Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

IN THE MATTER OF	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Practices	WT Docket No. 16-421
Mobilitie, LLC Petition for Declaratory Ruling	

JOINT COMMENTS OF LEAGUE OF ARIZONA CITIES AND TOWNS, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, NEW MEXICO MUNICIPAL LEAGUE, LEAGUE OF OREGON CITIES & SCAN NATOA, INC.

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF LOCAL GOVERNMENTS iii

I. INTRODUCTION 1

II. RESTRICTIONS PROPOSED IN THE PETITION AND SUGGESTED IN THE PUBLIC NOTICE WOULD HINDER INNOVATIVE AND COLLABORATIVE SOLUTIONS TO SMALL CELL DEPLOYMENTS 1

A. Mobilitie's Petition and the Bureau's Public Notice Fail to Account for Distinctions between Regulatory and Proprietary Functions and Interests 3

1. Mobilitie's Petition Conflates Regulatory and Proprietary Fees in an Attempt to Invent an Economic Barrier for the Commission to Remove 5

2. Allegedly Unreasonable Delays Conflate Regulatory Decisions with Proprietary Decisions 9

B. Applicants Themselves Often Cause Significant Delays, and Shorter Timeframes Would Likely Encourage Applicants to "Game" the Shot Clock 10

C. If the Commission Addresses its Rules, it Should Seek to Eliminate Uncertainties and Counterproductive Incentives 21

1. The Commission Should Define "Duly Filed" as the Time at Which the Applicant Tenders a *Complete* Application 21

2. The Commission Should Dispense with the "10-Day Resubmittal" Review Period and the Limitations on Subsequent Incomplete Notices Within the First 30 Days 23

III. THE COMMISSION CANNOT PERMISSIBLY INTERPRET THE PROVISIONS IN § 253 AS PROPOSED IN MOBILITIE'S PETITION 24

A. "Fair and Reasonable Compensation" Refers to Regulatory Fees, and § 253 Does Not Authorize the Commission to Preempt Compensation Paid to States or Local Governments as Market Participants 24

B. "Fair and Reasonable Compensation" Does Not Mean Compensation Based on Cost Recoupment Alone 25

1. "Fair and Reasonable" Compensation Means Something More than "Just and Reasonable" Compensation 25

2. State and Local Governments May Impose Fees Based on Gross Revenues 26

IV. THE COMMISSION SHOULD CONSIDER ALTERNATIVES TO RESOLVE THE ISSUES RAISED BY MOBILITIE, BASED ON THE COMMISSION'S OWN PAST PRACTICE 29

A. The Commission Should Issue a Notice of Inquiry Rather than Continue to Promulgate Legislative Rules Though Adjudicatory Proceedings 30

B. The Commission Should Follow its Staff's Prior Recommendation and Form a "Joint Task Force" to Consider Best Practices for Deployments in the Public Rights-of-Way 31

V. CONCLUSION 32

EXHIBIT A 33

STATEMENT OF INTEREST OF LOCAL GOVERNMENTS

The League of Arizona Cities and Towns, League of California Cities, California State Association of Counties ("CSAC"), New Mexico Municipal League ("NMML"), League of Oregon Cities, and SCAN NATOA, Inc. ("SCAN") (collectively, "Local Governments") offers these comments in response to the Public Notice dated December 22, 2016, which sought comment on small cell siting practices and a Petition for Declaratory Ruling filed by Mobilitie, LLC.[1]

The League of Arizona Cities and Towns is a voluntary membership organization of the 91 incorporated cities and towns across the state of Arizona, from the smallest towns of only a few hundred in population, to the largest cities with hundreds of thousands in population. The League provides vital services and tools to its members, including representing the interests of cities and towns before the legislature and courts.

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians.

CSAC is a non-profit corporation whose membership consists of all of California's 58 counties. The mission of CSAC is to represent county government before the California Legislature, U.S. Congress, state and federal agencies and other entities, while educating the public about the value and need for county programs and services.

The NMML is a non-profit, nonpartisan corporation whose members are the incorporated municipalities of the State of New Mexico. All 106 New Mexico incorporated municipalities are

[1] *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421 (Dec. 22, 2016) [hereinafter "Public Notice"].

members of the New Mexico Municipal League. Its largest member has 10,000 times the population of its smallest, yet each member city casts one delegate vote in setting policy and electing officers. NMML staff and officers frequently appear before state agencies and legislative committees to testify on rules, regulations, and proposed legislation affecting municipalities in New Mexico.

The League of Oregon Cities, originally founded in 1925, is an intergovernmental entity consisting of Oregon's 242 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state and federal courts.

SCAN has a history spanning over 20 years representing the interests of over 300 members primarily consisting of local government telecommunications officers and advisors located in California and Nevada. Accordingly, SCAN's members have a keen interest and stake in this proceeding and its outcome.

I. INTRODUCTION

The Wireless Telecommunications Bureau (the "Bureau") should refrain from pursuing additional or more restrictive rules in this proceeding arising from Mobilitie's petition.[2] Instead, the Bureau should consider certain simplified reforms that will actually accelerate mobile broadband deployment, such as (1) starting the shot clock upon the tendering of a complete application; (2) dispensing with the 10-day resubmittal period; and (3) removing the limitations on subsequent incomplete notices.

Additionally, the Bureau should decline to interpret the provisions in 47 U.S.C. § 253 as proposed in the Petition and suggested in the Public Notice. Local Governments recommend that the Bureau take steps to encourage and facilitate more collaborative approaches to achieving robust small cell deployment, such as issuing a notice of inquiry and/or establishing joint task force to further consider the issues in this proceeding.

II. RESTRICTIONS PROPOSED IN THE PETITION AND SUGGESTED IN THE PUBLIC NOTICE WOULD HINDER INNOVATIVE AND COLLABORATIVE SOLUTIONS TO SMALL CELL DEPLOYMENTS

Mobilitie's Petition proposes new limitations on State and local authority over the public rights-of-way and the Bureau's Public Notice seeks comment on whether new limitations on local authority to review permit applications will accelerate wireless deployment. These proposals appear to be based on the erroneous assumption that carriers are not, at least in part, responsible for delays in their deployment. Without a proper distinction between proprietary and regulatory functions, or how applicant conduct contributes to delays, any new regulations by the

[2] *See In the Matter of Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way*, Petition for Declaratory Ruling, WT Docket No. 16-421 (Nov. 15, 2016) [hereinafter "Petition"].

Commission may limit, instead of encourage, innovative and collaborative solutions to small cell deployments in the public right-of-way.

State and local governments have property interests in (a) the public rights-of-way and (b) government-owned poles and other government-owned improvements within the public rights-of-way. This adds a proprietary dimension to the otherwise regulatory relationship between local governments and wireless carriers. Federal limitations on application review periods and compensation generally do not preempt States or local governments in their proprietary roles.[3] Mobilitie's Petition conflates local governments' proprietary and regulatory functions, and exaggerates Mobilitie's largely self-perceived and self-inflicted plight.

Additionally, significant delays in small cell deployment have arisen from applicant misrepresentations and misconduct. Even wireless industry members publicly acknowledge that aggressive and deceptive tactics by applicants, in particular those employed by Mobilitie, are among the primary impediments to deployment.[4]

New limitations on local regulatory authority will be unlikely to accelerate wireless facility deployment where (a) such limitations would not apply to decisions by State and local governments acting in their proprietary capacity, which is outside the Commission's preemptive authority; and/or (b) delays are caused solely or primarily by wireless applicants. Instead, existing regulations already create perverse incentives for applicants to "game" the shot clock to find shortcuts around local regulatory review altogether. To the extent that the Bureau

[3] *See, e.g.*, *Qwest v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) ("*Portland*") (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2nd Cir. 2002) (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").

[4] Ernest Worthman, *Mini-cell Towers Shouldn't Be Passed as Small Cells*, AGL (Aug. 30, 2016), *available at*: http://www.aglmediagroup.com/mini-cell-towers-shouldnt-be-passed-as-small-cells/.

recommends revisiting the *2009 Declaratory Ruling* or the *2014 Infrastructure Order*, it should seek to eliminate incentives to flaunt legitimate local review.

A. Mobilitie's Petition and the Bureau's Public Notice Fail to Account for Distinctions between Regulatory and Proprietary Functions and Interests

Small cells and other right-of-way facilities differ from traditional macro cells in more ways than mere size. One difference that neither Mobilitie's Petition nor the Bureau's Public Notice appear to recognize is that State and local governments have property rights in the places and structures where small cells are commonly located – streets, sidewalks, light poles, traffic signals, bus shelters and other similar improvements in the public rights-of-way. As a consequence, State and local governments have an increasingly proprietary role (in addition to their regulatory role) in the deployment process as installations largely move from largely private property to spaces and structures owned by the State or local governments.[5]

Different small cell proposals can implicate different property interests. A proposed installation in the public rights-of-way may implicate the local government's *real property* interest in the land that comprises the public rights-of-way, its *personal property* interest in the government-owned improvements placed within the public rights-of-way or, in some cases, both. For example, if a wireless provider seeks to attach an antenna to a private (investor-owned) electric company's distribution pole, the local government may have a real property interest in generalized access to the streets for a commercial purpose, but would not likely have a personal property interest in that specific pole. On the other hand, the local government might have both a real property interest and a personal property interest if the proposal involved a city-owned streetlight in the public right-of-way.

[5] Although the Bureau's Public Notice describes federal law as it pertains to State and local government regulatory authority over wireless facilities, it does not contain any reference or acknowledgement that wireless facilities in the public rights-of-way often implicate State and local government proprietary interests. *See* Public Notice at 5–7.

Whether and to what extent local government may have a proprietary interest in the public rights-of-way also differs based on state law. Some states, such as Arizona, New Mexico and Oregon, grant municipalities the right to receive compensation from telecommunication service providers that use the municipality's real property, subject to certain limits.[6] Local governments may also be permitted to charge a separate fee for installations on their streetlights and other government-owned structures. Other states, like California, grant so-called "state-wide franchises" that prohibit local franchise fees for access to the real property in the public rights-of-way, but do not prohibit private proprietary agreements with telecommunications providers for attachments to municipally-owned structures within the public rights-of-way.[7]

The failure to appreciate these core distinctions between regulatory and proprietary functions can explain why firms like Mobilitie perceive costs and decisions timelines as unreasonable compared to their past experiences in a pre-small cell world.[8] The Bureau should recognize that the "barriers" alleged in Mobilitie's Petition stem from (a) Mobilitie's failure to recognize State and local property rights in the public rights-of-way; (b) the distinction between local regulatory functions and proprietary ones; and/or (c) the legislative framework that differs on a state-by-state basis.

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[6] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-583(C) (authorizing an annual fee for undergrounded conduit on a linear-foot basis); N.M. STAT. ANN. § 62-1-3 (authorizing counties and municipalities to grant franchises, but limiting county franchise fees to "reasonable and actual costs" to grant and administer the franchise); OR. REV. STAT. § 221.515 (authorizing municipalities to collect up to a seven percent gross-revenues privilege tax).

[7] *See, e.g.*, CAL. PUB. UTILS. CODE § 7901; *Williams Commc'ns, Inc. v. Riverside*, 8 Cal. Rptr. 3d 96, 107–08 (Cal. Ct. App. 2003) (construing § 7901 as "a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration").

[8] See Iain Gillott, *Sprint's New Plan: Network Suicide*, LINKEDIN (Jan. 25, 2016), *available at*: https://www.linkedin.com/pulse/sprints-new-plan-network-suicide-iain-gillott (describing abandoned past attempts to site wireless facilities in the rights-of-way for various reasons related to property ownership).

1. Mobilitie's Petition Conflates Regulatory and Proprietary Fees in an Attempt to Invent an Economic Barrier for the Commission to Remove

The Bureau requested comment on Mobilitie's claim that it faces multiple, upfront and recurring fees.[9] Mobilitie improperly frames these costs as purely regulatory fees, and misstates the distinction between *proprietary* fees required to receive value for access to public/government property for its private/commercial use, and *regulatory* fees generally charged to recover the reasonable processing costs the government incurs to review and issue the permit to access the public rights-of-way.

With the proper distinction between proprietary rents and regulatory fees in mind, Mobilitie's attempt to inflate regulatory fees becomes obvious:

Application Fees. Mobilitie mischaracterizes inducements to negotiate and enter a license agreement to use government property with an application fee charged to review a proposed project and issue a permit to use the public rights-of-way. Although Mobilitie alleges that "a California city requested an $8,000 'administration fee,' but [did not] explain how it calculated that fee," the City of Antioch, California, requested a fee in that amount as a one-time sum to offset its costs to negotiate a master license agreement for installations on municipal streetlights, and also provided Mobilitie with invoice summaries from its legal counsel to "explain how it calculated that fee."[10] Under that agreement, the administration fee would not be required for each pole and was totally unrelated to any regulatory application fee. Moreover, the city intended the master license agreement to reduce overall regulatory burdens and accelerate small cell deployment by establishing a pre-approved site design for typical streetlights within that jurisdiction.

[9] *See* Public Notice at 13.
[10] Petition at 16.

Mobilitie also fails to recognize that whatever rights it may have to access or use the public rights-of-way do not also grant it rights to use third parties' personal property within the public rights-of-way. Local governments often own poles, streetlights, traffic signals, ducts, conduit and other chattel that may, in the owner's discretion (*i.e.*, not in their role as a right-of-way regulator), be leased or licensed to telecommunication providers for compensation negotiated at arms-length. On the other hand, the permit fees due for any project in the public rights-of-way are separate, but often still limited to cost.[11]

Per-Pole Fees. Mobilitie complains that "every locality is seeking a separate [per-pole] fee for each and every facility Mobilitie constructs," that "[t]hese fees do not serve to compensate the city for processing Mobilitie's applications" and that these fees "materially impair" its business model.[12] Even taking Mobilitie's statements about per-pole fees at face value, most – if not all – these fees are rents charged in the government's proprietary capacity and not subject to, controlled or limited by § 253.[13]

Mobilitie's assertions are incorrect because many local governments like those within California are prohibited by state law from charging state-certified telephone corporations (like Mobilitie) for access to the public rights-of-way.[14] While cities in California may charge telephone corporations a fee for access to poles owned by the government in its proprietary capacity, those cities do not (and cannot) charge a per-pole fee for attachments to third-party poles or new poles owned by the applicant. California cities could not force Mobilitie to use

[11] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-583(C); CAL. GOV'T CODE § 50030; N.M. STAT. ANN. § 62-1-3.
[12] *See* Petition at 16.
[13] *See, e.g.*, *Portland*, 385 F.3d at 1240.
[14] *See* CAL. PUB. UTILS. CODE § 7901; *T-Mobile W. LLC v. City and Cnty. of San Francisco*, 208 Cal. Rptr. 3d 248, 260 (Cal. Ct. App. 2016) (review granted by California Supreme Court on 12/21/16, S238001) ("[C]ities may not charge franchise fees to telephone corporations for the privilege of installing telephone lines in the public right-of-way.").

government-owned poles – and thereby require a per-pole fee – because state law also prohibits local mandates to site all wireless facilities on property "owned by particular parties within the jurisdiction."[15]

Additionally, Mobilitie's assumption that fees charged for attachments to municipally-owned poles should be related to cost recoupment ignores the regulatory/proprietary distinction. While a "$10,800 annual per-pole fee" may exceed the additional costs imposed on the government in its regulatory capacity to permit and monitor the installation, such fees are proprietary fees that compensate local government for allowing the use of its property.[16] Indeed, if a local government did not charge a fee or receive some other value for the attachment or installation, that action (or inaction) could violate prohibitions on donations to corporations by government entities, found in some State constitutions.[17]

Lastly, market rates for access to municipal property for a commercial purpose does not "materially impair" the ability of entities to provide telecommunication services because service providers have other options within the public rights-of-way. For example, the Pole Attachment Act already enables firms like Mobilitie to attach their facilities to utility poles at cost-based rates.[18] In jurisdictions like California, state law prevents local governments from assessing charges that "exceed the reasonable costs" incurred by the government to issue a permit to construct their own poles.[19] These same options are open to all other providers. To the extent that Mobilitie's business model gambled on rent-free access to use state or local government-owned

[15] CAL. GOV'T CODE § 65964(c).
[16] *See* Petition at 16–17.
[17] *See, e.g.*, ARIZ. CONST., art. IX, § 7; CAL. CONST., art. XVI, § 6; N.M. CONST., art. IX, § 14.
[18] *See* 47 U.S.C. § 224.
[19] *See* CAL. GOV'T CODE § 50030; *Riverside*, 8 Cal. Rptr. 3d at 107–08.

property residing in the public rights-of-way, some commentators have opined that the economic "barriers" Mobilitie has encountered are self-inflicted.[20]

Gross-Revenue Fees. Mobilitie complains that fees based on its gross revenues "directly affect [its] ability to finance projects in those communities" that charge such fees.[21] With respect to Mobilitie's claims about Oregon and California cities, these claims lack both evidence and merit. Gross-revenue fees charged by Oregon local governments have survived legal challenges as fair and reasonable compensation.[22] The fact that Mobilitie's competitors, other wireless infrastructure providers, have operated in Oregon for years under the same percentage fees strongly weighs against Mobilitie's claim that those fees effectively prohibit telecommunications services.[23] Moreover, Mobilitie's claim about gross-revenue fee assessment in California could not possibly prevent its operations because such fees for access to the public rights-of-way would violate State law.[24]

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[20] *See* Gillott, *supra* note 8 (describing reasons why Sprint and Mobilitie's plan to decommission up to 80% of its macro sites and transition equipment to new and existing structures in the public rights-of-way is likely to fail); Dawn Chmielewski and Ina Fried, *Sprint Finalizes Plan to Trim Network Costs by Up to $1 Billion*, RE/CODE (Jan. 15, 2016, 9:44 AM), *available at*: http://www.recode.net/2016/1/15/11588832/sprint-finalizes-plan-to-trim-network-costs-by-up-to-1-billion (describing Sprint's business plan to cut expenses by transitioning its facilities from leaseholds on private property to streetlights and other government property where it assumed it will pay significantly less).

[21] *See* Petition at 18.

[22] *See, e.g.*, *City of Portland v. Elec. Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1072 (D. Or. 2005) ("Certainly, it is reasonable to base compensation on a percentage of revenue generated . . . ."); *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1257–1259 (D. Or. 2002) (holding "the Cities' revenue-based fees are 'fair and reasonable compensation' . . . "), *rev'd on other grounds*, 385 F.3d 1236 (9th Cir. 2004), *aff'd*, *Qwest Corp. v. City of Portland*, No. Civ.01-1005-JE, 2006 WL 2679543 (Sept. 15, 2006).

[23] *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271–1272 (10th Cir. 2004) (finding that "fair and reasonable" should be evaluated under a totality of the circumstances test); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624–25 (6th Cir. 2000); *see also Sprint Tel. PCS, LP v. Cnty. of San Diego*, 543 F.3d 571, 576–77 (9th Cir. 2008) (*en banc*).

[24] *See* CAL. GOV'T CODE § 50030; *Riverside*, 8 Cal. Rptr. 3d at 107–08.

2. Allegedly Unreasonable Delays Conflate Regulatory Decisions with Proprietary Decisions

Just as applicants for a macro cell site (or any other project that requires a permit) generally need to prove an ownership interest or other authorization to file an application, local governments generally resolve whether they will allow a wireless facility on their own poles (or the like) in the public rights-of-way as an independent matter, and before the regulatory review (land use and/or encroachment permitting) process can meaningfully begin. The Petition appears to incorrectly assume that State and local governments make their proprietary decisions (to allow access on their own poles) simultaneously and concurrently with their regulatory decisions (to issue a land use permit). If public agencies, acting in their proprietary capacity, reach agreement to allow a carrier's facilities on their support structures, that agreement does not guarantee that a carrier's proposed facilities will comply with local right-of-way or zoning rules.

A trend among local governments to enter into an agreement with carriers on a general process to streamline regulatory review for wireless facilities placed on government-owned structures in the public rights-of-way is gaining momentum. These agreements often contain "pre-approved designs" or "pre-approved configurations" that require little or no discretionary review.[25] However, the process to reach an agreement can take several months. Local governments often lack resources and/or staff time to devote to these projects, and potential licensees – especially Mobilitie – often display an initial interest, only to disappear for several months (or longer).

To the extent that industry commenters assert there are delays in deployment, the Commission should evaluate whether those perceived delays involved (a) seeking approval to

[25] *See, e.g.*, CINCINNATI, OH., CODE, tit. VII, ch. 719 (permitting over-the-counter approvals for small cells that meet design guidelines developed in collaboration with the wireless industry).

mount antenna on, for example, a government-owned street light (*i.e.*, a proprietary decision); or (b) seeking a permit to construct a wireless facility after the owner consented to the attachment (*i.e.*, a regulatory decision). As the Commission properly recognized in the *2014 Infrastructure Order*, the presumptively reasonable times to act under § 332(c)(7) do not affect proprietary decisions.[26] Accordingly, the Bureau should find that further "clarifications" to its shot clock rules would not accelerate the deliberative or negotiation processes.

B. Applicants Themselves Often Cause Significant Delays, and Shorter Timeframes Would Likely Encourage Applicants to "Game" the Shot Clock

The Bureau's Public Notice erroneously presumes that the "'presumptive timeframes' established in the *2009 Declaratory Ruling* and the *2014 Infrastructure Order* may be longer than necessary and reasonable to review a small cell" application.[27] In fact, delays in the deployment process often arise from applicant misconduct or flaws in the Commission's rules that encourage such misconduct.

In fact, the same article cited in the Public Notice as authority for the proposition that "it frequently takes two years or more from small cell site acquisition to completion"[28] continues, in the very next sentence, to lay significant responsibility on applicants for the delays:

> "Many markets face incremental challenges driven by the backlash from the aggressive tactics of Mobilitie," Walter Piecyk of BTIG wrote in a research note in July. "We previously noted how the planning commission in San Francisco voted in favor of a code amendment to deal with the proliferation of small cells better and insure their ability to force operators to clean-up shoddy work by

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[26] *See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865, 12964 ¶ 239 (Oct. 17, 2014) ("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.") [hereinafter, "*2014 Infrastructure Order*"].

[27] *See* Public Notice at 11.

[28] *See id.* at 7 (quoting Colin Gibbs, *Small Cells: Still Plenty of Potential Despite Big Challenges*, FIERCEWIRELESS (Sept. 1, 2016), *available at*: http://www.fiercewireless.com/wireless/small-cells-still-plenty-potential-despite-big-challenges).

> requiring permit renewals after 10 years. We suspect that trend to continue in other towns and cities throughout America."
>
> . . .
>
> "And to be clear, Mobilitie shouldn't shoulder all of the blame," Piecyk continued. "As we continue to peel the onion, we are finding examples where Crown Castle's siting practices are aggravating local communities as well . . . ."[29]

Although more guarded, carriers share the sentiment that "some companies are being 'a little too cavalier in some instances and messing up [the industry's] ability to deploy small cells.'"[30] Those approaches cause significant delays that the Commission cannot mitigate by regulating State and local governments.

For example, despite claims from Mobilitie nearly a year ago that it would increase transparency, which included ground-breaking steps such as "us[ing] its *own name* as it works with cities and counties to develop small cell sites,"[31] the firm continues to approach municipalities under misleading pseudonyms both officious (*e.g.*, "California Utility Pole Authority") and ambiguous (*e.g.*, "Interstate Transport and Broadband, LLC," "Broadband Network of New Mexico, LLC," "OR Fiber Network Company, LLC" and "CA Transmission Network, LLC").[32]

Small cell carriers may misrepresent their legal authority, misrepresent their proposed project, disregard local processes and even construct illegal facilities without permits, including

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[29] Gibbs, *supra* note 29.
[30] *See* Martha DeGrasse, *Carrier Small Cells Appear Slowly but Surely*, RCRWIRELESS (May 24, 2016), *available at*: http://www.rcrwireless.com/20160524/carriers/carrier-small-cells-tag4 (quoting Dave Mayo, SVP, T-Mobile, referring to Mobilitie).
[31] *See* Marth DeGrasse, *Mobilitie to Increase Transparency for Jurisdictions*, RCRWIRELESS (May 27, 2016), *available at*: http://www.rcrwireless.com/20160527/network-infrastructure/mobilitie-utility-tag4 (quoting Christos Karmis, President, Mobilitie, LLC) (emphasis added).
[32] *See, e.g.*, Email from Alexander Paul, Interstate Transport and Broadband, LLC for California Transmission Network, LLC, to Rick Angrisani, City of Clayton, Cal. (Mar. 21, 2016, 7:23 AM); Email from Keith Witcosky, City of Redmond, Or., to Michael Johnston, Telecom Law Firm PC (Jan. 30, 2017, 4:24 PM).

the following (anecdotal) examples since the *2009 Declaratory Ruling* and the *2014 Infrastructure Order*:

Misrepresenting Legal Authority and/or Proposed Facilities. The Commission's rules prohibit applicants from making false or misleading statements to the Commission.[33] "[I]t is well recognized that the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency."[34] Yet, the Commission's rules neither punish nor prohibit false or misleading statements made to local governments.

Although local laws often prohibit such falsehoods and authorize a denial as a consequence, federal bans on effective prohibitions under both § 253 and § 332(c)(7) may allow an applicant who knowingly lied to a State or local government to obtain an order from a federal court to order the permits to be issued. Without real consequences for misrepresentations in permit applications, the review process is often delayed as local governments sift through applications to separate facts from falsehoods.

The following examples illustrate common misrepresentations about the applicant's legal authority and/or proposed facilities:

- Mobilitie notoriously operated under various alter egos with governmental-sounding names. Figure 1 contains annotated project plans presented to the City of Thousand Oaks, California, and depicts the type of alter ego name that Mobilitie has used for plans presented to many cities in various other states.

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[33] *See* 47 C.F.R. § 1.17.
[34] *Schoenbohm v. FCC*, 204 F.3d 243, 247 (D.C. Cir. 2000) (citing *Swan Creek Commc'ns, Inc. v. FCC*, 39 F.3d 1217, 1221–1224 (D.C. Cir. 1994) and *Garden State Broad. Ltd. v. FCC*, 996 F.2d 386, 393–94 (D.C. Cir. 1993)).

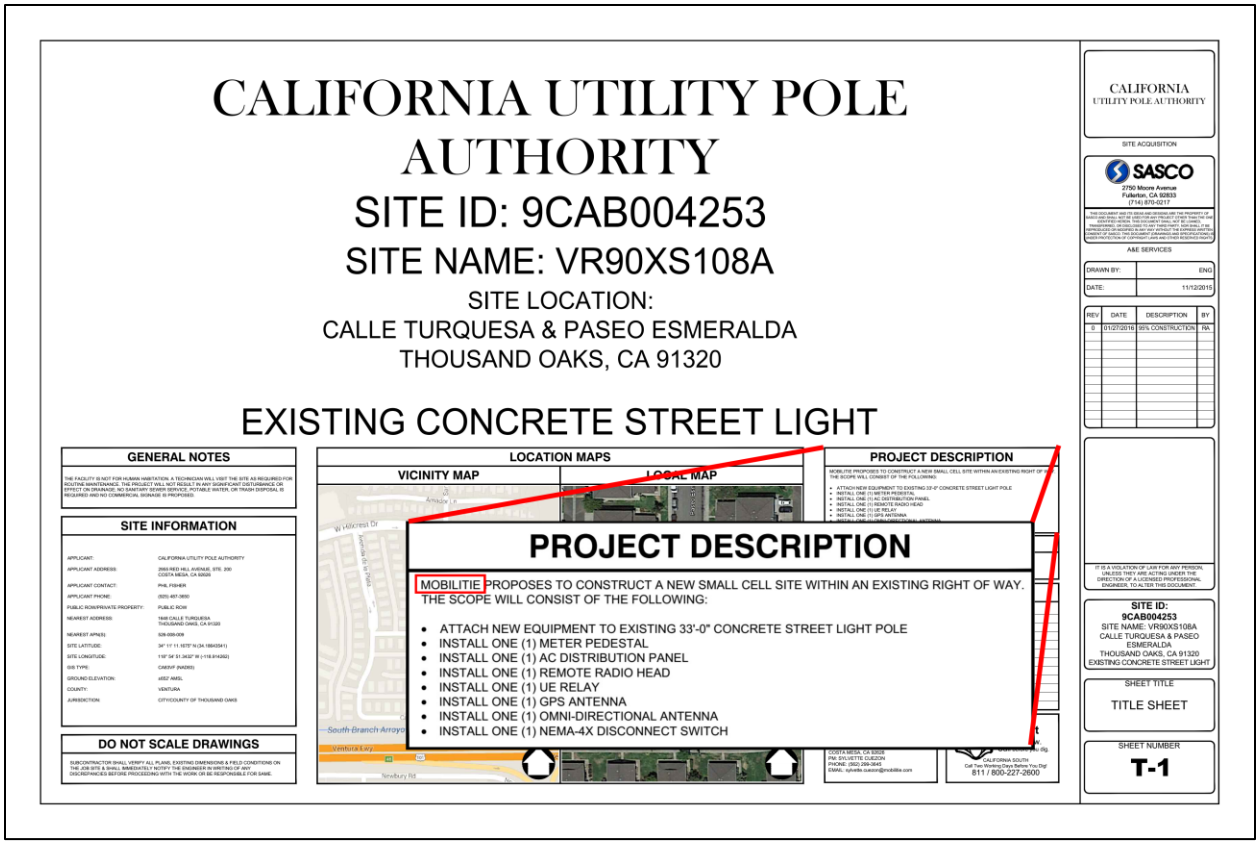

Figure 1

One plausible reason why a deregulated, private corporation that installs and operates wireless equipment on utility poles would assume a name like the "California Utility Pole Authority" is that may have hoped to convince some actual governmental authorities to grant special benefits or exemptions, or to perceive that only state-level oversight is required, precluding local jurisdiction approvals.

- Numerous entities, which include Mobilitie, Crown Castle, ExteNet and Verizon Wireless, misrepresent that their status as either a "telephone corporation" or "CLEC" under state law entitles them to the same regulatory treatment as electric, water and natural gas corporations.[35]

[35] *See, e.g.*, Letter from Michael van Eckhardt, AT&T, to John Conley *et al.*, City of Vista, Cal., at 3 (Feb. 8, 2017) (objecting to any concealment requirements for new small cells in the public rights-of-way); Letter from Paul Albritton, Counsel for Verizon Wireless, to John Conley *et al.*, City of Vista, Cal., at 3 (Feb. 8, 2017) (contending that state law prohibits any inquiry into the technical reasons why an applicant desires a new small cell in a particular location); Letter from Michael Shonafelt, Counsel for Crown Castle, to Mayor Clyde Roberson *et al.*, City of Monterey, Cal., at 4 (Oct. 17, 2016) ("Crown Castle's special regulatory status as a CLEC gives rise to a vested right under Public Utilities Code section 7901 to use the ROW . . . [and] . . . Crown Castle contends that a discretionary use permit – like that required by the City in this case – constitutes an unlawful precondition for a CLEC's entry into the ROW") (citing *See T-Mobile W. LLC v. City and Cnty. of San Francisco*, 208 Cal. Rptr. 3d 248 (Ct. App. 2016) (review granted by California Supreme Court on 12/21/16, S238001); Letter from Paul Albritton, Counsel for Verizon Wireless, to Chair Daniel Fletcher *et al.*, City of Monterey, Cal., at 1-2 (Sept. 13, 2006) ("[R]ight-of-way wireless facilities should be permitted through an encroachment permit, not a use permit,

- In August 2016, the Minnesota Department of Commerce sent a letter to Mobilitie demanding that "Mobilitie cease from asserting that PUC authority has exempted it from the regulatory requirements of local government units."[36] News stories about similar misrepresentations to cities and counties seem to follow Mobilitie in several other states, as well.[37]

- In Clayton, California, Mobilitie initially contacted city staff to request information on permitting procedures and a potential right-of-way use agreement.[38] After city staff provided Mobilitie with guidelines and instructions for each process, Mobilitie ended contact with city staff.[39] Several months later, a representative from CA Transmission Network, LLC (one of Mobilitie's corporate alter egos) contacted the city engineer and falsely asserted that CA Transmission Network, LLC was a California Public Utilities Commission-regulated public utility.[40] To date, the California Public Utilities Commission still has not granted CA Transmission Network, LLC's application for a Certificate of Public Convenience and Necessity ("CPCN").[41] Mobilitie's representative further indicated that it would submit construction permit applications for two 120-foot transport poles rather than follow the procedures initially outlined by city staff. When questioned about the proposed locations, staff discovered that the permits that Mobilitie requested from Clayton to deploy a 120-foot transport pole were for a location in an adjacent jurisdiction.[42]

- Mobilitie's representatives falsely claimed to city staff in Pleasanton, California, that it received approvals from the City of Thousand Oaks, California, to install unconcealed facilities on streetlights in a residential neighborhood. Mobilitie also provided project

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because Verizon Wireless, as a telephone corporation, is authorized to use the right-of-way under California Public Utilities Code § 7901."); Letter from David Bronston, counsel for Mobilitie, LLC, to Andrew J. Benelli, City of Fresno, Cal., at 1 (Apr. 8, 2016) ("Applicant has been granted a Certificate of Public Convenience and Necessity by the California Public Utilities Commission and is a utility under the laws of the state. As a public utility, Applicant is entitled to access to the public rights of way.").

[36] Letter from Diane Dietz, Minn. Dept. of Commerce, to Chester Bragado, Mobilitie, LLC (Aug. 4, 2016).

[37] *See, e.g.*, Alyssa Stahr, *Minnesota Utilities Warn Mobilitie About Misrepresentation*, INSIDETOWERS, *available at*: https://insidetowers.com/cell-tower-news-minnesota-utilities-warn-mobilitie-misrepresentation/ (last visited Feb. 27, 2017) (describing controversies in Virginia); *Officials Feel Mobilitie is Disingenuous as Moratoriums Mount Throughout the Nation*, WIRELESSESTIMATOR (Nov. 26, 2016), *available at*: http://wirelessestimator.com/articles/2016/officials-feel-mobilitie-is-disingenuous-as-moratoriums-mount-throughout-the-nation/ (describing controversies in Florida, California and Connecticut); J. Sharpe Smith, *Municipalities, Mobilitie have a Meeting of the Minds*, AGL (Oct. 11, 2016), *available at:* http://www.aglmediagroup.com/municipalities-mobilitie-have-a-meeting-of-the-minds/ (describing controversies in Connecticut).

[38] *See, e.g.*, Email from Savir Punia, Mobilitie, LLC, to Mindy Gentry, City of Clayton, Cal. (Aug. 31, 2015, 9:48 AM); Email from Mindy Gentry, City of Clayton, Cal., to Savir Punia, Mobilitie, LLC (Sept. 17, 2015, 9:55 AM).

[39] *See* Email from Richard Tang, Mobilitie, LLC, to Mindy Gentry, City of Clayton, Cal. (Oct. 27, 2016, 5:00 PM).

[40] *See* Email from Alexander Paul, Interstate Transport and Broadband, LLC for CA Transmission Network, to Rick Angrisani, City of Clayton, Cal. (Mar. 21, 2016, 7:23 AM).

[41] *See In the Matter of the Application of CA Transmission Network, LLC*, Docket No. A1608012 (Aug. 19, 2016).

[42] *See* Email from Rick Angrisani, City of Clayton, Cal., to Alexander Paul, Interstate Transport and Broadband, LLC for CA Transmission Network, LLC (Mar. 21, 2016, 7:30 AM).

plans to Pleasanton city staff for the alleged Thousand Oaks facilities as evidence. When Pleasanton contacted Thousand Oaks, they discovered that Mobilitie had not yet even contacted Thousand Oaks, much less applied for city permits for those facilities. A similar scenario occurred in San Dimas, California, when Mobilitie falsely claimed that other nearby jurisdictions had approved 120-foot poles in the public rights-of-way.

- In La Crosse, Wisconsin, Mobilitie's representatives presented information about Mobilitie's facilities that falsely represented their physical size and scale.[43] The presentation included the slide shown in Figure 2, below.

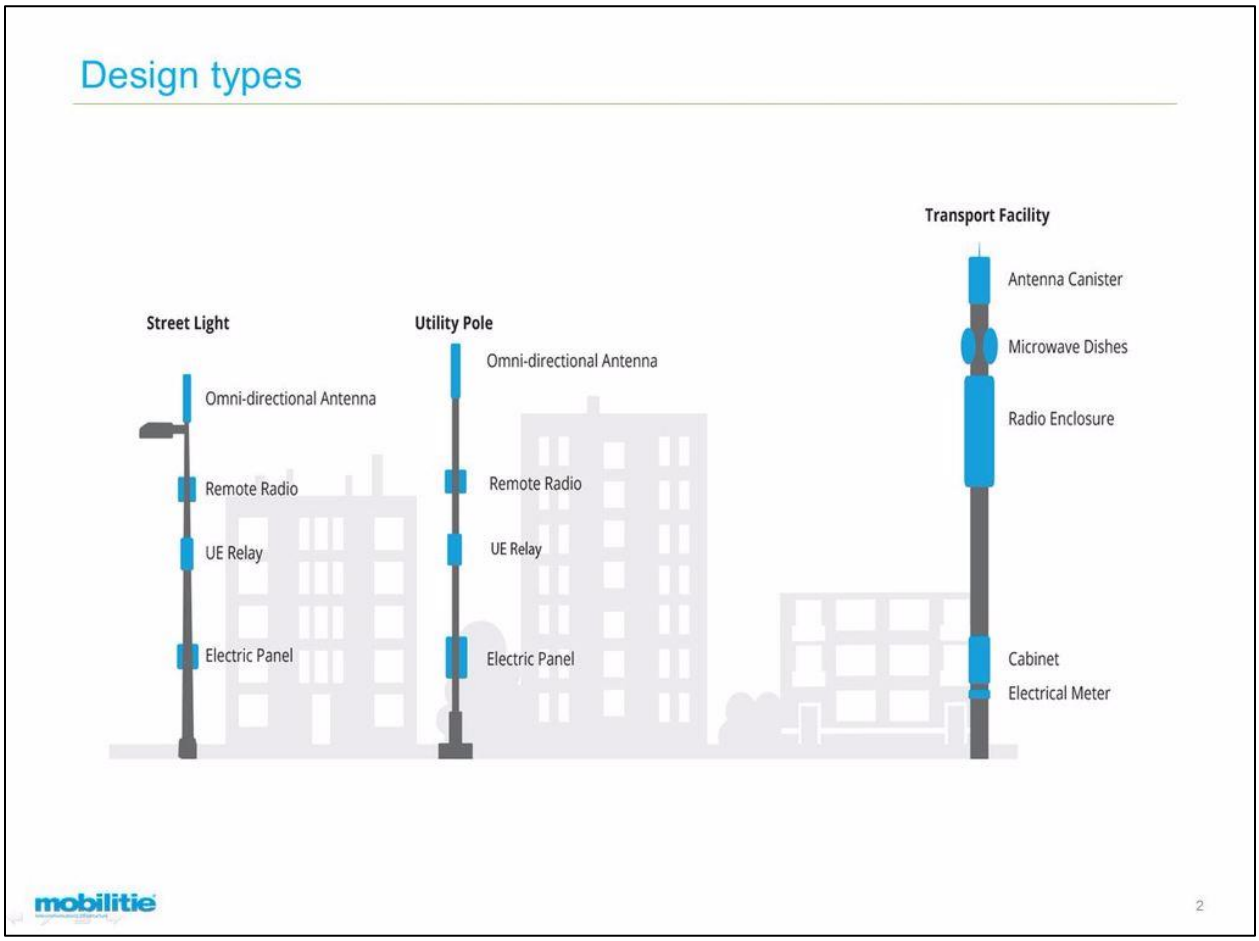

Figure 2: Power Point Slide Presented by Mobilitie to La Crosse, Wisconsin, Public Works Board on Jan. 23, 2017.

Figure 2 suggests that all Mobilitie's facilities are approximately the same size. However, as illustrated in the scaled graphic in Figure 3, below, the graphic grossly understates the actual differences between Mobilitie's facilities.

[43] *See* "Mobilitie Presentation" at 10 (Jan. 23, 2017), *available at*: http://cityoflacrosse.legistar.com/LegislationDetail.aspx?ID=2930404&GUID=D4B0E9C5-A313-48D1-97B4-EABD788E7E5B&Options=&Search=.

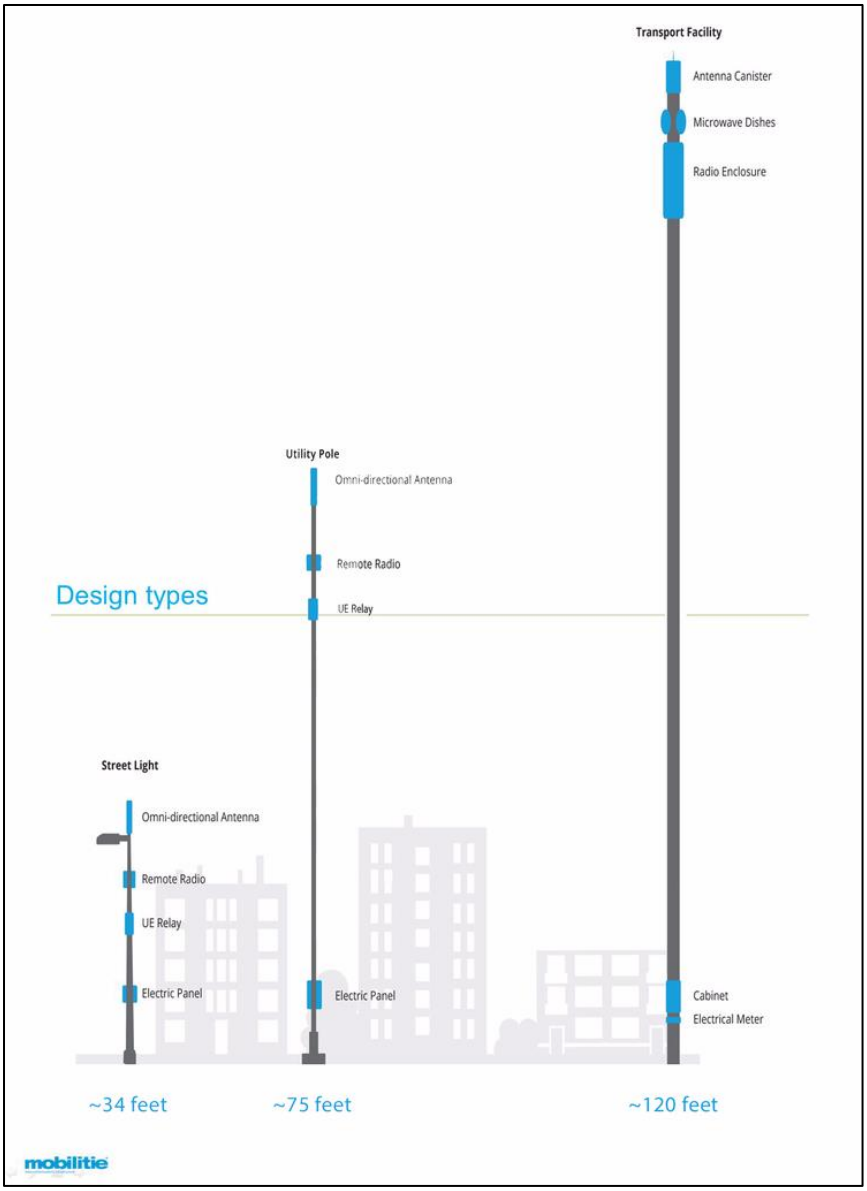

Figure 3: Mobilitie Slide Modified to Show Actual Scale Relative to the Street Light Installation.

Even wireless industry members find this misrepresentation "absurd" because the 120-foot transmission towers "dwarf [the] other options . . . ."[44] Misrepresentations of this magnitude justifiably cause local governments to scrutinize Mobilitie's applications.

Disregarding Local Process and Gaming the Shot Clock. A pattern has emerged since the Commission adopted the *2014 Infrastructure Order* in which applicants flaunt local

[44] *See Mobilitie's DAS Marketing Illustrations are Labeled as "Quite Deceptive"*, WIRELESSESTIMATOR (Feb. 17, 2017), *available at*: http://wirelessestimator.com/articles/2017/mobilities-das-marketing-illustrations-are-labeled-as-quite-deceptive/.

processes and submit woefully inadequate "applications" for multiple sites, often to an incorrect department within the municipality. Ambiguous letters from applicants with multiple preliminary site plans often arrive on Friday afternoons or before a long holiday weekend. These applicant behaviors appear to be geared toward gaming the shot clock—submitting just enough to start the clock and then lying in wait for time to expire as the local officials attempt to make heads or tails from a cover letter with multiple site plans that arrived in the mail.

- The California Street Light Association ("CALSLA") compiled comments from its constituent California cities and counties documenting, among other things, that Mobilitie has (1) failed to provide accurate project descriptions or equipment specifications upon request by local officials, (2) submitted incomplete applications, (3) terminated communications with local officials after submitting incomplete applications, (4) erroneously claimed exemptions from permitting procedures, local regulations and state environmental compliance laws and (5) complained of high fees without explaining why the fees would be unreasonable.[45] Their full responses appear in **Exhibit A** to these comments.

- In Albuquerque, New Mexico, Mobilitie approached that city with proposals for small cells on poles without identifying the owner of the poles.[46] After Mobilitie confirmed that it desired to attach to certain city-owned poles, Mobilitie failed to respond to the city's requests that Mobilitie enter into lease negotiations to obtain the required property rights for attachments to city-owned poles.[47]

- Mobilitie's representative hand-delivered to the City of Pleasanton, California, a letter styled as an introduction with 12 plan sets for new facilities attached.[48] Rather than follow the city's publicly-stated application process, Mobilitie treated the letter as a single application filed for all 12 sites. The letter was dated and delivered on a Friday. Under California state law, any application for a wireless installation may be deemed-approved if the local government fails to act within the Commission's presumptively reasonable timeframe for review.[49] The apparent intent behind the letter was to submit an "application" that would trigger the shot clock but not be seriously reviewed by the local government staff, which would likely result in a deemed-approval. The same scenario played out in several other Northern California cities, including Antioch, Brentwood, Concord,

[45] *See* Letter from Jean A. Bonander, CALSLA, to Michael Johnston, Telecom Law Firm PC (Feb. 15, 2017).
[46] *See* Email from Kathleen T. Ahghar, City of Albuquerque, N.M., to Kevin Winner, ITB Utility (May 17, 2016, 1:35 PM).
[47] *See* Email from Jane L. Yee, City of Albuquerque, N.M., to Brenna Moorhead, Goodwin Procter LLP, counsel for Broadband Network of New Mexico, LLC (Jan. 18, 2017, 2:05 PM).
[48] *See* Letter from Richard Tang, Mobilitie, LLC, to Jenny Soo, City of Pleasanton, Cal. (Oct. 14, 2016).
[49] *See* CAL. GOV'T CODE § 65964.1.

Richmond, San Pablo, and Pittsburg. Mobilitie's representative also delivered a letter to the City of Fresno, California, which at that time did not require a special permit for installations on unpaved road shoulders, on a Friday.[50]

- In Richmond, California, Mobilitie's representative submitted encroachment applications for 13 new wireless facilities even though the Richmond Municipal Code expressly required a prior authorization from the Community Development Department.[51] A month later, Mobilitie emailed the city project plans for three additional sites but did not submit any additional applications or fees. Two sites were proposed to be located on city-owned streetlights without prior authorization from the city. City staff also discovered that one site was proposed to be located on private property. Although city staff suggested some potential alternative locations on private electric company poles, Mobilitie ultimately withdrew its applications.

- In Brentwood, California, Mobilitie's representative submitted a letter to the city's Public Works Department with project plans, an insurance certificate and a check for $144, but not an application for a use permit as expressly required by the Brentwood Municipal Code.[52] Again, Mobilitie tendered the "application" on a Friday. Although the letter described the project plans as "construction drawings," the attached plans stated on each page: "PRELIMINARY NOT FOR CONSTRUCTION."[53]

- In Goleta, California, Mobilitie's representative emailed that city project plans for six new wireless facilities, but with no application or fees. The email acknowledged that the city requires a "Right-of-Way Access Agreement" (*i.e.*, a standard document required for all entities that carry on operations in the public rights-of-way that sets out maintenance, insurance, safety and other operational requirements, but does not require any fees), but Mobilitie claimed that "our CPCN which can serve in lieu of a City-specific ROW Access/Franchise Agreement."[54] The email also requested that the city confirm who owns the poles to which Mobilitie wanted to attach their equipment.[55] This email made clear that Mobilitie did not positively know who owned the pole before it submitted applications for attachments.

- In Richmond, California, ExteNet submitted 31 encroachment permit applications for small cells without first obtaining a use permit from the city, which was required by the

[50] *See* Letter from Rebecca Eichinger, Mobilitie, LLC, to Andrew Benelli, City of Fresno, Cal. (Jun. 3, 2016).
[51] *See* Letter from Richard Tang, Mobilitie, LLC, to City of Richmond, Cal. (Aug. 29, 2016). This letter was dated on a Monday, but Mobilitie's representative hand delivered the applications on a Wednesday (the city closes on Fridays due to State budget shortfalls).
[52] *See* Letter from Richard Tang, Mobilitie, LLC, to City of Brentwood, Cal., Public Works Department (Aug. 2, 2016). The letter was received on August 19, 2016, as evidenced by the city's in-take stamp.
[53] *See id.*
[54] *See* Email from Ben Johnson, Mobilitie, LLC, to Marti Milan, City of Goleta, Cal. (Jan. 31, 2017, 4:13 PM).
[55] *See id.*

City's recently adopted ordinance that was effective and published before ExteNet submitted its applications.[56] These applications were received by the city on a Thursday.

- ExteNet submitted 10 applications to Concord, California, for facilities throughout both residential and commercial neighborhoods that it alleged should all be subject to administrative approval, despite local regulations that required public notice with a possible public hearing for highly visible wireless facilities placed in close proximity to residential uses.[57]

- In Gresham, Oregon, Mobilitie submitted a single application for six of its sites without addressing the criteria clearly set out in the local code. Subsequently, a Mobilitie representative acknowledged that the applications were submitted without reviewing the applicable code provisions.[58]

- In Monterey, California, on the day before an appeal to the city council from a permit denial, legal counsel for Crown Castle sent a letter to legal counsel for the city that stated:

  > . . . in the event the City Council departs from the recommendations of the Staff Report [to grant the appeal and approve the permit] and adopts new conditions or otherwise raises concerns that have the potential for a denial of the Appeal, ***Crown Castle hereby requests a continuance of the hearing***. Crown Castle makes this request on the record now . . . . Please include this letter in the administrative record of the Appeal. Crown Castle's representatives will be on hand at tonight's meeting to answer any questions.[59]

  That night, the Monterey city council heard evidence that the proposed site would potentially obstruct view of the historic Cannery Row and decided to schedule a special meeting at the project site to assess first hand whether and to what extent the proposed location might impact historic assets.[60] A different attorney for Crown Castle stood up and objected to the continuance. When the mayor asked whether the attorney knew that its client already requested a continuance for exactly this purpose, the attorney said he did, but that he withdrew consent to the continuance because he claimed that shot clock had expired and wished to pursue a deemed-approved remedy under state law.

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[56] *See* Letter from Yader Bermudez, City of Richmond, Cal., to Matt Yergovich, ExteNet Sys. (Cal.) LLC (Nov. 15, 2016).

[57] In this case, ExteNet's representative submitted both the initial applications and his responses to the city's incomplete notices on Mondays. Although the applications were misfiled and incomplete, it does not appear that their representative attempted to intentionally game the shot clock in the same manner as those who routinely submit on Fridays.

[58] *See* Email from David R. Ris, City of Gresham, Or., to Michael Johnston, Telecom Law Firm PC (Jan. 23, 2017, 3:56 PM).

[59] Letter from Michael Shonafelt, counsel for Crown Castle, to Robert May, counsel for City of Monterey, Cal., at 2 (Oct. 4, 2016) (emphasis in original).

[60] *See* Monterey City Council, Meeting Minutes at 5 (Oct. 4, 2016), *available at*: http://isearchmonterey.org/cache/2/yvx5igkacsotydo441kqyukq/366444022820170918125 44.PDF.

- In early April 2016, Mobilitie submitted four encroachment permit applications to the City of Antioch, California, for installations on city-owned streetlights without any prior authorization from the city to use its streetlights. The applications listed the owner as "N/A."

- In Sacramento, California, Mobilitie requested to meet with Public Works staff and brought 40 incomplete applications, which included applications for fifteen 120-foot steel poles. When staff informed Mobilitie that it could not accept 40 incomplete applications, Mobilitie's representative left the packet on the security desk in the lobby in an apparent attempt to be able to later claim that the shot clock had been started.[61]

- In Yuma, Arizona, after receiving a letter from the city that outlined how Mobilitie's initial application failed to satisfy the city's code for obtaining a city telecommunications license, Mobilitie resubmitted its application with general responses that appeared intended to avert answering the city's questions. After a second letter from the city, Mobilitie's third submission continued to provide vague and inadequate responses to the city's questions on items as basic as what infrastructure Mobilitie intended to install in the city's right-of-way. When the city sent a third letter to Mobilitie explaining the deficiencies, Mobilitie never responded.

Unpermitted Installations. Until recently, local officials would only occasionally discover unpermitted modifications to existing wireless facilities. Totally unpermitted sites were rare. However, as one author predicted, "[t]he scary proposition may be that, in the interest of time-to-market, [Mobilitie] does not ask for permission, but simply puts up the new poles and then deals with the backlash later."[62] This prediction proved to be correct:

- In March 2016, in Baltimore, Maryland, Mobilitie installed a new, "a roughly three-story-tall utility pole" without permits that obstructed access to an ADA sidewalk ramp.[63] The city commenced a code enforcement action and fined Mobilitie for the violation.[64]

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[61] *See* Email from Darin Arcolino, City of Sacramento, to Omar Masry, City of San Francisco (July 7, 2016, 12:35 PM).

[62] *See* Iain Gillott, *Analyst Angle: Sprint Network Plan Equals 'Network Suicide'*, RCRWIRELESS (Jan. 25, 2016), *available at*: http://www.rcrwireless.com/20160125/opinion/analyst-angle-sprints-network-plan-equals-suicide-2-tag9.

[63] *See* Ryan Knutson, *Sprint's Wireless Fix? More Telephone Poles: Wireless Provider's Innovative Plan to Boost Cell Service Runs into Local Hurdles*, WALL ST. J. (Jun. 7, 2016, 6:03 PM), *available at*: https://www.wsj.com/articles/sprints-drive-to-improve-coverage-faces-permit-delays-1465337015.

[64] *See One Company Fined for Not Getting a Small Cell Permit, Another for not Permitting Inspectors*, WIRELESSESTIMATOR (Apr. 4, 2016), *available at*: http://wirelessestimator.com/articles/2016/one-company-fined-for-not-getting-a-small-cell-permit-another-for-not-permitting-inspectors/.

- In Denison, Texas, Mobilitie construed a nearly 90-foot tower in the public rights-of-way without prior approval from the city. Mobilitie sent the city a self-styled application letter (similar to what it provides other cities) with project plans marked "PRELIMINARY NOT FOR CONSTRUCTION," rather than the application form required by the city. The city never issued any permits.

- In Vallejo, California, staff discovered an unpermitted Verizon small cell on a utility pole after Verizon submitted an application for a building permit. When city staff notified Verizon of the unpermitted work, Verizon threatened legal action if the city did not issue a permit within a week.[65]

Wireless carrier tactics like these disrupt and delay the deployment process, and prevent cooperative and collaborative partnerships.[66] As one industry member and observer put it:

> So what makes [Mobilitie's conduct] so different than what other players do? Not really that much. But the tipping point here is if a municipality feels that a wireless company has misrepresented itself or what it is doing, the relationship between the whole wireless industry and the municipality is soured. If you are the company coming in after a wireless company has upset a municipality, don't expect a warm reception. We all have a responsibility to treat municipalities with respect and honesty.[67]

C. If the Commission Addresses its Rules, it Should Seek to Eliminate Uncertainties and Counterproductive Incentives

To the extent that the Bureau seeks comment on further "clarifications" to the *2009 Declaratory Ruling* and the *2014 Infrastructure Order*, Local Governments offers the following specific recommendations.

1. The Commission Should Define "Duly Filed" as the Time at Which the Applicant Tenders a *Complete* Application

Counterproductive carrier conduct often occurs in the submittal phase because, under the "clarifications" in the *2014 Infrastructure Order*, "the presumptively reasonable timeframe begins to run when an application is first submitted" – no matter how incomplete the first

[65] *See* Email from Teri Killgore, City of Vallejo, Cal., to Michael Johnston, Telecom Law Firm PC (Feb. 7, 2017, 10:40 AM).
[66] *See, e.g.*, Worthman, *supra* note 4.
[67] *Id.*

submittal may be.[68] Despite the Commission's rule that requires local governments to publish their application requirements in advance, woefully incomplete application submittals have become the rule rather than the exception.[69] Given that the Commission's other rules already bar *ex post facto* application requirements, carriers should be expected (and required by the Commission) to tender complete submittals and there should be no excuse for an incomplete application – and certainly no incentive.[70]

At the very least, the Commission should declare that the shot clock does not begin to run when the "submittal" does not even appear on the proper form provided by the jurisdiction. Mobilitie's conduct appears to seek to start the shot clock no matter how incomplete the application, and its representatives often submit a mere letter that states Mobilitie expects to commence construction in the near future.[71]

The Commission has consistently recognized local governments' right to require an application.[72] Allowing applicants to trigger the shot clock with an incomplete application, or in some cases no application at all, encourages attempts to deceive local governments and game the shot clock. Accordingly, the Commission should revise its clarification in the *2014 Infrastructure Order* and declare that the presumptively reasonable time for review begins to run when the applicant tenders a *complete* application.

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[68] *2014 Infrastructure Order* at ¶ 258.
[69] *See id.* at ¶ 260 ("[I]n order to toll the timeframe for review on grounds of incompleteness, a municipality's request for additional information must specify the code provision, ordinance, application instruction, or otherwise publically-stated [sic] procedures that require the information to be submitted.").
[70] *See id.* at ¶¶ 217, 260.
[71] *See generally* Part II.A, *supra*.
[72] *See 2014 Infrastructure Order* at ¶ 211 (Oct. 24, 2014); *In the Matter of 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, 24 FCC Rcd. 13994, 13994 (Nov. 18, 2009) (assuming local authority to require an application) [hereinafter "*2009 Declaratory Ruling*"].

2. The Commission Should Dispense with the "10-Day Resubmittal" Review Period and the Limitations on Subsequent Incomplete Notices Within the First 30 Days

The 10-day resubmittal review period further encourages applicants to tender resubmittals right before weekends, holidays and other government closures.[73] And the so-called "one-shot" rule that limits subsequent incomplete notices to items specifically delineated in the first incomplete notice,[74] encourages applicants to withhold legitimate requests for additional information based on a minor procedural oversight in the first incomplete notice. The Commission should eliminate these rules.

These complex procedural rules do not coincide with the practical realities involved in wireless facility siting reviews. Although the Commission's rules might seem more reasonable if one person were responsible to review an application, local governments almost always route applications through multiple departments with specialized knowledge over engineering, right-of-way management, land use planning, finance and other disciplines. If one department sends an incomplete notice to the applicant with respect to their narrow review, the applicant can claim that the notice precludes other incomplete notices from the other departments because their concerns would not relate back to the incompleteness cited in the first notice.

The Commission should eliminate the 10-day resubmittal review period and the limitations on subsequent incomplete notices within the first 30 days.

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[73] In this respect, the 10-day resubmittal review period appears to conflict with at least two Commission rules: (a) The holiday-exception procedural rule for replies due within 10 days or less. *See* 47 C.F.R. § 1.4(h) (providing that where "the filing period for a response is 10 days or less, an additional 3 days (excluding holidays) will be allowed to all parties in the proceeding for filing a response"); and (b) The 15-day review period for "[a]ny amendments to an application for renewal of any instrument of authorization . . . ." *See id.* § 73.3578; *see also* § 1.927(h) (providing that amendments to application that "constitute[] a major change shall be treated as a new application" altogether).

[74] *See 2014 Infrastructure Order* at ¶ 218.

III. THE COMMISSION CANNOT PERMISSIBLY INTERPRET THE PROVISIONS IN § 253 AS PROPOSED IN MOBILITIE'S PETITION

Mobilitie asks the Commission to interpret the safe harbor for "fair and reasonable compensation" for access to the public rights-of-way in § 253(c) as strict cost recoupment, in direct contradiction with Congress' statutory scheme in the Communications Act and express intent in the Congressional record. The Commission should dismiss Mobilitie's Petition and decline to interpret § 253(c).

A. "Fair and Reasonable Compensation" Refers to Regulatory Fees, and § 253 Does Not Authorize the Commission to Preempt Compensation Paid to States or Local Governments as Market Participants

"Fair and reasonable compensation" refers to fees charged by State and local governments in their regulatory – not proprietary – capacities as consideration for access to the public rights-of-way.[75] Federal preemption prohibits State and local governments "from *regulating* within a protected zone" but does not prohibit proprietary activities within such preempted fields.[76] As the Supreme Court stated:

> [a] State does not regulate . . . simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption . . . because pre-emption doctrines apply only to state *regulation*.[77]

The same principle applies to preemption under the Communications Act.[78] Whatever the Commission's authority may be to interpret the term "fair and reasonable consideration" with respect to regulatory fees, the Commission simply lacks the authority to preempt State or local governments in their proprietary capacity as a market participant. Accordingly, the Commission

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[75] *See Portland*, 385 F.3d at 1240.
[76] *See Bldg. and Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 226–27 (1993) (emphasis added).
[77] *Id.* (emphasis in original).
[78] *See, e.g., Portland*, 385 F.3d at 1240 (recognizing that Section 253(a) preempts only "regulatory schemes"); *Mills*, 283 F.3d at 421 (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").

should reject Mobilitie's plea to have the Commission regulate State or local governments, where states and local governments enter into arm's-length agreements as market participants with the wireless industry.

B. "Fair and Reasonable Compensation" Does Not Mean Compensation Based on Cost Recoupment Alone

Mobilitie's proposal to limit compensation for commercial telecommunications uses the public rights-of-way conflicts with existing statutes on rate regulation and Congressional intent to preserve local authority to charge rates based on gross revenues. The Commission should reject Mobilitie's proposal.

1. "Fair and Reasonable" Compensation Means Something More than "Just and Reasonable" Compensation

A crucial flaw in Mobilitie's proposal to interpret "fair and reasonable" as cost recoupment is that Congress uses the phrase "just and reasonable" in the Communications Act when it intends to describe a cost-based compensation scheme.[79] "[F]air and reasonable" under § 253(c) cannot mean the same as "just and reasonable" under § 224 or § 251 because different words in the same act have different meanings.[80] Thus, contrary to Mobilitie's claim that the dictionary definition for "compensation" compels the Commission to define this term as "cost,"[81] the plain language in Congress' statutory scheme clearly shows that "fair and reasonable" means something *other than* cost.

Moreover, "fair and reasonable compensation" must mean something *greater than* cost given that Congress did not intend the "fair and reasonable" standard to subsidize for-profit

[79] *See, e.g.*, 47 U.S.C. § 224(d)(1) (establishing a cost-based formula for pole attachment rates); 47 U.S.C. § 251(d)(1)(A)(i) (defining "just and reasonable" rates for interconnection as "based on the cost").
[80] *See Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").
[81] *See* Petition at 24.

telecommunications providers at the States' or local governments' expense.[82] Despite Mobilitie's argument that Congress chose the word "compensation" over "payments,"[83] at least one federal court has held that:

> Congress chose the term compensation, rather than cost, to further its intent that local municipalities be permitted to recoup revenue in exchange for a telecommunications provider's use of the public streets.[84]

Especially where municipalities act in their proprietary (not regulatory) capacity to lease or license space on their own traffic signals, light poles or the like, their "fair and reasonable" compensation is defined by market value. The Commission should reject Mobilitie's proposal to limit "fair and reasonable compensation" to mere a cost-based fee. To hold otherwise could amount to a regulatory taking, in violation of the Fifth Amendment.[85]

2. State and Local Governments May Impose Fees Based on Gross Revenues

In 1996, Congress considered and overwhelmingly rejected (by a 4-to-1 margin) an alternative to the "fair and reasonable compensation" approach that would have required State and local governments to charge all telecommunications service providers the same fees.[86] "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[87] One district court has found that neither § 253(c) (as passed by Congress), Congressional history, nor case law limits a city from charging more than their "cost of

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[82] *See* 141 CONG. REC. H 8460 (Aug. 4, 1995) (statement of Rep. Stupak).
[83] *See* Petition at 24.
[84] *See Elec. Lightwave*, 452 F. Supp. 2d at 1072.
[85] *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (noting that "it is most reasonable to construe the reference to 'private property' in the Takings Clause . . . as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.'").
[86] *See* 141 CONG. REC. H 8427 (Aug. 4, 1995).
[87] *I.N.S. v. Cardoza–Fonseca*, 480 U.S. 421, 442–43 (1987).

maintaining the rights of way. Nor does it require absolute parity among providers and utilities in setting compensation levels. Rather, those restrictions are an overlay put forth by telecommunications providers . . . and it is not the law in any circuit."[88]

When Congress was considering 1996 Telecommunications Act, a proposal then styled as § 243(e) stated in full:

> PARITY OF FRANCHISE AND OTHER CHARGES.—Notwithstanding section 2(b), no local government may impose or collect any franchise, license, permit, or right-of-way fee or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights-of-way from any provider of telecommunications services *that distinguishes between or among providers of telecommunications services*, including the local exchange carrier. For purposes of this subsection, a franchise, license, permit, or right-of-way fee or an assessment, rental, or any other charge or equivalent thereof does not include any imposition of general applicability which does not distinguish between or among providers of telecommunications services, or any tax.[89]

In response to concerns that this "parity" requirement would unfairly prevent different fees for different uses that imparted different impacts on the rights-of-way and the public's use, a bipartisan amendment offered by Congressmen Barton and Stupak proposed to completely delete Section 243 and replace it with language substantially similar to the current law.[90] Congressman Stupak stressed that, under the proposed § 243(e), "local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets."[91] Given that many incumbents paid little or no actual compensation under sometimes-ancient franchises, the parity requirement would effectively subsidize new entrants

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[88] *Elec. Lightwave*, 452 F. Supp. 2d at 1074–1075.
[89] 141 CONG. REC. H 8427 (Aug. 4, 1995) (emphasis added).
[90] *See* 141 CONG. REC. H 8460–8461 (Aug. 4, 1995). *See also* Fredrick E. Ellrod III and Nicholas P. Miller, *Property Rights, Federalism and the Public Right-of-Way*, 26 SEATTLE UNIV. L. REV. 475, 521–23 (2003) (discussing at length the legislative history behind the Stupak Amendment).
[91] 141 CONG. REC. H 8460 (Aug. 4, 1995) (statement of Rep. Stupak).

who would be permitted to use public property at the public's expense.[92] Congressman Barton stated that "[t]he Federal Government has absolutely no business telling State and local governments how to price access to their local right-of-way."[93]

The House overwhelmingly adopted the Stupak-Barton amendment and rejected the parity requirement.[94] The amendment confirms that the House (a) intended local governments to determine compensation for access to the rights-of-way and that charges might differ among various users; and (b) rejected in 1996 a proposal similar to Mobilitie's petition in 2017.

Mobilitie's proposed cost-based "compensation" scheme with exemptions from gross-revenue fees seeks to resurrect the "parity" requirement Congress discarded in the Stupak-Barton amendment. Such a construction would be struck down because "it appears from the statute or its legislative history that the [definition] is not one that Congress would have sanctioned."[95]

Although Mobilitie attempts to shoehorn statements by Senator Diane Feinstein that describe rights-of-way management functions into limitations on compensation,[96] Senator Feinstein's statements concerned the Commission's preemptive scope under § 253(d) rather than the permissible "compensation" protected under § 253(c).[97] Senator Feinstein's proposed amendment to limit the Commission's preemptive powers cannot be understood as tacitly endorsing limitations on compensation for access to the public rights-of-way.

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[92] *See id.* at H 8460 (statement of Rep. Stupak). As an example, Congressman Stupak submitted evidence that cities collectively spent more than $100 billion on right-of-way maintenance in 1994, but collected only $3 billion in fees from all rights-of-way users, including gas, water, electric and telecommunications companies. *See id.* (statement of Rep. Stupak).
[93] *Id.* at H 8460 (statement of Rep. Barton).
[94] *See id.* at H 8477 (10 representatives did not vote).
[95] *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984).
[96] *See* Petition at 25.
[97] 141 CONG. REC. S 8305–8306 (Aug. 4, 1995).

The Congressional record clearly shows that Congress considered gross-revenue fees to be permissible. Several federal courts agree that § 253(c) does not prohibit compensation based on gross revenues.[98] The Commission should, too.

IV. THE COMMISSION SHOULD CONSIDER ALTERNATIVES TO RESOLVE THE ISSUES RAISED BY MOBILITIE, BASED ON THE COMMISSION'S OWN PAST PRACTICE

Mobilitie's Petition lacks merit and should be dismissed. However, to the extent that the Bureau desires to address any issues raised in Mobilitie's Petition or the Public Notice, the Bureau should follow the recommendations set forth in the National Broadband Plan and the example set by Chairman Pai in creating the Broadband Deployment Advisory Committee and engage with federal, state, local, tribal and industry stakeholders in a meaningful factual investigation.

Whether the Commission has the legal authority to adopt substantive, legislative-type rules through a declaratory ruling does not guarantee the rules adopted will achieve their intended purpose. For the reasons discussed below, a collaborative, fact-based and consensus-driven approach is needed to accelerate wireless broadband.

[98] *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534, 543 (D.P.R. 2003) (holding that "Section 253(c) of the Telecom Act does not explicitly forbid revenue-based fees" and approving of an "approach which does permit a municipality to obtain a reasonable 'rent' for [a carrier's] use of [the municipality's] property"); *Qwest v. City of Portland*, 200 F. Supp. 2d at 1256–1257 (concluding that Ninth Circuit precedent "does not stand for the proposition that § 253(a) categorically bars all revenue-based right-of-way fees"). Also, contrary to Mobilitie's assertion of a circuit split on "fair and reasonable compensation," *see* Petition at 26–28, the courts agree that a fee's relationship to cost can be an important – but not dispositive – factor. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006) (finding that a franchise fee need not be limited to cost but should have some relationship to it); *Santa Fe*, 380 F.3d at 1271–1272 (finding that "fair and reasonable" should be evaluated under a totality of the circumstances test, including costs); *Dearborn*, 206 F.3d at 624–25 (same); *Qwest v. City of Portland*, 200 F. Supp. 2d at 1256–1257.

A. The Commission Should Issue a Notice of Inquiry Rather than Continue to Promulgate Legislative Rules Though Adjudicatory Proceedings

Mobilitie's Petition seeks a declaratory ruling to interpret provisions in § 253(c), and the Public Notice sought comment on "whether the Commission should issue a declaratory ruling to further clarify" the *2009 Declaratory Ruling* or the *2014 Infrastructure Order*.[99] The Bureau's Public Notice appears self-convinced that the best course lies in adjudication rather than rulemaking.[100] Local Governments disagree.

Although the Commission may exercise discretion as to whether to proceed by adjudication or rulemaking, that discretion is not unlimited.[101] New rules and changes to existing ones could amount to substantive, legislative-type rules that may call for compliance with the notice-and-comment requirements in the Administrative Procedures Act. The Commission should explore the issues raised in the Public Notice through a Notice of Inquiry ("NOI"), which could be followed by a Notice of Proposed Rulemaking ("NPRM").

As a practical matter, the Commission lacks a complete and relevant record on the issues raised in the Public Notice. Although the Public Notice appears to suggest that the record from prior proceedings is sufficient, this would mean reliance on stale comments and anecdotes about problems the Commission already addressed in connection with different technologies.[102] Moreover, the Public Notice lacks sufficiently specific propositions to put the public on notice about potential new or changed rules.[103]

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[99] *See* Public Notice at 10.
[100] *See* Public Notice at 6–7.
[101] *See SEC v. Chenery Corp.*, 332 U.S 194, 202–03 (1947); *see also Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976). The Administrative Procedure Act requires that the Commission publish its proposed rule in the Federal Register, give interested persons an opportunity to participate in the proceedings, consider relevant matters presented, state the basis and purpose for the rule and then publish any substantive rule in the Federal Register at least 30 days prior to the effective date. *See* 5 U.S.C. §§ 553(b)-(d); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).
[102] *See* Public Notice at 8–9.
[103] *See Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 168–71 (D.C. Cir. 2013).

To the extent that the Commission desires to investigate ways to improve small cell deployment practices, the Commission should engage with stakeholders to develop an NPRM based on a robust record.

B. The Commission Should Follow its Staff's Prior Recommendation and Form a "Joint Task Force" to Consider Best Practices for Deployments in the Public Rights-of-Way

State and local government should play a key role in the development of proposed improvements to the small cell deployment process. In the National Broadband Plan issued in 2012, Commission staff recommended that the Commission "should establish a joint task force with state, Tribal and local policymakers to craft guidelines for rates, terms and conditions for access to public rights-of-way."[104] More recently, in January 2017, Chairman Pai announced that he would form a similar task force, the Broadband Deployment Advisory Committee ("BDAC"), to develop an administrative record and recommend best practices to accelerate wireless deployments.[105] The Commission should follow its own recommendation and approach these issues raised in the Public Notice through a joint task force.

The Commission should also note that issuing new or amended regulations at this time would be detrimental to any joint task force or advisory board, especially given that Chairman Pai intends his BDAC to "draft for the Commission's consideration a model code for broadband deployment."[106] Such a task force may not be able to engage in a robust review and discussion if it were formed after the Commission adopts new or amended regulations.

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[104] *See* FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 131 (2012) *available at:* https://www.fcc.gov/general/national-broadband-plan.
[105] *See* Chairman Ajit Pai, *Formation of the Broadband Deployment Advisory Committee (BDAC)* (Jan. 31, 2017), *available at*: http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0131/DOC-343243A1.pdf [hereinafter "*BDAC Statement*"].
[106] *See BDAC Statement* at 1.

V. CONCLUSION

For the foregoing reasons, the Bureau should (1) refrain from additional or more restrictive rules that may exacerbate shot-clock gaming by the wireless industry and (2) consider simplified reforms to the initial application completeness review as described in Part II.C to these comments. Alternatively, the Bureau should consider more collaborative approaches to small cell deployment, such as a notice of inquiry and/or a joint task force.

Respectfully submitted,

Dated: March 8, 2017

Robert C. May III
Telecom Law Firm, PC

Javan N. Rad
Chief Assistant City Attorney
City of Pasadena

Counsel for League of Arizona Cities and Towns, League of California Cities, California State Association of Counties, New Mexico Municipal League, League of Oregon Cities, and SCAN NATOA, Inc.

EXHIBIT A

Additional Comments by the California Street Light Association

(appears behind this cover)

EXHIBIT A

February 15, 2017

TO: Michael Johnston, Legal Counsel, League of California Cities

FROM: Jean A Bonander, Executive Director, California Street Light Association (CALSLA)

SUBJECT: ROW Fee Petition (FCC WT Docket No. 16-421) re: Mobilitie

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Thank you for the opportunity to comment on issues surrounding Mobilitie's attempts to use the public right of way to deploy small cell installations. Per your email, there are three categories of interest. The cities, counties and vendors who have commented at CALSLA about these issues are generally indicating the following concerns.

Unpermitted Work

CALSLA jurisdictions have so far not indicated that Mobilitie has tried to install small cell devices, poles or other infrastructure without permits.

Description of Equipment

CALSLA jurisdictions have indicated that Mobilitie representatives who have scheduled meetings with local government officials have not generally been able to provide the jurisdiction with accurately described or rendered equipment or specifications. In situations where drawings have been provided, e.g., the City of San José, the amount of additional equipment on the pole infrastructure for one carrier is substantial. Please see the attached drawing for clarification.

Misinformation

Several CALSLA jurisdictions have indicated that Mobilitie representatives have made the following kinds of statements about interactions with local governments:

- Mobilitie representatives schedule an initial meeting or inquire about applications and fees, then fail to follow up with a completed application.

- Mobilitie representatives claim to have filed a completed application, and when the jurisdiction questions the allegation and asks for more information, Mobilitie representatives claim that the local government is delaying processing.

- Mobilitie representatives file an application, then fail to complete the process without comment to the local jurisdiction.

- Mobilitie representatives claim that no permit or application is required, that they are exempt from local regulations and on occasion, exempt from CEQA.

- Moblitie representatives have claimed that fees for processing an application are too high, with no further explanation.

Other Issues

The CALSLA Executive Committee, comprised of city and county representatives from around the state, would also like to suggest that the issues listed below are of concern and need additional attention by policy makers at the League of California Cities and the California State Association of Counties.

- Net Neutrality. In this instance, net neutrality means that the various competing private sector telecommunications companies need to come up with a common standard for attachment equipment so that multiple devices can be hosted at one facility location, like a street light pole or a wall-pak mount on a building.

- Migration Regulation. If new right of way infrastructure is required, e.g., an additional pole in the right of way, the telecommunications company shall agree to migrate its attachment device to a common/shared facility as soon as technically possible, and that any decommissioning costs are borne by the telecommunications company.

- Equal Access. Telecommunications companies should expect to be required to place their attachment devices throughout communities, making certain that all members of the community have equivalent access to the services that will be delivered by the company.

- Design Consideration and Quality of Life. If new right of way infrastructure, e.g., an additional pole must be installed in the public right of way, the jurisdiction's design guidelines, right of way access requirements and accessibility requirements must be maintained.

- Aesthetic and Reasonable Use of the Public Right of Way. Most right of way legislation was created in the early 1900's and, as use of the right of way has become more valuable to both communities and private sector vendors, it is important to preserve this asset for the most important and required services and facilities.

- Common Processing Requirements. To the extent possible, local jurisdictions, under the auspices of the League of California Cities and the California State Association of Counties, should quickly develop common application policies, fee schedules, review

guidelines and permitting procedures for small cell attachments to preempt Federal or State authorities from imposing inappropriate standards on local communities.

- Performance Bonds. Any telecommunications company wanting to add devices to the public right of way and/or local government infrastructure facilities shall post a performance bond for clean-up, decommissioning and/or for removal should the telecommunications company file for bankruptcy or otherwise abandon its assets.

- Coordination of Services. As is required of almost all vendors and interjurisdictional participants in projects, the telecommunications companies will coordinate their efforts with local jurisdictions on timing of construction, joint trenching and joint street openings/repairs to achieve economies of scale, minimize disruption to the public, and to expedite comprehensive project management.

- Understanding of Impacts – Utility Owned Facilities (LS-1) and Customer Owned Facilities (LS-2). The issues of which entity permits, conducts environmental or design review, coordinates the construction/installation, receives revenue or fees, incurs expenses and the handling of decommissioning needs to be clarified between the investor owned utility (IOU) infrastructure and the customer owned (cities, counties, special districts) infrastructure.

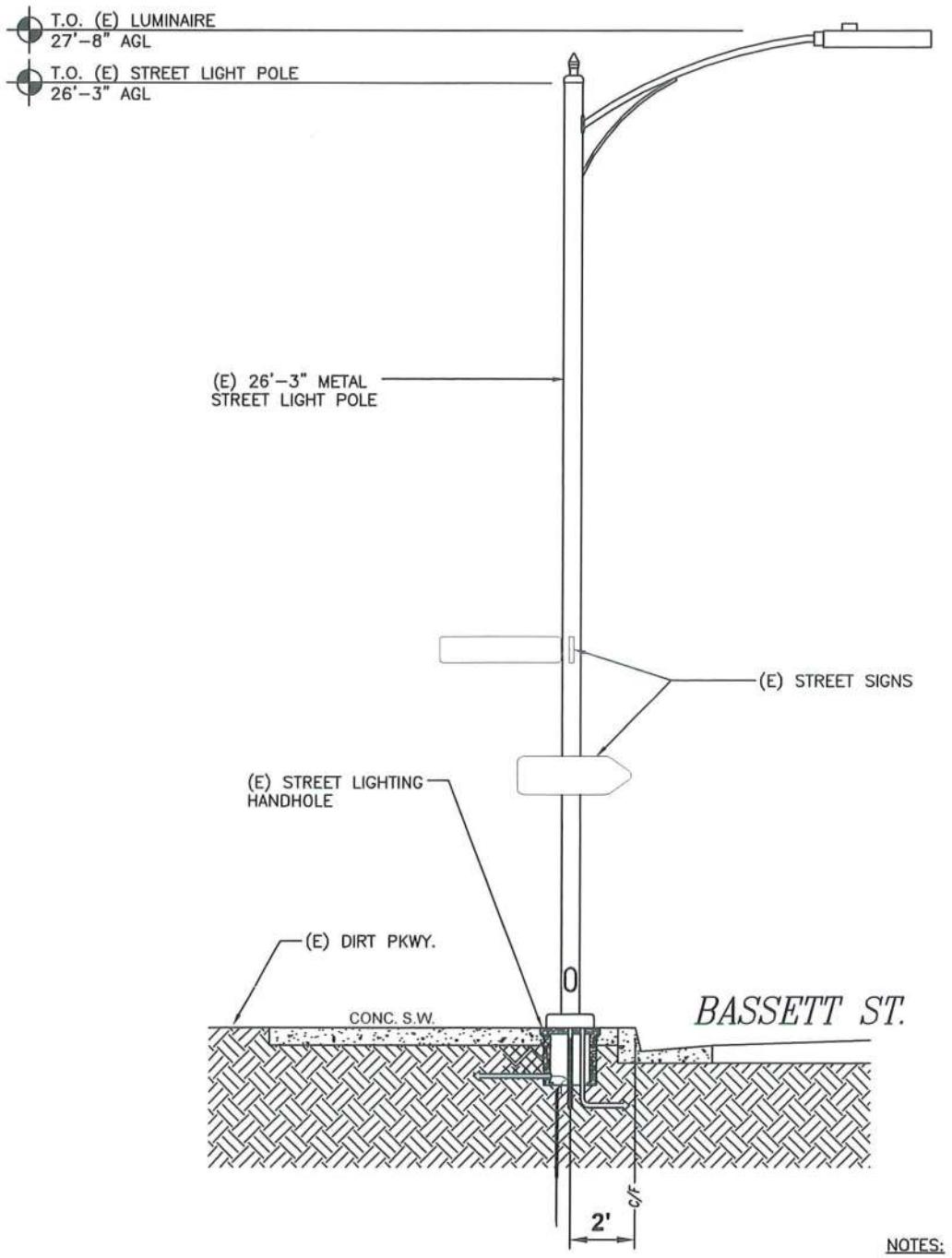
I hope you find this information helpful. If CALSLA can be of additional assistance, please contact me.

Attachment: City of San José Drawings/Mobilitie

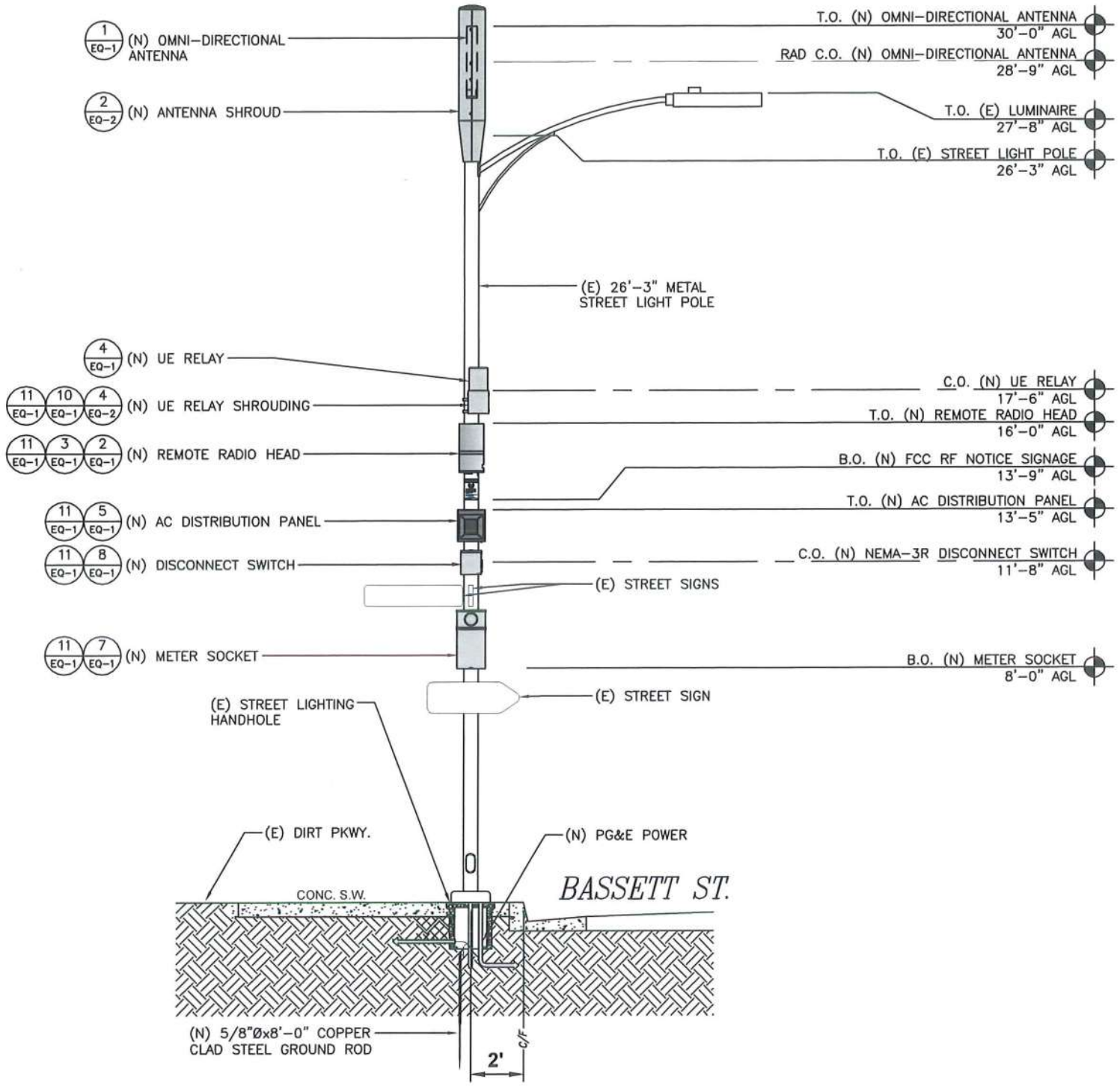
Contact Information:

Jean A Bonander, Executive Director
California Street Light Association (CALSLA)
56 Hacienda Drive
Tiburon CA 94920-1127
jean@calsla.org
415-508-7527

EXHIBIT A



EXISTING SIDE VIEW



NEW SIDE VIEW

NOTES:

1. ALL HARDWARE SHALL BE STAINLESS STEEL.
2. ALL CABLES SHALL BE SECURED TO POLE EVERY 36" OR LESS.
3. LIGHTNING RODS SHALL BE INCLUDED AS REQUIRED.
4. STRUCTURAL BACKFILL TO BE COMPACTED IN 6" MAXIMUM LAYERS TO 95% OF CONTENT IN ACCORDANCE WITH ASTM D698. ADDITIONALLY, STRUCTURAL BACKFILL MUST HAVE A MINIMUM COMPACTED UNIT WEIGHT OF 100 POUNDS PER CUBIC FOOT (16kN/m3)

(E) POLE ELEVATIONS — 1

SCALE: 1" = 5'

mobilitie
intelligent infrastructure

cable engineering services
PRESCOTT COMMUNICATIONS INC.
10640 Sepulveda Blvd. Suite 1, Mission Hills, CA 91345
Phone No.: (818)898-2352 Fax No.: (818)898-9186

PROJECT NO:	9CAB013787
DRAWN BY:	AH
CHECKED BY:	JM

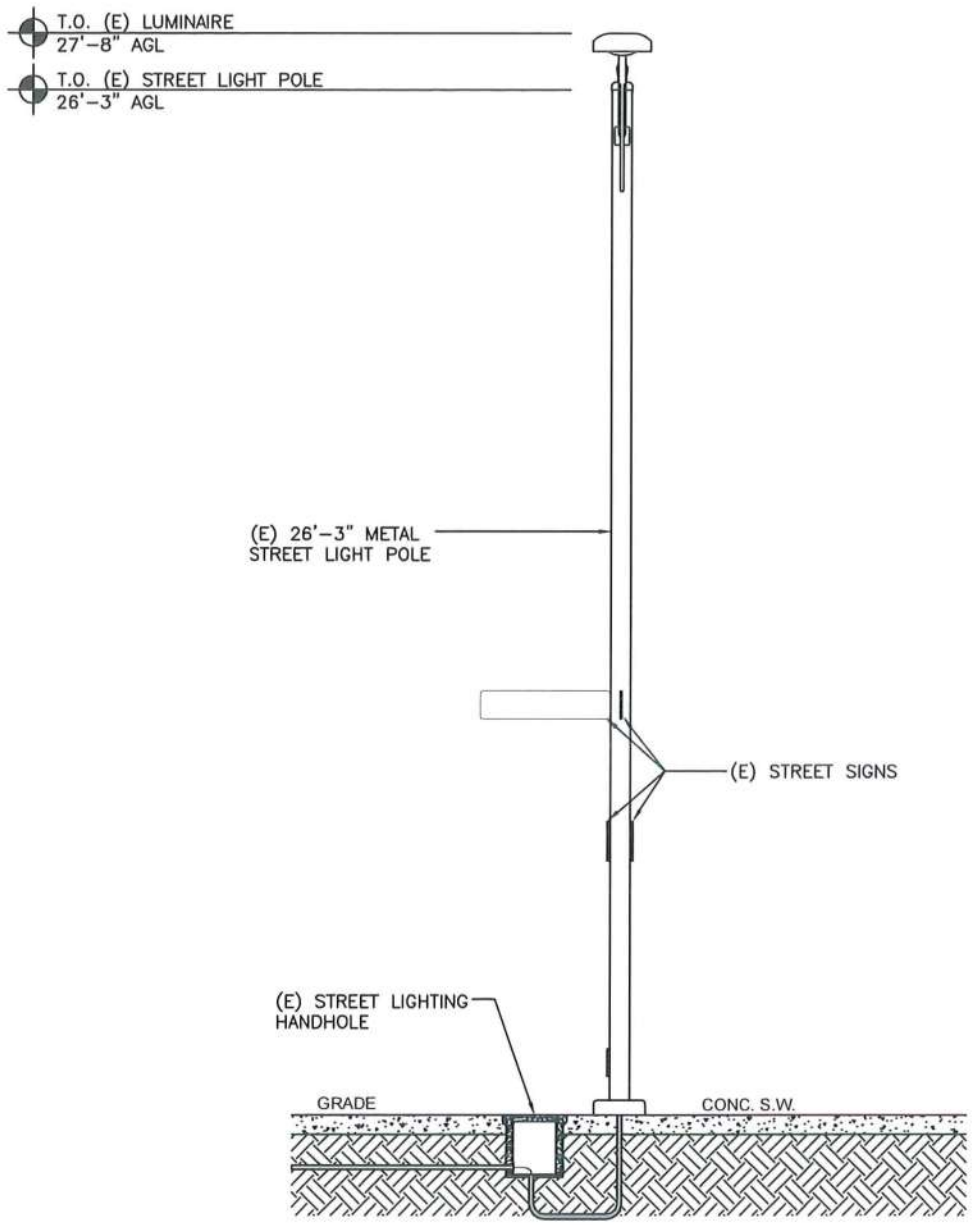
0	01/16/17	90% CONSTRUCTION

SITE ID: 9CAB013787
SAN JOSE, CA 95110
(E) 26'-3" METAL STREET LIGHT

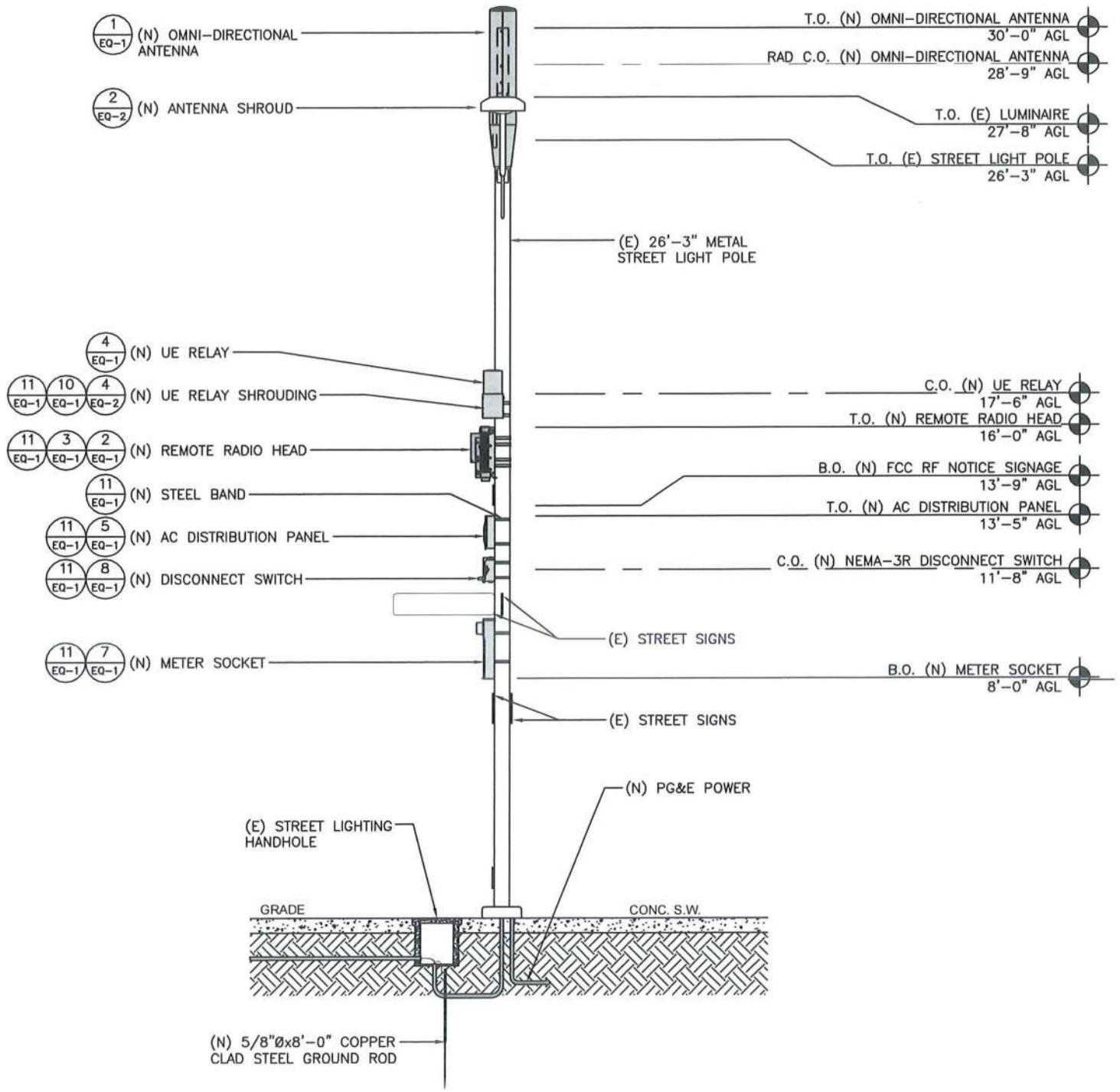
SHEET TITLE
POLE ELEVATIONS

SHEET NUMBER
EV-1

EXHIBIT A



EXISTING FRONT VIEW



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SITE ID: 9CAB013787
SAN JOSE, CA 95110
(E) 26'-3" METAL STREET LIGHT

SHEET TITLE
POLE ELEVATIONS

SHEET NUMBER
EV-2