ANTENNAS IN THE RIGHTS-OF-WAY: JUST ANOTHER UTILITY ON THE POLE? A GUIDE FOR LAND USE AND LOCAL GOVERNMENT LAWYERS

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ANTENNAS IN THE RIGHTS-OF-WAY: JUST ANOTHER UTILITY ON THE POLE? A GUIDE FOR LAND USE AND LOCAL GOVERNMENT LAWYERS

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In cooperation with the New Jersey State Bar Association **Land Use** and **Local Government Law Sections**

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The Evolution of Wireless Development

Dominic Villecco

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1G

- First generation, or "cellular"
- Late 70s to early 80s – Developed by Bell Labs
- The beginning of cell phones as we know them
- Analog narrowband service (one phone call per one radio channel)
- Primary goal: expanding coverage
- Devices were primarily car phones
- Primary network congestion during daily rush hours
- In-building virtually non-existent

Photo: V-COMM, LLC

Photo: Endurance Warranty

2G

- Second generation
- Late 80s to early 90s
- Digital network
- Calling features mostly the same as 1G
  - 2G added texting
- Devices were smaller, had lower power and transitioned to hand held
- In-building coverage became more of an issue
- Primary goal: providing coverage where none previously existed
  - "Ubiquity"
- Network capacity was not a concern with digitized radio channels supporting 3x the capacity of previous narrowband channels

Photo: Computer Weekly

Photo: Tmo News

3G

- Third generation
- Late 90s to early 2000s
- More data-oriented and promised more new and enhanced features
  - Primary features: email and instant messaging
    - Until Apple release the first iPhone
- Data speeds faster than 2G, but much slower than 4G
- Transitional technology (3G) vs. breakout technology (4G)
- In-building systems more prevalent
  - Large public venues had systems or were implementing them
- Primary goal: continued coverage
  - However, limitations of 3G technology became the limitations of the devices

Photo: GSM Arena

Photo: Business Insider

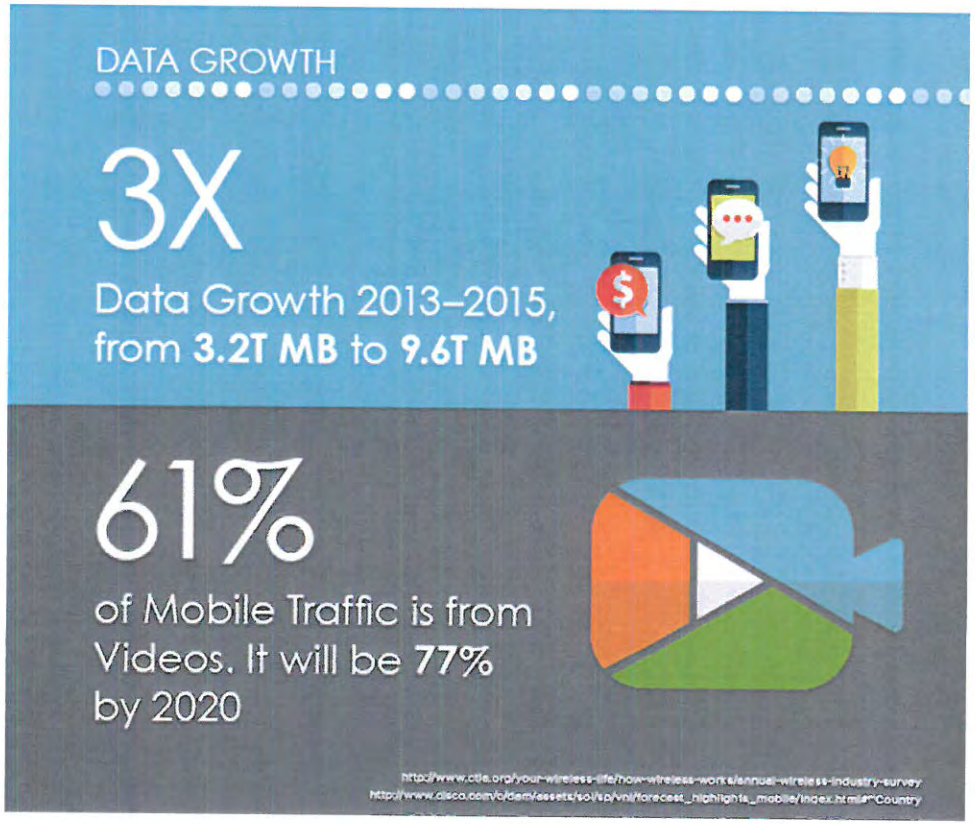
4G

- Fourth generation, or "4G LTE"
- Late 2000s to today
- Delivered true ubiquity
- Primary goal: capacity
  - Coverage is no longer the driving factor for in-building wireless networks
  - Without capacity, the service/connection cannot get through
- In-building networks deployed in 2G and 3G eras have either been upgraded or are in desperate need of one

Photo: PC Mag

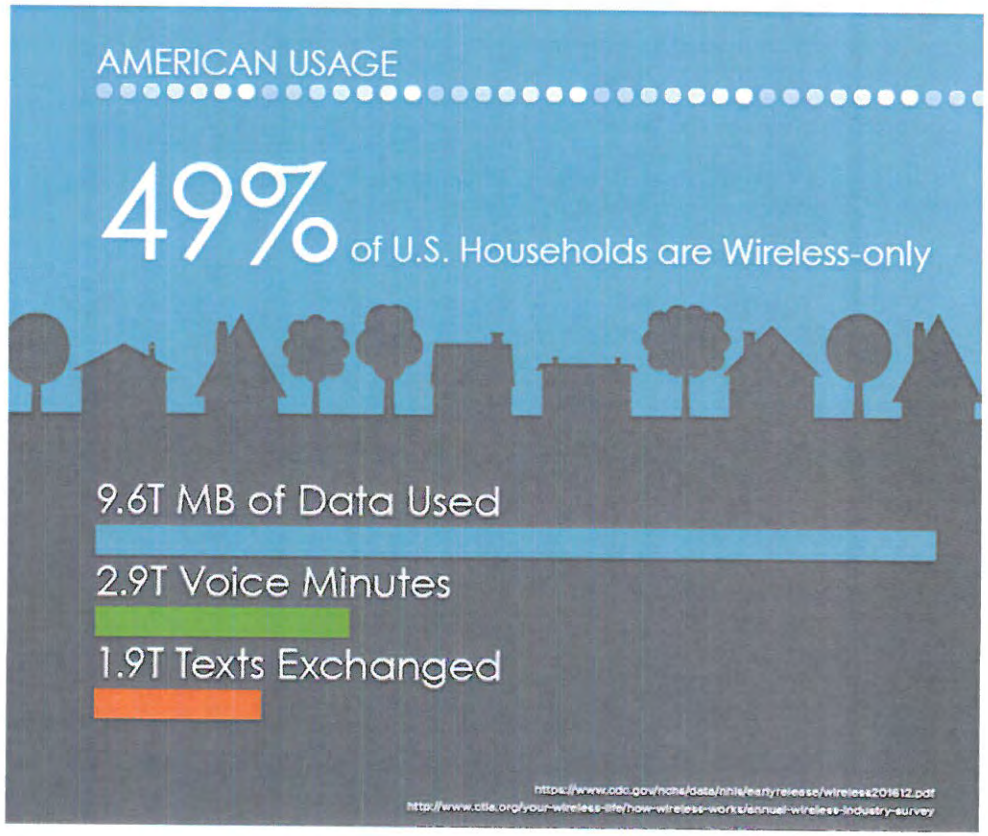
Photo: Samsung

Wireless Data Growth



Source: CTIA

Homes are Wireless Only



Source: CTIA

5G and the Future of Wireless

- Fifth generation
  - Currently in trials around US
  - Commercial offerings likely in the next 2-5 years
- Infrastructure must get closer to the users
  - Due to higher frequency bands – less coverage
  - High frequency bands mean higher bandwidths
  - e.g., the Right of Way
- Broadband service delivery
  - Triple Play (TV/Phone/Internet) like services
  - True landline replacement envisioned

Photo: V-COMM, LLC

IoT: the Future of Wireless

- Internet of Things (IoT)
  - M2M
  - All things connected
- Smart Homes
- Smart Cities
- Smart Cars

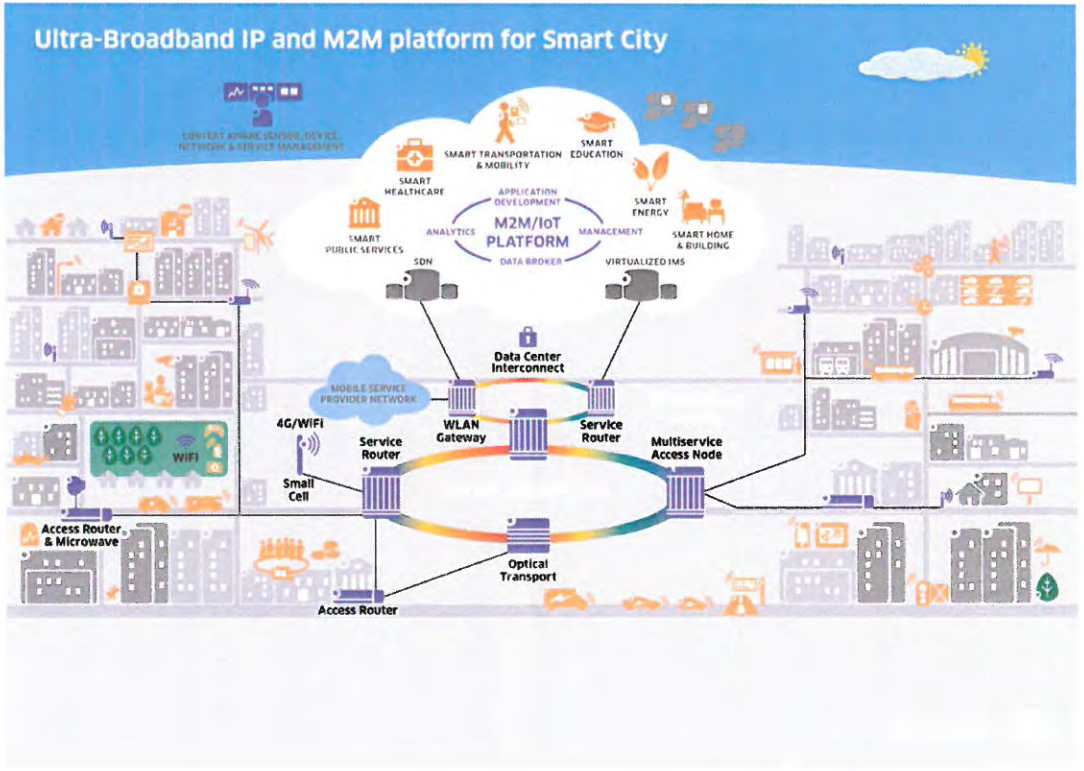


Photo: Nokia

When Everything is Connected

By 2022, there will be 1.5 billion Internet of Things devices with cellular connections, up from 400 million in 2016 worldwide.

Source: Ericsson, Ericsson Mobility Report: On the Pulse of the Networked Society, (November 2016), at https://www.ericsson.com/assets/local/mobility-report/documents/2016/ericsson-mobility-report-november-2016.pdf

Photo: Ericsson

Antennas in the Rights-of-Way

Gregory D. Meese, Esq.

A. Background- Federal Regulation of Telecommunications

1. Communications Act of 1934, 48 Stat. 1064
   a) Preceded by Wireless Ship Act of June 4,1910,36 Stat. 629
   b) Radio Acts of 1912 and 1927,37 Stat. 302;44 Stat. 1162
   c) Federal Communications Commission formed to create "a unified and comprehensive regulatory system for the industry." FCC v. Pottsville Broad. Co., 309 U.S. 134, 137 (1940); Nat'l Broad. Co. v. United States, 319 U.S. 190, 210-13 (1943)
   d) Congress "intended the FCC to possess exclusive authority over technical matters related to radio broadcasting." Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 320 (2nd Cir. 2000)

2. Telecommunications Act of 1996,47 U.S.C. §151et seq.,as amended
   a) Procompetitive and deregulatory
   b) Congress sought "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Rep. No. 104-458, at 113 (1996)
   c) TCA imposed specific limitations on authority of state and local governments to regulate the location, construction, and modification of antenna facilities. Rancho Palos Verdes v. Abrams, 544 U.S. 113,115 (2005)
   d) Section 332(c)(7) - Preservation of local zoning authority
      (1) Preserves the authority of State and local governments over zoning and land use matters
      (2) "The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof:

(i) Shall not unreasonably discriminate among providers of functionally equivalent services; and

(ii) Shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(iii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless services 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.

(iv) 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.

(v) 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 emission.

(vi) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court o competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

e) Case Law

Smart v. Fairlawn, 152 N.J. 309 (1998)

(Telecommunications facility requiring the construction of a new tower not inherently beneficial; for a use variance an FCC license will generally satisfy the requirement that the facility serve the public welfare; an applicant must demonstrate that its chosen site is particularly well suited for the proposed use; as with inherently beneficial uses, a weighing of the positive and negative criteria must show that granting the variance will not result in a substantial detriment to the public good).

(1) AWACS v. Clementon Bd. of Adjust., 160 N.J. 21 (1999) (Expert testimony must be presented in support of use variance)

(2) New Brunswick Cellular Telephone Co. v. Bor. Of South Plainfield Bd. of Adjust., 160 N.J. 1(1999) (To demonstrate that a site is particularly suited for a telecommunications facility, the applicant must show the need for the facility at the location. Need can be based upon lack of capacity. Where a municipality hasn't enacted a telecommunications siting ordinance, the carrier must take the initiative to find a reasonable location.)

(3) Cellular Tel. v. Zoning Bd. of Adjust. of Ho-Ho-Kus,

197 F.3d 64 (3d Cir. 1999) (Determinations regarding quality of service must be based on competent expert testimony and evidence. Local zoning policies and decisions have the effect of prohibiting service if they result in "significant gaps" in the availability of wireless service. The statutory bar against regulatory prohibition is absolute, and does not anticipate any deference to local findings.)

(4) Northeast Towers v. Zoning Bd. of Adjust., 327 N.J. Super. 476 (App. Div. 2000) (Application for tower properly denied where applicant failed to demonstrate need for the tower.)

(5) Ocean County Cellular Tel. d/b/a Comcast Cellular One v. Twp. of Lakewood Bd. of Adjust., 175 N.J. 75 (2002) (Reversal of denial of use variance for a rooftop wireless facility upheld where evidence demonstrated that the site was particularly well-suited and the carrier made a reasonable and good faith effort, without success, to find an available and suitable alternative site. Boards do not have carte blanche to reject an application based on conjecture that a possible alternative site is both suitable and available.)

(6) Sprint Spectrum v. Bor. of Upper Saddle River Bd. of Adjust., 352 N.J. Super. 575 (App. Div. 2002) (Board's denial reversed and matter remanded for order requiring board to approve use variance for 3-carrier monopole on volunteer fire department property. De novo review of record conducted with respect to the claim that board's denial has resulted in the prohibition of wireless services pursuant to § 332C(7)(B)(i)(ll) of the TCA, demonstrated that: (1) a significant gap in coverage existed as the gap was not being serviced by another wireless carrier; (2) the site was the least intrusive means of closing the gap; and (3) any further attempts to secure approvals to construct a facility capability of filling the gap would be a futile.)

(7) Sprint Spectrum v. Zoning Bd. of Adjust., Bor. Of Leonia, 360 N.J. Super. 373 (App. Div. 2003) (Proposed installation of telecommunications antennas and equipment on roof of apartment building satisfied positive criteria for use variance where company was licensed by FCC, there was a gap in service, placement of antennas at the proposed site would fill the gap, and there was no other suitable site in the borough. The negative criteria were satisfied because antenna installation would not have detrimental effects on residential zone.)

(8) New York SMSA LTD d/b/a Bell Atlantic Mobile (now Verizon Wireless}, et al. v. Twp. of Mendham, et al. 366 N.J. Super. 141 (App. Div.), aff'd 181 N.J. 387 (2004) (Claims that Board determinations are not supported by substantial evidence under § 332(c)(7)(B)(iii) are reviewed under the substantial credible evidence standard, whereas claims of effective prohibition under § 332(c)(7)(B)(i)(ll) are reviewed de novo with no deference to factual findings. The two basic questions in evaluating whether a carrier has established a significant gap in coverage are: (1) whether "the cellular provider established that the quality of cellular service is sufficiently poor so as to rise to the level of a 'significant' gap"; and (2) whether the cellular provider established that the purported gap in service affects a significant number of users.)

(9) New York SMSA Limited Partnership v. Bd. of Adjust., Twp. of Weehawken, 370 N.J. Super. 319 (App. Div. 2004) ("No case interpreting and applying New Jersey's MLUL has required a wireless communications carrier to prove the existence of a significant gap in coverage in order to satisfy the positive criteria of N.J.S.A. 40:55D-70(d). Although the existence of a coverage gap, i.e. a need for additional service, has been deemed relevant to an analysis of the positive criteria, [citation omitted] New Jersey courts have not applied the rigorous standard developed by federal courts addressing alleged significant gaps in coverage under the TCA. Thus, the question of a significant coverage gap only arises when the carrier claims that the denial of its application constitutes an effective prohibition of wireless communications services in violation of the TCA, 47 U.S.C.A. § 332(c)(7)(B)(i)(ll).)

(10) Cellular Tel. Wireless v. Bd. of Adjust., Twp. of North Bergen, 2005 WL 1798288 (3d Cir. N.J.) (Nonconforming commercial building in residential zone particularly suitable for wireless communications facility.)

(11) T-Mobile Northeast LLC v. Bor. of Leonia Zoning Board of Adjust., 942 F. Supp. 2d 474 (D.N.J. 2013) (Board's decision to deny application of FCC-licensed wireless provider to collocate antennas on roof of apartment building where another carrier already had antennas violated Section 332(c)(7)(B) of the Telecommunications Act of 1996 because it (1) resulted in unreasonable discrimination against plaintiff; (2) had the effect of prohibiting wireless services; and (3) was not supported by substantial evidence in the record. Court reverses the "one provider rule" based on FCC's interpretation of the TCA. Facility did not have to cover the entire gap.)

(12) Sprint Spectrum L.P. v. Zoning Board of Adjust., Bor. of Paramus, 21 F.Supp.3d 381(2014) (A distributed antenna system, or DAS, "is not a feasible alternative [to a monopole or macro site] because it will not offer comparable wireless service when measured against the coverage that can be provided by the proposed macro facility. A DAS has significant reliability concerns associated with its deployment on utility poles, its small coverage areas per node, and its vulnerability to disruption." "The Carriers do not bear the burden of proving that every potential alternative, no matter how speculative, is unavailable. The proper inquiry for an effective prohibition claim is whether 'a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc.'" The denial of the variance application therefore constituted a prohibition of service in violation of 47 U.S.C. § 332(c)(7)(B)(i)(11) and was not supported by substantial evidence in violation of 47 U.S.C. § 332(c)(7)(B)(iii).)

(13) Sprint Spectrum, L.P. v. Zoning Board of Adjust., Bor. of Paramus,606 Fed. Appx. 669 (3rd Cir. 2015) (A land use board has effectively prohibited the provision of wireless services where a carrier has demonstrated that (1) its facility will fill a significant gap in service, and (2) the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. This requires a showing that a good faith effort has been made to evaluate less intrusive alternatives, which includes considerations of alternative sites, tower designs, and system

designs. Whether a state or local government's regulation violates the effective prohibition provision of the TCA is reviewed de novo, and is not limited to the record compiled by the state or local authority. A monopole is the least intrusive means where DAS was found not to be feasible for the coverage area in question "because it is more susceptible than a monopole to outages due to falling trees, less flexible and therefore less able to cover multiple carriers, and designed to cover a smaller gap than required." The carriers "do not bear the burden of proving that every potential alternative, no matter how speculative, is unavailable. The proper inquiry for an effective prohibition claim is whether a good faith effort has been made to identify and evaluate less intrusive alternatives."

f) "Shot Clock"- In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), 24 FCC Rcd. 13994,13995 (2009).

(1) FCC imposes a 90 day limit to process a collocation application and 150 days to process all other applications.

(2) City of Arlington, Texas v. Federal Communications Commission,133 S.Ct. 1863 (2013)(court upholds rules; applies deference to FCC's interpretation of its statutory authority i.e., its jurisdiction)

(3) Upstate Cellular Network, d/b/a Verizon Wireless v. City of Auburn, N.Y.,5:16-cv-01032-DNH-TWD (N.D.N.Y. June 28, 2017) (A municipality may not avoid or stop the shot clock period by enacting a moratorium.)

(4) New Cingular Wireless PCS, LLC v. Town of Stoddard, N.H., 853 F. Supp. 2d 198, 203-04 (D.N.H. 2012) ("The Shot Clock Ruling contemplates not just that a local government will take some action on an application within the deadline, but that it will

'resolve [the] application' before the deadline." quoting 2009 FCC Order at 38).

g) Eligible Facilities Request,47 U.S.C. §1455(a)- Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act") - "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."

(1) An "eligible facilities request" means 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.

(2) An eligible facilities request must be acted upon within 60 days or it is deemed approved

(3) Substantial Change Defined by FCC in 2014 Infrastructure Order. See, Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order, 29 FCC Red. 12865 (Oct. 17, 2014)(2014 Infrastructure Order), amended by 30 FCC Red. 31(Jan. 5, 2015); 47 C.F.R. §1.40001; Montgomery County v. FCC, 811F.3d 121(4th Cir. 2015)

(A) Towers. For towers (other than towers in the ROW), an increase in the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; or it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater;

(B) Buildings, water tanks, other support structures. For other support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater (measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the TRA); or it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet.

(c) Equipment. For any structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights- of-way and base stations (i.e., other than tower facilities), it involves the installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves the installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure; or entails any excavation or deployment outside the current site.

(d) Existing Stealth Facilities. A substantial change may occur if the installation would "defeat the concealment elements of the eligible support structure" or "it does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is noncompliant only in a manner that would not exceed the thresholds identified" in the Order.

h) New Jersey Collocation Law, N.J.S.A. 40:550-46.2

(1) Site plan approval shall not be required for collocations of wireless communications equipment that meet certain conditions.

(2) The term "collocate" "means to place or install wireless communications equipment on a wireless communications support structure."

(3) The term "wireless communications support structure" is defined in the Collocation Law to "mean[] a structure that is . . . capable of supporting, wireless communications equipment, including a [tower], utility pole or a building." N.J.S.A. 40:55D-46.2b.

(4) The law provides that "[a[n application for development to collocate wireless communications equipment on a wireless communications support structure ... shall not be subject to site plan review provided the application meets the following requirements:

1. The wireless communications support structure shall have been previously granted all necessary approvals by the appropriate approving authority;

2. The proposed collocation shall not increase

(a) the overall height of the wireless communications support structure by more than ten percent of the original height of the wireless communications support structure, (b) the width of the wireless communications support structure or (c) the square footage of the existing equipment compound to an area greater than 2,500 square feet;

3. The proposed collocation complies with the final approval of the wireless communications support structure and all conditions attached thereto and does not create a condition for which variance relief would be required pursuant to [the Municipal Land Use Law) or any other applicable law, rule or regulation."

i) Pole Attachments- 47 U.S.C. § 224. Requires any utility to provide nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it requested by a cable television system or any telecommunications carrier. Access may be denied on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(1) "Congress concluded that '[o)wing to a variety of factors, including environmental or zoning restrictions' and the very significant costs of

erecting a separate pole network or entrenching cable underground, 'there is often no practical alternative [for network deployment] except to utilize available space on existing poles.'" In the Matter of Implementation of Section 224 of the Act. A National Broadband Plan for Our Future, WC Docket No. 07-245; GN Docket No. 09-51, April 7, 2011, citing, S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977) (1977 Senate Report), reprinted in 1978 U.S.C.C.A.N. 109. (2011 Pole Attachment Order, 26 FCC Red 5240)

(2) Congress directed the FCC to "regulate the rates, terms, and conditions of pole attachments to provide that such rates, terms, and conditions are just and reasonable, and … adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.

(3) FCC Order establishes a timeline for both wireline and wireless attachments; requires rejections to requests for attachment to be explained; establishes rates; etc.

(4) Utilities may deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes.

(5) Rates revised. In the Matter of implementation of Section 224 of the Act, A National Broadband Plan for Our Future, Order On Reconsideration, WC Docket No. 07-245; GN Docket No. 09-51, Nov. 24, 2015).

(6) New Jersey a "reverse preemption" state. See N.J.S.A. 48:3-18 (Any person may enter into an agreement to use poles upon such terms and conditions as may be agreed upon); N.J.A.C. 14:3-2.3; N.J.A.C. 14:18-2.9

(7) Limitations on Use of Existing Poles

(a) Electrical code

(b) Utility rules- not where primary power exists

(c) Structural

(d) Space limitations

3. Summary of Important Themes

a) Federal Preemption- The foundation of preemption doctrines is "the Supremacy Clause, U.S. Const., Art. VI,cl. 2, [which] invalidates state laws that 'interfere with, or are contrary to,' federal law." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712, 85 L. Ed. 2d 714, 105 S. Ct. 2371(1985) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211, 6 L. Ed. 23 (1824)).

(1) "Essentially, the TCA represents a congressional judgment that local zoning decisions harmless to the FCC's greater regulatory scheme -- and only those proven to be harmless-- should be allowed to stand." MetroPCS, Inc. v. City & County of San Francisco, 400 F.3d 715,736 (9th Cir. 2005)

(2) Court's deferral to FCC with regard to interpretation of TCA. See, City of Arlington, Texas v. FCC, 133 S.Ct. 1863 (2013)(upholding Shot Clock) and T-Mobile Northeast LLC v. Bor. of Leonia Zoning Board of Adjust., 942 F. Supp. 2d 474 (D.N.J. 2013)(reversal of judicially created "one provider rule" based on FCC interpretation.)

b) Market competition, rather than state and local regulation, should determine which companies provide the telecommunications services demanded by consumers. In re Classic Tel.,Inc.,11 FCC Red 13082, P 25 (F.C.C. 1996)

c) Municipalities may not prohibit the ability of FCC-licensed carriers to provide service and must allow companies to construct facilities necessary to do so

d) Time. Applications must be acted upon timely

e) Anti-discrimination. Applicants with functionally similar equipment may not be discriminated against

f) Health impacts from radio frequency emission preempted

g) Utilities must allow access, subject to availability and safety considerations

B. Section 253: Subsection a's Prohibition and Safe Harbors of Subsections b & c.

47 U.S.C.§253- Removal of Barriers to Entry

(a) In general. No 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.
(b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, 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.
(c) State and local government authority. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

1. Subpart (a) -limitation on both state and municipal action
2. Subpart (b) - limitation only on state authority, unless delegated to municipality
3. Subpart (c) - allows traditional right-of-way management regulation and reasonable compensation (if allowed by the State)
4. Section 253 Case Law. Under Section 253(a), the First, Second, and Tenth Circuits have held that a State or local legal requirement would be subject to preemption if it may have the effect of prohibiting the ability of an entity to provide telecommunications services, while the Eighth and Ninth Circuits have required that "a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."

    a. In the Matter of Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, 11 FCC Red 13082, 1996 FCC LEXIS 5414, 4 Comm. Reg. (P & F) 1062) ("We conclude that

section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality. Such legal requirements undeniably "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," as proscribed by section 253(a). The legislative history confirms this straight forward interpretation of section 253(a). Moreover, this reading of section 253(a) is consistent with the overriding goals of the 1996 Act. As explained in the Local Competition First Report and Order, under the 1996 Act, the opening of the local exchange and exchange access markets to competition "is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets." Section 253's focus on State and local requirements that may prohibit or have the effect of prohibiting any entity from providing any telecommunications services complements the obligations and responsibilities imposed on telecommunications carriers by the 1996 Act that are intended to "remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well." Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals."

b. N.J. Payphone Ass'n v. Town of W. N.Y., 299 F.3d 235 (3'ct Cir. 2002) Subpart (a) expressly preempts any state or local law inconsistent with its prohibition. Exclusive nature of payphone franchise preempted. "[D]esignating a single company as authorized to provide payphones in the public rights of way in a large geographical area which currently is served by multiple companies, and which is capable of accommodating at least 75-100 separate telephones, reduces competition and constitutes a barrier to entry. "[P]ayphones on private property would, for various reasons such as the inconvenience of travelling to such phones or their lack of visibility from the rights of way, be imperfect substitutes for phones actually in the rights of way. The availability of competition from such

locations thus does not save the Ordinance from the prohibitions of Section 253(a)."

With respect to subpart (c), "Congress intended permissible management of the rights of way to be limited to those local statutes or regulations that are nondiscriminatory and competitively neutral."

c. BeiiSouth Telecomms., Inc. v. City of Coral Springs, 42 F. Supp. 2d 1304 (S.D. Fla 1999). Section 253 preempts all state and local regulations that "prohibit or have the effect of prohibiting" the ability to provide telecommunications services (§ 253(a)), unless such regulations fall within either of the statute's two "safe harbor" provisions(§§ 253(b) or (c)).

Section (b) only applies to states, ""unless of course a state specifically delegated the state authority to its local governments."

d. Bell Atlantic-Maryland, Inc. v. Prince George's County,49 F. Supp. 2d 805, 814 (D. Md. 1999). Section (b) is limited to "state" action, unless such authority has been delegated to the municipality by the state. "In the absence of such a delegation, local governments are prohibited by the [TCA] from exercising any regulatory powers over telecommunications companies beyond those listed in section 253(c): "managing the public rights-of-way" and "requiring fair and reasonable compensation" for the "use" thereof."

e. AT&T Communs., Inc. v. City of Dallas, 8 F. Supp. 2d 582, 591(N.D. Tex 1998). "Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications."

f. TCG N.Y., Inc. v. City of White Plains, 125 F. Supp. 2d 81(S.D.N.Y. 2000). Any process for entry that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decision-makers to grant or deny permission to use the public rights-of-way" has "the effect of prohibiting" service. "Any attempt to regulate beyond the circumscribed scope of activities related to public rights-of-way is beyond the scope of P 253(c).

g. TC Sys. v. Town of Colonie, 263 F. Supp. 2d 471 (N.D.N.Y. 2003). Local law that gives the authority to the town to prohibit telecommunications services by a particular provider that have nothing to do with the town's rights-of-way are prohibited. The

prohibition does not need to be absolute. The carrier must only show that the regulations and actions materially inhibit the ability to provide telecommunications services. "Local regulations which seek to regulate a town's rights-of-way are permissible, while local regulations that seek to regulate the prov1s1on of telecommunications services or the telecommunications providers themselves, are impermissible."

h. Global Network Communs., Inc. v. City of New York, 562 F.3d 145 (2"d Cir. 2009). City's denial of franchise upon finding that the company had ties to organized crime and had defrauded property owners upheld as reasonable regulation under Subsection c.

i. N.Y.SMSA Ltd. P'ship v. Town of Clarkstown, 603 F. Supp. 2d 715 (S.D. N.Y. 2009). Legislative preference for technology to be deployed preempted.

j. NextG Networks of N.Y., Inc. v. City of New York, 2004 U.S. Dist. LEXIS 25063 (2004).

k. P.R. Tel. Co. v. Municipality of Guayanilla, 450 F.3d 9 (1't Cir. 2006). Without evidence of the municipality's costs of maintaining the rights of way, the municipality failed to establish that its fee was "fair and reasonable compensation" for purposes of§ 253(c).

I. Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008). "[A] plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."

m. Level 3 Commc'ns, L.L.C. v. City of St. Louis, 477 F.3d 528 (8th Cir. 2007). "[A] plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. We again acknowledge that other courts hold otherwise and suggest that possible prohibition will suffice."

n. Ill. Bell Tel. Co. v. Viii. Of Itasca, 503 F. Supp. 2d 928 (N.D. Ill. 2007). Prohibition on ground mounted equipment by telecom provider, but allowing the same for other utilities, belies legitimate right-of- way management concerns and supports a claim of prohibition not saved by Subsection c.

C. New Jersey State Law- Use of Poles and the Public Rights-of-Way

1. N.J.S.A. 48:3-18- Agreements to Use Poles

"Any person municipal or otherwise, may enter into a written agreement with any other such person owning or using any poles erected under municipal consent in any street, highway or other public place for the use by the former person of the poles upon such terms and conditions as may be agreed upon by the persons."

2. N.J.S.A. 48:3-19- Municipal Consent

"The consent of the municipality shall be obtained for the use by a person of the poles of another person unless each person has a lawful right to maintain poles in such street, highway or other public place."

3. N.J.S.A. 54:30A-124(a)- Fees

"No municipal, regional, or county governmental agency may impose any fees, taxes, levies or assessments in the nature of a local franchise, right of way, or gross receipts fee, tax, levy or assessment against energy companies subject to the provisions of P.L.1940, c.5 (C.54:30A-49 et seq.) prior to January 1, 1998 or telecommunication companies. Nothing in this section shall be construed as a bar to reasonable fees for actual services made by any municipal, regional or county governmental agency. Nothing in this section shall be construed to affect the franchising process or the assessment of franchise fees with respect to the provision of cable television service in accordance with the provisions of P.L.l972,c.186 (C.48:5A-1et seq.).

4. N.J.S.A. 48-17-8- Ground owner consent

"Any telegraph or telephone company organized under the laws of this or any other State, or of the United States may erect, construct and maintain the necessary poles, wires, conduits, and other fixtures for its lines, in, upon, along, over or under any public street, road or highway, upon first obtaining the consent in writing of the owner of the soil to the erection of such poles, and through, across or under any of the waters within this State and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same."

This statute abrogated common law. See, Halsey v. Rapid Transit S.R. Co., 47 N.J. Eq. 380 (1890)(poles placed in street to power street cars permitted over abutting property owner's objection because owner holds naked fee, subject to public easement).

5. N.J.S.A. 48:7-1- Electric company poles; consent

"Any company organized or to be organized pursuant to the laws of this State for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric light, heat or power may use the public highways, streets and alleys in this State for the purpose of erecting poles to sustain the necessary wires and fixtures, upon first obtaining the consent in writing of the owners of the soil. The poles shall be so located as in no way to interfere with the safety or convenience of persons traveling on the highways.

No poles shall be erected in any street of an incorporated city or town without first obtaining from the incorporated city or town a designation of the street in which the same shall be placed and the manner of placing the same. Such use of the public streets shall be subject to such regulations as may be first imposed by the corporate authorities of the city or town."

6. N.J.S.A. 48:7-2- Pipes beneath roadway

"Any such company may lay pipes or conduits and wires therein beneath such public highways, streets and alleys as it may deem necessary. Such pipes or conduits shall be laid at least 2 feet below the surface and shall not unnecessarily interfere with public travel, or damage public or private property. They shall be laid at the greatest practicable distance from the outside of any water or gas pipe, but in no event less than 1foot therefrom, except where it shall be necessary to cross or intersect any such gas or water pipe.

No public streets shall be opened in any municipality for the purpose of laying any such pipes, conduits or wires without the permission of the municipality."

7. N.J.S.A. 48:3-17a- Public utility pole or underground facility; consent

"a. After the effective date of P.L. 1991, c. 366 (C. 48:3-17a), before a public utility places a pole, used for the supplying and distributing of electricity for light, heat or power, or for the furnishing of telegraph, telephone or other telecommunications service, on a public right of way on which the predominant method of lighting is gas lighting, a public utility shall, in addition to any other requirements of law, first acquire the consent of the governing body of the municipality in which the public right of way is located.

b. After the effective date of P.L. 2004, c. 154, before a public utility places, replaces or removes a pole or an underground facility located in a single municipality within a 24-hour period, which pole or underground facility is used for the supplying and distribution of electricity for light, heat or power, or for the furnishing of water service or telephone or other telecommunications service on or below a public right of way in that municipality, the public utility shall, in addition to any other requirements of law, notify an appropriately licensed municipal code official of the municipality at least 24 hours before undertaking any construction or excavation related to the placement, replacement or removal of such pole or underground facility. The provisions of this subsection shall apply only to a municipality where the governing body of that municipality has first adopted an ordinance requiring the notification of a public utility that provides service in that municipality of the application of the provisions of this subsection in the municipality. For the purposes of this section, "underground facility" means one or more underground pipes, cables, wires, lines or other structures used for the supplying and distribution of electricity for light, heat or power or for the providing of water service, or for the furnishing of telephone or other telecommunications service.

c. After completing the placement, replacement or removal of a pole or an underground facility pursuant to this section, the public utility shall remove from such right of way any pole or underground facility no longer in use as well as any other debris

created from such placement, replacement or removal and restore the property including, but not limited to, the installation of a hot patch as needed to restore the property within the right of way to its previous condition as much as possible. As used in this section, "hot patch" means the installation of a mixture of asphalt to restore property within the right of way to its previous condition subsequent to the construction or excavation of a site required for the placement, replacement of a pole or an underground facility pursuant to this section.

d. For the purposes of this section, "pole" means, in addition to its commonly accepted meaning, any wires or cable connected thereto, and any replacements therefor which are similar in construction and use.

e. In the event a public utility does not meet the requirements of subsection c. of this section concerning the removal of debris and the restoring of property including, but not limited to, the installation of a hot patch, within a right of way to its previous condition within 90 days of placement, replacement or removal of a pole or an underground facility, the municipality shall be authorized to impose a fine up to an amount not to exceed $100 each day until the requirements of subsection c. are met, except that if the public utility is unable to complete the installation of a hot patch due to the unavailability of asphalt material during the period of time from November through April, the public utility shall not be required to complete the hot patch installation until 60 days immediately following the end of the November through April period. At least five business days prior to the end of the 90-day period established by this subsection, the municipality shall notify the public utility that the penalties authorized by this subsection shall begin to be assessed against the utility after the end of the 90-day period unless the utility complies with the requirements of subsection c. of this section. Any penalty imposed shall be collected or enforced in a summary manner, without a jury, in any court of competent jurisdiction according to the procedure provided by "The Penalty Enforcement Law of 1999," P.L. 1999, c. 274 (C. 2A:58-10 et seq.). The Superior Court and municipal court shall have jurisdiction to enforce the provisions of this

section. In the case of removal or replacement of a pole or an underground facility utilized by two or more public utilities, the public utility last removing its pipes, cables, wires, lines or other structures shall be liable for the removal and restoration required under subsection c. of this section, unless a written agreement between the public utilities provides otherwise.

f. Under emergency conditions which significantly impact the placement of a pole or underground facility resulting from natural forces or human activities beyond the control of the public utility, or which pose an imminent or existing threat of loss of electrical, water, power, telephone, or other telecommunication service, or which pose an imminent or existing threat to the safety and security of persons or property, or both, or which require immediate action by a public utility to prevent bodily harm or substantial property damage from occurring, the provisions of subsection b. of this section shall not apply when a public utility undertakes any construction or excavation related to the placement, replacement or removal of a pole or an underground facility in response to such an emergency, provided that the public utility undertaking such construction or excavation notifies the appropriately licensed municipal code official of the municipality in which such construction or excavation occurs at the earliest reasonable opportunity and that all reasonable efforts are taken by the public utility to comply with the removal and restoration requirements of subsection c. of this section after responding to the emergency."

8. N.J.S.A. 27:16-6- Municipal Consent to County ROW

"The duty of maintaining and keeping in repair every road so laid out and opened, taken over, or acquired, shall devolve exclusively upon the board of chosen freeholders, and all other duties and all powers respecting such road shall be imposed upon and be vested in it, but when a road is acquired in accordance with section 27:16-5 of this title nothing herein contained shall divest any municipality in which the road or any portion thereof may be, or through which it may extend, of its

authority to light such road, or its power to construct, grade, curb, pave or repair the sidewalks and curbs along it, nor shall this power of the municipalities divest the board of chosen freeholders of its right to construct across or under the sidewalks of the road the necessary culverts or other structures for the proper drainage, protection and maintenance of the road.

The board of chosen freeholders shall not grant an easement, right of way, or use in, under or over, any portion of a county road in a municipality, unless the governing body of the municipality, or the board of public utility commissioners, shall consent thereto. When, in connection with any such grant, the consent of property owners is required by law, it shall be obtained before such grant of any such easement, right of way or use."

9. N.J.S.A. 48:3-11. Granting of consents; "street" defined

Where by law the consent of a municipality is required for the use of any street either above, below or on the surface thereof, such consent shall not be granted except as hereinafter in this article provided. The word "street" as used in this article shall mean and include any street, avenue, park, parkway, highway or other public place.

10. N.J.S.A. 48:3-12. Petition

No such consent shall be granted by a municipality until a petition shall have been filed with the clerk thereof by the person desiring the same. The petition shall specify the period for which the consent is asked, and the uses in detail for which the street is desired, and whether above, below or on the surface thereof.

11. N.J.S.A. 48:3-13. Notice; publication

The petition shall not be considered by the board or body of such municipality authorized to grant consent until public notice shall be given by publication once a week for at least two weeks in one or more newspapers published and circulated in the municipality, or if there be no such newspaper, in a newspaper published in the county in which the municipality is located, to be designated by such board or body, and by posting the notice in five of the most public places in the municipality for at least fourteen days before the meeting of the board or body at which the application shall be considered.

12. N.J.S.A. 48:3-14. Notice; contents

The notice shall specify the name of the person or corporation presenting the petition, the date and hour when the same will be considered by the board or body of such municipality authorized to grant consent, the date of filing the same, the character of the use to which the street is to be put, and the time for which permission or consent is sought.

13. N.J.S.A. 48:3-15. Grant by ordinance; fifty-year limit

Upon the date fixed by the notice, or upon such subsequent date as the hearing of the petition may be adjourned, the board or body of such municipality authorized to grant consent may, by ordinance and not otherwise, grant for a period not exceeding fifty years, the right to use the street petitioned for. The ordinance shall not be acted upon by such board or body at the meeting at which the same is introduced but shall be laid over for not less than fourteen days and not passed until a subsequent regular meeting of the board or body or an adjourned meeting thereof.

14. N.J.S.A. 48:3-16. Acceptance of ordinance granting consent

The consent granted by the ordinance shall not become effective unless an acceptance in writing of the ordinance shall be filed by the person applying for consent with the clerk or other equivalent officer of the board or body of the municipality granting the consent, within thirty days after receiving notice of the passage of the ordinance.

D. May Zoning be Required for Use of ROW? Probably Not.

1. No history of requiring zoning for use of public rights-of-way.
2. The statutory framework involving pole attachments does not implicate the MLUL, rather the Public Utilities provisions of the New Jersey statutes.
3. Statute requires municipal" consent" not zoning approval.
4. The rights-of-way are not owned by the local government in the proprietary sense, but rather held in trust for the public. State v. Township of South Hackensack, 65 N.J. 377, 383, 322 A.2d 818 (1974)." New Jersey Payphone Ass'n v. Town of West N.Y., 130 F. Supp. 2d 631, 638 (D.N.J. 2001), aff’d 299 F.3d 235 (3'd Cir.

2002). The public has an easement for streets, utilities and sidewalks, leaving the landowner only the naked fee in the land. Bechefsky v. City of Newark, 59 N.J. Super. 487, 492, 158 A.2d 214 (App. Div. 1960) (citing Saco v. Hall, 1 N.J. 377, 382, 63 A.2d 887 (1949)). See also, Halsey v. Rapid Transit S. R. Co., 47 N.J. Eq. 380 (1890)("1t is perfectly consistent with the purposes for which streets are acquired that the public authorities should adapt them, in their use, to the improvements and conveniences of the age.")

5. MLUL does not set forth a procedure for consent to use or place equipment in the ROW.

6. MLUL definitions don't apply to developments in the ROW.

   a) The term "development" is defined and limited to "the division of a parcel of land into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation or enlargement of any building or other structure, or of any mining excavation or landfill, and any use or change in the use of any building or other structure, or land or extension of use of land, for which permission may be required pursuant to P.L.1975, c.291 (C.40:550-1 et seq.)." One seeking permission to attach an antenna to a utility pole is not seeking permission pursuant to the provisions of N.J.S.A. 40:550-1, et seq. (i.e., the MLUL), but rather the public utility provisions of N.J.S.A. 48:3-19. Since permission is not required under the MLUL, the attachment of antennas and equipment is not a MLUL "development."

   b) The definition of an "application for development" is limited to a subdivision, site plan, planned development, cluster development, conditional use, zoning variance or direction of the issuance of a permit for a building or structure in the bed of any street or public drainage way."

c) The definition of "Site Plan" is limited to the development of "one or more lots" and the area where the utility poles are located in not within what the MLUL defines as a "lot" but as a "street."

d) "Street" means any street, avenue, boulevard, road, parkway, viaduct, drive or other way (1) which is an existing State, county or municipal roadway, or (2) which is shown upon a plat heretofore approved pursuant to law, or (3) which is approved by official action as provided by this act, or (4) which is shown on a plat duly filed and recorded in the office of the county recording officer prior to the appointment of a planning board and the grant to such board of the power to review plats; and includes the land between the street lines, whether improved or unimproved, and may comprise pavement, shoulders, gutters, curbs, sidewalks, parking areas and other areas within the street lines. N.J.S.A. 40:550-7.

e) May refer to planning board under N.J.S.A. 40:55D-25(b) which allows the planning board to "[p]articipate in the preparation and review of programs or plans required by State of federal law or regulation" and "[p]erform such other advisory duties as are assigned to it by ordinance or resolution of the governing body for the aid and assistance of the governing body or other agencies or officers." N.J.S.A. 40:55D-25(b)(1)&(2), respectively.

f) The public interest is not well served by requiring zoning for equipment that is less intrusive than much of the "stuff' already existing on utility poles for which no zoning approval has ever been required when the result is delayed implementation of SG and other advanced telecommunications services contrary to the intent of the TCA.

E. Permissible ROW Management Conditions

1. Generally must be limited to safety or aesthetics
2. Conditions that may be acceptable (if reasonably implemented)
   a) Requirement to obtain construction permits and observe building codes
   b) Requirement to obtain pole attachment agreement and approvals necessary from the owner and/or operator of the utility poles to be used
   c) Limitation on height of attachment to existing pole
   d) Limitation on equipment width from side of pole
   e) Limitation on size and location of ground-mounted equipment
   f) Requirements for aesthetic design of antenna, conduit and equipment to maintain continuity of streetscape
   g) Requirement for design, size, height and location of new poles to maintain continuity of streetscape
   h) Requirement to submit map showing locations of facilities i) Requirement to pay relocation costs if necessary for street widening or other public works
   j) Coordination of construction scheduling
   k) Requirement for flagmen or safety devices during work
   l) Requirement for indemnity and insurance
   m) Requirement to repair damage to ROW or other property caused by installation or removal
   n) Limitation of duration of consent- NJ Law has 50 year duration
   o) Requirement to pay "reasonable fees for actual services made by any municipal" agency.

F. FCC Activities- Expect New Rules Soon

1. Streamlining Deployment of Small Cell infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling, Public Notice, 31FCC Red 13360, 13368 (WTB 2016)
2. Accelerating Wireless Broadband Deployment by Removing

Barriers to Infrastructure Investment, 82 FR 21761 (WT Docket No. 17-79).

a) In this Notice of Proposed Rulemaking, the FCC reviews options to "remove or reduce regulatory impediments to wireless infrastructure investment and deployment in order to promote the rapid deployment of advanced mobile broadband service to all Americans." Under consideration are:

(1) Measures to expedite local processing of wireless siting applications, including a "deemed granted" remedy in cases of unreasonable delay.

(2) Review of decision on what is a reasonable timeframe for action on a siting application

(3) Reductions in burdens imposed by National Environmental Policy Act (NEPA) and Section 106 of the National Historic Preservation Act.

(4) Modification of the 2014 Infrastructure Order's characterization of the distinction between State and local governments' regulatory rules versus their proprietary roles as "owners" of public resources. "How should the line be drawn in the context of properties such as public rights of way (e.g., highways and city streets), municipally-owned lampposts or water towers, or utility conduits? Should a distinction between regulatory and proprietary be drawn on the basis of whether State or local actions advance those government entities' interests as participants in a particular sphere of economic activity (proprietary), by contrast with their interests in overseeing the use of public resources (regulatory)?"

3. With the Court granting great deference to the FCC's interpretation of the TCA, expect a more active agency.

PSE&G Third Party Infrastructure Attachments in the Right of Way

July 25, 2017

Anthony Suppa, Jr. P.E.

PSE&G
Asset Management & Centralized Services

PSE&G Third Party Attachments

- PSE&G has allowed Wireless Telecommunication Carriers to attach their antennas to our transmission towers and place ground equipment at our sites for approximately 20 years
- The wireless carriers are required to have a Master Agreement in place with PSE&G before they can begin the process of trying to locate a wireless site on one of our towers
- Once a wireless carrier has a Master Agreement in place, they can work with PSE&G on the process of locating a site on one of our towers.
- After a proposed site has been evaluated by both PSE&G and the wireless carrier and all approvals are in place, the site can proceed to construction
- All tower work is done by PSE&G (Contractors) and all ground work is done by the carriers with oversight by PSE&G engineering

PSE&G Third Party Attachments

- Currently there are multiple carriers on PSE&G Electric Transmission Towers with more than 200 contracts in force located throughout our service territory.

PSE&G Third Party Attachment Approval Process for Wireless Antennas on Electric Transmission Towers

1. Receive Customer Request for Attachment
2. Perform Initial Investigation
3. Provide Feedback to Customer (wireless carrier)
4. Gather Pertinent Technical data
5. Perform Technical Site Design Visit
6. Lease Exhibit is Reviewed and Approved
7. Zoning Package is Received for Review and Approval (if required)
8. NJDEP Permit Applications are Received for Review and Approval
9. Structural Analysis is Received for Review and Approval

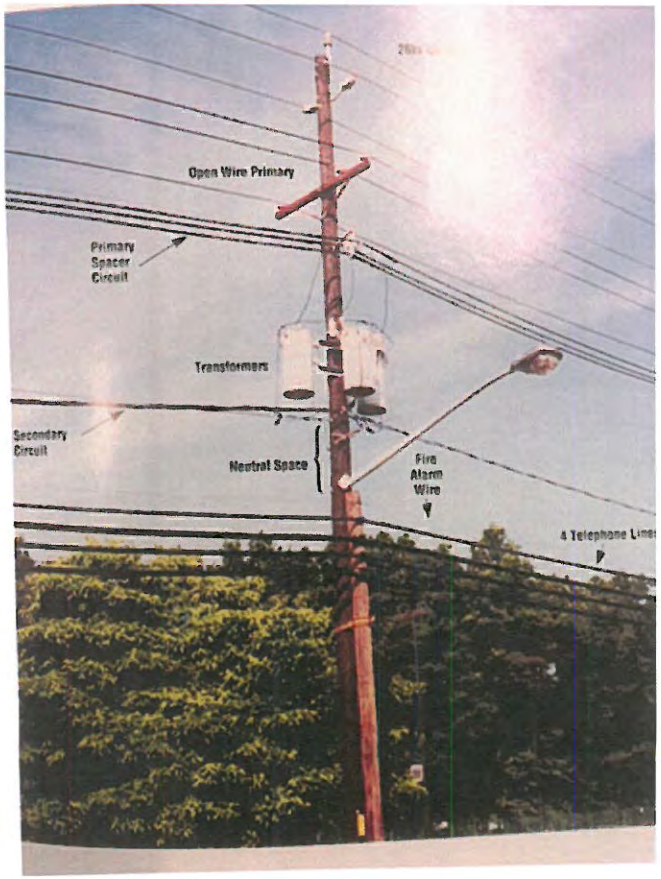
PSE&G Third Party Attachment Approval Process for Wireless Antennas on Electric Transmission Towers

10. Site License Agreement is Prepared and Executed
11. Zoning is Authorized
12. Construction Drawings are Received for Review and Approval
13. Prepare Construction Contract for Tower Work
14. Request Outage (where applicable)
15. Oversee Tower Construction

Third Party Antenna Systems Mounted on PSE&G's Distribution Wood Poles

- 1. Contact PSE&G Asset Management Group that manages the location of wireless attachments on PSE&G wood distribution poles to go through and complete Licensing Process
- 2. Submit Pertinent Technical Information for PSE&G review and Approval
- 3. Submit Application for Individual Sites for PSE&G Review and Approval
- 4. Construction, Installation, Maintenance and Inspection must be performed by PSE&G or a PSE&G pre-approved Contractor trained and Qualified to Work in the PSE&G Power Supply Area of the Distribution Pole.

Third Party Antenna Systems Mounted on PSE&G's Distribution Wood Poles



NATIONAL CENTER FOR HEALTH STATISTICS
National Health Interview Survey Early Release Program

Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2016

Stephen J. Blumberg, Ph.D., and Julian V. Luke
Division of Health Interview Statistics, National Center for Health Statistics

Overview

The second 6 months of 2016 was the first time that a majority of American homes had only wireless telephones. Preliminary results from the July–December 2016 National Health Interview Survey (NHIS) indicate that 50.8% of American homes did not have a landline telephone but did have at least one wireless telephone (also known as cellular telephones, cell phones, or mobile phones)—an increase of 2.5 percentage points since the second 6 months of 2015. More than 70% of all adults aged 25-34 and of adults renting their homes were living in wireless-only households. This report presents the most up-to-date estimates available from the federal government concerning the size and characteristics of this population.

NHIS Early Release Program

This report is published as part of the NHIS Early Release Program. Twice each year, the National Center for Health Statistics (NCHS) releases selected estimates of telephone coverage for the civilian noninstitutionalized U.S. population based on data from NHIS, along with comparable estimates from NHIS for the previous 3 years. The estimates are based on in-person interviews that are conducted throughout the year to collect information on health status, health-related behaviors, and health care access and utilization. The survey also includes information about household telephones and whether anyone in the household has a wireless telephone.

To provide access to the most recent information from NHIS, estimates using the July–December 2016 data are being released prior to final data editing and final weighting. These estimates should be considered preliminary. Estimates produced using the final data files may differ slightly from those presented here.

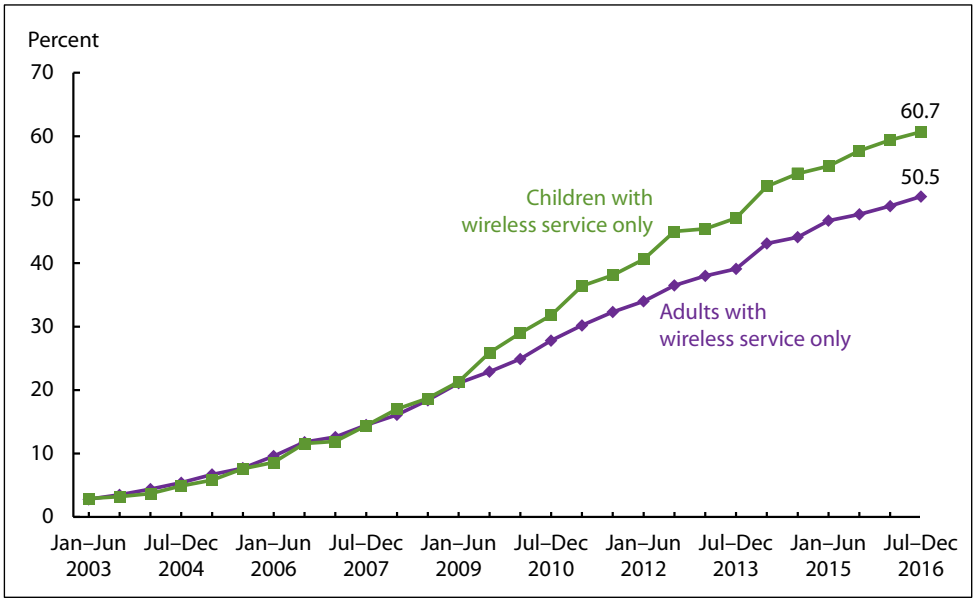
Methods

For many years, NHIS has asked respondents to provide residential telephone numbers, to permit the recontacting of survey participants. Starting in 2003, additional questions were asked to determine whether a family had a landline telephone. An NHIS family was considered to have landline telephone service if the survey respondent for the family reported that there was "at least one phone inside your home that is currently working and is not a cell phone." (To avoid possible confusion with cordless landline telephones, the word "wireless" was not used in the survey.)

An NHIS "family" is an individual or a group of two or more related persons living together in the same housing unit (a "household"). Thus, a family can consist of only one person, and more than one family can live in a household (including, for example, a household where there are multiple single-person families, as when unrelated roommates are living together).

The survey respondent for each family was also asked whether "anyone in your family has a working cellular telephone." Families are identified as "wireless families" if respondents reported that someone in the family had a working cell phone at the time of interview. This person (or persons) could be a civilian adult, a member of the military, or a child.

Figure. Percentages of adults and children living in households with only wireless telephone service: United States, 2003–2016



NOTE: Adults are aged 18 and over; children are under age 18.
DATA SOURCE: NCHS, National Health Interview Survey.

Households are identified as "wireless-only" if they include at least one wireless family and if there are no families with landline telephone service in the household. Persons are identified as wireless-only if they live in a wireless-only household. A similar approach is used to identify adults living in households with no telephone service (neither wireless nor landline). Household telephone status (rather than family telephone status) is used in this report because most telephone surveys do not attempt to distinguish among families when more than one family lives in the same household.

From July through December 2016, information on household telephone status was obtained for 19,956 households that included at least one civilian adult or child. These households included 36,828 civilian adults aged 18 and over, and 11,437 children under age 18. Analyses of telephone status are presented separately for households, adults, and children in **Table 1**.

Analyses of demographic characteristics are based on data from the NHIS Person and Household Files. Demographic data for all civilian adults living in interviewed households were used in these analyses. "Household income" is the sum of the family incomes in the household. Estimates stratified by household poverty status are based on reported income only because imputed income values are not available until a few months after the annual release of NHIS microdata. Household poverty status was unknown for 22.7% of adults in these analyses.

Analyses of selected health measures are based on data from the NHIS Sample Adult File. Health-related data for one randomly selected civilian adult in each family (the "sample adult") were used in these analyses. From July through December 2016, data on household telephone status and selected health measures were collected from 16,522 of these sample adults.

Because NHIS is conducted throughout the year and the sample is designed to yield a nationally representative sample each month, data can be analyzed quarterly. Weights are created for each calendar quarter of the NHIS sample. NHIS data weighting procedures are described in more detail in a previous NCHS report (Parsons et al., 2014).

Point estimates and 95% confidence intervals were calculated using SUDAAN software (RTI International, Research Triangle Park, NC) to account for the complex sample design of NHIS. Differences between percentages were evaluated using two-sided significance tests at the 0.05 level. Terms such as "more likely" and "less likely" indicate a statistically significant difference. Lack of comment regarding the difference between any two estimates does not necessarily mean that the difference was tested and found to be not significant. Because of small sample sizes, estimates based on less than 1 year of data may have large variances, and caution should be used in interpreting such estimates.

A new sample design was implemented with the 2016 NHIS. Sample areas were reselected to take account of changes in the distribution of the U.S. population since 2006, when the previous sample design was first implemented; commercial address lists were used as the main source of addresses, rather than field listing; and the oversampling procedures for black, Hispanic, and Asian persons that were a feature of the previous sample design were not implemented in 2016. Some differences between estimates for 2016 and estimates for earlier years may be attributable to the new sample design.

Telephone Status

In the second 6 months of 2016, more than one-half of all households (50.8%) did not have a landline telephone but did have at least one wireless telephone (**Table 1**). More than 123 million adults (50.5% of all adults) lived in households with only wireless telephones; over 44 million children (60.7% of all children) lived in households with only wireless telephones.

The percentage of households that are wireless-only and the percentages of adults and children living in wireless-only households have been steadily increasing. The observed 2.5-percentage-point increase in the percentage of households that are wireless-only from the second 6 months of 2015 through the second 6 months of 2016 was statistically significant. The 2.8-percentage-point increase for adults and the 3.0-percentage-point increase for children across the same 12-month time period were also significant (**Figure**). However, the increases from the first 6 months of 2016 to the second 6 months of 2016 were not statistically significant for adults ($p = 0.11$) or children ($p = 0.36$).

Approximately 3.2% of households had no telephone service (neither wireless nor landline) in the second 6 months of 2016. About 7.4 million adults (3.0%) and 2.3 million children (3.1%) lived in these households. The percentage of adults living without any telephone service has increased slightly but significantly over the past 3 years (**Table 1**). The corresponding percentage of children has not changed significantly ($p = .16$).

Demographic Differences

The percentage of U.S. civilian noninstitutionalized adults living in wireless-only households is shown, by selected demographic characteristics and survey time period, in **Table 2**. For July–December 2016:

- More than seven in ten adults aged 25–29 (72.7%) and aged 30-34 (71.0%) lived in households with only wireless telephones. These rates are greater than the rate for those 18–24 (61.7%). The percentage of adults living with only wireless telephones decreased as age increased beyond 35 years: 62.5% for those 35–44; 45.2% for those 45–64; and 23.5% for those 65 and over.
- More than four in five adults living only with unrelated adult roommates (83.7%) were in households with only wireless telephones. This rate is higher than the rates for adults living alone (54.7%), adults living only with spouses or other adult family members (42.7%), and adults living with children (58.1%).
- More than seven in ten adults living in rented homes (71.5%) had only wireless telephones. This rate is significantly higher than the rate for

adults living in homes owned by a household member (40.9%).

- Adults living in poverty (66.3%) and near poverty (59.0%) were more likely than higher income adults (48.5%) to be living in households with only wireless telephones. (Footnote 3 in **Table 2** gives definitions of these categories.)
- Hispanic adults (64.8%) were more likely than non-Hispanic white (46.6%), non-Hispanic black (52.1%), or non-Hispanic Asian (47.4%) adults to be living in households with only wireless telephones.

Geographic differences were also noted. Adults living in the Midwest (53.0%), South (55.5%), and West (53.4%) were more likely than those living in the Northeast (34.2%) to be living in households with only wireless telephones. Adults living in metropolitan areas (53.0%) were more likely than those living in nonmetropolitan areas (47.0%) to be living in wireless-only households.

Demographic Distributions

The demographic differences noted in the previous section are based on the distribution of household telephone status within each demographic group. When examining the population of wireless-only adults, some readers may instead wish to consider the distribution of various demographic characteristics within the wireless-only adult population.

Table 3 gives the percent distributions of selected demographic characteristics for adults living in households with only wireless telephones, by survey time period. The estimates in this table reveal that the distributions of selected demographic characteristics changed little over the 3-year period shown. The exceptions were related to age and home ownership status.

- The proportion of wireless-only adults who were aged 45 and over has increased steadily, from 34.2% in the second 6 months of 2013 to 39.7% in the second 6 months of 2016.
- The proportion of wireless-only adults living in homes owned by a household member increased from 48.5% in the second 6 months of 2013 to 54.4% in the second 6 months of 2016.

Selected Health Measures by Household Telephone Status

Many health surveys, political polls, and other types of research are conducted using random-digit-dial (RDD) telephone surveys. Despite operational challenges, most major survey research organizations include wireless telephone numbers when conducting RDD surveys. If they did not, the exclusion of households with only wireless telephones (along with the small proportion of households that have no telephone service) could bias results. This bias—known as coverage bias—could exist if there are differences between persons with and without landline telephones for the substantive variables of interest.

The NHIS Early Release Program updates and releases estimates for 15 key health indicators every 3 months. **Table 4** presents estimates by household telephone status (landline, wireless-only, or phoneless) for all but two of these measures. ("Pneumococcal vaccination" and "personal care needs" were not included because these indicators are limited to older adults aged 65 and over.) For July–December 2016:

- Regarding alcohol consumption, the percentage of adults who had at least one heavy drinking day in the past year was substantially higher among wireless-only adults (29.8%) than among adults living in landline households (18.8%). Wireless-only adults were also more likely to be current smokers.
- Compared with adults living in landline households, wireless-only adults were more likely to have their health status described as excellent or very good, more likely to have met the 2008 federal physical activity guidelines for aerobic activity (based on leisure-time activity), and less likely to have ever been diagnosed with diabetes.
- The percentage without health insurance coverage at the time of interview among wireless-only adults under age 65 (13.6%) was greater than the percentage among adults in that age group living in landline households (7.7%).
- Compared with adults living in landline households, wireless-only adults were more likely to have experienced financial barriers to obtaining needed health care, and they were less likely to have a usual place to go for medical care. Wireless-only adults were also less likely to have received an influenza vaccination during the previous year
- Wireless-only adults (46.1%) were more likely than adults living in landline households (36.9%) to have ever been tested for human immunodeficiency virus (HIV), the virus that causes AIDS.

The potential for bias due to undercoverage remains a real threat to health surveys that do not include sufficient representation of households with only wireless telephones.

Wireless-mostly Households

The potential for bias due to undercoverage is not the only threat to surveys conducted only on landline telephones. Researchers are also concerned that some people living in households with landlines cannot be reached on those landlines because they rely on wireless telephones for all or almost all of their calls.

In 2007, a question was added to NHIS for persons living in families with both landline and cellular telephones. The respondent for the family was asked to consider all of the telephone calls his or her family receives and to report whether "all or almost all calls are received on cell phones, some are received on cell phones and some on regular phones, or very few or none are received on cell phones." This question permits the identification of persons living in "wireless-mostly"

households—defined as households with both landline and cellular telephones in which all families receive all or almost all calls on cell phones.

Among households with both landline and wireless telephones, 38.0% received all or almost all calls on wireless telephones, based on data for July–December 2016. These wireless-mostly households make up 15.0% of all households. During the second 6 months of 2016, about 41 million adults (16.7%) lived in wireless-mostly households.

Table 5 gives the percentage of adults living in wireless-mostly households, by demographic characteristics and survey time period. For July–December 2016:

- Adults with college degrees (19.6%) were more likely to be living in wireless-mostly households than were high school graduates (14.8%) or adults with less education (12.2%).
- Adults living with children (19.4%) were more likely than adults living alone (9.9%) to be living in wireless-mostly households.
- Adults living in poverty (10.0%) and adults living near poverty (11.1%) were less likely than higher-income adults (18.9%) to be living in wireless-mostly households.
- Adults living in rented homes (10.5%) were less likely to be living in wireless-mostly households than were adults living in homes owned by a household member (19.7%).

NHIS data cannot be used to estimate the proportion of wireless-mostly adults who are unreachable or to estimate the potential for bias due to their exclusion from landline surveys.

State Estimates

The potential for bias may differ from one state to another because the prevalence of wireless-only households varies substantially across states. For more information about prevalence estimates at the state level, see

- NCHS. Modeled estimates (with standard errors) of the percent distribution of household telephone status for adults aged 18 and over, by state: United States, 2015. August 2016. Available from: http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless_state_201608.pdf.
- Blumberg SJ, Ganesh N, Luke JV, Gonzales G. Wireless substitution: State-level estimates from the National Health Interview Survey, 2012. National health statistics reports; no 70. Hyattsville, MD: National Center for Health Statistics. 2013. Available from: http://www.cdc.gov/nchs/data/nhsr/nhsr070.pdf.

Other NHIS Early Release Program Products

Two additional reports are published regularly as part of the NHIS Early Release Program. *Early Release of Selected Estimates Based on Data From the National Health Interview Survey* is published quarterly and provides estimates for 15 selected measures of health. *Health Insurance Coverage: Early Release of Estimates From the National Health Interview Survey* is also published quarterly and provides additional estimates regarding health insurance coverage. Other Early Release Program products are released as needed.

In addition to these reports, preliminary microdata files containing selected NHIS variables are produced as part of the ER Program. Beginning in May 2016, the telephone service use variables presented in this report have been included in those microdata files. These variables are made available twice each year, in November or December for data from the first 6 months of the calendar year and in May or June for data from the second 6 months of the calendar year. NHIS data users can analyze these files through the NCHS Research Data Centers (http://www.cdc.gov/rdc/) without having to wait for the final annual NHIS microdata files to be released.

For more information about NHIS and the NHIS Early Release Program, or to find other Early Release Program products, see

- NHIS home page at http://www.cdc.gov/nchs/nhis.htm.
- Early Release Program home page at http://www.cdc.gov/nchs/nhis/releases.htm.
- Parsons VL, Moriarity CL, Jonas K, et al. Design and estimation for the National Health Interview Survey: 2006–2015. National Center for Health Statistics. Vital Health Stat 2(165). 2014. Available from: http://www.cdc.gov/nchs/data/series/sr_02/sr02_165.pdf.

Suggested Citation

Blumberg SJ, Luke JV. Wireless substitution: Early release of estimates from the National Health Interview Survey, July–December 2016. National Center for Health Statistics. May 2017. Available from: http://www.cdc.gov/nchs/nhis.htm.

Table 1. Percent distribution of household telephone status for households, adults, and children, by date of interview: United States, July 2013–December 2016

Date of interview	Number of households (unweighted)	Landline with wireless	Landline without wireless	Landline with unknown wireless	Nonlandline with unknown wireless	Wireless-only	Phoneless	Total
Households								
July–December 2013	21,512	47.7	8.6	0.1	0.1	41.0	2.5	100.0
January–June 2014	22,438	44.7	8.5	0.1	0.0	44.0	2.6	100.0
July–December 2014	22,023	42.7	8.4	0.2	0.1	45.4	3.2	100.0
January–June 2015	21,517	41.6	7.6	0.1	0.0	47.4	3.4	100.0
July–December 2015	19,959	41.2	7.2	0.1	0.0	48.3	3.1	100.0
January–June 2016	20,206	40.2	7.2	0.1	0.0	49.3	3.1	100.0
July–December 2016	19,956	39.4	6.5	0.0	0.0	50.8	3.2	100.0
95% confidence interval[1]	…	38.44-40.34	6.09-7.03	0.02-0.08	0.02-0.09	49.76-51.76	2.92-3.56	…
Adults								
July–December 2013	40,173	51.5	7.0	0.1	0.1	39.1	2.2	100.0
January–June 2014	42,262	47.3	7.0	0.1	0.1	43.1	2.4	100.0
July–December 2014	41,160	45.8	7.1	0.1	0.1	44.1	2.9	100.0
January–June 2015	40,489	43.9	6.2	0.1	0.0	46.7	3.1	100.0
July–December 2015	37,332	43.7	5.8	0.1	0.0	47.7	2.7	100.0
January–June 2016	36,885	42.1	5.8	0.1	0.0	49.0	2.9	100.0
July–December 2016	36,828	41.0	5.4	0.0	0.0	50.5	3.0	100.0
95% confidence interval[1]	…	39.92-42.16	4.96-5.79	0.02-0.08	0.02-0.11	49.27-51.72	2.72-3.35	…
Children								
July–December 2013	13,714	46.4	3.8	0.1	0.0	47.1	2.5	100.0
January–June 2014	14,349	41.7	3.5	–	0.0	52.1	2.7	100.0
July–December 2014	13,754	39.1	3.3	0.1	0.0	54.1	3.4	100.0
January–June 2015	13,493	38.3	3.0	0.1	0.0	55.3	3.2	100.0
July–December 2015	12,197	36.2	2.8	0.1	0.0	57.7	3.1	100.0
January–June 2016	11,552	34.6	2.5	0.1	0.0	59.4	3.4	100.0
July–December 2016	11,437	33.5	2.6	0.0	0.1	60.7	3.1	100.0
95% confidence interval[1]	…	31.72-35.29	2.11-3.14	0.00-0.16	0.04-0.32	58.70-62.64	2.61-3.73	…

0.0 Quantity more than zero but less than 0.05.

… Category not applicable.

– Quantity zero.

[1]Refers to July–December 2016.

NOTE: Data are based on household interviews of a sample of the civilian noninstitutionalized population.

DATA SOURCE: NCHS, National Health Interview Survey, July 2013–December 2016.

Table 2. Percentage of adults living in wireless-only households, by selected demographic characteristics and calendar half-years: United States, July 2013–December 2016

Demographic characteristic	July–December 2013	January–June 2014	July–December 2014	January–June 2015	July–December 2015	January–June 2016	July–December 2016	95% confidence interval[1]
Race/ethnicity								
Hispanic or Latino, any race(s)	53.1	56.1	58.6	59.2	60.5	63.7	64.8	61.94–67.47
Non-Hispanic white, single race	35.1	39.6	40.3	43.2	44.0	45.0	46.6	45.32–47.89
Non-Hispanic black, single race	42.7	44.9	45.7	48.1	48.5	49.2	52.1	49.23–54.98
Non-Hispanic Asian, single race	38.1	41.3	42.3	47.9	48.4	51.4	47.4	42.18–52.61
Non-Hispanic other, single race	51.7	52.4	54.8	51.8	56.5	57.5	57.9	50.25–65.12
Non-Hispanic multiple race	45.7	52.5	53.3	53.6	60.2	53.9	62.2	56.97–67.24
Age (years)								
18–24	53.0	57.8	58.0	59.4	61.1	62.7	61.7	59.23–64.03
25–29	65.7	69.3	69.2	71.3	72.6	72.1	72.7	71.01–74.37
30–34	59.7	64.9	67.4	67.8	69.0	69.8	71.0	68.79–73.14
35–44	47.8	52.5	53.7	56.6	58.2	60.0	62.5	60.38–64.60
45–64	31.4	35.7	36.8	40.8	41.2	43.3	45.2	43.88–46.57
65 and over	13.6	15.7	17.1	19.3	20.5	21.1	23.5	22.19–24.86
Sex								
Male	40.4	44.3	45.7	48.2	49.3	50.3	51.6	50.30–52.93
Female	37.9	41.9	42.6	45.3	46.1	47.8	49.4	48.24–50.66
Education								
Some high school or less	41.8	46.6	46.5	49.0	51.1	52.1	55.2	52.86–57.54
High school graduate or GED[2]	38.8	43.3	44.2	46.7	47.2	48.4	50.2	48.60–51.89
Some post-high school, no degree	41.7	45.6	47.1	49.0	49.7	50.8	52.4	51.05–53.74
4-year college degree or higher	35.5	39.0	40.3	43.5	44.8	46.5	47.1	45.08–49.05
Employment status last week								
Working at a job or business	44.4	48.9	49.9	52.7	53.7	55.6	56.4	55.03–57.67
Keeping house	40.5	47.6	47.2	49.3	50.7	53.0	54.9	51.47–58.34
Going to school	46.3	49.7	53.8	49.6	53.2	53.4	58.9	54.95–62.75
Something else (incl. unemployed)	27.0	29.1	29.7	32.7	33.4	33.5	35.7	34.37–37.09
Household structure								
Adult living alone	46.6	48.3	49.5	51.1	52.1	53.3	54.7	53.47–55.88
Unrelated adults, no children	76.1	73.9	81.3	84.6	78.8	79.1	83.7	77.80–88.29
Related adults, no children	31.0	35.3	35.8	39.1	39.7	40.7	42.7	41.24–44.18
Adult(s) with children	44.8	49.8	50.8	53.3	55.2	57.0	58.1	55.99–60.11
Household poverty status[3]								
Poor	56.2	59.1	59.4	59.3	64.3	63.1	66.3	63.44–69.02
Near-poor	46.1	50.8	51.1	54.4	54.0	54.0	59.0	56.40–61.57
Not-poor	36.6	40.8	42.5	45.7	45.7	48.2	48.5	46.87–50.15

See footnotes at end of table.

Table 2. Percentage of adults living in wireless-only households, by selected demographic characteristics and calendar half-years: United States, July 2013–December 2016—*Continued*

Demographic characteristic	July–December 2013	January–June 2014	July–December 2014	January–June 2015	July–December 2015	January–June 2016	July–December 2016	95% confidence interval[1]
Geographic region[4]								
Northeast	24.9	27.8	29.5	31.6	31.4	32.4	34.2	31.15–37.33
Midwest	43.7	46.9	48.0	51.9	51.4	51.7	53.0	50.98–54.99
South	41.9	47.3	47.0	50.2	51.3	52.3	55.4	53.45–57.40
West	41.2	43.8	46.9	47.1	51.2	54.4	53.4	50.94–55.82
Metropolitan statistical area status								
Metropolitan	40.5	43.9	45.7	47.8	48.4	51.6	53.0	51.67–54.36
Not metropolitan	33.7	39.8	37.6	42.3	43.1	46.3	47.0	44.38–49.57
Home ownership status[5]								
Owned or being bought	28.5	32.9	33.1	37.2	37.3	39.0	40.9	39.54–42.21
Renting	61.7	64.6	66.2	67.0	68.8	69.7	71.5	70.02–72.87
Other arrangement	49.3	52.2	49.2	52.8	58.0	52.0	53.9	47.71–60.03
Number of wireless-only adults in survey sample (unweighted)	16,436	18,380	18,740	18,921	17,974	17,896	18,387	…

… Category not applicable.

[1]Refers to July–December 2016.

[2]GED is General Educational Development high school equivalency diploma.

[3]Based on household income and household size using the U.S. Census Bureau's poverty thresholds. "Poor" persons are defined as those below the poverty threshold. "Near-poor" persons have incomes of 100% to less than 200% of the poverty threshold. "Not-poor" persons have incomes of 200% of the poverty threshold or greater. Early Release estimates stratified by poverty status are based on reported income only and may differ from similar estimates produced later that are based on both reported and imputed income. NCHS imputes income when income is unknown, but the imputed income file is not available until a few months after the annual release of National Health Interview Survey microdata. For households with multiple families, household income and household size were calculated as the sum of the multiple measures of family income and family size.

[4]In the geographic classification of the U.S. population, states are grouped into the following four regions used by the U.S. Census Bureau: *Northeast* includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont; *Midwest* includes Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin; *South* includes Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia; and *West* includes Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

[5]For households with multiple families, home ownership status was determined by considering the reported home ownership status for each family. If any family reported owning the home, then the household-level variable was classified as "Owned or being bought" for all persons living in the household. If one family reported renting the home and another family reported "other arrangement," then the household-level variable was classified as "Other arrangement" for all persons living in the household.

NOTE: Data are based on household interviews of a sample of the civilian noninstitutionalized population.

DATA SOURCE: CDC/NCHS, National Health Interview Survey, July 2013–December 2016.

Table 3. Percent distributions of selected demographic characteristics for adults living in wireless-only households, by date of interview: United States, July 2013–December 2016

Demographic characteristic	July–December 2013	January–June 2014	July–December 2014	January–June 2015	July–December 2015	January–June 2016	July–December 2016	95% confidence interval[1]
Race/ethnicity								
Hispanic or Latino, any race(s)	20.5	19.8	20.3	19.6	19.9	20.5	20.3	18.32–22.48
Non-Hispanic white, single race	59.2	60.4	60.0	60.2	59.7	59.1	59.3	56.77–61.76
Non-Hispanic black, single race	12.6	12.1	12.1	12.1	12.0	11.7	12.2	10.96–13.57
Non-Hispanic Asian, single race	5.2	5.2	5.3	5.8	5.8	6.1	5.5	4.44–6.72
Non-Hispanic other, single race	1.0	0.9	0.7	0.8	1.0	0.9	0.9	0.73–1.11
Non-Hispanic multiple race	1.4	1.6	1.5	1.5	1.7	1.8	1.8	1.59–2.06
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	…
Age (years)								
18–24	17.4	17.1	16.6	16.0	16.0	15.8	14.9	14.20–15.59
25–29	14.8	14.1	13.9	13.6	13.6	13.3	13.0	12.40–13.53
30–34	13.3	13.1	13.2	12.6	12.6	12.4	12.3	11.73–12.90
35–44	20.4	20.3	20.1	19.9	20.0	19.9	20.2	19.39–21.03
45–64	27.8	28.6	28.8	30.0	29.6	30.2	30.5	29.62–31.39
65 and over	6.4	6.8	7.3	7.9	8.3	8.4	9.2	8.68–9.69
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	…
Sex								
Male	49.7	49.6	49.9	49.8	49.9	49.5	49.3	48.81–49.78
Female	50.3	50.4	50.1	50.2	50.1	50.5	50.7	50.22–51.19
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	…
Education								
Some high school or less	14.5	14.7	13.9	13.5	13.6	14.2	12.9	12.11–13.70
High school graduate or GED[2]	26.9	27.2	26.9	26.0	25.8	26.3	25.8	24.72–26.97
Some post-high school, no degree	32.4	32.2	31.9	32.0	31.7	30.9	32.3	31.29–33.26
4-year college degree or higher	26.2	25.9	27.3	28.5	28.9	28.7	29.0	27.87–30.20
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	…
Employment status last week								
Working at a job or business	70.1	69.3	70.1	69.7	69.7	70.3	69.9	69.01–70.80
Keeping house	5.7	6.4	6.0	6.0	5.9	5.8	5.7	5.23–6.29
Going to school	3.6	4.1	4.0	3.6	3.7	3.4	3.6	3.26–3.96
Something else (incl. unemployed)	19.8	19.5	19.1	19.8	20.0	19.7	20.1	19.36–20.84
Unknown, not reported	0.8	0.9	0.9	0.8	0.7	0.8	0.7	0.41–1.04
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	…
Household structure								
Adult living alone	18.6	17.0	17.5	16.4	17.4	17.0	16.2	15.58–16.88
Unrelated adults, no children	2.9	2.5	2.9	2.4	2.6	1.9	1.8	1.48–2.27
Related adults, no children	36.9	38.8	37.9	39.6	39.6	39.3	40.4	39.16–41.72
Adult(s) with children	41.6	41.8	41.6	41.6	40.4	41.8	41.5	40.16–42.88
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	…

Table 3. Percent distributions of selected demographic characteristics for adults living in wireless-only households, by date of interview: United States, July 2013–December 2016—*Continued*

Demographic characteristic	July–December 2013	January–June 2014	July–December 2014	January–June 2015	July–December 2015	January–June 2016	July–December 2016	95% confidence interval[1]
Household poverty status[3]								
Poor	14.1	13.0	13.6	10.9	12.1	10.9	10.8	9.97–11.71
Near-poor	16.6	16.7	15.9	15.5	15.6	14.9	15.4	14.48–16.39
Not-poor	47.8	49.4	49.3	53.1	50.8	53.8	53.7	52.35–55.13
Unknown, not reported	21.5	20.8	21.3	20.5	21.5	20.4	20.0	18.78–21.33
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	…
Geographic region[4]								
Northeast	11.3	11.1	12.0	11.5	12.1	12.1	12.5	11.00–14.15
Midwest	25.1	25.0	24.3	25.0	23.2	23.3	22.7	20.37–25.24
South	39.9	41.1	39.9	39.9	40.5	38.5	39.6	34.66–44.81
West	23.8	22.9	23.8	23.5	24.2	26.2	25.2	20.67–30.29
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	…
Metropolitan statistical area status								
Metropolitan	82.6	81.6	83.1	82.3	87.8	83.8	84.1	81.51–86.38
Not metropolitan	17.4	18.4	16.9	17.7	12.2	16.2	15.9	13.62–18.49
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	…
Home ownership status[5]								
Owned or being bought	48.5	51.1	49.5	53.8	51.6	52.9	54.4	53.03–55.83
Renting	49.1	46.4	48.4	44.2	45.8	45.1	43.4	41.88–44.84
Other arrangement	2.4	2.6	2.1	2.0	2.6	2.0	2.2	1.87–2.61
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	…
Number of wireless-only adults in survey sample (unweighted)	16,436	18,380	18,740	18,921	17,974	17,896	18,387	…

… Category not applicable.

[1]Refers to July–December 2016.

[2]GED is General Educational Development high school equivalency diploma.

[3]Based on household income and household size using the U.S. Census Bureau's poverty thresholds. "Poor" persons are defined as those below the poverty threshold. "Near-poor" persons have incomes of 100% to less than 200% of the poverty threshold. "Not-poor" persons have incomes of 200% of the poverty threshold or greater. Early Release estimates stratified by poverty status are based on reported income only and may differ from similar estimates produced later that are based on both reported and imputed income. NCHS imputes income when income is unknown, but the imputed income file is not available until a few months after the annual release of National Health Interview Survey microdata. For households with multiple families, household income and household size were calculated as the sum of the multiple measures of family income and family size.

[4]In the geographic classification of the U.S. population, states are grouped into the following four regions used by the U.S. Census Bureau: *Northeast* includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont; *Midwest* includes Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin; *South* includes Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia; and *West* includes Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

[5]For households with multiple families, home ownership status was determined by considering the reported home ownership status for each family. If any family reported owning the home, then the household-level variable was classified as "Owned or being bought" for all persons living in the household. If one family reported renting the home and another family reported "other arrangement," then the household-level variable was classified as "Other arrangement" for all persons living in the household.

NOTE: Data are based on household interviews of a sample of the civilian noninstitutionalized population.

DATA SOURCE: CDC/NCHS, National Health Interview Survey, July 2013–December 2016.

Table 4. Prevalence rates (and 95% confidence intervals) for selected measures of health-related behaviors, health status, health care service use, and health care access for adults aged 18 and over, by household telephone status: United States, July–December 2016

Measure	Landline[1]	Wireless-only	Phoneless
Health-related behaviors			
At least one heavy drinking day in past year[2]	18.8 (17.58-20.06)	29.8 (28.29-31.32)	24.5 (20.06-29.63)
Current smoker[3]	12.1 (11.08-13.16)	18.4 (17.09-19.79)	19.3 (15.05-24.52)
Met the 2008 federal physical activity guidelines for aerobic activity through leisure-time aerobic activity[4]	36.9 (35.52-38.35)	41.5 (39.99-43.01)	35.7 (31.04-40.66)
Health status			
Health status described as excellent or very good[5]	59.8 (58.54-60.99)	62.9 (61.37-64.42)	56.6 (50.66-62.43)
Experienced serious psychological distress in past 30 days[6]	2.4 (2.02-2.88)	4.6 (4.01-5.22)	3.2 (1.78-5.65)
Obese (adults aged 20 and over)[7]	30.7 (29.29-32.13)	30.1 (28.82-31.38)	25.6 (21.26-30.52)
Asthma episode in past year[8]	3.9 (3.36-4.49)	4.1 (3.53-4.70)	*2.6 (1.37-4.88)
Ever diagnosed with diabetes[9]	12.2 (11.28-13.15)	7.3 (6.64-8.06)	8.6 (5.60-12.93)
Health care service use			
Received influenza vaccine during past year[10]	49.7 (48.27-51.09)	35.2 (33.94-36.51)	37.4 (31.82-43.38)
Ever been tested for HIV[11]	36.9 (35.27-38.55)	46.1 (44.53-47.73)	38.7 (32.93-44.77)
Health care access			
Has a usual place to go for medical care[12]	92.2 (91.26-93.05)	81.1 (79.69-82.43)	81.4 (77.22-84.96)
Failed to obtain needed medical care in past year due to financial barriers[13]	3.9 (3.36-4.51)	7.8 (7.15-8.55)	10.0 (7.21-13.77)
Currently uninsured (adults aged 18–64)[14]	7.7 (6.58-8.89)	13.6 (12.30-15.08)	19.5 (14.32-26.00)
Number of adults in survey sample (unweighted)	7,422	8,607	493

* Estimate has a relative standard error greater than 30% and does not meet standards for reliability or precision.

[1]Includes households that also have wireless telephone service.

[2]The estimates presented here are for men aged 18 and over who had five or more drinks in 1 day at least once in the past year and women aged 18 and over who had four or more drinks in 1 day at least once in the past year. A year is defined as the 12 months prior to interview. The analyses excluded adults with unknown alcohol consumption (about 1%).

[3]A person who had smoked more than 100 cigarettes in his or her lifetime and now smokes every day or some days. The analyses excluded adults with unknown smoking status (about 2%).

[4]This measure reflects an estimate of regular leisure-time aerobic activity motivated by the 2008 federal *Physical Activity Guidelines for Americans* (http://www.health.gov/paguidelines/), which are being used in setting Healthy People 2020 objectives (http://www.healthypeople.gov). The 2008 guidelines refer to any kind of aerobic activity, but estimates in this table are limited to leisure-time physical activity only. These leisure-time aerobic activity estimates may therefore underestimate the percentage of adults who met the 2008 guidelines for aerobic activity. The 2008 federal guidelines recommend that for substantial health benefits, adults perform at least 150 minutes a week of moderate-intensity aerobic physical activity, or 75 minutes a week of vigorous-intensity aerobic physical activity, or an equivalent combination of moderate- and vigorous-intensity aerobic activity. The 2008 guidelines also state that aerobic activity should be performed in episodes of at least 10 minutes and preferably should be spread throughout the week. The analyses excluded adults with unknown physical activity participation (about 3%).

[5]Health status data were obtained by asking respondents to assess their own health and that of family members living in the same household as excellent, very good, good, fair, or poor. The analyses excluded persons with unknown health status (about 0.1%).

[6]Six psychological distress questions are included in the National Health Interview Survey. These questions ask how often during the past 30 days a respondent experienced certain symptoms of psychological distress (feeling so sad that nothing could cheer you up, nervous, restless or fidgety, hopeless, worthless, that everything was an effort). The response codes (0–4) of the six items for each person were weighted equally and summed. A value of 13 or more for this scale indicates that at least one symptom was experienced "most of the time" or "all of the time" and is used here to define serious psychological distress. The analyses excluded adults with unknown serious psychological distress status (about 4%).

[7]Obesity is defined as a body mass index (BMI) of 30 kg/m^2 or more. The measure is based on self-reported height and weight. The analyses excluded adults with unknown height or weight (about 6%). Estimates of obesity are presented for adults aged 20 and over because the Healthy People 2020 objectives (http://www.healthypeople.gov) for healthy weight among adults define adults as persons aged 20 and over.

[8]Information on an episode of asthma or an asthma attack during the past year is self-reported by adults aged 18 and over. A year is defined as the 12 months prior to interview. The analyses excluded persons with unknown asthma episode status (about 0.1%).

[9]Prevalence of diagnosed diabetes is based on self-report of ever having been diagnosed with diabetes by a doctor or other health professional. Persons reporting "borderline" diabetes status and women reporting diabetes only during pregnancy were not coded as having diabetes in the analyses. The analyses excluded adults with unknown diabetes status (about 0.1%).

Table 4. Prevalence rates (and 95% confidence intervals) for selected measures of health-related behaviors, health status, health care service use, and health care access for adults aged 18 and over, by household telephone status: United States, July–December 2016

Measure	Landline[1]	Wireless-only	Phoneless

[10]Receipt of flu shots and receipt of nasal spray flu vaccinations were included in the calculation of flu vaccination estimates. Responses to these two flu vaccination questions do not indicate when the subject received the flu vaccination during the 12 months preceding the interview. In addition, estimates are subject to recall error, which will vary depending on when the question is asked because the receipt of a flu vaccination is seasonal. The analyses excluded adults with unknown flu vaccination status (about 3%).

[11]Individuals who received human immunodeficiency virus (HIV) testing solely as a result of blood donation were considered not to have been tested for HIV. The analyses excluded adults with unknown HIV test status (about 5%).

[12]Does not include a hospital emergency room. The analyses excluded persons with an unknown usual place to go for medical care (about 1.5%).

[13]A year is defined as the 12 months prior to interview. The analyses excluded persons with unknown responses to the question on failure to obtain needed medical care due to cost (about 0.2%).

[14]A person was defined as uninsured if he or she did not have any private health insurance, Medicare, Medicaid, Children's Health Insurance Program, state-sponsored or other government-sponsored health plan, or military plan at the time of interview. A person was also defined as uninsured if he or she had only Indian Health Service coverage or had only a private plan that paid for one type of service such as accidents or dental care. The data on health insurance status were edited using an automated system based on logic checks and keyword searches. The analyses excluded adults with unknown health insurance status (about 1%).

NOTE: Data are based on household interviews of a sample of the civilian noninstitutionalized population.

DATA SOURCE: CDC/NCHS, National Health Interview Survey, July–December 2016.

Table 5. Percentage of adults living in wireless-mostly households, by selected demographic characteristics and calendar half-years: United States, July 2013–December 2016

Demographic characteristic	July–December 2013	January–June 2014	July–December 2014	January–June 2015	July–December 2015	January–June 2016	July–December 2016	95% confidence interval[1]
Total	18.3	16.6	16.9	16.3	16.1	16.6	16.7	15.95–17.54
Race/ethnicity								
Hispanic or Latino, any race(s)	16.6	14.6	14.2	15.4	15.0	14.5	15.6	13.63–17.75
Non-Hispanic white, single race	18.6	16.8	17.2	16.0	16.0	16.6	16.5	15.45–17.57
Non-Hispanic black, single race	18.2	16.9	17.5	17.3	17.1	18.4	17.5	15.81–19.36
Non-Hispanic Asian, single race	20.4	19.5	19.4	18.4	19.7	18.7	21.8	17.28–27.10
Non-Hispanic other, single race	14.1	11.0	*10.3	18.0	12.8	13.6	16.0	11.02–22.65
Non-Hispanic, multiple race	16.9	16.3	17.0	17.8	15.0	16.8	14.0	9.87–19.56
Age (years)								
18–24	20.0	18.1	17.7	17.1	17.2	16.5	17.2	15.43–19.14
25–29	14.5	11.8	13.5	11.1	11.1	12.6	11.7	10.06–13.65
30–44	20.0	17.6	17.2	16.9	16.2	16.5	15.9	14.79–16.99
45–64	21.6	20.0	20.6	19.2	19.9	20.1	20.7	19.62–21.86
65 and over	10.3	10.2	10.6	12.0	11.0	12.5	12.9	11.99–13.95
Sex								
Male	18.6	16.7	17.1	16.5	16.2	16.8	16.9	16.03–17.85
Female	18.0	16.5	16.7	16.1	16.1	16.4	16.6	15.79–17.35
Education								
Some high school or less	12.4	12.4	11.0	12.1	12.1	12.8	12.2	10.92–13.62
High school graduate or GED[2]	16.5	14.3	14.5	14.6	14.9	14.6	14.8	13.82–15.93
Some post-high school, no degree	18.9	17.3	17.7	16.4	15.8	16.9	17.4	16.25–18.51
4-year college degree or higher	22.3	20.1	20.8	19.5	19.5	19.7	19.6	18.38–20.89
Employment status last week								
Working at a job or business	21.4	18.9	19.5	18.2	18.3	18.0	18.4	17.47–19.35
Keeping house	16.9	15.9	16.8	13.9	15.5	15.7	16.9	14.83–19.30
Going to school	21.1	20.5	19.0	21.6	19.7	20.8	18.3	15.43–21.50
Something else (incl. unemployed)	11.4	11.2	10.9	11.9	11.4	13.2	13.0	12.17–13.87
Household structure								
Adult living alone	9.4	9.3	9.3	9.5	9.5	10.1	9.9	9.00–10.80
Unrelated adults, no children	11.2	9.2	5.5	7.4	*10.3	9.3	*6.0	3.09–11.27
Related adults, no children	18.1	15.9	17.3	16.4	16.3	16.3	17.1	16.07–18.24
Adult(s) with children	22.6	20.8	20.0	19.2	19.2	20.0	19.4	18.17–20.68
Household poverty status[3]								
Poor	9.1	9.1	8.4	10.0	8.7	9.7	10.0	8.45–11.82
Near-poor	12.0	10.6	12.0	12.5	10.7	12.8	11.1	9.43–12.91
Not-poor	22.1	20.0	19.4	18.4	18.7	18.6	18.9	17.85–19.96

See footnotes at end of table.

Table 5. Percentage of adults living in wireless-mostly households, by selected demographic characteristics and calendar half-years: United States, July 2013–December 2016—*Continued*

Demographic characteristic	July–December 2013	January–June 2014	July–December 2014	January–June 2015	July–December 2015	January–June 2016	July–December 2016	95% confidence interval[1]
Geographic region[4]								
Northeast	20.1	18.7	21.4	20.4	19.0	20.9	21.4	19.37–23.48
Midwest	16.2	14.5	14.6	13.1	14.9	13.9	15.0	13.34–16.91
South	18.0	16.0	16.2	16.3	15.6	16.0	15.8	14.61–16.99
West	19.3	18.1	16.5	16.2	15.9	16.7	16.2	14.50–17.94
Metropolitan statistical area status								
Metropolitan	18.7	16.9	17.0	16.8	16.3	16.6	17.2	16.22–18.25
Not metropolitan	16.7	15.5	16.2	14.2	15.0	12.9	12.9	11.65–14.22
Home ownership status[5]								
Owned or being bought	21.0	19.0	19.9	19.0	19.0	19.0	19.7	18.67–20.78
Renting	12.4	11.1	11.0	10.5	10.4	11.5	10.5	9.54–11.48
Other arrangement	14.8	12.8	12.1	14.1	11.7	16.3	14.9	10.94–20.06
Number of adults in survey sample who live in landline households with wireless telephones (unweighted)	22,879	19,608	18,040	17,527	15,780	15,487	15,173	…

* Estimate has a relative standard error greater than 30% and does not meet standards for reliability or precision.

… Category not applicable.

[1]Refers to July–December 2016.

[2]GED is General Educational Development high school equivalency diploma.

[3]Based on household income and household size using the U.S. Census Bureau's poverty thresholds. "Poor" persons are defined as those below the poverty threshold. "Near-poor" persons have incomes of 100% to less than 200% of the poverty threshold. "Not-poor" persons have incomes of 200% of the poverty threshold or greater. Early Release estimates stratified by poverty status are based on reported income only and may differ from similar estimates produced later that are based on both reported and imputed income. NCHS imputes income when income is unknown, but the imputed income file is not available until a few months after the annual release of National Health Interview Survey microdata. For households with multiple families, household income and household size were calculated as the sum of the multiple measures of family income and family size.

[4]In the geographic classification of the U.S. population, states are grouped into the following four regions used by the U.S. Census Bureau: *Northeast* includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont; *Midwest* includes Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin; *South* includes Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia; and *West* includes Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

[5]For households with multiple families, home ownership status was determined by considering the reported home ownership status for each family. If any family reported owning the home, then the household-level variable was classified as "Owned or being bought" for all persons living in the household. If one family reported renting the home and another family reported "other arrangement," then the household-level variable was classified as "Other arrangement" for all persons living in the household.

NOTE: Data are based on household interviews of a sample of the civilian noninstitutionalized population.

DATA SOURCE: CDC/NCHS, National Health Interview Survey, July 2013–December 2016.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UPSTATE CELLULAR NETWORK, D/B/A VERIZON WIRELESS,

Plaintiff,

-v- 5:16-CV-1032 (DNH/TWD)

CITY OF AUBURN, NEW YORK; CITY COUNCIL OF THE CITY OF AUBURN, NEW YORK; PLANNING BOARD OF THE CITY OF AUBURN, NEW YORK; ZONING BOARD OF APPEALS OF THE CITY OF AUBURN, NEW YORK; BRIAN HICKS, CODE ENFORCEMENT OFFICER OF THE CITY OF AUBURN, NEW YORK,

Defendants.

APPEARANCES: OF COUNSEL:

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DAVID N. HURD
United States District Judge

MEMORADUM, DECISION and ORDER

I. INTRODUCTION.

Plaintiff Upstate Cellular Network, doing business as Verizon Wireless ("plaintiff' or "Verizon") filed this action on August 23, 2016. Verizon asserts that the defendants, the City of Auburn ("Auburn"), the City Council of the City of Auburn, New York ("City Council"), Planning Board of the City of Auburn, New York ("Planning Board"), Zoning Board of Appeals, New

York ("Zoning Board") and Brian Hicks, Code Enforcement Officer of the City of Auburn, New York ("Hicks", and collectively, the "defendants"), improperly failed to act on its application to construct and operate a wireless telecommunications site in violation of the Telecommunications Act of 1996, 47 U.S.C. § 332 *et seq*. (the "TCA") and the Federal Communications Commission's (the "FCC") orders, rules and regulations. Plaintiff seeks declaratory judgment and injunctive relief. See Complaint. Presently under consideration are competing motions for summary judgment pursuant to Federal Rule of Civil Procedure 56 by plaintiff and defendants. The matter is fully briefed and oral argument was held in Utica, New York on June 23, 2017.

II. FACTUAL BACKGROUND.

The following facts are gleaned from the parties' submissions, including the statements submitted pursuant to Northern District Local Rule 7.1. Much of the factual background regarding this case is not in dispute.

Verizon is a wireless telecommunications licensee of the FCC and provides commercial mobile services and personal wireless services throughout New York State. See Defs.' Rule 7.1 Response, at ¶ 1, 8. On or about March 3, 2016, Verizon mailed an application (the "Application") to the defendants seeking site plan approval from the Planning Board and a use variance special permit from the Zoning Board. Id. at ¶44 The Application sought to construct and operate a wireless telecommunications facility, consisting of a 100 foot high monopole tower and corresponding site improvements, on property located at 246 Franklin Street in the City of Auburn (the "Site"). Id. ¶¶47-48.

Additionally, on March 3, 2016, the City Council passed a six month moratorium prohibiting "the acceptance and review of new applications seeking approval for new telecommunication facilities and towers" in Auburn. See Moratorium Ordinance. On March 4,

2016, defendants, through its attorneys, returned the Application to Verizon stating that the moratorium precluded filing or consideration of the Application. See Defs.' Rule 7.1 Response, at 1149. On April4, 2016, plaintiff resubmitted the Application to defendants, citing its belief that defendants' action was required and urged defendants to proceed with its consideration. See April 4, 2016 Letter. On April 8, 2016, counsel for Auburn wrote to plaintiff and again declined to accept or process the Application. See April 8, 2016 Letter. On May 3, 2016, counsel for Verizon again wrote to defendants requesting consideration of the Application, however, the defendants did not accept or act on the Application. See May 3, 2016 Letter; Defs.' Rule 7.1 Response, at ¶57. On or about May 4, 2016, counsel for plaintiff and defendants held a telephone conference where defendants expressed Auburn's willingness to accept and consider plaintiffs Application after the moratorium expired and the City of Auburn Code of Ordinances ("City Code") was amended. See Defs.' Rule 7.1 Response, at ¶59.

On August, 23, 2016, Verizon commenced this action seeking declaratory judgment and injunctive relief. On August 25, 2016, the City Council passed an amendment to its City Code concerning wireless telecommunications facilities. See Pl.'s Rule 7.1 Response, at 1112. On August 29, 2016, defendants' counsel wrote to plaintiff advising them of the adoption of the new ordinance and requesting plaintiff forward its application for review. Id. at ¶13. On September 8, 2016, plaintiff advised defendants that it would not resubmit its application and would proceed with litigation. Id. at ¶ 14.

Ill. **LEGAL STANDARDS**

(a) Summary Judgment Standard.

Summary judgment is appropriate where, construing the evidence in the light most favorable to the non-moving party, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". FED. R. Civ. PRO. 56(c);

Richardson v. Selky, 5 F.3d 616, 621 (2d Cir. 1993). The party moving for summary judgment has the burden to establish "'that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law.'" Bowen v. National R.R. Passenger Corp., 363 F. Supp. 2d 370, 373 (N.D.N.Y. 2005) (quoting Rodriquez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995)). A fact is "material" for purposes of this inquiry if it: "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,247 (1986). A material fact is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

"[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A party opposing summary judgment "'may not rest upon the mere allegations or denials of [their] pleading, but must set forth specific facts showing that there is a genuine issue for trial.'" Id. (quoting First Nat'l Bank of Ariz. v. Cities Svcs.Co., 391 U.S. 253, 288 (1968)}. Those specific facts must be supported by "citing to particular parts of materials in the record." FED. R. Civ. PRO. 56(c)(1)(A). "[I]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50.

(b) The Telecommunications Act.

The TCA was enacted to “provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information services… by opening all telecommunications markets to competition … “H.R. Conf. Rep. No. 104-458, at 113 (1996). To this end, Congress enacted 47 U.S.C. § 332, “which limits the state and local government’s authority to deny construction of wireless telecommunications towers, and regulates how such decisions must

be made." Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 637 (2d Cir. 1999). Section 332(c)(7) of the TCA imposes procedural limitations on local zoning decisions and requires that local governments "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." 47 U.S.C. § 332(c)(7)(B)(ii). In 2009, the FCC, the administrative agency charged with implementing the TCA[1], clarified that a "reasonable period of time" is "presumptively, 90 days to process personal wireless service facility siting applications requesting collocations, and, also presumptively, 150 days to process all other applications." See In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(8), 24 F.C.R.R. 13994 (2009) (the "2009 FCC Order") at 1"]32. Further, in 2014, the FCC issued additional guidance to clarity that the 150 day time frame, commonly referred to as the "shot clock", "runs regardless of any moratorium." See Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, 29 F.C.C.R. 12865 (2014) (the "2014 FCC Order") at ¶ 265.

The TCA also mandates that zoning regulations or municipal actions shall not have the effect of prohibiting the provision of personal wireless services. See 47 U.S.C. § 332(c)(7)(B)(i)(ll) (the "effective prohibition provision"). The Second Circuit has interpreted the effective prohibition provision to preclude "denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land lines." Willoth, 176 F.3d at 643. Under the Willoth standard, an applicant will prevail on a claim under the effective prohibition provision if it

[1] The FCC's interpretation of the "reasonable period of time" language is entitled to Chevron deference as a permissible construction of an ambiguous statute. See Up State Tower Co., LLC v. Town of Kiantone. New York, 2016 WL 7178321, at *4 (W.D.N.Y. Dec. 9, 2016) (citing City of Arlington v. F.C.C., 668 F.3d 229, 256 (5',Cir. 2012)).

shows both that: (i) a significant gap exists in wireless coverage and (ii) its proposed facility is the least intrusive means for closing such significant gap. Id.

Pursuant to the TCA, a plaintiff that is "adversely affected by any final action or failure to act by a State or local government" that is inconsistent with the provisions of the TCA may commence an action within 30 days after such action or failure to act." 47 U.S.C. §332(c)(7)(B)(v). The 2009 FCC Order provides that a "failure to act" occurs when "State or local governments do not act upon application within [the 150 shot clock period]" and "any court action must be brought by ... day 180 on penalty of losing the ability to sue." 2009 FCC Order, at 32, 49. See also 2014 FCC Order, at 247 ("[F]ailure to meet the applicable timeframe presumptively constitutes a failure to act under Section 332(c)(7)(B)(v), enabling an applicant to pursue judicial relief within the next 30 days.")[2]

IV. **DISCUSSION.**

Verizon's complaint alleges that defendants: (i) failed to act or unreasonably delayed review of Verizon's Application in violation of Section 332 of the TCA and (ii) unlawfully prohibited Verizon from constructing a wireless service facility in violation of Section 332 of the TCA. In their motion for summary judgment, defendants argue that: (i) neither of plaintiffs claim are ripe for judicial review as Auburn has not yet reviewed plaintiffs Application and (ii) defendants otherwise acted reasonably in instituting the moratorium and were willing to consider plaintiffs Application upon the expiration of the moratorium. Defendants assert

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[2]As the 150 day shot clock period expired on August 1, 2016, Verizon's filing of its complaint on August 23, 2016 was properly within the 30 day period to commence an action under the TCA. Even if it could be argued that plaintiffs claims accrued earlier, at the time of the initial rejection of the application on March 4, 2016 or upon its subsequent return on April 8, 2016, defendants did not plead or raise the statute of limitations as an affirmative defense, and therefore, it is deemed waived. See Chimblo v. Comm. of Internal Revenue, 177 F.3d 119, 125 (2d Cir. 1999) ("As a general matter, the statute of limitations is an affirmative defense that must be pleaded; it is not jurisdictional."); Masterpage Comm., Inc. v. Town of Olive, NN, 418 F. Supp. 2d 66,76 n. 5 (N.D.N.Y. 2005) (D.J. Mordue).

that their actions were consistent with the requirements of the TCA. See Defs.' Mem. Supp. Summ. J. at 5.

(A) Failure to Act Claim.

Defendants contend that as the moratorium began on March 3, 2016, the City could not accept the Application received by Verizon on March 4, 2016. Therefore, they argue that the 150 day shot clock never began because the Application was not "duly filed". As a result, defendants argue that this case is not ripe for judicial review.

(i) Plaintiff's Action is Ripe for Judicial Review.

The interpretation of the TCA proposed by the defendants is clearly at odds with the intent of the TCA and the FCC orders and therefore must be rejected. Review of the TCA and FCC rules and regulations both unquestionably support the conclusion that Auburn's moratorium does not toll the shot clock period.

The Supreme Court has found that in passing the TCA, "Congress impose[d) specific limitations on the traditional authority of state and local governments to regulate the location, construction and modification of [wireless telecommunications] facilities." Citv of Arlington v. FCC, 133 S. Ct. 1863, 1866 (2013) (internal quotations omitted). The TCA implements Congress' intent to encourage the rapid deployment of wireless telecommunications and seeks "to stop local authorities from keeping wireless providers tied up in the hearing process through invocation of state procedures, moratoria or gimmicks." Masterpage Comm., Inc. v. Town of Olive, 418 F. Supp. 2d 66, 77-80 (N.D.N.Y. 2005) (D.J. Mordue) (quoting Lucas v. Planning Bd. of Town of LaGrange, 7 F. Supp. 2d 310,321-22 (S.D.N.Y. 1998)).

Review of the 2014 FCC Order in particular makes clear that the defendants' argument concerning the effect of the moratorium borderlines on frivolous. The 2014 FCC Order states that "the presumptively reasonable time frame begins to run when an

application is first submitted . . .". 2014 FCC Order, at 11258. Further, while the FCC recognizes the need of local municipalities to update their zoning regulations, the 2014 FCC Order expressly provides that the 150 shot clock "runs regardless of any moratorium." Id. at ¶ 265.

In doing so, the FCC expressly rejects the recommendation made by many municipal commenters that a moratorium should toll the shot clock or otherwise affect the right of a wireless provider to seek legal redress when the shot clock expires without local government action. See id. at ¶ 265, 266. The fact that the local moratorium was passed prior to the submission of the application by the wireless provider does not modify the obligation of the local government to act on an application in a reasonable period of time. See id. at 11266 ("We recognize that new technologies may in some cases warrant changes in procedures and codes, but we find no reason to conclude that the need for any such change should freeze all applications."). The 2014 Order is clear that "any moratorium that results in a delay of more than 90 days for a collocation application or 150 days for any other application will be presumptively unreasonable." Id. at ¶ 267.

Simply put, a municipality may not avoid or stop the shot clock period by enacting a moratorium. While local moratoria on applications may be necessary and advisable to permit a municipality to update applicable zoning regulations, the moratorium does not stop the shot clock period, regardless of whether an application is received before or after the moratorium was enacted.

Given that the stated purpose of the TCA is to ensure that local governments act on applications "within a reasonable period of time", it would be counter to such purpose to endorse defendants' interpretation. A local government may not unilaterally decide not to "file" or accept a properly submitted application, by reason of a moratorium or otherwise, and effectively toll the shot clock period. As a result, the shot clock period started on March 4, 2016, when the Application was properly submitted to the defendants pursuant to the then existing City Code.

As Verizon's Application was received by defendants on March 4, 2016, the 150 day shot clock expired on August 1, 2016. Auburn admits that it declined to even accept the Application at any time during the 150 day shot clock period, despite three requests from Verizon to do so. It is not disputed that Verizon's application was not processed, reviewed or otherwise acted upon by Auburn within the shot clock period and thus the City is presumed to have unreasonably delayed Verizon's Application in violation of Section 332 of the TCA.

(ii) Defendants' Delay was Unreasonable.

Defendants asserts that even if the 150 day shot clock period was violated, its actions were reasonable and the TCA's presumption of unreasonable delay should be rebutted.

Defendants allege that on March 1, 2016, the Planning Board passed a resolution issuing site approval for a new telecommunications facility and tower to be located on Allen Street in Auburn (the "Allen Street Tower"). The approval of the Allen Street Tower was met with community opposition and a lawsuit was filed in New York State court listing both defendants and the wireless operator as co-defendants. Defendants claim that the six month moratorium passed on March 3, 2016 resulted from the public opposition and litigation resulting from the Allen Street Tower and was intended to give Auburn staff time to incorporate an ordinance into its ongoing comprehensive revision of the City Code. Defendants also highlight that the time delay from the passage of the moratorium on March 3, 2016 until the adoption of the amendments to the City Code on August 25, 2016 consisted of 175 days and argue that their violation, if any, was only 25 days.

In its 2009 Order, the FCC recognized that "certain cases may legitimately require more processing time" and therefore provided that the deadlines could be extended by agreement of the applicant or that the shot clock may be tolled to obtain certain required

information. See 2009 FCC Order, at ¶ 3. The FCC also clarified that the deadlines were only presumptively reasonable, and that "local authority will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable" based upon the "unique circumstances in individuals cases." Id. at ¶ 42, 44.

Defendants have completely failed to rebut the presumption that their delay was unreasonable. "The Shot Clock Ruling contemplates not just that a local government will take some action on an application within the deadline, but that it will 'resolve [the] application' before the deadline." New Cingular Wireless PCS, LLC v. Town of Stoddard, N.H., 853 F. Supp. 2d 198,203-04 (D.N.H. 2012) (quoting 2009 FCC Orderat1J38). Under the provisions of the TCA and FCC Orders, the local municipality has 150 days in which to promptly review an application and make its final determination, consistent with local Jaw, the TCA and federal rules and regulations. In 175 days of review, Auburn did not review or consider Verizon's Application at all, much Jess complete its review. Defendants made no requests for information relative to the Application and took no action relative to the Application at any point during the 150 day shot clock period. On three separate occasions, defendants expressly rejected the Application based solely on their seriously flawed interpretation of the TCA and refused to fulfill their obligations under federal law.

Neither the existing litigation concerning the Allen Street Tower nor the fact that defendants were willing to consider Verizon's Application after 175 days reasonably justify their refusal to consider the Application pursuant to the requirements of the TCA and the FCC Orders within the 150 day shot clock period. See American Towers. Inc. v. Wilson County, 2014 WL 28953, at *13 (M.D. Tenn. Jan. 2. 2014) (County's informal policy of deferring action on siting application because of pending litigation, between the wireless provider and the county or a third party, finds "no support in the TCA" and is insufficient to rebut the presumption of unreasonable delay). Defendants have failed to demonstrate what, if any, changes were

made to the City Code concerning wireless facilities or show that the appropriate six month delay in accepting or considering any new applications, a period of time which wholly encompasses the shot clock period, was both necessary and appropriate given the unique circumstances facing Auburn. As a result, defendants have failed to rebut the presumption that their delay was unreasonable and their actions constituted a failure to act or unreasonably delay in violation of the TCA.

(B) *Unlawful Prohibition Claim.*

Verizon contends that the actions of the defendants prevented it from closing a significant gap in service, and thus, effectively prohibited service. The TCA requires that local zoning activity "shall not prohibit or have the effect of prohibiting the provision" of wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(ll).

(i) *Plaintiff's Claim is Ripe for Judicial Review.*

Defendants argue that Verizon's unlawful prohibition claim is not ripe for judicial review since defendants never made a final determination concerning plaintiffs Application. In order to prove a claim of effective prohibition, plaintiff must show that its application has been rejected and that any additional efforts are so unlikely to be successful, that it would be a waste of plaintiffs effort to try. Up State Tower Co.. LLC v. The Town of Kiantone, New York, 2017 WL 957208, at *7 (W.D.N.Y. March 13, 2017). Defendants assert that plaintiffs Application has never been "rejected".

However, an effective prohibition claim under the TCA exists where a local government has enacted a moratorium and refuses to process an application. See APT Minneapolis. Inc. v. StillwaterTwp., 2001 WL 936193, at *26 (D. Minn. Aug. 15, 2001); Sprint Spectrum L.P. v. Town of Farmington, 1997 WL 631104, at *17 (D. Conn. Oct. 6, 1997); Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457, 1466-68 (N.D. AI. 1997). Therefore, for the same reasons noted with regard to the failure to act claim, Verizon has demonstrated that its unlawful prohibition claim is ripe for judicial review.

(ii) Plaintiff has established their Effective Prohibition Claim.

"Under New York law, 'cellular telephone companies, such as [plaintiff], are classified as 'public utilities' for purposes of zoning applications' and, as such, '[a] zoning board of appeals has a narrower range of discretion in dealing with special permit applications filed by utilities than is true in the case of the generality of applications.'" Omnipoint Comm., Inc. v. Viii. of Tarrytown Planning Bd., 302 F. Supp. 2d 205, 215 (S.D.N.Y. 2004) (quoting Omnipoint Comm., Inc. v. Common Council of the Citv of Peekskill, 202 F. Supp. 2d 210, 222 (S.D.N.Y. 2002)). The Second Circuit has interpreted the effective prohibition provision of the TCA to mean that local governments may not regulate personal wireless service facilities in such a way as to prohibit remote users from reaching "facilities necessary to make and receive phone calls." Sprint Spectrum. L.P. v. Willoth, 176 F.3d 630,637 (2d Cir.1999). "In other words, local governments must allow service providers to fill gaps in the ability of wireless telephone users to have access to land-lines." Id. However, a local government may reject an application "if the service gap can be closed by less intrusive means." Id.

Verizon's Application, which was submitted as an Exhibit, meets the applicable requirements of the TCA. See Application, Affirmation of Robert Burgdorf, Exhibit 1. The Application seeks to construct a 100 foot monopole and related site improvements on the Highland Park golf site. The Site is consistent with the adjacent land uses, including a high school, community college and golf course.

The Application provides significant information, including Radio Frequency propagation maps, which clearly demonstrates a significant gap in its service in the City of Auburn and related capacity deficiencies, an area along Franklin Street and Route 5 which includes major thoroughfares, residences, businesses and schools. See Application, Declaration of Emily McPherson. In addition, the Application establishes that there is no

less intrusive means to fill the significant gap in coverage other than to construct and operate a wireless facility at the Site. See Application; McPherson Decl. ¶¶ 15-28.

As a result, defendants failure to consider Verizon's Application had the effect of prohibiting wireless service within the City of Auburn in violation of the TCA. Therefore, plaintiff is entitled to summary judgment concerning its effective prohibition claim.

(C) Appropriate Remedy.

Having found that Verizon is entitled to judgment as a matter of law on the claims addressed above, the appropriate remedy must be determined. Verizon argues that the appropriate remedy pursuant to the TCA is an order directing Auburn and its boards and directors to take appropriate steps to approve the Application which has been previously submitted. Defendants contend even if its actions are deemed to be in violation of the TCA, the Application should be resubmitted and considered pursuant to Auburn's revised City Code within 150 days.

"The standard for a permanent injunction is similar to the standard for a preliminary injunction: (1) irreparable harm and (2) success on the merits." Nextel Partners, Inc. v. Town of Amherst. NY, 251 F. Supp. 2d 1187, 1200 (W.D.N.Y. 2003) (citing Jackson Dairy. Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979)). Courts have "consistently held that a mandatory injunction is an appropriate remedy for violations of the TCA." Nextel Partners, Inc. 251 F. Supp. 2d at 1200 (citing Cellular Telephone Company v. The Town of Oyster Bay, 166 F.3d 490, 496 (2d Cir. 1999)); see also Preferred Sites, LLC v. Troup County, 296 F.3d 1210, 1222 (11th Cir. 2002); Nat'l Tower. LLC v. Plainville Zoning Bd. of Appeals 297 F.3d 14, 21-22 (1'' Cir. 2002); Omnipoint Comm.. Inc. v. Planning & Zoning Comm. of the Town of Wallingford, 83 F. Supp. 2d 306, 312 (D. Conn. 2000). Such injunction usually takes the form of an order directing the defendants to issue the relative permits, which "serves the [TCA's] stated goal of expediting resolution of this type of action."

Oyster Bay, 166 F.3d at 497. The FCC has also endorsed such approach, stating that "injunctions granting an application may be appropriate in many cases" and that local governments "will risk issuance of an injunction granting the application" if they do not consider such application in conformance with the TCA and the FCC Orders. 2009 FCC Order, at ¶¶ 38 - 39.

Verizon has clearly established that defendants violated the TCA in both failing to act on the Application and in effectively prohibiting wireless service in the City of Auburn. Additionally, defendants have failed to demonstrate any deficiencies with Verizon's Application or otherwise articulate a community interest which would be negatively harmed if a mandatory injunction were issued. Defendant failed to submit a copy of the relevant City Code as it existed in March 2016 or the revised City Code which was enacted in August 2016 and failed to express any issues which the Application may have raised. Instead, quiet shockingly, defendants asserted at oral argument that they did not even retain a copy of the plaintiffs Application when they returned it to plaintiff on March 4, 2016, instead relying upon their dubious legal argument that they could not file the Application due to the moratorium. Regardless, defendants again received plaintiff's application in February 2017 as part of this action and have failed to identify any deficiencies which would require further City consideration.

Given the City's flagrant disregard to its obligations under the TCA, its refusal to even take the first step of consideration of plaintiffs application within 175 days of its submission, this is not a case where the locality was merely conducting good faith information gathering concerning an application. Defendants' persistent and affirmative violation of both the text and spirit of the TCA must result in its relinquishment of its right to obtain further review of plaintiffs Application. [3]

As a result, directing that the Application be resubmitted to defendants with a new 150 day shot clock period, as defendants request, would serve no useful purpose and would greatly prejudice Verizon by further delaying its ability to provide service. A mandatory injunction is an appropriate remedy.

V. CONCLUSION

Defendants' actions in refusing to act on Verizon's Application violated the TCA and the corresponding FCC Orders. Further, defendants' proffered rationale for their delay is insufficient to rebut the presumption of unreasonableness created under the TCA. Lastly, plaintiff has established that defendants' actions effectively prohibit it from providing telecommunication services in violation of the TCA. As a result, a mandatory injunction directing defendants to approve plaintiffs application and issue all applicable permits and/or approvals is appropriate.

Therefore, it is ORDERED that:

1. Defendants' February 28, 2017 motion for summary judgment is **DENIED** in its entirety;

2. Plaintiffs February 28, 2017 motion for summary judgment is **GRANTED;**

A Plaintiffs application shall be considered received by the defendants as of March 4, 2016;

B. Defendants shall approve plaintiffs application to construct and operate a wireless

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[3] It is noted that a mandatory injunction does deprive both the public the ability to provide its input at public hearings required before the Planning Board and Zoning Board and input from Cayuga County pursuant to New York General Municipal Law 239-m. However, had defendants complied with the requirements of the TCA, both parties would have had sufficient time to provide input.

communications facility on property located at 246 Franklin Street, Auburn, New York, including a 100 foot high monopole tower and other site improvements;

C. Approval of the application shall be pursuant to the City Code as it existed on March 4, 2016 and shall be deemed to have been approved prior to the effective date of Chapter 300 of the current City Code, which shall have no effect on the plaintiff's application and approval;

D. The approval of the application shall include: (i) site plan approval by the City of Auburn Planning Board, (ii) the granting of a use variance from the City of Auburn Zoning Board of Appeals and (iii) 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;

E. The approval of the application shall be made on or before **July 10, 2017;**

F. Certification of the above approval of the application shall be filed by the defendants with the Clerk of the Court on or before **July 11, 2017;** and

3. Jurisdiction shall be retained to monitor implementation of and to enforce this order.

IT IS SO ORDERED.

United States District Judge

Dated: June 28, 2017
Utica, New York

299 F.3d 235 (2002)

NEW JERSEY PAYPHONE ASSOCIATION, INC, a not for profit corporation organized under the laws of New Jersey,
v.
TOWN OF WEST NEW YORK, Appellant.

No. 01-1917.

United States Court of Appeals, Third Circuit.

Argued: March 5, 2002.
Filed: July 26, 2002.

236*236 Joseph R. Mariniello, (argued), Mariniello & Mariniello, P.C., Fort Lee, N.J., for appellant.

237*237 Jeffrey A. Donner, (argued), Stryker Tams & Dill, LLP, Newark, N.J., for appellee.

BEFORE: ALITO, RENDELL, and HALL,[1] Circuit Judges.

HALL, Circuit Judge.

The Town of West New York appeals the District Court's grant of summary judgment finding an ordinance of the town preempted by Section 253 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 253. The ordinance permits the town to grant an exclusive franchise to one or two pay telephone providers to provide telephone service on public rights of way. The franchise is to be awarded pursuant to a formal auction process and is to be based on several criteria, primarily the amount of compensation offered to the town by the bidder. The town denies that the ordinance has the effect of prohibiting pay telephone providers from providing pay telephone service in violation of 47 U.S.C. § 253(a). It also claims in the alternative that it falls within the Section 253(c) safe harbor protecting municipal regulation of public rights of way from the preemptive effect of Section 253(a). We affirm the ruling of the District Court.

The District Court had original subject matter jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Although the appeal was not initially timely, the District Court granted an extension of time to file pursuant to Fed.R.App.P. 4(a)(5). That extension has not been appealed and this appeal is within the extended time period granted by the District Court.

I.

This appeal concerns the lawfulness of an ordinance adopted on February 16, 2000 by the Town of West New York, New Jersey (the "Town") regulating the placement of pay telephones in public rights of way. Plaintiff-Appellee, the New Jersey Payphone Association (the "Payphone Association") is a not-for-profit organization whose members operate payphones in the Town. The Payphone Association challenged the Town's Ordinance 26/99 (the "Ordinance") on a number of grounds, alleging that it violates Section 253 of the Telecommunications Act of 1996 (the "TCA"), 47 U.S.C. § 253; New Jersey statutory law; and the United States and New Jersey Constitutions.

Citing the need to control the placement of pay telephones on public rights of way in order to ensure the safe passage of vehicular and pedestrian traffic and promote an aesthetically pleasing environment, the Ordinance requires prospective payphone operators to obtain a local permit for each pay telephone specifying its exact location. Historically, any service provider could obtain such

a permit subject to payment of a small fee and satisfaction of certain minimum requirements as to the maintenance, location, and specifications of their payphones. In the current Ordinance, however, Section Three specifies:

> The Town reserves the right to award a Contract for replacement or operation of [payphones] in the public right-of-way of the Town and on Town owned property. If the Town exercises such rights no other permits or renewals for the operation of [payphones] shall be issued and any previously installed [payphones] 238*238 shall be removed from the public right-of-way within thirty days.

J.A. at 74.

Pursuant to Section Three of the Ordinance, the town issued a document entitled "Franchise for Public Pay Telephones throughout the Town of West New York" (the "Franchise Notice"), inviting bids for contracts to provide payphones. J.A. at 76-111. The Franchise Notice informs bidders that the Town has been split into two zones for bidding purposes with a separate auction for each zone. Bidders are required to install between 75 and 100 payphones for each zone at locations to be determined by the Director of Public Safety in consultation with the successful bidder. The Franchise Notice also provides that the Town is to be compensated based on a percentage of revenue generated by the payphones. In addition, bidders must demonstrate the ability to provide a security deposit of $250 per proposed telephone, or at least $18,750.

The Franchise Notice also sets out the criteria used by the Town in evaluating bids. The Town is to evaluate bids based on a list of seven factors including: the experience of the applicant, the ability of the applicant to maintain the pay telephones, the efficiency of the public service to be provided, the willingness of the applicant to provide telephones in historically under-served residential areas lacking private telephones, the applicant's history of maintaining payphones within the Town, and the cost of calls to the public. Also on the list of evaluation criteria is the amount of compensation offered to the Town by the applicant. The purchasing agent for the Town forthrightly testified by affidavit that he considered compensation to the Town to be the most important factor in evaluating bids. J.A. at 138-139.

As it happened, the initial attempt to auction service for the two zones ended without any awards. Three companies submitted proposals. The purchasing agent testified that the three bids were largely equivalent except for the compensation offered to the Town and the per-call cost to the public. He determined that differences in billing methods between the bidding companies in light of inadequate bid specifications on the treatment of long distance service created difficulties in evaluating the bids. Accordingly, he recommended that all bids be rejected and the specifications redrawn in order to conduct the auction anew. After initiation of this suit, the parties agreed to take no further action pending determination of the lawfulness of the Ordinance and Franchise Notice.

The District Court issued an opinion granting summary judgment for the Payphone Association and denying the Town's cross-motion for summary judgment on the basis that Section Three of the Ordinance was preempted by 47 U.S.C. § 253. *New Jersey Payphone v. Town of West New York,* 130 F.Supp.2d 631 (D.N.J. 2001). It specifically found the grant of an exclusive franchise preempted by Section 253 and separately found the selection criteria used in awarding such franchises also violated this section. In addition to granting summary judgment, the District Court permanently enjoined the Town from enforcing Section Three of the Ordinance and the Franchise Notice, including making any award of an exclusive franchise for providing pay telephone service in the Town based on the amount of compensation paid. Because the District Court found that federal preemption fully resolved the dispute, it declined to reach alternative constitutional and state law claims raised by the Payphone Association. Preemption of Section Three of the Ordinance and the

Franchise Notice by Section 239*239 253 of the TCA is correspondingly the sole issue raised on appeal.[2]

II.

A. Background Considerations

Section 253 of Title 47 of the United States Code provides in relevant part:

(a) *In general*

No 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.

(b) *State regulatory authority*

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, 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.

(c) *State and local government authority*

240*240 Nothing in this section affects the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) *Preemption*

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Subpart (a) expressly preempts any state or local law inconsistent with its prohibition. As indicated by their opening text, subparts (b) and (c) are structurally savings clauses, excepting the listed local and state functions from the preemptive effect of subpart (a). *Cablevision of Boston Inc. v. Public Improvement Comm'n,* 184 F.3d 88, 98 (1st Cir.1999). At the same time, the division between (b) and (c) defines the boundaries of each body's retained regulatory authority, with states permitted to regulate broadly with respect to public safety and other issues, and local governments limited to powers delegated by their states and management of their rights of way. *In re TCI Cablevision,*12 F.C.C.R. 21396, ¶ 102-104, 109 (Sept. 19, 1997). In the case of a dispute over a local regulation of rights of way, once the party seeking preemption sustains its burden of showing that a local municipality has violated Section 253(a) by formally or effectively prohibiting entry into the payphone market, the burden of proving that the regulation comes within the safe harbor in Section 253(c) falls on the defendant municipality. *In re Petition of the State of Minnesota,* 14 F.C.C.R. 21697, n. 26 (1999).

This much is clear: Section 253 is quite inartfully drafted and has created a fair amount of confusion. For this reason, we briefly clear out some legal underbrush before getting to the main issue.

In applying Section 253, one question with which courts have struggled is whether there is a private right of action to challenge ordinances as preempted by the section directly in federal court. This issue is made confusing by the structure of the section and the language of Section 253(d). To begin with, it is not clear from the text and placement of subsection (d) whether Congress intended preemption by the Federal Communications Commission (the "FCC") to be the sole means of enforcing Sections 253(a) and (b), or, if a private cause of action exists to enforce either of these subsections. *See* *Cablevision of Boston,* 184 F.3d at 98. In the former case, (d)'s omission of (c) could be read to mean that a private right of action addressed directly to a federal court, instead of FCC jurisdiction, is available solely to challenge local legislation purporting to regulate rights of way and thereby potentially implicating Section 253(c).[3] This was the conclusion reached by the Sixth and Eleventh Circuits, which, based primarily on legislative history, found that it was the intent of Congress to allow municipalities to defend themselves against preemption suits locally rather than travel to 241*241 Washington D.C. to be heard before the FCC. *TCG Detroit v. City of Dearborn,* 206 F.3d 618, 623 (6th Cir.2000); *BellSouth Telecommunications, Inc. v. Town of Palm Beach,* 252 F.3d 1169, 1189-91 (11th Cir.2001); *see also* 141 Cong.Rec. S8305-02 (June 14, 1995) (final text of § 253(d) designed to leave rights-of-way issues to local federal courts and allow the FCC to preempt "core" issues only.)

While the opinion of the Eleventh Circuit in particular is well reasoned, we need not decide whether to adopt it at this time because resolution of this issue is not before us. In ruling on summary judgment, the District Court found that there is a private right of action implied in Section 253. 130 F.Supp.2d at 636. That ruling has not been challenged on appeal. Therefore, for the purpose of this case only, we assume that there is a private federal court remedy for local rights-of-way ordinances that are preempted by the TCA. The Supreme Court has held that whether a federal statute creates a private claim for relief is not a jurisdictional question. *Northwest Airlines, Inc. v. County of Kent, Michigan,*510 U.S. 355, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994) (adjudicating the claims raised by a private plaintiff on certiorari while assuming a private right of action under the federal Anti-Head Tax Act). Consequently, we are not required to address the private right of action issue when it has not been raised by the parties.

A second question with which courts have struggled is the scope of preemption consistent with Section 253(c). Confusion again arises because of inconsistencies within the structure of the statute. Although Sections 253(b) and (c) are framed as savings clauses, Section 253(d) speaks of "violation" of (b) suggesting that it must impose some sort of substantive limitation independent of (a). This also raises the possibility that Section 253(c), which is similarly phrased, contains a parallel limitation. The legislative history of the TCA also gives some suggestion that Congress, in enacting Section 253(c), may have intended to create a separate enforceable requirement that municipal acts be "competitively neutral and nondiscriminatory." *See* 141 Cong.Rec. H8460-01 (Aug. 4, 1995) (debate on current language which was adopted to allow localities to retain authority to set own fees so long as they were competitively neutral).

While there is a circuit split on this issue,[4] the facts of the present case are such that there is again no need to resolve it for the Third Circuit at this time. As discussed below, the operation of Section 253(a) is sufficient to preempt the Ordinance in this case and it does not fall within the Section 253(c) safe harbor. We therefore limit our ruling to preemption under Section 253(a).

B. Exclusivity

The Supremacy clause of the United States Constitution invalidates state laws that "interfere with or are contrary to" federal law. *Gibbons v. Ogden,* 9 242*242 Wheat. 1, 22 U.S. 1, 211, 6 L.Ed. 23 (1824). When acting on subjects within its constitutional power, Congress is empowered to preempt state law in several ways, including by expressly stating its intention to do so. *Jones v. Rath Packing*

Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). In this case, Section 253 expressly preempts state or local statutes, regulations, or other requirements that prohibit or have the effect of prohibiting market entry. 47 U.S.C. § 253(a).

In deciding whether the District Court correctly granted summary judgment to the Payphone Association on the issue of preemption, we review its legal determinations *de novo. Gritzer v. CBS Inc.,* 275 F.3d 291, 296 (3d Cir.2002). We begin, as did the District Court, with the exclusive nature of the franchises that Section Three of the Ordinance and the Franchise Notice would create. We find that the exclusivity of the franchises that the Town would grant violates Section 253(a). There can be no question that designating a single company as authorized to provide payphones in the public rights of way in a large geographical area which currently is served by multiple companies, and which is capable of accommodating at least 75-100 separate telephones, reduces competition and constitutes a barrier to entry. The deliberate creation of scarcity by the Town in this case is directly at odds with the letter and spirit of the TCA. The District Court correctly noted that, "it is well-recognized that the [TCA] marked a sea change in the regulation of the telephone industry in which Congress rejected the long-held premise that monopolies were necessary to reliable and universal service." 130 F.Supp.2d at 636(quoting *Cablevision,* 184 F.3d at 97). Because Section Three of the Ordinance would act to recreate just such monopolies, it is preempted. *See also* 47 U.S.C. § 276 (directing the FCC to establish rules to promote competition among payphone service providers.)

The Town nevertheless protests that the Ordinance is not preempted because the auction process it wishes to use is itself competitive. It also argues that the Ordinance does not create a substantial burden on competition because other providers may still compete to place pay telephones on private property near to the public rights of way. We find both of these arguments unconvincing. A bidding competition where the winner is determined by willingness to share a monopoly profit with the Town is clearly not the kind of competition intended by the TCA. Even if an exclusive franchise were awarded solely on the basis of the nominal cost of services to the consumer, an auction run under such a rule would still be a highly imperfect substitute for actual market competition. In either case, the effect of such an ordinance is still to prohibit losing entities as a matter of law from competing for private customers, a violation of the plain language of Section 253(a).

As to placing pay telephones on private property, the Town provides no evidence for the inherently implausible proposition that such installations would allow other providers to fully compete for the patronage of people requiring use of a payphone while travelling or otherwise located in public places. In economic parlance, payphones on private property would, for various reasons such as the inconvenience of travelling to such phones or their lack of visibility from the rights of way, be imperfect substitutes for phones actually in the rights of way. The availability of competition from such locations thus does not save the Ordinance from the prohibitions of Section 253(a).

The Town also claims that Section Three of the Ordinance is protected by Section 243*243253(c). It claims that the Ordinance is within the safe harbor because its purpose is to ensure the orderly flow of traffic unimpeded by the random placement of public payphones in unsafe locations as well as to prevent such telephones from becoming the focal points of various criminal activities and ensure that they are adequately maintained. It thus claims that it is properly an exercise of its reserved power to manage the public rights of way.

While we are extremely skeptical about the proposition that managing traffic patterns and crime requires an exclusive franchise, we do not deny that there may be a rational relationship between the two. The purchasing agent's candid admission that the amount of compensation offered to the Town was the primary criterion in selecting the winning bid certainly suggests that preserving the safety of the rights of way was not the real or primary purpose of the Ordinance. It has obvious use as a tool for revenue generation and regulation of the telecommunications services provided to the

public. However, it is at least plausible that the Ordinance could ease the burden of policing the rights of way by limiting the number of providers of payphones that the Town would be required to monitor to one. Under conditions of limited resources, such a reduction in the cost of monitoring could possibly have a material bearing on the Town's ability to police the placement and maintenance of payphones.[5] Thus, although other courts have been willing to strike down local legal requirements that are only tenuously linked to rights-of-way management, *see* City of Auburn v. Qwest Corp., 260 F.3d 1160, 1178-79 (9th Cir. 2001), (financial reporting requirements and regulations on ownership related to fitness and stability of service providers struck down as "more than necessary" to manage rights of way and on the basis that permitting them on such a tenuous connection would leave no limiting principle on § 253(c)); *City of White Plains,* 125 F.Supp.2d at 1309 (reporting and inspection requirements are outside the scope of "reasonable" regulations of the rights of way), or that merely act as conditions on access to rights of way as a "hook" to achieve other regulatory purposes, *see* BellSouth Telecommunications v. City of Coral Springs, 42 F.Supp.2d 1304, 1309 (S.D.Fla.1999) *rev'd in part on other grounds (excluding reporting requirements, financial, technical and legal qualifications); Town Of Palm Beach,* 127 F.Supp.2d at 1355, we will assume that the Ordinance qualifies as "manage[ment of] the public rights of way" for the purposes of Section 253(c).

However, this does not end the inquiry as the scope of the Section 253(c) safe harbor is limited by its use of the terms "competitively neutral" and "nondiscriminatory." The use of these terms in the section is not immediately obvious but rather poses something of an interpretive challenge of its own. The FCC reads them as straightforward limits on both the power to manage the rights of ways reserved for local governments in general and their freedom to impose fees for use of 244*244 the rights of way. *See In re Classic Telephone, Inc.,* 11 F.C.C.R. 13082 ¶ 39; *TCI Cablevision,* 12 F.C.C.R. 21,396, ¶ 108; *In re State of Minnesota,* 14 F.C.C.R. 21697 ¶ 61. The majority of courts that have ruled on this issue have also followed the lead of the FCC without comment. *See City of Dallas,* 8 F.Supp.2d at 593; *TCG Detroit v. City of Dearborn,* 977 F.Supp. 836, 840-41 (E.D.Mich.1997) *aff'd* 206 F.3d 618 (6th Cir.2000). The First Circuit, however, has questioned this reading, reasoning that as a matter of syntax, the phrase "on a competitively neutral and nondiscriminatory basis" as it appears in the middle of Section 253(c) can only modify the phrase "to require fair and reasonable compensation" immediately preceding it in the text and not "to manage the public rights of way." *Cablevision of Boston* 184 F.3d at 100-101. On its reading, the phrase "for use of public rights-of-way" following "on a competitively neutral and nondiscriminatory basis" must as a matter of logic modify "compensation," thereby trapping "on a competitively neutral and nondiscriminatory basis" on the same grammatical level as itself. In other words, the First Circuit reasons that the relevant phrase is followed by text making it part of a subordinate clause that only makes sense as a condition on compensation requirements.[6]

Our own appraisal of the text of Section 253(c) read in isolation is that the function of "on a competitively neutral and nondiscriminatory basis" is ambiguous. While the reading of the First Circuit is most consistent with the syntax to which it points, it is also possible to read the relevant phrase as limiting both the power to manage the rights of way in general and to demand compensation. Although such a reading is awkward, it is, unfortunately, not significantly more so than the available alternatives because Section 253(c) is simply not well drafted. It is, rather, written in such a way as to make problems of syntax unavoidable regardless of the reading.

For example, immediately following the language already cited above, Section 253(c) uses the phrase "for use of public rights of way on an nondiscriminatory basis." A natural reading of that phrase might suggest that it means that telecommunications providers must use the public rights of way in a non-discriminatory manner. However, such a reading — odd on it own terms — is nonsensical in context, because this phrase is located in a safe harbor that preserves powers for state and local governments and does not deal with regulation of service providers themselves. This second use of the term "nondiscriminatory" may therefore be meant to signify that compensation

requirements and perhaps general rights-of-way management are to be nondiscriminatory. But if so, the term is at least partially duplicative of the same term used in the previous phrase. We are thus forced to choose between illogical uses of the term "nondiscriminatory."

In trying to ferret out the intention of Congress, we therefore conclude that it would not be proper to place too much interpretive weight on the niceties of the syntax of Section 253(c), given the inconsistencies 245*245 of the section as a whole. The most that we can safely conclude looking at the text of this section in isolation is that there are multiple readings possible, several of which require rights-of-way management to be at least nondiscriminatory and others of which require it to be both nondiscriminatory and competitively neutral.

However, in looking for the meaning of this statutory language, we must look to the statutory context in which that language is used and the broader context of the statute as a whole as well as the language itself. *See* *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 477, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992); *McCarthy v. Bronson,* 500 U.S. 136, 139, 111 S.Ct. 1737, 114 L.Ed.2d 194 (1991); *Rosenberg v. XM Ventures,* 274 F.3d 137, 141-42 (3d. Cir.2001). In this instance, the statutory framework indicates that Congress intended permissible management of the rights of way to be limited to those local statutes or regulations that are nondiscriminatory and competitively neutral. A reading of Section 253(c) placing no limit on management of public rights of way outside of compensation requirements would be demonstrably at odds with the Congressional intent expressed in Section 253(a) to foster competition. We can find no reasonable basis in light of the overarching scheme of the TCA to conclude that Congress intended to reserve for the states and localities the power to discriminate against certain telecommunications service providers in regulating rights of way while otherwise generally preempting local laws burdening market entry. Rather, a more reasonable reading of the section in context is that Congress simply intended to preserve local power to regulate the public rights of way for purposes unrelated to the competition to provide telecommunications services to the public and in a manner consistent with that competition.

Further evidence that the contrary could not have been Congress' intent is found in Section 253(b). This section, which is largely parallel to Section 253(c), includes the *general* requirement that state regulation be "on a competitively neutral basis," indicating that Congress understood quite well that a broader carve-out of state authority would permit states to use the areas in which their regulatory authority was preserved to undermine the competitive framework established by the TCA as a whole. In this context, it would make no sense for regulation of the rights of ways, access to which is critical to the ability of service providers to reach potential customers, to be exempted from a requirement that is otherwise generally applied to state law protecting public safety and welfare. Section 253(b) demonstrates the balance Congress chose as necessary to effectuate its intent to enhance competition and eliminate local monopolies while leaving room for reasonable regulation of issues of particular state and local concern.

Thus, in looking at the statutory language in context, we find that the more logical reading of Section 253(c) requires management of public rights of way to be competitively neutral and nondiscriminatory. Nevertheless, since Section 253(c) is facially ambiguous, we also look to the legislative history. While most of the Congressional discussion of Section 253 was on subjects tangential to those of concern here, *see e.g.,* 141 Cong.Rec. H8460-01 (August 4, 1995) (statements by Congressmen Stupak and Barton),[7] such commentary 246*246 as is available touching on this issue support this reading. For example, the report of the conference committee reconciling the House and Senate versions of the TCA notes "the authority of a local government to manage its public rights-of-way in a nondiscriminatory and competitively neutral manner" in several places. S.Rep. 104-230, *178, *179, *180 (February 1, 1996). During floor debate of an amendment brought by Senator Feinstein to eliminate a prior version of Section 253(d) giving the FCC authority to preempt municipal rights-of-way regulations, Senator Hollings described the history of the section as follows:

Section [253] is the removal of the barriers to entry, and that is exactly the intent of the Congress.... What we are trying to do is say, now, let the games begin, and we do not want the States and the local folks prohibiting or having any effect of prohibiting the ability of any entity to enter interstate or intrastate telecommunications services. When we provided that, the States necessarily came and said ... we have the responsibilities over the public safety and welfare....

So what about that? ... So we said, well, right to the point: "Nothing in this section shall affect the ability of a State to impose on a competitively neutral basis"—those are the key words there....

The mayors came ... and they said we have our rights of way and we have to control — and every mayor must control the rights of way. So then we wrote in there: Nothing shall affect the authority of a local government to manage the public rights of way or to acquire fair and reasonable compensation on a competitively neutral and nondiscriminatory basis.

"Competitively neutral and nondiscriminatory basis." Then we said finally, indeed, if they do not do it on a competitively neutral or nondiscriminatory basis, we want the FCC to come in there in an injunction.

141 Cong.Rec. S8134-01, *S8174 (June 12, 1995). Similarly, one of the authors of Section 253(c) noted that it "does not let the city governments prohibit entry of telecommunications service providers for pass through or for providing service to their community." 141 Cong.Rec. H460-01, *8460 (August 4, 1995) (statement of Congressman Barton). Finally, those statements on the floor of the House of Representatives that touched on the issue during debate on the Conference Report to accompany the TCA also reflected the understanding that municipalities were to be limited to nondiscriminatory and competitively neutral rights of way management. 142 Cong.Rec. H1145, *H1150, *H1173 (February 1, 1996) (statements of Congressman Goss and Congresswoman Pelosi).

Though somewhat cursory, this evidence of legislative intent supports the reading of Section 253(c) adopted by the FCC and other jurisdictions. In combination with this legislative history, the context provided by the other parts of Section 253 and the structure of the statute as a whole persuades us that the "competitively neutral 247*247 and nondiscriminatory" requirement applies to management of the rights of way as well as compensation.

In deciding whether the Ordinance is protected under Section 253(c) we must thus determine whether it is competitively neutral and nondiscriminatory. We find that it is not. The Ordinance is facially discriminatory in that it permits the Town to choose one service provider allowed to provide pay telephone service to the public to the exclusion of all others based on criteria determined by it rather than the market. The Town may, of course, make distinctions that result in the *de facto* application of different rules to different service providers so long as the distinctions are based on valid considerations. It can, for example, have different policies for companies wishing to dig up the streets in order to lay new conduit, from those who wish to convert existing conduit and do not need to dig up the streets. What it cannot do is what it has tried to do: create a set of rules the purpose of which is to select one company over others for preferential treatment.

The attempt to create zones of exclusive franchise also fails the test of competitive neutrality. Bidders are required according to Section Three and the Franchise Notice to compete for service of two zones requiring a minimum of 75-100 payphones. As an integral part of that requirement they must demonstrate the ability to service such zones and are also required to pay a deposit tied to the number of payphones they will install. The Ordinance thus favors larger companies with the resources to service the zones as defined by the Town. The Town cannot, consistent with the requirement to be competitively neutral, force companies into a competition the terms of which favor larger telecommunications companies with the resources to meet such demands over smaller competitors who may not have similar resources.

Because Section Three of the Ordinance sets up an exclusive franchise that is inherently discriminatory and creates competitive inequalities, it is not protected by Section 253(c).

C. Selection Criteria

In addition to the creation of an exclusive franchise itself, the District Court also evaluated the selection criteria specified in the Franchise Notice for their consistency with Section 253. However, such an evaluation is not necessary in this case, since we have already found that the attempt to set up an exclusive franchise is itself preempted by Section 253(a) and not saved by Section 253(c). We therefore decline to rule separately on whether the use of such criteria would be permissible. We do note, however, that several of the criteria which the Town would apply have been rejected in connection with non-exclusive franchise schemes considered by other jurisdictions. *See* *City of Auburn,* 260 F.3d at 1178; *City of White Plains,* 125 F.Supp.2d at 91-93; *City of Dallas,* 8 F.Supp.2d at 592-94; *City of Coral Springs,* 42 F.Supp.2d at 1310.

CONCLUSION

For the foregoing reasons, the District Court's Order Granting the Payphone Association's Motion for Summary Judgment and denying the Town's Cross-Motion for Summary Judgment is AFFIRMED.

ALITO, Circuit Judge, concurring in the judgment.

This case involves a challenge under federal and state law to a local ordinance regulating the use of public rights-of-way by payphone service providers. The majority bases its decision on federal law, 248*248 holding that the ordinance is invalid because it is preempted by the Federal Telecommunications Act of 1996. While I agree that the ordinance in question is invalid, I arrive at this conclusion for different reasons.

It is well established that, when possible, federal courts should generally base their decisions on non-constitutional rather than constitutional grounds. *See* *Harmon v. Brucker,* 355 U.S. 579, 581, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958) ("In keeping with our duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' nonconstitutional claim that respondent acted in excess of powers granted him by Congress."); *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *United States v. Serafini,* 167 F.3d 812, 815 n. 7 (3d Cir. 1999) ("Longstanding practice calls for federal judges to explore all non-constitutional grounds of decision before addressing constitutional ones." (quoting *United States v. Bloom,* 149 F.3d 649, 653 (7th Cir.1998))). Indeed, reaching constitutional issues in advance of non-constitutional ones may be reversible error. *See, e.g., Crane v. Indiana High School Athletic Association,*975 F.2d 1315, 1319 (7th Cir. 1992) (citing *Schmidt v. Oakland Unified School District,*457 U.S. 594, 595, 102 S.Ct. 2612, 73 L.Ed.2d 245 (1982)); *WJW-TV, Inc. v. City of Cleveland,* 878 F.2d 906, 910 n. 4 (6th Cir.1989); *Beeson v. Hudson,* 630 F.2d 622, 627 (8th Cir.1980).

In *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland,* 49 F.Supp.2d 805 (D.Md.1999), a case very similar to the one now before us, the district court held that the Federal Telecommunications Act preempted a local ordinance that regulated the use of county-owned rights-of-way by telecommunications companies doing business in the county. The district court did not address the state-law issues raised. On appeal, the Fourth Circuit held that the district court had committed reversible error by deciding the constitutional question of preemption before considering the state-law questions upon which the case might have been decided. *See* *Bell Atlantic Maryland, Inc. v. Prince George's County, Maryland,* 212 F.3d 863 (4th Cir.2000). The Fourth Circuit reasoned as follows: (1) courts should avoid deciding constitutional questions unless they are essential to the disposition of a case; (2) determining

whether a federal statute preempts a state statute is a constitutional question implicating the Supremacy Clause; (3) disposition of the state-law questions raised by Bell Atlantic could have disposed of the case; (4) therefore, the district court committed reversible error by deciding the constitutional question of preemption before considering the state-law questions. *See id.*at 865-66. The Fourth Circuit reiterated this reasoning in *MediaOne Group, Inc. v. County of Henrico, Virginia,* 257 F.3d 356 (4th Cir. 2001), and the Eleventh Circuit took a similar approach in *BellSouth Telecommunications, Inc. v. Town of Palm Beach,* 252 F.3d 1169 (11th Cir.2001).

The majority opinion addresses the preemption question first and does not reach the state-law arguments. The District Court acknowledged the Fourth Circuit decision in *Bell Atlantic-Maryland,* but disagreed with its approach. *New Jersey Payphone Association Inc. v. Town of West New York,* 130 F.Supp.2d 631, 634 (D.N.J.2001). The District Court reasoned that it was appropriate to address the preemption issue first because preemption is a constitutional issue only in the indirect 249*249 sense that the authority for preemption rests on the Supremacy Clause. *See id.* at 634-35.

It is clear, however, that preemption is a constitutional issue. *See Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981) ("[Determining whether a statute is preempted by federal law] `is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.'") (quoting *Perez v. Campbell,* 402 U.S. 637, 644, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971)).

The rationales behind the doctrine of avoiding constitutional questions except as a last resort are grounded in fundamental constitutional principles — the "great gravity and delicacy" of judicial review, separation of powers, the paramount importance of constitutional adjudication, the case or controversy requirement, and principles of federalism. *See Rescue Army v. Municipal Court of Los Angeles,* 331 U.S. 549, 571, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947); *Ashwander,* 297 U.S. at 345-46, 56 S.Ct. 466 (Brandeis, J., concurring). In this case, two factors mitigate the applicability of these principles: (1) we are striking down a local ordinance, not a federal law, and (2) the basis for doing so is preemption by federal statute, not direct violation of the federal Constitution. The former factor reduces the significance of concerns about separation of powers and the finality of judicial review because we are not invalidating an act of Congress, and our interpretation of the statutes at issue does not foreclose a response by the state or federal legislature. The latter factor diminishes the relevance of the paramount importance of constitutional adjudication as it applies to this case because we are not engaging in constitutional interpretation or declaring constitutional rights.

Nevertheless, the limitation on Article III courts to adjudication of actual cases or controversies counsels us to dispose of cases on the narrowest possible ground, which in this case is the state-law ground. Indeed, this seems to be the basis for Justice Brandeis's prudential rules regarding constitutional adjudication as set forth in his *Ashwander* concurrence. 297 U.S. at 345-47, 56 S.Ct. 466 (Brandeis, J., concurring). Moreover, the federalism rationale is pertinent here because we have the option of avoiding invocation of federal supremacy over local laws. Therefore, resolving this case on state-law grounds does less violence to principles of federalism and dual sovereignty. In sum, the principles underlying the prudential rules set forth in *Ashwander* are sufficiently applicable here as to counsel that we begin our analysis of this case with the state-law claim.

On the state-law claim, it is clear that the Ordinance violates N.J.Stat § 54:30-124(a), which prohibits a municipality from imposing any fees or assessments "in the nature of a local franchise" against telecommunication companies. It is well established in New Jersey law that a municipality may not raise revenue beyond what is required to meet regulatory expenses. *See, e.g., Taxi's Inc. v. Borough of East Rutherford,* 149 N.J.Super. 294, 373 A.2d 717, 723 (1977) ("A municipality may not, under the enabling legislation, pass a valid ordinance for revenue purposes only, but it may exact a fee commensurate with the cost of regulation and even in excess thereof if within reasonable limits." (citations omitted)). West New York offers no contrary arguments on the state-law issues. Indeed, the only argument that could conceivably be made by the Town in support of the Ordinance is that its revenue-raising 250*250 is

"within reasonable limits." *See, e.g., Gilbert v. Town of Irvington,* 20 N.J. 432, 120 A.2d 114, 117 (1956) (holding that a municipality lacks general revenue-raising power, but that it may collect license fees "which may, at least within reasonable limits, exceed the regulatory costs"). This is not a plausible claim in this case, however, because the fees in the Ordinance are tied explicitly to the revenue generated by the payphone service provider. That is, the municipality will earn a proportion of the profits, and therefore, the fee scheme cannot honestly be considered to be an attempt to defray regulatory expenses. Thus, the Ordinance is in violation of N.J.Stat § 54:30-124(a).

Accordingly, I concur in the judgment, but for reasons grounded in state law rather than federal law.

[1] The Honorable Cynthia Holcomb Hall, Circuit Judge for the Ninth Circuit, sitting by designation.

[2] Despite this fact, the concurrence would ground affirming the District Court in state rather than federal law on the basis of the jurisprudential principle that federal courts should generally not pass on constitutional questions when non-constitutional grounds will dispose of a dispute. *See Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 345, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (J. Brandeis, concurring). While we certainly recognize the importance of this canon, we disagree with its application in this case.

We have in the past noted that federal preemption is generally an issue requiring the determination of congressional intent rather than resolving a constitutional problem of substance. *See United Services Auto. Assoc. v. Muir,* 792 F.2d 356, 363 (3d Cir.1986). While Judge Alito, following the Fourth Circuit's approach in *Bell Atlantic Maryland Inc. v. Prince George's County,* 212 F.3d 863 (4th Cir.2000), cites Supreme Court dicta labeling whether state and federal laws conflict a "constitutional question," *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981), the Supreme Court, which has itself on occasion considered preemption issues despite the presence of unresolved and potentially dispositive state law issues, *see Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 604, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991), has also acknowledged that, "[t]he basic question involved in [preemption claims under the Supremacy Clause] is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Swift & Co. v. Wickham,* 382 U.S. 111, 120, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965); *see also Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) ("[t]he question, at bottom, is one of statutory intent"). For this reason, preemption questions are "treated as `statutory' for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications." *Douglas v. Seacoast Products, Inc.,* 431 U.S. 265, 272, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977). This is particularly appropriate where preemption is of the express statutory variety and Congress' power to provide for such preemption is not in question.

Moreover, the concurrence itself recognizes that concerns about separation of powers, finality, and the paramount significance of constitutional adjudication are not substantially implicated in this case. While principles of federalism and comity are to some extent implicated, we are not convinced that they are better served by ruling on a state law issue intimately concerned with local budgeting and the apportionment of powers between state and local governments than by interpreting a federal statute that was expressly intended by Congress to preempt certain types of local ordinances touching on issues within its power to regulate. *See Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 28, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959) (citing *Chicago v. Fieldcrest Dairies, Inc.,* 316 U.S. 168, 171, 62 S.Ct. 986, 86 L.Ed. 1355 (1942)). Therefore, we see no reason to address the state law issues, which have not been extensively briefed, in preference to the TCA claim that is the focus of this appeal.

[3] The tension in this reading is that subsection (c) can not be "violated" or separately enforced if it is merely a safe harbor.

[4] The Sixth Circuit and a number of district courts have found that Subsection (c) contains a separate limitation raising a cause of action. *See TCG Detroit,* 206 F.3d 618, 623-24 (6th Cir.2000), *Bell Atlantic-Md., Inc. v. Prince George's County, Md.,* 49 F.Supp.2d 805, 814 (D.Md.1999) (rev'd on other grounds, 212 F.3d 863 (4th Cir.2000)); *AT&T Communications of the Southwest, Inc. v. City of Dallas,* 8 F.Supp.2d 582, 591 (N.D.Tex.1998). The Eleventh Circuit has found that subsection (a) contains the only substantive limitation. *Town of Palm Beach,* 252 F.3d at 1169 1187-88. *See also TCG New York Inc. v. City of White*

Plains, N.Y., 125 F.Supp.2d 81, 87 (S.D.N.Y.2000). The First Circuit, while discussing the issue, has not resolved it. *Cablevision of Boston,* 184 F.3d at 98-100.

[5] We hasten to note that the facts presented by the Town do not demonstrate an inability to police the rights of way under current conditions. Indeed, an affidavit provided by the Deputy Director of the Town's police force certified that the Town had previously suffered from a proliferation of unlicensed payphones, but indicated that efforts to curtail the problem through traditional methods had met with a substantial measure of success. (J.A. at 132-136, certification of Joseph Pelligio). Nevertheless, the Ordinance is rationally related to management of the public rights of way in that it may reduce the cost of such policing.

[6] Nevertheless, without deciding the issue, the First Circuit also noted that an examination of the context of a statutory section can sometimes lead courts to decide "that a linguistically implausible interpretation best reflects the legislature's intent." *Id.* at 101. It reasoned that Congress likely intended "on a competitively neutral and nondiscriminatory basis" to apply to Section 253(c) as a whole, since both management of rights of way and compensation schemes could equally interfere with the TCA's goal of open competition among telecommunication providers. *Id.*

[7] Section 253(c) began life as the Stupak-Barton amendment in the House of Representatives (identical language was inserted into the Senate version of the TCA in committee by Senator Hutchison). The amendment was written to replace Representative Dan Schaefer's "parity provision" which would have required that any fees imposed upon a telecommunications provider for use of the public rights of way would have to have been exactly equal regardless of the extent to which any particular provider would impose upon local resources or other users of the rights of way. *See* 141 Cong.Rec. H8427 (August 4, 1995). The authors' comments accompanying the introduction of their amendment were primarily concerned with providing local governments with the flexibility to vary charges based on the use of the rights of way.

130 F.Supp.2d 631 (2001)

NEW JERSEY PAYPHONE ASSOCIATION INC., a not for profit corporation organized under the laws of New Jersey, Plaintiff,
v.
TOWN OF WEST NEW YORK, Defendant.

No. Civ.A. 00-1843.

United States District Court, D. New Jersey.

March 7, 2001.

632*632 Jeffrey A. Donner, Stryker, Tams & Dill, Newark, NJ, for plaintiff.

Joseph R. Mariniello, Mariniello & Mariniello, Fort Lee, NJ, for defendant.

OPINION

WOLIN, District Judge.

This matter is opened before the Court upon the motion of plaintiff New Jersey Payphone Association, Inc. for summary judgment and the cross-motion of defendant the Town of West New York, also for summary judgment. The motion and cross-motion have been decided upon the written submissions of the parties pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below, plaintiff's motion will be granted and defendant's cross-motion will be denied. Summary judgment will be entered for plaintiff in this matter and the Town of West New York will be enjoined from enforcement of its ordinance that is the subject of this litigation.

BACKGROUND

This lawsuit concerns Ordinance 26/99 (the "Ordinance") adopted on February 16, 2000 by the Town of West New York (the "Town") regarding pay telephones in public rights of way. Plaintiff New Jersey Payphone Association (the "Payphone Association") is a not-for-profit association whose members maintain pay telephones in West New York. The Payphone Association challenges the Ordinance on a number of grounds, alleging that it violates the Unites States and New Jersey Constitutions, New Jersey statutory law, and that the ordinance is preempted by the express provisions of the Federal Telecommunications Act of 1996.

The Payphone Association moved before this Court for a preliminary injunction. This motion was denied in the Court's Letter Opinion and Order of June 7, 2000, on the ground that plaintiff failed to establish that waiting for a plenary adjudication would cause its members to suffer an irreparable injury. The merits of the arguments were not reached. Now, both parties move before this Court for summary judgment on the complaint.

Citing the need to control the placement of pay telephones for the benefit of pedestrian and vehicular traffic in the public rights of way, the Ordinance requires prospective pay telephone operators to obtain a permit for each pay telephone specifying that pay telephone's exact location. Section three of the Ordinance continues:

The Town reserves the right to award a Contract for replacement or operation of [pay telephones] in the public right-of-way of the Town and on Town owned property. If the Town exercises such rights

no other permits or renewals for the operation of [pay telephones] shall be issued and any previously installed [pay telephones] shall be removed from the public right-of-way within thirty days.

Pursuant to this paragraph of the Ordinance, the Town promulgated a document titled "Franchise for Public Pay Telephones throughout the Town of West New York." This document invited bids for the contract to provide pay telephones. Included are substantive specifications for proposals. The document as a whole will be referred to hereinafter as the "Franchise Specification."

The Franchise Specification provides that the Town is to be compensated based 633*633upon a percentage of revenue generated by the pay telephones. West New York is to be split into two districts with contracts granted to the two successful bidders. At least 75 pay telephones must be installed by the winning bidder at locations to be approved by a Town official. A security deposit of $250 per proposed telephone must be paid to qualify to bid. This would amount to a payment of at least $18,750 assuming the bidder proposes to install the minimum of 75 telephones.

The Town is to evaluate the bids based upon a number of factors, including: the experience of the applicant, the ability of the applicant to maintain the pay telephones, the efficiency of the public service to be provided, the willingness of the applicant to provide pay telephones in residential neighborhoods that lack private telephones, the applicant's history of maintaining pay telephones in West New York, and the cost of a call to the public. Also considered is the compensation offered the Town by the applicant. Ronald Theobald, Purchasing Agent for the Town, testified by affidavit that he considered compensation to the Town to be the most important factor in evaluating the bids.

As it happened, three companies submitted proposals. Theobald testifies that the applications were equivalent with the exception of the compensation offered and the per-call cost to the public. Theobald determined that differences in billing methods between the bidding companies created difficulties in evaluating the bids. Accordingly, he recommended that all the bids be rejected. Due to the pendency of this action, the parties have agreed that no further action will be taken with regard to awarding the contract or otherwise putting into effect the Town's Ordinance.

In response to inquiries by the Court, the parties have clarified their positions in one important respect. The Town's Ordinance and Franchise Specification are contradictory in that the Ordinance expressly states that it applies to both public property and public rights of way. However, the Franchise Specification states it covers pay telephones on public property only. While the merits of this distinction are discussed *infra,* it suffices here to note that the Payphone Association only challenges the Ordinance to the extent it regulates pay telephones in public rights of way. The Payphone Association expressly disavows any challenge to the Town's ability to control whose pay telephones are installed in what is unequivocally Town property, such as the foyer of City Hall, or in a fire station.

The Town rejects the notion that any valid distinction exists. The Town argues that it owns the public rights of way as well as its own buildings and grounds. By extension, therefore, the Town claims the authority to contract for the installation of pay telephones essentially any place that is not private property. Specifically, this would include the right to grant a franchise to install pay telephones on the Town's sidewalks or on the sides of buildings abutting public rights of way.

The parties do agree, however, that the Ordinance and the Franchise Specification are intended to cover both rights of way and Town buildings, grounds and other property, notwithstanding the ambiguity in their language. The Court requested supplemental submissions on the parties' positions on this issue and has carefully considered the parties' arguments.

DISCUSSION

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see* Hersh v. Allen Prods. Co., 789 F.2d 230, 232 (3d Cir.1986). This Court noted in its opinion denying Payphone Association's application for a preliminary injunction that the issues presented by this case are primarily legal. 634*634 *See also* NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 344, (3d Cir.2001) (factual issues obviated by presence of preemption issue).

1. The Preemption Issue

The moving papers argue several alternative grounds for decision. Most prominently, plaintiff argues that the Ordinance is preempted by the *Telecommunications Act of 1996,*Pub.L. No. 104-104, 110 Stat. 56, codified in relevant part at 47 U.S.C. § 253. Plaintiff also contends that the Ordinance violates the substantive due process rights of the United States and New Jersey Constitutions, and constitutes a taking of private property without compensation in violation of the Fifth Amendment of the United States Constitution. Finally, according to plaintiff, the Ordinance creates a "fee, assessment or levy" contrary to New Jersey statute N.J.S.A. 54:30A-124.

"Longstanding practice calls for federal judges to explore all non-constitutional grounds of decision before addressing constitutional ones...." *United States v. Serafini,* 167 F.3d 812, 815 (3d Cir.1999). Likewise, the federal courts do not resolve difficult or important matters of state law where it is not necessary to do so. *See, e.g.,* 28 U.S.C. § 1367(c)(1) (court may decline to exercise supplemental jurisdiction over novel or complex issues of state law); *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 27-28, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959) (federal courts to stay proceedings involving state law issues regarding city and state relations); *Planned Parenthood of Central New Jersey v. Farmer,* 220 F.3d 127, 149 (3d Cir. 2000) (avoidance of "needless friction" with important state policies one prong of *Pullman* abstention doctrine). The Court should not be understood to decline jurisdiction or to abstain from considering the state constitutional and statutory issues raised by the parties. However, where a matter may be decided by a straightforward application of a federal statute, the Court believes that this is the preferable course for a federal court to take.

The Court notes that the Fourth Circuit vacated a decision by the District of Maryland in a similar case, on the ground that preemption under the Telecommunications Act was itself a constitutional issue and that certain state-law issues should have been reached first. The Court respectfully disagrees with this approach, however.

Our own Third Circuit has written, "the basic question involved in [preemption claims under the Supremacy Clause] is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *United Services Auto. Ass'n v. Muir,* 792 F.2d 356, 363 (3d Cir. 1986) (quoting *Swift & Co. v. Wickham,* 382 U.S. 111, 120, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965)) (alteration in original), *cert. denied sub nom., Grode v. United Services Auto Ass'n,* 479 U.S. 1031, 107 S.Ct. 875, 93 L.Ed.2d 830 (1987). This is particularly true where preemption is of the express, statutory variety, as opposed to either the doctrines of field or conflict preemption. Such preemption is pursuant to an explicit statutory command that state law be displaced. *Orson, Inc. v. Miramax Film Corp.,* 189 F.3d 377, 381 (3d Cir.1999), *cert. denied,* 529 U.S. 1012, 120 S.Ct. 1286, 146 L.Ed.2d 232 (2000). The inquiry is one of statutory intent. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

Preemption of state law pursuant to an express provision of a federal statute is only a constitutional issue in the sense that the authority for such preemption rests in part upon the Supremacy Clause of the United State Constitution. Every federal statute must be bottomed upon a grant of power in the federal Constitution; this does not convert every federal statutory question into a constitutional

one. *See* *Hotel Employees & Restaurant Employees Int'l Union v. Nevada Gaming Comm'n,* 984 F.2d 1507, 1512 (9th Cir. 1993)(Pullman abstention not appropriate "because preemption is not a constitutional 635*635issue"); *United Services Auto. Ass'n,* 792 F.2d at 363 (preemption not the type of constitutional issue to be avoided under *Pullman* abstention doctrine). Here there is no dispute over Congress' power to legislate in the field of telecommunications, nor over whether federal law trumps an ordinance of the Town of West New York. The constitutional aspects of the interrelation between the Telecommunications Act and the Ordinance are not truly "issues" in this case at all. The only issue here is the statutory one of whether the Town's actions contravene a federal law.

Therefore, the Court will address first the arguments of plaintiffs that the Ordinance is preempted by the federal Telecommunications Act. Because the Court finds below that preemption does exist and that the Ordinance and the Franchise Specification are void on that ground, the Court will reach neither the constitutional nor state law grounds raised by plaintiff.

2. Ripeness

The Town argues that the Payphone Association's challenge is not ripe for judicial review. The Town makes this argument solely with reference to the Payphone Association's state law challenge to the Ordinance under N.J.S.A. 54:30A-124. Although the Court does not reach this substantive ground in this Opinion, in an excess of caution and to settle any uncertainty regarding the justiciability of this matter, the Court will briefly address the federal doctrine of ripeness. It is plain that all of the substantive issues raised in this matter, whether actually reached by the Court or not, are ripe for review in this Court.

The Third Circuit addressed the ripeness doctrine in *Philadelphia Federation of Teachers v. Ridge,* 150 F.3d 319, 322-23 (3d Cir.1998). The doctrine prevents the federal courts from entanglement in abstract disputes. *Id.* (quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds, Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)). Two factors comprise the analysis: whether the issues are fit for judicial resolution and whether the parties will suffer hardship if a decision is withheld. *Id.; see also Step-Saver Data Sys., Inc. v. Wyse Technology,* 912 F.2d 643 (3d Cir.1990) (using a three-part test, weighing: (1) the adversity of the parties' interests; (2) the conclusiveness of the judgment; and (3) the utility of the judgment).

In *Philadelphia Federation of Teachers,* the Court of Appeals wrote that the "fitness for judicial review" prong of its ripeness test depended upon whether the issues presented were primarily legal or contingent on hypothetical facts, and whether the decision would decisively resolve the controversy at hand. 150 F.3d at 323. The Court has already noted the legal character of the issues at bar. Plainly a ruling for the Payphone Association would be conclusive with respect to the Ordinance and its effect upon plaintiff.

The hardship to the parties, or whether a lack of decision would create "a `direct and immediate' dilemma for the parties," *id.,* is clear here. Absent a ruling, the Town and the Payphone Association will remain at loggerheads and the Town will be forced to decide whether to withdraw or to proceed with its franchise scheme at the risk of offending federal law. It matters not that no contract has actually been signed; indeed, the parties have represented to the Court that the Town has delayed its bidding process pending the decision by this Court. Therefore, both prongs of the ripeness test having been met. The Town's argument that the case is not yet justiciable must be rejected.

3. The Federal Telecommunications Act

Section 253 of Title 47 of the United States Code provides:

(a) *In general*

No State or local statute or regulation, or other State or local legal requirement, 636*636 may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) *State regulatory authority*

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, 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.

(c) *State and local government authority*

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Subsection (a) is the operative subsection of the statute, expressly preempting any state or local law inconsistent with its prohibition. Subsections (b) and (c) are savings clauses, excepting the listed local and state functions from the preemptive effect of subsection (a). *See* *Cablevision of Boston, Inc. v. Public Improvement Comm'n,* 184 F.3d 88, 98 (1st Cir.1999). Once the party seeking preemption sustains its burden to show that a local municipality has violated § 253(a) by prohibiting or effectively prohibiting entry into the payphone market, the burden of proving that a statute or regulation comes within the safe harbor in § 253(c) falls on the party claiming that the safe harbor applies — in this case, the Town. *See In re PETITION OF THE STATE OF MINNESOTA,* 14 F.C.C.R. 21,697, n. 26, 1999 WL 1244016, n. 26 (F.C.C.1999) (citing *In re the Public Utility Commission of Texas,* 13 F.C.C.R. 3460, ¶ 83 (F.C.C. 1997)).

The parties do not address whether the Telecommunications Act provides a private right of action by telecommunications providers against a municipal violation of section 253. Substantial authority and the legislative history holds that there is such a private right of action. TCG *Detroit v. City of Dearborn,* 206 F.3d 618 (6th Cir.2000) (section 253(c) provides private right of action) (quoting 141 Cong. Rec. S 8213 (June 13, 1995)); *see* *Cablevision,* 184 F.3d at 100 n. 9 (assuming without deciding that private right of action exists). Under section 253(d), The FCC is granted powers of policing violations of 253(a) and (b). Like the several courts that have addressed the issue previously, this Court finds that omitting section 253(c) from the FCC's jurisdiction suggests that Congress intended that 253(c) be enforceable through private litigation. For this reason, and for the reasons more fully discussed in the authorities cited immediately above, the Court finds that the Payphone Association properly has brought this action to enforce section 253(c).

There can be little argument that an exclusive franchise as contemplated by the Section Three of the Town's Ordinance would constitute a "barrier to entry" prohibited under section 253(a). It is well-recognized that the Telecommunications Act marked a sea change in the regulation of the telephone industry in which Congress rejected the long-held premise that monopolies were necessary to reliable and universal service. *Cablevision,* 184 F.3d at 97. On its face, the Town's exclusive franchising scheme is at odds with the spirit and letter of the Telecommunications Act.

Indeed, the Town does not argue to the contrary. Instead, the Town relies upon the savings provision of section 253(c) to defend the Ordinance. The Town argues that the Ordinance is necessary "to regulate the physical occupation of the Town's 637*637 rights of way ... in the interest of avoiding pedestrian traffic problems."

The Court is unable to see how selling off the exclusive right to provide pay phones to the highest bidder bears any rational relationship to the interest identified by the Town or to any other interest that the Town may legitimately advance pursuant to the savings clause of section 253(c). As the First Circuit wrote in a passage quoted by the Town itself, "[i]f ... a local authority decides to regulate for its own reasons (*e.g.,* to minimize disruption to traffic patterns), § 253(c) would require that it do so in a way that avoids creating unnecessary competitive inequities among telecommunications providers." *Cablevision,* 184 F.3d at 105.

Managing pedestrian traffic patterns does not require an exclusive franchise. An exclusive franchise is plainly incompatible with the proviso of section 253(c) that such traffic management concerns be on a "competitively neutral" and "nondiscriminatory." The FCC, admittedly in a somewhat different context, has listed appropriate right-of-way management measures. These include regulations regarding location, the physical integrity of the streets, indemnity requirements, controlling the use of underground cable facilities, *et cetera. In re Classic Tel., Inc.,* 11 F.C.C.R. 13,082, ¶ 39, 1996 WL 554531, ¶ 39 (1996) (citing remarks of Sen. Feinstein).

The *Classic Telephone* decision specifically disapproved of municipal measures that simply deny a franchise to one provider while granting it to another under the rubric of right-of-way management pursuant to section 253(c). *Id.* ¶ 40. The Court need not decide how tight a link must exist between a municipal regulation of pay telephones and the purported goal of preserving the public rights-of-way. *Cf. TCG New York, Inc. v. City of White Plains,* 125 F.Supp.2d 81, 91 (S.D.N.Y.2000) (regulation not saved from preemption by section 253(c) that did not "directly relate" to management of right-of-way). Here, beyond any reasonable question, the Ordinance's exclusive franchise is unrelated to legitimate traffic or right-of-way management powers of the Town.

The Town asks the Court to imagine a parade of horribles if its Ordinance is struck down: the Town will be forced to permit an unlimited number of payphones in a popular location, and the Town will be powerless to prevent payphones in dangerous locations. These problems are plainly unrelated to the selling of an exclusive franchise, however. A permitting procedure that requires approval of a proposed pay telephone sites is an obvious solution to the Town's stated concerns. It is not for the Court to devise or to dictate traffic management regulations for the Town. However, the ease with which one can imagine alternatives to effectuate the Town's claimed traffic management goal undercuts the Town's claim that the exclusive franchise scheme will serve that purpose. *See IN RE MINNESOTA,* 14 F.C.C.R. 21, 697, ¶ 60, 1999 WL 1244016, ¶ 60("Minnesota has decided not to use a permit process similar in effect for other state rights-of-way and instead has granted exclusive physical access to a single entity in return for valuable consideration.")

Purchasing Agent Theobald's candid admission that the amount of compensation to the Town was the primary criterion in selecting the winning bid further undermines the Town's claim that the Ordinance and the Franchise Specification were an exercise of its traffic management powers. Nor does the Town's emphasis on the highest bidder bear any relation to the "fair and reasonable compensation" for the use of the public right-of-way that section 253(c) permits municipalities to exact.

Some courts have found that the fairness and reasonableness of a franchise fee under section 253(c) depends upon a rough proportionality between the fee and the extent of the use of the public right-of-way, fees other providers have been willing to pay, and the negotiating history of the 638*638 parties. *TCG Detroit,* 206 F.3d at 625; *see also TCG New York,* 125 F.Supp.2d at 96. Others, more persuasively in this Court's view, read "fair and reasonable compensation" to limit municipalities to recoupment of costs directly incurred through the use of the public right-of-way. *Bell Atlantic-Maryland, Inc. v. Prince George's County,* 49 F.Supp.2d 805, 817 (D.Md.1999), *vacated on other grounds,* 212 F.3d 863 (4th Cir.2000); *Peco Energy Co. v. Township of Haverford,* 1999 WL 1240941, *7 (E.D.Pa. 1999). Indeed, some courts have held that a revenue-based franchise fee can

never be sufficiently connected to compensation for use of the right-of-way to pass muster under 253(c). *Prince George's County,* 49 F.Supp.2d at 818; *Peco Energy Co.,*1999 WL 1240941 at *8; *AT & T Communications of Southwest, Inc. v. City of Dallas,* 8 F.Supp.2d 582, 593 (N.D.Tex.1998). 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.

The Court need not choose between these competing views of "fair and reasonable compensation" in this case, because a highest bidder arrangement based on commissions generated by an exclusive franchise for all of the payphones in the Town has no logical link at all to costs nor to any other measure of what might be deemed "fair and reasonable." Indeed, such an arrangement clearly constitutes a barrier to entry for smaller payphone providers, even apart from the exclusivity of the franchise.

Moreover, the price exacted by the municipality will contain an increment reflecting the value of the franchise's exclusivity. The bids are for the right to exclude all others, not merely for compensation to the Town for the use of the right-of-way. This increment of value is as unrelated to compensation for use of the right-of-way as it is antithetical to the overarching, pro-competitive purpose of the statute. *See IN RE MINNESOTA,* 14 F.C.C.R. 21697, ¶ 62, 1999 WL 1244016, ¶ 62. Therefore, that the Town found willing bidders does not weigh in favor of the reasonableness of the compensation scheme, and those bids are no guide to what is "fair and reasonable" under the statute.

The Town argues strenuously that it has the right to charge a fee for use of the public right-of-way because the right-of-way is Town property. The Town misunderstands the nature of its ownership interest in the public streets and sidewalks. The ownership interest in the land under the public streets resides in the adjacent land owner. The public has an easement for streets, utilities and sidewalks, leaving the landowner only the naked fee in the land. *Bechefsky v. City of Newark,* 59 N.J.Super. 487, 492, 158 A.2d 214 (1960) (citing *Saco v. Hall,* 1 N.J. 377, 382, 63 A.2d 887 (1949)). The local government holds the easement in trust for the public. *State v. South Hackensack Tp.,*65 N.J. 377, 383, 322 A.2d 818 (1974).

Thus, the control the municipality exerts over the easement is a function of its powers as trustee, conventionally expressed as the police power to manage the public right-of-way. *See also Bechefsky,* 59 N.J.Super. at 492, 158 A.2d 214 ("sovereign power over land lying within street lines is lodged in the municipality"). Distinct from public parks or government buildings, the municipality does not possess ownership rights as a proprietor of the streets and sidewalks. Consequently, the Town's analogies and hypotheticals likening the effect of the Ordinance to the Town's management of public parks and buildings are inapt. Likewise, the Town's citation of various state-law authorities supporting its right-of-way management powers simply beg the question, because these authorities are only controlling to the extent they are not preempted by federal law.

Having considered the Ordinance's key elements of exclusiveness and compensation, the Court turns to the other criteria of the Franchise Specification to determine whether they also are repugnant to the 639*639 Telecommunications Act. As set forth above, these criteria are: the experience of the applicant; the ability of the applicant to maintain the pay telephones; the efficiency of the public service to be provided; the willingness of the applicant to provide pay telephones in residential neighborhoods that lack private telephones; the applicant's history of maintaining pay telephones in West New York; and the cost of a call to the public.

Section 253(b) permits States to regulate pay telephone service for the benefit of the public safety, to promote universal service and to "safeguard the rights of consumers." This power is not, however, extended to municipalities. The Town does not cite section 253(b), and makes no claim that the State of New Jersey has delegated its regulatory powers (to the extent they are saved from

preemption by section 253(b)) to the Town. Therefore, the remaining criteria for granting a pay phone concession must rest upon the right-of-way management powers saved by section 253(c).[1]

It is clear that several of the listed criteria cannot be plausibly linked to right-of-way management issues. Controlling the cost of a telephone call, for example, has no connection to traffic management. The Court notes the factual claims made by the Town that pay telephones in high crime areas have been a public nuisance. The Town also complains that lack of control over pay telephone placement has made it difficult to compel the removal of non-functioning or undesirable pay telephones because their owners cannot be identified. Reading between the lines, the Court is willing to perceive a possible connection to right-of-way management by better ascertaining the identity and responsibility of pay telephone providers. Also, as previously noted, neutrally administered controls over the location of pay telephones might well be justified as right-of-way management.

The criteria as presently stated in the Ordinance must fail, however. First, such requirements as "experience" and "ability to maintain" may all to readily be applied as barriers to entry. Indeed, the clear bias inherent in such requirements in favor of larger, established pay telephone providers clearly would thwart the intent of the Telecommunications Act to displace entrenched telecommunications monopolies with an openly competitive market. The Town's own citation of the FCC's findings that the pay telephone market is easy and cheap to enter establishes that undue reliance on experience in granting pay telephone permits will easily run afoul of the section 253(a)'s ban on barriers to entry. *See* Town's Brief at 14 (citing *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 11 F.C.C.R. 20,541, ¶ 11, 1996 WL 547458, ¶ 11 (F.C.C.1996)).

Moreover, it is clear that any ordinance containing such criteria must be crafted to prevent Town officials from granting or denying pay telephone applications at their unguided discretion. As several courts have held, the power to deny permission to install a pay telephone on right-of-way management grounds must be exercised pursuant to regulations tied specifically 640*640 and clearly to traffic and right of way management concerns. *TCG New York,* 125 F.Supp.2d at 92 (ordinance preempted "because it leaves the City near total discretion to approve or reject an application"); *Prince George's County,* 49 F.Supp.2d at 816; *Peco Energy,* 1999 WL 1240941, * 6; *City of Dallas,* 8 F.Supp.2d at 593. Unfettered discretion to deny a permit or a denial pursuant to such vague standards as the "public interest" is void as a barrier to entry. *TCG New York,* 125 F.Supp.2d at 92.

Therefore, while the Court will concede that some of the secondary criteria along the lines set forth in the Ordinance might, if substantially modified, be validly adopted, these secondary criteria are also invalid as right-of-way management measures as presently drafted. Of course, as already discussed, the Court is fully satisfied that the Ordinance's principle features, the exclusive franchise awarded to the highest bidder, is not permissible under section 253(c). Thus, Section Three of the Ordinance and the Franchise Specification are preempted by the federal Telecommunications Act, 47 U.S.C. § 253, and are void.

One final issue remains. The Ordinance provides that if any part is found to be invalid, then the rest of the Ordinance will continue in effect. Although, absent Section Three, the Ordinance does not provide for an exclusive franchise, Section Two of the Ordinance still requires a permit for the placement of a pay telephone in West New York specifying the exact location of the equipment.

It is not clear what, if any, criteria govern the grant or denial of a pay telephone permit under Section Two. The statement of "Intent and Purpose" in Section One of the Ordinance speaks of aesthetics and the "perception of disorder" as well as pedestrian traffic management. If this statement is to provide the guidelines for awarding pay telephone permits, then one must ask whether the Court's

discussion above regarding clear guidelines and the necessity to contain municipal discretion would provide grounds to challenge a denial of a permit under Section Two as well.

The parties have not discussed this question and it is not properly before the Court. The Town may wish to make sure that the enforcement of the remaining, non-preempted portions of the Ordinance, and any modified pay telephone ordinance it may adopt in the future, are consistent with the principles discussed in this Opinion.

4. Permanent Injunction

It has been held in this District that the standard for an award of a permanent injunction is identical to that for the award of a preliminary injunction, except that actual success on the merits must be shown, rather than a mere likelihood. *Harlem Wizards Entertainment Basketball, Inc. v. NBA Properties, Inc.,* 952 F.Supp. 1084, 1091 (D.N.J.1997) (Walls, J.). It is clear that the different showing on the merits is an important point of distinction. "In deciding whether a permanent injunction should be issued, the court must determine if the plaintiff has actually succeeded on the merits (i.e. met its burden of proof)." *ACLU v. Black Horse Pike Reg. Bd. of Educ.,* 84 F.3d 1471, 1477 n. 3 (3d Cir.1996).

This Court's decision to grant summary judgment stands as its plenary decision on the merits, and thus plaintiffs have established actual success in this matter. It is not so clear that another critical element of the preliminary injunction showing, irreparable injury, also applies to permanent injunctions. The Court of Appeals noted a conflict in the case law on this issue in *Temple Univ. v. White,* 941 F.2d 201, 213 (3d Cir.1991), *cert. denied sub nom., Snider v. Temple Univ.,* 502 U.S. 1032, 112 S.Ct. 873, 116 L.Ed.2d 778, (1992),but declined to resolve it. Since then, the Third Circuit has not spoken on whether irreparable injury is necessary for a permanent injunction.

641*641 Of course, were a legal remedy available, the Court would not issue an injunction in equity. Moreover, the Supreme Court has long held that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506-07, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). Other panels of the Third Circuit, prior to *Temple University,* treated irreparable injury as a necessary part of the analysis of a request for permanent injunctive relief. *See, e.g., Natural Resources Defense Council, Inc. v. Texaco Refining & Marketing, Inc.,*906 F.2d 934, 936 (3d Cir. 1990). Finally, the Court must consider the traditional equitable issue of the balance of the harms to be borne if the Court grants or denies an injunction. *See Prudential Ins. Co. of Am. v. Massaro,* 2000 WL 1176541, *17 (D.N.J.2000) (noting precedent treating irreparable injury requirement as implicit in equitable analysis).

Presumably the motive behind operating pay telephones is to earn a profit. It might be argued, therefore, that the harm to the Payphone Association's members if they are excluded from the Town's pay telephone market is remediable through money damages. However, plaintiff's members have a federal statutory right to participate in a local payphone market free from municipally-imposed barriers to entry. This right cannot be directly vindicated by a money judgment after the fact.

The public interest and the balance of the harms clearly weigh in favor of an injunction. Congress has stated that the public interest requires a competitive pay telephone market. The only "harm" imposed upon the Town by the Court's ruling today is that it may not exclude or regulate local pay telephones in a manner unrelated to the Town's right-of-way management concerns. Such harm is not legally cognizable, because under federal law the Town has no right to exercise this power. The harm to the plaintiff and its constituent pay telephone operators has been discussed. The threatened harm is "irreparable" for the purposes of the permanent injunction analysis.

Each of the factors weighing in favor of the plaintiffs' application, the Court will grant a permanent injunction barring further enforcement of the Town's Ordinance.

CONCLUSION

For the foregoing reasons, the Court will grant plaintiff's motion for summary judgment and deny defendant's cross-motion for summary judgment. The Order of Judgment will declare that Section 3 of the Ordinance and the Franchise Specification promulgated pursuant to Section 3 of the Ordinance are preempted by the Telecommunications Act, 47 U.S.C. § 253(a) and not saved from preemption by 47 U.S.C. § 253(c). The Court will permanently enjoin the Town from enforcing Section Three of the Ordinance and the Franchise Specification, including without limitation an injunction against awarding any exclusive franchise for providing pay telephone service in the Town based upon the amount of compensation paid to the Town by that provider.

An appropriate Order is attached.

ORDER OF JUDGMENT AND PERMANENT INJUNCTION

For the reasons set forth in the Court's Opinion filed herewith,

It is this 7th day of March, 2001

ORDERED that the plaintiff's motion for summary judgment is granted, and it is further

ORDERED that the defendant's cross-motion for summary judgment is denied, and it is further

ORDERED and ADJUDGED as the declaration of this Court that Section Three of Ordinance 26/99 (the "Ordinance") of the Town of West New York, and the document titled Franchise for Public Pay Telephones throughout the Town of West New York (the "Franchise Specification") 642*642 promulgated pursuant to the Ordinance is preempted and is void and of no effect, pursuant to 47 U.S.C. § 253, and it is further

ORDERED that the Town of West New York is hereby permanently enjoined from enforcing or putting into effect Section Three of the Ordinance and/or the Franchise Specification, including without limitation making any award of an exclusive franchise for providing pay telephone service in the Town based upon the amount of compensation paid.

[1] The Town cited authorities regarding municipal powers over public streets, *e.g.,* N.J.S.A. 48:7-2, N.J.S.A. 40:60-60.25.29, in its supplemental letter brief in support of its claim to rights as a proprietor of the public right-of-way. The Town has not argued that these statutes amount to a state delegation of state powers saved from preemption under section 253(b). *Cf.* *BellSouth Telecommunications, Inc. v. City of Orangeburg,* 337 S.C. 35, 522 S.E.2d 804, 807 (1999) (state statute permitting municipality to enact ordinances for, *inter alia,* "health, peace order and good government" was delegation of power saved from preemption by section 253(b)). The Payphone Association has not, therefore, responded to this possibility and the Court will not directly rule upon it. On the record as it presently stands, however, the Court notes that the flaws in the Ordinance that place it outside the savings clause of 253(c) would likely render it outside the protections of section 253(b) as w

GEORGE A. HALSEY
v.
THE RAPID TRANSIT STREET RAILWAY COMPANY.

[NO NUMBER IN ORIGINAL]

COURT OF CHANCERY OF NEW JERSEY

47 N.J. Eq. 380*; *20 A. 859*; *1890 N.J. Ch. LEXIS 11

October, 1890, Decided

PRIOR HISTORY: [***1] On application for an injunction, heard on bill and affidavits and answer and affidavits.

DISPOSITION: Application denied.

HEADNOTES

1. The ownership in land over which a street has been laid is, for all substantial purposes, in the public, although the owner retains the naked fee, and the right of the public to use it for public travel is the primary and superior right.

2. Land taken for a street is taken for all time, and compensation is made once for all, and by the taking the public acquire the right to use it for travel, not only by such means as were in use when the land was acquired, but by such other means as new wants and the improvements of the age may render necessary.

3. Any use of a street which is limited to an exercise of the right of passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not, in any substantial degree, destroy the street as a means of free passage, common to all the people, is a legitimate use and within the purposes for which the public acquired the land.

4. An individual cannot maintain an action for injury caused by obstructing a highway unless he suffers some private, direct and material damage beyond the public at large, as well as damage otherwise irreparable. Mere diminution of the value of his property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief.

5. A preliminary injunction will not be granted where either the complainant's right is in doubt, or where the damage which will result from an invasion of his right is not irreparable.

6. An abutting owner is allowed to exercise privileges on the sidewalk, in front of his premises, which he may not exercise elsewhere in the street, because he is chargeable with the whole expense of maintaining the sidewalk.

7. When not restrained by ordinance or otherwise, an abutter may use the highway in front of his premises for loading and unloading goods, for vaults and chutes, for awnings and shade trees, but only on condition that he does not interfere with the safety of public travel. The public right is paramount and that of the abutter subordinate.

8. Where a corporation is authorized by a general grant to exercise a franchise or to carry on a business, and the grant contains no words either defining or limiting the powers which the corporation may exercise, it will take, by implication, all such powers as are reasonably necessary to enable it to accomplish the purposes of its creation.

9. Where no method is prescribed by law in which a municipality shall exercise its powers, but it is left free to determine the method for itself, it may act either by resolution or ordinance.

10. Placing poles in the middle of the street, for the purpose of using electricity for street car propulsion, does not impose a new servitude on the land in the street--the poles facilitate the use of the street as a public way.

11. The question whether a new method of using a street for public travel results in the imposition of an additional burthen on the land or not, must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use.

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12. Lamp-posts and other appropriate instruments may be lawfully erected in the streets of a city for the purpose of lighting them at night.

COUNSEL: Mr. John R. Emery and Mr. Frederic W. Stevens, for the complainant.

Mr. Chandler W. Riker and Mr. Theodore Runyon, for the defendant.

JUDGES: VAN FLEET, V. C.

OPINION BY: VAN FLEET

OPINION

[*382] [**859] VAN FLEET, V. C.

The complainant owns lands abutting on Kinney street and Belmont avenue, in the city of Newark. His lands have a frontage on Kinney street of two hundred and thirty-six feet and on Belmont avenue of about one hundred and thirty-three feet. His title extends to the middle of the street. The defendant is a street railway corporation. It was organized under a general statute approved April 6th, 1886, entitled "An act to provide for the incorporation of street railway companies and to regulate the same." *Rev. Sup. p. 363*. The defendant has laid two railroad tracks in Kinney street, and intends to lay two others in Belmont avenue. One of those laid in Kinney street is on that part of the street in which the complainant owns the fee of the land. No claim is made that these tracks were put down without authority of law, or in violation of the [***2] complainant's rights. They are unquestionably lawful structures. They were put down by permission of the city authorities and under their supervision. The defendant intends to use electricity as the propelling power of its cars, and for the purpose of applying this force to the motors on its cars, it has, with the permission of the city authorities, erected three iron poles in the centre of Kinney street and strung wires thereon. The poles stand partly on the complainant's land. The erection of these poles and the use to which the defendant intends to apply them constitutes the only ground on which the complainant rests his right to the relief he asks. The bill describes these three poles as standing one hundred and eleven feet distant from each other, about twenty feet in height, ten inches by six in diameter at the base, set in a guard or frame, in the form of an inverted cup, which at its [**860] base is twenty-two inches by eighteen in diameter. To what depth below the surface the poles have been sunk, or what are the dimensions of the part extending below the surface, or whether they have been put in the earth at all or simply set up on the surface, are matters, in respect [***3] to which, neither the bill nor the answer gives any information whatever. Both pleadings, however, agree that the poles stand in the centre of the street, so that it is an undisputed fact in the case, that the whole extent of the [*383] land of the complainant occupied by either the poles or the guards, are three spaces of nine inches by eleven, and that the spaces so occupied are in that part of the street where the right of the public is, for purposes of travel, paramount as against the complainant. The poles were erected without the consent of the complainant and without compensation to him. No compensation is intended to be made. The complainant insists that the erection of the poles imposed a new and additional servitude on his land in the street; in other words, that his land, by the erection of the poles, has been appropriated to a purpose for which the public have no right to use it. If his insistment is true, it is obvious that his constitutional rights have been violated, for one of the most important guaranties of the constitution is, that private property shall not be taken for public use without just compensation. It is likewise obvious that if the complainant's constitutional [***4] rights have been invaded by the erection of the poles, he is entitled to protection by injunction, for that is the only remedy which will adequately redress his wrong. It is the only judicial means by which that which has been taken from a citizen in violation of the rights secured to him by the constitution can be effectually restored to him. The complainant asks that the defendant may be enjoined from erecting poles on his land in Belmont avenue, and also from making any use of those erected on his land in Kinney street.

The question on which the decision of the case must turn is this: Has the complainant's land in the street been appropriated to a purpose for which the public have no right to use it? It is of the first importance in discussing this question to keep constantly before the mind the fact that the *locus in quo* is a public highway, where the public right of free passage, common to all the people, is the primary and superior right. The complainant has a right in the same land. He holds the fee subject to the public easement. But his right is subordinate to that of the public, and so insignificant, when contrasted with that of the public, that it has been declared [***5] to be practically without the least beneficial interest. Mr. Justice Depue, in pronouncing the judgment of the court of errors and appeals in *Hoboken Land and Improvement* [*384] *Co.* v. *Hoboken*, 36 N.J.L. *540, 581*, said: "With respect to lands over which streets have been laid, the ownership for all substantial purposes is in the public. Nothing remains in the original proprietor but the naked fee, which on the assertion of the public right is divested of all beneficial interest." This view was subsequently enforced by the same court in *Sullivan v. North Hudson R. R. Co., 51 N.J.L. 518, 543, 18 A. 689*. Both the nature and extent of the public right are well defined. Lands taken for streets are taken for all time, and if taken upon compensation, compensation is made to the owner once for all. His compensation is awarded on the basis that he is to be deprived perpetually

of his land. The lands are acquired for the purpose of providing a means of free passage, common to all the people, and consequently may be rightfully used in any way that will subserve that purpose. By the taking the public acquire a right of free passage over every [***6] part of the land, not only by the means in use when the lands were taken, but by such other means as the improvements of the age, and new wants, arising out of an increase in population or an enlargement of business, may render necessary. It is perfectly consistent with the purposes for which streets are acquired that the public authorities should adapt them, in their use, to the improvements and conveniences of the age. *Morris and Essex R. R. Co. v. Newark, 10 N.J. Eq. 352, 357*. This is the principle on which it has been held that a street railway, operated by animal power, does not impose a new servitude on the land in the street, but is, on the contrary, a legitimate exercise of the right of public passage. Such use, though it may be a new and improved use, still is just such a use as comes precisely within the purposes for which the public acquired the land. Chancellor Williamson, speaking on this subject in the case last cited, said in substance (*p. 558*), the authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, subject only to the inconvenience of the railroad, is not such a taking [***7] of private property from the owner of the fee of the adjacent land as is prohibited by the constitution. The easement of the highway is in the public, although the fee is technically in the adjacent owner. It is the easement only which is [*385] appropriated, and no right of the owner is interfered with. While the street is preserved as a common public highway, the use of it does not belong to the owner of the land abutting on it any more than it does to any other individual of the community. The legislature, therefore, does not, by permitting a railroad company to use the highway in common with the public, take away from the land-owner anything that belongs to him. It is not a misappropriation of the way. It is used, in addition to the ordinary mode, in an improved mode for the people to pass and repass. This exposition of the law, so far as it concerns horse railroads, has been approved as correct in all subsequent cases. As I understand the adjudications of this state, this principle must be considered authoritatively established, that any use of a street which is limited to an exercise of the right of public passage, and which is confined to a mere use of the public easement, [***8] whether it be by old methods or new, and which does not tend, in any substantial respect, to destroy the street as a means of free passage, [**861] common to all the people, is perfectly legitimate. Such use invades no right of the abutting owners; it takes nothing from them which the law reserved to the original proprietor when his land was taken; it is simply a user of a right already fully vested in the public, and consequently, by its exercise, nothing is taken from the abutting owners which can be made the basis of additional compensation.

It is not denied that the railway tracks which the defendant has laid on the complainant's land were placed there by authority of law, nor that the defendant has a legal right to use them in the transportation of passengers, but the complainant's claim is this: that by the erection of the three poles, his land in the street has been appropriated to a use entirely outside of the public easement, and that it follows, as a necessary legal consequence, that such use constitutes a wrongful taking of his property. Stated more briefly, his claim is, that the erection of the poles puts an additional servitude on his land, and attempts to give the [***9] public a right in his land which, as yet, has not been acquired, nor paid for. That the poles will, to a trifling extent, obstruct public travel and prevent infinitesimal parts of the street from being [*386] used as a means of free passage, is a fact which cannot be denied, but there is nothing in this situation of affairs which entitles the complainant to the aid of a court of equity, unless it is made to appear that the nuisance thus created results in some substantial injury to him, different from that suffered by the public at large, and that the damage which he will sustain in consequence of the nuisance is irreparable in its character. The rule on this subject is settled. An individual has no right of action, in cases of nuisance created by obstructing a highway, unless he suffers some private, direct and material damage beyond the public at large, as well as damage otherwise irreparable. Mere diminution of the value of the property of the party complaining, by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. [***10] *Morris and Essex R. R. Co. v. Prudden, 20 N.J. Eq. 530, 537*. No irreparable damage is shown in this case; indeed, I think it may well be doubted whether a sufficient injury is shown to entitle the complainant to maintain a personal action in any court. The bill avers the following facts: that the complainant's premises are used as a japannery, with a present entrance to them from Kinney street; that one of the poles in Kinney street stands about forty-five feet distant from the point of entrance, and that the pole, by reason of the slope of the street, makes the passage of wagons to the entrance more inconvenient than it would be if the pole was not there. Now, I am compelled to confess to an utter want of capacity to see how a pole, with a base of twenty-two inches by eighteen, standing in the middle of a street sixty feet wide, and distant forty-five feet from the point of entrance, can, to any appreciable extent, obstruct or impede the passage of a wagon over the street to the entrance, no matter what the slope of the street may be. It is true there is a very small space in the middle of the street over which a wagon approaching the entrance cannot pass, but [***11] it may pass on either side. Besides, the distance of the pole from the entrance renders it very improbable, as it seems to me, that a wagon, in passing from the street

to the entrance, would, if there was no pole there, pass over this space one time in fifty. Certain it is, that even if it be true that the pole diminishes the complainant's [*387] means of access to the entrance, the diminution is so insignificant as to lay no ground for relief in equity.

A doubt as to whether the complainant's land in the street has been appropriated to a purpose for which the public have no right to use, will, at this stage of the cause, be fatal to his claim to an injunction. In a case where the complainant's right is doubtful and no irreparable damage will result from the doing of the act which he seeks to have enjoined, a preliminary injunction should not be granted. *Hinchman v. Paterson Horse R. R. Co., 17 N.J. Eq. 75, 81*. The rule on this subject has recently been stated by the court of errors and appeals, in a form so lucid and imperative as to remove all doubt respecting the judgment which this court must pronounce on applications of the class just described. [***12] This is the form in which the rule is laid down: "It is impossible to emphasize too strongly the rule so often enforced in this court, that a preliminary injunction will not be allowed where either the complainant's right, which he seeks to have protected *in limine* by an interlocutory injunction, is in doubt, or where the injury which may result from the invasion of that right is not irreparable." *Hagerty v. Lee, 45 N.J. Eq. 255, 256, 17 A. 826*. The poles have been placed on that part of the complainant's land where, if their erection constitutes a legal injury at all, they will do the least possible harm. They have been placed on the edge of his boundary line, at a point where, so long as his land remains subject to the public easement, it is not possible for him to make any use whatever of the land. Had they been placed on the sidewalk in front of his premises, rights, growing out of a duty incumbent upon the abutting owner in respect to that part of the street, might have made it the duty of the court to consider questions not at all involved in this case. "A sidewalk," said Chief-Justice Beasley, in [***13] *Agens v. Newark, 37 N.J.L. 415, 423*, "has always, in the laws and usages of this state, been regarded as an appendage to, and a part of, the premises to which it is attached, and is so essential to the beneficial use of such premises, that its improvement may well be regarded as a burthen belonging to the ownership of the land, and the order or requisition for such an improvement as a police regulation. On this ground, I conceive [*388] it to be quite legitimate to direct it to be put in order at the sole expense of the owner of the property to which it is subservient and indispensable." And Mr. Justice Dixon, in pronouncing the opinion of the supreme court in *Weller v. McCormick*, [**862] *47 N.J.L. 397, 400, 1 A. 516*, said: "Probably in consideration of the peculiar privilege usually accorded to the owner to use the adjacent sidewalk for stoops, areas, chutes and other domestic and trade conveniences, he has been held chargeable with the whole expense of maintaining this portion of the road." These utterances show that there is a material distinction between the rights of an abutting owner in the sidewalk adjacent to his premises and [***14] those which he may exercise over the other part of the street. I entertain no doubt that that part of the street which has been set apart for public use by means of vehicles may be lawfully applied to uses which would be unlawful, as against the adjacent owner, if exercised, against his will, on the sidewalk which his money has paid for.

The question here, however, is, what are the rights of an adjacent owner in that part of the street in which he holds the naked fee, but which has been set apart, by municipal regulation, for public use by means of vehicles. Mr. Justice Haines, in speaking of his rights in an ordinary highway, not an urban way, said, in *Starr* v. *Camden and Atlantic R. R. Co., 4 Zab. 592, 597:* "He may lay water pipes, gas or other pipes below the surface; may excavate for a vault, or dig for mining purposes, and use the soil in any other manner that does not interrupt the free passage over it." In a recent case, heard by the chief-justice and Justices Dixon and Reed, Mr. Justice Dixon, in pronouncing the opinion of the court, said, in substance, that an abutter may use the highway in front of his premises, when not restrained by positive enactment, [***15] for loading and unloading goods, for vaults and chutes, for awnings, shade trees, &c., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel. The public right is paramount, and includes the right to have the street safe for travel. That of the abutting owner is subordinate. *Weller v. McCormick, 52 N.J.L. 470, 19 A. 1101*. Some of the rights mentioned in these definitions cannot, [*389] as is obvious, be exercised in that part of the street where the poles stand. An awning could not lawfully be put there, nor a chute, nor shade trees. Nor could the privilege of loading and unloading goods be exercised at that point either rightfully or advantageously. As to the other rights mentioned, namely, to lay pipes, to construct a vault and to mine, there is not, as the case now stands, a word of proof before the court going to show that the poles do or will impair these rights in the slightest degree, or prevent the complainant from exercising them to the fullest extent.

The court might very properly, I think, at this point deny the complainant's application, on the ground that he has shown no such injury as [***16] entitles him to relief by injunction, but as this course would leave the principal question of the case undecided, it should not, in my judgment, be adopted. The litigants, I think, are entitled to a decision on the question, whether or not the complainant's land in the street has been appropriated, by the erection of the poles, to a use not within the public easement. That is the question which received the principal attention of counsel on the argument, and which has occupied the

greater part of the time devoted to the consideration of the case.

The right of the defendant to use electricity as its motive power is clear. The defendant was organized under a general statute, authorizing seven or more persons to associate themselves together, by articles in writing, for the purpose of forming a corporation to construct, maintain and operate a street railway for the transportation of passengers. *Rev. Sup. p. 363*. The motive power to be used by corporations formed under this statute is in no way limited or defined; the statute does not say that they shall use animal, mechanical or chemical power; it says nothing at all on the subject of power; hence, under the general grant of power [***17] to maintain and operate a street railway, it would seem to be clear, that a corporation formed under this statute, takes, by necessary and unavoidable implication, a right to use any force, in the propulsion of its cars, that may be fit and appropriate to that end, and which does not prevent that part of the public which desires to use the street, according to other customary [*390] methods, from having the free and safe use thereof. While the rule is elementary that public grants are to be strictly construed, still it is also well established, that where a corporation is authorized, by a general grant, to exercise a franchise or to carry on a business, and the grant contains no words either defining or limiting the powers which the corporation may exercise, it will take, by implication, all such powers as are reasonably necessary to enable it to accomplish the purposes of its creation. I am, therefore, of opinion, that if there was no other legislation on this subject than that just mentioned, and that it was made to appear that electricity could be used for the propulsion of street cars without preventing the free and safe use of the street by other means of transportation, [***18] the defendant would, by force of the statute under which it was organized, have a right to use electricity as its motive power. But there is other legislation on this subject. Just a month prior to the approval of the statute under which the defendant was organized, another statute was passed, which declares that any street railway company in this state may use electric motors as the propelling power of its cars instead of horses; provided, it shall first obtain the consent of the proper municipal authority to use such motors. *Rev. Sup. p. 369* § *30*. On the argument it was contended that the legislature meant to confine the grant made by this statute to such corporations as were in existence when the statute was passed and to exclude such as should subsequently be created. This view was not pressed with much vigor, nor without the expression of doubt. I cannot adopt it. On the contrary, it seems to me, that when the two statutes are considered together, as they must be--for [**863] each forms a part of the same legislative scheme and both were enacted at the same session--it is made perfectly plain that the legislature meant that corporations formed under the later statute [***19] should have the benefit of the grant made by the earlier. The grant, it will be observed, is not limited to such street railroad companies as were in existence when the statute was passed, or as had theretofore been created, but is made to any street railroad company in this state. The grant is general, and was obviously designed to operate in favor of all corporations of the kind described, [*391] whether existing at its date or subsequently created. This construction puts the legislation under consideration in harmony with that provision of the constitution which prohibits the granting of any exclusive privilege to a corporation and commands that corporate powers, of every nature, shall be conferred by general laws.

By the terms of the statute just construed, no street railway corporation can use electricity as its motive power until it has obtained the consent of the proper municipal authority. The defendant has such consent. It was given by resolution adopted by the common council and approved by the mayor. The complainant contends that consent cannot be given by resolution, and insists that the municipality, in such a matter, can only act by ordinance. But the rule, according [***20] to the adjudged cases, is firmly settled the other way, and may be stated as follows: Where a statute commits the decision of a matter to the common council or other legislative body of a city, and is silent as to the method in which the decision shall be made, it may be made either by resolution or ordinance. Or--to state the rule in another form--where no method is prescribed in which a municipality shall exercise its power, but it is left free to determine the method for itself, it may act either by resolution or ordinance. One method is just as effectual in point of law as the other. *State v. Jersey City, 27 N.J.L. 493*; *City of Burlington v. Dennison, 42 N.J.L. 165; Butler v. Passaic, 44 N.J.L. 171*.

In view of the legislation and the action of the city authorities just discussed, it would seem to be clear, that the right of the defendant to use electricity as its motive power, stands, at least so far as the public are concerned, on a sure foundation. The poles and wires are to be used to apply electricity to the motors on the cars. They form a part of what is called the overhead system. In the present state of [***21] the art, they constitute a part of the best, if not the only means, by which electricity can be successfully used for street car propulsion. The proof on this point is decisive. Thomas A. Edison is perhaps the highest authority on this subject in this country. He says, in an affidavit annexed to the defendant's answer, that the only method of applying electricity [*392] for street car propulsion which, up to the present time, has proved successful, electrically and commercially, is what is known in the art as the overhead system, whereby electricity is supplied to the motors on the cars from wires suspended above the cars. Other electricians say the same thing. The proofs also

show, that there are over two hundred electric street railways in the United States either in operation or in course of construction, and that of those in operation nearly all use the overhead system. That, according to the proofs, is the best system, and the one in general use, and the only one which, as yet, has proved successful. The facts just stated are in no way controverted, so as the proofs now stand, the court is bound to declare, as an established fact, that the poles and wires are, in the present [***22] state of the electric art, necessary to the successful operation of the defendant's railway by electricity. The poles and wires are to be used as helps to the public in exercising their right of passage over the street. They form part of the means by which a new power, to be used in the place of animal power, is to be supplied for the propulsion of street cars, and they have been placed in the street to facilitate its use as a public way and thus add to its utility and convenience. The whole matter may be summed up in a single sentence: the poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. That being so, it seems to me to be clear beyond question, that the poles and wires do not impose a new burthen on the land, but must, on the contrary, be regarded, both in law and reason, as legitimate accessories to the use of the land for the very purposes for which it was acquired. They are to be used for the propulsion of street cars, and the right of the public to use the streets by means of street cars, without making compensation to the owners of the naked fee in the street, is now so thoroughly settled as to be no [***23] longer open to debate. It would seem then to be entirely certain, that the occupation of the street by the poles and wires, takes nothing from the complainant which the law reserved to the original proprietor when the public easement was acquired. This view is in strict accord with the uniform current of judicial opinion on [*393] this subject. The question presented here for judgment has already been considered by the supreme court of Rhode Island in *Taggart v. Newport Street Railway Co., 16 R.I. 668, 19 A. 326*, and by the circuit court of the United States for the eastern district of Arkansas in *Williams v. City Electric Street Railway Co., 41 F. 556*, and by local courts in Kentucky, Ohio and Indiana, and in each instance the decision has been that the placing of the poles and wires in the street, for the purpose of propelling street cars by electricity, did not impose a new servitude on the land, nor appropriate the land to a use not within the public easement. The decision in these cases was placed upon this manifestly just principle.: that the question, whether a new method of using a street for public travel results in the imposition [***24] of an additional burthen on the land or not, must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use. The use is the test and not the motive power. And this principle exhibits, in a very clear light, the reason why it has been held that the placing of [**864] telegraph and telephone poles in the street imposes an additional servitude on the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence. Although our public highways have always been used for carrying the mails and for the promotion of other like means of communication, yet the use of them for a like purpose, by means of the telegraph and telephone, differs so essentially, in every material respect, from their general and ordinary uses, that the general current of judicial authority has declared that it was not within the public easement. Massachusetts has, however, by a divided court, held otherwise. [***25] *Pierce v. Drew, 136 Mass. 75*.

The authority on which the complainant principally relies to maintain his right to an injunction, is the judgment of the court of errors and appeals in *Wright* v. *Carter*. That case arose out of the following facts: The legislature authorized a turnpike company to construct its turnpike on a public highway, but directed that the highway should be vacated before the construction [*394] of the turnpike was commenced. The object of this direction was not to discharge the land from the public easement, but to relieve the public from the duty of keeping the highway in a proper state of repair and to impose that duty on the turnpike company. The highway was vacated and the turnpike constructed. After the turnpike was completed, the company built a house for its gate-keeper within the limits of the highway and on land in which the plaintiff held the naked fee. The plaintiff then brought ejectment. His action was based on the notion that the vacation of the highway discharged his land from the public easement, and that after the easement had once been discharged, it was not within the power of the legislature to reimpose it without [***26] making provision that compensation should be made. He also insisted, that even if the public easement still endured, a new servitude had been imposed on his land by the erection of the house. The supreme court held both his positions to be unsound and gave judgment for the defendant. *Wright v. Carter, 27 N.J.L. 76*. This judgment was carried to the court of errors and appeals and there reversed. No opinion appears to have been written, but the ground of the reversal is given by Chief-Justice Beasley in *State v. Laverack, 34 N.J.L. 201*. On page 208 he says: "I have always understood that the view of the supreme court, touching the legislative right to convert the public highway into a turnpike was concurred in by the higher court, and that the point of dissent was with regard to the privilege which had been sanctioned of putting the toll-house on the property of the land-owner." The chief-justice also expresses it as his judgment, that the erection of the house "was an invasion of the property of the land-owner, because to this extent it put an additional servitude upon his property. While the land was a public highway

such a building could [***27] not have been erected; consequently, when such land was converted into a turnpike, to authorize such an erection was to give to the public a new use in such land." *Wright* v. *Carter* and the case under consideration differ, it will be noticed, in every essential feature except that they both relate to a public way. The house could, under no possible condition of circumstances, be used as an instrument to [*395] aid the public in exercising their right of free passage. It was not erected for any such purpose, but, on the contrary, with the obvious design to withdraw permanently and entirely from public use, as a means of passage, that part of the way which it covered. The poles and wires have been erected for an entirely different purpose; in fact, for a purpose which is the exact opposite of that just stated. They are designed to facilitate the use of the streets as means of public passage, and thus increase their utility and convenience to the public. But I do not believe it is possible to imagine any condition of facts which would make it lawful to erect a building, to be used as a dwelling, in a public way. Such use of the land would undoubtedly be entirely foreign to [***28] the purposes for which it was acquired. There can, however, be no doubt, I think, that erections may be lawfully made in the streets of a city for the purpose of lighting them. They must be lighted at night to make their use safe and convenient and to prevent lawlessness and crime. By the charter of Newark power is given to its governing body, by express words, to light the streets, parks and other public places. I have no doubt that in virtue of this power the city has the right to erect poles in the street just where the poles in question are. The poles in question are in fact to be used for the purpose of lighting the street. One of the conditions on which the city gave its consent to the erection of the poles is, that the defendant shall place on every other pole a group of five incandescent lights, of sixteen candle power each, and furnish such light every night. This use of the poles and wires would, in my judgment, legalize their erection, but this is not their primary use. They were erected primarily and principally to facilitate the use of the street and add to its convenience as a public way, and it is upon this ground that I think it should be declared that their presence [***29] in the street invades no right of the complainant.

The averment that the use of electricity by the defendant, as its propelling power, will render the street so extremely dangerous as practically to destroy it as a public way for any other use than that which the defendant may make of it, is not supported by the proofs; on the contrary, I think it is very clearly shown, [*396] that an electric current of the volume the defendant will use, may be used with entire safety to everybody.

The complainant's application must be denied, with costs.

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In the Matter of Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief

Core Terms

franchise, telecommunications service, telephone, telecommunication, reply, carrier, rights-of-way, preempt, local government, intrastate, barrier, preemption, legal requirements, interstate, reconsider, entity, telephone company, telephone service, cable, rural, provide a service, last resort, certificate, delegate, consumer, convenience, rulemaking, incumbent, notice, municipality

Action

[**1] MEMORANDUM OPINION AND ORDER

Panel: By the Commission

Opinion

[*13082] [*13083] I. INTRODUCTION

1. On March 19, 1996, Classic Telephone, Inc. (Classic) filed the above-captioned Petition for Preemption, Declaratory Ruling and Injunctive Relief. Classic claims that two Kansas municipalities, Hill City and Bogue (the Cities), have blocked Classic's entry into the local markets in violation of Section 253 of the Communications Act of 1934, 1 added by the Telecommunications Act of 1996 (1996 Act). 2 Section 253(a) bars State and local governments from imposing legal requirements that may prohibit or have the effect of prohibiting the provision of telecommunications services. Accordingly, Classic requests that the Commission preempt the Cities' conduct, direct the Cities to issue telecommunications franchises to Classic, and enjoin the municipalities from further interfering with Classic's right to provide telecommunications services in those municipalities. For the reasons discussed below, we grant Classic's request to the extent that we conclude that the Cities' decisions denying Classic's franchise applications are preempted under section 253, and deny Classic's petition in all other respects. [**2]

II. BACKGROUND

2. Classic is a wholly-owned subsidiary of Classic Communications, a holding company that controls various subsidiaries providing telecommunications services. On March 10, 1995, Classic entered into a purchase and sale agreement to acquire four telephone service exchanges in northwestern Kansas from United Telephone Company of Kansas (United). 3 One of these exchanges was the Hill City Exchange, which serves both Hill City and Bogue, Kansas (the Cities). Classic Cable, another subsidiary of Classic Communications, provides cable television services to the Cities as well as other communities in Kansas. 4

3. United has been the certified incumbent provider of local exchange and exchange access telephone services in the Hill City Exchange, [**3] pursuant to a certificate of public convenience and necessity (CPCN) granted by the Kansas Corporation Commission (KCC). 5 Until 1993, United also held the local franchise authorizing it to operate a telephone **[*13084]** business and system in Hill City. 6 Although United never held a local franchise for Bogue, it provided telephone service to that city during the same period it provided service to Hill City. 7 In August 1993, Hill City terminated United's franchise effective December 31, 1993, on the ground it was dissatisfied with the quality of United's local telephone service. 8 Since terminating United's franchise, Hill City has permitted United to continue operating with an expired franchise to ensure continuation of telephone service to its residents. 9 Similarly, at Bogue's request, United continues to operate in Bogue without a franchise. 10

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4. In March 1994, United sought declaratory and injunctive relief in Kansas state court against Hill City regarding its refusal to renew United's telephone franchise. 11 On appeal from the state district court, the Supreme Court of Kansas held in United Tel. Co. of Kansas that, under Kansas law, a city may require a telephone company holding a

CPCN from the KCC to obtain a local franchise in order to provide telecommunications services to residents of that city. 12 Kansas law permits local units of government to determine "which company or companies shall serve their communities so long as that decision does not interfere with intrastate and interstate communications." 13 The Supreme Court of Kansas concluded that:

While a telephone company with a certificate of convenience and necessity to serve an area may construct lines through a city, it may not serve that city without a franchise. While a city may grant a franchise to a telephone company, that company [**5] must obtain a certificate of convenience and necessity from the KCC. Finally, while the KCC may grant or deny certificates of convenience and necessity based on its powers to regulate the statewide **[*13085]** telecommunications system, it may not force a city to grant a franchise to a telephone company. 14

5. In May 1995, soon after having entered into the purchase and sale agreement for the Hill City Exchange from United, Classic applied for telephone franchises to serve Hill City and Bogue. 15 Each of the Cities denied Classic's application [**6] for a franchise to serve that city. 16 Each city had previously granted a franchise to another company, Rural Telephone Service Co. (Rural) , to construct a telephone system and operate a telephone business within the Cities. 17 As noted above, however, the Cities allowed United to continue to provide service until Rural was operational.

6. In its September 1995 decision denying Classic's franchise request, Hill City noted that it did not "want to see two telephone companies in Hill City, competing side by side, in a situation that [would] be financially uneconomic for either company." 18 Hill City [**7] then stated its reasons for selecting Rural, rather than Classic, as Hill City's telephone franchisee: (i) Rural is a local company with a good reputation for telecommunications services, whereas Classic's corporate headquarters is in Texas, and Classic did not have a track record for furnishing telephone services; (ii) Rural's subscribers are its owners, whereas Classic's owners are unknown; and (iii) Rural has shown that it has the financial resources with which to build an advanced telecommunications network, whereas Classic has only claimed that it is financially secure without revealing its balance sheet. 19 Moreover, Hill City claimed that the KCC's "long standing policy of certificating only one telephone provider in **[*13086]** each service territory may have a rational basis." 20 As for Bogue, it does not appear from the record before us that it issued a formal written decision explaining why it denied Classic's franchise petition. 21

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7. On December 8, 1995, the KCC approved the sale of United's Kansas exchanges (the Exchanges) to Classic, granted Classic a CPCN, authorized the transfer of the franchise, plant, property and equipment of United to Classic, and designated Classic as the carrier of last resort for the Hill City Exchange service area, which serves both the Cities. 22 In its decision, the KCC determined that Classic had "demonstrated it has sufficient managerial, technical, and financial capabilities to operate a telecommunications public utility in the described service territory;" that Classic is capitalized in an amount sufficient to assure the smooth operation of the Exchanges; that the close proximity of the Exchanges to various operations of Classic gives Classic the opportunity to consolidate services in the Exchanges; and that Classic will assume all responsibility to complete the modernization activity associated with the Exchanges by December 31, 1997. 23 The KCC also found that because Classic was purchasing the assets of United, the existing certificated [**9] incumbent local exchange carrier (LEC) for the Hill City Exchange, Classic would assume the obligation to be the provider of last resort for the entire Hill City Exchange. 24 Furthermore, in light of the Kansas Supreme Court's ruling in United Tel. Co. of Kansas, the KCC held that while the lack of a local franchise may actually prevent Classic from providing service within the city limits of Hill City and Bogue, the failure of the Cities to grant Classic permission to provide service does not affect Classic's willingness or managerial, technical, and financial capabilities **[*13087]** to provide service within the Hill City Exchange. 25 The KCC also noted that, under Kansas law, a local franchise cannot be exclusive. 26 In a separate decision issued on December 8th, the KCC also granted Rural a CPCN to provide local exchange service in Kansas, but did not designate Rural as the carrier of last resort in the Hill City Exchange. 27

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8. The Cities immediately filed Petitions for Reconsideration of the KCC's December 8th Order granting Classic a CPCN and designating Classic as the carrier of last resort. Hill City requested that the KCC clarify whether its designation of Classic as the carrier of last resort was only until Rural's system was fully constructed, or if the designation was in perpetuity. 28 Bogue argued in its reconsideration petition that the KCC erred in granting Classic a CPCN and in designating Classic as the carrier of last resort because neither United nor Classic currently had an official franchise in Hill City or Bogue. 29 On January 11, 1996, the KCC affirmed and clarified its December 8th Order, stating that its decision to designate Classic as the carrier of last resort was reasonable based on the ability of Classic to provide "efficient [**11] and sufficient telephone service to the entire [Hill City] Exchange." 30 The KCC stated that at the time of its decision, no other telecommunications provider, including Rural, had a complete network to provide "necessary intrastate and interstate services to all subscribers within the exchange." 31 The KCC noted that its decision could be reconsidered at any time, and that when Rural completed its network, it could file a petition to reopen the docket to consider the issue of carrier of last resort designation. For similar reasons, the KCC also affirmed its decision to grant Classic a CPCN. 32

9. On February 14, 1996, Classic formally requested Hill City and Bogue to reconsider their denials of Classic's franchise applications in light of the enactment of the **[*13088]** 1996 Act. 33 Classic stated in its requests for reconsideration that section 253 and other provisions of the 1996 Act dealing [**12] with telephony favor competitive, not monopoly, provision of such services. 34 Classic asserted that, pursuant to section 253, the Cities "must grant competitive franchises when requested," and it notified the Cities that if they did not act on Classic's renewed franchise requests, it would pursue all available remedies for noncompliance under the 1996 Act. 35

10. Both cities rejected the renewed requests. Hill City stated in its denial that it would not grant Classic a franchise for the reasons set forth in its September 20, 1995 denial, and further, that it did not agree with Classic's "broad" interpretation of the 1996 Act. 36 Hill City also asserted that it was inappropriate to grant Classic a franchise for two additional reasons: (i) because the U.S. District Court for the District of Kansas had yet to issue a decision on the Cities' petitions, filed on February [**13] 9, 1996, requesting review of the KCC's December 8th and January 11th orders; and (ii) the FCC had not approved the transfer of FCC licenses from United to Classic, or ruled on Classic's price cap waiver requests. 37

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[*13089] 11. Bogue denied Classic's request for reconsideration on the grounds that: (i) Classic did not show that it would provide a telephone system equal in quality to the system that Rural was constructing, which Bogue interpreted to mean that Classic would retain the existing "obsolete" system, whereas Rural was already constructing an entirely "new, modern, all buried, one party system;" (ii) Classic failed to provide Bogue sufficient financial information that demonstrated Classic possessed the resources necessary to furnish telephone service; and (iii) Classic did not show that service by two telephone exchange carriers was an economical and efficient use of Bogue's rights-of-way. 38

12. Based on the Cities denials of Classic's requests for reconsideration, on March 19, 1996, Classic filed the above-captioned petition for preemption, declaratory ruling, and injunctive relief. On March 26, 1996, the Common Carrier Bureau issued a public notice establishing the pleading cycle for comments on Classic's petition. Eleven parties filed comments, oppositions, or replies regarding Classic's petition. 39 In addition, [**15] Classic filed several notifications of permitted ex parte presentations before the Commission. 40

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III. DISCUSSION

13. The issue before us in this proceeding is whether section 253 preempts the Cities' decisions denying Classic's franchise requests. 41

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[*13090] A. Ripeness and Other Procedural Issues

14. Bogue contends that we need not reach the merits of Classic's petition because it is premature. Specifically, Bogue asserts that we are required by section 257 of the Communications Act to complete a rulemaking to determine what constitutes a barrier to entry before we may rule on the merits of any petition that seeks to invoke our preemption authority under section 253. [42] Classic disputes Bogue's contentions on the grounds that section 253 "authorizes the Commission to preempt any law or regulation" that violates the section's prohibition against State and local entry barriers. [43] According to Classic, the Commission is required, pursuant to this section, to issue a public notice and provide an opportunity for public comment before reaching a decision on a petition that seeks to invoke its authority under section 253, but is not required to conduct a rulemaking. [44] Moreover, Classic contends that the delay that would result if the Commission were to defer action on this petition pending the adoption of rules pursuant to section 257 would put Classic at a competitive disadvantage in providing service in the Cities. [45]

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[*13091] 15. We find that Classic's petition is not premature and is properly before us. We reject Bogue's assertion that section 257 of the Communications Act requires us to complete a rulemaking prior to considering the merits of a petition filed under section 253. Section 257 requires the Commission to establish regulations "for the purpose of identifying and eliminating . . . market entry barriers for entrepreneurs and other small business." [46] We find that our authority under section 257 to identify and eliminate "market entry barriers" complements our authority under section 253 more broadly to preempt legal requirements that "may prohibit or have the effect of prohibiting" the provision of telecommunications services. There is nothing in the language of section 257 or its legislative history even remotely suggesting that it requires a rulemaking proceeding to implement section 253. We determine that the Commission's rulemaking responsibility under section 257 does not affect the issues raised in this proceeding.

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16. Moreover, section 253 itself does not require the Commission to conduct a rulemaking prior to considering requests for preemption under section 253 and in fact, requires a different procedure. Rather, section 253(d) directs the Commission to rule on a petitioner's preemption request after public notice and an opportunity for comment on a particular State or local requirement. [47] While the Commission certainly could adopt rules to implement section 253, [48] it need not do so. Where Congress required the Commission to conduct a rulemaking proceeding prior to implementing a particular provision of the 1996 Act, the statutory provision makes that requirement explicit. [49] Section 253 contains no such implementation requirements.

B. Section 253(a)

17. Classic claims that the Cities have awarded "de facto" exclusive franchises to Rural for the provision [**20] of telecommunications services within Hill City and Bogue. [50] Classic contends that the Cities' decisions to deny Classic's franchise application were based on allegedly invalid concerns regarding the economic effects of having two competing telephone **[*13092]** companies. [51] Classic maintains, therefore, that the Cities' decisions violate section 253(a) which states that "no 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." [52] Classic argues that the Commission must exercise its explicit preemption authority under section 253 to prevent local governments, such as the Cities, from frustrating the pro-competitive, de-regulatory purpose of the 1996 Act, and to remove decisions concerning the provision of telecommunications services "from the vicissitudes of local politics and arbitrary regulatory restraints." [53]

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18. The supporting commenters generally argue that by not granting a franchise to Classic, the Cities are prohibiting Classic from providing telecommunications services in violation of section 253, and that pursuant to this statute, the Commission must preempt the actions of the Cities. These commenters argue that the legislative history of section 253 demonstrates that Congress intended this section to remove all barriers to entry in the provision of telecommunications services. [54]

19. The Cities maintain that their franchise denials do not prohibit the provision of telecommunications services, and therefore, the decisions do not violate section 253(a). Specifically, Bogue contends that the Cities' actions are permitted because the real intent of the 1996 Act is to protect competition, not individual competitors [**22] such as Classic. [55] Bogue maintains that its denial of Classic's franchise request was not an explicit prohibition on entry, but the denial of a franchise to a single company because that company is unqualified to **[*13093]** provide service. [56] Similarly, Hill City asserts that it has "no desire or intention to limit qualified or trustworthy entities from providing telecommunication services within its boundaries," but that it is permitted to deny the request of an unqualified company for a franchise to operate a telephone system and business. [57]

20. Moreover, Bogue argues that section 253 does not give the Commission authority to preempt the purely local matter of franchising authority. Bogue maintains that Congress did not intend to alter the "dual regulatory system" set out in section 2(b) of the Communications Act, which provides that, with certain exceptions, nothing in the Act shall be construed to give the Commission jurisdiction with respect [**23] to "regulations for or in connection with intrastate communication service by wire or radio of any carrier . . ." [58] If Congress had intended to modify this jurisdictional limitation, Bogue contends that Congress would have explicitly granted the Commission authority to regulate local matters, including matters relating to franchise issues. [59] Bogue further argues that because there is no clear expression of preemption of franchising power in the 1996 Act, the Cities retain the authority, which existed prior to the 1996 Act, to deny franchises, and not just impose conditions on franchises. [60]

21. Furthermore, the Cities argue that construing a locality's denial of a franchise application as a barrier to entry eliminates the ability of State or local governments to deny a franchise under any circumstances. Bogue contends, for example, that if the Commission interprets section 253 to remove from State and local governments all authority to deny franchises, State and local governments [**24] "would be required, without question, to issue a local telephone exchange franchise" regardless of the technical, financial, and other qualifications of an applicant.

22. Classic replies that based on the unambiguous language of section 253, the Commission's preemption authority extends to all barriers to entry, including those erected by **[*13094]** local authorities pursuant to their limited franchising power. [62] In addition, Classic contends that section 2(b) of the Communications Act does not restrict the Commission's preemption authority over legal requirements that violate section 253 because section 253 makes clear that State or local barriers to entry affect competition in general and the harm to competition cannot be separated into interstate and intrastate components of our nation's telecommunications system. [63]

23. Scope of Section [**25] 253. Section 253(a) proscribes State or local statutes, regulations, or legal requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services." [64] Section 253 preempts legal requirements that may prohibit or have the effect of prohibiting intrastate telecommunications services whether or not such legal requirements affect interstate telecommunications services. Contrary to Bogue's arguments, the plain language of section 253 does not exempt from the scope of federal preemption purely local matters of franchising authority. In addition, the legislative history confirms that Congress intended to preempt purely intrastate matters; section 253 does not exclude all franchising issues. [65]

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24. Moreover, the standards for preemption established in Louisiana PSC do not foreclose preemption of State and local entry restrictions under section 253. [66] In Louisiana PSC the Supreme Court found that section 2(b) of the Communications Act prohibits the Commission from exercising federal jurisdiction with respect to "charges,

classifications, **[*13095]** practices, services, facilities, or regulations for or in connection with intrastate communications services." 67 Thus, section 2(b) makes clear that, in the absence of a grant of authority to the Commission, State and local regulators retain jurisdiction over intrastate matters. But neither on its face nor as construed in Louisiana PSC does section 2(b) override express statutory preemption by Congress as found in section 253. Moreover, as we held in the Local Competition First Report and Order, where section 2(b) conflicts with a later and more direct provision of the Act, we will apply the latter provision despite section 2(b). 68 Thus, to the extent that section 2(b) would otherwise preclude preemption of certain State or local legal restrictions on the provision of intrastate telecommunications services, section 253 [**27] removes that limitation.

[**28]

25. Section 253(a). We conclude that section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality. Such legal requirements undeniably "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," as proscribed by section 253(a). The legislative history confirms this straight forward interpretation of section 253(a). 69 Moreover, this reading of section 253(a) is consistent with the overriding goals of the 1996 Act. As explained in the Local Competition First Report and Order, under the 1996 Act, the opening of the local exchange and exchange access markets to competition "is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets." 70 Section 253's focus on State and local requirements that may prohibit or have the effect of prohibiting any entity from providing any telecommunications services complements the obligations and responsibilities imposed on telecommunications carriers by the 1996 Act [**29] that are intended to "remove not only statutory and regulatory impediments to **[*13096]** competition, but economic and operational impediments as well." 71 Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.

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26. We find that the evidence presented in this case supports Classic's contention that the manner in which the Cities implemented their franchise requirements, as reflected in their decisions denying Classic's franchise requests, prohibits Classic from providing interstate and intrastate telecommunications services in Bogue and Hill City, Kansas. Therefore, the decisions appear to violate section 253(a)'s proscription against prohibitions on the provision of telecommunications service by any entity, as well as the fundamental pro-competitive goal of the 1996 Act. For example, Hill City confirmed its intention to limit competition by permitting only one company, Rural, to provide telecommunications services, stating in its decision that Hill City does not "want to see two telephone companies . . . competing side by side, in a situation that will be financially uneconomic for either company," 72 and that it may be a couple of years before true local service competition is present in Hill City. 73 Furthermore, as a basis for its denial, Hill City relied on the problems the community faced with United's provision of telecommunications services, rather than examining Classic's ability [**31] to provide quality telecommunications services. Additionally, Bogue explained that its decision to deny Classic's franchise request "is properly read as finding that [Classic] has not demonstrated that two telephone exchange carriers could exist in the small city of Bogue." 74

27. In their decisions, Hill City and Bogue both relied heavily on a comparison of the relative capabilities of Classic and Rural to provide local telephone service. The emphasis placed on the comparative capabilities of the two providers suggests that the Cities intended to choose only one entity as the telecommunications service provider for Bogue and Hill City, the result of which was to impose an absolute prohibition on Classic from providing telecommunications services. This absolute prohibition on Classic's competitive entry is precisely the type of action Congress intended to proscribe under section 253(a), absent a **[*13097]** demonstration that the franchise denials are an exercise of authority specifically reserved to State and local governments [**32] under sections 253(b) or 253(c). As stated previously, based on the reasoning used by the Cities in their decisions denying Classic's franchise requests, the Cities' application of their franchising requirements to Classic prevents Classic from providing telecommunications services, and therefore, on its face, appears to violate section 253(a). In their pleadings in this proceeding, the Cities seek to justify their actions under sections 253(b) and 253(c). We address those claims below.

28. The Cities argue that a finding that the denials of Classic's franchise applications violate section 253(a) has the untenable result of eliminating the authority of States or localities to make franchising decisions. We reject this contention. We do not believe that Congress intended to remove franchising authority from State and local governments. Nothing in the language of the 1996 Act or the legislative history reflects this intention. 75 In fact, as discussed below, sections 253(b) and 253(c) recognize the authority of States and localities (including the Cities) to impose franchise requirements for certain purposes, and as such, these sections preserve the authority of States and localities [**33] to deny a franchise application until such time the applicant complies with these permitted legal requirements. We find here only that, on this record, the Cities' exercise of their franchising authority to prevent Classic from providing service appears, without further examination, to be prohibited by section 253(a).

C. Sections 253(b) and 253(c)

29. Although the Cities did not specifically offer these reasons in their decisions denying Classic's franchise applications, the Cities now claim in their submissions in this proceeding that they denied Classic's franchise applications on consumer protection grounds, the need to protect the public safety and welfare, and in order to manage the public rights of way, pursuant to authority preserved under sections 253(b) and 253(c). 76 First, Bogue asserts that section 253(b) permits competitively neutral franchise denials, 77 and that "there is nothing in the Communications Act of 1934 that requires [**34] a franchising authority to authorize **[*13098]** inadequate local exchange service." 78 Bogue claims that commenters fail to explain why the Cities' efforts to protect the local community through the Cities' franchising power should be preempted. 79 Bogue also maintains that the powers accorded to the States in section 253(b) extend to localities by delegation under Kansas law. 80 Furthermore, Hill City contends that its denial was consistent with section 253(b) because it was attempting to protect its citizens from a harmful telecommunications provider. 81 Hill City also maintains that section 253(c) "creates an express and reasonable exception to the general prohibition of new section 253(a)" against barriers to entry, permitting the city to refuse to allow inadequate or harmful telecommunications systems to dig up public areas for construction or modification. 82 Hill City claims, and the National Telephone Cooperative Association agrees, that section 253(c) permits the Cities to exercise police power over public rights-of-way to preclude unqualified and/or untrustworthy entities from providing inadequate or unlawful telecommunications services. 83 The Cities contend that [**35] their decisions denying Classic's franchise applications are appropriate pursuant to sections 253(b) and 253(c), and that the Commission, therefore, must deny Classic's petition for preemption.

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30. In this regard, Hill City also raises allegations of general misconduct against Classic. Hill City claims that Classic was "attempting to monopolize local cable and telephone service, " would not be responsive to local service needs, was engaging in deceptive and illegal tying practices, and had developed a "highly antagonistic relationship" with the Cities. 84

[*13099] 31. Classic replies that the Cities' decisions were not based on concerns about consumer protection, quality of service, or management of the public rights-of-way, pursuant to sections 253(b) or 253(c), and that the Cities' arguments are based on an unjustifiable expansive reading of the limited powers given to States and localities under those sections. 85 Classic argues that the Cities may not invoke the rights specifically reserved to the States under section 253(b). Classic contends, moreover, that even assuming local governments, by delegation, have authority to impose requirements under section 253(b), nothing in this section [**37] permits the Cities to impose preconditions on Classic in such a way as to prohibit entry. 86 Commenters note that the Cities' legitimate service quality concerns should be addressed by some means other than denying a franchise -- such as the introduction of the very competition the Cities seek to prohibit. 87 Furthermore, commenters argue that management of the public rights-of-way under section 253(c) does not include denial of entry or interference with the provision of interstate or intrastate telecommunications services. Classic and

commenters also assert that because Classic is purchasing the assets of the incumbent provider whose facilities already occupy the rights-of-way that the Cities' claim would be overburdened, the Cities' denials of Classic's franchise requests also exceed the authority reserved to local governments in section 253(c). 88

32. Classic disputes the Cities' allegations of misconduct and [**38] maintains that it has not engaged in deceptive marketing practices, has been found by the KCC to be fully qualified to provide telephone service in the Cities, and has fulfilled all of its obligations with respect to upgrading the existing United system, as ordered by the KCC. 89 Furthermore, Classic argues that, even assuming that the allegations of misconduct were well founded, it does not change the fact that the Cities unlawfully prohibited Classic from providing telecommunications services.

33. Classic Motion to Strike Hill City Comments. Classic urges the Commission to strike the majority of the Hill City comments in this proceeding on the basis that the allegations of misconduct "run afoul of the Commission's recent reaffirmation of its **[*13100]** commitment to eliminate frivolous pleadings." 90 We deny Classic's request to strike without reaching the issue of whether Hill City's allegations have merit. As discussed, infra, to the extent that Hill City shows that the alleged misconduct was an appropriate basis for denial pursuant to section 253(b) or 253(c), the allegations of misconduct are relevant to a determination of whether [**39] Hill City's denial of Classic's franchise application is preempted under section 253. We note that Classic's record as a cable operator, its promises to upgrade the existing system, and its marketing practices are all actions the Cities may legitimately regulate by requiring Classic, Rural, and all other qualified entities to abide by the same competitively neutral requirements consistent with sections 253(b) and 253(c), or by taking legitimate enforcement actions against Classic to address any violation of State laws. Moreover, as intended by Congress, the introduction of competition in the Cities should create an incentive for Classic, Rural, and other potential carriers to provide high quality systems and services at competitive rates. Accordingly, we will not strike these arguments as frivolous.

34. Authority of Localities Pursuant to Section 253(b). As an initial matter, we must determine whether section 253(b) applies only to States, as argued by Classic and other commenters, 91 or also [**40] to their political subdivisions. Unlike section 253(c), which refers to both State and local government authority, section 253(b) refers only to the authority of States. It appears from the titles of the subsections and the history of this provision that Congress deliberately separated the functions included under section 253(b) and 253(c). Previous versions of subsection (b) gave similar regulatory authority to both State and local officials, but the text of the provision enacted limited to the States the authority of subsection (b). 92 Nonetheless, this statutory language does not necessarily preclude States from delegating their regulatory authority to local political subdivisions. The Supreme Court, in Wisconsin Public Intervenor v. Mortier, 93 found that a federal statute that plainly authorizes States to regulate, and is also plainly silent with reference to local governments, should not be construed as leaving localities with no regulatory authority, but only that the localities "could not claim the regulatory authority explicitly conferred upon the States that might otherwise have been preempted" by federal law. 94 The Court explained that "the principle is well settled [**41] that local governmental units are created as convenient agencies for exercising such of **[*13101]** the governmental powers of the State as may be entrusted to them in its absolute discretion." 95 As with section 253(b), earlier versions of the statutory provision at issue in Mortier included both States and political subdivisions, but the provision as ultimately enacted referred only to the States. The Court in Mortier stated that while this change indicated "an unwillingness by Congress to grant political subdivisions regulatory authority, it does not demonstrate an intent to prevent the States from delegating such authority to its subdivisions, and still less does it show a desire to prohibit local regulation altogether." 96 Accordingly, section 253(b) may be read to preserve certain regulatory powers of the States, and if there is a specific delegation by the State, local governments as well. Kansas law envisions a role for both the KCC and local units of government. 97 Thus, for purposes of this order, we will assume that the Cities may attempt to justify their actions pursuant to section 253(b).

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35. Section 253(b). Section 253(b) preserves the authority of States to impose requirements 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, provided that such requirements are necessary, competitively neutral, and consistent with the statute's universal service requirements, set forth in section 254 of the Communications Act, as amended. 98 Section 253(b), for example, ensures that States continue to have authority to require telecommunications service providers to make emergency services available to the public and comply with local consumer protection laws.

36. We conclude that the Cities have failed to provide [**43] sufficient evidence to show that their denials of Classic's franchise requests are permitted pursuant to section 253(b). Rather, as discussed, the reasons set forth by the Cities in their decisions denying Classic's franchise requests clearly indicate that the Cities simply did not want to authorize the entry of a competitive telecommunications provider.

37. Furthermore, while the Cities have stated that their goals in denying Classic's franchise applications were to ensure the continued quality of telecommunications services, the Cities have not shown, or even attempted to show, that they applied their franchising requirements in a "competitively neutral" manner as required under section 253(b). In fact, based on the evidence before us in this proceeding, it appears the Cities in effect applied their franchise requirements to Classic in a manner that is not competitively neutral. At the very **[*13102]** least, this mandate of competitive neutrality requires the Cities to treat similarly situated entities in the same manner. In this instance, the Cities denied Classic's franchise applications outright while granting the application of Rural, subject to certain conditions subsequent [**44] concerning service quality. We find no basis in the record of this proceeding that would justify such discrimination, which has the effect of foreclosing entry by one competitor while allowing another to enter.

38. Moreover, the Cities have not provided any evidence that their absolute denials of franchises to Classic were "necessary" to achieve the stated public interest goals as required by section 253(b). Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry, 99 such as clearly defined service quality requirements or legitimate enforcement actions. We find that the record in this proceeding does not support the Cities' claim that Classic is "unqualified" to provide local telephone service in the affected areas and that, therefore, the denials were necessary to protect the public interest goals set out in section 253(b). To the contrary, the record reveals that unlike the Cities' decisions, the KCC based its Dec. 8th decision to grant Classic a CPCN on a record of empirical evidence including, among other information, Classic's debt to asset [**45] ratio, projected income, and a stipulation regarding the gain on sale of the United system. 100 Relying on that comprehensive evidentiary record, the KCC found that Classic is capitalized in an amount sufficient to assure the smooth operation of the exchanges; that the close proximity of the exchanges to various operations of Classic gives Classic the opportunity to consolidate services in the exchanges; and that Classic will assume all responsibility to complete the modernization activity associated with the exchanges by Dec. 31, 1997. 101 These findings by the relevant state regulatory commission support the view that Classic is qualified to provide telecommunications services to the residents of the Hill City Exchange and belie the Cities' assertions to the contrary that their franchise denials are permitted pursuant to section 253(b) as 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." 102

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[*13103] 39. Section 253(c). Section 253(c) preserves the authority of State and local governments to manage the public rights-of-way, but requires such regulations to be both competitively neutral and nondiscriminatory. In addition, section 253(c) permits State and local governments to impose compensation requirements for the use of the public rights-of-way so long as such compensation is fair and reasonable, competitively neutral, nondiscriminatory, and is publicly disclosed. 103 The legislative history sheds light on permissible management functions under section 253(c). During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that: (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent [**47] with the requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations; " and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation." 104

40. We find that the Cities have failed to show that their franchise denials reflect an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way. The Cities' denials, therefore, do not trigger section 253(c). Instead, the [**48] Cities merely claim that section 253(c) permits their decisions, without providing any support for this contention. Based on the record before us, we conclude that the Cities have not established an adequate premise to invoke the provisions of section 253(c).

41. Neither City relied on authority to manage public rights-of-way in its initial decision denying Classic's franchise request. 105 Although both of the Cities issued their reconsideration decisions after enactment of the 1996 Act, neither decision relied on the Cities' authority to manage public rights-of-way in affirming its earlier denial of a franchise to Classic. Specifically, in its decision on reconsideration Hill City simply reiterated that its denial of Classic's franchise request was based on the reasons set forth in its September 20, 1995 decision. Hill City's initial denial predated by more than four months passage of the **[*13104]** 1996 Act and did not discuss issues relating to its management of the public rights-of-way or related compensation. Similarly, Bogue's decision on reconsideration did not refer to, or specifically rely on section 253(c), nor did it invoke concerns about management of rights-of-way [**49] or related compensation. 106

42. Indeed, in its pleadings in this proceeding Bogue did not argue that its denial of Classic's franchise was an exercise of its authority to manage the public rights-of-way or related compensation requirements. Moreover, Hill City advanced its arguments based on management of rights-of-way and section 253(c) [**50] for the first time in conclusory fashion in its pleadings in this proceeding. In its comments in opposition to Classic's petition, Hill City claimed that, pursuant to section 253(c) it retained authority to deny Classic's franchise request because "police and franchise powers [preserved by section 253(c)] permit it to deny franchises to those who attempt to deceive its citizens, to monopolize critical telecommunications services and links, and to intimidate local governments and individuals." 107 Hill City asserted that, from the beginning, it was merely attempting "to obtain access to quality and reasonably priced telecommunications facilities and services for its residents and businesses." 108 These conclusory statements are inadequate to establish that the Cities actions reflect an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way. Thus, upon evaluation of the record before us, we conclude that the denials did not involve the Cities' efforts "to manage the public rights-of-way" or to impose compensation requirements "for use of public rights-of-way, " and therefore, do not trigger section 253(c). [**51]

[*13105] D. Section 251(f)(1)(A)

43. Bogue also contends that, although it has shown other valid reasons for denying Classic's franchise application, as a rural locality it is entitled pursuant to section 251(f) to deny Classic's franchise on economic grounds. 109 Bogue asserts that section 251(f) expressly prohibits local telecommunications exchange competition in rural areas, absent an affirmative finding by the appropriate State agency that such competition is not unduly economically burdensome. 110

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44. Classic replies that the Cities' reliance on section 251(f) to justify their denials of Classic's franchise applications is misplaced. First, Classic argues that section 251(f) permits States, not localities, to make a determination as to whether a rural LEC shall be exempted from section 251(c) obligations. 111 In addition, Classic contends that the key distinction made between rural and non-rural markets under section 253 is in subsection 253(f) which declares that a State may require a telecommunications carrier in a rural area "to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier before being able to provide such service." 112

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45. Section 251(f)(1)(A) provides that the obligations imposed on incumbent LECs pursuant to section 251(c) "shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically **[*13106]** burdensome [and] is technically feasible . . ." 113 Section 251(f) permits the State commission, not the local government, to decide on a case-by-case basis whether a rural LEC has offered evidence that application of the Commission's section 251(c) requirements "would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry." 114 Even assuming that the KCC has properly delegated its authority under section 251(f) to the Cities, 115 that section has no bearing on franchising decisions and opportunities for entry. Because the record does not reflect that the KCC (or even Bogue) has made such a decision, that Classic is a rural LEC, or that section 251(f) has bearing on these issues, section 251(f) does not appear to be applicable to the franchise issue [**54] before us.

E. Conclusion and Remedies

46. As stated previously, the Cities' decisions reflect the application of their franchise requirements in a manner that prohibits Classic from providing telecommunications services. The decisions, on their face, appear to violate section 253(a). Moreover, the Cities have failed to provide any evidence to show that their franchise denials are permitted pursuant to section 253(b). In addition, the Cities have not demonstrated that their actions were public rights-of-way management or related compensation actions so as to trigger section 253(c). We find, therefore, that section 253 preempts the Cities' decisions denying Classic's franchise applications for the provision of telecommunications services.

47. In its petition, Classic requests that the Commission: (1) declare that the Cities' denials of franchises to Classic have prohibited Classic from providing [**55] telecommunications services in violation of section 253(a); (2) declare that the Cities' denials are preempted pursuant to section 253(d); (3) declare that the Cities "must immediately grant to Classic all necessary franchise authorizations to offer telecommunications services within their corporate limits;" and (4) enjoin the Cities "from taking any action that has the purpose or effect of directly or indirectly interfering with Classic's provision of telecommunications services anywhere within Classic's service area. " 116 Classic maintains that the Commission's authority encompasses more than the ability to preempt any legal requirements that violate section 253, but also extends to the power to strike the barrier and issue injunctions to effect **[*13107]** the pro-competitive policies of section 253. 117 Classic contends that in addition to the explicit preemption authority pursuant to section 253, the Communications Act of 1934, as amended, empowers and requires the Commission to "execute and enforce the provisions of this Act," 118 and that under this directive, the Commission has broad discretion to determine the appropriate tools to remedy any violation of the prohibition [**56] on barriers to entry articulated in section 253. 119

48. Bogue contends that the Commission [**57] is prohibited from declaring that the Cities "must immediately grant to Classic all necessary franchises. " 120 Bogue argues that the Tenth Amendment of the U.S. Constitution prohibits the Commission from issuing an order to a State or locality that requires the State to take action in furtherance of a federal regulatory objective. 121

49. In the instant proceeding, section 253 preempts the Cities' decisions denying Classic's franchise applications. It appears from the record that the relevant Kansas franchising statute and regulations, which prohibit exclusive franchises, do not themselves prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services in violation of section 253. They do not create explicit barriers to entry and are facially competitively neutral. Section 253 does not, therefore, as suggested by some of the commenting parties, 122 preempt the applicable franchising statute or local regulations. Likewise, we do not find it necessary to examine the decision of the Supreme Court [**58] of Kansas in United Tel. Co. of Kansas, confirming that under Kansas law a telephone **[*13108]** company holding a CPCN from the KCC must also obtain a franchise from the city the telephone company intends to serve. 123

50. Section 253 preempts the Cities from enforcing their franchise requirements as reflected in the record in this proceeding -- with the effect of precluding Classic from providing local telecommunications services within the Cities. We expect the Cities to expeditiously reconsider Classics' franchise applications, i.e., within 60 days from the release of this order, in a manner consistent with this opinion. At this time, however, we decline Classic's request to "enjoin Hill City and Bogue from taking any action that

has the purpose or effect of directly or indirectly interfering with Classic's provision of telecommunications services anywhere within Classic's service [**59] area. " 124 We do not believe such action is necessary at this time. We believe that, in this decision, we have provided the Cities sufficient guidance to implement their franchising requirements in a manner that does not prohibit the ability of any entity, including Classic, from providing telecommunications services and we expect they will do so. We note that, contrary to Bogue's arguments, the Tenth Amendment of the U.S. Constitution is not offended by federal preemption pursuant to section 253. Section 253 explicitly preempts State and local legal requirements. In this situation, pursuant to the Supremacy Clause of Article VI of the Constitution, federal law governs.

IV. ORDERING CLAUSES

51. Accordingly, pursuant to section 253 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 253, IT IS ORDERED that the Petition for Preemption, Declaratory Ruling and Injunctive Relief filed by Classic Telephone, Inc. IS GRANTED to the extent discussed herein, and is in all other respects DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

Acting Secretary

Footnotes

1 47 U.S.C. § 253.

2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. (1996 Act).

3 Classic Petition at 3.

4 See Classic Petition, Exhibit 12 at 2-3, Order and Certificate, United Tel. Co. of Kansas and Classic Tel., Inc., KCC Case No. 192-521-U (issued Dec. 8, 1995) (KCC Dec. 8th Order).

5 Classic Petition at 3.

6 See Hill City Comments, Exhibit 1, United Tel. Co. of Kansas v. City of Hill City, 258 Kan. 208, 213, 899 P.2d 489 (Kan. 1995) (United Tel. Co. of Kansas). United had received a ten-year franchise from Hill City in 1974 that was automatically renewed through 1993. Id.

7 See United Tel. Co. of Kansas, 258 Kan. at 213.

8 Hill City Comments at 4-5.

9 Classic Petition at 3.

10 Classic Petition at 3 n.2. See para. 5, infra.

11 United Tel. Co. of Kansas, 258 Kan. at 211.

12 Id.

13 United Tel. Co. of Kansas, 258 Kan. at 222 (citing KAN. STAT. ANN. 17-1901, 17-1902, 12-2001, and 66-131).

14 United Tel. Co. of Kansas, 258 Kan. at 223. In the case before us, the Hill City Exchange serves both Hill City and Bogue. Although a telecommunications provider needs only one CPCN to serve the entire Hill City Exchange, under Kansas law the provider must obtain a franchise from each city in the exchange to serve those cities. Id.

15 Classic Petition at 4-5; Classic Petition, Exhibits 3 and 5.

16 Hill City denied Classic's franchise application pursuant to a written decision on September 20, 1995. It appears from the record that Bogue did not issue a formal written decision denying Classic's franchise application, but apparently conveyed this information to Classic orally.

17 See United Tel. Co. of Kansas, 258 Kan. at 214. Hill City granted Rural a franchise on March 7, 1994. It is unclear from the record exactly when Bogue granted Rural a franchise.

18 Classic Petition, Exhibit 4, Letter from City of Hill City, Kansas to Classic Telephone, Inc. (September 20, 1995) denying telephone franchise (Hill City Initial Decision).

19 Hill City Initial Decision at 3.

20 Id. Kansas law prohibits the grant of exclusive franchises. KAN. STAT. ANN. 12-2001(b)(2)(3). The Cities argue in their comments, however, that by denying Classic's franchise applications, they were not granting Rural an exclusive franchise, but were simply denying the franchise of an applicant (Classic) that was not qualified to provide telecommunications services.

21 On March 13, 1996, Bogue issued a Decision on Reconsideration of its denial of Classic's franchise application. See para. 11, infra.

22 KCC Dec. 8th Order.

23 KCC Dec. 8th Order at 3-4 and 11.

24 KCC Dec. 8th Order at 11. Although the KCC does not define the term "provider of last resort, " historically, the incumbent LEC is expected to provide service to all customers in the service area, whether or not it is economically beneficial to do so. In exchange for this obligation, the carrier is eligible for universal service funds. In the instant case, Classic is purchasing the system of the incumbent LEC, United. See Universal Service and the Information Superhighway: Perspectives from the Telecommunications Experience, 64 Fordham L. Rev. 782 (1995).

25 KCC Dec. 8th Order at 13.

26 Id. at 12-13 (citing KAN. STAT. ANN. 12-2001(b)(2)(3)).

27 Classic Petition at n.9 (citing Rural Telephone Service Company, Inc., Order and Certificate, KCC Case No. 190-843-U (Dec. 8, 1995)). The record before us in this proceeding does not reflect the basis for the KCC's decision granting Rural a CPCN.

28 Classic Petition, Exhibit 13, In re: United Telephone Co. of Kansas and Classic Tel., Inc., Order on Reconsideration, KCC Case No. 192-521-U, 95-CLST-508-COC (Jan. 11, 1996) (KCC Order on Recon.).

29 KCC Order on Recon. at 3.

30 Id. at 5.

31 Id.

32 Id.

[33↑] Classic Petition, Exhibit 9, Hill City Decision on Recon. ; Classic Petition, Exhibit 10, Bogue Decision on Recon.

[34↑] Classic Petition, Exhibit 7, Classic Request for Reconsideration of Hill City's Decision.

[35↑] Id.; Classic Petition, Exhibit 8, Classic Request for Reconsideration of Bogue's Decision.

[36↑] Hill City Decision on Recon.

[37↑] Id. On November 8, 1995, Classic, in concurrence with United, filed an application with this Commission pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Part 63 of the Commission's rules, 47 C.F.R. Part 63, seeking Commission authority to acquire control of United's facilities located in several Kansas telephone exchanges, including the Hill City Exchange. On June 5, 1996, the Common Carrier Bureau granted Classic's application, finding that the transfer of control would serve the present or future public convenience and necessity. Classic Tel., Inc., Order and Certificate, DA 96-895, File No. W-P-C-7127 (Com. Car. Bur., rel. June 5, 1996). Also on November 8th, Classic and United filed a petition for waiver of two Commission rules. First, United and Classic requested a waiver of the definition of "Study Area" contained in Part 36 Appendix-Glossary of the Commission's rules, which effectively freezes all study area boundaries, as of November 15, 1984. In addition, Classic requested a waiver of Commission rule section 61.41(c)(2), which requires non-price cap companies, and the telephone companies with which they are affiliated, to become subject to price cap regulation after acquiring a price cap company or any part thereof. The Cities filed comments in opposition to Classic's waiver petition. On June 3, 1996, the Common Carrier Bureau granted the requested waivers, finding that the public interest would be served by allowing United to alter its study area boundary, and allowing Classic to establish a new Kansas study area operating under rate-of-return regulation. The Bureau also determined that the objections of Bogue and Hill City had been adequately addressed by the KCC and did not warrant denial of the petition. Classic Tel., Inc. and United Tel. Co. of Kansas, Memorandum Opinion and Order, FCC File No. AAD 95-171, DA 96-885 (Com. Car. Bur., rel. June 3, 1996) (Classic Study Area Waiver).

[38↑] Classic Petition, Exhibit 10, Bogue Decision on Recon.

[39↑] Parties filing pleadings in the instant proceeding include: Association for Local Telecommunications Service (ALTS), AT&T Corp. (AT&T), the Cable Telecommunications Association, Inc. (CATA), MCI Telecommunications Corporation (MCI), Sprint Corporation (Sprint), Texas Cable & Telecommunications Association (TC&TA), Telecommunications Resellers Association (TRA), and National Cable Television Association, Inc., the city of Hill City, Kansas (Hill City), the city of Bogue, Kansas (Bogue), and the National Telephone Cooperative Association.

[40↑] April 22, 1996 (regarding ex parte meeting between Vice-President of Classic Telephone, Inc, counsel for Classic, Chief of the Program Policy and Planning Division of the Common Carrier Bureau, and Commission staff); June 7, 1996 (regarding letter from Rural referencing Classic's Opposition to Petition for Waiver in File No. AAD 96-38); June 10, 1996 (regarding ex parte meetings between Chairman and CEO of Classic Communications, Inc., counsel for Classic, and the Legal Advisors to Chairman Reed Hundt, Commissioner James Quello, Commissioner Rachelle Chong, and Commissioner Susan Ness); July 22, 1996 (alleging efforts by Hill City to prevent Classic Telephone and its affiliates, Classic Communications and Classic Cable, from providing telecommunications and cable service in Hill City); August 15, 1996 (regarding ex parte communications between counsel for Classic and Commission staff); August 15, 1996 (regarding ex parte communications between counsel for Classic and Legal Advisor to Chairman Reed Hundt).

[41↑] Section 253, in relevant part, provides:
SEC. 253. REMOVAL OF BARRIERS TO ENTRY.
(a) IN GENERAL.--No 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.
(b) STATE REGULATORY AUTHORITY.--Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, 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.
(c) STATE AND LOCAL GOVERNMENT AUTHORITY.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
(d) PREEMPTION. --If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. 47 U.S.C. § 253.

[42↑] Bogue Comments at 4-5; Bogue Reply Comments at 8. See also ALTS Comments at 2-3 (requesting that the Commission establish guidelines as to what types of actions the Commission would view as violative of section 253).

[43↑] Classic Reply Comments at 13.

[44↑] Classic Reply Comments at 14.

45 Classic Reply Comments at 15.

46 Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry, GN Docket No. 96-113, 11 FCC Rcd. 6280 (Section 257 NOI) (1996).

47 See 47 U.S.C. § 253(d).

48 See, e.g., 47 U.S.C. §§ 154(i), 201(b), 303(r).

49 See, e.g., 47 U.S.C. § 251(d) (requiring the Commission "to establish regulations to implement the requirements of this section").

50 Classic Petition at 2.

51 See Hill City Initial Decision.

52 47 U.S.C. § 253(a). Additionally, Classic notes that the Cities' actions violate Kansas law which prohibits municipalities from granting an exclusive telephone franchise. KAN. STAT. ANN. § 12.2001(b)(3). See Classic Reply Comments at 6 (citing United Tel. Co. of Kansas, 258 Kan. at 222) (recognizing that the express intent of the Kansas Franchise Act was to vest cities with the power to grant franchises, but only to the extent that such cities' "decision does not interfere with intrastate and interstate communications")); see also National Telephone Cooperative Association Reply Comments at 2.

53 Classic Petition at 10-11.

54 See ALTS Comments at 3-4 and CATA Comments at 6 (citing S. CONF. REP. NO. 230, 104th Cong., 2d Sess. 1, at 126 (1996) (Joint Explanatory Statement) (explaining the intent of the identical Senate provision that Congress ultimately adopted as the official language of section 253)); see also MCI Comments at 3; TRA Comments at 2.

55 Bogue Comments at 12 (citing Brown Shoe Co. v. United States, 370 U.S. 294, 344, 82 S.Ct. 1502 (1961)).

56 Bogue Reply Comments at 5-6.

57 Hill City Comments at 3 and 8.

58 47 U.S.C. § 152(b).

59 See Bogue Comments at 14.

60 Bogue Comments at 11. See National Telephone Cooperative Association Reply Comments at 2.

62 Classic Reply at 5.

63 Classic Reply at 8.

64 47 U.S.C. § 253(a) (emphasis added).

65 The language of the identical Senate provision that Congress ultimately adopted as the official language of section 253 preempts barriers to entry in the provision of both interstate and intrastate telecommunications services. See, e.g., Joint Explanatory Statement at 126 and S. REP. NO. 23, 104th Cong., 1st Sess. at 35. As Senator Hollings observed, such preemption is necessary for "uniformity, understanding, [and] open competition in interstate telecommunications -- and intrastate . . . telecommunications. " 141 Cong. Rec. S8174 (daily ed. June 12, 1995) (statement of Sen. Hollings).

66 Louisiana Pub. Serv. Comm'n, 476 U.S. 355 (1986) (Louisiana PSC). Under Louisiana PSC, the Commission may preempt State regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. Louisiana PSC, 476 U.S. at 375 n.4. In construing the "inseparability doctrine" recognized by the Supreme Court in Louisiana PSC, federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the State regulation thwarts or impedes a valid Federal policy. See Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

67 Louisiana PSC, 476 U.S. at 373 (quoting 47 U.S.C. § 152(b)).

68 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Report and Order, FCC Docket No. 96-98, FCC 96-325 at P 93 (rel. August 8, 1996) (Local Competition First Report and Order).

69 For example, Senator Pressler, the Senate manager of the legislation, stated that some "States have granted . . . certain exclusive franchises, not allowing competition . . . and if we are having deregulation here, removal of barriers to entry, we have to take this step." 141 Cong. Rec. S8175 (daily ed. June 12, 1995) (statement of Sen. Pressler). "Section [253] goes to the very heart of this bill because removal of barriers to entry is what we are trying to accomplish." Id. See also, 141 Cong. Rec. S8174 (daily ed. June 12, 1995) (statement of Sen. Hollings) (stating that the intent of section 253 "is the removal of the barriers to entry").

70 Local Competition First Report and Order at P 4 (emphasis added).

71 Local Competition First Report and Order at P 3. Congress's intention to eliminate all economic and operational barriers to entry is reflected in newly enacted section 251, which requires incumbent local exchange carriers (LECs) to offer interconnection and network elements on an unbundled basis to requesting telecommunications carriers, and also provides for resale of LECs' retail services. See 47 U.S.C. §§ 251(c)(2), 251(c)(3), and 251(c)(4).

72 Classic Petition, Exhibit 4, Hill City Decision at 2.

73 Hill City Decision at 2.

74 Bogue Comments at 8 (quoting Bogue Decision on Recon.).

75 In the Joint Explanatory Statement, Congress explained that States must retain the ability to "reasonably condition telecommunications activities" in order to safeguard the rights of consumers. Joint Explanatory Statement at 127.

76 See Bogue Comments at 6; see also Hill City Comments at 17.

77 Bogue Reply Comments at 5.

78 Bogue Comments at 7. Bogue believes that Classic's use of the existing United system is inadequate, and argues that permitting Classic to operate the "existing dilapidated system" while requiring Rural to construct a high cost, state of the art system would not be competitively neutral. Id. at 7-8. In addition, Bogue expresses concern regarding the ability of Classic to provide essential communications services in light of the poor financial ratings of Classic's affiliate, Classic Cable. Id. at 6-10.

79 Bogue Reply Comments at 4.

80 Bogue Comments at 2 n.3. As a result of the holding by the Supreme Court of Kansas in United Tel. Co. of Kansas, the Cities and the National Telephone Cooperative Association argue that the State of Kansas has delegated to Cities the authority Congress granted to the States in section 253(b). United Tel. Co. of Kansas, 258 Kan. at 220-225. See para. 4, supra.

81 Hill City Comments at 17-18.

82 Id. at 13.

83 Id. at 3; National Telephone Cooperative Association Reply Comments at 2.

84 Hill City Comments at 17-18.

85 Classic Reply Comments at 7.

86 See Classic Reply at 3.

87 AT&T Comments at 3 n.4.

88 See CATA Comments at 3-4; TC&TA Comments at 5; AT&T Reply Comments at 3-4; MCI Reply Comments at 5; National Cable Television Association Reply Comments at 3.

89 Classic Reply Comments at 17-25.

90 Id. at 17 & n.10 (citing Commission Taking Tough Measures Against Frivolous Pleadings, FCC Public Notice No. FCC 96-42, 11 FCC Rcd. 3030 (Feb. 9, 1996)).

91 See, e.g., Classic Reply Comments at 10.

92 H.R. REP. NO. 204, 104th Cong., 1st Sess. pt. 1 at 5 (1995).

93 Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) (WPI v. Mortier).

94 Id., 501 U.S. at 607.

95 Id., 501 U.S. at 607-608 (citations omitted).

96 Id., 501 U.S. at 609.

97 See para. 4, supra.

98 47 U.S.C. § 253(b). See Joint Explanatory Statement at 127.

99 In describing the identical Senate provision that Congress ultimately adopted as the official language of section 253(b), Congress stated that "States may not exercise this authority in a way that has the effect of imposing entry barriers. " Joint Explanatory Statement at 126.

100 See KCC Dec. 8th Order at 3, 11, and Attachment A.

101 See KCC Dec. 8th Order.

102 47 U.S.C. § 253(b).

103 47 U.S.C. § 253(c).

104 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco). See also, Implementation of Section 302 of the Telecommunications Act of 1996, Second Report and Order, CS Docket No. 96-46, FCC 96-249, 61 Fed. Reg. 28698 at P 210 (1996) (describing additional examples of legitimate public rights-of-way management authority).

105 Indeed, as noted previously, the record does not reflect that Bogue issued a written decision explaining why it denied Classic's franchise application initially. See para. 6, supra.

106 Bogue based its denial on a comparative evaluation between Rural and Classic and on economic considerations of having multiple providers in a small community. In fact, Bogue's decision only mentioned rights-of-way in passing in the broader context of the economic considerations of multiple providers. Specifically, Bogue found that "Classic Telephone, Inc. cannot match the economy to subscribers of the service to be provided by Rural; and that the use of the city streets, alleys and public ways by two telephone companies to serve a City with the population of 191 persons of all ages, is not an economical or efficient use." Bogue Decision on Recon. at 1.

107 Hill City Comments at 16. We note that Hill City relied on the same allegations in support of its claim that the franchise denial was permitted pursuant to section 253(b). Hill City stated that its actions were consistent with section 253(b) because "Hill City must protect the local public safety and welfare from any entity that appears to be attempting to monopolize local cable and telephone service, to be deceiving local residents . . . , to developing highly antagonistic relationships with many local governments, and to be willing to use lawsuits to intimidate potential opposition." Hill City Comments at 18.

108 Hill City Comments at 15.

109 Bogue Comments at 15 n.20. Section 251(f) provides:

(f) RURAL MARKETS.--It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply-- "(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) that effectively prevents a competitor from meeting the requirements of section 214(e)(1); and "(2) to a provider of commercial mobile services. 47 U.S.C. § 251(f).

110 Bogue argues that because the State of Kansas regulates telephone exchange carriers at both the State level and through its various municipalities, section 251(f) must be read to include municipalities to the extent that a particular state may have delegated its franchising authority. Bogue Comments at 17-18 & n.24 (citing Gregory v. Ashcroft, 501 U.S. 452, 460, 111 S.Ct. 2395 (1991)).

111 Classic Reply at 11.

112 47 U.S.C. § 214(e)(1). Classic Reply Comments at 10.

113 47 U.S.C. § 251(f).

114 47 U.S.C. § 251 (f). See Local Competition First Report and Order at P 1262.

115 The record does not reflect whether the KCC has delegated its authority under 251(f) to the Cities.

116 Classic Petition at 14-15.

[117] Classic Ex Parte Presentation at 4 (June 10, 1996) (citing 47 U.S.C. § 154(i) and (j); Southwestern Cable Co., 392 U.S. 157, 178, 88 S.Ct. 1994; Policy Rules Concerning Rates for Dominant Carriers (Part I of II), 3 FCC Rcd. 3195, 3296-97 (1988); In re Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements, 6 FCC Rcd. 7511, 7513 (1991), recon., 7 FCC Rcd. 4123 (1992); Southern New England Telephone Company Expedited Petition for Emergency Interim Relief, Preliminary Injunction and Stay, 10 FCC Rcd. 13194 (1995); Applications of Craig O. McCaw and AT&T For Consent to Transfer Control of McCaw Cellular Communications and Its Subsidiaries, 9 FCC Rcd. 5836, 5920 (1995)).

[118] 47 U.S.C. § 151.

[119] Classic Ex Parte Presentation at 1-3 (June 10, 1996).

[120] Bogue Comments at 19.

[121] Bogue Comments at 19 (citing New York v. United States, 505 U.S. 144 (1992)).

[122] MCI suggests that Congress deliberately separated the functions preserved under sections 253(b) and 253(c) to remove from local governments the authority to regulate entry. MCI Reply at 3-4.

[123] See United Tel. Co. of Kansas, 258 Kan. at 211.

[124] Classic Petition at 15.

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

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

NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY

Adopted: April 20, 2017 **Released: April 21, 2017**

Comment Date: (30 days after date of publication in the Federal Register)
Reply Comment Date: (60 days after date of publication in the Federal Register)

By the Commission: Chairman Pai and Commissioner O'Rielly issuing separate statements; Commissioner Clyburn concurring and issuing a statement.

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I. INTRODUCTION

1. The deployment of next-generation wireless broadband has the potential to bring enormous benefits to the Nation's communities. By one assessment, the next generation of wireless broadband is expected to directly involve $275 billion in new investment, and could help create 3 million new jobs and boost annual GDP by $500 billion.[1] Reflecting these benefits, use of wireless broadband service and capacity has been growing dramatically, and such growth is widely expected to continue due to the increasing use of high-bandwidth applications like mobile streaming, the greater expected capacity of 5G connections, and the deployment of the Internet of Things (IoT).[2] Continuing to meet this demand and realizing the potential benefits of next-generation broadband will depend, however, on having an updated regulatory framework that promotes and facilitates next generation network infrastructure facility deployment.

2. This Notice of Proposed Rulemaking and Notice of Inquiry (NPRM and NOI, respectively) commences an examination of the regulatory impediments to wireless network infrastructure investment and deployment, and how we may remove or reduce such impediments consistent with the law and the public interest, in order to promote the rapid deployment of advanced wireless broadband service to all Americans. Because providers will need to deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next generation technologies, there is an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise.

3. We expect the measures on which we seek comment to be only a part of our efforts to expedite wireless infrastructure deployment. We invite commenters to propose other innovative approaches to expediting deployment. Further, our process for implementing Section 106 of the National Historic Preservation Act is governed by certain Nationwide Programmatic Agreements and affects States as well as federally recognized Tribal Nations. We look forward to working with these partners on

[1] *See* accenturestrategy, "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities," http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf ("Smart Cities Paper").

[2] *See* Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021, at 15 (100 Mbps 5G connections are expected to drive high traffic volumes). Cisco estimates that a 5G connection will generate 4.7 times more traffic than the average 4G connection. *See id.* at 3. Another estimate projects that peak period bandwidth demand will increase at a compounded annual rate of 52 percent. *See* Information Technology & Innovation Foundation, "5G and Next Generation Wireless: Implications for Policy and Competition," June 2016, at 1, http://www2.itif.org/2016-5g-next-generation.pdf. Overall, it is estimated that, by 2019, mobile data traffic in the United States will have grown by nearly six times over the traffic level that existed in 2014, when the Commission last addressed wireless facility siting issues in a rulemaking. *See* CTIA-The Wireless Association®, "Mobile Data Demand: Growth Forecasts Met," Thomas K. Sawanobori, Dr. Robert Roche, June 22, 2015, at 1, http://www.ctia.org/docs/default-source/default-document-library/062115mobile-data-demands-white-paper-new.pdf.

proposals involving the Section 106 review process that require amendments or supplements to these agreements.[3]

II. NOTICE OF PROPOSED RULEMAKING

A. Streamlining State and Local Review

4. This NPRM examines regulatory impediments to wireless infrastructure investment and deployment and seeks comment on measures to help remove or reduce such impediments. In this section, we address the process for reviewing and deciding on wireless facility deployment applications conducted by State and local regulatory agencies. We seek comment on several potential measures or clarifications intended to expedite such review pursuant to our authority under Section 332 of the Communications Act.

5. Congress enacted the Telecommunications Act of 1996 as a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans . . . ."[4] One provision of that enactment, Section 332(c)(7), strikes a balance between "preserv[ing] the traditional authority of state and local governments to regulate the location, construction, and modification of wireless communications facilities like cell phone towers" and "reduc[ing] . . . the impediments imposed by local governments upon the installation of facilities for wireless communications."[5] Thus, Section 332(c)(7)(A) preserves "the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities," subject to significant limitations – including Section 332(c)(7)(B)(ii), which requires States and local governments to "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 [the relevant] government or instrumentality, taking into account the nature and scope of such request."[6] The purpose of the latter provision is to counteract delays in State and local governments' consideration of wireless facility siting applications, which thwart timely rollout and deployment of wireless service. Congress took further action to streamline this process in 2012 by enacting Section 6409(a) of the Spectrum Act, which provides that "a State or local government may not deny, and shall approve," applications to deploy or modify certain types of wireless facilities.[7]

6. The Commission has taken a number of important actions to date implementing Section 332(c)(7) of the Communications Act (Act) and Section 6409(a) of the Spectrum Act, each of which has been upheld by federal courts.[8] We seek to assess the impact of the Commission's actions to date, in

[3] *See* Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1, App'x B (Collocation NPA); Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 CFR Part 1, App'x C (NPA). *See also Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 8824 (WTB 2016).

[4] Telecommunications Act of 1996, S. Rep. 104-230, at 1 (Feb. 1, 1996) (Conf. Report).

[5] *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808, 814 (2015); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

[6] *See* 47 U.S.C. § 332(c)(7)(B)(ii). Such decisions must be "in writing and supported by substantial evidence contained in a written record." *Id.* § 332(c)(7)(B)(iii).

[7] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (Spectrum Act), *codified at* 47 U.S.C. § 1455(a).

[8] *See*, *e.g.*, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (*2009 Declaratory Ruling*), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014) (*2014 Infrastructure Order*), erratum, 30 FCC Rcd 31 (2015), *aff'd*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

order to evaluate the measures we discuss in the NPRM, as well as other possible actions, and to determine whether those measures are likely to be effective in further reducing unnecessary and potentially impermissible delays and burdens on wireless infrastructure deployment associated with State and local siting review processes. Thus, we ask parties to submit facts and evidence on the issues discussed below and on any other matters relevant to the policy proposals set forth here. We seek information on the prevalence of barriers, costs thereof, and impacts on investment in and deployment of wireless services, including how such costs compare to the overall costs of deployment. We seek information on the specific steps that various regulatory authorities employ at each stage in the process of reviewing applications, and which steps have been most effective in efficiently resolving tensions among competing priorities of network deployment and other public interest goals. In addition, parties should detail the extent to which the Commission's existing rules and policies have or have not been successful in addressing local siting review challenges, including effects or developments since the *2014 Infrastructure Order*, the Commission's most recent major decision addressing these issues.[9]

7. Further, in seeking comment on new or modified measures to expedite local review, we invite commenters to discuss what siting applicants can or should be required to do to help expedite or streamline the siting review process. Are there ways in which applicants are causing or contributing to unnecessary delay in the processing of their siting applications? If so, we seek comment on how we should address or incorporate this consideration in any action we take in this proceeding. For example, to what extent have delays been the result of incomplete applications or failures to properly respond to requests to the applicant for additional information, and how should measures we adopt or revise to streamline application review ensure that applicants are responsible for supplying complete and accurate filings and information? Further, are there steps the industry can take outside the formal application review process that may facilitate or streamline such review? Are there siting practices that applicants can or should adopt that will facilitate faster local review while still achieving the deployment of infrastructure necessary to support advanced wireless broadband services?

1. "Deemed Granted" Remedy for Missing Shot Clock Deadlines

8. The Commission has previously considered, but not adopted, proposals to establish a "deemed granted" remedy for violations of Section 332(c)(7)(B)(ii) in the context of applications outside the scope of the Spectrum Act.[10] That is, the Commission has declined to establish that a non-Spectrum Act siting application would be "deemed granted" if a State or local agency responsible for land-use decisions fails to act on it by the applicable shot clock deadline. The Commission's existing policy for non-Spectrum Act siting applications provides that State or local agencies are obligated to act within a presumptively "reasonable period of time" – *i.e.*, the 90-day shot clock for collocation applications and the 150-day shot clock for other applications – and, upon the agency's "failure to act" by the pertinent deadline, the applicant may sue the agency pursuant to Section 332(c)(7)(B)(v) within 30 days after the date of that deadline.[11] In such litigation, the agency may attempt to "rebut the presumption that the established timeframes are reasonable" – for example, by demonstrating that slower review in a particular

[9] To the extent that parties have submitted information in response to the Wireless Telecommunications Bureau's *Streamlining PN* that is relevant to these questions, we invite them to submit such data in the present docket. *See Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13368 (WTB 2016) (*Streamlining PN*); comment period extended by *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, Order, 32 FCC Rcd 335 (WTB 2017). In addition, to the extent parties discuss the conduct or practices of government bodies or wireless facility siting applicants, we strongly urge them to identify the particular entities that they assert engaged in such conduct or practices.

[10] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39. The Commission reaffirmed this ruling as to applications not subject to the Spectrum Act in the *2014 Infrastructure Order*. *See* 29 FCC Rcd at 12961, para. 226.

[11] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14008-10, 14013-14, paras. 37-42, 49-50.

case was reasonable in light of the "nature and scope of the request," or for other reasons.[12] If the agency fails to make such a showing, it may face "issuance of an injunction granting the application."[13] By contrast, for applications subject to Section 6409(a) of the Spectrum Act, the Commission adopted a "deemed granted" remedy: if a State or local agency fails to act on such an application by the 60-day deadline, the application will be "deemed granted."[14]

9. We now take a fresh look and seek comment on a "deemed granted" remedy for State and local agencies' failure to satisfy their obligations under Section 332(c)(7)(B)(ii) to act on applications outside the context of the Spectrum Act. We invite commenters to address whether we should adopt one or more of the three options discussed below regarding the mechanism for implementing a "deemed granted" remedy. We describe each of these options below and explain our analysis of the Commission's legal authority to adopt each of them. We seek comment on the benefits and detriments of each option and invite parties to discuss our legal analysis. We also seek comment on whether there are other options for implementing a "deemed granted" remedy.

10. *Irrebuttable Presumption*. In the *2009 Shot Clock Declaratory Ruling*, the Commission created a "rebuttable presumption" that the shot clock deadlines established by the Commission were reasonable. The Commission anticipated that this would give State and local regulatory agencies "a strong incentive to resolve each application within the time frame defined as reasonable."[15] Thus, when an applicant sues pursuant to Section 332(c)(7)(B)(v) to challenge an agency's failure to act on an application by the applicable deadline, the agency would face the burden of "rebut[ting] the presumption that the established timeframes are reasonable,"[16] and if it fails to satisfy this burden, the court could "issu[e] . . . an injunction granting the application."[17] We believe one option for establishing a "deemed granted" remedy for a State or local agency's failure to act by the applicable deadline would be to convert this *rebuttable presumption* into an *irrebuttable* presumption. Thus, our determination of the reasonable time frame for action (*i.e.*, the applicable shot clock deadline) would "set an absolute limit that – in the event of a failure to act – results in a deemed grant."[18]

11. We believe we have legal authority to adopt this approach, for the following reasons. First, we see no reason to continue adhering to the cautious approach articulated in the *2009 Shot Clock Declaratory Ruling – i.e.*, that Section 332(c)(7) "indicates Congressional intent that courts should have

[12] *Id.* at 14010-11, paras. 42, 44.

[13] *Id.* at 14009, para. 38; *see also City of Rancho Palos Verdes*, 504 U.S. 116 (proper remedies for Section 332(c)(7) violations include injunctions but not constitutional-tort damages).

[14] *2014 Infrastructure Order*, 29 FCC Rcd at 12957, para. 216. In such cases, applicants may sue and seek a declaratory judgment confirming that an application was "deemed granted" due to the State or local agency's failure to act within the 60-day shot clock deadline status, while an agency could sue to challenge an applicant's claim that an application was "deemed granted." *Id.* at 12963-64, paras. 234-36. *See also id.* at 12961, para. 226 ("deemed grant" status takes effect only after applicant notifies the reviewing jurisdiction in writing); *id.* at 12962, para. 231 (listing issues a locality could raise in litigation to challenge an applicant's claimed "deemed grant"). The Commission clarified that, prior to the 60-day deadline, State and local agencies may review applications to determine whether they constitute covered requests" and may "continue to enforce and condition approval [of such applications] on compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes." *Id.* at 12955, para. 211; *see also id.* at 12951, 12956, paras. 202, 214 n.595.

[15] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 38.

[16] For example, the locality could rebut the presumption that the established deadlines are reasonable" by showing that, in light of the "nature and scope of the request" in a particular case, it "reasonably require[d] additional time" to negotiate a settlement or to prepare a written explanation of its decision. *Id.* at 14011, para. 44.

[17] *Id.* at 14008-09, para. 38.

[18] *2014 Infrastructure Order*, at 12991, para. 226 (describing impact of irrebuttable presumption in context of applications subject to the Spectrum Act).

the [sole] responsibility to fashion . . . remedies" on a "case-specific" basis.[19] The Commission advanced that theory without citing any legislative history or other sources, and the Fifth Circuit, in its decision upholding the *2009 Shot Clock Declaratory Ruling*, apparently declined to rely on it. Instead, the Fifth Circuit found *no* indication in the statute and its legislative history of any clear Congressional intent on whether the Commission could "issue an interpretation of § 332(c)(7)(B)(v) that would guide courts' determinations of disputes under that section," and went on to affirm that the Commission has broad authority to render definitive interpretations of ambiguous provisions such as this one in Section 332(c)(7).[20] The Fifth Circuit further found – and the Supreme Court affirmed – that courts must follow such Commission interpretations.[21]

12. We thus believe we have authority to adopt irrebuttable presumptions establishing as a matter of rule the maximum reasonable amount of time available to review a wireless facilities application, and seek comment on this conclusion. As the Fifth Circuit found, the inherent ambiguity in "the phrase 'reasonable period of time,' as it is used in § 332(c)(7)(B)(ii)," leaves ample "room for agency guidance on the amount of time state and local governments have to act on wireless facility zoning applications."[22] We see nothing in the statute that explicitly compels a case-by-case assessment of the relevant circumstances for each individual application, nor any provision specifically requiring that those time frames be indefinitely adjustable on an individualized basis, rather than subject to dispositive maximums that may be deemed reasonable as applied to specified categories of applications.[23] While Section 332(c)(7)(B)(ii) provides that a locality must act on each application "within a reasonable time, *taking into account the nature and scope of such request*,"[24] this does not necessarily mean that a reviewing court "must consider the specific facts of individual applications"[25] to determine whether the locality acted within a reasonable time frame; the Commission is well-positioned to take into account the "nature and scope" of particular categories of applications in determining the maximum reasonable amount of time for localities to address each type.

13. Moreover, the Fourth Circuit, in affirming the *2014 Infrastructure Order*, held that the "deemed granted" remedy adopted in the context of the Spectrum Act was permissible under the Tenth Amendment, was consistent with the statutory purpose (*i.e.*, ensuring that deployment "applications are not mired in the type of protracted approval processes that the Spectrum Act was designed to avoid"),[26] and was well within the Commission's authority. We do not view Sections 332(c)(7)(B)(ii) and (v) as materially different from the Spectrum Act in this regard, and we therefore believe that the same "deemed granted" remedy is within the Commission's authority under those statutory provisions as well, where the Commission exercises its statutory authority in accordance with *City of Arlington* to establish standards,

[19] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39.

[20] *City of Arlington v. FCC*, 668 F.3d at 251. *See also id.* at 250-51 ("Had Congress intended to insulate § 332(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly[.] * * * Here, however, Congress did not clearly remove the FCC's ability to implement the limitations set forth in § 332(c)(7)(B) . . . .").

[21] *City of Arlington v. FCC*, 668 F.3d at 249-50; 133 S. Ct. at 1871-73. *See also National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (Commission's interpretation of an ambiguous statutory provision overrides earlier court decisions interpreting the same provision).

[22] *City of Arlington*, 668 F.3d at 255.

[23] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39.

[24] 47 U.S.C. § 332(c)(7)(B)(ii).

[25] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39.

[26] *Montgomery County*, 811 F.3d 121, 128.

in specific contexts, for what constitutes "a reasonable period of time after the request is duly filed."[27] We seek comment on this analysis.

14. *Lapse of State and Local Governments' Authority*. In the alternative (or in addition) to the irrebuttable presumption approach discussed above, we believe we may implement a "deemed granted" remedy for State and local agencies' failure to act within a reasonable time based on the following interpretation of ambiguous provisions in the statute. Section 332(c)(7)(A) assures these agencies that their "authority over decisions concerning the placement, construction, and modification of personal wireless service facilities" is preserved—but significantly, qualifies that assurance with the provision "*except as provided*" elsewhere in Section 332(c)(7). We seek comment on whether we should interpret this phrase as meaning that if a locality fails to meet its obligation under Section 332(c)(7)(B)(ii) to "act on [a] request for authorization to place, construct, or modify personal wireless facilities within a reasonable period of time," then its "authority over decisions concerning" that request lapses and is no longer preserved. Under this interpretation, by failing to act on an application within a reasonable period of time, the agency would have defaulted its authority over such applications (*i.e.*, lost the protection of Section 332(c)(7)(A), which otherwise would have preserved such authority), and at that point no local land-use regulator would have authority to approve or deny an application. Arguably, we could establish that in those circumstances, there is no need for an applicant to seek such approval. We seek comment on this interpretation and on the desirability of taking this approach.

15. *Preemption Rule*. A third approach to establish a "deemed granted" remedy—standing alone or in tandem with one or both of the approaches outlined above—would be to promulgate a rule to implement the policies set forth in Section 332(c)(7). Sections 201(b) and 303(r), as well as other statutory provisions, generally authorize the Commission to adopt rules or issue other orders to carry out the substantive provisions of the Communications Act.[28] Further, the Fifth Circuit affirmed the determination in the *2009 Shot Clock Declaratory Ruling* that the Commission's "general authority to make rules and regulations to carry out the Communications Act includes the power to implement § 332(c)(7)(B)(ii) and (v)."[29] Accordingly, we seek comment on whether we could promulgate a "deemed granted" rule to implement Section 332(c)(7). We also seek comment on whether Section 253, standing alone or in conjunction with Section 332(c)(7) or other provisions of the Act, provides the authority for the Commission to promulgate a "deemed granted" rule.[30]

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[27] *See City of Arlington*, 133 S. Ct. at 1868; 47 U.S.C. § 332(c)(7)(B)(ii).

[28] *See* 47 U.S.C. §§ 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."), 303(r) (directing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act"). *See also* 47 U.S.C. § 154(i); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 380 (1999) ("§ 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.") (emphasis in original); *City of Arlington*, 133 S. Ct. at 1866 (in specific context of Section 332(c)(7), stating: "Section 201(b) . . . empowers the . . . Commission to 'prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions.' Of course, that rulemaking authority extends to the subsequently added portions of the Act.") (quoting § 201(b) and citing *Brand X*).

[29] *City of Arlington*, 668 F.3d at 249; *see also id.* at 252-54 (finding that the Commission's interpretation was a permissible construction of the ambiguous provisions in § 332(c)(7), and the interpretation was entitled to deference); *id.* at 247 & n.83 (summarizing Commission's analysis and citing 47 U.S.C. §§ 151, 154(i), 201(b), and 303(r) as basis for the Commission's general authority to adopt rules and orders to implement the Act), *aff'd in pertinent part*, 133 S. Ct. at 1866. *See also 2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14001-03, paras. 23-26 (legal analysis interpreting Sections 332(c)(7), 201(b), and 303(r)).

[30] State or local governments' failures to act within reasonable time frames arguably could violate Section 253(a) if they have the "effect of prohibiting" wireless carriers' provision of service; and this might justify our addressing this problem by adopting a rule to implement the policies of Section 253(a) as well as Section 332(c)(7). *See infra* Sections III.A and C (discussing implications of the overlapping provisions in Sections 253(a) and

(continued….)

16. In considering adoption of rules implementing Section 332(c)(7)(B)(i), (ii), and (iii), we are aware of a statement in the Conference Report issued in connection with the Telecommunications Act of 1996 that "[i]t is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) . . . the courts shall have exclusive jurisdiction over all . . . disputes arising under this section."[31] Does this statement, standing alone, affect our authority to adopt rules governing disputes about localities' failure to comply with their obligations under Section 332(c)(7)(B)(ii) to act on siting applications within a reasonable time? Or is a generic rule distinguishable from a proceeding addressing a dispute between a particular applicant and a particular State or local regulator? Can a statement in legislative history foreclose us from complying with an explicit mandate elsewhere in the Communications Act? Does it prevent us from exercising the rulemaking authority explicitly granted by Sections 201(b) and 303(r)?[32] We are mindful of the D.C. Circuit's admonition that "a plain reading of an unambiguous statute cannot be eschewed in favor of a contrary reading, suggested only by the legislative history and not by the text itself," and that "[w]e will not permit a committee report to trump clear and unambiguous statutory language."[33] We invite commenters to address these issues.

2. Reasonable Period of Time to Act on Applications

17. In 2009, the Commission determined that, for purposes of determining what is a "reasonable period of time" under Section 332(c)(7)(B)(ii), 90 days should be sufficient for localities to review and act on (either by approving or denying) complete collocation applications, and that 150 days is a reasonable time frame for them to review and act on other types of complete applications to place, construct, or modify wireless facilities.[34] In its *2014 Infrastructure Order*, the Commission implemented Section 6409(a) of the Spectrum Act (enacted by Congress in 2012)[35] by, among other things, creating a new 60-day shot clock within which localities must act on complete applications subject to the definitions in the Spectrum Act.[36]

18. We ask commenters to discuss whether the Commission should consider adopting different time frames for review of facility deployments not covered by the Spectrum Act. For example, we seek comment on whether we should harmonize the shot clocks for applications that are not subject to the Spectrum Act with those that are, so that, for instance, the time period deemed reasonable for non-Spectrum Act collocation applications would change from 90 days to 60 days.[37] Alternatively, should we establish a 60-day shot clock for some subset of collocation applications that are not subject to the

(Continued from previous page)
253(c)(7)(B)(i)(II) banning State or local legal requirements that "prohibit or have the effect of prohibiting" the provision of wireless telecommunications service).

[31] S. Rep. No. 104-230, at 207-08 (1996) (Conf. Rep.).

[32] *See supra*.

[33] *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987). *See also United States v. Gonzales*, 520 U.S. 1, 6 (1997) (rejecting "resort to legislative history" to interpret a "straightforward statutory command," where "the legislative history only muddies the waters."); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (even where there are "contrary indications in the statute's legislative history[,] . . . we do not resort to legislative history to cloud a statutory text that is clear.").

[34] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14004, 14012-13, paras. 32, 45-48 (2009) (*2009 Shot Clock Declaratory Ruling*), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[35] Section 6409(a) of the Spectrum Act, 47 U.S.C. § 1455(a), mandates that State and local land-use regulators "must approve, and may not deny" applications to deploy wireless facilities within a specified, narrow category.

[36] *2014 Infrastructure Order*, 29 FCC Rcd at 12956-57, para. 215. The Commission also defined each of the terms used in the Spectrum Act to specify the types of facilities subject to mandatory approval. *See id.* at 12926-51, paras. 145-204; 47 CFR § 1.40001(b).

[37] *2014 Infrastructure Order*, 29 FCC Rcd at 12957, para. 215; 47 CFR § 1.40001(c)(2).

Spectrum Act, for example, applications that meet the relevant dimensional limits but are nevertheless not subject to the Spectrum Act because they seek to collocate equipment on non-tower structures that do not have any existing antennas?[38] Should we adopt different presumptively reasonable time frames for resolving applications for more narrowly defined classes of deployments such as (a) construction of new structures of varying heights (*e.g.*, 50 feet tall or less, versus 50 to 200 feet tall, versus taller than 200 feet); (b) construction of new structures in or near major utility or transportation rights of way, or that are in or near established clusters of similar structures, versus those that are not; (c) deployments in areas that are zoned for residential, commercial, or industrial use, or in areas where zoning or planning ordinances contemplate little or no additional development; or (d) replacements or removals that do not fall within the scope of Section 6409(a) of the Spectrum Act (for example, because they exceed the dimensional limits for requests covered by that provision)? We also request comment on whether to establish different time frames for (i) deployment of small cell or Distributed Antenna System (DAS) antennas or other small equipment versus more traditional, larger types of equipment or (ii) requests that include multiple proposed deployments or, equivalently, "batches" of requests submitted by a single provider to deploy multiple related facilities in different locations, versus proposals to deploy one facility.[39] Should we align our definitions of categories of deployments for which we specify reasonable time frames for local siting review with our definitions of the categories of deployments that are categorically excluded from environmental or historic preservation review?[40]

19. We seek comment on what time periods would be reasonable (outside the Spectrum Act context) for any new categories of applications, and on what factors we should consider in making such a decision. For what types or categories of wireless siting applications may shorter time periods be reasonable than those established in the *2009 Shot Clock Declaratory Ruling*? We invite commenters to submit information to help guide our development of appropriate time frames for various categories of deployment. We ask commenters to submit any available data on whether localities already recognize different categories of deployment in their processes, and on the actual amounts of time that localities have taken under particular circumstances.

20. We also seek comment on whether the Commission should provide further guidance to address situations in which it is not clear when the shot clock should start running, or in which States and localities on one hand, and industry on the other, disagree on when the time for processing an application begins. For instance, we have heard anecdotally that some jurisdictions impose a "pre-application" review process, during which they do not consider that a request for authorization has been filed. We seek comment on how the shot clocks should apply when there are such pre-application procedures; at what point should the clock begin to run? Are there other instances in which there is a lack of clarity or disagreement about when the clock begins to run? We ask parties to address whether and how the Commission should provide clarification of how our rules apply in those circumstances.

21. Finally, we seek comment on whether there are additional steps that should be considered to ensure that a deemed granted remedy achieves its purpose of expediting review. For example, to what extent can the attachment of conditions to approvals of local zoning applications slow the deployment of infrastructure? Are applicants encountering requirements to comply with codes that are not reasonably

[38] *See 2014 Infrastructure Order*, 29 FCC Rcd at 12935, para. 168 (finding that the term "existing . . . base station" in Section 6409((a)(2) covers only structures that, at the time of the application, supports or houses base station equipment); 47 CFR § 1.40001(b)(1)(iv).

[39] The Wireless Telecommunications Bureau also sought comment on these issues in the *Streamlining PN*. *See* 31 FCC Rcd at 13370-71.

[40] *See* 47 CFR §§ 1.1306, 1.1307.

related to health and safety?[41] To the extent these conditions present challenges to deployment, are there steps the Commission can and should take to address such challenges?

3. Moratoria

22. Another concern relating to the "reasonable periods of time" for State and local agencies to act on siting applications is that some agencies may be continuing to impose "moratoria" on processing such applications, which inhibit the deployment of the infrastructure needed to provide robust wireless services. If so, such moratoria might contravene the *2014 Infrastructure Order*, which clearly stated that the shot clock deadlines for applications continue to "run[] regardless of any moratorium."[42] The Commission explained that this conclusion was "consistent with a plain reading of the *2009 Declaratory Ruling*, which specifies the conditions for tolling and makes no provision for moratoria," and concluded that this means that "applicants can challenge moratoria in court when the shot clock expires without State or local government action."[43] We see no reason to depart from this conclusion. We ask commenters to submit specific information about whether some localities are continuing to impose moratoria or other restrictions on the filing or processing of wireless siting applications, including refusing to accept applications due to resource constraints or due to the pendency of state or local legislation on siting issues, or insisting that applicants agree to tolling arrangements. Commenters should identify the specific entities engaging in such actions and describe the effect of such restrictions on parties' ability to deploy or upgrade network facilities and provide service to consumers. We propose to take any additional actions necessary, such as issuing an order or declaratory ruling providing more specific clarifications of the moratorium ban or preempting specific State or local moratoria. Commenters should discuss the benefits and detriments of any such additional measures and our legal authority to adopt them.

B. Reexamining National Historic Preservation Act and National Environmental Policy Act Review

23. In the following sections, we undertake a comprehensive fresh look at our rules and procedures implementing the National Environmental Policy Act (NEPA)[44] and the National Historic Preservation Act (NHPA)[45] as they relate to our implementation of Title III of the Act in the context of wireless infrastructure deployment, given the ongoing evolution in wireless infrastructure deployment towards smaller antennas and supporting structures as well as more frequent collocation on existing structures.

24. We note that any revisions to our rules or procedures implementing NEPA require consultation with the Council for Environmental Quality (CEQ).[46] In addition, any changes to the programmatic agreements governing our review under the NHPA would require the agreement of the Advisory Council on Historic Preservation (ACHP) and the National Conference of State Historic Preservation Officers (NCSHPO), and other revisions to our rules governing NHPA review may benefit

[41] In the context of the deemed granted remedy under the Spectrum Act, the Commission clarified that localities could "continue to enforce and condition approval [of such applications] on compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes." *See 2014 Infrastructure Order*, 29 FCC Rcd at 12955, para. 211.

[42] *2014 Infrastructure Order*, 29 FCC Rcd at 12971, para. 265; *see generally id.* at 12971-72, paras. 263-67.

[43] *Id.* at 12971, para. 265.

[44] 42 U.S.C. § 4321 *et seq.*

[45] 54 U.S.C. § 300101 *et seq.*

[46] 40 CFR § 1507.3(a) ("Each agency shall consult with [CEQ] while developing its procedures and before publishing them in the Federal Register for comment. … The procedures shall be adopted only after an opportunity for public review and after review by [CEQ] for conformity with [NEPA] and [CEQ's] regulations.").

from their perspectives.[47] Furthermore, some of the changes discussed below might significantly or uniquely affect Tribal governments and their land and resources. The ACHP, in a filing in this proceeding, has stressed that the expertise and experience of these and other stakeholders is crucial to understanding the issues raised herein, and we emphasize that we intend to continue to work closely with ACHP and others.[48] We direct the Wireless Telecommunications Bureau (WTB), in coordination with the Consumer and Governmental Affairs Bureau, Office of Intergovernmental Affairs, and other Bureaus and Offices as appropriate, to consult with other agencies and organizations, including the CEQ, ACHP, and NCSHPO, as warranted to develop the record and obtain their perspectives on the issues herein. We further direct the Office of Native Affairs and Policy (ONAP), in coordination with WTB and other Bureaus and Offices as appropriate, to conduct government-to-government consultation as appropriate with Tribal Nations. Tribal Nations may notify ONAP of their desire for consultation via email to tribalinfrastructure@fcc.gov.

1. Background

25. *NEPA and the NHPA.* NEPA requires agencies of the Federal Government to identify and evaluate the environmental effects of proposed "major Federal actions significantly affecting the quality of the human environment . . . ."[49] In turn, Section 106 of the NHPA states that "prior to the issuance of any license," the head of a Federal agency "shall take into account the effect of the undertaking on any historic property" and "shall afford the [ACHP] a reasonable opportunity to comment with regard to the undertaking."[50] Similar to a "major Federal action," an "undertaking" includes, among other things, projects, activities, or programs that "requir[e] a Federal permit, license, or approval[.]"[51] Courts have generally treated Federal actions under NEPA as closely analogous to undertakings under the NHPA.[52]

26. *Commission Precedent: Scope of Obligations.* The Commission has assumed responsibility for NEPA and NHPA review of wireless communications facilities construction based on the Commission's actions in two areas: licensing and antenna structure registration (ASR). As a historical matter, the Commission's initial focus on antenna sites made sense, reflecting the relatively more involved role the Commission played in the space. For instance, in 1974, when the Commission first promulgated rules implementing NEPA,[53] all licenses conferred authority to operate from a specific site, and the Commission was required to issue a construction permit for that site before granting the license.[54] In 1982, however, Congress amended the Communications Act to eliminate construction permits by default in some services and to authorize the Commission to waive the construction permit

[47] Agency implementation of Section 106 of the NHPA is governed by the rules of the ACHP, which specify the process under which Federal agencies shall perform their historic preservation reviews. 36 CFR § 800.2(a).

[48] *See* Letter from Milford Wayne Donaldson, FAIA, Chairman, Advisory Council on Historic Preservaton, to the Honorable Ajit Pai, Chairman, FCC, WT Docket Nos. 17-79, 15-180 (filed Apr. 13, 2017) at 1.

[49] 42 U.S.C. § 4332(2)(C).

[50] 54 U.S.C. § 306108.

[51] 54 U.S.C. § 300320(3). *See also* 40 CFR § 1508.18(b).

[52] *See*, *e.g.*, *Karst Env't'l Educ. and Prot., Inc. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007); *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001). *But see Indiana Coal Council, Inc. v. Lujan,* 774 F. Supp. 1385, 1401 (D.D.C. 1991) ("Congress appears to have established different thresholds in the NHPA and in NEPA for determining whether an activity triggers the obligation . . . .").

[53] *Implementation of the National Environmental Policy Act*, Report and Order, 49 FCC 2d 1313, 1333, para. 46 (1974).

[54] *See* 47 U.S.C. § 319 (a) ("[n]o license shall be issued . . . for the operation of any station unless a permit for its construction has been granted . . . .").

requirement in the public interest in other services.[55] Currently, the Commission requires construction permits only in the broadcast services. Furthermore, licenses in many services, including most licenses in the commercial wireless services, now authorize transmissions over a particular band of spectrum within a wide geographic area without further limitation as to transmitter locations. In 1990, the Commission amended Section 1.1312 of the rules to specify that where construction of a Commission-regulated radio communications facility is permitted without prior Commission authorization (*i.e.*, without a construction permit), the licensee or applicant determines prior to construction whether the facility may have a significant environmental effect.[56] The D.C. Circuit subsequently found that the Commission's retention of limited approval authority over tower construction in Section 1.1312 to the extent necessary to ensure this review was not arbitrary and capricious.[57]

27. *The Commission's Rules.* The Commission's rules require an applicant to prepare and file an environmental assessment (EA)[58] if its proposed construction meets any of several environmentally sensitive conditions specified in the rules.[59] If an EA is required, the application will not be processed and the applicant may not proceed with construction until environmental processing is completed.[60] All other constructions are categorically excluded from environmental processing unless the processing bureau determines, in response to a petition or on its own motion, that the action may nonetheless have a significant environmental impact.[61]

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[55] 47 U.S.C. § 319(d); *see* Pub.L. 97-259, 96 Stat. 1087, § 119 (1982).

[56] 47 CFR § 1.1312(a); *see Amendment of Environmental Rules,* Report and Order, 5 FCC Rcd 2942 (1990) (*Pre-Construction Review Order*).

[57] *CTIA – The Wireless Ass'n v. FCC*, 466 F.3d 105, 114 (D.C. Cir. 2006). In the underlying Report and Order, the Commission had declined to revisit whether it should treat tower construction as an undertaking under the NHPA, while noting its belief that under Section 319 and Federal environmental statutes, it "has sufficient approval authority to trigger the requirements of section 106." *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1093 para. 24 (2004) (*NPA Order*). Two Commissioners dissented in part, expressing the view that in the absence of a construction permit or a site-by-site license, the Commission's retention of jurisdiction to require historic preservation review exceeded its statutory authority. *See id.* at 1230 (Statement of Commissioner Kathleen Q. Abernathy), 1233 (Statement of Commissioner Kevin J. Martin).

[58] Under CEQ rules, an EA is to be prepared for actions that ordinarily may have a significant environmental impact. *See* 40 CFR §§ 1501.4(b), 1507.3(b)(2)(iii). If an EA shows that a proposed action will have no significant environmental impact, then the agency issues a Finding Of No Significant Impact, 40 CFR § 1508.13, and the proposed action can proceed. However, if an EA indicates that the action will have a significant environmental impact, the action cannot proceed unless the agency prepares an environmental impact statement (EIS). *See* 40 CFR § 1501.4 (requiring an EIS for actions that normally have a significant environmental impact).

[59] *See* 47 CFR §§ 1.1307(a), 1.1308(a), 1.1312(b). These are facilities that are to be located in an officially designated wilderness area, an officially designated wildlife preserve, or a flood plain; that may affect listed threatened or endangered species or their critical habitats, or are likely to jeopardize proposed threatened or endangered species or destroy or adversely modify proposed critical habitats; that may affect districts, sites, buildings, structures or objects that are listed, or eligible for listing, in the National Register of Historic Places; that may affect Native American religious sites; that will involve significant change in surface features (*e.g.*, wetland fill or deforestation); that will be located in residential neighborhoods and equipped with high intensity white lights; that will cause human exposure to radiofrequency emissions that exceed specified levels; or that will exceed 450 feet in height. *See* 47 CFR § 1.1307(a), (b), (d) Note.

[60] 47 CFR §§ 1.1308(d), 1.1312(b).

[61] *See* 47 CFR § 1.1307 (c), (d). An agency may establish categorical exclusions to cover actions "which do not individually or cumulatively have a significant effect on the human environment" and thus require no EA or EIS. *See* 40 CFR §§ 1508.4, 1507.3(b)(2)(ii). CEQ regulations require that an agency that chooses to establish categorical exclusions must also provide for "extraordinary circumstances," 40 CFR § 1508.4, under which a normally excluded action may have a significant effect.

28. The Commission fulfills its obligations under the NHPA with respect to radio spectrum licensees through Section 1.1307(a)(4) of the rules, which requires an EA if the proposed construction may affect historic properties.[62] In particular, Section 1.1307(a)(4) directs licensees and applicants, when determining whether a proposed action may affect historic properties, to follow the procedures in the ACHP's rules as modified by the Collocation NPA and the NPA, two programmatic agreements that took effect in 2001 and 2005, respectively.[63] These programmatic agreements, which were executed pursuant to Section 800.14(b) of the ACHP's rules, substitute for the procedures that Federal agencies must ordinarily follow in performing their historic preservation reviews.[64]

29. Under the Collocation NPA, most antenna collocations on existing structures are excluded from Section 106 historic preservation review, with a few exceptions to address potentially problematic situations. The NPA establishes detailed processes for reviewing new towers and those collocations that remain subject to review. Among other efficiencies, in cases where the applicant has not found that the proposed construction will have an adverse effect, the NPA permits the applicant's determination to become final if the State Historic Preservation Officer (SHPO) does not respond to the applicant's submission within 30 days without any affirmative action by the Commission.[65]

30. In addition, the NPA requires applicants to use reasonable and good faith efforts to identify and contact any Tribal Nation or Native Hawaiian Organization (NHO) that may attach religious and cultural significance to historic properties that may be affected by an undertaking.[66] To facilitate this process, the Commission developed the Tower Construction Notification System (TCNS), which automatically notifies Tribal Nations and NHOs of proposed constructions within geographic areas that they have confidentially identified as potentially containing historic properties of religious and cultural significance to them. The NPA provides that use of the TCNS constitutes a reasonable and good faith effort to identify potentially interested Tribal Nations and NHOs.[67]

31. While Tribal Nations and NHOs, like SHPOs, are subject to a 30-day guideline for responses,[68] applicants are required to seek guidance from the Commission if a Tribal Nation or NHO

[62] 47 CFR § 1.1307(a)(4).

[63] *See* Collocation NPA; NPA. The Collocation NPA was amended in 2016 to establish further exclusions from review for small antennas. *See Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas,* Public Notice, 31 FCC Rcd 4617 (WTB 2016).

[64] 36 CFR § 800.14(b)(2). *See generally* 36 CFR Part 800, Subpart B (historic preservation review procedures that Federal agencies must follow in the absence of an approved program alternative under Section 800.14(b)).

[65] NPA, §§ VII.B.2, VII.C.2 (providing that if the applicant determines that no historic properties exist within the Area of Potential Effect (APE) or that the undertaking will have no effect on historic properties, that determination is deemed final unless the SHPO objects within 30 days; if the applicant determines that the project will have no adverse effect, after 30 days it may provide a copy of its submission to the Commission, which has 15 days to notify the applicant of any concerns or else the process is complete). Another efficiency is that within the APE for visual effects, and with the exception of resources significant to Tribal Nations and Native Hawaiian Organizations, applicants are only required to consider effects on resources that are listed on the National Register of Historic Places or that have been previously identified as eligible for listing, rather than making affirmative efforts to identify unidentified eligible resources. *Id.,* § VI.D.1.a.

[66] NPA, §§ IV.B, IV.C. *See also* 54 U.S.C. § 302706(b).

[67] NPA, § IV.B.

[68] *Id.*, § IV.F.4 ("[o]rdinarily, 30 days from the time the relevant tribal or NHO representative may reasonably be expected to have received an inquiry shall be considered a reasonable time").

does not respond to the applicant's inquiries.[69] In 2005, the Commission issued a Declaratory Ruling establishing a process that enables an applicant to proceed toward construction when a Tribal Nation or NHO does not timely respond to a TCNS notification.[70] The Commission staff, in collaboration with industry, has subsequently developed a similar process (the "Good Faith Protocol") to address situations where a Tribal Nation or NHO expresses initial interest in a project, but then fails to communicate further with the Applicant after having been provided any additional information or fees that it has requested.

2. Updating Our Approach to the NHPA and NEPA

a. Need for Action

32. Improving spectrum efficiency for future 4G and 5G services by providing end users with higher quality connections, more bandwidth and lower latency will require significant densification of DAS and small cell facilities.[71] To achieve this anticipated level of service, wireless providers will need flexibility to strategically place thousands of DAS and small cell facilities throughout the country within the next few years. Yet, they face challenges in their efforts to obtain authorizations for deploying this necessary infrastructure, not only from local governments but also in completing the Commission's environmental and historic preservation review processes under NEPA and Section 106 of the NHPA.

33. Many wireless providers have raised concerns about the Commission's environmental and historic preservation review processes because, they say, these reviews increase the costs of deployment and pose lengthy and often unnecessary delays, particularly for small facility deployments.[72]

34. The historic preservation review process under Section 106 of the NHPA has raised particular concerns among wireless providers. This process not only requires that providers make their own determinations as to whether a project will have effects on historic properties, but also requires obtaining input from SHPOs and Tribal Nations, and wireless providers argue that this process results in significant delays in the execution of their deployment plans.[73]

35. A large number of wireless providers complain that the Tribal component of the Section 106 review process is particularly cumbersome and costly.[74] Providers have argued that Tribal Nation

[69] *Id.*, § IV.G; *see also id.,* § IV.H (providing that TCNS contact is only an initial effort to contact the Tribal Nation or NHO, and does not in itself fully satisfy the applicant's obligations or substitute for government-to-government consultation unless the Tribal Nation or NHO affirmatively disclaims further interest).

[70] *See Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement*, Declaratory Ruling, 20 FCC Rcd 16092 (2005) (*2005 Declaratory Ruling*).

[71] *See, e.g.*, Joint Venture Publications, Bridging the Gap: 21st Century Wireless Telecommunications Handbook at 12-15 (Sept. 2016), http://www.jointventure.org/publications/joint-venture-publications/1473-bridging-the-gap-21stcentury-wireless-telecommunications-handbook (Bridging the Gap Report); Ixia, Small Cells, Big Challenge: A Definitive Guide to Designing and Deploying HetNets at 41 (Nov. 2013), https://www.ixiacom.com/resources/small-cells-big-challenge.

[72] *See*, *e.g.*, Sprint Comments, WT Docket No. 16-421, at 44-48; Verizon Comments, WT Docket No. 16-421, at 34-39.

[73] *See*, *e.g.*, Competitive Carrier Association Comments, WT Docket No. 16-421, at 35-36; Crown Castle Comments, WT Docket No. 15-180, at 3-4; Verizon Comments, WT Docket No. 16-421, at 37; Verizon Comments, WT Docket No. 15-180, at 4-5.

[74] *See*, *e.g.,* Competitive Carrier Association Comments, WT Docket No. 16-421, at 35-36; Crown Castle Comments, WT Docket No. 15-180, at 3-4; CTIA Comments, WT Docket No. 16-421, at 5; NTCH, WT Docket No. 16-421, Comments at 7-9; Sprint Comments, WT Docket No. 16-421, at 45. Verizon Comments, WT Docket No. 16-421, at 37; Verizon Comments, WT Docket No. 15-180, at 4-5.

review has caused substantial delays[75] that significantly exceed those attributable to the SHPO review process,[76] and Tribal compensation in connection with the review of submissions to TCNS has become a highly contentious subject. These Tribal reviews do not relate to Tribal lands, but to areas of Tribal interest, which include Tribal burial grounds and other sites that Tribes regard as sacred off Tribal lands.[77] We observe that TCNS data reveals that, in recent years, the areas of interest claimed by Tribal Nations have increased. TCNS data reveals that the average number of Tribal Nations notified per tower project increased from eight in 2008 to 13 in August 2016 and 14 in March 2017. Six of the 19 Tribal Nations claiming ten or more full States within their geographic area of interest in March 2017 had increased that number since August 2016, with three Tribal Nations claiming 20 or more full States in addition to select counties. In 2015, 50 Tribal Nations noted fees associated with their review process in TCNS; by March 2017, Commission staff was aware of at least 95 Tribal Nations routinely charging fees, including 85 with fees noted in TCNS and 10 that staff was aware of from other sources. This data further suggests that the average cost per Tribal Nation charging fees increased by 30% and the average fee for collocations increased by almost 50% between 2015 and August 2016.

36. Many wireless providers argue that, as a result, the cumulative Tribal fees that they pay both per site and for their overall deployment programs have increased precipitously. According to Sprint, its costs associated with Tribal participation "have become prohibitive and are unnecessarily diverting capital from deployment" as its per site costs have "increased 14-fold in the last six years, from less than $500 per site in 2011 to more than $6,300 today."[78] Furthermore, the progression toward smaller and more numerous cell sites is likely increasing the number of submissions that are subject to fee requests. Moreover, Verizon notes that the total fees it pays for Tribal participation "increased from just over $300,000 in 2012 to almost $4 million in 2015. And the average spend per site is now $2,344."[79] Further, Competitive Carriers Association (CCA) contends that one of its members "reports that rooftop macrocell collocations in Chicago have generated between $11,000 -12,000 per site in Tribal fees, and that does not even account for the necessary expenses to collocate on a site," though CCA recognizes "a duty to protect Tribal ancestral lands and properties," and states a desire to "work collaboratively with Tribes to more clearly define the pre-consultation process and cost."[80]

37. Wireless providers and facility owners argue that these developments have combined to increase the urgency of reexamining the Commission's rules and policies to ensure that they are clear on licensees' and applicants' obligations, and that these rules and polices at present are effectively requiring that applicants pay fees that are not legally required by law. We seek concrete information on the amount of time it takes for Tribal Nations to complete the Section 106 review process and on the costs that Tribal participation imposes on facilities deployment and on the provision of service. We also seek comment and specific information on the extent of benefits attributable to Tribal participation under the

[75] *See*, *e.g.*, Crown Castle Comments, WT Docket No. 15-180, at 3-4; Verizon Comments, WT Docket No. 15-180, at 4-5.

[76] Verizon Comments, WT Docket No. 16-421, at 36-40. Verizon states that in July 2016 it had 2,450 pending requests for Tribal review, and that "more than half had been pending for more than 90 days, almost a third had been pending for more than six months, and 20 had been pending for more than a year."

[77] See *infra* para. 50-51.

[78] Sprint Comments, WT Docket No. 16-421, at 45.

[79] Verizon Comments, WT Docket No. 16-421, at 35.

[80] Tim Donovan, SVP of Legislative Affairs, CCA, and Rebecca Murphy Thompson, EVP & General Counsel, CCA, A Game of Monopoly: Mobility Fund II & Infrastructure (Feb. 24, 2017), http://ccablog.tumblr.com/post/157659003646/a-game-of-monopoly-mobility-fund-ii.

Commission's Section 106 procedures, particularly in terms of preventing damage to historic and culturally significant properties.[81]

38. In addition, in May 2016, PTA-FLA filed a Petition for Declaratory Ruling arguing that "Tribal fees have become so exorbitant in some cases to approach or even *exceed* the cost of actually erecting the tower."[82] PTA-FLA states that the Commission should "prohibit the payment of fees to Tribal Nations" because the payment of such fees "has demonstrably contributed to the expansion of required reviews and attendant delays."[83] In the alternative, PTA-FLA states that "the reviewing fees should be limited to no more than $50" unless a Tribal Nation "demonstrates that the review is exceptionally complex," and that the total fee should never exceed $200.[84] In addition, PTA-FLA argues that Tribal Nations "should be required to identify under objective, independently verifiable criteria the areas where construction could reasonably be deemed to have an impact" on an area in which Tribal Nations "actually resided or habituated" so that tower constructors can have a better idea of what sites to avoid before tower planning even begins."[85] In cases where Tribal Nations "need to preserve secrecy of particular sacred sites to avoid unwanted intrusions," PTA-FLA states that "such sites should be identified to the Commission in confidence" so that the Commission can "advise prospective constructors in the area that a site" will require consultation with a Tribal Nation.[86] Finally, PTA-FLA argues that the NPA and Collocation Agreement "should be amended to exempt from review sites that will obviously have no effects" on a Tribal Nation's sacred burial grounds.[87] We incorporate PTA-FLA's petition into this proceeding, and we seek comment below on its proposals.

39. Some wireless providers contend that the SHPO review process also results in significant delays in deployment. We seek comment on the costs associated with SHPO review under the Commission's historic preservation review process, including direct financial costs; costs that delay imposes on carriers, tower owners, and the public; and any other costs. What are the costs associated with SHPO review of typical small facility deployments, and how do these compare with the costs for tower construction projects? Does the SHPO review process duplicate historic preservation review at the local level, particularly when local review is conducted by a Certified Local Government or a governmental authority that issues a Certificate of Appropriateness?[88] In addition, we seek comment on how often SHPO review results in changes to a construction project due to a SHPO's identification of potential harm to historic properties or confers other public benefits.

40. Some argue that NEPA compliance imposes extraordinarily high costs on wireless providers and results in significant delays.[89] Sprint notes that it has spent "tens of millions of dollars" to investigate pursuant to NEPA requirements deployments which, it alleges, present "minimal likelihood of

[81] *See, e.g.,* Letter from Gary D. Batton, Chief, Choctaw Nation of Oklahoma, to Ajit Pai, Chairman, FCC, WT Docket No. 17-79, at 1-2 (filed Mar. 30, 2017).

[82] Petition for Declaratory Ruling, PTA-FLA, Inc., WT Docket No. 15-180, at 8 (filed May 3, 2016) (PTA-FLA Petition for Declaratory Ruling) (emphasis in original).

[83] *Id.* at 14.

[84] *Id.*

[85] *Id.* at 14-15.

[86] *Id.* at 15.

[87] *Id.* at 16.

[88] A "Certified Local Government" is a local government whose local historic preservation program is certified under Chapter 3025 of the National Historic Preservation Act. *See* 54 U.S.C. §§ 300302, 302501 *et seq*. A "Certificate of Appropriateness" is an authorization from a local government allowing construction or modification of buildings or structures in a historic district.

[89] *See*, *e.g.*, Verizon Comments, WT Docket 16-421, at 34-39; Sprint Comments, WT Docket 16-421, at 44-48.

harm."[90] It states that the Commission's NEPA rules impose huge network costs with little or nothing in the way of corresponding benefits to the environment.[91] More specifically, some commenters complain about delays associated with EAs – which T-Mobile states may "languish for an extended period of time—sometimes years,"[92] partly because when EAs are required, the Commission is not subject to any processing timelines or dispute resolution procedures.[93] T-Mobile also complains that in cases where an EA is not filed, parties may file environmental objections under the Commission's rules with respect to a planned facility, and such cases are not subject to timelines for resolution.[94] A number of commenters propose that EAs for deployments on flood plains should be eliminated if a site will be built at least one foot above the base flood elevation and a local building permit has been obtained.[95] We seek comment on the costs and relative benefits of the Commission's NEPA rules. What are the costs associated with NEPA compliance, other than costs associated with historic preservation review? How do the costs of NEPA compliance for tower construction compare to such costs for small facilities, and what specific benefits does the review confer?

41. Finally, some note that facilities requiring Federal review must also undergo pre-construction review by local governmental authorities, and assert that the inability to engage in these dual reviews simultaneously can add significant time to the process. Verizon states that local siting and Federal historic preservation "reviews cannot and do not run concurrently, because the local reviews may result in changes to the location or parameters (height, width, and size) of the facility which must be established before the historic preservation review process can begin."[96] Verizon also states that providers cannot commence construction of their facilities until after completion of the historic preservation review process, which they state typically takes several months.[97] We seek comment on whether local permitting, NEPA review, and Section 106 review processes can feasibly be conducted simultaneously, and on whether there are barriers preventing simultaneous review to the extent it is feasible. To what extent do significant siting changes or the potential for such changes during the local process make simultaneous review impractical or inefficient? Alternatively, have reviewing or consulting parties in the Commission's NEPA or Section 106 review processes declined to process an application until a local permitting process is complete? We seek comment on whether and under what circumstances simultaneous review would, on the whole, minimize delays and provide for a more efficient process and what steps, if any, the Commission should take to facilitate or enable such simultaneous review.

b. Process Reforms

(i) Tribal Fees

42. In this section, we identify and seek comment on several issues relevant to fees paid to Tribal Nations in the Section 106 process. In addition to commenting on the legal framework and on potential resolutions to the issues, we encourage commenters to provide specific factual information on current Tribal and industry practices and on the impacts of those practices on licensees/tower owners, Tribal Nations, and timely deployment of advanced broadband services to all Americans. We further welcome information on the practices of other Federal agencies for our consideration.

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[90] Sprint Comments, WT Docket No. 16-421, at 47-48.

[91] *See*, *e.g.,* T-Mobile Comments, WT Docket No. 16-421, at 39.

[92] *Id*.

[93] *Id.*

[94] *Id.*

[95] *See*, *e.g.*, Verizon Comments, WT Docket No. 16-241, at 38-39.

[96] Verizon Comments, WT Docket No. 15-180, at 4-5.

[97] *Id*.

43. Neither the NHPA nor the ACHP's implementing regulations address whether and under what circumstances Tribal Nations and NHOs may seek compensation in connection with their participation in the Section 106 process. The ACHP has, however, issued guidance on the subject in the form of a memorandum in 2001 and as part of a handbook last issued in 2012. The ACHP 2001 Fee Guidance explains that "the agency or applicant is not required to pay the tribe for providing its views."[98] Further, "[i]f the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process."[99] The guidance also states, however, that when a Tribal Nation "fulfills the role of a consultant or contractor" when conducting reviews, "the tribe would seem to be justified in requiring payment for its services, just as any other contractor," and the company or agency "should expect to pay for the work product."[100] As we explain below, we seek comment on how the ACHP's guidance can be applied in the context of our existing procedures and the proposals in this proceeding. Moreover, we seek comment on practices or procedures of other Federal agencies with respect to addressing the various roles a Tribal Nation may play in the Section 106 process and how to identify those services for which a Tribal Nation would be justified in seeking fees.

44. *Circumstances When Fees Are Requested*. The NPA requires applicants to make a reasonable and good faith effort to identify Tribal Nations and NHOs that may attach religious and cultural significance to historic properties affected by an undertaking, and this effort is commonly accomplished through the TCNS. Some Tribal Nations require the payment of a fee prior to performing even preliminary review of all or nearly all projects submitted to them via the TCNS.

45. The ACHP Handbook clearly states that no "portion of the NHPA or the ACHP's regulations require[s] an agency or an applicant to pay for any form of tribal involvement."[101] We note that ACHP guidance permits payments to a Tribal Nation when it fulfills a role similar to any other consultant or contractor. At what point in the TCNS process, if any, might a Tribal Nation act as a contractor or consultant?[102] We seek comment on any facts that might affect the answer to that question. Does the particular request of the applicant determine whether a Tribal Nation is acting as a contractor or

[98] *See* ACHP, Fees in the Section 106 Review Process (2001), http://www.achp.gov/regs-fees.html (ACHP 2001 Fee Guidance).

[99] *Id*.

[100] *Id*. *See also* ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook, at 13 (2012), http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf (ACHP 2012 Handbook) ("[No] portion of the NHPA or the ACHP's regulations require[s] an agency or an applicant to pay for any form of tribal involvement. However, during the identification and evaluation phase of the Section 106 process when the agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe, it may ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor. Since Indian tribes are a recognized source of information regarding historic properties of religious and cultural significance to them, federal agencies should reasonably expect to pay for work carried out by tribes. The agency or applicant is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the duties of obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on those historic properties, through reasonable methods."). The ACHP 2012 Handbook also indicates that with respect to properties where the agency concludes that no historic properties are affected, Tribal concurrence in that decision is not required, though Tribal Nations and NHOs can state any objections to the ACHP, which if it agrees may provide its opinion to the agency. *See id*. at 23.

[101] ACHP 2012 Handbook at 13.

[102] *See* PTA-FLA Petition at 14 (asserting that the payment of fees for Tribal review should be prohibited).

consultant? For example, the ACHP Handbook notes that if an applicant asks for "specific information and documentation" from a Tribal Nation, then the Tribal Nation is being treated as a contractor or consultant.[103] Should we infer if the applicant does not ask explicitly for such information and documentation, then no payment is necessary? We also seek comment on whether Tribal review for some types of deployment is less in the nature of a contractor or consultant. For example, would collocations or applications to site poles in rights of way be less likely to require services outside of the Tribal Nation's statutory role? In reviewing TCNS submissions for collocations or for siting poles in rights of way, under what circumstances might a Tribal Nation incur research costs for which it or another contractor might reasonably expect compensation?

46. Once a Tribal Nation or NHO has been notified of a project, an applicant must provide "all information reasonably necessary for the Indian tribe or NHO to evaluate whether Historic Properties of religious and cultural significance may be affected" and provide the Tribal Nation or NHO with a reasonable opportunity to respond.[104] We seek comment on this requirement and on any modifications the Commission can and should make. In particular, we seek comment on whether the information in FCC Form 620 or FCC Form 621 is sufficient to meet the requirement that "all information reasonably necessary…" has been provided to the Tribal Nation. If not, are there modifications to these forms that would enable the Commission to meet this requirement? For example, should the FCC Form 620 and FCC Form 621 be amended to address the cultural resources report that an applicant prepares after completing a Field Survey?[105] Additionally, we seek comment on whether a Tribal Nation's or NHO's review of the materials an applicant provides under NPA Section VII is ever, and if so under what circumstances, the equivalent of asking the Tribal Nation or NHO to provide "specific information and documentation" like a contractor or consultant would, thereby entitling the Tribal Nation to seek compensation under ACHP guidance and the NPA. If a Tribal Nation chooses to conduct research, surveying, site visits or monitoring absent a request of the applicant, would such efforts require payment from the applicant? If an archaeological consultant conducted research, surveying, site visits, or monitoring absent a request of the applicant, would the applicant normally be required to pay that contractor or consultant? We seek comment on how the ACHP Handbook's statement that an "applicant is free to refuse [payment] just as it may refuse to pay for an archaeological consultant," as well as its statement that "the agency still retains the duties of obtaining the necessary information [to fulfill its Section 106 obligations] through reasonable methods," impacts our analysis of payments for Tribal participation.[106]

47. We note that some Tribal Nations have indicated that they assess a flat upfront fee for all applications as a way to recover costs for their review of all TCNS applications, thereby eliminating the administrative burden of calculating actual costs for each case. We seek comment on this manner of cost recovery and whether such cost recovery is consistent with ACHP's fee guidance in its 2012 Handbook.[107] Tribal Nations have also indicated that they have experienced difficulties in collecting compensation after providing service as a reason for upfront fee requests. We seek comment on whether this concern could be alleviated if we clarify when a Tribal Nation is acting under its statutory role and when it is being hired as a contractor or consultant under our process. We also seek comment on whether there might be a more appropriate way to address this concern.

48. What steps, if any, can the Commission take to issue our own guidance on the circumstances in our process when the Tribal Nation is expressing its views and no compensation by the

[103] ACHP 2012 Handbook at 13.

[104] NPA, § IV.F.

[105] *See id*. at § VI.D.2.

[106] ACHP 2012 Handbook at 13.

[107] *See id*.

agency or the applicant is required under ACHP guidance, and the circumstances where the Tribal Nation is acting in the role of a consultant or contractor and would be entitled to seek compensation? We seek comment on what bright-line test, if any, could be used. How does the reasonable and good faith standard for identification factor, if at all, into when a Tribal request for fees must be fulfilled in order to meet the standard? We seek comment on how disputes between the parties might be resolved when a Tribal Nation asserts that compensable effort is required to initiate or conclude Section 106 review. We seek comment on whether there are other mechanisms to reduce the need for case-by-case analysis of fee disputes. While we seek comment generally on our process, we also seek comment particularly in the context of deployment of infrastructure for advanced communications networks.

49. To the extent that supplementing current ACHP guidance would help clarify when Tribal fees may be appropriate while both facilitating efficient deployment and recognizing Tribal interests, what input, if any, should the Commission provide to the ACHP on potential modifications to ACHP guidance?

50. *Amount of Fees Requested*. One factor that appears to be driving tower owners and licensees to seek Commission guidance in the fee area is not the mere existence of fees, but instead the amount of compensation sought by some Tribal Nations. How, if at all, does the "reasonable and good faith" standard for identification factor into or temper the amount of fees a Tribal Nation may seek in compensation? Are there any extant fee rates or schedules that might be of particular use to applicants and Tribal Nations in avoiding or resolving disputes regarding the amount of fees?

51. One party has requested in a petition that the Commission establish a fee schedule or otherwise resolve fee disputes.[108] We seek comment on the legal framework applicable to this request. How might the impact of fee disputes on the deployment of infrastructure for advanced communications networks provide a basis for establishing a fee schedule in this context using the Communications Act as authority? Do the NHPA or other statutes limit our ability to establish such a fee schedule, and if so, how? How might the Miscellaneous Receipts Act (MRA)[109] and General Accountability Office (GAO) precedent on improper augmentation temper the parameters of our actions in the area?[110] We seek comment on whether other Federal agencies have established fee schedules or addressed the matter in any way, *e.g.*, either formally or informally or with respect to particular projects. How does due regard for Tribal sovereignty and the Government's treaty obligations affect our latitude for action in this area?

52. If we were to establish a fee schedule, we seek comment on what weight or impact it might have on our process. For example, to what extent would fees at or below the level established by a fee schedule be considered presumptively reasonable? We further seek comment on what legal framework would be relevant to resolution of disputes concerning an upward or downward departure from the fee schedule.[111] Should the fees specified in such a schedule serve as the presumptive maximum

[108] *See,* PTA-FLA Petition at 14 (contending that "reviewing fees should be no more than $50 unless the tribe demonstrates that the review is exceptionally complex. In no event should the fee exceed $200").

[109] 31 U.S.C. § 3302(b).

[110] While a fee schedule or direction to make certain payments to a Tribal Nation would not directly involve money being received by the Commission, the GAO has explained both in the MRA context and in the context of improper augmentation that control over funds (who receives, who pays) is a significant part of its analysis. For example, directing a party to pay a fee that an agency might itself properly pay out of its appropriation can raise questions relating to both the MRA and improper augmentation of the agency's appropriation. *See* B-300248 (January 15, 2004) (Small Business Administration both violated the MRA and improperly augmented its appropriation by having parties pay fees to a third party instead of using its appropriation to fund the activity).

[111] We observe that around the time the NPA was completed, the Commission and the United South and Eastern Tribes (USET) agreed to Voluntary Best Practices to promote cooperation between the Commission's applicants and USET's members. USET appended to the Best Practices a model cost recovery schedule that it stated was intended solely to cover Tribal costs. Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review Pursuant to Section 106 of the National Historic Preservation Act (Oct. 25, 2004). The cost (continued….)

an applicant would be expected to pay, and under what circumstances might an upward departure from the fee schedule be appropriate? In addition to the concepts cited in the prior paragraph, are there other legal principles at play in the resolution of a dispute over a fee that might not arise in the context of merely setting a fee schedule? Have any other Federal agencies formally or informally resolved fee disputes between applicants and Tribal Nations, and if so, under what legal parameters? We also seek comment on what categories of services should be included, and whether the categories should be general or more specific. How would we establish the appropriate level for fees? How could a fee schedule take into account both regional differences and changes in costs over time, *i.e.*, inflation?[112] We also seek comment on whether the Commission should only establish a model fee schedule and whether that would be consistent with the Tribal engagement requirements contemplated by Section 106.

53. *Geographic Areas of Interest*. Tribal Nations have increased their areas of interest within the TCNS as they have improved their understanding of their history and cultural heritage. As a result, applicants must sometimes contact upwards of 30 different Tribal Nations and complete the Section 106 process with each of them before being able to build their project. We seek comment on whether there are actions the Commission can and should take to mitigate this burden while complying with our obligation under the NHPA and promoting the interests of all stakeholders. For example, the TCNS allows Tribal Nations and NHOs to select areas of interest at either a State or county level, but many Tribal Nations have asked to be notified of any project within entire States, and in a few instances, at least 20 different States. We seek comment on whether we could and should encourage, or require, the specification of areas of interest by county. We also seek comment on whether we should require some form of certification for areas of interest, and if so, what would be the default if a Tribal Nation fails to provide such certification.[113]

54. We seek comment on whether TCNS should be modified to retain information on areas where concerns were raised and reviews conducted, so that the next filer knows whether there is a concern about cultural resources in that area or not. To what extent should applicants be able to rely on prior clearances, given that resources may continue to be added to the lists of historic properties? To the extent we consider allowing applicants to rely on prior clearances, how should we accommodate Tribal Nations' changes to their areas of interest? We further seek comment on how the Commission can protect information connected to prior site reviews, especially those areas where a tower was not cleared because there may be artifacts. We also seek comment on whether the Commission can make any other changes to TCNS or our procedures to improve the Tribal review process.

55. In addition, applicants routinely receive similar requests for compensation or compensable services from multiple Tribal Nations. While we recognize that each Tribal Nation is sovereign and may have different concerns, we seek comment on when it is necessary for an applicant to compensate multiple Tribal Nations for the same project or for the same activity related to that project, in particular site monitoring during construction. We also seek comment on whether, when multiple Tribal Nations request compensation to participate in the identification of Tribal historic properties of religious and cultural significance, whether there are mechanisms to gain efficiencies to ensure that duplicative

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recovery schedule indicated that there should be no charge for identification of potentially interested Tribal Nations and for the initial contact, but that charges for review of survey material and site visitation would range between $300 and $500, as appropriate to recover the Tribal Nation's costs and accounting for regional differences. *See id*. at Attachment, "USET Model Explanatory Cost Recovery Schedule." We are unaware that any USET Member Tribe (or other Tribal Nation) ever formally adopted the model cost recovery schedule.

[112] We note that the fee ranges found in the Cost Recovery Schedule associated with the USET Voluntary Best Practices are now 13 years old.

[113] *See, e.g.,* PTA-FLA Petition at 14-15 (proposing a requirement for Tribal Nations to "identify under objective, independently verifiable criteria the areas where construction could reasonably be deemed to have an impact on tribal grounds").

review is not conducted by each Tribal Nation. Is it always necessary to obtain such services from all responding Tribal Nations that request to provide the service, and if so, why? Might one Tribal Nation when functioning in the role of a contractor perform certain services and share the work product with other Tribal Nations, *e.g.*, site monitoring? Could an applicant hire a qualified independent site monitor and share its work product with all Tribal Nations that are interested? How would we ensure that such a monitor is qualified so that other Tribal Nations' interests will be adequately considered? Should we require that such a monitor meet some established minimum standards? We also seek comment on whether monitors should be required to prepare a written report and provide a copy to applicants.

56. *Remedies and Dispute Resolution*. While the ACHP has indicated that Tribal concurrence is not necessary to find that no historic properties of religious and cultural significance to Tribal Nations or NHOs would be affected by an undertaking,[114] the agency is responsible for getting the information necessary to make that determination.[115] We seek comment on how these two directives interact. The ACHP 2001 Fee Guidance states that "if an agency or applicant attempts to consult with an Indian tribe and the tribe demands payment, the agency or applicant may refuse and move forward."[116] We seek comment on whether and under what circumstances the Commission should authorize a project to proceed when a Tribal Nation refuses to respond to a Section 106 submittal without payment.

57. Under the NPA, when a Tribal Nation or NHO refuses to comment on the presence or absence of effects to historic properties without compensation, the applicant can refer the procedural disagreement to the Commission.[117] We seek comment on whether the Commission can adjudicate these referrals by evaluating whether the threshold of "reasonable and good faith effort" to identify historic properties has been met, given that the Tribal Nation can always request government-to-government consultation in the event of disagreement.

58. We seek comment on when the Commission must engage in government-to-government consultation to resolve fee disputes, including when the compensation level for an identification activity has been established by a Tribal government.

59. *Negotiated Alternative*. We note that since September 2016, the Commission has been facilitating meetings among Tribal and industry stakeholders with the goal of resolving challenges to Tribal requirements in the Section 106 review process, including disagreements over Tribal fees.[118] We seek comment on whether the Commission should continue seeking to develop consensus principles and, if so, how those principles should be reflected in practice. For example, we seek comment on whether we should seek to enter into agreements regarding best practices with Tribal Nations and their representatives.

(ii) Other NHPA Process Issues

60. *Lack of Response*. As discussed above, while both SHPOs and Tribal Nations/NHOs are expected ordinarily to respond to contacts within 30 days, the NPA and the Commission's practice establish different processes to be followed when responses are not timely.[119] We seek comment on what measures, if any, we should take to further speed either of these review processes, either by amending the NPA or otherwise, while assuring that potential effects on historic preservation are fully evaluated. What

[114] *See* ACHP 2012 Handbook at 23. *See also* 36 CFR § 800.4.

[115] *See* 36 CFR § 800.4 (imposing the requirement to identify historic properties on "the agency").

[116] *See* ACHP 2001 Fee Guidance.

[117] *See* NPA, § IV.G.

[118] *See id*. at § IV.J ("the Commission will use its best efforts to arrive at agreements regarding best practices with Indian tribes and NHOs and their representatives").

[119] *See* Section II.B.1, *supra.*

effect would such proposals have on addressing Section 106-associated delays to deployment? Should different time limits apply to different categories of construction, such as new towers, DAS and small cells, and collocations? Have advances in communications during the past decade, particularly with respect to communications via the Internet, changed reasonable expectations as to timeliness of responses and reasonable efforts to follow up?

61. With respect to Tribal Nations and NHOs, we seek comment on whether the processes established by the *2005 Declaratory Ruling* and the Good Faith Protocol adequately ensure the completion of Section 106 review when a Tribal Nation or NHO is non-responsive.[120] We seek comment on whether the process can be revised in a manner that would permit applicants to self-certify their compliance with our Section 106 process and therefore proceed once they meet our notification requirements, without requiring Commission involvement, in a manner analogous to the "deemed granted" remedy for local governments.[121] Would such an approach be consistent with the NPA and with the Commission's legal obligations? We note that Commission staff has discovered on numerous occasions that applicants have failed to perform their Tribal notifications as our processes require. If we were to permit applicants to self-certify that they have completed their Tribal notification obligations, we seek comment on how we could ensure that the certifications are truthful and well-founded.

62. *Batching*. In the PTC Program Comment,[122] the ACHP established a streamlined process for certain facilities associated with building out the Positive Train Control (PTC) railroad safety system. Among other aspects of the PTC Program Comment, eligible facilities may be submitted to SHPOs and through TCNS in batches.[123]

63. We seek comment on whether we should adopt either a voluntary or mandatory batched submission process for non-PTC facilities. What benefits could be realized through the use of batching? What lessons can be learned from the experience with PTC batching? What guidelines should we provide, if any, regarding the number of facilities to be included in a batch, their geographic proximity, or the size of eligible facilities? Should there be other conditions on eligibility, such as the nature of the location or the extent of ground disturbance? Should different time limits or fee guidelines, if any are adopted, apply to batched submissions? What changes to our current TCNS and E-106 forms and processes might facilitate batching? We seek comment on these and any other policy or operational issues associated with batching of proposed constructions.

64. *Other NHPA Process Reforms*. We seek comment on whether there are additional procedural changes that we should consider to improve the Section 106 review process in a manner that does not compromise its integrity.

(iii) NEPA Process

65. We seek comment on ways to improve and further streamline our environmental compliance regulations while ensuring we meet our NEPA obligations. For example, should we consider new categorical exclusions for small cells and DAS facilities? If so, under what conditions and on what basis? Should we revise the Commission's rules so that an EA is not required for siting in a floodplain[124]

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[120] *See id*.

[121] *See* Section II.A.1, *supra*.

[122] *See Wireless Telecommunications Bureau Announces Adoption of Program Comment to Govern Review of Positive Train Control Wayside Facilities*, WT Docket 13-240, Public Notice, 29 FCC Rcd 5340, Attachment (WTB 2014) (PTC Program Comment).

[123] *See id.* at § VII.A. *See also* Batching Guidance for TCNS and E106 Submissions Under the Positive Train Control Program Comment (rev. Dec. 19, 2014), http://wireless.fcc.gov/ptc/Batching_Guidance_121914.pdf.

[124] For more information on floodplain definitions and management, see Executive Order 11988 as amended by Executive Order 13690 and accompanying guidance, Guidelines for Implementing Executive Order 11988,

(continued….)

when appropriate engineering or mitigation requirements have been met?[125] Are there other measures we could take to reduce unnecessary processing burdens consistent with NEPA?

c. NHPA Exclusions for Small Facilities

66. As part of our effort to expedite further the process for deployment of wireless facilities, including small facility deployments in particular, we seek comment below on whether we should expand the categories of undertakings that are excluded from Section 106 review. With respect to each of the potential exclusions discussed below, we seek comment on the alternatives of adopting additional exclusions directly in our rules, or incorporating into our rules a program alternative pursuant to the ACHP rules. The Commission may exclude activities from Section 106 review through rulemaking upon determining that they have no potential to cause effects to historic properties, assuming such properties are present.[126] Where potential effects are foreseeable and likely to be minimal or not adverse, a program alternative under the ACHP's rules may be used to exclude activities from Section 106 review.[127] We seek comment about whether the exclusions discussed below meet the test for an exclusion in 36 CFR § 800.3(a)(1) or whether they would require a program alternative. To the extent that a program alternative would be necessary, we seek comment on which of the program alternatives authorized under the ACHP's rules would be appropriate.[128] Particularly, for those potential exclusions where a program alternative would be required, commenters should discuss whether a new program alternative is necessary or whether an amendment to the NPA or a second amendment to the Collocation NPA would be the appropriate procedural mechanism.

(i) Pole Replacements

67. We seek comment on whether the Commission should take further measures to tailor Section 106 review for pole replacements. As noted above, wireless companies are increasingly deploying new infrastructure using smaller antennas and supporting structures, including poles. Under the existing NPA, pole replacements are excluded from Section 106 review if the pole being replaced meets the definition of a "tower" under the NPA (constructed for the sole or primary purpose of supporting Commission-authorized antennas), provided that the pole being replaced went through Section 106 review.[129] The NPA also more generally excludes construction in or near communications or utility rights of way, including pole replacements, with certain limitations. In particular, the construction is excluded if the facility does not constitute a substantial increase in size over nearby structures and it is not within the boundaries of a historic property. However, proposed facilities subject to this exclusion must complete the process of Tribal and NHO participation pursuant to the NPA.[130]

68. We seek comment on whether additional steps to tailor Section 106 review for pole replacements would help serve our objective of facilitating wireless facility siting, while creating no or foreseeably minimal potential for adverse impacts to historic properties. For example, should the

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Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (October 8, 2015).

[125] *See, e.g.,* Verizon Comments, WT Docket No. 16-241, at 38-39.

[126] 36 CFR § 800.3(a)(1). Based on its authority under Section 800.3(a)(1), the Commission has established targeted unilateral exclusions from historic preservation review requirements for certain small facility collocations on utility structures and on buildings and other non-tower structures, provided they meet certain specified criteria. *2014 Infrastructure Order*, 29 FCC Rcd at 12901-12, paras. 76-103.

[127] 36 CFR § 800.14(c).

[128] 36 CFR § 800.14.

[129] NPA, § III.B; *see also* § II.A.14 (definition of "Tower").

[130] NPA § III.E. "Substantial increase in size" is defined by reference to Section I.E of the Collocation NPA.

replacement of poles be excluded from Section 106 review, regardless of whether a pole is located in a historic district, provided that the replacement pole is not "substantially larger" than the pole it is replacing (as defined in the NPA)? We envision that this proposed exclusion could address replacements for poles that were constructed for a purpose other than supporting antennas, and thus are not "towers" within the NPA definition, but that also have (or will have) an antenna attached to them. This exclusion would also apply to pole replacements within rights of way, regardless of whether such replacements are in historic districts. We seek comment on this proposal and on whether any additional conditions would be appropriate. For example, consistent with the existing exclusion for replacement towers, commenters should discuss whether the exclusion should be limited to projects for which construction and excavation do not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction. How would the "leased or owned property" be defined within a utility right of way that may extend in a linear manner for miles?

(ii) Rights of Way

69. We seek comment on whether to expand the NPA exemption from Section 106 review for construction of wireless facilities in rights of way. First, as noted above, current provisions of the NPA exclude from Section 106 review construction in utility and communications rights of way subject to certain limitations.[131] We seek comment on whether to adopt a similar exclusion from Section 106 review for construction or collocation of communications infrastructure in transportation rights of way and whether such an exclusion would be warranted under 36 CFR § 800.3(a)(1). We recognize the Commission's previous determination in the *NPA Order* that, given the concentration of historic properties near many highways and railroads, it was not feasible to draft an exclusion for transportation corridors that would both significantly ease the burdens of the Section 106 process and sufficiently protect historic properties.[132] The Commission also recognized, however, that transportation corridors are among the areas where customer demand for wireless service is highest, and thus where the need for new facilities is greatest.[133]

70. In addition, since the *NPA Order*, wireless technologies have evolved and many wireless providers now deploy networks that use smaller antennas and compact radio equipment, including DAS and small cell systems. In view of the changed circumstances that are present today, we find that it is appropriate to reconsider whether we can exclude construction of wireless facilities in transportation rights of way in a manner that guards against potential effects on historic properties. We seek comment on whether such an exclusion should be adopted, subject to certain conditions that would protect historic properties, and, if so, what those conditions should be. For example, should we require that poles be installed by auguring or that cable or fiber be installed by plow or by directional drilling? What stipulations are needed if a deployment may be adjacent to or on National Register-eligible or listed buildings or structures, or in or near a historic district? Would it be appropriate to have any limitation on height, in addition to the requirement in the current rights of way exclusion that the structures not constitute a substantial increase in size over existing nearby structures? How should any new exclusion address Tribal and NHO participation, especially for historic properties with archaeological components?[134] We also seek comment on how to define the boundaries of a transportation right of way for these purposes.

71. In addition to considering whether to adopt an exclusion for construction in transportation rights of way, we also seek comment on whether to amend the current right of way exclusion to apply

[131] NPA, § III.E.

[132] *NPA Order*, 20 FCC Rcd at 1097, para. 62.

[133] *Id.*

[134] In its Petition for Declaratory Ruling, PTA-FLA argues that sites falling within designated utility or highway rights of way should be excluded from Tribal review. *See* PTA-FLA Petition at 16.

regardless of whether the right of way is located on a historic property. As noted above, the current right of way exclusion applies only if (1) the construction does not involve a substantial increase in size over nearby structures and (2) the deployment would not be located within the boundaries of a historic property.[135] We seek comment on whether this provision should be amended to exclude from Section 106 review construction of a wireless facility in a utility or communications right of way located on a historic property, provided that the facility would not constitute a substantial increase in size over existing structures. To the extent that utility and communications rights of way on historic properties already are lined with utility poles and other infrastructure, would allowing additional infrastructure have the potential to create effects? Commenters should discuss whether, if the exclusion is extended to historic properties, any additional conditions would be appropriate to address concerns about potential effects, for example any further limitation on ground disturbance.[136] If so, how should ground disturbance be defined?[137] We also seek comment about whether Tribal and NHO participation should continue to be required if an exclusion is adopted for facilities constructed in utility or communications rights of way on historic properties.

(iii) Collocations

72. Next, we seek comment on options to further tailor our review of collocations of wireless antennas and associated equipment. The Commission's rules have long excluded most collocations of antennas from Section 106 review, recognizing the benefits to historic properties that accrue from using existing support structures rather than building new structures. The Commission has also recently expanded these exclusions in the First Amendment to the Collocation NPA to account for the smaller infrastructure associated with new technologies. We seek comment now on whether additional measures to further streamline review of collocations are appropriate, whether as a matter of 36 CFR § 800.3(a)(1) or under program alternatives, including those discussed below and any other alternatives.

73. First, we seek comment on whether some or all collocations located between 50 and 250 feet from historic districts should be excluded from Section 106 review. Under current provisions in the Collocation NPA, Section 106 review continues to be required for collocations on buildings and other non-tower structures located within 250 feet of the boundary of a historic district to the extent those collocations do not meet the criteria established for small wireless antennas.[138] We seek comment on whether this provision should be revised to exclude from Section 106 review collocations located up to 50 feet from the boundary of a historic district. We seek comment on this proposal and on whether any additional criteria should apply to an exclusion under these circumstances.

74. Next, we seek comment on the participation of Tribal Nations and NHOs in the review of collocations on historic properties or in or near historic districts. Although, as stated above, the Collocation NPA excludes most antenna collocations from routine historic preservation review under Section 106, collocations on historic properties or in or near historic districts are generally not excluded,[139] and in these cases, the NPA provisions for Tribal and NHO participation continue to apply.

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[135] NPA, § III.E.

[136] The existing definition of "substantial increase in size" prevents excavation outside the current tower site. Collocation NPA, § I.E.

[137] *See, e.g.,* Collocation NPA, § VI.A.6 (limiting application of small antenna exclusion to where the "depth and width of any proposed collocation does not exceeds the depth and width of any previous ground disturbance (including footings and other anchoring mechanisms)," with an exception for up to four lightning rods).

[138] Collocation NPA, § V.A.2.

[139] Collocations on structures located on historic properties or in historic districts are excluded from Section 106 review in certain circumstances. The 2016 Amendments to the Collocation Agreement created exclusions from Section 106 review for small or minimally visible wireless antennas and associated equipment on structures in historic districts or on historic properties and replacements of small wireless antennas and associated equipment. Collocation NPA, §§ VII.A, B, C, VIII.

Consistent with our effort in this NPRM to take a fresh look at ways to improve and facilitate the review process for wireless facility deployments, we seek comment on whether to exclude from the NPA procedures for Tribal and NHO participation collocations that are subject to Section 106 review solely because they are on historic properties or in or near historic districts, other than properties or districts identified in the National Register listing or determination of eligibility as having Tribal significance. For instance, should we exclude from review non-substantial collocations on existing structures involving no ground disturbance or no new ground disturbance, or non-substantial collocations on new structures in urban rights of way or indoors? Should we exclude from the NPA provisions for Tribal and NHO participation collocations of facilities on new structures in municipal rights of way in urban areas that involve no new ground disturbance and no substantial increase in size over other structures in the right of way? Should we exclude collocations of facilities on new structures in industrial zones or facilities on new structures in or within 50 feet of existing utility rights of way? Commenters should discuss whether collocations in these circumstances have the potential to cause effects on properties significant to Tribal history or culture. If so, are any effects likely to be minimal or not adverse? Does the likelihood of adverse effects depend on the circumstances of the collocation, for example whether it will cause new ground disturbance?[140] We also seek comment on alternatives to streamline procedures for Tribal and NHO participation in these cases, for example different guidance on fees or deeming a Tribal Nation or NHO to have no interest if it does not respond to a notification within a specified period of time.

75. Finally, we seek comment on whether we can or should exclude from routine historic preservation review certain collocations that have received local approval. In particular, one possibility would be to exclude a collocation from Section 106 review, regardless of whether it is located on a historic property or in or near a historic district, provided that: (1) the proposed collocation has been reviewed and approved by a Certified Local Government[141] that has jurisdiction over the project; or (2) the collocation has received approval, in the form of a Certificate of Appropriateness[142] or other similar formal approval, from a local historic preservation review body that has reviewed the project pursuant to the standards set forth in a local preservation ordinance and has found that the proposed work is appropriate for the historic structure or district. By eliminating the need to go through historic preservation review at both local and Federal levels, creating an exclusion for collocations under these circumstances might create significant efficiencies in the historic preservation review process. We seek comment on this option and on any alternatives, including whether any additional conditions should apply and whether the process for engaging Tribal Nations and NHOs for these collocations should continue to be required.

d. Scope of Undertaking and Action

76. We also invite comment on whether we should revisit the Commission's interpretation of the scope of our responsibility to review the effects of wireless facility construction under the NHPA and NEPA. In the *Pre-Construction Review Order*, the Commission retained a limited approval authority over facility construction to ensure environmental compliance in services that no longer generally require construction permits.[143] In light of the evolution of technology in the last 27 years and the corresponding changes in the nature and extent of wireless infrastructure deployment, we seek comment on whether this

[140] For example, in its Petition for Declaratory Ruling, PTA-FLA contends that constructions on sites that will have no effect on Tribal burial grounds, including sites which have been previously disturbed, should be exempted from Tribal review. *See* PTA-FLA Petition at 16.

[141] A "Certified Local Government" is a local government whose local historic preservation program is certified under Chapter 3025 of the National Historic Preservation Act. *See* 54 U.S.C. §§ 300302, 302501 *et seq*.

[142] A "Certificate of Appropriateness" is an authorization from a local government allowing construction or modification of buildings or structures in a historic district.

[143] *Pre-Construction Review Order*, 5 FCC Rcd at 2943, paras. 9-11; *see also CTIA – The Wireless Association v. FCC*, 446 F.3d at 115 (holding that this interpretation was not arbitrary and capricious).

retention of authority is required and, if not, whether and how it should be adjusted. Commenters should address the costs of NEPA and NHPA compliance and its utility for environmental protection and historic preservation for different classes of facilities, as well as the extent of the Commission's responsibility to consider the effects of construction associated with the provision of licensed services under governing regulations and judicial precedent.[144] For example, should facilities constructed under site-specific licenses be distinguished from those constructed under geographic area licenses? Can we distinguish DAS and small cell facilities from larger structures for purposes of defining what constitutes the Commission's action or undertaking, and on what basis?[145] Should review be required only when an EA triggering condition is met, as PTA-FLA suggests, and if so how would the licensee or applicant determine whether an EA is required in the absence of mandatory review?[146] To the extent there is a policy basis for distinguishing among different types of facilities, would exclusions from or modifications to the NEPA and/or NHPA review processes be a more appropriate tool to reflect these differences? Are the standards for defining the scope of our undertaking or major Federal action different under the NHPA than under NEPA? We also invite comment on whether to revisit the Commission's determination that registration of antenna structures constitutes the Commission's Federal action and undertaking so as to require environmental and historic preservation review of the registered towers' construction.[147]

77. In addition, since our environmental rules were adopted, an industry has grown of non-licensees that are in the business of owning and managing communications sites, so that most commercial wireless towers and even smaller communications support structures are now owned from the time of their construction by non-licensees. We seek comment on how this business model affects our environmental and historic preservation compliance regime. For example, how does the requirement to perform environmental and historic preservation review prior to construction apply when the licensee is not the tower owner? If the tower is built pursuant to a contract or other understanding with a collocator, what marketplace or other effects would result from interpreting the environmental obligation to apply to the licensee? What about cases where there is no such agreement or understanding? Does the requirement in the Collocation NPA to perform review for collocations on towers that did not themselves complete Section 106 review create problems in administration or market distortions where the owner of the underlying tower may not have been subject to our rules at the time of construction?[148] We invite comment on these and any related questions.

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[144] *See, e.g.,* 40 CFR § 1508.8 (providing that "significant effects" under NEPA include indirect effects that are "caused by the action and are later in time or [more distant but] still reasonably foreseeable"); 36 CFR § 800.5(a)(1) (providing that under the NHPA, effects to be considered include "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative"); 40 CFR § 1502.4(a) (forbidding segmentation of an action into its component parts to obviate NEPA review).

[145] *See* CTIA Comments, WT Docket No. 16-421, at 47; *but see 2014 Infrastructure Order*, 29 FCC Rcd at 12903-4, para. 83 (finding no basis to draw this distinction with respect to NHPA undertakings).

[146] *See* PTA-FLA Petition at 13 (requesting ruling "that site construction by non-licensees and/or licensees where neither FCC registration nor a Section 1.1308 environmental assessment by the Commission is required do not constitute a federal undertaking and therefore are not subject to the Section 106 process"); *id.* at 9-13 (argument supporting this interpretation).

[147] *Streamlining the Commission's Antenna Structure Clearance Procedure; Revision of Part 17 of the Commission's Rules Concerning Construction, Marking, and Lighting of Antenna Structures*, Report and Order, 11 FCC Rcd 4272, 4289, para. 41 (1995); *see, e.g., Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n*, 959 F.2d 508 (4th Cir. 1992) (finding that FERC's certification of an incinerator was a ministerial action and not a major Federal action or undertaking where FERC had no discretion to deny certification or to consider environmental values).

[148] Collocation NPA, § IV.A.1.

3. Collocations on Twilight Towers

78. Section 1.1307(a)(4) of the Commission's rules directs licensees and applicants, when determining whether a proposed action may affect historic properties, to follow the procedures in the ACHP's rules as modified by the Collocation NPA and the NPA, two programmatic agreements that took effect in 2001 and 2005 respectively.[149] Under the Collocation NPA, collocations on towers constructed on or before March 16, 2001 are generally excluded from routine historic preservation review regardless of whether the underlying tower has undergone Section 106 review.[150] The Collocation NPA provides that collocations on towers constructed after March 16, 2001, by contrast, are excluded from historic preservation review only if the Section 106 review process for the underlying tower and any associated environmental reviews has been completed.[151] The NPA, which became effective on March 7, 2005, establishes detailed procedures for reviewing the effects of communications towers on historic properties.

79. There are a large number of towers that were built between the adoption of the Collocation NPA in 2001 and when the NPA became effective in 2005 that either did not complete Section 106 review or for which documentation of Section 106 review is unavailable. These towers are often referred to as "Twilight Towers." Although during this time the Commission's environmental rules required licensees and applicants to evaluate whether proposed facilities may affect historic properties,[152] the text of the rule did not at that time require parties to perform this evaluation by following the ACHP's rules or any other particular process. Thus, some in the industry have argued that, prior to the NPA, it was unclear whether the Commission's rules required consultation with the relevant SHPO and/or THPO, Tribal engagement, or any other procedures, and that this uncertainty was the reason why many towers built during this period did not go through the clearance process.[153] Because the successful completion of the Section 106 process is a predicate to the exclusion from review of collocations on towers completed after March 16, 2001, licensees cannot collocate on these Twilight Towers unless either each collocation completes Section 106 review or the underlying tower goes through an individual post-construction review process.

80. The Commission has worked with stakeholders in an effort to develop a programmatic solution that would allow Twilight Towers more readily to be used for collocations.[154] Most recently, in

[149] *See* 47 CFR § 1.1307(a)(4).

[150] Collocation NPA, § III. Collocations on towers constructed on or before March 16, 2001 are excluded from Section 106 review unless (1) the mounting of the antenna will result in a substantial increase in size of the tower; or (2) the tower has been determined by the Commission to have an adverse effect on one or more historic properties; or (3) the tower is the subject of a pending environmental review or related proceeding before the Commission involving compliance with Section 106 of the National Historic Preservation Act; or (4) the collocation licensee or the owner of the tower has received written or electronic notification that the Commission is in receipt of a complaint from a member of the public, a Tribal Nation, a SHPO or the ACHP, that the collocation has an adverse effect on one or more historic properties.

[151] Collocation NPA, § IV.

[152] *See* 47 CFR 1.1307(a)(4) (2004) (requiring EA if facility may affect property listed or eligible for listing in the National Register of Historic Places).

[153] *See, e.g.*, Letter from Brian M. Josef, Ass't Vice Pres. Reg. Affairs, CTIA and D. Zachary Champ, Dir. Gov't. Affairs, PCIA-The Wireless Infrastructure Assoc. to Chad Breckinridge, Assoc. Chief, Wireless Telecommunications Bureau (filed Feb. 19, 2016) at 3-4 (CTIA/PCIA Feb. 19th Letter); *but see* "Fact Sheet, Antenna Collocation Programmatic Agreement," Public Notice, 17 FCC Rcd 508, 511 (2002) ("this evaluation process includes consultation with the relevant [SHPO] and/or [THPO], as well as compliance with other procedures set out in the ACHP rules, 36 C.F.R. Part 800, Subpart B").

[154] *See, e.g.,* CTIA/PCIA Feb. 19th Letter; Email from Jennifer Sigler, Tribal Archaeologist, Eastern Shawnee Tribe of Oklahoma, to January2016TowerMtg@fcc.gov (Feb. 12, 2016); Email from Jan Biella, Pilar Cannizzaro, and Andy Wakefield, New Mexico Historic Preservation Division, to January2016TowerMtg@fcc.gov (Feb. 18, 2016).

August 2016, WTB circulated for discussion a draft term sheet (2016 Twilight Towers Draft Term Sheet) outlining a potential streamlined process for Twilight Towers to complete individual review.[155]

81. We seek comment on steps the Commission should take to develop a definitive solution for the Twilight Towers issue. As we undertake this process, our goal remains to develop a solution that will allow Twilight Towers to be used for collocations while respecting the integrity of the Section 106 process. Facilitating collocations on these towers will serve the public interest by making additional infrastructure available for wireless broadband services and the FirstNet public safety broadband network.[156] Moreover, facilitating collocations on existing towers will reduce the need for new towers, lessening the impact of new construction on the environment and on locations with historical and cultural significance.

82. In particular, we seek comment on whether to treat collocations on towers built between March 16, 2001 and March 7, 2005 that did not go through Section 106 historic preservation review in the same manner as collocations on towers built prior to March 16, 2001 that did not go through review. Under this approach, collocations on such towers would generally be excluded from Section 106 historic preservation review, subject to the same exceptions that currently apply for collocations on towers built on or prior to March 16, 2001, *i.e.*, collocations would be excluded from Section 106 review unless (1) the mounting of the antenna will result in a substantial increase in size of the tower; (2) the tower has been determined by the Commission to have an adverse effect on one or more historic properties; (3) the tower is the subject of a pending environmental review or related proceeding before the Commission involving compliance with Section 106 of the National Historic Preservation Act; or (4) the collocation licensee or the owner of the tower has received written or electronic notification that the Commission is in receipt of a complaint from a member of the public, a Tribal Nation, a SHPO or the ACHP that the collocation has an adverse effect on one or more historic properties.[157] We seek comment on whether allowing collocations without individual Section 106 review in these circumstances would rapidly make available a significant amount of additional infrastructure to support wireless broadband deployment without adverse impacts. In particular, we note that the vast majority of towers that have been reviewed under the NPA have had no adverse effects on historic properties, and we are aware of no reason to believe that Twilight Towers are any different in that regard. Moreover, these towers have been standing for 12 years or more and, in the vast majority of cases, no adverse effects have been brought to our attention.

83. Although we seek comment on such an approach, we are mindful of the concerns that have been expressed by Tribal Nations and SHPOs throughout the discussions on this matter that simply allowing collocations to proceed would not permit review in those cases where an underlying tower may have undetermined adverse effects. In particular, Tribal Nations have expressed concern that some of the towers that were constructed between 2001 and 2005 may have effects on properties of religious and cultural significance that have not been noticed because their people are far removed from their traditional homelands. We seek comment on these concerns. As an initial matter, we seek comment on our underlying assumption regarding the likelihood that Twilight Towers had in their construction or continue to have adverse effects that have not been noted. To the extent such effects exist, what is the likelihood

[155] *See* National Association of Tribal Historic Preservation Officers, http://nathpo.org/wp/wp-content/uploads/2016/08/Twilight-Towers-Discussion-Draft-Term-Sheet-081916.pdf. The term sheet proposed for discussion a process that would include identification of Twilight Towers by their owners, limits on the number of towers each owner may submit for review per month, deadlines for submission to be set by the Commission, review fees consistent with customary practices subject to adjustment to reflect the circumstances of Twilight Tower review, a 60-day review deadline, and a dispute resolution process.

[156] *See* 47 U.S.C. § 1426(c)(3) (providing that "the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing (A) commercial or other communications infrastructure; and (B) Federal, state, tribal, or local infrastructure").

[157] Collocation NPA, § III.

that they could be mitigated, and what is the likelihood that a new collocation would exacerbate those effects?[158]

84. We further seek comment on any alternative approaches. For example, should we consider a tower-by-tower process under which proposed collocations on Twilight Towers would trigger a streamlined, time-limited individual review, along the lines of the process discussed in the 2016 Twilight Towers draft term sheet?[159] If the Commission were to adopt such an approach, what elements should be included? For example, some in the industry have recommended a tower-by-tower approach that is voluntary and allows tower owners to submit a tower for review as market conditions justify, involves same processes and systems that are used for new and modified towers, asks ACHP to direct SHPOs and THPOs to submit prompt comments on such towers, and imposes no monetary penalty on tower owners.[160] We seek comment on whether to adopt this approach. Should towers be categorized, such that, for example, public safety towers receive priority for streamlined review? Alternatively, to what extent are there existing processes that function efficiently to allow collocations on Twilight Towers? Generally, given what we say above about the text of our rule, we do not anticipate taking any enforcement action or imposing any penalties based on good faith deployment during the Twilight Tower period.

85. We also seek comment on the procedural vehicle through which any solution should be implemented. Would permitting collocation on Twilight Towers require either an amendment to the Collocation NPA or another program alternative under 36 CFR § 800.14(b)? Is one form of program alternative preferable to another, and if so, why? If we were to pursue a streamlined or other alternative review procedure, would that require an amendment to the Collocation NPA or other program alternative?[161]

4. Collocations on Other Non-Compliant Towers

86. Finally, we invite comment on whether we should take any measures, and if so what, to facilitate collocations on non-compliant towers constructed after March 7, 2005. We note that unlike in the case of the Twilight Towers, the rules in effect when these towers were constructed explicitly required compliance with the review procedures set forth in the NPA. We invite commenters to propose procedures, including review processes, time frames, criteria for eligibility, and other measures, to address any or all of these towers.

III. NOTICE OF INQUIRY

87. In Sections 253 and 332(c)(7) of the Act, Congress codified its intent to streamline regulations that might otherwise slow down the deployment of broadband facilities, while balancing this goal against the long-standing and important role that State and local authorities play with respect to land-use decisions. In this section, we examine and seek comment on the scope of these statutory provisions and any new or updated guidance or determinations the Commission should provide pursuant to its authority under those provisions, including through the issuance of a Declaratory Ruling.

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[158] The premise of the Collocation NPA is that collocations falling within its terms are unlikely to adversely affect historic properties. *See* Collocation NPA, para. 8 ("Whereas, the parties hereto agree that the effects on historic properties of collocations of antennas on towers, buildings and structures are likely to be minimal and not adverse . . . .").

[159] *See* National Association of Tribal Historic Preservation Officers, http://nathpo.org/wp/wp-content/uploads/2016/08/Twilight-Towers-Discussion-Draft-Term-Sheet-081916.pdf.

[160] CTIA/PCIA Feb. 19th Letter at 6-7.

[161] *See* 36 CFR § 800.2(a) (requiring Federal agencies to perform Section 106 review pursuant to either Subpart B of the ACHP's rules or a valid program alternative).

A. Intersection of Sections 253(a) and 332(c)(7)

88. We start our examination with the relevant statutory terms. Sections 253 and 332(c)(7) of the Act contain very similar language addressing State and local regulations. Section 253(a) says 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."[162] Section 332(c)(7) generally preserves State and local governments' "authority . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities,"[163] but provides that their "regulation of [such activities] . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[164] Section 332(c)(7) imposes additional limitations as well, stating that State or local regulation of facility siting "shall not unreasonably discriminate among providers of functionally equivalent services";[165] that State and local governments must act on siting requests "within a reasonable period of time";[166] that any decision to deny a siting request "shall be in writing and supported by substantial evidence contained in a written record";[167] and that State and local governments may not regulate wireless facility siting based on the environmental effects of radiofrequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.[168]

89. Both Section 253(a) and Section 332(c)(7) ban State or local regulations that "prohibit or have the effect of prohibiting" service.[169] Both sections also proscribe State and local restrictions that unreasonably discriminate among service providers.[170] These sections thus appear to impose the same substantive obligations on State and local governments, though the remedies provided under each are different. There are court decisions holding that "the legal standard is the same under either [Section 253 or 332(c)(7)]," and that there is "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."[171] We seek comment on whether there is any reason to conclude that the substantive obligations of these two provisions differ, and if so in what way. Do they apply the same standards in the same or similar situations? Do they impose different standards in different situations? We invite commenters to explain how and why. We also seek comment on the interaction between Sections 253 and 332(c)(7). For instance, if a locality exceeds its authority over access to rights of way by denying (or failing to act on) a wireless facility siting application in a manner that effectively prohibits the provision of wireless telecommunications service, does the locality violate not only Sections 253(a) and (c), but also Section 332(c)(7)? Similarly, does a locality that violates Section 332(c)(7) by failing to act within a reasonable time also violate Section 253(a) if its failure to act effectively prohibits the provision of telecommunications service?

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[162] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[163] *Id.* § 332(c)(7)(A).

[164] *Id.* § 332(c)(7)(B)(i)(II).

[165] *Id.* § 332(c)(7)(B)(i)(I).

[166] *Id.* § 332(c)(7)(B)(ii).

[167] *Id.* § 332(c)(7)(B)(iii).

[168] *Id.* § 332(c)(7)(B)(iv).

[169] *Id.* §§ 253(a), 332(c)(7)(B)(i)(II).

[170] *Compare* 47 U.S.C. § 332(c)(7)(B)(i)(I) *with* 47 U.S.C. § 253(b) & (c) (specifying categories of State and local legal requirements that may be preempted unless they are "competitively neutral" and "nondiscriminatory").

[171] *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008) (en banc); *see also T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 991-93 (9th Cir. 2009).

B. "Prohibit or Have the Effect of Prohibiting"

90. In interpreting the phrase "prohibit or have the effect of prohibiting," the Commission has made clear that Section 253(a) "proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality,"[172] and, similarly, that under Section 332(c)(7), State or local government decisions to deny a siting application on the basis that one or more carriers other than the applicant already provides wireless service in the geographic area have "the effect of prohibiting" the provision of wireless service, in violation of Section 332(c)(7)(B)(i)(II).[173] The Commission has also indicated that the relevant question in interpreting the phrase "prohibit or have the effect of prohibiting" is whether an action "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[174] We seek comment on whether the Commission should provide further guidance on how to interpret and apply this statutory language, and on what interpretations it should consider.

91. A number of courts have interpreted the phrase "prohibit or have the effect of prohibiting," as it appears in both Sections 253(a) and 332(c)(7), but they have not been consistent in their views. Under Section 253(a), the First, Second, and Tenth Circuits have held that a State or local legal requirement would be subject to preemption if it *may* have the effect of prohibiting the ability of an entity to provide telecommunications services,[175] while the Eighth and Ninth Circuits have erected a higher burden and insisted that "a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."[176] By the same token, different courts have imposed inconsistent burdens of proof to establish that localities violated Section 332(c)(7) by improperly denying siting application. 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."[177] By contrast, 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.[178] We invite commenters to address these issues of statutory interpretation so we may have the benefit of a full range of views from the interested parties as we determine what action, if any, we should

[172] *See Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13095, para. 25 (1996).

[173] *See 2009 Declaratory Ruling*, 24 FCC Rcd at 14016-19, paras. 56-65.

[174] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Calif.*, 12 FCC Rcd 14191, 14206, para. 31 (1997).

[175] *Puerto Rico Tel. Co.* v. *Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1270 & n.9 (10th Cir. 2004).

[176] *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc); *Level 3 Commc'ns, L.L.C. v. City of St. Louis,* 477 F.3d 528, 532–33 (8th Cir. 2007). *But see* Letter from Michael Pastor, General Counsel, New York City Dept. of Information Technology and Telecommunications, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-3 (filed Apr. 12, 2017) (offering alternative interpretation).

[177] *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).

[178] *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999); *APT Pittsburgh Ltd. P'ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999); *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056-57 (9th Cir. 2014); *City of Anacortes*, 572 F.3d at 995-99.

take to resolve them.[179] We also invite parties to address whether there is some new theory altogether that we should consider.

92. We also seek comment on the proper role of aesthetic considerations in the local approval process. The use of aesthetic considerations is not inherently improper; many courts have held that municipalities may, without necessarily violating Section 332(c)(7), deny siting applications on the grounds that the proposed facilities would adversely affect an area's aesthetic qualities, *provided* that such decisions are not founded merely on "generalized concerns" about aesthetics but are supported by "substantial evidence contained in a written record"[180] about the impact of specific facilities on particular geographic areas or communities.[181] We seek comment on whether we should provide more specific guidance on how to distinguish legitimate denials based on evidence of specific aesthetic impacts of proposed facilities, on the one hand, from mere "generalized concerns," on the other.

93. Finally, we note that WTB's *Streamlining PN* sought comment on application processing fees and charges for the use of rights of way.[182] We invite parties to comment on similar issues relating to the application of section 332(c)(7)'s "prohibit or have the effect of prohibiting" language on infrastructure siting on properties beyond rights of way. For instance, we seek comment on the up-front application fees that State or local government agencies impose on parties submitting applications for authority to construct or modify wireless facilities in locations other than rights of way. Can those fees, in some instances, "prohibit or have the effect of prohibiting" service? For instance, are those fees cost based? If commenters believe a particular State or locality's application fees are excessive, we invite them to provide detailed explanations for that view and to explain how such fees might be inconsistent with section 332 of the Act. Relatedly, do wireless siting applicants pay fees comparable to those paid by other parties for similar applications, and if not, are there instances in which such fees violate section

[179] *Brand X*, 545 U.S. at 982-83 (when "Congress has delegated to an agency the authority to interpret a statute," any "ambiguity [is to] be resolved . . . by the agency," and a contrary "judicial precedent [does not] foreclose the agency from an interpreting an ambiguous statute.").

[180] 47 U.S.C. § 332(c)(7)(B)(iii) ("Any decision . . . 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."). "In a number of cases, courts have overturned denials of permits [for lack of 'substantial evidence'], finding (for example) that safety concerns and aesthetic objections rested upon hollow generalities and empty records." *Town of Amherst v. Omnipoint Communic'ns Enterprises, Inc.*, 173 F.3d 9, 16 (1st Cir. 1999) (dictum).

[181] *See, e.g., Sprint PCS Assets LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 725-26 (9th Cir. 2009); *City of Anacortes*, 572 F.3d at 994-95; *T-Mobile Central, LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299, 1312 (10th Cir. 2008); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999); *AT&T Wireless PCS, Inc. v. City of Virginia Beach*, 155 F.3d 423, 427, 430-31 (4th Cir. 1998). It is also indicative – although not dispositive – that the legislative history of the Telecommunications Act of 1996 refers to giving "localities the flexibility to treat facilities that create different *visual, aesthetic*, or safety concerns differently to the extent permitted under generally applicable zoning requirements . . . ." S. Rep. No. 104-230, at 208 (1996) (Conf. Rep.). Notably, NEPA requires Federal agencies to consider the aesthetic effects of Federal actions, and in some cases may warrant an agency's requiring an applicant to modify a proposed project so as to avoid or mitigate adverse aesthetic impacts, *see* 42 U.S.C. § 4331(b) ("it is the continuing responsibility of the Federal Government to use all practicable means… [to] assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings"); 40 CFR § 1508.8(b); *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973); and the Commission itself has applied aesthetic considerations in some cases involving NEPA review. *See, e.g., SBA Towers III, LLC Petitions to Deny and Requests for Environmental Review, Copper Harbor, Mich.*, 31 FCC Rcd 1755, 1765-67, paras. 38-42 (WTB/CIPD 2016); *AT&T Mobile Services, Inc. Construction of Tower at Fort Ransom, N.D.*, 30 FCC Rcd 11023, 11032, para. 28 (WTB/CIPD 2015).

[182] *See Streamlining PN*, 31 FCC Rcd at 13371-73 (Section II.B.3). The Public Notice also sought comment on local governments' practices that may "prohibit or have the effect of prohibiting" the provision of wireless service, *see id.* at 13369-70 (Section II.B.1), and raised questions about the reasonable period of time for State and local governments to process siting applications. 31 FCC Rcd at 13370-71 (Section II.B.2); *cf. supra*, Section II.A.1 & 2.

332's prohibition of regulations that "unreasonably discriminate among providers of functionally equivalent services"?

94. We also seek similar information about the recurring charges – as well as the other terms, conditions, or restrictions – that State or local government agencies impose for the siting of wireless facilities on publicly owned or controlled lands, structures such as light poles or water towers, or other resources other than rights of way. Do such fees or practices "prohibit or have the effect of prohibiting" service, or do they "unreasonably discriminate among providers of functionally equivalent services? Are there disparities between the charges or other restrictions imposed on some parties by comparison with those imposed on others? Do any agencies impose charges or other requirements that commenting parties believe to be particularly burdensome, such as franchise fees based on a percentage of revenues? Are other aspects of the process for obtaining approval particularly burdensome? Commenters should explain their concerns in sufficient detail to allow State and local governments to respond and to allow the Commission to determine whether it should provide guidance on these issues.[183]

C. "Regulations" and "Other Legal Requirements"

95. The terms of Section 253(a) specify that a "statute," "regulation," or "other legal requirement" may be preempted,[184] while the terms of Section 332(c)(7) refer to "decisions" concerning wireless facility siting and the "regulation" of siting.[185] We seek comment on how those terms should be interpreted. For instance, do the terms "statute," "regulation," and "legal requirement" in Section 253(a) have essentially the same meaning as the parallel terms "regulation" and "decisions" in Section 332(c)(7)? The Commission has held in the past that the terminology in Section 253(a) quoted above "recognizes that State and local barriers to entry could come from sources other than statutes and regulations" and "was meant to capture a broad range of state and local actions" that could pose barriers to entry—including agreements with a single party that result in depriving other parties of access to rights of way.[186] We believe there is a reasonable basis for concluding that the same broad interpretation should apply to the language of Section 332, and we seek comment on this analysis.

96. We also seek comment on the extent to which these statutory provisions apply to States and localities acting in a proprietary versus regulatory capacity, and on what constitutes a proprietary capacity. In the *2014 Infrastructure Order*, the Commission opined that the Spectrum Act and the rules and policies implementing it apply to localities' actions on siting applications when acting in their capacities as land-use *regulators*, but not when acting as managers of land or property that they own and operate primarily in their *proprietary* roles.[187] The Order cited cases indicating that "Sections 253 and 332(c)(7) do not preempt non-regulatory decisions of a State or locality acting in its proprietary capacity."[188] We seek comment on whether we should reaffirm or modify the *2014 Infrastructure*

[183] *Cf. infra* Section III.C (discussing State and local government agencies' roles as "proprietors" versus "regulators" of public resources including, but not limited to, rights of way).

[184] *See* 47 U.S.C. § 253(a) ("No 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 . . . telecommunications service") (emphases added).

[185] *See* 47 U.S.C. §§ 332(c)(7)(A) ("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.") (emphasis added), 332(c)(7)(B)(i)(II) ("The *regulation* of the placement, construction, and modification of personal wireless service facilities . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services") (emphasis added).

[186] *See Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transmission Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21704, para. 11 (1999) (*Minnesota Preemption Order*).

[187] *2014 Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 239-40.

[188] *Id.* at 12965, para. 239 & n.646 (citations omitted).

Order's characterization of the distinction between State and local governments' regulatory roles versus their proprietary roles as "owners" of public resources. How should the line be drawn in the context of properties such as public rights of way (*e.g.*, highways and city streets), municipally-owned lampposts or water towers, or utility conduits? Should a distinction between regulatory and proprietary be drawn on the basis of whether State or local actions advance those government entities' interests as participants in a particular sphere of economic activity (proprietary),[189] by contrast with their interests in overseeing the use of public resources (regulatory)?[190] What about requests for proposals (RFPs) or contracts involving state or local entities? We invite commenters to identify any States or local governments that have imposed restrictions on the installation of new facilities or the upgrading of existing facilities in public rights of way, and describe those restrictions and their impacts. Do such restrictions have characteristics or effects that are comparable to moratoria on processing applications?[191].

D. Unreasonable Discrimination

97. We seek comment on whether certain types of facially neutral criteria that some localities may be applying when reviewing and evaluating wireless siting applications could run afoul of Section 253, Section 332(c)(7), or another provision of the Act.[192] For instance, we ask commenters to identify any State or local regulations that single out telecom-related deployment for more burdensome treatment than non-telecom deployments that have the same or similar impacts on land use, to explain how, and to address whether this type of asymmetric treatment violates Federal law.

98. We also seek comment on the extent to which localities may be seeking to restrict the deployment of utility or communications facilities above ground and attempt to relocate electric, wireline telephone, and other utility lines in that area to underground conduits. Obviously, it is impossible to operate wireless network facilities underground.[193] Undergrounding of utility lines seems to place a premium on access to those facilities that remain above ground, such as municipally-owned street lights. Is there a particular way that Section 253 or 332(c)(7) should apply in that circumstance? More generally, we seek comment on parties' experience with undergrounding requirements, including how wireless facilities have been treated in communities that require undergrounding of utilities. We also seek comment on whether and how the Communications Act applies in such instances. For instance, may localities deny applications to construct new above-ground wireless structures in such areas, or deny applications to install collocated equipment on structures that may eventually be dismantled? Could

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[189] *See Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993) (finding State agency acted in proprietary capacity, and not as a regulator, when establishing requirements for prospective subcontractors in context of procuring services for construction of a wastewater treatment project, because the actions under review were "analogous [to] private conduct" of non-governmental parties overseeing large construction projects).

[190] *Minnesota Preemption Order*, 14 FCC Rcd at 21707-08, para. 18 (finding preemption appropriate because, "[i]n this case, Minnesota is not merely acquiring fiber optic capacity for its own use; it is providing a private party with exclusive physical access to the freeway rights-of-way[,] . . . [which] has the potential to adversely affect competitors that do not have similar access. *This situation is very different from a traditional government procurement of telecommunications facilities or services*.") (emphasis added).

[191] *Cf. supra* Section II.A.3.

[192] *See, e.g.*, 47 U.S.C. § 253(a), (c); 47 U.S.C. § 332(c)(7)(B)(i)(I).

[193] *Cf. Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d at 580 ("If 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."); *Cox Communic'ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260, 1269 (S.D. Cal. 2002) (holding that alleged discrimination caused by city ordinance that treated gas utility more favorably than wireless carrier was not *unreasonable*, because "the gas company installs most of its facilities underground, which impacts the City's zoning and visual concerns differently than above-ground facilities").

"undergrounding" plans "prohibit or have the effect of prohibiting" service by causing suitable sites for wireless antennas to become scarce? We seek comment on parties' experiences with undergrounding generally.

99. Section 332(c)(7)(B)(i)(I) prohibits States and localities from unreasonably discriminating among providers of "functionally equivalent services."[194] We seek comment on whether parties have encountered such discrimination, and ask that they provide specific examples. We also seek comment on what constitutes "functionally equivalent services" for this purpose. For instance, should entities that are considered to be utilities be viewed as an appropriate comparison? For the limited purpose of applying Section 332(c)(7)(B)(i)(I), can wireless and wireline services be considered "functionally equivalent" in some circumstances? Which types of discrimination are reasonable and which are unreasonable?

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

100. Pursuant to the Regulatory Flexibility Act (RFA),[195] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in this NPRM. The IRFA is set forth in the Appendix. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[196]

B. Initial Paperwork Reduction Act Analysis

101. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.[197] In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.[198]

C. Other Procedural Matters

1. Ex Parte Rules – Permit-but-Disclose

102. Except to the limited extent described in the next paragraph, this proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[199] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda

[194] 47 U.S.C. § 332(c)(7)(B)(i)(I).

[195] *See* 5 U.S.C. § 603.

[196] *See* 5 U.S.C. § 603(a).

[197] *See* Paperwork Reduction Act of 1995, Public Law 104-13.

[198] *See* 44 U.S.C. § 3506(c)(4).

[199] 47 CFR § 1.1200 *et seq.*

or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

103. In light of the Commission's trust relationship with Tribal Nations and Native Hawaiian Organizations (NHOs), and our obligation to engage in government-to-government consultation with them, we find that the public interest requires a limited modification of the *ex parte* rules in this proceeding.[200] Tribal Nations and NHOs, like other interested parties, should file comments, reply comments, and *ex parte* presentations in the record in order to put facts and arguments before the Commission in a manner such that they may be relied upon in the decision-making process. But we will exempt *ex parte* presentations involving elected and appointed leaders and duly appointed representatives of federally-recognized Tribal Nations and NHOs from the disclosure requirements in permit-but-disclose proceedings[201] and the prohibitions during the Sunshine Agenda period.[202] Specifically, presentations from elected and appointed leaders or duly appointed representatives of federally-recognized Tribal Nations or NHOs to Commission decision makers shall be exempt from disclosure. To be clear, while the Commission recognizes that consultation is critically important, we emphasize that the Commission will rely in its decision-making only on those presentations that are placed in the public record for this proceeding.

2. Comment Filing Procedures

104. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). **All filings related to this NPRM and NOI shall refer to WT Docket No. 17-79.**

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://apps.fcc.gov/ecfs/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.

105. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325,

[200] *See, e.g., Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement*, Policy Statement, 16 FCC Rcd 4078 (2000) ("The Commission will endeavor to identify innovative mechanisms to facilitate Tribal consultation in agency regulatory processes that uniquely affect telecommunications compliance activities, radio spectrum policies, and other telecommunications service-related issues on Tribal lands.").

[201] 47 CFR 1.1206.

[202] 47 CFR 1.1203.

Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

106. *People with Disabilities*. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

107. *Additional Information*. For additional information on this proceeding, contact Aaron Goldschmidt, Aaron.Goldschmidt@fcc.gov, of the Wireless Telecommunications Bureau, Competition & Infrastructure Policy Division, (202) 418-7146, or David Sieradzki, David.Sieradzki@fcc.gov, of the Wireless Telecommunications Bureau, Competition & Infrastructure Policy Division, (202) 418-1368.

V. ORDERING CLAUSES

108. Accordingly, IT IS ORDERED, pursuant to Sections 1, 2, 4(i), 7, 201, 253, 301, 303, 309, and 332 of the Communications Act of 1934, as amended 47 U.S.C. §§ 151, 152, 154(i), 157, 201, 253, 301, 303, 309, and 332, Section 102(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(C), and Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108, that this Notice of Proposed Rulemaking and Notice of Inquiry IS hereby ADOPTED.

109. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[203] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities of the policies and rules proposed in this Notice of Proposed Rulemaking ("Notice"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[204] In addition, the Notice and IRFA (or summaries thereof) will be published in the *Federal Register*.[205]

A. Need for, and Objectives of, the Proposed Rules

2. In this Notice, we examine how we may further remove or reduce regulatory impediments to wireless infrastructure investment and deployment in order to promote the rapid deployment of advanced mobile broadband service to all Americans. First, the Notice seeks comment on certain measures or clarifications to expedite State and local processing of wireless facility siting applications pursuant to our authority under 332 of the Communications Act, including a "deemed granted" remedy in cases of unreasonable delay. Next, we undertake a comprehensive fresh look at our rules and procedures implementing the National Environmental Policy Act ("NEPA") and Section 106 of the National Historic Preservation Act ("Section 106"). As part of this review, we seek comment on potential measures to improve or clarify the Commission's Section 106 process, including in the area of fees paid to Tribal Nations in connection with their participation in the process, cases involving lack of response by relevant parties including affected Tribal Nations, and batched processing. We also seek comment on possible additional exclusions from Section 106 review, and we reexamine the scope of our responsibility to review the effects of wireless facility construction under the NHPA and NEPA. Finally, the Notice seeks comment on so-called "Twilight Towers," wireless towers that were constructed during a time when the process for Section 106 review was unclear, that may not have completed Section 106 review as a result, and that are therefore not currently available for collocation without first undergoing review. We seek comment on various options addressing Twilight Towers, including whether to exclude collocations on such towers from Section 106 historic preservation review, subject to certain exceptions, or alternatively subjecting collocations on Twilight Towers to a streamlined, time-limited review. We expect the measures on which we seek comment in this Notice to be only a part of our efforts to expedite wireless infrastructure deployment and we invite commenters to propose other innovative approaches to expediting deployment.

B. Legal Basis

3. The authority for the actions taken in this Notice is contained in Sections 1, 2, 4(i), 7, 201, 253, 301, 303, 309, and 332 of the Communications Act of 1934, as amended 47 U.S.C. §§ 151, 152, 154(i), 157, 201, 253, 301, 303, 309, and 332, Section 102(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(C), and Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108.

[203] *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).

[204] *See* 5 U.S.C. § 603(a).

[205] *See id.*

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

4. 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 proposed rules and policies, if adopted.[206] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[207] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[208] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[209] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. The Notice seeks comment on potential rule changes regarding State, local, and Federal regulation of the siting and deployment of communications towers and other wireless facilities. Due to the number and diversity of owners of such infrastructure and other responsible parties, particularly small entities that are Commission licensees as well as non-licensees, we classify and quantify them in the remainder of this section. The Notice seeks comment on our description and estimate of the number of small entities that may be affected by our actions in this proceeding.

6. *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 comprehensive small entity size standards that could be directly affected herein.[210] 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.[211] These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.[212] 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."[213] Nationwide, as of 2007, there were approximately 1,621,215 small organizations.[214] Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[215] U.S. Census Bureau

[206] 5 U.S.C. § 603(b)(3).

[207] 5 U.S.C. § 601(6).

[208] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[209] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[210] *See* 5 U.S.C. § 601(3)-(6).

[211] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 1 – What is a small business?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

[212] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 2- How many small business are there in the U.S.?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

[213] 5 U.S.C. § 601(4).

[214] Independent Sector, The New Nonprofit Almanac & Desk Reference (2010).

[215] 5 U.S.C. § 601(5).

data published in 2012 indicate that there were 89,476 local governmental jurisdictions in the United States.[216] We estimate that, of this total, as many as 88,761 entities may qualify as "small governmental jurisdictions."[217] Thus, we estimate that most governmental jurisdictions are small.

7. *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.[218] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[219] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[220] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[221] Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

8. The Commission's own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today.[222] 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.[223] Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[224] Thus, using available data, we estimate that the majority of wireless firms can be considered small.

9. *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

[216] U.S. Census Bureau, Statistical Abstract of the United States: 2012 at 267, Table 429 (2011), http://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf (citing data from 2007).

[217] The 2012 U.S. Census data for small governmental organizations are not presented based on the size of the population in each organization. There were 89,476 local governmental organizations in the Census Bureau data for 2012, which is based on 2007 data. As a basis of estimating how many of these 89,476 local government organizations were small, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000 in 2011. *See* U.S. Census Bureau, City and Town Totals Vintage: 2011, http://www.census.gov/popest/data/cities/totals/2011/index.html. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small.

[218] NAICS Code 517210. *See* https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517210.

[219] 13 CFR § 121.201, NAICS Code 517210.

[220] U.S. Census Bureau, Subject Series: Information, tbl. 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210."

[221] *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 "100 employees or more."

[222] *See* http://wireless.fcc.gov/uls. For the purposes of this IRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

[223] *See Trends in Telephone Service* at tbl. 5.3.

[224] *See id*.

rules.[225] 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.[226] 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.[227] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[228] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[229] Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. We note 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.

10. *Public Safety Radio Licensees.* Public Safety Radio Pool licensees as a general matter, include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[230] 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. For this category we apply the SBA's definition for Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications and for which the small entity size standard is defined as those entities employing 1,500 or fewer persons.[231] For this industry,

[225] 47 CFR Part 90.

[226] 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.

[227] 13 CFR § 121.201, NAICS Code 517210.

[228] U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[229] *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."

[230] *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.

[231] *See* 13 CFR § 121.201, NAICS Code 517210.

U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[232] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[233] Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. 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.[234] There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.235 We estimate that fewer than 2,442 public safety radio licensees hold these licenses because certain entities may have multiple licenses.

11. *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 SBA's definition for Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications and for which the small entity size standard is defined as those entities employing 1,500 or fewer persons.[236] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[237] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[238] Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. According to the Commission's records, 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 this Notice.[239] 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

[232] U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[233] *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."

[234] This figure was derived from Commission licensing records as of June 27, 2008. Licensing numbers change on a daily basis. We do not expect this number to be significantly smaller today. 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.

[235] 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.

[236] *See* 13 CFR § 121.201, NAICS Code 517210.

[237] U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[238] *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."

[239] This figure was derived from Commission licensing records as of August 16, 2013. Licensing numbers change on a daily basis. We do not expect this number to be significantly smaller today. 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.

this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

12. *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.

13. 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.[240] 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.[241] The SBA has approved these definitions.[242] 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. The Commission's licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission's licensing database indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission's licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS licenses in 176 EAs was conducted.[243] 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.

14. 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 applicable definition of small entity is the "Wireless Telecommunications Carriers (except satellite)" definition under the SBA rules.[244] Under that SBA category, a business is small if it has 1,500 or fewer employees.[245] For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[246] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees

[240] *See* Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008 para. 123 (2000).

[241] *Id*.

[242] *See* Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 4, 1999).

[243] See "Multiple Address Systems Spectrum Auction Closes," Public Notice, 16 FCC Rcd 21011 (2001).

[244] 13 CFR § 121.201, NAICS Code 517210.

[245] *Id*.

[246] U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210," https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

or more.[247] Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our action.[248]

15. *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)).[249]

16. *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.[250] 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 392 incumbent BRS licensees that are considered small entities.[251] 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 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

17. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[252] 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.[253] Auction 86 concluded in 2009 with the sale of 61 licenses.[254] Of the ten winning bidders, two bidders that claimed small business status won

[247] 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."

[248] *See id.*

[249] *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).

[250] 47 CFR § 21.961(b)(1).

[251] 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.

[252] *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).

[253] *Id.* at 8296 para. 73.

[254] *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).

4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

18. *EBS* - The SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,436 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[255] Thus, we estimate that at least 2,336 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers. 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.[256] The SBA's small business size standard for this category is all such firms having 1,500 or fewer employees. U.S. Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small. To gauge small business prevalence for these cable services we must, however, use the most current census data for the previous category of Cable and Other Program Distribution and its associated size standard which was all such firms having $13.5 million or less in annual receipts.[257] According to U.S. Census Bureau data for 2007, there were a total of 996 firms in this category that operated for the entire year.[258] Of this total, 948 firms had annual receipts of under $10 million, and 48 firms had receipts of $10 million or more but less than $25 million.[259] Thus, the majority of these firms can be considered small.

19. *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.[260] 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.[261] These definitions have been approved by the SBA.[262] 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.

[255] The term "small entity" within SBREFA applies to small organizations (nonprofits) 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). We do not collect annual revenue data on EBS licensees.

[256] U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012.

[257] 13 CFR § 121.201, NAICS Code 517110.

[258] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Receipts by Enterprise Employment Size for the United States: 2007, NAICS Code 517510 (rel. Nov. 19, 2010).

[259] *Id*.

[260] Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, *Second Report and Order*, 13 FCC Rcd 15182, 15192 para. 20 (1998); *see also* 47 CFR § 90.1103.

[261] *Id*.

[262] *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Feb. 22, 1999).

20. *Television Broadcasting*. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound."[263] These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.[264] 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.[265] The 2012 Economic Census reports that 751 firms in this category operated in that year. 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.[266] Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

21. The Commission has estimated the number of licensed commercial television stations to be 1,384.[267] Of this total, 1,264 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 February 24, 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 394.[268] Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

22. We note, however, that in assessing whether a business concern qualifies as "small" under the above definition, business (control) affiliations[269] must be included. 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.[270]

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[263] U.S. Census Bureau, 2012 NAICS Definitions, "515120 Television Broadcasting," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017.

[264] U.S. Census Bureau, 2012 NAICS Definitions, "515120 Television Broadcasting," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017.

[265] 13 CFR § 121.201; 2012 NAICS Code 515120.

[266] 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/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

[267] *Broadcast Station Totals as of December 31, 2016*, Press Release (MB, rel. January 5, 2017) (*January 5, 2017 Broadcast Station Totals Press Release*), https://www.fcc.gov/document/broadcast-station-totals-december-31-2016.

[268] *January 5, 2017 Broadcast Station Totals Press Release*.

[269] "[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." 13 CFR § 21.103(a)(1).

[270] There are also 2,344 LPTV stations, including Class A stations, and 3689 TV translator stations. 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.

23. *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."[271] The SBA has established a small business size standard for this category as firms having $38.5 million or less in annual receipts.[272] Economic Census data for 2012 shows that 2,849 radio station firms operated during that year.[273] 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.[274] Therefore, based on the SBA's size standard the majority of such entities are small entities.

24. According to Commission staff review of the BIA Publications, Inc. Master Access Radio Analyzer Database as of June 2, 2016, about 11,386 (or about 99.9 percent) of 11,395 commercial radio stations had revenues of $38.5 million or less and thus qualify as small entities under the SBA definition. The Commission has estimated the number of licensed commercial radio stations to be 11,415.[275] We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,101.[276] 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.

25. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.[277] 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.[278] 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.

26. *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.[279] This U.S. industry, Radio Stations, 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.[280] 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.[281]

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[271] https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017.

[272] 13 CFR § 121.201, NAICS Code 515112 Radio Stations.

[273] U.S. Census Bureau, Table No. EC1251SSSZ4, "Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 (515112 Radio Stations)," https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

[274] *Id.*

[275] *January 5, 2017 Broadcast Station Totals Press Release*.

[276] *January 5, 2017 Broadcast Station Totals Press Release*.

[277] "[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." 13 CFR § 121.103(a)(1).

[278] 13 CFR § 121.102(b).

[279] NAICS Code 515112.

[280] http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515112&search=2007 NAICS Search.

[281] 13 CFR 121.201.

U.S. Census data for 2012 indicate that 2,849 radio station firms operated during that year.[282] 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.[283] Based on U.S. Census data, we conclude that the majority of FM Translator Stations and Low Power FM Stations are small.

27. *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.[284] These definitions were approved by the SBA.[285] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[286] 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.[287]

28. *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."[288] The category has a small business size standard of $32.5 million or less in average annual receipts, under SBA rules.[289] 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.[290] Of this total, 299

[282] U.S. Census Bureau, Table No. EC1251SSSZ4, "Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 (515112 Radio Stations)," https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

[283] *Id.*

[284] Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2–12.7 GHz Band, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, 9711, para. 252 (2002).

[285] *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).

[286] *See* "Multichannel Video Distribution and Data Service Spectrum Auction Closes," *Public Notice*, 19 FCC Rcd 1834 (2004).

[287] *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).

[288] U.S. Census Bureau, 2012 NAICS Definitions, "517410 Satellite Telecommunications," http://www.census.gov/naics/2012/def/ND517410.HTM.

[289] 13 CFR § 121.201, NAICS Code 517410.

[290] 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/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

firms had annual receipts of less than $25 million.[291] Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

29. *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. 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. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.[292] 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.[293] For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than $25 million.[294] Thus, a majority of "All Other Telecommunications" firms potentially affected by our action can be considered small.

30. *Fixed Microwave Services*. Microwave services include common carrier,[295] private-operational fixed,[296] and broadcast auxiliary radio services.[297] They also include the Local Multipoint Distribution Service (LMDS),[298] the Digital Electronic Message Service (DEMS),[299] the 39 GHz Service (39 GHz),[300] the 24 GHz Service,[301] and the Millimeter Wave Service[302] where licensees can choose between common carrier and non-common carrier status.[303] The SBA nor the Commission has defined a small business size standard for microwave services. For purposes of this IRFA, the Commission will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an

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[291] *Id.*

[292] https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517919.

[293] 13 CFR § 121.201, NAICS Code 517919.

[294] https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

[295] *See* 47 CFR Part 10, Subpart I.

[296] 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.

[297] Auxiliary Microwave Service is governed by Part 74 and Part 78 of Title 47 of the Commission's rules. 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.

[298] *See* 47 CFR Part 101, Subpart L.

[299] *See* 47 CFR Part 101, Subpart G.

[300] *See* 47 CFR Part 101, Subpart N.

[301] *See id.*

[302] *See* 47 CFR Part 101, Subpart Q.

[303] *See* 47 CFR §§ 101.533, 101.1017.

entity with no more than 1,500 persons is considered small.[304] Under that size standard, such a business is small if it has 1,500 or fewer employees.[305] U. S. Census Bureau data for 2012, show that there were 967 firms in this category that operated for the entire year. 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 the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our proposed action.[306]

31. According to Commission data in the Universal Licensing System (ULS) as of September 22, 2015 there were approximately 61,970 common carrier fixed licensees, 62,909 private and public safety operational-fixed licensees, 20,349 broadcast auxiliary radio licensees, 412 LMDS licenses, 35 DEMS licenses, 870 39 GHz licenses, and five 24 GHz licenses, and 408 Millimeter Wave licenses in the microwave services. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

32. *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.

33. 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.[307] 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, and that nearly all of these qualify as small businesses under the SBA's definition for "All Other Telecommunications."[308] 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.[309] For this category, U.S. Census data for 2012 show that

[304] 13 CFR § 121.201, NAICS Code 517210.

[305] 13 CFR § 121.201, NAICS Code 517210.

[306] *See* U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[307] We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

[308] 13 CFR § 121.201, NAICS Code 517919. Under this category, a business is small if it has $32.5 million or less in annual receipts.

[309] 13 CFR § 121.201, NAICS Code 517919.

there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than $25 million.[310] Thus, a majority of "All Other Telecommunications" firms potentially affected by our action can be considered small. 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.

D. Description of Projected Reporting, Recordkeeping, and other Compliance Requirements for Small Entities

34. The Notice seeks comment on potential rule changes that may affect reporting, recordkeeping and other compliance requirements. Specifically the Notice seeks comment on a specific NHPA submission process known as batching. Currently, a streamlined process for certain facilities associated with building out the Positive Train Control (PTC) railroad safety system is in effect whereby eligible facilities may be submitted to State Historic Preservation Officers (SHPOs) and through the Tower Construction Notification System (TCNS) in batches instead of individually. The Notice seeks comment on whether we should require SHPOs and Tribal Historic Preservation Officers (THPOs) to review non-PTC facilities in batched submissions as well. If adopted, this may require modifications to reporting or other compliance requirements for small entities and or jurisdictions to enable such submissions. We anticipate that batch rather than individual submissions will add no additional burden to small entities and may reduce the cost and delay associated with the deployment of wireless infrastructure. In addition, the Notice seeks comment on whether the current Section 106 process can be revised in a manner that would permit applicants to self-certify their compliance with our Section 106 process and therefore proceed once they meet our notification requirements, without requiring Commission involvement. This self-certifying process may also require additional reporting or other compliance requirements for small entities. Similarly, we anticipate that a self-certification process will reduce the cost and delay associated with the deployment of wireless infrastructure for small entities by expediting the current Section 106 process.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

35. The RFA requires an agency to describe any significant alternatives that it has considered in developing 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 or reporting requirements under the rule for 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 small entities.[311]

36. In this proceeding, the Commission seeks to examine regulatory impediments to wireless infrastructure investment and deployment, and how we may remove or reduce such impediments consistent with the law and the public interest. We anticipate that the steps on which the Notice seeks comment will help reduce burdens on small entities that may need to deploy wireless infrastructure by reducing the cost and delay associated with the deployment of such infrastructure. As discussed below, however, certain proposals may impose regulatory compliance costs on small jurisdictions.

37. The Notice seeks comment on potential ways to expedite wireless facility deployment. First, it seeks comment on certain measures or clarifications to expedite State and local processing of wireless facility siting applications pursuant to our authority under Section 332 of the Communications

310 https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

311 *See* 5 U.S.C. § 603(c).

Act. Specifically, the Notice proposes to adopt one or more of three mechanisms for implementing a "deemed granted" remedy for State and local agencies' failure to satisfy their obligations under Section 332(c)(7)(B)(ii) to act on applications outside the context of the Spectrum Act, including irrebuttable presumption, lapse of State and local governments' authority, and a preemption rule. The Notice also seeks comment on how to quantify a "reasonable period of time" within which to act on siting applications. Specifically, the Notice asks commenters to discuss whether the Commission should consider adopting different time frames for review of facility deployments not covered by Section 6409 of the Spectrum Act, by identifying more narrowly defined classes of deployments and distinct reasonable time frames to govern such classes. The Notice also seeks comment on what time periods would be reasonable (outside the Spectrum Act context) for any new categories of applications, and on what factors the Commission should consider in making such a decision. The Notice also seeks comment on whether the Commission should provide further guidance to address situations in which it is not clear when the shot clock should start running, or in which States and localities on one hand, and industry on the other, disagree on when the time for processing an application begins, and on whether there are additional steps that should be considered to ensure that a deemed granted remedy achieves its purpose of expediting review.

38. In addition, the Notice seeks comment on Moratoria. The Commission clarified in the *2014 Infrastructure Order* that the shot clock deadline applicable to each application "runs regardless of any moratorium."[312] The Notice asks commenters to submit specific information about whether some localities are continuing to impose moratoria or other restrictions on the filing or processing of wireless siting applications, including identification of the specific entities engaging in such actions and description of the effect of such restrictions on parties' ability to deploy network facilities and provide service to consumers. The Notice also proposes to take any additional actions necessary, such as issuing an order or declaratory ruling providing more specific clarifications of the moratorium ban or preempting specific State or local moratoria. The proposed measures should reduce existing regulatory costs for small entities that construct or deploy wireless infrastructure. We invite commenters to discuss the economic impact of any of these proposed measures on small entities, including small jurisdictions, and on any alternatives that would reduce the economic impact on such entities.

39. Second, the Notice undertakes a fresh look at our rules and procedures implementing NEPA and the NHPA as they relate to our implementation of Title III of the Act in the context of wireless infrastructure deployment. The Notice seeks comment on potential measures in several areas that could improve the efficiency of our review under the NHPA and NEPA, including in the areas of fees, addressing delays, and batched processing. Specifically, the Notice seeks comment on the costs, benefits, and time requirements associated with the historic preservation review process under Section 106 of the NHPA, including SHPO and Tribal Nation review, as well as on the costs and relative benefits of the Commission's NEPA rules. The Notice also seeks comment on potential process reforms regarding Tribal Fees, including fee amounts, when fees are requested, the legal framework of potential fee schedules, the delineation of Tribal Nation's geographic area of interest, and on potential remedies, dispute resolution, and possible negotiated alternatives.

40. The Notice then seeks comment on other possible reforms to our NHPA process that may make it faster, including time limits and self-certification when no response to a Section 106 submission is provided, on whether we should require SHPOs and THPOs to review non-PTC facilities in batched submissions, and if so, how such a process should work and what sort of facilities would be eligible, and finally, whether there are additional procedural changes that we should consider to improve the Section 106 review process in a manner that does not compromise its integrity.

41. Further, the Notice seeks comment on ways to improve and further streamline our environmental compliance regulations while ensuring we meet our NEPA obligations. Toward that end,

[312] *2014 Infrastructure Order*, 29 FCC Rcd at 12971, para. 265.

the Notice seeks comment on whether to revise the Commission's rules so that an EA is not required for siting in a floodplain when appropriate engineering or mitigation requirements have been met and on whether to expand the categories of undertakings that are excluded from Section 106 review, to include pole replacements, deployments in rights-of-way, and collocations based on their minimal potential to adversely affect historic properties. The Notice also seeks comment on whether we should revisit the Commission's interpretation of the scope of our responsibility to review the effects of wireless facility construction under the NHPA and NEPA. These potential changes to our rules and procedures implementing NEPA and the NHPA would reduce environmental compliance costs on entities that construct or deploy wireless infrastructure. These potential revisions are likely to provide an even greater benefit for small entities that may not have the compliance resources and economies of scale of larger entities. We invite comment on ways in which the Commission can achieve its goals, but at the same time further reduce the burdens on small entities.

42. Third, the Notice seeks comment on steps the Commission should take to develop a definitive solution for the Twilight Towers issue that will allow Twilight Towers to be used for collocations while respecting the integrity of the Section 106 process. Facilitating collocations on these towers will serve the public interest by making additional infrastructure available for wireless broadband services and the FirstNet public safety broadband network[313], as well as reduce the need for new towers, lessening the impact of new construction on the environment and on locations with historical and cultural significance, thereby reducing the associated regulatory burden, particularly the burden on small entities.

43. In particular, the Notice seeks comment on whether to treat collocations on towers built between March 16, 2001 and March 7, 2005 that did not go through Section 106 historic preservation review in the same manner as collocations on towers built prior to March 16, 2001 that did not go through review. Under this approach, collocations on such towers would generally be excluded from Section 106 historic preservation review, subject to the same exceptions that currently apply for collocations on towers built on or prior to March 16, 2001. We seek comment on whether allowing collocations without individual Section 106 review in these circumstances would rapidly make available a significant amount of additional infrastructure to support wireless broadband deployment without adverse impacts. The Notice also seeks comment on any alternative approaches and on the procedural vehicle through which any solution should be implemented. Finally, the Notice invites comment on what measures, if any, should be taken to facilitate collocations on non-compliant towers constructed after March 7, 2005, including whether we should pursue an alternative review process, or any other alternative approach, for any or all of these towers. These proposals would reduce the environmental compliance costs associated with collocations, especially for small entities that have limited financial resources. We invite commenters to discuss the economic impact of any of the proposals for the solution to the Twilight Towers issue on small entities, including small jurisdictions, and on any alternatives that would reduce the economic impact on such entities.

44. For the options discussed in this Notice, we seek comment on the effect or burden of the prospective regulation on small entities, including small jurisdictions, the extent to which the regulation would relieve burdens on small entities, and whether there are any alternatives the Commission could implement that could achieve the Commission's goals while at the same time minimizing or further reducing the burdens on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

45. None.

[313] *See* Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act), 47 U.S.C. § 1426 (c)(3) (providing that "the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing (A) commercial or other communications infrastructure; and (B) Federal, state, tribal, or local infrastructure.").

STATEMENT OF
CHAIRMAN AJIT PAI

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79

As a football fan, I'm still shaking my head at the Atlanta Falcons' epic collapse in the Super Bowl against the New England Patriots. As a regulator, what concerns me even more are the stories I've heard about the roadblocks to deploying wireless infrastructure that companies encountered leading up to the big game.

Tens of thousands of fans flooded Houston's NRG Stadium in February to send many terabytes of data in the form of texts, pictures, and videos. In order to handle this massive increase in network traffic, wireless carriers knew in advance they'd have to upgrade their infrastructure in order to boost network capacity in and around the stadium.

But meeting this commitment was much harder than it should've been. For instance, one company ended up paying thousands of dollars per utility pole for purposes of meeting historic preservation requirements. Now, it's hard to imagine that there is much to preserve, historically speaking, in the parking lot of NRG Stadium. After all, initial construction started in the early 2000s. Yet this company was forced to pay hundreds of thousands of dollars in total to complete this review—excessive costs that both delayed construction and were ultimately passed on to consumers.

This case isn't unique. I have heard time and time again how current rules and procedures impede the timely, cost-effective deployment of wireless infrastructure.

This will only become a bigger problem as our wireless networks evolve. A key feature of the transition from 4G to 5G is a change in network architecture. The future of wireless will evolve from large, macro-cell towers to include thousands of densely-deployed small cells, operating at lower power.

As networks evolve, our rules should too. Historic preservation and environmental review regulations designed for large macro-cell towers just don't make sense for small cells that can be the size of a pizza box. And cities shouldn't impose unreasonable demands or moratoria on wireless siting requests. This simply penalizes their own constituents who want better mobile service. To address these issues, we are seeking ideas for updating state, local, and Tribal infrastructure review to meet the realities of the modern marketplace.

If we do our job—if we can make the deployment of wireless infrastructure easier, consistent with the public interest—then we can help close the digital divide in our country. This is especially true for low-income and minority communities, which disproportionately rely on wireless service as their primary or sole on-ramp to the Internet. Working with our partners at the federal, state, local, and Tribal levels, I hope we can take another meaningful step towards bringing high-speed Internet access to all Americans and maintaining our nation's global leadership in the wireless space.

I'd like to thank the dedicated staff of the Wireless Telecommunications Bureau, including Paul D'Ari, Steve DelSordo, Angela DeMahy, Chas Eberle, Aaron Goldschmidt, Garnet Hanly, Leon Jackler, Don Johnson, Erica Rosenberg, Hilary Rosenthal, Jennifer Salhus, David Sieradzki, Michael Smith, Jill Springer, Jeff Steinberg, Joel Taubenblatt, Suzanne Tetreault, Peter Trachtenberg, and Mary Claire York. I would also like to thank David Horowitz, Andrea Kelly, Marcus Maher, Lee Martin, Linda Oliver, and Anjali Singh from the Office of General Counsel; Lyle Ishida and Dan Margolis from the Office of Native Affairs and Policy; and Michael Wagner from the Media Bureau. All of your efforts are much appreciated.

CONCURRING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79

We have all seen the statistics and read the headlines about the predicted explosive growth when it comes to the demand for wireless services. We are also very aware that consumers expect us to take our policy role seriously, when it comes to ensuring that the nation is prepared to meet this demand. Part of that preparation is ensuring that we can readily deploy the necessary infrastructure to support current, and future wireless offerings. 5G and IoT are just around the corner, and we are all eager to see how innovative wireless technologies will improve the way we live, work and play.

I have yet to come across a single community that wants to be left behind or overlooked as we embark on this new frontier. With that in mind, it is noteworthy that we all support efforts to streamline infrastructure deployment. But we must do so in a way that allows all sides to come to the table with a willingness to negotiate and work together.

As I have said before, approving applications to site antennas and other infrastructure, are difficult policy challenges for local governments. Many are overwhelmed by the increased volume of siting and permitting applications in a 4G and 5G world. Indeed, the localities considering siting applications vary immensely from geographic and demographic differences, to financial considerations, to differences in local law. They are on the front lines addressing the challenges of cost, complexity, and time faced by siting applicants, while answering and addressing the never ending questions, concerns and needs, of their communities.

We cannot afford to deal with any of these elements in a vacuum. Local officials and industry must work together to identify challenges, engage in coordinated efforts to update outdated regulations, and brainstorm deployment plans that are minimally disruptive to communities, and they must do so in an efficient and timely way. A collaborative local process and open dialogue between the public and private sector will minimize conflict, introduce predictability, and create incentives for information sharing and transparency.

I have met with industry representatives, as well as those from local governments, and I understand each of their grievances. Some localities charge fees that applicants view as excessive for permit applications, access to rights-of-way, and public structures, while others find themselves economically underwater after the negotiations are complete. And while it is important that municipalities are properly compensated for use of their rights-of-way and public structures, a balanced and equitable system would ensure that those fees paid by the companies are both fair and reasonable.

Siting applicants have themselves been criticized for submitting incomplete applications, which some localities point to as a source of delay in processing permits. That must be appropriately addressed. Some applications lack field engineering expertise, propose locations that are clearly not viable, or are submitted by entities that lack clear legal authority to do so. That cannot be ignored. Review of incomplete or inadequate applications, adds to the costs, burdens, and time imposed on local governments, and impacts the ability of localities to timely review properly completed applications. This cannot be denied. Applicants could help speed the review process by ensuring that their submissions are complete and reflect all necessary underlying work and municipalities must recognize that infrastructure builds enable, empower and improve their communities.

I think it is important to acknowledge that there are actions that can be taken on both sides of the aisle, and I thank my colleagues for agreeing to my requests to seek comment on actions applicants can take to help streamline the process, as well as to seek comment on the "deemed granted" approach, rather than proposing it outright.

The *NPRM* also proposes to take a "fresh" look at our rules implementing the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA), and while I am not opposed to reviewing our rules, we must be careful not subvert statutory intent, as we update our rules to reflect the evolving wireless landscape.

I encourage all parties to fully participate in this proceeding, and propose creative solutions that will allow us all to work together towards our common goal. In the end, it is the American consumer who will benefit from our efforts. They are ever most in mind when I make decisions, as they should be in yours.

Many thanks to the hard-working staff of the Wireless Telecommunications Bureau for your work on this item.

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79

I am pleased to support today's notice of proposed rulemaking and notice of inquiry seeking comment on potential ways to overcome some of the barriers being put in front of wireless infrastructure siting. Since I joined the Commission, I have engaged on this topic with many interested parties and discussed the importance of facilitating network deployments in many fora. The Commission can continue to release spectrum into the marketplace, but wireless services only become a reality if the infrastructure is in place to deliver them to the American consumer. While today's notice is narrower in scope than I would have liked, I recognize that stakeholders commented on several issues in response to last December's Wireless Telecommunications Bureau public notice.[1] Hopefully, the Commission will also consider those ideas expeditiously.

I have heard some argue that there should be more outreach to stakeholders before taking today's step, but I must respectfully disagree. While conversations can be productive, the Commission, in an open and transparent fashion, should obtain all the facts and ask the difficult questions to holistically consider any barriers placed before wireless infrastructure siting. The Commission cannot continuously hear accounts of deployment hurdles and sit idly by. If this generates the need for preemption, I have no hesitation to use authority provided by Congress to get new wireless services deployed.

Take, for instance, the tortured history of twilight towers, the resolution of which I have been urging since I came to the Commission and which has been outstanding since 2005. Twelve years later, there has been a lot of talk, but no action. It makes no sense to have towers upon which no collocations can occur. Facilities are needed as industry participants build out newly available bands and densify their systems. This issue must be resolved once and for all, and immediately.

I have also met with many people about the delays and expense of seeking the necessary local permitting and tribal approvals. This has been especially problematic for small cell systems, which should not require the same review and fees as a macro tower. Many localities and tribes are, undoubtedly, acting in good faith, and I thank them for their cooperation in approving the deployments necessary to provide Americans with the wireless services they demand, but bad actors are ruining it for everyone. Infrastructure siting is not a means to increase revenues; and delaying application reviews, imposing de facto moratoria, preventing densification and upgrades of networks, among other tactics, is not acceptable.

As we go forward, I am interested in hearing the suggestions of all interested parties and, as always, I will consider all views before making a final decision. I will review with particular interest submissions regarding our statutory authority to impose a deemed granted remedy under section 332. While I like the idea, the wording of the statute may complicate our ability to bypass the judicial system. Further, I have concerns about one petitioner's suggestion that the Commission set a fee schedule or resolve disputes with tribes. I generally do not believe this is the Commission's role.

I appreciate that the Chairman incorporated my requested edits, such as providing additional information about alternative twilight tower solutions, adding a statement that twilight towers should not

[1] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, 31 FCC Rcd 13360 (WTB 2016).

be subject to any type of enforcement action or penalties, discussing potential improvements that we can make to the Commission's Tower Construction Notification System and our internal processes, seeking comment on whether the current Commission forms are sufficient to provide all the required upfront information for tribal review, and exploring whether specific types of collocations, such as those on existing structures with no ground disturbance or indoors, should be exempt from historic preservation and environmental reviews, amongst others.

Finally, I thank the staff for their efforts on this item and for all the work to come on what is one of the most important proceedings before the Commission.

About the Panelists…

Gregory D. Meese is a Principal of Price Meese Shulman & D'Arminio, P.C. in Woodcliff Lake, New Jersey, where he concentrates his practice in zoning and land use. He secures governmental approvals for commercial, institutional, industrial and residential developments in New Jersey and New York, litigates significant environmental and land use issues in state and federal courts, and counsels clients in matters of compliance with state and federal land development regulations. He also negotiates and drafts leases and contracts

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern District of New York, the Second and Third Circuit Courts of Appeals and the United States Supreme Court, Mr. Meese is a former Chair of the Board of Directors of the New Jersey State Bar Association Land Use Law Section, counsel to the Builders Association of Northern New Jersey and Co-chair of the Environmental Law Section of the Bergen County Bar Association. He serves on the Board of Directors of the New Jersey Wireless Association and is Co-Chair of its Government Affairs/Education Committee.

Mr. Meese is the Editor of the *Land Use Citator*, an annual compendium of case law and statutory and regulatory enactments that impact land development and property rights in New Jersey published by ICLE. He also authored a chapter on the zoning of telecommunications facilities for Matthew Bender's national zoning treatise *Zoning and Land Use Controls*, and was the Special Editor of the June 1999 issue of *New Jersey Lawyer Magazine* which focused on telecommunications and utility law issues. Listed in Who's Who in American Law, he has lectured extensively on land use, telecommunications and environmental law matters.

Mr. Meese received his B.A. from Rutgers University and his J.D. from the American University, Washington College of Law.

Anthony F. Suppa, Jr., P.E. is a licensed Professional Engineer and Project Manager, Third Party Attachments, for Public Service Electric and Gas Company (PSE&G) in Newark, New Jersey. He is an experienced manager/department head with more than 30 years of experience in the fields of civil engineering and telecommunications engineering. He is Project Manager for third party attachments for wireless attachments on PSE&G electric transmission towers and other telecommunication structures on PSE&G property, and is responsible for leading, managing and directing the third-party overhead transmission wireless communication attachment initiative.

Mr. Suppa is a Licensed Professional Engineer and Certified Municipal Engineer in New Jersey. He is a member of the Board of Trustees of the New Jersey Wireless Association and Chair of the Professional Service Committee of the Association.

Mr. Suppa received his B.S. from the Newark College of Engineering. He has 24 Continuing Professional Competency (CPC) credits.

Dominic Villecco is a 36-year veteran of the telecommunications industry and the founder and president of V-COMM, LLC in Cranbury, New Jersey. As such, he has led the organization from

two employees to more than 50, with two main offices on the East Coast. Prior to founding V-COMM in 1995, Mr. Villecco led all engineering efforts for Comcast Cellular Communications, Inc. and Comcast International Holdings. As former Director of Engineering for American Cellular Network Corporation (AMELL), he helped design the first regional cellular network in the United State with proprietary automatic call delivery among independent carriers.

A qualified expert witness in telecommunications engineering in New Jersey, New York, Pennsylvania, Delaware and Michigan, Mr. Villecco previously served as Vice Chair of the Board of Advisors for Drexel University's Electrical and Computer Engineering Department and as Chair of the Technical Subcommittee for APCO Region 28 and its 700 MHz initiatives. He is recognized as a telecommunications expert by the FCC and US Department of Justice, and serves as Vice President of the Board of Trustees and Chair of the Public Safety Committee of the New Jersey Wireless Association (NJWA). In 2017 he received the NG911 Awareness Award from the NG9-1-1 Institute.

Mr. Villecco attended Rutgers University and received his BSEE in Electrical Engineering from Drexel University.