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

In the Matter of	)	
	)	
Build America: Eliminating Barriers to Wireless Deployments	)	WT Docket No. 25-276
	)	

COMMENTS OF
ARLINGTON, TX; BELLEVUE, WA; BOSTON, MA; BOWIE, MD; CARMEL-BY-THE-SEA, CA; COACHELLA VALLEY WATER DISTRICT; CULVER CITY, CA; DALLAS, TX; DISTRICT OF COLUMBIA; FONTANA, CA; GAITHERSBURG, MD; HENDERSON, NV; HILLSBOROUGH, CA; HOWARD COUNTY, MD; MARIN COUNTY, CA; MONTEREY, CA; MONTGOMERY COUNTY, MD; ONTARIO, CA; PALO ALTO, CA; PIEDMONT, CA; PISCATAWAY, NJ; PLANO, TX; TEXAS COALITION OF CITIES FOR UTILITY ISSUES; UPLAND, CA; ANN ARBOR, MI; MICHIGAN COALITION TO PROTECT PUBLIC RIGHTS-OF-WAY; MICHIGAN MUNICIPAL LEAGUE; AND MICHIGAN TOWNSHIPS ASSOCIATION

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I. INTRODUCTION AND SUMMARY

The twenty municipalities, four associations representing nearly 2,000 members, three counties, and one special district from eight states and the District of Columbia listed above, as members of the Local Community Wireless Coalition (Local Communities or Coalition),[1] respectfully file these opening comments representing a wide range of local government experiences in response to the *Notice of Proposed Rulemaking* (NPRM)[2] in the above-captioned docket.[3]

The Commission's NPRM begins with a significant omission: it completely ignores that the legal rug has been pulled out from beneath its existing guidance and rules governing

[1] Association descriptions are listed in the appendix.

[2] *Build America: Eliminating Barriers to Wireless Deployments*, Notice of Proposed Rulemaking, WT Docket No. 25-276, FCC 25-67, 90 Fed. Reg. 55066 (Dec. 1, 2025) (*NPRM*).

[3] The Coalition files pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's (Commission) rules. 47 C.F.R. §§ 1.415, 1.419.

preemption of local authority on wireless siting. The law underlying the Commission's wireless siting rulings are now in question given the recent Supreme Court decisions such as *Loper*[4] and *McLaughlin*[5] that reduce judicial deference to agencies to its modern nadir. Instead of expanding existing rules or codifying old guidance, the Commission should be re-thinking its whole approach to align with current law and the limits of its own jurisdiction. The federal courts have interpreted the Sections 332 and 253 of the Communications Act in a manner inconsistent with the Commission's prior conclusions and the Commission no longer has the freedom to act inconsistently with their opinions. The Commission must retract or reconsider its existing rules and guidance—not expand them. Everything, including shot clocks and small cell rules should be reanalyzed.

The Commission must now justify its prior actions under the new standard, which it cannot. And it certainly cannot extend the flawed findings more broadly; the terms of Sections 332 and 253 do not apply as the Commission wishes. Even if the Commission's *Small Cell Order*[6] were to warrant continued deference (which it does not), law governing non-small cell deployments has been well developed for many years in the federal courts. That case law is now binding on the Commission. Existing preemption doctrine and the statute's legislative history also do not support the Commission's current rules or its proposals.

Local government authority over land use is critical to protect the health and welfare of local communities and private property values. The local, democratically accountable, zoning

[4] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (overruling *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

[5] *McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp.*, 606 U.S. 146 (2025).

[6] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 9088, at ¶ 9 (2018), *aff'd in part and rev'd in part, City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020) (*Small Cell Order*).

framework ensures that wireless infrastructure is deployed efficiently while maintaining public safety and the unique aesthetic character cherished by each community. The Commission's proposals to preempt the use of conditional use permits (CUPs) reveals its lack of expertise and knowledge of land use law and policy, an area of local control it has no authority to regulate.

Given the flawed basis of the current rules, the Commission certainly cannot extend its particularized findings with respect to new small cell deployments to all wireless deployments. The Commission impermissibly proposes to extend some of the rules adopted in the *Small Cell Order* to facilities that do not qualify as small wireless facilities, even though virtually all of the Commission's *Small Cell Order* was justified by the supposedly unique attributes of small cell technology.

In considering regulation of fees, the Commission must take into account that local governments can serve two distinct roles vis-à-vis wireless facility placement: (1) as zoning regulators; and (2) as landlords. The Commission ignores that local government fees charged in the first capacity are typically limited to costs. Rent charged by local government landlords should not be regulated at all; it should be set by the market, like any other property owner's.

The Commission's proposed "rocket docket" would subvert the law. The Commission cannot resolve disputes under Section 332, which puts remedies firmly in the hands of the courts. Federal courts addressing the issue have found Section 332 provides the exclusive vehicle to challenge individual permitting decisions; Section 253 can only be used for facial challenges to generally-applicable laws. Section 253(d) is also limited in its scope. The Commission should not adopt any additional procedures to implement Section 253(d), and if the Commission chooses to pursue this goal, it requires more extensive rulemaking to develop it, including considering the Commission's existing formal complaint procedures.

The Commission should not adopt its proposals under Section 6409 that would protect conditions that disguise—but not ones that hide—an existing facility. It should also reject proposals that would eliminate certain protections for aesthetic siting conditions. The proposals would deprive wireless companies and local communities of opportunities to find mutually acceptable solutions and would undermine the purpose of Section 6409.

Local Communities support new proceedings to thoroughly review the latest scientific data and update the Commission's current guidelines for exposure to RF radiation. Thirty-year-old standards and a court remand that remains unaddressed by the Commission do little to quell public concerns about the issue.

II. THE COMMISSION IS PROPOSING TO BECOME A NATIONAL ZONING BOARD CONTRARY TO LAW AND POLICY.

The Commission must revise and reconsider its existing interpretations of Sections 332 and 253 given the end of *Chevron* deference and the contrary and binding rulings of the federal courts. Its unjustified proposals to expand on those rulings are not authorized by statute, and would also be bad policy.

A. The Commission must retract or revise, and not extend, rules inconsistent with current law, particularly after the demise of *Chevron* deference and *McLaughlin.*

As in its companion docket considering wireline deployments,[7] the Commission ignores that the expansive view of federal agency power is no longer current law—making no mention of *Chevron* or *Loper* at all.[8] Now that the Supreme Court has overruled the *Chevron* doctrine[9] and

[7] *Build Am.: Eliminating Barriers to Wireline Deployments*, WC Docket No. 25-253, Notice of Inquiry, FCC 25-66 (rel. Sept. 30, 2025) (*Wireline NOI* or *NOI*).

[8] Arlington, TX *et al*., Reply Comments, WC Docket No. 25-253 at 3-4 (filed Dec. 18, 2025) (*Local Community Wireline NOI Reply Comments*).

[9] *Loper*, 603 U.S. 369.

empowered federal district courts to render their own views of the law,[10] the Commission can no longer count on the validity of its prior decisions. *Loper* calls into question any action relying on *Portland*[11] and *Arlington*,[12] the two leading cases upholding the Commission's authority to interpret the law as to local government preemption in wireless siting, both of which relied heavily on *Chevron*. The Commission, instead of expanding the application of rules that rely on questionable legal footing, must re-justify or repeal its current policies and rules as to shot clocks and small wireless facilities because they would no longer withstand court review under current standards.

1. Effective prohibition must mean an actual, not theoretical, prohibition.

As is now clear, the Commission can no longer claim authority to overrule federal court decisions interpreting the terms "prohibit or have the effect of prohibiting" in Sections 332 and 253. The Commission previously revised its interpretation of that standard applying a "materially inhibit" standard to small cell technology—but only small cell technology—in its *Small Cell Order*. Although the Ninth Circuit upheld the Commission's new interpretation as to small cell technology based on mandatory deference under *Chevron*,[13] that holding no longer will bind courts reviewing the new docket underway because of both *Loper* and *McLaughlin*. As the Coalition lays out here, the case law regarding macro towers and non-small cell technology is clear, and the

[10] *McLaughlin*, 606 U.S. 146.

[11] *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020) (*Portland*).

[12] *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290 (2013). In his *Loper* concurring opinion, Justice Gorsuch cited the Court's *Arlington* decision as a clear instance of *Chevron* overreach: "[U]nder the *Chevron* regime, . . . executive agencies may effectively judge the scope of their own lawful powers." *Loper*, 603 U.S. at 433 (Gorsuch, J., concurring) (citing *Arlington*, 569 U.S. at 296-97).

[13] *Portland*, 969 F.3d at 1037.

Commission's small cell rules should be retracted to align with the federal judiciary's interpretation of the statute.

Unlike the Commission's materially inhibit standard, federal circuit courts have overwhelmingly found that an actual prohibition is required to meet the statute's effective prohibition standard. When *Chevron* still applied, the Commission erroneously ignored three circuit courts' binding plain language interpretations of that term. Interpreting Section 332, the Second and Fourth Circuits both reject a standard similar to that in the *Small Cell Order*, concluding a carrier must, for example, establish "a legally cognizable deficit in coverage amounting to an effective absence of coverage, and that it lacks reasonable alternative sites to provide coverage."[14] The Eighth Circuit adopted a similar reading of the effective prohibition language in Section 253, rejecting an attack on a non-cost based fee (for a wireline deployment) because Section 253(a) was "clear" that "no" statutory reading "results in a preemption of regulations which might, or may at some point in the future . . . prohibit services."[15] Beyond the three federal circuits with a plain language interpretation, many circuits have developed their own best interpretation of the statute—now the binding interpretation of the statute under *Loper*—and overwhelmingly conclude they must consider the actual, not speculative, impact of a denial, focusing on the significance of the denial and the absence of an alternative means to provide

[14] *T-Mobile Ne. LLC v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259, 268 (4th Cir. 2012) (*Fairfax Cnty.*). The Second Circuit rejecting a standard focused solely on the business needs of a provider because it "founders on the statutory language" and would "effectively nullify a local government's right to deny construction of wireless telecommunications facilities, a right explicitly contemplated" by Section 332. *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir. 1999) (*Willoth*). This continues to be the standard. a plaintiff must demonstrate both that a significant gap exists in wireless coverage and that the proposed facility is the least intrusive means to close that gap. *Indus. Tower & Wireless, LLC v. Roisman*, No. 24-2512-CV, 2025 WL 3002379, at *1 (2d Cir. Oct. 27, 2025).

[15] *Level 3 Commc'ns, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 533 (8th Cir. 2007).

service.[16] As the First Circuit aptly explains, "[i]nquiries into the existence and type of [service] gap are . . . helpful analytic tools toward" answering the statutory question of whether "a given decision, ordinance, or policy amounts to an effective prohibition on the delivery of wireless services."[17]

The tension between the Commission's interpretation in the *Small Cell Order* and the federal judiciary's has been noticed. For example, before the Supreme Court's decision in *McLaughlin*, one federal district court found:

> the Court is inclined to agree . . .that the 2018 Declaratory Ruling reflects an unreasonable interpretation of Section 332. Not only does the FCC's interpretation conflict with the interpretations of every Circuit that has addressed the issue and expand *California Payphone* to new contexts in which it had not been previously applied, it also appears to upset the balanced regulatory approach that was intended by Congress. . . . [T]he FCC's new rule also potentially runs afoul of established Eleventh Circuit case law . . . .[18]

While that district court opinion was bound by the Commission's ruling at the time, it no longer is. The Commission must come to terms with the fact that it can no longer preempt these binding interpretations of the law. It should retract its current guidance that is inconsistent with the federal courts' interpretation of statutory text.

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[16] *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 40 (1st Cir. 2014); *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 806 (6th Cir. 2012); *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 825 (8th Cir. 2006); *VoiceStream Minneapolis, Inc. v. St. Croix Cnty.*, 342 F.3d 818, 833-35 (7th Cir. 2003).

[17] *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 631-32 (1st Cir. 2002); *accord, e.g.*, *Willoth*, 176 F.3d at 641; *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 20 (1st Cir. 2002); *360 degrees Commc'ns Co. of Charlottesville v. Bd. of Supervisors of Albemarle Cnty.*, 211 F.3d 79, 86 (4th Cir. 2000).

[18] *T-Mobile S., LLC v. City of Roswell, Ga.*, 662 F. Supp. 3d 1269, 1284 (N.D. Ga. 2023).

2. The Commission's materially inhibit standard impermissibly contains no limiting standard.

The Commission's "materially inhibit" standard from the *Small Cell Order* is infirm for another reason. It is completely one-sided with no balancing among interests of community members, other land users and wireless companies. It falls short because it is inconsistent with binding U.S. Supreme Court precedent and U.S. circuit court precedent.

In *Iowa Utilities*,[19] the U.S. Supreme Court rejected the Commission's one-sided interpretation of Section 251(d)(2)(B), a provision that is arguably more protective than the effective prohibition language in Section 332.[20] The Court found lacking the Commission's view, which took—as its sole deciding factor—any increase in cost or decrease in service quality from the new entrant's business plans as an impairment prohibited by statute. In *Iowa Utilities*, the Court found, "the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial . . . 'impair[s]' the entrant's ability to furnish its desired services . . . is simply not in accord with the ordinary and fair meaning of those terms."[21] The Court explained that an increase in the new entrant's costs or decrease in its profits, without more, *does not mean that a new entrant's ability to provide service has been "impaired"* under the legal standard of the statute.[22] Rather, "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act."[23] Likewise the Commission's interpretation of effective prohibition and its materially

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[19] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (*Iowa Utilities*).

[20] Section 251(d)(2)(B) directed the Commission to adopt rules giving new entrants access to incumbent telecommunications providers' networks when the failure to provide such access would "impair" a new entrant's ability to "provide the services it seeks to offer." 47 U.S.C. § 251(d)(2)(B).

[21] *Iowa Utils.*, 525 U.S. at 390.

[22] *Id.* at 390 (emphasis added).

[23] *Id.* at 388.

inhibit standard do not contain a limiting standard: under this standard the wireless provider wins any contest—clearly not Congress' intent.

After *Chevron*'s demise, the Commission cannot overturn—and instead should adopt the analysis of—multiple U.S. circuit courts which agree that the statute requires balancing among competing interests. As the Seventh Circuit explained, in Section 332(c)(7) Congress struck "a delicate balance between the need for a uniform federal policy and the interests of state and local governments in continuing to regulate the siting of wireless communications facilities."[24] The Fourth Circuit agrees, Section 332(c)(7) "reflects the balance between the national interest of facilitating the growth of telecommunications and the interest of local governments in making decisions based on zoning considerations."[25]

3. Sections 253 and 332 do not apply to non-common carriage services.

The Commission should proceed with caution when it relies upon Sections 253 and 332, given the evolving classification of broadband services.

As the Local Communities explained in their reply comments to the *Wireline NOI*,[26] Section 253(a) applies only to state and local requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate *telecommunications service*."[27] Because broadband internet access service is not a "telecommunications service,"[28]

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[24] *VoiceStream Minneapolis, Inc.*, 342 F.3d at 829. *Arlington I*, 668 F.3d at 234 (noting that the purpose of Section 332(c)(7) is to balance the competing interests to preserve the traditional role of state and local governments in land use and zoning regulation and the rapid development of new telecommunications technologies).

[25] *Fairfax Cnty.*, 672 F.3d at 265.

[26] *Local Community Wireline NOI Reply Comments* at 4.

[27] 47 U.S.C. § 253(a) (emphasis added).

[28] *In re MCP No. 185*, 124 F.4th at 998.

Section 253 simply does not apply to it.[29] Similarly, Section 332(c)(7) applies only to "personal wireless service facilities,"[30] and mobile broadband service is now excluded from that term since it is defined as "private mobile service."[31] In the near future, it is entirely likely that some wireless infrastructure will not support any service covered by Section 332. Section 332 would not appear to apply, for example, to infrastructure supporting fixed wireless access (FWA) services that deliver only broadband service.[32] Even if FWA services carry voice, they transmit the traffic as data, similar to VOIP,[33] which is not a common carrier service.[34]

B. Existing case law surrounding preemption and the legislative history of Section 332 demonstrates sweeping preemption is not allowed.

Once *Chevron* deference to agency interpretations of the law is properly set aside, established case law dictates that courts should not assume that Congress lightly or expansively preempts local government authority. Congress clearly did not preempt broadly here. The statute contains express savings clauses at its very outset: Section 332(c)(7)(A), titled "Preservation of Local Zoning Authority," preserves local authority unless expressly preempted by the terms of Section 332(c)(7)(B): "*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

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[29] *Local Community Wireline NOI Reply Comments* at 4.

[30] 47 U.S.C. § 332(c)(7)(C), § 332(d).

[31] *In re MCP No. 185*, 124 F.4th at 1012 ("Because mobile broadband is not a commercial mobile service, it necessarily is a private mobile service.").

[32] *See* NPRM, ¶ 2.

[33] "VoWiFi and VoLTE enable voice services over IP . . . ." *How FWA, VoWiFi and VoLTE are Shaping the Future of Access*, SUMMA NETWORKS (Mar. 25, 2025), https://www.summanetworks.com/blog/how-fwa-vowifi-and-volte-are-shaping-the-future-of-access.

[34] *E.g.*, *Advancing IP Interconnection Accelerating Network Modernization Call Authentication Tr. Anchor*, Notice of Proposed Rulemaking, FCC 25-73, at ¶ 79 (rel. Oct. 29, 2025).

regarding the placement, construction, and modification of personal wireless service facilities."[35] As the Supreme Court[36] and the Commission have found,[37] the statute places five discrete limits on local governments, and no more.[38] Further, these provisions were adopted as part of the 1996 Telecommunications Act, which contains additional explicit direction that its provisions "shall not be construed" to "modify, impair, or supersede" state or local law.[39]

The Supreme Court explains the Commission "literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power

[35] 47 U.S.C. § 332(c)(7)(A) (emphasis added).

[36] *T-Mobile S., LLC v. City of Roswell, Ga.*, 574 U.S. 293, 303 (2015) ("The Act's saving clause makes clear that, other than the enumerated limitations imposed on local governments by the statute itself, 'nothing in this chapter shall limit or affect the authority of a State or local government . . . .' Given this language . . . we understand the enumerated limitations to set out an exclusive list.")

[37] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd. 13994, at ¶25 (2009) (The Commission cannot not rely on other provisions of the Act or exercise ancillary authority to "impose additional limitations" on local authority "beyond those stated in Section 332(c)(7).").

[38] 47 U.S.C. § 332(c)(7)(B)(i)-(iv) (states and localities shall not "unreasonably discriminate among providers of functionally equivalent services"; shall not "prohibit or have the effect of prohibiting the provision of personal wireless services"; "shall act on any request . . . within a reasonable period of time after the request is duly filed"; must render any decision "in writing and supported by substantial evidence contained in a written record"; and may not regulate "on the basis of the environmental effects of radio frequency emissions" as long as "facilities comply with the Commission's regulations concerning such emissions").

[39] In a subsection titled "no implied effect," Congress directed that the 1996 Act and its amendments to the existing law "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (codified at 47 U.S.C. § 152 note). Congress further added a "tax savings provision" that sharply confined which provisions in the 1996 Act may be construed to preempt state and local fees and taxes: "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede . . . any State or local law pertaining to taxation, except as provided in [47 U.S.C. §§ 542, 573(c)] . . . and section 602 of this Act." 1996 Act, § 601(c)(2), 110 Stat. at 143. While Subsection 601(c)(2) of the 1996 Act refers to "taxation," the provisions it references address both taxes and fees.

upon it."[40] The Court recognizes the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[41]

The Telecommunications Act's legislative history confirms the plain text's broad preservation of local authority. The Conference Report explained that the prior version of the statute which ultimately became the 1996 Act mandated the Commission to complete a rulemaking governing the placement of wireless infrastructure, but the final version rejected that approach:

> The conference agreement creates a new section 704 which *prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.* The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. *It is the intent of the conferees* that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 *the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated*.[42]

[40] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

[41] *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 311 (2019) (citation and internal quotation marks omitted). In addressing a federal statute carefully calibrated to preserve state and local authority, the Supreme Court plurality held in *Whiting* that "a high threshold must be met if a state law is to be preempted for conflicting with a purposes of the federal Act." *Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (*Whiting*) (cleaned up) (plurality opinion).

[42] TELECOMMUNICATIONS ACT OF 1996, 104th Congress, 2d Session, House Report 104-458, at 208, (Jan. 31, 1996), https://www.congress.gov/committee-report/104th-congress/house-report/458/1 (emphasis added).

The Commission itself has stated, "We fully acknowledge and value the important role that local reviewing authorities play in the siting process, and . . . 'our goal is not to operate as a national zoning board.'"[43]

C. Local government land use authority is fundamental to protect economic interests and public safety.

Under the constitutional framework established by the Tenth Amendment and the 1926 Supreme Court case *Euclid v. Ambler*,[44] zoning authority rests with state governments, which have typically delegated this authority to local jurisdictions. Land use regulation allows communities to "order[] their physical environment to minimize conflict, maximize beauty, and facilitate efficient societies."[45] Without it, property owners and residents could easily fall victim to a series of incompatible uses on adjoining land—from the loss of light and air from adjacent tall buildings that motivated the earliest zoning laws to on-going efforts to protect residential areas from dangerous uses.[46] While every land user would prefer that their use could be paramount over all others, the necessity of shared communities and adjoining property dictates that we utilize a system of democratically elected, locally controlled public institutions to manage land use for all. Extensive public participation informs the development of comprehensive plans, which often include policies intended to guide aesthetic standards. As such, the adopted policies and related local zoning controls include and represent our communities' collective directives to minimize the

[43] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Pol'ys,* Report and Order, 29 FCC Rcd. 12865, 12961, ¶ 228, at (2014) (citation omitted) (*2014 Broadband Deployment Order*).

[44] *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

[45] § 1:1. Land use regulation before zoning, 1 Arden H. Rathkopf & Daren A. Rathkopf. *Rathkopf's The Law of Zoning and Planning* § 1:1 (4th ed. 2025).

[46] § 1:3, § 1.16. Historical development, Police Power, 1 *Am. Law. Zoning* §§ 1:3, 1.16 (5th ed.).

visual impacts of telecom facilities, while also pursuing other important priorities. Ultimately, this collaborative framework ensures that wireless services are deployed efficiently while maintaining safety standards and the unique aesthetic character desired by all community members.

The Commission vastly exceeds its expertise and authority when it attempts to run roughshod over a fully developed set of state statutes, regulation and common law related to land use with nary an interest in the present system. Federal constitutional protections combined with state and local law contain extensive protections and procedures for the protection of landowners and permittees, including wireless companies.[47] The Commission's *NPRM* does not acknowledge or seek to understand this context when considering possible action. The Commission is rushing ahead to propose action when it does not even comprehend the basic protections for all permitees embedded in zoning and land use jurisprudence or the specific protections that have already been adopted for wireless companies. Such action without sufficient knowledge and fact-finding is arbitrary and capricious.

Aesthetic regulations are a particular class of protections that safeguard important economic interests such as property values, tourism, and quality of life.[48] As local governments

[47] *See generally, e.g.*, 8 Eugene McQuillin, *The Law of Municipal Corporations* § 25 (3d ed. 2024). For example, California (as explained below) provides for favorable treatment for wireless providers in some cases. Cal. Gov't Code § 65964(b). The Michigan Zoning Enabling Act requires wireless communications equipment to be permitted by right or through special land use approval (similar to a conditional use permit) if certain requirements are met. Mich. Comp. Laws § 125.3514.

[48] *E.g.*, Matthew Carmona, *Place value: place quality and its impact on health, social, economic and environmental outcomes*, JOURNAL OF URBAN DESIGN (June 12, 2018), https://doi.org/10.1080/13574809.2018.1472523, at 24(1), 1–48 (a rich body of work supports private and public economic benefits, including rising property values, from increased "place quality"). Research also demonstrates the negative impact of items such as billboards which impose economic harms. Jonathan Snyder and Samuel S. Fels Fund, *Beyond Aesthetics: How Billboards Affect Economic Prosperity*, HBAE PROSPERITY (December 2011) https://www.scenic.org/wp-content/uploads/2019/09/Beyond_Aesthetics1.pdf.

have previously documented, intrusive wireless installations may affect property values; even small reductions in property values could have significant economic effects.[49] For example, one study found a visible antenna up to 1,000 feet away results in a market diminution for residential homes — impacts shared by every home in an area with an aggregate, significant impact.[50] The Commission has recognized that local decisions "avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are . . . permissible."[51] And federal courts have recognized that aesthetic concerns can be a legitimate factor in local zoning decisions with respect to wireless deployments.[52] There is simply no authority for the Commission to make these aesthetic judgments on a national scale in place of local communities.

D. Conditional Use Permits are common and legitimate tools for land use management.

Illustrating the Commission's lack of experience or knowledge of land use regulation, it seeks comment on whether it could preempt use of CUPs[53] both as they are used generally in wireless infrastructure siting, and specifically under Section 6409.[54] For example, the Commission asks whether it should adopt a rule that prohibits any new conditions as part of a CUP renewal process "once a particular deployment is found to be an eligible facilities request and the permit is

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[49] Smart Communities, Comments, WT Docket No. 16-421, 8 (filed March 8, 2017), Report and Declaration of David E Burgoyne for the Smart Communities Siting Coalition, Attach. 3 at 2, https://www.fcc.gov/ecfs/document/1030998488645/1.

[50] *Id.*

[51] *Small Cell Order,* at ¶ 87.

[52] See, e.g., *Green Mountain Realty Corp. v. Leonard*, 688 F.3d 40, 53 (1st Cir. 2012); *Omnipoint Commc'ns, Inc. v. City of White Plains*, 430 F.3d 529, 533 (2d Cir. 2005); *Portland*, 969 F.3d at 1032.

[53] As the Commission noted, states use different terminology for CUPs. NPRM, n.150. Other common names include "special permit," "special exception," and "special land use approval." *See generally* 3 *Rathkopf's The Law of Zoning and Planning* § 61:9 (4th ed.).

[54] NPRM, ¶¶ 27, 63-65.

granted."[55] Such an action would be inconsistent with the zoning process, which is inherently intended to evolve with time and changing community needs.

Zoning, and CUPs as a particular zoning tool, represent a core government function used to keep pace with community growth and changes in development. As the leading municipal treatise explains, "Zoning is not static, but it changes with changed conditions and the complexities of a modern age. If the rule were otherwise, there could be no progress."[56] Even though zoning rules must change with time, a wide body of common law and jurisprudence governs and protects all land use including the rights of land owners and permit-holders.[57] Thus, a locality cannot deprive property owners without due process of law: the validity of every change of, or exception to, use restrictions depends upon its own circumstances. A change in zoning restrictions cannot be made to accommodate private interests detrimental to the welfare of other property owners in the same district.[58]

Zoning requires a variety of tools to achieve its objectives while giving due consideration to all. As the leading treatise explains, "Zoning laws regulate land uses in two basic ways: some uses are permitted as a matter of right if the uses conform to the zoning ordinance; other sensitive land uses require discretionary administrative approval pursuant to criteria in the zoning ordinance and require a conditional use permit."[59] Thus, CUPs or special permits are one tool that local

[55] NPRM, ¶ 27.

[56] § 25:183. Change of uses and restrictions, 8 McQuillin, supra, § 25:183.

[57] *Id.*

[58] *Id.* (citing extensive cases).

[59] § 25:145. Use control through zoning laws, 8 McQuillin, § 25:145.

jurisdictions use to ensure that its regulations and allowed uses continue to be compatible with their locations. CUPs are attractive because they are certain, predictable, and transparent.[60]

In some jurisdictions, including Michigan, such approvals run with the land and are generally not subject to expiration once the use is established.[61] However, placing limits on the duration of use permits is one tool that is well within local government authority as a valid exercise of land use power.[62] In many cases, a party that can demonstrate it meets the CUP criteria can expect to get a permit; the local board's job is to determine whether the criteria are met. In some cases, state laws like those in California[63] and Michigan have constrained zoning authority to create special protection for a wireless provider's benefit.[64]

As a general matter, CUP holders are protected under land use law, just like other land users and owners. The leading case in California considering the rights of a wireless provider with respect to the expiration of its 10-year CUP, fully considers whether the CUP holder had "a fundamental vested right," if so "the trial court must exercise its independent judgment on the

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[60] Special or conditional use permits typically "must be granted pursuant to standards in the zoning ordinance that specify both the types of property uses that are specially permitted and the criteria that must be met for their approval." § 14:1. Special use permits, generally, 2 Am. Law. Zoning § 14:1 (5th ed.).

[61] *See* Rathkopf's The Law of Zoning and Planning § 61:50 (4th ed.).

[62] Existing zoning law typically requires special use conditions to be "reasonable, which is usually explained as requiring that the conditions must be related to the proposed use of the property and must be intended to minimize adverse impacts from the proposed special use." § 14:17. Special permit conditions, *id*. at § 14:17.

[63] Cal. Gov't Code § 65964(b) (creating a presumption that an original issuance of a CUP should be at least 10 years, except in certain circumstances). The Commission's criticism of Monterey, CA's ordinance is therefore misplaced. *See* NPRM, ¶ 27. The Commission's other reference to Monterey, CA is actually to Monterey Park, CA. *See* NPRM, n.174.

[64] The Michigan Zoning Enabling Act requires wireless communications equipment to either be permitted by right or through special land use approval if certain conditions are met. Mich. Comp. Laws § 125.3514.

evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence."[65] If there is no vested right the court must determine whether the local findings "are supported by substantial evidence in light of the whole record."[66] In the Ninth Circuit opinion, the court noted, "[American Tower Corporation] agreed to the original CUP's terms, so [it] knew it would have to remove its facilities if it did not renew the CUPs after ten years."[67] As Chief Justice Roberts has said, "a telecommunications company is no babe in the legal woods."[68] These companies are more than able to understand and comply with the express terms of a CUP. Zoning law sufficiently governs when a permittee obtains a vested right that would overcome a locality's decision. There is no possible justification for the Commission to wade into this area of the law.

For these reasons, it would be vastly outside of the Commission's authority and would be arbitrary and capricious for the Commission to broadly preempt CUPs as to time limits; preempt CUPs as to aesthetic conditions; or limit CUPs to "legitimate safety concerns."[69]

CUPs also do not violate Section 6409. Section 6409 is meant to allow only insubstantial changes to "existing" towers and base stations, meaning those towers and base stations that have been "reviewed and approved under the applicable zoning or siting process."[70] The law surely never contemplated that by requiring approval of insubstantial changes to existing approved facilities, a permit holder could suddenly be empowered to evade the normal application of land

[65] *Am. Tower Corp. v. City of S.D.*, 763 F.3d 1035, 1057–59 (9th Cir. 2014) (citations omitted).

[66] *Id.* at 1057.

[67] *Id.* at 1059.

[68] *T-Mobile South v. City of Roswell, Ga.*, 574 U.S. at 315 (Roberts, C.J. dissenting).

[69] NPRM, ¶ 65.

[70] 47 C.F.R. § 1.6100(b)(5).

use and zoning laws to the entire facility. By definition, such a change would no longer be "insubstantial" and thus is not covered by Section 6409.[71]

If the Commission were to preempt CUPs or special permits, it would also arbitrarily and capriciously contradict earlier findings of the Commission that the mere requirement to obtain a variance under local law is not a violation of Section 253 or 332. The Commission previously rejected an industry request for a broad preemption decision that "zoning ordinances requiring variances for all wireless siting requests are unlawful."[72] The Commission concluded it needed specific evidence and that "any further consideration of blanket variance ordinances should occur within the factual context of specific cases."[73]

E. Justifications for small cell rules for fees or other matters do not apply to other facilities, particularly macro facilities.

The Commission impermissibly proposes to extend some of the rules adopted in the *Small Cell Order* to facilities that do not qualify as small wireless facilities,[74] even though virtually all of the Commission's *Small Cell Order* was justified by the supposedly unique attributes of small cell technology and the unique need for the industry to rapidly and widely deploy 5G. The Commission also ignores its interpretation of Section 332 falls under a legal shadow after the demise of *Chevron*.

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[71] *See infra* Part IV.

[72] *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*, WT Docket No. 08-165, FCC 09-99, 24 FCC Rcd. 13994, ¶ 67 (2009) (*Shot Clock Order*).

[73] *Id.* Further as we explain here, Section 253(d) permits only preemption of a specific ordinance or law and requires notification to a particular community when preemption of its law or ordinance is requested. *Infra* Part III.

[74] NPRM, ¶ 31.

The Commission justified its rulings as to small wireless facilities because, from a regulatory perspective, "new small cell deployments that have antennas often no larger than a small backpack . . . raise different issues than the construction of large, 200-foot towers that marked the 3G and 4G deployments of the past."[75] The Commission focused on "boost[ing] the United States' standing in the race to 5G."[76] The Commission specifically defined small wireless facilities as to their size,[77] and many of the Commission's justifications of its rules were premised entirely on the small, unobtrusive size of these facilities anticipated to be placed in streets on light poles and utility poles.

As important, the Commission also relied upon 5G's unique need for densification which required adding many hundreds of thousands more small antennas, compared to prior wireless technologies.[78] The Ninth Circuit upheld some of the Commission's rules on the premise that 5G "requires the installation of thousands of 'small cell' wireless facilities."[79] For this reason, the Court found the Commission's policies apply "differently in the context of 5G, because state and local regulation . . . is more likely to have a prohibitory effect on 5G technology than it does on older technology . . . [as] it requires rapid, widespread deployment of more facilities."[80] The

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[75] *Small Cell Order*, ¶ 3.

[76] *Id.* at ¶ 7. *See also, e.g., id.*, ¶ 24 & n.46.

[77] 47 C.F.R. § 1.6002(l).

[78] For example, the Commission based its conclusions on extensive representations from providers and experts. *Small Cell* Order at ¶ 47, n.46 (Verizon would "require 10 to 100 times more antenna locations than currently exist"; AT&T would "deploy hundreds of thousands of wireless facilities in the next few years alone—equal to or more than the number providers have deployed in total over the last few decades"; Sprint would "build at least 40,000 new small sites over the next few years"; experts stated the total number of small antennas would "'roughly double the number of macro cells built over the last 30 years'" or require "3 to 10 times the number of existing sites").

[79] *Portland*, 969 F.3d at 1031.

[80] *Id.* at 1035.

findings with respect to the need for densification with small wireless facilities cannot just be ported over to larger facilities.

1. Expanding the application of small wireless facility rules to other facilities does not make sense.

The Commission asks if it needs to affirm its finding that "state and local regulations that prevent the densification of a network can be an effective prohibition of covered services" when it comes to 5G technology.[81] It should not for two reasons. First, the "densification" the Commission now refers to expands the term significantly as compared to the small wireless facility densification of 2018. The Commission proposes to define the term as "the build-out of facilities in support of 5G services…including macro sites and small wireless facilities, that can transmit frequency signals that travel short distances and efficiently reuse finite spectrum resources to provide higher bandwidth applications."[82] Under this definition, virtually any facility regardless of size or proposed coverage area is now eligible for favorable treatment. What is lost is the unique justification for small cell rules: the twin elements of small size and volume.[83]

Second, macro sites and small cells are fundamentally different in physical footprint and impact, often requiring very different review considerations, and therefore should not be treated interchangeably or subject to the same timelines, standards, or conditions. For example, structural considerations such as wind and load bearing, and locational considerations (in the right-of-way vs. outside of it) are vastly different between the two types of facilities and therefore are subject

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[81] NPRM, ¶¶ 69-74.

[82] *Id.* ¶ 71.

[83] *Portland*, 969 F.3d at 1037-38 (twice citing the Commission's conclusions targeting the particular attributes of small cells, "even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate *given the nature and volume of anticipated Small Wireless Facility deployment*'") (emphasis added).

to materially different engineering and safety review. For example, the City of Ann Arbor's hands-on experience with both "small" and macro cell towers led it to conclude that the vastly differing height of the towers alone (from a mere 40 feet to 200+ feet) means the City cannot use common siting rules for both types of towers. Other communities have come to similar conclusions. Treating them as if they are the same is factually wrong.

2. The Commission's existing fee rules are not justifiable and cannot be expanded.

Like other rules adopted and affirmed under *Chevron* deference, the Commission's existing fee rules are under a cloud since they are grounded in an incorrect interpretation of effective prohibition which is not reasonable and not the law adopted by a significant number of federal courts.[84] Moreover, even if the original rules were properly adopted, the Commission should not expand its rules with respect to fees as they apply to small wireless facilities to other wireless facilities.[85]

The Commission seeks comment on whether its specific findings as to small wireless facilities should be applied to all wireless facilities. In doing so, the Commission posits an incomplete and flawed set of economic principles that leave out a basic understanding of two different local government functions: (1) zoning regulator; and (2) landlord. The Commission ignores, as explained above, that its existing small cell fee rules were upheld only via a 2 to 1 split among the 3-judge panel, based on *Chevron* deference and premised on the unique high volume attributes of small cell technology. Its rules are precariously justified and the Commission's faulty reasoning in the NPRM does nothing to improve their foundation or rationale. Nor can the Commission resort to using Section 253(d) to adopt broad, prescriptive rules and safe harbors. The

[84] *Supra* Part II.A.

[85] NPRM, ¶ 41.

statute is limited in scope—enabling the Commission to preempt a specific state or local law or ordinance.[86]

Instead of expanding the application of flawed principles, the Commission must re-evaluate its existing rules in the current legal context, and further take into account the different local government roles vis-à-vis wireless facility placement.

a. The Commission should not further regulate fees.

Local governments are already subject to numerous restrictions on their ability to charge fees (as opposed to taxes) for general revenue raising purposes.[87] Permitting fees typically fall within the category of user fees which are already required to be cost-recovery based.[88] For example, California state law requires permit fees for telecommunications facilities not to exceed the reasonable costs of providing the service.[89] Such limitations apply to all costs incurred to

[86] Congress crafted Section 253(d) to preempt specific policies of a particular state or local government. Congress directed that notice and an opportunity to comment is required before the Commission determines that "*a* State or local government"—*i.e.*, an *individual* State or local government—has violated subsection (a) or (b). 47 U.S.C. § 253(c) (emphasis added). Only then is the Commission permitted to preempt a state or local law.

[87] *See generally* 16 McQuillin Municipal Corporations. Chapter 44 Taxation (3d ed. 2024).

[88] A valid user fee must normally: (1) be charged in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society.; (2) paid by choice, in that the party paying the fee has the option of not utilizing the government service; and (3) the charges collected must be to compensate the governmental entity providing the services for its expenses and not to raise revenues. § 44:24. User fees distinguished from "taxes," 16 McQuillin, supra, § 44:24.

[89] Cal. Gov't Code § 50030:

> Any permit fee imposed by a city, including a chartered city, a county, or a city and county, for the placement, installation, repair, or upgrading of telecommunications facilities such as lines, poles, or antennas by a telephone corporation that has obtained all required authorizations to provide telecommunications services from the Public Utilities Commission and the Federal Communications Commission, shall not exceed the reasonable costs of providing the service for which the fee is charged and shall not be levied for general revenue purposes.

engage in land-use planning. Localities must regulate uses and manage the right-of-way for all users and set permitting and other fees borne by all entities seeking permits or other services. Even if the Commission regulates fees, it cannot limit fees to incremental costs, as it appears to acknowledge.[90] As the Local Community Wireline Coalition explained in the wireline docket, and incorporated in these comments by reference, the Commission cannot prohibit localities from recovering common costs even if they are difficult to allocate.[91]

Judge Bress' dissent in *Portland* on the flaws in the Commission's economic analysis as to both the cost-based fee rules and safe harbors is compelling and shows why they are flawed. He explained that "fees are prohibitive because of their financial effect on service providers, not because they happen to exceed a state or local government's costs."[92] He noted that the Commission's "commonsense observation" that reducing fees will produce savings to those that pay fees, "would seemingly mean that any fee in any amount could qualify as an effective prohibition, once aggregated."[93] And he pointed out that, even if those savings could potentially be reinvested in deploying small cell facilities in other jurisdictions, "it does not follow that every type of fee rises to the level of an 'effective prohibition,' which is the line Congress drew in the Telecommunications Act."[94] Thus the Commission's rule lacks a limiting standard.[95]

The Commission also has not considered the role of third-party tower infrastructure firms in its justification for cost-based limits. As the Commission is aware, often wireless infrastructure

[90] NPRM, ¶¶ 46-47; *id.*, n.100 (recognizing that common costs of shared plant should be included in the context of tariffs).

[91] *Local Community Wireline NOI Reply Comments* at 21-22.

[92] *Portland*, 969 F.4th at 1054 (Bress, J. dissenting).

[93] *Id.* at 1055.

[94] *Id.* at 1055.

[95] *Id.* (citing *Iowa Utilities*).

is not owned by the company providing personal wireless service.[96] While the Commission has found Section 332 protects those firms, it hast not taken account of whether such third-party infrastructure companies pass along any cost savings they experience as a result of the Commission's rulings on fees. If a third-party infrastructure company pays a community only a cost-based fee to use municipal street lights for a distributed antenna system, what impact does that have on the wireless company that rents the distributed antenna system from the infrastructure company at a market rate? The Commission made no provision what-so-ever to ensure that the savings from its fee limits actually flow through to the companies that provide wireless service. If only the infrastructure company benefits, the whole justification of the Commission's assumptions disappears. The Commission's rules therefore are, on their face, arbitrary and capricious because nothing prohibits these infrastructure companies from charging market rates to their customers, the wireless companies, while the infrastructure companies pocket the difference between market rates and regulated rates.

b. The Commission cannot regulate rent charged by local governments as landlords.

The Commission has incorrectly conflated local governments role as regulator and as landlord. The Commission must maintain a hands-off approach to any proprietary fees or rents charged by local governments as landlords. As the Commission recognized more than a decade ago,

> courts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity— actions similar to those a private entity might take—and its attempts to regulate." As the Supreme Court has explained, "[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests,

[96] NPRM, n.33.

> and when analogous private conduct would be permitted, this Court will not infer such a restriction." Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt "non regulatory decisions of a state or locality acting in its proprietary capacity."[97]

This decision was correct, and existing rules or proposals to act contrary to it are wrong.

And while every new technology self-servingly claims that deregulation is essential for national competitiveness, the benefits of 5G and the causation between the Commission's rules and current deployment levels have not borne out.[98] While the goal of the Communications Act is to promote competition, it is focused on doing so through adherence to market principles, which include requiring market participants to pay market rates for resources used. The Commission incorrectly claims that localities do not compete against one another, when they can and do compete with one another for businesses and services, and have in fact vigorously competed for deployment of advanced infrastructure.[99]

In sum, the Commission's rules limiting fees and rent are no longer justifiable as to small wireless facilities and cannot justifiably be extended or made more severe. Nor is it necessary or advisable, as the Commission proposes, to codify its ruling in *Clark County* that a locality "has the

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[97] *Shot Clock Order*, ¶ 249 (citations omitted).

[98] George S. Ford, Ph.D., *The 5G Promise Falls Short of Reality: Examining Economic Impact Claims*, PHOENIX CENTER PERSPECTIVES (May 28, 2025), https://www.phoenix-center.org/perspectives/Perspective25-03Final.pdf.

[99] *E.g.*, Christian Gonzales, *How state and local governments win at attracting companies*, MCKINSEY & COMPANY (2019), https://www.mckinsey.com/industries/public-sector/our-insights/how-state-and-local-governments-win-at-attracting-companies#/.

burden of demonstrating to the Commission why fees above safe harbor levels should not be preempted."[100]

3. Other Commission proposals should not be pursued.

For the reasons discussed above, the stricter shot clocks, application start dates, and aesthetic rules relating to 5G are not applicable to the broader range of existing and perhaps future wireless technology. The Commission has offered no explanation or justification as to why the rules that it carefully crafted for 5G small cell technology should apply more broadly. It ignores that the Commission is bound by widespread and existing case law. The Commission could not, without more, adopt its proposals in this docket.

F. A deemed granted remedy is not available under Section 332.

The Commission raises the specter of adopting a deemed granted remedy under Section 332 without even discussing its extensive past consideration and rejection of this approach.[101] The Commission has determined multiple times that it should not adopt a deemed granted remedy for a "failure to act" under Section 332. In 2009, the Commission rejected an industry proposal seeking such a remedy, correctly concluding that the statute directs aggrieved parties to go to the courts to seek case-specific remedies for failures to act after examining all of the relevant facts.[102] The Commission noted that courts had not generally found an injunction

[100] NPRM, ¶¶ 41, 42.

[101] NPRM, ¶ 39.

[102] *Shot Clock Order*, ¶ 39. ("Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that "[t]he court shall hear and decide such action on an expedited basis."). *See also Arlington*, 668 F.3d at 250.

mandating grant of the application was "always or presumptively appropriate."[103] The Commission rejected adoption of a deemed granted remedy a second time, for small wireless facilities, in 2018 for similar reasons, stating:

> Our approach advances Section 332(c)(7)(B)(v)'s provision that certain siting disputes, including those involving a siting authority's failure to act, shall be heard and decided by a court of competent jurisdiction on an expedited basis. The framework reflected in this Order will provide the courts with substantive guiding principles in adjudicating Section 332(c)(7)(B)(v) cases, but it will not dictate the result or the remedy appropriate for any particular case; the determination of those issues will remain within the courts' domain.[104]

The Commission's decision not to create a deemed granted remedy was upheld by the Ninth Circuit when it rejected an industry challenge.[105] It further noted the distinction between the obligation to "act" under Section 332 and the obligation to "approve" in Section 6409.[106]

Although in 2018 the Commission held open the possibility of revisiting establishing a deemed granted remedy under Section 332,[107] such a step is not permitted by statute—particularly post-*Chevron.*

That the Commission adopted a deemed granted remedy for Section 6409 applications provides no authority to do so under Section 332. The Commission premised its adoption of a deemed granted remedy on the particular language in Section 6409, because it states "without equivocation that the reviewing authority 'may not deny, and shall approve' any qualifying application."[108] The Commission concluded "this directive" "leaves no room for a lengthy and

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[103] *Id. See also Shot Clock Order*, n.99 (a "local authority's exceeding a reasonable time for action would not, in and of itself, entitle the siting applicant to an injunction granting the application").

[104] *Shot Clock Order*, ¶ 124.

[105] *Portland*, 969 F.3d at 1044.

[106] *Id.*

[107] *Small Cell Order*, ¶ 128.

[108] *2014 Broadband Deployment Order*, 29 FCC Rcd., at 12961, ¶ 227.

discretionary approach . . . once the application meets these criteria, the law forbids the State or local government from denying it."[109] The mandatory language which justifies a deemed granted remedy in Section 6409[110] does not appear in Section 332, and therefore could not be justified as a remedy for an effective prohibition. Further, as explained in more detail below, Section 253(d) does not apply to individual permitting denials and cannot be used.[111] Expanding the remedy would ignore the premise of Section 6409, which is a dramatic and extreme solution applying only to "insubstantial" changes. Section 6409, by its terms, addresses minor changes to existing installations that fall within explicit and objective criteria adopted by the Commission. The function of Section 6409, which applies only to facilities that have already been through an approval process, cannot logically apply to wholly new facilities.

III. A ROCKET DOCKET DEPRIVES LOCAL COMMUNITIES OF DUE PROCESS AND WILL PRODUCE FLAWED DECISIONS.

The Commission seeks comment on whether it can reduce reliance on the courts in resolving disputes under Section 332 and whether it should "create an accelerated process or 'rocket docket'" for wireless disputes under Section 253(d).[112]

The Commission cannot resolve disputes under Section 332, which puts remedies firmly in the hands of the courts. Section 332(c)(7)(B)(v) specifically permits persons adversely affected by a State or local government to "commence an action in any court of competent jurisdiction."[113] A party may petition *the Commission* for relief only if it is "*inconsistent with clause (iv).*"

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[109] *Id.*

[110] 47 U.S.C. § 1455.

[111] *Infra* Part III.

[112] NPRM, ¶¶ 79-82.

[113] 47 U.S.C. § 332(c)(7)(B)(v).

Clause (iv) governs only "the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions" as long as they "comply with the Commission's regulations."[114] As explained above, the legislative history further confirms Congress intended the courts to have exclusive jurisdiction over all other disputes arising under Section 332.[115] As noted earlier, the Commission has repeatedly recognized this reality.[116]

That may explain why the Commission proposes reliance on Section 253(d), but in doing so the Commission fares no better. Section 253(d) is explicitly limited to enforcing Section 253(a) and (b), not a broad range of actions.[117] Federal courts addressing the issue have found Section 332 provides the exclusive vehicle to challenge individual permitting decisions; Section 253 can be used to challenge generally-applicable laws.[118] Section 253 cannot be used to obtain relief in place of Section 332 where a Section 332 claim falls short.[119]

Even if the Commission had authority here, it should not adopt a rocket docket. Congress wisely delegated the duties of fact-finding and resolving individual disputes to "courts of competent jurisdiction." The predictable and well-established court rules of discovery and

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[114] 47 U.S.C. § 332(c)(7)(B)(iv).

[115] H.R. Rep. No. 104-458, at 208 (1996); *supra* Part II.B.

[116] *Supra* Part II.F.

[117] 47 U.S.C. § 253(d).

[118] *Verizon Wireless (VAW) LLC v. City of Rio Rancho, NM*, 476 F. Supp. 2d 1325, 1336 (D.N.M. 2007) (Section 332 is for individual permitting decisions); *Cox Commc'ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002) (Section 332 does not allow applicants to challenge generally-applicable laws, only individual decisions).

[119] *Vertical Broad., Inc. v. Town of Southampton*, 84 F. Supp. 2d 379, 388 (E.D.N.Y. 2000) (provider cannot use Section 253 to avoid defects in its Section 332 claim).

evidence are needed when facts about a particular wireless decision are in dispute. Local courts possess expertise over zoning and land use completely outside of the Commission's ken.

The Commission's *NPRM* in this docket and previous rulings, for example, illustrate its carelessness with fact-finding, crediting plainly baseless claims, inaccurate articles or other questionable bases for drawing its conclusions. For example, Local Communities note that the Commission has established some basic protections for the use of Section 253(d) to preempt local or state regulatory authority, which are fully appropriate but have not been followed in this docket or the *Wireline NOI* docket even as the Commission proposes to preempt dozens of local ordinances and policies. Specifically the rules state:

> In the case of petitions for rulemaking that seek Commission preemption of state or local regulatory authority, the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the *ex parte* rules unless the Commission determines that the matter should be entertained by making it part of the record under § 1.1212(d) and the parties are so informed.[120]

Any process adopted to implement Section 253(d) should at least start with the rules already in place.[121]

But if the Commission nonetheless moves forward to adopt a rocket docket, the Commission should explore relevant options in more detail through further notice and comment. Any more formal process should look to the procedures under Section 208,[122] which provide for discovery and counterclaims which would be necessary to protect localities' due process rights

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[120] 47 C.F.R. § 1.1204(b) n.4.

[121] The Commission has proposed in the instant NPRM to preempt many localities but has not served any of them.

[122] 47 U.S.C. § 208; 47 C.F.R. § 1.720 *et seq.*

and develop an accurate factual record. Any such process should take into account appropriate timelines and safeguards relevant to participation by a state or local government, a question which requires further factual development.

IV. THE COMMISSION SHOULD NOT ADOPT ITS PROPOSALS PURSUANT TO SECTION 6409 AND SHOULD REPEAL EXISTING FLAWED RULES.

A. The Commission should not adopt its proposed changes.

The Commission should reject its proposals to exclude conditions that minimize the visual impact of the facility if it does not disguise the facility, and to eliminate protection for aesthetic-related siting conditions in its rules if the proposed change falls within the Commission's limits on height, cabinets, appurtenances and excavation.[123]

The Commission should not limit concealment protections to conditions that make a facility look like something else by excluding other concealment conditions, such as color requirements or set-back requirements that ensure the facility is not visible from the street, or shielding that does not disguise, but merely hides, the facility. Excluding these conditions from protection will counter-productively increase burdens. Conditions that minimize visual impact, but fall short of a disguise, offer important flexibility for providers and communities to identify mutually acceptable and reasonable sites for wireless facilities. The Commission's proposal will irrationally incentivize localities to impose conditions that are more difficult to meet and often less effective. The Commission's proposal will slow down deployment as localities must develop site conditions that will be protected by Commission rules, even if the community would be satisfied with less burdensome visual conditions.

[123] NPRM, ¶ 23.

The Commission should not adopt its proposal to codify guidance that limits the circumstances when a siting condition, supported by express evidence, is not binding. The Commission's current rules state that, to be binding, a siting condition must be supported by express evidence and must not prohibit a modification that falls within the Commission's thresholds for height, cabinets, appurtenances and excavation in subsections (i)-(iv) of its rules.[124] The Commission now proposes to modify this rule with examples that would be dependent upon the reasonableness of the condition, regardless of whether it was a binding condition supported by express evidence.[125] This additional limitation, concluding that conditions which comply with the Commission's rules may not be binding if they are not "reasonable," is not consistent with Commission guidance or its rules. Further, a reasonableness standard introduces ambiguity into a process that is supposed to be simple because it is objective and easy to apply. The point of the highly specialized process under Section 6409 is rapid processing of objectively insubstantial changes. But for a locality (or a wireless provider) to determine whether the mandatory approval process should apply under this new guidance, the parties would now need to determine whether a condition was reasonable, not just whether it was a validly-adopted condition and whether the proposed change fits within the Commission's objective thresholds. This will slow things down

[124] 47 C.F.R. § 1.6100(b)(7)(vi).

[125] Specifically, the Commission states its new codified guidance would state:

> If there was express evidence that the shroud cover requirement was a condition of the locality's original approval, the locality could enforce its shrouding condition *if the provider could reasonably install* a four-foot shroud to cover the new four-foot antenna. The locality also could enforce a shrouding requirement that was not size-specific and that did not limit modifications allowed under section 1.6100(b)(7)(i)-(iv).

NPRM, ¶ 24 (emphasis added).

and will unfairly impinge on localities that complied with the Commission's rules. To adopt such a change would be arbitrary and capricious.

The Commission also asks whether it should codify the following guidance:

> Under the proposal, existing walls and fences around non-stealth designed facilities would be considered aesthetic conditions and not concealment elements. However, if there was express evidence that the wall or fence was a condition of approval in order to fully obscure the original equipment from view, the locality may require a provider to make *reasonable efforts* to extend the wall or fence to continue covering the equipment.[126]

Local Communities agree that permit conditions should continue to apply when they are adopted to obscure the original equipment from view, but as explained above, Local Communities do not agree that a reasonableness condition is helpful or will effectively implement the goals of Section 6409. Further, as explained above, the Commission should not preempt any CUPs under Section 6409.[127]

B. The Commission must ensure mandatory Section 6409 changes remain insubstantial.

The Commission should reconsider its current rules and only adopt new rules or guidance that complies with the limits inherent in Section 6409. By its terms, eligible facility requests only apply to a modification that "does not substantially change . . . physical dimensions."[128] The Commission's existing rules do not comply with that statutory standard. For example, the Commission's existing rules permit unlimited additional cabinets and unlimited additional equipment that does not meet the definition of cabinets under the Commission's most recent interpretations.

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[126] NPRM, ¶ 25 (emphasis added).

[127] *Supra* Part II.C.2.

[128] 47 U.S.C. § 1455(a)(1).

Likewise some of the guidance, as proposed, is flawed as it does not consider the cumulative impact on stealth facilities on locations that might contain multiple collocations where providers might be able to obtain multiple mandatory changes via Section 6409. The Commission's assertion that one coaxial cable would not render the stealth design ineffective[129] is meaningless as the proposed guidance does nothing to prevent multiple cables or multiple other changes that could reasonably be expected cumulatively to produce excessive visual impacts that would render the stealth design ineffective. The Commission should, at a minimum, account for such cumulative effects in its guidance.

Under the new legal standards appropriately cabining the Commission's authority to interpret statutory terms, the Commission has less latitude to stretch the statute than it once had. The Commission's rules therefore should appropriately limit mandatory changes to insubstantial ones.

V. THE COMMISSION SHOULD ADDRESS RF RULES BUT NOT ADOPT OTHER PROPOSED REGULATIONS OR CLARIFICATIONS.

The Commission does not need to adopt new rules prohibiting what federal law already accomplishes: local governments are already prohibited from considering radiofrequency (RF) emissions.[130] Local Communities do support initiation of proceedings to thoroughly review the latest scientific data and update the Commission's current guidelines for exposure to RF radiation. Many commenters have highlighted the need for updates to the Commission's RF emissions standards both in this docket and in the Delete, Delete docket.[131] Local governments hear public

[129] NPRM, ¶ 21.

[130] NPRM, ¶ 61.

[131] *See, e.g.*, PA Safe Technology, GN Docket No. 25-133 at 1-2 (filed April 11, 2025); People's Initiative, GN Docket No. 25-133 at 2-3 (filed April 11, 2025); Environmental Health Sciences, GN Docket No. 25-133 at 2-20 (filed April 11, 2025).

concerns about RF emissions on a regular basis, often at meetings that last long into the evening or early hours of the morning, even though local officials are barred by federal law from considering the health and environmental effects of RF emission exposure if proposed facilities meet existing standards.

As multiple commenters have noted, the Commission has yet to take action following the D.C. Circuit Court's 2021 decision overturning the Commission's decision to terminate its Notice of Inquiry on this topic because "the Commission's cursory analysis of material record evidence was insufficient as a matter of law."[132] Thirty-year-old standards do little to quell public concerns about the issue—particularly given the rapid advancement in RF technology. The Commission should therefore comply with the D.C. Circuit Court's ruling and finish its proceeding to consider whether its current RF guidelines should be the subject of a rulemaking proceeding, or alternatively, provide a reasoned justification that its existing guidelines do, in fact, protect against the harmful effects of exposure to RF radiation.[133]

It is in everyone's best interests to recognize that siting RF emitting equipment ever closer to the general public will heighten RF anxiety, and the Commission alone bears the regulatory authority and responsibility to address public concerns about siting in closer proximity to the public through updated standards.

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[132] *Env't Health Tr. v. FCC*, 9 F.4th 893, 914 (D.C. Cir. 2021).

[133] *See id.* at 944, the Commission must:

> (i) provide a reasoned explanation for its decision to retain its testing procedures for determining whether cell phones and other portable electronic devices comply with its guidelines, (ii) address the impacts of RF radiation on children, the health implications of long-term exposure to RF radiation, the ubiquity of wireless devices, and other technological developments that have occurred since the Commission last updated its guidelines, and (iii) address the impacts of RF radiation on the environment.

The Commission should not act on its other proposals, such as further action on moratoria, which is unnecessary given the current guidance and ample opportunities for wireless companies to address any violations through existing legal mechanisms. Further, Local Communities do not support Commission action on Artificial Intelligence. As explained above, the Commission lacks legal authority to address AI beyond its authority over common carriage and personal wireless services.

VI. CONCLUSION

The Commission should not proceed on the proposals it has put forward, instead it should issue a further notice considering adequately the legal implications of the new developments in administrative law and determining how to better align Commission actions within the confines of its authority.

Respectfully submitted,

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APPENDIX

Description of Client Coalitions

The MML is a Michigan non-profit corporation, an association representing approximately 524 political subdivisions, predominantly cities and villages. Its purpose is to make Michigan's communities better by thoughtfully innovating programs, energetically connecting ideas and people, actively serving members with resources and services, and passionately inspiring positive change for Michigan's greatest centers of potential: its communities. See https://mml.org/.

The MTA is a Michigan non-profit corporation, an association representing approximately 1,240 townships. Its purpose is to advance local democracy by fostering township leadership and public policy essential for a strong and vibrant Michigan. See https://michigantownships.org/.

PROTEC is a thirty-year-old governmental consortium of more than one hundred Michigan municipalities focusing on our public rights-of-way and the intersection with those many utilities occupying and those seeking access to occupy and utilize our public rights-of-way. See https://www.protec-mi.org/.

The Texas Coalition of Cities for Utility Issues is a coalition of 74 municipalities dedicated to supporting the interests of Texas cities and their citizens with regard to utility issues. Comprised of large municipalities and rural villages, TCCFUI monitors the activities of the United States Congress, the Texas Legislature and state and federal regulatory agencies. See https://tccfui.org/.