Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

JOINT REPLY 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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I. THE BUREAU HAS NOT BEEN PRESENTED WITH A MEANINGFUL LEGAL REASON TO CONSIDER THE MEASURES PROPOSED BY MOBILITIE

The industry comments did not provide the Bureau with any meaningful reason to interpret the provisions of § 253 in the manner proposed by Mobilitie. Additionally, the industry comments did not provide any legal authority that would allow the Commission to preempt States and local governments when they act within their proprietary capacity as owners of property in the public right-of-way. In other words, the Commission cannot impose cost-based rates for wireless facilities where States and local governments own an existing street light pole, utility pole or traffic signal pole.[1]

II. THE INDUSTRY'S INTENTIONALLY OBFUSCATED FACTUAL RECORD PRESENTS YET ANOTHER REASON FOR THE BUREAU TO DECLINE TO IMPLEMENT NEW OR MORE RESTRICTIVE REGULATIONS

Just as the industry failed to provide the Bureau with a cogent legal basis for its desired outcome, their comments lacked any compelling or verifiable factual basis. Industry comments overflow with unsupported anecdotes and self-serving stories, without identifying jurisdictions by name. Where the industry identified jurisdictions by name, the allegations were often misleading or incorrect.

Despite the Bureau's direction that it would discount anecdotal evidence, wireless industry commenters generally provided *more* anecdotes than ever before. The record offered by industry stakeholders is replete with unidentified jurisdictions.[2]

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[1] Some industry comments appear to (erroneously) suggest that the Commission may adopt virtually any rule or interpretation it pleases because State and local governments derive their authority to regulate wireless facilities solely from the Communications Act. This is simply not true. Local governments derive their authority from their inherent police powers. *See City of Dallas v. FCC*, 118 F.3d 393, 397–98 (5th Cir. 1997). T-Mobile even attempts to (incorrectly) explain why Congress' specific limitations on federal preemption in Section 601, 110 Stat. at 143–44, do not actually limit the Commission's authority. *See Comments of T-Mobile USA, Inc.*, Comment, WT Docket No. 16-421 at 13 n.28 (Mar. 8, 2017) [hereinafter "T-Mobile Comments"].

[2] *See, e.g.*, *Comments of AT&T*, Comment, WT Docket No. 16-421 (Mar. 8, 2017) (naming no municipalities, but alleging a nationwide problem) [hereinafter "AT&T Comments"]; *Comments of Mobilitie, LLC*, Comment, WT

Although AT&T states in a footnote that it intentionally declined to name names in order preserve its relationships with municipalities,[3] the industry's obfuscation appears to be intended to establish a self-serving record to create a problem that does not exist. The Bureau should discount, if not totally reject, the unsupported anecdotal evidence in the wireless industry's comments. [4]

One reason why the industry comments appear so thin on concrete facts may be that their anecdotes cannot withstand scrutiny. In the few instances described below where the wireless industry comments actually identified allegedly "bad actors," the actual facts show that the industry's characterizations are misleading at best.

A. Fees

Industry comments generally lament the lease and license fees they must pay for access to property and/or structures they do not own. While comments by AT&T, Sprint, T-Mobile and Verizon variously assail unnamed jurisdictions from Arizona, California and Oregon, only one industry commenter provides a concrete–but factually inaccurate—example to support its claims.

Crown Castle erroneously claims that the City of Carlsbad, California, made it "impractical" to continue its operations. As Carlsbad's reply comments show, the city has

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Docket No. 16-421 at 10–13, 15–16 (Mar. 8, 2017) (offering various vague anecdotes about unnamed municipalities) [hereinafter "Mobilitie Comments"]; *Comments of Sprint Corp.*, Comment, WT Docket No. 16-421 (Mar. 8, 2017) (naming no municipalities, but alleging a nationwide problem) [hereinafter "Sprint Comments"]; *T-Mobile Comments* at 2 (naming only San Francisco, but alleging a nationwide problem); *Comments of Verizon*, Comment, WT Docket No. 16-421 at 7 n.17, Appendix A (Mar. 8, 2017) (offering six pages of anecdotes about unnamed municipalities and utilities) [hereinafter "Verizon Comments"]; *Comments of Wireless Infrastructure Association*, Comment, WT Docket No. 16-421 at 12–13 (Mar. 8, 2017) (offering various vague anecdotes about unnamed municipalities) [hereinafter "WIA Comments"].

[3] *AT&T Comments* at 17 n.18 ("AT&T works closely with state and local governments on a multitude of issues. In the interest of maintaining those relationships, AT&T provides general references only.").

[4] *Cf. Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992) (J. Posner) (citing *Morales v. Yeutter*, 952 F.2d 954, 958 (7th Cir.1991)) ("The nature of the record compiled in a notice-and-comment rulemaking proceeding—voluminous, largely self-serving commentary uncabined by any principles of reliability, let alone by the rules of evidence . . . .").

already extended Crown Castle's currently-expired agreement on the same terms and conditions to allow for the use of city-owned poles for more than eight months while the parties work collaboratively to develop a comprehensive program for wireless facility access to municipally-owned infrastructure.[5]

B. Moratoria

The Competitive Carriers Association ("CCA") and the Wireless Infrastructure Association ("WIA") erroneously assert that Fresno County, California, among other communities, adopted moratoria that resulted in "wasted time and resources."[6] Contrary to the industry comments that municipalities "regularly use moratoria as an indefinite stall tactic,"[7] Fresno County lawfully adopted a 45-day moratorium on new facilities in unincorporated areas so it could assess how other communities permit facilities in the public rights-of-way and adopt its own procedures.[8] Fresno County had no process in place to permit right-of-way facilities, let alone the "120 feet tall, 4-feet in diameter" towers proposed by Mobilitie.[9] Rather than indefinitely stall deployment, the short-term moratorium was intended to allow the county to develop a system to review and approve these facilities in a manner that would ensure that such massive and numerous facilities would not threaten pedestrians, motorists and other users in the

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[5] *See Reply Comments of the City of Carlsbad, Cal.*, Reply Comment, WT Docket No. 16-421 at 3–4 (Apr. 7, 2017).
[6] *See Comments of Competitive Carriers Association*, Comment, WT Docket No. 16-421 at 32 (Mar. 8, 2017) [hereinafter "CCA Comments"]; *see also WIA Comments* at 15 n.18. How or why CCA's members would "waste resources" under a moratoria in a state like California is unclear because the shot clock runs through the moratoria and state law deems the application approved when the Commission's timeframe for review expires. *See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 29 FCC Rcd. 12865 at ¶ 219 (Oct. 17, 2014) [hereinafter "*2014 Infrastructure Order*"]; CAL. GOV'T CODE § 65964.1.
[7] *See CCA Comments* at 32–33.
[8] *See* Cnty. of Fresno Ordinance No. 16-016 at 2:12–22 (Nov. 15, 2016) [hereinafter "Fresno Ordinance"].
[9] *See id.* at 2:21; *see also* Marc Benjamin, *Fresno County Adopts Moratorium on Cellphone Towers*, TECHWIRE.NET (Nov. 21, 2016) ("'The utility poles that go in the public right-of-way are generally designed to have some give or break away,' said Bernard Jimenez, deputy Fresno County planning director. 'If you have a 120-foot steel tower with a 4-foot diameter and cement foundation, that's not going to have a lot of give.'").

public rights-of-way.[10] The 45-day moratorium expired on its own terms on December 30, 2016 – nearly 100 days ago and more than two months before CCA and WIA provided their opening comments to the Bureau.

C. Amortization

Crown Castle alleges that California cities such as Vista and Palos Verdes Estates intend to adopt "ordinances (virtually identical to ordinances adopted in Irvine, Santa Monica and San Diego)" that use amortization provisions to effectively prohibit new eligible facilities requests or negate the Commission's rules.[11] This assertion is incorrect because (1) municipalities may, consistent with the Commission's rules, amortize legal nonconforming structures; and (2) the draft amortization provisions in these communities would not bar approval for any eligible facilities request or, for that matter, any new siting requests.

The Commission's rules on eligible facilities requests preempt legal nonconforming status as basis for denial – but do not preempt all legal nonconforming regulations.[12] For example, municipalities in California may amortize nonconforming uses, i.e., "provide for the eventual termination of nonconforming uses if [they] provide[] a reasonable amortization period commensurate with the investment involved."[13]

Both the Vista and Palos Verdes Estates draft ordinances respect the preemptive authority of an eligible facilities request under Section 6409(a) – such that the amortization provisions cannot be applied to prevent eligible facilities requests, and would expressly require local

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[10] *See* Fresno Ordinance at 3:3–11, 3:23–4:3.
[11] *See Comments of Crown Castle International Corp.*, Comment, WT Docket No. 16-421 at 20 (Mar. 8, 2017).
[12] *See 2014 Infrastructure Order*, 29 FCC Rcd. at ¶ 201; *see also Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (restating the presumption against preemption applies in areas traditionally regulated by States or localities, such as development and construction); *Hillsborough Cnty. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 712–13 (1985) (restating federal preemption principles applied to local ordinances).
[13] *See Metromedia, Inc. v. City of San Diego*, 640 P.2d 407, 427 (Cal. 1980) (en banc), *vacated on other grounds* 453 U.S. 490, 513–16 (1981).

officials to approve eligible facilities requests associated with legal nonconforming facilities. However, the draft ordinances both provide at least a minimum 10-year amortization period based on the applicant's own disclosures about project valuation, both contain exceptions to the amortization for extreme financial hardship.[14]

III. NEW OR MORE RESTRICTIVE PROCEDURAL RULES REQUESTED BY THE INDUSTRY WOULD EXACERBATE SHOT CLOCK "GAMING" PROBLEMS

Various industry comments claim that new and more restrictive shot clock regulations are needed, but they fail to appreciate the root cause of their problems.[15] As explained in Local Governments' opening comments, the Commission's complex procedural rules, short timeframes and deemed-granted penalties invite "gaming" of the shot clock by some industry members.[16] New or more restrictive rules would only further encourage this behavior.

As an example, Sprint requests that the Commission declare that the shot clock can begin to run when the applicant submits "basic information about the proposed site" when the local government adopts a moratorium.[17] This proposed rule would essentially approve of the gaming tactics employed by Mobilitie – Sprint's vendor.

The Bureau should decline to adopt any new or more restrictive procedural rules. Rather, the Bureau should simplify its existing rules to remove incentives to "game" the shot clock.

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[14] *See* Vista, Cal., Draft Ordinance for New and Substantially Changed Wireless Communication Facilities § 18.92.100, *available at*: http://www.cityofvista.com/home/showdocument?id=10326 (last visited on Apr. 3, 2017) (emphasis added); Palos Verdes Estates, Cal., Draft Ordinance for Wireless Communication Facilities § 18.55.047, *available at*: http://www.pvestates.org/home/showdocument?id=3174 (last visited on Apr. 3, 2017).

[15] *See, e.g.*, *AT&T Comments* at 4–5; *T-Mobile Comments* at 3–4.

[16] *See 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.*, WT Docket No. 16-421 at 21–24 (Mar. 8, 2017).

[17] *See Sprint Comments* at 20.

IV. CONCLUSION

For the foregoing reasons in these reply comments, and for the reasons set forth in Local Governments' opening comments, 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. Alternatively, the Bureau should consider more collaborative approaches to small cell deployment, such as a notice of inquiry and/or a joint task force.[18]

Respectfully submitted,

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[18] Subsequent to the opening comments in this proceeding, the Commission agendized a contemplated notice of inquiry on these issues. As of the time of this filing, the agenda for the April 20, 2017 Open Commission Meeting contains an agenda item on Wireless Infrastructure Deployment, with an FCC Fact Sheet dated March 30, 2017, describing a proposed notice of inquiry that "asks for comment on how Sections 253 and 332(c)(7) of the Communications Act apply to wireless facilities, including how the Commission could update our policies under these provisions."