



**CITY COUNCIL WORKSHOP MEETING AGENDA**  
**Monday, July 1, 2019, 4:30 PM**  
**City Hall, 616 NE 4th Ave**

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**I. CALL TO ORDER**

**II. ROLL CALL**

**III. PUBLIC COMMENTS**

**IV. WORKSHOP TOPICS**






- A. Camas Municipal Code (CMC) Chapter 18.35 Wireless Communication Facilities Amendments  
Presenters: Lauren Hollenbeck, Senior Planner and Meridee Pabst, AT&T Land Use Vice President

 [Washington Small Cell Presentation](#)  
[Wireless Communication Facilities Presentation](#)  
[Staff Report](#)  
[CMC 18.35 Redlines](#)  
[September 2018 Federal Communications Commission Ruling](#)  
[Case Law](#)  
[Draft Small Wireless Facility \(SWF\) Design Standards](#)

- B. 2019 Legislative Housing Bills  
Presenter: Sarah Fox, Senior Planner

 [Staff Report](#)  
[Grant Overview](#)  
[Housing Bills Presentation](#)  
[House Bill 1923](#)  
[House Bill 1923 Report](#)  
[House Bill 1377-S](#)  
[House Bill 1377-S Report](#)  
[Church Owned Properties in Camas](#)  
[Senate Bill 5383](#)

- C. Community Development Miscellaneous and Updates  
Details: This is a placeholder for miscellaneous or emergent items.  
Presenter: Robert Maul, Planning Manager

- D. Camas Municipal Code (CMC) Title 5, Department of Revenue Recommended Amendments  
Presenter: Cathy Huber Nickerson, Finance Director  
 [CMC Title 5 Redlines](#)
- E. Crown View Pump Station Professional Services Agreement Amendment with Wallis Engineering  
Presenter: Sam Adams, Utilities Manager  
 [Staff Report](#)  
[Wallis Engineering Amendment](#)
- F. Local Limits Development Update  
Presenter: Sam Adams, Utilities Manager  
 [Staff Report](#)  
[Executive Summary](#)
- G. Professional Services Agreement Amendment with CH2M Engineering  
Presenter: Sam Adams, Utilities Manager  
 [Staff Report](#)  
[CH2M Amendment No. 2](#)
- H. NW Camas Meadows Drive/NW Larkspur Street Improvements Update  
Presenter: James Carothers, Engineering Manager  
 [Staff Report](#)
- I. Public Works Miscellaneous and Updates  
Details: This is a placeholder for miscellaneous or emergent items.  
Presenter: Steve Wall, Public Works Director
- J. City Administrator Miscellaneous Updates and Scheduling  
Details: This is a placeholder for miscellaneous or scheduling items.  
Presenter: Pete Capell, City Administrator

## **V. COUNCIL COMMENTS AND REPORTS**

## **VI. PUBLIC COMMENTS**

## **VII. ADJOURNMENT**

NOTE: The City welcomes public meeting citizen participation. For accommodations; call 360.834.6864.



# AT&T Small Cells – Washington

Enhancing our network to meet consumer demand today while preparing for the technologies and innovations of tomorrow.

Meridee Pabst – Wireless Policy Group



# Why small cells?





Consumer and business demand for wireless data is on the rise.



# Small cells are critical to provide reliable wireless service coverage

- 95% of Americans own a cellphone and 77% own a smartphone. <sup>1</sup>
- More than 62% of American households rely on wireless as their primary means of communication. <sup>2</sup>
- 80 percent of all 911 calls came from cell phones. <sup>3</sup>
- 470,000% increase in data traffic from January 2007 through December 2018. <sup>4</sup>
- 98% of small businesses rely on wireless technology. <sup>5</sup>
- Existing macro sites have limited capacity.
- Residents use smartphones, tablets, laptops at home—all drive the need for reliable and expanded connectivity.

1. <http://www.pewinternet.org/fact-sheet/mobile/>

2. <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201605.pdf>

3. <https://www.nena.org/page/911Statistics>

4. [https://about.att.com/innovationblog/2019/01/restaurant\\_industry\\_5g\\_updates.html](https://about.att.com/innovationblog/2019/01/restaurant_industry_5g_updates.html)

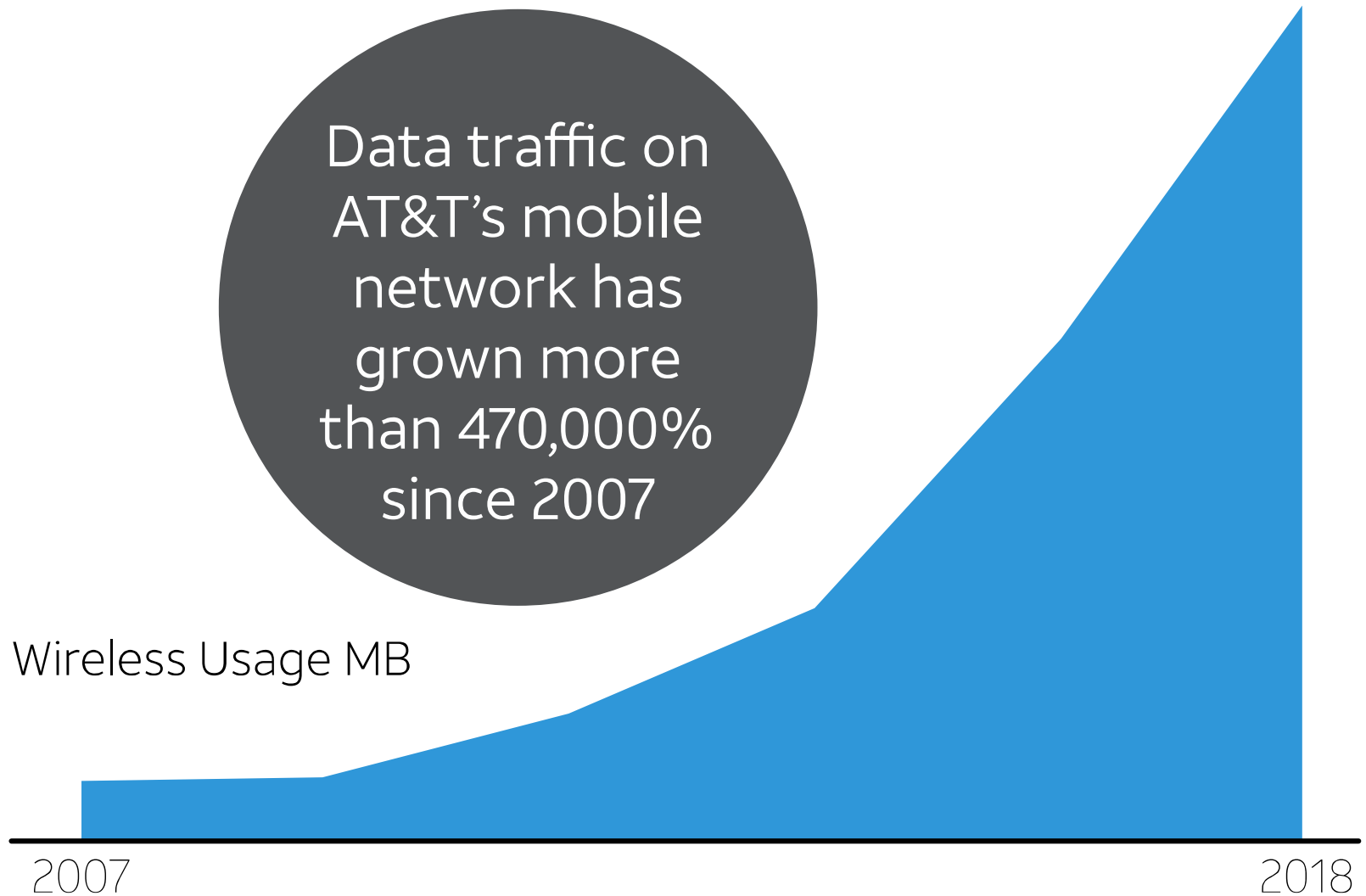
5. <https://smallbiztrends.com/2013/05/small-business-use-wireless.html>



# What the demand looks like on AT&T's network:

Data traffic on  
AT&T's mobile  
network has  
grown more  
than 470,000%  
since 2007

Wireless Usage MB



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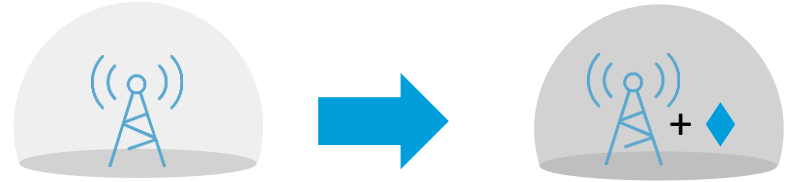


# Ways to Increase Wireless Network Capacity

①

## *Deploy more spectrum*

- Spectrum is *not readily available*



②

## *Improve spectrum efficiency*

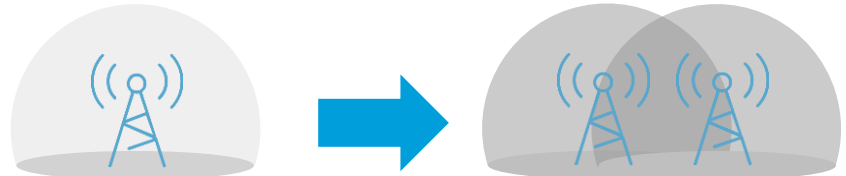
- Repurposing existing spectrum
- e.g., 3G carves for LTE



③

## *Add more macro (cell sites) cells*

- Optimal for low concentration areas



④

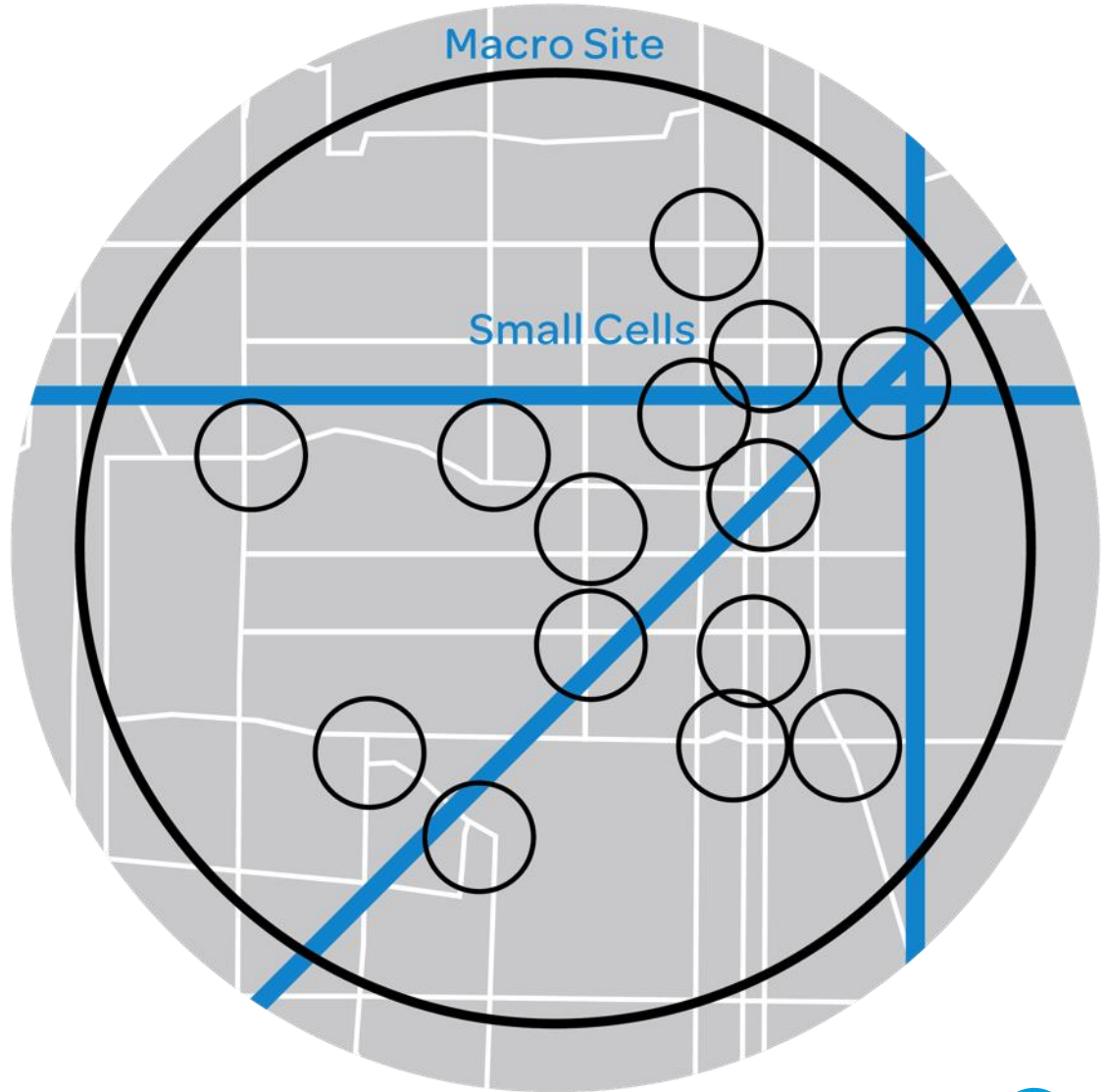
## *Add more small cells*

- Offloads surrounding macro sites





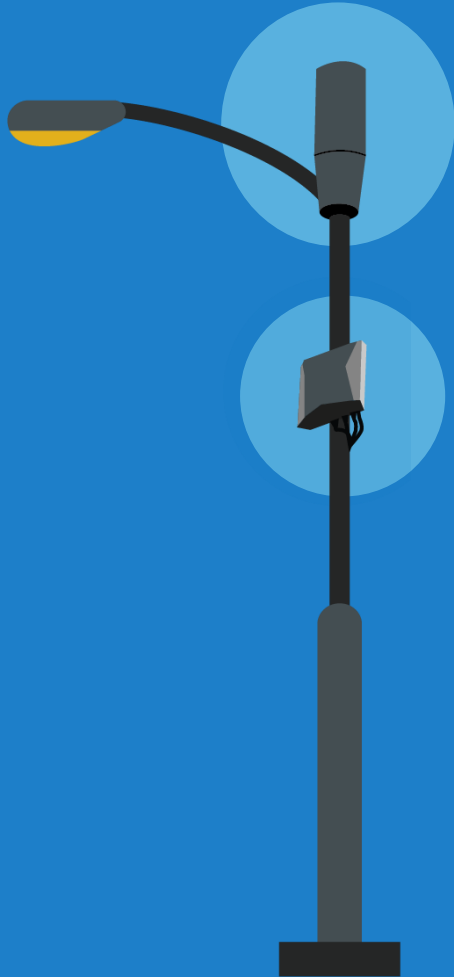
Small cells can  
densify our  
network to  
meet customer  
demand



What is a small cell?



# What is a Small Cell?



## A new network architecture is needed

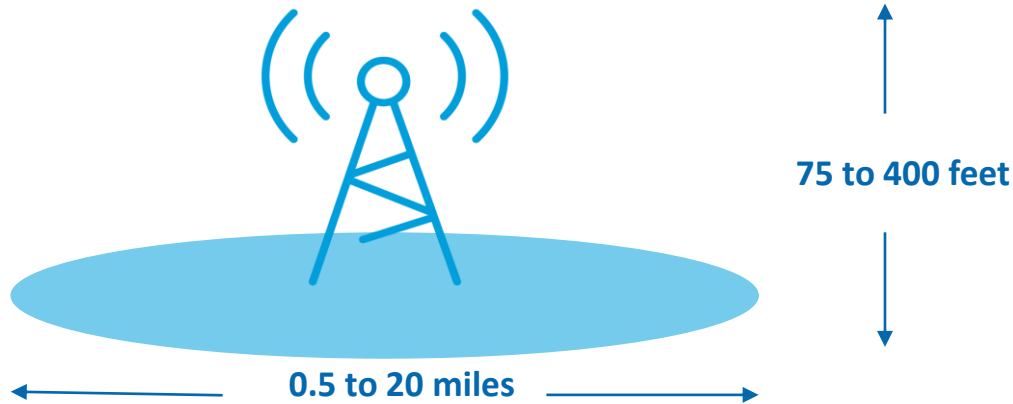
Small cells are **flexible, targeted** network solutions that cover a radius up to 1200+ feet & can be readily deployed to specific locations, including:

- Where customers are prone to experience connectivity issues
- Heavily populated areas that need more network capacity
- Areas that can't effectively be served by a traditional macro cell

This allows us to provide a better LTE experience today while also allowing us to prepare for the technologies of the future such as 5G, smart cities and new developments in the Internet of Things (IoT).

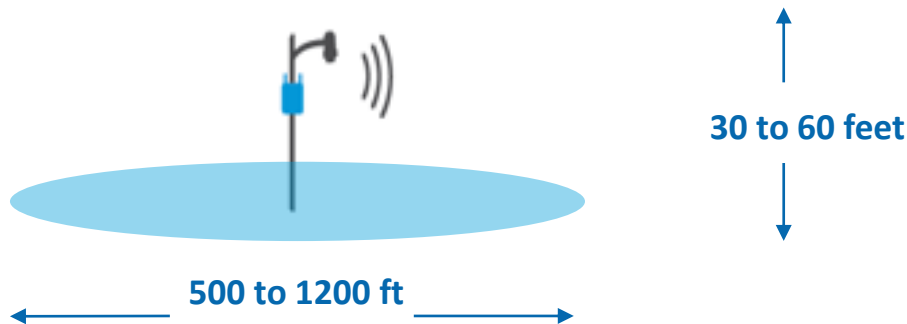
This photo depicts an example of what a small cell could look like. Actual size, shape and dimensions may vary by location.

# The footprint, or service area, of a site is determined by height and by frequency band



## Macrocell (4G LTE)

*The common form factor for wireless communication. Higher height and lower frequencies used result in the larger service area.*



## Current Small Cell (4G LTE)

*Uses the same frequencies as macrocells, in addition to utilizing unlicensed spectrum. Due to lower height, footprint is smaller. Increases capacity or coverage in target areas.*



## Future Small Cell (5G)

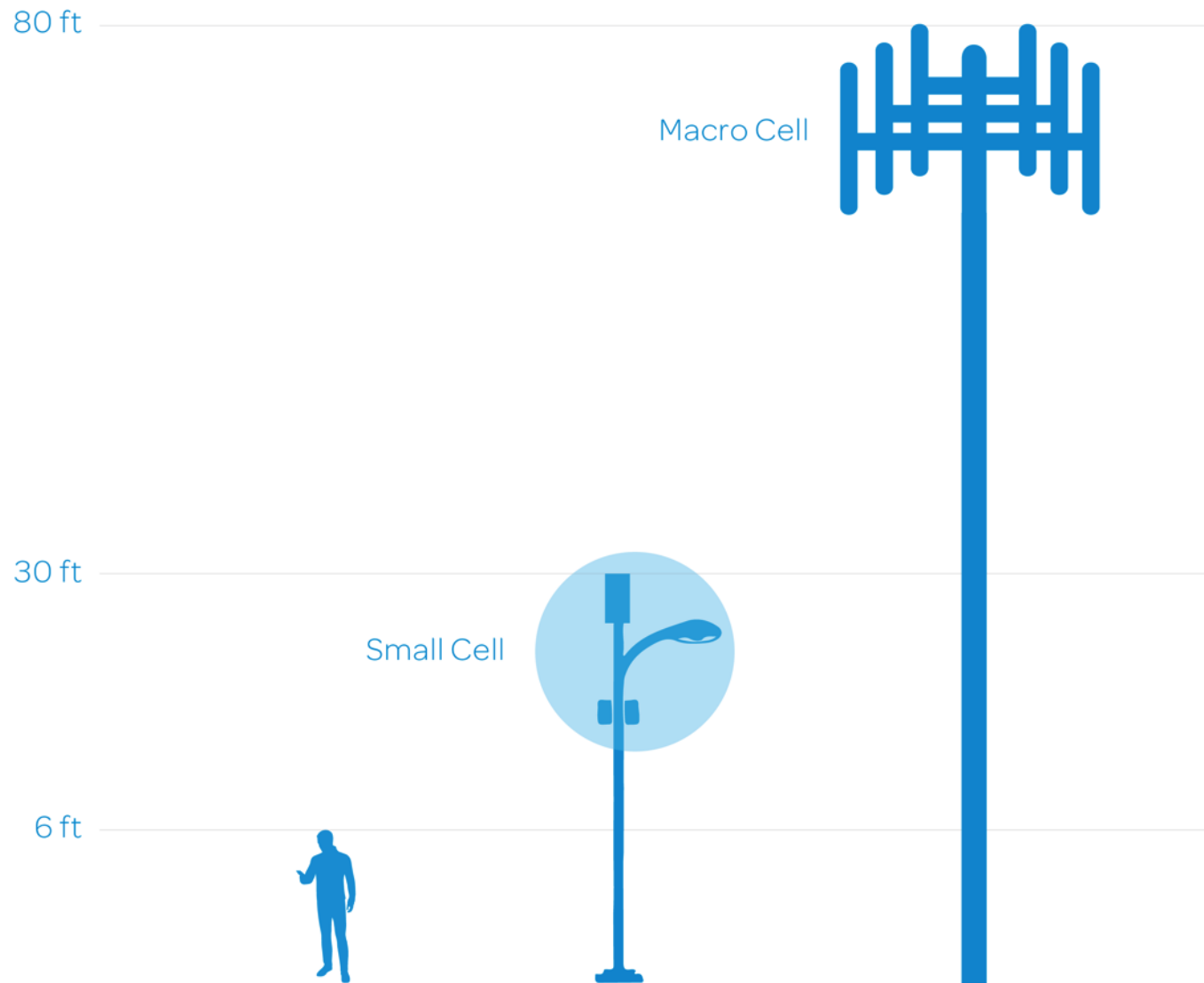
*Very high frequencies enabled by future 5G technology will result in a smaller footprint, but can be used to meet the exponential increased capacity demand. These frequencies are not used for wireless service today.*

- Heights and service areas are approximations
- Small cell sites supplement vs. replace macrocell sites





## Different technology, different process



# Examples of small cells deployed in communities

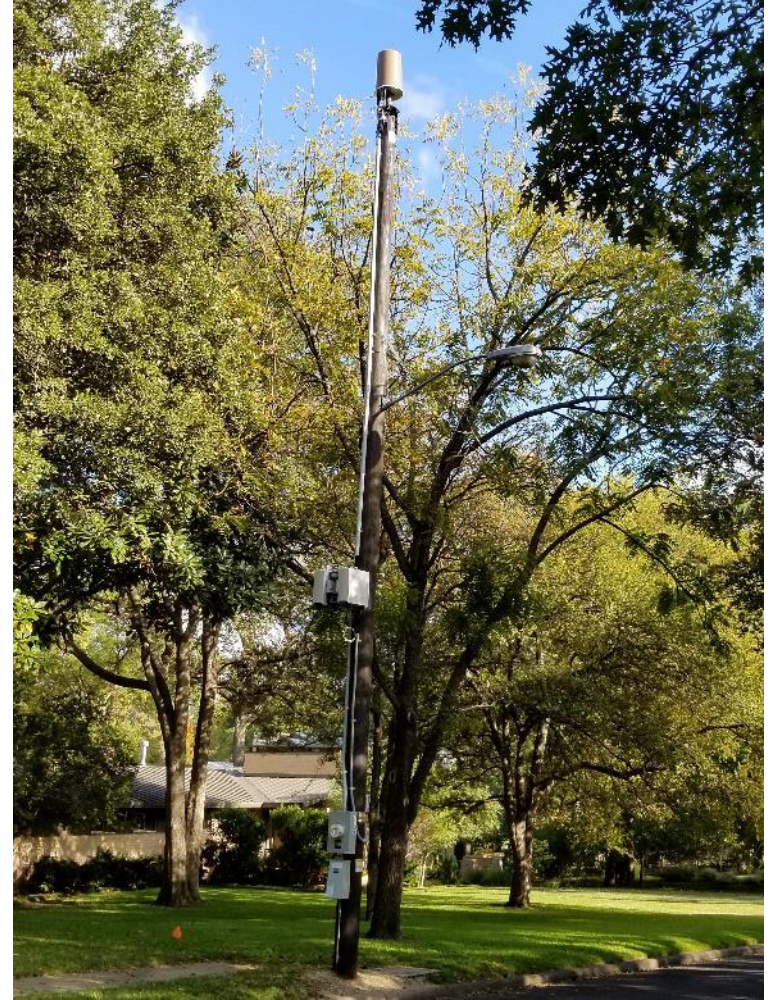


Eugene, OR





## Dallas, TX





## Indianapolis, IN



## San Francisco, CA



MOBILIZING  
**YOUR**  
WORLD<sup>SM</sup>



The background features abstract, overlapping geometric shapes in various shades of blue, ranging from light sky blue to deep navy blue. These shapes are primarily located on the left and right sides of the slide, framing the central text area.

# Camas Municipal Code (CMC)

## Chapter 18.35 Wireless Communication Facilities

City Council July 1, 2019 Workshop





# Federal Communications Commission (FCC) Ruling on Small Wireless Facilities-

## ▶ Key Points-

- Shot Clocks
- Reasonable costs
- Aesthetic Standards
- “Effectively Prohibits”

# Shot Clocks

FCC Review Shot Clock Types and Times	
Type of Review	Shot Clock
Collocation of small wireless facilities	60 days
Collocations of facilities <b>other</b> than small wireless**	90 days
Construction of new small wireless facilities*	90 days
Construction of new facilities <b>other</b> than small wireless**	150 days

\*Green-shaded shot clocks are new

\*\*Previously existed but not codified. FCC codifies them in the Declaratory Ruling.

# Reasonable costs

Local governments must demonstrate that its fees are based on a “reasonable approximation of its costs” and that its costs are “reasonable” and no higher than fees charged to “similarly-situated competitors in similar situations.”





# Aesthetic Standards



**VS**



- 1) Reasonable
- 2) No more burdensome than those applied to other types of infrastructure deployments
- 3) Published in advance



# Effective Prohibition- A Term to Remember

An effective prohibition occurs where a local requirement “materially inhibits” a provider’s ability to engage in any of a variety of activities related to its provision of a covered service.

Questions?

## STAFF REPORT

### Minor Amendments to Camas Municipal Code (CMC)

### Chapter 18.35 Wireless Communication Facilities

File# MC19-02

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<u>TO</u>	Mayor Turk City Council
<u>FROM</u>	Lauren Hollenbeck, Senior Planner on behalf of Planning Commission
<u>DATE</u>	June 25, 2019
<u>NOTICES</u>	Department of Commerce acknowledged receipt of the proposed amendment on May 31, 2019 (Submittal ID# 2019-S-232). A State Environmental Policy Act (SEPA) determination of non-significance for a non-project action was published on June 6, 2019 with a comment period ending on June 20, 2019.

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### Summary

This workshop is a discussion of proposed code updates in response to the Federal Communications Commission (FCC) ruling on wireless communication facilities, particularly in regards to small cell wireless facilities and management of local right-of-ways, which have been in effect since September 2018. City staff, with input from telecommunication providers such as AT&T, have proposed amendments to Chapter 18.35 *Wireless Communication Facilities* for compliance with the new FCC ruling. Other minor amendments include updates to clarify sections to Chapter 18.35. Planning Commission held a public hearing on June 18, 2019.

The following attachments are provided for your review: 1) The proposed CMC amendments shown as red strike-through text or underlined, 2) The September 2018 FCC ruling, 3) New York SMSA Limited Partnership v. Town of Clarkstown case law, 4) Draft Public Works Small Wireless Facility design standards

The following is a brief description of the proposed amendments within the following chapters to CMC Chapter 18.35.

### *Chapter 18.35 Wireless Communication Facilities*

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#### **Chapter 18.35.020 - Definitions**

Suggest adopting the FCC definitions in 27 CFR Section 6002 for “antenna”, “antenna equipment”, “collocation”, “facility or personal wireless facility”, “small wireless facilities”, and “structure”.

#### **Chapter 18.35.030 - Towers**

Remove footnote 3 under Table 18.35-1 and footnote 5 in Table 18.35-2 regarding “gap in service”. The recent FCC Order expressly rejects the “significant gap” test previously applicable in the 9<sup>th</sup> Circuit Court of Appeals. Order footnote 94, page 19 of FCC ruling.



The federal court previously developed the significant gap test to measure the quality of coverage and show gaps where there was no coverage. However, the new FCC ruling made clear that a local requirement is an unlawful “effective prohibition” if it “materially limits or inhibits” the ability for a provider to provide a service (i.e. gap coverage).

#### **Chapter 18.35.040 – Collocation of antennas, DAS, and small wireless facilities**

CMC 18.35.040.E *DAS and small wireless facilities*. This section identifies the development standards applicable to these facilities within the right-of-way, which include new Public Works Small Wireless Facility Design Standards, an encroachment permit, a building permit, and other applicable agreements such as a franchise agreement.

The Type II review referenced in this section is no longer applicable and stricken from this section. The FCC ruling established “shot clocks” for review of WCF’s per 27 CFR Section 6003. Review timelines are added in a new section CMC 18.35.051 discussed further below.

#### **Chapter 18.35.050 – Tower, sharing, collocation and preferred tower locations**

Section C prohibits new towers in all R and MF zones however Section D and CMC 18.35.030 *Towers* permits new towers in all R and MF zones. Further, the code clearly outlines the steps for building a tower in a residential zone. Therefore, CMC 18.35.050.C has been stricken.

#### **Chapter 18.35.051 – Application review timeframes**

This is a new section to address the FCC ruling that established “shot clocks” for review of WCF’s 27 CFR Section 6003. This new ruling shortens the time cities have to process applications for small wireless facilities (SWF’s) or other facilities to either 60 or 90 days, depending on whether they are being mounted on an existing or new structure.

If an initial application for SWF’s is deemed incomplete by staff, it must be done within 10 days of application submittal accompanied with a written notice that clearly and specifically identifies the missing documentation. The review timeframe will be reset at the beginning of the review timeframe upon submittal of the missing documents and information.

If an initial application for WCF’s is deemed incomplete by staff, it must be done within 30 days of application submittal accompanied with a written notice that clearly and specifically identifies the missing documentation. The review timeframe will pause (not reset) until the missing information is submitted.

Pre-application meetings are not required. However, if a pre-application meeting is required it is included in the application review period.

#### **Chapter 18.35.060 – Application submittal requirements**

CMC 18.35.060.D *Visual Analysis*. AT&T suggests deleting all preferences for use of alternative technology because such preferences are preempted by federal law- *New York SMSA Limited Partnership v. Town of Clarkstown*. Under federal law, technology options cannot be regulated but aesthetics can for example. As such, the following language is proposed for removal “technology design options for the facility”.

In the same sentence staff proposes removing reference to “closing the same gap” for compliance with the FCC ruling that rejects the significant gap test as discussed above.

CMC 18.35.060.G.3 *Description of service coverage*. Remove reference to “close a gap” for compliance with the FCC ruling that rejects the significant gap test as discussed above.

CMC 18.35.060.H *DAS and SWF*. Subsections 1 and 2 are development standards, which are already referenced in CMC 18.35.040, and therefore do not need to be included under application submittal requirements. These subsections are proposed for removal.

CMC 18.35.060.J *Accessory Equipment*. This section is a development standard, which is already included under CMC 18.35.070(J), and therefore does not need to be included under application submittal requirements. Further, this section requires accessory equipment to be placed underground whereas CMC 18.35.070(I) allows placement on a pole. This section is proposed for removal.

### **Chapter 18.35.070 – General development standards applicable to WCFs**

CMC 18.35.070.C *Visual Impact*. AT&T suggests deleting all preferences for use of alternative technology because such preferences are preempted by federal law- *New York SMSA Limited Partnership v. Town of Clarkstown*. Under federal law, technology options cannot be regulated but aesthetics can for example. As such, the following language is proposed for removal “design alternatives such as the use of microcell”.

In the same sentence staff proposes removing reference to “close the gap” for compliance with the FCC ruling that rejects the significant gap test as discussed above.

CMC 18.35.070.I *WCFs in the Public Right-of-Way*. The new FCC ruling requires limiting aesthetic review and requirements (including undergrounding and historic/environmental requirements) to those that are reasonable for SWFs, comparable to requirements for other rights-of-way users. As such, this section clarifies that SWFs in ROW’s are subject to the new Public Works design standards.

### **Chapter 18.35.090 – Exceptions from standards**

CMC 18.35.090.D.3 and 4 *Criteria*. Remove references to “significant gap in service” for compliance with the FCC ruling that rejects the significant gap test as discussed above.

The FCC ruling further clarifies that the applicable test of when a local regulation has “the effect of prohibiting” wireless service is only when the regulation “materially inhibits or limits” the ability of the provider to provide wireless service.

### **Chapter 18.35.130 – Independent technical review**

A third party review is more likely for a proposal that might be more controversial and/or difficult to review (i.e. such as a new tower in a residential zone or a CUP) opposed to SWF’s in ROW’s.

The FCC ruling prohibits cities from assessing fees that include anything other than a “reasonable approximation” of “reasonable costs” directly related to maintaining the right-of-way and the small cell facility. For example, excessive and unreasonable costs such as excessive contractor or consultant fees may not be passed to the applicant.

### **Recommendation**

Staff recommends City Council discuss proposed amendments that was forwarded by the Planning Commission for approval and provide direction to staff.

## Chapter 18.35 - WIRELESS COMMUNICATION FACILITIES<sup>[11]</sup>

### Footnotes:

--- (11) ---

**Editor's note—** [Ord. No. 17-009](#), § I, adopted July 3, 2017, repealed former Ch. 18.35, Telecommunication Ordinance, §§ 18.35.010—18.35.180, and Exh. A thereto enacted a new Ch. 18.35 as set out herein. See the Code Comparative Table and Disposition List for complete derivation.

### 18.35.010 - Purpose.

The purpose of this chapter is to provide a uniform and comprehensive set of standards for the development, siting and installation of wireless telecommunication facilities. These regulations are intended to protect the public health, safety and welfare of the residents of Camas, to preserve community character and protect aesthetic quality in accordance with guidelines and intent of federal regulations and to encourage siting in preferred locations to minimize aesthetic impacts and to minimize the intrusion of towers into residential areas (R, MF zones) and gateways as designated on the City of Camas Zoning Map.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

### 18.35.020 - Definitions.

The following words and phrases used in this chapter shall have the following meanings:

- A. "Antenna" 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, one or more rods, panels, discs or similar devices used for wireless communication, which may include, but is not limited to, omni-directional antenna (whip), directional antenna (panel), and parabolic antenna (dish).
- B. "Antenna array" means a single or group of antenna elements and associated mounting hardware, transmission lines, or other appurtenances which share a common attachment device such as a mounting frame or mounting support structure for the sole purpose of transmitting or receiving electromagnetic waves.
- C. "Antenna equipment" 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. "Base station" means a structure or equipment at a fixed location that enables commission-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined in this chapter or any equipment associated with a tower.
  - 1. The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.
  - 2. The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including distributed antenna systems and small cell-wireless facility networks).

Commented [LH1]: FCC Definition

Commented [LH2]: FCC Definition

3. The term includes any structure other than a tower that, at the time the relevant application is filed with the city under this section, supports or houses equipment described in this section that has been reviewed and approved under the applicable zoning or siting process, or under Washington or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing such support.
4. The term does not include any structure that, at the time the relevant application is filed with the State of Washington or the city under this section, does not support or house equipment described in this section.

**ED.** "Collocation" means (1) mounting or installing an antenna and associated antenna equipment on a pre-existing structure, and/or (2) modifying a structure for the purpose of mounting or installing an antenna and associated antenna equipment on that structure.

Commented [LH3]: FCC Definition

~~the mounting or installation of transmission equipment on a support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.~~

**FE.** "Commission" means the Federal Communications Commission ("FCC").

**GF.** "Distributed antenna system" or "DAS" means a network consisting of transceiver equipment at a central hub site to support multiple antenna locations throughout the desired coverage area.

**H.** "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 communication services.

Commented [LH4]: FCC definition

**IHG.** "Small-cell wireless facilities" are facilities that meet each of the following conditions:

Commented [LH5]: FCC Definition

(1) The facilities—

(a) are mounted on structures 50 feet or less in height including their antennas, or

(b) are mounted on structures 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. (aka micro-cells) means compact wireless base stations containing their own transceiver equipment and function like cells in a mobile network but provide a smaller coverage area than traditional macrocells. Small-cell antennas are mounted at street level, typically on the external walls of external structures, lamp-posts and other street furniture or utility structures and can often blend in to the building features. For purposes of these definitions, volume is a measure of the exterior displacement, not the interior volume of the enclosures. Antennas or equipment concealed from public view in or behind an otherwise approved structure or concealment are not included in calculating volume.

~~1. Small cell antenna: Each antenna shall be no more than three cubic feet in volume.~~

~~2. Small cell equipment: Each equipment enclosure shall be no larger than seventeen cubic feet in volume. Associated conduit, mounting bracket or extension arm, electric meter, concealment, telecommunications demarcation box, ground-based enclosures, battery back-up power systems, grounding equipment, power transfer switch, and cutoff switch may be located outside the primary equipment enclosure(s) and are not included in the calculation of equipment volume.~~

**IJJ.** "Stealth design" means technology that minimizes the visual impact of wireless communications facilities by camouflaging, disguising, screening, and/or blending into the

surrounding environment. Examples of stealth design include but are not limited to facilities disguised as trees, flagpoles, bell towers, utility support structures, parking lot light standards, and architecturally screened roof-mounted antennas.

JKI. "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).

Commented [LH6]: FCC Definition

LK. "Tower" means any structure built for the sole or primary purpose of supporting any commission-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site. A structure built to support a small wireless facility is not a "tower" for purposes of this Chapter.

MLJ. "Tower height" means the vertical distance measured from the base of the tower structure at grade to the highest point of the structure including the antenna but does not include a lightning rod

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

ONL. "Utility support structure" means poles or towers with a primary purpose of supporting utility electrical, telephone land lines, cable or other similar facilities; street lights; pedestrian lights; traffic light structures; traffic sign structures; or water towers.

PQM. "Wireless communication facilities" or "WCF" means a staffed or unstaffed facility or location for the transmission and/or reception of radio frequency (RF) signals or other wireless communications or other signals for commercial or governmental communications purposes, typically consisting of one or more antennas or group of antennas, a tower or attachment support structure, transmission cables and other transmission equipment, and an equipment enclosure or cabinets.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

#### 18.35.030 - Towers.

- A. Towers shall be located only in those areas and pursuant to the process described in CMC Tables 18.35-1 and 18.35-2, provided that towers that are proposed to be located in a residential zone or within one hundred fifty feet of a residential zone shall be subject to the siting priorities set forth for preferred tower locations in CMC 18.35.050.

<b>Table 18.35-1</b> <b>New Wireless Communication Tower Criteria</b> <b>Allowed by Type II Permit</b>				
<b>Zone Category</b>	<b>Located in Public Right-of-way (ROW)</b>	<b>Maximum Tower Height <sup>[2]</sup></b>	<b>Stealth Design</b>	<b>Setback from Property Lines (does not apply within ROW) <sup>[2]</sup></b>

NP, SU <sup>[1]</sup>	Yes	50'	Optional <sup>[1]</sup>	N/A
	No	75'	Optional <sup>[1]</sup>	20'; and 60' from any ROW
RC, CC, NC <sup>[1]</sup>	Yes	50'	Optional <sup>[1]</sup>	N/A
	No	60'	Optional <sup>[1]</sup>	20'; and 60' from any ROW
BP <sup>[1]</sup>	Yes	50'	Optional <sup>[1]</sup>	N/A
	No	70'	Optional <sup>[1]</sup>	20'; and 70' from any ROW
LI, LI/BP <sup>[1]</sup>	Yes	50'	Optional <sup>[1]</sup>	N/A
	No	150'	Optional <sup>[1]</sup>	20'; and 100' from any ROW
HI <sup>[1]</sup>	Yes	70'	Optional <sup>[1]</sup>	N/A
	No	150'	Optional <sup>[1]</sup>	20' and 100' from any ROW

<sup>[1]</sup> If an applicant wants to construct a tower in a residential zone or within fifty feet of a residential zone, then a Type III process and stealth design are required. If an applicant wants to construct a tower within fifty-one to one hundred fifty feet of a residential zone, then a Type II process and stealth design are required. If an applicant wants to construct a tower beyond one hundred fifty feet of a residential zone, then the review process is that which is required in the zone in which the tower is to be located.

<sup>[2]</sup> See exception for locations adjacent to a residence in CMC 18.35.070(B).

~~<sup>[3]</sup> Lesser of the maximum tower height or the height necessary to serve a gap in service.~~

**Commented [LH7]:** The recent FCC Order expressly rejects the "significant gap" test previously applicable in the 9th Circuit Court of Appeals. Order, footnote 94.

**Table CMC 18.35-2**  
**New Wireless Communication Tower Criteria**

Allowed by Type III Conditional Use Permit				
Zone Category	Located in Public Right-of-Way (ROW)	Maximum Tower Height <sup>[6]</sup>	Stealth Design	Setback from Property Lines <sup>[2]</sup> (does not apply within ROW)
All R, MF, MX, DC <sup>[1]</sup>	No	60'	Required	20'
NP, SU, RC, CC, NC <sup>[1]</sup>	No	61'—70' <sup>[3]</sup>	Optional <sup>[1]</sup>	20'
BP <sup>[1]</sup>	No	71'—90' <sup>[4]</sup>	Optional <sup>[1]</sup>	20'

<sup>[1]</sup> All new towers in a residential zone or within fifty feet of a residential zone shall require stealth design.

<sup>[2]</sup> See exceptions for locations adjacent to a residence in CMC 18.35.070(B).

<sup>[3]</sup> An additional twenty feet in height is allowed if applicant uses stealth design.

<sup>[4]</sup> An additional thirty feet in height is allowed if applicant uses stealth design.

<sup>[5]</sup> ~~Lesser of the maximum tower height or the height necessary to serve a gap in service.~~

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

**Commented [LH8]:** The recent FCC Order expressly rejects the “significant gap” test previously applicable in the 9th Circuit Court of Appeals. Order, footnote 94.

18.35.040 - Collocation of antennas, DAS, and small ~~wireless facilities~~ cells.

- A. To the extent not otherwise covered by this chapter, collocation and new wireless communication antenna arrays are permitted in all zones via administrative (building permits) approval provided that they are attached to or inside of an existing structure (except on the exterior of pole signs or anywhere on a billboard) that provides the required clearances for the array's operation without the necessity of constructing a tower or other apparatus to extend the antenna array more than fifteen feet above the structure.
- B. For antenna arrays on city-owned property or right-of-way, ~~other execution of applicable necessary agreements and/or permits, such as an encroachment permit, are is~~ also required.
- C. If any support structure must be constructed to achieve the needed elevation or if the attachment adds more than fifteen feet above the existing structure, the proposal is subject to Type II review. The limitation to fifteen feet is applicable to cumulative increases and any previously approved additions to height made under this section must be included in its measurement.

D. Any equipment shelter or cabinet and other ancillary equipment are subject to the general development standards of CMC 18.35.070.

E. ~~Distributed antenna systems~~DAS and small ~~wireless facilities~~cells. Notwithstanding the foregoing:

1. ~~Distributed antenna systems~~(DAS) and small ~~cells~~~~wireless facilities~~ are permitted in all land use zones and public rights-of-way, ~~regardless of and are not subject to~~ the siting preferences listed in CMC 18.35.050.

a. DAS and small wireless facilities, as well as their support structures, are permitted in the public right-of-way, subject to compliance with applicable Public Works design standards and issuance of an encroachment permit and building permit. Any wireless service and/or infrastructure provider installing DAS and small wireless facilities in the right-of-way must also have a municipal master permit, franchise, or other applicable authorization to use the right-of-way, and if applicable, an agreement or permit to attach to City-owned structures.

b. DAS and small wireless facilities, as well as their support structures, are permitted outside of the public right-of-way, subject to compliance with the standards in this Chapter 18.35 and issuance of a building permit.

~~2. DAS and small cell systems are subject to approval via administrative Type II review under CMC 18.35.070. Additionally, design review is required when the applicant proposes a new utility support structure or building.~~

~~2. 3. Multiple-site DAS and small wireless facilities~~cells. Consolidated review of multiple-site DAS and small ~~wireless facilities~~ cells shall be provided; provided, that the denial of one or more DAS or small wireless facilities in a consolidated application shall not delay the processing of any other DAS or small wireless facility or related structures submitted in the same consolidated application.

Commented [LH9]: Application review timelines added below in CMC 18.35.051.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

18.35.050 - Tower, sharing, collocation and preferred tower locations.

A. Tower Sharing and Collocation. New WCF facilities must, to the maximum extent feasible, collocate on existing towers or other structures to avoid construction of new towers, unless precluded by zoning constraints such as height, structural limitations, inability to obtain authorization by the owner of an alternative location, or where an alternative location will not meet the service coverage or other objectives of the applicant. Applications for a new tower must address all existing towers or structures of a similar height within one-half mile of the proposed site as follows:

1. By providing evidence that a request was made to locate on the existing tower or other structure, with no success; or
2. By showing that locating on the existing tower or other structure is infeasible.

B. All new wireless telecommunication towers shall be designed and built to accommodate collocation or additional loading. For the purposes of this provision, 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:

1. Twelve antennas with a float plate wind-loading of not less than four square feet per antenna;
2. A standard mounting structure, standoff arms, platform or other similar structure designed to hold the antennas;
3. Cable ports at the base and antenna levels of the tower; and
4. Sufficient room within or on the tower for twelve runs of seven-eighths-inch coaxial cable from the base of the tower to the antennas.



~~G. New towers shall be prohibited in all R and MF zones unless such a prohibition would prohibit or have the effect of constitute a denial prohibiting of wireless service coverage objectives under the Federal Telecommunication Act.~~

**Commented [LH10]:** This section prohibits new towers but the following section permits them. The rest of the code makes very clear steps the applicant must complete in order to build a tower in the residential zone. This statement seems to add a layer of ambiguity.

~~C.D.~~ Preferred Tower Locations. All new towers in residential (R, MF) zones or within one hundred fifty feet of a residential zone shall require a demonstration that the tower will be sited in the most preferred zoning district/area that will address a defined service coverage or other objective based upon the following priorities, ordered from most-preferred (1) to least-preferred (7):

1. City-owned or operated property, facilities and rights-of-way excepting therefrom, right-of-way and city facilities located in residential zones (R, MF zones) or gateways designated on the zoning maps of the City of Camas, and where the tower will not be located within one hundred fifty feet of a residential zone;
2. HI, I, LIBP zones;
3. BP zones;
4. RC and CC zones;
5. NC and DC zones;
6. City-owned or operated property (not right-of-way) and facilities in any zone, as long as less than fifty percent of height of the tower is visible as viewed from a public street, public open areas (e.g. fields, playgrounds, parking areas), or property that is being used for residential purposes;
7. Parcels of land in residential zones (R, MF zones).

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

18.35.051 – Application review timeframes.

**Commented [LH11]:** This section was added to address the new FCC ruling regarding shot clocks.

Instead of the generally applicable review timeframes in CMC Chapter 18.55, the following timeframes apply to the review of WCFs:

A. The following application review timeframes for wireless communication facilities include any other required permit review or process:

1. 60 days for collocations of small wireless facilities on existing structures;
2. 90 days for collocations of facilities, other than small wireless facilities, on existing structures;
3. 90 days for new construction of small wireless facilities; and
4. 150 days for new construction of facilities, other than small wireless facilities

B. If an initial application for small wireless facilities is deemed incomplete in a written notice within 10 days of application submittal, and the written notice clearly and specifically identifies the missing documents or information, the review timeframe will be reset at the beginning of the applicable review timeframe upon submittal of the missing documents and information (the resubmitted application).

C. If an initial application for other wireless facilities is deemed incomplete in a written notice within 30 days of application submittal, and the written notice clearly and specifically identifies the missing documents or information, the review timeframe will pause (not reset) until the missing information is submitted (the resubmitted application).

D. If a resubmitted application for wireless facilities, including small wireless facilities, is deemed incomplete in a written notice within 10 days of application resubmittal and the written notice clearly and specifically identifies the missing documents or information based on the original notice of incompleteness, the review timeframe will pause (not reset) until the missing information is submitted.

E. Pre-applications are encouraged but not required.

#### 18.35.060 - Application submittal requirements.

In addition to the application materials required elsewhere in the CMC, Type II and Type III applications submitted under this chapter shall include the following materials, as applicable to the type of use or facility proposed:

- A. Requirement for FCC Documentation. The applicant shall provide a copy of:
  1. Documentation for FCC license submittal or registration; and
  2. The applicant's FCC license or registration.
- B. Speculation. No application shall be accepted, approved, constructed or maintained for a speculation tower, i.e., solely from an applicant that simply constructs towers and leases tower space to service providers, but is not a service provider. An application made on behalf of a service provider and consented to by the service provider would not be considered to be a speculation tower.
- C. Site Plans. Complete and accurate plans and drawings to scale, prepared, signed and sealed by a Washington-licensed engineer, land surveyor and/or architect, including:
  1. Plan views and all elevations before and after the proposed construction with all height and width measurements called out;
  2. A depiction of all proposed transmission equipment;
  3. A depiction of all proposed utility runs and points of contact; and
  4. A depiction of the leased or licensed area with all rights-of-way and/or easements for access and utilities in plan view.
- D. Visual Analysis. A color visual analysis that includes to-scale visual simulations that show unobstructed before-and-after construction daytime and clear-weather views from at least four angles, together with a map that shows the location of each view. The applicant shall provide an analysis of alternative sites ~~and technology design options for the facility~~ within and outside of the city that are capable of ~~closing the same gap in meeting the~~ service provider's service area ~~as the preferred site objectives~~ with an equivalent or lesser visual impact.
- E. Statement of Purpose/RF Justification for WCF. A clear and complete written statement of purpose shall minimally include: (1) a description of the technical objective to be achieved; (2) a to-scale map that identifies the proposed site location and the targeted service area to be benefited by the proposed project; and (3) if the purpose of the facility is to provide coverage, full-color signal propagation maps with objective units of signal strength measurement that show the applicant's current service coverage levels from all adjacent wireless sites without the proposed site, predicted service coverage levels from all adjacent wireless sites with the proposed site, and predicted service coverage levels from the proposed site without all adjacent wireless sites. These materials shall be reviewed and signed by a Washington-licensed professional engineer or a qualified employee of the applicant. The qualified employee of the applicant shall submit his or her qualifications with the application.
- F. Design Justification. A clear and complete written analysis that explains how the proposed design complies with the applicable design standards under this chapter to the maximum extent feasible. A complete design justification must identify all applicable design standards under this

**Commented [LH12]:** AT&T suggests deleting all preferences for use of alternative technology because such preferences are preempted by federal law. New York SMSA Limited Partnership v. Town of Clarkstown, 612 F.3d 97, 105-07 (2nd Cir. 2010).

**Commented [LH13]:** The recent FCC Order expressly rejects the "significant gap" test previously applicable in the 9th Circuit Court of Appeals. Order, footnote 94.

chapter and provide a factually detailed reason why the proposed design either complies or cannot feasibly comply.

G. Collocation and Alternative Sites Analysis.

1. All Towers. All applications for a new tower must demonstrate that collocation is not feasible, consistent with CMC 18.35.050.
2. Towers in a Residential Zone or Within One Hundred Fifty Feet of a Residential Zone.
  - a. For towers in or within one hundred fifty feet of a residential zone, the applicant must address the city's preferred tower locations in CMC 18.35.050 with a detailed explanation justifying why a site of higher priority was not selected. The city's tower location preferences must be addressed in a clear and complete written alternative site analysis that shows at least five higher ranked, alternative sites considered that are in the geographic range of the service coverage or other objectives of the applicant, together with a factually detailed and meaningful comparative analysis between each alternative candidate and the proposed site that explains the substantive reasons why the applicant rejected the alternative candidate. An applicant may reject an alternative tower site for one or more of the following reasons:
    1. Preclusion by structural limitations;
    2. Inability to obtain authorization by the owner;
    3. Failure to meet the service coverage or other objectives of the applicant;
    4. Failure to meet other engineering requirements for such things as location, height and size;
    5. Zoning constraints, such as the inability to meet setbacks;
    6. physical or environmental constraints, such as unstable soils or wetlands; and/or
    7. Being a more intrusive location based on physical features and land uses on the site or in the surrounding area despite the higher priority in this chapter as determined by the planning director or hearing examiner, as applicable.
  - b. A complete alternative sites analysis provided under this subsection (F)(2) may include less than five alternative sites so long as the applicant provides a factually detailed written rationale for why it could not identify at least five potentially available, higher ranked, alternative sites.
3. Required description of service coverage objectives. For purposes of disqualifying potential collocations and/or alternative sites for the failure to meet the applicant's service coverage objectives the applicant will provide:
  - a. A description of its objective, ~~whether it be to close a gap or address a deficiency in coverage, capacity, frequency and/or technology;~~
  - b. Detailed technical maps or other exhibits with clear and concise RF data, or other relevant information to illustrate or explain that the service objective is not met using the alternative (whether it be collocation or a more preferred location); and
  - c. A description of why the alternative (collocation or a more preferred location) does not meet the objective.

H. DAS and Small Wireless FacilitieCells. As outlined in CMC 18.35.010, the city encourages, but does not require, the use of DAS and small wireless facilitiecells. Each applicant will submit a statement that explains how it arrived at the structure and design being proposed.

1. ~~All pole-mounted DAS or small cell equipment shall be painted with flat, non-reflective colors or shades of either black, brown or grey that blend with the visual environment.~~

**Commented [LH14]:** The recent FCC Order expressly rejects the "significant gap" test previously applicable in the 9th Circuit Court of Appeals. Order, footnote 94.

**Commented [LH15]:** Subsections (1) and (2) are already in the development standards section (-.040) and don't need to be repeated here (these are application submittal requirements).

~~2. For all DAS or small cell equipment to be located within the right-of-way, prior to submitting for a building permit, the applicant must have a valid municipal master permit, municipal franchise, or exemption otherwise granted by applicable law, addressing this technology to the extent consistent with RCW 35.21.860.~~

- I. Radio Frequency Emissions Compliance Report for WCF. A written report, prepared, signed and sealed by a Washington-licensed professional engineer or a competent employee of the applicant, which assesses whether the proposed WCF demonstrates compliance with the exposure limits established by the FCC. The report shall also include a cumulative analysis that accounts for all emissions from all WCFs located on or adjacent to the proposed site, identifies the total exposure from all facilities and demonstrates planned compliance with all maximum permissible exposure limits established by the FCC. The report shall include a detailed description of all mitigation measures required by the FCC.
- ~~J. Accessory Equipment. All equipment for WCF, DAS and small cells shall be located or placed in an existing building, underground, or in an equipment shelter that is (a) designed to blend in with existing surroundings, using architecturally compatible construction and colors; and (b) located so as to be as unobtrusive as possible consistent with the proper functioning of the WCF, DAS or small cell technology. Accessory equipment located within a ROW shall be limited to placement underground.~~
- K. Noise Study. A noise study, prepared, signed and sealed by a Washington-licensed engineer, for the proposed WCF and all associated equipment demonstrating compliance with CMC 9.32.050 Public Disturbance Noises.
- L. Collocation Consent for WCFs. A written statement, signed by a person with the legal authority to bind the applicant and the project owner, which indicates whether the applicant is willing to allow other transmission equipment owned by others to collocate with the proposed wireless communication facility whenever technically and economically feasible and aesthetically desirable.
- M. Other Published Materials. All other information and/or materials that the city may, from time to time, make publicly available and designate as part of the application requirements.

**Commented [LH16]:** This is a development standard, most of which already appears below in -.070(l). Suggest moving all related provisions to -.070. And, according to -.070(l) accessory equipment in the ROW may be placed on the pole.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

18.35.070 - General development standards applicable to WCFs.

The following criteria shall be applied in approving, approving with conditions or denying a WCF that is subject to a Type II or III review procedure. Unless otherwise provided in this chapter, WCF construction shall be consistent with the development standards of the zoning district in which it is located.

- A. Tower Height. Refer to CMC Tables 18.35-1 and 2.
  - 1. Setback Requirements. Refer to CMC Tables 18.35-1 and 2 for towers. All equipment shelters, cabinets or other on-the-ground ancillary equipment shall be buried or meet the setback requirement of the zone in which located.
  - 2. Notwithstanding the setbacks provided for in Tables 18.35-1 and 2, when a tower is located adjacent to a parcel zoned for residential (R, MF zones), the minimum setback from the lot line for a new tower must be equal to the height of the proposed tower, unless the setback is waived by the owner of the residentially zoned parcel.
- B. Landscaping. All landscaping shall be installed and maintained in accordance with this chapter. Existing on-site vegetation shall be preserved to the greatest extent reasonably possible and/or improved, and disturbance of the existing topography shall be minimized. The approval authority may grant a waiver from the required landscaping based on findings that a different requirement would better serve the public interest.

1. Tower bases, when fenced (compounds), or large equipment shelters (greater than three feet by three feet by three feet), shall be effectively visually softened through the planting of a fifteen-foot perimeter planting to include a combination of groundcover, shrubs and trees, or as otherwise required based on the underlying zone or street standard.
  2. If fencing is installed, it shall consist of decorative masonry or wood fencing. In commercial districts other than the DC zone, and industrial zones, three strands of barbed wire may be placed atop a lawful fence if the fence is not visible from an adjacent street or is placed behind a sight-obscuring fence or wall. Electrified fences are not permitted in any zone. Razor or concertina wire is not allowed.
  3. Applicant shall demonstrate an irrigation plan is designed and will be in place to ensure the full establishment of plantings for two years.
- C. Visual Impact. All WCFs in residential zones and within one hundred fifty feet of residential zones, including equipment enclosures, shall be sited and designed to minimize adverse visual impacts on surrounding properties and the traveling public to the greatest extent reasonably possible, consistent with the proper functioning of the WCF. Such WCFs and equipment enclosures shall be integrated through location and design to blend in with the existing characteristics of the site. Such WCFs shall also be designed to either resemble the surrounding landscape and other natural features where located in proximity to natural surroundings, or be compatible with the urban, built environment, through matching and complimentary existing structures and specific design considerations such as architectural designs, height, scale, color and texture, and/or be consistent with other uses and improvements permitted in the relevant zone. If a new tower is proposed, the applicant must demonstrate the need for a new tower and why alternative locations ~~and design alternatives such as the use of microcell~~ cannot be used to ~~close the gap in~~ meet the applicant's service provision objective.
- D. Use of Stealth Design/Technology. The applicant shall make an affirmative showing as to why they are not employing stealth technology. More specifically:
1. Stealth design is required in residential zones and to the extent shown in Tables 18.35-1 and 2. Stealth and concealment techniques must be appropriate given the proposed location, design, visual environment, and nearby uses, structures, and natural features. Stealth design shall be designed and constructed to substantially conform to surrounding building designs or natural settings, so as to be visually unobtrusive. Stealth design that relies on screening wireless communications facilities in order to reduce visual impact must screen all substantial portions of the facility from view to the extent technically feasible. Stealth and concealment techniques incorporating faux-tree designs are limited to trees native to the Pacific Northwest.
- E. Lighting. For new wireless communication support towers, only such lighting as is necessary to satisfy FAA requirements is permitted. All FAA-required lighting shall use lights that are designed to minimize downward illumination. Security lighting for the equipment shelters or cabinets and other on-the-ground ancillary equipment is also permitted as long as it is down shielded to keep light within the boundaries of the site. Motion detectors for security lighting are encouraged in residential, R and MF zones or adjacent to residences.
- F. Signage. No facilities may bear any signage or advertisement(s) other than signage required by law or expressly permitted/required by the city.
- G. Code Compliance. All facilities shall at all times comply with all applicable federal, state and local building codes, electrical codes, fire codes and any other code related to public health and safety.
- H. Building-Mounted WCFs.
1. In residential (R, MF) zones, all transmission equipment shall be concealed within existing architectural features to the maximum extent feasible. Any new architectural features proposed to conceal the transmission equipment shall be designed to mimic the existing

**Commented [LH17]:** AT&T suggests deleting all preferences for use of alternative technology because such preferences are preempted by federal law. New York SMSA Limited Partnership v. Town of Clarkstown, 612 F.3d 97, 105-07 (2nd Cir. 2010).

**Commented [LH18]:** As noted above, the recent FCC Order expressly rejects the "significant gap" test previously applicable in the 9th Circuit Court of Appeals. Order, footnote 94.

underlying structure, shall be proportional to the existing underlying structure or conform to the underlying use and shall use materials in similar quality, finish, color and texture as the existing underlying structure.

2. In residential zones, all roof-mounted transmission equipment shall be set back from all roof edges to the maximum extent feasible.
  3. In all other zones, antenna arrays and supporting transmission equipment shall be installed so as to camouflage, disguise or conceal them to make them closely compatible with and blend into the setting and/or host structure.
- I. WCFs in the Public Rights-of-Way. Except for DAS and small wireless facilities, which are subject only to applicable Public Works design standards, WCFs in the public rights-of-way shall meet the following:
1. Preferred Locations. Facilities shall be located as far from residential uses as feasible. Facilities in the rights-of-way shall maintain at least a two hundred-foot separation from other wireless facilities ~~(except with respect to DAS or small cells)~~, except when collocated or on opposite sides of the same street.
  2. Pole-Mounted or Tower-Mounted Equipment. All pole-mounted and tower-mounted transmission equipment shall be mounted as close as possible to the pole or tower so as to reduce the overall visual profile to the maximum extent feasible. All pole-mounted and tower-mounted transmission equipment shall be painted with flat, non-reflective colors or shades of either black, brown or grey that blend with the visual environment.
  3. For all WCFs to be located within the right-of-way, prior to submitting for a building permit, the applicant must have a valid municipal master permit, municipal franchise, or exemption otherwise granted by applicable law, to the extent consistent with RCW 35.21.860.
- J. Accessory Equipment. All equipment shall be located or placed in an existing building, underground, or in an equipment shelter that is (a) designed to blend in with existing surroundings, using architecturally compatible construction and colors; and (b) located so as to be unobtrusive as possible consistent with the proper functioning of the WCF.
- K. Spacing of Towers. Towers shall maintain a minimum spacing of one-half mile, unless it can be demonstrated that physical limitations (such as topography, terrain, tree cover or location of buildings) in the immediate service area prohibit adequate service by the existing facilities and that collocation is not feasible under CMC 18.35.050.
- L. Site Design Flexibility. Individual WCF sites vary proximity to adjacent buildings, existing trees, topography and other local variables. By mandating certain design standards, there may result a project that could have been less intrusive if the location of the various elements of the project could have been placed in more appropriate locations within a given site. Therefore, the WCF and supporting equipment may be installed so as to best camouflage, disguise them, or conceal them, to make the WCF more closely compatible with and blend into the setting and/or host structure, upon approval by the approval authority. The design flexibility allowed under this subsection includes additional height for a tower located within tall trees on (i) city property or (ii) other parcels at least five acres in size, so that the impact of the tower may be minimized by the trees while still allowing for the minimum clearance needed for the tower to achieve the applicant's coverage or other objectives. A formal exception from standards under CMC 18.35.090 is not required for proposals meeting this subsection by being a less intrusive design option.
- M. Structural Assessment. The applicant of a proposed tower shall have a structural assessment of the tower conducted by a professional engineer, licensed in the State of Washington, which shall be submitted with the application for a building permit and demonstrate the structural stability and carrying capacity for antennae.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)



18.35.080 - Regulations for facilities subject to a conditional use permit.

- A. Approval Criteria. In addition to the development standards in this chapter and the approval criteria in CMC 18.43.050, the following additional approval criteria apply:
1. The need for the proposed tower shall be demonstrated if it is to be located in a residential zone or within one hundred fifty feet of an existing residential lot. An evaluation of the operational needs of the wireless communications provider, alternative sites, alternative existing facilities upon which the proposed antenna array might be located, and collocation opportunities on existing support towers within one-half mile of the proposed site shall be provided. Evidence shall demonstrate that no practical alternative is reasonably available to the applicant.
  2. The proposed tower satisfies all of the provisions and requirements of this chapter.
- B. Public Notice. In addition to the notice of hearing requirements of CMC 18.55, for proposals in residential zones and within one hundred fifty feet of a residential zone, the mailed public notice should include a black and white architectural elevation and color photo simulation renderings of the proposed WCF.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

18.35.090 - Exception from standards.

- A. Applicability. Except as otherwise provided in this chapter (under Site Design Flexibility), no WCF shall be used or developed contrary to any applicable development standard unless an exception has been granted pursuant to this section. These provisions apply exclusively to WCFs and are in lieu of the generally applicable variance and design deviation provisions in CMC Titles 17 and 18.
- B. Procedure Type. A wireless communications facility exception is a Type III procedure.
- C. Submittal Requirements. In addition to the general submittal requirements for a Type III application, an application for a wireless communication facility exception shall include:
1. A written statement demonstrating how the exception would meet the criteria.
  2. A site plan that includes:
    - a. Description of the proposed facility's design and dimensions, as it would appear with and without the exception.
    - b. Elevations showing all components of the wireless communication facility as it would appear with and without the exception.
    - c. Color simulations of the wireless communication facility after construction demonstrating compatibility with the vicinity, as it would appear with and without the exception.
- D. Criteria. An application for a wireless communication facility exception shall be granted if the following criteria are met:
1. The exception is consistent with the purpose of the development standard for which the exception is sought.
  2. Based on a visual analysis, the design minimizes the visual impacts to residential zones through mitigating measures, including, but not limited to, building heights, bulk, color, and landscaping.
  3. The applicant demonstrates the following:
    - a. ~~Compliance with this Chapter's standards would materially inhibit the ability of the provider to provide wireless service. A significant gap in the coverage, capacity, or technologies of the service network exists such that users are regularly unable to connect to the service network, or are regularly unable to maintain a connection, or are unable to achieve reliable wireless coverage within a building;~~

**Commented [LH19]:** The recent FCC Order clarified the applicable test of when a local regulation has "the effect of prohibiting" wireless service under federal statutes, 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. FCC Order, paragraph 16.

- b. The ~~gap-service need~~ can only be ~~filled-met~~ through an exception to one or more of the standards in this chapter; and
  - c. The exception is narrowly tailored to ~~fill-meet~~ the service ~~gap-need~~ such that the wireless communication facility conforms to this chapter's standards to the greatest extent possible.
4. ~~Exceptions in Residential Zones. For a new tower proposed to be located in a residential zone or within one hundred fifty feet of a residential zone, unless the proposal qualifies as a preferred location on city-owned or operated property or facilities under CMC 18.35.050(C)(1), the applicant must also demonstrate that the manner in which it proposes to fill the significant gap in coverage, capacity, or technologies of the service network is the least intrusive on the values that this chapter seeks to protect.~~

**Commented [LH20]:** The recent FCC Order expressly rejects the "significant gap" /least intrusive means test previously applicable in the 9th Circuit Court of Appeals. Order, footnote 94.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

#### 18.35.100 - Final inspection.

- A. A certificate of occupancy will only be granted upon satisfactory evidence that the WCF was installed in substantial compliance with the approved plans and photo simulations.
- B. Failure to Comply. If it is found that the WCF installation does not substantially comply with the approved plans and photo simulations, the applicant shall immediately make any and all such changes required to bring the WCF installation into compliance.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

#### 18.35.110 - Maintenance.

- A. All wireless communication facilities must comply with all standards and regulations of the FCC and any other State or federal government agency with the authority to regulate wireless communication facilities.
- B. The site and the wireless communication facilities, including all landscaping, fencing and related transmission equipment must be maintained at all times in a neat and clean manner and in accordance with all approved plans.
- C. All graffiti on wireless communication facilities must be removed at the sole expense of the permittee after notification by the city to the owner/operator of the WCF.
- D. If any FCC, state or other governmental license or any other governmental approval to provide communication services is ever revoked as to any site permitted or authorized by the city, the permittee must inform the city of the revocation within thirty days of receiving notice of such revocation.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

#### 18.35.120 - Discontinuation of use.

- A. Any wireless communication facility that is no longer needed and its use is discontinued shall be reported immediately by the service provider to the community development director. Discontinued facilities shall be completely removed within six months and the site restored to its pre-existing condition.
- B. There shall also be a rebuttable presumption that any WCF that is regulated by this chapter and that is not operated for a period of six months shall be considered abandoned. This presumption may be rebutted by a showing that such WCF is an auxiliary back-up or emergency utility or device not subject to regular use or that the WCF is otherwise not abandoned. For those WCFs deemed

abandoned, all equipment, including, but not limited to, antennas, poles, towers, and equipment shelters associated with the WCF shall be removed within six months of the cessation of operation. Irrespective of any agreement among them to the contrary, the owner or operator of such unused facility, or the owner of a building or land upon which the WCF is located, shall be jointly and severally responsible for the removal of abandoned WCFs. If the WCF is not thereafter removed within ninety days of written notice from the city, the city may remove the WCF at the expense of the property owner and WCF owner. Both owners are jointly and severally liable for the city's removal costs, including all costs and attorneys' fees. If there are two or more wireless communications providers collocated on a single support structure, this provision shall not become effective until all providers cease using the WCF for a continuous period of six months.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

#### 18.35.130 - Independent technical review.

Although the city intends for city staff to review administrative matters to the extent feasible, the city may retain the services of an independent, radio frequency technical expert of its choice to provide technical evaluation of permit applications for WCFs, including administrative and conditional use permits but not including applications for small wireless facilities within the right-of-way. The technical expert review may include, but is not limited to (a) the accuracy and completeness of the items submitted with the application; (b) the applicability of analysis and techniques and methodologies proposed by the applicant; (c) the validity of conclusions reached by the applicant; and (d) whether the proposed WCF complies with the applicable approval criteria set forth in this chapter. The applicant shall pay the objectively reasonable and actual cost for any independent consultant fees, along with applicable overhead recovery, through a deposit, estimated by the city, paid within ten days of the city's request. When the city requests such payment, the application shall be deemed incomplete for purposes of application processing timelines. In the event that such costs and fees do not exceed the deposit amount, the city shall refund any unused portion within thirty days after the final permit is released or, if no final permit is released, within thirty days after the city receives a written request from the applicant. If the costs and fees exceed the deposit amount, then the applicant shall pay the difference to the city before the permit is issued.

**Commented [LH21]:** The new ruling applicable to SWF in ROW- "local governments are expressly prohibited from recovering "unreasonable" costs, such as excessive contractor or consultant fees.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

#### 18.35.140 - Exempt facilities.

The following are exempt from this chapter:

- A. FCC-licensed amateur (ham) radio facilities;
- B. Satellite earth stations, dishes and/or antennas used for private television reception not exceeding one meter in diameter;
- C. A government-owned WCF installed upon the declaration of a state of emergency by the federal, state or local government, or a written determination of public necessity by the city; except that such facility must comply with all federal and state requirements;
- D. A temporary, commercial WCF installed for providing coverage of a special event such as news coverage or sporting event, subject to approval by the city. The WCF shall be exempt from the provisions of this chapter for up to one week before and after the duration of the special event;
- E. In locations more than one hundred fifty feet from a residential zone, other temporary, commercial WCFs installed for a period of ninety days, subject to renewals at the city's discretion; provided that such temporary WCF will comply with applicable setbacks and height requirements.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

18.35.150 - Indemnification.

Each permit issued shall have as a condition of the permit a requirement that the applicant defend, indemnify and hold harmless the city and its officers, agents, employees, volunteers, and contractors from any and all liability, damage, or charges (including attorneys' fees and expenses) arising out of claims, suits, demands, or causes of action as a result of the permit process, granted permit, construction, erection, location, performance, operation, maintenance, repair, installation, replacement, removal, or restoration of the WCF on city property or in the public right-of-way.

( [Ord. No. 17-009](#), § I(Exh. A), 7-3-2017)

DRAFT

**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.

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## I. INTRODUCTION

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

2. Supporting the deployment of 5G and other next-generation wireless services through smart infrastructure policy is critical. Indeed, upgrading to these new services will, in many ways, represent a more fundamental change than the transition to prior generations of wireless service. 5G can enable increased competition for a range of services—including broadband—support new healthcare and Internet of Things applications, speed the transition to life-saving connected car technologies, and create jobs. It is estimated that wireless providers will invest \$275 billion<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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

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<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> Accelerating Future Economic Value Report at 2.

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> And that study shows that such new service would be

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<sup>5</sup> 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.”).

<sup>6</sup> 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).

<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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.

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<sup>8</sup> *Id.*

<sup>9</sup> “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.’”<sup>10</sup> The Senate floor manager, Senator Larry Pressler, stated that “[t]his is the most comprehensive deregulation of the telecommunications industry in history.”<sup>11</sup> 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.”<sup>12</sup> The conference report on the 1996 Act similarly indicates that Congress “intended to remove all barriers to entry in the provision of telecommunications services.”<sup>13</sup> 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.”<sup>14</sup>

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.”<sup>15</sup> Courts have observed that Section 253 represents a “broad preemption of laws that inhibit competition.”<sup>16</sup>

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

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<sup>10</sup> *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)).

<sup>11</sup> 141 Cong. Rec. S8197 (daily ed. June 12, 1995).

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

<sup>13</sup> S. Rep. No. 104-230, at 126 (1996) (Conf. Rep.).

<sup>14</sup> 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.”).

<sup>15</sup> 47 U.S.C. § 253(a).

<sup>16</sup> *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.”<sup>17</sup>

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.”<sup>18</sup> 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.”<sup>19</sup> 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.<sup>20</sup> 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.”<sup>21</sup> The provision further directs the court to “decide such action on an expedited basis.”<sup>22</sup>

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).”<sup>23</sup> 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.”<sup>24</sup> The Commission also noted that an alternative interpretation would “diminish the service provided to [a wireless provider’s] customers.”<sup>25</sup>

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

<sup>18</sup> 47 U.S.C. § 332(c)(7)(B)(i).

<sup>19</sup> 47 U.S.C. § 332(c)(7)(B)(ii).

<sup>20</sup> 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).

<sup>21</sup> 47 U.S.C. § 332(c)(7)(B)(v).

<sup>22</sup> 47 U.S.C. § 332(c)(7)(B)(v).

<sup>23</sup> *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).

<sup>24</sup> *2009 Declaratory Ruling*, 24 FCC Rcd at 14017-18, para. 61.

<sup>25</sup> *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.”<sup>26</sup> 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.<sup>27</sup> The Commission further determined that failure to meet the applicable time frame enables an applicant to pursue judicial relief within the next 30 days.<sup>28</sup> 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.”<sup>29</sup> If the agency fails to make such a showing, it may face “issuance of an injunction granting the application.”<sup>30</sup> In its *2014 Wireless Infrastructure Order*,<sup>31</sup> 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.<sup>32</sup>

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.”<sup>33</sup> 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.<sup>34</sup> In implementing Section 6409 and in an effort to “advance[e] Congress’s goal

<sup>26</sup> *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.”).

<sup>27</sup> *Id.* at 14012, para. 45.

<sup>28</sup> *Id.* at 14005, 14012, paras. 32, 45.

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

<sup>30</sup> *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).

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

<sup>32</sup> *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.”).

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

<sup>34</sup> *Id.*

of facilitating rapid deployment,”<sup>35</sup> 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.<sup>36</sup> 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.”<sup>37</sup> 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.”<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> In August 2018, the Commission concluded that state and local moratoria on telecommunications services and facilities deployment are barred by Section 253(a).<sup>43</sup>

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<sup>35</sup> *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12872, para. 15.

<sup>36</sup> *Id.* at 12922, 12956-57, paras. 135, 214-15.

<sup>37</sup> *Id.* at 12961-62, paras. 226, 228.

<sup>38</sup> *Montgomery County*, 811 F.3d at 129.

<sup>39</sup> 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).

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

<sup>41</sup> *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).

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

<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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."<sup>47</sup> 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.<sup>48</sup> Crown Castle, for example, describes "excessive and unreasonable" "fees

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<sup>44</sup> 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*).

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

<sup>46</sup> 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>.

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

<sup>48</sup> 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.”<sup>49</sup> 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.<sup>50</sup> Likewise, AT&T states that a Texas city has refused to allow small cell placement on any structures in a right-of-way (ROW).<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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).

<sup>49</sup> 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.”).

<sup>50</sup> 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).

<sup>51</sup> AT&T Comments at 6-7.

<sup>52</sup> 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.

<sup>53</sup> *See* Verizon Comments at 7.

<sup>54</sup> *See* Verizon Comments at 35.

<sup>55</sup> *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).

problematic.<sup>56</sup> Similarly, AT&T identified an instance in which it took a locality in California 800 days to process an application.<sup>57</sup> GCI provides an example in which it took an Alaska locality nine months to decide an application.<sup>58</sup> 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.<sup>59</sup> Similarly, Lighttower provides examples of long delays in processing siting applications.<sup>60</sup> 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.”<sup>61</sup>

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.<sup>62</sup> 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

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<sup>56</sup> 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.

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

<sup>58</sup> GCI Comments at 5-6.

<sup>59</sup> T-Mobile Comments at 21.

<sup>60</sup> 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).

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

<sup>62</sup> 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.<sup>63</sup> The SPEED Act would similarly streamline federal permitting processes.<sup>64</sup> 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.<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup> “[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.”<sup>68</sup> 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.”<sup>69</sup> Although many states and localities support our efforts, we acknowledge that there are others who advocated for different approaches, arguing, among other points,

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

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

<sup>65</sup> See BDAC Model Municipal Code; Draft BDAC Rates and Fees Report; BDAC Regulatory Barriers Report.

<sup>66</sup> 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”).

<sup>67</sup> 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).

<sup>68</sup> 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.”)

<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> 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

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<sup>70</sup> 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.

<sup>71</sup> 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.<sup>72</sup>

**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.<sup>73</sup> Section 253(a) addresses "any interstate or intrastate telecommunications service," while Section 332(c)(7)(B)(i)(II) addresses "personal wireless services."<sup>74</sup> 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

<sup>72</sup> 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).

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

<sup>74</sup> *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.<sup>75</sup> 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).<sup>76</sup> 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.<sup>77</sup>

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.”<sup>78</sup> 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.<sup>79</sup> We also resolve the conflicting court interpretations of the

<sup>75</sup> 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*).

<sup>76</sup> *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*).

<sup>77</sup> *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)).

<sup>78</sup> *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.

<sup>79</sup> *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.<sup>80</sup>

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).<sup>81</sup> 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.<sup>82</sup> Moreover, both of these provisions apply to wireless telecommunications services<sup>83</sup> as well as to commingled services and facilities.<sup>84</sup>

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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.

<sup>80</sup> *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”).

<sup>81</sup> *See infra* Part III.A, B.

<sup>82</sup> *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.

<sup>83</sup> 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.<sup>85</sup> 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.

<sup>84</sup> *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).

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

capabilities.<sup>86</sup> 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.<sup>87</sup>

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.”<sup>88</sup> 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

<sup>86</sup> 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.

<sup>87</sup> 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.

<sup>88</sup> 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.”<sup>89</sup> 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.”<sup>90</sup> 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.<sup>91</sup> 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.”<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> Those cases, including some that formed the foundation for

<sup>89</sup> *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)).

<sup>90</sup> *California Payphone*, 12 FCC Rcd at 14206, para. 31.

<sup>91</sup> *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.

<sup>92</sup> Crown Castle June 7, 2018 *Ex Parte* Letter at 13.

<sup>93</sup> *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.

<sup>94</sup> Smart Communities seeks clarification of whether this Declaratory Ruling is meant to say that the “coverage gap” standard followed by a number of courts should include consideration of capacity as well as coverage issues. Letter from Gerard Lavery Lederer, Counsel, Smart Communities and Special Districts Coalition, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Att. at 17 (Sept. 19, 2018) (Smart Communities Sept. 19 *Ex Parte* Letter). We are not holding that prior “coverage gap” analyses are consistent with the standards we articulate here as long as they also take into account “capacity gaps”; rather, we are articulating here the effective prohibition standard that should apply while, at the same time, noting one way in which prior approaches erred by requiring coverage gaps. Accordingly, we reject both the version of the “coverage gap” test followed by the First, Fourth, and Seventh Circuits (requiring applicants to show “not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try”) and the version endorsed by the Second, Third, and Ninth Circuits (requiring applicants to show that the proposed facilities are the “least intrusive means” for filling a coverage gap) *See supra* n. 75. We also note that some courts have expressed concern about alternative readings of the statute that would lead to extreme outcomes—either always requiring a grant under some interpretations, or never preventing a denial under other interpretations. *See, e.g.*, *Willoth*, 176 F.3d at 639-41; *APT*, 196 F.3d at 478-79; *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999); *AT&T Wireless PCS v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 1998) (*City Council of Virginia Beach*); *see also, e.g.*, Greenling Comments at 2; City and County of San Francisco Reply

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

<sup>95</sup> *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.

<sup>96</sup> *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.”<sup>97</sup> 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.<sup>98</sup>

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).<sup>99</sup> 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.<sup>100</sup> 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).<sup>101</sup> 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”).

<sup>97</sup> 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.

<sup>98</sup> *See WIA Comments* at 39; *T-Mobile Comments* at 43-44.

<sup>99</sup> *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.

<sup>100</sup> *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).

<sup>101</sup> 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.<sup>102</sup> 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.’”<sup>103</sup>

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.<sup>104</sup> 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.<sup>105</sup> 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.

<sup>102</sup> 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.

<sup>103</sup> *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.

<sup>104</sup> 47 U.S.C. § 253(a), (b), (c).

<sup>105</sup> 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."<sup>106</sup> 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.<sup>107</sup>

## **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.<sup>108</sup> 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."<sup>109</sup> The fee, together with other requirements, thus "place a significant burden" on the provider.<sup>110</sup> 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.'"<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup>

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.<sup>114</sup> While the court noted that "compensation is . . . sometimes used as a synonym for cost,"<sup>115</sup> 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

<sup>106</sup> *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*).

<sup>107</sup> See *infra* Part III.B.

<sup>108</sup> 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").

<sup>109</sup> *Municipality of Guayanilla*, 450 F.3d at 18-19.

<sup>110</sup> *Id.* at 19.

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

<sup>112</sup> *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).

<sup>113</sup> *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.'").

<sup>114</sup> *City of White Plains*, 305 F.3d at 77.

<sup>115</sup> *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.<sup>116</sup> But the court did observe that “Section 253(c) requires compensation to be reasonable essentially to prevent monopolist pricing by towns.”<sup>117</sup>

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.<sup>118</sup> The court held “that the rental provisions are prohibitive because they create[d] a massive increase in cost” for Qwest.<sup>119</sup> 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.”<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup> 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

<sup>116</sup> *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.

<sup>117</sup> *Id.*

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

<sup>119</sup> *Id.* at 1271.

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

<sup>121</sup> 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”).

<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup> Sprint, in turn, has announced plans to build at least 40,000 new small sites over the next few years.<sup>125</sup> 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.”<sup>126</sup>

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.<sup>127</sup> 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.<sup>128</sup> 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.”<sup>129</sup>

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

<sup>123</sup> 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).

<sup>124</sup> See Verizon Comments at 3; AT&T Comments at 1.

<sup>125</sup> 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).

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

<sup>127</sup> *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).

<sup>128</sup> *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).

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

<sup>130</sup> 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,<sup>131</sup> (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.<sup>132</sup>

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."<sup>133</sup> 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).

<sup>131</sup> 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)).

<sup>132</sup> 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.

<sup>133</sup> 47 U.S.C. § 253(a).

of consumers” are not preempted.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup>

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.”<sup>137</sup> 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).<sup>138</sup> Our interpretation of Section 253(a) is informed by this statutory context,<sup>139</sup> 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.<sup>140</sup> 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,<sup>141</sup> particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment.<sup>142</sup> 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.<sup>143</sup>

<sup>134</sup> 47 U.S.C. § 253(b).

<sup>135</sup> 47 U.S.C. § 253(c).

<sup>136</sup> 47 U.S.C. § 253(d).

<sup>137</sup> *Texas PUC Order*, 13 FCC Rcd at 3481, para. 44.

<sup>138</sup> 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.

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

<sup>140</sup> 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”).

<sup>141</sup> See *infra* paras. 62-63.

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

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

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*.<sup>144</sup> 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.<sup>145</sup> 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,<sup>146</sup> and seek to guard against competitive disparities.<sup>147</sup> 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.<sup>148</sup> Although there is precedent that "fair and reasonable" compensation could mean not only cost-based charges but also market-based charges in certain instances,<sup>149</sup> 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.

<sup>144</sup> See *supra* note 71.

<sup>145</sup> 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").

<sup>146</sup> 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.

<sup>147</sup> 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.

<sup>148</sup> 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.

<sup>149</sup> 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.<sup>150</sup> As discussed in greater detail below, while it might well be fair for providers to bear basic, reasonable costs of entry,<sup>151</sup> 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.<sup>152</sup>

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.”<sup>153</sup> The Commission has long understood that Section 253(a) is focused on state or local barriers to entry for the provision of service,<sup>154</sup> 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.<sup>155</sup> 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).<sup>156</sup> Reasonable state and local regulation of facilities deployment is an important predicate for a viable marketplace for

<sup>150</sup> 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)).

<sup>151</sup> See *infra* para. 56.

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

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

<sup>154</sup> 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.

<sup>155</sup> 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.

<sup>156</sup> 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.<sup>157</sup> 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.<sup>158</sup> 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.<sup>159</sup> 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.<sup>160</sup> 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.<sup>161</sup>

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

<sup>157</sup> 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.

<sup>158</sup> 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).

<sup>159</sup> 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.

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

<sup>161</sup> See *infra* paras. 60-65.



competitor to distort the marketplace and create a barrier to entry in violation of Section 253(a).<sup>162</sup> 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.<sup>163</sup> 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.'" <sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup>

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.<sup>167</sup> We are persuaded that providers and infrastructure builders, like all economic actors, have a finite (though perhaps fluid)<sup>168</sup> 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.<sup>169</sup> This and regulatory uncertainty created by such effectively prohibitive conduct<sup>170</sup> creates an

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

<sup>163</sup> See, e.g., WIA Comments, Attach. 2 at 70.

<sup>164</sup> 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.

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

<sup>166</sup> 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).

<sup>167</sup> 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.

<sup>168</sup> 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.

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

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.<sup>171</sup>

61. The record is replete with evidence that providers have limited capital budgets that are constrained by state and local fees.<sup>172</sup> As AT&T explains, "[a]ll providers have limited capital dollars to invest, funds that are quickly depleted when drained by excessive ROW fees."<sup>173</sup> 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.").

<sup>170</sup> *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.").

<sup>171</sup> *Municipality of Guayanilla*, 450 F.3d at 19.

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

<sup>173</sup> AT&T Aug. 6, 2018 *Ex Parte* Letter at 2.

municipalities have no ability to avoid this harm.”<sup>174</sup> 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.<sup>175</sup> Limiting localities to reasonable cost recovery will “allow[] AT&T and other providers to stretch finite capital dollars to additional communities.”<sup>176</sup> 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.”<sup>177</sup> 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.”<sup>178</sup> 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.<sup>179</sup> 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.”<sup>180</sup> 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).<sup>181</sup>

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.<sup>182</sup> 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

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<sup>174</sup> *Id.*

<sup>175</sup> *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).

<sup>176</sup> *Id.*

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

<sup>178</sup> Sprint Comments at 17.

<sup>179</sup> Sprint Aug. 13, 2018 *Ex Parte* Letter at 1-2.

<sup>180</sup> 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”).

<sup>181</sup> 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).

<sup>182</sup> *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.<sup>183</sup> In such cases, the resources consumed in serving one geographic area are likely to deplete the resources available for serving other areas.<sup>184</sup> 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.<sup>185</sup> 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.”<sup>186</sup> 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.”<sup>187</sup> 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.”<sup>188</sup> 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.”<sup>189</sup>

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”<sup>190</sup> in recognition that “getting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources.”<sup>191</sup> Commenters from smaller municipalities recognize that “thousands and thousands of small cells are needed for 5G... [and]

<sup>183</sup> 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.

<sup>184</sup> 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)).

<sup>185</sup> 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).

<sup>186</sup> AT&T Comments at 19.

<sup>187</sup> AT&T Comments at 19-20.

<sup>188</sup> Mobilitie Comments at 3.

<sup>189</sup> Crown Castle Aug. 10, 2018 *Ex Parte* Letter at 2.

<sup>190</sup> Sal Pace July 30, 2018 *Ex Parte* Letter at 1.

<sup>191</sup> LaWana Mayfield July 31, 2018 *Ex Parte* Letter at 1

old regulations could hinder the timely arrival of 5G throughout the country”<sup>192</sup> 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.”<sup>193</sup> 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].”<sup>194</sup> “[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.”<sup>195</sup> 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).<sup>196</sup> 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.<sup>197</sup> 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.<sup>198</sup>

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.<sup>199</sup> 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

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<sup>192</sup> Dr. Carolyn Prince July 31, 2018 *Ex Parte* Letter at 2.

<sup>193</sup> 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).

<sup>194</sup> Representative Terry Alexander Aug. 7, 2018 *Ex Parte* Letter at 1.

<sup>195</sup> 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”).

<sup>196</sup> *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).

<sup>197</sup> 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).

<sup>198</sup> 47 U.S.C. § 253(a).

<sup>199</sup> *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.<sup>200</sup> 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.<sup>201</sup> 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.<sup>202</sup>

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.<sup>203</sup> We note that courts have upheld the Commission’s preemption of the enforcement of provisions in private agreements that conflict with our decisions.<sup>204</sup> 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.<sup>205</sup> 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.<sup>206</sup> Instead, we find it

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

<sup>201</sup> 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.

<sup>202</sup> 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).

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

<sup>204</sup> 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).

<sup>205</sup> 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.

<sup>206</sup> 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).<sup>207</sup>

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.<sup>208</sup> 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.

<sup>207</sup> 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.

<sup>208</sup> 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,<sup>209</sup> 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,<sup>210</sup> 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."<sup>211</sup>

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.<sup>212</sup>

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."<sup>213</sup> Several commenters argue, in

<sup>209</sup> 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.

<sup>210</sup> 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.

<sup>211</sup> 47 U.S.C. § 253(c).

<sup>212</sup> *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.")

<sup>213</sup> 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 all<sup>214</sup> or a "market-based rent."<sup>215</sup> 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.<sup>216</sup> We find little support in the record, legislative history, or case law for that position.<sup>217</sup> 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.")

<sup>214</sup> 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.").

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

<sup>216</sup> 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.

<sup>217</sup> 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.<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup> 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.”<sup>221</sup> 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.<sup>222</sup>

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.<sup>223</sup> 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”).

<sup>218</sup> See *supra* Parts III.A, B.

<sup>219</sup> 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.

<sup>220</sup> 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.

<sup>221</sup> 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.

<sup>222</sup> See *supra* para. 50.

<sup>223</sup> See, e.g., Colorado Comm. and Utility All. *et al.* Comments at 18-19 (discussing range of costs that application fees cover).

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.<sup>224</sup> 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).<sup>225</sup> 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,"<sup>226</sup> 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.<sup>227</sup> Courts have similarly found that states and localities may not impose a range of fees on one provider but not on another<sup>228</sup> and even some municipal commenters acknowledge that governments should not discriminate as to the fees charged to different providers.<sup>229</sup> The record reflects continuing concerns from providers, however, that they face discriminatory charges.<sup>230</sup> 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

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<sup>224</sup> See *supra* note 71 (identifying three categories of fees charged by states and localities).

<sup>225</sup> 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.

<sup>226</sup> 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.").

<sup>227</sup> *TCI Cablevision of Oakland County*, 12 FCC Rcd. at 21443, para. 108 (1997).

<sup>228</sup> *City of White Plains*, 305 F.3d 80.

<sup>229</sup> 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)").

<sup>230</sup> 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.<sup>231</sup>

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,”<sup>232</sup> 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.<sup>233</sup>

80. By presuming that fees at or below the levels above comply with Section 253, we assume

<sup>231</sup> 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).

<sup>232</sup> BDAC Regulatory Barriers Report, Appendix C, p. 3.

<sup>233</sup> 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. 189 149<sup>th</sup> Gen. Assemb. Reg. Sess. (Del. 2017) (\$100 per small wireless facility on application; fees not to exceed actual, direct and reasonable cost); S. 21320<sup>th</sup> Gen. Assemb. Reg. Sess. (Ind. 2017) (\$100 per small wireless facility); H.R. 1991, 99<sup>th</sup> Gen. Assemb. 2<sup>nd</sup> 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.<sup>234</sup> Allowing localities to charge fees above these levels upon this showing recognizes local variances in costs.<sup>235</sup>

### 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.”<sup>236</sup> 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.”<sup>237</sup> And Section 253(c) preserves state and local authority to manage the public rights-of-way.<sup>238</sup>

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.<sup>239</sup> Parties describe a wide range of such requirements that allegedly restrict deployment of Small Wireless Facilities. For example, many providers criticize

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<sup>234</sup> 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.

<sup>235</sup> 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).

<sup>236</sup> *California Payphone*, 12 FCC Rcd at 14206, para. 31; *see supra* paras. 34-42.

<sup>237</sup> 47 U.S.C. § 253(b).

<sup>238</sup> 47 U.S.C. § 253(c).

<sup>239</sup> *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,<sup>240</sup> as well as unduly stringent mandates regarding the size of equipment, colors of paint, and other details.<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> 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

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<sup>240</sup> 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.

<sup>241</sup> 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”).

<sup>242</sup> 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.

<sup>243</sup> 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.<sup>244</sup>

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.<sup>245</sup> 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.<sup>246</sup> “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.<sup>247</sup>

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<sup>244</sup> 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).

<sup>245</sup> See *supra* paras. 55-56.

<sup>246</sup> 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).

<sup>247</sup> 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.<sup>248</sup> 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."<sup>249</sup> 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.<sup>250</sup> We acknowledge that while some such requirements may violate 253(a), others may be reasonable aesthetic requirements.<sup>251</sup> 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.

<sup>248</sup> 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.

<sup>249</sup> *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).

<sup>250</sup> 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.

<sup>251</sup> 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.<sup>252</sup>

**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.<sup>253</sup> 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).<sup>254</sup>

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.<sup>255</sup> As the Ninth Circuit has observed, at its core, this doctrine is "a

<sup>252</sup> 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").

<sup>253</sup> 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.

<sup>254</sup> 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).

<sup>255</sup> 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.”<sup>256</sup> 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.”<sup>257</sup> 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.<sup>258</sup> 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.<sup>259</sup>

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.”<sup>260</sup> 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*).

<sup>256</sup> 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).

<sup>257</sup> See *Boston Harbor*, 507 U.S. at 231.

<sup>258</sup> See *American Trucking Ass’n v. City of Los Angeles*, 569 U.S. 641, 650 (2013) (*American Trucking*).

<sup>259</sup> 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).

<sup>260</sup> 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.

rights-of-way.”<sup>261</sup> 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.<sup>262</sup> 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.<sup>263</sup> 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.<sup>264</sup> In light of the foregoing, whatever the force of the market participant doctrine in other contexts,<sup>265</sup> 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.”<sup>266</sup>

95. Similarly, and as discussed elsewhere,<sup>267</sup> 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

<sup>261</sup> 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).

<sup>262</sup> 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.”

<sup>263</sup> 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.’”)

<sup>264</sup> 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.”).

<sup>265</sup> 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.

<sup>266</sup> *Minnesota Order*, 14 FCC Rcd at 21707, para. 18 (internal citations omitted) (emphasis omitted).

<sup>267</sup> 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).<sup>268</sup>

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.<sup>269</sup> In the proprietary context, “a State acts as a ‘market participant with no interest in setting policy.’”<sup>270</sup> 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.”<sup>271</sup> 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.<sup>272</sup> To

<sup>268</sup> 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).

<sup>269</sup> 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).

<sup>270</sup> See, e.g., *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008).

<sup>271</sup> See Verizon Comments at 26-28 & n.85; T-Mobile Comments at 50 & n.210 and cases cited therein.

<sup>272</sup> 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.<sup>273</sup> 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.<sup>274</sup> These examples extend far beyond governments' treatment of single structures;<sup>275</sup> 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.<sup>276</sup> 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.<sup>277</sup> 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.

<sup>273</sup> See, e.g., Verizon Aug. 23, 2018 *Ex Parte* Letter at 4-5.

<sup>274</sup> See *supra* para. 25.

<sup>275</sup> Cf. *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404.

<sup>276</sup> 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.

<sup>277</sup> 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.<sup>278</sup> 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.<sup>279</sup>

99. Nothing in Sections 253 or 332(c)(7) purports to limit the exercise of our general interpretive authority.<sup>280</sup> 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.<sup>281</sup> 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.<sup>282</sup>

<sup>278</sup> See, e.g., *Moratoria Declaratory Ruling*, FCC 18-111, paras. 161-68; *2009 Declaratory Ruling*, 24 FCC Rcd at 14001, para. 23.

<sup>279</sup> 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.

<sup>280</sup> 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.

<sup>281</sup> 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.

<sup>282</sup> Consequently, we reject claims that relying on our general interpretative authority to interpret Section 253 and Section 332(c)(7) would render any provisions of the Act mere surplusage, see, e.g., Smart Communities Reply at 34-35, or would somehow “usurp the role of the judiciary.” Washington State Cities Reply at 14. We likewise



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,<sup>283</sup> 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.<sup>284</sup> 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.”<sup>285</sup> 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.”<sup>286</sup> Rather than cutting against the need for, or desirability of, the interpretations we offer in this Declaratory Ruling, the brief instead presaged them.<sup>287</sup>

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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.

<sup>283</sup> *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.

<sup>284</sup> *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)).

<sup>285</sup> 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)).

<sup>286</sup> *Id.* at 18.

<sup>287</sup> 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.<sup>288</sup> In particular, our interpretations do not directly “compel the states to administer federal regulatory programs or pass legislation.”<sup>289</sup> 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).<sup>290</sup>

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.<sup>291</sup> As relevant to our interpretations here, it is not clear, at first blush, that such concerns would be implicated.<sup>292</sup> 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.

<sup>288</sup> 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.

<sup>289</sup> *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*).

<sup>290</sup> *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.

<sup>291</sup> 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)”).

<sup>292</sup> 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.

### 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.<sup>293</sup> 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.<sup>294</sup> 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.<sup>295</sup> 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.<sup>296</sup>

#### 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.”<sup>297</sup> 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 structures<sup>298</sup> and are similar to shot clocks enacted in state level small cell bills and the real world

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<sup>293</sup> 2009 Declaratory Ruling, 24 FCC Rcd at 13994.

<sup>294</sup> See *infra* para. 106.

<sup>295</sup> 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 time frames for action within each class.”).

<sup>296</sup> 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).

<sup>297</sup> 47 U.S.C. § 332(c)(7)(ii).

<sup>298</sup> 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.<sup>299</sup> 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.<sup>300</sup>

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.<sup>301</sup> 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.<sup>302</sup> Indeed, many localities already process wireless siting applications in less than the required time<sup>303</sup> 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.

<sup>299</sup> 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).

<sup>300</sup> 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.

<sup>301</sup> 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).

<sup>302</sup> 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).

<sup>303</sup> 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.

jurisdictions require by law that collocation applications be processed in 60 days or less.<sup>304</sup> With the passage of time, siting agencies have become more efficient in processing siting applications.<sup>305</sup> These facts demonstrate that a shorter, 60-day shot clock for processing collocation applications for Small Wireless Facilities is reasonable.<sup>306</sup>

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.<sup>307</sup> 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.<sup>308</sup> The size of Small Wireless Facilities poses little or no risk of adverse effects on the environment or historic preservation.<sup>309</sup> 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.<sup>310</sup>

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.<sup>311</sup> 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

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<sup>304</sup> 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.

<sup>305</sup> 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.”).

<sup>306</sup> 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).

<sup>307</sup> 2009 *Declaratory Ruling*, 24 FCC Rcd at 14012, para. 40.

<sup>308</sup> TIA Comments at 4.

<sup>309</sup> *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).

<sup>310</sup> 2009 *Declaratory Ruling*, 24 FCC Rcd at 14012, para. 46.

<sup>311</sup> 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.<sup>312</sup> 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.<sup>313</sup>

109. Some municipalities argue that smaller facilities are neither objectively “small” nor less obtrusive than larger facilities.<sup>314</sup> Others contend that shorter shot clocks for a broad category of “smaller” facilities are too restrictive,<sup>315</sup> and would fail to take into account the varied and unique climate, historic architecture, infrastructure, and volume of siting applications that municipalities face.<sup>316</sup> 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.<sup>317</sup>

110. While some commenters argue that additional shot clock classifications would make the siting process needlessly more complex without any proven benefits,<sup>318</sup> 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.<sup>319</sup> We

<sup>312</sup> CTIA Aug. 30, 2018 *Ex Parte* Letter at 6.

<sup>313</sup> 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.”).

<sup>314</sup> 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).

<sup>315</sup> 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).

<sup>316</sup> 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.

<sup>317</sup> 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.

<sup>318</sup> 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”).

<sup>319</sup> While several parties proposed additional shot clock categories, we believe that the any benefit from a closer tailoring of categories to circumstances is not outweighed by the administrative burden on siting authorities and

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.<sup>320</sup> 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.<sup>321</sup> 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.<sup>322</sup> 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.<sup>323</sup> Numerous industry commenters advocated a 90-day shot clock for all non-collocation deployments.<sup>324</sup> 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.<sup>325</sup> 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).

<sup>320</sup> 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).

<sup>321</sup> BDAC Model Municipal Code at § 3.2a(i)(B).

<sup>322</sup> CTIA Comments, Attach. 1 at 38.

<sup>323</sup> 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”).

<sup>324</sup> 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.

<sup>325</sup> CCUA argues that the new shot clocks would force siting authorities to deny applications when they find that applications are incomplete. Letter from Kenneth S. Fellman, Counsel, CCUA, to Marlene H. Dortch, Secretary,

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.<sup>326</sup> 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.<sup>327</sup>

## 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.<sup>328</sup> 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.<sup>329</sup> 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.<sup>330</sup> 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.<sup>331</sup> Some localities also argue that a single, national shot clock for batched applications would fail to account for unique local circumstances.<sup>332</sup>

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.

<sup>326</sup> STREAMLINE Small Cell Deployment Act, S. 3157, 115th Cong. (2018).

<sup>327</sup> BDAC Model Municipal Code at § 3.2a(i)(B),

<sup>328</sup> We define either scenario as “batching” for the purpose of our discussion here.

<sup>329</sup> *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 18; *see also Mobilitie PN*, 31 FCC Rcd at 13371.

<sup>330</sup> *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 . . . .”).

<sup>331</sup> 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).

<sup>332</sup> 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.<sup>333</sup> 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.<sup>334</sup> 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.<sup>335</sup> Thus, contrary to some localities' arguments,<sup>336</sup> 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,<sup>337</sup> 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

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<sup>333</sup> See, e.g., Sprint Comments, Docket No. 16-421, at 43-44 (filed Mar. 8, 2017); Verizon Comments at 42; CTIA Comments at 17.

<sup>334</sup> 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.").

<sup>335</sup> 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).

<sup>336</sup> 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).

<sup>337</sup> See *infra* para. 144.

would have a straightforward case for obtaining expedited relief in court.<sup>338</sup>

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.<sup>339</sup> 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.<sup>340</sup> 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.<sup>341</sup> 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.<sup>342</sup> 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.”<sup>343</sup> Such relief also is supported where few or no issues remain to be decided, and those that remain can be addressed by a court.<sup>344</sup>

121. Consistent with those sensible considerations reflected in prior precedent, we expect that

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<sup>338</sup> 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).

<sup>339</sup> See *supra* paras. 34-42.

<sup>340</sup> *Id.*

<sup>341</sup> See, e.g., *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para. 284.

<sup>342</sup> 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)).

<sup>343</sup> See, e.g., *Nat’l Tower*, 297 F.3d at 21-22; *AT&T Mobility*, 127 F. Supp. 3d at 1176.

<sup>344</sup> 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.<sup>345</sup> 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,<sup>346</sup> 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.<sup>347</sup> 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.”<sup>348</sup> 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.<sup>349</sup> Actual success on the merits would be

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<sup>345</sup> 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)).

<sup>346</sup> 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).

<sup>347</sup> 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.

<sup>348</sup> *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para. 284.

<sup>349</sup> *Pub. Serv. Tel. Co. v. Georgia Pub. Serv. Comm’n*, 755 F. Supp. 2d 1263, 1273 (N.D. Ga.), *aff’d*, 404 F. App’x 439 (11th Cir. 2010); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004); *Nat. Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 941 (3d Cir. 1990); *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007); *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914–15 (1st Cir. 1989).

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.<sup>350</sup> 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.<sup>351</sup> 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.<sup>352</sup> 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.<sup>353</sup> 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,<sup>354</sup> 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."<sup>355</sup> 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.<sup>356</sup>

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.<sup>357</sup> 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.

<sup>350</sup> *See New Jersey Payphone*, 130 F. Supp. 2d at 640.

<sup>351</sup> *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).

<sup>352</sup> *New Jersey Payphone*, 130 F. Supp. 2d at 641.

<sup>353</sup> *City of Arlington*, 668 F.3d at 234.

<sup>354</sup> *Contra* 47 U.S.C. 332(c)(7)(B)(ii).

<sup>355</sup> *New Jersey Payphone*, 130 F. Supp. 2d at 641.

<sup>356</sup> *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).

<sup>357</sup> 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.”<sup>358</sup>

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.<sup>359</sup> 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.<sup>360</sup>

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.<sup>361</sup> 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.<sup>362</sup> If, for example, 30 percent (based on T-Mobile’s experience<sup>363</sup>) 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.

<sup>358</sup> *City of Arlington*, 668 F.3d at 250.

<sup>359</sup> 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.”).

<sup>360</sup> 47 U.S.C. § 332(c)(7)(B)(v).

<sup>361</sup> WIA Comments at 16.

<sup>362</sup> *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)).

<sup>363</sup> T-Mobile Comments at 8.

period, that would translate to 45,000 violations in 2018 and 240,000 violations in 2026.<sup>364</sup> 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.<sup>365</sup>

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 manner<sup>366</sup> and the interest of localities to protect public safety and welfare and preserve their authority over the permitting process.<sup>367</sup> 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.<sup>368</sup> 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.<sup>369</sup>

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.<sup>370</sup> 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

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<sup>364</sup> 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.

<sup>365</sup> 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 Lighttower's Comments in 2016 Streamlining Public Notice); T-Mobile Comment, Attach. A at 8.

<sup>366</sup> 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; Lighttower Comments at 7, 18-19; Samsung Comments at 6; T-Mobile Comments at 13, 16, Attach. A at 25; WIA Comments at 15-17.

<sup>367</sup> 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.

<sup>368</sup> 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.

<sup>369</sup> 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.

<sup>370</sup> 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.

objectives<sup>371</sup> guiding our analysis.<sup>372</sup>

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.<sup>373</sup> 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.<sup>374</sup> 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’

<sup>371</sup> *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).

<sup>372</sup> 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.

<sup>373</sup> 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.

<sup>374</sup> *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.<sup>375</sup> 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.<sup>376</sup> 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.”<sup>377</sup> 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.”<sup>378</sup> 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.<sup>379</sup>

### **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.”<sup>380</sup> 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.<sup>381</sup> Local siting authorities, on the other hand, argue that a broad application of Section 332 will harm public safety and welfare by not

<sup>375</sup> 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.

<sup>376</sup> 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.”

<sup>377</sup> KS Rep. Sloan Comments at 2; Nokia Comments at 10.

<sup>378</sup> NATOA *et al.* Comments at 16-17.

<sup>379</sup> *See infra* paras. 145-46.

<sup>380</sup> *See* 47 U.S.C. § 332(c)(7)(B)(ii).

<sup>381</sup> *See, e.g.,* CTIA Comments at 15; CTIA Reply at 10; Mobilitie Comments at 6-7; WIA Comments at 24; WIA Reply at 13; T-Mobile Comments at 21-22; CCA Reply at 9; Sprint June 18 *Ex Parte* at 3.



giving them enough time to evaluate whether a proposed deployment endangers the public.<sup>382</sup> They assert that building and encroachment permits should not be subsumed within the shot clocks because these permits incorporate essential health and safety reviews.<sup>383</sup> 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,<sup>384</sup> 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.”<sup>385</sup> 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).<sup>386</sup> 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.<sup>387</sup> Accordingly, the fact that the title standing alone could be read

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<sup>382</sup> 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).

<sup>383</sup> League of Az Cities and Towns *et al.* Reply at 21-22.

<sup>384</sup> *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).

<sup>385</sup> *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).

<sup>386</sup> *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.

<sup>387</sup> *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.<sup>388</sup>

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.”<sup>389</sup> 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).<sup>390</sup> This is especially true in jurisdictions requiring multi-departmental siting review or multiple authorizations.<sup>391</sup>

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.<sup>392</sup> 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.<sup>393</sup> 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).<sup>394</sup> 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

<sup>388</sup> 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)).

<sup>389</sup> *City of Rancho Palos Verdes v. Abrams*, 544 U.S. at 115 (internal quotation marks and citations omitted).

<sup>390</sup> 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.

<sup>391</sup> 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.”).

<sup>392</sup> *City of Arlington*, 668 F.3d at 234.

<sup>393</sup> *Cox Commc’ns PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).

<sup>394</sup> *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).<sup>395</sup> 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.”<sup>396</sup> 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.”<sup>397</sup> 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,<sup>398</sup> special use/conditional use permits,<sup>399</sup> land disturbing activity and excavation permits,<sup>400</sup> building permits,<sup>401</sup> and a state department of education permit to install an antenna at a high school.<sup>402</sup> Notably, a lot of cases have involved local agencies that are separate and distinct from the local zoning authority,<sup>403</sup> 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.”<sup>404</sup>

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

<sup>395</sup> *Ogden Fire Co. No. 1 v. Upper Chichester TP.*, 504 F.3d 370, 395-96 (3d Cir. 2007).

<sup>396</sup> *Upstate Cellular Network*, 257 F. Supp. 3d at 319.

<sup>397</sup> *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).

<sup>398</sup> 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).

<sup>399</sup> See, e.g., *Virginia Metronet, Inc. v. Bd. of Sup’rs of James City County*, 984 F. Supp. 966, 968 (E.D. Va. 1998); *Cellular Tel. Co.*, 166 F.3d at 491; *T-Mobile Cent., LLC v. Unified Gov’t of Wyandotte County*, 546 F.3d 1299, 1303 (10th Cir. 2008); *City of Anacortes*, 572 F.3d at 989; *Helcher*, 595 F.3d at 713–14; *AT&T Wireless Servs. of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1152 (S.D. Cal. 2003); *PrimeCo Pers. Commc’ns L.P. v. City of Mequon*, 242 F. Supp. 2d 567, 570 (E.D. Wis.), *aff’d*, 352 F.3d 1147 (7th Cir. 2003); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1212 (11th Cir. 2002).

<sup>400</sup> 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).

<sup>401</sup> 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).

<sup>402</sup> *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).

<sup>403</sup> 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).

<sup>404</sup> 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.”<sup>405</sup> 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.<sup>406</sup> 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.<sup>407</sup> 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.<sup>408</sup> 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.<sup>409</sup>

139. While some commenters argue for a 60-day shot clock for all collocation categories,<sup>410</sup> 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

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<sup>405</sup> League of Az Cities and Towns *et al.* Reply at 21-22.

<sup>406</sup> *2009 Declaratory Ruling*, 24 FCC Rcd at 14012-013, paras. 45, 48.

<sup>407</sup> *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332-33, 3334, 3337-38, paras. 6, 9, 17-19.

<sup>408</sup> Chicago Comments at 2 (supporting maintaining existing shot clocks); Bellevue *et al.* Comments at 13-14 (supporting maintaining existing shot clocks).

<sup>409</sup> 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”).

<sup>410</sup> 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.<sup>411</sup> 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.<sup>412</sup>

### 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.<sup>413</sup> 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.<sup>414</sup> 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.”<sup>415</sup> 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.*”<sup>416</sup> 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

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<sup>411</sup> *Wireless Infrastructure Second R&O*, FCC 18-30 at paras. 74-76.

<sup>412</sup> 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).

<sup>413</sup> AT&T Comments at 10; AT&T Reply at 9; Verizon Reply at 32; WIA Comments at 22; ExteNet Comments at 9.

<sup>414</sup> 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).

<sup>415</sup> *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para 46.

<sup>416</sup> 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.<sup>417</sup>

#### 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.<sup>418</sup> The clock can be paused, however, if the locality notifies the applicant within 30 days that the application is incomplete.<sup>419</sup> 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.<sup>420</sup> In the *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on these determinations.<sup>421</sup> Localities contend that the shot clock period should not begin until the application is deemed complete.<sup>422</sup> Industry commenters argue that the review period for incompleteness should be decreased from 30 days to 15 days.<sup>423</sup>

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.<sup>424</sup> We do not find it necessary at this point to shorten our 30-day initial review period for completeness because, as was the case when this review period was adopted in the *2009 Declaratory Ruling*, it remains consistent with review periods for completeness under existing state wireless infrastructure deployment statutes<sup>425</sup> and still “gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants

<sup>417</sup> 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.

<sup>418</sup> *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, at para. 258.

<sup>419</sup> *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”).

<sup>420</sup> *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, para. 259.

<sup>421</sup> *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.

<sup>422</sup> 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).

<sup>423</sup> 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).

<sup>424</sup> 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).

<sup>425</sup> 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.”<sup>426</sup>

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.<sup>427</sup> 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.<sup>428</sup> 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.<sup>429</sup> Industry commenters claim that some localities impose burdensome pre-application requirements before they will start the shot clock.<sup>430</sup> 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.<sup>431</sup> We conclude that the ability to toll a shot clock when an application is found incomplete or by

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<sup>426</sup> *2009 Declaratory Ruling*, 24 FCC Rcd at 14014-15, para. 53.

<sup>427</sup> 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.

<sup>428</sup> 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.”).

<sup>429</sup> *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.

<sup>430</sup> 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.

<sup>431</sup> 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.<sup>432</sup> 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,<sup>433</sup> the shot clock begins to run when the application is proffered. In other words, the request is “duly filed” at that time,<sup>434</sup> 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.<sup>435</sup> 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.<sup>436</sup> 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.<sup>437</sup> 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).<sup>438</sup>

## 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).

<sup>432</sup> *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12971, at para. 265.

<sup>433</sup> See, e.g., CCA Reply at 7; GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteNet Comments at 4, 15-16; Mobilitie Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.

<sup>434</sup> 47 U.S.C. § 332(c)(7)(B)(ii).

<sup>435</sup> 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).

<sup>436</sup> *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

<sup>437</sup> *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

<sup>438</sup> 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.*

(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  
Irregularators  
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

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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)<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (NPRM)*, released in April 2017.<sup>2</sup> 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.<sup>3</sup>

**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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> The Commission also addresses collocation on structures not previously zoned for wireless use,<sup>8</sup> when the four Section 332 shot clocks begin to run,<sup>9</sup>

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<sup>1</sup> 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).

<sup>2</sup> See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Notice of Proposed Rulemaking, 32 FCC Rcd 3330 (2017).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> See *supra* paras. 23-9.

<sup>5</sup> See *supra* paras. 111-12.

<sup>6</sup> See *supra* paras. 138-39; *2009 Declaratory Ruling*.

<sup>7</sup> See *supra* paras. 132-37.

<sup>8</sup> See *supra* para. 140.

the impact of incomplete applications on our Section 332 shot clocks,<sup>10</sup> and how state imposed shot clocks remedies effect the Commission's Section 332 shot clocks remedies.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> Subsequently, NATOA filed comments concerning the draft FRFA.<sup>15</sup> 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.<sup>16</sup> 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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<sup>9</sup> See *supra* paras. 141-46.

<sup>10</sup> *Id.*

<sup>11</sup> See *supra* para. 147.

<sup>12</sup> See *supra* paras. **Error! Reference source not found.**-131.

<sup>13</sup> See *supra* para. 127.

<sup>14</sup> 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).

<sup>15</sup> Letter from Nancy Werner, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 4-5 (filed Sept. 19, 2018).

<sup>16</sup> See *supra* para. 106.

applications to be processed in less time than the Commission's new shot clocks. With the passage of time, siting agencies have become more efficient in processing siting applications and this, in turn, should reduce any economic burden the Commission's new shot clock provisions have on them.

8. The Commission has carefully considered the impact of its new shot clocks on siting authorities and has established shot clocks that take into consideration the nature and scope of siting requests by establishing shot clocks of different lengths of time that depend on the nature of the siting request at issue.<sup>17</sup> 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.<sup>18</sup> Since local siting authorities have gained experience in processing siting requests in an expedited fashion, they should be able to comply with the Commission's new shot clocks.

9. The Commission has taken into consideration the concerns of the Smart Communities and Special Districts Coalition and NATOA. It has established shot clocks that will not favor wireless providers over other applicants with pending siting applications. Further, instead of adopting a deemed granted remedy that would grant a siting application when a shot clock lapses without a decision on the merits, the Commission provides guidance as to the appropriate judicial remedy that applicants may pursue and examples of exceptional circumstance where a siting authority may be justified in needing additional time to review a siting application then the applicable shot clock allows.<sup>19</sup> 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 siting 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.<sup>20</sup>

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.<sup>21</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>22</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>23</sup> A "small business

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<sup>17</sup> See *supra* paras. 105-112.

<sup>18</sup> *Id.*

<sup>19</sup> See *supra* paras. 116-131.

<sup>20</sup> 5 U.S.C. § 604(a)(3).

<sup>21</sup> See 5 U.S.C. § 604(a)(3).

<sup>22</sup> 5 U.S.C. § 601(6).

<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> These types of small businesses represent 99.9 percent of all businesses in the United States which translates to 28.8 million businesses.<sup>27</sup>

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.”<sup>28</sup> 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).<sup>29</sup>

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.”<sup>30</sup> U.S. Census Bureau data from the 2012 Census of Governments<sup>31</sup> indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.<sup>32</sup> 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.”

<sup>24</sup> 15 U.S.C. § 632.

<sup>25</sup> See 5 U.S.C. § 601(3)-(6).

<sup>26</sup> 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](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf) (June 2016).

<sup>27</sup> 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](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf) (June 2016).

<sup>28</sup> 5 U.S.C. § 601(4).

<sup>29</sup> 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”.

<sup>30</sup> 5 U.S.C. § 601(5).

<sup>31</sup> 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#>.

<sup>32</sup> 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 (county<sup>33</sup>, municipal and town or township<sup>34</sup>) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts<sup>35</sup> and special districts<sup>36</sup>) 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.<sup>37</sup> Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of “small governmental jurisdictions.”<sup>38</sup>

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.<sup>39</sup> The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>40</sup> For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>41</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>42</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications

<sup>33</sup> 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.

<sup>34</sup> 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.

<sup>35</sup> 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.

<sup>36</sup> 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.

<sup>37</sup> 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.

<sup>38</sup> *Id.*

<sup>39</sup> 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>.

<sup>40</sup> 13 CFR § 121.201, NAICS Code 517210.

<sup>41</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5/naics~517210).

<sup>42</sup> *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.<sup>43</sup> 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.<sup>44</sup> Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>49</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>50</sup> 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

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<sup>43</sup> 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.

<sup>44</sup> 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](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>45</sup> See *id.*

<sup>46</sup> 47 CFR Part 90.

<sup>47</sup> 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.

<sup>48</sup> 13 CFR § 121.201, NAICS Code 517312.

<sup>49</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5/naics~517210).

<sup>50</sup> *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.<sup>51</sup> 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.<sup>52</sup> For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>53</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>54</sup> 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.<sup>55</sup> There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.<sup>56</sup> 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.<sup>57</sup> The appropriate size standard for this category under SBA rules is that such a business

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<sup>51</sup> 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.

<sup>52</sup> See 13 CFR § 121.201, NAICS Code 517210.

<sup>53</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210).

<sup>54</sup> *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."

<sup>55</sup> 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.

<sup>56</sup> 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.

<sup>57</sup> 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.<sup>58</sup> For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>59</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>60</sup> 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.<sup>61</sup> 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*.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> The SBA has approved these definitions.<sup>65</sup> 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

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<sup>58</sup> See 13 CFR § 121.201, NAICS Code 517210.

<sup>59</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5/naics~517210).

<sup>60</sup> *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."

<sup>61</sup> 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.

<sup>62</sup> 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.

<sup>63</sup> See *Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Rcd 11956, 12008 para. 123 (2000).

<sup>64</sup> *Id.*

<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>68</sup> For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>69</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>70</sup> 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)).<sup>71</sup>

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.<sup>72</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent

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<sup>66</sup> See *Multiple Address Systems Spectrum Auction Closes*, Public Notice, 16 FCC Rcd 21011 (2001).

<sup>67</sup> 13 CFR § 121.201, NAICS Code 517210.

<sup>68</sup> *Id.*

<sup>69</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5/naics~517210).

<sup>70</sup> *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."

<sup>71</sup> *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).

<sup>72</sup> 47 CFR § 21.961(b)(1).



BRS licensees do not meet the small business size standard).<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> Auction 86 concluded in 2009 with the sale of 61 licenses.<sup>76</sup> 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.<sup>77</sup> The SBA's small business size standard for this category is all such firms having 1,500 or fewer employees.<sup>78</sup> U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.<sup>79</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>80</sup> 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

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<sup>73</sup> 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.

<sup>74</sup> *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).

<sup>75</sup> *Id.* at 8296 para. 73.

<sup>76</sup> *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).

<sup>77</sup> U.S. Census Bureau, 2017 NAICS Definitions, "517311 Wired Telecommunications Carriers," <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2017>.

<sup>78</sup> 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>.

<sup>79</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5/naics~517110).

<sup>80</sup> *Id.*

institutions and school districts, which are by statute defined as small businesses.<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup> These definitions have been approved by the SBA.<sup>84</sup> 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.”<sup>85</sup> These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.<sup>86</sup> 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.<sup>87</sup> The 2012 Economic Census reports that 751 firms in this category operated in that year.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup> 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

<sup>81</sup> 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).

<sup>82</sup> *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.

<sup>83</sup> *Id.*

<sup>84</sup> *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Feb. 22, 1999).

<sup>85</sup> 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>.

<sup>86</sup> *Id.*

<sup>87</sup> 13 CFR § 121.201; 2012 NAICS Code 515120.

<sup>88</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~515120).

<sup>89</sup> *Id.*

<sup>90</sup> *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>.

<sup>91</sup> *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.<sup>92</sup> 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.<sup>93</sup> 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.”<sup>94</sup> The SBA has established a small business size standard for this category as firms having \$38.5 million or less in annual receipts.<sup>95</sup> Economic Census data for 2012 show that 2,849 radio station firms operated during that year.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,128.<sup>100</sup> 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.

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<sup>92</sup> *Id.*

<sup>93</sup> 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.”

<sup>94</sup> 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>.

<sup>95</sup> 13 CFR § 121.201, NAICS Code 515112.

<sup>96</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~515112).

<sup>97</sup> *Id.*

<sup>98</sup> BIA/Kelsey, MEDIA Access Pro Database (viewed Jan. 26, 2018).

<sup>99</sup> 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>.

<sup>100</sup> *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.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> This U.S. industry, Radio Stations, comprises establishments primarily engaged in broadcasting aural programs by radio to the public.<sup>104</sup> Programming may originate in their own studio, from an affiliated network, or from external sources.<sup>105</sup> 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.<sup>106</sup> U.S. Census Bureau data for 2012 indicate that 2,849 radio station firms operated during that year.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> These definitions were approved by the SBA.<sup>110</sup> On January 27, 2004, the Commission

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<sup>101</sup> 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."

<sup>102</sup> 13 CFR § 121.102(b).

<sup>103</sup> 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>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> 13 CFR § 121.201, NAICS code 515112.

<sup>107</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~515112).

<sup>108</sup> *Id.*

<sup>109</sup> *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers,*

completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.<sup>111</sup> 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.<sup>112</sup>

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.”<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> Of this total, 299 firms had annual receipts of less than \$25 million.<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup> Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.<sup>119</sup> 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.<sup>120</sup> 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).

<sup>110</sup> 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).

<sup>111</sup> See “*Multichannel Video Distribution and Data Service Spectrum Auction Closes; Winning Bidders Announced*,” Public Notice, 19 FCC Rcd 1834 (2004).

<sup>112</sup> 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).

<sup>113</sup> 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>.

<sup>114</sup> 13 CFR § 121.201, NAICS Code 517410.

<sup>115</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~517410).

<sup>116</sup> *Id.*

<sup>117</sup> 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>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> 13 CFR § 121.201, NAICS Code 517919.

were 1,442 firms that operated for the entire year.<sup>121</sup> 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.<sup>122</sup> 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,<sup>123</sup> private-operational fixed,<sup>124</sup> and broadcast auxiliary radio services.<sup>125</sup> They also include the Local Multipoint Distribution Service (LMDS),<sup>126</sup> the Digital Electronic Message Service (DEMS),<sup>127</sup> the 39 GHz Service (39 GHz),<sup>128</sup> the 24 GHz Service,<sup>129</sup> and the Millimeter Wave Service<sup>130</sup> where licensees can choose between common carrier and non-common carrier status.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> U.S. Census Bureau data for 2012, show that there were 967 firms in this category that operated for the entire year.<sup>134</sup> 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

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<sup>121</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919).

<sup>122</sup> *Id.*

<sup>123</sup> See 47 CFR Part 101, Subpart I.

<sup>124</sup> 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.

<sup>125</sup> 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.

<sup>126</sup> See 47 CFR §§ 101, 1001-101, 1017.

<sup>127</sup> See 47 CFR §§ 101, 101.501-101.538.

<sup>128</sup> See 47 CFR Part 101, Subpart N (reserved for Competitive bidding procedures for the 38.6-40 GHz Band).

<sup>129</sup> See *id.*

<sup>130</sup> See 47 CFR §§ 101, 101.1501-101.1527.

<sup>131</sup> See 47 CFR §§ 101.533, 101.1017.

<sup>132</sup> These statistics are based on a review of the Universal Licensing System on September 22, 2015.

<sup>133</sup> 13 CFR § 121.201.

<sup>134</sup> 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](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.<sup>135</sup> 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.<sup>136</sup> For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year.<sup>137</sup> 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.<sup>138</sup> 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

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<sup>135</sup> We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

<sup>136</sup> 13 CFR § 121.201, NAICS Code 517919.

<sup>137</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~517919).

<sup>138</sup> *Id.*

compliance requirements for companies involved in wireless infrastructure deployment.<sup>139</sup> 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.<sup>140</sup> 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.”<sup>141</sup>

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,”<sup>142</sup> and to develop an informal dispute resolution process and

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<sup>139</sup> See *supra* para. 144.

<sup>140</sup> See *supra* para. 110.

<sup>141</sup> 5 U.S.C. § 603(c)(1)-(4).

<sup>142</sup> KS Rep. Sloan Comments at 2; Nokia Comments at 10.

mediation program,<sup>143</sup> 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.<sup>144</sup> 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**

<sup>50.</sup> 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.<sup>145</sup> 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*.<sup>146</sup>

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<sup>143</sup> NATOA *et al.* Comments at 16-17.

<sup>144</sup> *See supra* para. 131.

<sup>145</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>146</sup> 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.”<sup>1</sup> 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.

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<sup>1</sup> 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.

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.

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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.



## New York SMSA Ltd. Partnership v. Town of Clarkstown

99 F. Supp. 2d 381 (S.D.N.Y. 2000)

Decided May 26, 2000

### MEMORANDUM DECISION AND ORDER DENYING PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

McMAHON, District Judge.

Plaintiffs, a wireless provider and the builder of its monopoly facilities, bring this action pursuant to the Federal Telecommunications Act of 1996, [47 U.S.C. § 332](#) ("TCA") asking the Court for a mandatory injunction compelling Defendants to issue a permit for Plaintiffs to build a wireless monopoly in the Town of Clarkstown. For the reasons stated below, the requested injunction is denied, Defendants' cross-motion for summary judgment is granted, and the case is dismissed.

#### *I. The Parties and Procedural Posture*

Plaintiff SMSA Limited Partnership ("SMSA"), doing business as Verizon Wireless (formerly known as Bell Atlantic Mobile, hereinafter "BAM"), is licensed by the Federal Communications Commission to provide wireless telecommunications service within the Town of Clarkstown and surrounding areas. Plaintiff Crown Atlantic Company, LLC ("Crown Atlantic") is a joint venture between Verizon Wireless and Crown Castle International Corporation, and is responsible for the construction of wireless facilities like the one at issue in this lawsuit.

Plaintiffs bring suit against Defendant Clarkstown, New York (the "Town"), the Clarkstown Planning Board, and Adolph Milch, Clarkstown Building Inspector, on the grounds that the Town's denial of

Plaintiffs' application to construct a monopoly that would provide wireless service in the Congers section of Clarkstown violated their statutory rights under the TCA and various state and federal constitutional rights under the United States and New York Constitutions.

Plaintiffs filed this action on April 20, 2000, together with an order to show cause seeking injunctive relief. On May 2, 2000, the Court determined that Goosetown Enterprises, Inc., doing business as Goosetown Communications ("Goosetown"), was a necessary party to this suit and granted it status as a Defendant Intervenor. Goosetown is a telecommunications company <sup>383</sup> located in Clarkstown that, like Plaintiffs, <sup>\*383</sup> submitted an application to construct a wireless facility that would provide coverage in Congers. Goosetown was the successful applicant.

#### *II. The Facts*

There is a gap in wireless telephone service in the Congers area of Clarkstown. In order to remedy the gap, three separate wireless providers, Goosetown, SMSA and Sprint Spectrum, LLP ("Sprint"), not a party to this suit, each sought approval from the Clarkstown Planning Board to construct a monopoly wireless facility. Sprint applied on April 11, 1997 for permission to build at Lot 129.A5.5 at 33 Route 59 in Congers. Goosetown applied for a special use permit on June 3, 1999 to build at Lot 142/129.A.5.09 in Congers. SMSA proposed to build at 35 Hemlock Drive (the "Soffer site"). Plaintiffs were the last to apply for a special use permit, which they did on August 4, 1999.

1 <sup>1</sup> There is some confusion in the record and the parties' submissions as to the dates on which Goosetown and SMSA first "applied" to build. Goosetown contends that it submitted its initial application for the site to the Planning Board on September 4, 1998. It is undisputed, however, that Goosetown applied for the special use permit on June 3, 1999, and SMSA applied on August 4, 1999.

According to the Clarkstown Wireless Law, co-location of wireless communications providers is the primary consideration in granting special permit approval, since co-location minimizes the number and visual impact of monopoles.<sup>2</sup> The Town therefore makes every effort to select a single tower location that meets the technical and coverage needs of the wireless carriers, while at the same time meeting the Town's safety and visual impact considerations. Clarkstown hoped to select only one applicant to build a monopole that would fill the coverage gap; the other carriers would be required to co-locate on that facility.

2 See Local Law 17 of 1996, codified as Chapter 251 of the Clarkstown Town Code, at § 251-12(3) ("the facility service plan shall include . . . a commitment to colocate or allow colocation wherever possible on all existing and proposed facilities.")

Defendant Goosetown first discussed its application with the Planning Board's Technical Advisory Committee on September 23, 1998. On March 3, 1999, another meeting with the Technical Advisory Committee was held, at which both Sprint and SMSA were also present (although SMSA had not yet filed an application to build a facility). Goosetown contends that, at this second meeting, the Advisory Committee stated its preference for the Goosetown site over the other two, on the grounds that it was in a more remote area and would have the least visual impact. According to Goosetown, the Committee also noted that the Goosetown site was the best situated with respect to businesses, schools and homes. After incorporating changes to its site plan recommended by the Technical Advisory

Committee, Goosetown submitted its formal application for a special use permit on June 4, 1999.

A public hearing was held on the Goosetown application on July 14, 1999. Some members of the public expressed opposition to the site. At the conclusion of the public hearing, the Town's planning, environmental and wireless communications consultants all gave the Goosetown application a positive recommendation to the Planning Board.

In order to reach an agreement on co-location for the other wireless carriers in the Congers area, the Planning Board required Goosetown and other cellular carriers, including SMSA, to attend another Technical Advisory Committee meeting. The follow-up Advisory Committee Meeting was held on August 4, 1999. At that meeting, SMSA, Sprint, Nextel, AT T Wireless and Omnipoint all indicated that the Goosetown site would meet their coverage needs.

However, on the very same day, SMSA submitted  
384 its own application for a special \*384 use permit. SMSA noted on its application that there was no existing tower on which BAM's antennas could be co-located in order to remedy the gap in coverage in Congers. On August 4, 1999, that statement was true, since the existing applications (by Goosetown and Sprint) had not been ruled on one way or the other. Plaintiffs' application was accompanied by the requisite environmental, visual impact and other technical analyses required under the Town Wireless Law. The environmental reports specifically indicated that the proposed facility would meet the maximum electromagnetic radio frequency exposure limits under the TCA.

Goosetown's application came before the Planning Board at the September 29, 1999 meeting, during which additional public comments on the Goosetown proposal were allowed. The Town's consultants reiterated their opinion that Goosetown was the preferred site, but no final vote was taken.

On October 21, 1999, BAM's Executive Vice President and Chief Technical Officer wrote to Goosetown expressing an interest in co-locating should Goosetown be the winning applicant:

I appreciate the opportunity to have discussed the Congers, N.Y. cell site with you over the last few days.

Bell Atlantic Mobile did engage Crown Castle to find us a cell site location in your town. *In spite of that engagement, please be assured that Bell Atlantic Mobile is willing to go on any one of the sites that is approved by the town.*

(Lynch Letter to Buto, October 21, 1999, attached to Gottlieb Decl. at Ex. I) (emphasis added).

On October 27, 1999, the Planning Board held a public hearing to discuss, seriatim, the pending applications of Sprint, SMSA and Goosetown. At that meeting, a few members of the public expressed concern about the visual impact and the possible health effects of SMSA's proposed site. But no decision was taken on the SMSA site and no date was set for further consideration of SMSA's application.

It was also at this meeting that the so-called "theory of prudent avoidance," which lies at the heart of this litigation, was first advanced to the Board. Members of the Board were given a copy of a chart prepared by Goosetown, which showed the distances of Goosetown's proposed monopole site from neighboring schools, business, ballfields and residences. Using the Goosetown chart as an aid, Morton Leifer, the Town's electronic communications consultant, told the Board that, while the SMSA site complied with FCC requirements, the Planning Board should adopt a policy of "prudent avoidance" to minimize the radio frequency emissions in the neighborhood. He argued, in essence, that if all applicants complied with the FCC radio frequency exposure limits (as they did), the Town could consider which site was situated farthest from key residential, business and recreational locations. He therefore recommended that the Board consider

approving the Goosetown site, because it would produce the lowest level of radio frequency emissions at the schools, businesses and residences in Congers.

At the meeting, it was made clear that emissions levels themselves could not be the legal basis for approving or denying an application for a permit. In addressing that point, Leifer stated:

Every site that is considered can only be considered if the exposure is below the [maximum exposure limits], then the town tries to mitigate even further the exposure by trying to maximize the distance from areas of interest. So we know that, and again, we don't claim any site is unsafe. We're not permitted to do that, but what we can do is mitigate the exposure, limit the exposure even further by making the distances as great as possible.

(Transcript of Oct. 27, 1999, Planning Board Meeting at 43, attached to Snyder Decl. at Ex. 4.)

385 \*385 After the public portion of the meeting was closed, the Planning Board discussed the Goosetown site, which was on the agenda for final review of its special permit application. The Board voted 4 to 3 to deny the application, on the basis that Goosetown had failed to comply with the local Wireless Law. Upon reconsideration, one member changed his vote and the Board voted to continue the matter.

On November 16, 1999, the CEO of Bell Atlantic Mobile wrote to Goosetown indicating that BAM was "prepared to locate on whatever tower is approved in Congers, provided it meets with our coverage requirements and the business terms are in line with industry norms." (Strigl Letter to Gottlieb, Nov. 16, 1999, attached to Gottlieb Decl. at Ex. F.) Goosetown exercised its option on the property for its proposed monopole on November 30, 1999.

The Planning Board's discussion of the SMSA, Goosetown and Sprint sites continued on December 1, 1999. At that meeting, counsel for

SMSA told the Board that it could mitigate the visual impact of its site by constructing the 150-foot monopole to look like an evergreen tree. She also stated that SMSA would shift the location of the monopole so that it was further from the school and business sites than the Goosetown proposal. These revised plans were submitted for consideration.

The Town consultants present at the discussion stated that they had no further comments or questions of SMSA's counsel concerning the SMSA site. Planning Board member Heim inquired, however, whether a negative declaration under the New York State Environmental Quality Review Act ("SEQRA") would be prepared for the SMSA site.

The Chair of the Planning Board, Rudolph Yacyshyn, then noted that he had consulted with the Town Attorney, Paul Schofield, and that the Board was in a position, "officially for the record and formally" to "take a consensus of the Board" regarding the Congers monopole site selection. (Transcript of Dec. 1, 1999 Planning Board Meeting, attached to Snyder Decl. at Ex. 10, p. 16.) Board Member Richard Paris then moved: "I will make a motion, Mr. Chairman. My preference is for the Crown Atlantic [SMSA] site." (*Id.* at 17.) The motion carried by a vote of 3 to 2. (*Id.*) Mr. Paris continued:

I further recommend, Mr. Chairman, *that the three matters be continued until our consultants have an opportunity to review the minutes and develop the proper negative declarations, the proper resolution for special permit, resolutions for the denial for the two applications that were not selected, and that the application that was accepted tonight is on the basis of the revised location submitted with the camouflaged rendering as provided just as direction.*

(*Id.* at 18.) (emphasis added).

The Board adopted this resolution by vote of 4-2.

SMSA contends the adoption of these two resolutions at the December 1 meeting constituted final approval of its site and denial of Goosetown's application (Sprint's site appears never to have been in the running). It so argues even though certain resolutions that were required in order to complete the approval process (including a SEQRA negative declaration and a written resolution by the Board) had not been adopted, or even drafted at that point. Nonetheless, it seems clear that if all the necessary resolutions had been available to be adopted, SMSA would have won the day. It was the preference of a majority of the Board (albeit a bare majority of the Board), and the Board clearly anticipated that the other two applications were to be denied.

Following the December 1 hearing, a number of events occurred that directly effected further scheduling of the three pending monopole applications. In the second week of January 2000, a new Planning Board Chairman was appointed to replace Mr. Yacyshyn. Also, a new Town Attorney <sup>386</sup> was appointed, and a new Deputy <sup>\*386</sup> Town Attorney was appointed to represent the Planning Board. The new attorneys were immediately preoccupied with an unrelated report of attempted bribery of one member of the Planning Board by a real estate developer, which prompted the Town's Board of Trustees to impose a moratorium on the issuance of all special permits. This moratorium elicited correspondence from Plaintiffs' counsel and other attorneys with matters before the Planning Board, arguing that such a moratorium should not apply to special permits for wireless communication facilities. After reviewing the relevant case law, the Town Attorney agreed with Plaintiffs' counsel that the moratorium should not apply to special permits for wireless facilities, and he directed the Planning Board to schedule all the pending applications for wireless facilities for hearings and votes. The follow-up hearing for the proposed Congers sites was scheduled for March 29, 2000.

Meanwhile, both competing parties plowed ahead with their proposals. In January 2000, Goosetown closed on its purchase for its proposed site. And



on March 8, 2000, SMSA filed an application for a building permit with the Building Inspector, Adolph Milch, and paid an application fee of \$5,768.00.

The Planning Board asked Robert Geneslaw, a consultant to the Planning Board, to draft a final resolution for approving the SMSA site. However, on March 15, Geneslaw sent a memo to the Board indicating that additional information would be required concerning the SMSA proposed site (the one it proposed on December 1, not the one in its initial application), including information about the ground elevation at the site of the proposed tower, which Geneslaw indicated had been based on outdated U.S. Geological Survey maps. (Geneslaw Memo to Board, Mar. 15, 2000, attached to Snyder Decl. at Ex. 17.) He noted that both the Rockland County Planning Department and the Palisades Interstate Park Commission had reviewed SMSA's revised proposal (pursuant to special permit application procedures) and had specific concerns about the site that the Board should take into consideration. The County specifically requested that the N Y State Department of Transportation conduct a review of the proposed facility. The Parks Commission was concerned that the proposed facility would be visible from its parks. In its review, the Parks Commission noted that both the Goosetown facility and the SMSA facility would be visible from the parks, but that SMSA would be at a higher, and therefore more visible, location. A copy of Geneslaw's memo made its way to SMSA's counsel.

SMSA also received a copy of a memo dated March 21, addressed to the Planning Board, from Town Consultant Morton Leifer. Leifer told the board that letters he received from numerous people subsequent to the December 1 meeting "make a strong case for revisiting some of the issues that had moved the Board to their present position." He noted that the Town had five sites from which to choose for placement of a wireless facility in the Congers area, but that the SMSA and Goosetown sites were the only two in contention. He further stated:

The view shed of both is nearly identical. Proximity to various occupied locations near the cell tower must therefor [sic] rank high as a deciding factor. *Given that the Planning Board cannot prohibit cellular siting based on health issues, it does have the option, and I believe the obligation, to maximize the distance of cell towers to all occupied locations whenever possible.*

(Leifer letter to Planning Board, Mar. 21, 2000 attached to Snyder Decl. at Ex. 19) (emphasis added).

Leifer's memo goes on to describe, in some detail, the problems with measuring and comparing the effects of radio frequency emissions in different locations (e.g., brick school buildings versus ballfields, etc.) He concluded that, because Goosetown's proposed site "has a greater overall  
387 aggregate \*387 distance to all occupied locations and produces a higher percentage of improvement in reducing radio frequency exposure to those sites" it presented "the rational, reasonable and defensible choice." (*Id.*)

At the March 29 meeting, the Planning Board voted unanimously on a resolution to adopt the SEQRA negative declarations on the SMSA site. After lengthy discussion, the Board voted down a resolution to approve SMSA's application to build the facility on the Soffer site by a vote of 4-3. At the same meeting, the Board adopted negative declarations on the Goosetown site and voted 4-3 to approve the application of Goosetown. At the close of the meeting, Sprint withdrew its site application without prejudice.

On April 20, 2000, Plaintiffs e-mailed Goosetown to confirm that they: (1) were "definitely interested" in Goosetown's monopole; (2) had forwarded a proposed lease to Goosetown's attorney; (3) had left a message for Plaintiffs' counsel regarding the status of lease negotiations; and (4) were looking forward to working with Goosetown. (Breyer-Gottlieb e-mail exchange, Apr. 20, 2000, attached to Gottlieb Aff. at Ex. G.).

The same day, they filed this action. Plaintiffs allege five causes of action arising out of the delay and ultimate denial of SMSA's application: (1) the denial was not based on substantial evidence as required by the TCA, 47 U.S.C. § 332(c)(7)(B) (iii), and further violated Plaintiffs' right to due process under the New York and United States Constitutions; (2) the delay violated § 332(c)(7)(B)(ii) of the TCA; (3) the denial was impermissibly based on perceived health effects in violation of § 332(c)(7)(B)(iv); (4) the denial deprived Plaintiffs of their property rights under the Fifth and Fourteenth Amendments; and (5) Clarkstown's decision constituted a barrier to interstate delivery of telecommunications in violation of § 101(a) of the TCA. They demand a mandatory injunction enforcing what they contend is their property right to a building permit so that they can construct their monopole. Nowhere in the complaint is there any suggestion that co-location on Goosetown's monopole will not completely close any gap in coverage that BAM currently experiences in Congers.

On April 26, 2000, in response to the suit (and after a conference before this Court), the Planning Board passed a resolution entitled "Resolution and Statement of Findings Regarding Special Permit Application by Crown Atlantic Company, LLC for Wireless Communication Monopole, SL 129-A-5.08, Congers." The resolution states in relevant part:

[T]he Town Telecommunications consultant [Leifer] advised the board that of the three proposed sites the "Goosetown site" was the overall superior site based on "prudent avoidance" and health, safety, and welfare factors, and

...

the Planning Board at its March 29, 2000 meeting failed to pass a resolution of approval for the Crown Atlantic site by virtue of a vote 3 in favor and 4 against.

...

be it resolved that the Planning Board hereby denies the application of Crown Atlantic Company . . . and issues the following statement of findings in support of its actions on the application:

1. With the Planning Board's approval of the Goosetown site at its March 29, 2000 meeting the needs of applicant, will be clearly met as required by Chapter 251 of the Code of the Town of Clarkstown and the Telecommunications Act by virtue of applicants agreement to co-locate on said "Goosetown site". It should be noted that the approval resolution for the Goosetown site requires that as a condition it demonstrates that it enter into agreement with other carriers within a limited time frame in order for its approval not to lapse. Additionally, Goosetown must offer agreement to all carriers at the market rate.

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\*388 2. The Towns telecommunication consultant, after exhaustive and detailed review which is contained in the record, advised this board that the "Crown Atlantic Site," *would have a greater impact on the health, safety, and welfare of the residents of the immediate area.* He rendered this determination based on the Theory of prudent avoidance.

3. In the event that Goosetown does not build its facility, which was approved by the Planning Board at its March 29, 2000 meeting in accordance with that resolution, applicant may revive the subject application, with notice to the Planning Board secretary, without prejudice.

(Clarkstown Resolution, Apr. 26, 2000, attached to Kraushaar Decl. at Ex. A) (emphasis added).

The Goosetown Defendant Intervenor cross-moved to dismiss the complaint on May 5, 2000.

### III. Discussion

#### A. Plaintiffs' Motion for Entry of a Mandatory Injunction Lacks Merit and Is Denied

# 1. Plaintiffs Have Not Demonstrated Irreparable Injury

Congress enacted the TCA in order to:

provide a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services *by opening all telecommunication markets to competition. Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 492-93 (2d. Cir. 1999) (citing H.R.Conf.Rep. No. 104-458 at (206) (1996), reprinted in U.S.C.C.A.N. 124).

In furtherance of the goal of promoting competition, Congress enacted the "National Telecommunications Siting Policy," 47 U.S.C. § 332(c)(7), which limits a local government's authority to deny the construction of wireless facilities, regulates how such decisions must be made, and provides for federal judicial oversight of decisions made by states and localities.

<sup>3</sup> <sup>3</sup> The siting provisions state:

## (A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

## (B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof —

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions. 47 U.S.C. § 332(c)(7)(B). (emphasis added).

Because the TCA provides for judicial oversight over how decisions concerning the siting of wireless facilities are made, zoning decisions about wireless facilities sites are reviewed more closely by courts than are other types of local zoning decisions to which federal courts traditionally apply great deference. *See Oyster Bay*, 166 F.3d at 493 (citations omitted). However,

389 the purpose of the TCA is not to \*389 substitute the judgment of the federal courts (or the federal government) for that of state and local governments, but rather to ensure that localities do not exercise their power over zoning decisions in a way that results in the denial of telecommunication services or the denial of competition. See *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 638 (2d Cir. 1999). To paraphrase a long-standing maxim of anti-trust law, it is telecommunications service, not telecommunications service providers, that the law protects. See *APT Pittsburgh Ltd. P'ship v. Penn Tp. Butler County of Penn.*, 196 F.3d 469, 480 (3d Cir. 1999) (noting that the relevant "gap" in service is not the gap affecting providers, but rather users of wireless service).

A mandatory injunction is the proper remedy where a town violates the siting provisions of the TCA. See *Oyster Bay*, 166 F.3d at 497 (citations omitted). "The basic requirements to obtain injunctive relief have always been a showing of irreparable injury and the inadequacy of legal remedies." *Ticor Title Ins. Co., et al. v. Cohen*, 173 F.3d 63, 68 (2d Cir. 1999) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982); *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989)). And where a plaintiff seeks a mandatory injunction, courts apply a heightened standard of review; plaintiff must make a clear showing of entitlement to the relief sought or demonstrate that extreme or serious damage would result absent the relief. See *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985).

Plaintiffs contend that, as a result of the Town's denial of its application, they will be unable to close the gap in BAM's wireless services, which will result in irreparable loss to them, their wireless customers, and the public at large. This loss of service, they contend, justifies mandatory injunctive relief.

However, there is absolutely no evidence in the record before me that there will be any gap in coverage for BAM customers (who are the true

beneficiaries of the TCA) if Goosetown builds its monopole and BAM co-locates on it. It is a condition of Goosetown's permit that it allow Plaintiffs, and anyone else who wishes to do so, to co-locate on its facility. And a senior official of BAM has twice indicated an interest in co-location — once before the Town Board decided where to award the permit, and once after. There is a complete absence of evidence that Plaintiffs, or any other wireless provider, will be denied wireless coverage if Goosetown builds the facility. The only thing that will be denied Plaintiffs is rent from other wireless carriers. But nothing in the TCA guarantees any particular competitor that it have access to anything other than the opportunity to provide service.

A local government is entitled to choose one wireless carrier or monopole builder over another, as long as the decision is not discriminatory.<sup>4</sup> The TCA was enacted to promote competition, and as long as the losing carrier is able to minimize the gap in its coverage through co-location or alternative sites, the TCA's prohibition against denying wireless services is not implicated. See *Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999) (holding that "local zoning policies and decisions have the effect of prohibiting wireless services if they result in 'significant gaps' in the availability of wireless services"); *Airtouch Cellular v. City of El Cajon*, 83 F. Supp.2d 1158 (S.D.Ca. 2000) (holding that the denial of Airtouch's tower did not have the effect of denying services because Airtouch could have explored alternative sites); *Sprint Spectrum v. Bd. of Cty. Commissioners of Jefferson Cty.*, 59 F. Supp.2d 1101 (D.Colo. 1999) (holding that denial of Sprint's application was not

390 a \*390 prohibition of wireless services where Sprint had alternative sites, even if those sites were less desirable and more expensive). Because Plaintiff SMSA has not been denied wireless coverage, there is no loss of service. It therefore cannot demonstrate the irreparable harm necessary to entitle them to a mandatory injunction.



4 Plaintiffs bring no claim under the anti-discrimination provisions of the TCA, so there is no need to determine whether the decision was discriminatory.

Plaintiffs contend that, by denying them their application, the Town Defendants have violated the TCA, and cite several cases supporting this contention. However, without exception, the cases cited by Plaintiffs involved situations in which a municipality denied any permit to build a facility that would remedy the wireless providers' gap in coverage.<sup>5</sup> That is not the fact pattern before me in this case.

<sup>5</sup> See, e.g., *Oyster Bay*, 166 F.3d at 497; *Nextel v. City of Mount Vernon*, 99 Civ. 10575 (S.D.N.Y. Nov. 5, 1999); *Sprint Spectrum L.P. v. Mills*, 1999 WL 688715 (S.D.N.Y. Aug. 27, 1999); *Iowa Wireless Servs. v. City of Moline*, 29 F. Supp.2d 915, 924 (C.D.Ill. 1998) (ordering defendant to grant plaintiff a special use permit "with all deliberate speed"); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove*, 20 F. Supp.2d 875, 881-82 (E.D.Pa. 1998) (ordering zoning board to issue requested special exception permit and declining to remand because to do so would "[f]rustrate the TCA's intent to provide aggrieved parties full relief on an expedited basis"); *Illinois RSA No. 3, Inc. v. Cty. of Peoria*, 963 F. Supp. 732, 747 (C.D.Ill. 1997) (concluding that injunction directing defendant to issue permit is appropriate relief under TCA); *BellSouth Mobility Inc. v. Gwinnett County, Georgia*, 944 F. Supp. 923, 929 (N.D.Ga. 1996) (granting plaintiffs' request for writ of mandamus and ordering defendant to grant plaintiffs' requested permit); *Sprint Spectrum L.P. v. Town of Easton*, 982 F. Supp. 47 (D.Mass. 1997); *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457 (N.D.Ala. 1997) (writ of mandamus ordering defendants to issue permit); *Alexander Cellular Corp. v. Town of Rochester*, Index No. 97-2602 (Sup.Ct. Ulster County 1997) (where it is clear that petitioner's application is complete and that the municipality has had

ample opportunity to review same, the permit must be granted); *Sprint L.P. v. Zoning Board of Appeals of the Town of Guilderland*, Index No. 2871-97 (Sup.Ct. Albany County 1997) (zoning board directed to issue permit).

In its zeal to call my attention to dozens of cases inapposite to the instant facts, Plaintiffs have failed to cite the most recent Second Circuit opinion that is actually on point. In *Sprint Spectrum v. Willoth*, 176 F.3d 630 (2d Cir. 1999), Sprint sought a mandatory injunction compelling a municipality to permit it to erect three 150 foot cellular towers, which Sprint contended were necessary to insure adequate wireless coverage. The municipality denied Sprint's application after finding that adequate coverage could be obtained by erecting fewer than three towers. The Second Circuit upheld the district court's denial of the injunction, and noted that it did not "read the TCA to allow the goals of increased competition and rapid deployment of new technology to trump all other considerations, including the preservation of the autonomy of states and municipalities." *Willoth*, 176 F.3d at 639. Consistent with the recognition of legitimate municipal considerations, the Circuit held:

A local government may reject an application for construction of a wireless facility in an under-served area without thereby prohibiting wireless services if the service gap can be closed by less intrusive means.

*Id.* at 643 (citing *Town of Amherst v. Omnipoint Comm. Enter.*, 173 F.3d 9, 14 (1st Cir. 1999)).

The Court continued:

A local government can also reject an application that seeks permission to construct more towers than the minimum required to provide wireless telephone services in a given area. A denial of such a request is not a prohibition of personal wireless services as long as fewer towers would provide users in the given area with some ability to reach a cell site. *Id.*

By granting Plaintiffs the relief they seek, this Court would be compelling Clarkstown either to accept one competitor over another — for no discernable reason — or to permit the building of a second monopole in Congers. As the holding in 391 *Willoth* \*391 makes clear, nothing in the TCA compels such a result.

For all these reasons, I conclude that Plaintiffs' contention here that they will suffer irreparable harm as a result of Clarkstown's decision to approve Goosetown is disingenuous and wholly without merit.

<sup>6</sup> While Plaintiffs make veiled allusions to a "political fix" in the Board's decision to approve the Goosetown site, as noted earlier, their complaint makes no direct challenge of that decision, nor does the record contain any evidence that the approval of the Goosetown site was improper or in violation of the TCA or the Town Law. It is thus not necessary for this Court to review the standards under which the Town chose the Goosetown site.

## 2. Plaintiffs Are Not Entitled to Relief under the TCA

For the reasons discussed below in connection with the Clarkstown Defendants' Motion for Summary Judgment, Plaintiffs have failed to make a showing that they are entitled to relief necessary to support an injunction — indeed, they have utterly failed to plead any viable cause of action under the TCA. For this reason, too, their claim for injunctive relief must be denied.

## B. The Clarkstown Defendants' Motion for Summary Judgment Dismissing The Complaint Is Meritorious and Is Granted

After reviewing the record, I am constrained to conclude that Plaintiffs have failed to raise an issue of material fact that they are entitled to any relief under the TCA or the New York or United States Constitutions. I therefore find that Defendants are entitled to summary judgment as a matter of law.

### 1. Denial in Writing

First, I dismiss as moot Plaintiffs' claim that the Clarkstown Planning Board's denial of SMSA's application at the March 29, 2000 meeting violated the TCA because it was not in writing. It is true that, as of April 20, when this action was filed, the Board had not made a determination in writing. However, the Resolution passed by the town on April 26, 2000 "closed that gap."

### 2. Denial Based on Substantial Evidence

Superficially more interesting, and apparently a matter of first impression, is Plaintiffs' contention that the Board's adoption of the "prudent avoidance" approach was not supported by substantial evidence in that it was made on the basis of perceived health effects, which is impermissible under the TCA.

As noted above, the TCA requires that denials be supported by substantial evidence. See 47 U.S.C. § 332(c)(7)(B)(iii). "In determining whether the denial was supported by substantial evidence, courts must employ 'the traditional standard used for judicial review of agency actions.'" *Nextel Partners of Upstate New York v. Town of Canaan*, 62 F. Supp.2d 691, 694 (N.D.N.Y. 1999). This is a deferential standard of review, and "courts may neither engage in their own fact-finding nor supplant the Town Board's reasonable determinations." *Id.* (citing *Oyster Bay*, 166 F.3d at 494.) Substantial evidence means something less than a preponderance but more than a scintilla: "[i]t means such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion." *Universal Camera v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951) (internal quotations omitted).

The evidence on which the Board relies includes the testimony at the October, December and March Planning Board meetings, the submissions made by the Plaintiffs and Goosetown, and the written reports and oral opinions of the technical advisors. On the specific issue of "prudent avoidance," the Board relied primarily on the reports of Mr. Leifer. As Plaintiffs have placed no evidence in the record to contradict, refute or even  
392 call \*392 into question the adequacy of Mr. Leifer's reports, or the accuracy of his conclusion that the Goosetown tower would result in a lower level of radio frequency emissions at key residences and schools in Congers, the Court finds that the Town based its decision on substantial evidence.

However, this does not answer the question of whether basing a choice between two competing sites on a desire to minimize the level of radio frequency emissions that would reach surrounding locations is a *per se* violation of the TCA.

The TCA prohibits a municipality from denying permission to build cellular facilities that meet the FCC's radio frequency emission standards on the basis of perceived environmental or health effects. See 47 U.S.C. § 332(c)(7)(b)(iv). In this instance, coverage was not denied solely on this impermissible basis. Rather, Clarkstown was confronted with three applications to build facilities to cover the same coverage gap.

Because co-location would solve everyone's coverage gap, Clarkstown had a perfect right to select just one company to build the facility. Under *Willoth*, the Town was not required to accept all three applications. In choosing between the two finalists, Goosetown and Plaintiffs, the Board admittedly relied on Leifer's theory of "prudent avoidance" — that is, his suggestion that, if all the applicants met the radio frequency requirements, the Board could consider how best to *minimize* the effects of radio frequency

emission on the "health, safety and welfare" of the neighboring community. The novel question presented by this action is whether anything in the TCA prohibited the Board from adopting the theory of "prudent avoidance" in these circumstances.

This Court finds nothing in the statute that prohibits a municipality from seeking to minimize perceived health effects when deciding among competing applicants. In this case, all of the applicants met FCC emissions standards. The record reveals that no one was denied consideration on health-related grounds; all three applications were considered on the merits. On the record before me, there appeared to be little or nothing to differentiate the two finalists (other than the relative visibility of the two monopolies, which was insubstantial) except their relative proximity to homes and schools.

As long as the goals of the TCA were met by granting some qualified applicant a permit to build a facility that would bridge the coverage gap, it seems to this Court that it should be a matter of indifference to the federal government who that someone is. And as long as no one who met the FCC's emissions standards was denied consideration, it seems to this Court that the municipality ought to be able to address the concerns of its citizens, and limit political fallout, by deciding to maximize the distance between the monopole and other municipal uses. Frankly, any other reading of the TCA in this case would virtually compel the municipality to award the permit to whatever applicant's site was closest to homes and schools, so as to avoid any implication that the decision was based on perceived health effects. That cannot be what Congress intended.

### 3. Plaintiffs Had No Property Rights in the Permit

Plaintiffs next contend that the Planning Board granted final approval for their monopole at the December 1, 1999 meeting, and that the Town's failure to issue the permit deprived them of their constitutional (property) rights. Plaintiffs are wrong. Under the New York Town Law, a special use permit cannot be granted without a written

determination made pursuant to the State Environmental Quality Review Act ("SEQRA"). See N.Y. Town L. § 274 (McKinney 1999); *Devitt v. Heimbach*, 58 N.Y.2d 925, 460 N.Y.S.2d 512, 447 N.E.2d 59 (1983) (vacating a municipal enabling resolution on the grounds that the SEQRA determination had not been made); *Sun Beach Real Estate Development* <sup>393</sup>*Corp. v. Anderson*, 98 A.D.2d 367, 469 N.Y.S.2d 964 (2nd Dept. 1983) (a subdivision application is deemed complete upon receipt of the SEQRA determination), *aff'd* 62 N.Y.2d 969, 479 N.Y.S.2d 336, 468 N.E.2d 291. Nothing in the TCA trumps these state law procedural requirements. See 47 U.S.C. § 332(c)(7)(A). It is undisputed that the written resolution concerning the SEQRA determination for the SMSA site was not made until the March 29, 2000 meeting. No such resolution had been drafted, let alone voted on, in December. Thus, even if it was the intention of the Board to approve the SMSA site, as a matter of New York law, Plaintiffs could not have been given the right to a building permit at the December 1 meeting.

It is well established that the mere filing of an application for a permit, without the issuance of the permit itself, does not vest the applicant with any rights other than the right to appeal the failure to approve the application to the Zoning Board of Appeals. See *Yale Auto Parts v. Johnson*, 758 F.2d 54 (2d Cir. 1985). The fact that Plaintiffs submitted a filing fee does not create a property interest; rather, Plaintiffs must prove that it was a certainty that they had a legitimate entitlement to the permit. *Id.* at 57 (citing *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). The TCA does not create in wireless companies a "claim of entitlement" to permits to build cellular towers. To the contrary, as is clear from the Second Circuit's holding in *Willloth*, the approval process is fraught with uncertainty, particularly where three equally qualified companies are competing to build one monopoly within 1500 feet of one another. See also *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999) (holding that a builder did not have a federally

protectable property right to permits for a four lot single family home subdivision); *RRI Realty Corp. v. Southampton*, 870 F.2d 911 (2d Cir. 1989) (applicant for building permit did not have sufficiently clear entitlement to permit for it to constitute a property interest.) Plaintiffs therefore fail to state a claim that they have been deprived of property rights under either the federal or New York Constitutions.

#### 4. Plaintiffs Have No Claim for "Unreasonable Delay" under the TCA

Finally, Plaintiffs allege that the Clarkstown defendants violated the TCA by not acting on its application in a timely manner. Plaintiffs are correct that, under the TCA, the Town was required to act upon its request for placement of the monopoly within a "reasonable time." See 47 U.S.C. § 332(c)(7)(ii). My colleague, Judge Brieant, recently noted that the prohibition of TCA § 704 against unreasonable delay "implemented Congress' intent 'to stop local authorities from keeping wireless providers tied up in the hearing process' through invocation of state procedures, moratoria or gimmicks." *Lucas v. Planning Board of Town of LaGrange*, 7 F. Supp.2d 310, 321-22 (S.D.N.Y. 1998) (quoting *Easton*, 982 F. Supp. at 50.) Congress did not, however, intend for particular wireless providers to be given preferential treatment, or to subject their requests for permits to any but the generally applicable time frames for zoning decisions. See H.R. 104-458, 104th Cong. 2nd Sess., Jan. 31, 1996, p. 208.

Under New York law, the applicable time frame for consideration of a special use permit is set forth in § 274-b(6) of the Town Law. See N.Y. Town L. § 274-b(6) (McKinney 1999).<sup>7</sup> Plaintiffs <sup>394</sup>argue that, <sup>394</sup>even if the Board did not approve the permit application at the December 1 meeting, it violated the TCA by failing to either approve or deny their application by February 2, 2000, or 62 days from the date of the public hearing.

<sup>7</sup> That article of the Town Law provides in relevant part that the certain procedures be followed when determining whether a special use permit be issued:



The authorized board shall conduct a public hearing within sixty-two days from the day an application is received on any matter referred to it under this section. . . .

*The authorized board shall decide upon the application within sixty-two days after the hearing. The time within which the authorized board must render its decision may be extended by mutual consent of the applicant and the board.*

N Y Town L. § 274-b(6) (McKinney 1999) (emphasis added). The Clarkstown "Wireless Law" mirrors the language in the N.Y. Town Law.

Defendants respond that Plaintiffs cannot come to federal court and cry "unreasonable delay" under the TCA when, in fact, their application was the last of the three Congers proposals received by the Board, and the Board acted on their application as promptly — if not more promptly — than it did the Sprint and Goosetown applications. Further, Defendants note that there can be no claim under the "unreasonable delay" provisions of the TCA where the coverage requirements are met by another facility — which was approved on the very day that Plaintiffs' application was denied. Finally, Defendants contend that the 62-day time period for rendering a decision does not run until the municipality makes the SEQRA determination.

The record indicates that a public hearing was held on December 1, 1999, and at the close of that meeting, the Board voted to continue the matter. The next meeting held to discuss the matter was on March 29, 2000. This meeting was not a public hearing. Thus, under the Town Law, Clarkstown was under an obligation to reach a decision on the special use permit within 62 days, unless an extension was agreed to by mutual consent of the applicant and the Board.

There is plenty of evidence in the record that changes to the composition of the Planning Board, the appointment of the new attorneys and the dispute over the moratorium delayed the scheduling of the follow-up discussions of the Conger monopolies. There is, however, no evidence that either party consented to extend the statutory deadline.

I am therefore convinced by Plaintiffs' reasoning that failure to reach a decision within 62 days of the public hearing could be construed as an "unreasonable delay" under the TCA. As such, if Plaintiffs had been the only applicant with a permit application before the Board, and they had come before this Court on the 63rd day seeking injunctive relief, this Court would have looked favorably on such a request. That is because, where a plaintiff is the only applicant before a Board, and the Board fails to reach a decision within the statutorily proscribed period, the failure to reach a decision may have the *de facto* effect of prohibiting wireless services in violation of the TCA.

However, Plaintiffs' claim that the failure to reach the decision by the 63rd day entitles them to injunctive relief is without merit for two reasons. First, Plaintiffs did not bring this suit on the 63rd day. Instead, thinking that they were going to win final approval for the construction of their monopoly, SMSA waited until after the Board had made its decision on March 29 to bring this lawsuit. The problem Plaintiffs now face is that, having waited until the Goosetown monopoly was selected over their site, Plaintiffs can no longer make the claim that the delay had the effect of denial of wireless services. Indeed, the claim of delay is as moot as the claim of failure to make findings in writing.

The subsection of the TCA under which Plaintiff brings its claims for unreasonable delay applies siting criteria to those zoning decisions that prohibit or have the effect of prohibiting wireless services in a given area. *See* 47 U.S.C. § 332(c)(7)(B)(i)(II). The TCA provides that "[a]ny person adversely affected by any final action or failure to

act by a state or local government . . . may . . . commence an action in any court of competent jurisdiction." See 47 U.S.C. § 332(c)(7)(B)(5). As  
395 a matter of logic, a final action resulting in denial gives rise to a claim of improper denial. A failure to act resulting from delay gives rise to a claim of unreasonable delay and constructive denial. Congress could not have intended for plaintiffs to bring a claim that a Board's action was both a final denial of their application and a delay that had the effect of a denial. By waiting until after the final decision was rendered, Plaintiffs forwent a claim of "unreasonable delay."

8 8 While Plaintiffs are correct that the application process went on longer than might be ideal, this appears to have resulted from a change in Town administration at the beginning of this year and a crisis generated by charges of impropriety against one Planning Board member, not from an effort to prohibit the provision of cellular services in Congers. Although I need not reach the question of whether these facts might justify the six weeks delay, there is no evidence in the record that the Town was attempting to play "cat and mouse" with Plaintiffs in the hopes that Plaintiffs would drop their application. See *Town of Canaan*, 62 F. Supp.2d at 695 (finding delay was not unreasonable where Town deemed the environmental review incomplete).

Second, even if Plaintiffs had moved for injunctive relief on the 63rd day they would not have been entitled to it. Under Plaintiffs' interpretation of the TCA and its effect on the Town Law, all three carriers with applications before the Board — Goosetown, Sprint and Plaintiffs — would have been entitled to a mandatory injunction on the 63rd day, because, all three had been subjected to an "unreasonable delay." Plaintiffs' suggested result, if carried to its logical extreme, would have federal courts ordering towns to permit multiple wireless facilities every time a board failed to reach a

decision by the 63rd day. Such a rule would be preposterous, and clearly against the holding in *Willoth*.

The New York State Legislature did not provide for the "default approval" of special use permits where a Board fails to reach a decision. Indeed, had it so intended, the legislature could have written it into the Town Law, as it did in the case of subdivision approvals. See N.Y. Town L. § 276(3) (a planning board which fails to act on a preliminary subdivision plat application within 45 days is deemed to have approved the preliminary plat). Thus, while mandatory injunction is the proper form of relief where the application is not acted on and a gap in coverage ensues, it would be inappropriate to order said relief in these circumstances where several applications remained pending before the Board.

Finally, Defendants argue that the 62-day time limit did not begin to run on December 1, because the public hearing was not "closed" until the SEQRA determination was made. And they argue by analogy that, because the approval process cannot come to a conclusion until the negative resolution passes, see *Honess 52 Corp. v. Widholt*, 176 Misc.2d 57, 672 N.Y.S.2d 237 (Sup.Ct. Dutchess County 1998) (62-day review period under Section 276 governing approval of subdivisions does not begin to run until enactment of SEQRA findings), the public hearing must necessarily remain open until that act is accomplished. See 61 McKinney's Consol Laws of N.Y., § 274-b, Supp.Prac.Comm., T. Rice, p. 205 (noting that the time requirement for commencing a public hearing does not run until the SEQRA determinations have been made). And it is clear that SEQRA determinations are the *sine qua non* of special permit approval. Having found that Plaintiffs state no claim under the TCA, however, I need not reach this interesting question of New York law.

#### 4. Goosetown's Ability to Meet SMSA's Coverage Requirements

Finally, Plaintiffs argue that Goosetown may not be capable of installing its facility in a timely manner, which would create an unreasonable delay in BAM's offering service in the gap area. However, there is not a shred of evidence in this record to support SMSA's bare-bones contention that Goosetown will not be able to build its  
396 monopoly in a timely manner. The record \*396 reveals that Goosetown was the first applicant, having begun the process almost two years prior to Plaintiffs. It has already taken title to its site. Intervenor avers, without contradiction, that it is ready to go — and would have started construction but for this lawsuit. The Planning Board conditioned its approval of the Goosetown site on Goosetown installing its facility and making it available for co-location within six months of the date that its permit was approved.

Plaintiffs' speculation would appear to boil down to "we are big and they are small, and small can't guarantee getting the job done." But as Goosetown points out, one of the express goals of the TCA was to promote competition among cellular service providers. And, although Plaintiff seems to make an issue out of the fact that they are a federally licensed wireless provider whereas Goosetown is not federally licensed, the TCA does not provide for preferential treatment of licensed carriers. Thus, bigger is not necessarily better.

Summary judgment is entered for Defendants and all claims against them are dismissed.

This constitutes the decision and order of this Court.

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**City of Camas**  
**Public Works Small Wireless Facility ("SWF") Design Standards**  
**[DRAFT – 06-24-2019]**

Small wireless facilities, as defined in CMC 18.35.020, are permitted in the public rights-of-way of the City, subject to the following Design Standards, issuance of an encroachment permit and, when applicable, a building permit. The wireless service and/or infrastructure provider must also have a municipal master permit, franchise, or other applicable authorization to use the right-of-way, and an agreement or permit to attach to City-owned structures. Proposed DAS systems in the public rights-of-way are also subject to these design standards.

All SWF shall meet the height and size limitations in the definition of "small wireless facilities" in CMC 18.35.020.

As used herein, "decorative pole" means a City structure that is specially designed and placed for aesthetic purposes and on which no appurtenances or attachments, other than a SWF, lighting, specially designed informational or directional signage or temporary holiday, or temporary holiday or special events attachments, have been placed or are permitted to be placed according to nondiscriminatory standards.

See CMC 18.35.020 for the definitions of "utility support structure," "antenna," and other wireless terms used herein.

A. SWF Attached to Wooden Utility Support Structures. SWF attached to existing or replacement wooden utility support structures shall conform to the following design criteria, to the extent technically feasible:

1. The utility support structure at the proposed location may be replaced with a taller structure for the purpose of accommodating a SWF; provided, that the replacement structure shall not exceed a height that is a maximum of 10 feet taller than the existing structure or the height permitted by the definition of SWF, whichever is greater, unless a further height increase is required and confirmed in writing by the structure owner, and such height extension is the minimum extension necessary to provide sufficient separation and/or clearance from electrical and wireline facilities. Replacement wooden utility support structures may either match the approximate color and materials of the replaced structure, or shall be the standard new wooden utility support structure used by the structure owner in the City.
2. A pole extender may be used instead of replacing an existing utility support structure, but may not increase the height of the existing structure by more than 10 feet or the height permitted by the definition of SWF, whichever is greater, unless a further height increase is required and confirmed in writing by the structure owner, and such height extension is the minimum extension necessary to provide sufficient separation and/or



clearance from electrical and wireline facilities. The pole extender shall be painted to approximately match the color of the structure and shall substantially match the diameter of the utility support structure as measured at its top. A "pole extender" means an object affixed between the utility support structure and the antenna for the purpose of increasing the height of the antenna above the utility support structure.

3. To the extent technically feasible, antennas, antenna equipment, equipment enclosures, and all ancillary equipment, boxes, and conduit shall be colored or painted to match the approximate color of the surface of the utility structure on which they are attached.
4. Panel antennas shall not be mounted more than 12 inches from the surface of the utility support structure, unless an additional distance is required by the utility support structure owner, and shall not exceed three cubic feet in volume.
5. A canister antenna may be mounted on top of an existing or replacement utility support structure, which must not exceed the height requirements described in subsection (A)(1) above. A canister antenna mounted on the top of a utility support structure shall not exceed the diameter of the utility support structure by more than 12 inches or be 16 inches in diameter, whichever is greater, and to the extent technically feasible, shall be colored or painted to match the structure. The canister antenna must be placed to look as if it is an extension of the utility support structure. In the alternative, the applicant may install a side-mounted canister antenna, so long as the inside edge of the antenna is no more than 12 inches from the surface of the utility support structure. To the extent technically feasible, all cables shall be concealed either within the canister antenna or within a sleeve between the antenna and the utility support structure.
6. An omni-directional antenna may be mounted on the top of an existing or replacement utility support structure, which may not exceed the height requirements described in subsection (A)(1) above, provided such antenna is no more than three cubic feet in volume and is mounted directly on the top of a utility support structure or attached to a sleeve made to look like the exterior of the structure as close to the top of the structure as technically feasible. To the extent technically feasible, all cables shall be concealed within the sleeve between the bottom of the antenna and the mounting bracket.
7. All related antenna equipment, including but not limited to ancillary equipment, radios, cables, associated shrouding, disconnect boxes, meters, microwaves, and conduit, which is mounted on utility support structures shall not be mounted more than six inches from the surface of the structure, unless a further distance is required by the utility support structure owner.
8. Antenna equipment for SWFs must be attached to the utility support structure, unless otherwise permitted to be ground-mounted pursuant to subsection (D)(1) below. The equipment must be placed in the smallest enclosure(s) feasible for the intended purpose. The equipment enclosure(s) and all other wireless equipment associated with the utility support structure, including wireless equipment associated with the antenna and any preexisting associated equipment on the utility support structure, may not exceed 28 cubic feet. Multiple equipment enclosures are acceptable if designed to more closely integrate with the SWF design; provided, that said multiple enclosures must not cumulatively exceed 28 cubic feet. The applicant is encouraged to place the equipment

enclosure(s) behind any banners or road signs that may be on the utility support structure.

9. An applicant who desires to enclose both its antennas and antenna equipment within one enclosure may do so; provided, that such enclosure is the minimum size necessary for its intended purpose, and the enclosure and all other wireless equipment associated with the utility support structure, including wireless equipment associated with the antenna and any preexisting associated equipment on the structure, do not exceed 28 cubic feet. To the extent feasible, the unified enclosure shall be placed so as to appear as an integrated part of the utility support structure or behind banners or signs. The unified enclosure may not be placed more than six inches from the surface of the utility support structure, unless a further distance is required and confirmed in writing by the structure owner. The applicant is encouraged to place the unified enclosure behind any banners or road signs that may be on the utility support structure.
10. All cables shall be routed through conduit along the outside of the utility support structure. The outside conduit shall be colored or painted to match or be compatible with the utility support structure. The number of conduit shall be minimized to the number technically necessary to accommodate the SWF.
11. The diameter of a replacement utility support structure shall comply with the City's setback and sidewalk clearance requirements and, to the extent technically feasible, shall not be more than a 25 percent increase of the existing utility support structure, as measured at the base of the structure.
12. Glulam utility support structures are specifically prohibited.

B. SWF Attached to Non-Wooden Utility Support Structures. SWF attached to existing or replacement non-wooden utility support structures shall conform to the following design criteria, to the extent technically feasible:

1. Antennas, antenna equipment and associated equipment enclosures (including disconnect switches and other appurtenant devices), conduit and fiber shall be fully concealed within the utility support structure, unless such concealment is technically infeasible or is incompatible with the utility support structure design, in which case the antennas, antenna equipment, and associated equipment enclosures must be camouflaged to appear as an integral part of the utility support structure or flush-mounted to the structure, meaning no more than six inches off of the structure, and must be the minimum size necessary for the intended purpose, not to exceed the volumetric requirements for SWF. If an equipment enclosure is permitted on the exterior of the utility support structure, the applicant is required to place the equipment enclosure behind any banners or road signs that may be on the structure.
2. Any replacement utility support structure shall substantially conform to the existing neighboring support structure design standards utilized within the contiguous right-of-way and shall require city approval.
3. The height of any replacement utility support structure may not extend more than 10 feet above the height of the existing structure, or the height permitted by the definition

of SWF, whichever is greater, unless such further height increase is required and confirmed in writing by the structure owner.

4. The diameter of a replacement utility support structure shall comply with the City's setback and sidewalk clearance requirements and, to the extent technically feasible, shall not be more than a 25 percent increase of the existing non-wooden utility support structure measured at the base of the structure, unless additional diameter is needed in order to conceal equipment within the base of the structure, and shall comply with the requirements in subsection (D)(2) below.
5. A canister antenna on top of an existing or replacement utility support structure may not extend more than six feet above the height of the existing or replacement structure and the diameter may not exceed the diameter of the structure by more than 12 inches or be 16 inches in diameter, whichever is greater, unless the applicant can demonstrate that more space is technically or aesthetically needed.
6. Decorative poles. A wireless provider, through the encroachment permit process, shall be permitted to collocate on or replace a decorative pole when necessary to collocate a small wireless facility; provided that any such replacement pole shall substantially conform to the City's decorative pole design(s). The City prefers that wireless providers install a new structure pursuant to subsection (C), below, instead of using a decorative pole, unless the provider can demonstrate that a new structure is technically infeasible or that use of a decorative pole better minimizes visual impacts.

C. New Structures for SWF. SWF attached to new structures shall conform to the following design criteria, to the extent technically feasible:

1. Antennas, antenna equipment and associated equipment enclosures (including disconnect switches and other appurtenant devices), conduit and fiber shall be fully concealed within the structure, unless such concealment is otherwise technically infeasible, or is incompatible with the structure design, then the antennas and associated equipment enclosures must be camouflaged to appear as an integral part of the structure or flush-mounted to the structure, meaning no more than six inches off of the structure, and must be the minimum size necessary for the intended purpose, not to exceed the volumetric requirements for SWF.
2. To the extent technically feasible, all new structures and structure-mounted antennas or equipment shall be painted or colored with flat, non-reflective colors or shades of either black, brown or grey that blend with the visual environment.
3. The City prefers that wireless providers install SWF on existing or replacement utility support structures (except decorative poles) instead of installing new structures, unless the provider can demonstrate that installation on an existing or replacement utility support structure (except decorative poles) is technically infeasible or otherwise not possible (due to a lack of owner authorization, safety considerations, or other reasons acceptable to the Director).

D. General Requirements. All SWF shall conform to the following design criteria, to the extent technically feasible:

1. Ground-mounted equipment in the right-of-way is prohibited, unless such equipment is placed underground, or the applicant can demonstrate that utility support structure-mounted equipment and undergrounding are technically infeasible. If ground-mounted equipment is necessary, then the applicant shall submit a plan showing an appropriate design to mitigate the visual impacts of the equipment and meet the location requirements of subsection (D)(2), below. Generators located in the right-of-way are prohibited.
2. Replacement utility support structures and new structures shall comply with the Americans with Disabilities Act (ADA), City construction and sidewalk clearance standards, and City, state and federal laws and regulations in order to provide a clear and safe passage within the right-of-way. Further, the location of any replacement or new structure must be physically possible, comply with applicable traffic warrants, not interfere with utility or safety fixtures (e.g., fire hydrants, traffic control devices), and not adversely affect public health, safety or welfare.
3. Replacement utility support structures shall be located as near as possible to the existing structure with the requirement to remove the abandoned structure.
4. Any replacement utility support structure shall substantially conform to the design of the structure it is replacing or the neighboring structures in the contiguous right-of-way, unless otherwise approved by the Director.
5. No signage, message, or identification other than signs required by law and the manufacturer's identification is allowed to be portrayed on any SWF and its support structure, and any such signage shall be of the minimum amount possible to achieve the intended purpose and comply with applicable law; provided, that signs are permitted as concealment techniques where appropriate.
6. Antennas and antenna equipment shall not be illuminated except as required by a federal or state authority, or unless approved as part of a light standard.
7. Side arm mounts for antennas or antenna equipment must be the minimum extension necessary, but in any case, no more than 12 inches off the utility support structure for wooden utility support structures, and no more than six inches off the utility support structure for non-wooden utility support structures, as measured from the surface of the utility support structure to the inside edge of the antennas or equipment.
8. Designs for SWFs located on existing or replacement City-owned utility support structures may deviate from the design standards in this section, provided such deviations are approved as part of a lease or other agreement between the applicant and the City.



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## STAFF REPORT 2019 LEGISLATIVE SESSION HOUSING BILLS

To: Shannon Turk, Mayor  
Council Members

From: Sarah Fox, Senior Planner

Report Date June 25, 2019

Previous Workshops on Housing: June 3, 2019 and February 19, 2019.

- Attachments:
1. Grant Opportunity Overview from Dept. of Commerce
  2. Housing Bills Workshop Presentation, June 3, 2019
  3. House Bill 1923
  4. House Bill 1923 Report
  5. House Bill 1377-S
  6. House Bill 1377-S Report
  7. Church Owned Properties in Camas – map
  8. Senate Bill 5383

### Summary

Staff provided a presentation at the previous Council meeting in regard to the new state laws that were signed into law during the 2019 legislative session, which focused on housing. This report includes a list of the changes that will be necessary to be consistent with the new laws.

The legislature also passed a bill to encourage cities to adopt measures that will increase residential capacity (E2SHB 1923). The bill includes grant assistance to cities who undertake an effort to adopt two of twelve discretionary actions. Attachment (#1), "[Grant Opportunity Overview from Dept. of Commerce](#)" provides details on each of the twelve actions. This report will discuss the items most applicable to our city.

### Mandatory Changes

The following items are organized by bill number. Staff comments include a brief recommendation for actions to amend Camas Municipal Code ("CMC") to be consistent with the changes to state law. These changes will be brought forward through the legislative process at a future date.

House Bill	Description	Comments
<b>SHB 1377</b>	Cities must provide a bonus density for affordable housing on property owned or controlled by a religious organization	<p>Bill requires that cities create a policy that is consistent with this law upon request from a religious organization.</p> <p>A map of all the properties in Camas that are owned by religious organizations is provided at Attachment 7. The staff presentation further identified those that are located within residential zones</p>

		<p>(Attachment 2). No applications for developments on those properties have been submitted to date.</p> <p>A request from a religious entity under this law would be considered to be a "Type IV" application. Type IV decisions are legislative actions which involve the adoption or amendment of the city's land use regulations, comprehensive plan, map inventories, and other policy documents that affect the entire city. These applications involve the greatest amount of discretion and evaluation of subjective approval criteria.</p> <p><b>Recommendation: Adopt a regulation consistent with other density bonus provisions in our development code at CMC Chapter 18.09 Density and Dimensions.</b></p>																				
E2SHB 1923	<p>Cities must adopt a new definition for "permanent supportive housing".</p> <p>New definition: "Subsidized, leased housing with no limit on length of stay, paired with on-site or off-site voluntary services designed to support a person living with a disability to be a successful tenant in a housing arrangement, improve the resident's health status, and connect residents of the housing with community-based health care, treatment, and employment services."</p>	<p>Current Use Authorization for "<u>Assisted Living</u>" at CMC§18.07.030 and 18.07.040</p> <table><tr><td><b>Zones:</b></td><td>R</td><td>MF</td><td>NC</td><td>DC</td><td>CC</td><td>RC</td><td>MX</td><td>BP</td><td>LI/BP LI HI</td></tr><tr><td><b>Authorization:</b></td><td>C</td><td>P</td><td>C</td><td>P</td><td>P</td><td>X/P<sup>10</sup></td><td>P</td><td>X</td><td>X</td></tr></table> <p><b>Recommendation: (1) Add new definition consistent with state law. (2) Allow "Permanent supportive housing" wherever "Assisted Living" is allowed.</b></p>	<b>Zones:</b>	R	MF	NC	DC	CC	RC	MX	BP	LI/BP LI HI	<b>Authorization:</b>	C	P	C	P	P	X/P <sup>10</sup>	P	X	X
<b>Zones:</b>	R	MF	NC	DC	CC	RC	MX	BP	LI/BP LI HI													
<b>Authorization:</b>	C	P	C	P	P	X/P <sup>10</sup>	P	X	X													
E2SHB 1923	<p>Cities must be consistent with the new definition of "affordable housing" that includes a definition for rental housing and owner-occupied housing.</p> <p>Affordable <u>rental housing</u> must be defined as 60% of the median household income (MHI) and <u>owner-occupied housing</u> be defined as 80% of the MHI.</p>	<p><u>CMC Chapter 3.86 Multifamily Tax Exemption</u> includes the following definition, "<i>Affordable housing means residential housing that is rented by a person or household whose monthly housing costs, including utilities other than telephone, do not exceed thirty percent of the household's monthly income. For the purposes of housing intended for owner occupancy, "affordable housing" means residential housing that is within the means of low or moderate-income households</i>".</p> <p><b>Recommendation: Amend definition at CMC Chapter 3.86 consistent with state law.</b></p>																				
E2SHB 1923	<p>Requires cities to set maximum residential parking ratios for low income, senior, and affordable housing units located near "high quality transit service".</p>	<p>This item is mandatory, however, "high quality transit service" includes in its definition a frequency of service of four times per hour for at least 12 hours a day. At this time, C-Tran serves our city twice per hour.</p> <p><b>This item is not applicable to Camas <u>at this time</u> and no action would be required.</b></p>																				

<b>ESSB 5383</b>	<p>Cities must include a new definitions: "tiny house"; "tiny house with wheels"; and "tiny house communities", and not prohibit them.</p> <p>New definition (in part), "Means a dwelling to be used as permanent housing with permanent provisions for living, sleeping, eating, cooking, and sanitation built in accordance with state building code.</p>	<p>A city or town may not prevent entry or require removal of a recreation vehicle or a tiny house with wheels used as a primary residence <b>in a manufactured/mobile home community</b>, except for regulations related to fire, safety, or other regulations related to recreation vehicles.</p> <p>Current code at CMC§18.29.070(E): <i>"Trailers and Recreational Vehicles. No travel trailer or recreational vehicle shall be utilized, except as temporary living quarters, and accessory to an existing manufactured home, which use shall not exceed a maximum of ten days per year."</i></p> <p><b>Recommendation: (1) Add new definitions for "tiny house", and (2) Repeal subsection "E" at CMC§18.29.070 to be consistent with state law.</b></p>
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## Grant Opportunity

The Department of Commerce provided an overview and guidance on the grant opportunity that will be made available with the adoption of House Bill 1923 (Refer to Attachment 1, E2SHB 1923). At the workshop on June 3<sup>rd</sup>, staff provided an overview of the bill and made note of a few of the housing actions that are already in effect in our city.

The following discussion will provide a brief description of those items that could be considered to be minor changes to our current code during a periodic update, or through a limited effort to increase residential density and diversity ("**Limited**"). All of the applicable actions could also be considered during the development of a Housing Action Plan ("**HAP**"), if the city chooses to pursue that option. Staff provides a recommendation for each item to be considered through a "Limited" or "HAP" project---either could be eligible for grant funding.

The goal of a Housing Action Plan (HAP) is to "*encourage construction of additional affordable and market rate housing in a greater variety of housing types and at prices that are accessible to a greater variety of incomes, including strategies aimed at the for-profit single-family market.*"

Staff provided information on the need for diversified and affordable housing at the February 19<sup>th</sup> workshop. The initial information provided at the workshop was gathered from census data, city employee data, and building permits issued over the past nine years.

## RESIDENTIAL BUILDING PERMITS - TRENDS

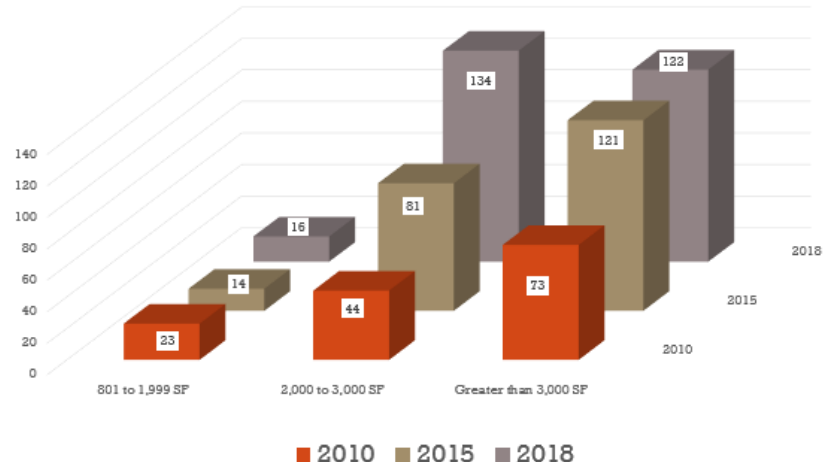


FIGURE 1 - WORKSHOP PRESENTATION, FEBRUARY 2019

Staff reported that the bulk of the building permits over the past nine years was for single family residences and the majority exceeded 3,000 square feet. Last year, the city saw more permits for homes in the 2,000 to 3,000 square foot range.

Twelve (12) Activities Eligible for Funding per E2SHB 1923	Comments
1. Increase residential density near commuter light rail stations to 50 dwelling units per acre...	Not applicable to our city as we do not have a light rail station.
2. Increase residential density along high frequency transit corridors to 25 dwelling units per acre...	Not applicable to our city as we do not have high frequency transit.
3. Authorize at least one duplex, triplex, or courtyard apartment on each parcel in one or more zoning districts that permit single-family residences unless a city documents a specific infrastructure or physical constraint that would make this requirement unfeasible for a particular parcel.	Duplexes are allowed outright (P) in multifamily zones and as a conditional use (CUP) in single family zones.  <b>HAP:</b> The city could consider allowing duplexes outright (P) in single family zones.
4. Authorize cluster zoning or lot size averaging in all zoning districts that permit single family residences;	City already allows a type of cluster zoning in all single family zones, called Planned Residential Developments (PRD).
5. Authorize attached accessory dwelling units (ADUs) on all parcels containing single family homes where the lot is at least 3,200 square feet in size, and permit both attached and detached ADUs on all parcels containing single-family homes, provided lots are at least 4,356 square feet in size. Qualifying city ordinances or regulations may not provide for on-site parking requirements, owner occupancy requirements, or square footage limitations below 1,000 square feet for the accessory dwelling unit, and must not prohibit the separate rental or sale of accessory dwelling units and the primary residence. Cities must set applicable impact fees at no more than the projected impact of the accessory dwelling unit...	The city allows only one ADU (interior or exterior) on a property and requires owner occupancy of one of the units.  Refer to CMC Chapter 18.27 Accessory Dwelling Units.  <b>HAP or Limited:</b> The city could revise the ADU standards, and consider allowing both an interior and exterior ADU on a property and other provisions as described.
6. Adopt a subarea plan pursuant to RCW 43.21C.420.  The plan must be for a mixed use urban center or near a major transit stop. The plan must also be accompanied by an environmental impact statement (EIS).	The city will be starting a subarea planning effort for the North Shore this month.  This area is not served by major transit and the comprehensive plan did not identify this area as a mixed use urban center.
7. Adopt a planned action pursuant to RCW 43.21C.440(1)(b)(ii). To be eligible for funding, the planned action area should: <input type="checkbox"/> Contain mixed use or residential development; and <input type="checkbox"/> Encompasses an area that is within one-half mile of a major transit stop; or will be within one-half mile of a major transit stop no later than five years from the date of the designation of the planned action.	Not applicable to our city as we do not have a major transit stop as defined by the law.
8. Adopt an infill exemption under RCW 43.21C.229 for residential or mixed-use development.	<b>HAP or Limited:</b> The city could analyze where there are areas of the city that have had adequate environmental review and where there are no anticipated adverse environmental impacts from infill development.



9. Adopt a form-based code in one or more zoning districts that permit residential uses. "Form-based code" means a land development regulation that uses physical form, rather than separation of use, as the organizing principle for the code;	<p>The city regulates land uses and other development standards based on bulk and distances, not form.</p> <p><b>HAP:</b> The city could develop a form based code for defined areas or zoning districts.</p>
10. Authorize a duplex on each corner lot within all zoning districts that permit single family residences.	<p>Refer to response at #3 (above). Duplexes are allowed outright (P) in multifamily zones and as a conditional use (CUP) in single family zones. Clark County allows duplexes outright (P) on corner lots in single family zones.</p> <p><b>Limited or HAP:</b> The city could consider allowing duplexes outright (P) on all corner lots in single family zones.</p>
11. Allow for the division or redivision of land into the maximum number of lots through the short subdivision process provided in chapter 58.17 RCW;	<p>No action necessary. The city already allows the maximum number of lots for a short subdivision.</p>
12. Authorize a minimum net density of six dwelling units per acre in all residential zones, where the residential development capacity will increase within the city.	<p>There is a minimum net density of six dwelling units per acre in all multifamily zones, but the city does not require a minimum density in single family zones.</p> <p><b>HAP:</b> The city could evaluate the effectiveness of this action to increase residential building capacity.</p>

In summary, the grant eligible activities that are relevant to Camas and are recommended by staff to move forward through development of a Housing Action Plan (HAP) or as a limited scope code amendment (Limited) include: Activities 3; 5; 8; 9; 10 or 12. Staff did not prioritize this list.

### Next steps

The recommendations for the changes to Camas Municipal Code to be consistent with new state laws will move forward through the legislative process and procedures, beginning with workshops and hearings before Planning Commission, consistent with CMC18.55.320.

At the writing of this report, the grant application had not been released by the WA Department of Commerce. When the grant application is available, staff requests that this item be brought back to council as a future agenda item.



## Department of Commerce

# Increasing Residential Building Capacity E2SHB 1923 Grant Opportunity Overview

### Growth Management Services

### Local Government Division

E2SHB 1923 (2019) encourages all cities planning under the Growth Management Act (GMA) to adopt actions to increase residential building capacity. Cities are especially encouraged to increase residential building capacity in areas that have supportive transportation and utility infrastructure, and are served with frequent transit service. Cities are also encouraged to prioritize the creation of affordable, inclusive neighborhoods and to consider the risk of residential displacement, particularly in neighborhoods with communities at high risk of displacement.

This bill provides a total \$5,000,000 in grants assistance, prioritized by the legislature for cities over 20,000 in population. A city may receive up to \$100,000 in grant funds must take at least two of the actions to increase residential building capacity listed below, or develop a housing action plan.

Commerce will reach out directly to eligible cities to apply for the funding. Those cities will be asked to complete a survey about eligible actions, specifically if they already have them, and for which ones they intend to apply for funding. The survey will be open until July 10, after which date, Commerce will use the information to make decisions about the grant program. Applications will be available after July 15, and will be due August 30. Until July 15, we recommend that eligible jurisdictions work with decision makers to review the list of eligible activities below, and decide which ones they may pursue for funding. If your city has not received notification of the survey, please contact Paul Johnson at (360) 725-3048 or [paul.johnson@commerce.wa.gov](mailto:paul.johnson@commerce.wa.gov).

After the first round of grants, if funding allows, Commerce may consider accepting and funding applications from cities with a population of less than 20,000 if the actions proposed will result in significant housing capacity or regulatory streamlining.

#### Commerce contacts:

Dave Andersen, GMS Managing Director / Project Lead, (509) 434-4491

Paul Johnson, GMS Grants Coordinator, (360) 725-3048

Email: [dave.andersen@commerce.wa.gov](mailto:dave.andersen@commerce.wa.gov) and [paul.johnson@commerce.wa.gov](mailto:paul.johnson@commerce.wa.gov)

## Activities eligible for E2SHB 1923 funding

### 1. Select at least two of the actions listed below:

- a) *Increase residential density near commuter or light rail stations to 50 dwelling units per acre. Designated areas should be at least 500 acres in size.***

This may be done in the form of a sub-area plan or rezoning within a designated area in response to or anticipation of commuter or light rail stations. Special attention should be paid to prioritize bicycle, pedestrian, and transit access to station areas. Regulations should require *no more than an average of one on-site parking space per two bedrooms* in multifamily areas.

- b) *Increase residential density along high frequency transit corridors to 25 dwelling units per acre. Designated areas should be at least 250 acres for cities with a population of less than 40,000 people, or 500 acres for cities with a population over 40,000.***

This may be done in the form of a sub-area plan or rezoning along a transit corridor in response to or in anticipation of high frequency transit corridors. *High frequency transit service is defined as bus service at least four times per hour, at least 12 hours per day.* Rezones should include higher density residential development within a 10- to 15-minute walk of transit stops, with special attention to considerations for road crossings to transit service. Regulations should require *no more than an average of one on-site parking space per two bedrooms* in multifamily areas.

- c) *Authorize at least one duplex, triplex, or courtyard apartment on each parcel in one or more zoning districts that permit single-family residences unless a city documents a specific infrastructure or physical constraint that would make this requirement unfeasible for a particular parcel.***

This option would allow much more diversity in housing stock within single family zoning districts. Documentation of specific infrastructure or physical constraints should go beyond whether sewer or other services currently exist at the location. Documentation should describe how specific geographic features of the land, such as water bodies or critical areas make it extremely difficult to develop, or serve isolated parcels with urban services.

- d) *Authorize cluster zoning or lot size averaging in all zoning districts that permit single-family residences;***

**Cluster zoning** is a zoning method in which development density is determined for an entire specified area, rather than on a lot-by-lot basis. Within the specified cluster

zone, a developer can exercise greater flexibility in designing and placing structures, as long as the total density requirement is met.

**Lot size averaging** allows the size of individual lots within a development to vary from the zoned maximum density, provided that the average lot size in the development as a whole meets that maximum. Housing can then be developed on lots smaller than otherwise permitted in a zone, allowing for greater densities in some areas and more diversity throughout the development.

These tools can be especially useful in lands encumbered by critical areas or other constraints that point to a more flexible approach.

- e) ***Authorize attached accessory dwelling units (ADUs) on all parcels containing single-family homes where the lot is at least 3,200 square feet in size, and permit both attached and detached ADUs on all parcels containing single-family homes, provided lots are at least 4,356 square feet in size. Qualifying city ordinances or regulations may not provide for on-site parking requirements, owner occupancy requirements, or square footage limitations below 1,000 square feet for the accessory dwelling unit, and must not prohibit the separate rental or sale of accessory dwelling units and the primary residence. Cities must set applicable impact fees at no more than the projected impact of the accessory dwelling unit. To allow local flexibility, other than these factors, accessory dwelling units may be subject to such regulations, conditions, procedures, and limitations as determined by the local legislative authority, and must follow all applicable state and federal laws and local ordinances.***

All jurisdictions planning under the GMA over 20,000 in population and all counties over 125,000 in population are already required to allow accessory dwelling units (ADUs) in single family zones.<sup>1</sup> To be eligible for funding under E2SHB 1923, eligible jurisdictions must adopt an ADU ordinance that is consistent with these specifications for lot size, unit size, no parking requirement, no owner occupancy requirement, reduced impact fees, and subsequent separate sale of separate units. Beyond these items, local governments may choose to waive utility connection fees, building or permit fees, or address design. For more information please review [MRSC's guidance](#) on this topic, except that the [1994 CTED ADU guidance](#) is superseded by these requirements.

- f) ***Adopt a subarea plan pursuant to RCW 43.21C.420.***

Cities with populations over 5,000 may adopt optional elements of comprehensive plans of development regulations that apply within subareas for areas that are either:

- a. Areas designated as mixed use or urban centers in a land use or transportation plan adopted by a regional transportation planning organization; or

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<sup>1</sup> See RCW 36.70A.400 and RCW 43.63A.215(3) (laws of 1993)

- b. Areas within one half mile of a major transit stop, zoned for an average minimum density of 15 units per gross acre. A major transit stop is defined as a stop on a high capacity transportation service funded under RCW 81.104, commuter rail stops, stops on rail or fixed guideways, stops on bus rapid transit routes or routes that run on high occupancy vehicle lanes; or stops for a bus or other transit mode providing fixed route service at intervals of at least thirty minutes during the peak hours of operation.

The plan must be accompanied by an environmental impact statement (EIS) assessing and disclosing the probable significant adverse environmental impacts. Any development proposed within 10 years of the EIS, which is consistent with the plan and regulations may not be challenged under SEPA.<sup>2</sup>

***g) Adopt a planned action pursuant to RCW 43.21C.440(1)(b)(ii).***

A planned action is an adopted plan and environmental review on a sub-area within an urban growth area, consistent with a comprehensive plan adopted under the Growth Management Act. The plan and environmental review are completed before projects are proposed. Project-level significant impacts must be addressed in a State Environmental Policy Act (SEPA) document, unless the impacts are specifically deferred for consideration at the project level. The SEPA document may be a determination of non-significance (DNS), a mitigated determination of significance (MDNS), or an environmental impact statement EIS). To be eligible for funding, the planned action area should:

- Contain mixed use or residential development; and
- Encompasses an area that is within one-half mile of a major transit stop; or will be within one-half mile of a major transit stop no later than five years from the date of the designation of the planned action. Major transit stop means a commuter rail stop, a stop on a rail or fixed guideway or transitway system, or a stop on a high capacity transportation service funded or expanded under chapter [81.104](#) RCW.

For more information see <http://mrsc.org/Home/Explore-Topics/Planning/Land-Use-Administration/Planned-Action.aspx>

***h) Adopt an infill exemption under RCW 43.21C.229 for residential or mixed-use development***

This section allows for exemptions from SEPA evaluation if the city or county's applicable comprehensive plan was previously subjected to environmental analysis and if the local government considers the specific probable adverse environmental impacts of the proposed action and determines they are adequately addressed by the development regulations or other requirements.

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<sup>2</sup> See RCW 43.21C.420 (amended by E2SHB 1923, laws of 2019)

Such an exemption categorically exempts government action related to development proposed to fill in an urban growth area, where current density and intensity of use in the area is lower than called for in the goals and policies of the applicable comprehensive plan and the development is either (i) Residential development, (ii) Mixed-use development, or (iii) Commercial development up to 65,000 square feet, excluding retail development. It does not exempt government action related to development that is inconsistent with the applicable comprehensive plan or would exceed the density or intensity of use called for in the comprehensive plan.

- i) *Adopt a form-based code in one or more zoning districts that permit residential uses. "Form-based code" means a land development regulation that uses physical form, rather than separation of use, as the organizing principle for the code;***

The purpose of a form-based code is to control the size and bulk of buildings, instead of regulating by the number of units. This can help a local government encourage development that meets the desired community character, but encourages a greater number of units of a given parcel, as the number of units are not restricted. For more information see [mrsc.org/Home/Explore-Topics/Planning/Development-Types-and-Land-Uses/Form-Based-Codes.aspx](http://mrsc.org/Home/Explore-Topics/Planning/Development-Types-and-Land-Uses/Form-Based-Codes.aspx).

- j) *Authorize a duplex on each corner lot within all zoning districts that permit single-family residences.***

A duplex on a corner lot can have the advantage of looking like a single-family housing unit with a front-facing door on each corner. This approach can add density in single-family areas without appearing to add a traditional duplex, but provides the benefit of additional smaller units which can be more affordable.

- k) *Allow for the division or redivision of land into the maximum number of lots through the short subdivision process provided in chapter 58.17 RCW;***

RCW 58.17.020(6) defines a short subdivision as "the division or re-division of land into four or fewer lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership. However, the legislative authority of any city or town may by local ordinance increase the number of lots, tracts, or parcels to be regulated as short subdivisions to a maximum of nine. This applies in all cities and for counties within urban growth areas. By increasing the number of lots in short plat, more development may be permitted by the quicker short plat process, which can be processed administratively, rather than the longer subdivision process, which generally requires approval of the legislative body. Local governments may also wish to review RCW 58.17.100 which allows for delegation of final plat approval to the planning commission or staff rather than going back to council.

- l) Authorize a minimum net density of six dwelling units per acre in all residential zones, where the residential development capacity will increase within the city.***

This option is applicable where net density in residential zones is less than six dwelling units per acre. Net density is the gross acreage minus public right of ways, divided by the number of units. Where areas are encumbered by critical areas, clustering can help achieve the target density.

## **2. Cities may instead adopt a Housing Action Plan**

*The goal of any such housing plan must be to encourage construction of additional affordable and market rate housing in a greater variety of housing types and at prices that are accessible to a greater variety of incomes, including strategies aimed at the for-profit single-family home market. The housing action plan should:*

- (a) Quantify existing and projected housing needs for all income levels, including extremely low-income households, with documentation of housing and household characteristics, and cost-burdened households; and c) Analyze population and employment trends, with documentation of projections;***

Data should document the type and age of housing within the community, and the demographics of the households within the communities. It should look across income segments and identify how many households in each income segment are paying more than 30 percent of their income for housing costs. The analysis should also project population demographics and income levels for the planning period and identify the types and densities of housing that are needed for housing suitable and affordable for all demographic and economic segments. This analysis should specifically consider multifamily and attached housing types. For more information see WAC 365-196-410.

- (b) Develop strategies to increase the supply of housing, and variety of housing types, needed to serve the housing needs identified in (a) of this subsection;***

Data gathered in the previous section should point to the types of housing that should be allowed by local zoning, and the types of incentives and regulations that will be needed to encourage the development of appropriate housing affordable to all income segments of the community. Trade-offs in parking requirements, setbacks, and open space considerations may be reviewed as they affect the yield in housing. Strategies to encourage and support the development of subsidized housing, such as fee waivers and free land should be considered, along with options for creating more housing. For a full menu of strategies, see [www.ezview.wa.gov](http://www.ezview.wa.gov) (Affordable Housing

Planning Resources). Policy actions can be evaluated on the whether they are short term, or long term, how effective they are, or whether they have a fiscal impact.

***(d) Consider strategies to minimize displacement of low-income residents resulting from redevelopment;***

Economic displacement occurs where low-income residents are forced out of traditional low-cost areas as redevelopment occurs and rents rise. Strategies to minimize displacement include preserving existing affordable housing, encouraging greater housing development, including, but not limited to affordable housing (so more housing is available for all income segments), using collective ownership of housing, engaging existing residents in identifying strategies, and taking a broader look using regional rather than localized strategies. For more information consider US Department of Housing and Urban Development (HUD) resources such as: [www.huduser.gov/portal/sites/default/files/pdf/DisplacementReport.pdf](http://www.huduser.gov/portal/sites/default/files/pdf/DisplacementReport.pdf)

***(e) Review and evaluate the current housing element adopted pursuant to RCW 36.70A.070, including an evaluation of success in attaining planned housing types and units, achievement of goals and policies, and implementation of the schedule of programs and actions;***

The housing element of the comprehensive plan should be evaluated for how well development is implementing policies, specifically whether the community is on track to accommodate the portion of the countywide population allocated to the community within the planning period, and whether the housing types are affordable to all economic segments. If these metrics are not met, new comprehensive plan policies should be proposed to support zoning that allow the size and types of housing that can be affordable to most economic segments of the population. Policies may also encourage or incentivize the development of subsidized affordable housing. Action strategies or housing metrics can help the plan stay on track over time.

***(f) Provide for participation and input from community members, community groups, local builders, local realtors, nonprofit housing advocates, and local religious groups; and***

Broad participation from all parts of the community can help to understand and communicate the housing need. Members of the public can provide information and perspective on how the community can meet the state requirements to plan for housing affordable to all economic segments.

***(g) Include a schedule of programs and actions to implement the recommendations of the housing action plan.***



The housing action plan should cumulate in a broad array of potential programs and actions that the jurisdiction has committed to pursue, or can partner with other organizations to implement. The actions should include an update to policies in the comprehensive plan, along with actions to update regulations to implement selected strategies. The schedule should include a timeline for actions and funding, if required to implement the plan.

### **Actions projected from appeal**

If adopted between July 28, 2019, and April 1, 2021, ordinances, amendments to development regulations, and other nonproject actions taken by a city are not subject to administrative or judicial appeal under the State Environmental Policy Act (SEPA).<sup>3</sup> This excludes the adoption of a sub-area plan adopted pursuant to RCW 43.21C.420. In addition, any action taken by a city prior to April 1, 2021 to amend their comprehensive plan, or adopt or amend ordinances or development regulations to enact any of the twelve actions to increase residential building capacity is not subject to appeal to the Growth Management Hearings Boards.<sup>4</sup>

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<sup>3</sup> E2SHB 1923, Section 1(3)

<sup>4</sup> E2SHB 1923, Section 1 (4)

# 2019 Housing Bills

CITY COUNCIL WORKSHOP

JUNE 2019

# Overview

2

E2SHB 1923

- Incentives for adopting measures to increase affordability
- Grants

SHB 1377

Requires cities to provide bonus density for affordable housing on properties owned by religious organizations

## FOCUS:

SHB 1377 Properties owned by a religious organization

- ▶ Must develop “density bonus” policy upon request
- ▶ Must allow density bonus for new or rehab affordable housing development
- ▶ 100% of units at less than 80% of MFI
- ▶ Exclusive use for 50 years



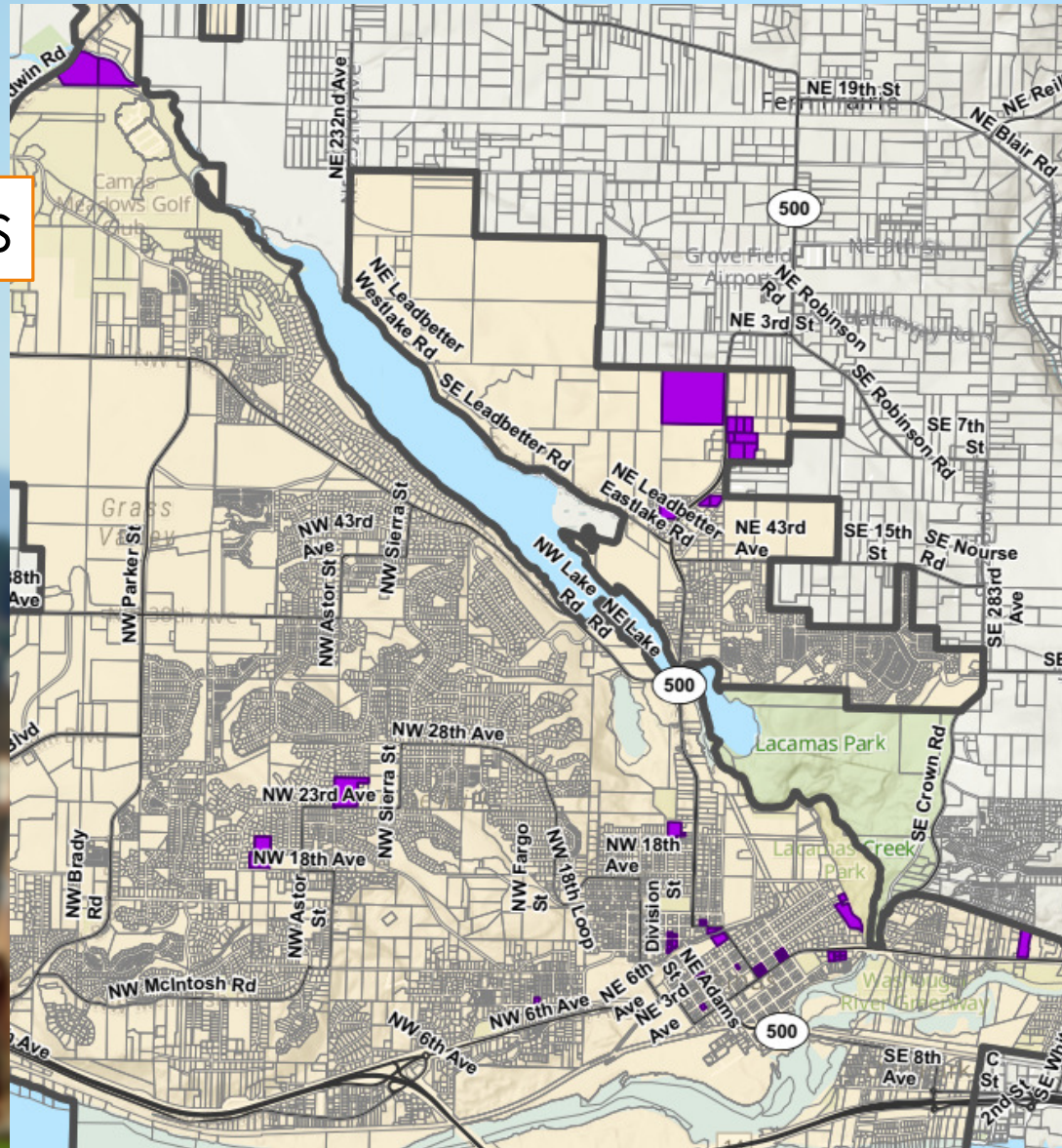
## FOCUS:

SHB 1377 Properties owned by a religious organization

Current density bonus policies

- ▶ 20% density bonus for PRDs
- ▶ 20% density bonus for preservation of critical areas, parks & open spaces
- ▶ 20% density bonus for Flex Developments

## 24 Properties





6



## FOCUS: E2SHB 1923

- Very little is **required** from cities
- All cities are **encouraged** to adopt actions to increase residential capacity



# FOCUS:

## E2SHB 1923

8

### Required:

- ▶ New definition of “permanent supportive housing”
- ▶ New definitions of affordable housing
- ▶ Set max parking limitations

### Encouraged:

- ▶ Menu of options that cities are encouraged to adopt
- ▶ Grant \$100,000
- ▶ April 1, 2021

# FOCUS: E2SHB 1923

## Required New definitions

Affordable housing

*Extremely low-income*

*Low-income household*

*Very low-income household*

*Permanent supportive housing*





# FOCUS: E2SHB 1923

10

Terminology	New law	Camas (Current) Ch. 3.86
Affordable Housing	<ul style="list-style-type: none"><li>Rentals 60% of <b>Median Family Income</b> ("MFI")</li><li>Owner-occupied 80% MFI</li></ul>	<ul style="list-style-type: none"><li>Must not exceed 30% of MFI</li><li>No housing categories</li></ul>
Extremely low-income	Below 30% MFI	Not defined
Very low-income	Below 50% MFI	Not defined
Low-income	Below 80% MFI	(SAME)
Moderate-income	Not defined	80 – 115% MFI

# FOCUS: E2SHB 1923

11

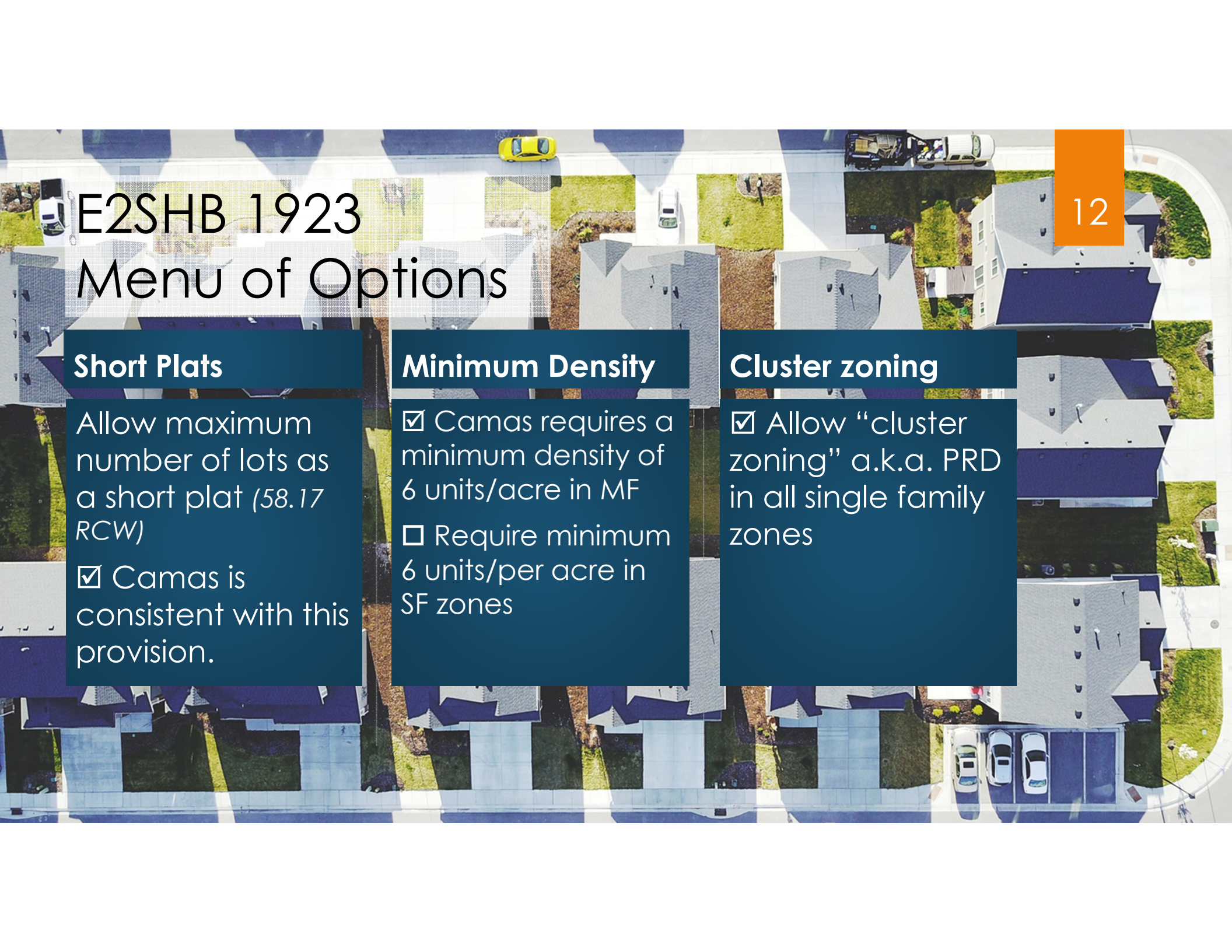
## New:

“Permanent supportive housing” may not be prohibited and definition must be updated.

## Camas Code:

1. “Adult family home, residential care facility, supported living arrangement, or housing for the disabled ”
2. “Housing for the disabled”
3. “Assisted Living





# E2SHB 1923 Menu of Options

12

## Short Plats

Allow maximum number of lots as a short plat (58.17 RCW)

☒ Camas is consistent with this provision.

## Minimum Density

☒ Camas requires a minimum density of 6 units/acre in MF

☐ Require minimum 6 units/per acre in SF zones

## Cluster zoning

☒ Allow “cluster zoning” a.k.a. PRD in all single family zones

# E2SHB 1923

## Menu of Options

### Parking Maximums

Set maximum parking ratios for housing that is intended to serve low-income, seniors or people with disabilities

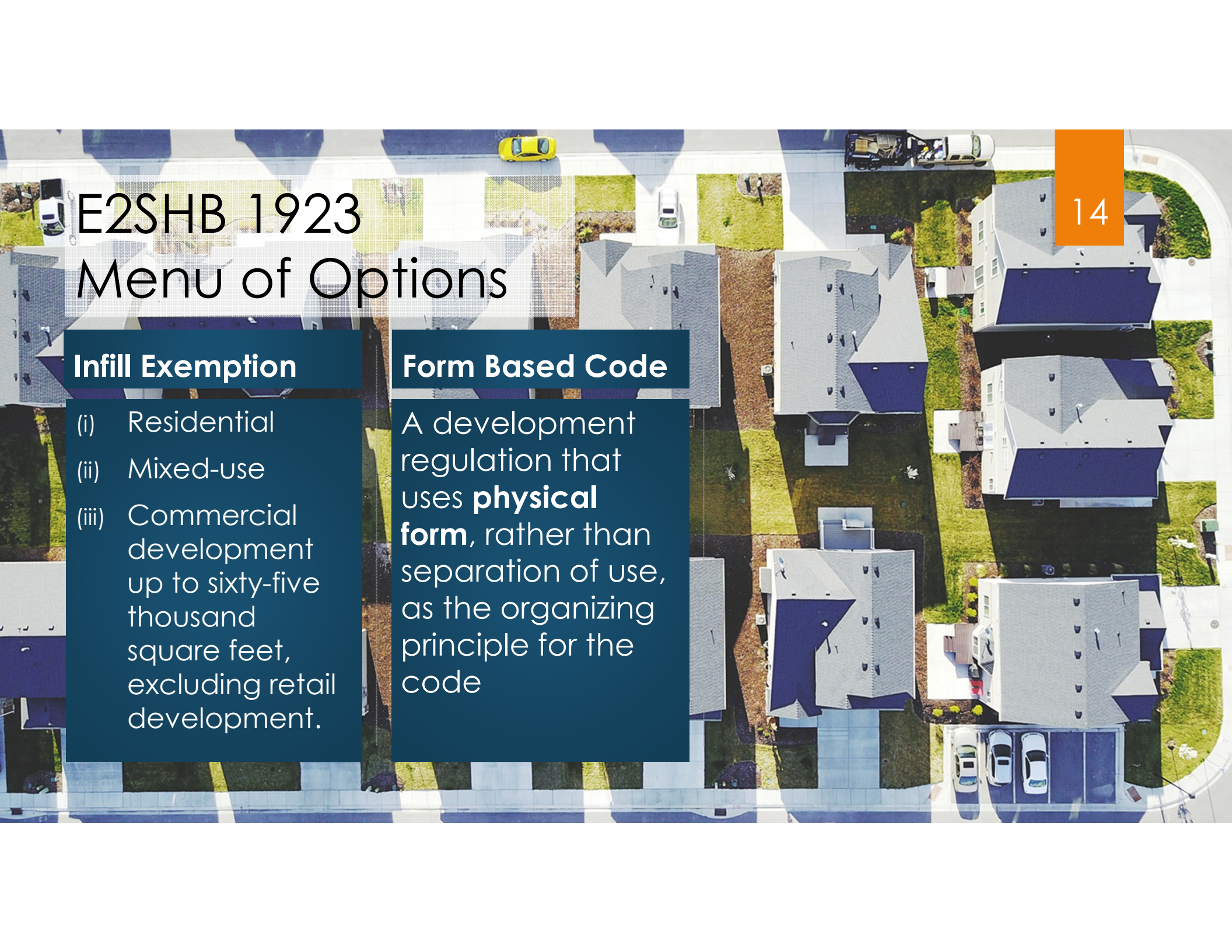
### Duplex

Allow duplex, triplex or courtyard apartment in all single family zones

### Duplex

Allow duplexes on all corner lots in single family zones





# E2SHB 1923 Menu of Options

14

## Infill Exemption

- (i) Residential
- (ii) Mixed-use
- (iii) Commercial development up to sixty-five thousand square feet, excluding retail development.

## Form Based Code

A development regulation that uses **physical form**, rather than separation of use, as the organizing principle for the code



# E2SHB 1923

## Menu of Options

### ADUs

- ☒ Allow ADUs on all residential lots
- ☐ Allow **both** attached and detached on same lot
- ☐ Exempt from parking regs.

### Subarea Plan

- ☐ Must include an EIS
- ☐ May be part of a mixed use or urban center
- ☐ Subsequent development cannot be challenged under SEPA

### Planned Action

- ☐ Must contain mixed use or residential development
- ☐ EIS/SEPA may be deferred to project level

# E2SHB 1923

## Menu of Options

### Housing Action Plan

- ▶ Quantify existing and projected housing needs by income level
- ▶ Public outreach and broad participation
- ▶ Create strategies and programs to implement

16

Photo by Michal Jarmoluk from pixabay





# Appeal protections:

17

If adopted by **April 1, 2021**, ordinances, amendments to development regulations, and other non-project actions **are not subject to** administrative or judicial **appeal** under the State Environmental Policy Act (SEPA).

# Appeal protections:

18

In addition, any actions to amend the comp. plan or regulations to enact the provision of E2SHB 1923 **are not** subject **to legal challenge to Growth Management** Hearings Boards.

# Summary / Next Steps

19

## SHB 1377

- Requires cities **to provide bonus density** for affordable housing on properties owned by religious organizations

## E2SHB 1923

- Incentives for adopting measures to increase affordability



# Recommendations

20

## SHB 1377 - Properties owned by a religious organization

- ☑ Amend CMC to allow density bonus for development of affordable housing by religious organizations within **residential zones**
- ☐ Allow 20% density bonus

# Recommendations

21

## Required Amendments

- ☑ Add definition of “permanent supportive housing”

## Options

- ☐ Continue to refine affordable housing measures as time allows
- ☐ Apply for grant to \_\_\_\_.
  - ☐ Create a housing action plan, or
  - ☐ Include affordable housing as an element of the **North Shore Subarea Plan**



CERTIFICATION OF ENROLLMENT

**ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1923**

Chapter 348, Laws of 2019

66th Legislature  
2019 Regular Session

URBAN RESIDENTIAL BUILDING CAPACITY

EFFECTIVE DATE: July 28, 2019—Except for section 11, which becomes effective July 1, 2019.

Passed by the House April 24, 2019  
Yeas 75 Nays 19

FRANK CHOPP

**Speaker of the House of Representatives**

Passed by the Senate April 22, 2019  
Yeas 33 Nays 16

CYRUS HABIB

**President of the Senate**

Approved May 9, 2019 3:12 PM

JAY INSLEE

**Governor of the State of Washington**

CERTIFICATE

I, Bernard Dean, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1923** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BERNARD DEAN

**Chief Clerk**

FILED

May 13, 2019

**Secretary of State  
State of Washington**

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ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1923

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AS AMENDED BY THE SENATE

Passed Legislature - 2019 Regular Session

State of Washington

66th Legislature

2019 Regular Session

By House Appropriations (originally sponsored by Representatives Fitzgibbon, Macri, Appleton, Doglio, Dolan, Santos, and Frame)

READ FIRST TIME 03/01/19.

1 AN ACT Relating to increasing urban residential building  
2 capacity; amending RCW 36.70A.030, 43.21C.420, and 36.70A.490; adding  
3 new sections to chapter 36.70A RCW; adding new sections to chapter  
4 43.21C RCW; adding a new section to chapter 35.21 RCW; adding a new  
5 section to chapter 35A.21 RCW; adding a new section to chapter 36.22  
6 RCW; providing an effective date; and declaring an emergency.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8 NEW SECTION. **Sec. 1.** A new section is added to chapter 36.70A  
9 RCW to read as follows:

10 (1) A city planning pursuant to RCW 36.70A.040 is encouraged to  
11 take the following actions in order to increase its residential  
12 building capacity:

13 (a) Authorize development in one or more areas of not fewer than  
14 five hundred acres that include at least one train station served by  
15 commuter rail or light rail with an average of at least fifty  
16 residential units per acre that require no more than an average of  
17 one on-site parking space per two bedrooms in the portions of  
18 multifamily zones that are located within the areas;

19 (b) Authorize development in one or more areas of not fewer than  
20 five hundred acres in cities with a population greater than forty  
21 thousand or not fewer than two hundred fifty acres in cities with a

1 population less than forty thousand that include at least one bus  
2 stop served by scheduled bus service of at least four times per hour  
3 for twelve or more hours per day with an average of at least twenty-  
4 five residential units per acre that require no more than an average  
5 of one on-site parking space per two bedrooms in portions of the  
6 multifamily zones that are located within the areas;

7 (c) Authorize at least one duplex, triplex, or courtyard  
8 apartment on each parcel in one or more zoning districts that permit  
9 single-family residences unless a city documents a specific  
10 infrastructure of physical constraint that would make this  
11 requirement unfeasible for a particular parcel;

12 (d) Authorize cluster zoning or lot size averaging in all zoning  
13 districts that permit single-family residences;

14 (e) Authorize attached accessory dwelling units on all parcels  
15 containing single-family homes where the lot is at least three  
16 thousand two hundred square feet in size, and permit both attached  
17 and detached accessory dwelling units on all parcels containing  
18 single-family homes, provided lots are at least four thousand three  
19 hundred fifty-six square feet in size. Qualifying city ordinances or  
20 regulations may not provide for on-site parking requirements, owner  
21 occupancy requirements, or square footage limitations below one  
22 thousand square feet for the accessory dwelling unit, and must not  
23 prohibit the separate rental or sale of accessory dwelling units and  
24 the primary residence. Cities must set applicable impact fees at no  
25 more than the projected impact of the accessory dwelling unit. To  
26 allow local flexibility, other than these factors, accessory dwelling  
27 units may be subject to such regulations, conditions, procedures, and  
28 limitations as determined by the local legislative authority, and  
29 must follow all applicable state and federal laws and local  
30 ordinances;

31 (f) Adopt a subarea plan pursuant to RCW 43.21C.420;

32 (g) Adopt a planned action pursuant to RCW 43.21C.440(1)(b)(ii),  
33 except that an environmental impact statement pursuant to RCW  
34 43.21C.030 is not required for such an action;

35 (h) Adopt increases in categorical exemptions pursuant to RCW  
36 43.21C.229 for residential or mixed-use development;

37 (i) Adopt a form-based code in one or more zoning districts that  
38 permit residential uses. "Form-based code" means a land development  
39 regulation that uses physical form, rather than separation of use, as  
40 the organizing principle for the code;

(j) Authorize a duplex on each corner lot within all zoning districts that permit single-family residences;

(k) Allow for the division or redivision of land into the maximum number of lots through the short subdivision process provided in chapter 58.17 RCW; and

(l) Authorize a minimum net density of six dwelling units per acre in all residential zones, where the residential development capacity will increase within the city.

(2) A city planning pursuant to RCW 36.70A.040 may adopt a housing action plan as described in this subsection. The goal of any such housing plan must be to encourage construction of additional affordable and market rate housing in a greater variety of housing types and at prices that are accessible to a greater variety of incomes, including strategies aimed at the for-profit single-family home market. A housing action plan may utilize data compiled pursuant to section 3 of this act. The housing action plan should:

(a) Quantify existing and projected housing needs for all income levels, including extremely low-income households, with documentation of housing and household characteristics, and cost-burdened households;

(b) Develop strategies to increase the supply of housing, and variety of housing types, needed to serve the housing needs identified in (a) of this subsection;

(c) Analyze population and employment trends, with documentation of projections;

(d) Consider strategies to minimize displacement of low-income residents resulting from redevelopment;

(e) Review and evaluate the current housing element adopted pursuant to RCW 36.70A.070, including an evaluation of success in attaining planned housing types and units, achievement of goals and policies, and implementation of the schedule of programs and actions;

(f) Provide for participation and input from community members, community groups, local builders, local realtors, nonprofit housing advocates, and local religious groups; and

(g) Include a schedule of programs and actions to implement the recommendations of the housing action plan.

(3) If adopted by April 1, 2021, ordinances, amendments to development regulations, and other nonproject actions taken by a city to implement the actions specified in subsection (1) of this section, with the exception of the action specified in subsection (1)(f) of

1 this section, are not subject to administrative or judicial appeal  
2 under chapter 43.21C RCW.

3 (4) Any action taken by a city prior to April 1, 2021, to amend  
4 their comprehensive plan, or adopt or amend ordinances or development  
5 regulations, solely to enact provisions under subsection (1) of this  
6 section is not subject to legal challenge under this chapter.

7 (5) In taking action under subsection (1) of this section, cities  
8 are encouraged to utilize strategies that increase residential  
9 building capacity in areas with frequent transit service and with the  
10 transportation and utility infrastructure that supports the  
11 additional residential building capacity.

12 (6) A city with a population over twenty thousand that is  
13 planning to take at least two actions under subsection (1) of this  
14 section, and that action will occur between the effective date of  
15 this section and April 1, 2021, is eligible to apply to the  
16 department for planning grant assistance of up to one hundred  
17 thousand dollars, subject to the availability of funds appropriated  
18 for that purpose. The department shall develop grant criteria to  
19 ensure that grant funds awarded are proportionate to the level of  
20 effort proposed by a city, and the potential increase in housing  
21 supply or regulatory streamlining that could be achieved. Funding may  
22 be provided in advance of, and to support, adoption of policies or  
23 ordinances consistent with this section. A city can request, and the  
24 department may award, more than one hundred thousand dollars for  
25 applications that demonstrate extraordinary potential to increase  
26 housing supply or regulatory streamlining.

27 (7) A city seeking to develop a housing action plan under  
28 subsection (2) of this section is eligible to apply to the department  
29 for up to one hundred thousand dollars.

30 (8) The department shall establish grant award amounts under  
31 subsections (6) and (7) of this section based on the expected number  
32 of cities that will seek grant assistance, to ensure that all cities  
33 can receive some level of grant support. If funding capacity allows,  
34 the department may consider accepting and funding applications from  
35 cities with a population of less than twenty thousand if the actions  
36 proposed in the application will create a significant amount of  
37 housing capacity or regulatory streamlining and are consistent with  
38 the actions in this section.

39 (9) In implementing this act, cities are encouraged to prioritize  
40 the creation of affordable, inclusive neighborhoods and to consider

1 the risk of residential displacement, particularly in neighborhoods  
2 with communities at high risk of displacement.

3 **Sec. 2.** RCW 36.70A.030 and 2017 3rd sp.s. c 18 s 2 are each  
4 amended to read as follows:

5 Unless the context clearly requires otherwise, the definitions in  
6 this section apply throughout this chapter.

7 (1) "Adopt a comprehensive land use plan" means to enact a new  
8 comprehensive land use plan or to update an existing comprehensive  
9 land use plan.

10 (2) "Agricultural land" means land primarily devoted to the  
11 commercial production of horticultural, viticultural, floricultural,  
12 dairy, apiary, vegetable, or animal products or of berries, grain,  
13 hay, straw, turf, seed, Christmas trees not subject to the excise tax  
14 imposed by RCW 84.33.100 through 84.33.140, finfish in upland  
15 hatcheries, or livestock, and that has long-term commercial  
16 significance for agricultural production.

17 (3) "City" means any city or town, including a code city.

18 (4) "Comprehensive land use plan," "comprehensive plan," or  
19 "plan" means a generalized coordinated land use policy statement of  
20 the governing body of a county or city that is adopted pursuant to  
21 this chapter.

22 (5) "Critical areas" include the following areas and ecosystems:  
23 (a) Wetlands; (b) areas with a critical recharging effect on aquifers  
24 used for potable water; (c) fish and wildlife habitat conservation  
25 areas; (d) frequently flooded areas; and (e) geologically hazardous  
26 areas. "Fish and wildlife habitat conservation areas" does not  
27 include such artificial features or constructs as irrigation delivery  
28 systems, irrigation infrastructure, irrigation canals, or drainage  
29 ditches that lie within the boundaries of and are maintained by a  
30 port district or an irrigation district or company.

31 (6) "Department" means the department of commerce.

32 (7) "Development regulations" or "regulation" means the controls  
33 placed on development or land use activities by a county or city,  
34 including, but not limited to, zoning ordinances, critical areas  
35 ordinances, shoreline master programs, official controls, planned  
36 unit development ordinances, subdivision ordinances, and binding site  
37 plan ordinances together with any amendments thereto. A development  
38 regulation does not include a decision to approve a project permit  
39 application, as defined in RCW 36.70B.020, even though the decision

1 may be expressed in a resolution or ordinance of the legislative body  
2 of the county or city.

3 (8) "Forestland" means land primarily devoted to growing trees  
4 for long-term commercial timber production on land that can be  
5 economically and practically managed for such production, including  
6 Christmas trees subject to the excise tax imposed under RCW 84.33.100  
7 through 84.33.140, and that has long-term commercial significance. In  
8 determining whether forestland is primarily devoted to growing trees  
9 for long-term commercial timber production on land that can be  
10 economically and practically managed for such production, the  
11 following factors shall be considered: (a) The proximity of the land  
12 to urban, suburban, and rural settlements; (b) surrounding parcel  
13 size and the compatibility and intensity of adjacent and nearby land  
14 uses; (c) long-term local economic conditions that affect the ability  
15 to manage for timber production; and (d) the availability of public  
16 facilities and services conducive to conversion of forestland to  
17 other uses.

18 (9) "Freight rail dependent uses" means buildings and other  
19 infrastructure that are used in the fabrication, processing, storage,  
20 and transport of goods where the use is dependent on and makes use of  
21 an adjacent short line railroad. Such facilities are both urban and  
22 rural development for purposes of this chapter. "Freight rail  
23 dependent uses" does not include buildings and other infrastructure  
24 that are used in the fabrication, processing, storage, and transport  
25 of coal, liquefied natural gas, or "crude oil" as defined in RCW  
26 90.56.010.

27 (10) "Geologically hazardous areas" means areas that because of  
28 their susceptibility to erosion, sliding, earthquake, or other  
29 geological events, are not suited to the siting of commercial,  
30 residential, or industrial development consistent with public health  
31 or safety concerns.

32 (11) "Long-term commercial significance" includes the growing  
33 capacity, productivity, and soil composition of the land for long-  
34 term commercial production, in consideration with the land's  
35 proximity to population areas, and the possibility of more intense  
36 uses of the land.

37 (12) "Minerals" include gravel, sand, and valuable metallic  
38 substances.

39 (13) "Public facilities" include streets, roads, highways,  
40 sidewalks, street and road lighting systems, traffic signals,



1 domestic water systems, storm and sanitary sewer systems, parks and  
2 recreational facilities, and schools.

3 (14) "Public services" include fire protection and suppression,  
4 law enforcement, public health, education, recreation, environmental  
5 protection, and other governmental services.

6 (15) "Recreational land" means land so designated under RCW  
7 36.70A.1701 and that, immediately prior to this designation, was  
8 designated as agricultural land of long-term commercial significance  
9 under RCW 36.70A.170. Recreational land must have playing fields and  
10 supporting facilities existing before July 1, 2004, for sports played  
11 on grass playing fields.

12 (16) "Rural character" refers to the patterns of land use and  
13 development established by a county in the rural element of its  
14 comprehensive plan:

15 (a) In which open space, the natural landscape, and vegetation  
16 predominate over the built environment;

17 (b) That foster traditional rural lifestyles, rural-based  
18 economies, and opportunities to both live and work in rural areas;

19 (c) That provide visual landscapes that are traditionally found  
20 in rural areas and communities;

21 (d) That are compatible with the use of the land by wildlife and  
22 for fish and wildlife habitat;

23 (e) That reduce the inappropriate conversion of undeveloped land  
24 into sprawling, low-density development;

25 (f) That generally do not require the extension of urban  
26 governmental services; and

27 (g) That are consistent with the protection of natural surface  
28 water flows and groundwater and surface water recharge and discharge  
29 areas.

30 (17) "Rural development" refers to development outside the urban  
31 growth area and outside agricultural, forest, and mineral resource  
32 lands designated pursuant to RCW 36.70A.170. Rural development can  
33 consist of a variety of uses and residential densities, including  
34 clustered residential development, at levels that are consistent with  
35 the preservation of rural character and the requirements of the rural  
36 element. Rural development does not refer to agriculture or forestry  
37 activities that may be conducted in rural areas.

38 (18) "Rural governmental services" or "rural services" include  
39 those public services and public facilities historically and  
40 typically delivered at an intensity usually found in rural areas, and

1 may include domestic water systems, fire and police protection  
2 services, transportation and public transit services, and other  
3 public utilities associated with rural development and normally not  
4 associated with urban areas. Rural services do not include storm or  
5 sanitary sewers, except as otherwise authorized by RCW 36.70A.110(4).

6 (19) "Short line railroad" means those railroad lines designated  
7 class II or class III by the United States surface transportation  
8 board.

9 (20) "Urban governmental services" or "urban services" include  
10 those public services and public facilities at an intensity  
11 historically and typically provided in cities, specifically including  
12 storm and sanitary sewer systems, domestic water systems, street  
13 cleaning services, fire and police protection services, public  
14 transit services, and other public utilities associated with urban  
15 areas and normally not associated with rural areas.

16 (21) "Urban growth" refers to growth that makes intensive use of  
17 land for the location of buildings, structures, and impermeable  
18 surfaces to such a degree as to be incompatible with the primary use  
19 of land for the production of food, other agricultural products, or  
20 fiber, or the extraction of mineral resources, rural uses, rural  
21 development, and natural resource lands designated pursuant to RCW  
22 36.70A.170. A pattern of more intensive rural development, as  
23 provided in RCW 36.70A.070(5)(d), is not urban growth. When allowed  
24 to spread over wide areas, urban growth typically requires urban  
25 governmental services. "Characterized by urban growth" refers to land  
26 having urban growth located on it, or to land located in relationship  
27 to an area with urban growth on it as to be appropriate for urban  
28 growth.

29 (22) "Urban growth areas" means those areas designated by a  
30 county pursuant to RCW 36.70A.110.

31 (23) "Wetland" or "wetlands" means areas that are inundated or  
32 saturated by surface water or groundwater at a frequency and duration  
33 sufficient to support, and that under normal circumstances do  
34 support, a prevalence of vegetation typically adapted for life in  
35 saturated soil conditions. Wetlands generally include swamps,  
36 marshes, bogs, and similar areas. Wetlands do not include those  
37 artificial wetlands intentionally created from nonwetland sites,  
38 including, but not limited to, irrigation and drainage ditches,  
39 grass-lined swales, canals, detention facilities, wastewater  
40 treatment facilities, farm ponds, and landscape amenities, or those

wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas created to mitigate conversion of wetlands.

(24) "Affordable housing" means, unless the context clearly indicates otherwise, residential housing whose monthly costs, including utilities other than telephone, do not exceed thirty percent of the monthly income of a household whose income is:

(a) For rental housing, sixty percent of the median household income adjusted for household size, for the county where the household is located, as reported by the United States department of housing and urban development; or

(b) For owner-occupied housing, eighty percent of the median household income adjusted for household size, for the county where the household is located, as reported by the United States department of housing and urban development.

(25) "Extremely low-income household" means a single person, family, or unrelated persons living together whose adjusted income is at or below thirty percent of the median household income adjusted for household size, for the county where the household is located, as reported by the United States department of housing and urban development.

(26) "Low-income household" means a single person, family, or unrelated persons living together whose adjusted income is at or below eighty percent of the median household income adjusted for household size, for the county where the household is located, as reported by the United States department of housing and urban development.

(27) "Permanent supportive housing" is subsidized, leased housing with no limit on length of stay, paired with on-site or off-site voluntary services designed to support a person living with a disability to be a successful tenant in a housing arrangement, improve the resident's health status, and connect residents of the housing with community-based health care, treatment, and employment services.

(28) "Very low-income household" means a single person, family, or unrelated persons living together whose adjusted income is at or below fifty percent of the median household income adjusted for household size, for the county where the household is located, as

1 reported by the United States department of housing and urban  
2 development.

3 NEW SECTION. **Sec. 3.** A new section is added to chapter 36.70A  
4 RCW to read as follows:

5 The Washington center for real estate research at the University  
6 of Washington shall produce a report every two years that compiles  
7 housing supply and affordability metrics for each city planning under  
8 RCW 36.70A.040 with a population of ten thousand or more. The initial  
9 report, completed by October 15, 2020, must be a compilation of  
10 objective criteria relating to development regulations, zoning,  
11 income, housing and rental prices, housing affordability programs,  
12 and other metrics relevant to assessing housing supply and  
13 affordability for all income segments, including the percentage of  
14 cost-burdened households, of each city subject to the report required  
15 by this section. The report completed by October 15, 2022, must also  
16 include data relating to actions taken by cities under this act. The  
17 report completed by October 15, 2024, must also include relevant data  
18 relating to buildable lands reports prepared under RCW 36.70A.215,  
19 where applicable, and updates to comprehensive plans under this  
20 chapter. The Washington center for real estate research shall  
21 collaborate with the Washington housing finance commission and the  
22 office of financial management to develop the metrics compiled in the  
23 report. The report must be submitted, consistent with RCW 43.01.036,  
24 to the standing committees of the legislature with jurisdiction over  
25 housing issues and this chapter.

26 NEW SECTION. **Sec. 4.** A new section is added to chapter 43.21C  
27 RCW to read as follows:

28 If adopted by April 1, 2021, amendments to development  
29 regulations and other nonproject actions taken by a city to implement  
30 section 1 (1) or (4) of this act, with the exception of the action  
31 specified in section 1(1)(f) of this act, are not subject to  
32 administrative or judicial appeals under this chapter.

33 NEW SECTION. **Sec. 5.** A new section is added to chapter 36.70A  
34 RCW to read as follows:

35 In counties and cities planning under RCW 36.70A.040, minimum  
36 residential parking requirements mandated by municipal zoning

ordinances for housing units constructed after July 1, 2019, are subject to the following requirements:

(1) For housing units that are affordable to very low-income or extremely low-income individuals and that are located within one-quarter mile of a transit stop that receives transit service at least four times per hour for twelve or more hours per day, minimum residential parking requirements may be no greater than one parking space per bedroom or .75 space per unit. A city may require a developer to record a covenant that prohibits the rental of a unit subject to this parking restriction for any purpose other than providing for housing for very low-income or extremely low-income individuals. The covenant must address price restrictions and household income limits and policies if the property is converted to a use other than for low-income housing. A city may establish a requirement for the provision of more than one parking space per bedroom or .75 space per unit if the jurisdiction has determined a particular housing unit to be in an area with a lack of access to street parking capacity, physical space impediments, or other reasons supported by evidence that would make on-street parking infeasible for the unit.

(2) For housing units that are specifically for seniors or people with disabilities, that are located within one-quarter mile of a transit stop that receives transit service at least four times per hour for twelve or more hours per day, a city may not impose minimum residential parking requirements for the residents of such housing units, subject to the exceptions provided in this subsection. A city may establish parking requirements for staff and visitors of such housing units. A city may establish a requirement for the provision of one or more parking space per bedroom if the jurisdiction has determined a particular housing unit to be in an area with a lack of access to street parking capacity, physical space impediments, or other reasons supported by evidence that would make on-street parking infeasible for the unit. A city may require a developer to record a covenant that prohibits the rental of a unit subject to this parking restriction for any purpose other than providing for housing for seniors or people with disabilities.

NEW SECTION. **Sec. 6.** A new section is added to chapter 43.21C RCW to read as follows:

1 (1) A project action pertaining to residential, multifamily, or  
2 mixed use development evaluated under this chapter by a city or town  
3 planning under RCW 36.70A.040 is exempt from appeals under this  
4 chapter on the basis of the evaluation of or impacts to  
5 transportation elements of the environment, so long as the project  
6 does not present significant adverse impacts to the state-owned  
7 transportation system as determined by the department of  
8 transportation and the project is:

9 (a) (i) Consistent with a locally adopted transportation plan; or

10 (ii) Consistent with the transportation element of a  
11 comprehensive plan; and

12 (b) (i) A project for which traffic or parking impact fees are  
13 imposed pursuant to RCW 82.02.050 through 82.02.090; or

14 (ii) A project for which traffic or parking impacts are expressly  
15 mitigated by an ordinance, or ordinances, of general application  
16 adopted by the city or town.

17 (2) For purposes of this section, "impacts to transportation  
18 elements of the environment" include impacts to transportation  
19 systems; vehicular traffic; waterborne, rail, and air traffic;  
20 parking; movement or circulation of people or goods; and traffic  
21 hazards.

22 **Sec. 7.** RCW 43.21C.420 and 2010 c 153 s 2 are each amended to  
23 read as follows:

24 (1) Cities with a population greater than five thousand, in  
25 accordance with their existing comprehensive planning and development  
26 regulation authority under chapter 36.70A RCW, and in accordance with  
27 this section, may adopt optional elements of their comprehensive  
28 plans and optional development regulations that apply within  
29 specified subareas of the cities, that are either:

30 (a) Areas designated as mixed-use or urban centers in a land use  
31 or transportation plan adopted by a regional transportation planning  
32 organization; or

33 (b) Areas within one-half mile of a major transit stop that are  
34 zoned to have an average minimum density of fifteen dwelling units or  
35 more per gross acre.

36 (2) Cities located on the east side of the Cascade mountains and  
37 located in a county with a population of two hundred thirty thousand  
38 or less, in accordance with their existing comprehensive planning and  
39 development regulation authority under chapter 36.70A RCW, and in

1 accordance with this section, may adopt optional elements of their  
2 comprehensive plans and optional development regulations that apply  
3 within the mixed-use or urban centers. The optional elements of their  
4 comprehensive plans and optional development regulations must enhance  
5 pedestrian, bicycle, transit, or other nonvehicular transportation  
6 methods.

7 (3) A major transit stop is defined as:

8 (a) A stop on a high capacity transportation service funded or  
9 expanded under the provisions of chapter 81.104 RCW;

10 (b) Commuter rail stops;

11 (c) Stops on rail or fixed guideway systems, including  
12 transitways;

13 (d) Stops on bus rapid transit routes or routes that run on high  
14 occupancy vehicle lanes; or

15 (e) Stops for a bus or other transit mode providing fixed route  
16 service at intervals of at least thirty minutes during the peak hours  
17 of operation.

18 (4) (a) A city that elects to adopt such an optional comprehensive  
19 plan element and optional development regulations shall prepare a  
20 nonproject environmental impact statement, pursuant to RCW  
21 43.21C.030, assessing and disclosing the probable significant adverse  
22 environmental impacts of the optional comprehensive plan element and  
23 development regulations and of future development that is consistent  
24 with the plan and regulations.

25 (b) At least one community meeting must be held on the proposed  
26 subarea plan before the scoping notice for such a nonproject  
27 environmental impact statement is issued. Notice of scoping for such  
28 a nonproject environmental impact statement and notice of the  
29 community meeting required by this section must be mailed to all  
30 property owners of record within the subarea to be studied, to all  
31 property owners within one hundred fifty feet of the boundaries of  
32 such a subarea, to all affected federally recognized tribal  
33 governments whose ceded area is within one-half mile of the  
34 boundaries of the subarea, and to agencies with jurisdiction over the  
35 future development anticipated within the subarea.

36 ~~(c) ((In cities with over five hundred thousand residents, notice~~  
37 ~~of scoping for such a nonproject environmental impact statement and~~  
38 ~~notice of the community meeting required by this section must be~~  
39 ~~mailed to all small businesses as defined in RCW 19.85.020, and to~~  
40 ~~all community preservation and development authorities established~~



~~under chapter 43.167 RCW, located within the subarea to be studied or within one hundred fifty feet of the boundaries of such subarea. The process for community involvement must have the goal of fair treatment and meaningful involvement of all people with respect to the development and implementation of the subarea planning process.~~

~~(d))~~ The notice of the community meeting must include general illustrations and descriptions of buildings generally representative of the maximum building envelope that will be allowed under the proposed plan and indicate that future appeals of proposed developments that are consistent with the plan will be limited. Notice of the community meeting must include signs located on major travel routes in the subarea. If the building envelope increases during the process, another notice complying with the requirements of this section must be issued before the next public involvement opportunity.

~~((e))~~ (d) Any person that has standing to appeal the adoption of this subarea plan or the implementing regulations under RCW 36.70A.280 has standing to bring an appeal of the nonproject environmental impact statement required by this subsection.

~~((f) Cities with over five hundred thousand residents shall prepare a study that accompanies or is appended to the nonproject environmental impact statement, but must not be part of that statement, that analyzes the extent to which the proposed subarea plan may result in the displacement or fragmentation of existing businesses, existing residents, including people living with poverty, families with children, and intergenerational households, or cultural groups within the proposed subarea plan. The city shall also discuss the results of the analysis at the community meeting.~~

~~(g))~~ (e) As an incentive for development authorized under this section, a city shall consider establishing a transfer of development rights program in consultation with the county where the city is located, that conserves county-designated agricultural and forestland of long-term commercial significance. If the city decides not to establish a transfer of development rights program, the city must state in the record the reasons for not adopting the program. The city's decision not to establish a transfer of development rights program is not subject to appeal. Nothing in this subsection (4) ~~((g))~~ (e) may be used as a basis to challenge the optional comprehensive plan or subarea plan policies authorized under this section.

1       (5)(a) Until July 1, ((2018)) 2029, a proposed development that  
2 meets the criteria of (b) of this subsection may not be challenged in  
3 administrative or judicial appeals for noncompliance with this  
4 chapter as long as a complete application for such a development that  
5 vests the application or would later lead to vested status under city  
6 or state law is submitted to the city within a time frame established  
7 by the city, but not to exceed the following time frames:

8       (i) Nineteen years from the date of issuance of the final  
9 environmental impact statement, for projects that are consistent with  
10 an optional element adopted by a city as of the effective date of  
11 this section; or

12       (ii) Ten years from the date of issuance of the final  
13 environmental impact statement, for projects that are consistent with  
14 an optional element adopted by a city after the effective date of  
15 this section.

16       (b) A proposed development may not be challenged, consistent with  
17 the timelines established in (a) of this subsection, so long as the  
18 development:

19       (i) Is consistent with the optional comprehensive plan or subarea  
20 plan policies and development regulations adopted under subsection  
21 (1) or (2) of this section;

22       (ii) Sets aside or requires the occupancy of at least ten percent  
23 of the dwelling units, or a greater percentage as determined by city  
24 development regulations, within the development for low-income  
25 households at a sale price or rental amount that is considered  
26 affordable by a city's housing programs. This subsection (5)(b)(ii)  
27 applies only to projects that are consistent with an optional element  
28 adopted by a city pursuant to this section after the effective date  
29 of this section; and ((that))

30       (iii) Is environmentally reviewed under subsection (4) of this  
31 section ~~((may not be challenged in administrative or judicial appeals~~  
32 ~~for noncompliance with this chapter as long as a complete application~~  
33 ~~for such a development that vests the application or would later lead~~  
34 ~~to vested status under city or state law is submitted to the city~~  
35 ~~within a time frame established by the city, but not to exceed ten~~  
36 ~~years from the date of issuance of the final environmental impact~~  
37 ~~statement))~~.

38       ((b)) (c) After July 1, ((2018)) 2029, the immunity from  
39 appeals under this chapter of any application that vests or will vest  
40 under this subsection or the ability to vest under this subsection is

1 still valid, provided that the final subarea environmental impact  
2 statement is issued by July 1, ~~((2018))~~ 2029. After July 1, ~~((2018))~~  
3 2029, a city may continue to collect reimbursement fees under  
4 subsection (6) of this section for the proportionate share of a  
5 subarea environmental impact statement issued prior to July 1,  
6 ~~((2018))~~ 2029.

7 (6) It is recognized that a city that prepares a nonproject  
8 environmental impact statement under subsection (4) of this section  
9 must endure a substantial financial burden. A city may recover or  
10 apply for a grant or loan to prospectively cover its reasonable  
11 expenses of preparation of a nonproject environmental impact  
12 statement prepared under subsection (4) of this section through  
13 access to financial assistance under RCW 36.70A.490 or funding from  
14 private sources. In addition, a city is authorized to recover a  
15 portion of its reasonable expenses of preparation of such a  
16 nonproject environmental impact statement by the assessment of  
17 reasonable and proportionate fees upon subsequent development that is  
18 consistent with the plan and development regulations adopted under  
19 subsection (5) of this section, as long as the development makes use  
20 of and benefits ~~((from))~~ from, as described in subsection (5) of  
21 this section, ~~((from))~~ the nonproject environmental impact statement  
22 prepared by the city. Any assessment fees collected from subsequent  
23 development may be used to reimburse funding received from private  
24 sources. In order to collect such fees, the city must enact an  
25 ordinance that sets forth objective standards for determining how the  
26 fees to be imposed upon each development will be proportionate to the  
27 impacts of each development and to the benefits accruing to each  
28 development from the nonproject environmental impact statement. Any  
29 disagreement about the reasonableness or amount of the fees imposed  
30 upon a development may not be the basis for delay in issuance of a  
31 project permit for that development. The fee assessed by the city may  
32 be paid with the written stipulation "paid under protest" and if the  
33 city provides for an administrative appeal of its decision on the  
34 project for which the fees are imposed, any dispute about the amount  
35 of the fees must be resolved in the same administrative appeal  
36 process.

37 (7) If a proposed development is inconsistent with the optional  
38 comprehensive plan or subarea plan policies and development  
39 regulations adopted under subsection (1) of this section, the city

shall require additional environmental review in accordance with this chapter.

**Sec. 8.** RCW 36.70A.490 and 2012 1st sp.s. c 1 s 309 are each amended to read as follows:

The growth management planning and environmental review fund is hereby established in the state treasury. Moneys may be placed in the fund from the proceeds of bond sales, tax revenues, budget transfers, federal appropriations, gifts, or any other lawful source. Moneys in the fund may be spent only after appropriation. Moneys in the fund shall be used to make grants or loans to local governments for the purposes set forth in RCW 43.21C.240, 43.21C.031, ~~((~~0~~))~~ 36.70A.500, section 1 of this act, for costs associated with section 3 of this act, and to cover costs associated with the adoption of optional elements of comprehensive plans consistent with RCW 43.21C.420. Any payment of either principal or interest, or both, derived from loans made from this fund must be deposited into the fund.

NEW SECTION. **Sec. 9.** A new section is added to chapter 35.21 RCW to read as follows:

A city may not prohibit permanent supportive housing in areas where multifamily housing is permitted.

NEW SECTION. **Sec. 10.** A new section is added to chapter 35A.21 RCW to read as follows:

A code city may not prohibit permanent supportive housing in areas where multifamily housing is permitted.

NEW SECTION. **Sec. 11.** A new section is added to chapter 36.22 RCW to read as follows:

(1) Except as provided in subsection (2) of this section, a surcharge of two dollars and fifty cents shall be charged by the county auditor for each document recorded, which will be in addition to any other charge or surcharge allowed by law. The auditor shall remit the funds to the state treasurer to be deposited and used as follows:

(a) Through June 30, 2024, funds must be deposited into the growth management planning and environmental review fund created in RCW 36.70A.490 to be used first for grants for costs associated with

1 section 1 of this act and for costs associated with section 3 of this  
2 act, and thereafter for any allowable use of the fund.

3 (b) Beginning July 1, 2024, sufficient funds must be deposited  
4 into the growth management planning and environmental review fund  
5 created in RCW 36.70A.490 for costs associated with section 3 of this  
6 act, and the remainder deposited into the home security fund account  
7 created in RCW 43.185C.060 to be used for maintenance and operation  
8 costs of: (i) Permanent supportive housing and (ii) affordable  
9 housing for very low-income and extremely low-income households.  
10 Funds may only be expended in cities that have taken action under  
11 section 1 of this act.

12 (2) The surcharge imposed in this section does not apply to: (a)  
13 Assignments or substitutions of previously recorded deeds of trust;  
14 (b) documents recording a birth, marriage, divorce, or death; (c) any  
15 recorded documents otherwise exempted from a recording fee or  
16 additional surcharges under state law; (d) marriage licenses issued  
17 by the county auditor; or (e) documents recording a federal, state,  
18 county, or city lien or satisfaction of lien.

19 (3) For purposes of this section, the terms "permanent supportive  
20 housing," "affordable housing," "very low-income households," and  
21 "extremely low-income households" have the same meaning as provided  
22 in RCW 36.70A.030.

23 NEW SECTION. **Sec. 12.** Section 11 of this act is necessary for  
24 the immediate preservation of the public peace, health, or safety, or  
25 support of the state government and its existing public institutions,  
26 and takes effect July 1, 2019.

Passed by the House April 24, 2019.  
Passed by the Senate April 22, 2019.  
Approved by the Governor May 9, 2019.  
Filed in Office of Secretary of State May 13, 2019.

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# HOUSE BILL REPORT

## E2SHB 1923

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### As Passed Legislature

**Title:** An act relating to increasing urban residential building capacity.

**Brief Description:** Increasing urban residential building capacity.

**Sponsors:** House Committee on Appropriations (originally sponsored by Representatives Fitzgibbon, Macri, Appleton, Doglio, Dolan, Santos and Frame).

#### **Brief History:**

##### **Committee Activity:**

Environment & Energy: 2/14/19, 2/21/19 [DPS];

Appropriations: 2/26/19, 2/28/19 [DP2S(w/o sub ENVI)].

##### **Floor Activity:**

Passed House: 3/13/19, 66-30.

Senate Amended.

Passed Senate: 4/13/19, 33-12.

House Refused to Concur.

Senate Receded.

Senate Amended.

Passed Senate: 4/22/19, 33-16.

House Concurred.

Passed House: 4/24/19, 75-19.

Passed Legislature.

#### **Brief Summary of Engrossed Second Substitute Bill**

- Encourages cities that are planning fully under the Growth Management Act (GMA) to take certain actions to increase residential building capacity and housing affordability.
- Authorizes cities that are planning fully under the GMA to adopt a housing action plan.
- Exempts from appeal under the State Environmental Policy Act (SEPA) and the Growth Management Act (GMA) certain nonproject actions taken by a city to implement the residential building capacity elements of the act.
- Authorizes planning grants of up to \$100,000 for certain cities that take certain actions with regard to residential building capacity.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

- Exempts certain project actions from appeals under SEPA on the basis of transportation impacts, provided they meet certain criteria.
- Directs the Washington Center for Real Estate Research at the University of Washington to prepare a biennial report on housing supply and affordability.
- Establishes certain requirements related to minimum residential parking requirements in certain cities.
- Creates a document recording fee of \$2.50 for certain documents, to be deposited into the GMA Planning and Environmental Review Fund.

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## HOUSE COMMITTEE ON ENVIRONMENT & ENERGY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Fitzgibbon, Chair; Lekanoff, Vice Chair; Doglio, Fey, Mead, Peterson and Shewmake.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Shea, Ranking Minority Member; Dye, Assistant Ranking Minority Member; Boehnke.

**Staff:** Robert Hatfield (786-7117).

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Environment & Energy. Signed by 21 members: Representatives Ormsby, Chair; Bergquist, 2nd Vice Chair; Robinson, 1st Vice Chair; Stokesbary, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Rude, Assistant Ranking Minority Member; Caldier, Cody, Dolan, Fitzgibbon, Hansen, Hudgins, Jinkins, Macri, Pettigrew, Ryu, Springer, Stanford, Sullivan, Tharinger and Ybarra.

**Minority Report:** Do not pass. Signed by 7 members: Representatives Chandler, Dye, Hoff, Kraft, Mosbrucker, Steele and Sutherland.

**Minority Report:** Without recommendation. Signed by 3 members: Representatives Pollet, Senn and Tarleton.

**Staff:** Meghan Morris (786-7119).

### **Background:**

#### Growth Management Act.

The Growth Management Act (GMA) is the comprehensive land use planning framework for counties and cities in Washington. Originally enacted in 1990 and 1991, the GMA establishes land use designation and environmental protection requirements for all Washington counties and cities. The GMA also establishes a significantly wider array of



planning duties for 29 counties, and the cities within those counties, that are obligated to satisfy all planning requirements of the GMA. These jurisdictions are sometimes said to be "fully planning" under the GMA.

The GMA directs fully planning jurisdictions to adopt internally consistent comprehensive land use plans. Comprehensive plans are implemented through locally adopted development regulations, and both the plans and the local regulations are subject to review and revision requirements prescribed in the GMA. In developing their comprehensive plans, counties and cities must consider various goals set forth in statute. These goals include:

- *Urban Growth.* Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- *Housing.* Encourage the availability of affordable housing to all economic segments of the population of Washington State, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.
- *Public Facilities and Services.* Ensure that those public facilities and services necessary to support development are adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

Counties that fully plan under the GMA must include a plan, scheme, or design for different types of land use areas, including Urban Growth Areas (UGAs)—areas within which urban growth must be encouraged and outside of which growth can occur only if it is not urban in nature. Planning jurisdictions must include within their UGAs sufficient areas and densities to accommodate projected urban growth for the succeeding 20-year period. In addition, cities must include sufficient areas to accommodate the broad range of needs and uses that will accompany the projected urban growth, including, as appropriate, medical, governmental, institutional, commercial, service, retail, and other nonresidential uses.

#### State Environmental Policy Act.

The SEPA establishes a review process for state and local governments to identify environmental impacts that may result from governmental decisions, such as the issuance of permits or the adoption of land use plans. The SEPA environmental review process involves a project proponent or the lead agency completing an environmental checklist to identify and evaluate probable environmental impacts. Government decisions that the SEPA-checklist process identifies as having significant adverse environmental impacts must then undergo a more comprehensive environmental analysis in the form of an Environmental Impact Statement (EIS).

Projects which undergo a SEPA review may be required to mitigate significant adverse environmental impacts in order to receive approval from the government entity performing the SEPA analysis. Project proponents may also choose to mitigate environmental impacts identified in the environmental checklist in order to receive a determination that the project does not have significant environmental impacts, and therefore can avoid the process of completing an EIS for the project.

#### State Environmental Policy Act—Subarea Plans.

A city with a population greater than 5,000 may adopt optional elements of its comprehensive plans and optional development regulations that apply within specified

subareas of the cities that are either: areas designated as mixed-use or urban centers in a land use or transportation plan adopted by a regional transportation planning organization; or areas within 0.5 miles of a major transit stop that are zoned to have an average minimum density of 15 dwelling units or more per gross acre.

A city that elects to include subarea development elements into its comprehensive plan must prepare a nonproject EIS specifically for the subarea. At least one community meeting must be held before the scoping of the EIS. All property owners within the subarea and within 150 feet of the subarea must be notified of the community meeting. Additional notice provisions are specified. A person may appeal the adoption of the subarea or the implementing regulations if they meet the requirements for standing provided in the GMA.

In a city with over 500,000 residents (large city), community meeting notices must be mailed to all small businesses within the subarea and within 150 feet of the subarea. A large city must also analyze whether the subarea plan will result in the displacement or fragmentation of businesses, existing residents, or cultural groups. The analysis must be discussed at the community meeting and incorporated in the nonproject EIS.

Until July 1, 2018, project-specific developments cannot be appealed as long as they are within the scope of the EIS and the development application is vested within a timeframe established by the city not to exceed 10 years from the adoption of the final EIS. After July 1, 2018, project specific developments cannot be appealed as long as they are within the scope of the EIS, the final EIS is issued by July 1, 2018, and the development application is vested.

#### State Environmental Policy Act—Categorical Exemptions.

Under SEPA, certain nonproject actions are categorically exempted from the requirements of SEPA. Examples of categorically exempt nonproject actions include certain amendments to development regulations and certain amendments to technical codes.

#### State Environmental Policy Act—Categorical Exemptions—Infill Development.

Counties and cities planning fully under GMA may establish categorical exemptions from the requirements of SEPA to accommodate infill development. Locally authorized categorical exemptions may differ from the categorical exemptions established by the Department of Ecology by rule. Under the infill development categorical exemption, cities and counties may adopt categorical exemptions to exempt government action related to development that is new residential development, mixed-use development, or commercial development up to 65,000 square feet, proposed to fill in an urban growth area when:

- current density and intensity of the use in the area is lower than called for in the goals and policies of the applicable comprehensive plan;
- the action would not exceed the density or intensity of use called for in the goals and policies of the applicable comprehensive plan;
- the local government considers the specific probable adverse environmental impact of the proposed action and determines that those specific impacts are adequately addressed by other applicable regulations, comprehensive plans, ordinances, or other local, state, and federal laws and rules; and
- the applicable comprehensive plan was previously subjected to environmental analysis through an EIS according to SEPA.

## **Summary of Engrossed Second Substitute Bill:**

### Increased Residential Building Capacity and Housing Affordability.

Cities planning fully under the Growth Management Act (GMA) are encouraged to take two or more of the following actions in order to increase residential building capacity:

- authorize development of at least 50 residential units per acre in one or more areas of not fewer than 500 acres that include one or more train stations served by commuter rail or light rail;
- authorize development of an average of at least 25 residential units per acre in one or more areas of not fewer than 500 acres in cities with a population greater than 40,000, or areas of not fewer than 250 acres in cities with a population less than 40,000, that include one or more bus stops served by scheduled bus service of at least four times per hour for 12 or more hours per day;
- authorize at least one duplex, triplex, or courtyard apartment on each parcel in one or more zoning districts that permit single-family residences unless a city documents a specific infrastructure or physical constraint that would make this requirement unfeasible for a particular parcel;
- authorize cluster zoning or lot size averaging in all zoning districts that permit single-family residences;
- authorize accessory dwelling units on all lots located in zoning districts that permit single-family residences, subject to certain restrictions;
- adopt a subarea plan pursuant to the State Environmental Policy Act (SEPA);
- adopt a planned action pursuant to the planned action provisions of SEPA, except that an Environmental Impact Statement (EIS) need not be prepared for such a planned action;
- adopt increases in categorical exemptions pursuant to the infill development provisions of SEPA for single-family and multifamily development;
- adopt a form-based code in one or more zoning districts that permit residential uses;
- authorize a duplex on each corner lot within all zoning districts that permit single-family residences;
- allow for the division or redivision of land into the maximum number of lots through the short subdivision process; and
- authorize a minimum net density of six dwelling units per acres in all residential zones.

Cities planning fully under the GMA may adopt a housing action plan. The goal of the housing plan must be to encourage construction of additional affordable and market rate housing in a greater variety of housing types and at prices that are accessible to a greater variety of incomes. The housing action plan should, among other things, quantify existing and projected housing needs for all income levels and develop strategies to increase the supply of housing, and should consider strategies to minimize displacement of low-income residents resulting from redevelopment and review and evaluate the current housing element.

If taken prior to April 1, 2021, the actions taken by a city to implement the residential building capacity elements are exempt from administrative or judicial appeal under SEPA and the Growth Management Act.

A city with a population over 20,000 that is planning to take at least two actions to increase residential building capacity by April 1, 2021 is eligible to apply for a grant of up to \$100,000 from the Department of Commerce (Commerce) to support planning and outreach efforts. A city seeking to develop a housing action plan is also eligible to apply for a grant of up to \$100,000 from Commerce. Commerce must establish grant award amounts that take into consideration if the proposed action will create a significant amount of housing capacity or regulatory streamlining.

#### Growth Management Act—Definitions.

The following terms are added to the definitions within the GMA:

- "affordable housing" means, unless the context clearly indicates otherwise, residential housing whose monthly costs, including utilities other than telephone, do not exceed 30 percent of the monthly income of a household whose income is, for rental housing 60 percent or for owner-occupied housing 80 percent, of the median family income adjusted for family size, for the county where the household is located, as reported by the United States Department of Housing and Urban Development (HUD);
- "extremely low-income household" means a single person, family, or unrelated persons living together whose adjusted income is at or below 30 percent of the median family income adjusted for family size, for the county where the household is located, as reported by the HUD;
- "low-income household" means a single person, family, or unrelated persons living together whose adjusted income is at or below 80 percent of the median family income adjusted for family size, for the county where the household is located, as reported by the HUD; and
- "very low-income household" means a single person, family, or unrelated persons living together whose adjusted income is at or below 50 percent of the median family income adjusted for family size, for the county where the household is located, as reported by the HUD; and
- "permanent supportive housing" means subsidized, leased housing with no limit on length of stay, paired with on-site or off-site voluntary services designed to support a person living with a disability to be a successful tenant in a housing arrangement, improve the resident's health status, and connect residents of the housing with community-based health care, treatment, and employment services.

#### Housing Supply and Affordability Report.

The University of Washington, through the Washington Center for Real Estate Research, shall produce a report every two years that compiles housing supply and affordability metrics for each city planning under the GMA with a population of 10,000 or more. The report must be a compilation of objective criteria relating to development regulations, zoning, income, housing and rental prices, housing affordability programs, and other metrics relevant to assessing housing supply and affordability for all income segments. The Washington Center for Real Estate Research shall collaborate with the Washington Housing Finance Commission and the Office of Financial Management to develop the metrics compiled in the report. The report must be submitted to the Legislature by October 15 of each even-numbered year beginning in 2020.

#### Growth Management Act—Minimum Residential Parking Requirements.

For affordable housing units that are affordable to very low-income or extremely low-income individuals and that are located within 0.25 miles of a transit stop that receives transit service at least four times per hour for 12 or more hours per day, minimum residential parking requirements may be no greater than one parking space per bedroom or 0.75 spaces per unit.

For housing units that are specifically for seniors or people with disabilities, that are located within 0.25 miles of a transit stop that receives transit service at least four times per hour for 12 or more hours per day, no minimum residential parking requirement may be imposed, with certain exceptions.

#### State Environmental Policy Act—Transportation Elements.

A project action evaluated under SEPA by a city, county, or town planning fully under the GMA is exempt from appeals under SEPA on the basis of the evaluation of or impacts to transportation elements of the environment, so long as the project does not present significant adverse impacts to state highways as determined by the Department of Transportation and the project is:

- consistent with a locally adopted transportation plan; or
- consistent with the transportation element of a comprehensive plan, and either a project for which traffic or parking impact fees are imposed pursuant to, or a project for which traffic or parking impacts are expressly mitigated by, an ordinance adopted by the city, town, or county.

#### State Environmental Policy Act—Subarea Plans.

The requirement that cities with populations greater than 500,000 take certain actions regarding notice of scoping for a nonproject EIS related to subarea plans is eliminated. The requirement that cities with populations greater than 500,000 analyze whether an adopted subarea plan will result in displacement or fragmentation of certain populations is eliminated.

Until July 1, 2029, a proposed development that meets the criteria described below is exempt from appeal under SEPA as long as a complete application for such a development is submitted to the city within a time frame established by the city, not to exceed 19 years from the date of issuance of the final EIS for projects that are consistent with an optional element adopted by a city as of the effective date of this section, or 10 years from the date of issuance of the final EIS for projects that are consistent with an optional element adopted by a city after the effective date of this section.

The criteria that a proposed development must meet in order to qualify for the SEPA appeal exemption are:

- the development must be consistent with the optional comprehensive plan or subarea plan policies and development regulations adopted under the SEPA subarea plan provisions;
- the development must set aside or require the occupancy of at least 10 percent of the dwelling units, or a greater percentage as determined by city development regulations, within the development for low-income households at a sale price or rental amount that is considered affordable by a city's housing program, for projects that are consistent with an optional element of a subarea plan adopted after the effective date of the act; and

- the development must be environmentally reviewed through a nonproject EIS pursuant to the SEPA subarea plan provisions.

**Growth Management Planning and Environmental Review Fund.**

The scope of permissible uses of the GMA Planning and Environmental Review Fund is expanded to include planning grants, the biennial study prepared by Washington Center for Real Estate Research, and costs associated with the adoption of optional elements of comprehensive plans.

**Permanent Supportive Housing.**

A city may not prohibit permanent supportive housing in areas where multifamily housing is permitted.

**Recording Fee.**

A surcharge of \$2.50 must be charged by the county auditor for each document recorded. Each county auditor must remit the collected funds to the Washington State Treasurer. The funds must initially be deposited in the GMA Planning and Environmental Review Fund. Beginning in 2024, sufficient funds must be deposited in the GMA Planning and Environmental Review Fund for the costs associated with the biennial report on housing supply and affordability required by the act, and the remainder of the funds must be deposited into the Home Security Fund Account. The surcharge does not apply to certain documents, including, among others, documents recording a birth, marriage, divorce, or death.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed, except section 11, relating to the document recording surcharge, which takes effect July 1, 2019.

**Staff Summary of Public Testimony (Environment & Energy):**

(In support) This bill represents a big step forward. There are multiple proposals before the Legislature on the housing crisis, and this one does a good job of addressing the issue of density in urban areas. There should be a minimum density requirement, at least in most cities, that have the urban services to accommodate growth, such as light rail service.

This bill will help ensure cities do their part to provide enough homes for all of Washington. Rents are rising faster than incomes and the reason is that not enough new homes are being built. One factor holding housing back is restrictive zoning. This bill is not a silver bullet, but silver buckshot. Every city is unique, so the bill allows individual cities flexibility to adopt measures that work for them.

Affordability will never happen without taking additional actions. By passing a suite of complementary bills, Washington has a chance to be a national model for housing affordability.

There should be language in the bill about deep affordability. There should also be anti-displacement language in the bill. It is important to put affordable housing dollars to work faster. This bill deals with unnecessary parking requirements, impediments to permanent supportive housing, and higher impact fees for multi-family housing.

(Opposed) The bill silences citizens because they do not get to appeal when there has been a change in zoning. There is no clear definition of affordable housing. It would be good to look at the profiteering aspect of the bill.

The key to affordability is supply, and the bill makes a good faith effort at syncing up state policies to make that happen. There are concerns with elements of the mandatory affordability requirement.

This bill is the best of the various bills the Legislature is considering this year for housing affordability and building capacity. Zoning is not the major impediment to development in most cities. People simply will not build projects if they do not pencil out. There should be greater protection from appeals if the state is going to tell local governments to adopt these policies.

(Other) The outline of the legislation is fantastic. There are concerns about the safe harbor with regard to appeals under the State Environmental Policy Act (SEPA). Deeper affordability and displacement are important to look at. There may be value in looking at a sliding scale of cities that are subject to the requirements, rather than a flat number of 10,000. The housing element in section 2 of the bill should be better linked to section 1 in terms of requirements.

It is good to have a greater variety of housing options. It is important not to lose sight of the fiscal impact of the housing element update requirements. The state is not really funding periodic updates to comprehensive plans now; for cities to get that work done, they will need some help. The relationship is unclear between the appeal process and the role of the Department of Commerce.

Increasing housing near transit is a fundamental principle of good planning. There are some technical issues in the bill that should be addressed; for example, the bill amends the Growth Management Act to remove the requirements for an Environmental Impact Statement (EIS), but it also amends SEPA in a way that contemplates that an EIS would be prepared.

It is good to recognize the power of transit-oriented development. Increasing urban housing density in the vicinity of transit is much more efficient. There should be a role for the Department of Transportation to determine whether a project poses a significant impact to the state transportation system.

The bill will go a long way to helping to get more housing supply on the ground for all income levels.

**Staff Summary of Public Testimony (Appropriations):**



(In support) The legislation will increase housing near jobs that are critical to working families. The creation of additional construction jobs will stimulate the economy. This bill is a work in progress to find the right balance of density, affordability, and housing options that reflect the needs of the community.

(Opposed) Market rate is determined by negotiations between buyers and sellers; government should not attempt to control the residential real estate market. Lowering construction costs does not necessarily lead to residential projects, unless those units can be sold or rented. The attempt to balance density and redevelopment challenges faced by cities is an important one. However, cities with extensive zoning and streamlined permitting are still not seeing increased development. Additional resources are needed.

(Other) Affordable home ownership options of all kinds are needed. Local jurisdictions should be appropriately encouraged to create growth and development opportunities.

**Persons Testifying (Environment & Energy):** (In support) Representative Fitzgibbon, prime sponsor; Alex Hur, Master Builders Association of King and Snohomish Counties; Craig Enkelking, Sightline; and Michele Thomas, Washington Low-Income Housing Alliance.

(Opposed) Carl Schroeder, Association of Washington Cities; Jan Himebaugh, Building Industry Association of Washington; and Phyllis Booth.

(Other) Bryce Yadon, Futurewise; Dave Anderson, Department of Commerce; Tim Gates, Department of Ecology; Elizabeth Robbins, Department of Transportation; and Jeanette McKasgue, Washington Realtors.

**Persons Testifying (Appropriations):** (In support) Joe Kendo, Washington State Labor Council and American Federation of Labor and Congress of Industrial Organizations; and Alex Hur, Master Builders Association of King and Snohomish Counties.

(Opposed) Bob Jacobs; and Carl Schroeder, Association of Washington Cities.

(Other) Jan Himebaugh, Building Industry Association of Washington.

**Persons Signed In To Testify But Not Testifying (Environment & Energy):** None.

**Persons Signed In To Testify But Not Testifying (Appropriations):** None.

CERTIFICATION OF ENROLLMENT

**SUBSTITUTE HOUSE BILL 1377**

Chapter 218, Laws of 2019

66th Legislature  
2019 Regular Session

AFFORDABLE HOUSING DEVELOPMENT ON RELIGIOUS ORGANIZATION PROPERTY

EFFECTIVE DATE: July 28, 2019

Passed by the House April 18, 2019  
Yeas 85 Nays 9

FRANK CHOPP

**Speaker of the House of Representatives**

Passed by the Senate April 12, 2019  
Yeas 42 Nays 3

CYRUS HABIB

**President of the Senate**

Approved April 30, 2019 2:43 PM

JAY INSLEE

**Governor of the State of Washington**

CERTIFICATE

I, Bernard Dean, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1377** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BERNARD DEAN

**Chief Clerk**

FILED

May 1, 2019

**Secretary of State  
State of Washington**

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**SUBSTITUTE HOUSE BILL 1377**

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AS AMENDED BY THE SENATE

Passed Legislature - 2019 Regular Session

**State of Washington**

**66th Legislature**

**2019 Regular Session**

**By** House Housing, Community Development & Veterans (originally sponsored by Representatives Walen, Barkis, Jenkin, Harris, Springer, Macri, Wylie, Ryu, Reeves, Robinson, Griffey, Appleton, Bergquist, Jinkins, Tharinger, Slatter, Kloba, Doglio, Goodman, Leavitt, Ormsby, and Santos)

READ FIRST TIME 02/08/19.

1       AN ACT Relating to affordable housing development on religious  
2 organization property; adding a new section to chapter 35.63 RCW;  
3 adding a new section to chapter 35A.63 RCW; adding a new section to  
4 chapter 36.70A RCW; and adding a new section to chapter 44.28 RCW.

5       BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6       NEW SECTION.   **Sec. 1.**   A new section is added to chapter 35.63  
7 RCW to read as follows:

8       (1) A city planning under this chapter must allow an increased  
9 density bonus consistent with local needs for any affordable housing  
10 development of any single-family or multifamily residence located on  
11 real property owned or controlled by a religious organization  
12 provided that:

13       (a) The affordable housing development is set aside for or  
14 occupied exclusively by low-income households;

15       (b) The affordable housing development is part of a lease or  
16 other binding obligation that requires the development to be used  
17 exclusively for affordable housing purposes for at least fifty years,  
18 even if the religious organization no longer owns the property; and

19       (c) The affordable housing development does not discriminate  
20 against any person who qualifies as a member of a low-income  
21 household based on race, creed, color, national origin, sex, veteran

1 or military status, sexual orientation, or mental or physical  
2 disability; or otherwise act in violation of the federal fair housing  
3 amendments act of 1988 (42 U.S.C. Sec. 3601 et seq.).

4 (2) A city may develop policies to implement this section if it  
5 receives a request from a religious organization for an increased  
6 density bonus for an affordable housing development.

7 (3) The religious organization developing the affordable housing  
8 development must pay all fees, mitigation costs, and other charges  
9 required through the development of the affordable housing  
10 development.

11 (4) If applicable, the religious organization developing the  
12 affordable housing development should work with the local transit  
13 agency to ensure appropriate transit services are provided to the  
14 affordable housing development.

15 (5) This section applies to any religious organization  
16 rehabilitating an existing affordable housing development.

17 (6) For purposes of this section:

18 (a) "Affordable housing development" means a proposed or existing  
19 structure in which one hundred percent of all single-family or  
20 multifamily residential dwelling units within the development are set  
21 aside for or are occupied by low-income households at a sales price  
22 or rent amount that may not exceed thirty percent of the income limit  
23 for the low-income housing unit;

24 (b) "Low-income household" means a single person, family, or  
25 unrelated persons living together whose adjusted income is less than  
26 eighty percent of the median family income, adjusted for household  
27 size, for the county where the affordable housing development is  
28 located; and

29 (c) "Religious organization" has the same meaning as in RCW  
30 35.21.915.

31 NEW SECTION. **Sec. 2.** A new section is added to chapter 35A.63  
32 RCW to read as follows:

33 (1) A city planning under this chapter must allow an increased  
34 density bonus consistent with local needs for any affordable housing  
35 development of any single-family or multifamily residence located on  
36 real property owned or controlled by a religious organization  
37 provided that:

38 (a) The affordable housing development is set aside for or  
39 occupied exclusively by low-income households;

1 (b) The affordable housing development is part of a lease or  
2 other binding obligation that requires the development to be used  
3 exclusively for affordable housing purposes for at least fifty years,  
4 even if the religious organization no longer owns the property; and

5 (c) The affordable housing development does not discriminate  
6 against any person who qualifies as a member of a low-income  
7 household based on race, creed, color, national origin, sex, veteran  
8 or military status, sexual orientation, or mental or physical  
9 disability; or otherwise act in violation of the federal fair housing  
10 amendments act of 1988 (42 U.S.C. Sec. 3601 et seq.).

11 (2) A city may develop policies to implement this section if it  
12 receives a request from a religious organization for an increased  
13 density bonus for an affordable housing development.

14 (3) The religious organization developing the affordable housing  
15 development must pay all fees, mitigation costs, and other charges  
16 required through the development of the affordable housing  
17 development.

18 (4) If applicable, the religious organization developing the  
19 affordable housing development should work with the local transit  
20 agency to ensure appropriate transit services are provided to the  
21 affordable housing development.

22 (5) This section applies to any religious organization  
23 rehabilitating an existing affordable housing development.

24 (6) For purposes of this section:

25 (a) "Affordable housing development" means a proposed or existing  
26 structure in which one hundred percent of all single-family or  
27 multifamily residential dwelling units within the development are set  
28 aside for or are occupied by low-income households at a sales price  
29 or rent amount that may not exceed thirty percent of the income limit  
30 for the low-income housing unit;

31 (b) "Low-income household" means a single person, family, or  
32 unrelated persons living together whose adjusted income is less than  
33 eighty percent of the median family income, adjusted for household  
34 size, for the county where the affordable housing development is  
35 located; and

36 (c) "Religious organization" has the same meaning as in RCW  
37 35A.21.360.

38 NEW SECTION. **Sec. 3.** A new section is added to chapter 36.70A  
39 RCW to read as follows:

1 (1) Any city or county fully planning under this chapter must  
2 allow an increased density bonus consistent with local needs for any  
3 affordable housing development of any single-family or multifamily  
4 residence located on real property owned or controlled by a religious  
5 organization provided that:

6 (a) The affordable housing development is set aside for or  
7 occupied exclusively by low-income households;

8 (b) The affordable housing development is part of a lease or  
9 other binding obligation that requires the development to be used  
10 exclusively for affordable housing purposes for at least fifty years,  
11 even if the religious organization no longer owns the property; and

12 (c) The affordable housing development does not discriminate  
13 against any person who qualifies as a member of a low-income  
14 household based on race, creed, color, national origin, sex, veteran  
15 or military status, sexual orientation, or mental or physical  
16 disability; or otherwise act in violation of the federal fair housing  
17 amendments act of 1988 (42 U.S.C. Sec. 3601 et seq.).

18 (2) A city or county may develop policies to implement this  
19 section if it receives a request from a religious organization for an  
20 increased density bonus for an affordable housing development.

21 (3) An affordable housing development created by a religious  
22 institution within a city or county fully planning under RCW  
23 36.70A.040 must be located within an urban growth area as defined in  
24 RCW 36.70A.110.

25 (4) The religious organization developing the affordable housing  
26 development must pay all fees, mitigation costs, and other charges  
27 required through the development of the affordable housing  
28 development.

29 (5) If applicable, the religious organization developing the  
30 affordable housing development should work with the local transit  
31 agency to ensure appropriate transit services are provided to the  
32 affordable housing development.

33 (6) This section applies to any religious organization  
34 rehabilitating an existing affordable housing development.

35 (7) For purposes of this section:

36 (a) "Affordable housing development" means a proposed or existing  
37 structure in which one hundred percent of all single-family or  
38 multifamily residential dwelling units within the development are set  
39 aside for or are occupied by low-income households at a sales price

1 or rent amount that may not exceed thirty percent of the income limit  
2 for the low-income housing unit;

3 (b) "Low-income household" means a single person, family, or  
4 unrelated persons living together whose adjusted income is less than  
5 eighty percent of the median family income, adjusted for household  
6 size, for the county where the affordable housing development is  
7 located; and

8 (c) "Religious organization" has the same meaning as in RCW  
9 36.01.290.

10 NEW SECTION. **Sec. 4.** A new section is added to chapter 44.28  
11 RCW to read as follows:

12 The joint committee must review the efficacy of the increased  
13 density bonus incentive for affordable housing development located on  
14 property owned by a religious organization pursuant to this act and  
15 report its findings to the appropriate committees of the legislature  
16 by December 1, 2030. The review must include a recommendation on  
17 whether this incentive should be continued without change or should  
18 be amended or repealed.

Passed by the House April 18, 2019.

Passed by the Senate April 12, 2019.

Approved by the Governor April 30, 2019.

Filed in Office of Secretary of State May 1, 2019.

--- END ---



# HOUSE BILL REPORT

## SHB 1377

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### As Passed Legislature

**Title:** An act relating to affordable housing development on religious organization property.

**Brief Description:** Concerning affordable housing development on religious organization property.

**Sponsors:** House Committee on Housing, Community Development & Veterans (originally sponsored by Representatives Walen, Barkis, Jenkin, Harris, Springer, Macri, Wylie, Ryu, Reeves, Robinson, Griffey, Appleton, Bergquist, Jenkins, Tharinger, Slatter, Kloba, Doglio, Goodman, Leavitt, Ormsby and Santos).

### Brief History:

#### Committee Activity:

Housing, Community Development & Veterans: 2/1/19, 2/6/19 [DPS].

#### Floor Activity:

Passed House: 3/8/19, 84-12.

Senate Amended.

Passed Senate: 4/12/19, 42-3.

House Concurred.

Passed House: 4/18/19, 85-9.

Passed Legislature.

### Brief Summary of Substitute Bill

- Requires certain cities and counties engaged in comprehensive planning to allow an increased density bonus for certain affordable housing development on property owned or controlled by a religious organization.

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### HOUSE COMMITTEE ON HOUSING, COMMUNITY DEVELOPMENT & VETERANS

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Ryu, Chair; Morgan, Vice Chair; Gildon, Ranking Minority Member; Barkis, Assistant Ranking Minority Member; Entenman, Frame, Leavitt and Reeves.

**Minority Report:** Do not pass. Signed by 1 member: Representative Corry.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Staff:** Cassie Jones (786-7303).

### **Background:**

Planning enabling statutes allow cities and counties, at their option, to adopt comprehensive plans, zoning ordinances, and other official controls regulating land uses within their boundaries. Such regulations may generally include: the location and the use of buildings, structures, and land for residence, industry, trade, and other purposes; the height, construction, and design of buildings and structures; the size of yards, open spaces, lots, and tracts; the density of population; the set-back of buildings; the subdivision and development of land; and adoption of standard building codes and fire regulations. These regulations must form parts of a comprehensive plan which must prepare for the physical and generally advantageous development of the city or county and be designed to encourage the most appropriate uses of land.

Other cities and counties are required, or have elected, to adopt comprehensive plans under the Growth Management Act (GMA). The GMA establishes land-use designation and environmental protection requirements for all Washington cities and counties, and a significantly wider array of planning duties for the cities and counties within that are obligated to satisfy all planning requirements of the GMA. The GMA directs planning jurisdictions (*i.e.*, jurisdictions that fully plan under the GMA) to adopt internally consistent comprehensive land-use plans that are generalized, coordinated land-use policy statements of the governing body. Comprehensive plans are implemented through locally adopted development regulations.

Generally, a density bonus is a zoning tool used by cities and counties in which they allow a developer to build more housing units, taller buildings, or more floor space than normally allowed, in exchange for provision of a defined public benefit, such as a specified number or percentage of affordable housing units. Any city or county that is fully planning under the GMA may enact or expand an affordable housing incentive program that may include density bonuses in the urban growth area.

### Joint Legislative Audit and Review Committee.

The Joint Legislative Audit and Review Committee (JLARC) is comprised of an equal number of House of Representatives and Senate members, Democrats and Republicans. The nonpartisan staff of the JLARC conduct performance audits, program evaluations, sunset reviews, and other analyses assigned by the Legislature and the JLARC itself.

### **Summary of Substitute Bill:**

A city planning under certain planning enabling statutes, or a city or county fully planning under the Growth Management Act (GMA), must allow an increased density bonus consistent with local needs for any affordable housing development of any single-family or multifamily residence located on real property owned or controlled by a religious organization if the affordable housing development:

- is set aside for, or occupied exclusively for, low-income households. "Low-income household" means a single person, family, or unrelated persons living together whose

- adjusted income is less than 80 percent of the median family income, adjusted for household size for the county where the affordable housing development is located;
- is part of a lease or other binding obligation that requires development to be used exclusively for affordable housing purposes for at least 50 years, even if the religious organization no longer owns the property; and
- does not discriminate against any person who qualifies as a member of a low-income household.

A city or town, code city, or county may develop policies to implement the increased density bonus if it receives a request for a religious organization for the increased density bonus. The religious organization developing the qualifying affordable housing must pay all fees, mitigation costs, and other charges required and, if applicable, should work with local transit agencies to ensure appropriate transit services are provided to the affordable housing development.

"Affordable housing development" means a proposed or existing structure in which 100 percent of all single-family or multifamily residential dwelling units within the development are set aside for or are occupied by low-income households at a sales price or rent amount that may not exceed 30 percent of the income limit for the low-income housing unit.

An affordable housing development created by a religious institution within a city or county fully planning under the GMA must be located within an urban growth area.

The Joint Legislative Audit and Review Committee must review the efficacy of the increased density bonus incentive for affordable housing development located on property owned by a religious organization and must report its findings to the appropriate committees of the Legislature by December 1, 2030. The review must include a recommendation on whether this incentive should be continued without change or should be amended or repealed.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

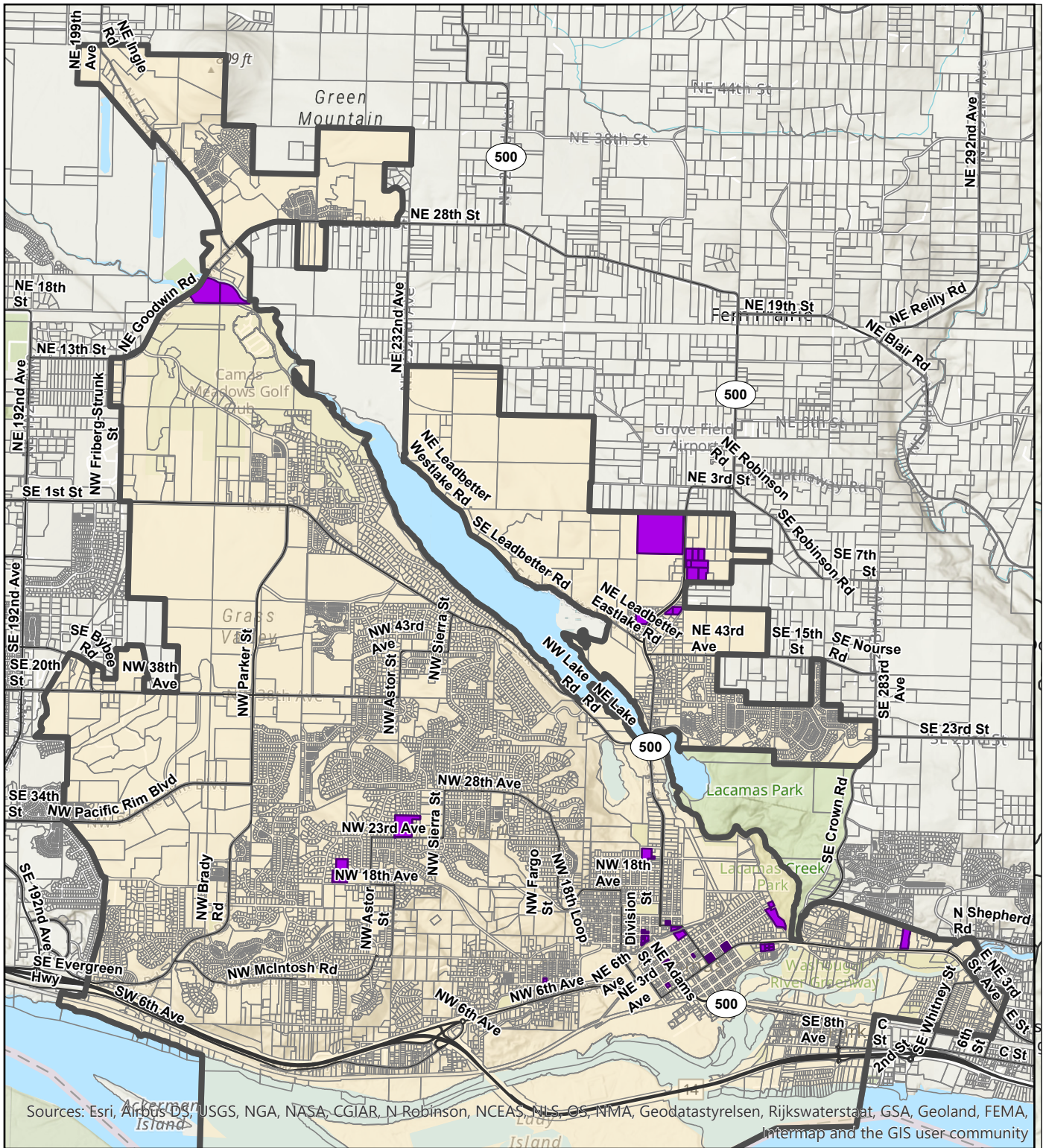
**Staff Summary of Public Testimony:**

(In support) This is an effort to address affordable housing and homelessness in our communities. The faith community often leads the way with its efforts to house the homeless. This bill provides for a density bonus for affordable housing on religious organization property. Sometimes zoning ordinances prevent religious organizations from carrying out their mission to provide affordable housing. Under this bill, religious organizations would still have to comply with other requirements not related to the density bonus. The cities and the faith communities have been working together for years to promote affordable housing efforts by religious organizations. A technical amendment would improve the bill by allowing cities to plan for the density bonus after a request by a religious organization to avoid unnecessary planning efforts.

(Opposed) None.



**Persons Testifying:** Representative Walen, prime sponsor; Carl Schroeder, Association of Washington Cities; and Paul Benz, Faith Action Network.

**Persons Signed In To Testify But Not Testifying:** None.



## City of Camas Church-Owned Properties

### KEY

-  Camas City Limits
-  Church-Owned Properties



NOTE: Information shown on this map was collected from several sources. Clark County accepts no responsibility for any inaccuracies that may be present.

0 1 2 3 4 Miles

CERTIFICATION OF ENROLLMENT  
**ENGROSSED SUBSTITUTE SENATE BILL 5383**

Chapter 352, Laws of 2019

66th Legislature  
2019 Regular Session

TINY HOUSES

EFFECTIVE DATE: July 28, 2019

Passed by the Senate April 22, 2019  
Yeas 41 Nays 1

CYRUS HABIB

**President of the Senate**

Passed by the House April 10, 2019  
Yeas 95 Nays 0

FRANK CHOPP

**Speaker of the House of Representatives**

Approved May 9, 2019 3:26 PM

JAY INSLEE

**Governor of the State of Washington**

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5383** as passed by the Senate and the House of Representatives on the dates hereon set forth.

BRAD HENDRICKSON

**Secretary**

FILED

May 13, 2019

**Secretary of State  
State of Washington**

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**ENGROSSED SUBSTITUTE SENATE BILL 5383**

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AS AMENDED BY THE HOUSE

Passed Legislature - 2019 Regular Session

**State of Washington**

**66th Legislature**

**2019 Regular Session**

**By** Senate Housing Stability & Affordability (originally sponsored by Senators Zeiger, Palumbo, Nguyen, Short, Van De Wege, Wilson, C., and Wilson, L.)

READ FIRST TIME 02/14/19.

1       AN ACT Relating to tiny houses; amending RCW 58.17.040,  
2   35.21.684, 43.22.450, 19.27.035, and 35.21.278; adding a new section  
3   to chapter 35.21 RCW; and creating a new section.

4   BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5       NEW SECTION.   **Sec. 1.** Tiny houses have become a trend across the  
6   nation to address the shortage of affordable housing. As tiny houses  
7   become more acceptable, the legislature finds that it is important to  
8   create space in the code for the regulation of tiny house siting.  
9   Individual cities and counties may allow tiny houses with wheels to  
10   be collected together as tiny house villages using the binding site  
11   plan method articulated in chapter 58.17 RCW.

12       The legislature recognizes that the International Code Council in  
13   2018 has issued tiny house building code standards in Appendix Q of  
14   the International Residential Code, which can provide a basis for the  
15   standards requested within this act.

16       **Sec. 2.** RCW 58.17.040 and 2004 c 239 s 1 are each amended to  
17   read as follows:

18       The provisions of this chapter shall not apply to:

19       (1) Cemeteries and other burial plots while used for that  
20   purpose;



1       (2) Divisions of land into lots or tracts each of which is one-  
2 one hundred twenty-eighth of a section of land or larger, or five  
3 acres or larger if the land is not capable of description as a  
4 fraction of a section of land, unless the governing authority of the  
5 city, town, or county in which the land is situated shall have  
6 adopted a subdivision ordinance requiring plat approval of such  
7 divisions: PROVIDED, That for purposes of computing the size of any  
8 lot under this item which borders on a street or road, the lot size  
9 shall be expanded to include that area which would be bounded by the  
10 center line of the road or street and the side lot lines of the lot  
11 running perpendicular to such center line;

12       (3) Divisions made by testamentary provisions, or the laws of  
13 descent;

14       (4) Divisions of land into lots or tracts classified for  
15 industrial or commercial use when the city, town, or county has  
16 approved a binding site plan for the use of the land in accordance  
17 with local regulations;

18       (5) A division for the purpose of lease when no residential  
19 structure other than mobile homes, tiny houses or tiny houses with  
20 wheels as defined in section 5 of this act, or travel trailers are  
21 permitted to be placed upon the land when the city, town, or county  
22 has approved a binding site plan for the use of the land in  
23 accordance with local regulations;

24       (6) A division made for the purpose of alteration by adjusting  
25 boundary lines, between platted or unplatted lots or both, which does  
26 not create any additional lot, tract, parcel, site, or division nor  
27 create any lot, tract, parcel, site, or division which contains  
28 insufficient area and dimension to meet minimum requirements for  
29 width and area for a building site;

30       (7) Divisions of land into lots or tracts if: (a) Such division  
31 is the result of subjecting a portion of a parcel or tract of land to  
32 either chapter 64.32 or 64.34 RCW subsequent to the recording of a  
33 binding site plan for all such land; (b) the improvements constructed  
34 or to be constructed thereon are required by the provisions of the  
35 binding site plan to be included in one or more condominiums or owned  
36 by an association or other legal entity in which the owners of units  
37 therein or their owners' associations have a membership or other  
38 legal or beneficial interest; (c) a city, town, or county has  
39 approved the binding site plan for all such land; (d) such approved  
40 binding site plan is recorded in the county or counties in which such

land is located; and (e) the binding site plan contains thereon the following statement: "All development and use of the land described herein shall be in accordance with this binding site plan, as it may be amended with the approval of the city, town, or county having jurisdiction over the development of such land, and in accordance with such other governmental permits, approvals, regulations, requirements, and restrictions that may be imposed upon such land and the development and use thereof. Upon completion, the improvements on the land shall be included in one or more condominiums or owned by an association or other legal entity in which the owners of units therein or their owners' associations have a membership or other legal or beneficial interest. This binding site plan shall be binding upon all now or hereafter having any interest in the land described herein." The binding site plan may, but need not, depict or describe the boundaries of the lots or tracts resulting from subjecting a portion of the land to either chapter 64.32 or 64.34 RCW. A site plan shall be deemed to have been approved if the site plan was approved by a city, town, or county: (i) In connection with the final approval of a subdivision plat or planned unit development with respect to all of such land; or (ii) in connection with the issuance of building permits or final certificates of occupancy with respect to all of such land; or (iii) if not approved pursuant to (i) and (ii) of this subsection (7)(e), then pursuant to such other procedures as such city, town, or county may have established for the approval of a binding site plan;

(8) A division for the purpose of leasing land for facilities providing personal wireless services while used for that purpose. "Personal wireless services" means any federally licensed personal wireless service. "Facilities" means unstaffed facilities that are used for the transmission or reception, or both, of wireless communication services including, but not necessarily limited to, antenna arrays, transmission cables, equipment shelters, and support structures; and

(9) A division of land into lots or tracts of less than three acres that is recorded in accordance with chapter 58.09 RCW and is used or to be used for the purpose of establishing a site for construction and operation of consumer-owned or investor-owned electric utility facilities. For purposes of this subsection, "electric utility facilities" means unstaffed facilities, except for the presence of security personnel, that are used for or in

1 connection with or to facilitate the transmission, distribution,  
2 sale, or furnishing of electricity including, but not limited to,  
3 electric power substations. This subsection does not exempt a  
4 division of land from the zoning and permitting laws and regulations  
5 of cities, towns, counties, and municipal corporations. Furthermore,  
6 this subsection only applies to electric utility facilities that will  
7 be placed into service to meet the electrical needs of a utility's  
8 existing and new customers. New customers are defined as electric  
9 service locations not already in existence as of the date that  
10 electric utility facilities subject to the provisions of this  
11 subsection are planned and constructed.

12 **Sec. 3.** RCW 35.21.684 and 2009 c 79 s 1 are each amended to read  
13 as follows:

14 (1) A city or town may not adopt an ordinance that has the  
15 effect, directly or indirectly, of discriminating against consumers'  
16 choices in the placement or use of a home in such a manner that is  
17 not equally applicable to all homes. Homes built to 42 U.S.C. Sec.  
18 5401-5403 standards (as amended in 2000) must be regulated for the  
19 purposes of siting in the same manner as site built homes, factory  
20 built homes, or homes built to any other state construction or local  
21 design standard. However, except as provided in subsection (2) of  
22 this section, any city or town may require that:

23 (a) A manufactured home be a new manufactured home;

24 (b) The manufactured home be set upon a permanent foundation, as  
25 specified by the manufacturer, and that the space from the bottom of  
26 the home to the ground be enclosed by concrete or an approved  
27 concrete product which can be either load bearing or decorative;

28 (c) The manufactured home comply with all local design standards  
29 applicable to all other homes within the neighborhood in which the  
30 manufactured home is to be located;

31 (d) The home is thermally equivalent to the state energy code;  
32 and

33 (e) The manufactured home otherwise meets all other requirements  
34 for a designated manufactured home as defined in RCW 35.63.160.

35 A city with a population of one hundred thirty-five thousand or  
36 more may choose to designate its building official as the person  
37 responsible for issuing all permits, including department of labor  
38 and industries permits issued under chapter 43.22 RCW in accordance  
39 with an interlocal agreement under chapter 39.34 RCW, for

1 alterations, remodeling, or expansion of manufactured housing located  
2 within the city limits under this section.

3 (2) A city or town may not adopt an ordinance that has the  
4 effect, directly or indirectly, of restricting the location of  
5 manufactured/mobile homes in manufactured/mobile home communities  
6 that were legally in existence before June 12, 2008, based  
7 exclusively on the age or dimensions of the manufactured/mobile home.  
8 This does not preclude a city or town from restricting the location  
9 of a manufactured/mobile home in manufactured/mobile home communities  
10 for any other reason including, but not limited to, failure to comply  
11 with fire, safety, or other local ordinances or state laws related to  
12 manufactured/mobile homes.

13 (3) Except as provided under subsection (4) of this section, a  
14 city or town may not adopt an ordinance that has the effect, directly  
15 or indirectly, of preventing the entry or requiring the removal of a  
16 recreational vehicle or tiny house with wheels as defined in section  
17 5 of this act used as a primary residence in manufactured/mobile home  
18 communities.

19 (4) Subsection (3) of this section does not apply to any local  
20 ordinance or state law that:

21 (a) Imposes fire, safety, or other regulations related to  
22 recreational vehicles;

23 (b) Requires utility hookups in manufactured/mobile home  
24 communities to meet state or federal building code standards for  
25 manufactured/mobile home communities; or

26 (c) Includes both of the following provisions:

27 (i) A recreational vehicle or tiny house with wheels as defined  
28 in section 5 of this act must contain at least one internal toilet  
29 and at least one internal shower; and

30 (ii) If the requirement in (c)(i) of this subsection is not met,  
31 a manufactured/mobile home community must provide toilets and  
32 showers.

33 (5) For the purposes of this section, "manufactured/mobile home  
34 community" has the same meaning as in RCW 59.20.030.

35 (6) This section does not override any legally recorded covenants  
36 or deed restrictions of record.

37 (7) This section does not affect the authority granted under  
38 chapter 43.22 RCW.

**Sec. 4.** RCW 43.22.450 and 2001 c 335 s 8 are each amended to read as follows:

Whenever used in RCW 43.22.450 through 43.22.490:

(1) "Department" means the Washington state department of labor and industries;

(2) "Approved" means approved by the department;

(3) "Factory built housing" means any structure, including a factory built tiny house with or without a chassis (wheels), designed primarily for human occupancy other than a manufactured or mobile home the structure or any room of which is either entirely or substantially prefabricated or assembled at a place other than a building site;

(4) "Install" means the assembly of factory built housing or factory built commercial structures at a building site;

(5) "Building site" means any tract, parcel or subdivision of land upon which factory built housing or a factory built commercial structure is installed or is to be installed;

(6) "Local enforcement agency" means any agency of the governing body of any city or county which enforces laws or ordinances governing the construction of buildings;

(7) "Commercial structure" means a structure designed or used for human habitation, or human occupancy for industrial, educational, assembly, professional or commercial purposes.

NEW SECTION. **Sec. 5.** A new section is added to chapter 35.21 RCW to read as follows:

(1) A city or town may adopt an ordinance to regulate the creation of tiny house communities.

(2) The owner of the land upon which the community is built shall make reasonable accommodation for utility hookups for the provision of water, power, and sewerage services and comply with all other duties in chapter 59.20 RCW.

(3) Tenants of tiny house communities are entitled to all rights and subject to all duties and penalties required under chapter 59.20 RCW.

(4) For purposes of this section:

(a) "Tiny house" and "tiny house with wheels" means a dwelling to be used as permanent housing with permanent provisions for living, sleeping, eating, cooking, and sanitation built in accordance with the state building code.

1 (b) "Tiny house communities" means real property rented or held  
2 out for rent to others for the placement of tiny houses with wheels  
3 or tiny houses utilizing the binding site plan process in RCW  
4 58.17.035.

5 **Sec. 6.** RCW 19.27.035 and 2018 c 207 s 2 are each amended to  
6 read as follows:

7 The building code council shall:

8 (1) (a) By July 1, 2019, adopt a revised process for the review of  
9 proposed statewide amendments to the codes enumerated in RCW  
10 19.27.031; and

11 ~~((+2))~~ (b) Adopt a process for the review of proposed or enacted  
12 local amendments to the codes enumerated in RCW 19.27.031 as amended  
13 and adopted by the state building code council.

14 (2) By December 31, 2019, adopt building code standards specific  
15 for tiny houses.

16 **Sec. 7.** RCW 35.21.278 and 2012 c 218 s 1 are each amended to  
17 read as follows:

18 (1) Without regard to competitive bidding laws for public works,  
19 a county, city, town, school district, metropolitan park district,  
20 park and recreation district, port district, or park and recreation  
21 service area may contract with a chamber of commerce, a service  
22 organization, a community, youth, or athletic association, or other  
23 similar association located and providing service in the immediate  
24 neighborhood, for drawing design plans, making improvements to a  
25 park, school playground, public square, or port habitat site,  
26 installing equipment or artworks, or providing maintenance services  
27 for a facility or facilities as a community or neighborhood project,  
28 or environmental stewardship project, and may reimburse the  
29 contracting association its expense. The contracting association may  
30 use volunteers in the project and provide the volunteers with  
31 clothing or tools; meals or refreshments; accident/injury insurance  
32 coverage; and reimbursement of their expenses. The consideration to  
33 be received by the public entity through the value of the  
34 improvements, artworks, equipment, or maintenance shall have a value  
35 at least equal to three times that of the payment to the contracting  
36 association. All payments made by a public entity under the authority  
37 of this section for all such contracts in any one year shall not

1 exceed twenty-five thousand dollars or two dollars per resident  
2 within the boundaries of the public entity, whichever is greater.

3 (2) A county, city, town, school district, metropolitan park  
4 district, park and recreation district, or park and recreation  
5 service area may ratify an agreement, which qualifies under  
6 subsection (1) of this section and was made before June 9, 1988.

7 (3) Without regard to competitive bidding laws for public works,  
8 a school district, institution of higher education, or other  
9 governmental entity that includes training programs for students may  
10 contract with a community service organization, nonprofit  
11 organization, or other similar entity, to build tiny houses for low-  
12 income housing, if the students participating in the building of the  
13 tiny houses are in:

14 (a) Training in a community and technical college construction or  
15 construction management program;

16 (b) A career and technical education program;

17 (c) A state recognized apprenticeship preparation program; or

18 (d) Training under a construction career exploration program for  
19 high school students administered by a nonprofit organization.

Passed by the Senate April 22, 2019.

Passed by the House April 10, 2019.

Approved by the Governor May 9, 2019.

Filed in Office of Secretary of State May 13, 2019.

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**Title 5**  
**BUSINESS TAXES, LICENSES AND REGULATIONS**

**Chapters:**

5.02 – Business Licenses Generally

*5.04 – Ambulances -- Repealed by Ordinance 19-005 § II, 6/8/2019*

5.08 – Building Trades

5.12 – Cards and Billiards

*5.16 – Coin-Operated Music Devices -- Repealed by Ordinance 19-005 § II, 6/8/2019*

5.20 – Special Events

5.24 – Peddlers, Hawkers, Solicitors and Canvassers

*5.28 – Public Dances -- Repealed by Ordinance 19-005 § II, 6/8/2019*

5.32 – Taxis

5.36 – Sexually Oriented Businesses

5.45 – Telecommunications

5.50 – Pawn Brokers and Second Hand Dealers

5.55 – Natural Gas Utility Tax

## Chapter 5.02

### BUSINESS LICENSES GENERALLY

#### Sections:

- 5.02.010 – Definitions
- 5.02.020 – Business license required – Posting
- 5.02.030 – Occupational permit
- 5.02.035 – Home occupation permit
- 5.02.040 – Application and renewal
- 5.02.050 – License term or expiration
- 5.02.060 – Fee
- 5.02.070 – Exception – Applicability or provisions
- 5.02.080 – Violation – Penalty

#### 5.02.010 – Definitions

As used in this chapter:

- A. "Business", "occupation", or "pursuit" means and includes all wholesalers, retailers, service providers, towing operators, peddlers, canvassers, solicitors, for-hire vehicles, limousine services, pawnbrokers, secondhand dealers, and junk dealers engaged in business with the object of economic gain, benefit or advantage to the person, firm, or corporation, or to another person, class, directly or indirectly, whether part-time or full-time, whether resident or nonresident except those businesses or activities for which licenses of franchises are required by any other chapter or section of the Camas Municipal Code as now or hereafter enacted or amended.
- B. "Canvasser", "peddler", or "solicitor" is defined as solicitor.
- C. "City" means the city of Camas.
- D. "Corporation" see "person".
- E. "Director" means the finance director of the city of Camas.
- F. "Driver" and "Operator" mean the person physically engaged in driving for-hire vehicle, whether or not the person is the owner of or has any financial interest in the vehicle.
- G. "~~Engage~~ Engaging in business"
  - 1. The term "Engaging in business" means ~~commence~~commencing, ~~conduct~~conducting, or ~~continue~~continuing in business, and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public to conducting such business.
  - 2. This subsection sets forth examples of activities that constitute engaging in business in the City, and establishes safe harbors for certain of those activities so that a person who meets the criteria may engage in de minimus business activities in the City without having to pay a business license fee. The activities listed in this section are illustrative only and are not intended to narrow the definition of "engaging in business" in subsection (1). If an activity is not listed, whether it

constitutes engaging in business in the City shall be determined by considering all the facts and circumstances and applicable law.

3. Without being all inclusive, any one of the following activities conducted within the City by a person, or its employee, agent, representative, independent contractor, broker, or another acting on its behalf constitutes engaging in business and requires a person to register and obtain a business license.

a. Owning, renting, leasing, maintaining, or having the right to use, or using, tangible personal property, intangible personal property, or real property permanently or temporarily located in the City.

b. Owning, renting, leasing, using, or maintaining, an office, place of business, or other establishment in the City.

c. Soliciting sales.

d. Making repairs or providing maintenance or service to real or tangible personal property, including warranty work and property maintenance.

e. Providing technical assistance or service, including quality control, product inspections, warranty work, or similar services on or in connection with tangible personal property sold by the person or on its behalf.

f. Installing, constructing, or supervising installation or construction of, real or tangible personal property.

g. Soliciting, negotiating, or approving franchise, license, or other similar agreements.

(h) Collecting current or delinquent accounts.

i. Picking up and transporting tangible personal property, solid waste, construction debris, or excavated materials.

j. Providing disinfecting and pest control services, employment and labor pool services, home nursing care, janitorial services, appraising, landscape architectural services, security system services, surveying, and real estate services including the listing of homes and managing real property.

k. Rendering professional services such as those provided by accountants, architects, attorneys, auctioneers, consultants, engineers, professional athletes, barbers, baseball clubs and other sports organizations, chemists, consultants, psychologists, court reporters, dentists, doctors, detectives, laboratory operators, teachers, veterinarians.

l. Meeting with customers or potential customers, even when no sales or orders are solicited at the meetings.

m. Training or recruiting agents, representatives, independent contractors, brokers or others, domiciled or operating on a job in the City, acting on its behalf, or for customers or potential customers.

n. Investigating, resolving, or otherwise assisting in resolving customer complaints.

o. In-store stocking or manipulating products or goods, sold to and owned by a customer, regardless of where sale and delivery of the goods took place.

p. Delivering goods in vehicles owned, rented, leased, used, or maintained by the person or another acting on its behalf.

4. If a person, or its employee, agent, representative, independent contractor, broker or another acting on the person's behalf, engages in no other activities in or with the City but the following, it need not register and obtain a business license.

a. Meeting with suppliers of goods and services as a customer.

b. Meeting with government representatives in their official capacity, other than those performing contracting or purchasing functions.

c. Attending meetings, such as board meetings, retreats, seminars, and conferences, or other meetings wherein the person does not provide training in connection with tangible personal property sold by the person or on its behalf. This provision does not apply to any board of director member or attendee engaging in business such as a member of a board of directors who attends a board meeting.

d. Renting tangible or intangible property as a customer when the property is not used in the City.

e. Attending, but not participating in a "trade show" or "multiple vendor events". Persons participating at a trade show shall review the City's trade show or multiple vendor event ordinances.

f. Conducting advertising through the mail.

g. Soliciting sales by phone from a location outside the City.

5 A seller located outside the City merely delivering goods into the City by means of common carrier is not required to register and obtain a business license, provided that it engages in no other business activities in the City. Such activities do not include those in subsection 4 above.

The City expressly intends that engaging in business include any activity sufficient to establish nexus for purposes of applying the license fee under the law and the constitutions of the United States and the State of Washington. Nexus is presumed to continue as long as the taxpayer benefits from the activity that constituted the original nexus generating contact or subsequent contacts.

H. "Firm" see "Person".

I. "For-hire vehicle" includes all vehicles used for the transportation of passengers for compensation, except chartered and scheduled buses, vehicles not for hire by the general public such as vans operated by hotels, employers, churches, schools, and retirement facilities and ride share vehicles. The term primarily includes taxicabs, ride-share, and limousines.

J. "Limousine" means a chauffeur-driven, unmetered luxury motor vehicle prearranged for transportation meeting the definition in RCW 46.04.274. Limousines differ from "taxis" in that they are exclusive use of the person(s) paying the prearranged fare, are unmetered, unmarked, and are not available for spontaneous hire.

K. "Occupational permit" is an additional requirement for certain businesses performing occupations, that by their nature present a heightened public safety risk, including: for-hire vehicle driver or solicitor.

L. "Operator" see "Driver".

M. "Peddler" see "Solicitor".

N. "Person" means any natural person of any gender, firms, corporations, partnerships or associations either acting by themselves or by servant, agent or employee. The singular shall include the plural.

O. "Person", "firm" or "corporation" used interchangeably in this chapter means any individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, co-partnership, joint venture, club, company, joint stock company, business trust, corporation, association, canvasser, peddler, solicitor, society, or any group of individuals acting as a unit whether mutual cooperative, fraternal, nonprofit or otherwise, and includes the United States or any instrumentality thereof for whom a valid business license may be required therefrom under the provisions of this chapter.

P. "Pursuit" see "Business".

Q. "Solicitor" within the meaning of this chapter is any person who, either as a principal or agent, goes door to door or from place to place and enters upon any private property within the city and thereon engages in any of the following activities:

1. Sells, takes orders for, or offers to sell or take orders for any goods, wares or merchandise whether or not collecting in advance for such goods, wares or merchandise; and/or
2. Sells, takes orders for, or offers to sell or take orders for services, whether or not collecting in advance for performance of such services; and/or
3. Sells, takes orders for, or offers to sell or take orders for the making, manufacturing, or repairing of any article or thing whatsoever, whether or not collecting in advance for the performance of such services; and/or
4. Seeks contribution or donations.

R. "Towing operator" is anyone engaged in business of offering towing service by use of a vehicle wrecker or by a vehicle adapted for that purpose, whereby motor vehicles are towed or are otherwise removed from the place where they are disabled.

S. "Business Licensing Service" or "BLS" mean the office within the Washington State Department of Revenue providing business licensing services to the City.

(Ord. 19-005 § I, Part, 6/8/2019)

#### **5.02.020 - Business License required - Posting**

It is unlawful for any person, firm or corporation to engage in any business, occupation or pursuit, as defined by CMC 5.02.010 in the city without first having obtained a business license therefore as provided in this chapter. The business license provided for in this chapter shall be posted in a conspicuous location at the place of business. Such business license is nontransferable.

(Ord. 19-005 § I, Part, 6/8/2019)

#### **5.02.030 – Occupational permit**

Enacted to regulate the practice of certain occupations that, by their nature, present a heightened public safety risk to the public.

- A. For-Hire Vehicle Driver/Operator. No person shall drive a for-hire vehicle including a limousine, within the city without a permit from the city. Owners, sole proprietors will also be required to obtain a city of Camas business license. Employees hired as drivers must obtain a permit.
- B. Solicitor. It is unlawful for any person to act as a solicitor, within the meaning and application of this chapter, without first obtaining an occupational permit in the manner provided by this chapter.

(Ord. 19-005 § I, Part, 6/8/2019)

#### **5.02.035 - Home occupation permit**

Home occupations are regulated under Title 18 of the Camas Municipal Code and the requirements therein are in addition to the business license provided for in this chapter.

(Ord. 19-005 § I, Part, 6/8/2019)

#### **5.02.040 - Application and renewal**

A. Application for a business license shall be made through the Business Licensing Service of the Washington State Department of Revenue.

B. Each business location operated within the city must have its own license, provided, however that all business activities conducted at a location by the same owner requires only one business license. If two or more business owners each conduct their own business at the same physical location, each business owner must obtain their own business license for their respective business.

C. Application for an occupational permit shall be made directly with the city of Camas giving such information as deemed necessary to enable the enforcement of this chapter. The occupational permit is in addition to the business license provided for in this chapter.

(Ord. 19-005 § I, Part, 6/8/2019)

#### **5.02.050 - License term or expiration**

A. Licenses are issued on an annual basis but will be set to expire on a date established by the Business Licensing Service and must be renewed on or before that expiration date to continue in business in the city.

1. Failure to renew by the expiration date will result in incurring the penalty described in CMC 5.02.060.

2. Failure to renew within 120 days after expiration will result in the cancellation of the license and will require reapplication for the license, as provided in this chapter, in order to continue engaging in business in the city.

B. The license term and respective fee amount may be prorated to synchronize the license expiration date with the expiration date established by the Business Licensing Service.

(Ord. 19-005 § I, Part, 6/8/2019)

#### **5.02.060 - Fee**

The city's business licensing application fee for any business or activity required to be licensed under this chapter is \$10.00. The city's business ~~licensing~~ license renewal fee for any business or activity required to be licensed under this chapter shall be \$10.00 annually. Fees for other licenses and permits required under other chapters of this title are separate from the fees stated in this chapter.

In addition to the city licensing fees, applications submitted through the Business Licensing Service must include the total fees due for all other licenses requested, as well as the application-handling fee authorized by RCW 19.02.075.

In addition, to the city license fees, renewals submitted through the Business Licensing Service must include the total fees due for all other licenses being renewed, as well as the renewal-handling fee authorized by RCW 19.02-075. Renewals submitted through the Business Licensing Service after the license expiration date will be assessed a late renewal penalty authorized by RCW 19.02-.085 in addition to all other fees due.

(Ord. 19-005 § I, Part, 6/8/2019)

#### **5.02.070 - Exception - Applicability of provisions**

Some or all the requirements of this chapter shall not be applicable as described below:

A. Nonprofit organizations, as recognized being tax-exempt by the federal government under USC 26 § 501(c), (i.e. Internal Code Section 501(c)) are exempted from the city business license fee but are required to register as a business ~~to with~~ the director or designee. Provided, such nonprofits, when designated as religious, educational, charitable, or fraternal in nature, as described in USC 26 § 501(c)3, and solely

performing their respective religious, educational, charitable or fraternal activities, without any actual business conducted, are fully exempt from the licensing requirements of this chapter.

B. For purposes of the license required by this chapter, any person or business whose annual value of products, gross proceeds of sales, or gross income of the business in the city is equal to or less than \$2,000 ~~(or higher threshold as determined by city)~~ and who does not maintain a place of business within the city, ~~shall~~must submit a business license registration to the director or designee as provided in this chapter, but are exempt from the city business license fee. The threshold does not apply to regulatory or occupational license requirements or activities that require a specialized permit.

(Ord. 19-005 § I, Part, 6/8/2019)

#### **5.02.080 - Violation - Penalty**

Any person as defined in this chapter and the officers, directors, managing agents, or partners of any organization or business violating or failing to comply with any provisions of Chapter 5.02 shall be subject to a civil infraction punishable by a maximum fine of five hundred dollars.

(Ord. 19-005 § I, Part, 6/8/2019)



## Chapter 5.20

### SPECIAL EVENTS\*

#### Sections:

5.20.010 - Definitions.

#### **5.20.020 - Permit required.**

5.20.030 - Permit issuance.

5.20.040 - Action on permit application.

5.20.050 - Grounds for denial of application.

5.20.060 - Permit conditions.

5.20.070 - Appeal procedure.

5.20.080 - Indemnification agreement.

5.20.090 - Insurance.

5.20.100 - Fees for city services.

5.20.110 - Cleanup deposits.

5.20.120 - Revocation of permits.

5.20.130 - Violation—Penalty.

5.20.140 - Severability.

#### **5.20.020 - Permit required.**

Any person desiring to conduct or sponsor a special event shall apply for a special event permit by filing an application with the Parks and Recreation Office and pay an application fee as per the fee schedule established by the city council per resolution, forty-five days prior to the date on which the event is to occur. No fee shall be imposed when prohibited by the First and Fourteenth Amendments to the United States Constitution, or Article I, Sections 3, 4, 5 or 11 of the Washington State Constitution. Political or religious activities intended primarily for the communication or expression of ideas shall be presumed to be a constitutionally protected event. The permit required under this chapter is in addition to the business license required under Chapter 5.02 CMC, when applicable.

A special event permit is not required for the following:

- A. Funerals and wedding processions;
- B. Other similar events and activities which would not directly affect or use in any manner city services or streets;
- C. School and City events which are routinely scheduled;
- D. Non-commercial and limited use of city park areas for events such as birthdays, anniversaries, and reunions with less than 50 attendees, closed to the public at large, and otherwise not significantly impacting municipal public property or public rights-of-way as described in Section 5.20.010;
- E. Non-commercial use of the Fallen Leaf Park picnic shelter.

(Ord. 19-005 § II, Part, 6/8/2019; Ord. No. 2714, § IV, 12-1-2014; Ord. No. 2641, § I, 3-5-2012; Ord. 2418 § 1 (part), 2005)

## Chapter 5.32

### TAXIS

#### Sections:

5.32.010 - Definitions.

5.32.020 - Certificate of public convenience and necessity required.

5.32.030 - Application for certificate.

5.32.040 - Public hearing.

#### **5.32.050 - Issuance of certificate.**

5.32.060 - Liability insurance required.

#### **5.32.070 - License fees.**

5.32.080 - Transfer of license.

5.32.090 - Suspension and revocation of certificates.

5.32.100 - Taxicabs—Equipment and maintenance.

5.32.110 - Designation of taxicabs.

5.32.120 - Calculation of charges.

5.32.130 - Rates of fare—Rate card required.

5.32.140 - Receipts.

5.32.150 - Refusal of passenger to pay fare.

5.32.160 - Solicitation, acceptance and discharge of passengers.

5.32.170 - Taxi stands.

5.32.180 - Use by private vehicles prohibited.

5.32.190 - Manifests.

5.32.200 - Holder's records and reports.

5.32.210 - Taxicab driver's license required.

5.32.220 - Application, fee, and issuance of taxicab driver's license.

5.32.230 - Display of taxicab driver's license.

5.32.240 - Renewal of taxicab driver's license.

5.32.250 - Right of revocation—Appeal.

5.32.260 - Failure to comply.

5.32.270 - Taxicab driver's license records to be kept by director.

5.32.280 - Enforcement responsibility.

5.32.290 - Penalties for violation.

#### **5.32.050 - Issuance of certificate.**

- A. If the city council finds that further taxicab service in the city will serve the public convenience and necessity and that the applicant is fit, willing, and able to perform such public transportation and to conform to the provisions of this chapter, then the ~~city clerk~~director shall issue a certificate stating the name and address of the applicant, the number of vehicles authorized under the certificate and the date of issuance; otherwise, the application shall be denied.
- B. In making the above findings, the city council may take into consideration the number of taxicabs already in operation, whether existing transportation is adequate to meet the public need, the probable effect of increased service on local traffic conditions, and the character, experience, and responsibility of the applicant.

(Ord. 1927 § 5, 1993)

#### **5.32.070 - License fees.**

- A. No certificate shall be issued or continued in operation unless the holder thereof has paid an annual license fee for the right to engage in the taxicab business and an additional fee each year as per the fee schedule established by the city council per resolution for each vehicle operated under a certificate of public convenience and necessity. Such license or certificate, and respective fee required under this chapter is in addition to a business license that may be required under Chapter 5.02 CMC.
- B. In the case of licenses issued on or after July 1st of each year, one-half of the above fees shall be paid. License fees shall be in addition to any other license fees or charges established by proper authority and applicable to the holder or any vehicle under his operation and control. All licenses shall expire at 11:59 p.m. on December 31st of each year and may be renewed by the director upon the holder's request, proof of adequate insurance, and payment of fees.

(Ord. 19-005 § II, Part, 6/8/2019; Ord. No. 2714 , § IX, 12-1-2014; Ord. 1927 § 7, 1993)

## Chapter 5.45

# TELECOMMUNICATIONS

## Sections:

### Article I. - Definitions

5.45.010 - Definitions.

## Article II. - Business Registration of Telecommunications Carriers and Providers

5.45.015 - Purpose of telecommunications business registration.

5.45.020 - Telecommunications business registration required.

## 5.45.025 - Business registration fee.

5.45.030 - General penalties.

5.45.035 - Other remedies.

### Article III. - General Provisions

5.45.045 - Purpose.

5.45.055 - Telecommunications right-of-way use authorization required.

5.45.060 - Telecommunications franchise required.

5.45.065 - Cable television franchise required.

5.45.070 - Facilities lease required.

5.45.075 - Construction permits required.

5.45.080 - Application to existing franchise ordinances, agreements, leases and permits—Effect of other laws.

5.45.085 - Permits—Effect of other laws. *Reserved*

5.45.090 - Universal service.

5.45.095 - Fees and compensation not a tax.

### Article IV. - Telecommunications Right-of-Way Use Authorizations

5.45.100 - Telecommunications right-of-way use authorization.

5.45.110 - Telecommunications right-of-way use authorization application.

5.45.115 - Issuance/denial of right-of-way use authorization.

5.45.120 - Appeal of director's decision.

5.45.125 - Agreement.

5.45.130 - Nonexclusive grant.

5.45.135 - Rights granted.

5.45.140 - Term of telecommunications right-of-way use authorization.

5.45.145 - Specified route.

5.45.150 - Service to city users.

5.45.155 - Compensation to the city.

5.45.160 - Amendment of authorization.

5.45.165 - Renewal of telecommunications right-of-way use authorization.

5.45.170 - Standards for renewal of authorization.

5.45.175 - Obligation to cure as a condition of renewal.

5.45.180 - Universal service.

5.45.185 - Annual fee for recovery of city costs.

5.45.190 - Other city costs.

### Article V. - Telecommunications Franchise

5.45.192 - Telecommunications franchise.

5.45.195 - Franchise application.

5.45.200 - Determination by the city.

5.45.205 - Agreement.

5.45.210 - Nonexclusive grant.

5.45.215 - Term of franchise grant.

5.45.220 - Rights granted.

5.45.225 - Franchise territory.

5.45.230 - Compensation to the city.

5.45.235 - Nondiscrimination.

5.45.240 - Amendment of franchise grant.

5.45.245 - Renewal application.

5.45.250 - Renewal determination.

5.45.255 - Obligation to cure as a condition of renewal.

5.45.260 - Universal service.

5.45.265 - Annual fee for recovery of city costs.

5.45.270 - Other city costs.

### Article VI. - Facilities Lease

5.45.272 - Facilities lease.

5.45.275 - Lease application.

5.45.280 - Determination by the city.

5.45.285 - Agreement.

5.45.290 - Nonexclusive lease.

5.45.295 - Term of facilities lease.

5.45.300 - Rights granted.

5.45.305 - Interference with other users.

5.45.310 - Ownership and removal of improvements.

5.45.315 - Cancellation of lease by lessee.

5.45.320 - Compensation to the city.

5.45.325 - Amendment of facilities lease.

5.45.330 - Renewal application.

5.45.335 - Renewal determination.

5.45.340 - Obligation to cure as a condition of renewal.

### Article VII. - Conditions of Telecommunications Right-of-Way Use Authorizations, Telecommunications Franchises, and Facilities Leases

5.45.345 - Purpose.

5.45.350 - Acceptance.

5.45.355 - Police power.

5.45.360 - Rules and regulations by the city.

5.45.365 - Location of facilities.

5.45.370 - Compliance with one number locator service.

5.45.375 - Construction permits.

5.45.380 - Interference with the public ways.

5.45.385 - Damage to property.

5.45.390 - Notice of work.

5.45.395 - Repair and emergency work.

5.45.400 - Maintenance of facilities.

5.45.405 - Relocation or removal of facilities.

5.45.410 - Building moving.

5.45.415 - Removal of unauthorized facilities.

5.45.420 - Emergency removal or relocation of facilities.

5.45.425 - Damage to facilities.

5.45.430 - Restoration of public ways, other ways and city property.

5.45.435 - Facilities maps.

5.45.440 - Duty to provide information.

5.45.445 - Leased capacity.

5.45.450 - Insurance.

5.45.455 - General indemnification.

5.45.460 - Performance and construction surety.

5.45.465 - Security fund.

5.45.470 - Restoration bond.

5.45.475 - Coordination of construction activities.

5.45.480 - Assignments or transfers of grant.

5.45.485 - Transactions affecting control of grant.

5.45.490 - Revocation or termination of grant.

5.45.495 - Notice and duty to cure.

5.45.500 - Hearing.

5.45.505 - Standards for revocation or lesser sanctions.

5.45.510 - Incorporation by reference.

5.45.515 - Notice of entry on private property.

5.45.520 - Safety requirements.

5.45.525 - Most favored community.

### Article VIII. - Construction Standards

5.45.530 - Construction codes.

5.45.535 - Construction permits.

5.45.540 - Applications.

5.45.545 - Engineer's certification.

5.45.550 - Traffic control plan.

5.45.555 - Issuance of permit.

5.45.560 - Appeal of director's decision.

5.45.565 - Compliance with permit.

5.45.570 - Display of permit.

5.45.575 - Survey of underground facilities.

5.45.580 - Noncomplying work.

5.45.585 - Completion of construction.

5.45.590 - As-built drawings.

5.45.595 - Restoration after construction.

5.45.600 - Landscape restoration.

5.45.605 - Construction surety.

5.45.610 - Exceptions.

5.45.615 - Responsibilities of the owner.

## Article II. - Business Registration of Telecommunications Carriers and Providers

## 5.45.025 - Business registration fee.

Each initial and all subsequent annual applications for a telecommunications business registration shall be accompanied by an application fee to be set by resolution of the city council for the purpose of reimbursing the city for administrative expenses associated with processing the application. ~~Such The franchise and telecommunications business registration, and related fees required under this chapter-is are~~ in addition to the city business license and fee provided for ~~in this~~under chapter 5.02 CMC, when applicable.

(Ord. 19-005 § II, Part, 6/8/2019; Ord. 2117 § 1 (part), 1997)

## Chapter 5.50

### PAWN BROKERS AND SECOND HAND DEALERS

#### Sections:

5.50.010 - Definitions.

#### **5.50.020 - License required—Expiration and fee.**

5.50.030 - Record book.

5.50.040 - Inspection of records and goods.

5.50.050 - Report to chief of police.

5.50.060 - Retention of property—Inspection.

5.50.070 - Prohibited transactions.

5.50.080 - Termination of business.

5.50.090 - Number of licenses to be granted.

5.50.100 - Violation—Penalty.

#### **5.50.020 - License required—Expiration and fee.**

- A. It is unlawful for any person to engage in the business of pawnbroking or act as a secondhand dealer in the city of Camas without first obtaining a license pursuant to the provisions of this chapter. Each license shall be for a two-year period to expire on December 31st of the second year from issuance. The license fee for a pawnbroking business shall be per the fee schedule established by the city council per resolution. The license required under this chapter is in addition to the city business license required under CMC 5.02.
- B. All applications for issuance of a pawnbroker or secondhand dealer's license shall be made to and filed with the director on forms furnished for such purpose, and shall be accompanied by the required fee. An initial or renewal application shall be referred to the chief of police for investigation, report and recommendation. Within thirty days after receipt of a copy of the application, the chief of police shall render a written recommendation to the director as to approval or denial of the application for license or renewal thereof.
- C. The director shall deny an initial or renewed pawnbroker's license to any applicant, or any other person with any interest in the application for, or holder of such license, if such licensee:
1. Has been convicted of burglary, robbery, theft or possession of or receiving stolen property within the past ten years;
  2. Has obtained a pawnbroker or secondhand dealer license by fraud, misrepresentation, concealment, or through inadvertence or mistake;
  3. Has had any license revoked pursuant to this chapter;
  4. Makes a misrepresentation of, or fails to disclose, any material fact to the city;
  5. Has failed to timely pay its pawnbroker or secondhand dealer license fee pursuant to this chapter;
  6. Has failed to display a pawnbroker or secondhand dealer license on the premises where the licensed activity is conducted at all times during the operation of the licensed activity.

(Ord. 19-005 § II, Part, 6/8/2019; Ord. No. 2714 , § X, 12-1-2014; Ord. 2319 § 1 (part), 2002)



## Staff Report

July 1, 2019 Council Workshop Meeting

### Wallis Engineering Consultant Services Amendment

Staff Contact	Phone	Email
Sam Adams	360.817.7003	<a href="mailto:sadams@cityofcamas.us">sadams@cityofcamas.us</a>

INTRODUCTION/PURPOSE/SUMMARY: This is an additional amendment to the existing professional services agreement with Wallis Engineering for stormwater engineering design for the Crown View Pump Station neighborhood.

BUDGET IMPACT: \$23,025 expenditure from the Water/Sewer and Stormwater Fund. The budgets have sufficient funds to complete this work.

RECOMMENDATION/RECOMMENDED ACTION/ACTION REQUESTED: This item is for Council information only. Staff recommends this item be placed on the July 15, 2019 Consent Agenda for Council's consideration.

**WALLIS ENGINEERING  
SUPPLEMENTAL AGREEMENT #2  
EXHIBIT A2: SCOPE OF WORK  
CITY OF CAMAS  
CROWN VIEW PLAZA PUMP STATION IMPROVEMENTS**

June 2019  
WE#1444A

**PROJECT DESCRIPTION AND GENERAL SCOPE**

Wallis Engineering (Wallis) is currently providing professional services to the City of Camas to design and prepare contract documents for the Crown View Plaza Pump Station Improvement project. The primary objective of this project is to increase the capacity and reliability of the pump station. Previous investigations and analysis identified the need for additional storm sewer improvements to decrease and/or eliminate localized flooding immediately adjacent to and over the pump station site.

This scope of work for Supplemental Agreement #2 includes the additional work necessary to design and prepare contract documents to modify, repair and improve the local storm sewer system adjacent to the site within NW Ivy/Kent Lane and portions of the downstream outfall piping. Improvements are anticipated to include point repairs of known failures, installation of additional manholes and collection structures and pipe replacement consistent with Option 1 described in the “Crown View Pump Station Stormwater Analysis” Technical Memorandum completed by Wallis dated April 24, 2018.

**SUBCONSULTANTS**

<b>Subconsultant</b>	<b>Discipline</b>	<b>Task(s)</b>
KC Development	Survey	Task 2.3
MD Structural	Structural Engineering	Task 3

**CONTRACT DURATION:** Contract term shall be extended to June 30, 2020.

**SPECIFIC SCOPE OF WORK**

**Task 1 Project Management (Supplemented)**

This supplement does not change the scope of project management work but adds additional time necessary to manage the supplemented tasks.

**Task 2 Pre-Design (Supplemented)**

The original scope of work did not include topographic survey within NW Ivy/Kent Lane or existing features towards the stormwater outfall to the extents necessary to design stormwater system improvements.

- 2.3 Field Survey and Base Drawing. (Supplemented).** KC Development will conduct additional topographic survey along NW Ivy and NW Kent Lane and towards the existing stormwater system outfall as necessary to design stormwater system improvements. Minor brush clearing is anticipated to complete the data collection. Collected data will be added to the CAD base previously created.

### **Task 3          Design (Supplemented)**

The original scope of work did not include the work necessary to design and prepare contract documents for stormwater improvements surrounding the site or to reconstruct the existing retaining wall that will be impacted by the planned stormwater improvements. The tasks below are supplemented to complete this additional work.

- 3.1      50% Design Package. (Supplemented)** Wallis will incorporate stormwater system improvements to the contract plans and construction cost estimate.
- 3.2      90% Design Package. (Supplemented)** Stormwater system improvements will be included the work identified under this subtask.
- 3.3      Final Design Package. (Supplemented)** Stormwater system improvements will be included the work identified under this subtask.
- 3.4      Additional Site Design. (Supplemented)** MD Structural will provide structural design of the reconstructed retaining wall adjacent to 3218 NW Ivy Lane, including structural calculations and drawings. Wallis will provide additional site work design for the retaining wall. This work will replace the work identified in Supplement 1, which is no longer required based on the City's desire to not expand the pump station site. The fee for this subtask will utilize the budget from Supplement 1 and the additional budget included in this supplement to accomplish this work.

#### ***Task 3 Deliverable:***

- 50%, 90%, and final design packages including stormwater system improvements.

#### ***Task 3 Assumptions:***

- Analysis for stormwater treatment and detention will not be completed.
- No environmental permitting is required for replacing the existing gravity storm sewer line adjacent to 3218 NW Ivy Lane and towards the existing creek. If the improvements are within a critical area or buffer, the improvements would be considered ongoing maintenance of an existing facility, impacts will be temporary in nature and no new footprint is proposed.
- Specifications for stormwater improvements will be in CSI format.
- The City will process and obtain the required building permit for the retaining wall. Drawings and structural calculations will be provided by Wallis and MD Structural.

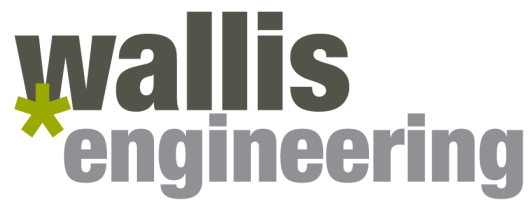


**Agreement**  
**Exhibit B- Fee Estimate**  
**City of Camas - Crown View Pump Station Improvements**  
**Supplement #2**  
**WE #1444A**  
June 2019

TASK		E1	E2	E3	E4	E5	T1	TW	C1	Staff Cost	Expenses	Subconsultants		Total
												KC Dev	MD	Cost
<b>Task 1</b>	<b>Project Management and Administration (Supplemented)</b>	\$171	\$159	\$136	\$119	\$102	\$104	\$95	\$80					
		4		6					8	\$2,140				\$2,140
	<b>TASK 1 SUBTOTAL</b>	<b>4</b>	<b>0</b>	<b>6</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>8</b>	<b>\$2,140</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>	<b>\$2,140</b>
<b>Task 2</b>	<b>Pre-Design (Supplemented)</b>													
2.3	Field Survey and Base Drawings				2		4			\$654		\$1,760		\$2,414
	<b>TASK 2 SUBTOTAL</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>4</b>	<b>0</b>	<b>0</b>	<b>\$654</b>	<b>\$0</b>	<b>\$1,760</b>	<b>\$0</b>	<b>\$2,414</b>
<b>Task 3</b>	<b>Design (Supplemented)</b>													
3.1	50% Design Package		4		20	12	12			\$5,488				\$5,488
3.2	90% Design Package	2	8		16	8	8		8	\$5,806				\$5,806
3.3	Final Design Package	1	4		12		8		8	\$3,707				\$3,707
3.4	Additional Site Design		2		8					\$1,270			\$2,200	\$3,470
	<b>TASK 3 SUBTOTAL</b>	<b>3</b>	<b>18</b>	<b>0</b>	<b>56</b>	<b>20</b>	<b>28</b>	<b>0</b>	<b>16</b>	<b>\$16,271</b>	<b>\$0</b>	<b>\$0</b>	<b>\$2,200</b>	<b>\$18,471</b>
	<b>GRAND TOTAL</b>	<b>7</b>	<b>18</b>	<b>6</b>	<b>58</b>	<b>20</b>	<b>32</b>	<b>0</b>	<b>24</b>	<b>\$19,065</b>	<b>\$0</b>	<b>\$0</b>	<b>\$1,760</b>	<b>\$23,025</b>

Depending on availability, actual staff usage may not match the above estimated hours breakdown. Billing rates for all staff are listed in the Fee Summary.

<b>FEE SUMMARY</b>			
Staff	Hours	Rate	Fees
SE - Senior Engineer	0	\$187	\$0
E1- Engineer 1	7	\$171	\$1,197
E2 - Engineer 2	18	\$159	\$2,862
E3 - Engineer 3	6	\$136	\$816
E4 - Engineer 4 (PM)	58	\$119	\$6,902
E5- Engineer 5	20	\$102	\$2,040
E6 -Engineer 6	0	\$92	\$0
Inspector	0	\$99	\$0
T1 - Technician 1	32	\$104	\$3,328
TW- Technical Writer	0	\$95	\$0
C1 - Clerical 1	24	\$80	\$1,920
<b>Total Fees from Staff</b>			<b>\$19,065</b>
Subconsultant			Fees
KC Dev			\$1,760
MD			\$2,200
<b>Total Fees from Subconsultants</b>			<b>\$3,960</b>
<i>NOTE: Fee includes 10% markup</i>			
Expenses			Cost
Printing (P)			\$0
Mileage (M)			\$0
<b>Total Fees from Expenses</b>			<b>\$0</b>
<b>TOTAL BUDGET</b>			<b>\$23,025</b>



## 2019 RATE SCHEDULE

Rates are effective thru December 31, 2019

<u>Staff</u>	<u>Rate</u>
Senior Engineer	\$187
Engineer 1	\$171
Engineer 2	\$159
Engineer 3	\$136
Engineer 4	\$119
Engineer 5	\$102
Engineer 6	\$92
Project Manager / Senior Designer	\$131
Inspector	\$99
Technician 1	\$104
Technical Writer	\$95
Clerical 1	\$80

- These hourly rates include in-house office expenses, photocopying, and other incidental items. Mileage will be reimbursed at the current standard IRS rate. Outside expenses will be billed at cost plus 10%.



## Staff Report

July 1, 2019 Council Workshop Meeting

### Local Limits Presentation

Staff Contact	Phone	Email
Sam Adams	360.817.7003	<a href="mailto:sadams@cityofcamas.us">sadams@cityofcamas.us</a>

**INTRODUCTION/PURPOSE/SUMMARY:** In June of 2017, the City hired CH2M Engineering to help with the development of Local Limits. The development of those limits is a requirement of the City's Wastewater Treatment Plant (WWTP) National Discharge Elimination System (NPDES) permit. A list of 20 pollutants of concern were included in the City's NPDES permit in which the Department of Ecology wanted the City to test for and develop limits. These limits are established for the WWTP based on the plant's ability to process the pollutants or loads and the receiving water's (Columbia River) ability to dilute them to acceptable levels when discharged.

In October of 2017, the City invited Camas industries to a kick off meeting to discuss Local Limits, the process for developing limits, and to give them the opportunity to ask questions and provide feedback.

For each quarter in 2018, the City's consultant sampled the influent and effluent at the WWTP and at specific industries within the City for the pollutants of concern and maintained a data base of results. CH2M then used that data to develop draft Technically Based Local Limits for the Camas Wastewater Treatment Plant. A copy of the executive summary from the Draft report that documents the process used to develop the Local Limits is attached for reference. Per the City's NPDES permit, we are required to submit the draft report with proposed Local Limits to the Department of Ecology by July 15, 2019 for review and comment.

On June 10, 2019, Staff and the City's consultant met with Camas industries to discuss the outcome of the process and the draft Local Limits. Proposed Local Limits of particular interest include Fluoride and the Best Management Practices for reducing Total Dissolved Solids and Sulfates. In general, the draft Local Limits as proposed will not affect the industries as they currently operate. It is important to note the Local Limits presented in the summary are Draft and that the Department of Ecology has authority to modify, change or not accept the limits in the report.

**RECOMMENDATION/RECOMMENDED ACTION/ACTION REQUESTED:** This item is for Council information only.

## Executive Summary

The United States Environmental Protection Agency (EPA) regulates compliance with the Clean Water Act (CWA), including Section 307(b) pretreatment standards. As part of this function, EPA issues National Pollutant Discharge Elimination System (NPDES) permits to publicly owned treatment works (POTWs). These permits contain provisions that require compliance with Title 40 of the *Code of Federal Regulations* Parts 403 through 471 (40 CFR 403–471) to ensure compliance with pretreatment standards by significant sources introducing pollutants subject to such standards to the POTW (cf, CWA 402(b)(8), 33 U.S.C. § 1342(b)(8) *et seq.*). Requirements to develop Technically Based Local Limits (TBLLs) are specified at 40 CFR 403.5 (c).

This TBLL evaluation has been prepared to meet NPDES requirements for the Camas Wastewater Treatment Plant (WWTP). These limits have been developed in accordance with EPA's Technical Support Document *Local Limits Development Guidance* (EPA, 2004) and in accordance with Section S6, Part F. of NPDES Permit No. WA-0020249. In response to these standards, conditions, and requirements, the local limits in Table ES-1 have been developed for the Camas WWTP.

The limits in the document are intended to protect the Camas wastewater system, prevent treatment interference, protect the environment, and protect worker health and safety. The assumptions are conservative and the data used apply to Camas only and are not intended to set standards for local limits developed for other jurisdictions.

**Table ES-1. Local Limits Summary**

Parameter	Local Limit	Page
Antimony	1.62 mg/L	See Note 1
Arsenic	0.14 mg/L	See Note 1
Cadmium	0.025 mg/L	See Note 1
Chromium (Total)	5.0 mg/L	5-7
Chromium (Hexavalent)	No Limit Adopted	4-1
Copper	0.438 mg/L	See Note 1
Cyanide	0.116 mg/L	See Note 1
Fluoride-Concentration	30.62 mg/L	5-13
Fluoride-Mass		
Analog Devices	76.6 lb/d	5-13
WaferTech	140.5 lb/d	5-13
Lead	0.135 mg/L	See Note 1
Mercury	0.007 mg/L	See Note 1
Molybdenum	0.286 mg/L	See Note 1
Nickel	0.461 mg/L	See Note 1
NWTPH-Dx	No Limit Adopted	4-1
NWTPH-Gx	No Limit Adopted	4-1
Selenium	0.31 mg/L	See Note 1
Silver	0.304 mg/L	See Note 1
Sulfate	No Additional Limit Adopted	5-13
TDS	No Additional Limit Adopted	5-14
Zinc	0.403 mg/L	See Note 1
Flow	No Limit Adopted	6-1

**Table ES-1. Local Limits Summary**

Parameter	Local Limit	Page
BOD <sub>5</sub>	No Limit Adopted	6-1
TSS	No Limit Adopted	6-1
Ammonia	No Limit Adopted	6-1
pH	5.5–9.0 SU	6-1
Oils and Grease	50 mg/L total O&G	6-2
Temperature	40°C (104°F) at POTW; 60°C (140°F) from SIU	6-2
Flammability	No two consecutive readings at ≥5% LEL, and no reading of ≥10% LEL allowed	6-2

1. See Local Limits Page 2 (Appendix C).

**Notes:**

BOD<sub>5</sub> = 5-day biochemical oxygen demand

lb/d = pounds per day

LEL = lower explosive limit

mg/L = milligrams per liter

POTW = publicly owned treatment works

SIU = significant industrial user

SU = standard units

TDS = total dissolved solids

TSS = total suspended solids



## Staff Report

July 1, 2019 Council Workshop Meeting

### CH2M Consultant Services Amendment

Staff Contact	Phone	Email
Sam Adams	360.817.7003	<a href="mailto:sadams@cityofcamas.us">sadams@cityofcamas.us</a>

INTRODUCTION/PURPOSE/SUMMARY: This is an amendment to the existing professional services agreement with CH2M Engineering for Local Limits Development for the Wastewater Treatment Plant.

BUDGET IMPACT: \$37,165 expenditure from the Water/Sewer Fund. The Water/Sewer budget has sufficient funds to complete this work.

RECOMMENDATION/RECOMMENDED ACTION/ACTION REQUESTED: This item is for Council information only. Staff recommends this item be placed on the July 15, 2019 Consent Agenda for Council's consideration.

# Attachment 1

## Scope of Work

### Amendment 2: Local Limits Development – City of Camas, Washington

The City of Camas has requested CH2M to provide consulting services to the City of Camas (City) to help develop technically-based local limits (TBLL) for industrial users, as required by the City's NPDES Permit for the Camas Wastewater Treatment Plant (WWTP).

The work described herein includes additional scope and budget amended to City of Camas Contract S1003 under Task 5 (data analysis and TBLL calculations); Task 6 (support in responding to regulatory review), and Task 7 (meeting with Ecology to review the proposed TBLLs). This is the second amendment to the originally contracted scope for the Local Limits Development Plan, which was approved separately by the City.

#### Task 5 – Data Analysis and Written Rationale (Tech Memo)

- Correct errors in Ecology's local limits spreadsheet in order to complete calculations and achieve regulatory deadline for submittal of proposed TBLL (20 hours).
- Conduct literature research on fluoride, sulfate, and total dissolved solids and incorporate into the proposed TBLL (80 hours). The majority of this research effort was to develop the TBLL for fluoride, which emerged as a more complex issue than anticipated during the course of sampling and initial data analysis in 2018.

#### Task 6 – Local Limits Adoption Support

- Estimated additional effort up to 18 hours for the first review cycle with Ecology and up to 10 hours for the second review cycle with Ecology.

#### Task 7 – Meetings & Discussions

- Ecology Meeting: One (1) CH2M staff will meet in-person with Ecology's permit writer for the City of Camas, Dave Knight, in Olympia to review TBLL calculations. Assume 18 hours total labor including travel to/from Twin Falls, ID (2 nights stay in Olympia), meeting, preparation, meeting notes, and follow-up communication with Ecology.

#### Task 7 Deliverables

1. Meeting notes for Ecology meeting

#### Cost

CH2M HILL proposes to perform the services described for this amended scope of work (Tasks 5-7) for a not-to-exceed amount of \$37,165 per Table 1 below. The total project fee including the original scope, previous Amendment 1 and this Amendment 2 is \$162,034. Labor will be billing at a 3.2 multiplier on raw salary costs.



**Table 1. Amendment 2 Fee**

<b>Task</b>	<b>Labor Cost</b>	<b>Expenses</b>	<b>Total</b>
Task 1 – Prepare Local Limits Development Plan <i>(already contracted separately, no change)</i>	--	--	--
Task 2 – Communication/Collaboration Plan <i>(already contracted separately, no change)</i>	--	--	--
Task 3 – Data Review <i>(already contracted separately, no change)</i>	--	--	--
Task 4 – Site-Specific Testing <i>(already contracted separately, no change)</i>	--	--	--
Task 5 – Data Analysis and Calculations <i>(Amendment 2 amount only)</i>	\$24,947	--	\$24,947
Task 6 – Local Limits Adoption Support <i>(Amendment 2 amount only)</i>	\$6,796	--	\$6,796
Task 7 – Meetings & Discussions <i>(Amendment 2 amount only)</i>	\$3,922	\$1,500	\$5,422
Task 8 – Project Management <i>(already contracted separately, no change)</i>	--	--	--
<b>Total (Amendment 2)</b>	<b>\$35,665</b>	<b>\$1,500</b>	<b>\$37,165</b>



## Staff Report

July 1, 2019 Council Workshop

### NW Camas Meadows Drive/NW Larkspur Street Improvements Update

Staff Contact	Phone	Email
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**PURPOSE:** NW Larkspur Street has now been paved and construction is nearing substantial completion. Prior to this City capital project receiving Washington State Transportation Improvement Board (TIB) funding, the developer of the Parklands at Camas Meadows Mixed Use Development entered into a development agreement with the City. Since this agreement was executed, the developer has constructed Camas Meadows Drive from NW Payne Street to the north end of the Larkspur Street project.

The execution date of the development agreement was March 28, 2016. As part of this agreement, Section 4.5 states, "All road barricades preventing circulation on NW Larkspur Street shall remain in place pending analysis of traffic and roadway conditions in the vicinity of the (Parklands) Property, and shall only be removed at the sole discretion of the City."

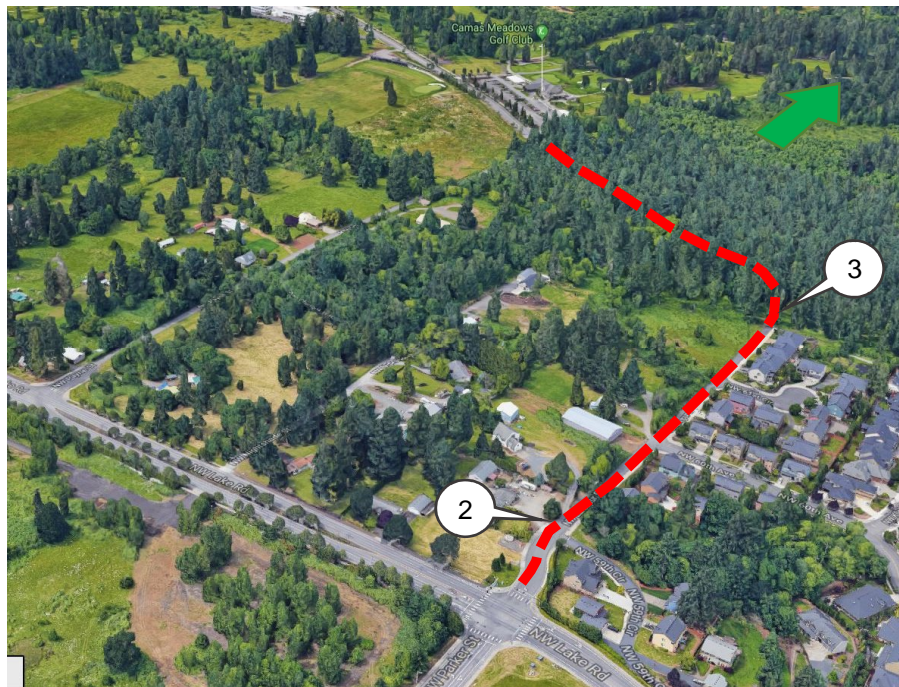


Figure 1: Camas Meadows Drive and Larkspur Street - Before Improvements  
(Note: Figure 2 pictures taken at (2) Figure 3 picture taken at (3).)

As part of the Larkspur project, this traffic analysis was completed and roadway conditions have been addressed in the project design and construction, especially by way of providing traffic calming features and moving portions of the travel lane farther away from the residents on the east side of the roadway.



Figure 2: Larkspur Street Improvements Looking North Toward Camas Meadows Drive



Figure 3: Camas Meadows Drive Looking South at the Larkspur Street Capital Improvements

**RECOMMENDATION:** At this point in time, staff is seeking consensus from Council regarding opening NW Camas Meadows Drive/Larkspur Street to through traffic upon substantial completion of the City's capital project.