Before the
Massachusetts Office of the Attorney General
One Ashburton Place, 20th Floor
Boston, Massachusetts 02108

In the Matter of

Initiative Petitions for a Law Relative to Radiation Limits for Technology and Wireless Facilities	)))	Petitions 23-39 & 23-40

MEMORANDUM OF LAW BY CTIA – THE WIRELESS ASSOCIATION IN OPPOSITION TO INITIATIVE PETITIONS 23-39 & 23-40

I. INTRODUCTION

CTIA[1] files this memorandum of law to oppose Attorney General certification of Initiative Petitions 23-39 and 23-40 ("the Petitions")[2] for their failure to satisfy the requirements of Amendment Article 48 of the Massachusetts Constitution.[3] Mass. Const. Amend. Art. 48.

The Petitions would impose sweeping changes affecting numerous governmental departments, technology and communications companies, and citizens who depend on wireless technologies to stay connected. Among other things, the Petitions seek to impose a moratorium

[1] CTIA – The Wireless Association® (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st-century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry, and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] *See* Initiative Petition 23-39, Initiative Petition for a Law Relative to Radiation Limits for Technology and Wireless Facilities, Version A (2023) ("Petition 23-39"), *available at* https://www.mass.gov/doc/23-39-initiative-petition-for-a-law-relative-to-radiation-limits-for-technology-and-wireless-facilities-version-a/download; Initiative Petition 23-40, Initiative Petition for a Law Relative to Radiation Limits for Technology and Wireless Facilities, Version B (2023) ("Petition 23-40"), *available at* https://www.mass.gov/doc/23-40-initiative-petition-for-a-law-relative-to-radiation-limits-for-technology-and-wireless-facilities-version-b/download.

[3] *See Get involved in the initiative petition review process*, Mass. Office of the Attorney General, https://www.mass.gov/service-details/get-involved-in-the-initiative-petition-review-process (last visited Aug. 11, 2023) ("One way to get involved in the petition review process is by submitting a memorandum of law by the second Friday after the petition-filing deadline (the Friday after the second Wednesday in August). The memorandum should include legal reasons why the Attorney General's Office should or should not certify the measure in accordance with Amendment Article 48 of the Massachusetts Constitution.").

on all new wireless facility installations, prohibit installations in certain locations such as parks and schools, significantly limit the ability to build and operate wireless facilities and deploy or sell wireless equipment and products moving forward, regulate the software installed on such devices, impose new educational requirements, require new epidemiological studies, and change the mission and board of the state's Broadband Institute.

These wide-ranging policy prescriptions, many of which would be preempted by federal law,[4] are not closely enough related to one another to provide a coherent choice to voters and allow them to express a reasoned yes or no preference on the Petitions. Moreover, the Petitions purport to limit or remove entirely existing property rights and do not provide for compensation for these expropriations. As a result, neither of these Petitions pass Article 48's requirements for certification by this Office.

Indeed, the present Petitions are two new efforts in a long line of petitions by this proponent—some of which have been on exactly the same subjects—that have been rejected by this Office for failure to satisfy Article 48's requirements. These Petitions, too, should not be certified because they: (i) fail the relatedness requirement under Article 48; and (ii) would result in takings of property without compensation.

[4] While not pertinent for this Office's review under Article 48, federal law exclusively establishes the operational and technical characteristics for radiofrequency equipment and expressly preempts state and local laws that materially inhibit the deployment and operation of wireless communication facilities. Many of the provisions of the Petitions directly seek to regulate these characteristics or are intended to limit deployment and operation of wireless facilities and equipment. and would thus be preempted under federal law. By filing this opposition, CTIA does not waive any other legal objection, including preemption, that it may raise in the event one of the Petitions is ultimately enacted into law.

II. THE PETITIONS DO NOT SATISFY ARTICLE 48 BECAUSE THE MEASURES DO NOT MEET THE RELATEDNESS REQUIREMENT.

A. The Relatedness Requirement Is A Meaningful Limitation On Initiative Petitions That Serves Critical Democratic Objectives.

Article 48 requires the Attorney General to certify that an initiative petition "contains only subjects . . . which are related or which are mutually dependent." Mass. Const. Amend Art. 48, Init., Pt. 2, § 3. The Massachusetts Supreme Judicial Court has observed that these and other conditions of Article 48 are "not mere technicalities," and accordingly has "required strict adherence to [these] requirements." *Opinion of the Justs. to the House of Representatives*, 422 Mass. 1212, 1219, *adopted sub nom. Anderson v. Att'y Gen*., 422 Mass. 809 (1996); *see also Sears v. Treasurer & Receiver Gen*., 327 Mass. 310, 321 (1951) ("[W]hen [the people] seek to enact laws by direct popular vote they must do so in strict compliance with those provisions and conditions.").

The relatedness inquiry requires the Attorney General to find that there is "a common purpose to which each subject of an initiative petition can reasonably be said to be germane." *Massachusetts Tchrs. Ass'n v. Sec'y of Com*., 384 Mass. 209, 219–20 (1981). To this end, "the general subject of an initiative proposal cannot be so broad as to render the 'related subjects' limitation meaningless." *Id*. Reviewing courts also have articulated the relatedness language in Article 48 as requiring an initiative petition to set forth a "unified statement of public policy." *Carney v. Att'y Gen*., 447 Mass. 218, 231 (2006).

These inquiries give effect to the purpose of the relatedness requirement, which exists to protect the integrity of the democratic process that enables initiative petitions to be enacted into law by the voters. As the Supreme Judicial Court has explained, "[t]he mandate that an initiative petition contain a single 'common purpose' arises because a voter, unlike a legislator, 'has no opportunity to modify, amend, or negotiate the sections of a law proposed by popular imitative.'

. . . A voter cannot 'sever the unobjectionable from the objectionable,' and must vote to approve or reject an initiative petition in its entirety." *Anderson v. Att'y Gen*., 479 Mass. 780, 786 (2018) (quoting *Carney*, 447 Mass. at 230) (internal citations omitted). As such, "while an initiative petition may contain numerous subjects, it must embody one purpose, and 'must express an operational relatedness among its substantive parts that would permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy.'" *Anderson v. Att'y Gen*., 479 Mass. at 786 (quoting *Carney*, 447 Mass. at 230–31). "At some high level of abstraction, any two laws may be said to share a 'common purpose.' The salient inquiry is: Do the similarities of an initiative's provisions dominate what each segment provides separately so that the petition is sufficiently coherent to be voted on 'yes' or 'no' by the voters? That is the crux of the relatedness controversy." *Carney*, 447 Mass. at 226.

A critical concern that animated the delegates who adopted Article 48 in the early twentieth century was the potential for abuse of the initiative petition process. As the Supreme Judicial Court has explained, "a great deal of debate centered on the need to add provisions to the original draft amendment that would foreclose the kinds of abuses and misapplications of initiative petitions that the delegates determined had occurred in other States." *Carney*, 447 Mass. at 228. During these debates, "[a] recurring topic of concern was the possibility that well-financed 'special interests' would exploit the initiative process to their own ends by packaging proposed laws in a way that would confuse the voter." *Id*. One such means of exploitation "was the practice of 'hitching' alluring provisions at the beginning of an initiative petition and burying more controversial proposals farther down." *Id*. The relatedness requirement is one of the "gatekeeping measures" that the delegates added to protect against these types of abuses. *Id*. at 229.

Accordingly, the relatedness inquiry serves a critical function under Massachusetts law. It

requires the Attorney General to find that subjects within a petition are actually—and meaningfully—related, such that the petition sets forth a unified statement of public policy that voters will be able to comprehend in voting for or against. It imposes a substantive limitation on the scope of initiative petitions that protects against the abuse and manipulation of voters by petition drafters.

B. The Petitions Fail The Relatedness Inquiry.

The Petitions at issue here are both entitled "Initiative Petition for a Law Relative to Radiation Limits for Technology and Wireless Facilities," and are substantially similar in substance. Each would enact several laws affecting many parts of the government, companies across different industry sectors, and aspects of radiofrequency ("RF") emissions and purported health effects therefrom:

- **Section 1** would require "technology corporations"—including internet and wireless service providers as well as product manufacturers—to (i) minimize electromagnetic frequency ("EMF") and radiation exposure from their products and services, and (ii) use products, software, and business practices designed to limit exposure in various enumerated ways (e.g., conducting real-world testing of exposure, using only devices that have wired connectivity as the "default mode," providing wireless services as an "opt-in" offering, changing antenna emission patterns to "radiate away from the head and [] body," etc.)
- **Section 2** would empower the Department of Telecommunications and Cable, which currently under Commonwealth law has no jurisdiction over wireless services, to "conduct monitoring and data-collecting functions of electromagnetic radiation as emitted from wireless facilities" and to "provide support to municipalities in their review of wireless facility applications and infrastructure."
- **Section 3** would change the title of the law changed by Section 2 to reflect the Department's new jurisdiction over wireless facilities.
- **Section 4** would change a definition in the statutory chapter governing the Department of Telecommunications and Cable, such that "advanced telecommunications capability" would no longer be a technologically neutral concept and would instead favor technologies that "best reduce[] electromagnetic radiation exposures."
- **Section 5** would create a "division of communication and electronic radiation" monitoring within the Massachusetts government, would require that division to create an "Electromagnetic Database" showing detailed technical information about wireless deployments and their performance across the Commonwealth, and would require county-

level engineers to obtain certification from a specific Florida-based organization (the "Building Biology Institute") that purports to have electromagnetic radiation expertise and be able to assess RF emissions from wireless deployments;

- **Section 6** would impose various requirements on operators of wireless facilities in Massachusetts, including the obligation to pay for annual radiation testing, to obtain liability insurance of at least $3 million per antenna,[5] and to demonstrate a "significant gap in coverage or capacity" as well as provide other documentary materials when applying to deploy any new infrastructure. Section 6 also would prohibit all new installations of wireless facilities on public higher education campuses, school campuses, and in state parks or forests, would prohibit the streamlined "one touch make ready" process for deployments on utility poles, and would require providers to give government officials the ability to turn off their facilities.
- The second **Section 6** in Petition 23-39 (absent from Petition 23-40) would require the Department of Public Health to add Electromagnetic Sensitivity to its list of dangerous diseases, maintain a case registry, and educate health care providers about symptoms and treatment.
- **Section 7** in Petition 23-39 (the second Section 6 in Petition 23-40) would require education about the biological impacts of electromagnetic radiation in the public K-12 school curriculum.
- **Section 8** in Petition 23-39 (Section 7 in Petition 23-40) would require wireless service providers to limit EMF "radiation power density, pulsing, and signaling" to the "minimum required for their services."
- **Section 10** in Petition 23-39 (Section 8 in Petition 23-40) would require a 2-year investigation into the "health and environmental effects" of facilities used for "personal wireless service and driverless cars," during which time new installations of such facilities would simply be prohibited. The scope of the investigation would include everything from "historic events" to "agriculture" and "the continued viability of the human race."
- **Section 11** in Petition 23-39 (Section 9 in Petition 23-40) would create a commission to examine how to mitigate non-ionizing radiation exposures related to the use of technology by first responders.
- The second **Section 11** in Petition 23-39 (Section 10 in Petition 23-40) would require public schools to take at least three separate and distinct actions involving operations, pedagogy, and property management (in addition to the education requirements in Section 7):
    - "eliminate" RF emissions "known or likely to be harmful," and reduce all other non-ionizing RF emissions,
    - "educate" students and staff on reducing exposure "at school and at home for better health," and

[5] Although the Petition does not clearly state this point, this insurance requirement would require tens of billions of dollars of new insurance coverage throughout the Commonwealth.

- prohibit use of school property for the construction of any wireless facilities.

- **Section 12** in Petition 23-39 (Section 11 in Petition 23-40) would require public institutions of higher education to take similar steps as public K-12 schools.
- **Section 13** in Petition 23-39 (Section 12 in Petition 23-40) would require the Department of Elementary and Secondary Education to develop guidelines for K-12 schools to reduce exposure, and require the Board of Elementary and Secondary Education to evaluate the efforts of schools to meet their new obligations.
- **Section 14** in Petition 23-39 (Section 13 in Petition 23-40) requires the Board of Higher Education to take similar steps for institutions of higher education as the Department and Board of Education would take with respect to K-12 schools.
- The second **Section 14** in Petition 23-39 (also Section 14 in Petition 23-40) would change the remit of the Massachusetts Broadband Institute to include "securing [] wired infrastructure" and "support[ing] hard-wired connectivity" as "first priorities."
- The third **Section 14** in Petition 23-39 (Section 15 in Petition 23-40) would replace one of the board seats of the Broadband Institute with "an engineer with knowledge of Building Biology," the Florida-based organization referenced in Section 5.
- The fourth **Section 14** in Petition 23-39 (Section 16 in Petition 23-40) adds Building Biology and "reducing exposure" to the range of sufficient qualifications for appointed board members of the Broadband Institute.
- **Section 15** in Petition 23-39 (Section 17 in Petition 23-40) would require utility companies to offer analog meters in lieu of wireless meters, to remove any installed wireless meters at ratepayers' requests, and to obtain ratepayer consent to install any wireless meters. It also would require the Department of Public Utilities to convene a study on how utilities can eliminate electromagnetic exposure.

As a threshold matter, this grab-bag of measures—which apply to a range of different state entities and have impacts on everything from the design of electronic devices to state property management to education policy to electric utility ratemaking—are not "mutually dependent." For example, there is no way in which the new obligations on utility companies with respect to the use of analog utility meters will affect the government study of wireless communications technology utilized by first responders or the school board's design of educational materials. *See, e.g., Gray v. Att'y Gen.*, 474 Mass. 638, 648 (2016) (finding that mutual dependence was not met with respect to education-related measures in an initiative petition because education commissioner's obligation to publish the previous school year's test items would "exist independently" of the

obligation to use specific curriculum standards in testing).

Nor are the provisions within each Petition sufficiently "related" to satisfy Article 48. A previous declination letter by this Office shows why. On September 7, 2022, this Office declined to certify four petitions that—like the Petitions here—were put forward by Kirstin Beatty and sought to "limit the emission of non-ionizing radiation" from "wireless facilities" and other sources. *See* Declination Letter, Initiative Petition Nos. 22-06 through 22-09: Initiative Petition[s] for a Law Relative to Non-Ionizing Radiation Limits for Technology and Wireless Facilities, Version H, P, and R; Initiative Petition for a Law Relative to Non-Ionizing Radiation Limits (Sep. 7, 2022) ("2022 Declination Letter"), *available at* https://www.mass.gov/doc/declination-letter-for-22-06-22-07-22-08-22-09/download. These petitions contained provisions "aimed at reducing human exposure to non-ionizing radiation" ***and*** a provision tasking a "disease registry" with "conduct[ing] epidemiological investigations that include evaluation of pollution and non-ionizing radiation as causes of disease." *Id.* at 2–3.

This Office found that "[t]he proposed laws d[id] not meet the relatedness requirements of Art. 48" because the "expanded disease registry" bore "no meaningful operational relationship to the common purpose of the remaining sections." *Id.* at 3. Rather, the link between reducing exposure to non-ionizing radiation and the registry's role in "providing evidence of harm caused by non-ionizing radiation" was "too theoretical" because any "common purpose . . . would be extremely broad, such as 'harm reduction' or 'disease prevention,'" and "purposes of such breadth do not meet the relatedness requirement." *Id.* at 4.

The Petitions here suffer from the same infirmities as the 2022 petitions. Like the 2022 petitions, most of the provisions in the Petitions here are ostensibly aimed at reducing human exposure to RF emissions. *See, e.g.*, Petition 23-39 § 1 (requiring "exposure" be "limited to 'As

Low as Reasonably Achievable'" and "'As Safe as Reasonably Achievable'"); Petition 23-40 § 1 (same). But also like the 2022 petitions, the Petitions here would require a state entity to conduct investigations that bear no meaningful relationship to those sections. In particular, both Petitions would require a commission to, *inter alia*, (i) identify "historic events" that may "obscure relevant scientific findings" about RF emissions, (ii) assess the effect of "exposures" on "agriculture" and "ecosystems," and (iii) "identify solutions to limit negative economic impacts upon the general populace and small businesses, including with regard to retirement funds." Petition 23-39 § 8; Petition 23-40 § 10.

Just like the disease registry in the 2022 petitions, the commission in the Petitions here would investigate numerous topics that have nothing to do with reducing human exposure to RF emissions. Indeed, while identifying "historic events" that have "obscure[d] relevant scientific findings," *id.*, might be "valuable" to some, it "would have nothing to do with the presence, absence, or effect of non-ionizing radiation." 2022 Declination Letter at 4. Because the only way to link these provisions would be to define the common purpose in an "extremely broad" manner, "such as 'harm reduction' or 'disease prevention,'" the Petitions "do not meet the relatedness requirement." 2022 Declination Letter at 4.

But that is not all, as the Petitions here contain provisions that are even ***less*** related than the disqualifying provision in the 2022 petitions. Indeed, the Petitions would effectuate numerous disparate policy interventions that result either in too broad a "common purpose" or measures that are too attenuated from that purpose. While several of the measures purport to be aimed at reducing RF emissions by limiting or halting the deployment of new infrastructure and seeking to ensure minimal levels of emissions by existing facilities, the Petitions go much farther than that. In particular, the Petitions would adopt measures to require that K-12 students "learn about the

biological impacts of electromagnetic radiation," Petition 23-39 § 7 & Petition 23-40 second § 6, that public schools and institutes of higher education "educate [their] students and staff on reducing non-ionizing radiation exposures at school and at home," Petition 23-39 §§ 11(c), 12(c) & Petition 23-40 §§ 10(c), 11(c), and that the Department of Health "collect and disseminate to health care providers . . . and the public recommended educational materials and diagnosis guidelines" for EMF-related illness, Petitions § 6(c).

These and other provisions in the Petitions speak to purposes well beyond simply limiting levels of RF emissions, such that "[a]ny adequate description of the common purpose" of each Petition, like the drafter's rejected petitions from 2022, "would be extremely broad." 2022 Declination Letter at 4. The Petitions therefore require too high a "level of abstraction . . . to clear the relatedness hurdle." *Carney*, 447 Mass. at 230-31. *See also, e.g., Opinion of the Justs.*, 422 Mass. at 1220, (initiative petition that would allow the Inspector General access to the records of the commissioner of veterans' services was unrelated to the MA House of Representatives proffered objective of "legislative accountability," and the drafters' claimed common purpose of government accountability was "unacceptably broad"); *Gray*, 474 Mass. at 649 (holding that measures that were connected by "a conceptual or abstract bond" under "the domain of elementary and secondary education" failed the relatedness requirement); *accord* Declination Letter, Initiative Petition for a Law Relative to Less Chemicals for Ecosystems at 2 n.1 (Sep. 7, 2022) (explaining that "pollution reduction" may be "unacceptably broad" and collecting cases), *available at* https://www.mass.gov/doc/declination-letter-for-22-10-initiative-petition-for-a-law-relative-to-less-chemicals-for-ecosystems/download.

For the same reasons that one cannot discern a sufficiently narrow "common purpose" of the Petitions, the far-ranging nature of the initiatives preclude a voter from discerning and casting

a ballot on a "unified statement of public policy." While it is clear that concerns about RF emissions animated the drafter of the Petitions, even a voter that shared those concerns could not approve, *e.g.*, a testing requirement to ensure that communications equipment operated in Massachusetts meets federal radiofrequency exposure guidelines (*see* Petitions § 6(a)) without *also* voting to: (1) change the curriculum in their child's school (Petition 23-39 § 7, Petition 23-40 second § 6), (2) revise the criteria by which schools are evaluated (Petition 23-39 § 11(f), Petition 23-40 § 10(f)), (3) make it a *crime* to fail to submit "drive test maps" with a siting application (Petitions §§ 6(e)(2)(iv), 6(i)), and (4) significantly alter the consumer market for wireless devices available for use in the state (Petitions § 1(b)). The contents of the Petitions are simply not consistent with the readily comprehensible, "unified public policy" that the delegates envisioned, and that courts have required, initiative petitions to contain. *Compare, e.g., Abdow v. Att'y Gen.*, 468 Mass. 478, 487 (2014) (initiative petition that would revise the statutory definition of "illegal gaming" and add laws to prohibit "illegal gaming," resulting in the prohibition of three types of gaming, were "operationally related" measures that reflected a "unified statement of public policy") *with Gray*, 474 Mass. at 649 (initiative petition that would reject common core standards and also require increased transparency in school testing embodied "two separate public policy issues" and therefore failed to offer voters a unified statement of public policy).

The Supreme Judicial Court's decision in *Carney* is instructive. There, an initiative petition would have imposed new criminal penalties for dog fighting, abuse, and neglect, but also would have eliminated dog racing in the Commonwealth. In overturning this Office's certification of the petition, the Court found that "there is no meaningful operational relationship between §§ 2 and 3, which would amend criminal statutes penalizing animal abuse, and § 4, which would dismantle the legitimate business of parimutuel dog racing." *Carney*, 447 Mass. at 231. While the new

criminal sanctions "might result in more convictions or longer sentences for animal abuse," the "administrative overhaul" to "abolish[] the business and entire regulatory scheme of parimutuel dog racing will certainly affect track owners and employees, spectators, vendors, contractors, dog owners and trainers, concessionaires, and the commercial base of at least two Massachusetts towns." *Id*. Explaining that "[t]he voter who favors increasing criminal penalties for animal abuse should be permitted to register that clear preference without also being required to favor eliminating parimutuel dog racing," and vice versa, the Court held that the petition did not "offer[] fellow citizens a meaningful choice to express a uniform public policy" and therefore failed the relatedness requirement. *Id*. at 232.

Just as in *Carney,* the numerous, disparate measures proposed by the Petitions, including administrative changes to the siting of wireless equipment, interventions into the market for wireless equipment and products, requirements for electric utilities related to analog meters, and obligations for schools, the Department of Education, and the Department of Health, among others, to design new programs and conduct new research, lack the "meaningful operational relationship" necessary for certification under Article 48.

Further, these Petitions fall squarely within the delegates' concerns about abuse of the initiative process. Voters are unlikely to appreciate the breadth of the Petitions and the extreme measures they would impose, dispersed as they are among measures that might appear more limited or incremental. For instance, requiring communications providers, as an aspirational matter, to cause emissions no greater than necessary to provide their services is one thing,[6] but

[6] Even such a vague and aspirational requirement as this would almost certainly be preempted by federal law, as the Federal Communications Commission ("FCC") exclusively regulates the use of electromagnetic spectrum and the field of the technical and operational characteristics of radiofrequency equipment, and because the Communications Act expressly prohibits state and local regulations regarding emissions by personal wireless service facilities where those facilities comply with FCC emissions regulations.

mandating that all new technology equipment used in the Commonwealth have specific technological features (many of which, like "default . . . wired connectivity" and RF emissions-halting buttons, do not exist in many of today's wireless devices) is quite another. Petitions § 1(b). And the broad definitions used by the Petitions will ensure that their impact will be significantly far-reaching, as "products . . . which involve digital . . . [or] wireless technologies," *id*. § 1(d) (definition of 'Technology corporations'), are used everywhere from city infrastructure to hospitals to checkout counters. Similarly, imposing various standards or application requirements on communications providers who seek to deploy wireless infrastructure is one thing,[7] but (i) altogether preventing the construction of any new infrastructure pending a 2-year investigation, and (ii) requiring removal of equipment from locations throughout the Commonwealth, again is quite another. Voters are unlikely to appreciate that these Petitions will effectively prevent new and emerging wireless technologies from coming to Massachusetts, restrict the availability of existing products sold in every other state in the nation, eliminate wireless connectivity in certain locations, and threaten the ability for residents of the Commonwealth to have *any* wireless connectivity moving forward.

Indeed, the Petitions here perform a sleight of hand that is far more disingenuous than the petition at issue in *Carney* concerning animal abuse criminal penalties on the one hand and the legitimate industry of dog racing on the other. These Petitions purport to merely address "radiation limits for technology and wireless facilities," but are better understood as seeking to radically change the way of life of all people in Massachusetts by starting on a path to altogether eliminate

[7] Here again, just because a voter might perceive the impact of this provision as limited does not mean it would be permissible under federal law. The Petitions' proposed obligations on providers seeking to deploy infrastructure—even setting apart the plainly preempted moratorium on all new personal wireless facilities and prohibitions on new deployments and collocations in certain areas within the Commonwealth including schools and parks—all raise serious concerns under federal law, though those issues are outside the scope of this office's Article 48 review.

wireless communications from their Commonwealth. The Petitions not only combine disparate public policy issues that will affect a wide range of people and industries, but attempt to smuggle in a major technological devolution through a package masquerading as "common sense" regulation.

If the Petitions were adopted, voters who were looking to enact limits on RF emissions (which in any event, would be preempted by federal law), could, quite literally, find themselves stranded on a highway unable to use their cell phones in an emergency because their carrier was unable to build new facilities anywhere in the Commonwealth and was forced to remove facilities from neighboring parks, forests, and schools. If these Petitions are not "exploiting" the initiative petition process as the early twentieth century delegates feared, it is difficult to see what would.

III. THE PETITIONS ARE EXCLUDED FROM THE INITIATIVE PROCESS BECAUSE THEY WOULD EFFECT A TAKING WITHOUT COMPENSATION.

A proposition may not "be the subject of an initiative . . . petition" if it is "inconsistent with . . . [t]he right to receive compensation for private property appropriated to public use." MA Const. Amend. Art. 48, Pt. 2, § 2. Thus, certification of a petition is inappropriate where it effects a taking under "art. 10 of the Massachusetts Declaration of Rights" or "the takings clause of the Fourteenth Amendment to the United States Constitution." *Dimino v. Sec'y of Com.*, 427 Mass. 704, 708–11 (1998) (holding "Attorney General's certification of [an] initiative was improper" where it was inconsistent with the right to receive compensation for private property appropriated to public use).

Here, the Petitions propose a law that would effect a regulatory taking that is inconsistent with the right to receive compensation for private property appropriated to public use. In particular, the Petitions would outright prohibit on school campuses or in state parks and state forests "the installation of new wireless facilities," including installation "on existing wireless communications infrastructure." Petition 22-39 § 6(f), (g); Petition 22-40 § 6(f), (g). Thus, where

telecommunications providers have built out or leased infrastructure but not yet deployed facilities, the law would deprive the provider of "all economically beneficial or productive use of" of the infrastructure, thereby effecting a *per se* taking.[8] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–19 (1992); *see Gulf Power Co. v. United States*, 187 F.3d 1324, 1328–29 (11th Cir. 1999) (explaining that the infrastructure itself—i.e., "poles, ducts, conduits"—constitute property for takings analysis). Furthermore, the law does not propose any compensation for the providers under these circumstances. Thus, the proposed law is "inconsistent with the right to receive compensation under art. 48" and must be "excluded from the initiative process." *Dimino*, 427 Mass. at 711 (quotations and alterations omitted).

IV. CONCLUSION

For the foregoing reasons, the Attorney General should decline to certify Initiative Petitions 23-39 and 23-40.

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[8] Because complete deprivation establishes a *per se* taking, *see Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005), prior precedent declining to engage in the "ad hoc, factual" analysis governing other regulatory takings are inapposite, *see Yankee Atomic Elec. Co. v. Sec'y of Com.*, 403 Mass. 203, 208 (1988); *Carney v. Att'y Gen.*, 451 Mass. 803, 813–14 (2008).