November 1, 2019

**To City of Davis Council Members:**

**To City of Davis Planning Commissioners:**

**To City of Davis Management and Staff:**

**Re: Request for Toll Agreement on Shot Clocks Regarding All 5G/4G “Small” Wireless Telecommunication Facilities Pending Receipt of Environmental Assessment et al.**

*[Request of City Clerk:  Please add this letter to the City of xxxxx Public Record, thank you.]*

Dear Council Members, City Manager, Assistant City Managers:

This letter is to specifically address several issues that are urgent. There have been so far three sets of 5G/4G “Small” Wireless Telecommunication Facilities (WTF) lease applications, submitted by telecom industry Crown Castle and Nexius now totaling 11 “Small” WTF sites, or at least that I know of since I last corresponded on October 25, 2019 with the City of xxxxx head planner. This letter addresses all those that are current and pending as well as any future proposed small WTF lease applications to come.

### ****The Need for Environmental Review: NEPA and CEQA****

The United States Court of Appeals for the District of Columbia Circuit is one of the thirteen United States Courts of Appeals. After the U.S. Supreme Court, the D.C. Circuit is usually considered the most prestigious of American courts because its jurisdiction contains the U.S. Congress and many of the U.S. government agencies, and therefore it is the main appellate court for many issues of American administrative law and constitutional law.

As a result, the current ministerial actions taken on by the City of xxxxx processing these 5G/4G applications request to be revoked and equitable actions be established since the federal NEPA requirements are expected to be fulfilled as part of any 5G/4G WTF and 5G/4G “Small” WTF application. The residents of the City of xxxxx request that a “Toll Agreement” be made on all current WTF shot clocks pending the completion of an Environmental Assessment (EA). The justifications are stated below.

**On August 9, 2019**, the judges' ruling in The United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT in case 18-1129 found that the **“FCC Order 18-30 was arbitrary and capricious and, therefore, unlawful”**. Consequently, the Court vacated FCC Order 18-30, thereby reinstating prior NEPA law requirements such as requiring an **Environmental Assessment** of densified 4G + 5G cell tower deployment. Since Crown Castle and Nexius and any other cell provider spectrum license is obtained at the FCC, the placement, construction and/or modification of any so-called 5G/4G Small Cells, also known as, ”Small” Wireless Telecommunication Facilities (WTF) anywhere in the US, including the City of xxxxx, is considered a part of a federal undertaking. This August 9, 2019 DC Circuit decision mandates environmental review of the fully-envisioned network of these so-called "Small” Cells/”Small” WTF throughout the City**.**

Since the U.S. Court of Appeals for the D.C. Circuit ruled that the FCC did not justify its deregulation of the NEPA reviews and the ability to vacate that part of the larger wireless deployment deregulation order, here are some of the statements made about the FCC decision that their **“rules were an abrogation of local authority over siting and was running roughshod over important environmental and historical issues in the rush to 5G.”**  The result over the final decision meant that streamlining the national rollout of the small WTF are subject to review to the same extent as larger wireless facilities pursuant to the National Environmental Policy Act of 1969 (NEPA).

**Before the City of xxxxx can move forward on any continuance in the permitting process, we must first abide by the DC Circuit's decision where the NEPA review must be completed by the FCC regarding any Crown Castle and Nexius, but not limited to these, proposed densification of any 5G/4G WTF and “Small” WTF.** All processing must be put on hold until the applicant can demonstrate with substantial written evidence into the public record that the FCC has completed its NEPA review.

In addition, because of the ministerial approach, the public has been left out of the development and decision-making process. As a result of the NEPA requirements the FCC shot clock deadline need also be vacated and instead public involvement be brought back as a vital part of the review process. Public workshops shall be held to inform, educate, and opportunity given for comment and input as well as review and comment of any data and RF reports and all proposed locations, but not limited to these. All WTF related subject matter and information shall be accessible on the City website and public notification be given, and notices mailed to residents living within 500’ radius of any proposed WTF.

Below is the brief that argues for the Ninth Circuit Judges to Vacate the following 2018 FCC Orders:

#### **City of New York for Case 19-70144**

Brief for Case 19-70123: Intervenors THE CITY OF NEW YORK and NATOA, et al. v FCC

The attached brief is here:

<https://www.natoa.org/documents/NYC%20NATOA%20Intervenor%20Brief.pdf>

* [**FCC 18-111**](https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf) **the “Moratorium Order” -** Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79 (rel. Aug. 3, 2018).
* [**FCC 18-133**](https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf) **the “Streamline Small Cell Deployment Order” -** Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, FCC 18-133, WT Docket No. 17-79, WC Docket No. 17-84 (rel. Sept. 27, 2018).

#### **Key Quotes from the Brief:**

**The FCC’s general authority to interpret ambiguities in the 1996 Telecommunications Act (the Act) cannot support the sweep of these Orders.**  Settled Supreme Court precedent bars an agency from intruding on areas of traditional local concern and pushing up against constitutional limits without a clear statement from Congress vesting it with such authority . . . the Act lacks any clear statement authorizing such steps, but Congress expressly preserved local governments’ authority to manage and receive reasonable compensation for use of their rights-of-way, as well as their authority over the “placement, construction, and modification” of personal wireless-service facilities. Thus, the FCC is not entitled to deference, and its ultra vires orders must be vacated

. . . . House and Senate conferees decided to generally “preserve the authority of State and local governments over zoning and land use matters.” Sprint, 543 F.3d at 576 (citing H.R. Rep. No. 104-204(I), § 107, at 94 (1995); H.R. Rep. No. 104-458, § 704, at 207-08 (1996) (Conf. Rep.); see also T-Mobile, 572 F.3d at 992. "

The Act is far less elastic than the FCC claims and that the FCC’s reading bends the phrase common to both Sections 253 and 332—“effect of prohibiting”—well beyond its breaking point . . . the Orders must be vacated for a more fundamental reason: they exceed the FCC’s authority under the Act . . . Under Chevron’s two-step framework, the first question a court asks when confronted with a challenge to an agency action is whether the statute is clear, based on the text, legislative intent, and canons of statutory interpretation. If the statute is clear, the statute answers the question. If it is not, at the second step, agencies like the FCC have authority to interpret ambiguities and are due deference on their resolution of the statute’s gray areas

. . . the Orders raise serious takings questions, infringe on local police power, and potentially commandeer local officials . . . There must be a clear indication that Congress intended to allow the agency to intrude on core areas of local concern or create potential takings and commandeering questions before moving to Chevron’s second step. Solid Waste Agency Northern Cook Cnty. v. United States Army Corps of Eng’rs, 531 U.S. 159, 172–73 (2001)"

. . .**in Section 253(c), Congress expressly preserved local governments’ authority to “manage the public rights-of-way”** and “require fair and reasonable compensation from telecommunications providers” for access to their rights-of-way. And Congress expressly withheld authority from the FCC over the “placement, construction, and modification” of wireless service facilities in Section 332(c)(7)(A), except in limited circumstances

. . . Such an astounding degree of interference with local-government policing, property, and personnel may even exceed Congress’s legislative power. See Murphy v. NCAA, 138 S. Ct. 1461, 1476, 1479 (2018) (explaining that “[t]he legislative powers granted to Congress are sizable, but they are not unlimited,” and that “all other legislative power is reserved for the States, as the Tenth Amendment confirms”)

. . . local governments have traditionally received “great latitude under their police powers” to pass laws to ensure the “**protection of the lives, limbs, health, comfort, and quiet of all persons**.” Gonzales v. Oregon, 546 U.S. 243, 270 (2006)

. . . **The Supreme Court has recently reiterated that the anticommandeering doctrine bars the federal government from forcing local governments to administer federal regulatory programs**. See Murphy, 138 S. Ct. at 1477. The Orders try to do just that by seizing control over existing local machinery for processing applications to open streets and install items on sidewalks and city-owned poles. The Orders direct officials to ignore local regulations, constrain their ability to reject or delay approving applications, and set priorities for local decision makers. See also Printz v. United States, 521 U.S. 898, 925–26 (1997) (federal law cannot compel local law-enforcement officials to implement a federal program by carrying out background checks under strict time limits). "

. . . the notion that agencies are more likely to get the answer right, given their expertise, does not apply to questions of basic statutory construction which is generally the judiciary’s province. See INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987) (pure questions of statutory construction are for the courts, while case-by-case questions of interpretation are for agencies).

. . . **Congress was clear that it did not intend to allow the FCC to reach local rights-of-way**, as Senator Gorton summarized:

The rules that a city or a county imposes on how its street rights of way are going to be utilized, whether there are aboveground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section. [141 Cong. Rec. S8306, 8308 (daily ed. June 14, 1995).]

. . . H.R. Rep. No. 104458, at 207-08 (1996) (Conf. Rep.) (explaining that Section 332(c)(7) “preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances” set forth in Section 332(c)(7)(B)). **This language could not be clearer in precluding the FCC from relying on Section 253(a) as a source of authority to displace local governments’ “decisions** regarding the placement, construction, and modification of personal wireless service facilities” as any preemption of these decisions is permitted only in the narrow context of the specific circumstances enumerated in Section 332(c)(7)(B).

The FCC attempts to expand its preemptive authority under the Act by lowering the threshold for what acts of a state or local government constitute an effective prohibition. **Intervenors agree with local-government petitioners that the FCC’s new reading of the Act is irrational**. What’s more, the mere fact that the FCC must strain so hard to find a hook on which to hang its authority to issue the Orders is itself powerful evidence that the Act contains no clear congressional authorization for them."

**Sections 253(c) and 332(c)(7)(A) in the Act were included by Congress for the specific purpose of preserving state and local rights**. They are precisely the kind of statutory limitations that an unaccountable federal agency ought not to be able to displace without a clear statement from Congress.

**The orders should be vacated and a Toll Agreement submitted to** halt the Shot Clocks over all current and future City of xxxxx 5G/4G WTF and 5G/4G “Small” WTF applications. This is urgent and primary and takes precedence over all other WTF related actions at this time.

Respectfully and In Truth,

Lena Pu

Environmental Research & Design

NACST.org

