, 569 U.S. 290 (2013).

²⁴ *2009 Declaratory Ruling*, 24 FCC Rcd at 14017-18, para. 61.

²⁵ *Id.*

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.”²⁶ The Commission interpreted “reasonable period of time” under Section 332(c)(7)(B)(ii) to be 90 days for processing collocation applications and 150 days for processing applications other than collocations.²⁷ The Commission further determined that failure to meet the applicable time frame enables an applicant to pursue judicial relief within the next 30 days.²⁸ In litigation involving the 90-day and 150-day time frames, the locality may attempt to “rebut the presumption that the established timeframes are reasonable.”²⁹ If the agency fails to make such a showing, it may face “issuance of an injunction granting the application.”³⁰ In its *2014 Wireless Infrastructure Order*,³¹ the Commission clarified that the time frames under Section 332(c)(7) are presumptively reasonable and begin to run when the application is submitted, not when it is found to be complete by a siting authority.³²

20. In 2012, Congress adopted Section 6409 of the Middle Class Tax Relief and Job Creation Act (the Spectrum Act), which provides further evidence of Congressional intent to limit state and local laws that operate as barriers to infrastructure deployment. It states that, “[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified as 47 U.S.C. § 332(c)(7)] or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”³³ Subsection (a)(2) defines the term “eligible facilities request” as any request for modification of an existing wireless tower or base station that involves (a) collocation of new transmission equipment; (b) removal of transmission equipment; or (c) replacement of transmission equipment.³⁴ In implementing Section 6409 and in an effort to “advance[e] Congress’s goal

²⁶ *Id.* at 14008, para. 37; *see also id.* at 14029 (Statement of Chairman Julius Genachowski) (“[T]he rules we adopt today . . . will have an important effect in speeding up wireless carriers’ ability to build new 4G networks--which will in turn expand and improve the range of wireless choices available to American consumers.”).

²⁷ *Id.* at 14012, para. 45.

²⁸ *Id.* at 14005, 14012, paras. 32, 45.

²⁹ *Id.* at 14008-10, 14013-14, paras. 37-42, 49-50.

³⁰ *Id.* at 14009, para. 38; *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (proper remedies for Section 332(c)(7) violations include injunctions but not constitutional tort damages).

³¹ Specifically, the Commission determined that once a siting application is considered complete for purposes of triggering the Section 332(c)(7) shot clocks, those shot clocks run regardless of any moratoria imposed by state or local governments, and the shot clocks apply to DAS and small-cell deployments so long as they are or will be used to provide “personal wireless services.” *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, 12966, 12973, paras. 243, 270, (2014) (*2014 Wireless Infrastructure Order*), *aff’d*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015) (*Montgomery County*); *see also Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3339, para. 22 (2017) (*Wireless Infrastructure NPRM/NOD*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84 and WT Docket No. 17-79, FCC 18-111, paras. 140-68 (rel. Aug. 3, 2018) (*Moratoria Declaratory Ruling*).

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

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

³⁴ *Id.*

of facilitating rapid deployment,”³⁵ the Commission adopted rules to expedite the processing of eligible facilities requests, including documentation requirements and a 60-day period for states and localities to review such requests.³⁶ The Commission further determined that a “deemed granted” remedy was necessary for cases in which the reviewing authority fails to issue a decision within the 60-day period in order to “ensur[e] rapid deployment of commercial and public safety wireless broadband services.”³⁷ The Fourth Circuit, affirming that remedy, explained that “[f]unctionally, what has occurred here is that the FCC—pursuant to properly delegated Congressional authority—has preempted state regulation of wireless towers.”³⁸

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

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

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

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

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

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

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

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

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

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

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

B. The Need for Commission Action

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

24. 5G wireless services, in particular, will transform the U.S. economy through increased use of high-bandwidth and low-latency applications and through the growth of the Internet of Things.⁴⁵ While the existing wireless infrastructure in the U.S. was erected primarily using macro cells with relatively large antennas and towers, wireless networks increasingly have required the deployment of small cell systems to support increased usage and capacity. We expect this trend to increase with next-generation networks, as demand continues to grow, and providers deploy 5G service across the nation.⁴⁶ It is precisely “[b]ecause providers will need to deploy large numbers of wireless cell sites to meet the country’s wireless broadband needs and implement next-generation technologies” that the Commission has acknowledged “an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise.”⁴⁷ As explained below, the need to site so many more 5G-capable nodes leaves providers’ deployment plans and the underlying economics of those plans vulnerable to increased per site delays and costs.

25. Some states and local governments have acted to facilitate the deployment of 5G and other next-gen infrastructure, looking to bring greater connectivity to their communities through forward-looking policies. Leaders in these states are working hard to meet the needs of their communities and balance often competing interests. At the same time, outlier conduct persists. The record here suggests that the legal requirements in place in other state and local jurisdictions are materially impeding that deployment in various ways.⁴⁸ Crown Castle, for example, describes “excessive and unreasonable” “fees

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

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

⁴⁶ See, e.g., Letter from Brett Haan, Principal, Deloitte Consulting, U.S., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Sept. 17, 2018) (“Significant investment in new network infrastructure is needed to deploy 5G networks at-scale in the United States. 5G’s speed and coverage capabilities rely on network densification, which requires the addition of towers and small cells to the network. . . . This requires carriers to add 3 to 10 times the number of existing sites to their networks. Most of this additional infrastructure will likely be built with small cells that use lampposts, utility poles, or other structures of similar size able to host smaller, less obtrusive radios required to build a densified network.” (citation omitted)); see also Deloitte LLP, 5G: The Chance to Lead for a Decade (2018) (Deloitte 5G Paper), available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-5gdeployment-imperative.pdf>.

⁴⁷ See *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3331, para. 2.

⁴⁸ See, e.g., Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 10, 2018) (“Unfortunately, many municipalities are unable, unwilling, or do not make it a priority to act on applications within the shot clock period.”); Letter from Keith Buell, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Aug. 13, 2018) (Sprint Aug. 13, 2018 *Ex Parte* Letter); Letter from Katherine R. Saunders, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21,

to access the [rights-of-way] that are completely unrelated to their maintenance or management.” It also points to barriers to market entry “for independent network and telecommunications service providers,” including municipalities that “restric[t] access to the [right-of-way] only to providers of commercial mobile services” or that impose “onerous zoning requirements on small cell installations when other similar [right of way] utility installations are erected with simple building permits.”⁴⁹ Crown Castle is not alone in describing local regulations that slow deployment. AT&T states that localities in Maryland, California, and Massachusetts have imposed fees so high that it has had to pause or decrease deployments.⁵⁰ Likewise, AT&T states that a Texas city has refused to allow small cell placement on any structures in a right-of-way (ROW).⁵¹ T-Mobile states that the Town of Hempstead, New York requires service providers who seek to collocate or upgrade equipment on existing towers that have been properly constructed pursuant to Class II standards to upgrade and certify these facilities under Class III standards that apply to civil and national defense and military facilities.⁵² Verizon states that a Minnesota town has proposed barring construction of new poles in rights-of-way and that a Midwestern suburb where it has been trying to get approval for small cells since 2014 has no established procedures for small cell approvals.⁵³ Verizon states that localities in New York and Washington have required special use permits involving multiple layers of approval to locate small cells in some or all zoning districts.⁵⁴ While some localities dispute some of these characterizations, their submissions do not persuade us that there is no basis or need for the actions we take here.

26. Further, the record in this proceeding demonstrates that many local siting authorities are not complying with our existing Section 332 shot clock rules.⁵⁵ WIA states that its members routinely face lengthy delays and specifically cite localities in New Jersey, New Hampshire, and Maine as being

(Continued from previous page)

2018) (“[L]ocal permitting delays continue to stymie deployments.”); Letter from Kenneth J. Simon, Crown Castle, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Aug. 10, 2018); Letter from Scott K. Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 30, 2018) (CTIA Aug. 30, 2018 *Ex Parte* Letter).

⁴⁹ Crown Castle Comments at 7; *see also* Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 19, 2018) (“In Hillsborough, California, Crown Castle submitted applications covering 16 nodes, and was assessed \$60,000 in application fees. Not only did Hillsborough go on to deny these applications, following that denial it also then sent Crown Castle an invoice for an additional \$351,773 (attached as Exhibit A), most of which appears to be related to outside counsel fees—all for equipment that was not approved and has not yet been constructed.”).

⁵⁰ Letter from Henry Hultquist, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Aug. 6, 2018) (AT&T Aug. 6, 2018 *Ex Parte* Letter).

⁵¹ AT&T Comments at 6-7.

⁵² T-Mobile Reply Comments at 7-9; *see also* CCA Reply Comments at 12; CTIA Reply Comments at 18; WIA Reply Comments at 22-23.

⁵³ *See* Verizon Comments at 7.

⁵⁴ *See* Verizon Comments at 35.

⁵⁵ *See, e.g.*, T-Mobile Comments at 8 (stating that “roughly 30% of all of its recently proposed sites (including small cells) involve cases where the locality failed to act in violation of the shot clocks.”). According to WIA, one of its members “reports that 70% of its applications to deploy Small Wireless Facilities in the public ROWs during a two-year period exceeded the 90-day shot clock for installation of Small Wireless Facilities on an existing utility pole, and 47% exceeded the 150-day shot clock for the construction of new towers.” WIA Comments at 7. A New Jersey locality took almost five years to deny a Sprint application. *See Sprint Spectrum L.P. v. Zoning Bd. of Adjustment of the Borough of Paramus, N.J.*, 21 F. Supp. 3d 381, 383, 387 (D.N.J. 2014), *aff’d*, 606 Fed. Appx. 669 (3d Cir. 2015). Another locality took almost three years to deny a Crown Castle application to install a DAS system. *See Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 WL 3357169, *6-8 (S.D.N.Y. 2013), *aff’d*, 552 Fed. Appx. 47 (2d Cir. 2014).

EXHIBIT 17

ZDO-276: FY 2020 Minor and Time Sensitive Amendments

Page 10 of 116

problematic.⁵⁶ Similarly, AT&T identified an instance in which it took a locality in California 800 days to process an application.⁵⁷ GCI provides an example in which it took an Alaska locality nine months to decide an application.⁵⁸ T-Mobile states that a community in Colorado and one in California have lengthy pre-application processes for all small cell installations that include notification to all nearby households, a public meeting, and the preparation of a report, none of which these jurisdictions view as triggering a shot clock.⁵⁹ Similarly, Lighttower provides examples of long delays in processing siting applications.⁶⁰ Finally, Crown Castle describes a case in which a “town took approximately two years and nearly twenty meetings, with constantly shifting demands, before it would even ‘deem complete’ Crown Castle’s application.”⁶¹

27. Our Declaratory Ruling and Third Report and Order are intended to address these issues and outlier conduct. Our conclusions are also informed by findings, reports, and recommendations from the FCC Broadband Deployment Advisory Committee (BDAC), including the Model Code for Municipalities, the Removal of State and Local Regulatory Barriers Working Group report, and the Rates and Fees Ad Hoc Working Group report, which the Commission created in 2017 to identify barriers to deployment of broadband infrastructure, many of which are addressed here.⁶² We also considered input from numerous state and local officials about their concerns, and how they have approached wireless deployment, much of which we took into account here. Our action is also consistent with congressional efforts to hasten deployment, including bi-partisan legislation pending in Congress like the STREAMLINE Small Cell Deployment Act and SPEED Act. The STREAMLINE Small Cell Deployment Act proposes to streamline wireless infrastructure deployments by requiring siting agencies to act on deployment requests within specified time frames and by limiting the imposition of onerous

⁵⁶ WIA Comments at 8. WIA states that one of its “member reports that the wireless siting approval process exceeds 90 days in more than 33% of jurisdictions it surveyed and exceeds 150 days in 25% of surveyed jurisdictions.” WIA Comments at 8. In some cases, WIA members have experienced delays ranging from one to three years in multiple jurisdictions—significantly longer than the 90- and 150-day time frames that the Commission established in 2009.

⁵⁷ See WIA Comments at 9 (citing and discussing AT&T’s Comments in the 2016 Streamlining Public Notice, WT Docket No. 16-421).

⁵⁸ GCI Comments at 5-6.

⁵⁹ T-Mobile Comments at 21.

⁶⁰ Lighttower 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. Lighttower 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.” Lighttower Comments at 5-6. See also WIA Comments at 9 (citing and discussing Lighttower’s Comments in the 2016 Streamlining Public Notice, WT Docket No. 16-421).

⁶¹ WIA Comments at 8 (citing and discussing Crown Castle’s Comments in 2016 Streamlining Public Notice, WT Docket No. 16-421).

⁶² BDAC Report of the Removal of State and Local Regulatory Barriers Working Group, <https://www.fcc.gov/sites/default/files/bdac-regulatorybarriers-01232018.pdf> (approved by the BDAC on January 23, 2018) (BDAC Regulatory Barriers Report); Draft Final Report of the Ad Hoc Committee on Rates and Fees to the BDAC, <https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-rates-fees-wg-report-07242018.pdf> (July 26, 2018) (Draft BDAC Rates and Fees Report); BDAC Model Municipal Code (Harmonized), <https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-harmonization-wg-model-code-muni.pdf> (approved July 26, 2018) (BDAC Model Municipal Code). The Draft Final Report of the Ad Hoc Committee on Rates and Fees to the BDAC was presented to the BDAC on July 26, 2018 but has not been voted by the BDAC as of the adoption of this Declaratory Ruling. Certain members of the Removal of State and Local Barriers Working Group also submitted a minority report disagreeing with certain findings in the BDAC Regulatory Barriers Report. See Minority Report Submitted by McAllen, TX, San Jose, CA, and New York, NY, GN Docket No. 17-83 (Jan 23, 2018); Letter from Kevin Pagan, City Attorney of McAllen to Marlene Dortch, Secretary, FCC (filed September 14, 2018).

conditions and fees.⁶³ The SPEED Act would similarly streamline federal permitting processes.⁶⁴ In the same vein, the Model Code for Municipalities adopts streamlined infrastructure siting requirements while other BDAC reports and recommendations emphasize the negative impact of high fees on infrastructure deployments.⁶⁵

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

⁶³ See, e.g., STREAMLINE Small Cell Deployment Act, S.3157, 115th Congress (2017-2018).

⁶⁴ See, e.g., Streamlining Permitting to Enable Efficient Deployment of Broadband Infrastructure Act of 2017 (SPEED Act), S. 1988, 115th Cong. (2017).

⁶⁵ See BDAC Model Municipal Code; Draft BDAC Rates and Fees Report; BDAC Regulatory Barriers Report.

⁶⁶ See, e.g., Letter from Patricia Paoletta, Counsel to Deloitte Consulting LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Sept. 20, 2018) (“Deloitte noted that, as with many technology standard evolutions, the value of being a first-mover in 5G will be significant. Being first to LTE afforded the United States macroeconomic benefits, as it became a test bed for innovative mobile, social, and streaming applications. Being first to 5G can have even greater and more sustained benefits to our national economy given the network effects associated with adding billions of devices to the 5G network, enabling machine-to-machine interactions that generates data for further utilization by vertical industries”).

⁶⁷ Letter from Montana State Senator Duane Ankney to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (Duane Ankney July 31, 2018 *Ex Parte* Letter); Letter from Fred A. Lamphere, Butte County Sheriff, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1 (filed Sept. 11, 2018) (Fred A. Lamphere Sept. 11, 2018 *Ex Parte* Letter); Letter from Todd Nash, Susan Roberts, Paul Catstilleja, Wallowa County Board of Commissioners, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Aug. 20, 2018); Letter from Lonnie Gilbert, First Responder, National Black Growers Council Member, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1 (filed Sept. 12, 2018); Letter from Jason R. Saine, North Carolina House of Representatives, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed Sept. 14, 2018) (Jason R. Saine Sept. 14, 2018 *Ex Parte* Letter) (minimal regulatory standard across the United States is critical to ensure that the United States wins the race to the 5G economy).

⁶⁸ Letter from LaWana Mayfield, City Council Member, Charlotte, NC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (LaWana Mayfield July 31, 2018 *Ex Parte* Letter); see also Letter from South Carolina State Representative Terry Alexander to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed August 7, 2018) (“[P]olicymakers at all levels of government must streamline complex siting stipulations that will otherwise slow down 5G buildout for small cells in particular.”); Letter from Sal Pace, Pueblo County Commissioner, District 3, CO, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 30, 2018) (Sal Pace July 30, 2018 *Ex Parte* Letter) (“[T]he FCC should ensure that localities are fully compensated for their costs . . . Such fees should be reasonable and non-discriminatory, and should ensure that localities are made whole. Lastly, the FCC should set reasonable and enforceable deadlines for localities to act on wireless permit applications. . . . The distinction between siting large macro-towers and small cells should be reflected in any rulemaking.”)

⁶⁹ Letter from Dr. Carolyn A. Prince, Chairwoman, Marlboro County Council, SC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (Dr. Carolyn Prince July 31, 2018 *Ex Parte* Letter)

that the FCC lacks authority to take certain actions.⁷⁰ We have carefully considered these views, but nevertheless find our actions here necessary and fully supported.

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

III. DECLARATORY RULING

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

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

32. Second, in Part III.B, we note, as numerous courts have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can effectively prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress's limits in Sections 253 and 332. We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision. Namely, fees are only permitted to the extent that they represent a reasonable approximation of the local government's objectively reasonable costs, and are non-discriminatory.⁷¹ In this section, we also identify specific fee levels for the deployment of Small Wireless Facilities that presumptively comply with this standard. We do so to help avoid unnecessary litigation, while recognizing that it is the standard itself, not the particular, presumptive fee levels we articulate, that ultimately will govern whether a particular fee is allowed under Sections 253 and 332. So fees above

⁷⁰ See, e.g., *City of Manhattan*, KS Sept. 13, 2018 *Ex Parte* Letter at 1-2; Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter at 1-2; Damon Connolly Sept. 17, 2018 *Ex Parte* Letter at 1-2.

⁷¹ Fees charged by states or localities in connection with Small Wireless Facilities would be "compensation" for purposes of Section 253(c). This Declaratory Ruling interprets Section 253 and 332(c)(7) in the context of three categories of fees, one of which applies to all deployments of Small Wireless Facilities while the other two are specific to Small Wireless Facilities deployments inside the ROW. (1) "Event" or "one-time" fees are charges that providers pay on a non-recurring basis in connection with a one-time event, or series of events occurring within a finite period. The one-time fees addressed in this Declaratory Ruling are not specific to the ROW. For example, a provider may be required to pay fees during the application process to cover the costs related to processing an application building or construction permits, street closures, or a permitting fee, whether or not the deployment is in the ROW. (2) Recurring charges for a Small Wireless Facility's use of or attachment to property inside the ROW owned or controlled by a state or local government, such as a light pole or traffic light, is the second category of fees addressed here, and is typically paid on a per structure/per year basis. (3) Finally, ROW access fees are recurring charges that are assessed, in some instances, to compensate a state or locality for a Small Wireless Facility's access to the ROW, which includes the area on, below, or above a public roadway, highway, street, sidewalk, alley, utility easement, or similar property (including when such property is government-owned). A ROW access fee may be charged even if the Small Wireless Facility is not using government owned property within the ROW. AT&T Comments at 18 (describing three categories of fees); Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 11 (filed Aug. 10, 2018) (Verizon Aug. 10, 2018 *Ex Parte* Letter) (characterizing fees as recurring or non-recurring); see also Draft BDAC Rates and Fees Report at p. 15-16. Unless otherwise specified, a reference to "fee" or "fees" herein refers to any one of, or any combination of, these three categories of charges.

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. We note that the Small Wireless Facilities that are the subject of this Declaratory Ruling remain subject to the Commission's rules governing Radio Frequency (RF) emissions exposure.⁷²

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

34. In Sections 253(a) and 332(c)(7)(B) of the Act, Congress determined that state or local requirements that prohibit or have the effect of prohibiting the provision of service are unlawful and thus preempted.⁷³ Section 253(a) addresses "any interstate or intrastate telecommunications service," while Section 332(c)(7)(B)(i)(II) addresses "personal wireless services."⁷⁴ Although the provisions contain identical "effect of prohibiting" language, the Commission and different courts over the years have each employed inconsistent approaches to deciding what it means for a state or local legal requirement to have the "effect of prohibiting" services under these two sections of the Act. This has caused confusion among both providers and local governments about what legal requirements are permitted under Sections 253 and 332(c)(7). For example, despite Commission decisions to the contrary construing such language under Section 253, some courts have held that a denial of a wireless siting application will "prohibit or have the effect of prohibiting" the provision of a personal wireless service under Section 332(c)(7)(B)(i)(II) only if the provider can establish that it has a significant gap in service coverage in the

⁷² See 47 CFR §§ 1.1307, 1.1310. We disagree with commenters who oppose the Declaratory Ruling on the basis of concerns regarding RF emissions. See, e.g., Comments from Judy Aizuss, Comments from Jeffrey Arndt, Comments from Jeanice Barcelo, Comments from Kristin Beatty, Comments from James M. Benster, Comments from Terrie Burns, Comments from EMF Safety Network, Comments from Kate Reese Hurd, Comments from Marilynne Martin, Comments from Lisa Mayock, Comments from Kristen Moriarty Termunde, Comments from Sage Associates, Comments from Elizabeth Shapiro, Comments from Paul Silver, Comments from Natalie Ventrice. The Commission has authority to adopt and enforce RF exposure limits, and nothing in this Declaratory Ruling changes the applicability of the Commission's existing RF emissions exposure rules. See, e.g., Section 704(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104 (directing Commission to "prescribe and make effective rules regarding the environmental effects of radio frequency emissions" upon completing action in then-pending rulemaking proceeding that included proposals for, *inter alia*, maximum exposure limits); 47 U.S.C. § 332(c)(7)(B)(iv) (recognizing legitimacy of FCC's existing regulations on environmental effects of RF emissions of personal wireless service facilities, by proscribing state and local regulation of such facilities on the basis of such effects, to the extent such facilities comply with Commission regulations concerning such RF emissions); 47 U.S.C. § 151 (creating the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service, . . . for the purpose of [*inter alia*] promoting safety of life and property through the use of wire and radio communications"). See also H.R. Rep. No. 204(I), 104th Cong., 1st Sess. 94 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61 (1996) (in legislative history of Section 704 of 1996 Telecommunications Act, identifying "adequate safeguards of the public health and safety" as part of a framework of uniform, nationwide RF regulations); ; *Reassessment of FCC Radiofrequency Exposure Limits and Policies*, First Report and Order, Further Notice of Proposed Rulemaking and Notice of Inquiry, 28 FCC Rcd 3498, 3530-31, para. 103, n.176 (2013).

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

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

area and a lack of feasible alternative locations for siting facilities.⁷⁵ Other courts have held that evidence of an already-occurring or complete inability to offer a telecommunications service is required to demonstrate an effective prohibition under Section 253(a).⁷⁶ Conversely, still other courts like the First, Second, and Tenth Circuits have endorsed prior Commission interpretations of what constitutes an effective prohibition under Section 253(a) and recognized that, under that analytical framework, a legal requirement can constitute an effective prohibition of services even if it is not an insurmountable barrier.⁷⁷

35. In this Declaratory Ruling, we first reaffirm, as our definitive interpretation of the effective prohibition standard, the test we set forth in *California Payphone*, namely, that a state or local legal requirement constitutes an effective prohibition if it “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁷⁸ We then explain how this “material inhibition” standard applies in the context of state and local fees and aesthetic requirements. In doing so, we confirm the First, Second, and Tenth Circuits’ understanding that under this analytical framework, a legal requirement can “materially inhibit” the provision of services even if it is not an insurmountable barrier.⁷⁹ We also resolve the conflicting court interpretations of the

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

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

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

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

⁷⁹ See, e.g., *City of White Plains*, 305 F.3d at 76; *Municipality of Guayanilla*, 450 F.3d at 18; see also, e.g., Crown Castle June 7, 2018 *Ex Parte* Letter at 12. Because the clarifications in this order should reduce uncertainty regarding the application of these provisions for state and local governments as well as stakeholders, we are not persuaded by some commenters’ arguments that an expedited complaint process is required. See, e.g., AT&T Comments at 28; CTIA Reply at 21. We do not address, at this time, recently-filed petitions for reconsideration of our August 2018 *Moratoria Declaratory Ruling*. See, e.g., Smart Communities Petition for Reconsideration, WC

‘effective prohibition’ language so that continuing confusion on the meaning of Sections 253 and 332(c)(7) does not materially inhibit the critical deployments of Small Wireless Facilities and our nation’s drive to deploy 5G.⁸⁰

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

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Docket No. 17-84 & WT Docket No. 17-79 (filed Sept. 4, 2018); New York City Petition for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (filed Sept. 4, 2018). Nor do we address requests for clarification and/or action on other issues raised in the record beyond those expressly discussed in this order. These other issues include arguments regarding other statutory interpretations that we do not address here. *See, e.g.*, CTIA Reply at 23 (raising broader questions about the precise interplay of Section 253 and Section 332(c)(7)); Crown Castle June 7, 2018 *Ex Parte* Letter at 16-17 (raising broader questions about the scope of “legal requirements” under Section 253(a)). Consequently, this order should not be read as impliedly taking a position on those issues.

⁸⁰ *See, e.g.*, Crown Castle June 7, 2018 *Ex Parte* Letter at 11-12 (arguing that “[d]espite the Commission’s efforts to define the boundaries of federal preemption under Section 253, courts have issued a number of conflicting decisions that have only served to confuse the preemption analysis under section 253” and that “the Commission should clarify that the *California Payphone* standard as interpreted by the First and Second Circuits is the appropriate standard going forward”); *see also* BDAC Regulatory Barriers Report at p. 9 (“The Commission should provide clarity on what actually constitutes an “excessive” fee for right-of-way access and use. The FCC should provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not “fair and reasonable.” The Commission should specifically clarify that “fair and reasonable” compensation for right-of way access and use implies some relation to the burden of new equipment placed in the ROW or on the local asset, or some other objective standard.”). Because our decision provides clarity by addressing conflicting court decisions and reaffirming that the “materially inhibits” standard articulated in the Commission’s *California Payphone* decision is the appropriate standard for determining whether a state or local law operates as an effective prohibition within the meaning of Sections 253 and 332, we reject arguments that our action will increase conflicts and lead to more litigation. *See e.g.*, Letter from Michael Dylan Brennan, Mayor, City of University Heights, Ohio, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Sept. 19, 2018) (stating that “...this framing and definition of effective prohibition opens local governments to the likelihood of more, not less, conflict and litigation over requirements for aesthetics, spacing, and undergrounding”).

⁸¹ *See infra* Part III.A, B.

⁸² *See County of San Diego*, 543 F.3d at 579 (“We see nothing suggesting that Congress intended a different meaning of the text ‘prohibit or have the effect of prohibiting’ in the two statutory provisions, enacted at the same time, in the same statute. * * * * As we now hold, the legal standard is the same under either [Section 253 or 332(c)(7)].”); *see also, e.g., Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (citing *Sullivan v. Stroup*, 496 U.S. 478, 484 (1990) (reading same term used in different parts of the same Act to have the same meaning); *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973) (per curiam) (“[S]imilarity of language . . . is . . . a strong indication that the two statutes should be interpreted *pari passu*”); Verizon Comments at 9-10; AT&T Reply at 3-4; Crown Castle June 7, 2018 *Ex Parte* Letter at 15.

⁸³ Common carrier wireless services meet the definition of “telecommunications services,” and thus are within the scope of Section 253(a) of the Act. *See, e.g., Moratoria Declaratory Ruling*, FCC 18-111, para 142 n.523; *see also, e.g., League of Minnesota Cities* Comments at 11; Verizon Reply at 9-10. While some commenters cite certain distinguishing factual characteristics between wireline and wireless services, the record does not reveal why those distinctions would be material to whether wireless telecommunications services are covered by Section 253 in the first instance. *See, e.g., City of San Antonio et al. Comments*, Exh. A at 13; Virginia Joint Commenters Comments at 5, Exh. A at 45-46. To the contrary, Section 253(e) expressly preserves “application of section 332(c)(3) of this title to commercial mobile service providers” notwithstanding Section 253—a provision that would be meaningless if wireless telecommunications services already fell outside the scope of Section 253. 47 U.S.C. § 253(e). For this same reason, we also reject claims that the existence of certain protections for personal wireless services in Section 332(c)(7), or the phrase “nothing in this chapter” in Section 332(c)(7)(A), demonstrate that states’ or localities’

37. As explained in *California Payphone* and reaffirmed here, a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially inhibits the provision of such services. We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service.⁸⁵ This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service

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

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

⁸⁵ By "covered service" we mean a telecommunications service or a personal wireless service for purposes of Section 253 and Section 332(c)(7), respectively.

EXHIBIT 17

ZDO-276: FY 2020 Minor and Time Sensitive Amendments

Page 17 of 116

capabilities.⁸⁶ Under the *California Payphone* standard, a state or local legal requirement could materially inhibit service in numerous ways—not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services. Thus, an effective prohibition includes materially inhibiting additional services or improving existing services.⁸⁷

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

⁸⁶ See, e.g., Crown Castle Comments at 54-55; Free State Foundation Comments at 12; T-Mobile Comments at 43-45; CTIA Reply at 14; WIA Reply at 26; Crown Castle June 7, 2018 *Ex Parte* Letter at 13-14; Letter from Kara Romagnino Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 8-9 (filed June 27, 2018) (CTIA June 27, 2018 *Ex Parte* Letter). As T-Mobile explains, for example, a provider might need to improve “signal strength or system capacity to allow it to provide reliable service to consumers in residential and commercial buildings.” T-Mobile Comments at 43; see also, e.g., *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket Nos. 13-238, et al., Notice of Proposed Rulemaking, 28 FCC Rcd 14238, 14253, para. 38 (2013) (observing that “DAS and small cell facilities[] are critical to satisfying demand for ubiquitous mobile voice and broadband services”). The growing prevalence of smart phones has only accelerated the demand for wireless providers to take steps to improve their service offerings. See, e.g., *Twentieth Wireless Competition Report*, 32 FCC Rcd at 9011-13, paras. 62-65.

⁸⁷ Our conclusion finds further support in our broad understanding of the statutory term “service,” which, as we explained in our recent *Moratoria Declaratory Ruling*, means “any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ, including to provide existing services more robustly, or at a higher level of quality—such as through filling a coverage gap, densification, or otherwise improving service capabilities.” *Moratoria Declaratory Ruling*, FCC 18-111, para. 162 n.594; see also *Public Utility Comm’n of Texas Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3496, para. 74 (1997) (*Texas PUC Order*) (interpreting the scope of ‘telecommunications services’ covered by Section 253(a) and clarifying that it would be an unlawful prohibition for a state or locality to specify “the means or facilities” through which a service provider must offer service); Crown Castle June 7, 2018 *Ex Parte* Letter at 10-11 (discussing this precedent). We find this interpretation of “service” warranted not only under Section 253(a), but Section 332(c)(7)(B)(i)(II)’s reference to “services” as well.

⁸⁸ Preamble to the Telecommunications Act of 1996, Pub. Law. No. 104-104, § 202, 110 Stat. 56 (1996). Consequently, we reject arguments suggesting that the provision of some level of wireless service in the past necessarily demonstrates that there is no effective prohibition of service under the state or local legal requirements that applied during those periods or that an effective prohibition only is present if a provider can provide no covered service whatsoever. See, e.g., City and County of San Francisco Comments at 25-26; Virginia Joint Commenters Comments, Exh. A at 31-33. Nor, in light of these goals, do we find it reasonable to interpret the protections of these provisions as doing nothing more than guarding against a monopoly as some suggest. See, e.g., Smart Communities Comments, WC Docket No. 17-84, at 8-9 (filed June 15, 2017) cited in Smart Communities Comments at 57 n.141.

intensive use of the electromagnetic spectrum.”⁸⁹ These provisions demonstrate that our interpretation of Section 253 and Section 332(c)(7)(B)(i)(II) is in accordance with the broader goals of the various statutes that the Commission is entrusted to administer.

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

40. As we explained above, we reject alternative readings of the effective prohibition language that have been adopted by some courts and used to defend local requirements that have the effect of prohibiting densification of networks. Decisions that have applied solely a “coverage gap”-based approach under Section 332(c)(7)(B)(i)(II) reflect both an unduly narrow reading of the statute and an outdated view of the marketplace.⁹⁴ Those cases, including some that formed the foundation for

⁸⁹ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, FCC 18-30, para. 62 (rel. Mar. 30, 2018) (*Wireless Infrastructure Second R&O*) (quoting 47 U.S.C. §§ 151, 309(j)(3)(A), (D)).

⁹⁰ *California Payphone*, 12 FCC Rcd at 14206, para. 31.

⁹¹ *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81; *see also, e.g.*, Crown Castle June 7, 2018 *Ex Parte* at 10-11, 13.

⁹² Crown Castle June 7, 2018 *Ex Parte* Letter at 13.

⁹³ *See, e.g.*, *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81; *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities*, Declaratory Ruling, 15 FCC Rcd 15168, 15173, paras. 12-13 (2000) (*Western Wireless Order*); *Pittencrieff Communications, Inc. Petition for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 1735, 1751-52, para. 32 (1997) (*Pittencrieff, aff’d*, *Cellular Telecomm. Indus. Ass’n v. FCC*, 168 F.3d 1332 (5th Cir. 1999); *City of White Plains*, 305 F.3d at 80.

⁹⁴ Smart Communities seeks clarification of whether this Declaratory Ruling is meant to say that the “coverage gap” standard followed by a number of courts should include consideration of capacity as well as coverage issues. Letter from Gerard Lavery Lederer, Counsel, Smart Communities and Special Districts Coalition, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Att. at 17 (Sept. 19, 2018) (Smart Communities Sept. 19 *Ex Parte* Letter). We are not holding that prior “coverage gap” analyses are consistent with the standards we articulate here as long as they also take into account “capacity gaps”; rather, we are articulating here the effective prohibition standard that should apply while, at the same time, noting one way in which prior approaches erred by requiring coverage gaps. Accordingly, we reject both the version of the “coverage gap” test followed by the First, Fourth, and Seventh Circuits (requiring applicants to show “not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try”) and the version endorsed by the Second, Third, and Ninth Circuits (requiring applicants to show that the proposed facilities are the “least intrusive means” for filling a coverage gap) *See supra* n. 75. We also note that some courts have expressed concern about alternative readings of the statute that would lead to extreme outcomes—either always requiring a grant under some interpretations, or never preventing a denial under other interpretations. *See, e.g.*, *Willoth*, 176 F.3d at 639-41; *APT*, 196 F.3d at 478-79; *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999); *AT&T Wireless PCS v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 2008) (*City Council of Virginia Beach*); *see also, e.g.*, Greenling Comments at 2; City and County of San Francisco Reply

“coverage gap”-based analytical approaches, appear to view wireless service as if it were a single, monolithic offering provided only via traditional wireless towers.⁹⁵ By contrast, the current wireless marketplace is characterized by a wide variety of offerings with differing service characteristics and deployment strategies.⁹⁶ As Crown Castle explains, coverage gap-based approaches are “simply

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at 16. Our interpretation avoids those concerns while better reflecting the text and policy goals of the Communications Act and 1996 Act than coverage gap-based approaches ultimately adopted by those courts. Our approach ensures meaningful constraints on state and local conduct that otherwise would prohibit or have the effect of prohibiting the provision of personal wireless services. At the same time, our standard does not preclude all state and local denials of requests for the placement, construction, or modification of personal wireless service facilities, as explained below. *See infra* III.B, C.

⁹⁵ *See, e.g., Willoth*, 176 F.3d at 641-44; *360 Degrees Commc’ns Co. v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 86-88 & n.1 (4th Cir. 2000) (*Albemarle County*); *see also, e.g., ExteNet Comments* at 29; *T-Mobile Comments* at 42; *Verizon Comments* at 18; *WIA Comments* at 38-40. Even some cases that implicitly recognize the limitations of a gap-based test fail to account for those limitations in practice when applying Section 332(c)(7)(B)(i)(II). *See, e.g., Second Generation Properties v. Town of Pelham*, 313 F.3d 620, 633 n.14 (4th Cir. 2002) (discussing scenarios where a carrier has coverage but insufficient capacity to adequately handle the volume of calls or where new technology emerges and a carrier would like to use it in areas that already have coverage using prior-generation technology). Courts that have sought to identify limited set of characteristics of personal wireless services covered by the Act essentially allow actual or effective prohibition of many personal wireless services that providers wish to offer with additional or more advanced characteristics. *See, e.g., Willoth*, 176 F.3d at 641-43 (drawing upon certain statutory definitions); *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999) (*Borough of Ho-Ho-Kus*) (concluding that it should be up to state or local authorities to assess and weigh the benefits of differing service qualities); *Albemarle County*, 211 F.3d at 87 (citing 47 CFR §§ 22.99, 22.911(b) as noting the possibility of some ‘dead spots’); *cf. USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817 (8th Cir. 2006) (describing as a “dubious proposition” the argument that a denial of a request to construct a tower resulting in “less than optimal” service quality could be an effective prohibition). An outcome that allows the actual or effective prohibition of some covered services is contrary to the Act. Section 253(a) applies to any state or local legal requirement that prohibits or has the effect of prohibiting any entity from providing “any” interstate or intrastate telecommunications service, 47 U.S.C. § 253(a). Similarly, Section 332(c)(7)(B)(i)(II) categorically precludes state or local regulation of the placement, construction, or modification of personal wireless service facilities that prohibits or has the effect of prohibiting the provision of personal wireless “services.” 47 U.S.C. § 332(c)(7)(B)(i)(II). We find the most natural interpretation of these sections is that any service that meets the definition of “telecommunications service” or “personal wireless service” is encompassed by the language of each provision, rather than only some subset of such services or service generally. The notion that such state or local regulation permissibly could prohibit some personal wireless services, so long as others are available, is at odds with that interpretation. In addition, as we explain above, a contrary approach would fail to advance important statutory goals as well as the interpretation we adopt. Further, the approach reflected in these court decisions could involve state or local authorities “inquir[ing] into and regulat[ing] the services offered—an inquiry for which they are ill-qualified to pursue and which could only delay infrastructure deployment.” Crown Castle June 7, 2018 *Ex Parte* Letter at 14. Instead, our effective prohibition analysis focuses on the service the provider wishes to provide, incorporating the capabilities and performance characteristics it wishes to employ, including facilities deployment to provide existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless service for the benefit of the public.

⁹⁶ *See generally, e.g., Twentieth Wireless Competition Report*, 32 FCC Rcd at 8968; *see also, e.g., T-Mobile Comments* at 42-43; *AT&T Reply* at 4-5; *CTIA Reply* at 13-14; *WIA Reply* at 23-24; *Crown Castle June 7, 2018 Ex Parte Letter* at 15. We do not suggest that viewing wireless service as if it were a single, monolithic offering provided only via traditional wireless towers would have reflected an accurate understanding of the marketplace in the past, even if it might have been somewhat more understandable that courts held such a simplified view at that time. Rather, the current marketplace conditions highlight even more starkly the shortcomings of coverage gap-based approaches, which do not account for other characteristics and deployment strategies. *See, e.g., Twentieth Wireless Competition Report*, 32 FCC Rcd at 8974-75, para. 12 (observing that “[p]roviders of mobile wireless services typically offer an array of mobile voice and data services,” including “interconnected mobile voice services”); *id.* at 8997-97, paras. 42-43 (discussing various types of wireless infrastructure deployment to, among

incompatible with a world where the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network coverage.”⁹⁷ Moreover, a critical feature of these new wireless builds is to accommodate increased in-building use of wireless services, necessitating deployment of small cells in order to ensure quality service to wireless callers within such buildings.⁹⁸

41. Likewise, we reject the suggestion of some courts like the Eighth and Ninth Circuits that evidence of an existing or complete inability to offer a telecommunications service is required under 253(a).⁹⁹ Such an approach is contrary to the material inhibition standard of *California Payphone* and the correct recognition by courts “that a prohibition does not have to be complete or ‘insurmountable’” to constitute an effective prohibition.¹⁰⁰ Commission precedent beginning with *California Payphone* itself makes clear that an insurmountable barrier is not required to find an effective prohibition under Section 253(a).¹⁰¹ The “effectively prohibit” language must have some meaning independent of the “prohibit”

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other things, “improve spectrum efficiency for 4G and future 5G services,” “to fill local coverage gaps, to densify networks and to increase local capacity”).

⁹⁷ Crown Castle June 7, 2018 *Ex Parte* Letter at 15; *see also id.* at 13 (“Densification of networks will be key for augmenting the capacity of existing networks and laying the groundwork for the deployment of 5G.”); *id.* at 15-16 (“When trying to maximize spectrum re-use and boost capacity, moving facilities by just a few hundred feet can mean the difference between excellent service and poor service. The FCC’s rules, therefore, must account for the effect siting decisions would have on every level of service, including increasing capacity and adding new spectrum bands. Practices and decisions that prevent carriers from doing either materially prohibit the provision of telecommunications service and thus should be considered impermissible under Section 332.”). Contrary approaches appear to occur in part when courts’ policy balancing places more importance on broadly preserving state and local authority than is justified. *See, e.g., APT*, 196 F.3d at 479; *Albemarle County*, 211 F.3d at 86; *City Council of Virginia Beach*, 155 F.3d at 429; *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002); *see also, e.g., League of Arizona Cities et al. Joint Comments* at 45; *Smart Communities Reply* at 33. As explained above, our interpretation that “telecommunications services” in Section 253(a) and “personal wireless services” in Section 332(c)(7)(B)(i)(II) are focused on the covered services that providers seek to provide—including the relevant service characteristics they seek to incorporate—not only is consistent with the text of those provisions but better reflects the broader policy goals of the Communications Act and the 1996 Act.

⁹⁸ *See WIA Comments* at 39; *T-Mobile Comments* at 43-44.

⁹⁹ *See, e.g., County of San Diego*, 543 F.3d at 577, 579-80; *City of St. Louis*, 477 F.3d at 533-34; *see also, e.g., Virginia Joint Commenters Comments*, Exh. A at 39-41. Although the Ninth Circuit in *County of San Diego* found that “the unambiguous text of §253(a)” precluded a prior Ninth Circuit approach that found an effective prohibition based on broad governmental discretion and the “mere possibility of prohibition,” that holding is not implicated by our interpretations here. *County of San Diego*, 543 F.3d at 578; *cf. City of St. Louis*, 477 F.3d at 532. Consequently, those decisions do not preclude the Commission’s interpretations here, *see, e.g., Verizon Reply* at 7, and we reject claims to the contrary. *See, e.g., Smart Communities Comments* at 60.

¹⁰⁰ *City of White Plains*, 305 F.3d at 76 (citing *RT Commc’ns*, 201 F.3d at 1268); *see also, e.g., Municipality of Guayanilla*, 450 F.3d at 18 (quoting *City of White Plains*, 305 F.3d at 76 and citing *City of Santa Fe*, 380 F.3d at 1269); Crown Castle June 7, 2018 *Ex Parte* Letter at 12; Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach at 5. Indeed, the Eighth Circuit’s *City of St. Louis* decision acknowledges that under Section 253 “[t]he plaintiff need not show a complete or insurmountable prohibition,” even while other aspects of that decision suggest that an insurmountable barrier effectively would be required. *City of St. Louis*, 477 F.3d at 533 (citing *City of White Plains*, 305 F.3d at 76).

¹⁰¹ In *California Payphone*, the Commission concluded that the ordinance at issue “does not ‘prohibit’ the ability of any payphone service provider to provide payphone service in the Central Business District within the meaning of section 253(a),” but went on to evaluate the possibility of an effective prohibition by considering “whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” *California Payphone*, 12 FCC Rcd at 14205, 14206, paras. 28, 31. In the *Texas PUC Order*, the Commission found that state law build-out requirements would require “substantial financial investment” and a “comparatively high cost per loop sold” in particular areas, interfering with the

language, and we find that the interpretation of the First, Second, and Tenth Circuits reflects that principle, while being more consistent with the *California Payphone* standard than the approach of the Eighth and Ninth Circuits.¹⁰² The reasonableness of our interpretation that ‘effective prohibition’ does not require a showing of an insurmountable barrier to entry is demonstrated not only by a number of circuit courts’ acceptance of that view, but in the Supreme Court’s own characterization of Section 253(a) as “prohibit[ing] state and local regulation that *impedes* the provision of ‘telecommunications service.’”¹⁰³

42. The Eighth and Ninth Circuits’ suggestion that a provider must show an insurmountable barrier to entry in the jurisdiction imposing the relevant regulation is at odds with relevant statutory purposes and goals, as well. Section 253(a) is designed to protect “any entity” seeking to provide telecommunications services from state and local barriers to entry, and Sections 253(b) and (c) emphasize the importance of “competitively neutral” and “nondiscriminatory” treatment of providers.¹⁰⁴ Yet focusing on whether the carrier seeking relief faces an insurmountable barrier to entry would lead to disparities in statutory protections among providers based merely on considerations such as their access to capital and the breadth or narrowness of their entry strategies.¹⁰⁵ In addition, the Commission has observed in connection with Section 253: “Each local government may believe it is simply protecting the

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“statewide entry” plans that new entrants “may reasonable contemplate” in violation of Section 253(a) notwithstanding claims that the specific new entrants at issue had “‘vast resources and access to capital’ sufficient to meet those added costs. *Texas PUC Order*, 13 FCC Rcd at 3498, para. 78. The Commission also has expressed “great concern” about an exclusive rights-of-way access agreement that “appear[ed] to have the potential to adversely affect the provision of telecommunications services by facilities-based providers, in violation of the provision of section 253(a).” *Minnesota Order*, 14 FCC Rcd at 21700, para. 3. As another example, in the *Western Wireless Order*, the Commission stated that a “universal service fund mechanism that provides funding only to ILECs” would likely violate Section 253(a) not because it was insurmountable but because it would “effectively lower the price of ILEC-provided service relative to competitor-provided service” and thus “give customers a strong incentive to choose service from ILECs rather than competitors.” *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8.

¹⁰² We discuss specific applications of the *California Payphone* standard in the context of certain fees and non-fee regulations in the sections below; we leave others to be addressed case-by-case as they arise or otherwise are taken up by the Commission or courts in the future.

¹⁰³ *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 491 (2002) (emphasis added); see also, e.g., *Level 3 Communications*, Petition for a Writ of Certiorari, *Level 3 Communications, LLC v. City of St. Louis*, No. 08-626, at 13 (filed Nov. 7, 2008) (“[T]he term ‘[p]rohibit’ commonly has a less absolute meaning than that adopted below, and properly refers to actions that ‘hold back,’ ‘hinder,’ or ‘obstruct.’” (quoting Random House Webster’s Unabridged Dictionary 1546 (2d ed. 1998))). We thus are not compelled to interpret ‘effective prohibition’ to set the high bar suggested by some commenters based on other dictionary definitions. *Smart Communities Petition for Reconsideration*, WC Docket No. 17-84, WT Docket No. 17-79 at 7 (filed Sept. 4, 2018). Because we are unpersuaded that the statutory terminology requires us to interpret an effective prohibition as satisfied only by an insurmountable barrier to entry, we likewise reject commenters’ attempts to argue that “effective prohibition” must be understood to set a higher bar by comparison to the “impairment” language in Section 251 of the Act and associated regulatory interpretations of network unbundling requirements taken from that context. *Id.* at 6. In addition, commenters do not demonstrate why the statutory framework and regulatory context of network unbundling under Section 251—and the specific concerns about access by non-facilities-based providers to competitive networks underlying the court precedent they cite—is sufficiently analogous to that of Section 253 and Section 332(c)(7)(B)(i)(II) that statements from that context should inform our interpretation here. See, e.g., *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 392. In responding to these discrete arguments raised in a petition for reconsideration of the *Moratoria Declaratory Ruling* that bear on actions we take in this order we do not thereby resolve any of the petition’s arguments with respect to that order. The requests for relief raised in the petition remain pending in full.

¹⁰⁴ 47 U.S.C. § 253(a), (b), (c).

¹⁰⁵ See, e.g., *Texas PUC Order*, 13 FCC Rcd at 3498, para. 78 (rejecting claims that there should be a higher bar to find an effective prohibition for providers with significant financial resources and recognizing that the effects of the relevant state requirements on a given provider could differ depending on the planned geographic scope of entry).

interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. We believe that Congress' recognition of this fact was the genesis of its grant of preemption authority to this Commission."¹⁰⁶ As illustrated by our consideration of effective prohibitions flowing from state and local fees, there also can be cases where a narrow focus on whether an insurmountable barrier can be shown within the jurisdiction imposing a particular legal requirement would neglect the serious effects that flow through in other jurisdictions as a result, including harms to regional or national deployment efforts.¹⁰⁷

B. State and Local Fees

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

44. In *City of White Plains*, the Second Circuit likewise faced a 5 percent gross revenue fee, which it found to be "[t]he most significant provision" in a franchise agreement implementing an ordinance that the court concluded effectively prohibited service in violation of Section 253.¹¹⁴ While the court noted that "compensation is . . . sometimes used as a synonym for cost,"¹¹⁵ it ultimately did not resolve whether fair and reasonable compensation "is limited to cost recovery, or whether it also extends to a reasonable rent," relying instead on the fact that "White Plains has not attempted to charge Verizon

¹⁰⁶ *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21442, para. 106 (1997) (*TCI Cablevision Order*).

¹⁰⁷ See *infra* Part III.B.

¹⁰⁸ The Commission also has recognized the potential for fees to result in an effective prohibition. See, e.g., *Pittencrieff*, 13 FCC Rcd at 1751-52, para. 37 (observing that "even a neutral [universal service] contribution requirement might under some circumstances effectively prohibit an entity from offering a service").

¹⁰⁹ *Municipality of Guayanilla*, 450 F.3d at 18-19.

¹¹⁰ *Id.* at 19.

¹¹¹ *Id.* (quoting *City of White Plains*, 305 F.3d at 76).

¹¹² *Municipality of Guayanilla*, 450 F.3d at 17 (looking at the aggregate cost of fees charged across jurisdictions given the interconnected nature of the service).

¹¹³ *Id.* at 22 ("We need not decide whether fees imposed on telecommunications providers by state and local governments must be limited to cost recovery. We agree with the district court's reasoning that fees should be, at the very least, related to the actual use of rights of way and that 'the costs [of maintaining those rights of way] are an essential part of the equation.'").

¹¹⁴ *City of White Plains*, 305 F.3d at 77.

¹¹⁵ *Id.* In this context, the court stated that the term "compensation" is "flexible" and capable of different meanings depending on the context in which it is used. *Id.*

the fee that it seeks to charge TCG,” thus failing Section 253’s “competitively neutral and nondiscriminatory” standard.¹¹⁶ But the court did observe that “Section 253(c) requires compensation to be reasonable essentially to prevent monopolist pricing by towns.”¹¹⁷

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

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

47. *Record Evidence on Costs Associated with Small Wireless Facilities.* Keeping pace with the demands on current 4G networks and upgrading our country’s wireless infrastructure to 5G require

¹¹⁶ *City of White Plains*, 305 F.3d at 79. In particular, the court concluded that “fees that exempt one competitor are inherently not ‘competitively neutral,’ regardless of how that competitor uses its resulting market advantage,” *id.* at 80, and thus “[a]llowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goals of the [1996 Act],” *id.* at 79.

¹¹⁷ *Id.*

¹¹⁸ *City of Santa Fe*, 380 F.3d at 1270-71.

¹¹⁹ *Id.* at 1271.

¹²⁰ *Id.* at 1272 (observing that “[t]he City acknowledges . . . that the rent required by the Ordinance is not limited to recovery of costs”).

¹²¹ Compare, e.g., *Municipality of Guayanilla*, 450 F.3d at 18-19 (finding that fees were significant and had the effect of prohibiting service); *City of Santa Fe*, 380 F.3d at 1271 (similar); with, e.g., *Qwest v. Elephant Butte Irrigation Dist.*, 616 F. Supp. 2d 1110, 1123-24 (D.N.M. 2008) (rejecting Qwest’s reliance on preceding finding of effective prohibition from quadrupled costs where the fee at issue was a penny per foot); *Qwest v. City of Portland*, 2006 WL 2679543, *15 (D. Or. 2006) (asserting with no explanation that “a registration fee of \$35 and a refundable deposit of \$2,000 towards processing expenses . . . could not possibly have the effect of prohibiting Qwest from providing telecommunications services”).

¹²² For example and as noted above, in *Municipality of Guayanilla* the First Circuit reserved judgment on whether the fair and reasonable compensation allowed under Section 253 must be limited to cost recovery or if it was sufficient if the compensation was related to the actual use of rights of way. *Municipality of Guayanilla*, 450 F.3d at 22. Other courts have found reasonable compensation to require cost-based fees. *XO Missouri v. City of Maryland Heights*, 256 F. Supp. 2d 987, 993-95 (E.D. Mo. 2003) (*City of Maryland Heights*); *Bell Atlantic–Maryland, Inc. v. Prince George’s County*, 49 F. Supp. 2d 805, 818 (D. Md. 1999) (*Prince George’s County*) vacated on other grounds, 212 F.3d 863 (4th Cir. 2000). Still other courts have applied a test that weighs a number of considerations when evaluating whether compensation is fair and reasonable. *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000) (*City of Dearborn*) (considering “the amount of use contemplated . . . the amount that other providers would be willing to pay . . . and the fact that TCG had agreed in earlier negotiations to a fee almost identical to what it now was challenging as unfair”).

the deployment of many more Small Wireless Facilities.¹²³ For example, Verizon anticipates that network densification and the upgrade to 5G will require 10 to 100 times more antenna locations than currently exist. AT&T estimates that providers will deploy hundreds of thousands of wireless facilities in the next few years alone—equal to or more than the number providers have deployed in total over the last few decades.¹²⁴ Sprint, in turn, has announced plans to build at least 40,000 new small sites over the next few years.¹²⁵ A report from Accenture estimates that, overall, during the next three or four years, 300,000 small cells will need to be deployed—a total that it notes is “roughly double the number of macro cells built over the last 30 years.”¹²⁶

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

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

50. We conclude that ROW access fees, and fees for the use of government property in the ROW,¹³⁰ such as light poles, traffic lights, utility poles, and other similar property suitable for hosting

¹²³ See CTIA June 27, 2018 *Ex Parte* Letter at 6 (“[s]mall cell technology is needed to support 4G densification and 5G connectivity.”); see also *Accelerating Wireless Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, 32 FCC Rcd 9760, 9765, para. 12 (2017) (*2017 Pole Replacement Order*) (recognizing that Small Wireless Facilities will be increasingly necessary to support the rollout of next-generation services).

¹²⁴ See Verizon Comments at 3; AT&T Comments at 1.

¹²⁵ See Letter from Keith C. Buell, Senior Counsel, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Feb. 21, 2018).

¹²⁶ *Accelerating Future Economic Value Report* at 6; see also Deloitte 5G Paper.

¹²⁷ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3266, 3296-97, paras. 100 -101 and 3298-99, paras. 104-105 (2017).

¹²⁸ *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3360, para. 87. In addition, in 2016, the Wireless Telecommunications Bureau released a public notice seeking comment on ways to expedite the deployment of next generation wireless infrastructure, including providing guidance on application processing fees and charges for use of rights of way. See *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Public Notice, 31 FCC Rcd 13360 (WTB 2016).

¹²⁹ *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3362, para. 90.

¹³⁰ We do not find these fees to be taxes within the meaning of Section 601(c)(2) of the 1996 Act. See, e.g., Smart Communities Reply at 36 (quoting the savings clause for “State or local law pertaining to taxation” in Section 601(c)(2) of the 1996 Act). It is ambiguous whether a fee charged for access to ROWs should be viewed as a tax for purposes of Section 601(c)(2) of the 1996 Act. See, e.g., *City of Dallas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997) (distinguishing “the price paid to rent use of public right-of-ways” from a “tax” and citing similar precedent). Given that Congress clearly contemplated in Section 253(c) that states’ and localities’ fees for access to ROWs could be subject to preemption where they violate Section 253—or else the savings clause in that regard would be superfluous—we find the better view is that such fees do not represent a tax encompassed by Section 601(c)(2) of

Small Wireless Facilities, as well as application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of Small Wireless Facilities inside and outside the ROW, violate Sections 253 or 332(c)(7) unless these conditions are met: (1) the fees are a reasonable approximation of the state or local government's costs,¹³¹ (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.¹³²

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

52. *Text and Structure.* We start our analysis with a consideration of the text and structure of Section 253. That section contains several related provisions that operate in tandem to define the roles that Congress intended the federal government, states, and localities to play in regulating the provision of telecommunications services. Section 253(a) sets forth Congress's intent to preempt state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."¹³³ Section 253(b), in turn, makes clear Congress's intent that state "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights

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 the 1996 Act. We do not address whether particular fees could be considered taxes under other statutes not administered by the FCC, but we reject the suggestion that tests courts use to determine what constitute "taxes" in the context of such other statutes should apply to the Commission's interpretation of Section 601(c)(2) here in light of the statutory context for Section 601(c)(2) in the 1996 Act and the Communications Act discussed above. *See, e.g., Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 & n.3 (9th Cir. 2006) (holding that particular fees at issue there were taxes for purposes of the Tax Injunction Act and stating in dicta that had the Tax Injunction Act not applied it would agree with the conclusion of the district court that it was covered by Section 601(c)(2) of the 1996 Act); *MCI Communications Services, Inc. v. City of Eugene*, 359 F. Appx. 692, 696 (9th Cir. 2009) (asserting without analysis that the same test would apply to determine if a fee constitutes a tax under both the Tax Injunction Act and Section 601(c)(2) of the 1996 Act).

¹³¹ By costs, we mean those costs specifically related to and caused by the deployment. These include, for instance, the costs of processing applications or permits, maintaining the ROW, and maintaining a structure within the ROW. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 114 (D.P.R. 2005) (*Guayanilla District Ct. Opinion*), *aff'd*, 450 F.3d 9 (1st Cir. 2006) ("fees charged by a municipality need to be related to the degree of actual use of the public rights-of way" to constitute fair and reasonable compensation under Section 253(c)).

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

¹³³ 47 U.S.C. § 253(a).

of consumers” are not preempted.¹³⁴ Of particular importance in the fee context, Section 253(c) reflects a considered policy judgment that “[n]othing in this section” shall prevent states and localities from recovering certain carefully delineated fees. Specifically, Section 253(c) makes clear that fees are not preempted that are “fair and reasonable” and imposed on a “competitively neutral and nondiscriminatory basis,” for “use of public rights-of-way on a “nondiscriminatory basis,” so long as they are “publicly disclosed” by the government.¹³⁵ Section 253(d), in turn, provides one non-exclusive mechanism by which a party can obtain a determination from the Commission of whether a specific state or local requirement is preempted under Section 253(a)—namely, by filing a petition with the Commission.¹³⁶

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

¹³⁴ 47 U.S.C. § 253(b).

¹³⁵ 47 U.S.C. § 253(c).

¹³⁶ 47 U.S.C. § 253(d).

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

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

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

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

¹⁴¹ See *infra* paras. 62-63.

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

¹⁴³ See, e.g., Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 9-10. We therefore reject the view of those courts that have concluded that Section 253(a) necessarily requires some additional showing beyond the fact that a particular fee is not cost-based. See, e.g., *Owest v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006) (“we

54. In addition, notwithstanding that Section 253(c) only expressly governs ROW fees, we find it appropriate to look to its substantive standards as a ceiling for other state and local fees addressed by this *Declaratory Ruling*.¹⁴⁴ For one, our evaluation of the material effects of fees on the deployment of Small Wireless Facilities does not differ whether the fees are for ROW access, use of government property within the ROW, or one-time application and review fees or the like—any of which drain limited capital resources that otherwise could be used for deployment—and we see no reason why the Act would tolerate a greater prohibitory effect in the case of application or review fees than for ROW fees.¹⁴⁵ In addition, elements of the substantive standards for ROW fees in Section 253(c) appear at least analogous to elements of the *California Payphone* standard for evaluating an effective prohibition under Section 253(a). In pertinent part, both incorporate principles focused on the legal requirements to which a provider may be fairly subject,¹⁴⁶ and seek to guard against competitive disparities.¹⁴⁷ Without resolving the precise interplay of those concepts in Section 253(c) and the *California Payphone* standard, their similarities support our use of the substantive standards of Section 253(c) to inform our evaluation of fees at issue here that are not directly governed by that provision.

55. From the foregoing analysis, we can derive the three principles that we articulate in this Declaratory Ruling about the types of fees that are preempted. As explained in more detail below, we also interpret Section 253(c)'s "fair and reasonable compensation" provision to refer to fees that represent a reasonable approximation of actual and direct costs incurred by the government, where the costs being passed on are themselves objectively reasonable.¹⁴⁸ Although there is precedent that "fair and reasonable" compensation could mean not only cost-based charges but also market-based charges in certain instances,¹⁴⁹ the statutory context persuades us to adopt a cost-based interpretation here. In particular, while the general purpose of Section 253(c) is to preserve certain state and local conduct from preemption, it includes qualifications and limitations to cabin state and local action under that savings clause in ways that ensure appropriate protections for service providers. The reasonableness of interpreting the qualifications and limitations in the Section 253(c) savings clause as designed to protect the interests of service providers is emphasized by the statutory language. The "competitively neutral and

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decline to read" prior Ninth Circuit precedent "to mean that all non-cost based fees are automatically preempted, but rather that courts must consider the substance of the particular regulation at issue"). At the same time, our interpretation does not take the broader view of the preemptive scope of Section 253 adopted by the Sixth Circuit, which interpreted Section 253(c) as an independent prohibition on conduct that is not itself prohibited by Section 253(a). *City of Dearborn*, 206 F.3d at 624.

¹⁴⁴ See *supra* note 71.

¹⁴⁵ Cf. *Cheney R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) (observing that the *expressio unius* canon is a "feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved," and concluding there that "Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion").

¹⁴⁶ For ROW compensation to be saved under Section 253(c) it must be "fair and reasonable," while the *California Payphone* standard looks to whether a legal requirement "materially limits or inhibits" the ability to compete in a "fair" legal environment for a covered service. *California Payphone*, 12 FCC Rcd at 14206, para. 31.

¹⁴⁷ For ROW compensation to be saved under Section 253(c) it also must be "competitively neutral and nondiscriminatory," while the *California Payphone* standard also looks to whether a legal requirement "materially limits or inhibits" the ability to compete in a "balanced" legal environment for a covered service. *California Payphone*, 12 FCC Rcd at 14206, para. 31.

¹⁴⁸ See *infra* paras. 69-77; see also, e.g., *City of Maryland Heights*, 256 F. Supp. 2d at 993-95; *Bell Atlantic–Maryland*, 49 F. Supp. 2d at 818.

¹⁴⁹ See, e.g., *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010) (statute did not unambiguously require the SEC to interpret "fair and reasonable" to mean cost-based, and the SEC's reliance on market-based rates as "fair and reasonable" where there was competition was a reasonable interpretation).

nondiscriminatory” and public disclosure qualifications in Section 253(c) appear most naturally understood as protecting the interest of service providers from fees that otherwise would have been saved from preemption under Section 253(c) absent those qualifiers. Under the *noscitur a sociis* canon of statutory interpretation, that context persuades us that the “fair and reasonable” qualifier in Section 253(c) similarly should be understood as focused on protecting the interest of providers.¹⁵⁰ As discussed in greater detail below, while it might well be fair for providers to bear basic, reasonable costs of entry,¹⁵¹ the record does not reveal why it would be fair or reasonable from the standpoint of protecting providers to require them to bear costs beyond that level, particularly in the context of the deployment of Small Wireless Facilities. In addition, the text of Section 253(c) provides that ROW access fees must be imposed on a “competitively neutral and nondiscriminatory basis.” This means, for example, that fees charged to one provider cannot be materially higher than those charged to a competitor for similar uses.¹⁵²

56. Other considerations support our approach, as well. By its terms, Section 253(a) preempts state or local legal requirements that “prohibit” or have the “effect of prohibiting” the provision of services, and we agree with court precedent that “[m]erely allowing the [local government] to recoup its processing costs . . . cannot in and of itself prohibit the provision of services.”¹⁵³ The Commission has long understood that Section 253(a) is focused on state or local barriers to entry for the provision of service,¹⁵⁴ and we conclude that states and localities do not impose an unreasonable barrier to entry when they merely require providers to bear the direct and reasonable costs caused by their decision to enter the market.¹⁵⁵ We decline to interpret a government’s recoupment of such fundamental costs of entry as having the effect of prohibiting the provision of services, nor has any commenter argued that recovery of cost by a government would prohibit service in a manner restricted by Section 253(a).¹⁵⁶ Reasonable state and local regulation of facilities deployment is an important predicate for a viable marketplace for

¹⁵⁰ See, e.g., *Life Technologies Corp. v. Promega Corp.*, 137 S. Ct. 734 (2017) (“A word is given more precise content by the neighboring words with which it is associated.” (internal alteration and quotation marks omitted)).

¹⁵¹ See *infra* para. 56.

¹⁵² See, e.g., *City of White Plains*, 305 F.3d at 80.

¹⁵³ *City of Santa Fe*, 380 F.3d at 1269; see also Verizon Comments at 17.

¹⁵⁴ See, e.g., *Sandwich Isles Section 253 Order*, 32 FCC Rcd at 5878, 5882-83, paras. 1, 13; *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8; *Petition of the State of Minnesota for a Declaratory Ruling regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights of Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21707, para. 18 (*Minnesota Order*); *Hyperion Order*, 14 FCC Rcd at 11070, para. 13; *Texas PUC Order*, 13 FCC Rcd at 3480, para. 41; *TCI Cablevision Order*, 12 FCC Rcd at 21399, para. 7; *California Payphone*, 12 FCC Rcd at 14209, para. 38; see also, e.g., *AT&T Comm’ns of the Sw. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tx. 1998) (*AT&T v. City of Dallas*) (“[A]ny fee that is not based on AT&T’s use of City rights-of-way violates § 253(a) of the FTA as an economic barrier to entry.”); Verizon Comments at 11-12; Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 7. Because we view the *California Payphone* standard as reflecting a focus on barriers to entry, we decline requests to adopt a distinct, additional standard with that as an explicit focus. See, e.g., T-Mobile Comments at 35.

¹⁵⁵ See, e.g., *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5301-03, paras. 142-45 (2011) (rejecting an approach to defining a lower bound rate for pole attachments that “would result in pole rental rates below incremental cost” as contrary to cost causation principles); *Investigation of Interstate Access Tariff Non-Recurring Charges*, Memorandum Opinion and Order, 2 FCC Rcd 3498, 3502, para. 34 (1987) (observing in the rate regulation context that “the public interest is best served, and a competitive marketplace is best encouraged, by policies that promote the recovery of costs from the cost-causer”). Our interpretation limiting states and localities to the recovery of a reasonable approximation of objectively reasonable cost also takes into account state and local governments’ exclusive control over access to the ROW.

¹⁵⁶ For example, Verizon states that “[a]lthough any fee could be said to raise the cost of providing service,” Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 9, “[t]he Commission should interpret . . . Section 253(a) to allow cost-based fees for access to public rights-of-way and structures within them, but to prohibit above-cost fees that generate revenue in excess of state and local governments’ actual costs.” *Id.*, Attach. at 6.

communications services by protecting property rights and guarding against conflicting deployments that could harm or otherwise interfere with others' use of property.¹⁵⁷ By contrast, fees that recover more than the state or local costs associated with facilities deployment—or that are based on unreasonable costs, such as exorbitant consultant fees or the like—go beyond such governmental recovery of fundamental costs of entry. In addition, interpreting Section 253(a) to prohibit states and localities from recovering a reasonable approximation of reasonable costs could interfere with the ability of states to exercise the police powers reserved to them under the Tenth Amendment.¹⁵⁸ We therefore conclude that Section 253(a) is circumscribed to permit states and localities to recover a reasonable approximation of their costs related to the deployment of Small Wireless Facilities.

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

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

¹⁵⁷ See, e.g., *TCI Cablevision Order*, 12 FCC Rcd at 21441, para. 103; see also, e.g., Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968). States’ or localities’ regulation premised on addressing effects of deployment besides these costs caused by facilities deployment are distinct issues, which we discuss below. See *infra* Part III.C.

¹⁵⁸ The Supreme Court has recognized that land use regulation can involve an exercise of police powers. See, e.g., *Hodel v. Va. Surface Min. & Reclamation Ass’n, Inc.*, 452 U.S. 264, 289 (1981). As that Court observed, “[i]t would . . . be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity.” *Id.* at 292. At the same time, the Court also has held that “historic police powers of the States” are not to be preempted by federal law “unless that was the clear and manifest purpose of Congress.” *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (internal quotation marks omitted). As relevant here, we see no clear and manifest intent that Congress intended to preempt publicly disclosed, objectively reasonable cost-based fees imposed on a nondiscriminatory basis, particularly in light of Section 253(c).

¹⁵⁹ We disagree with suggestions that the Commission applied an additional and more stringent “commercial viability” test in *California Payphone*. See, e.g., Crown Castle June 7, 2018 *Ex Parte* Letter at 10. Instead, the Commission was simply evaluating the Section 253 petition on its own terms, see, e.g., *California Payphone*, 12 FCC Rcd at 14204, 14210, paras. 27, 41, and, without purporting to define the bounds of Section 253(a), explaining that the petitioner “ha[d] not sufficiently supported its allegation” that the provision of service at issue “would be ‘impractical and uneconomic.’” *Id.* at 14210, para. 41. Confirming that this language was simply the Commission’s short-hand reference to arguments put forward by the petitioner itself, and not a Commission-announced standard for applying Section 253, the Commission has not applied a “commercial viability” standard in other decisions, as these same commenters recognize. See, e.g., Crown Castle June 7, 2018 *Ex Parte* Letter at 10.

¹⁶⁰ *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81.

¹⁶¹ See *infra* paras. 60-65.

competitor to distort the marketplace and create a barrier to entry in violation of Section 253(a).¹⁶² We reaffirm that conclusion here.

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

60. *Capital Expenditures.* Apart from the text, structure, and legislative history of the 1996 Act, an additional, independent justification for our interpretation follows from the simple, logical premise, supported by the record, that state and local fees in one place of deployment necessarily have the effect of reducing the amount of capital that providers can use to deploy infrastructure elsewhere, whether the reduction takes place on a local, regional or national level.¹⁶⁷ We are persuaded that providers and infrastructure builders, like all economic actors, have a finite (though perhaps fluid)¹⁶⁸ amount of resources to use for the deployment of infrastructure. This does not mean that these resources are limitless, however. We conclude that fees imposed by localities, above and beyond the recovery of localities’ reasonable costs, materially and improperly inhibit deployment that could have occurred elsewhere.¹⁶⁹ This and regulatory uncertainty created by such effectively prohibitive conduct¹⁷⁰ creates an

¹⁶² See, e.g., *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8.

¹⁶³ See, e.g., WIA Comments, Attach. 2 at 70.

¹⁶⁴ WIA Comments, Attach. 2 at 70 (quoting 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from Office of City Attorney, City and County of San Francisco)) (emphasis added)); see also, e.g., Verizon Comments at 15 (similar); *City of Maryland Heights*, 256 F. Supp. 2d at 995-96.

¹⁶⁵ 141 Cong. Rec. H8460-01, H8460 (daily ed. Aug. 4, 1995).

¹⁶⁶ We reject other comments downplaying the relevance of legislative statements by some commenters as inconsistent with the text and structure of the Act. See, e.g., League of Arizona Cities *et al.* Joint Comments at 27-28; NATOA Comments, Exh. A at 26-28; Smart Communities Reply at 57-58; Cities of San Antonio *et al.* Reply at 20-21; see also, e.g., *City of Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1071-72 (D. Or. 2005).

¹⁶⁷ At a minimum, this analysis complements and reinforces the justifications for our interpretation provided above. While the relevant language of Section 253(a) and Section 332(c)(7)(B)(i)(II) is not limited just to Small Wireless Facilities, we proceed incrementally in our Declaratory Ruling here and address the record before us, which indicates that our interpretation of the effective prohibition standard here is particularly reasonable in the context of Small Wireless Facility deployment.

¹⁶⁸ For example, the precise amount of these resources might shift as a service provider encounters unexpected costs, recovers costs passed on to subscribers, or earns a profit above those costs.

¹⁶⁹ As Verizon observes, “[a] number of states enacted infrastructure legislation because they determined that rate relief was necessary to ensure wireless deployment,” and thus could be seen as having “acknowledged that excessive fees impose a substantial barrier to the provision of service.” Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 7-8. In view of the evidence in the record regarding the effect of state and local fees on capital expenditures, see, e.g., EXHIBIT 17
Corning Sept. 5, 2018 *Ex Parte* Letter (noting that cost savings from reduced small cell attachment and application

appreciable impact on resources that materially limits plans to deploy service. This record evidence emphasizes the importance of evaluating the effect of fees on Small Wireless Facility deployment on an aggregate basis. Consistent with the First Circuit's analysis in *Municipality of Guayanilla*, the record persuades us that fees associated with Small Wireless Facility deployment lead to "a substantial increase in costs"—particularly when considered in the aggregate—thereby "plac[ing] a significant burden" on carriers and materially inhibiting their provision of service contrary to Section 253 of the Act.¹⁷¹

61. The record is replete with evidence that providers have limited capital budgets that are constrained by state and local fees.¹⁷² As AT&T explains, "[a]ll providers have limited capital dollars to invest, funds that are quickly depleted when drained by excessive ROW fees."¹⁷³ AT&T added that "[c]ompetitive demands will force carriers to deploy small cells in the largest cities. But, when those largest cities charge excessive fees to access ROWs and municipal ROW structures, carriers' finite capital dollars are prematurely depleted, leaving less for investment in mid-level cities and smaller communities. Larger municipalities have little incentive to not overcharge, and mid-level cities and smaller

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fees could result in \$2.4 billion in capital expenditure and that 97% of this capital expenditure would go toward investments in rural and suburban areas), we disagree with arguments that fees do not affect the deployment of wireless facilities in rural and underserved areas. *See, e.g.*, Letter from Sam Liccardo, Mayor, City of San Jose, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 4 (filed Sept. 18, 2018) (City of San Jose Sept. 18, 2018 *Ex Parte* Letter) (stating that "whether or not a provider wishes to invest in a dense urban area, including underserved urban areas, or a rural area is fundamentally based on the size of the customer base and the market demand for service—not on the purported wiles of a 'must-serve' jurisdiction somehow forcing investment away from rural areas because a right of way or attachment fee is charged."); Letter from Joanne Hovis, Chief Executive Officer, Coalition for Local Internet Choice, James Baller, President, Coalition for Local Internet Choice, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 3 (filed Sept. 18, 2018) ("in lucrative areas, carriers will pay market fees for access to property just as they would any other cost of doing business. But they will not, as rational economic actors, necessarily apply new profits (created by FCC preemption) to deploying in otherwise unattractive areas.").

¹⁷⁰ *See, e.g.*, CTIA Comments at 32 (identifying "disparate interpretations" regarding the fees that are preempted and seeking FCC clarification to "dispel the resulting uncertainty"); Verizon Comments at 10 (similar); Letter from Cathleen A. Massey, Vice Pres.-Fed. Regulatory Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 7 (filed Sept. 21, 2017) (seeking clarification of Section 253); BDAC Regulatory Barriers Report, p. 9 ("The FCC should provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not 'fair and reasonable.' The Commission should specifically clarify that 'fair and reasonable' compensation for right-of way access and use implies some relation to the burden of new equipment placed in the ROW or on the local asset, or some other objective standard.").

¹⁷¹ *Municipality of Guayanilla*, 450 F.3d at 19.

¹⁷² *See, e.g.*, AT&T Comments at 2; Conterra Broadband et al. Comments at 6; Mobilite Comments at 3; Sprint Comments at 17; Letter from Courtney Neville, Associate General Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2-3 (filed July 16, 2018) (CCA July 16, 2018 *Ex Parte* Letter); Letter from Henry Hultquist, Vice President, Federal Regulatory, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed June 8, 2018) (AT&T June 8, 2018 *Ex Parte* Letter); Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Letter from Katharine R. Saunders, Managing Associate General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed June 21, 2018) (Verizon June 21, 2018 *Ex Parte* Letter); Letter from Ronald W. Del Sesto, Jr., Counsel for Uniti Fiber, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 5 (filed Oct. 30, 2017); Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 2-4. When developing capital budgets, companies rationally would account for anticipated revenues associated with the services that can be provided by virtue of planned facilities deployment, and the record does not reveal—nor do we see any basis to assume—that such revenues would be so great as to eliminate constraints on providers' capital budgets so as to enable full deployment notwithstanding the level of state and local fees.

¹⁷³ AT&T Aug. 6, 2018 *Ex Parte* Letter at 2.

EXHIBIT 17

ZDO-276: FY 2020 Minor and Time Sensitive Amendments

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

62. Our conclusion finds further support when one considers the aggregate effects of fees imposed by individual localities, including, but not limited to, the potential limiting implications for a nationwide wireless network that reaches all Americans, which is among the key objectives of the statutory provisions in the 1996 Act that we interpret here.¹⁸² When evaluating whether fees result in an effective prohibition of service due to financial burden, we must consider the marketplace regionally and nationally and thus must consider the cumulative effects of state or local fees on service in multiple geographic areas that providers serve or potentially would serve. Where providers seek to operate on a regional or national basis, they have constrained resources for entering new markets or introducing, expanding, or improving existing services, particularly given that a provider’s capital budget for a given

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (pausing or delaying deployments in Citrus Heights, CA, Oakland, CA and three Maryland counties; decreasing deployments in Lowell, MA and decreasing deployments from 98 to 25 sites in Escondido, CA).

¹⁷⁶ *Id.*

¹⁷⁷ Verizon Aug. 10, 2018 *Ex Parte* Letter at 5, Attach. at 2-4.

¹⁷⁸ Sprint Comments at 17.

¹⁷⁹ Sprint Aug. 13, 2018 *Ex Parte* Letter at 1-2.

¹⁸⁰ Conterra Broadband *et al.* Comments at 6; *see also* Letter from John Scott, Counsel for Mobilitie, LLC to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (“high fees imposed by some cities hurt other cities that have reasonable fees, because they reduce capital resources that might have gone to those cities, and because they pressure other financially strapped cities not to turn away what appears to be a revenue opportunity”).

¹⁸¹ Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 4 (filed August 10, 2018) (Crown Castle Aug. 10, 2018 *Ex Parte* Letter).

¹⁸² *New England Public Comms. Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19717, para. 9 (1996) (1996 Act intent of “accelerat[ing] deployment of advanced telecommunications services to all Americans by opening all telecommunications markets to competition.”); *see also* Crown Castle Aug. 10, 2018 *Ex Parte* Letter at 7.

period of time is often set in advance.¹⁸³ In such cases, the resources consumed in serving one geographic area are likely to deplete the resources available for serving other areas.¹⁸⁴ The text of Section 253(a) is not limited by its terms only to effective prohibitions within the geographic area targeted by the state or local fee. Where a fee in a geographic area affects service outside that geographic area, the statute is most naturally read to encompass consideration of all affected areas.

63. A contrary, geographically-restrictive interpretation of Section 253(a) would exacerbate the digital divide by giving dense or wealthy states and localities that might be most critical for a provider to serve the ability to leverage their unique position to extract fees for their own benefit at the expense of regional or national deployment by decreasing the deployment resources available for less wealthy or dense jurisdictions.¹⁸⁵ As a result, the areas likely to be hardest hit by excessive government fees are not necessarily jurisdictions that charge those fees, but rather areas where the case for new, expanded, or improved service was more marginal to start—and whose service may no longer be economically justifiable in the near-term given the resources demanded by the “must-serve” areas. To cite some examples of harmful aggregate effects, AT&T notes that high annual recurring fees are particularly harmful because of their “continuing and compounding nature.”¹⁸⁶ It also states that, “if, as S&P Global Market Intelligence estimates, small-cell deployments reach nearly 800,000 by 2026, a ROW fee of \$1000 per year . . . would result in nearly \$800 million annually in forgone investment.”¹⁸⁷ Yet another commenter notes that, “[f]or a deployment that requires a vast number of small cell facilities across a metropolitan area, these fees quickly mount up to hundreds of thousands of dollars, often making deployment economically infeasible,” and “far exceed[ing] any costs the locality incurs by orders of magnitude, while taking capital that would otherwise go to investment in new infrastructure.”¹⁸⁸ Endorsing such a result would thwart the purposes underlying Section 253(a). As Crown Castle observes, “[e]ven where the fees do not result in a direct lack of service in a high-demand area like a city or urban core, the high cost of building and operating facilities in these jurisdictions consume [sic] capital and revenue that could otherwise be used to expand wireless infrastructure in higher cost areas. This impact of egregious fees is prohibitory and should be taken into account in any prohibition analysis.”¹⁸⁹

64. Some municipal commenters endorse a cost-based approach to “ensure that localities are fully compensated for their costs [and that] fees should be reasonable and non-discriminatory, and should ensure that localities are made whole”¹⁹⁰ in recognition that “getting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources.”¹⁹¹ Commenters from smaller municipalities recognize that “thousands and thousands of small cells are needed for 5G... [and]

¹⁸³ See, e.g., AT&T June 8, 2018 *Ex Parte* Letter at 2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Verizon June 21, 2018 *Ex Parte* Letter at 2.

¹⁸⁴ See, e.g., *Municipality of Guayanilla*, 450 F.3d at 17 (“Given the interconnected nature of utility services across communities and the strain that the enactment of gross revenue fees in multiple municipalities would have on PRTC’s provision of services, the Commonwealth-wide estimates are relevant to determining how the ordinance affects PRTC’s ‘ability . . . to provide any interstate or intrastate telecommunications service’” under Section 253(a)).

¹⁸⁵ See, e.g., Letter from Sam Liccardo, Mayor of San Jose, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, Attachment at 1-2 (filed Aug. 2, 2018) (describing payment by providers of \$24 million to a Digital Inclusion Fund in order to deploy small cells in San Jose on city owned light poles).

¹⁸⁶ AT&T Comments at 19.

¹⁸⁷ AT&T Comments at 19-20.

¹⁸⁸ Mobilitie Comments at 3.

¹⁸⁹ Crown Castle Aug. 10, 2018 *Ex Parte* Letter at 2.

¹⁹⁰ Sal Pace July 30, 2018 *Ex Parte* Letter at 1.

¹⁹¹ LaWana Mayfield July 31, 2018 *Ex Parte* Letter at 1

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

65. Applying this approach here, the record reveals that fees above a reasonable approximation of cost, even when they may not be perceived as excessive or likely to prohibit service in isolation, will have the effect of prohibiting wireless service when the aggregate effects are considered, particularly given the nature and volume of anticipated Small Wireless Facility deployment.¹⁹⁹ The record reveals that these effects can take several forms. In some cases, the fees in a particular jurisdiction will lead to reduced or entirely forgone deployment of Small Wireless Facilities in the near term for that

¹⁹² Dr. Carolyn Prince July 31, 2018 *Ex Parte* Letter at 2.

¹⁹³ Letter from Ashton J. Hayward III, Mayor, Pensacola, FL to the Hon. Brendan Carr, Commissioner, WT Docket No. 17-79 at 1 (filed June 8, 2018).

¹⁹⁴ Representative Terry Alexander Aug. 7, 2018 *Ex Parte* Letter at 1.

¹⁹⁵ Senator Duane Ankney July 31, 2018 *Ex Parte* Letter at 1; *see also* Letter from Elder Alexis D. Pipkins, Sr. to the Hon. Brendan Carr, Commissioner, FCC at 1 (filed July 26, 2018) (“the race to 5G is global...instead of each city or state for itself, we should be working towards aligned, streamlined frameworks that benefit us all.”); Letter from Jeffrey Bohm, Chairman of the Board of Commissioners, County of St. Clair to Brendan Carr, Commissioner, FCC, WT Docket 17-79 at 1-2 (filed August 22, 2018) (“Smaller communities, such as those located in St. Clair County would benefit from having the Commissions reduce the costly and unnecessary fee’s that some larger communities place on small cells as a condition of deployment. These fees, wholly disproportionate to any cost, put communities like ours at an unfair disadvantage”); Letter from Scott Niesler, Mayor, City of Kings Mountain, to Brendan Carr, Commissioner, FCC, WT Docket 17-79 at 1-2 (filed June 4, 2018) (“the North Carolina General Assembly has enacted legislation to encourage the deployment of small cell technology to limit exorbitant fees which can siphon off capital from further expansion projects. I was encouraged to see the FCC taking similar steps to enact policies that help clear the way for the essential investment”).

¹⁹⁶ *Guayanilla District Ct. Opinion*, 354 F. Supp. 2d at 111-12; *but see, e.g.*, Letter from Nina Beety to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 at 5 (filed Sept. 17, 2018) (Nina Beety Sept. 17, 2018 *Ex Parte* Letter) (asserting that providers artificially under-capitalize their deployment budgets to build the case for poverty).

¹⁹⁷ Letter from Larry Hanson, Executive Director, Georgia Municipal Association to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Sept. 17, 2018) (Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter).

¹⁹⁸ 47 U.S.C. § 253(a).

¹⁹⁹ *See, e.g., Wireless Infrastructure Second R&O*, FCC 18-30, at para. 64. In addition, although one could argue that, in theory, a sufficiently small departure from actual and reasonable costs might not have the effect of prohibiting service in a particular instance, the record does not reveal an alternative, administrable approach to evaluating fees without a cost-based focus.

jurisdiction.²⁰⁰ In other cases, where it is essential for a provider to deploy in a given area, the fees charged in that geographic area can deprive providers of capital needed to deploy elsewhere, and lead to reduced or forgone near-term deployment of Small Wireless Facilities in other geographic areas.²⁰¹ In both of those scenarios the bottom-line outcome on the national development of 5G networks is the same—diminished deployment of Small Wireless Facilities critical for wireless service and building out 5G networks.²⁰²

66. Some have argued that our decision today regarding Sections 253 and 332 should not be applied to preempt agreements (or provisions within agreements) entered into prior to this Declaratory Ruling.²⁰³ We note that courts have upheld the Commission’s preemption of the enforcement of provisions in private agreements that conflict with our decisions.²⁰⁴ We therefore do not exempt existing agreements (or particular provisions contained therein) from the statutory requirements that we interpret here. That said, however, this Declaratory Ruling’s effect on any particular existing agreement will depend upon all the facts and circumstances of that specific case.²⁰⁵ Without examining the particular features of an agreement, including any exchanges of value that might not be reflected by looking at fee provisions alone, we cannot state that today’s decision does or does not impact any particular agreement entered into before this decision.

67. *Relationship to Section 332.* While the above analysis focuses on the text and structure of the Act, legislative history, Commission orders, and case law interpreting Section 253(a), we reiterate that in the fee context, as elsewhere, the statutory phrase “prohibit or have the effect of prohibiting” in Section 332(c)(7)(B)(i)(II) has the same meaning as the phrase “prohibits or has the effect of prohibiting” in Section 253(a). As noted in the prior section, there is no evidence to suggest that Congress intended for virtually identical language to have different meanings in the two provisions.²⁰⁶ Instead, we find it

²⁰⁰ See, e.g., AT&T June 8, 2018 *Ex Parte* Letter at 1-2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2.

²⁰¹ AT&T June 8, 2018 *Ex Parte* Letter at 1-2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Verizon June 21, 2018 *Ex Parte* Letter at 2; CCA July 16, 2018 *Ex Parte* Letter at 2-3.

²⁰² See, e.g., Letter from Thomas J. Navin, Counsel to Corning, Inc. to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Jan 25, 2018), Attach. at 6-7 (comparing different effects on deployment between a base case and a high fee case, and estimating that pole attachment fees nationwide assuming high fees would result in 28.2M fewer premises passed, or 31 percent of the 5G Base case results, and an associated \$37.9B in forgone network deployment).

²⁰³ City of San Jose Sept. 18, 2018 *Ex Parte* Letter at 1-2.

²⁰⁴ See, e.g., *Building Owners and Managers Ass’n Int’l v. FCC*, 254 F.3d 89 (D.C. Cir. 2001) (OTARD rules barring exclusivity provisions in lease agreements). As the D.C. Circuit has recognized, “[w]here the Commission has been instructed by Congress to prohibit restrictions on the provision of a regulated means of communication, it may assert jurisdiction over a party that directly furnishes those restrictions, and, in so doing, the Commission may alter property rights created under State law.” *Id.* at 96; see also *Lansdowne on the Potomac Homeowners Ass’n v. OpenBand at Lansdowne, LLC*, 713 F.3d 187 (4th Cir. 2013).

²⁰⁵ For example, the City of Los Angeles asserts that fee provisions in its agreements with providers are not prohibitory and must be examined in light of a broader exchange of value contemplated by the agreements in their entirety. Letter from Eric Garcetti, Mayor, City of Los Angeles to the Hon. Ajit Pai, Chairman, FCC, WT Docket No. 17-79 (filed Sept 18, 2018). We agree that agreements entered into before this decision will need to be examined in light of their potentially unique circumstances before a decision can be reached about whether those agreements or any particular provisions in those agreements are or are not impacted by today’s FCC decision.

²⁰⁶ We reject the claims of some commenters that Section 332(c)(7)(B)(i)(II) is limited exclusively to decisions on individual requests and therefore must be interpreted differently than Section 253(a). See, e.g., San Francisco Comments at 24-26. Section 332(c)(7)(B)(i) explicitly applies to “regulation of the placement, construction, and modification,” and it would be irrational to interpret “regulation” in that paragraph to mean something different from the term “regulation” as used in 253(a) or to find that it does not encompass generally applicable “regulations” as well as decisions on individual applications. Moreover, even assuming *arguendo* that San Francisco’s position reflects the appropriate interpretation of the scope of Section 332(c)(7)(B)(i)(II), the record does not reveal why a

more reasonable to conclude that the language in both sections generally should be interpreted to have the same meaning and to reflect the same standard, including with respect to preemption of fees that could “prohibit” or have “the effect of prohibiting” the provision of covered service. Both sections were enacted to address concerns about state and local government practices that undermined providers’ ability to provide covered services, and both bar state or local conduct that prohibits or has the effect of prohibiting service.

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

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

70. Applying the principles established in this Declaratory Ruling, a variety of fees not reasonably tethered to costs appear to violate Sections 253(a) or 332(c)(7) in the context of Small Wireless Facility deployments.²⁰⁸ For example, we agree with courts that have recognized that gross

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distinction between broadly-applicable requirements and decisions on individual requests would call for a materially different analytical approach, even if it arguably could be relevant when evaluating the application of that analytical approach to a particular preemption claim. In addition, although some commenters assert that such an interpretation “would make it virtually impossible for local governments to enforce their zoning laws with regard to wireless facility siting,” they provide no meaningful explanation why that would be the case. *See, e.g.*, San Francisco Reply at 16. While some local commenters note that the savings clauses in Section 253(b) and (c) do not have express counterparts in the text of Section 332(c)(7)(B)(i), *see, e.g.*, San Francisco Comments at 26, we are not persuaded that this compels a different interpretation of the virtually identical language restricting actual or effective prohibitions of service in Section 253(a) and Section 332(c)(7)(B)(i)(II), particularly given our reliance on considerations in addition to the savings clauses themselves when interpreting the “effective prohibition” language. *See supra* paras. 57-65. We offer these interpretations both to respond to comments and in the event that some court decision could be viewed as supporting a different result.

²⁰⁷ Section 253(a) expressly addresses state or local activities that prohibit or have the effect of prohibiting “any entity” from providing a telecommunications service. 47 U.S.C. § 253(a). In the *2009 Declaratory Ruling*, the Commission likewise interpreted Section 332(c)(7)(B)(i)(II) as implicated where the state or local conduct prohibits or has the effect of prohibiting the provision of personal wireless service by one entity even if another entity already is providing such service. *See 2009 Declaratory Ruling*, 24 FCC Rcd at 14016-19, paras. 56-65.

²⁰⁸ We acknowledge that a fee not calculated by reference to costs might nonetheless happen to land at a level that is a reasonable approximation of objectively reasonable costs, and otherwise constitute fair and reasonable compensation as we describe herein. If all these criteria are met, the fee would not be preempted.

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

71. *Interpretation of Section 253(c) in the Context of Fees.* In this section, we turn to the interpretation of several provisions in Section 253(c), which provides that state or local action that otherwise would be subject to preemption under Section 253(a) may be permissible if it meets specified criteria. Section 253(c) expressly provides that state or local governments may require telecommunications providers to pay "fair and reasonable compensation" for use of public ROWs but requires that the amounts of any such compensation be "competitively neutral and nondiscriminatory" and "publicly disclosed."²¹¹

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

73. We disagree with arguments that "fair and reasonable compensation" in Section 253(c) should somehow be interpreted to allow state and local governments to charge "any compensation," and we give weight to BDAC comments that, "[a]s a policy matter, the Commission should recognize that local fees designed to maximize profit are barriers to deployment."²¹³ Several commenters argue, in

²⁰⁹ See, e.g., *Municipality of Guayanilla*, 450 F.3d at 21; *City of Maryland Heights*, 256 F. Supp. 2d at 993-96; *Prince George's County*, 49 F. Supp. 2d at 818; *AT&T v. City of Dallas*, 8 F. Supp. 2d at 593; see also, e.g., CTIA Comments at 30, 45; *id.* Attach. at 17; ExteNet Comments, Exh. 1 at 41; T-Mobile Comments at 7; WIA Comments at 52-53.

²¹⁰ See, e.g., CCA Comments at 17-21 (asking the Commission to declare franchise fees or percentage of revenue fees outside the scope of fair and reasonable compensation and to prohibit state and localities from requiring service providers to obtain business licenses for individual cell sites). For example, although fees imposed by a state or local government calculated as a percentage of a provider's revenue are unlikely to be a reasonable approximation of cost, if such a percentage-of-revenue fee were, in fact, ultimately shown to amount to a reasonable approximation of costs, the fee would not be preempted.

²¹¹ 47 U.S.C. § 253(c).

²¹² *Guayanilla District Ct. Opinion*, 354 F. Supp. 2d at 114 ("fees charged by a municipality need to be related to the degree of actual use of the public rights-of way" to constitute fair and reasonable compensation under Section 253(c)); *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), *aff'd* 299 F. 3d 235 (3d Cir. 2002) (*New Jersey Payphone*) ("Plainly, a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry.")

²¹³ BDAC Regulatory Barriers Report, Appendix C, p. 3 (a "[ROW] burden-oriented [fee] standard is flexible enough to suit varied localities and network architectures, would ensure that fees are not providing additional

particular, that Section 253(c)'s language must be read as permitting localities latitude to charge any fee at all²¹⁴ or a "market-based rent."²¹⁵ Many of these arguments seem to suggest that Section 253 or 332 have not previously been read to impose limits on fees, but as noted above courts have long read these provisions as imposing such limits. Still others argue that limiting the fees state and local governments may charge amounts to requiring taxpayers to subsidize private companies' use of public resources.²¹⁶ We find little support in the record, legislative history, or case law for that position.²¹⁷ Indeed, our

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revenues for other localities purposes unrelated to providing and maintaining the ROW, and would provide some basis to challenge fees that, on their face, are so high as to suggest their sole intent is to maximize revenue.")

²¹⁴ See, e.g., Baltimore Comments at 15-16 (noting that local governments traditionally impose fees based on rent, and other ROW users pay market-based fees and arguing that citizens should not have to "subsidize" wireless deployments); Bellevue *et al.* Reply at 12-13 (stating that "the FCC should compensate municipalities at fair market value because any physical invasion is a taking under the Fifth Amendment, and just compensation is "typically" calculated using fair market value."); NLC Comments at 5 ("local governments, like private landlords, are entitled to collect rent for the use of their property and have a duty to their residents to assess appropriate compensation. This does not necessarily translate to restricting this compensation to just the cost of managing the asset—just as private property varies in value, so does municipal property."); Smart Communities Reply at 7-10 (stating that "fair and reasonable compensation (i.e., fair market value) is not, as some commenters contend, measured by the regulatory cost for use of a ROW or other property; rather it is measured by what it would cost the user of the ROW to purchase rights from a local property owner.").

²¹⁵ Draft BDAC Rates and Fees Report, p. 10 (listing "Local Government Perspectives").

²¹⁶ See, e.g., NLC Comments, Statement of the Hon. Gary Resnick, Mayor, Wilton Manors, FL Comments at 6-7 ("preemption of local fees or rent for use of government-owned light and traffic poles, or fees for use of the right-of-way amounts to a taxpayer subsidy of wireless providers and wireless infrastructure companies. There is no corresponding benefit for such taxpayers such as requiring the broadband industry to reduce consumer rates or offer advanced services to all communities within a certain time frame."); Letter from Rondella M. Hawkins, Officer, City of Austin—Telecommunications & Regulatory Affairs, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 7, 2018) at 1. These commenters do not explain why allowing recovery of a reasonable approximation of the state or locality's objectively reasonable costs would involve a taxpayer subsidy of service providers, and we are not persuaded that our interpretation would create a subsidy.

²¹⁷ As discussed more fully above, Congress intended through Section 253 to preempt state and local governments from imposing barriers in the form of excessive fees, while also preserving state and local authority to protect specified interests through competitively neutral regulation consistent with the Act. Our interpretation of Section 253(c) is consistent with Congress's objectives. Our interpretation of "fair and reasonable compensation" in Section 253(c) is also consistent with prior Commission action limiting fees, and easing access, to other critical communications infrastructure. For example, in implementing the requirement in the Pole Attachment Act that utilities charge "just and reasonable" rates, the Commission adopted rules limiting the rates utilities can impose on cable companies for pole attachments. Based on the costs associated with building and operation of poles, the rates the Commission adopted were upheld by the Supreme Court, which found that the rates imposed were permissible and not "confiscatory" because they "provid[ed] for the recovery of fully allocated cost, including the actual cost of capital." See *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987). Here, based on the specific language in the separate provision of Section 253, we interpret the "effective prohibition" language, as applied to small cells, to permit state and local governments to recover only "fair and reasonable compensation" for their maintenance of ROW and government-owned structures within ROW used to host Small Wireless Facilities. Relatedly, Smart Communities errs in arguing that the Commission's Order "provides localities 60 days to provide access and sets the rate for access," making it a "classic taking." Smart Communities Sept. 19, 2018 *Ex Parte* Letter at 25. To the contrary, the Commission has not given providers any right to compel access to any particular state or local property. Cf. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). There may well be legitimate reasons for states and localities to deny particular placement applications, and adjudication of whether such decisions amount to an effective prohibition must be resolved on a case-by-case basis. In this regard, we note that the record in this proceeding reflects that the vast majority of local jurisdictions voluntarily accept placement of wireless, utility, and other facilities in their rights-of-way. And in any event, cost-based recovery of the type we provide here has been approved as just compensation for takings purposes in the context of such facilities. See *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1368, 1370-71 (11th Cir. 2002). See also *United States v. 564.54 Acres*

approach to compensation ensures that cities are not going into the red to support or subsidize the deployment of wireless infrastructure.

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

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

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of Land, 441 U.S. 506, 513 (1979) (recognizing that alternative measure of compensation might be appropriate “with respect to public facilities such as roads or sewers”).

²¹⁸ See *supra* Parts III.A, B.

²¹⁹ See, e.g., *City of White Plains*, 305 F.3d at 78-79; *Guayanilla District Ct. Opinion*, 354 F. Supp. 2d at 114. We disagree with arguments that competition between municipalities, or competition from adjacent private landowners, would be sufficient to ensure reasonable pricing in the ROW. See e.g., Smart Communities Comments, Exh. 2, The Economics of Government Right of Way Fees, Declaration of Kevin Cahill, Ph.D at para. 15. We find this argument unpersuasive in view of the record evidence in this proceeding showing significant fees imposed on providers in localities across the country. See, e.g., AT&T Comments at 18; Verizon Comments at 6-7; see also BDAC Regulatory Barriers Report, Appendix. C, p. 2.

²²⁰ See, e.g., Smart Communities Comments Cahill 2A at 2-3 (noting that “...a common model is to charge a fee that covers the costs that a municipality incurs in conducting the inspections and proceedings required to allow entry, fees that cover ongoing costs associated with inspection or expansion of facilities ...”); Colorado Comm. and Utility All. *et al.* Comments at 19 (noting that “application fees are based upon recovery of costs incurred by localities.”); Draft BDAC Rates and Fees Report, p. 15-16.

²²¹ See also Draft BDAC Rates and Fees Report, p. 15-16. Although the BDAC Ad Hoc Rates and Fees Committee and municipal commenters only support a cost-based approach for one-time fees, we find no reason not to extend the same reasoning to ROW access fees or fees for the use of government property within the ROW, when all three types of fees are a legal requirement imposed by a government and pose an effective prohibition. The BDAC Rates and Fees Report did not provide a recommendation on fees for ROW access or fees for the use of government property within the ROW, and we disagree with suggestions that our ruling, which was consistent with the committee’s recommendation for one-time fees, circumvents the efforts of the Ad Hoc Rates and Fees Committee. See Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter at 3.

²²² See *supra* para. 50.

²²³ See, e.g., Colorado Comm. and Utility All. *et al.* Comments at 18-19 (discussing range of costs that application fees cover).

EXHIBIT 17

76. Because we interpret fair and reasonable compensation as a *reasonable approximation* of costs, we do not suggest that localities must use any specific accounting method to document the costs they may incur when determining the fees they charge for Small Wireless Facilities within the ROW. Moreover, in order to simplify compliance, when a locality charges both types of recurring fees identified above (i.e., for access to the ROW and for use of or attachment to property in the ROW), we see no reason for concern with how it has allocated costs between those two types of fees. It is sufficient under the statute that the total of the two recurring fees reflects the total costs involved.²²⁴ Fees that cannot ultimately be shown by a state or locality to be a reasonable approximation of its costs, such as high fees designed to subsidize local government costs in another geographic area or accomplish some public policy objective beyond the providers' use of the ROW, are not "fair and reasonable compensation...for use of the public rights-of-way" under Section 253(c).²²⁵ Likewise, we agree with both industry and municipal commenters that excessive and arbitrary consulting fees or other costs should not be recoverable as "fair and reasonable compensation,"²²⁶ because they are not a function of the provider's "use" of the public ROW.

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

²²⁴ See *supra* note 71 (identifying three categories of fees charged by states and localities).

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

²²⁶ See Letter from Ashton J. Hayward III, Mayor, Pensacola, FL to the Hon. Brendan Carr, Commissioner, WT Docket No. 17-79 at 1 (filed June 8, 2018); see also, Illinois Municipal League Comments at 2 (noting that proposed small cell legislation in Illinois allows municipalities to recover "reasonable costs incurred by the municipality in reviewing the application.").

²²⁷ *TCI Cablevision of Oakland County*, 12 FCC Rcd. at 21443, para. 108 (1997).

²²⁸ *City of White Plains*, 305 F.3d 80.

²²⁹ City of Baltimore Reply at 15 ("The City does agree that rates to access the right of way by similar entities must be nondiscriminatory."). Other commenters argue that nothing in Section 253 can apply to property in the ROW. City of San Francisco Reply at 2-3, 19 (denying that San Francisco is discriminatory to different providers but also asserting that "[l]ocal government fees for use of their poles are simply beyond the purview of section 253(c)").

²³⁰ See, e.g., CFP Comments at 31-33 (noting that the City of Baltimore charges incumbent Verizon "less than \$.07 per linear foot for the space that it leases in the public right-of-way" while it charges other providers "\$3.33 per linear foot to lease space in the City's conduit). Some municipal commenters argue that wireless infrastructure occupies more space in the ROW. See Smart Communities Reply Comments at 82 ("wireless providers are placing many of those permanent facilities in the public rights-of-way, in ways that require much larger deployments. It is not discrimination to treat such different facilities differently, and to focus on their impacts"). We recognize that different uses of the ROW may warrant charging different fees, and we only find fees to be discriminatory and not competitively neutral when different amounts are charged for similar uses of the ROW.

for similar use of the public ROW.²³¹

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

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

80. By presuming that fees at or below the levels above comply with Section 253, we assume

²³¹ Our interpretation is consistent with principles described by the BDAC’s Ad Hoc Committee on Rates and Fees. Draft BDAC Rates and Fees Report at 5 (Jul. 24, 2018) (listing “neutral treatment and access of all technologies and communication providers based upon extent/nature of ROW use” as principle to guide evaluation of rates and fees).

²³² BDAC Regulatory Barriers Report, Appendix C, p. 3.

²³³ These presumptive fee limits are based on a number of different sources of data. Many different state small cell bills, in particular, adopt similar fee limits despite their diversity of population densities and costs of living, and we expect that these presumptive fee limits will allow for recovery in excess of costs in many cases. 47 CFR § 1.1409; National Conference of State Legislatures, *Mobile 5G and Small Cell Legislation*, (May 7, 2018), <http://www.ncsl.org/research/telecommunications-and-information-technology/mobile-5g-and-small-cell-legislation.aspx> (providing description of state small cell legislation); Little Rock, Ark. Ordinance No. 21,423 (June 6, 2017); NCTA August 20, 2018 *Ex Parte* Letter, Attachment; *see also* H.R. 2365, 2018 Leg. 2d Reg. Sess. (Ariz. 2018) (\$100 per facility for first 5 small cells in application; \$50 annual utility attachment rate, \$50 ROW access fee); H.R. 189 149th Gen. Assemb. Reg. Sess. (Del. 2017) (\$100 per small wireless facility on application; fees not to exceed actual, direct and reasonable cost); S. 21320th Gen. Assemb. Reg. Sess. (Ind. 2017) (\$100 per small wireless facility); H.R. 1991, 99th Gen. Assemb. 2nd Reg. Sess. (Missouri, 2018) (\$100 for each facility collocated on authority pole; \$150 annual fee per pole); H.R. 38 2018 Leg. Assemb. 2d Reg. Sess. (N.M. 2018) (\$100 for each of first 5 small facilities in an application; \$20 per pole annually; \$250 per facility annually for access to ROW); S. 189, 2018 Leg. Gen. Sess. (Utah 2018) (\$100 per facility to collocate on existing or replacement utility pole; \$250 annual ROW fee per facility for certain attachments). *See also* Letter from Kara R. Graves, Director, Regulatory Affairs, CTIA, and D. Zachary Champ, Director, Government Affairs, WIA to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 10, 2018) Attach. (listing fees in twenty state small cell legislations) (CTIA/WIA Aug. 10, 2018 *Ex Parte* Letter); Letter from Scott K. Bergmann, Sen. Vice President, Regulatory Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 4, 2018) at 3, Attach. (analyzing average and median recurring fee levels permitted under state legislation). These examples suggest that the fee levels we discuss above may be higher than what many states already allow and further support our finding that there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of Section 253. We recognize that certain fees in a minority of state small cell bills are above the levels we presume to be allowed under Section 253. Any party may still charge fees above the levels we identify by demonstrating that the fee is a reasonable approximation of cost that itself is objectively reasonable.

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

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

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

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

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

84. *Aesthetics.* The *Wireless Infrastructure NPRM/NOI* sought comment on whether deployment restrictions based on aesthetic or similar factors are widespread and, if so, how Sections 253 and 332(c)(7) should be applied to them.²³⁹ Parties describe a wide range of such requirements that allegedly restrict deployment of Small Wireless Facilities. For example, many providers criticize

²³⁴ Several state and local commenters express concern about the presumptively reasonable fee levels we establish, including concerns about the effect of the fee levels on existing fee-related provisions included in state and local legislation. *See e.g.*, Letter from Kent Scarlett, Exec. Director, Ohio Municipal League to Marlene H. Dortch, Secretary, FCC at 1 (filed Sept. 18, 2018); Letter from Liz Kniss, Mayor, City of Palo Alto to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84 at 1 (filed Sept. 17, 2018). As stated above, while the fee levels we establish reflect our presumption regarding the level of fees that would be permissible under Section 253 and 332(c)(7), state or local fees that exceed these levels may be permissible if the fees are based on a reasonable approximation of costs and the costs themselves are objectively reasonable.

²³⁵ We emphasize that localities may charge fees to recover their objectively reasonable costs and thus reject arguments that our approach requires localities to bear the costs of small cell deployment or applies a one-size-fits-all standard. *See, e.g.*, Letter from Mike Posey, Mayor, City of Huntington Beach, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Sept. 11, 2018) (Mike Posey Sept. 11, 2018 *Ex Parte* Letter).

²³⁶ *California Payphone*, 12 FCC Rcd at 14206, para. 31; *see supra* paras. 34-42.

²³⁷ 47 U.S.C. § 253(b).

²³⁸ 47 U.S.C. § 253(c).

²³⁹ *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3362-66, paras. 90-92, 95, 97-99.

burdensome requirements to deploy facilities using “stealth” designs or other means of camouflage,²⁴⁰ as well as unduly stringent mandates regarding the size of equipment, colors of paint, and other details.²⁴¹ Providers also assert that the procedures some localities use to evaluate the appearance of proposed facilities and to decide whether they comply with applicable land-use requirements are overly restrictive.²⁴² Many providers are particularly critical of the use of unduly vague or subjective criteria that may apply inconsistently to different providers or are only fully revealed after application, making it impossible for providers to take these requirements into account in their planning and adding to the time necessary to deploy facilities.²⁴³ At the same time, we have heard concerns in the record about carriers deploying unsightly facilities that are significantly out of step with similar, surrounding deployments.

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

²⁴⁰ See, e.g., CCIA Comments at 14-15 (discussing regulations enacted by Village of Skokie, Illinois); WIA Reply Comments (WT Docket No. 16-421) at 9-10 (discussing restrictions imposed by Town of Hempstead, New York); see also AT&T Comments at 14-17; PTA-FLA Comments at 19; Verizon Comments at 19-20; AT&T Aug. 6, 2018 *ex parte* at 3.

²⁴¹ See, e.g., CCIA Comments at 13-14 (describing regulations established by Skokie, Illinois that prescribe in detail the permissible colors of paint and their potential for reflecting light); AT&T Aug. 6, 2018 *ex parte* at 3 (“Some municipalities require carriers to paint small cell cabinets a particular color when like requirements were not imposed on similar equipment placed in the ROW by electric incumbents, competitive telephone companies, or cable companies,” and asserts that it often “is highly burdensome to maintain non-factory paint schemes over years or decades, including changes to the municipal paint scheme,” due to “technical constraints as well such as manufacture warranty or operating parameters, such as heat dissipation, corrosion resistance, that are inconsistent with changes in color, or finish.”); AT&T Comments at 16-17 (contending that some localities “allow for a single size and configuration for small cell equipment while requiring case-by-case approval of any non-conforming equipment, even if smaller and upgraded in design and performance,” and thus effectively compel “providers [to] incur the added expense of conforming their equipment designs to the approved size and configuration, even if newer equipment is smaller, to avoid the delays associated with the approval of an alternative equipment design and the risk of rejection of that design.”); *id.* at 17 (some local governments “prohibit the placement of wireless facilities in and around historic properties and districts, regardless of the size of the equipment or the presence of existing more visually intrusive construction near the property or district”).

²⁴² See, e.g., Crown Castle Comments at 14-15 (criticizing San Francisco’s aesthetic review procedures that discriminate against providers and criteria and referring to extended litigation); CTIA Reply Comments at 17 (“San Francisco imposes discretionary aesthetic review for wireless ROW facilities.”); T-Mobile Comments at 40; *but see* San Francisco Comments at 3-7 (describing aesthetic review procedures). See also AT&T Comments at 13-17; Extenet Comments at 37; CTIA Comments at 21-22; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8.

²⁴³ See, e.g., AT&T Comments at 13-17; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8. WIA cites allegations that an unnamed city in California recently declined to support approval of a proposed small wireless installation, claiming that the installations do not meet “Planning and Zoning Protected Location Compatibility Standards,” even though the same equipment has been deployed elsewhere in the city dozens of times, and even though the “Protected Location” standards should not apply because the proposals are not on “protected view” streets). WIA Reply Comments, WT Docket No. 16-421 at 9-10; *id.* at 8 (noting that one city changed its aesthetic standards after a proposal was filed); AT&T Comments at 17 (noting that a design approval took over a year); Virginia Joint Commenters, WT Docket No. 16-421 (state law providing discretion for zoning authority to deny application because of “aesthetics” concerns without additional guidance); Extenet Reply Comments at 13 (noting that some “local governments impose aesthetic requirements based entirely on subjective considerations that effectively give local governments latitude to block a deployment for virtually any aesthetically-based reason”).

their historic, cultural, and scenic resources and their citizens' quality of life.²⁴⁴

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

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

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

²⁴⁴ See, e.g., NLC Comments, WT Docket No. 16-421 at 8-10; Smart Communities Comments, WT Docket No. 16-421 at 35-36; New York City Comments at 10-15; New Orleans Comments at 1-2, 5-8; San Francisco Comments at 3-12; CCUA Reply Comments at 5; Irvine (CA) Comments at 2; Oakland County (MI) Comments at 3-5; Florida Coalition of Local Gov’ts Reply Comments at 6-12 (justifications for undergrounding requirements); *id.* at 16-421 (justifications for municipal historic-preservation requirements); *id.* at 22-16 (justifications for aesthetics and design requirements).

²⁴⁵ See *supra* paras. 55-56.

²⁴⁶ Our decision to adopt this objective requirement is supported by the fact that many states have recently adopted limits on their localities’ aesthetic requirements that employ the term “objective.” See, e.g., Letter from Scott Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 8 (filed Sept. 19, 2018) (noting requirements enacted in the states of Arizona, Delaware, Missouri, North Carolina, Ohio, and Oklahoma, that local siting requirements for small wireless facilities be “objective”); see also Letter from Kara R. Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 8 (filed Sept. 4, 2018).

²⁴⁷ Some local governments argue that, because different aesthetic concerns may apply to different neighborhoods, particularly those considered historic districts, it is not feasible for them to publish local aesthetic requirements in advance. See, e.g., Letter from Mark J. Schwartz, County Manager, Arlington County, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018) (Arlington County Sept. 18 *Ex Parte* Letter); Letter from Allison Silberberg, Mayor, City of Alexandria, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018). We believe this concern is unfounded. As noted above, the fact that our approach here (including the publication requirement) is consistent with that already enacted in many state-level small cell bills supports the feasibility of our decision. Moreover, the aesthetic requirements to be published in advance need not

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

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

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

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 prescribe in detail every specification to be mandated for each type of structure in each individual neighborhood. Localities need only set forth the objective standards and criteria that will be applied in a principled manner at a sufficiently clear level of detail as to enable providers to design and propose their deployments in a manner that complies with those standards.

²⁴⁸ See, e.g., AT&T Comments at 14-15; Crown Castle Comments at 54-56; T-Mobile Comments at 38; Verizon Comments at 6-8; WIA Comments at 56; CTIA Reply at 16. *But see* Chicago Comments at 15; City of Claremont (CA) Comments at 1; City of Kenmore (WA) Comments at 1; City of Mukilteo (WA) Comments at 2; Florida Coalition of Local Gov'ts Comments at 6-12; Smart Communities Comments at 74.

²⁴⁹ *County of San Diego*, 543 F.3d at 580, *accord*, BDAC Model Municipal Code at 13, § 2.3.e (providing for municipal zoning authority to allow providers to deploy small wireless facilities on existing vertical structures where available in neighborhoods with undergrounding requirements, or if no technically feasible structures exist, to place vertical structures commensurate with other structures in the area).

²⁵⁰ See, e.g., Verizon Comments at 8 (describing requirements imposed by Buffalo Grove, Illinois); CCIA Comments at 14-15 (“These restrictions stifle technological innovation and unnecessarily burden the ability of a provider to use the best available technological to serve a particular area. For example, 5G technology will require higher band spectrum for greater network capacity, yet some millimeter wave spectrum simply cannot propagate long distances over a few thousand feet—let alone a few hundred. Therefore, a local requirement of, for example, a thousand-foot minimum separation distance between small cells would unnecessarily forestall any network provider seeking to use higher band spectrum with greater capacity when that provider needs to boost coverage in a specific area of a few hundred feet.”). See also AT&T Comments at 15; CTIA Reply at 17.

²⁵¹ 47 U.S.C. § 253(a).

almost certainly have the effect of prohibiting service under the standards we articulate here. Therefore, such requirements should be evaluated under the same standards for aesthetic requirements as those discussed above.²⁵²

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

92. We confirm that our interpretations today extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.²⁵³ As explained below, for two alternative and independent reasons, we disagree with state and local government commenters who assert that, in providing or denying access to government-owned structures, these governmental entities function solely as "market participants" whose rights cannot be subject to federal preemption under Section 253(a) or Section 332(c)(7).²⁵⁴

93. First, this effort to differentiate between such governmental entities' "regulatory" and "proprietary" capacities in order to insulate the latter from preemption ignores a fundamental feature of the market participant doctrine.²⁵⁵ As the Ninth Circuit has observed, at its core, this doctrine is "a

²⁵² Another type of restriction that imposes substantial burdens on providers, but does not meaningfully advance any recognized public-interest objective, is an explicit or implicit *quid pro quo* in which a municipality makes clear that it will approve a proposed deployment only on condition that the provider supply an "in-kind" service or benefit to the municipality, such as installing a communications network dedicated to the municipality's exclusive use. *See, e.g.,* Comcast Comments at 9-10 Verizon Comments at 7, Crown Castle Comments at 55-56. Such requirements impose costs, but rarely, if ever, yield benefits directly related to the deployment. Additionally, where such restrictions are not cost-based, they inherently have "the effect of prohibiting" service, and thus are preempted by Section 253(a). *See also* BDAC Regulatory Barriers Report, Appendix E at 1 (describing "conditions imposed that are unrelated to the project for which they were seeking ROW access" as "inordinately burdensome"); BDAC Model Municipal Code at 19, § 2.5a.(v)(F) (providing that municipal zoning authority "may not require an Applicant to perform services . . . or in-kind contributions [unrelated] to the Communications Facility or Support Structure for which approval is sought").

²⁵³ *See supra* paras. 50-91. Some have argued that Section 224 of the Communications Act's exception of state-owned and cooperative-owned utilities from the definition of "utility," "[a]s used in this section," suggests that Congress did not intend for any other portion of the Act to apply to poles or other facilities owned by such entities. City of Mukilteo, et. al. Ex Parte Comments on the Draft Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from James Bradford Ramsay, General Counsel, NARUC to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79 at 7 (filed Sept. 19, 2018). We see no basis for such a reading. Nothing in Section 253 suggests such a limited reading, nor does Section 224 indicate that other provisions of the Act do not apply. We conclude that our interpretation of effective prohibition extends to fees for all government-owned property in the ROW, including utility poles. *Compare* 47 U.S.C. § 224 with 47 U.S.C. § 253. We are not addressing here how our interpretations apply to access or attachments to government-owned property located outside the public ROW.

²⁵⁴ *See, e.g.,* AASHTO Comments, Att. 1 (Del. DOT Comments) at 3-5; New York City Comments at 2-8; San Antonio et al. Comments at 14-15; Smart Communities Comments at 62-66; San Francisco Comments at 28-30; League of Arizona Cities et al. Comments, WT Docket No. 16-421 at 3-9; San Antonio et al. Comments, WT Docket No. 16-421 at 14-15. *See also* *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3364-65, para. 96 (seeking comment on this issue).

²⁵⁵ The market participant doctrine establishes that, unless otherwise specified by Congress, federal statutory provisions may be interpreted as preempting or superseding state and local governments' activities involving regulatory or public policy functions, but not their activities as "market participants" to serve their "purely proprietary interests," analogous to similar transactions of private parties. *Building & Construction Trades Council*

presumption about congressional intent,” which “may have a different scope under different federal statutes.”²⁵⁶ The Supreme Court has likewise made clear that the doctrine is applicable only “[i]n the absence of any express or implied indication by Congress.”²⁵⁷ In contrast, where state action conflicts with express or implied federal preemption, the market participant doctrine does not apply, whether or not the state or local government attempts to impose its authority over use of public rights-of-way by permit or by lease or contract.²⁵⁸ Here, both Sections 253(a) and Section 332(c)(7)(B)(i)(II) expressly address preemption, and neither carves out an exception for proprietary conduct.²⁵⁹

94. Specifically, Section 253(a) expressly preempts certain state and local “legal requirements” and makes no distinction between a state or locality’s regulatory and proprietary conduct. Indeed, as the Commission has long recognized, Section 253(a)’s sweeping reference to “State [and] local statute[s] [and] regulation[s]” and “other State [and] local legal requirement[s]” demonstrates Congress’s intent “to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services.”²⁶⁰ Section 253(b) mentions “requirement[s],” a phrase that is even broader than that used in Section 253(a) but covers “universal service,” “public safety and welfare,” “continued quality of telecommunications,” and “safeguard[s] for the] rights of consumers.” The subsection does not recognize a distinction between regulatory and proprietary. Section 253(c), which expressly insulates from preemption certain state and local government activities, refers in relevant part to “manag[ing] the public rights-of-way” and “requir[ing] fair and reasonable compensation,” while eliding any distinction between regulatory and proprietary action in either context. The Commission has previously observed that Section 253(c) “makes explicit a local government’s continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public

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v. Associated Builders & Contractors, 507 U.S. 218, 229, 231 (1993) (*Boston Harbor*); see also *Wisconsin Dept. of Industry, Labor, and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (*Gould*).

²⁵⁶ See, e.g., *Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Distr.*, 498 F.3d 1031, 1042 (9th Cir. 2007); *Johnson v. Rancho Santiago Comm. College*, 623 F.3d 1011, 1022 (9th Cir. 2010).

²⁵⁷ See *Boston Harbor*, 507 U.S. at 231.

²⁵⁸ See *American Trucking Ass’n v. City of Los Angeles*, 569 U.S. 641, 650 (2013) (*American Trucking*).

²⁵⁹ At a minimum, we conclude that Congress’s language has not unambiguously pointed to such a distinction. See Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Aug. 23, 2018) (Verizon Aug. 23, 2018 *Ex Parte* Letter). Furthermore, we contrast these statutes with those that do not expressly or impliedly preempt proprietary conduct. Compare, e.g., *American Trucking*, 569 U.S. 641 (finding that FAA Authorization Act of 1994’s provision that “State [or local government] may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property” expressly preempted the terms of a standard-form concession agreement drafted to govern the relationship between the Port of Los Angeles and any trucking company seeking to operate on the premises), and *Gould*, 475 U.S. at 289 (finding that NLRA preempted a state law barring state contracts with companies with disfavored labor practices because the state scheme was inconsistent with the federal scheme), with *Boston Harbor*, 507 U.S. at 224-32. In *Boston Harbor*, the Supreme Court observed that the NLRA contained no express preemption provision or implied preemption scheme and consequently held:

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

Id. (internal citations omitted).

²⁶⁰ See *Minnesota Order*, 14 FCC Rcd at 21707, para. 18. We find these principles to be equally applicable to our interpretation of the meaning of “regulation[s]” referred to under Section 332(c)(7)(B) insofar as such actions impermissibly “prohibit or have the effect of prohibiting the provision of personal wireless services.” *Supra* paras 34-42.

EXHIBIT 17

rights-of-way.”²⁶¹ We conclude here that, as a general matter, “manage[ment]” of the ROW includes any conduct that bears on access to and use of those ROW, notwithstanding any attempts to characterize such conduct as proprietary.²⁶² This reading, coupled with Section 253(c)’s narrow scope, suggests that Congress’s omission of a blanket proprietary exception to preemption was intentional, and thus, that such conduct can be preempted under Section 253(a). We therefore construe Section 253(c)’s requirements, including the requirement that compensation be “fair and reasonable,” as applying equally to charges imposed via contracts and other arrangements between a state or local government and a party engaged in wireless facility deployment.²⁶³ This interpretation is consistent with Section 253(a)’s reference to “State or local legal requirement[s],” which the Commission has consistently construed to include such agreements.²⁶⁴ In light of the foregoing, whatever the force of the market participant doctrine in other contexts,²⁶⁵ we believe the language, legislative history, and purpose of Sections 253(a) and (c) are incompatible with the application of this doctrine in this context. We observe once more that “[o]ur conclusion that Congress intended this language to be interpreted broadly is reinforced by the scope of section 253(d),” which “directs the Commission to preempt any statute, regulation, or legal requirement *permitted* or imposed by a state or local government if it contravenes sections 253(a) or (b). A more restrictive interpretation of the term ‘other legal requirements’ easily could permit state and local restrictions on competition to escape preemption based solely on the way in which [state] action was structured. We do not believe that Congress intended this result.”²⁶⁶

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

²⁶¹ See *Minnesota Order*, 14 FCC Rcd at 21728-29, para. 60, quoting H. R. Rep. No. 104-204, U.S. Congressional & Administrative News, March 1996, vol.1, Legislative History section at 41 (1996).

²⁶² Indeed, to permit otherwise could limit the utility of ROW access for telecommunications service providers and thus conflict with the overarching preemption scheme set up by Section 253(a), for which 253(b) and 253(c) are exceptions. By construing “manage[ment]” of a ROW to include some proprietary behaviors, we mean to suggest that conduct taken in a proprietary capacity is likewise subject to 253(c)’s general limitations, including the requirement that any compensation charged in such capacity be “fair and reasonable.”

²⁶³ Cf. *Minnesota Order*, 14 FCC Rcd at 21729-30, para. 61-62 (internal citations omitted) (“Moreover, Minnesota has not shown that the compensation required for access to the right-of-way is ‘fair and reasonable.’ The compensation appears to reflect the value of the exclusivity inherent in the Agreement [which provides the developer with exclusive physical access, for at least ten years, to longitudinal rights-of-way along Minnesota’s interstate freeway system] rather than fair and reasonable charges for access to the right-of-way. Nor has Minnesota shown that the Agreement provides for ‘use of public rights-of-way on a nondiscriminatory basis.’”)

²⁶⁴ Cf. Crown Castle June 7, 2018 *Ex Parte* Letter at 17 n.83 (“Section 253(c), which carves out ROW management, would hardly be necessary if all ROW decisions were proprietary and shielded from the statute’s sweep.”).

²⁶⁵ We acknowledge that the Commission previously concluded that “Section 6409(a) applies only to State and local governments acting in their role as land use regulators” and found that “this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt ‘non regulatory decisions[.]’” See *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 237-240. To the extent necessary, we clarify here that the actions and analysis there were limited in scope given the different statutory scheme and record in that proceeding, which did not, at the time, suggest a need to “further elaborate as to how this principle should apply to any particular circumstance” (there, in connection with application of Section 6409(a)). Here, in contrast, as described herein, we find that further elucidation by the Commission is needed.

²⁶⁶ *Minnesota Order*, 14 FCC Rcd at 21707, para. 18 (internal citations omitted) (emphasis omitted).

²⁶⁷ See *infra* Part IV.C.1 (Authorizations Subject to the “Reasonable Period of Time” Provision of Section 332(c)(7)(B)(ii)).

“place[ment], construct[ion], or modif[ication]” of facilities on government-owned property, for the purpose of providing “personal wireless service.” We observe that this result, too, is consistent with Commission precedent such as the *Minnesota Order*, which involved a contract that provided exclusive access to a ROW. As but one example, to have limited that holding to exclude government-owned property within the ROW even if the carrier needed access to that property would have the effect of diluting or completely defeating the purpose of Section 332(c)(7).²⁶⁸

96. Second, and in the alternative, even if Section 253(a) and Section 332(c)(7) were to permit leeway for states and localities acting in their proprietary role, the examples in the record would be excepted because they involve states and localities fulfilling regulatory objectives.²⁶⁹ In the proprietary context, “a State acts as a ‘market participant with no interest in setting policy.’”²⁷⁰ We contrast state and local governments’ purely proprietary actions with states and localities acting with respect to managing or controlling access to property within public ROW, or to decisions about where facilities that will provide personal wireless service to the public may be sited. As several commenters point out, courts have recognized that states and localities “hold the public streets and sidewalks in trust for the public” and “manage public ROW in their regulatory capacities.”²⁷¹ These decisions could be based on a number of regulatory objectives, such as aesthetics or public safety and welfare, some of which, as we note elsewhere, would fall within the preemption scheme envisioned by Congress. In these situations, the state or locality’s role seems to us to be indistinguishable from its function and objectives as a regulator.²⁷² To

²⁶⁸ See also *infra* para. 134-36 and cases cited therein. Precedent that may appear to reach a different result can be distinguished in that it resolves disputes arising under Section 332 and/or 253(a) without analyzing the scope of Section 253(c). Furthermore, those situations did not involve government-owned property or structures within a public ROW. See, e.g., *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420-21 (2d Cir. 2002) (declining to find preemption under Section 332 applicable to terms of a school rooftop lease); *Omnipoint Commc’ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 195-96, 200-01 (9th Cir. 2013) (declining to find preemption under Section 332 applicable to restrictions on lease of parkland).

²⁶⁹ In this regard, also relevant to our interpretations here is courts’ admonition that government activities that are characterized as transactions but in reality are “tantamount to regulation” are subject to preemption, *Gould*, 475 U.S. at 289, and that government action disguised as private action may not be relied on as a pretext to advance regulatory objectives. See, e.g., *Coastal Communications Service v. City of New York*, 658 F. Supp. 2d 425, 441-42 (E.D.N.Y. 2009) (finding that a restriction on advertising on newly-installed payphones was subject to section 253(a) where the advertising was a material factor in the provider’s ability to provide the payphone service itself).

²⁷⁰ See, e.g., *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008).

²⁷¹ See Verizon Comments at 26-28 & n.85; T-Mobile Comments at 50 & n.210 and cases cited therein.

²⁷² Indeed, the Commission has long recognized that, in enacting Sections 253(c) and 332(c)(7), Congress affirmatively protected the ability of state and local governments to carry out their responsibilities for maintaining, managing, and regulating the use of ROW and structures therein for the benefit of the public. *TCI Cablevision Order*, 12 FCC Rcd at 21441, para. 103 (1997) (“We recognize that section 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way.”); *Moratoria Declaratory Ruling*, FCC 18-111, para. 142 (same); *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling, and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103, para. 39 (1996) (same). We find these situations to be distinguishable from those where a state or locality might be engaged in a discrete, *bona fide* transaction involving sales or purchases of services that do not otherwise violate the law or interfere with a preemption scheme. Compare, e.g., *Cardinal Towing & Auto Repair, Inc., v. City of Bedford*, 180 F.3d 686, 691, 693-94 (5th Cir. 1999) (declining to find that the FAA Authorization Act of 1994, as amended by the ICC Termination Act of 1995, preempted an ordinance and contract specifications that were designed only to procure services that a municipality itself needed, not to regulate the conduct of others), with *NextG Networks of N.Y., Inc. v. City of New York*, 2004 WL 2884308 (N.D.N.Y., Dec. 10, 2004) (crediting allegations that a city’s actions, such as issuing a request for proposal and implementing a general franchising scheme, were not of a purely proprietary nature, but rather, were taken in pursuit of a regulatory objective or policy). This action could include, for example, procurement of services for the state or locality, or a

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.

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

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contract for employment services between a state or locality and one of its employees. We do not intend to reach these scenarios with our interpretations today.

²⁷³ See, e.g., Verizon Aug. 23, 2018 *Ex Parte* Letter at 4-5.

²⁷⁴ See *supra* para. 25.

²⁷⁵ Cf. *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404.

²⁷⁶ See *NextG Networks of N.Y., Inc. v. City of New York*, 2004 WL 2884308; *Coastal Communications Service v. City of New York*, 658 F. Supp. 2d at 441-42.

²⁷⁷ We contrast this instance to others in which we either declined to act or responded to requests for action with respect to specific disputes. See, e.g., 2014 *Wireless Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 237-240; *Continental Airlines Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion and Order, 21 FCC Rcd 13201, 13220, para. 43 (2006) (observing, in the context of a different statutory and regulatory scheme, that “[g]iven that the Commission intended to preempt restrictions [regarding restrictions on Continental's use of its Wi-Fi antenna] in private lease agreements, however, Massport would be preempted even if it is acting in a private capacity with regard to its lease agreement with Continental.”); *Sandwich Isles Section 253 Order*, 32 FCC Rcd at 5883, para. 14 (rejecting argument that argument that Section 253(a) is inapplicable where it would affect the state’s ability to “deal[] with its real estate interests . . . as it sees fit,” such as by granting access to “rights-of-way over land that it owns); *Minnesota Order*, 14 FCC Rcd at 21706-08, paras. 17-19; cf. *Amigo.Net Petition for Declaratory Ruling*, Memorandum Opinion and Order, 17 FCC Rcd 10964, 10967 (WCB 2002) (Section 253 did not apply to carrier’s provision of network capacity to government entities exclusively for such entities’ internal use); *T-Mobile West Corp. v. Crow*, 2009 WL 5128562 (D. Ariz., Dec. 17, 2009) (Section 332(c)(7) did not apply to contract for deployment of wireless facilities and services for use on state university campus). We clarify here that such prior instances are not to be construed as a concession that Congress did not make preemption available, or that the Commission lacked the authority to support parties’ attempts to avail themselves of relief offered under preemption schemes, when confronted with instances in which a state or locality is relying on its proprietary role to skirt federal regulatory reach. Indeed, these instances demonstrate the opposite—that preemption is available to effectuate Congressional intent—and merely illustrate application of this principle. Also, we do not find it necessary to await specific disputes in the form of Section 253(d) petitions to offer these interpretations. In the alternative and as an independent means to support the interpretations here, we clarify that we intend for our views to guide how preemption should apply in fact-specific scenarios.

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

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

99. Nothing in Sections 253 or 332(c)(7) purports to limit the exercise of our general interpretive authority.²⁸⁰ Congress's inclusion of preemption provisions in Section 253(d) and Section 332(c)(7)(B)(v) does not limit the Commission's ability pursuant to other sections of the Act to construe and provide its authoritative interpretation as to the meaning of those provisions.²⁸¹ Any preemption under Section 253 and/or Section 332(c)(7)(B) that subsequently occurs will proceed in accordance with the enforcement mechanisms available in each context. But whatever enforcement mechanisms may be available to preempt specific state and local requirements, nothing in Section 253 or Section 332(c)(7) prevents the Commission from declaring that a category of state or local laws is inconsistent with Section 253(a) or Section 332(c)(7)(B)(i)(II) because it prohibits or has the effect of prohibiting the relevant covered service.²⁸²

²⁷⁸ See, e.g., *Moratoria Declaratory Ruling*, FCC 18-111, paras. 161-68; *2009 Declaratory Ruling*, 24 FCC Rcd at 14001, para. 23.

²⁷⁹ Targeted interpretations of the statute like those we adopt here fall far short of a “federal regulatory program dictating the scope and policies involved in local land use” that some commenters fear. League of Minnesota Cities Comments at 9.

²⁸⁰ We also reject claims that Section 601(c)(1) of the 1996 Act constrains our interpretation of these provisions. See, e.g., NARUC Reply at 3; Smart Communities Reply at 33, 35-36. That provision guards against implied preemption, while Section 253 and Section 332(c)(7)(B) both expressly restrict state and local activities. See, e.g., *Texas PUC Order*, 13 FCC Rcd at 3485-86, para. 51. Courts also have read that provision narrowly. See, e.g., *In re FCC 11-161*, 753 F.3d 1015, 1120 (10th Cir. 2014); *Qwest Corp. v. Minnesota Pub. Utilities Comm'n*, 684 F.3d 721, 730-31 (8th Cir. 2012); *Farina v. Nokia Inc.*, 625 F.3d 97, 131 (3d Cir. 2010). Although the Ninth Circuit in *County of San Diego* asserted that there is a presumption that express preemption provisions should be read narrowly, and that the presumption would apply to the interpretation of Section 253(a), *County of San Diego*, 543 F.3d at 548, the cited precedent applies that presumption where “the State regulates in an area where there is no history of significant federal presence.” *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005). Whatever the applicability of such a presumption more generally, there is a substantial history of federal involvement here, particularly insofar as interstate telecommunications services and wireless services are implicated. See, e.g., *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003); *Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 490-92 (2d Cir. 1968); 47 U.S.C., Title III.

²⁸¹ See, e.g., California PUC Comments at 11; Verizon Comments at 31-33; CTIA Reply at 22-23; WIA Reply at 16-18. We thus reject claims to the contrary. See, e.g., City of New York Comments at 8; Virginia Joint Commenters Comments, Exh. A at 41-44; City of New York Reply at 1-2; NATOA Reply at 9-10; Smart Communities Reply at 34. Indeed, the Fifth Circuit upheld just such an exercise of authority with respect to the interpretation of Section 332(c)(7) in the past. See generally *City of Arlington*, 668 F.3d at 249-54. While some commenters assert that the questions addressed by the Commission in the order underlying the Fifth Circuit's *City of Arlington* decision are somehow more straightforward than our interpretations here, they do not meaningfully explain why that is the case, instead seemingly contemplating that the Commission would address a wider, more general range of circumstances than we actually do here. See, e.g., Virginia Joint Commenters Comments, Exh. A at 44-45.

²⁸² Consequently, we reject claims that relying on our general interpretive authority to interpret Section 253 and Section 332(c)(7) would render any provisions of the Act mere surplusage, see, e.g., Smart Communities Reply at 34-35, or would somehow “usurp the role of the judiciary.” Washington State Cities Reply at 14. We likewise

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

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reject other arguments insofar as they purport to treat Section 253(d)’s provision for preemption as more specific than, or otherwise controlling over, other Communications Act provisions enabling the Commission to authoritatively interpret the Act. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 43. To the contrary, “[t]he specific controls but only within its self-described scope.” *Nat’l Cable & Telecomm. Ass’n v. Gulf Power*, 534 U.S. 327, 336 (2002). In addition, concerns that the Commission might interpret Section 253(c) in a manner that would render it a nullity or in a manner divorced from relevant context—things we do not do here—bear on the reasonableness of a given interpretation and not on the existence of interpretive authority in the first instance, as some contend. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 43-44.

²⁸³ *See, e.g.*, City of San Antonio *et al.* Comments, Exh. B at 26-27; Fairfax County Comments at 20; Smart Communities Comments at 61. Some commenters assert that there are reasonable, material reliance interests arising from past court interpretations that would counsel against our interpretations in this order because “localities and providers have adjusted to the tests within their circuits” and “reflected those standards in local law.” Smart Communities Comments, WT Docket No. 16-141 at 67 (filed Mar. 8, 2017) cited in City of Austin Comments at 2 n.3. Arguments such as these, however, merely underscore the regulatory patchwork that inhibits the development of a robust nationwide telecommunications and private wireless service as envisioned by Congress. By offering interpretations of the relevant statutes here, we intend, thereby, to eliminate potential regional regulatory disparities flowing from differing interpretations of those provisions. *See, e.g.*, WIA Reply at 19-20.

²⁸⁴ *See* City of San Antonio *et al.* Comments, Exh. B at 27 (citing Brief for the United States as Amicus Curiae, *Level 3 Commc’ns v. City of St. Louis*, Nos. 08-626, 08-759 at 9, 11 (filed May 28, 2009) (Amicus Brief)).

²⁸⁵ Amicus Brief at 12-13. The brief also identified other specific areas of concern with those cases. *See, e.g., id.* at 13 (“The court appears to have accorded inordinate significance to Level 3’s inability to ‘state with specificity what additional services it might have provided’ if it were not required to pay St. Louis’s license fee. That specific failure of proof—which the court of appeals seems to have regarded as emblematic of broader evidentiary deficiencies in Level 3’s case—is not central to a proper Section 253(a) inquiry.” (citation omitted)); *id.* at 14 (“Portions of the Ninth Circuit’s decision, moreover, could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail. As discussed above, limiting the preemptive reach of Section 253(a) to legal requirements that completely preclude entry would frustrate the policy of open competition that Section 253 was intended to promote.” (citation omitted)).

²⁸⁶ *Id.* at 18.

²⁸⁷ Contrary to some claims, the need for these clarifications also is not undercut by prior determinations that advanced telecommunications capability is being deployed in a reasonable and timely fashion to all Americans. *See, e.g.*, Letter from Nancy Werner, General Counsel, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21, 2018) (NATOA June 21, 2018 *Ex Parte* Letter) (citing *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 33 FCC Rcd 1660, 1707-08, para. 94 (2018) (*2018 Broadband Deployment Report*)). These commenters do not explain why the distinct standard for evaluating deployment of advanced telecommunications capability, *see 2018 Broadband Deployment Report*, 33 FCC Rcd at 1663-76, paras. 9-39, should bear on the application of Section 253 or Section 332(c)(7). Further, as the Commission itself observed, “[a] finding that deployment of advanced

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

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

IV. THIRD REPORT AND ORDER

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

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telecommunications capability is reasonable and timely in no way suggests that we should let up in our efforts to foster greater deployment.” *Id.* at 1664, para. 13.

²⁸⁸ See, e.g., City of San Antonio *et al.* Comments, Exh. A at 28; Smart Communities Comments at 77-78; Smart Communities Reply at 48-50; NATOA June 21, 2018 *Ex Parte* Letter at 3.

²⁸⁹ *Montgomery County*, 811 F.3d at 128; see *Printz v. United States*, 521 U.S. 898 (1997) (*Printz*); *New York v. United States*, 505 U.S. 144 (1992) (*New York*). These provisions preempting state law thus do not “compel the States to enact or administer a federal regulatory program,” *Printz*, 521 U.S. at 900, or “dictate what a state . . . may or may not do.” *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018) (*Murphy*).

²⁹⁰ *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25. The Communications Act establishes its own framework for oversight of wireless facility deployment—one that is largely deregulatory, see, e.g., *Wireless Infrastructure Second R&O*, FCC 18-30, at para. 63; *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480-81, para. 182 (1994)—and it is reasonable to expect state and local governments electing to act in that area to do so only in a manner consistent with the Act’s framework. See, e.g., *Murphy*, 138 S. Ct. at 1470-71, 1480. Thus, the application of Section 253 and Section 332(c)(7)(B) is clearly distinguishable from the statute the Supreme Court struck down in *Murphy*, which did not involve a preemption scheme but nonetheless prohibited state authorization of sports gambling. *Id.* at 1481. The application here is also clearly distinguishable from the statute in *Printz*, which mandated states to run background checks on handgun purchases, *Printz*, 521 U.S. at 904–05, and the statute in *New York*, which required states to enact state laws that provide for the disposal of radioactive waste or else take title to such waste. *New York*, 505 U.S. at 151–52.

²⁹¹ See, e.g., City of New York Comments at 9-10; Smart Communities Comments at 78.; see also, e.g., *Nixon v. Mo. Mun. League*, 541 U.S. 125, 134 (2004) (identifying Tenth Amendment issues with the application of Section 253 where that application would implicate “state or local governmental self-regulation (or regulation of political inferiors)”).

²⁹² For example, where a state or local law or other legal requirement simply sets forth particular fees to be paid, or where the legal requirement at issue is simply an exercise of discretion that governing law grants the state or local government, it is not clear that preemption would unconstitutionally interfere with the relationship between a state and its political subdivisions.

EXHIBIT 17

A. New Shot Clocks for Small Wireless Facility Deployments

104. In 2009, the Commission concluded that we should use shot clocks to define a presumptive “reasonable period of time” beyond which state or local inaction on wireless infrastructure siting applications would constitute a “failure to act” within the meaning of Section 332.²⁹³ We adopted a 90-day clock for reviewing collocation applications and a 150-day clock for reviewing siting applications other than collocations. The record here suggests that our two existing Section 332 shot clocks have increased the efficiency of deploying wireless infrastructure. Many localities already process wireless siting applications in less time than required by those shot clocks, and a number of states have enacted laws requiring that collocation applications be processed in 60 days or less.²⁹⁴ Some siting agencies acknowledge that they have worked to gain efficiencies in processing siting applications and welcome the addition of new shot clocks tailored to the deployment of small scale facilities.²⁹⁵ Given siting agencies’ increased experience with existing shot clocks, the greater need for rapid siting of Small Wireless Facilities nationwide, and the lower burden siting of these facilities places on siting agencies in many cases, we take this opportunity to update our approach to speed the deployment of Small Wireless Facilities.²⁹⁶

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

105. In this section, using authority confirmed in *City of Arlington*, we adopt two new Section 332 shot clocks for Small Wireless Facilities—60 days for review of an application for collocation of Small Wireless Facilities using a preexisting structure and 90 days for review of an application for attachment of Small Wireless Facilities using a new structure. These new Section 332 shot clocks carefully balance the well-established authority that states and local authorities have over review of wireless siting applications with the requirements of Section 332(c)(7)(ii) to exercise that authority “within a reasonable period of time... taking into account the nature and scope of the request.”²⁹⁷ Further, our decision is consistent with the BDAC’s Model Code for Municipalities’ recommended timeframes, which utilize this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures²⁹⁸ and are similar to shot clocks enacted in state level small cell bills and the real world

²⁹³ 2009 Declaratory Ruling, 24 FCC Rcd at 13994.

²⁹⁴ See *infra* para. 106.

²⁹⁵ Chicago Comments at 7 (“[T]he City has worked to achieve efficient processing times even for applications where no federal deadline exists.”); New Orleans Comments at 3 (“City supports the concept proposed by the Commission . . . to establish . . . more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class.”).

²⁹⁶ See LaWana Mayfield July 31, 2018 *Ex Parte* Letter at 2 (“However, getting this infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources. The solution is to streamline relevant policies—allowing more modern rules for modern infrastructure.”); Letter from John Richard C. King, House of Representatives, South Carolina, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed Aug. 27, 2018) (“A patchwork system of town-to-town, state-to-state rules slows the approval of small cell installations and delays the deployment of 5G. We need a national framework with guardrails to streamline the path forward to our wireless future”); Letter from Andy Thompson, State Representative, Ohio House District 95, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 24, 2018) (“In order for 5G to arrive as quickly and as effectively as possible, relevant infrastructure regulations must be streamlined. It makes very little sense for rules designed for 100-foot cell towers to govern the path to deployment for modern equipment called small cells that can fit into a pizza box.”); Letter from Todd Nash, Wallowa County Board of Commissioners, Oregon, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 2 (filed Sept. 10, 2018) (FCC should streamline regulatory processes by, for example, tightening the deadlines for states and localities to approve new network facilities).

²⁹⁷ 47 U.S.C. § 332(c)(7)(ii).

²⁹⁸ The BDAC Model Municipal Code recommended, for certain types of facilities, shot clocks of 60 days for collocations and 90 days for new constructions on applications for siting Small Wireless Facilities. BDAC Model

experience of many municipalities which further supports the reasonableness of our approach.²⁹⁹ Our actions will modernize the framework for wireless facility siting by taking into consideration that states and localities should be able to address the siting of Small Wireless Facilities in a more expedited review period than needed for larger facilities.³⁰⁰

106. We find compelling reasons to establish a new presumptively reasonable Section 332 shot clock of 60 days for collocations of Small Wireless Facilities on existing structures. The record demonstrates the need for, and reasonableness of, expediting the siting review of these collocations.³⁰¹ Notwithstanding the implementation of the current shot clocks, more streamlined procedures are both reasonable and necessary to provide greater predictability for siting applications nationwide for the deployment of Small Wireless Facilities. The two current Section 332 shot clocks do not reflect the evolution of the application review process and evidence that localities can complete reviews more quickly than was the case when the existing Section 332 shot clocks were adopted nine years ago. Since 2009, localities have gained significant experience processing wireless siting applications.³⁰² Indeed, many localities already process wireless siting applications in less than the required time³⁰³ and several

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Municipal Code at §§ 2.2, 2.3, 3.2a(i)(B). Our approach utilizes the same timeframes set forth in the Model Municipal Code, and we disagree with comments that it is inconsistent with or ignores the work of the BDAC. GMA September 17 *Ex Parte* Letter at 4-5.

²⁹⁹ For instance, while the City of Chicago opposes the shot clocks adopted here, we note that the City has also stated that, “[d]espite th[e] complex review process, involving many utilities and other entities, CDOT on average processed small cell applications last year in 55 days.” Letter from Edward N. Siskel, Corp. Counsel, Dept. of Law, City of Chicago, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 19, 2018).

³⁰⁰ Just like the shot clocks originally established in 2009—later affirmed by the Fifth Circuit and the Supreme Court—the shot clocks framework in this Third Report and Order are no more than an interpretation of “the limits Congress already imposed on State and local governments” through its enactment of Section 332(c)(7). *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25. *See also City of Arlington*, 668 F.3d at 259. As explained in the *2009 Declaratory Ruling*, the shot clocks derived from Section 332(c)(7) “will not preempt State or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification,” and they “will continue to decide the outcome of personal wireless service facility siting applications pursuant to the authority Congress reserved to them in Section 332(c)(7)(A).” *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25.

³⁰¹ CTIA Comments, WT Docket No. 16-421, at 33 (filed Mar. 8, 2017); Letter from Juan Huizar, City Manager of the City of Pleasanton, TX, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed June 4, 2018) (describing the firsthand benefit of small cells and noting that communications infrastructure is a critical component of local growth); Letter from Sara Blackhurst, President, Action 22, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 2 (filed May 18, 2018) (Action 22 *Ex Parte*) (“While we understand the need for relevant federal rules and protections appropriate for larger wireless infrastructure, we feel these same rules are not well-suited for smaller wireless facilities and risk slowing deployment in communities that need connectivity now.”); Letter from Maurita Coley Flippin, President and CEO, MMTC, to the Hon. Ajit Pai, Chairman, FCC, WT Docket No. 17-79 at 2 (filed Sept. 5, 2018) (encourages the Commission to remove unnecessary barriers such as unreasonable delays so deployment can proceed expeditiously); Fred A. Lamphere Sept. 11, 2018 *Ex Parte* Letter at 1 (It is critical that the Commission continue to remove barriers to building new wireless infrastructure such as by setting reasonable timelines to review applications).

³⁰² T-Mobile Comments at 20; Crown Castle Reply at 5 (noting that the adoption of similar time frames by several states for small cell siting review confirms their reasonableness, and the Commission should apply these deadlines on a nationwide basis).

³⁰³ Alaska Dep’t of Natural Resources Comments at 2 (“[W]e are currently meeting or exceeding the proposed timeframe of the ‘Shot Clock.’”); *see also* CTIA Aug. 30, 2018 *Ex Parte* Letter at 5 (“Eleven states—Delaware, Florida, Indiana, Kansas, Missouri, North Carolina, Rhode Island, Tennessee, Texas, Utah, and Virginia—recently adopted small cell legislation that includes 45-day or 60-day shot clocks for small cell collocations.”); Jason R. Saine Sept. 14, 2018 *Ex Parte* Letter.

EXHIBIT 17

jurisdictions require by law that collocation applications be processed in 60 days or less.³⁰⁴ With the passage of time, siting agencies have become more efficient in processing siting applications.³⁰⁵ These facts demonstrate that a shorter, 60-day shot clock for processing collocation applications for Small Wireless Facilities is reasonable.³⁰⁶

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

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

³⁰⁴ North Carolina requires its local governments to decide collocation applications within 45 days of submission of a complete application. N.C. Gen. Stat. Ann. § 153A-349.53(a2). The same 45-day shot clock applies to certain collocations in Florida. Fla. Stat. Ann. § 365.172(13)(a)(1), (d)(1). In New Hampshire, applications for collocation or modification of wireless facilities generally have to be decided within 45 days (subject to some exceptions under certain circumstances) or the application is deemed approved. N.H. Rev. Stat. Ann. § 12-K:10. Wisconsin requires local governments to decide within 45 days of receiving complete applications for collocation on existing support structure that does not involve substantial modification, or the application will be deemed approved, unless the local government and applicant agree to an extension. Wis. Stat. Ann. § 66.0404(3)(c). Local governments in Indiana have 45 days to decide complete collocation applications, unless an extension is allowed under the statute. Ind. Code Ann. § 8-1-32.3-22. Minnesota requires any zoning application, including both collocation and non-collocation applications, to be processed in 60 days. Minn. Stat. § 15.99, subd. 2(a). By not requiring hearings, collocation applications in these states can be processed in a timely manner.

³⁰⁵ Chicago Comments at 7 (“[T]he City has worked to achieve efficient processing times even for applications where no federal deadline exists.”); New Orleans Comments at 3 (“City supports the concept proposed by the Commission . . . to establish . . . more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class.”); Action 22 *Ex Parte* at 2 (“While we understand the need for relevant federal rules and protections appropriate for larger wireless infrastructure, we feel these same rules are not well-suited for smaller wireless facilities and risk slowing deployment in communities that need connectivity now.”).

³⁰⁶ CCA Comments at 11-14; T-Mobile Comments at 20; Incompas Reply at 9; Sprint Comments at 45-47 (noting that Florida, Indiana, Kansas, Texas and Virginia all have passed small cell legislation that requires small cell application attachments to be acted upon in 60 days); T-Mobile Comments at 18 (arguing that the Commission should accelerate the Section 332 shot clocks for all sites to 60 days for collocations, including small cells).

³⁰⁷ 2009 *Declaratory Ruling*, 24 FCC Rcd at 14012, para. 40.

³⁰⁸ TIA Comments at 4.

³⁰⁹ *Wireless Infrastructure Second R&O*, FCC 18-30 at para. 42 (citing Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1, Appx. B, § VI (Collocation NPA)); *see also* 47 CFR § 1.1306(c)(1) (excluding certain wireless facilities from NEPA review).

³¹⁰ 2009 *Declaratory Ruling*, 24 FCC Rcd at 14012, para. 46.

³¹¹ DESHPO Comments at 2 (“opposes the application of separate time limits for review of facility deployments not covered by the Spectrum Act, as it would lead to confusion within the process for all parties involved (Applicants/Carrier, Consultants, SHPO)”).

no reason to apply different time periods (60 vs. 90 days) to what is essentially the same review: modification of an existing structure to accommodate new equipment.³¹² Finally, adopting a 60-day shot clock will encourage service providers to collocate rather than opting to build new siting structures which has numerous advantages.³¹³

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

110. While some commenters argue that additional shot clock classifications would make the siting process needlessly more complex without any proven benefits,³¹⁸ any additional administrative burden from increasing the number of Section 332 shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process.³¹⁹ We

³¹² CTIA Aug. 30, 2018 *Ex Parte* Letter at 6.

³¹³ Letter from Richard Rossi, Senior Vice President, General Counsel, American Tower, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 3 (filed Aug. 10, 2018) (“The reason to encourage collocation is straightforward, it is faster, cheaper, more environmentally sound, and less disruptive than building new structures.”).

³¹⁴ League of Az Cities and Towns Comments at 13, 29 (arguing that many small cells or micro cells can be taller and more visually intrusive than macro cells).

³¹⁵ See, e.g., Letter from Geoffrey C. Beckwith, Executive Director & CEO, Mass. Municipal. Assoc., Boston, MA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, (filed Sept. 11, 2018) (Geoffrey C. Beckwith Sept. 11, 2018 *Ex Parte* Letter); Mike Posey Sept. 11, 2018 *Ex Parte* Letter; Letter from John A. Barbish, Mayor, City of Wickliffe, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 13, 2018); Letter from Pauline Russo Cutter, Mayor, City of San Leandro, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 12, 2018); Letter from Ed Waage, Mayor, City of Pismo Beach, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from Scott A. Hancock, Executive Director, MML, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Sept. 18, 2018); Letter from Leon Towarnicki, City Manager, Martinsville, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from Thomas Aujero Small, Mayor, City of Culver City, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018).

³¹⁶ Philadelphia Comments at 4-5 (arguing that shorter shot clocks should not be implemented because “cities are already resource constrained and any further attempt to further limit the current time periods for review of applications will seriously and adversely affect public safety as well as diminish the proper role, under our federalist system, of state and local governments in regulating local rights of way”); Smart Communities Comments, Docket 16-421, at 13 (filed Mar. 8, 2017) (included by reference by Austin’s Comments); Alaska Dept. of Trans. Comments at 2. See, e.g., TX Hist. Comm. Comments at 2 (current shot clocks are appropriate and that further shortening these shot clocks is not warranted); Arlington, TX Comments at 2; Letter from William Tomko, Mayor of Chagrin Falls, OH, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 1-2 (filed Sept. 17, 2018); Nina Beety Sept. 17, 2018 *Ex Parte* Letter; Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter at 4.

³¹⁷ League of Az Cities and Towns *et al.* Comments at 26-27, 29-35; Cities of San Antonio *et. al* Comments at 8; Philadelphia Comments at 4.

³¹⁸ T-Mobile Comments at 22; Florida Coalition Comments at 9 (creating new shot clocks would result in “too many ‘shot clocks’ and both the industry and local governments would be confused as to which shot clock applied to what application”).

³¹⁹ While several parties proposed additional shot clock categories, we believe that the any benefit from a close tailoring of categories to circumstances is not outweighed by the administrative burden on siting authorities and

also reject the assertion that revising the period of time to review siting decisions would amount to a nationwide land use code for wireless siting.³²⁰ Our approach is consistent with the Model Code for Municipalities that recognizes that the shot clocks that we are adopting for the review of Small Wireless Facility deployment applications correctly balance the needs of local siting agencies and wireless service providers.³²¹ Our balance of the relevant considerations is informed by our experience with the previously adopted shot clocks, the record in this proceeding, and our predictive judgment about the effectiveness of actions taken here to promote the provision of personal wireless services.

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

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providers to manage these categories. *See* TX Hist. Comm. Comments at 2 (stating that it “could support a shorter review period for new structures less than fifty (50) feet tall, or where structures are located within or adjacent to existing utility rights-of-way (but not transportation rights-of-way) with existing utility structures taller than the proposed telecommunications structure”); Georgia Dept. of Trans. Comments at 2 (stating that time frames based on the zoning area are reasonable).

³²⁰ Cities of San Antonio *et. al* Comments, Exh. A at 17-18. In the same vein, the Florida Department of Transportation contends that “[p]ermit review times should comply with state statutes,” especially if the industry insists on being treated similarly as other utilities. AASHTO Comments, Attach. at 13 (Florida Dept. of Trans. Comments); *see also* Alaska Dept. of Trans. Comments at 2; TX Dept. of Trans. Comments at 2 (explaining that variations in topography, weather, government interests, and state and local political structure counsel against standardized nationwide shot clocks). The Maryland Department of Transportation is concerned about the shortened shot clocks proposed because they would conflict with a Maryland law that requires a 90-day comment period in considering wireless siting applications and because certain applications can be complex and necessitate longer review periods. AASHTO Comments, Attach. at 40 (MD Dept. of Trans. Comments).

³²¹ BDAC Model Municipal Code at § 3.2a(i)(B).

³²² CTIA Comments, Attach. 1 at 38.

³²³ T-Mobile Comments at 19-20 (stating that some states already have adopted more expedited time frames to lower siting barriers and speed deployment, which demonstrates the reasonableness of the proposed 60-day and 90-day revised shot clocks); Incompas Reply at 9 (stating that there is no basis for differing time-periods for similarly-situated small cell installation requests, and the lack of harmonization could discourage the use of a more efficient infrastructure); CCA Comments at 14 n.52 (citing CCA Streamlining Reply at 7-8 that in Houston, Texas, the review process for small cell deployments “usually takes 2 weeks, but no more than 30 days to process and complete the site review. In Kenton County, Kentucky, the maximum time permitted to act upon new facility siting requests is 60 days. Louisville, Kentucky generally processes small cell siting requests within 30 days, and Matthews, North Carolina generally processes wireless siting applications within 10 days”).

³²⁴ CTIA Reply at 3 (stating that the Commission should shorten the shot clocks to 90 days for new facilities); CTIA Comments at 11-12 (asserting that the existing 150-day review period for new wireless sites should be shortened to 90 days); Crown Castle Comments at 29 (stating that a 90-day shot clock for new facilities is appropriate for macro cells and small cells alike, to the extent such applications require review under Section 332 at all); ExteNet Comments at 8 (asserting that the Commission should accelerate the shot clock for all other non-collocation applications, including those for new DNS poles, from 150 days to 90 days); WIA Reply at 2.

³²⁵ CCA argues that the new shot clocks would force siting authorities to deny applications when they find the applications are incomplete. Letter from Kenneth S. Fellman, Counsel, CCA, to Marlene H. Dortch, Secretary.

also specify today a provision that will initially reset these two new shot clocks in the event that a locality receives a materially incomplete application.

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

2. Batched Applications for Small Wireless Facilities

113. Given the way in which Small Wireless Facilities are likely to be deployed, in large numbers as part of a system meant to cover a particular area, we anticipate that some applicants will submit “batched” applications: multiple separate applications filed at the same time, each for one or more sites *or* a single application covering multiple sites.³²⁸ In the *Wireless Infrastructure NPRM/NOI*, the Commission asked whether batched applications should be subject to either longer or shorter shot clocks than would apply if each component of the batch were submitted separately.³²⁹ Industry commenters contend that the shot clock applicable to a batch or a class of applications should be no longer than that applicable to an individual application of the same class.³³⁰ On the other hand, several commenters, contend that batched applications have often been proposed in historic districts and historic buildings (areas that require a more complex review process), and given the complexities associated with reviews of that type, they urge the Commission not to apply shorter shot clocks to batched applications.³³¹ Some localities also argue that a single, national shot clock for batched applications would fail to account for unique local circumstances.³³²

114. We see no reason why the shot clocks for batched applications to deploy Small Wireless Facilities should be longer than those that apply to individual applications because, in many cases, the batching of such applications has advantages in terms of administrative efficiency that could actually

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FCC, WT Docket No. 17-79 et al., at 3 (filed Sept. 18, 2018) (Kenneth S. Fellman Sept. 18, 2018 *Ex Parte* Letter). We disagree that this would be the outcome in such an instance because, as explained below, siting authorities can toll the shot clocks upon a finding of incompleteness.

³²⁶ STREAMLINE Small Cell Deployment Act, S. 3157, 115th Cong. (2018).

³²⁷ BDAC Model Municipal Code at § 3.2a(i)(B),

³²⁸ We define either scenario as “batching” for the purpose of our discussion here.

³²⁹ *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 18; *see also* *Mobilitie PN*, 31 FCC Rcd at 13371.

³³⁰ *See, e.g.*, Extenet Comments at 10-11 (“The Commission should not adopt a longer shot clock for batches of multiple DNS applications.”); Sprint Comments, Docket No. 16-421, at 43-44 (filed Mar. 8, 2017); CCA Comments at 16 (“The FCC also should ensure that batch applications are not saddled with a longer shot clock than those afforded to individual siting applications”); Verizon Comments at 42 (“The same 60-day shot clock should apply to applications proposing multiple facilities—so called ‘batch applications.’”); Crown Castle Comments at 30 (“Crown Castle also does not support altering the deadline for ‘batches’ of requests.”); T-Mobile Comments at 22-23 (“[A]n application that batches together similar numbers of small cells of like character and in proximity to one another should also be able to be reviewed within the same time frame”); CTIA Comments at 17 (“There is, however, no need for the Commission to establish different shot clocks for batch processing of similar facilities”).

³³¹ San Antonio Comments, Exh. A at 17, 19-20; *see also* Smart Communities Comments, Docket No. 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin’s Comments).

³³² Cities of San Antonio *et al.* Comments, Exh. A at 17, 19-20; *see also* Smart Communities Comments, Docket 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin’s Comments).

make review easier.³³³ Our decision flows from our current Section 332 shot clock policy. Under our two existing Section 332 shot clocks, if an applicant files multiple siting applications on the same day for the same type of facilities, each application is subject to the same number of review days by the siting agency.³³⁴ These multiple siting applications are equivalent to a batched application and therefore the shot clocks for batching should follow the same rules as if the applications were filed separately. Accordingly, when applications to deploy Small Wireless Facilities are filed in batches, the shot clock that applies to the batch is the same one that would apply had the applicant submitted individual applications. Should an applicant file a single application for a batch that includes both collocated and new construction of Small Wireless Facilities, the longer 90-day shot clock will apply, to ensure that the siting authority has adequate time to review the new construction sites.

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

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

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

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

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

³³³ See, e.g., Sprint Comments, Docket No. 16-421, at 43-44 (filed Mar. 8, 2017); Verizon Comments at 42; CTIA Comments at 17.

³³⁴ WIA Comments at 27 ("Merely bundling similar sites into a single batched application should not provide a locality with more time to review a single batched application than to process the same applications if submitted individually.").

³³⁵ See *infra* paras. 117, 119. See Letter from Nina Beety, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 17, 2018); Letter from Dave Ruller, City Manager, City of Kent, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Sept. 18, 2018).

³³⁶ Cities of San Antonio *et al.* Comments, Exh. A at 17, 19-20; see also Smart Communities Comments, Docket 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin's Comments).

³³⁷ See *infra* para. 144.

would have a straightforward case for obtaining expedited relief in court.³³⁸

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

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

121. Consistent with those sensible considerations reflected in prior precedent, we expect that

³³⁸ Where we discuss litigation here, we refer, for convenience, to “the applicant” or the like, since that is normally the party that pursues such litigation. But we reiterate that under the Act, “[a]ny person adversely affected by” the siting authority’s failure to act could pursue such litigation. 47 U.S.C. § 332(c)(7)(B)(v).

³³⁹ See *supra* paras. 34-42.

³⁴⁰ *Id.*

³⁴¹ See, e.g., *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para. 284.

³⁴² See, e.g., *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 41 (1st Cir. 2014) (addressing claimed violation of Section 332(c)(7)(B)(i)(II) of the Act); *Nat’l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21-22 (1st Cir. 2002) (*Nat’l Tower*) (same); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999) (addressing violation of Section 332(c)(7)(B)(v) of the Act); *AT&T Mobility Servs., LLC v. Vill. of Corrales*, 127 F. Supp. 3d 1169, 1175-76 (D.N.M. 2015) (addressing violation of Section 332(c)(7)(B)(i)(II)); *Bell Atl. Mobile of Rochester v. Town of Irondequoit*, 848 F. Supp. 2d 391, 403 (W.D.N.Y. 2012) (addressing violation of Section 332(c)(7)(B)(ii)); *New Cingular Wireless PCS, LLC v. City of Manchester*, 2014 WL 79932, *8 (D.N.H. Feb. 28, 2014) (addressing violation of Section 332(c)(7)(B)(i)(II)).

³⁴³ See, e.g., *Nat’l Tower*, 297 F.3d at 21-22; *AT&T Mobility*, 127 F. Supp. 3d at 1176.

³⁴⁴ See, e.g., *Green Mountain Realty*, 750 F.3d at 41-42; *Nat’l Tower*, 297 F.3d at 24-25; *Cellular Tel. Co.*, 166 F.3d at 497; *Bell Atl. Mobile*, 848 F. Supp. 2d at 403; *New Cingular Wireless PCS*, 2014 WL 79932, *8.

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

122. In light of the more detailed interpretations that we adopt here regarding reasonable time frames for siting authority action on specific categories of requests—including guidance regarding circumstances in which longer time frames nonetheless can be reasonable—we expect that litigation generally will involve issues that can be resolved entirely by the relevant court. Thus, as the Commission has stated in the past, “in the case of a failure to act within the reasonable time frames set forth in our rules, and absent some compelling need for additional time to review the application, we believe that it would also be appropriate for the courts to treat such circumstances as significant factors weighing in favor of [injunctive] relief.”³⁴⁸ We therefore caution those involved in potential future disputes in this area against placing too much weight on the Commission's recognition that a siting authority's failure to act within the associated timeline might not always result in a preliminary or permanent injunction under the Section 332(c)(7)(B) framework while placing too little weight on the Commission's recognition that policies established by federal communications laws are advanced by streamlining the process for deploying wireless facilities.

123. We anticipate that the traditional requirements for awarding preliminary or permanent injunctive relief would likely be satisfied in most cases and in most jurisdictions where a violation of 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is found. Typically, courts require movants to establish the following elements of preliminary or permanent injunctive relief: (1) actual success on the merits for permanent injunctive relief and likelihood of success on the merits for preliminary injunctive relief, (2) continuing irreparable injury, (3) the absence of an adequate remedy at law, (4) the injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (5) award of injunctive relief would not be adverse to the public interest.³⁴⁹ Actual success on the merits would be

³⁴⁵ See *Green Mountain Realty Corp.*, 750 F.3d at 41 (reasoning that remand to the siting authority “would not be in accordance with the text or spirit of the Telecommunications Act); *Cellular Tel. Co.*, 166 F.3d at 497 (noting “that injunctive relief best serves the TCA's stated goal of expediting resolution” of cases brought under 47 U.S.C. § 332(c)(7)(B)(v)).

³⁴⁶ See, e.g., *Nat'l Tower*, 297 F.3d at 23; *Up State Tower Co. v. Town of Kiantone*, 718 Fed. Appx. 29, 32 (2d Cir. 2017) (Summary Order).

³⁴⁷ See, e.g., *Wireless Infrastructure Second R&O*, FCC 18-30 at para. 62; *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332, para. 5.

³⁴⁸ *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para. 284.

³⁴⁹ *Pub. Serv. Tel. Co. v. Georgia Pub. Serv. Comm'n*, 755 F. Supp. 2d 1263, 1273 (N.D. Ga.), *aff'd*, 404 F. App'x 439 (11th Cir. 2010); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004); *Nat. Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 941 (3d Cir. 1990); *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007); *Walters v. [REDACTED]*, 145 F.3d 1032, 1048 (9th Cir. 1998); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914–15 (1st Cir. 1989).

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

124. Our approach advances Section 332(c)(7)(B)(v)'s provision that certain siting disputes, including those involving a siting authority's failure to act, shall be heard and decided by a court of competent jurisdiction on an expedited basis. The framework reflected in this Order will provide the courts with substantive guiding principles in adjudicating Section 332(c)(7)(B)(v) cases, but it will not dictate the result or the remedy appropriate for any particular case; the determination of those issues will remain within the courts' domain.³⁵⁷ This accords with the Fifth Circuit's recognition in *City of Arlington*

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Note that the standards for permanent injunctive relief differ in some respects among the circuits and the states. For example, “most courts do not consider the public interest element in deciding whether to issue a permanent injunction, though the Third Circuit has held otherwise.” *Klay*, 376 F.3d at 1097. Courts in the Second Circuit consider only irreparable harm and success on the merits. *Omnipoint Commc'ns, Inc. v. Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 225 (S.D.N.Y. 2004). The Third and Fifth Circuits have precedents holding that irreparable harm is not an essential element of a permanent injunction. *See Roe v. Operation Rescue*, 919 F.2d 857, 873 n. 8 (3d Cir. 1990); *Lewis v. S. S. Baune*, 534 F.2d 1115, 1123–24 (5th Cir. 1976). For the sake of completeness, our analysis discusses all of the elements that have been used in decided cases.

³⁵⁰ *See New Jersey Payphone*, 130 F. Supp. 2d at 640.

³⁵¹ *See Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d at 225–26 (quoting *Nextel Partners, Inc. v. Town of Amherst, N.Y.*, 251 F. Supp. 2d 1187, 1201 (W.D.N.Y. 2003)); *see Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 318 (N.D.N.Y. 2017).

³⁵² *New Jersey Payphone*, 130 F. Supp. 2d at 641.

³⁵³ *City of Arlington*, 668 F.3d at 234.

³⁵⁴ *Contra* 47 U.S.C. 332(c)(7)(B)(ii).

³⁵⁵ *New Jersey Payphone*, 130 F. Supp. 2d at 641.

³⁵⁶ *See Cellular Tel. Co.*, 166 F.3d at 496. While our discussion here focused on cases that apply the permanent injunction standard, we have the same view regarding relief under the preliminary injunction standard when a locality fails to act within the applicable shot clock periods. *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (discussing the standard for preliminary injunctive relief).

³⁵⁷ Several commenters support this position, urging the Commission to reaffirm that adversely affected applicants must seek redress from the courts. *See, e.g., League of Ar Cities and Towns, et al. Comments at 14-21; Philadelphia*

that the Act could be read “as establishing a framework in which a wireless service provider must seek a remedy for a state or local government’s unreasonable delay in ruling on a wireless siting application in a court of competent jurisdiction while simultaneously allowing the FCC to issue an interpretation of § 332(c)(7)(B)(ii) that would guide courts’ determinations of disputes under that provision.”³⁵⁸

125. The guidance provided here should reduce the need for, and complexity of, case-by-case litigation and reduce the likelihood of vastly different timing across various jurisdictions for the same type of deployment.³⁵⁹ This clarification, along with the other actions we take in this Third Report and Order, should streamline the courts’ decision-making process and reduce the possibility of inconsistent rulings. Consequently, we believe that our approach helps facilitate courts’ ability to “hear and decide such [lawsuits] on an expedited basis,” as the statute requires.³⁶⁰

126. Reducing the likelihood of litigation and expediting litigation where it cannot be avoided should significantly reduce the costs associated with wireless infrastructure deployment. For instance, WIA states that if one of its members were to challenge every shot clock violation it has encountered, it would be mired in lawsuits with forty-six localities.³⁶¹ And this issue is likely to be compounded given the expected densification of wireless networks. Estimates indicate that deployments of small cells could reach up to 150,000 in 2018 and nearly 800,000 by 2026.³⁶² If, for example, 30 percent (based on T-Mobile’s experience³⁶³) of these expected deployments are not acted upon within the applicable shot clock

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

³⁵⁸ *City of Arlington*, 668 F.3d at 250.

³⁵⁹ The likelihood of non-uniform or inconsistent rulings on what time frames are reasonable or what circumstances could rebut the presumptive reasonableness of the shot clock periods stems from the intrinsic ambiguity of the phrase “reasonable period of time,” which makes it susceptible of varying constructions. *See City of Arlington*, 668 F.3d at 255 (noting “that the phrase ‘a reasonable period of time,’ as it is used in § 332(c)(7)(B)(ii), is inherently ambiguous”); *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) (“Because ‘just,’ ‘unjust,’ ‘reasonable,’ and ‘unreasonable’ are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.”). *See also* Lighttower Comments at 3 (“The lack of consistent guidance regarding statutory interpretation is creating uncertainty at the state and local level, with many local jurisdictions seeming to simply make it up as they go. Differences in the federal courts are only exacerbating the patchwork of interpretations at the state and local level.”).

³⁶⁰ 47 U.S.C. § 332(c)(7)(B)(v).

³⁶¹ WIA Comments at 16.

³⁶² *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13363-64 (2016) (citing S&P Global Market Intelligence, John Fletcher, Small Cell and Tower Projections through 2026, SNL Kagan Wireless Investor (Sept. 27, 2016)).

³⁶³ T-Mobile Comments at 8.

period, that would translate to 45,000 violations in 2018 and 240,000 violations in 2026.³⁶⁴ These sheer numbers would render it practically impossible to commence Section 332(c)(7)(B)(v) cases for all violations, and litigation costs for such cases likely would be prohibitive and could virtually bar providers from deploying wireless facilities.³⁶⁵

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

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

³⁶⁴ These numbers would escalate under WIA's estimate that 70 percent of small cell deployment applications exceed the applicable shot clock. WIA Comments at 7.

³⁶⁵ See CTIA Comments at 9 (explaining that, "[p]articularly for small cells, the expense of litigation can rarely be justified"); WIA Comments at 16 (quoting and discussing Lightower's Comments in 2016 Streamlining Public Notice); T-Mobile Comment, Attach. A at 8.

³⁶⁶ See, e.g., AT&T Comments at 26; CCA Comments at 7, 9, 11-12; CCA Reply at 5-6, 8; Cityscape Consultants Comments at 1; CompTIA Comments at 3; CIC Comments at 17-18; Crown Castle Comments at 23-28; Crown Castle Reply at 3; CTIA Comments at 7-9, Attach. 1 at 5, 39-43, Attach. 2 at 3, 23-24; GCI Comments at 5-9; Lightower Comments at 7, 18-19; Samsung Comments at 6; T-Mobile Comments at 13, 16, Attach. A at 25; WIA Comments at 15-17.

³⁶⁷ See, e.g., Arizona Munis Comments at 23; Arizona Munis Reply at 8-9; Baltimore Reply at 10; Lansing Comments at 2; Philadelphia Reply at 9-12; Torrance Comments at 1-2; CPUC Comments at 14; CWA Reply at 5; Minnesota Munis Comments at 9; *but see* CTIA Reply at 9.

³⁶⁸ See, e.g., Chicago Comments at 2 (contending that wireless facilities siting entails fact-specific scenarios); AASHTO Comments, Attach. at 40 (MD Dept. of Trans. SHA Comments) (describing the complexity of reviewing proposed deployments on rights-of-way); AASHTO Comments, Attach. at 51 (Wyoming DOT Comments); Baltimore Reply at 11; Philadelphia Comments at 4; Alexandria Comments at 6; Mukilteo Comments at 1; Alaska Dept. of Trans. Comments at 2; Alaska SHPO Reply at 1.

³⁶⁹ See Fla. Stat. Ann. § 365.172(13)(d)(3.b); Ariz. Rev. Stat. Ann. § 9-594(C) (3); 53 Pa. Stat. Ann. § 11702.4; Cal. Gov't Code § 65964.1; Va. Code Ann. § 15.2-2232; Va. Code Ann. § 15.2-2316.4; Va. Code Ann. § 56-484.29; Va. Code Ann. § 56-484.28; Ky. Rev. Stat. Ann. § 100.987; N.H. Rev. Stat. Ann. § 12-K:10; Wis. Stat. Ann. § 66.0404; Kan. Stat. Ann. § 66-2019(h)(3); Del. Code Ann. tit. 17, § 1609; Iowa Code Ann. § 8C.7A(3)(c)(2); Iowa Code Ann. § 8C.4(4)(5); Iowa Code Ann. § 8C.5; Mich. Comp. Laws Ann. § 125.3514. See also CCA Reply at 9.

³⁷⁰ See, e.g., CTIA Comments at 10-11; T-Mobile Comments at 15-18, Verizon Comments at 37, 39-41, WIA Comments at 17-20.

objectives³⁷¹ guiding our analysis.³⁷²

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

³⁷¹ *City of Arlington*, 668 F.3d at 234 (noting that the purpose of Section 332(c)(7) is to balance the competing interests to preserve the traditional role of state and local governments in land use and zoning regulation and the rapid development of new telecommunications technologies).

³⁷² See *supra* paras. 119-20 (explaining how the remedy strikes the proper balance between competing interests). Because our approach to shot clocks involves our interpretation of Section 332(c)(7)(B)(ii) and the consequences that flow from that—and does not rely on Section 253 of the Act—we need not, and thus do not, resolve disputes about the potential use of Section 253 in this specific context, such as whether it could serve as authority for a deemed granted or similar remedy. See, e.g., San Francisco Comments at 9-10; CPUC Comments at 10; Smart Communities Comments at 4-11, 21; Smart Communities Reply at 78-79; League of Az Cities and Towns *et al.* Reply at 4; Alexandria Comments at 5; Irvine Comments at 5; Minnesota Cities Comments at 11-13; Philadelphia Reply at 2, 7; Fairfax County Comments at 17; Greenlining Reply at 4; NRUC Reply at 3-5; NATOA June 21, 2018 *Ex Parte* Letter. To the extent that commenters raise arguments regarding the proper interpretation of “prohibit or have the effect of prohibiting” under Section 253 or the scope of Section 253, these issues are discussed in the Declaratory Ruling, see *supra* paras. 34-42.

³⁷³ See App Association Comments at 9; CCI Comments at 6-8; Conterra Comments at 14-17; ExteNet Comments at 13; T-Mobile Comments at 17; Quintillion Reply at 6; Verizon Comments at 8-18; WIA Comments at 9-10. WIA contends that adoption of a deemed granted remedy is needed because various courts faced with shot clock claims have failed to provide meaningful remedies, citing as an example a case in which the court held that the town failed to act within the shot clock period but then declined to issue an injunction directing the siting agency to grant the application. WIA Comments at 16-17. However, a number of cases involving violations of the “reasonable period of time” requirement of Section 332(c)(7)(B)(ii)—decided either before or after the promulgation of the Commission’s Section 332(c)(7)(B)(ii) shot clocks—have concluded with an award of injunctive relief. See, e.g., *Upstate Cellular Network*, 257 F. Supp. 3d at 318 (concluding that the siting authority’s failure to act within the 150-day shot clock was unreasonable and awarding a permanent injunction in favor of the applicant); *Am. Towers, Inc. v. Wilson County*, No. 3:10-CV-1196, 2014 WL 28953, at *13-14 (M.D. Tenn. Jan. 2, 2014) (finding that the county failed to act within a reasonable period of time, as required under Section 332(c)(7)(B)(ii), and granting an injunction directing the county to approve the applications and issue all necessary authorizations for the applicant to build and operate the proposed tower); *Cincinnati Bell Wireless, LLC v. Brown County*, Ohio, No. 1:04-CV-733, 2005 WL 1629824, at *4-5 (S.D. Ohio July 6, 2005) (finding that the county failed to act within a reasonable period of time under Section 332(c)(7)(B)(ii) and awarding injunctive relief). But see *Up State Tower Co. v. Town of Kiantone*, 718 Fed. Appx. 29 (2d Cir. 2017) (declining to reverse district court’s refusal to issue injunction compelling immediate grant of application). Courts have also held “that injunctive relief best serves the TCA’s stated goal of expediting resolution of” cases brought under Section 332(c)(7)(B)(v). *Cellular Tel. Co.*, 166 F.3d at 497; *Brehmer v. Planning Bd. of Town of Wellfleet*, 238 F.3d 117, 121 (1st Cir. 2001). Under these circumstances, we do not agree with WIA that courts have failed to provide meaningful remedies to such an extent as would require the adoption of a deemed granted remedy.

³⁷⁴ *Zoning Bd. of Adjustment of the Borough of Paramus, N.J.*, 21 F. Supp. 3d at 383, 387 (more than four-and-a-half years for Sprint to prevail in court), *aff’d*, 606 F. App’x 669 (3d Cir. 2015); *Vill. of Corrales*, 127 F. Supp. 3d 1169 (nineteen months from complaint to grant of summary judgment); *Orange County–Poughkeepsie Ltd. P’ship v. Town of E. Fishkill*, 84 F. Supp. 3d 274, 293 (S.D.N.Y.), *aff’d sub nom.*, *Orange County–County Poughkeepsie Ltd. P’ship v. Town of E. Fishkill*, 632 F. App’x 1 (2d Cir. 2015) (seventeen months from complaint to grant of summary judgment).

decision-making process.

130. We find that the more specific deployment categories and shot clocks, which presumptively represent the reasonable period within which to act, will prevent the outcome proponents of a deemed granted remedy seek to avoid: that siting agencies would be forced to reject applications because they would be unable to review the applications within the prescribed shot clock period.³⁷⁵ Because the more specific deployment categories and shot clocks inherently account for the nature and scope of a variety of deployment applications, our new approach should ensure that siting agencies have adequate time to process and decide applications and will minimize the risk that localities will fail to act within the established shot clock periods. Further, in cases where a siting authority misses the deadline, the opportunity to demonstrate exceptional circumstances provides an effective and flexible way for siting agencies to justify their inaction if genuinely warranted. Our overall framework, therefore, should prevent situations in which a siting authority would feel compelled to summarily deny an application instead of evaluating its merits within the applicable shot clock period.³⁷⁶ We also note that if the approach we take in this Order proves insufficient in addressing the issues it is intended to resolve, we may again consider adopting a deemed granted remedy in the future.

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

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

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

132. As indicated above, Section 332(c)(7)(B)(ii) requires state and local governments to act “within a reasonable period of time” on “any request for authorization to place, construct, or modify personal wireless service facilities.”³⁸⁰ Neither the *2009 Declaratory Ruling* nor the *2014 Wireless Infrastructure Order* addressed the specific types of authorizations subject to this requirement. Industry commenters contend that the shot clocks should apply to all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment.³⁸¹ Local siting authorities, on the other hand, argue that a broad application of Section 332 will harm public safety and welfare by not

³⁷⁵ Baltimore Reply at 12; Mukilteo Comments at 1; Cities of San Antonio *et al.* Reply at 10; Washington Munis Comments, Attach. 1 at 8-9; *but see* CTIA Reply at 9.

³⁷⁶ We also note that a summary denial of a deployment application is not permitted under Section 332(c)(7)(B)(iii), which requires the siting authority to base denials on “substantial evidence contained in a written record.”

³⁷⁷ KS Rep. Sloan Comments at 2; Nokia Comments at 10.

³⁷⁸ NATOA *et al.* Comments at 16-17.

³⁷⁹ *See infra* paras. 145-46.

³⁸⁰ *See* 47 U.S.C. § 332(c)(7)(B)(ii).

³⁸¹ *See, e.g.*, CTIA Comments at 15; CTIA Reply at 10; Mobilite Comments at 6-7; WIA Comments at 24; WIA Reply at 13; T-Mobile Comments at 21-22; CCA Reply at 9; Sprint June 18 *Ex Parte* at 3.

giving them enough time to evaluate whether a proposed deployment endangers the public.³⁸² They assert that building and encroachment permits should not be subsumed within the shot clocks because these permits incorporate essential health and safety reviews.³⁸³ After carefully considering these arguments, we find that “any request for authorization to place, construct, or modify personal wireless service facilities” under Section 332(c)(7)(B)(ii) means all authorizations necessary for the deployment of personal wireless services infrastructure. This interpretation finds support in the record and is consistent with the courts’ interpretation of this provision and the text and purpose of the Act.

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

³⁸² League of Az Cities and Towns *et al.* Reply at 21-22. *See also* Arlington County, Sept. 18 *Ex Parte* Letter at 1-2 (asserting that it is infeasible to have the shot clock encompass all steps related the small cell siting process because there is no single application to get ROW access, public notice, lease negotiations, road closures, etc.; because these are separate processes involving different departments; and because the timeline in some instances will depend on the applicant, or the required information may interrelate in a manner that makes doing them all at once infeasible); Letter from Robert McBain, Mayor, Piedmont, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 *et al.*, at 3 (filed Sept. 18, 2018).

³⁸³ League of Az Cities and Towns *et al.* Reply at 21-22.

³⁸⁴ *Implementation of Section 402(b)(1)(a) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 11233 (1996); *2002 Biennial Regulatory Review*, Report, 18 FCC Rcd 4726, 4731–32 (2003); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”); *Communications Assistance for Law 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).

³⁸⁵ *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster’s Third New International Dictionary 97 (1976)); *HUD v. Rucker*, 535 U.S. 125, 131 (2002).

³⁸⁶ *See Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528–29 (1947) (“[H]eadings and titles are not meant to take the place of the detailed provisions of the text.”). Our conclusion is also consistent with our interpretation that Sections 253 and 332(c)(7) apply to fees for all applications related to a Small Wireless Facility. *See supra* para. 50.

³⁸⁷ *See, e.g.*, Virginia Joint Commenters Comments at 21-22 (stating that deployment of personal wireless facilities generally requires excavation and building permits); San Francisco Comments at 4-7, 12, 20-22 (describing the permitting process in San Francisco, the layers of multi-departmental review involved, and the required authorizations before certain personal wireless facilities can be constructed); Smart Cities Coal. Comments at 33-34 (describing several authorizations necessary to deploy personal wireless facilities depending on the location, e.g., public rights-of-way and other public properties, of the proposed site and the size of the proposed facility).

to limit Section 332(c)(7) to zoning decisions does not overcome the specific language of Section 332(c)(7)(B)(ii), which explicitly applies to a variety of authorizations.³⁸⁸

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

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

136. A number of courts have either explicitly or implicitly adopted the same view, that all necessary permits are subject to Section 332. For example, in *Cox Communications PCS, L.P. v. San Marcos*, the court considered an excavation permit application as falling within the parameters of Section 332.³⁹³ In *USCOC of Greater Missouri, LLC v. County of Franklin*, the Eighth Circuit reasoned that “[t]he issuance of the requisite building permits” for the construction of a personal wireless services facility arises under Section 332(c)(7).³⁹⁴ In *Ogden Fire Co. No. 1 v. Upper Chichester Township*, the Third Circuit affirmed the district court’s order compelling the township to issue a building permit for the

³⁸⁸ See *Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947). If the title of Section 332(c)(7) were to control the interpretation of the text, it would render superfluous the provision of Section 332(c)(7)(B)(ii) that applies to “authorization to . . . construct, or modify personal wireless service facilities” and give effect only to the provision that applies to “authorization to place . . . personal wireless service facilities.” This result would “flout[] the rule that ‘a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.’” *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

³⁸⁹ *City of Rancho Palos Verdes v. Abrams*, 544 U.S. at 115 (internal quotation marks and citations omitted).

³⁹⁰ For example, if we were to interpret Section 332(c)(7)(B)(ii) to cover only zoning permits, states and localities could delay their consideration of other permits (e.g., building, electrical, road closure or other permits) to thwart the proposed deployment.

³⁹¹ See, e.g., Virginia Joint Commenters Comments at 21-22; San Francisco Comments at 4-7, 12, 20-22; Smart Communities Comments at 33-34; CTIA Comments at 15 (stating that some jurisdictions “impose multiple, sequential stages of review”); WIA Comments at 24 (noting that “[m]any jurisdictions grant the application within the shot clock period only to stall on issuing the building permit”); Verizon Comments at 6 (stating that “[a] large Southwestern city requires applicants to obtain separate and sequential approvals from three different governmental bodies before it will consider issuing a temporary license agreement to access city rights-of-way”); Sprint June 18 *Ex Parte* at 3 (noting that “after a land-use permit or attachment permit is received, many localities still require electric permits, road closure permits, aesthetic approval, and other types of reviews that can extend the time required for final permission well beyond just the initial approval.”).

³⁹² *City of Arlington*, 668 F.3d at 234.

³⁹³ *Cox Commc’ns PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).

³⁹⁴ *USCOC of Greater Mo., LLC v. County of Franklin*, 636 F.3d 927, 931-32 (8th Cir. 2011).

construction of a wireless facility after finding that the township had violated Section 332(c)(7).³⁹⁵ In *Upstate Cellular Network v. Auburn*, the court directed the city to approve the application, including site plan approval by the planning board, granting a variance by the zoning authority, and “any other municipal approval or permission required by the City of Auburn and its boards or officers, including but not limited to, a building permit.”³⁹⁶ And in *PI Telecom Infrastructure V, LLC v. Georgetown–Scott County Planning Commission*, the court ordered that the locality grant “any and all permits necessary for the construction of the proposed wireless facility.”³⁹⁷ Our interpretation is also consistent with judicial precedents involving challenges under Section 332(c)(7)(B) to denials by a wide variety of governmental entities, many of which involved variances,³⁹⁸ special use/conditional use permits,³⁹⁹ land disturbing activity and excavation permits,⁴⁰⁰ building permits,⁴⁰¹ and a state department of education permit to install an antenna at a high school.⁴⁰² Notably, a lot of cases have involved local agencies that are separate and distinct from the local zoning authority,⁴⁰³ confirming that Section 332(c)(7)(B) is not limited in application to decisions of zoning authorities. Our interpretation also reflects the examples in the record where providers are required to obtain other types of authorizations besides zoning permits before they can “place, construct, or modify personal wireless service facilities.”⁴⁰⁴

137. We reject the argument that this interpretation of Section 332 will harm the public because it would “mean that building and safety officials would have potentially only a few days to

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

³⁹⁶ *Upstate Cellular Network*, 257 F. Supp. 3d at 319.

³⁹⁷ *PI Telecom Infrastructure V, LLC v. Georgetown–Scott County Planning Commission*, 234 F. Supp. 3d 856, 872 (E.D. Ky. 2017). *Accord T-Mobile Ne. LLC v. Lowell*, Civil Action No. 11–11551–NMG, 2012 WL 6681890, *6-7, *11 (D. Mass. Nov. 27, 2012) (directing the zoning board “to issue all permits and approvals necessary for the construction of the plaintiffs’ proposed telecommunications facility”); *New Par v. Franklin County Bd. of Zoning Appeals*, No. 2:09–cv–1048, 2010 WL 3603645, *4 (S.D. Ohio Sept. 10, 2010) (enjoining the zoning board to “grant the application and issue all permits required for the construction of the” proposed wireless facility).

³⁹⁸ See, e.g., *New Par v. City of Saginaw*, 161 F. Supp. 2d 759, 760 (E.D. Mich. 2001), *aff’d*, 301 F.3d 390 (6th Cir. 2002)

³⁹⁹ See, e.g., *Virginia Metronet, Inc. v. Bd. of Sup’rs of James City County*, 984 F. Supp. 966, 968 (E.D. Va. 1998); *Cellular Tel. Co.*, 166 F.3d at 491; *T-Mobile Cent., LLC v. Unified Gov’t of Wyandotte County*, 546 F.3d 1299, 1303 (10th Cir. 2008); *City of Anacortes*, 572 F.3d at 989; *Helcher*, 595 F.3d at 713-14; *AT&T Wireless Servs. of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1152 (S.D. Cal. 2003); *PrimeCo Pers. Comm’ns L.P. v. City of Mequon*, 242 F. Supp. 2d 567, 570 (E.D. Wis.), *aff’d*, 352 F.3d 1147 (7th Cir. 2003); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1212 (11th Cir. 2002).

⁴⁰⁰ See, e.g., *Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392, 394 (6th Cir. 2005); *Cox Commc’ns PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).

⁴⁰¹ See, e.g., *Upstate Cellular Network*, 257 F. Supp. 3d at 319; *Ogden Fire Co. No. 1 v. Upper Chichester Twp.*, 504 F.3d 370, 395-96 (3rd Cir. 2007).

⁴⁰² *Sprint Spectrum, L.P. v. Mills*, 65 F. Supp. 2d 148, 150 (S.D.N.Y. 1999), *aff’d*, 283 F.3d 404 (2d Cir. 2002).

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

⁴⁰⁴ See, e.g., Virginia Joint Commenters Comments at 21-22 (stating that deployment of personal wireless facilities generally requires excavation and building permits); San Francisco Comments at 4-7, 12, 20-22 (describing the permitting process in San Francisco, the layers of multi-departmental review involved, and the required authorizations before certain personal wireless facilities can be constructed); Smart Communities Comments at 33-34 (describing several authorizations necessary to deploy personal wireless facilities depending on the location, e.g. public rights-of-way and other public properties, of the proposed site and the size of the proposed facility).

evaluate whether a proposed deployment endangers the public.”⁴⁰⁵ Building and safety officials will be subject to the same applicable shot clock as all other siting authorities involved in processing the siting application, with the amount of time allowed varying in the rare case where officials are unable to meet the shot clock because of exceptional circumstances.

2. Codification of Section 332 Shot Clocks

138. In addition to establishing two new Section 332 shot clocks for Small Wireless Facilities, we take this opportunity to codify our two existing Section 332 shot clocks for siting applications that do not involve Small Wireless Facilities. In the *2009 Declaratory Ruling*, the Commission found that 90 days is a reasonable time frame for processing collocation applications and 150 days is a reasonable time frame to process applications other than collocations.⁴⁰⁶ Since these Section 332 shot clocks were adopted as part of a declaratory ruling, they were not codified in our rules. In the *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on whether to modify these shot clocks.⁴⁰⁷ We find no need to modify them here and will continue to use these shot clocks for processing Section 332 siting applications that do not involve Small Wireless Facilities.⁴⁰⁸ We do, though, codify these two existing shot clocks in our rules alongside the two newly-adopted shot clocks so that all interested parties can readily find the shot clock requirements in one place.⁴⁰⁹

139. While some commenters argue for a 60-day shot clock for all collocation categories,⁴¹⁰ we conclude that we should retain the existing 90-day shot clock for collocations not involving Small Wireless Facilities. Collocations that do not involve Small Wireless Facilities include deployments of

⁴⁰⁵ League of Az Cities and Towns *et al.* Reply at 21-22.

⁴⁰⁶ *2009 Declaratory Ruling*, 24 FCC Rcd at 14012-013, paras. 45, 48.

⁴⁰⁷ *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332-33, 3334, 3337-38, paras. 6, 9, 17-19.

⁴⁰⁸ Chicago Comments at 2 (supporting maintaining existing shot clocks); Bellevue *et al.* Comments at 13-14 (supporting maintaining existing shot clocks).

⁴⁰⁹ We also adopt a non-substantive modification to our existing rules. We redesignate the rule adopted in 2014 to codify the Commission’s implementation of the 2012 Spectrum Act, formerly designated as section 1.40001, as section 1.6100, and we move the text of that rule from Part 1, Subpart CC, to the same Subpart as the new rules promulgated in this Third Report and Order (Part 1, Subpart U). This recognizes that both sets of requirements pertain to “State and local government regulation of the placement, construction, and modification of personal wireless service facilities” (the caption of new Subpart U). The reference in paragraph (a) of that preexisting rule to 47 U.S.C. § 1455 has been consolidated with new rule section 1.6001 to reflect that all rules in Subpart U, collectively, implement both § 332(c)(7) and § 1455. With those non-substantive exceptions, the text of the 2014 rule has not been changed in any way. Contrary to the suggestion submitted by the Washington Joint Counties, *see* Letter from W. Scott Snyder *et al.*, Counsel for the Washington Cities of Bremerton, Mountlake Terrace, Kirkland, Redmond, Issaquah, Lake Stevens, Richland, and Mukilteo, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 *et al.*, at 6-7 (filed June 19, 2018), this change is not substantive and does not require advance notice. We find that “we have good cause to reorganize and renumber our rules in this fashion without expressly seeking comment on this change, and we conclude that public comment is unnecessary because no substantive changes are being made. Moreover, the delay engendered by a round of comment would be contrary to the public interest.” *See 2017 Pole Replacement Order*, 32 FCC Rcd at 9770, para. 26; *see also* 5 U.S.C. §553(b)(B) (notice not required “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”).

⁴¹⁰ CCIA Comments at 10; CCA Comments at 13-14; CCA Reply at 6 (arguing for 30-day shot clock for collocations and a 60-to-75-day shot clock for all other siting applications); WIA Reply at 21. *See also* Letter from Jill Canfield, NTCA Vice President Legal & Industry and Assistant General Counsel, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 19, 2018) (stating that NTCA supports a revised interpretation of the phrase “reasonable period of time” as found in Section 332(c) (7)(B)(ii) of the Communications Act as applicable to small cell facilities and that sixty days for collocations and 90 days for all other small cell siting applications should provide local officials sufficient time for review of requests to install small cell facilities in public rights-of-way).

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

3. Collocations on Structures Not Previously Zoned for Wireless Use

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

⁴¹¹ *Wireless Infrastructure Second R&O*, FCC 18-30 at paras. 74-76.

⁴¹² New Orleans Comments at 2-3; Samsung Comments at 4-5 (arguing that the Commission should reduce the shot clock applicable to new construction from 150 days to 90 days); Crown Castle Comments at 29 (stating that a 90-day shot clock for new facilities is appropriate for macro cells and small cells alike, to the extent such applications require review under Section 332 at all); TX Hist. Comm. Comments at 2 (arguing that the reasonable periods of time that the FCC proposed in 2009, 90 days for collocation applications and 150 days for other applications appear to be appropriate); WIA Comments at 20-23; WIA Reply at 11 (arguing for a 90-day shot clock for applications involving substantial modifications, including tower extensions; and a 120-day shot clock for applications for all other facilities, including new macro sites); CTIA Reply at 3 (stating that the Commission should shorten the shot clocks to 90 days for new facilities).

⁴¹³ AT&T Comments at 10; AT&T Reply at 9; Verizon Reply at 32; WIA Comments at 22; ExteNet Comments at 9.

⁴¹⁴ Bellevue *et al.* Reply at 6-7 (arguing that the Commission has rejected this argument twice and instead determined that a collocation occurs when a wireless facility is attached to an existing infrastructure that houses wireless communications facilities; San Francisco Reply at 7-8 (arguing that under Commission definitions, a utility pole is neither an existing base station nor a tower; thus, the Commission simply cannot find that adding wireless facilities to utility pole that has not previously been used for wireless facilities is an eligible facilities request). *See, e.g.*, Letter from Bonnie Michael, City Council President, Worthington, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 18, 2018); Letter from Jill Boudreau, Mayor, Mount Vernon, WA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 18, 2018).

⁴¹⁵ *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para 46.

⁴¹⁶ 47 CFR Part 1, App. B, NPA, Subsection C, Definitions.

Spectrum Act, pursuant to which facilities only fall within the scope of an “eligible facilities request” if they are attached to towers or base stations that have already been zoned for wireless use.⁴¹⁷

4. When Shot Clocks Start and Incomplete Applications

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

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

⁴¹⁷ See 47 CFR § 1.40001(b)(3), (4), (5) (definitions of eligible facilities request, eligible support structure, and existing). Each of these definitions refers to facilities that have already been approved under local zoning or siting processes.

⁴¹⁸ *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, at para. 258.

⁴¹⁹ *2009 Declaratory Ruling*, 24 FCC Rcd at 14014, paras. 52-53 (providing that the “timeframes do not include the time that applicants take to respond to State and local governments’ requests for additional information”).

⁴²⁰ *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, para. 259.

⁴²¹ *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.

⁴²² See, e.g., Maine DOT Comments at 2-3; Philadelphia Comments at 6; League of Az Cities and Towns *et al.* at 4, 8-9; Letter from Barbara Coler, Chair, Marin Telecommunications Agency, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 *et al.*, at 2 (filed Sept. 4, 2018) (Barbara Coler Sept. 4, 2018 *Ex Parte* Letter); Letter from Sam Liccardo, Mayor, San Jose, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 *et al.*, at 5 (filed Sept. 18, 2018).

⁴²³ Verizon Comments at 43. See Sprint June 18 *Ex Parte* at 2 (asserting that the shot clocks should begin to run when the application is complete and that a siting authority should review the application for completeness within the first 15 days of receipt or it would waive the right to object on that basis).

⁴²⁴ See, e.g., Barbara Coler Sept. 4, 2018 *Ex Parte* Letter at 2 (the pace of installation may be affected by incomplete applications); Kenneth S. Fellman Sept. 18, 2018 *Ex Parte* Letter at 3 (not uncommon to find documents not properly prepared and not in compliance with relevant regulations).

⁴²⁵ Most states have a 30-day review period for incompleteness. See, e.g., Colo. Rev. Stat. Ann. § 29-27-403; Ga. Code Ann. § 36-66B-5; Iowa Code Ann. § 8C.4; Kan. Stat. Ann. § 66-2019; Minn. Stat. Ann. § 237.163(3c)(b); 53 Pa. Stat. Ann. § 11702.4(b)(1); Cal. Gov’t Code § 65943. A minority of states have adopted either a longer or shorter review period for incompleteness, ranging from 5 days to 45 days. See N.C. Gen. Stat. Ann. § 153A-349.53 (45 days); Wash. Rev. Code Ann. § 36.70B.070 (28 days); N.H. Rev. Stat. Ann. § 12-K:10 (15 days); Del. Code Ann. tit. 17, § 1609 (14 days); Va. Code Ann. §§ 15.2-2316.4; 56-484.28; 56-484.29 (10 days); Wis. Stat. Ann. § 66.0404(3) (5 days).

from a last minute decision that an application should be denied as incomplete.”⁴²⁶

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

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

145. We also find that mandatory pre-application procedures and requirements do not toll the shot clocks.⁴²⁹ Industry commenters claim that some localities impose burdensome pre-application requirements before they will start the shot clock.⁴³⁰ Localities counter that in many instances, applicants submit applications that are incomplete in material respects, that pre-application interactions smooth the application process, and that many of their pre-application requirements go to important health and safety matters.⁴³¹ We conclude that the ability to toll a shot clock when an application is found incomplete or by

⁴²⁶ *2009 Declaratory Ruling*, 24 FCC Rcd at 14014-15, para. 53.

⁴²⁷ See, e.g., Geoffrey C. Beckwith Sept. 11, 2018 *Ex Parte* Letter at 1; Letter from Brad Cole, Executive Director, Illinois Municipal League, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al. at 1 (filed Sept. 14, 2018); Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter at 2.

⁴²⁸ See Sprint June 18 *Ex Parte* at 3; cf. Virginia Joint Commenters Comments at 21-22; San Francisco Comments at 4-7, 12, 20-22; CTIA Comments at 15 (“The Commission should declare that the shot clocks apply to the entire local review process.”).

⁴²⁹ *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.

⁴³⁰ See, e.g., CCA Reply at 7 (noting also that some localities unreasonably request additional information after submission that is either already provided or of unreasonable scope); GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteNet Comments at 4, 15-16; Mobilite Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.

⁴³¹ See, e.g., Philadelphia Reply at 9 (arguing that shot clocks should not run until a complete application with a full set of engineering drawings showing the placement, size and weight of the equipment, and a fully detailed structural analysis is submitted, to assess the safety of proposed installations); Philadelphia Comments at 6; League of Az Cities and Towns *et al.* Comments at 4 (arguing that the shot clock should not begin until after an application has been “duly filed,” because “some applicants believe the shot clock commences to run no matter how they submit their request, or how inadequate their submittal may be”); Colorado Comm. and Utility All. *et al.* Comments at 14 (explaining that the pre-application meetings are intended “to give prospective applicants an opportunity to discuss code and regulatory provisions with local government staff, and gain a better understanding of the process that will be followed, in order to increase the probability that once an application is filed, it can proceed smoothly to final decision”); Smart

mutual agreement by the applicant and the siting authority should be adequate to address these concerns. Much like a requirement to file applications one after another, requiring pre-application review would allow for a complete circumvention of the shot clocks by significantly delaying their start date. An application is not ruled on within “a reasonable period of time after the request is duly filed” if the state or locality takes the full ordinary review period after having delayed the filing in the first instance due to required pre-application review. Indeed, requiring a pre-application review before an application may be filed is similar to imposing a moratorium, which the Commission has made clear does not stop the shot clocks from running.⁴³² Therefore, we conclude that if an applicant proffers an application, but a state or locality refuses to accept it until a pre-application review has been completed,⁴³³ the shot clock begins to run when the application is proffered. In other words, the request is “duly filed” at that time,⁴³⁴ notwithstanding the locality’s refusal to accept it.

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

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

V. PROCEDURAL MATTERS

148. *Final Regulatory Flexibility Analysis.* With respect to this Third Report and Order, a Final Regulatory Flexibility Analysis (FRFA) is contained in Appendix C. As required by Section 603 of

(Continued from previous page)

Communities Comments at 15, 35 (pre-application procedures “may translate into faster consideration of individual applications over the longer term, as providers and communities alike, gain a better understanding of what is required of them, and providers submit applications that are tailored to community requirements”); UT Dept. of Trans. Comments at 5 (“The purpose of the pre-application access meeting is to help the entity or person with the application and provide information concerning the requirements contained in the rule.”); CCUA *et al.* Reply at 6 (“[Pre-application meetings] provide an opportunity for informal discussion between prospective applicants and the local jurisdiction. Pre-application meetings serve to educate, answer questions, clarify process issues, and ultimately result in a more efficient process from application filing to final action.”); AASHTO Comments, Attach. at 3 (GA Dept. of Trans. contending that pre-application procedures “should be encouraged and separated from an ‘official’ ‘application submittal’”); League of Az Cities and Towns *et al.* Comments at 5-7 (providing examples of incomplete applications).

⁴³² *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12971, at para. 265.

⁴³³ See, e.g., CCA Reply at 7; GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteNet Comments at 4, 15-16; Mobilite Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.

⁴³⁴ 47 U.S.C. § 332(c)(7)(B)(ii).

⁴³⁵ See CCUA *et al.* Comments at 14; Smart Communities Comments at 15, 35; UT Dept. of Trans. Comments at 5; CCUA *et al.* Reply at 6; Mukilteo Reply, Docket No. WC 17-84, at 1 (filed July 10, 2017).

⁴³⁶ *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

⁴³⁷ *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

⁴³⁸ 47 U.S.C. § 332(c)(7)(B)(v).

the Regulatory Flexibility Act, the Commission has prepared a FRFA of the expected impact on small entities of the requirements adopted in this Third Report and Order. The Commission will send a copy of the Third Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

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

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

VI. ORDERING CLAUSES

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

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

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

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

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

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

Streamlining State and Local Review of Wireless Facility Siting Applications

Part 1—Practice and Procedure

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

Subpart U—State and Local Government Regulation of the Placement, Construction, and Modification of Personal Wireless Service Facilities**§ 1.6001 Purpose.**

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

§ 1.6002 Definitions.

Terms used in this subpart have the following meanings:

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

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

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

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

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

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

(g) *Collocation*, consistent with section 1.1320(d) and the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas, Appendix B of this part, section I.B, means—

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

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

(3) The definition of “collocation” in paragraph (b)(2) of section 1.6100 applies to the term as used in that section.

- (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 facilities*, consistent with section 1.1312(e)(2), are facilities that meet each of the following conditions:
- (1) The facilities—
 - (i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or
 - (ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or
 - (iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
 - (2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;
 - (3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;
 - (4) The facilities do not require antenna structure registration under part 17 of this chapter;
 - (5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and
 - (6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).
- (m) *Structure* means a pole, tower, base station, or other building, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service (whether on its own or comingled with other types of services).

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

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

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

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

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

(2) *Batching.*

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

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

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

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

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

EXHIBIT 17**ZDO-276: FY 2020 Minor and Time Sensitive Amendments**

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

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

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

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

(3) *For resubmitted applications following a notice of deficiency*, the tolling period shall be the number of days from—

(i) The day after the date when the siting authority notifies the applicant in writing that the applicant's supplemental submission was not sufficient to render the application complete and clearly and specifically identifies the missing documents or information that need to be submitted based on the siting authority's original request under paragraph (d)(1) or paragraph (d)(2) of this section, until

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

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

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

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

4. 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
Lighttower 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
Irregulars
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

EXHIBIT 17**ZDO-276: FY 2020 Minor and Time Sensitive Amendments**

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

A. Need for and Objectives of the Rules

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

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

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601—612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Notice of Proposed Rulemaking, 32 FCC Rcd 3330 (2017).

³ See 5 U.S.C. § 604.

⁴ See *supra* paras. 23-9.

⁵ See *supra* paras. 111-12.

⁶ See *supra* paras. 138-39; *2009 Declaratory Ruling*.

⁷ See *supra* paras. 132-37.

⁸ See *supra* para. 140.

the impact of incomplete applications on our Section 332 shot clocks,¹⁰ and how state imposed shot clocks remedies effect the Commission's Section 332 shot clocks remedies.¹¹

4. The Commission discusses the appropriate judicial remedy that applicants may pursue in cases where a siting authority fails to act within the applicable shot clock period.¹² In those situations, applicants may commence an action in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(i)(II) and seek injunctive relief granting the application. Notwithstanding the availability of a judicial remedy if a shot clock deadline is missed, the Commission recognizes that the Section 332 time frames might not be met in exceptional circumstances and has refined its interpretation of the circumstances when a period of time longer than the relevant shot clock would nonetheless be a reasonable period of time for action by a siting agency.¹³ In addition, a siting authority that is subject to a court action for missing an applicable shot clock deadline has the opportunity to demonstrate that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services thereby rebutting the effective prohibition presumption.

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

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

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

7. These arguments, however, fail to acknowledge that Section 332 shot clocks have been in place for years and reflect Congressional intent as seen in the statutory language of Section 332. The record in this proceeding demonstrates the need for, and reasonableness of, expediting the siting review of certain facility deployments.¹⁶ More streamlined procedures are both reasonable and necessary to provide greater predictability. The current shot clocks do not reflect the evolution of the application review process and evidence that localities can complete reviews more quickly than was the case when the original shot clocks were adopted nine years ago. Localities have gained significant experience processing wireless siting applications and several jurisdictions already have in place laws that require

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⁹ See *supra* paras. 141-46.

¹⁰ *Id.*

¹¹ See *supra* para. 147.

¹² See *supra* paras. **Error! Reference source not found.**-131.

¹³ See *supra* para. 127.

¹⁴ Smart Communities Comments at 81; see also Letter from Gerard Lavery Lederer, Counsel, Smart Communities, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, *Ex Parte* Submission at 33 (filed Sept. 19, 2018).

¹⁵ Letter from Nancy Werner, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 4-5 (filed Sept. 19, 2018).

¹⁶ See *supra* para. 106.

applications to be processed in less time than the Commission's new shot clocks. With the passage of time, sitting agencies have become more efficient in processing siting applications and this, in turn, should reduce any economic burden the Commission's new shot clock provisions have on them.

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

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

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

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

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

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

12. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.²¹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²² In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²³ A "small business

¹⁷ See *supra* paras. 105-112.

¹⁸ *Id.*

¹⁹ See *supra* paras. 116-131.

²⁰ 5 U.S.C. § 604(a)(3).

²¹ See 5 U.S.C. § 604(a)(3).

²² 5 U.S.C. § 601(6).

²³ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an

concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.²⁴

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

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

15. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”³⁰ U.S. Census Bureau data from the 2012 Census of Governments³¹ indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.³² Of this number there were

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agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²⁴ 15 U.S.C. § 632.

²⁵ See 5 U.S.C. § 601(3)-(6).

²⁶ See SBA, Office of Advocacy, “Frequently Asked Questions, Question 1—What is a small business?” https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

²⁷ See SBA, Office of Advocacy, “Frequently Asked Questions, Question 2- How many small businesses are there in the U.S.?” https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

²⁸ 5 U.S.C. § 601(4).

²⁹ Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than \$100,000. Of this number 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of \$50,000 or less on the IRS Form 990-N for Small Exempt Organizations and 261,784 nonprofits reporting total revenues of \$100,000 or less on some other version of the IRS Form 990 within 24 months of the August 2016 data release date. See <http://nccs.urban.org/sites/all/nccs-archive/html/tablewiz/tw.php> where the report showing this data can be generated by selecting the following data fields: Report: “The Number and Finances of All Registered 501(c) Nonprofits”; Show: “Registered Nonprofits”; By: “Total Revenue Level (years 1995, Aug to 2016, Aug)”; and For: “2016, Aug” then selecting “Show Results”.

³⁰ 5 U.S.C. § 601(5).

³¹ See 13 U.S.C. § 161. The Census of Government is conducted every five (5) years compiling data for years ending with “2” and “7”. See also Program Description Census of Government <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.CO G#>.

³² See U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012 - United States-States. <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG02.US01>. Local governmental jurisdictions are classified in two categories - General purpose governments (county, municipal and town or township) and Special purpose governments (special districts and independent school districts).

37, 132 General purpose governments (county³³, municipal and town or township³⁴) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts³⁵ and special districts³⁶) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000.³⁷ Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of “small governmental jurisdictions.”³⁸

16. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless Internet access, and wireless video services.³⁹ The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.⁴⁰ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.⁴¹ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.⁴² Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications

³³ See U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States. <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01>. There were 2,114 county governments with populations less than 50,000.

³⁴ See U.S. Census Bureau, 2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States—States. <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01>. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.

³⁵ See U.S. Census Bureau, 2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01>. There were 12,184 independent school districts with enrollment populations less than 50,000.

³⁶ See U.S. Census Bureau, 2012 Census of Governments, Special District Governments by Function and State: 2012 - United States-States. <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG09.US01>. The U.S. Census Bureau data did not provide a population breakout for special district governments.

³⁷ See U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States - <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01>; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States—States - <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01>; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01>. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments the majority of the 38, 266 special district governments have populations of less than 50,000.

³⁸ *Id.*

³⁹ U.S. Census Bureau, 2012 NAICS Definitions, “517210 Wireless Telecommunications Carriers (Except Satellite),” See <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&typib&id=ib.en/ECN.NAICS2012.517210>.

⁴⁰ 13 CFR § 121.201, NAICS Code 517210.

⁴¹ U.S. Census Bureau, 2012 *Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

⁴² *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

carriers (except satellite) are small entities.

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

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

19. *Public Safety Radio Licensees.* Public Safety Radio Pool licensees as a general matter, include police, fire, local government, forestry conservation, highway maintenance, and emergency

⁴³ See <http://wireless.fcc.gov/uls>. For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

⁴⁴ See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf.

⁴⁵ See *id.*

⁴⁶ 47 CFR Part 90.

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

⁴⁸ 13 CFR § 121.201, NAICS Code 517312.

⁴⁹ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210*, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

⁵⁰ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

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

20. *Private Land Mobile Radio Licensees.* Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically applicable to PLMR users. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications.⁵⁷ The appropriate size standard for this category under SBA rules is that such a business

⁵¹ See subparts A and B of Part 90 of the Commission's Rules, 47 CFR §§ 90.1-90.22. Police licensees serve state, county, and municipal enforcement through telephony (voice), telegraphy (code), and teletype and facsimile (printed material). Fire licensees are comprised of private volunteer or professional fire companies, as well as units under governmental control. Public Safety Radio Pool licensees also include state, county, or municipal entities that use radio for official purposes. State departments of conservation and private forest organizations comprise forestry service licensees that set up communications networks among fire lookout towers and ground crews. State and local governments are highway maintenance licensees that provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. Emergency medical licensees use these channels for emergency medical service communications related to the delivery of emergency medical treatment. Additional licensees include medical services, rescue organizations, veterinarians, persons with disabilities, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities.

⁵² See 13 CFR § 121.201, NAICS Code 517210.

⁵³ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210. https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

⁵⁴ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

⁵⁵ This figure was derived from Commission licensing records as of June 27, 2008. Licensing numbers change daily. We do not expect this number to be significantly smaller as of the date of this order. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of public safety licensees that have less than 1,500 employees.

⁵⁶ Based on an FCC Universal Licensing System search of March 29, 2017. Search parameters: Radio Service = PA—Public Safety 4940-4990 MHz Band; Authorization Type = Regular; Status = Active.

⁵⁷ U.S. Census Bureau, 2012 NAICS Definitions, "517210 Wireless Telecommunications Carriers (Except Satellite)," See <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en/ECN.NAICS2012.517210> (last visited Mar. 6, 2018).

is small if it has 1,500 or fewer employees.⁵⁸ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.⁵⁹ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.⁶⁰ Thus under this category and the associated size standard, the Commission estimates that the majority of PLMR Licensees are small entities.

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

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

23. The Commission's licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission's licensing database indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission's licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS

⁵⁸ See 13 CFR § 121.201, NAICS Code 517210.

⁵⁹ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210*. https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

⁶⁰ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

⁶¹ This figure was derived from Commission licensing records as of September 19, 2016. Licensing numbers change on a daily basis. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of PLMR licensees that have fewer than 1,500 employees.

⁶² This figure was derived from Commission licensing records as of August 16, 2013. Licensing numbers change daily. We do not expect this number to be significantly smaller as of the date of this order. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of licensees that have fewer than 1,500 employees.

⁶³ See *Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Rcd 11956, 12008 para. 123 (2000).

⁶⁴ *Id.*

⁶⁵ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 4, 1999).

licenses in 176 EAs was conducted.⁶⁶ Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

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

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

26. *BRS* - In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.⁷² The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent

⁶⁶ See *Multiple Address Systems Spectrum Auction Closes*, Public Notice, 16 FCC Rcd 21011 (2001).

⁶⁷ 13 CFR § 121.201, NAICS Code 517210.

⁶⁸ *Id.*

⁶⁹ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

⁷⁰ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

⁷¹ *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

⁷² 47 CFR § 21.961(b)(1).

BRS licensees do not meet the small business size standard).⁷³ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

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

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

⁷³ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

⁷⁴ *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

⁷⁵ *Id.* at 8296 para. 73.

⁷⁶ *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

⁷⁷ U.S. Census Bureau, 2017 NAICS Definitions, "517311 Wired Telecommunications Carriers," <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2017>.

⁷⁸ See 13 CFR § 121.201. The Wired Telecommunications Carrier category formerly used the NAICS code of 517110. As of 2017 the U.S. Census Bureau definition shows the NAICS code as 517311 for Wired Telecommunications Carriers. See, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

⁷⁹ See U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

⁸⁰ *Id.*

institutions and school districts, which are by statute defined as small businesses.⁸¹

29. *Location and Monitoring Service (LMS)*. LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$15 million.⁸² A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$3 million.⁸³ These definitions have been approved by the SBA.⁸⁴ An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

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

31. The Commission has estimated the number of licensed commercial television stations to be 1,377.⁹⁰ Of this total, 1,258 stations (or about 91 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on November 16, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 384.⁹¹ Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how

⁸¹ The term “small entity” within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

⁸² *Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Second Report and Order, 13 FCC Rcd 15182, 15192 para. 20 (1998); see also 47 CFR § 90.1103.

⁸³ *Id.*

⁸⁴ See Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Feb. 22, 1999).

⁸⁵ U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017>.

⁸⁶ *Id.*

⁸⁷ 13 CFR § 121.201; 2012 NAICS Code 515120.

⁸⁸ U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515120.

⁸⁹ *Id.*

⁹⁰ *Broadcast Station Totals as of June 30, 2018*, Press Release (MB, rel. Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals Press Release), <https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf>.

⁹¹ *Id.*

many such stations would qualify as small entities. There are also 2,300 low power television stations, including Class A stations (LPTV) and 3,681 TV translator stations.⁹² Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

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

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

34. According to Commission staff review of the BIA/Kelsey, LLC’s Publications, Inc. Media Access Pro Radio Database (BIA) as of January 2018, about 11,261 (or about 99.92 percent) of 11,270 commercial radio stations had revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition.⁹⁸ The Commission has estimated the number of licensed commercial AM radio stations to be 4,633 stations and the number of commercial FM radio stations to be 6,738, for a total number of 11,371.⁹⁹ We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,128.¹⁰⁰ Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

⁹² *Id.*

⁹³ See 13 CFR § 21.103(a)(1) “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.”

⁹⁴ U.S. Census Bureau, 2017 NAICS Definitions, “515112 Radio Stations,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.

⁹⁵ 13 CFR § 121.201, NAICS Code 515112.

⁹⁶ U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* NAICS Code 515112, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

⁹⁷ *Id.*

⁹⁸ BIA/Kelsey, MEDIA Access Pro Database (viewed Jan. 26, 2018).

⁹⁹ Broadcast Station Totals as of June 30, 2018, Press Release (MB Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals), <https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf>.

¹⁰⁰ *Id.*

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

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

37. *Multichannel Video Distribution and Data Service (MVDDS).* MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years.¹⁰⁹ These definitions were approved by the SBA.¹¹⁰ On January 27, 2004, the Commission

¹⁰¹ 13 CFR § 121.103(a)(1). "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both."

¹⁰² 13 CFR § 121.102(b).

¹⁰³ See, U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 13 CFR § 121.201, NAICS code 515112.

¹⁰⁷ U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 NAICS Code 515112*, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

¹⁰⁸ *Id.*

¹⁰⁹ *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadband USA, PDC Broadband Corporation, and Satellite Receivers.*

completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.¹¹¹ Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.¹¹²

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

39. *All Other Telecommunications.* The “All Other Telecommunications” category is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.¹¹⁷ This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.¹¹⁸ Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.¹¹⁹ The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less.¹²⁰ For this category, U.S. Census data for 2012 show that there

(Continued from previous page) _____

Ltd. to Provide A Fixed Service in the 12.2–12.7 GHz Band, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

¹¹⁰ See Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 13, 2002).

¹¹¹ See “*Multichannel Video Distribution and Data Service Spectrum Auction Closes; Winning Bidders Announced*,” Public Notice, 19 FCC Rcd 1834 (2004).

¹¹² See “*Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63*,” Public Notice, 20 FCC Rcd 19807 (2005).

¹¹³ U.S. Census Bureau, 2017 NAICS Definitions, “517410 Satellite Telecommunications,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517410&search=2017+NAICS+Search&search=2017>.

¹¹⁴ 13 CFR § 121.201, NAICS Code 517410.

¹¹⁵ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS Code 517410, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~517410.

¹¹⁶ *Id.*

¹¹⁷ See U.S. Census Bureau, 2017 NAICS Definitions, NAICS Code “517919 All Other Telecommunications,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 13 CFR § 121.201, NAICS Code 517919.

were 1,442 firms that operated for the entire year.¹²¹ Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million and 42 firms had annual receipts of \$25 million to \$49, 999,999.¹²² Thus, a majority of “All Other Telecommunications” firms potentially affected by our action can be considered small.

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

41. The Commission notes that the number of firms does not necessarily track the number of

¹²¹ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

¹²² *Id.*

¹²³ See 47 CFR Part 101, Subpart I.

¹²⁴ Persons eligible under parts 80 and 90 of the Commission’s rules can use Private-Operational Fixed Microwave services. See 47 CFR Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

¹²⁵ See 47 CFR Parts 74, 78 (governing Auxiliary Microwave Service) Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. Auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes TV pickup and CARS pickup, which relay signals from a remote location back to the studio.

¹²⁶ See 47 CFR §§ 101, 1001-101, 1017.

¹²⁷ See 47 CFR §§ 101, 101.501-101.538.

¹²⁸ See 47 CFR Part 101, Subpart N (reserved for Competitive bidding procedures for the 38.6-40 GHz Band).

¹²⁹ See *id.*

¹³⁰ See 47 CFR §§ 101, 101.1501-101.1527.

¹³¹ See 47 CFR §§ 101.533, 101.1017.

¹³² These statistics are based on a review of the Universal Licensing System on September 22, 2015.

¹³³ 13 CFR § 121.201.

¹³⁴ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series, “Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

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

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

43. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a "Constructed" status and 13,987 registration records reflecting a "Granted, Not Constructed" status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.¹³⁵ Regarding towers that do not require ASR registration, we do not collect information as to the number of such towers in use and therefore cannot estimate the number of tower owners that would be subject to the rules on which we seek comment. Moreover, the SBA has not developed a size standard for small businesses in the category "Tower Owners." Therefore, we are unable to determine the number of non-licensee tower owners that are small entities. We believe, however, that when all entities owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands. In addition, there may be other non-licensee owners of other wireless infrastructure, including Distributed Antenna Systems (DAS) and small cells that might be affected by the measures on which we seek comment. We do not have any basis for estimating the number of such non-licensee owners that are small entities.

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

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

45. The *Third Report and Order* does not establish any reporting, recordkeeping, or other

¹³⁵ We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

¹³⁶ 13 CFR § 121.201, NAICS Code 517919.

¹³⁷ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

¹³⁸ *Id.*

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

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

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

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

48. The steps taken by the Commission in the *Third Report and Order* eliminate regulatory burdens for small entities as well as large companies that are involved with the deployment of personal wireless services infrastructure. By establishing shot clocks and guidance on injunctive relief for personal wireless services infrastructure deployments, the Commission has standardized and streamlined the permitting process. These changes will significantly minimize the economic burden of the siting process on all entities, including small entities, involved in deploying personal wireless services infrastructure. The record shows that permitting delays imposes significant economic and financial burdens on companies with pending wireless infrastructure permits. Eliminating permitting delays will remove the associated cost burdens and enabling significant public interest benefits by speeding up the deployment of personal wireless services and infrastructure. In addition, siting agencies will be able to utilize the efficiencies that they have gained over the years processing siting applications to minimize financial impacts.

49. The Commission considered but did not adopt proposals by commenters to issue "Best Practices" or "Recommended Practices,"¹⁴² and to develop an informal dispute resolution process and

¹³⁹ See *supra* para. 144.

¹⁴⁰ See *supra* para. 110.

¹⁴¹ 5 U.S.C. § 603(c)(1)-(4).

¹⁴² KS Rep. Sloan Comments at 2; Nokia Comments at 10.

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

Report to Congress

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

¹⁴³ NATOA *et al.* Comments at 16-17.

¹⁴⁴ *See supra* para. 131.

¹⁴⁵ 5 U.S.C. § 801(a)(1)(A).

¹⁴⁶ 5 U.S.C. § 604(b).

**STATEMENT OF
CHAIRMAN AJIT PAI**

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

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

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

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

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

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

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

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

To be sure, there are some local governments that don't like this *Order*. They would like to continue extracting as much money as possible in fees from the private sector and forcing companies to navigate a maze of regulatory hurdles in order to deploy wireless infrastructure. But these actions are not only unlawful, they're also short-sighted. They slow the construction of 5G networks and will delay if not prevent the benefits of 5G from reaching American consumers. And let's also be clear about one thing: When you raise the cost of deploying wireless infrastructure, it is those who live in areas where the

investment case is the most marginal—rural areas or lower-income urban areas—who are most at risk of losing out. And I don't want 5G to widen the digital divide; I want 5G to help close that divide.

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

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

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

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

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

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

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

Finally, I would have liked today's item to be broader and cover the remaining infrastructure issues in the record. First, the Commission's new interpretation of sections 253 and 332 applies beyond small cells. While our focus has been on these newer technologies, there needs to be a recognition that macro towers will continue to play a crucial role in wireless networks. One tower provider states that "[m]acro cell sites will continue to be a central component of wireless infrastructure . . .," because 80 [percent] of the population lives in suburban or rural areas where "macro sites are the most efficient way

to transmit wireless signals.”¹ Further, many of the interpretations in today’s item apply not only to these macro towers, but also to other telecommunications services, including those provided by traditional wireline carriers and potentially cable companies.

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

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

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

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

With this, I approve.

¹ American Tower Ex Parte Letter, WT Docket No. 17-79, n.6 (Aug. 10, 2018).

**STATEMENT OF
COMMISSIONER BRENDAN CARR**

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

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

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

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

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

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

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

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

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

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

EXHIBIT 17

ZDO-276; FY 2020 Minor and Time Sensitive Amendments

Page 111 of 116

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

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

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

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

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

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

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

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

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

More broadly, our decision today has benefited from the diverse views expressed by a range of stakeholders. On the local government side, I met with mayors, city planners, and other officials in their home communities and learned from their perspectives. They pushed back on the proposed “deemed

granted” remedy, on regulating rents on their property outside of rights-of-way, and on limits to reasonable aesthetic reviews. They reminded me that they’re the ones that get pulled aside at the grocery store when an unsightly small cell goes up. Their views carried the day on all of those points. And our approach respects the compromises reached in state legislatures around the country by not preempting nearly any of the provisions in the 20 state level small cells bills.

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

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

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

* * *

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

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

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

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

I believed that then. I still believe it now.

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

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

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

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

In addition, this decision irresponsibly interferes with existing agreements and ongoing deployment across the country. There are thousands of cities and towns with agreements for infrastructure deployment—including 5G wireless facilities—that were negotiated in good faith. So

many of them could be torn apart by our actions here. If we want to encourage investment, upending commitments made in binding contracts is a curious way to go.

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

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

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

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

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

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

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

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

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

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

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



MEMORANDUM

TO: Planning Commission

FROM: Glen Hamburg, Senior Planner

DATE: June 30, 2020

RE: File ZDO-276, *Minor and Time Sensitive Comprehensive Plan and Zoning and Development Ordinance Amendments (FY 2020)*

The Planning Commission held a public hearing on ZDO-276 on June 22, 2020. This memorandum responds to four questions Commissioners had during the hearing, and highlights certain minor changes Staff has made to the proposed amendments to Comprehensive Plan Chapter 4 and ZDO Sections 401, 406, 407, and 835.

Questions from June 22 Public Hearing:

1. *What can we learn from how the City of San Diego has regulated small wireless facilities?*

The City of San Diego is an example of a large jurisdiction that already requires wireless facilities match the color of portions of other structures they are attached to, as proposed for Clackamas County in ZDO-276, without an exception for “technical feasibility”.

The City’s February 2019 *Wireless Communication Facility (WCF) Guidelines* (Attachment F) prescribe aesthetic requirements for wireless facilities depending on whether they are on roofs or poles, on light fixtures, attached to buildings, or concealed by faux trees or architectural elements. The Guidelines do not provide an exception for “technical feasibility”. Rather, the Guidelines include photographs of existing wireless facilities showing that it is possible to for the facilities to be in a variety of colors, as well as textures.

In certain cases, the City of San Diego Guidelines require wireless facilities to be “painted” the “same color” of the structure they’re attached to, without any allowance for other covering/shielding methods or other colors that are “similar” to but not the same as those of the structure. The standards for Clackamas County as initially proposed in the draft amendments to ZDO Section 835, *Wireless Telecommunication Facilities*, in Attachment A are already more flexible to wireless service providers than San Diego’s Guidelines because they do not necessarily require that the wireless facilities be “painted” at all. Indeed, the County’s draft amendments allow the facilities to be covered in a film or made of any material that matches the color of the portion of the structure they’re mounted on, as

suggested by representatives of AT&T and others in the industry out of a concern that some paints could be technologically problematic.

Staff has included in Attachment E updated proposed amendments to Section 835 to provide further flexibility to wireless providers. The updated amendments would require small wireless facilities to be the same *or similar* color or colors as the portions of a building they're attached to or mounted on.

2. *Could we regulate small wireless facility colors according to technical feasibility or the market availability of certain products?*

Staff does not believe it would be practical or consistent with the FCC mandates to have ZDO standards that require small wireless facilities be certain colors only to the extent a service provider says those colors are “technically feasible” or “available” to them or their chosen suppliers, as those terms are undefined and subjective and would require Planning Staff to conduct, document, and defend an assessment of the technical feasibility and market availability. Applications with subjective standards and approval criteria warrant public notice and opportunity for appeal, which could not occur within the approval “shot clocks” required by the FCC.

3. *Are there opportunities for allowing the manufacture of products retailed on site other than just edible or drinkable products in the C-2, C-3, CC, OC, RTC, and SCMU Districts?*

Yes, but given the scope of this project and the current interests of the Oak Grove community, Staff recommends expanding the allowed uses in these zoning districts at this time only for the manufacture of edible and drinkable products retailed on site.

The C-3, CC, OC, and SCMU Districts already allow some manufacturing, including the mechanical, physical, or chemical transformation of materials, substances, or components into new products, and the assembly of component parts, regardless of whether the manufactured goods are retailed on site, provided the manufacturing operation doesn't include the primary processing of raw materials. This existing allowed manufacturing use in these four zoning districts conceivably includes making painting canvases, furniture, apparel, sports equipment, and mechanical devices. The prohibition on the “primary processing of raw materials”, however, effectively precludes bakeries that process wheat in to flour or breweries that process fresh hops in to beer.

Currently, no manufacturing is allowed in the Community Commercial (C-2 and RTC) zoning districts, whether or not the manufacturing includes the primary processing of raw materials or whether the goods produced are retailed on the same site.

The C-2, C-3, CC, OC, RTC, and SCMU Districts do already allow commercial art studios and commercial craft studios.

Text amendments to newly allow uses such brewpubs in the Community Commercial zoning districts was added to the 2018-2020 Long-Range Planning Work Program, following the request of Oak Grove community members and their representatives. For the reasons outlined in the Staff Report, Staff has proposed allowing the new use in the C-3, CC, OC, and SCMU Districts as well.

Staff has been informed that the Board of Historic Downtown Oak Grove (HDOG) met following the Planning Commission's June 22 hearing to discuss allowing in the C-2 and C-3 Districts the manufacture (and wholesale) of goods other than edible or drinkable products, and that the Board ultimately decided to stick with supporting uses like bakeries and brewpubs (i.e., manufacturing of edible or drinkable products) for the time being. Staff has not received a request to newly allow the manufacturing of any other products in the C-2, C-3, CC, OC, RTC, or SCMU Districts.

Manufacturing and wholesaling of other goods, such as apparel, fertilizer, furniture, automotive parts, sports equipment, soap/detergent, paper, cement, or electronics/robotics may or may not comply with the Comprehensive Plan goals and policies for the Community Commercial and other commercial zoning districts, and may or may not produce land use impacts that are disruptive to these zones' neighborhoods. Staff has not conducted an analysis of these other uses, considering the Work Program's direction for this project to be concerned with minor and time-sensitive amendments that are necessary to comply with governmental mandates and that require only minimal analysis.

Consideration of allowing additional manufacturing opportunities in commercial zoning districts could be added to the next work program.

4. Was there error in the draft amendments to ZDO Section 401 with its reference to Subsection 401.05(G)(4) in Table 401-1?

Yes. The draft amendments to Section 401 dated May 18, 2020, and included in Attachment A would have required that renewable energy facilities as defined in ORS 215.446 comply with Subsection 401.05(G)(4). This was an error, which has been corrected in the draft amendments dated June 30, 2020, and included in Attachment E.

Other Changes to Proposed Amendments (Attachment E):

In addition to changing the proposed amendments to Section 835 in order to allow small wireless facilities to be a color/colors the same as *or similar to* the portions of a building they're attached to, as mentioned above, Attachment E includes minor revisions to amendments to the following:

- Comprehensive Plan Chapter 4, *Land Uses*, in order to clarify that the manufacturing of edible or drinkable products would be permitted in General Commercial areas, even if they involve the processing of raw materials;
- ZDO Sections 401, *Exclusive Farm Use District (EFU)*, 406, *Timber District (TBR)*, and 407, *AG/Forest District (AG/F)*, in order to clarify that new uses and land divisions optionally allowed by the County would not be permitted by state law in urban or rural reserves; and
- Section 401, in order to align replacement dwelling standards and criteria with the wording of recently adopted Oregon Administrative Rules and to clarify that certain secondary school expansions require a Type II land use application.

Memo

To: Planning Commission

From: Karen Buehrig, Long Range Planning Manager

Re: Proposed Changes to the Fee In Lieu of Construction Language in ZDO Section 1007

Date: July 6, 2020

The original Fee In Lieu of Construction (FILO) provisions, which took effect in January 2008, were created working closely with the Pedestrian and Bikeway Advisory Committee and through other public engagement methods, such as open houses. The primary purpose of FILO is to address the issue of disconnected sidewalks being constructed in locations where few sidewalks currently exist. It also allows for the accumulation of funds that can be spent on the construction of sidewalks in locations where there are gaps.

ZDO-276 proposes amendments to these original FILO provisions to address issues that have arisen over the past 12 years, as identified by Development Engineering. Development Engineering, located in the Transportation Engineering Division, is the staff that determines if FILO is the best approach for a project. They follow the guidelines within ZDO Section 1007 when reviewing whether FILO is appropriate for an application.

At the June 22, 2020, Planning Commission hearing on ZDO-276, the Planning Commission had some additional questions about the FILO program and the related proposed amendments. Below are responses to those questions.

1. Who determines what specific projects the money collected from FILO is put towards?

Transportation Planning staff works together with Transportation Maintenance and Development Engineering to match opportunity with need. Project selection is dependent on the amount of funds in the FILO reserves. These projects are smaller than the projects in our Capital Improvement Plan, and we have recently been selecting projects identified through the Safe Route to Schools plans, as well as projects brought to our attention by local community groups.

There have been three projects constructed using FILO funds:

1. Completion of sidewalk gap on Sieben Parkway in Sunnyside Village near Library (2012)
2. Kellogg-Risley sidewalk project near Concord School (2013)
3. Torbank sidewalk connecting to Oak Grove Elementary School (2019)

2. What are the criteria used to decide which projects are funded with the collected FILO?

At this point, there are not specific criteria, but project selection is guided by the amount of funds available, the potential to leverage other funds, where investments have been made in the past, and where there is a clear connection to use.

3. How is an “equity lens” used to decide which projects are funded, so that certain areas/neighborhoods are not left without needed frontage improvements while others have their road frontages improved?

FILO funds slowly accumulate over time and the amount of money available is dependent on development. We have only been able to construct one project every five years or so; therefore, we have not established a detailed project selection process.

4. Amendments proposed to Subsection 1007.08(A)(3) reference certain distances (e.g., 100 feet, 200 feet). How were these distances determined?

There are two distance-related opportunities for FILO in the proposed amendments. The first is in Subsection 1007.08(A)(3)(d), which would allow FILO to be paid if the required improvements would be located on a road where a sidewalk or pathway does not exist within 200 feet. This provision and its particular distance is in the ZDO language already and is simply being moved. For reference, a typical city block in Portland is 400 feet. When the FILO provisions were created, 200 feet was the gap that was considered reasonable to have the applicant achieve a connection and complete a gap.

The second distance-related provision is in Subsection 1007.08(A)(3)(e). This provision would allow FILO to be paid when the improvements are located on public street frontage that is 100 feet or less and there is no existing sidewalk or pathway that the new improvements would connect to. This provision would allow for a property that is narrow, or without much street frontage, to not have to construct a sidewalk because it would not connect to anything, regardless of whether it is within 200 feet of an existing sidewalk. Requiring sidewalk construction for the small developers creates issues at times and Development Engineering was interested in adding this flexibility.

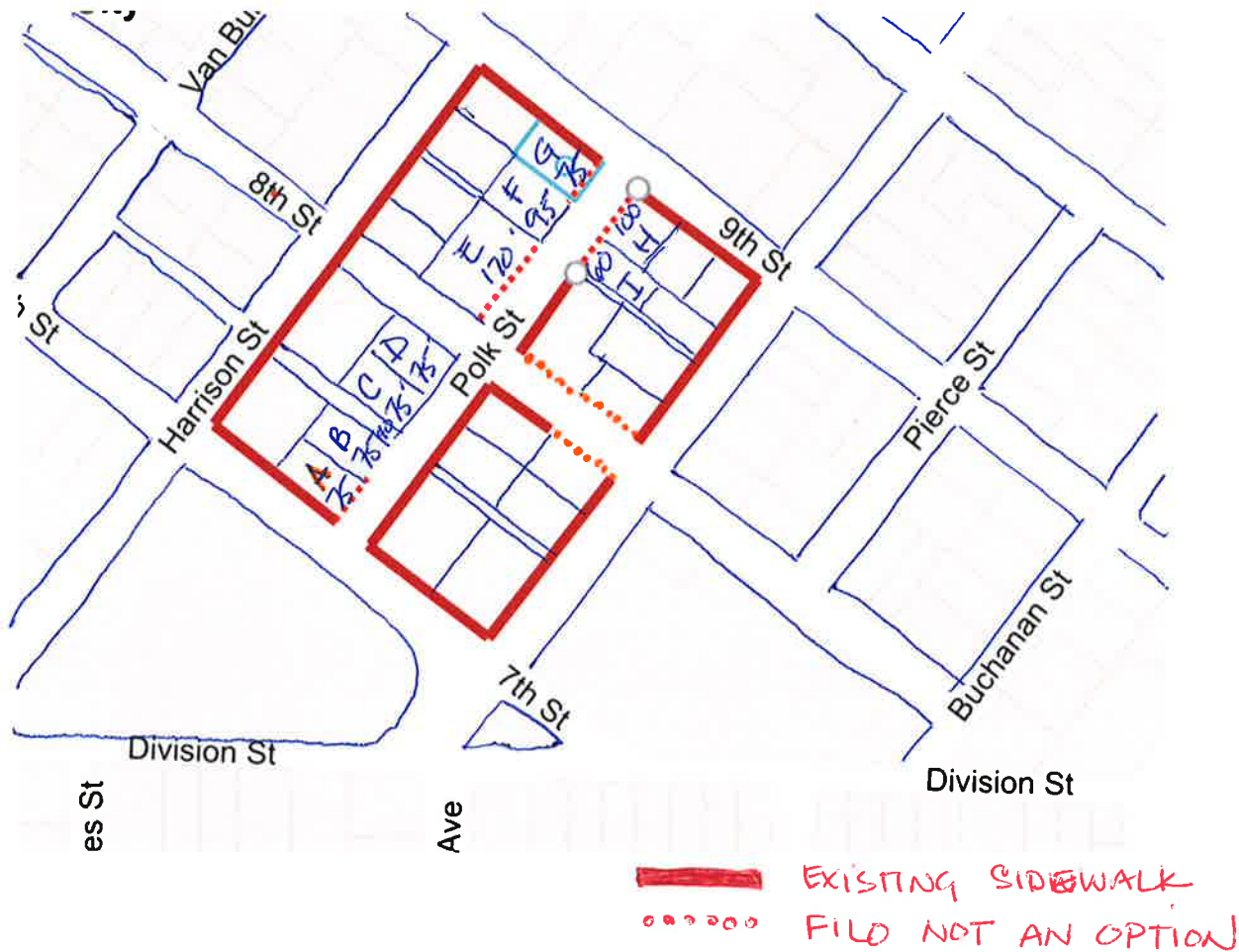
5. How is stormwater retention accounted for in the FILO fee?

Engineer's estimates for FILO are reviewed by staff to verify that the fee paid would cover most of what it would cost the County to complete the work. Staff has developed standard unit costs for FILO estimates that were derived from Capital Improvement Plan estimates and engineer's estimates that had been provided for development bonding purposes.

From inception of the FILO provisions in the ZDO, the cost of stormwater infrastructure has not been included in FILO estimates. This was likely due to the variation in what stormwater facilities would be needed on any given frontage. The idea of a linear foot cost for a typical storm system, including stormwater pipe and catch basins, has been discussed and will be considered in the future. For reference, the current FILO estimates include costs for pavement widening (including AC, rock, and geotextile fabric), a six-inch curb, a five-foot-wide landscape strip with street trees, a five- to seven-foot-wide sidewalk, and ADA curb ramps where applicable.

Stormwater treatments, such as vegetated water quality swales, are allowed to be constructed as long as ongoing maintenance is addressed. Within Water Environment Service's district, WES will maintain the swales. Swales located in the Oak Lodge Water Services District, however, they are not maintained by the District; rather, private maintenance agreements are required to maintain them. Outside of a stormwater district, County Transportation Maintenance cannot maintain these facilities; rather, again, private maintenance agreements are required to maintain them. The cost of water quality swales are not addressed in FILO estimates, mainly because they are not a standard approach and, in some cases, the soil may not be suitable for that type of facility. It would seem that a standard stormwater facility would make sense for FILO estimates since the funds will be used somewhere else, and it is unknown what facility will ultimately be constructed with the funds.

Diagram demonstrating how the provisions in 1007.08 3(d) and (e) are applied



1007.08 FEE IN LIEU OF CONSTRUCTION

3. Payment of the fee is deemed by the Department of Transportation and Development to be an acceptable alternative to construction of the requirements for at least one of the following reasons:

- d. The improvements are located on a road where a sidewalk or pathway does not exist within 200 feet of the required improvements; or
- e. The improvements are located on public street frontage that is 100 feet or less and there is no existing sidewalk or pathway that the new improvements would connect to.

Notes

1. Lots A, G, H, and I would not qualify for FILO because they are adjacent to existing sidewalk.
2. Lot E would not qualify for FILO because its Frontage is greater than 100 feet and it is within 200' of an existing sidewalk.
3. Lots C, D and F would all qualify for FILO since they are not directly adjacent to existing sidewalk and their frontage is less than 100'
4. If the new provision (e) was not added, Lots B and F would not qualify for FILO because there would only be the 200' requirement and not the lot frontage requirement.

THE CITY OF SAN DIEGO

Wireless Communication Facility (WCF) Guidelines

FEBRUARY 2019

Please note: The Wireless Ordinance (SDMC 141.0420) is currently being updated, which will soon require further changes to these Guidelines.



EXHIBIT 20

ZDO-276: FY 2020 Minor and Time Sensitive Amendments

Page 1 of 56

Table of Contents

- Introduction 3
 - Council Policy 600-43 3
 - General Plan - Wireless Facilities 3
- Federal Regulations 4
 - Telecommunications Act of 1996 4
 - Spectrum Act 4
 - FCC Declaratory Ruling and Third Report and Order – “Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment” 5
- State Regulations..... 5
 - AB 57 (2015)..... 5
- Shot Clocks and Processing Timelines 5
- Shot Clock Processing Standards for WCF projects..... 6
- Voluntary Preliminary Review..... 7
- SDMC 141.0420 - WCF Regulations..... 7
 - Design Requirements of SDMC 141.0420 7
- Design Requirements and Types of WCFs 8
 - Design Requirements for all WCFs 8
 - 1. Integration (Concealment) is required 8
 - 2. Concealment, Expiration Dates and Completely Concealed and Integrated Facilities (CCIFs):..... 11
 - 3. Landscaping 13
 - 4. Equipment, Generators, and Access..... 14
 - 5. Cabling and Cable Trays 15
 - 6. Associated WCF Components 16
 - 7. Mounting Hardware and Fasteners 16
 - 8. Fiberglass-Reinforced Plastic Installations 17
 - 9. Radio Frequency Protective Devices..... 17
 - 10. Unified solutions are desired when multiple carriers are present..... 18
 - 11. Emerging and future technologies..... 18
 - 12. Other Design Considerations 19
- WCFs that Comply with SDMC 141.0420, and their Design Requirements 20
 - 1. Architecturally-Designed Stand-Alone Towers 21
 - 2. Athletic Field Lights (AFL) 22
 - 3. Façade-Concealed Antennas 23

4. Façade-Mounted Antennas	24
5. Faux Architectural Elements.....	26
6. Faux Buildings	27
7. Faux Natural Elements	28
8. Flagpoles and similar vertical elements.....	31
9. Parking Lot or Pedestrian Path Light Standards.....	32
10. Right-of-way installations – Non-Small Cell.....	33
11. Rooftop Concealment	35
12. Small Cell WCFs (SC-WCFs)	36
13. Temporary Sites	43
WCFs that do not comply with Regulations (Previously Conforming Sites).....	44
14. Faux Palm Tree.....	45
15. Monopole, lattice tower, “Popsicle Sticks” or similar, whether standing alone or located on a building.	47
16. Unconcealed rooftop- or façade-mounted facilities or similar	48
17. Unconcealed or under-concealed implementations of otherwise lawful facilities.....	49
Administrative/Processing Requirements	50
1. Substantial Conformance Review.....	50
2. Spectrum Act	50
3. WCFs are iterative, which means plans require additional information	51
4. Annual Site Listing.....	52
5. Properties with Existing Code Violations	52
6. Plans should match what is constructed	53
Glossary	54

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February 2019: Minor corrections and clarifications, including additional web links

Introduction

In the City of San Diego, Wireless Communication Facilities (WCFs) are defined as the antennas, support structures, and other equipment or apparatus necessary for providing personal wireless services and information services. The Telecom Review Section of the Project Submittal and Management Division of Development Services processes WCF applications, from the entitlement and discretionary review process to building permit issuance and inspection. The Development Services [Wireless Communication Facilities web page](#) provides links to additional reference material.

[Council Policy 600-43](#) and the [City's General Plan](#) (Urban Design Element UD-A.15) provide guidance on the design and placement of WCFs within the City. San Diego Municipal Code (SDMC) Section [141.0420](#), "Wireless Communication Facility (WCF) Regulations," regulates WCFs, and [Information Bulletin 536](#) provides information on the procedures and submittal requirements for WCF permit applications. Other state and federal laws and policies, including guidance from the Federal Communications Commission (FCC), also govern WCF placement and development in the City.

These Wireless Communication Facility Guidelines outline the processing and design requirements the City has instituted to implement the above policies and regulations. These guidelines outline clear, reasonable, and predictable criteria to assess and process applications quickly and consistently. They establish a framework of opportunities for creating desirable WCFs in the City.

Council Policy 600-43

[Council Policy 600-43](#) provides guidelines for four locational categories that correspond to the Process levels contained within the Wireless Communication Facilities Regulations. The purpose of this policy is to provide comprehensive guidelines for the review and processing of applications for the placement and design of Wireless Communication Facilities in accordance with the City of San Diego land use regulations. These guidelines are intended to prescribe clear, reasonable, and predictable criteria to assess and process applications in a consistent and expeditious manner, while reducing visual and land use impacts associated with Wireless Communication Facilities.

The Council Policy establishes a hierarchy from most preferred location to least preferred location, encouraging the placement of WCFs in commercial and industrial zones. Higher preference sites have lower decision processes: WCFs in commercial and industrial zones are reviewed under Process One, a staff-level decision. WCFs in parks, open space, or residential zones are reviewed under Process Four, with permits decided by the Planning Commission.

General Plan - Wireless Facilities

The City of San Diego's General Plan addresses Wireless Communication Facilities in section UD-A.15, which requires proposed WCFs to:

- *Minimize the visual impact of wireless facilities.*

- *Conceal wireless facilities in existing structures when possible, otherwise use camouflage and screening techniques to hide or blend them into the surrounding area.*
- *Design facilities to be aesthetically pleasing and respectful of the neighborhood context.*
- *Conceal mechanical equipment and devices associated with wireless facilities in underground vaults or unobtrusive structures.*

Federal Regulations

Telecommunications Act of 1996

Section 704 of the Telecommunications Act of 1996 guides the City's review of WCFs. The City's review and approval or denial of WCF applications "shall not unreasonably discriminate among providers of functionally equivalent services," and "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

The Telecommunications Act requires the City to act on a permit application request within "a reasonable period of time", and states that any decision to deny a request to "place, construct, or modify [a WCF] shall be in writing and supported by substantial evidence contained in the written record."

The Telecommunications Act also prohibits the City from regulating the "placement, construction, and modification of [WCFs] on the basis of the environmental effects of Radio Frequency (RF) emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions." The City requires that WCF applications provide a report, prepared by a qualified RF engineer, demonstrating that the WCF will comply with the FCC RF Guidelines.

In conjunction with this act and other regulations, such as the California Permit Streamlining Act, the FCC's Shot Clock Ruling, and the California Environmental Quality Act (CEQA), the City processes WCF applications in an expeditious manner in compliance with all applicable regulations.

Spectrum Act

Section 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 (Spectrum Act) states that "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" and describes the required timeline (60 days). The associated [FCC Report and Order 14-153](#) provides guidance on what may be considered an "eligible facilities request" and what constitutes "substantial change". The City reviews each Spectrum Act application to determine if it qualifies as an eligible facilities request.

FCC Declaratory Ruling and Third Report and Order – “Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment”

The FCC adopted [Report and Order FCC 18-133](#) (the “Small Cell Order”) to accelerate the deployment of the next generation of wireless technology (known as 5G) using small cell antennas. Such antennas are typically placed on City streetlights or traffic signals in the right-of-way, although not exclusively. The Small Cell Order requires local jurisdictions to process applications for collocation of small cells on existing structures within 60 days and on new structures within 90 days. Right-of-way applications on City assets are reviewed by staff and processed concurrently with a Master Use and Occupancy Permit (MUOP), a Master Structural Permit, and a Right-of-Way Permit. Applications may also be made for new poles and/or on private property, which may require discretionary review.

This Report and Order also codifies processing timelines for non-small cell WCFs required by other federal policies: 90 days for existing structures, and 150 days for new structures. See [Information Bulletin 545](#) for more information on small cells.

State Regulations

AB 57 (2015)

AB 57 added [Section 65964.1](#) to the Government Code, which “deems approved” applications for most types of wireless sites if the City does not act on an application within the FCC’s “shot clock” timeframe if the applicant has provided all required notices.

Shot Clocks and Processing Timelines

The above federal laws and policies provide shot clocks for all types of WCF approved by the City of San Diego. The City must decide on a project within the shot clock timeframes outlined below. Shot clocks are tolled while the City awaits resubmittal.

Shot clocks for WCF projects	
Project Type	Shot Clock
Spectrum Act Projects	60 Days
SWF (Small Wireless Facility) on an existing structure	60 Days
SWF on a new structure	90 Days
Non-SWF on an existing structure	90 Days
Non-SWF on a new structure	150 Days

WCF applications have historically been a partnership between the applicant and City staff. The applicant submits a project, and the staff works with the applicant to ensure the project meets the requirements of City regulations and policies. This continues until all issues are resolved and the project can move forward.

The shot clocks codified by the Third Report and Order force the City to act quickly. This is good for the wireless industry, but it also removes any flexibility the City has to “partner” with the applicant during project review – there is no longer time to do so. Because this “partnership” often serves as a substitute for due diligence, applicants must ensure that such research is done prior to submittal.

The Spectrum Act requires the City to approve any eligible facilities request within 60 days. All other shot clocks do not require the City to approve an application, only to act on it. For non-Spectrum Act projects, the City needs a complete application early in the process to facilitate project approval. Otherwise, staff will be forced to deny an incomplete application to meet shot clock requirements. It is the applicant’s responsibility to ensure that they submit all the information that the City needs to decide on a project. This includes (but is not limited to) noise reports, biology reports, slope analyses, evidence that the project complies with the Land Development Code and engineering standards, requirements of these guidelines, etc.

Shot Clock Processing Standards for WCF projects

Non-Spectrum Act Projects:

To meet shot clock requirements, the City requires the concurrent submittal of zoning approval and construction permits at the same time. If the applicant does not want this, they must toll the shot clock. Tolling applies to the whole project, including any ministerial construction permits. Tolloed projects will still be processed diligently.

The City will issue one set of corrections; if they are all not addressed by the second review, the applicant must toll the shot clock.

If not tolled after the second review, all Process One and Two applications will be denied and fees forfeited. For Process Three through Five applications, a hearing will automatically be scheduled when the project is resubmitted. Failure to toll will result in a recommendation of denial at this hearing, and fees forfeited.

See [Information Bulletin 536](#) for more information.

Spectrum Act Projects:

The Third Report and Order does not affect the City’s Spectrum Act process or the Spectrum Act shot clock. See [Information Bulletin 536](#) for more information.

Small Cells:

See the [Information Bulletin 545](#) for more information.

Voluntary Preliminary Review

Because shot clocks greatly reduce staff's ability to help a submitted project through the process, the City strongly encourages applicants to submit voluntary preliminary review applications for any WCF project. Preliminary reviews are not a project and are not subject to any shot clock. Staff can then work with an applicant to address issues prior to submittal.

SDMC 141.0420 - WCF Regulations

[SDMC 141.0420, "Wireless Communication Facility Regulations"](#), outlines requirements for the placement of WCFs in the City of San Diego in support of the categories outlined in Council Policy 600-43. The zone, site characteristics, and development proposal will determine the permits required for a WCF.

In addition to SDMC 141.0420, WCFs may require other permits based on their location or project characteristics. For example, project sites containing Environmentally Sensitive Lands may require a Site Development Permit (SDP), projects in the Coastal Overlay Zone may require a Coastal Development Permit (CDP), and projects that deviate from the development regulations or WCF Guidelines may require a Planned Development Permit (PDP). All permits are consolidated and processed according to the highest process of any required permit.

The WCF Guidelines should be used in conjunction with the WCF Regulations. The Guidelines are a tool for processing WCF applications. They do not supersede the regulations found in the SDMC. They provide guidance to staff and stakeholders involved in the design and development of WCFs in the City of San Diego.

Design Requirements of SDMC 141.0420

Section 141.0420(g) of the SDMC specifies regulations which apply to all WCFs. The first four design requirements are applicable to all WCFs, and they are the foundation for these guidelines:

1. WCFs shall utilize the smallest, least visually intrusive antennas, components, and other necessary equipment.
2. The applicant shall use all reasonable means to conceal or minimize the visual impacts of the WCF through integration. Integration with existing structures or among other existing uses shall be accomplished through the use of architecture, landscape, and siting solutions.
3. The wireless communication facility's equipment shall be located within an existing building envelope, whenever possible. If a new equipment enclosure is necessary, it shall be of a height minimally necessary to accommodate the equipment, not to exceed 250 square feet, unless a Process Two Neighborhood Development Permit is granted in accordance with Section 126.0402.
4. Overhead wires connecting the antennas to the equipment are not permitted.

Other subsections of SDMC 141.0420(g) apply only to specific types of WCF, and are discussed later in these guidelines.

Design Requirements and Types of WCFs

Design Requirements for all WCFs

To provide guidance on the implementation of the Wireless Regulations, the following are general design guidelines for all WCF installations.

1. **Integration (Concealment) is required** – Integration is how each part of a site fits together. Well-integrated sites have WCFs that are as concealed as possible on the site. Concealment is the level to which the components of a WCF are hidden from view. It is a function of the appearance, placement, context, and level of visibility of a WCF. Depending on the site, a change in any of these elements may defeat concealment.

New WCFs and non-Spectrum Act modifications should be integrated (concealed) into a site. Spectrum Act projects may not defeat existing concealment.

Because they do not represent the smallest, least visually intrusive antennas, components, and other necessary equipment, non-integrated (unconcealed) installations are discouraged in the City of San Diego. There are a wide range of acceptable integration/concealment methods. The default level of concealment for a previously-approved site is its last approved Exhibit A. Every aspect of a site is considered an element of concealment including (but not limited to) the dimensions, build and scale, color, tree shape, branch count, materials and texture. Future modifications to a site must not defeat concealment.

A WCF's size, shape, number of antennas, dimensions, color, texture, offset, azimuth, height, location on a site and location on a structure all contribute to how concealed the site is. A change in any of these elements that makes the site more visible than it was previously is defeating concealment.

To judge how well-integrated a site is (how well it is concealed), we rely on three principles. Each influences the other, and together they determine how integrated a site is:



Figure 1: A well-concealed WCF. Antennas are architecturally integrated into the building.

- a. **The Principle of Balance** – All visible elements should have symmetry in all visible dimensions. Antennas and concealment elements should not dominate the element they are placed on.

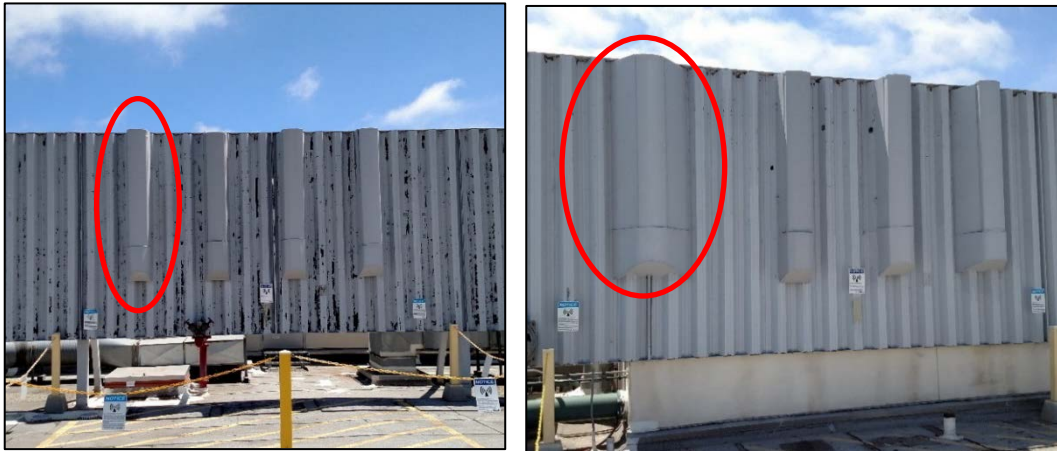


Figure 2: One sector of this site is balanced...and one sector is not.

Examples of the Principle of Balance include, but are not limited to:

- i. Visible antennas should be (or have the appearance of being) equal in length, width, and depth and should be evenly spaced on their support structure.
- ii. Visible equipment should be grouped in like size and should also be evenly spaced on the support structure in a way that compliments the symmetry of antennas.
- iii. Visibly-placed concealment elements (items that conceal WCF elements but are themselves visible) should also observe this principle. This may require the bilateral symmetry of faux architectural elements or screen boxes, such as adding cupolas or faux chimneys to both sides of a façade instead of one, or raising parapets at two corners of a façade instead of one, etc.

Antennas and shrouds should not dominate the element they are placed on. This is especially relevant to vertical elements such as light standards, flagpoles, and similar fixtures.

Depending on the context, balance/symmetry may NOT be desired in certain situations. However, it should always be assumed that symmetry is necessary, and the greatest possible amount of symmetry/balance should always be provided.

A balanced site will appear uniform and is considered less visually obtrusive than one that lacks balance. Bringing a site out of balance reduces its level of concealment.

- b. **The Principle of Context** – Specific situations require specific design solutions. What integrates well into one site may not be appropriate for another. Select the best design solution based on site and project characteristics.

Examples of the Principle of Context include, but are not limited to:

- i. A faux tree may be appropriate if there are other mature trees of a similar height in the vicinity, but not if there aren't.
- ii. A cupola may be appropriate for certain styles of architecture, but not for others.
- iii. Façade-mounted antennas may be appropriate for certain styles of architecture, but not for others.
- iv. Concealment behind a parapet is good, but designs that only raise part of the parapet may not be.
- v. A faux saguaro may conceal antennas well, but may not work in a park.
- vi. A faux chimney may look good, but too many of them on a building may not.
- vii. An eight-foot-tall rooftop box may look appropriate on a three-story industrial building, but not on a one-story liquor store.
- viii. A rustic water tower conceals antennas well, but may not be appropriate at Mission Valley Center.

A WCF that fits into its context (a faux tree within an area with many trees) is more integrated (concealed) than one that doesn't (a faux tree in the middle of a non-landscaped parking lot). Changing the context of a site can change its level of concealment.

- c. **The Principle of Least Visibility:** The least visible solution is best. Placement on the site should be as minimally visible as possible.

Examples of the Principle of Least Visibility include, but are not limited to:

- i. WCFs should not be located between buildings and the street. They should be concealed on existing buildings, or ground mounted adjacent to the side or rear of existing buildings.
- ii. Unless a site is architecturally integrated, visibility of WCF elements from the public right-of-way is not desirable, regardless of level of concealment.
- iii. Façade-concealed antennas are preferred over façade-mounted antennas.

- iv. Integration into architectural elements is preferred over covering antennas with something (i.e., appearing flush with a wall or hiding in a cupola is better than concealment behind a façade-mounted box). Design elements of existing façades should be replicated.
- v. Concealment within a structure is preferred over visible mounting (façade mounts or faux trees).
- vi. Covering or painting the antennas doesn't mean they're well-concealed. Concealment methods can themselves be visible (antenna skirts, FRP boxes, etc.). For example, even if it covers the antennas, a large, untapered FRP box can call attention to a facility.
- vii. Complete concealment is preferred over other methods.
- viii. RF safety barriers should be the least visible barrier possible. When possible, striping and restricted access should be used instead of posts, chains and/or fencing. When barriers must be visible, select building materials that integrate into the site. Radio Frequency Reports should consider alternative options. Photo simulations and plans should show proposed barriers and signage.

The less visible a facility is, the more integrated/concealed it is. Increasing visibility reduces/defeats concealment. Anything that is represented on plans and photo simulations as providing concealment (adjacent landscaping, paint colors, architectural elements, etc.) should be present for the life of the project, and so must be in an area within the applicant's control.

- 2. **Concealment, Expiration Dates and Completely Concealed and Integrated Facilities (CCIFs):** It is the City's goal to completely conceal WCFs wherever feasible. A CCIF is a site that is indistinguishable from the built and/or natural environment of the surrounding area. CCIFs apply camouflaging methods to WCFs to blend them into an existing/proposed structure or visual backdrop in a way that renders the WCF completely non-visible.



Figure 3: Antennas and equipment are all concealed within this tower element.

WCFs have three separate elements: antennas, cables, and equipment/equipment areas. Permits for WCFs that don't completely conceal any of these elements will be receive/be recommended to receive an expiration date of ten years. Longer permit terms (see table on Page 13) are available to applicants that completely conceal certain parts of their facility. Depending on the level of concealment, a permit can also be issued for a ten, twelve, or fifteen-year term. Sites that completely conceal all elements will qualify as CCIFs, which receive/will be recommended to receive no

expiration date. Without an expiration date, sites can be more easily modified without renewing their zoning approvals.

CCIFs must meet all the following criteria to receive no expiration date:

- a. Antennas must be completely hidden: The antennas, mounting apparatus, and any associated components should be fully concealed from all sides within a structure that achieves total and complete architectural integration with the existing building (for example, antennas behind FRP in a parapet, and equipment inside an existing building), or which creates outbuildings that are architecturally integrated into a site and are expected components of the setting (for example, a WCF integrated into single-family residential shed). Antennas should be completely hidden from view to qualify for a. Façade-mounted antennas (with or without FRP screening) and faux trees do not qualify.
- b. Cables and cable trays must be completely hidden from view: All cables should be routed internally or buried underground. Exterior cable trays designed to replicate an existing vertical element may be considered on a case by case basis. Standard cable trays painted and textured to match the existing building do not meet the intent and do not qualify as hidden.

- c. Equipment and equipment areas should be completely hidden: The associated equipment should be completely concealed inside an existing building, inside an underground vault, or in the same method as the antennas (RRUs, RRHs, surge suppressors, and similar). Screen walls/fences and prefabricated facilities do not meet the intent of a CCIF. Equipment enclosures designed to replicate existing buildings and structures may be considered on a case by case basis. This applies to any existing or proposed mechanical equipment that serves the WCF, including (but not limited to) generators, air conditioning units, and similar.



Figure 4: A completely concealed WCF. There are antennas in this picture!

Permit Terms and Concealment Levels:

Concealment Elements Provided from List on Page 12	Concealment Level	Permit Expiration Date
Anything other than below	Low	10 Years
a and b	Medium	12 Years
a and c	High	15 Years
a, b, and c	Complete (CCIF)	No expiration

3. **Landscaping** - Landscaping should be used to offset the overall visual impact of WCFs. Existing and proposed landscape material and design techniques should be utilized to integrate WCFs with the surrounding environment to improve views from neighboring properties and the public right-of-way. All landscape shall conform to the City's Landscape Regulations and the Land Development Manual: Landscape Standards. Landscape Plans submitted for review shall include the components identified in Information Bulletin 536.
 - a. Landscaping should address all components of a WCF, including cable trays and equipment areas. A combination of trees, shrubs, and/or vines can be used to screen and help soften the WCF.
 - b. Where it is not feasible to provide additional landscaping in proximity to a proposed WCF location, or substantial landscaping already exists on-site, other means of balancing the project's visual impacts should be considered.
 - c. The WCF's design should be consistent with the existing and/or proposed landscape design for the project site. Existing, mature trees should be retained when feasible. Any trees proposed for removal should be replaced in-kind or with sufficient replacements. Landscaping for a WCF should use the same plant palette as the underlying site to the satisfaction of the Development Services Department. Landscaping that does not conform to the existing site can be considered on a case-by-case basis.
 - d. When underground vaults are proposed, they should be located to meet minimum clearances from street trees. Locations of proposed underground vaults should not impact existing street trees and/or impede location for new street trees.
 - e. Removal, replacement, or installation of street trees is subject to review by the City's Urban Forester in accordance with SDMC 62.0600. Regardless of location, per SDMC 141.0420(g)(7), if trees with a trunk width of 4 inches or more (measured by caliper, 4 feet above grade) are removed or significantly trimmed for the installation or operation of the wireless communication facility, then replacement trees of a similar size should be planted to the satisfaction of the City Manager.
 - f. Tree "topping" or the improper pruning of trees is prohibited by the SDMC.

- g. Landscaping on the project site that screens, conceals, complements, or softens the visual impact of a WCF as shown in site photos, project plans, and photosimulations should remain for the life of the project, and should be under the applicant’s control. Wireless tenants should coordinate with property owners to ensure that this happens.
- h. Landscaping on other properties should generally not be considered to screen a WCF. However, this can be considered on a case-by-case basis if it can be justified to staff.

4. Equipment, Generators, and Access

- a. All non-antenna components of a WCF (except concealment features, cabling and cable trays) are considered “equipment” no matter where they are located.

- b. Architectural integration is required for equipment enclosures and screening walls. Architecture should match or complement that of the underlying site. Any equipment not located within an equipment enclosure should either be completely hidden from view, or should be concealed in the same manner as antennas.



Figure 5: The generator is concealed inside the building above the existing equipment enclosure.

- c. Use similar building materials, colors, accents, and texture as the primary building. If no buildings exist on site, ensure that the proposed structure is appropriately designed to blend into the environment.

- d. Minimize exterior appurtenances. Use a screen wall and landscape for screening.

- e. Use an open top with an architectural element, like a trellis, to eliminate the need for air conditioning units.



Figure 6: Equipment is concealed within this enclosure with the air conditioning units located on the roof behind the parapet.

- f. Existing topography or landscape can assist in screening views of equipment.

- g. Gates should be constructed of similar or complimentary materials as the enclosure but should maintain opaque qualities. Locate gates away from public areas if possible.

- h. Fences should be constructed of decorative materials that compliment and blend with the surroundings. Chain-link fencing and barbed wire are not permitted.

- i. Anti-graffiti finishes should be applied to all solid fences, walls, and gates. Employ design techniques to reduce the opportunities for graffiti.
- j. All rooftop equipment should be screened. Per SDMC 141.0420(g)(7), it should also be set back or located to minimize visibility, especially from the public right-of-way or public places.
- k. A noise analysis may be required to demonstrate that equipment will operate within allowed noise limits.
- l. All exhaust pipes, vents and similar components should be illustrated on plans and photo simulations, and should be screened.
- m. Caged access ladders should be located away from street views and placed in an area of the building where visibility is minimized.
- n. Generator plugs, Remote Radio Units (RRUs), Remote Radio Heads (RRHs), diplexers, meters, surge suppressors, and other similar components should be located to minimize visibility. If they are located near the antennas, they should have the same concealment method as the antennas, unless to do so would increase visibility. Otherwise, they should be located in the equipment area.

5. Cabling and Cable Trays

- a. Cables should run underground between the public right-of-way and the WCF.
- b. Cables should run underground between components of the WCF unless required to go into or onto a tower or base station. Cable trays should not be used to cross the ground, or to cross buildings not acting as a tower or base station.
- c. Cables running from the ground into a structure should be routed internally within the tower or base station unless the building construction does not allow internal routing of the cables. In that case, the cable tray should be concealed or integrated with the building design. The cable tray can also be designed as a decorative building feature or architectural element. No cables should be visible at the transition from ground to above-ground at any time.
- d. Cable trays on a building exterior should be placed and spaced consistently and appropriately so as not to disrupt the building design.
- e. Above-ground cable, "ice bridges", "dog houses", cable bridges, and similar are not considered to comply with SDMC 141.0420 unless concealed.
- f. Cables should not be visible protruding from the bottom of antennas. On new projects, 90-degree connectors, chin straps, and antennas skirts should be used to eliminate looping. On previously conforming projects, group cabling and minimize looping. No project should increase the amount of visible cabling.

- g. Cables running visibly (faux trees, certain permitted installations, and all previously conforming facilities) should be painted to match adjacent surfaces and should use a cable management plan to minimize visibility.

6. **Associated WCF Components** including Remote Radios, Surge Suppressors, Tower Mounted Amplifiers, and all similar components



Figure 7: This cable tray is concealed inside the "Simon" wing wall.

a. All roof-mounted components should be concealed behind and below a parapet, within a rooftop-mounted equipment area, or an architecturally-integrated structure that conforms to SDMC 141.0420(g)(5).

b. For faux trees, these components should be located behind the antennas and painted to match. Displacement of branches to accommodate any components is prohibited. For any allowed modifications to faux palms, these components should be concealed within the growth pod, faux hula skirt, or in the equipment enclosure.

- c. For Athletic Field Lights (AFL), these components should be concealed inside the antenna shroud with a bottom cap.
- d. Vents for radios or integrated antennas proposed behind FRP are permitted on the top only. Side and bottom vents may be considered depending on the installation.
- e. See also 4n above.

7. **Mounting Hardware and Fasteners**

- a. Mounting hardware should be selected to minimize depth of installation.
- b. If antennas are visible, pipes and mounting brackets should not be visible beyond the face of the antennas.
- c. If antennas are not visible, select mounting brackets that minimize the physical dimensions of any screening.
- d. Mounting hardware and related components should not be present if antennas are not present.

- e. Fasteners such as rivets, screws, and similar should not be visible.
8. **Fiberglass-Reinforced Plastic Installations** - Fiberglass Reinforced Plastic (FRP) or RF transparent materials can be used to screen and integrate a WCF with an existing building. FRP is subject to the following guidelines regardless of location:
- a. No visible transition lines between the old and new materials, colors, and/or surfaces are permitted. Specifically, FRP should be painted and textured to match adjacent surfaces exactly. If necessary, these surfaces should be repainted to retain consistency. This may necessitate painting an entire façade.
 - b. No exposed construction braces.
 - c. Rooftop additions should be concealed on all sides.
 - d. New architectural features such as columns, pilasters, corbels, or other ornamentation that conceal antennas may be used if it complements the architecture of the existing building.
 - e. Faux chimneys and similar additions should include architectural details and trim, if such details exist on the building, or if it improves the appearance of the WCF.
 - f. Architectural details (including, but not limited to flashing, horizontal/vertical trim, reveals, texture changes, and other similar building elements) should match the adjacent building face. Site-specific alternatives may be considered if they can be justified.
9. **Radio Frequency Protective Devices** – Where a site’s Radio Frequency (RF) Report identifies signage or other protective devices for RF safety, the following should apply.

- a. Locate signage and barriers to minimize or eliminate visibility from public areas. Signage should only be visible as someone approaches the antenna sectors from directly accessible areas; it should not be visible from the street/ground level.
- b. Signs placed on the roof/ground surface or painted warning markings on the flat roof or ground are preferred to signs and physical barriers in publicly



Figure 8: Place RF protective devices on the flat roof/ ground.

visible locations.

- c. If physical barriers should be used, they should be complementary to the architecture of the building unless completely concealed from view of the public.
- d. All RF-protective signs, barriers, and/or markings should appear on project plans and in photo simulations.
- e. Existing sites that modify their permits should bring signage into compliance with this section.

10. **Unified solutions are desired when multiple carriers are present** – If more than one carrier is located on a site, each carrier’s installation should be architecturally similar.

- a. When modifying existing sites co-located on base stations, carriers should work together and coordinate with property managers/owners to create unified concealment elements to the extent feasible.
- b. Co-locating carriers should meet or exceed existing concealment features. If co-locating onto a structure where existing carriers do not meet current concealment guidelines, the co-locating carrier must comply with current guidelines, unless to do so would increase the visual impact of the facility.
- c. Multiple faux trees on the same site should be of the same type.
- d. If physically possible, all carriers should share a unified concealment element.
- e. If multiple carriers are façade-mounted facilities on the same building, all carriers should have similar concealment dimensions and spacing.
- f. Carriers using the same facility should have the same type of concealment unless this requirement would increase the overall visibility of a WCF.
- g. If a design was approved at a site within the last 36 months, all subsequent permits by any carrier at the same site should match it, unless to do so would increase the overall visibility of the site.

11. **Emerging and future technologies** – Staff recognizes that emerging technologies present design issues that may not be anticipated by these published guidelines, and will work with applicants on site-specific solutions. For example, at the time of publication, antennas on certain newly available frequencies present screening challenges due to shorter wavelengths. However, history has shown that concealment technology evolves as well. All WCFs in the City of San Diego should be integrated/concealed to the maximum extent possible.

12. **Other Design Considerations** – Although the WCF Regulations and these Design Guidelines are the primary design considerations for WCFs, other Municipal Code sections may govern project design, depending on project location. These sections include, but are not limited to:
- a. Zoning (Commercial, Industrial, Agricultural, Residential, Open Space, or Planned District zoning, including overlay zones), which regulates setbacks and height limits.
 - b. Fence Regulations, which may regulate the height of screening walls and equipment enclosures.
 - c. Equipment Screening Regulations, which may require screening of equipment separately from the WCF regulations.
 - d. Environmentally Sensitive Lands Regulations, which contain additional permit and design requirements for sites located in Environmentally Sensitive Lands.
 - e. Coastal Development Permit Regulations, which may require a site located in the Coastal Zone to get a Coastal Development Permit, which contains specific findings.
 - f. Historic Resources Regulations, which may require alternative designs for WCFs located on the same site as a historic resource.

WCFs that Comply with SDMC 141.0420, and their Design Requirements

The following pages contain supplemental guidelines for specific WCF types. All installations should also follow the requirements for all WCFs found on pages 8-19.

These guidelines cannot encompass all current and future forms of WCF. Concealment structures that aren't contemplated here will be evaluated by the principles, general design guidelines, and best practices outlined in this document, and the guidelines for similar elements as appropriate.

Allowable types of WCF in the City of San Diego include:

- Architecturally-Designed Stand-Alone Towers
- Athletic Field Lights
- Façade-Concealed Antennas
- Façade-Mounted Antennas
- Faux Architectural Elements
- Faux Buildings
- Faux Natural Elements
- Flagpoles and Other Similar Vertical Elements
- Parking Lot or Pedestrian Path Light Standards
- Right-of-Way Sites (not Small Cells)
- Rooftop Concealment
- Small Cells (In the Right-of-way and on Private Property)
- Temporary Sites

Installation Type	Preferred	Can be CCIF?	Examples
<u>1. Architecturally-Designed Stand-Alone Towers</u>	Yes	Yes	<ul style="list-style-type: none"> • Signs • Clock towers • Obelisks • Steeples • Faux small water towers • Similar elements

Architecturally-Designed Stand-Alone Towers - Towers that are designed to appear as buildings or signs, and which conceal antennas completely within them. There are many variations on this design. It is anticipated that these towers are enclosed on all sides. Site-specific novelty designs (faux water tanks/towers, etc.) may also qualify for this type of concealment.



Figure 9: A tower designed as focal point/art piece.



Figure 10: A tower designed as a pole sign

- a. Design towers to architecturally blend with the setting. However, this guideline is not intended to preclude towers from being artistically treated, or from being community focal points as appropriate.
- b. Towers should be of a quality design, with architectural variation, including varied planes, textures, colors, and treatments. A simple box is not sufficient.
- c. Towers should be built at the lowest height possible.
- d. A separate sign permit may be required for any sign designed to conceal antennas.
- e. The WCF permit process cannot be used to request signage that does not follow Municipal Code standards for signage.
- f. Clock towers should have a functioning clock at all times.

Installation Type	Preferred	Can be CCIF?	Examples
2. Athletic Field Lights (AFL)	No, unless antennas are completely integrated into the pole	None	<ul style="list-style-type: none"> None

a. These guidelines are for lights used to illuminate large areas for the purposes of recreation. For lights used to illuminate the immediate area for pedestrian safety, use the Parking Lot or Pedestrian Path Light Standards guidelines on Page 32.

b. Mount antennas as close as possible to the pole, below the light source and within an antenna shroud no more than 38 inches in diameter.

c. Antenna shrouds should conceal antennas and any associated components. No WCF component except the antenna shroud should be visibly mounted to a pole.

d. Antenna shroud length may be one-third of the overall pole height.

e. Per SDMC 141.0420(g)(9), WCFs on AFL should replicate the design, diameter and proportion of the vertical element they are intending to imitate.

f. For allowed modifications to existing, previously conforming AFL with exposed antennas, all cables should be routed directly into port holes no more than 12 inches of exposed conduit (may be further evaluated on a case by case basis). Chin covers replicating the antenna profile should be used.

g. Paint antennas and mounting components the same color as the pole.

h. All cables and conduit to and from the light standard are to be routed from the caisson up into the pole. "Doghouse" cable coverings may be permitted to remain in limited circumstances where they are minimally visible.

i. Single-carrier, multi-pole installations should follow the Principle of Balance. If multiple carriers are present on a site, their facilities should also be complementary in size, shape, and style.



Figure 11: Photosimulation of athletic field light standards with antenna shrouds.

Installation Type	Preferred	Can be CCIF?	Examples
3. Façade-Concealed Antennas	Yes	Yes	<ul style="list-style-type: none"> • Within a wall • Within a parapet

Façade-Concealed Antennas are any antennas concealed within the plane of the façade, including the parapet, of a building using Fiber-Reinforced Plastic (FRP) panels or similar. This is a preferred installation type for integration into buildings.

- a. FRP should be textured and painted to match adjacent building faces at all times. Paint and texture should match completely.
- b. There should be no noticeable transitions between FRP and adjacent surfaces at any time, be they paint, texture, or seam.
- c. If concealed within a parapet, top, sides and rear of antennas and associated components should also be enclosed or otherwise screened from view. At no time should any WCF component be visible, be it antenna, mounting apparatus, cabling, or equipment.
- d. If a project extends the parapet upwards, it should follow the Principle of Balance: Parapet extensions should either be uniform (raise the entire parapet) or should be symmetrical (should balance along a building face, i.e. raise both corners, or be in the center, etc.). They should also present as the same length. Raising at sectors only is not desired unless it follows the Principle of Balance.

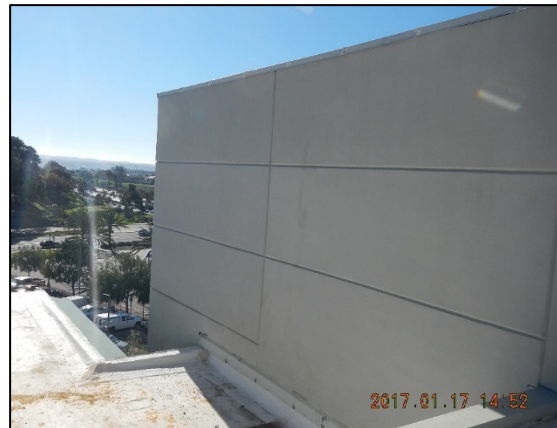


Figure 12: Antennas are concealed within the left-hand side of this wall.



Figure 13: Antennas are concealed behind the circular element.

Installation Type	Preferred	Can be CCIF?	Examples
<u>4. Façade-Mounted Antennas</u>	No	No	<ul style="list-style-type: none"> No concealment (previously conforming) Antenna Skirts and Chin Straps Façade-mounted antennas covered by FRP boxes

Façade-Mounted Antennas are any antennas mounted on the exterior of a building that are not faux architectural elements.



Figure 14: Façade-mounted antennas with antenna skirts and chin straps, placed symmetrically and painted to match.



Figure 15: Although façade-mounted boxes are not preferred, this is still an excellent example of integration.

architectural lines of the façade. Associated mounting brackets and coaxial cable shall be concealed from view. Any pipes or similar apparatus used to attach panel antennas to a building façade shall not extend beyond the length or width of the panel antenna. Any measurements may be verified during inspection.

a. Employ a symmetrical, balanced design for all façade-mounted antennas. No interruption of architectural lines or horizontal or vertical reveals is permitted. Antennas should be no longer or wider than the facade on which they are proposed, and they may not encroach into window areas or protrude above or below the surface on which they are mounted. Antennas should be mounted with their tops at the roofline unless there is an obstacle, or unless to do so would decrease the concealment of a site.

b. Use the smallest mounting brackets available to provide the smallest offset from the building.

c. Per SDMC 141.0420(g)(8), the distance between the front of the antenna (or antenna shroud/FRP) to the face of the building shall not exceed 12 inches. Panel antennas may be mounted up to 18 inches away from a building façade when the applicant provides evidence demonstrating that the wireless communication facility cannot operate without incorporating a tilt greater than 12 inches. Each panel antenna shall fit into the design of an existing façade and shall be no longer nor wider than the portion of the façade upon which it is mounted. The antennas shall not interrupt the

- d. Whether antenna skirts and chin covers are preferred vs. when unifying FRP boxes are preferred depends on the visual context of the building. Principles of Least Visibility, Context, and Balance apply.
- e. If a façade-mounted facility dominates a façade element, façade-mounted FRP boxes should be used, and made to look like an extension of the façade (see Figure 15 below)



Figure 16: FRP Boxes used to complement architecture.

f. If covered by an FRP box, boxes should unify an entire sector and be the same size and shape for each sector, unless this causes conflict with existing architectural features or increases visibility.

g. If not covered by an FRP box, use skirts and chin covers to conceal mounting hardware, create a cleaner appearance, and minimize visual impact. Chin covers should be designed to replicate the antenna profile. Transitions between antennas and screening devices should not be visible, and gaps are not

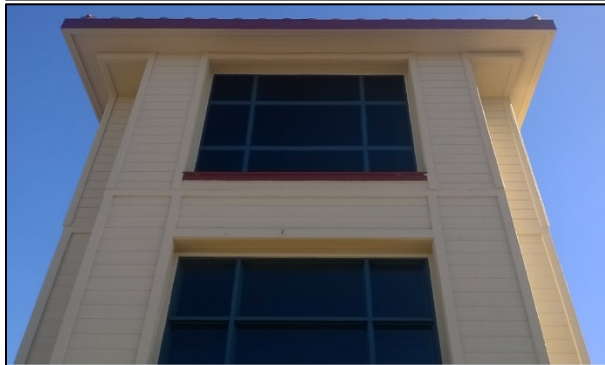
permitted. Antennas should present as the same length, width, and depth, spaced uniformly.

- h. Paint and texture antennas and concealment measures to match the adjacent building surfaces. This includes trim, reveals, lines, and similar features. No visible transition lines/gaps are allowed.
- i. No exposed cabling is permitted.
- j. Per SDMC 141.0420(g)(8), exposed mounting components may not remain on a building facade without the associated antennas. Such areas shall be returned to their pre-WCF condition or made to match the adjacent façade, whichever is more appropriate.
- k. If not covered by an FRP box, façade-mounted antennas should have a unified appearance. If antennas are a different shape and size, they should all be given unified dimensions using skirts and chin straps, and should be spaced uniformly across a façade.
- l. Façade-mounted FRP concealment that appears as an architectural element of the building may qualify as another type of concealment measure.
- m. Ventilation openings should be on the top or bottom of screening elements only.



Figure 17: Antenna skirts and chin straps used to conceal mounts and cables.

Installation Type	Preferred	Can be CCIF?	Examples
<u>5. Faux Architectural Elements</u>	Yes	Yes	<ul style="list-style-type: none"> • Cupolas • Chimneys • Attached steeples • Attached tower elements • Raised roofs • Partial stories • Attached signs • Other building extensions/additions



Faux Architectural Elements – Antennas concealed entirely within existing or proposed architectural elements on an existing building. Façade-concealed antennas that present as architectural elements of the building are considered faux architectural elements rather than façade-concealed antennas.

a. Should follow the Principles of Balance and Context.

b. Should be appropriate to the architectural context: should match style of existing building, and should be designed as a feature commonly found on the type/style of building.

c. Should match colors and textures of existing building, including finishing features such as reveals, windows, tapers, cornices, tiling, roofing materials, and trim.

d. This is a preferred installation type that can take a variety of forms. Tower elements and cupolas are pictured here, but architectural integration can also include tapered columns (can hide façade-mounted antennas individually), wing walls, dormers, statues, façade-mounted signage, and more.

Figure 18: A cupola, a clock tower, and an added story, all concealing antennas. Note the replicated windows in the bottom picture.

Installation Type	Preferred	Can be CCIF?	Examples
6. Faux Buildings	Yes	Yes	• None

Faux Buildings – Designed as a separate, stand-alone building that is allowed by the zone in which it is proposed. Distinguished from Stand-Alone towers in that faux buildings are designed to not stand out (single dwelling unit in a single dwelling unit neighborhood, commercial building that matches other buildings on the property, park building that might be expected in the park, etc.).

- a. Buildings should be of a quality design, with architectural variation, including varied planes, textures, colors, and treatments. A simple box is not sufficient.
- b. Buildings designed to conceal WCFs should meet all requirements of the Municipal Code, including setbacks, height, design, articulation, and landscaping.
- c. A faux building should complement the existing built environment in the area. If there is none, it should conform to the planned land uses in the area.



Figure 19: Two faux buildings that meet the requirements of their zones.



Installation Type	Preferred	Can be CCIF?	Examples
7. Faux Natural Elements	No, unless antennas are CCIF	In rare circumstances	<ul style="list-style-type: none"> • Faux tree • Faux bush • Faux saguaro cactus • Faux rock

Faux Natural Elements – WCFs designed to emulate naturally occurring elements, such as rocks or vegetation.

- a. Per SDMC 141.0420(g)(6), faux landscaping may be used on premises where natural vegetation similar in size and species exist or where landscaping similar in size and species is proposed as part of the development. Use in an existing setting where there are similar elements, or where such elements would be expected. It is discouraged to place faux vegetation in a location where nearby natural vegetation of the same size and type isn't existing or proposed.
- b. Landscaping used to complement faux vegetation should remain for the life of the permit, even if it is not located within the applicant's lease area. Applicants should coordinate with property owners to ensure that required landscaping is not removed, and that it is properly maintained. Landscaping on premises outside the carrier's/property owner's control is generally not considered to provide concealment.
- c. Faux vegetation should only be used in the form of faux trees and bushes. It should not be used to architecturally screen (to cover fences, walls, or areas).
- d. Provide detailed specifications during plan review **including 3D-modeled photo simulations for faux vegetation**. Models should include branches, foliage, pole, and equipment. Per SDMC 141.0420(g)(6), provide sufficient samples, models or other means to demonstrate the quality, appearance, and durability of the faux vegetation.
- e. "Doghouse" cable coverings should be avoided. Cables should run directly from underground into the pole.
- f. Projects will not be approved at final inspection if they do not match the approved exhibits, including photo simulations.
- g. **Faux trees and bushes:** Should be of a type and size to adequately conceal antennas within them while appearing natural. Due to the physical form of palm trees and the difficulty of providing concealment for WCF components, faux palms are no longer considered to comply with the Wireless Ordinance. Existing faux palms with valid permits may be modified as allowed by law. If modifications are allowed, the following conditions apply.



Figure 20: A 3D-modelled photo simulation.

1. Frond removal is considered defeating concealment and is not allowed.
 2. Increase in size or number of any visible element (antenna, equipment, or foliage) is considered defeating concealment and is not allowed. If RRUs or similar are needed, they should go behind antennas to the satisfaction of staff.
 3. Change in color or placement of existing elements can be considered if they do not increase in number or size. Color should still substantially conform to original.
 4. If fronds are replaced, they should all match each other and should meet or exceed the level of concealment provided by previously-approved photo-simulations.
- h. **Faux trees and bushes:** should be used where existing trees/bushes are of a similar height, species, and appearance, or where the most mature screening trees possible are proposed.

- i. **Faux trees and bushes:** in non-urban settings, faux plants should be species regionally appropriate to San Diego that blend with established plant communities.



Figure 21: A mono-pine. Note how difficult it is to see the antennas.

- j. **Faux trees and bushes:** All branches at the antenna level must extend a minimum of 24 inches beyond the entire vertical length of the antennas for maximum concealment. Antenna socks do not count toward this requirement.

- k. **Faux trees and bushes:** Should replicate the shape, structure, and color of live trees or bushes, and should be designed to look like the tree species they are intending to replicate (can't have pine tree that isn't shaped like a pine tree). Branching should not make the tree look top-heavy.

- l. **Faux trees and bushes:** Ensure that the top of the faux tree does not exceed allowed height on approved plans.

- m. **Faux trees and bushes:** Use 90-degree connectors to eliminate large looping cables coming from the bottom of the antennas.
- n. **Faux trees and bushes:** Socks are mandatory for all antennas and associated components located on a faux tree.
- o. **Faux trees and bushes:** Should be designed with a minimum of four branches per foot for full density coverage with limited spacing between the branches, unless 3D models justify lower branch counts.

- p. **Faux trees and bushes:** There should be no gaps in branch coverage. All branch ports should be used for branches. Branches should blend down the tree with no abrupt transitions.
- q. **Faux trees and bushes:** No exposed mounting apparatus may remain without the associated antennas; even if an antenna was approved at that location but not installed.
- r. **Faux trees and bushes:** Any changes to branches will require a building permit, and should appear on the scope of work of any plans submitted. Faux vegetation should not be re-branched without a permit, even if there is no other work. This rule is not intended to prevent the maintenance replacement of individual branches on an as-needed basis. However, the systematic removal and replacement of multiple branches without a building permit is prohibited.
- s. **Faux saguaro, faux rocks/boulders:** Should completely contain all WCF components within the faux structure, the ground, or the equipment enclosure. Should appear entirely natural, with no visible transitions between FRP and non-FRP elements. Should be appropriate to the place, may not be appropriate for all landscaping contexts or development types.

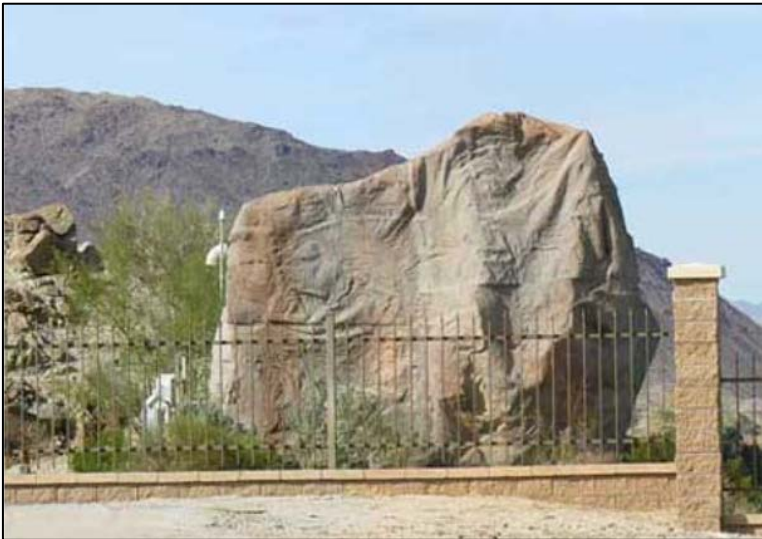


Figure 23: A faux boulder - not from San Diego.

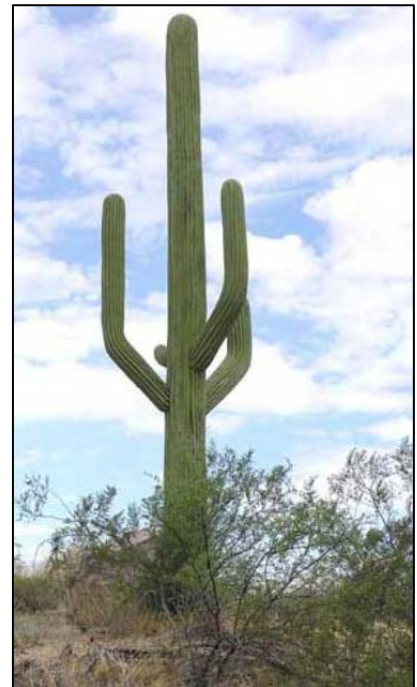


Figure 22: A faux saguaro. This installation is not in San Diego.

Installation Type	Preferred	Can be CCIF?	Examples
<u>8. Flagpoles and similar vertical elements</u>	No, unless CCIF	In rare circumstances	<ul style="list-style-type: none"> • Flagpoles • Utility poles • Foul poles • Similar

This section is designed to capture flagpoles, and other stand-alone pole-like elements of all-types that are not used for illumination.



Figure 24: There are antennas in this flagpole.

- a. Per SDMC141.0420(g)(9), flagpoles shall replicate the design, diameter and proportion of the vertical element they are intending to imitate and shall maintain a tapered design. Flagpoles 30 feet or less in height should not exceed 9-inches in diameter.
- b. Consideration will be given to flagpoles higher than 30-feet that exceed the 9-inch diameter limitation if it can be demonstrated that the flag pole is located in a suitable environment and appropriately tapered to maintain the appearance of an authentic flag pole.
- c. Flagpoles: Antennas and any pole-mounted equipment should be enclosed within the flagpole. Flagpoles may not have an antenna shroud.
- d. Flagpoles should comply with the U.S. Flag Code at all times.
- e. Poles placed for the sole purpose of mounting a WCF are strongly discouraged, as they do not provide the expected camouflage – they are themselves visible. However, innovative and decorative treatments of this idea can be explored provided they observe the Principles on Pages 9-11.
- f. Poles should be placed in conjunction with existing or added landscape planting.
- g. All cables should be routed directly from the ground up through the pole. No “doghouse” cable coverings are permitted.
- h. Single-carrier, multi-pole installations should follow the Principle of Balance. If multiple carriers are present on a site, their facilities should also be complementary in size, shape, and style.

Installation Type	Preferred	Can be CCIF?	Examples
<u>9. Parking Lot or Pedestrian Path Light Standards</u>	No, unless antennas are completely integrated into the pole	No	<ul style="list-style-type: none"> • Parking lot or parking garage lights • Pedestrian path lighting

- a. These guidelines are for lights used to illuminate the immediate area for pedestrian safety. For lights used to illuminate large areas for the purposes of recreation, use the Athletic Field Lights guidelines on Page 22.
- b. Per SDMC 141.0420(g)(9), light standards shall replicate the design, diameter and proportion of the vertical element they are intending to imitate. If there are other non-WCF light standards on site, they should be replicated as closely as possible.
- c. Use only in parking lots or along pedestrian paths. Not to be used to gain height in areas where a light standard is unnecessary.
- d. New light standard designs should be consistent and compatible with the surrounding area.
- e. Match design, material and color of nearby light poles.
- f. Replicate the height of existing poles.
- g. If more than one pole is used, space appropriately throughout property. Consideration should be given to existing vertical elements before proposing new light pole(s).
- h. All cables and conduit to and from the light standard should be routed from the caisson through the pole to the antennas. "Doghouse" cable coverings are not permitted.
- i. All antennas should be concealed inside an antenna shroud of a consistent width and compatible with the diameter of the pole, or concealed within the pole.
- j. Light fixtures should be sized and balanced with the design and height of the overall light pole.



Figure 25: A parking lot light with an antenna shroud that complements the pole.

Installation Type	Preferred	Can be CCIF?	Examples
10. Right-of-way installations – Non-Small Cell	No	No	• None

Any WCF in the public right-of-way with antennas greater than 24" in any dimension, typically designed to serve a wide area. These guidelines are intended to apply to non-small cell sites placed on City light poles. For other forms of WCF placed in the right-of-way, please refer to the guidelines for that WCF type, except that g. through j. below apply to any type of right-of-way installation.

- a. Pursuant to SDMC 141.0420(g)(9), poles shall match height, color, diameter, and material of the original and/or adjacent poles.
- b. No WCF component should exceed the height of the pole. If a pole is topped by a decorative element that is a different shape/diameter than the pole itself, antennas should not encroach into this area.
- c. Per SDMC 141.0420(h)(2), use brackets that allow antennas to be mounted no more than 6" from the pole (measured from the face of the pole to the face of the antennas). Antennas shall be parallel to the pole; no down-tilt or azimuth is allowed.
- d. Per SDMC 141.0420(h)(4), antennas (and associated cabling) or antenna shrouds shall be painted to match the color of the surface of the pole on which they are attached.
- e. Antenna shrouds are required unless precluded by RF engineering needs, or unless to add them would be aesthetically infeasible. Shrouds should have tapered bottom caps, and should also have non-tapered top caps if they are not within 5 feet of the height limit on the nearest property. Tapers may not be appropriate at all sites, but it should be assumed they are required.
- f. If an antenna shroud is not used, chin straps/chin covers are required. They should be no more than six inches long and no wider than antennas. Cables should be routed directly from chin straps into the pole, minimizing exposed cabling. Cables should not loop or bunch. 90-degree connectors should be used.
- g. All new or replacement poles must comply with all applicable City regulations and policies.
- h. Per SDMC 141.0420(h)(1), equipment must be located in an underground vault. If this is not feasible, a Conditional Use Permit is required for ground-mounted equipment. Ground-mounted equipment should be designed and located in an area with minimal visual impact.



Figure 26: Macro (non-small cell) right-of-way site with antenna shroud



Figure 27: This right-of-way installation has three antennas mounted flush to the pole with no pipe mounts and no antenna shroud. This is an older installation with no chin covers; they are now required.

i. All disturbed landscape shall be replaced in-kind and areas of bare or disturbed soil must be revegetated in accordance with the Landscape Regulations.

j. Disconnect switches are required. They should be mounted on the pole and should be painted the same color as the pole.

k. All cables and conduit to and from the light standard should be routed from the caisson through the pole to the antennas. "Doghouse" cable coverings are not permitted.

Installation Type	Preferred	Can be CCIF?	Examples
11. Rooftop Concealment	If façade integration is not possible	Yes, if they present as integrated into the building	<ul style="list-style-type: none"> • Rooftop boxes/screens, whether or not they are solely for the WCF • Faux penthouses, including facades • Elevator/stair towers, which may be considered façade-concealed

Rooftop Concealment – Any WCF with antennas mounted on the roof of a building, behind a plane of the façade. Does not include rooftop elements that present as a building façade, architectural element, or parapet; these would be evaluated under the guidelines for façade-mounted facilities, façade-concealed facilities, or faux architectural elements.

a. Should follow the Principles of Balance and Context; should be appropriate to the architectural setting: should match colors and textures of existing building (including features such as reveals, cornices, tiling, roofing materials, and trim), and should be designed as a feature commonly found on the type/style of building.

b. Integration into existing rooftop elements is preferred over creating new rooftop elements, unless to do so would defeat concealment or be otherwise undesirable.

c. Should conceal ALL WCF components from all sides. This may include the top. Antennas should not be visible from sides or back.

d. Per SDMC 141.0420(g)(5), equipment located on the roof of an existing structure shall be set back or located to minimize visibility, especially from the public right-of-way or public places.

e. Unconcealed rooftop installations such as lattice towers, monopoles, rack mounts, “popsicle sticks”, and unconcealed façade mounts are not considered to comply with SDMC 141.0420.

f. Rooftop elements should generally be set back from the roof edge at least as far as they are tall; however, this may not be required in certain contexts.

g. Should not dominate a façade – for example, an eight-foot tall antenna screen that runs most of the length of the façade on a one-story building dominates the façade, substantially increasing building height but not appearing as part of the structure. In this case, it would be more desirable to extend the parapet and make the building itself appear taller.



Figure 28: Two rooftop boxes that replicate existing building elements well.

Installation Type	Preferred	Can be CCIF?	Examples
12. Small Cell WCFs (SC-WCFs)	N/A	N/A	<ul style="list-style-type: none"> Right-of-way sites (on city assets and as stand-alone poles, with or without luminaires) Private property

A SC-WCF is one single dish antenna 24" or less in diameter or one single antenna with antenna shroud, no more than 24" in all dimensions. SC-WCFs are low-power cellular radio access nodes. They consist of small radio equipment, antennas, and backhaul that can be placed on City-owned structures such as City-owned streetlights and traffic signals, non-City-owned streetlights, standalone poles, and on private property.

a. **Guidelines for all SC-WCFs:**

- i. The Principles of Least Visibility, Balance, and Context should be observed.
- ii. 4G antennas should be shrouded or otherwise concealed at all times.
- iii. Pole-mounted 5G antennas should consolidate sectors using multi-sector shrouds. Building-mounted 5G antenna sectors should use antenna skirts and chin straps. At the time these guidelines were published, 5G concealment technology was still in development. As such technology advances, the City expects it to be used to maximum effect.
- iv. Unless otherwise stated in these guidelines, cabling should always be concealed. Absolutely no visible cabling at any time. Cabling shall run within any pole upon which a small cell is mounted.
- v. If placed on a pole, conceal all cabling within the pole, with no doghouse and no looping cables. Match nearby poles to the maximum extent possible.
- vi. Vertical elements should replicate the design, diameter and proportion of the vertical element they are intending to imitate.
- vii. Stand-alone poles (without a City-standard luminaire) are strongly discouraged on streets with a curb-to-curb measurement of 40 feet or less, except for areas containing only decorative poles. Decorative poles supporting SC-WCFs are allowed when they are designed to replicate other nearby decorative pole in color and style and not to exceed 50% of the existing height of the pole.
- viii. Equipment cabinets/shrouds not integrated into a pole or mounted on a cable strand may not exceed 7 cubic feet in volume, 24" in width, 12" in depth, and should be mounted directly behind any road signs located on a pole. Equipment cabinets and associated components should not block any road signs. The design of non-integrated equipment cabinets/shrouds should be slim in profile to match the pole.

- ix. Existing government infrastructure on a light pole, traffic signal, or elsewhere nearby may preclude small cell installation at a given location.
- x. Avoid electric meter enclosure if possible. Use an underground, unmetered connection. If not, use the narrowest electric meter and disconnect available.
- xi. All installations should use all design techniques to minimize visual impacts. Anti-graffiti finishes should be applied to all equipment cabinet designs reachable from ground level.
- xii. Any manufacturer decals or logos on equipment enclosures that may be visible to the public should be removed or painted over.

b. Guidelines for all SC-WCFs in the Public Right-of-Way:

- i. If there is a choice of using a location in the street or in an alley, the alley should be used.
- ii. Unless required to provide service, avoid pole locations near windows (especially residential windows), historically/architecturally significant buildings, ornamental light standards, and Maintenance Assessment Districts.
- iii. Locations with the least visual impact should be chosen. Exhaust all options to minimize visual impact.
- iv. Disturbed landscape shall be replaced in-kind and areas of bare or disturbed soil must be revegetated in accordance with the Landscape Regulations.
- v. Applicants should consider the aesthetics of the existing streetlights and neighborhoods when proposing a small cell installation. New/replacement poles should meet City standards and/or match height, color, diameter, cobra arm placement and shape, and material of the original and/or adjacent poles.
- vi. All installations should use all design techniques to minimize visual impacts. Anti-graffiti finishes should be applied to all equipment cabinet designs reachable from ground level.
- vii. Any manufacturer decals or logos on equipment enclosures that may be visible to the public should be removed or painted over.

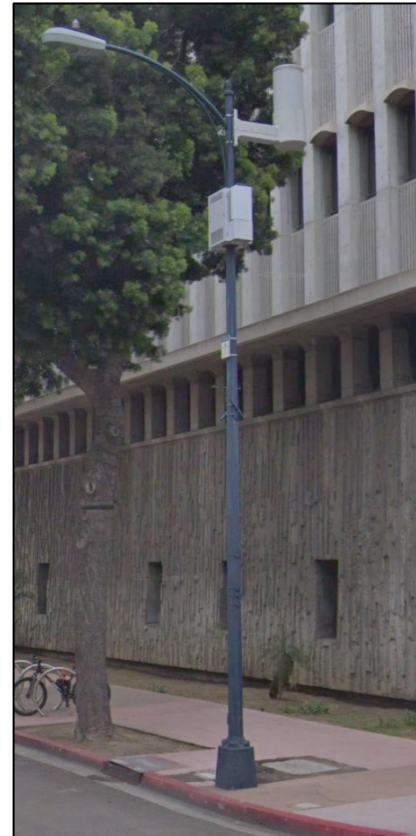


Figure 29: An unpainted small cell downtown.

Guidelines and Preference Levels for Specific Types of SC-WCF in the Public Right-of-Way

The following are preference levels and requirements for specific types of SC-WCFs in the public right-of-way. The intent is to locate on existing infrastructure already occupying the right of way. In selecting a lower-preference location, applicants should demonstrate why more-preferred locations were not feasible.

Preference level 1 (most preferred): On existing or replacement City-standard streetlights, or new City-standard streetlights as allowed by the Street Design Manual

- a. No more than one antenna shroud, 24" or smaller in all dimensions, and one equipment cabinet not exceeding 7 cubic feet in volume, 24" in width, 12" in depth, are allowed per pole. Equipment cabinet should be entirely occupied by required equipment with no empty space.
- b. City-standard cobra lights should also be used, and poles should be painted and textured to City standards to match existing streetlights in the vicinity. Equipment not integrated into a pole may not exceed 7 cubic feet in volume, 24" in width, 12" in depth, and must be mounted directly behind any road signs located on a pole. Equipment cabinets and associated components should not block any road signs.
- c. Applicants must consider the aesthetics of existing streetlights and neighborhoods when proposing a small cell installation. New/replacement poles should meet City standards and/or match height, color, diameter, cobra arm placement and shape, and material of the original and/or adjacent poles.
- d. Locations with the least visual impact should be chosen. Exhaust all options to minimize visual impact. If there is a choice of using a pole in the street or in an alley, the alley should be used.
- e. Antennas are either top-mounted or side-mounted. Both designs offer different advantages and requirements for integration and concealment. Case-by-case review is required.
- f. In areas with low structure heights, avoid designs featuring top-mounted antennas on tall poles that may not match the neighborhood context.

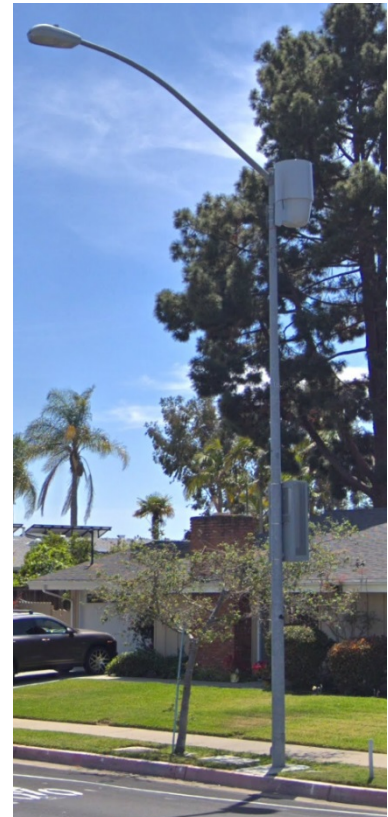


Figure 30: A small cell in La Jolla.

- g. Top-mounted antennas must be narrow to match the pole profile. Extension arms should be avoided. If not, antenna and pole top extension arms should not appear offset from the pole. Use extension arms that are as wide as the top of the pole and taper toward the antenna. Use a shroud around the base of the antenna to conceal cabling.
- h. For designs featuring side-mounted antennas, use arms containing flanges or channels to conceal cables and passive RF gear. No visible cabling is allowed.
- i. Side-mounted antennas should not exceed the height of the pole.
- j. Antennas, brackets, cabling and cabinet should be painted to match the color of the pole.
- k. Antennas should not obstruct the view from, or light into, any adjacent residential window.
- l. Equipment should face away from residential windows or primary travel direction are required.
- m. Use an underground, unmetered electric connection.
- n. Minimum height clearance for equipment mounted to the outside of a streetlight, traffic signal, or new pole in the right-of-way shall be eight feet above grade, mirroring the height requirements for signs in the right-of-way found in SDMC 142.1230(e)(1)(A).
- o. All cables should be concealed within the pole, with a sleeve between the bottom of the antenna and the mounting bracket. Use shrouds and/or 90-degree connectors to prevent exposed cables. No doghouses are allowed.
- p. Disconnect switches are required. They must be minimal in size, mounted on the pole, and must be painted the same color as the pole.

Preference level 2: Traffic signals and other signalized poles

- a. All Preference 1 requirements apply.
- b. Placement may not interfere with traffic signal operation.
- c. Only one installation is allowed per intersection or equivalent.

Preference level 3: On non-City-owned utility poles

- a. All Preference 1 requirements apply, except:
- b. When utility companies do not allow cabling to be concealed within the pole, one cable may run outside the pole, attached to the pole, painted to match, and running directly

into a top-mounted antenna shroud or side-mounted antenna mount/shroud. Cables must not hang or loop and should be directly fastened to the pole at all times. All cables, fasteners, and equipment should be painted to match the adjacent surface.

- c. More than one cable must be concealed within a cable riser attached directly to the pole and running parallel to the pole, of the absolute minimum diameter necessary for concealment, and painted to match the pole. Riser must connect directly to antenna shroud.
- d. Side-mounted antennas are required on utility poles unless the utility will not allow them for safety reasons.

Preference level 4: Strand-mounted on existing aerial utility wires

- a. Strand mounts must contain all equipment and antennas within one strand-mounted shroud no larger than 5 cubic feet. Shroud should be as narrow as possible to mimic the cable profile, and should be painted a neutral color.
- b. When utility companies do not allow cabling to be concealed within the pole, one cable may run outside the pole, attached to the pole, painted to match. Cables must not hang or loop and should be directly against the pole until the transition to the cable strand, then should run directly along the strand (painted to match) to the shroud.
- c. More than one cable must be concealed within a cable riser attached directly to the pole and running parallel to the pole, of the absolute minimum diameter necessary for concealment, and painted to match the pole. At transition to strand, it should run directly along the strand (painted to match) to the shroud.

Preference level 5: On proprietary poles WITH luminaire

- a. Proprietary light poles must contain all equipment, cabling and antennas within the pole itself and/or entirely under the ground.
- b. Proprietary light poles must be proposed in areas accepted by the City where light poles are appropriate per the Street Design Manual. If a light pole isn't appropriate at a location, one may not be constructed there.
- c. Antenna shrouds must be the same diameter as the pole, which may be no wider than 14 inches. The bottom 66 inches of a pole (the "base") may be up to 18 inches to accommodate equipment.
- d. To prevent accumulation of trash, facilities should be designed to avoid flat surfaces in the transition from the base to the upper pole.
- e. All installations must use a City-standard cobra light OR be designed to match existing non-standard lights in the vicinity to the satisfaction of staff.

- f. Poles should be painted and textured to City standards to match existing streetlights in the vicinity. If located in an area with non-standard or decorative street lights, match them to the maximum extent.
- g. Poles must match the height of nearby streetlights. If there are none, they must meet the applicable height limit in the area, or be no taller than 40 feet, whichever is less.
- h. Disconnect switches are required. They must be located inside the base of the pole and accessible to City personnel.

Preference level 6 (least preferred): Proprietary poles WITHOUT luminaire

- a. If a stand-alone pole is used, the pole should be of a unitary design, concealing all equipment within the pole itself, with an antenna/shroud mounted directly to the top of the pole and no visible transitions. No equipment should be visible outside the pole.
- b. Antenna shrouds must be the same diameter as the pole, which may be no wider than 14 inches. The bottom 66 inches of a pole (the “base”) may be up to 18 inches to accommodate equipment. To prevent accumulation of trash, facilities should be designed to avoid flat surfaces in the transition from the base to the upper pole.
- c. Stand-alone poles must match the height of nearby streetlights. If there are none, they must meet the applicable height limit in the area, or be no taller than 40 feet, whichever is less.
- d. Stand-alone poles should be designed to mimic the colors and styles of adjacent streetlights. If there are none, the facility should be painted a neutral color appropriate to the area
- e. Stand-alone poles should not obstruct pedestrian or vehicular paths of travel.
- f. Separation requirements: If a stand-alone pole is placed, it should be at least 10 feet away from existing city light poles, traffic signals, signalized poles, and any utility pole, and 250 feet away from any other proprietary pole.
- g. Stand-alone poles (without a City-standard streetlight) are strongly discouraged on streets with a curb-to-curb measurement of 40 feet or less.



Figure 31: Stand-alone small cell pole in Denver, Colorado. Exposed utility meters are not preferred in San Diego.

Guidelines for Small cells on private property: Pursuant to SDMC 141.0420(a)(2), one single dish antenna 24” or less in diameter or one single antenna with antenna shroud, no more than 24” in all

dimensions, is exempt from SDMC 141.0420, and requires only those ministerial permits necessary for installation.

More than one small cell on a premises from the same applicant may be considered a standard WCF, with permits required per SDMC 141.0420, and design subject to these guidelines.

Small cells on private property should be mounted to existing buildings (unless coverage objectives cannot be met otherwise) and follow the corresponding design guidelines herein. Design the installation to blend in to the structure to the extent feasible. Match colors and select locations for a minimum of visibility. Hide antennas in architectural elements or behind a façade. If this is not possible, use antenna skirts, chin straps, or antenna shrouds.

If building mounts are not desired, pedestrian path/parking lot light standards or flagpoles should be used, and the design guidelines for these types should be followed.

Installation Type	Preferred	Can be CCIF?	Examples
13. Temporary Sites	No	No	<ul style="list-style-type: none"> • City-wide for public events • For construction purposes • Pilot Projects

Temporary sites – installations that are not intended to provide permanent wireless services. There are four types:

- a. **Temporary Sites to Service Public Events** - Can only be issued to provide service to a citywide public event pursuant to SDMC 123.0402(c)(1). Per SDMC 123.0406, up to two TUPs can be issued every 365 days, but each TUP is limited to a maximum of 180 days.
- b. **Emergency sites** – Except on sites containing a residential use, when an emergency arises that is not the result of any act of the wireless service provider and is otherwise determined by the City Manager to be an emergency, a TUP not directly associated with an existing site can be issued pursuant to SDMC 123.0402(c)(2). The ending of a lease is not considered to constitute an emergency. Per SDMC 123.0406, up to two TUPs can be issued every 365 days, but each TUP is limited to a maximum of 180 days.
- c. **Temporary Sites to provide service during construction** – Not eligible for a TUP. If the need for an existing WCF to have a temporary site during construction is known at the time of zoning review, include the temporary site in the project details and plans with a schedule for installation and final removal. Staff will consider it during the project review process. Provisions for a temporary site will be written into the new permit.

If the need for a temporary site is not known at the time a WCF is originally approved, a temporary site can be approved using a Substantial Conformance Review (SCR). This type of temporary site must be located on the same property as a permanent site.

- d. **Pilot Projects** – Not eligible for a TUP. Tests of new technology, new concealment types, and similar types of pilot projects may take place on existing, active sites with valid permits. Such tests will be limited to a one-year term, granted by Substantial Conformance Review (SCR). Because new technologies may not be compatible with typical concealment methods, pilot projects that comply to guidelines to the extent feasible as coordinated with staff can be allowed.

WCFs that do not comply with Regulations (Previously Conforming Sites)

New permits or permit amendments for WCFs of these types will not be approved in the City of San Diego unless otherwise provided for by law.

Previously conforming WCFs with a valid permit that has not expired, but do not meet the current requirements of SDMC 141.0420 are listed here. Certain modifications may be allowed to these sites, and design requirements for these modifications are outlined herein.

Modifications to sites in this category are allowed only by the following methods. If this is not possible, the facility must be brought into compliance with the current Wireless Ordinance and Guidelines.

- a. Substantial Conformance Review (SCR): See criteria on Page 50.
- b. Spectrum Act/6409 modification: See criteria on Pages 50-51.

WCFs in this category must continuously be in conformance with their approved permits. Non-permitted work, deteriorated site conditions, or non-operational equipment that has not been removed can affect previously conforming rights and Spectrum Act eligibility, and may result in code enforcement action.

WCFs in this category include, but are not limited to:

- Faux Palm Trees
- Monopole, lattice tower, "Popsicle Sticks" or similar at any location
- Unconcealed rooftop- or façade-mounted facilities or similar
- Unconcealed or under-concealed implementations of otherwise lawful facilities

Installation Type

14. Faux Palm Tree

Monopole disguised as a palm tree. Do not meet the requirements of SDMC 141.0420. These WCFs are no longer approved in the City of San Diego unless otherwise provided for by law. Modifications only allowed per Page 44.



Figure 32: Faux palms do not provide the level of concealment required by the Wireless Ordinance - they are monopoles with fronds!

If an SCR is desired, the following conditions apply.

- a. Reducing the number of fronds is considered defeating concealment and is not allowed.
- b. Increase in size or number of any visible element (antenna, equipment, or foliage) is considered defeating concealment and is not allowed.
- c. Change in color or placement of existing elements can be considered if they do not increase in number or size; otherwise, it is not allowed.

- d. If fronds are replaced, they should all match each other and should meet or exceed the level of concealment provided by previously-approved photo-simulations.
- e. Note that non-compliance with any permit condition may be grounds to deny an SCR, and may subject the site to code enforcement action, including permit revocation.

If a Spectrum Act modification is desired:

- a. The facility must currently be constructed in its last approved configuration and the project must be considered an eligible facilities request.
- b. Spectrum Act applications may not be used to bring a site into compliance with its permit; the site must be compliant at the time of application.

Installation Type

15. Monopole, lattice tower, "Popsicle Sticks" or similar, whether standing alone or located on a building.

Pole- or tower-mounted facilities of any configuration that are not disguised or concealed, whether or not antenna shrouds are provided. Do not meet the requirements of SDMC 141.0420. No longer approved in the City of San Diego unless otherwise provided for by law. Modifications only allowed per Page 40.



Figure 33: Lattice towers and monopoles don't integrate. They do not meet the requirements of the Wireless Ordinance.

- a. If an SCR is desired, see Page 50. Note that SCRs cannot be used to decrease the level of conformity with the regulations or with these Guidelines.
- b. If a Spectrum Act modification is desired, see Pages 50-51. Note that the project must be an Eligible Facilities Request in order to be approved. Spectrum Act applications may not be used to bring a site into compliance with its permit; the site must be compliant at the time of application.
- c. If a new (non-Spectrum Act) approval is being sought, the facility must be brought into compliance with the current Wireless Ordinance and Guidelines.
- d. Co-location onto this type of facility must meet current regulations.
- e. Although this installation type is unconcealed by definition, antenna size and spacing is considered to provide an integrative function. If a project proposes to modify any facility in this category, all proposed antennas should appear to be the same size and spacing to comply with the Principle of Balance. Use antenna skirts and chin straps or similar.
- f. Cable management is also considered to provide an integrative function. Any modifications should manage cables to provide the absolute minimum of visibility. Avoid looping cables. Bunch cables whenever possible, and paint to match adjacent surfaces.

Installation Type	
<u>16. Unconcealed rooftop- or façade-mounted facilities or similar</u>	Base station-mounted facilities of any configuration (façade-mount, rack mount, towers on top of buildings, etc.) that are not disguised or concealed to current standards, whether or not antenna shrouds are provided. New permits for this type of WCF are no longer allowed in the City of San Diego unless otherwise provided for by law.



Figure 34: Unconcealed facilities like these do not meet the requirements of the Wireless Ordinance.

- a. If an SCR is desired, see Page 50. Note that SCRs cannot be used to decrease the level of conformity with the regulations or with these Guidelines.
- b. If a Spectrum Act modification is desired, see Pages 50-51. Note that the project must be an Eligible Facilities Request in order to be approved. Spectrum Act applications may not be used to bring a site into compliance with its permit; the site must be compliant at the time of application.
- c. If a new (non-Spectrum Act) approval is being sought, the facility must be brought into compliance with the current Wireless Ordinance and Guidelines.
- d. Co-location onto this type of facility must meet current regulations.
- e. Although this installation type is unconcealed by definition, antenna size and spacing is considered to provide an integrative function. If a project proposes to modify any facility in this category, all proposed antennas should appear to be the same size and spacing to comply with the Principle of Balance. Use antenna skirts and chin straps or similar, with 90-degree connectors.
- f. Cable management is also considered to provide an integrative function. Any modifications should manage cables to provide the absolute minimum of visibility. Avoid looping cables. Bunch cables whenever possible, and paint to match adjacent surfaces.

Installation Type	
<u>17. Unconcealed or under-concealed implementations of otherwise lawful facilities</u>	<p>Any facility with a valid permit for a facility type that is otherwise allowed herein, but which does not fully comply with these guidelines. Includes, but is not limited to:</p> <ul style="list-style-type: none"> • Façade-mounted antennas without cable management, chin straps, or antenna skirts • Any legal facility that doesn't follow the Principle of Balance • Legal faux trees that comply with their permits but don't comply with current standards • Light pole-mounted antennas or equipment without a shroud • Antenna shrouds that don't meet size requirements.

- a. If an SCR is desired, see Page 50. Note that SCRs cannot be used to decrease the level of conformity with the regulations or with these Guidelines.
- b. If a Spectrum Act modification is desired, see Pages 50-51. Note that the project must be an Eligible Facilities Request in order to be approved. Spectrum Act applications may not be used to bring a site into compliance with its permit; the site must be compliant at the time of application.
- c. If a new (non-Spectrum Act) approval is being sought, the facility must be brought into compliance with the current Wireless Ordinance and Guidelines.
- d. Co-location onto this type of facility must meet current regulations.

Administrative/Processing Requirements

1. **Substantial Conformance Review** – Substantial Conformance Review (SCR) is a process where projects can undertake modifications that are deemed to be in “substantial conformance” with the original permit. The goal of an SCR is to determine if the proposed project is consistent and in conformance with a previously approved permit. This includes a review of the revised project against the approved exhibits, permit conditions, environmental documentation, applicable land use policies and the public record for the prior permit. For general information on SCRs, see [Information Bulletin 500](#).

An SCR for a WCF must meet the following criteria, which supplement Attachment A to Information Bulletin 500:

- a. An SCR cannot be used to change the number of any visible WCF components or concealment elements.
 - b. An SCR cannot be used to increase the size, reduce the symmetry, or alter the appearance of any visible WCF components or concealment elements unless the change would positively affect the appearance of the facility.
 - c. An SCR cannot be used to increase the height of a project.
 - d. An SCR cannot be used to increase the amount of visible cabling.
 - e. An SCR cannot be used to cause visible elements to be different colors.
 - f. An SCR will not be granted if the site is not in compliance with its existing permit.
 - g. A building permit implementing the changes approved by an SCR must be issued within one year and pursued to completion or the SCR is null and void.
2. **Spectrum Act** – Pursuant to Section 6409(a) of the federal Middle Class Tax Relief and Job Creation Act of 2012 (the Spectrum Act), the City “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.”

The City complies with [FCC Report and Order FCC-14-153](#), and the reader is referred to that document for more information (see Pages 10 and 11 of that document for a summary). However, the following is of note, and is supported by the Report and Order:

- a. To be considered “existing” under the Spectrum Act, a site must be constructed in accordance with all applicable permits, including all permit conditions (Page 86, Paragraph 174). If not, the site cannot be considered an eligible facilities request. Applicants should research the complete permit history of their site before making a Spectrum Act application. Should a project not qualify, fees will not be refunded.

- b. Because a site must be “existing” to be considered an eligible facilities request, the City does not allow Spectrum Act applications to be used to bring a site into compliance with its permit. The site must be compliant at the time of application. The City makes an exception to this requirement if the non-compliance is related solely to previously-required landscaping that can be installed in conjunction with the Spectrum Act application.
 - c. Spectrum Act applications may not defeat existing concealment elements, and must comply with all permit conditions, except where the Spectrum Act separately allows certain modifications (Page 100, Paragraph 200).
 - d. Spectrum Act applications may not include replacement of the underlying structure (Page 89, Paragraphs 180 and 181).
3. **WCFs are iterative, which means plans require additional information** – WCFs typically have a series of permits that make incremental enhancements to a site, and can also change property owners/managers/carriers. This can make it difficult to account for exactly what is permitted on a site. The following are standards to facilitate plan review.
- b. Show the entire WCF on the plans, regardless of what is being modified. Every component should be shown. Show existing and proposed site plans, and elevations from all four directions, whether or not the elevation has any changes.
 - c. Project documents should reflect the total number of antennas, RRUs, RRHs, surge suppressors, generators, equipment cabinets, equipment rooms, cables, cable trays, and similar at a site, regardless of what is being modified by the current project. Even if only one antenna is being replaced, the whole WCF should be shown and described.
 - d. Project descriptions on applications and plans should describe the WCF in total. In other words, if an existing site has twelve antennas, the project description should not say “remove and replace three antennas”, it should say “remove and replace three antennas, nine existing antennas and twelve existing RRUs to remain, total of twelve antennas and twelve RRUs” or similar.
 - e. Specifications for all antennas, RRUs, RRHs, generators, and similar on a site should be provided, regardless of what is being modified by the current project. Even if the project is only to add one antenna, specifications for everything should be provided.
 - f. Plans should include existing and proposed antenna/equipment schedules in table form on the plans. Tables can be separate or combined into one. These tables should include the dimensions, manufacturer, and model number of all existing and proposed antennas and RRUs/RRHs.
 - g. If WCF components were previously approved but not built, this information should also be included in project descriptions and equipment schedules.

- h. Projects submitted by a site management company should disclose the carrier(s) on the site, and project submitted by a carrier should disclose the site management company. If Company A manages the site, and Carrier B is their tenant, plans submitted by Company A should say Carrier B is the tenant, and plans submitted by Carrier B should state that the site is managed by Company A.
4. **Annual Site Listing** – SDMC 141.0420 requires all WCF providers to submit site listings to the City. For the purposes of implementation, “WCF Provider” includes both wireless carriers and telecom site management companies. Therefore, sites may be on more than one list.

This documentation should include any site that provides commercial personal wireless services and/or information services, regardless of the size, location, or the technology used. This means that both macro sites and Small Cell WCFs (SC-WCFs) should be listed. The following should be included in this site listing. A Microsoft Excel template will be provided on the [City's WCF page](#), with separate formats for carriers and site management companies.

- a. Site Name: The name by which the provider refers to the site.
- b. Site Address: The address assigned to the site and/or used in applications. If there is no address, do not approximate. Staff will rely on geographic coordinates.
- c. Geographic coordinates: The latitude and longitude of the site in decimal degrees to the eighth decimal place. Latitude in San Diego will be a positive number, and longitude a negative number. 32.719370, -117.138327 is in San Diego, but 32.719370, 117.138327 is in China!

Please do not submit coordinate in Degrees/Minutes/Seconds (32°43'09.7"N 117°08'18.0"W); these coordinates may be used to track/map sites and decimal degrees (32.719370, -117.138327) are required.
- d. Site number: Typically in a format such as SD0338X or 805974.
- e. Wireless providers only: If your site is owned by another entity such as Crown Castle, SBA, American Tower, Mobilitie, etc., list the name of that entity.
- f. Property/Asset managers only: list each wireless provider at your site. If you give each provider a separate site number, each site number should be a separate line in the list. If multiple carriers share a site number, use one line per carrier.
- g. The type of site: Whether the site is a macro site or a Small Cell WCF (SC-WCF).
- h. Form factor: Site category as shown in these guidelines (faux tree, rooftop concealment, façade-mounted, etc.).

5. **Properties with Existing Code Violations** – WCFs may not be approved on properties with existing code or permit violations unless the violation is remedied by the project. This may

include collocated facilities that rely on the permits of others. Depending on the context, code violations may be cleared with the work proposed by the project, or a separate permit may be required. For Spectrum Act projects, all permit violations should be cleared prior to determining if the project is an Eligible Facilities Request. The Spectrum Act cannot be used to bring a site into compliance.

6. **Plans should match what is constructed** – Staff will not be held responsible for projects that are not constructed per plans and photo simulations. Variance in the field must be brought to staff's attention and reevaluated as soon as possible. Staff understands that projects can sometimes change in the field and will work toward an equitable solution.

Telecom inspections are not scheduled using the automated telephone system. Contractors should send high-resolution pictures demonstrating compliance with the conditions and exhibits identified on the approval notes imaged onto construction drawings to the Telecom Project Manager. Once cleared by the Project Manager, the project can call for final inspection.

Glossary

Italicized definitions match definitions found in section 113.0103 of the Municipal Code.

[AB 57](#): State law which “deems approved” applications for wireless sites if the City does not act on an application within the FCC’s “shot clock” timeframe.

Antenna: A device or system used for the transmission or reception of radio frequency signals for wireless communications. It may include an Omni-directional (whip), directional (panel), dish, or GPS antenna. It does not include the support structure.

Antenna shroud: A physical barrier that screens antennas entirely from view when they are mounted to a pole. Generally proposed as the only screening element. Also referred to as a radome or raydome. FRP integrated into building façade, architectural element, or rooftop screen is not an antenna shroud.

Concealment: The level to which WCFs components are hidden from view. Related to integration. (Pages 8-13)

Completely Concealed and Integrated Facility (CCIF): A site where antennas, cables and cable trays, and equipment are all completely hidden and blended into an existing/proposed structure or visual backdrop in a way that renders the WCF completely non-visible. (Page 11)

[Council Policy 600-43](#): City Council Policy that outlines location preferences for WCFs. (Page 3)

Equipment: Any non-antenna portion of the WCF, except concealment features, cabling and cable trays. Includes, but is not limited to, Remote Radio Units/Heads, surge protectors, diplexers, triplexers, battery racks, generators, air conditioners, XMUs, BBUs. (Pages 14-17)

Equipment area: A unified area, separate from the antennas, where most equipment is stored/mounted. All equipment does not have to be located here (for example, some or all Remote Radio Units, diplexers, surge suppressors, etc. may be located near antennas).

Fiberglass-Reinforced Plastic/FRP: A material used to conceal antennas. Allows signal to pass through and can be painted/textured to match existing/proposed buildings. (Page 17)

[General Plan Policy UD-A.15](#): Outlines design requirements for WCFs. Certain community plans may contain additional language. (Page 3)

Integration: How each part of a site fits together, how well a WCF fits into a site. Related to concealment. (Page 86)

Macro Site: Any WCF that is not a Small Cell WCF (SC-WCF).

Principle of Balance: All visible elements should have symmetry in all visible dimensions. Antennas and concealment elements should not dominate the element they are placed on. (Page 9)

Principle of Context: Specific situations require specific design solutions. What integrates well into one site may not be appropriate for another. Select the best design solution based on site and project characteristics. (Page 10)

Principle of Least Visibility: The least visible solution is best. Placement on the site should be as minimally visible as possible. (Page 10)

Radome/Raydome: See antenna shroud.

Remote Radio Head (RRH)/Remote Radio Unit (RRU): A part of the WCF's networking equipment that is separated into a smaller unit and can be placed near the antennas.

Site Management Company: Any entity that does not directly provide personal wireless services, but owns/manages sites that it leases to providers of personal wireless services.

Small Cell WCF (SC-WCF): Consists of one single antenna shroud, no more than 24" in all dimensions. (Pages 36-42)

Small Cell Wireless Facility (SWF): As defined in [FCC Report and Order 18-133](#).

Spectrum Act: Federal Law that governs certain modifications to WCFs. [FCC Report and Order 14-153](#) provides guidance on implementation. (Pages 4 and 50)

Stand-alone Pole: A small cell WCF that does not contain a City-standard streetlight. (Page 42)

Telecommunications Act of 1996: Federal law that regulates WCF processing and placement decisions. (Page 4)

Wireless Communication Facility (WCF): *The antennas, support structures, and other equipment or apparatus necessary for providing personal wireless services and information services.*

WCF Regulations: [Section 141.0420](#) of the San Diego Municipal Code, governs WCFs as a Separately-Regulated Use City-wide. Contains permitting and design requirements for WCFs. (Page 7)