Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promoting Broadband for All Americans by	)	WT Docket No. _____
Prohibiting Excessive Charges for Access to	)	
Public Rights of Way	)	

PETITION FOR DECLARATORY RULING

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Mobilitie, LLC ("Mobilitie") petitions the Commission pursuant to Section 1.2 of its Rules for a declaratory ruling interpreting three phrases in Section 253(c) of the Communications Act of 1934, as amended,[1] to speed the deployment of critical advanced wireless infrastructure. First, the Commission should interpret "fair and reasonable compensation" to mean charges that enable a locality to recoup its costs related to issuing permits and managing the rights of way, but no more. Second, it should interpret "competitively neutral and nondiscriminatory" to mean charges that do not exceed those imposed on other providers for similar access. Third, it should interpret "publicly disclosed by such government" to obligate localities to make available to a provider seeking access the rights of way charges they previously imposed on others. These actions will stop excessive and unfair rights of way fees that are impeding wireless broadband deployment, provide clarity and certainty to providers and localities alike, head off and resolve

[1] Section 253(c), 47 U.S.C. § 253(c), states, "Nothing in this section affects the authority of a State or local government to manage the public right-of-way or to require *fair and reasonable compensation* from telecommunications providers, *on a competitively neutral and nondiscriminatory basis*, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is *publicly disclosed by such government*." (emphasis added)

disputes, and thus accelerate more investment in network infrastructure – investment that is necessary to support the American public's exploding demand for wireless broadband.

I. INTRODUCTION AND SUMMARY

Wireless facilities and the networks that connect them are the critical infrastructure of the 21st Century. Wireless, and particularly wireless broadband, is for all practical purposes the newest essential public service, just as telephones and electricity were the essential services of the last century. Robust deployment of wireless facilities and networks demonstrably serves the public interest, and carriers that invest in and build that infrastructure should have the same affordable access to rights of way that companies providing other essential services have enjoyed for decades.

The fundamental purpose of rights of way has always been to benefit the public. Rights of way have always served the public interest by enabling citizens to obtain and use essential services, such as electricity, telephone, gas, water, and transportation.[2] Access to rights of way is a prerequisite to the deployment of the infrastructure that supports those services. Congress has specifically determined that federal, state and local rights of way should be available for communications infrastructure: Section 253 prohibits state and local regulatory "barriers" to new telecommunications services, including barriers to using rights of way.[3]

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[2] *See* Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 Dick. L. Rev. 209, 215 (2002) ("Gillespie") ("Use of the streets for these purposes is not only consistent with the public purpose for which the streets were dedicated but benefits the municipality."); *Montana-Dakota Utils. Co. v. City of Billings*, 80 P.3d 1247, 1251 (Mont. 2003) (observing that "Since the nineteenth century, state and local governments in Montana have granted franchises to private or public corporations for the construction and maintenance of infrastructures within the public rights-of-way to provide essential services to the public)".

[3] Congress had previously made *federal* rights of way available for communications services. The 1976 Federal Land and Policy Management Act authorized the creation of rights of way on federal lands, and permits access for a wide variety of purposes, including the "transmission or reception of radio,

Removing obstacles to deploying small cell networks in rights of way is particularly important because the wireless broadband those networks deliver will play a vital role in closing any gaps in nationwide broadband deployment. The Commission has found that *all* consumers require wireless broadband to have true and meaningful access to the Internet.[4] Given that over 31 million American adults are smartphone-only, with 15 percent of all Americans having a smartphone as their primary – often only – option for broadband access, actions that further deployment and drive such access clearly serve the public interest.[5] Many citizens who lack access to robust wireless broadband reside in urban areas, where small cell deployments along rights of way offer the optimal, if not the only, solution to making broadband available to meet increasing demand.[6] Given the major role that small cell deployments will play in expanding the availability of wireless broadband and 5G to all Americans, preventing excessive fees that

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television, telephone, telegraph, and other electronic signals, and other means of communication." 43 U.S.C. § 761 *et seq.*

[4] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report, 31 FCC Rcd 699, 706 ¶ 17 (2016) ("consumers have advanced telecommunications capability only to the extent that they have access to . . . mobile broadband service"); Commissioner Mignon L. Clyburn, Keynote Remarks at the #Solutions2020 Policy Forum, Georgetown University Law Center, at 5 (Oct. 19, 2016) ("#Solutions2020 Keynote") ("W]e must ensure that the benefits of high-speed wireless broadband reach all communities, including those Americans who continue to rely on 3G service.").

[5] Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Center (Apr. 1, 2015), http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf.

[6] *See, e.g.*, Next Generation Mobile Networks Alliance, *NGMN 5G White Paper*, at 41 (Feb. 17, 2015), https://www.ngmn.org/uploads/media/NGMN_5G_White_Paper_V1_0.pdf V1_0.pdf ("densification will be an important approach to deliver substantial data rate and capacity gains"); Small Cell Forum, *Small Cells and 5G Evolution: A Topic Brief*, at I (June 9, 2015), http://scf.io/en/documents/055__Small_cells_and_5G_evolution_a_topic_brief.php (5G, the future of mobile broadband, "will involve ever-smaller cells, whether to support dense zones of high capacity, or ever-increasing data consumption indoors"); *cf.* Sundeep Rangan *et al.*, *Millimeter-Wave Cellular Wireless Networks: Potentials and Challenges*, 102 Proceedings of the IEEE No. 3 (Mar. 2014), http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=6732923 (describing the promise of small cell deployment to open up millimeter wave broadband deployment in urban environments).

impede access to public rights of way is imperative. Just as rights of way have served the public by making available other essential services like water and electric power, they now can serve the public by making broadband, the newest essential service, available to all.

Courts have observed that local governments' *de facto* monopoly control over public rights of way creates the "danger that local governments will exact artificially high rates" for the use of public rights of way.[7] That danger is precisely what is occurring today across the nation, as many localities are leveraging the growing demand for wireless broadband and the corresponding need for new infrastructure to impose excessive rights of way fees. While some communities are working cooperatively with providers and impose relatively low fees, often no more than $100 for access to a streetlight of utility pole for attaching equipment, others are demanding thousands of dollars in up-front application fees, plus thousands of dollars for each pole as well as additional charges for deploying fiber or other backhaul. Given that small cells and new spectrum bands that will increasingly be used for wireless broadband require multiple sites, these fees when imposed city-wide can run into the hundreds of thousands of dollars, far exceeding any possible costs to localities for approving permits and managing their rights of way. Many require these high fees to be paid every year, often with mandatory annual escalations, which can result in rights of way charges of millions of dollars over time. These charges comprise a major component of deployment costs, undermining deployment incentives in these communities and the public interest.[8]

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[7] *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002); *see also Puerto Rico Tel. Co. v. Municipality of Guayanilla,* 283 F. Supp. 2d 534, 544 (D.P.R. 2003), *aff'd* 450 F. 3d 9 (1st Cir. 2006).

[8] Local governments may contend that they are serving their residents by collecting more revenues through high rights of way charges but, as the Commission has made clear, this position ignores the broader interests at the core of Section 253. *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*,

Reaping the promise of wireless broadband and now 5G requires massive investments in cell sites, backhaul, and transport facilities, as well as access to rights of way for building that infrastructure. Mobilitie, the nation's largest privately held wireless infrastructure provider, is making those investments. The company builds microwave, fiber, and other facilities to supply backhaul and transport to other carriers, principally on new or existing poles along roads and other rights of way. It also constructs small cells and WiFi networks in rights of way for use by wireless carriers. For Mobilitie and other firms that will lead the national effort to invest in the nation's wireless future, rapid access to rights of way at reasonable and nondiscriminatory prices (as promised by Section 253) is critical. Conversely, excessive and discriminatory rents, fees and other charges threaten to impede those investments and slow the deployment of essential wireless infrastructure. High charges imposed by localities can also make the competitive provision of new services cost-prohibitive, suppressing new entry and competition.

Commission action interpreting Section 253(c)'s limits on rights of way charges is particularly imperative given that the National Public Safety Broadband Network, "FirstNet," plans to launch next year. Congress created FirstNet in the 2012 Spectrum Act to provide a comprehensive state of the art national wireless network for the nation's public safety agencies.[9] The heart of FirstNet's plan is to construct or lease capacity on radio access networks, backhaul, and transport facilities nationwide, working with contractors which will likely include wireless

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Memorandum Opinion and Order, 12 FCC Rcd 21396, 21442 ¶106 (1997) ("Each local government may believe it is simply protecting the interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. We believe that Congress' recognition of this fact was the genesis of its grant of preemption authority to this Commission . . . . As a result, where relations among telecommunications providers would be affected, or where the rates, terms, and conditions under which telecommunications service is offered to the public are dictated by an [sic] local ordinance, is of considerable concern to this Commission.").

[9] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156.

carriers and infrastructure providers. FirstNet's vision is to provide local public safety agencies with immense new data capabilities in order to respond to the emergencies that constantly occur in cities and rural communities across America. But achieving that vision will depend on dense deployments of many sites across localities, which will in turn require extensive new backhaul and transport capacity. It is not feasible for FirstNet to accomplish its objectives without access to rights of way for its sites at reasonable and nondiscriminatory rates. Commission action interpreting Section 253(c) will directly assist FirstNet and in turn help fulfill Congress's public safety objectives.

To achieve its cardinal goal of preventing barriers to the deployment of new services, Section 253(c) limits the charges states and localities may impose for rights of way access. Such charges must be "fair and reasonable compensation" for the use of that public resource, and must also be "competitively neutral and nondiscriminatory." And they must be "publicly disclosed" by governments, so that they are transparent to the public and to carriers. These phrases are not specifically defined in the Act or the Commission's Rules. By clarifying them, the Commission will prevent excessive and discriminatory rights of way charges from impeding the deployment of critically needed wireless services, which soon will include 5G technologies. It will thus promote Congress's broader goal of accelerating deployment of ubiquitous wireless broadband services.

For all of these reasons, the Commission should exercise its authority to interpret Section 253(c) to fulfill that provision's core purpose and expedite the deployment of wireless broadband services that will reach all Americans.[10] It should declare that:

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[10] Mobilitie is not asking the Commission to address state laws that identify the types of entities authorized to access rights of way or that delineate the respective roles of state, county and municipal governments in managing rights of way. Nor is it seeking preemption of any specific state or local law or

- "Fair and reasonable compensation" means charges for rights of way application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way. Additional charges or those not related to actual use of the right of way, such as fees based on carriers' revenues, are unlawful.

- "Competitively neutral and nondiscriminatory" means charges imposed on a provider for access to rights of way that do not exceed the charges imposed on other providers for similar access. Higher charges are discriminatory and therefore unlawful.

- Localities must disclose to a provider seeking access to rights of way the charges that they previously assessed on others for access.

II. NEW WIRELESS BROADBAND TECHNOLOGIES DEPEND ON REASONABLE AND NONDISCRIMINATORY CHARGES FOR ACCESS TO RIGHTS OF WAY.

A. Access to Rights of Way Enables Robust Wireless Deployment.

The core public policy objective that rights of way serve – to enable the deployment of services which benefit the public – is particularly applicable to wireless services. For a number of reasons, rights of way have become an indispensable component of wireless infrastructure planning, investment and deployment. *First,* they enable companies to build reliable networks with increased capacity to serve all customers given that most people live and work adjacent to a street or highway. Rights of way are also the key to expanding the availability of robust broadband to all Americans. *Second,* the significant increases in demand for 4G services are requiring wireless carriers to "densify" their networks by installing what are estimated to be hundreds of thousands and potentially millions of additional sites. Rights of way are the optimal (if not the only) way to deploy the many new sites that are needed to serve customers. *Third,* rights of way also are essential locations for backhaul and transport, which rely on a combination of wireless and fiber facilities and thus need access to streets and highways. *Fourth,* using rights

regulation. Rather, it only seeks a ruling that addresses what constitute reasonable and nondiscriminatory – and thus permissible – fees under federal law.

of way reduces the transaction costs providers incur to negotiate with private landowners for access to individual buildings, which can involve hundreds of different leases across a geographic area. Lower costs translate directly into more investment, faster deployment, and more robust competition. These benefits are, as explained below, becoming even more critical for further expansion of wireless broadband and the deployment of 5G technologies.

In 2011 the Commission adopted a *Notice of Inquiry* "concern[ing] key challenges and best practices in expanding the reach and reducing the cost of broadband deployment by improving government policies for access to rights of way and wireless facilities siting."[11] It acknowledged the link between expanding broadband and securing affordable rights of way access, and sought comment on such questions as the following: "To what extent and in what circumstances are rights of way or wireless facilities siting charges reasonable? . . . Are there instances and circumstances in which rights of way or facilities siting charges are unreasonable? What are the appropriate criteria for determining the reasonableness of such charges?"[12] While parties submitted data on the high and discriminatory fees some localities were requiring them to pay before they could deploy new infrastructure, the Commission did not take further action. The Commission should now answer these questions. In fact, the issues it foresaw in 2011 are growing increasingly urgent given the rapidly growing demand for mobile broadband, the need

[11] *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, 26 FCC Rcd 5384 (2011) ("*Broadband Acceleration NOI*"). *See also Connecting America: The National Broadband Plan*, at 109 (2010) ("Securing rights to [rights of way] is often a difficult and time-consuming process that discourages private investment. . . . [G]overnment should take steps to improve utilization of existing infrastructure to ensure that network providers have easier access to poles, conduits, ducts and rights-of-way. . . . The cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands.").

[12] *Broadband Acceleration NOI* at 5391.

for much denser cell sites, and the corresponding need for backhaul and transport networks to support them.

B. Wireless Technologies Need Affordable Access to Rights of Way Now More than Ever to Achieve Our Goals for Broadband and 5G Global Leadership.

On a bipartisan basis, federal telecommunications policy has been designed to increase the availability of wireless broadband (including 5G) to meet the needs of all Americans. As Commissioner Pai has said, "In order for the U.S. to continue to lead the world in wireless, we must stay focused on ensuring that providers large and small can install the antennas and other physical facilities necessary to serve American consumers on the move."[13] And Commissioner Clyburn has stated, "America will only truly win the 5G race if all of our citizens benefit, and it is my sincere hope as we strive to ensure competitive opportunities that we deliver ubiquitous rewards to everyone."[14]

Networks to support small cells such as the ones Mobilitie is constructing will be a cornerstone of 5G deployment. To take advantage of these opportunities, however, the Commission must eliminate barriers to wireless infrastructure deployment. As Chairman Wheeler has observed:

> [T]he nature of 5G technology doesn't just mean more antenna sites, it also means that *without* such sites the benefits of 5G may be sharply diminished. In the pre-5G world, fending off sites from the immediate neighborhood didn't necessarily mean sacrificing the advantages of obtaining service from a distant cell site. With the anticipated 5G architecture, that would appear to be less feasible, perhaps much less feasible. Furthermore, the nature of the technology makes the review and approval by community siting authorities, and the associated costs and fees, all the more critical. There are just over 200,000 cell towers in the U.S., but there

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[13] FCC Commissioner Ajit Pai, Statement on the Removal of Regulatory Barriers to Small Cell Deployments, at 2 (Aug. 8, 2016).

[14] *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services,* Report and Order 31 FCC Rcd 8014 (2016) ("*Spectrum Frontiers Order*") (Separate Statement of Commissioner Mignon Clyburn at 2); *see also* Separate Statement of Commissioner Jessica Rosenworcel at 1.

> may be millions of small cell sites in the 5G future. If siting for a small cell takes as long and costs as much as siting for a cell tower, few communities will ever have the benefits of 5G.[15]

Commissioner Pai has sounded this same concern:

> Future 5G technologies will require "densification" of wireless networks. That means providers are going to deploy hundreds of thousands of new antennas and cell sites, and they are going to deploy many more miles of fiber to carry all of this traffic. Without a paradigm shift in our nation's approach to wireless siting and broadband deployment, our creaky regulatory approach is going to be the bottleneck that holds American consumers and businesses back. The upshot of all this is that we need to make it easier for ISPs to build, maintain, and upgrade their networks—and ultimately make broadband more affordable and accessible to all Americans.[16]

Commissioner O'Rielly has also noted that, "[t]o ensure timely and cost-effective 5G deployment, the Commission must be prepared to step in and move the siting process forward by using the existing authority provided by Congress, and affirmed by the courts, to hold localities accountable for their review processes and ultimate decisions."[17] And Commissioner Clyburn recently stated: "Lack of affordability remains one of the larger barriers to connected communities in this country . . . . Streamlining deployment is central to this effort. We must ensure that all providers are able to deploy and upgrade their infrastructure at the lowest cost and quickest pace."[18]

Recent statistics justify these concerns. According to Cisco's most current VNI Mobile Forecast with respect to the United States:

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[15] FCC Chairman Tom Wheeler, Remarks at the CTIA Super Mobility Show 2016, at 4 (Sept. 7, 2016).

[16] FCC Commissioner Ajit Pai, Remarks at the Brandery: "A Digital Empowerment Agenda," at 2 (Sept. 13, 2016).

[17] FCC Commissioner Michael O'Rielly, Remarks Before Hogan Lovells' Technology Forum: "The 5G Triangle," at 2 (May 25, 2016).

[18] #Solutions2020 Keynote at 4.

- mobile data traffic will grow six-fold from 2015 to 2020, a compound annual growth rate of 42%;
- mobile data traffic will grow two times faster than U.S. fixed IP traffic from 2015 to 2020;
- mobile data traffic in 2020 will be equivalent to six times the volume of the entire U.S. Internet in 2005; and
- the average mobile connection speed will double from 2015 to 2020, reaching 16 Mbps in 2020. [19]

The staggering growth in traffic will eventually outpace network capacity, absent the further densification of networks made possible by billions of dollars in investment to build new infrastructure in local communities across the country. Greatly increased backhaul and transport capacity, as well as "last-mile" capacity through additional cell sites, is critical. As Commissioner Rosenworcel noted in supporting the Commission's allocation of new spectrum bands for 5G, "While these superhigh signals carry a significant amount of data, they don't go far. But we can turn this limitation into a strength by combining these frequencies with small cells packed close together, densifying networks at lower cost. This all works – if we come up with policies and practices that facilitate small cell deployment." [20]

Rights of way are ideal – but also essential – for small cell and 5G technologies, as well as for the backhaul and transport facilities that connect them to all carriers' networks, allowing customers to enjoy nationwide connectivity. Much like mobile devices, wireless infrastructure is evolving toward extremely small equipment that can easily be located on streetlights and utility poles that already occupy rights of way, as well as on structures supporting signage and traffic control equipment. The reduced size and weight of small cell equipment generally does not pose loading problems for most rights of way structures. Many types of small cell antennas extend no more than a few feet in any direction; some are now nearly as small as a laptop.

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[19] Cisco, *VNI Mobile Forecast Highlights, 2015-2020*, http://www.cisco.com/assets/sol/sp/vni/forecast_highlights_mobile/.

[20] *Spectrum Frontiers Order* (Separate Statement of Commissioner Jessica Rosenworcel at 2).

Access to rights of way is also more essential for small cells and the transmission facilities that connect them than it has been for 3G and 4G macrocells. The higher-frequency radio spectrum bands that carriers will increasingly depend on for small cells and 5G can supply needed network capacity. However, these bands' propagation limitations require more closely-spaced infrastructure. There is often no practical way to deploy this infrastructure without using public rights of way. And every small cell site must be connected to networks through backhaul and transport facilities so that customers can send and receive communications to or from anywhere. Given the enormous capacity demands being placed on networks, fiber may be the only cost-effective choice in urban areas. Fiber supplies the bandwidth needed to accommodate explosive data growth for many years, avoiding the need to repeatedly install new conduit. But installing fiber is not technically feasible or financially viable without access to rights of way. If carriers and infrastructure providers are charged exorbitant rents or fees for that access, fiber deployment will be deterred.

In short, robust and ubiquitously available wireless broadband depends on affordable access to rights of way. By granting this petition, the Commission will give force to the core purpose of Section 253. And it will prevent excessive fees that are impeding providers from building the infrastructure that will help make wireless broadband for all Americans a reality.

C. High and Discriminatory Fees Are Impeding Deployment of Infrastructure Needed to Support Wireless Broadband.

Mobilitie and other providers are spearheading the wireless industry's expansion of network capacity to accommodate ever-growing customer demands for advanced technologies. These companies pay enormous up-front costs to construct and expand their networks, long before they can generate revenues from those networks. The economics of deployment are, however, made far more difficult when localities impose excessive fees as a precondition for deployment. As Commissioner O'Rielly stated at the Commission's May 3, 2016 workshop, "I continue to hear legitimate complaints about localities placing hurdles in front of small cell deployments. Issues range from permitting problems and excessive fees to forced tolling agreements and *de facto* moratoria. Site approvals in rights-of-way, which are especially important for small cell systems, appear to be particularly problematic."[21] In recent testimony to Congress, he expanded on his concerns:

> One area that the Commission, and perhaps Congress, can provide greater assistance is removing barriers to the wireless infrastructure necessary to deploy 5G. As I have previously outlined, experts estimate that the propagation capabilities (short distances) will require a ten-fold or greater siting of wireless towers and antennas. Some have argued that we may see a million new small cells and DAS antennas deployed in the next five years. All of this infrastructure can't be sited without approval of decision makers, including private land owners and municipal managers.
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> Standing in the way of progress, however, are some localities, Tribal governments and states seeking to extract enormous fees from providers and operating siting review processes that are not conducive to a quick and successful deployment schedule. At some point, the Commission may need to exert authority provided by Congress to preempt the activities of those delaying 5G deployment without justifiable reasons.[22]

Mobilitie's experience validates these concerns. It holds authorizations from state public utility commissions nationwide to provide telecommunications services, and has filed thousands of applications for permits or franchises in nearly all 50 states. Those applications cover tens of thousands of individual sites to be located in rights of way that include antennas, fiber, electric power supply, and other equipment. Some localities recognize the public interest benefits in

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[21] FCC Commissioner Michael O'Rielly, Statement at DAS and Small Cell Solutions Workshop (May 3, 2016).

[22] FCC Commissioner Michael O'Rielly, Statement Before the Senate Committee on Commerce, Science, and Transportation, "Oversight of the Federal Communications Commission," at 1-2 (September 15, 2016).

granting Mobilitie affordable access to rights of way to bring advanced services to their residents. These communities have worked cooperatively with Mobilitie and charge reasonable fees. For example, Mobilitie has concluded rights of way agreements with small up-front or annual fees ranging from $80 to $750 with the cities of Los Angeles and Anaheim, California; Minneapolis, Minnesota; Overland Park and Olathe, Kansas; Independence, Missouri; Newark and Union City, New Jersey; Bismarck, North Dakota; Price, Utah; and Racine and Wauwatosa, Wisconsin.

Many other localities are, however, requesting multiple, exorbitant fees that unlawfully discriminate against wireless technology and impair new or improved service. In Mobilitie's experience, these fees are orders of magnitude higher than what other localities charge – even ten times as much – and also far exceed a locality's charges to defray its reasonable costs of processing permit applications and managing its rights of way. Mobilitie believes these fees are materially higher than what other rights of way users have been charged, although, as discussed below, information as to what other users are paying is difficult to obtain.[23]

These high charges are particularly unjustified because equipment for new wireless technologies is often *less* intrusive than equipment for older wireline or wireless services. The regulatory approval process for these types of new wireless facilities should be faster and *less* burdensome, not slower and more expensive.

Commentators have noted the growing problem of high rights of way fees and have asked the Commission to address it:

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[23] Some localities are requiring Mobilitie to pay a revenues-based "franchise fee." But franchise fees are typically required when a locality awards a special privilege or exclusive right. In contrast, the agreements that Mobilitie is being asked to execute declare that Mobilitie is only being granted "non-exclusive" access, and that the locality may "franchise" an unlimited number of other providers – and collect revenues-based fees from each of them as well.

> Many LGUs [local government units] have recognized that communications are a beneficial service and crucial for economic development and, thus, they have allowed carriers to occupy the PROW [public rights of way] in return for one time permit charges or similar fees that are limited to recovering the cost of PROW management and maintenance. Other LGUs have seen the opportunity for a large and continuous revenue source, and they have used their monopoly control over the PROW to extract large fees that are used to subsidize other LGU services.[24]

Noting that broadband is "becoming an essential service" and that both "the Bush and Obama administrations have established accelerated broadband deployment as a national priority," this analysis concluded that high rights of way charges interfere with that priority: "To upgrade and build out their networks, carriers naturally need increased access to the PROW. LGUs that seek to subsidize other government services by charging revenue generating PROW fees are a formidable obstacle to that goal."[25]

"Given the importance of ubiquitous expansion of 4G and the rollout of 5G to our economic future, it's not reasonable for localities to view cell site deployment as a potential new revenue stream, which is something we've seen."[26] The problem is not confined to a few outlier localities – it exists nationwide. Across the country, Mobilitie is being confronted with multiple fees, often being asked to pay not only up-front fees but also annual recurring fees which escalate by mandatory amounts year after year. Worse, cities are requesting these fees not only for new poles or for attachments to city-owned light poles, but also where Mobilitie would install its equipment on a private utility's poles, even though there is no cost to the city from that installation and no new use of its rights of way. Types of fees include:

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[24] Thomas W. Snyder and William Fitzsimmons, *Putting a Price on Dirt: The Need for Better-Defined Limits on Government Fees for Use of the Public Right-of-Way Under Section 253 of the Telecommunications Act of 1996*, 64 Fed. Comm. L. J. 137, 138-39 (2012) ("Snyder & Fitzsimmons").

[25] *Id.* at 140.

[26] FCC Chairman Tom Wheeler, Remarks at the Competitive Carriers Association, at 5 (September 20, 2016 ("Wheeler CCA Remarks").

Application fees. Localities seek up-front fees to process any permit applications while reserving discretion to deny any or all permits. These fees are typically in the $1,000 - $3,000 range but can be far higher. For example, a Minnesota locality demanded a $10,000 up-front processing fee and a California city requested an $8,000 "administration fee," but neither locality explained how it calculated this amount or how it possibly reflected costs to process the application. These fees are problematic because they often are not *in lieu of* per-pole or per-site fees but are instead *in addition to* them, further driving up carriers' up-front costs.

Annual per-pole fees. In addition, every locality is seeking a separate fee for each and every facility Mobilitie constructs. These fees do not serve to compensate the city for processing Mobilitie's applications because those costs will already be recouped through the up-front application fees. Localities do not explain or justify annual per-pole fees as compensating them for the management of the rights of way, supervision of Mobilitie's operation, or other ongoing costs. Instead, the fees appear to be set to recover what localities believe the "market" rate is for the use of their rights of way so that they can profit from it. This results in huge variations in what Mobilitie is being asked to pay from city to city. And, because cities typically demand that the first year's fee be paid as a condition of granting a permit to construct a site, Mobilitie must pay the fee long before it can generate any revenues from its use. By adding to Mobilitie's up-front costs, these fees make the financial case for expanding service even more difficult. Examples of such high fees include:

- A Wisconsin city has requested annual fees of $30,000 for each pole.
- Two Oregon cities have requested payments of $6,083 and $5,000 annually for each pole.
- One California city initially proposed annual fees of $14,000 per pole. When Mobilitie objected the city reduced the fees to $4,000, justifying that number because a nearby city had charged $4,000. This pricing behavior signals that cities are setting fees not to

compensate them for managing the rights of way, but to collect as much as other cities are receiving or as much as the market can bear.

- Two other California cities are demanding annual fees of $10,800 and $7,210 per pole respectively.

- A Texas locality requested a $20,000 annual per-pole fee for new poles. Mobilitie proposed a lower amount but the city refused to accept it, forcing Mobilitie to limit its planned deployment to attaching equipment to existing poles. Even for simple attachments the city is demanding $2,000 annually for each pole, even where the attachment would require no disturbance of the underlying right of way.

- An Illinois jurisdiction is requesting a $12,000 annual per-pole fee.

- A New York locality imposed a blanket fee of $45,000 per year that is not tied to the number of poles Mobilitie constructs and thus bears no relationship to actual use of the rights of way.

It bears emphasis that these and other charges localities demand are "unit" fees, which must be paid for *each* small cell site. But small cell deployments may require dozens or even hundreds of sites to provide needed capacity and coverage, meaning that these fees skyrocket. A $5,000 per-site fee for a 100-site deployment translates into $500,000 in fees per year.

The magnitude of many rights of way fees materially impacts the economics of small cell and backhaul deployment, because those fees are so high in relation to other buildout costs and comprise a large percentage of those costs. The harmful impact of these fees is compounded because they are recurring fees that must be paid to the locality every year, meaning that over time they can far exceed all other deployment costs. Depending on the type of equipment used, the installation of a new pole can cost from $15,000 to $30,000. With some localities imposing per-site permit application fees of several thousand dollars, plus annual fees in that range as well, up-front fees can comprise 20-30 percent or more of total construction costs. But those up-front fees only are part of the payments Mobilitie must make. Because it typically also must pay the per-pole fee every year – and that fee is almost always subject to mandatory annual percentage escalations – the financial burden that local fees impose is exacerbated. Thus, for example, an annual $3,000 fee will cost well more than $30,000 for *each* installation over ten years, which can far exceed the entire costs of deployment. Such fees can make deployment financially nonviable, effectively preventing deployment of new service.

Percentage-of-revenues fees. Other localities demand that Mobilitie pay a percentage of its annual gross revenues, with required fees as high as six and seven percent (requested by localities in Oregon and Washington). Jurisdictions in California, Massachusetts, and New York, as well as other jurisdictions in Oregon, are requesting that Mobilitie pay them five percent of its gross annual revenues. These fees, which can exceed what localities can charge cable providers under federal law, by definition bear no relationship to Mobilitie's actual use of the rights of way. Such a substantial tax directly affects Mobilitie's ability to finance projects in those communities.

Fiber fees. Where Mobilitie seeks to lay Ethernet or other fiber in rights of way to transport traffic from its pole-based equipment to carriers' core networks, cities also request a per-foot fee. These fees vary tremendously. While some jurisdictions in states including Kansas, New York, Minnesota and Utah charge fees ranging from $0.19 to $1.08 per foot per year, other cities are requesting per-foot charges orders of magnitude higher. For example, several Texas cities have sought fiber fees based on the fair market value of adjacent private property – even though they would not be granting Mobilitie any title or other private property rights that property owners enjoy. Such "fair market value" fees drive up the costs of fiber to prohibitive levels, deterring the deployment of new fiber capacity needed to accommodate growing broadband traffic.

Third-party manager fees. Some localities are entering into exclusive contracts with private companies to manage their rights of way. Some of these firms compete with other companies deploying network infrastructure. Under these arrangements, the private manager is empowered to negotiate rent and other fees from carriers and keep a share of the profits. This practice results in fees that by definition do not only compensate the city but also pay a private party, without any relationship to Mobilitie's actual use of the rights of way. Chairman Wheeler has criticized this growing practice: "It's not reasonable for cities to 'franchise' their siting to a third party, who acts as a gatekeeper."[27]

The plethora of different and often multiple fees demonstrates that many localities are using their authority to manage rights of way as a pretext for raising revenue, regardless of Section 253(c)'s mandate for "fair and reasonable compensation" that is "competitively neutral and nondiscriminatory." And, because these fees must be paid in advance, they are particularly burdensome for a new entrant such as Mobilitie, who must pay them in addition to fronting the costs of equipment and construction, long before it can expect to generate revenue. This often creates an untenable situation that leaves Mobilitie with the dilemma of acceding to a municipality's unreasonable demands or not deploying in that municipality at all. These profit-generating regimes also frustrate the Commission's efforts to accelerate broadband deployment and foster the entry and growth of new competitive services.

[27] Wheeler CCA Remarks at 5.

III. A DECLARATORY RULING WILL ACHIEVE SECTION 253(c)'S OBJECTIVES BY CLARIFYING ITS APPLICATION TO RIGHTS OF WAY CHARGES.

A. The Commission's Clarification of Section 253(c) Is Needed Now.

In the Telecommunications Act of 1996, Congress directed the FCC to promote rapid deployment of telecommunications services and promote competition by outlawing state and local requirements that deter the deployment of those services. Section 253(a) provides, "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." While Section 253(c) preserves the rights of municipalities to charge access fees for their rights of way, those rights are expressly limited:

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

Thus Section 253(c) requires that any charges localities impose must be limited to "fair and reasonable compensation" and be imposed "on a competitively neutral and nondiscriminatory basis." The charges described above clearly violate Congress' directive because they are not tied in any way to actual costs of issuing permits and managing rights of way.[28] Instead they confirm that localities are leveraging their control over the public streets to raise revenues and profit from that control – precisely the incentive to impose "artificially high rates" that courts have invalidated.[29]

[28] *See* discussion in Section IV.A, *infra.*

[29] *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d. Cir. 2002).

Given the vital importance of new wireless infrastructure to achieving the national policy objective of universal broadband availability, and the threat that unreasonable and discriminatory charges pose to that objective, the Commission should provide guidance on how Section 253(c) applies to rights of way charges.[30] To facilitate the nationwide deployment of densified infrastructure in rights of way, the Commission should lay down "markers" that will provide more certainty to localities and carriers as to what charges Section 253(c) does and does not allow. Guidance will yield significant benefits:

- It will help to stop localities from imposing charges designed not to cover costs but to profit from the public's growing demand for more and faster wireless services.
- It will resolve many of the controversies over charges that have delayed infrastructure deployment and consumed resources of localities and carriers. Both will benefit from Commission guidance that sets metes and bounds for those charges.
- A mandate from the Commission can have broad, national impact, providing clarity to all affected parties. It is a far more efficient and effective remedy than case-by-case adjudications and better fits the national need for prompt action.
- It will provide guidance to courts when they adjudicate claims that localities have violated the requirements of Section 253.

B. A Declaratory Ruling Is the Right Course to Provide the Needed Guidance.

A declaratory ruling clarifying the application of Section 253(c) would square with Commission precedent. Historically the Commission has issued declaratory rulings to provide interested parties with guidance as to their respective obligations under the Act or the Commission's rules, particularly where conflicting interpretations or other factors have created uncertainty. Declaratory rulings efficiently provide certainty to all affected parties across the

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[30] *See, e.g.*, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (interpreting the statute's phrase, "reasonable period of time").

entire country, rather than the piecemeal approach of court adjudications. For example, the Commission issued a declaratory ruling to "clarify statutory rights under Section 251 of the [Act], in light of apparently conflicting determinations in several states."[31] In another declaratory ruling the Commission noted that guidance "would be helpful to avoid future disputes."[32] Courts have also specifically noted the Commission's particular role in interpreting Section 253.[33]

The Commission has also issued declaratory rulings interpreting the Act and its rules as they apply to other wireless facilities siting issues, and grounded its action each time on achieving its goal to foster new wireless services. In 2006 it granted a petition for declaratory ruling that an airport authority's restrictions on the deployment of wireless access points was preempted by the agency's "OTARD" rule, which is intended to promote the deployment of those antennas to improve service to the public.[34] And in 2009 the Commission issued a declaratory ruling interpreting language in Section 332(c)(7) of the Act to impose "shot clocks" for local zoning action on wireless siting applications. That ruling was designed to "promote[ ]

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[31] *Petition of CRC Communication of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act*, Declaratory Ruling, 26 FCC Rcd 8259 ¶ 1 (2011) ("[O]ur decision will provide clarity and guidance to incumbent local exchange carriers (LECs), competitive providers and state commissions about the rights and obligations regarding negotiation and arbitration under Section 251."); *Time Warner Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3517 ¶ 8 (2007) (declaratory ruling clarifying that telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to Section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services).

[32] *Network Affiliated Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 13610, 13611 ¶ 5 (2008).

[33] *See, e.g., BellSouth v. Town of Palm Beach,* 252 F.3d 1169, 1188 n.1 (6th Cir. 2001) ("As the federal agency charged with implementing the Act, the FCC's views on the interpretation of Section 253 warrant respect.").

[34] *Continental Airlines, Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion and Order, 21 FCC Rcd 2525 (2006).

the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks."[35]

To date, the Commission has not defined what types of rights of way access fees qualify under Section 253(c) as "just and reasonable compensation" or "competitively neutral and nondiscriminatory," or how they should be "publicly disclosed" by governments that impose them. Clarifying Section 253(c)'s application to rights of way charges will prevent disputes that frustrate and delay necessary investments in wireless broadband and 5G. As Commissioner Pai recently stated:

> [T]he FCC must aggressively use its statutory authority to ensure that local governments don't stand in the way of broadband deployment. In section 253 of the Communications Act, for example, Congress gave the Commission the express authority to preempt any state or local regulation that prohibits or has the effect of prohibiting the ability of any entity to provide wired or wireless service. So where states or localities are imposing fees that are not "fair and reasonable" for access to local rights of way, the FCC should preempt them. Where local ordinances erect barriers to broadband deployment (especially as applied to new entrants), the FCC should eliminate them. And where local governments are not transparent about their application processes, the FCC should require some sunlight. These processes need to be public and streamlined.[36]

IV. THE COMMISSION SHOULD INTERPRET SECTION 253(c) TO ACHIEVE CONGRESS'S OBJECTIVE OF REASONABLE, NONDISCRIMINATORY, RIGHTS OF WAY FEES.

To prevent excessive and discriminatory fees from deterring investment and forestalling deployment of advanced wireless infrastructure, and to provide more certainty to governments and carriers as to what constitutes lawful compensation, the Commission should adopt the following three interpretations of Section 253(c):

[35] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009).

[36] FCC Commissioner Ajit Pai, "A Digital Empowerment Agenda," at 7 (Sept. 13, 2016).

A. "Just and Reasonable Compensation" Is Appropriately Limited to a Locality's Cost of Managing its Rights of Way.

The Commission should first declare that the phrase "fair and reasonable compensation" means charges that enable a locality to recoup its reasonable costs to review and issue permits and manage its rights of way, and that additional charges are unlawful. A locality could, for example, collect a one-time fee to recover the personnel and other costs for reviewing a carrier's application for a permit or franchise to construct facilities in its rights of way. Similarly, a fee that covers the costs to supervise the construction of facilities for compliance with the terms and conditions of the permit, local building codes, liability insurance, or street excavation regulations would be reasonable. And a locality may collect recurring rental or access fees that cover its incremental personnel and other costs for monitoring the facilities (for example, to ensure they are maintained in compliance with signage and other requirements).

The Commission should declare, however, that additional charges that exceed these costs are unlawful. Thus, a locality's one-time and recurring charges and fees cannot be set at levels that are designed to raise revenues for the locality, because those charges would allow the locality to profit from its exclusive control of rights of way. Localities should not be able to seize on the nation's urgent need for a huge investment in wireless infrastructure as a new source of revenue.

The language, purpose and legislative history of Section 253 support limiting total compensation from all fees to those that are related to a locality's costs. Congress's use of the term "compensation" rather than, for example, "payments," reflects that permissible charges are only those necessary to "compensate" the locality for its costs of managing the rights of way.[37]

[37] "Compensation" connotes payment tied to a particular expense or outlay, not an ability to collect revenue generally. Black's Law Dictionary 283 (6th Ed.) (defining "compensation" as the "equivalent in

This conclusion fits Section 253's purpose – to promote new telecom services by removing barriers (including unreasonable charges) to telecom carriers, while preserving localities' right to manage their rights of way. Allowing localities to recoup the costs to manage – but not to profit from – rights of way would fulfill the statute's objective. Conversely, allowing localities to charge whatever the market will bear would eviscerate the statutory limits.

The legislative history of Section 253(c) is consistent with determining that "fair and reasonable compensation" means fees that are related to a locality's costs. During the floor debate on this section, Senator Feinstein gave examples of the limited types of activities that localities could conduct, including "requir[ing] a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation." Nowhere did she indicate that fees could be imposed more broadly or simply to collect new revenues.[38]

This interpretation does not require the Commission to specify dollar caps or other quantitative limits on what localities can charge. Localities have varying processes for reviewing rights of way use applications, overseeing the construction of facilities, and monitoring carriers' ongoing use. Their costs of managing rights of way access and use thus vary. But the magnitude of the variation is likely to be small – and far smaller than extreme variations that currently exist. Commission guidance that provides more certainty as to permissible costs will translate into faster and more robust investment.

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money for a loss sustained"); Webster's New World Dictionary at 227 (defining "compensation" as, for example, "something that constitutes an equivalent or recompense").

[38] 141 Cong. Rec. S8172 (June 12, 1995) (statement of Sen. Feinstein); *see also* 141 Cong. Rec. S8212 (1995) (statement of Sen. Gorton) (Section 253 is a "very, very broad prohibition against state and local" regulation).

This ruling will also provide needed guidance to federal courts, which have adopted different approaches to determining when a locality's charges are "fair and reasonable." Many courts have held that rights of way fees cannot be set at a level designed to raise revenues, but must be tied to the locality's costs of managing its rights of way. For example, in *AT&T Communications of the Southwest, Inc. v. City of Dallas*,[39] Dallas attempted to charge AT&T a franchise fee equal to 4% of its gross receipts for television operations in the city. The court found that this fee was "in no way tied to AT&T's use of City rights-of-way,"[40] and that "any fee that is not based on AT&T's use of City rights-of-way violates Section 253(a) of the [1996 Telecom Act] as an economic barrier to entry."[41]

Similarly, in *Bell Atlantic-Maryland, Inc. v. Prince George's County*,[42] the court rejected the county's attempt to impose a "right of way charge" equal to 3% of a rights of way user's gross revenues. It held that "the proper benchmark is the cost to the county of maintaining and improving the right of way that the carrier actually uses."[43] The court explained its reasoning as follows:

> The crucial point . . . is that any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use of the local rights-of-way, otherwise the fees constitute an unlawful economic barrier under Section 253(a). . . . For the same reason, the court also believes that local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way. *Franchise fees thus may not serve as general revenue-raising measures.*

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[39] 8 F. Supp. 2d 582 (N.D. Tex. 1998).

[40] *Id.* at 588.

[41] *Id.* at 593.

[42] 49 F. Supp. 2d 805 (D. Md. 1999), *vacated on other grounds*, 212 F. 3d 863 (4th Cir. 2000).

[43] *Id.* at 818.

> . . . If local governments were permitted under Section 253(c) to charge franchise fees that were unrelated either to a telecommunications company's use of the public rights-of-way or to a local government's costs of maintaining and improving its rights-of-way, then local governments could effectively thwart the [1996 Telecom Act's] pro-competition mandate and make a nullity out of Section 253(a). Congress could not have intended such a result.[44]

In *XO Missouri, Inc. v. City of Maryland Heights*,[45] local rights of way users were initially required to pay an annual license fee equal to the greater of the fee established by the city or 5% of the user's gross revenues. Here again, the court found that the city had not met the "just and reasonable compensation" standard in Section 253(c):

> The Court adopts the reasoning supporting other courts' decisions that revenue-based fees are impermissible under the [1996 Telecom Act]. *Thus, to meet the definition of "fair and reasonable compensation" a fee charged by a municipality must be directly related to the actual costs incurred by the municipality when a telecommunications provider makes use of the rights-of-way.* . . . [P]lainly a fee that does more than make a municipality whole is not compensatory in the literal sense, and instead risks becoming an economic barrier to entry.[46]

In *Puerto Rico Telephone Company, Inc. v. Municipality of Guayanilla*,[47] the First Circuit similarly rejected a Guayanilla, Puerto Rico ordinance that imposed a five percent gross revenue fee on telecommunications providers for their use of the municipality's public rights of way.

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[44] *Id.* at 817 (citation omitted) (emphasis added). *See also PECO Energy Company v. Township of Haverford,* 1999 U.S. Dist. LEXIS 19409, *24 (E.D. Pa. 1999) ("Revenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of way."); *Qwest Communications Corp. v. City of Berkeley*, 146 Supp. 2d 1081, 1100 (N.D. Ca. 2001) ("Fees charged against telecommunications carriers must be directly related to the carrier's actual use of the local rights of way."); *N.J. Payphone Ass'n Inc. v. Town of West York*, 130 F. Supp. 2d 631, 637-38 (D.N.J. 2001) ("*N.J. Payphone*"), *aff'd*, 299 F.3d 235 (3d Cir. 2002) ("fair and reasonable compensation" is limited to "recoupment of costs directly incurred through the use of the public rights-of-way. . . . A fee that does more than make a municipality whole is not compensatory in the literal sense.").

[45] 256 F. Supp. 2d 987 (E.D. Mo. 2003)

[46] *Id.* at 994 (citations omitted) (emphasis added).

[47] 450 F. 3d 9 (1st Cir. 2006) ("*Guayanilla*").

Again, the relationship between the fee and the municipality's costs was the linchpin of the court's analysis:

> We need not decide whether fees imposed on telecommunications providers by state and local government must be *limited* to cost recovery. We agree with the district court's reasoning that fees should be, at the very least, *related* to the actual use of rights of way and that "the costs [of maintaining those rights of way] are an essential part of the equation." . . . As the district court noted in this case, "[a]bsent evidence of costs, the Court cannot determine whether the Ordinance results in fair and reasonable compensation as opposed to monopolistic pricing."[48]

The First Circuit noted that fees carriers pay to localities often represent a one-for-one loss of dollars that otherwise could be used for beneficial network investment. It also found that "market-based" pricing was not consistent with Section 253(c): "The amount that other telecommunications carriers would be willing to pay tells us more about telecommunications providers' resources and their desire to comply with local regulations than it does about why the fee chosen is "fair and reasonable compensation for the state or municipality."[49]

Other courts have considered various factors in addition to the locality's costs. In *TCG Detroit v. City of Dearborn*, the Sixth Circuit approved a 4% gross revenue fee after examining "the extent of the use contemplated, the amount other telecommunications providers would be willing to pay, and the impact on the profitability of the business."[50] In *Qwest Corporation v. City of Santa Fe*,[51] the Tenth Circuit struck down a city's fee structure that sought to capture the right of way's fair market value. While it noted that courts were split on whether fees must be

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[48] *Id.* at 22 (emphasis in original), quoting *P.R. Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 113-114 (D.P.R. 2005).

[49] *Id.* at 18-19.

[50] 206 F.3d 618 (2000). *See also City of Portland, Oregon v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1074-75 (D. Or. 2005).

[51] 380 F.3d 1258, 1272-3 (10th Cir. 2004).

cost-based or could include other factors, it found the city's fees violated Section 253 because they were not cost-based and did not meet the Sixth Circuit's test, as enunciated in the *TCG Detroit* case. Another court has noted the varying approaches to determining when a right of way fee is fair and reasonable:

> Some courts have found that the fairness and reasonableness of a franchise fee under section 253(c) depends upon a rough proportion between the fee and the extent of the use of the public right-of-way, fees other providers have been willing to pay, and the negotiating history of the parties. . . . Others, more persuasively in this Court's view, read "fair and reasonable compensation" to limit municipalities to recoupment of costs directly incurred through the use of the public right-of-way.[52]

The courts' different approaches make the Commission's interpretive guidance particularly timely and important. By clarifying that localities may recover their reasonable costs to review and approve siting permits and to manage the rights of way, the Commission will provide more certainty to localities and carriers alike as to what fees are permissible, and thereby head off disputes that might otherwise land in court.[53] It also will ensure that localities can recoup their legitimate costs, while stopping efforts to impose excessive fees that hinder wireless deployment.

Commentators have long urged the Commission to limit rights of way fees to stop localities from charging whatever they can exact from carriers. After reviewing the language and purpose of Section 253(c), one article concluded that the provision "limits municipal taxes

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[52] *N.J. Payphone,* 130 F. Supp. 2d at 637-38.

[53] As the Supreme Court has made clear, courts must defer to an agency's interpretation under the *Chevron* framework even when the agency's construction contradicts pre-existing caselaw. "[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute … would allow a court's interpretation to override an agency's." Thus, the two-step *Chevron* analysis applies even where the courts have issued interpretations that predate the agency's, and "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005), *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

related to right-of-way use by telecommunications companies to regulatory costs."[54] Ten years later, another article noted that "courts have continuously struggled over the definition of fair and reasonable compensation," and urged the Commission to seize "the opportunity to end these inconsistent interpretations and restore Section 253 to its rightful role in the process of ensuring a fair field of play for all competitors."[55] It concluded:

> The role of government as expressed through Section 253 is to ensure that competitors meet on fair and balanced playing fields so that the best technologies and competitive strategies have the greatest opportunities to prevail. A level playing field exists when all firms pay for the actual costs they cause. Revenue-generating fees tilt the field of play and put [localities] in the position of picking winners and losers, which is the antithesis of Section 253 and the [Communications Act].[56]

The Commission should also declare that Section 253(c) does not permit fees which are based on a percentage of revenues. First, those fees are by definition not tied to a locality's costs – rather, they impose a tax based on revenues. Where a city imposes, for example, a five percent gross revenues fee, a provider with $10 million in revenues would pay an annual fee of $500,000 – whether it deploys one pole or 100 poles, or whether it deploys one mile of fiber or ten miles. Equally anomalous, a different provider with far lower revenues may use far more of the city's rights of way yet pay far less. Revenues-based fees thus fail Section 253's requirement that fees

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[54] Gillespie at 250 (2002). This article also noted that localities' demands for revenue-based fees on competitive carriers after the 1996 Act was enacted paralleled similar efforts to impose high fees on new telephone companies that sought to deploy their poles in the late 1800s and early 1900s, a practice that courts rejected: "As early as the 1880s, the United States circuit courts of appeals were striking down municipal wireline regulatory fees on the ground that they were higher than the cost of regulation and excessive as a matter of law." *Id.* at 215.

[55] Snyder & Fitzsimmons at 141-42.

[56] *Id.* at 174-75.

must be "reasonable compensation … *for use of public rights of way*," because the amount of the fee does not relate to actual occupation of those rights of way.[57]

The Commission has doubted the legality of revenues-based fees. In *TCG New York, Inc. v. City of White Plains*,[58] the Second Circuit struck down a five percent of gross revenues fee imposed on a new carrier as unlawfully discriminatory because the fee had not been imposed on an incumbent carrier. In an *amicus* brief to the court, the Commission agreed that the city's fee was unlawfully discriminatory, but also questioned its validity under the "fair and reasonable compensation" language of Section 253(c):

> *The FCC and the United States note that a percentage of gross revenues-based fee, even if it were applied to all users of the City's rights-of-way, would still be problematic under Section 253(c).* . . . A percentage of gross revenues-based fee, even if uniformly applied, might well have no relationship to either the extent of each carrier's use of the rights-of-way or the costs it imposed on the municipality. … Although the FCC has not addressed the specific issue, there also is serious question whether a gross revenues fee is "fair and reasonable compensation … for use of public rights of way" within the meaning of section 253(c).[59]

B. Localities Must Assess Nondiscriminatory Charges for Similar Access to Rights of Way.

Section 253(c) also prohibits right of way charges that are not "competitively neutral and nondiscriminatory." Nearly two decades ago, the Commission stated:

> One clear message from section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of

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[57] Emphasis added. The First Circuit struck down a revenues-based fee precisely for this reason: "[T]he fee charged does not directly relate to the extent actual use of public rights of way." *Guayanilla,* 450 F.3d at 22.

[58] 305 F.3d 67 (2d Cir. 2002).

[59] Brief for the Federal Communications Commission and the United States as Amici Curiae, at 14 n.7 *TCG New York Inc. v. City of White Plains,* 305 F.3d 67 (2d Cir. 2002) (emphasis added).

> incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.[60]

The Commission should reinforce this decision by declaring that "competitively neutral and nondiscriminatory" means charges imposed on a provider for access to rights of way that do not exceed the charges that were imposed on other providers for similar access to the rights of way. Higher charges would be unlawful. If, for example, a provider were granted access to a city's streets to install poles and other equipment without an up-front permit or other charge, the city's imposition of such a charge on a new entrant would be presumptively discriminatory. If the provider were charged a certain recurring annual fee for each pole it constructs or occupies, charging a higher fee for a new entrant would also be presumptively discriminatory.

Mobilitie is not seeking a ruling that all differences in charges are *per se* unlawful. A finding of discrimination must be grounded in a comparison of the relevant charges and the reasons for them. Fees may legitimately vary where they cover dissimilar deployments, or where one deployment imposes materially greater burdens on a right of way than another. For example, a taller pole that requires more excavation for construction may require more extensive local review than a shorter pole. And different fees may be warranted when they cover different types of wireless equipment that impose different loading or excavation requirements. A locality should, however, be obligated to explain and justify any variation in its charges by showing why different facilities impose different costs on its management of rights of way.

Clarifying the phrase "competitively neutral and nondiscriminatory" in this way will be consistent with court decisions, which have invalidated rights of way charges on a new telecommunications carrier that exceed charges imposed on other carriers. For example, as

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[60] *TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21443 ¶108 (1997).

noted above, in *TCG New York, Inc. v. City of White Plains*,[61] the Second Circuit struck down a requirement that plaintiffs pay a franchise fee equal to five percent of their gross revenue, even though the fee did not apply to the incumbent provider. The court concluded that Section 253(c) "forbids fees that are not competitively neutral, period, without regard to the municipality's intent."[62] It explained its rationale for striking down the fee:

> From an economics perspective, whether fees are competitively neutral should be determined based on future costs of providing services, not sunk costs incurred in the past, because that is the playing field on which the competition will take place . . . If TCG is required to pay five percent of its gross revenues to the City and [the incumbent] is not, competitive neutrality is undermined. [The incumbent] will have the advantage of choosing to either undercut TCG's prices or to improve its profit margin relative to TCG's profit margin. Allowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goals of the [1996 Telecom Act].[63]

In a recent case, *Zayo Group, LLC v. Mayor and City Council of Baltimore*,[64] the city nearly tripled the plaintiffs' conduit fee to $3.33 per linear foot (while the incumbent was only paying $0.07 per linear foot to lease space under the public right of way). Moreover, the plaintiffs were forced to use the city's conduit and pay the associated fee (while the incumbent was permitted to own and operate its own conduit). The Court found that the plaintiffs had sufficiently pleaded facts showing that the City's increase in fees had a prohibitive effect on their

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[61] 305 F.3d 67 (2d Cir. 2002).

[62] *Id.* at 80.

[63] *Id.* at 79 (citation omitted). In *Dearborn*, the city was precluded by state law from charging the plaintiff and the incumbent the same franchise fee. The Sixth Circuit held that the city's fee thus did not violate Section 253(c), but the Second Circuit in *TCG New York* disagreed: "§ 253 does not limit municipalities to charging fees that are "competitively neutral" to the extent permitted by state law; it forbids fees that are not competitively neutral, period, without regard to the municipality's intent. . . . Moreover, the Sixth Circuit's statement that [the plaintiff] failed to show that [the incumbent] was undercutting competitors and creating a barrier to entry misses the point that fees that exempt one competitor are inherently non 'competitively neutral,' regardless of how that competitor uses its resulting market advantage." *Id.* at 80.

[64] 2016 U.S. Dist. LEXIS 77700 (D. Md. 2016).

provision of telecommunications services and thus violated Section 253(a).[65] Turning to Section 253(c), the Court stated that "plaintiffs have pleaded sufficient facts showing that the City treated [the incumbent] and plaintiffs differently even though they were in the same telecommunications market."[66] Further, "because the City's alleged discrimination in favor of [the incumbent] may prevent 'rough parity' between competitors, plaintiffs have plausibly shown that the City's actions do not qualify for the § 253(c) safe harbor."[67]

To Mobilitie's knowledge, however, neither the Commission nor any court has addressed how Section 253(c)'s anti-discrimination mandate applies to *wireless* services. The Commission should do so now. Indeed, in some markets Mobilitie is paying far higher charges than other carriers – even though its facilities impose a smaller physical burden on the rights of way because they do not require overhead wires and incidental equipment required for wireline deployments. The Commission should adopt a declaratory ruling clarifying the application of Section 253(c) to discriminatory rights of way charges, and prohibiting charges that exceed those that were previously imposed on other carriers for similar rights of way access.

C. Localities Should Disclose Their Charges on Other Carriers Which Were Given Rights of Way Access.

Section 253(c) imposes one additional pertinent requirement: It authorizes state and local governments to collect reasonable and nondiscriminatory charges for the use of their rights of way, "if the compensation required is publicly disclosed by such government." To give force to this language, as well as to the substantive limits on permissible compensation, the Commission

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65 *Id.* at *16; *see also id.* at *17, quoting *Qwest*, 380 F.3d at 1271 ("[T]he City's more than tripling of fees may have constituted a 'massive increase in cost' that materially interfered with plaintiffs' ability to provide communications services.")

66 *Id.* at *20.

67 *Id.* at *21, quoting *TCG New York Inc.*, 305 F.3d at 80.

should declare that localities must at least disclose to a carrier upon request the charges they have imposed on all carriers for access to rights of way. That disclosure should include not only the amount of the charges but how they are calculated – for example, on a per-foot basis – and whether they are one-time or recurring.

Transparency in these charges is essential and in the public interest, as well as compelled by Section 253(c)'s language. All competing providers should be able to learn what charges localities have imposed over time for access to rights of way, and what have paid for particular types of access. For example, if a locality seeks to impose a license fee, it should disclose the amount of the fee and whether it previously assessed such a fee on other providers. If the locality seeks to impose a per-pole rental fee or other recurring charge, it should disclose whether it assessed that charge on others and if so the amount. When Mobilitie has been faced with high fees, it has often been unable to determine what the locality previously charged for access. As a result it has been forced to resort to burdensome and protracted requests under state and local Freedom of Information Act laws and ordinances, which impose a patchwork of different and time-consuming procedures. Even these efforts have rarely yielded pertinent data on rights of way charges imposed on others. The entire scheme of Section 253(c) is fundamentally dependent on providers' ability to know what these charges are and who pays them. There is no lawful or public interest basis for allowing a locality to avoid disclosing the amounts other providers paid for access, and conversely there is every reason why that information should be readily available.

V. CONCLUSION

The Commission should adopt a declaratory ruling interpreting and clarifying Section 253(c) as set forth above. Specifically, it should declare that:

- Fair and reasonable compensation" means charges for rights of way application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way. Additional charges or those not related to actual use of the right of way, such as fees based on carriers' revenues, are unlawful.

- "Competitively neutral and nondiscriminatory" means charges imposed on a provider for access to rights of way that do not exceed the charges imposed on other providers for similar access. Higher charges are unlawful.

- Localities must disclose to a provider seeking access to rights of way the charges that they have previously assessed on others for access.

These rulings will advance the national priorities of increased and expanded broadband wireless and 5G network capabilities to meet the needs of all Americans.

Respectfully submitted,

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