Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

REPLY COMMENTS OF THE FREE STATE FOUNDATION*

I. Introduction and Summary

These reply comments are submitted in response to the Commission's request for public comments regarding the Petition filed by Mobilitie, LLC, and streamlining small cell infrastructure deployment by improving wireless siting policies. The purpose of these reply comments is to highlight important actions that the Commission can take to accelerate 4G wireless network "densification" and pave the way for 5G deployments.

Densification of 4G wireless networks by placement of multiple small cells within close proximity in high data traffic areas enables faster speeds, increased capacity, and improved reliability. 5G wireless networks, which will also require dense placement of small cells, has the potential to offer speeds that are 10 times higher than 4G. Indeed, 5G is expected to become a dynamic economic driver, with $275 billion in projected industry infrastructure investments leading to the creation of 3 million jobs and boosting GDP by

* These reply comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

$500 billion. Even if these estimates turn out to be a bit high, there is no gainsaying that the economic benefits from small cell deployment will be enormous.

An extraordinarily high volume of small cells will be needed to achieve 4G densification and future 5G deployments – between 10 and 100 times as many antenna locations as there are for today's networks. Future demands require efficient permit processing for infrastructure siting on public property, including public rights-of-way.

The initial comments in this proceeding describe numerous instances of arbitrary and discriminatory restrictions, lengthy delays, and steep charges assessed by local governments reviewing wireless infrastructure siting applications. Unjustifiable restrictions, dragged-out reviews, and exorbitant fees and other uneconomic charges have slowed down or thwarted the deployment of infrastructure upgrades in many instances.

The Commission can accelerate 4G densification and future 5G deployments by proactively issuing declaratory rulings that preempt problematic local government rules that clearly violate statutory provisions or the Commission's regulations. Preemption of specific local rules can eliminate barriers to infrastructure deployment at much less cost and delay than litigation. The Commission should make clear that its Section 253(d) preemption authority applies when local governments consider applications for placement of wireless small cell infrastructure on rights-of-way. And the Commission should declare its willingness to exercise preemptive authority pursuant to Section 332(c)(7) and its general powers under Sections 5 concerning improper local governments restrictions on small cell and other wireless infrastructure on public or private property.

The Commission can also accelerate 4G densification and future 5G deployments by issuing a Declaratory Ruling that clarifies several respects in which Sections 253(a) and 332(c)(7) apply to local government regarding applications for wireless infrastructure siting and collocation:

- Clarify that Sections 253 and 332(c)(7) apply with respect to siting applications for wireless infrastructure, including small cells. That is, Section 253 applies to all telecommunications infrastructure siting on public rights-of-way. Section 332(c)(7) provides additional requirements for wireless infrastructure siting.

- Clarify that Sections 253's provisions concerning cell siting applications by "telecommunications service providers" includes providers of wireless infrastructure, including small cells. The underlying purpose for such facilities is to serve subscribers with wireless services.

- Clarify that Sections 253 and 332(c)(7) apply to "mixed-use" facilities that provide any type of telecommunications services as well as mobile broadband services. This would ensure consistent policy if the Commission reclassifies mobile broadband services as "information services."

- Clarify that small cell applications are subject to the Commission's shot clocks for siting and modifications under Sections 332(c)(7) and 6409. The Commission should consider reducing shot clock timeframes for local governments to act on applications to 60 days for collocations and 90 days for other sites, and also consider deeming applications granted when not acted on within the timeframes.

- Clarify factors for determining when state or local government actions are not "competitively neutral and nondiscriminatory" under Sections 253(a) and 332(c)(7), including when wireless infrastructure siting applicants are subject to more burdensome regulations than other providers using similar facilities.

- Clarify standards regarding prohibitions against local government rules or actions that "prohibit or have the effect of prohibiting" telecommunications services under Section 332(c)(7). Local government moratoria on cell siting and decision-making on applications based on business need or type of technology should be considered actions that "materially inhibit" or pose "substantial barriers" to providing wireless service.

- Clarify that bans on small cell "batch" applications "materially inhibit" or pose "substantial barriers" to providing wireless service. Batch applications should at least be presumptively permissible. And batch applications should at least presumptively be subject to the same shot clock timeframes as other facilities.

- Clarify that local governments must disclose application fees and charges they assess for siting wireless infrastructure access to public rights-of-way and other public property. Access to such information will help spur wireless infrastructure siting applications and provide ways to ensure accountability.

- The Commission should also consider clarifying limits on excessive fees and rates charged for wireless infrastructure siting. Section 253(c)'s provision that local governments may "require fair and reasonable compensation" for use of rights-of-way provides one ostensible basis for prohibiting excessive costs. Excessive fees and rates charged against wireless infrastructure and other telecommunications providers that bear no relation to a local government's own administrative and managerial costs "materially inhibit" or pose "substantially barriers" to the provision of such services.

Comments filed by state and local governments address local government authority in making telecommunications infrastructure siting decisions. Federalism is unmistakably part of the delicate balance that Congress struck with the need for robust interstate telecommunications services. Yet in striking that balance, Congress conferred on the Commission the responsibility to clarify, as needed, particulars of what Sections 253(a) and 332(c)(7) requires of local governments considering telecommunications infrastructure siting applications. To bring further clarity to infrastructure siting requirements, the Commission need not settle legal metaphysical distinctions regarding the proprietary/governmental distinction. It should ensure that its Declaratory Ruling tracks with the text and underlying purposes of Sections 253 and 332(c)(7).

The record in this proceeding demonstrates the need for further clarification of baseline standards for small cell infrastructure siting. That need is heightened by the volume and critical importance of small cell infrastructure siting to achieve 4G densification and future 5G infrastructure deployments. A declaratory ruling that further clarifies how Sections 253(a) and 332(c)(7) apply to local government actions regarding applications for wireless infrastructure siting would constrain arbitrary arbitrariness and

obstructionism. If properly crafted, such a ruling would remove barriers to infrastructure siting that is crucial to carrying on advanced interstate communications while maintaining respect for local government authority.

II. Next Generation Wireless Services Depend Upon Small Cells, but Deployment is Being Inhibited by Local Government Actions Concerning Facilities Siting

Densification of 4G wireless networks by placement of multiple small cells within close proximity in high data traffic areas enables faster speeds, increased capacity, and improved reliability.[1] 5G, which is still being developed and in trial stages, has the potential to offer speeds that are 10 times higher than 4G.[2] In fact, 5G is expected to become a dynamic economic driver. It is projected that industry's $275 billion in 5G-related investments will lead to the creation of as many as 3 million jobs and boost GDP by as much as $500 billion.[3]

Dense placement of small cells will also be necessary in order to successfully deploy 5G networks.[4] Indeed, an extraordinarily high volume of small cells will need placement to achieve 4G densification and future 5G deployments – between 10 and 100 times as many antenna locations as there are for today's 3G and 4G networks.[5] The Commission has previously observed that extensive small cell placement efforts are already underway.[6] Deployment of wireless infrastructure needed to realize the

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[1] Comments of Verizon, at 2, 5-6.
[2] Deloitte, "Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation" (January 2017), at 3, at: http://www.ctia.org/docs/default-source/default-document-library/deloitte_20170119.pdf.
[3] Accenture Strategy, "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities" (January 2017), at 1. *See also* Deloitte, "Wireless Connectivity."
[4] Accenture Strategy, "Smart Cities."
[5] *Id.* at 1.
[6] *See, e.g.*, FCC, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless,

potentialities of next-generation wireless services will necessarily require efficient and streamlined permit processes for wireless infrastructure siting on public property, including public rights-of-way.[7]

However, comments filed in this proceeding provide ample record of numerous arbitrary and discriminatory restrictions, lengthy delays, and steep charges by local governments concerning wireless infrastructure siting and colocation applications.[8] (Hereinafter, "siting" will be used to collectively refer to erecting new antennae and base-stations as well as co-locating infrastructure on existing cell sites.)

In its *Wireless Competition Reports*, the Commission has repeatedly recognized that "obtaining the necessary regulatory and zoning approvals from state and local authorities" is one of the most "significant constraints faced by wireless services providers that need to add or modify cell sites."[9] The evidence already submitted in this proceeding is consistent with earlier evidence of local government constraints that prompted the Commission's 2009 and 2014 *Shot Clock Orders*.[10] Although some comments claim that there is no problem or reason for the Commission to act,[11] such

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Including Commercial Mobile Services, Nineteenth Report, WT Docket No. 16-137 (September 23, 2016), at 52, ¶ 69.

[7] *See* Accenture Strategy, "Smart Cities," at 13.

[8] Comments of AT&T, at 7-20; Comments of Competitive Carriers Association, at 6-8; Comments of Crown Castle International Corp., at 10-24; Comments of CTIA, at 12-19; Comments of Lightower Fiber Networks, at 3-12; Comments of T-Mobile, at 6-8; Comments of Sprint, at 13-30; Comments of Wireless Infrastructure Association, at 5-22; Comments of Verizon, at 7-10 and Appendix A.

[9] *See, e.g.*, FCC, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Sixteenth Report, WT Docket No. 11-186 (March 21, 2013), at 209, ¶ 328. Other Reports contain similar observations.

[10] FCC, Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238, Report and Order (October 28, 2014), at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-153A1.pdf; FCC, Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling, WT Docket No. 08-165 (November 18, 2009), at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf.

[11] *See, e.g.*, Comments of NARUC, at 4-7; Comments of National League of Cities, et al., ("NLC)", at 6-8.

claims are not persuasive in light of the record and the Commission's own observations. The Commission has a solid evidentiary basis for taking decisive steps to clear away barriers to small cell siting and accelerate next-generation wireless network deployments.

III. Preempting Particular State or Local Government Requirements That Violate Sections 253 and 332(c)(7) Will Remove Cell Siting Barriers

The Commission can accelerate 4G densification and future 5G deployments by proactively issuing declaratory rulings that preempt problematic local rules or parts of rules that clearly violate statutory terms or the Commission's regulations. The Commission should make known its availability to expeditiously consider petitions filed by parties seeking Declaratory Rulings to preempt local government rules that allegedly violate federal statutes or the Commission's rules. It should also be willing to initiate proceedings on its own accord when local restrictions come to the Commission's attention. Preemption of specific local rules or provisions can eliminate barriers to infrastructure deployment and with less costs and delays than litigation in federal court. Such declaratory rulings would also establish agency precedents to guide local governments reviewing wireless infrastructure siting applications.

Section 253(d) expressly provides authority for the Commission, after notice and public comment, to preempt enforcement of state or local statutes, regulations, or legal requirements to the extent they are contrary to subsections (a) and (b).[12] That is, the Commission may preempt state or local government actions regarding cell siting applications that are not competitively neutral or that prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications services. In this proceeding, the Commission should make clear that this authority applies when local

[12] 47 U.S.C. § 253(d).

governments consider applications for placement of wireless small cell wireless infrastructure on public rights-of-way.

Pursuant to the limits placed on state and local government authority over wireless infrastructure siting decisions by Section 332(c)(7)(B) and the Commission's general powers under Section 5 to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions,"[13] the agency almost certainly has authority to accept petitions, initiate proceedings, and issue declaratory rulings that preempt local government decisions involving wireless infrastructure siting that violate Section 332(c)(7). That is, the Commission can preempt local government actions that "unreasonably discriminate among providers of functionally equivalent services," or "prohibit or have the effect of prohibiting the provision of personal wireless services."[14] And the Commission can likewise preempt local government failure to act "within a reasonable period of time after the request is duly filed."[15] The Commission should also make clear that this authority applies when local governments consider applications for placement of small cell infrastructure on public or private property.

IV. Clarifying Requirements Concerning Local Government Actions on Wireless Infrastructure Siting Will Accelerate Next-Generation Network Deployments

The Commission can accelerate 4G densification and future 5G deployments by issuing a Declaratory Ruling that clarifies several respects in which Sections 253(a) and 332(c)(7) apply to local government rules, actions, and inactions regarding applications for wireless infrastructure siting. In particular, the Commission should:

[13] 47 U.S.C. § 154(i).
[14] 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II).
[15] 47 U.S.C. § 332(c)(7)(B)(ii).

- Clarify that Sections 253 and 332(c) apply with respect to siting applications for small cells on public rights of way, including government-owned utility poles. The Commission should expressly recognize that the two provisions overlap, and are not mutually exclusive. The limits set out in Section 332(c)(7)(B) provides protections for wireless infrastructure siting applicants in addition to those provided in Section 253.[16]

- Clarify that Sections 253(a)'s provisions concerning cell siting applications by "telecommunications service providers" includes providers of wireless infrastructure, including small cells.[17] In many instances, wireless infrastructure providers make their facilities available to wireless carriers who serve end-user subscribers. In other instances, wireless carriers own the underlying infrastructure. From a policy standpoint, it makes no sense to treat the owners of such facilities differently depending on whether they are vertically integrated. In either instance the underlying purpose of such facilities is the same – serving end-user subscribers with wireless services.[18]

- Clarify that Sections 253(a) and 332(c)(7) apply to so-called "mixed-use" facilities – those providing wireless or any other telecommunications service as well as mobile broadband services. This would ensure that the Commission's policy would remain in place in the event that it decides to reclassify mobile broadband services as "information services" once more.[19]

- Clarify that small cell applications are subject to the Commission's shot clocks for siting and modifications under Sections 332(c)(7) and 6409. The Commission should also consider the proposals made in comments to reduce shot clock timeframes pursuant to Sections 332(c)(7) to 60 days for collocations, including small cells, and 90 days for other sites.[20] And it should finally consider, as comments have suggested, deeming applications granted when local governments fail to act within the established timeframes.[21] A "deemed granted" provision would make shot clocks more effective in spurring local governments to render decisions and also likely avoid much protracted litigation.

- Clarify factors for determining when state or local government actions are not "competitively neutral and nondiscriminatory" under Sections 253 and 332(c)(7). In particular, the Commission could clarify that singling out providers of wireless facilities for more burdensome regulations that do not apply to other providers using similar facilities in rights-of-way is not "competitively neutral" or "nondiscriminatory."[22]

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[16] Comments of Verizon, at 22.
[17] Comments of T-Mobile, at 35-36.
[18] For a contrary view, *see* Comments of NARUC, at 11-12.
[19] Comments of T-Mobile, at 33.
[20] Comments of CTIA, at 35-38; Comments of T-Mobile, at 23; Comments of Verizon, at 23-26.
[21] Comments of AT&T, at 25-27; Comments of CTIA, at 39-43; Comments of T-Mobile, at 25-28.
[22] Comments of AT&T, at 4; Comments of T-Mobile, at 28-30.

- Clarify standards regarding prohibitions against local government actions that "prohibit or have the effect of prohibiting" telecommunications services under Section 332(c)(7). The Commission should declare that those provisions bar local government actions that "materially inhibit" or pose "substantial barriers" to siting of wireless infrastructure, including small cells. Some federal courts have adopted similar standards in decisions regarding denials of cell siting applications.[23] Other courts have ruled local governments are merely barred from creating a "substantial gap" in wireless service.[24] The Commission should clarify that a wireless siting applicant need not demonstrate an actual prohibition of all wireless services in order to prove a violation.[25] Additionally, the Commission should declare that moratoria on cell siting applications and decision-making based on business need, type of facilities technology, or other business judgment matters that are unrelated to health and public safety concerns constitute local government actions that "materially inhibit" or pose "substantial barriers" to providing wireless service.[26]

- Clarify that bans on small cell "batch" applications "materially inhibit" or pose "substantial barriers" to providing wireless service, or that batch applications are at least presumptively permissible.[27] And small cell batch applications should at least presumptively be subject to the same shot clock timeframes as other siting or colocation applications.[28]

- Clarify that local governments must disclose the application and fees and charges they assess for siting wireless infrastructure access to public rights of way and other public property.[29] This is consistent with the language of Section 253(c) regarding disclosure of compensation paid for use of public rights-of-way. Transparency and access to such information will help spur wireless infrastructure siting applications and provide ways to ensure accountability.

- The Commission also should consider declaring that Section 253(c)'s provision that local governments may "require fair and reasonable compensation" for use of rights-of-way prohibits excessive costs and requires local governments to establish their own cost-based rate and fee formulas.[30] In addition, it should consider declaring that excessive fees and rates charged against wireless infrastructure and other telecommunications providers that bear no relation to a local government's own administrative and managerial costs "materially inhibit"

[23] *See* Comments of T-Mobile, at 18-19; Comments of Verizon, at 12, 20-22.
[24] *See* Comments of Verizon, at 21-22.
[25] Comments of T-Mobile, at 18.
[26] Comments of AT&T at 4; Comments of T-Mobile, at 21-22.
[27] Comments of Verizon, at 27. *See also* Accenture Strategy, "Smart Cities," at 14.
[28] Comments of Verizon, at 27.
[29] Comments of NLC, at 26-27; Comments of T-Mobile, at 15; Comments of Verizon at 18.
[30] 47 U.S.C. § 253(c); Comments of AT&T, at 22-23; Comments of CTIA, at 28-33; Comments of T-Mobile, at 13; Comments of Verizon, at 14-15.

or pose "substantially barriers" to the provision of such services.[31] Certainly, local governments should not be able to impose fees or charges on a non-neutral or discriminatory basis.[32] At the very least, the Commission should consider prohibiting local governments from charging wireless infrastructure providers for rights-of-way used based on providers' revenues.[33]

V. The Commission Can Clarify Requirements Concerning Wireless Infrastructure Siting Consistent with Principles of Federalism and Local Decision-making

Comments filed by state and local governments and their associations express or imply the ultimate authority of local governments in making telecommunications infrastructure siting decisions – including rate charges.[34] This authority is rooted in principles of federalism and reflected in limitations on the Commission's preemptive authority in Sections 253 and 332(c)(7). Federalism is unmistakably part of the delicate balance that Congress struck with the need for robust interstate telecommunications services. Yet in striking that balance, Congress conferred on the Commission the responsibility to clarify, as needed, particulars of what Sections 253(a) and 332(c)(7) requires of local governments when considering telecommunications infrastructure siting applications. Exercise of preemptive authority, even if limited, is nonetheless an aspect of that responsibility, based on the Commission's policy judgments regarding what actions it can reasonably take to provide relief from effective prohibitions on the provision of telecommunications services.

Some local governments insist telecommunications infrastructure siting permitting – especially fees and rates for using rights-of-way – involve governments' proprietary capacity and cannot be preempted. Yet there is an unmistakable regulatory

[31] 47 U.S.C. § 253(a); Comments of Verizon at 14.
[32] Comments of T-Mobile, at 14.
[33] *See* Comments of Verizon, at 16.
[34] Comments of NLC, at 17-25; Comments of NARUC, at 6-7.

aspect to permit processing.[35] The unique nature of siting decision-making is reflected in Sections 253 and 332(c)(7), by virtue of the limits it places both on the permitting process and on federal preemption. The Commission need not settle legal metaphysical distinctions regarding the proprietary/governmental distinction. It should ensure that its ruling tracks with the text and underlying purposes of Sections 253 and 332(c)(7).

Undoubtedly, not all local governments have obstructionist policies or review every individual wireless infrastructure siting application in a capricious manner. But the record already amassed in this proceeding demonstrates the need for further clarification of baseline standards to prevent obstructionist policies and capricious decision-making where it does exist. Indeed, the need for clarification is heighted by the volume and critical importance of small cell infrastructure siting that is necessary to achieve 4G densification and future 5G deployments. A declaratory ruling that clarifies how Sections 253(a) and 332(c)(7) apply to local government actions regarding applications for wireless infrastructure siting, as described in Section IV, would constrain arbitrary and obstructionist actions by local government. Nonetheless, such a ruling could also be fashioned in a manner that is respectful of local government authority.

VI. Conclusion

For the foregoing reasons, the Commission should issue a Declaratory Ruling consistent with the views expressed herein.

Respectfully submitted,

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[35] Comment of League of Arizona Cities and Towns, et al., at 3-10.

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