

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
)  
Comment Sought on Streamlining Deployment ) WT Docket No. 16-421  
of Small Cell Infrastructure by Improving )  
Wireless Facilities Siting Policies )  
)  
Mobilitie, LLC Petition for Declaratory Ruling )  
)

**COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.**

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## SUMMARY

The arrival of 5G wireless services will continue the transformation of the U.S. economy, giving birth to new technologies and innovations that are beyond imagination today. Services such as smart-city energy grids, connected transportation networks, mobile health care, smart homes, smart factories, and immersive entertainment may be just the beginning.<sup>1</sup> To realize the benefits of 5G and the Internet of Things, however, it is imperative for the Commission to focus not only on access to spectrum, but also to ensure that there is a proper environment for the deployment of the next generation networks that are required to deliver the explosive amounts of data Americans will consume in the years and decades ahead. With the issuance of the Public Notice, the FCC has taken an important step in that direction.

For more than two decades, Crown Castle has been at the forefront of our country's broadband revolution, deploying fiber optic and wireless infrastructure and developing the small cell networks<sup>2</sup> that will serve as the backbone for the broadband networks of the future. Over the past five years, Crown Castle has spent more than \$4.5 billion on small cell and fiber networks. Crown Castle has worked cooperatively with many jurisdictions and has successfully deployed small cell networks in hundreds of places, taking advantage of densification to boost network capacity and throughput and provide millions of Americans with access to networks that are ready to meet the needs of an increasingly wireless future. Cities such as Cincinnati, Chicago, Pittsburgh, Minneapolis and the Louisville-Jefferson County Metro Government, along with smaller jurisdictions such as State College, Pennsylvania, Brookfield, Wisconsin, Little Elm,

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<sup>1</sup> See *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421, DA 16-1427 at 3 (WTB rel. Dec. 22, 2016) (the "Public Notice").

<sup>2</sup> Except as otherwise specified, the term "small cell" as used herein includes both small cells and distributed antenna systems ("DAS").

Texas, The Colony, Texas, and Texas City, Texas, have facilitated the deployment of these networks to bring these services to their residents.

While Crown Castle's successful partnerships in many cities have allowed broadband networks to flourish, some jurisdictions have created obstacles to the deployment of small cell systems in the public rights-of-way. A number of jurisdictions impose unreasonable fees and conditions on small cell installations. These fees, which lack any rational relation to the cost of approving applications or maintaining the rights-of-way, can make deploying networks to serve consumers and businesses in these jurisdictions cost prohibitive. Other jurisdictions, meanwhile, discriminate against small cell installations in the rights-of-way while allowing, if not encouraging, other utilities to install equipment that frequently is larger than small cell equipment. These discriminatory practices have the effect of stifling competition and slowing broadband deployment. Finally, in some cases, municipalities have unjustifiably prohibited small cell installations or imposed moratoria that have the effect of prohibiting small cell installations in the public right-of-way.

Although this proceeding is focused on small cell deployment, the Commission should take the opportunity to examine those siting policies that impact all broadband networks and infrastructure, as these by their nature also hinder small cell deployment. Many jurisdictions impose onerous restrictions on the deployment of small cell equipment on private property. In some cases, municipalities deny applicants the ability to take advantage of the collocation benefits of Section 6409 of the Spectrum Act by imposing aggressive concealment requirements that make it impossible to add antennas to an otherwise eligible facility. In other cases, municipalities seek to evade review of their dilatory tactics by imposing substantial and unnecessary "pre-application" requirements or by quickly approving applications only to then

stall in the issuance of the resulting permits. Meanwhile, long delays in the judicial review process have served to empower these authorities, which realize they can substantially delay small cell deployments regardless of the outcome in court.

To address these impediments and develop a consistent framework for the implementation of federal telecommunications policy favoring deployment of next generation networks, there are a number of steps the Commission can and must take.

First, the FCC should clarify that both Sections 253 and 332 of the Communications Act apply to the deployment of small cells in public rights-of-way, and that the same pro-competitive, pro-deployment policy is embodied in each. A number of municipalities improperly attempt to exploit a perceived ambiguity in the statutes by: (i) applying a more cumbersome application and review process for facilities in the public rights-of-way used in the provision of wireless services than for either facilities deployed on private property or those used to provide wireline services to end users, or (ii) by denying access to the rights-of-way altogether. The Commission should make plain that the statutory prohibition on barriers to entry applies equally to all telecommunications facilities.

Second, the Commission should ensure that municipalities do not discriminate in their management of the rights-of-way. While the Public Notice reasonably focuses on discrimination based on fees, the Commission must also prohibit jurisdictions from engaging in other discriminatory tactics that impede the deployment of next generation wireless networks, such as a requirement for full zoning review of small cell facilities, but not other facilities that are difficult to conceal and, therefore, more likely to raise public safety and welfare concerns.

Third, the FCC should clarify a consistent standard for what constitutes a “prohibition” or an “effective prohibition” of service under Sections 253 and 332 that applies both when network

providers are prohibited from offering any service and when they are restricted in their ability to improve or expand existing services to meet the wireless needs of tomorrow. As part of this process, the Commission should identify certain activities that are *per se* or at least presumptively impermissible.

Finally, the FCC should revisit two important issues raised in the *2014 Infrastructure Order* that have not survived the test of time. The FCC should clarify that applications subject to zoning and not approved within a reasonable period of time shall be “deemed granted.” Too often, municipalities delay the deployment of next generation broadband networks by attempting to evade the shot clock and using the prospect of judicial review as a sword. A “deemed granted” remedy will force jurisdictions that unreasonably oppose small cell installations to address applications on the merits rather than imposing procedural hurdles. The Commission should also clarify that Section 6409(a) of the Spectrum Act applies to collocation of small cell facilities on any existing utility poles, whether or not those poles currently support wireless service facilities.

Crown Castle has already made substantial investments to develop state-of-the-art networks and is prepared to continue to make the investment necessary to deliver the promise of 5G and beyond. These efforts will spur innovation and unleash new technologies that will serve as economic drivers for decades to come. Without a more consistent regulatory framework, however, there is a risk that much of the United States will be left behind. As Chairman Pai recently observed in his keynote address at the Mobile World Congress, “it’s not a forgone conclusion that we will fully realize this technological potential. After all, building, maintaining, and upgrading broadband networks is expensive.”<sup>3</sup> Chairman Pai went on to explain that “the

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<sup>3</sup> Keynote Address of FCC Chairman Ajit Pai, Mobile World Congress, at 2 (Feb. 28, 2017), *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0228/DOC-343646A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0228/DOC-343646A1.pdf) (“Pai MWC Keynote”).

key to realizing our 5G future is to set rules that will maximize investment in broadband.”<sup>4</sup>

Crown Castle looks forward to working with the Commission to create an environment that properly balances federal communications policy with state and local interests and helps realize the potential of next generation broadband networks.

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<sup>4</sup> *See id.*

**TABLE OF CONTENTS**

	<u>Page</u>
SUMMARY .....	i
I. INTRODUCTION .....	1
II. COOPERATION OF STATE AND LOCAL INSTRUMENTALITIES IS CRITICAL TO THE ABILITY OF TELECOMMUNICATIONS PROVIDERS TO DEPLOY BROADBAND NETWORKS .....	6
A. The United States is Experiencing a New Digital Divide Between Municipalities That Support Deployment of Advanced Digital Networks and Those That Obstruct It. ....	7
B. Municipalities Continue to Treat Right-of-Way Installations of Small Cells in an Anti-Competitive Manner. ....	10
1. Imposition of Unreasonable Fees and Conditions .....	11
2. Discrimination Against Small Cell Installations.....	14
3. Prohibition of Small Cell Deployment .....	15
C. Despite the Commission’s Efforts To Date, Many Municipalities Still Impose Onerous Restrictions on Deployments Outside the Public Rights-of-Way. ....	20
1. Municipalities Attempt to Circumvent Section 6409 By Imposing Excessive Concealment Requirements on Existing Facilities .....	20
2. Municipalities Seek to Evade Review by Delaying Acceptance of Small Cell Applications .....	21
3. Existing Remedies Are Insufficient to Provide for Rapid Deployment of Next Generation Wireless Infrastructure .....	22
III. THE COMMISSION CAN EXPEDITE DEPLOYMENT OF ADVANCED WIRELESS NETWORKS BY CLARIFYING HOW FEDERAL LAW APPLIES TO MUNICIPAL REVIEW OF SMALL CELL INSTALLATIONS.....	24
A. The FCC Should Clarify That Both Sections 253 and 332 Apply to the Deployment of Small Cells in the Right-of-Way .....	24
B. The FCC Should Clarify That Discriminating Against Small Cell Service Offerings in the Right-of-Way Violates Sections 253(c) and 332(c)(7).....	27
C. The FCC Should Identify Specific Actions That Presumptively “Have the Effect of Prohibiting” An Entity from Providing Wireless or Telecommunications Services. ....	30
IV. THE FCC SHOULD REVISIT TWO ISSUES RAISED IN THE 2014 <i>INFRASTRUCTURE ORDER</i> .....	33
A. The FCC Should Clarify That Applications Subject to Zoning and Not Granted Within a “Reasonable Period of Time” Are Deemed Granted. ....	33

B.	The FCC Should Clarify That a “Collocation” Under Section 6409(a) of the Spectrum Act Includes Deployment of Small Cells to Existing Utility Poles, Whether or Not Those Poles Have Existing Antennas or Base Stations .....	38
V.	CONCLUSION.....	40



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**COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.**

Crown Castle International Corp. and its subsidiaries (“Crown Castle”) submit these comments in response to the Wireless Telecommunications Bureau’s Public Notice requesting comments on streamlining deployment of small cell infrastructure.<sup>5</sup> Crown Castle appreciates this opportunity to submit its views and encourages the FCC to act quickly to adopt the proposals in the Public Notice and the additional proposals suggested herein to create a regulatory environment that will allow the United States to maintain its position as a global leader in the deployment and utilization of broadband services and infrastructure.

**I. INTRODUCTION**

Broadband infrastructure provides the backbone for the deployment of advanced wireless services that are necessary to keep the United States at the forefront of the technological revolution. While our country’s existing wireless infrastructure was first built using macrocells, with relatively large antennas mounted on towers, as usage has grown and capacity needs have

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<sup>5</sup> On January 12, 2017, the Wireless Telecommunications Bureau issued a public notice extending the comment deadline to March 8, 2017. *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie LLC Petition for Declaratory Ruling* Public Notice, WT Docket No. 16-421, DA 17-51 (WTB rel. Jan. 12, 2017).

exploded, these networks have increasingly come to rely on small cell systems and fiber transport. This is a trend that will only increase with next generation networks, as demand continues to accelerate and 5G services are deployed around the country. Small cells address the growing demand for broadband services by providing for increased capacity and throughput in ways that existing networks cannot. Small cells also allow for the most efficient use of scarce spectrum resources, helping provide much needed capacity for our nation's rapidly expanding broadband ecosystem.

The challenge of developing the facilities and infrastructure needed to power next generation broadband networks is substantial. As Chairman Pai recently explained, "building, maintaining, and upgrading broadband networks is expensive. . . . [O]perators will have to deploy millions of small cells, and many more miles of fiber and other connections to carry all this traffic. Doing all this will command massive capital expenditures."<sup>6</sup>

Adding to the challenge, deployment of infrastructure and facilities that power wireless networks has historically faced resistance in jurisdictions across the country. Over the past 25 years, Congress and the FCC have taken a series of steps to help ensure that wireless networks can continue to be built in ways that meet consumer demand for new and innovative services, while balancing the legitimate land use concerns of local jurisdictions. Yet, despite these efforts, and despite the cooperation that many local governments have offered, small cell system providers still confront a patchwork of state and local regulations that can have the effect of significantly delaying or impeding the deployment of advanced broadband services using small cells. Some municipalities have refused to consider applications for small cell deployments while others have enacted procedures that make deployment of small cells cost and time

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<sup>6</sup> Pai MWC Keynote at 2.

prohibitive. The inconsistent rules and regulations governing small cell deployment will continue to burden network providers, who must devote extensive resources to navigating the labyrinth of local regulations and, in certain cases, commence litigation, resulting in an inconsistent and ever-changing regulatory landscape.

Crown Castle applauds the FCC's continued interest in creating a regulatory framework that allows for the deployment of services necessary to power a 21st century economy. Founded in 1994, Crown Castle is the country's largest independent owner and operator of shared wireless infrastructure, with more than 40,000 towers, 18,000 small cell installations, and over 26,500 miles of fiber. Crown Castle has more than 15 years of experience deploying small cell networks.

Notably, Crown Castle does not hold wireless licenses, and does not itself provide personal wireless services; rather its network offerings are exclusively wireline. Utilizing its fiber networks, Crown Castle provides (among other service offerings) wholesale wireline transport services to its wireless carrier customers.<sup>7</sup> These fiber networks provide the necessary carriage of the signals to and from radios used by the wireless carrier customers in a manner often referred to as "wireless backhaul." These service offerings are a key component to every small cell deployment, and thus Crown Castle and other wireline network providers like it are a

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<sup>7</sup> Crown Castle entities currently hold utility certifications in 45 states, the District of Columbia, and Puerto Rico. In all of these jurisdictions, utility commissions have issued Crown Castle entities certificates to provide its wholesale transport services. However, the status of these service offerings has recently come into question in Texas and Pennsylvania. See *Complaint of Extenet Network Sys., Inc. Against the City of Houston for Imposition of Fees for Use of Public Right of Way*, Proposal for Decision, SOAH Docket No. 473-16-1861, PUC Docket No. 45280 (Tex/ State Office of Admin.Hearings Feb. 24, 2017), attached hereto as Exhibit A (finding that unswitched point-to-point transport service to retail CMRS providers is not a wireless service); but see *Review of Issues Relating to Commission Certification of Distributed Antennae System Providers in Pennsylvania*, Motion of Robert W. Powelson, 2517831-LAW, Docket No. M-2016-2517831 (Penn. PUC Mar. 2, 2017), attached as Exhibit B (finding that that the FCC's regulatory classification of DAS "as 'personal wireless service' is persuasive" and that DAS networks should no longer be deemed utilities under Pennsylvania law because they are deemed CMRS facilities).

critical piece of this country's broadband ecosystem, supporting the deployment of next generation wireless services.

Crown Castle has been at the forefront of our country's broadband success story and is committed to continue facilitating the use of wireless data to both bridge digital divides and serve as an engine for economic growth. According to the FCC's most recent Wireless Competition Report, 99.5% of U.S. residents now have access to 4G LTE data service, and 98.6% have access to 4G LTE data service from two or more providers.<sup>8</sup> Americans use these networks to consume vast amounts of data: 9.65 trillion megabytes in 2015—a 138 percent increase from the prior year.<sup>9</sup> In fact, the average smartphone subscriber consumes almost 3 gigabytes of data per month—a more than ten-fold increase over just the past five years.<sup>10</sup> Modern broadband networks also help bridge the digital divide, as at least 7% of Americans now depend on wireless service to access the Internet, including a disproportionate percentage of low income and minority populations.<sup>11</sup>

Crown Castle has served as a catalyst for the growth in availability of high-speed wireless broadband services. With its 40,000 towers, Crown Castle is the country's largest provider of shared wireless infrastructure. As wireless providers have raced in recent years to expand their 4G LTE networks to meet the exponential growth in demand for wireless services, Crown Castle has provided a turnkey solution that has allowed for faster and wider deployment of high-speed wireless broadband networks.

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<sup>8</sup> *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Nineteenth Report, 31 FCC Rcd. 10534 ¶ 39 (2016) (“Wireless Competition Report”).

<sup>9</sup> *Id.* ¶ 126 (citing *CTIA Wireless Industry Indices; Annual Wireless Survey Results: A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry* at 97 (rel. Sept. 2015) (“CTIA Wireless Indices Year-End 2015”)).

<sup>10</sup> *See id.* (citing *CTIA Wireless Indices Year-End 2015* at 97).

<sup>11</sup> Pew Research Center, U.S. Smartphone Use in 2015 (Apr. 1, 2015), *available at* [http://www.pewinternet.org/files/2015/03/PI\\_Smartphones\\_0401151.pdf](http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf).

Furthermore, Crown Castle is at the forefront of efforts to improve spectrum utilization through network densification. Over the past several years, Crown Castle has invested more than \$4.5 billion in small cell and fiber networks, and it expects to invest approximately \$500 million more this year. Crown Castle has deployed and is currently deploying small cell networks in New York City, Philadelphia, Atlanta, Miami, New Orleans, Houston, Nashville, Chicago, Vail, Scottsdale, Los Angeles, San Francisco, Seattle, and other cities. In New York City, for example, Crown Castle has installed a fiber-based small cell network in Central Park to meet the needs of more than 200,000 daily summer visitors on a visually unobtrusive and carrier-neutral network. In Philadelphia, Crown Castle designed and installed a fiber-based small cell network designed to serve the needs of more than 900,000 people participating in the 2012 Papal Visit and to provide a lasting upgrade to the city's wireless capabilities.

As both an infrastructure provider and a telecommunications service provider, Crown Castle is also helping to lead the transition to 5G networks, which the Bureau recognizes "have the potential to revolutionize the mobile wireless experience by making the IoT widely available through the connection of billions of smart devices to the Internet."<sup>12</sup> Network densification will be critical to achieving the speed and capacity potential of next generation wireless standards like 5G and the corresponding innovation benefits. Crown Castle already has working relationships with more than 460 municipalities and 450 utilities that allow attachment of small cell facilities to their poles. This, however, is only the beginning. As Crown Castle works to fulfill the FCC's vision of private companies investing billions of dollars to establish the networks necessary to support the broadband needs of the future, it recognizes the need to amend regulatory schemes

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<sup>12</sup> Public Notice at 3.

and enhance participation with localities as they address their future broadband deployment needs.

In Section II of these comments, Crown Castle offers some examples of its experiences in small cell deployment, highlighting the many success stories while laying out some of the issues it has faced at the local level. In Sections III and IV, Crown Castle explains how it believes the FCC can act to address these challenges—by clarifying existing law, and by revisiting conclusions from prior proceedings that have turned out to be less effective in practice.

## **II. COOPERATION OF STATE AND LOCAL INSTRUMENTALITIES IS CRITICAL TO THE ABILITY OF TELECOMMUNICATIONS PROVIDERS TO DEPLOY BROADBAND NETWORKS**

As small cell network providers such as Crown Castle tackle the challenge of building the networks that will power the expanding wireless economy, they will need to work in partnership with state and local governments to facilitate rapid deployment of next generation networks. Crown Castle has already deployed small cell networks in communities large and small that have embraced the economic promise of advanced connectivity and adopted collaborative approaches to the deployment of fiber optic and wireless services and infrastructure. Individuals and businesses in these communities enjoy access to some of the world's most advanced broadband networks, and these jurisdictions should serve as models for the public-private cooperation that will be necessary for next generation broadband networks to flourish.

Unfortunately, Crown Castle frequently faces resistance from other state and local governments that hinder efforts to deploy facilities necessary to support next generation broadband networks. This resistance is particularly heightened when it comes to locating telecommunications networks in the public rights-of-way, an issue that is increasingly critical for 5G deployment. Many municipalities charge excessive and unreasonable fees to access the rights-of-way that are completely unrelated to their maintenance or management, and instead

serve merely to increase government revenues. Still other municipalities discriminate by erecting barriers that make it difficult for independent network and telecommunications service providers to deploy next-generation broadband networks in public rights-of-way (instead favoring incumbent and commercial mobile radio services (“CMRS”) providers). The patchwork of inconsistent local regulation serves as a barrier to deployment of regional or national networks. The barriers faced by Crown Castle and other small cell network providers are not limited to accessing the public rights-of-way, however. Many jurisdictions improperly apply onerous local zoning regulations to siting applications, adding to the cost and time required to deploy facilities. Left unaddressed, these impediments challenge the United States’ role as a leader in delivering broadband services.

A. **The United States is Experiencing a New Digital Divide Between Municipalities That Support Deployment of Advanced Digital Networks and Those That Obstruct It.**

The level of cooperation between state and local instrumentalities, on the one hand, and small cell and fiber network providers, on the other, can mean the difference between a municipality having advanced broadband capabilities or being stuck in the past. In Crown Castle’s experience, deployment of advanced wireless networks has flourished in jurisdictions that have demonstrated an appreciation for the value of wireless services and that have taken steps to streamline network deployment. In contrast, local jurisdictions’ interference has prevented providers from deploying networks capable of supporting next generation wireless networks in many geographic areas, contravening federal telecommunications policy. This state and local obstructionism has the effect of either discriminating against new entrants and new, innovative technologies, or, in rare cases, completely denying consumers the benefits of advanced wireless networks. Given the FCC’s longstanding commitment to preserving and facilitating competition for wireless services, it must act to provide equal access to Crown Castle

and other parties seeking to boost investment in and deployment of networks to support advanced wireless services.

The number of broadband network success stories is many and growing. As described above, Crown Castle has installed small cell networks in New York's Central Park and in Central Philadelphia that provide reliable and expandable wireless broadband services. Both networks have ample capacity to handle the influx of tourists in summer months, and Philadelphia's network also has supported large events such as the 2016 Democratic National Convention, concerts, Fourth of July fireworks, and more. In another positive example, after being ravaged by Hurricane Sandy in 2012, the Borough of Sea Bright, New Jersey, has turned to small cells to boost resiliency and increase capacity, transforming the Borough into a leader in broadband infrastructure.<sup>13</sup>

Other municipalities that recognize the potential of next generation wireless broadband and have worked collaboratively to bring these services to their residents include large jurisdictions like Chicago, Illinois, Pittsburgh, Pennsylvania, Minneapolis, and the Louisville-Jefferson County Metro Government, Kentucky, along with smaller jurisdictions such as State College, Pennsylvania, the Brookfield, Wisconsin, Little Elm, Texas, The Colony, Texas, and Texas City, Texas. The City of Cincinnati, Ohio offers a particularly illustrative example of how local governments and stakeholders can work together. After the City presented a draft ordinance that would have hindered small cell deployments, city officials engaged in a collaborative stakeholder process, held facilitated meetings, and listened to and addressed stakeholder concerns. The result was a compromise ordinance that balances municipal and

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<sup>13</sup> See Matt Leonard, *NJ City Boosts Communications Resiliency*, GCN (Dec. 20, 2016), available at <https://gcn.com/articles/2016/12/20/sea-bright-resilient-city.aspx>.



provider concerns and positions Cincinnati to be at the forefront of the next broadband revolution.

For each example of a community that has welcomed advanced broadband services, however, there are several contrasting examples of state and local governments that have obstructed barriers that hinder the deployment of next generation broadband networks. Discrimination against network providers trying to build out new small cell systems is a major impediment to broadband deployment. In most jurisdictions, an existing utility, including an incumbent telephone carrier, can place poles in the public right-of-way without any zoning review. Once those poles are installed, an affiliated wireless provider can often attach small wireless facilities—such as small cell nodes—with minimal or no scrutiny, thereby avoiding both the delays and costs experienced by other infrastructure providers. For providers such as Crown Castle that do not provide incumbent, wireline services to end users, however, the experience can be much different. In one central Pennsylvania city, for example, officials recently required Crown Castle to follow the zoning process normally reserved for new macro towers, even though other telecommunications providers only needed to obtain engineering permits. Although Crown Castle was able to obtain a special exemption for half its nodes, the added procedural hurdle resulted in a 3-4 month delay that the incumbent could have avoided.

Crown Castle is aware of a number of instances where the imposition of unreasonable review procedures has precluded the deployment of infrastructure to support advanced wireless services. The Township of Upper St. Clair, Pennsylvania, for example, passed an ordinance in 2015 requiring a zoning application to place small cells in the public rights-of-way, blocking small cell deployment in approximately 80% of the Township's land area. Many nearby municipalities have adopted nearly identical versions of this regulation. In Abington Township,

Pennsylvania, the Township subjected Crown Castle to discretionary zoning review not only for 21 proposed new nodes in the Township’s jurisdiction, but for two additional facilities on Pennsylvania Department of Transportation roads within the Township that are compliant with Section 6409. Before Crown Castle could even file its applications, the Township sought a preliminary injunction to prevent Crown Castle from construction, which is currently pending. And the Village of Lloyd Harbor, New York, has refused to provide Crown Castle with authority to install facilities in one part of the Village unless it provides coverage for another portion of the Village—a classic instance of a municipality erecting an effective prohibition.

Chairman Pai has properly recognized that “the more difficult government makes the business case for deployment, the less likely it is that broadband providers big and small will invest the billions of dollars needed to connect consumers with digital opportunity.”<sup>14</sup> As long as the regulatory environment remains uncertain and downright impossible in many jurisdictions, next generation broadband networks will be unable to flourish. The following sections describe in detail the types of barriers that must be overcome to create a consistent nationwide framework that will encourage widespread deployment of small cell networks.

**B. Municipalities Continue to Treat Right-of-Way Installations of Small Cells in an Anti-Competitive Manner.**

Many jurisdictions impose onerous and discriminatory restrictions and fees that thwart deployment of small cell networks due to the mere presence of antennas in the network design. These restrictions and fees, which generally do not apply to wireline deployment (without antenna appurtenances) in the rights-of-way, go beyond reasonable resource management, and appear designed to either deter small cell deployment or to merely generate revenue for cash-strapped local governments—all at the expense of broadband facility modernization and

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<sup>14</sup> Pai MWC Keynote at 2.

densification. Specifically, these jurisdictions fail to account either for the unobtrusive nature of small cells or the general nature of a small cell network design, which requires the installation of many relatively low-powered, fiber-connected nodes to provide maximum throughput and spectral efficiency. Moreover, some jurisdictions have challenged the ability of entities like Crown Castle, who have certificates from the state public utility commission, to provide backhaul service for wireless carriers. In some places, they have gone so far as to challenge the validity of the certificates of public convenience and necessity (“CPCNs”) with the state public utilities commissions. Taken together, these actions (or inactions) disrupt the availability of next generation broadband services.

1. Imposition of Unreasonable Fees and Conditions

Crown Castle increasingly encounters jurisdictions that impose unreasonable fees and requirements to provide access for the installation of small cell networks in public rights-of-way. Below are just some of the examples that Crown Castle has observed across the country:

- ***California:*** A number of California municipalities have established such onerous requirements as to effectively prohibit small cell installations within their jurisdictions.
  - The City of Newport Beach has created an untenable situation by seeking excessive fees for use of the City’s poles and denying applications for new pole construction. Based on a CBRE, Inc. market rent survey commissioned by the City, Newport Beach has adopted a new wireless ordinance that recommends a baseline annual rent of \$10,800 per node site—more than 50 times the average FCC rate for wireless pole attachments. When Crown Castle determined that the most prudent approach would be to construct its own poles, Newport Beach denied Crown Castle’s applications, claiming that the proposal created aesthetic concerns. Thus, for Crown Castle to access the right-of-way, it must use the City’s poles and pay the monopolistic fees established by the City. As a result, Crown Castle has re-evaluated its planned deployment for Newport Beach.
  - The City of Carlsbad is making it impractical for Crown Castle to continue operating a network of 90 plus nodes that have been in operation for approximately 10 years. During negotiations to renew the existing agreement with the City, Carlsbad has proposed an approximately 2100% increase in the

baseline annual attachment fee, using the inflated price from the study that CBRE prepared for Newport Beach.

- **Georgia:** The City of Atlanta is currently contemplating a new ordinance (which has passed first reading but presently is on temporary deferral) that seeks to impose disproportionate fees on wireless pole attachment with the stated intent of “maximizing the economic value of the City’s assets through licensed revenue arrangements balanced against the City’s own operational and use needs.” The ordinance includes a non-refundable application fee of \$750 per antenna (up to 20 antennas per application); a non-refundable application fee of \$750 per antenna upgrade or substantial modification; an attachment rate for small cell equipment on City-owned fixtures of \$3,000 per year “plus an additional \$250 per annum for placement of small cell antenna equipment on wooden poles”; \$4,500 per year for the “placement of small cell equipment on poles under 40 feet tall erected by the licensing party” plus “an additional \$900 per annum for additional carriers placed on the pole”; \$5,000 per year for the “placement of small cell antenna equipment on poles 41 feet to 70 feet tall erected by the licensing party” plus “an additional \$900 per annum for additional carriers placed on the pole”; and \$6,000 per year for the “placement of small cell antenna equipment on poles over 70 feet tall erected by the licensing party” plus an additional \$900 per annum for “additional carriers placed on the pole.” If enacted, other municipalities inevitably will seek to replicate the Atlanta ordinance.
- **Massachusetts:** Several Massachusetts state agencies charge excessive fees that appear to serve no purpose other than to generate revenue for the state. The Massachusetts Department of Transportation charges an application fee of \$500 per pole plus a \$1,500 per pole annual attachment fee, subject to an annual increase of 2% per year. The Massachusetts Department of Conservation and Recreation issued a request for proposals where the minimum acceptable bid was \$2,500 annually per pole attachment. The Massachusetts Economic Development Industrial Corporation, a state agency, most recently demanded \$3,500 per pole attachment.
- **Maryland:** Although the Public Notice references the number of pending applications in Montgomery County,<sup>15</sup> it omits the fact that Montgomery County has some of the highest and most burdensome application fees in the country. Montgomery County applies a two-step “special exception” process for any new small cell node pole installations in public rights-of-way that are not collocations on existing structures. First, a party must apply to the Telecommunications Facility Coordinating Group (“TFCG”) and pay an application fee of \$1,000 per collocation or \$2,000 for each new or replacement pole. Upon recommendation by the TFCG, the party must then pay a \$20,000 application fee per new or

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<sup>15</sup> See Public Notice at 1 n.3.

replacement pole, and the hearing examiner must review the application—a process that could take 3-6 months.<sup>16</sup>

- ***New York:*** The level of support toward small cell deployments varies greatly by jurisdiction in New York. While some municipalities have encouraged the deployment of next generation broadband infrastructure and services, others have imposed some of the most draconian restrictions in the country.
  - The Town of Hempstead requires an escrow fee of \$3,000 per new small cell node pole and \$1,000 per collocation to cover “consultant review.” At this rate, a typical network deployment results in escrow fees of \$150,000 or more. In addition, the Town charges an application fee of \$900 for each new pole and \$650 for each new node on an existing pole. Hempstead also imposes a \$450 fee to modify an existing site, which is in addition to the \$650 fee charged by the Highway Department for a new pole application. All of these fees are in addition to the annual “voluntary” 5% gross revenue share for the Town.<sup>17</sup>
  - In the Village of Brookville, Crown Castle filed under protest and received Zoning Board approval for the deployment of a small cell system. Nevertheless, it took one-and-a-half years for the village attorney to draft the approval resolution and negotiate the right of use agreement (“RUA”). Crown Castle had to deposit \$8,500 per node into escrow for “consultant review” and had to pay an additional application fee of \$2,000 per carrier, per node. In other words, for a collocation requiring no change to equipment, the cost would be \$4,000 per node. Crown Castle also had to pay almost \$20,000 in legal fees for the village attorney.
  - The Village of Laurel Hollow requires a \$3,000 escrow fee per small cell node and an application fee of \$900 for new poles and \$650 for collocated facilities on existing poles. In addition, the Village charges an annual fee of \$500 per municipal pole and a percentage revenue share.
- ***Virginia:*** At the state level, the Virginia Department of Transportation (“VDOT”) charges some of the most excessive and unreasonable annual fees in the country—\$24,000 for each new pole and \$12,000 per collocation on an existing pole, without regard for whether the pole is owned by the state or by a third party. At the county level, Fairfax County has established a Special Use

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<sup>16</sup> Applications for collocation on an existing third-party wood utility pole are considered as of right and may proceed directly to permit upon recommendation by the TFCG. However, the existing wooden pole often cannot accommodate the additional small cell equipment and therefore, new poles must be installed.

<sup>17</sup> The Town of Hempstead also has a wireless ordinance that has been the subject of pending litigation in federal court for more than six years. As of the date of this filing, a motion for summary judgment, asserting that the ordinance constitutes a prohibition and violates a variety of provisions of the Communications Act, has been fully briefed and awaiting decision for almost two years. *New York SMSA P’ship v. Town of Hempstead*, 2:10-cv-4997 (E.D.N.Y.).

Permit requirement for any new small cell node public installations in public rights-of-way. In addition to the \$15,000 application fee per utility pole, applications must be reviewed and approved by the County Planning Commission, which could take up to six months. Although Fairfax County has indicated that it will establish a process for submission of batch applications for a certain number of poles in a single application, this process has not yet been established. In response to these and other issues faced in Virginia with respect to the deployment of small cell systems, the Virginia legislature recently adopted legislation that resolves many of these issues.<sup>18</sup>

## 2. Discrimination Against Small Cell Installations

Many other jurisdictions discriminate against right-of-way small cell installations while permitting infrastructure for other utilities in the same zones. Recent actions of the Florida Department of Transportation (“FDOT”) exemplify such discriminatory treatment. A March 2015 memorandum from FDOT’s State Utilities Engineer states in pertinent part:

Wireless devices are not considered utilities and are not governed by Rule 14-46 nor the Utility Accommodation Manual (UAM). No utility permits are to be issued for wireless devices. However, wireless devices are allowed on the Department’s R/W by lease. These leases are administered through the Traffic Operations Office. In most all circumstance, these wireless devices need physical lines, for data and power in order to function. The physical lines are considered utilities and are governed by Rule 14-46 and the UAM.

Thus, Crown Castle could only place wireless devices on FDOT rights-of-way pursuant to a lease and would have to also obtain a utility permit for any physical lines utilized in connection with the wireless devices. FDOT subsequently proposed amendments to the Florida Administrative Code to redefine the term “utility” to exclude providers of telecommunications services that provide such services utilizing small cells. Crown Castle has filed a Petition for Administrative Determination of Invalidity of Proposed Rule to the State of Florida Division of Administrative Hearings, a copy of which is attached hereto as Exhibit C.

In yet another example, a New York municipality still has not provided Crown Castle with a fee schedule or its permits more than six months after entering into an RUA, claiming that

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<sup>18</sup> See Virginia SB 1282 (passed House and Senate on February 20, 2017, awaiting Governor’s signature).

zoning approval is required (despite the fact that the RUA says zoning is only required if it is required of the incumbent local exchange carrier).

### 3. Prohibition of Small Cell Deployment

A number of jurisdictions have gone farther, and either imposed an outright prohibition on the installation of small cell nodes in the right-of-way or applied explicit or implicit moratoria on processing of small cell applications, in violation of their shot clock obligations. Some of the examples encountered by Crown Castle are detailed below:

- **Alabama:** Officials from the Alabama Department of Transportation (“ALDOT”) recently advised Crown Castle that the agency will not permit installation of small cell sites for any entities, including those certified by the Alabama Public Service Commission, in accordance with a standing policy of prohibiting “distribution” equipment in state-controlled rights-of-way. Under this unwritten, interpretive policy, equipment placed in state-controlled rights-of-way must be only for “transmission” rather than “distribution,” resulting in an absolute prohibition of small cell deployment in state-controlled rights-of-way.
- **California:** Several California jurisdictions have imposed absolute or effective prohibitions on the installation of small cell nodes in rights-of-way.
  - Redwood City has one of the most stringent prohibitions on right-of-way deployments in the country, declaring on its website, “the City of Redwood City does not permit the installation of any new wireless communications facilities on City-owned property or in the right-of-way.”<sup>19</sup>
  - San Francisco has imposed a discriminatory pre-deployment aesthetic review requirement for right-of-way deployments despite the fact that San Francisco does not require an equivalent review for other (often more conspicuous) right-of-way deployments. An appeals court recently upheld San Francisco’s ordinance, though the matter is now under review by the California Supreme Court. The judicial review of this ordinance is now in its sixth year.
  - A consultant for one California jurisdiction has taken the position that although the municipality is required to approve or disapprove applications within the shot clock time frames, it is not required to “issue permits” within the same timeframes, thereby delaying if not completely obstructing infrastructure deployment.

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<sup>19</sup> See [www.redwoodcity.org/home/showdocument?id=2060](http://www.redwoodcity.org/home/showdocument?id=2060).

- **Colorado:** The City of Greenwood Village has a lengthy pre-application process for all installations, including attachments to an existing pole. Applicants must send notifications to all households within a 2,000 foot radius of the deployment, hold a neighborhood input meeting with staff-coordinated attendance, and prepare a report addressing all the issues raised in the meeting. These requirements add considerable time to the process and, because they occur “pre-application,” the City takes the position that they do not trigger the shot clock. Once submitted, the application must be reviewed for approval by both the Planning Commission and the City Council.
- **Delaware:** The Delaware Department of Transportation (“DelDOT”) has recently taken the position that although an entity has a CPCN from the Delaware Public Service Commission, if the service provided includes a cellular technology, the entity is not eligible for a permit to occupy the state’s rights-of-way. DelDOT added, without explanation, that “an initial review of small cell site installations by the Department has found that such installation may not be safe to travelers and may interfere with the primary transportation purpose of the public roads.”
- **Florida:** The City of Fort Lauderdale has extended its small cell moratorium eight times over the past two-and-a-half years, citing the need to better understand and document best practices on how to administer wireless facilities in the public right-of-way. In contrast, neighboring municipalities continue to permit, if not encourage, small cells. A consortium of facilities-based providers continues to work with the City as it continues to struggle to develop a practical and reasonable framework for permitting small cell facilities in the public right-of-way.
- **Illinois:** Crown Castle has encountered significant delay regarding its applications to install small cell networks in a number of Illinois jurisdictions.<sup>20</sup>
  - In one Illinois municipality, which Crown Castle initially contacted in October 2015 regarding the deployment of fiber optic lines and small cell nodes, municipal officials confirmed that a license agreement would be required for use of the public rights-of-way, and Crown Castle provided a draft of such an agreement in November 2015. Only after Crown Castle submitted applications in October 2016 accompanied by a letter advising the municipality of its obligations under the FCC’s shot clock, however, has the municipality agreed to move forward with negotiations.
  - Another Illinois municipality, meanwhile, required Crown Castle to enter into a license agreement to install fiber optics in the right-of-way notwithstanding the fact that similarly situated telecommunications providers had previously installed fiber optics in the right-of-way without a license or franchise agreement. It took the municipality approximately eight months to negotiate the license agreement.

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<sup>20</sup> Crown Castle is unable to identify the jurisdictions because of ongoing negotiations.



- **Indiana:** Although Crown Castle successfully deployed a dozen small cell nodes and a fiber optic backbone in Evansville in 2015, a competitor’s proposal caused the City to revise its procedures and prohibit the installation of new poles in the right-of-way, significantly delaying a planned 2016 expansion of Crown Castle’s network.
- **Hawaii:** Crown Castle has been working for more than two years to reach an agreement with the City and County of Honolulu to authorize small cell network deployment. The City and County have raised bid policy and anti-competition concerns about Crown Castle’s proposal despite having entered into master license agreements with Hawaiian Electric Industries and Hawaiian Telecom. They also have refused or been unable to provide clear direction regarding the procedure for placing new poles in the right-of-way, resulting in significant delay.
- **Louisiana:** In January 2016, Jefferson Parish denied Crown Castle’s application for a franchise notwithstanding the fact that it had granted a franchise to a competitor and allowed it to construct small cells in the Parish’s rights-of-way. Although Crown Castle has made several efforts to obtain reconsideration of the Parish’s unjustifiable decision, the Parish has refused.
- **Massachusetts:** The Massachusetts Port Authority has been unwilling to discuss either collocation on existing poles or the installation of new poles in the right-of-way, claiming that it “will issue an RFP in the future.” This inaction has had the effect of prohibiting service. The City of Cambridge, meanwhile, has refused to allow attachment to City-owned light poles or to approve the installation of new poles, thereby effectively prohibiting installations in certain parts of the city.
- **Maryland:**
  - As an alternative to the burdensome and costly “special exception” process described above, Montgomery County has introduced a zoning text amendment to specifically address small cell installations in the right-of-way. While this amendment would greatly improve the application and approval process for small cells, the amendment has stalled in response to public opposition.
  - In one Maryland municipality,<sup>21</sup> the city has attempted to rescind an RUA that it negotiated with Crown Castle, arguing that the document did not receive the required municipal approvals. The city now claims that it is drafting a new ordinance to manage right-of-way access, but frankly acknowledges that this ordinance will not be in place until at least June. As a result, the city has imposed a *de facto* moratorium on wireless deployment in the rights-of-way that remains in place and seems unlikely to be lifted soon.

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<sup>21</sup> Crown Castle is unable to identify the jurisdiction because of ongoing negotiations.

- A number of jurisdictions in Maryland have discussed forming a coalition to challenge the state-issued certificates held by neutral-host network providers like Crown Castle, in an attempt to prevent such providers from building facilities in the rights-of-way.<sup>22</sup>
- **Texas:**
  - The City of Austin adopted an ordinance prohibiting any entity that is not a CMRS provider from deploying wireless equipment in public rights-of-way, flatly prohibiting network providers from placing their own facilities unless they partner with a CMRS provider.
  - The City of Sugarland has flatly denied requests to deploy small cell networks in its municipal rights-of-way, claiming that Section 253 gives the City the right to prohibit all facilities used to support wireless services from deployment in its rights-of-way.
  - Texas is another jurisdiction where municipalities have challenged the validity of state-issued certificates held by network providers like Crown Castle.
- **Virginia:** Both Virginia state government agencies and municipalities have imposed onerous restrictions on right-of-way installations.
  - VDOT has taken the position that small cell node installations should be evaluated under the land use regulation governing communications tower sites rather than those applying to certificated providers of telecommunications service. In contradiction of its obligations under a franchise agreement with Crown Castle, the City of Newport News has purported to apply its wireless zoning ordinance to Crown Castle's deployment of small cell facilities in the right-of-way. Although a trial court sided with Crown Castle, the matter currently is on appeal.
  - In the unincorporated community of Tysons Corner, one of the densest communities in the Washington metropolitan area, installation of new structures within the public rights-of-way is prohibited—purportedly to comply with the area's comprehensive master plan. Although Crown Castle has received approval and permits for collocation on existing poles, this does not provide sufficient coverage for a small cell network. If Crown Castle wanted to pursue approval of new structures, it would first need to apply to the Tysons Corner Land Use Task Force and then be subject to the Fairfax County special exception process (as detailed above on pages 13-14), which carries excessive fees and a low probability of success under the current guidelines and processes.

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<sup>22</sup> As discussed in footnote 7, *supra*, a motion pending before the Pennsylvania Public Utility Commission would preclude operators of DAS networks from certification as public utilities. Such state-by-state classification of small cell facilities further complicates the regulatory environment for network deployment, frustrating the federal policy favoring deployment of high-speed broadband networks.

- **Washington:** The City of Mercer Island requires parties applying to install small cell nodes in residential rights-of-way to obtain consent from adjoining property owners despite the absence of similar requirements for other utilities operating in the same rights-of-way.
- **Wisconsin:** Small cell network providers have encountered delays and obstruction in a number of Wisconsin jurisdictions. In response to Crown Castle’s applications for the installation of fiber optics and small cell nodes, one city required Crown Castle to participate in a “pilot program” under which it had to provide drawings for specific locations and construct a custom-designed pole in locations where Crown Castle would be using city-owned streetlights. This city is still reviewing applications first submitted by Crown Castle in September 2015. Another city informed Crown Castle that it preferred the use of existing infrastructure to the installation of new poles, but then was slow to negotiate an agreement for the use of the city’s streetlights and has taken more than six months to approve Crown Castle’s request for fiber permits.<sup>23</sup>

These examples reflect just a sample of the patchwork of ever-changing local regulations faced by Crown Castle and other entities working to deploy the fiber optic backbones and small cell nodes required to support the next generation of wireless services, including 5G. Crown Castle calls attention to these examples not to reflect poorly on these jurisdictions, but to highlight the diverse and often discriminatory treatment faced across the nation. In many cases, the jurisdictions were either unprepared or ill-equipped to address the influx of new technology. In other cases, the jurisdictions may still not be aware of the growing need and economic benefit that will be derived from future 5G deployments and, therefore, have not taken the steps to facilitate such deployment. Although Crown Castle is working diligently to reach resolution of these and other issues with multiple jurisdictions, without substantial changes to the way municipalities process and permit small cell deployments, it may be impossible to develop the uniform, national footprint of high-speed data services necessary to fuel the continued growth of the innovation economy.

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<sup>23</sup> Crown Castle is unable to identify these jurisdictions due to ongoing negotiations.

**C. Despite the Commission’s Efforts To Date, Many Municipalities Still Impose Onerous Restrictions on Deployments Outside the Public Rights-of-Way.**

With respect to facility deployment outside of the rights-of-way, the Commission has kept pace with technological changes to fulfill the purposes of Sections 332 and 253 of the Communications Act and Section 6409 of the Spectrum Act and to respond to the challenges faced in many jurisdictions. Nevertheless, more work remains. A number of localities continue to apply improper conditions on eligible facilities requests (“EFRs”) under Section 6409, to seek information from EFR applicants unrelated to the determination of whether the application meets the EFR requirements, and/or to simply deny these applications without justification. Other municipalities impose undue delays on siting applications covered by Section 332, or hold these applications to an impermissibly high standard. These onerous requirements continue to impede the rollout of next generation wireless facilities.

**1. Municipalities Attempt to Circumvent Section 6409 By Imposing Excessive Concealment Requirements on Existing Facilities**

Some municipalities have been creative in their efforts to evade the intent and plain meaning of Section 6409, which requires that state and local governments “shall approve” and “may not deny...” any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”<sup>24</sup> For example, the cities of Vista, California, and Palos Verdes Estates, California, are considering draft ordinances (virtually identical to ordinances adopted in Irvine, Santa Monica and San Diego) governing the review process for wireless facilities that include an “amortization” provision effectively prohibiting the grant of new EFR permits for an existing

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<sup>24</sup> See Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”), Pub. L. 112-96, 126 Stat. 156 § 6409(a) (2012) (codified in 47 U.S.C. § 1455(a)).

facility.<sup>25</sup> Under these ordinances, all new permits, including EFR permits, must comply with an amortization schedule under which existing structures must meet the new ordinance's concealment requirements.<sup>26</sup> As a result, in most cases, no additional EFR permits will be granted for the structure because the addition of antennas will "defeat the existing concealment" and therefore not qualify as EFRs. Within 10 years, these ordinances will effectively negate the requirements of Section 6409.

2. Municipalities Seek to Evade Review by Delaying Acceptance of Small Cell Applications

In addition, some jurisdictions have adopted limited or unreasonably narrow readings of the Commission's *2009 Declaratory Ruling* and *2014 Infrastructure Order* that hinder small cell deployment.<sup>27</sup> Under the timeframes adopted in the *2009 Declaratory Ruling*, jurisdictions must review completed collocation applications within 90 days and applications for other facilities within 150 days.<sup>28</sup> Nevertheless, the industry continues to face enormous delays in attempting to construct small cell and other infrastructure necessary to deploy broadband communications services. For example, as noted above, some jurisdictions, such as the cities of Irvine, California, and Greenwood Village, Colorado, require lengthy and burdensome "pre-application" procedures before they will even accept an application triggering the "shot clock" timeframes. During the pre-application review period, cities may request modifications to locations based on departmental or community feedback, evaluating each new proposal in a vacuum, resulting in a

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<sup>25</sup> See City of Vista, *Draft Ordinance for New and Substantially Changed Wireless Communications Facilities Chapter 18.90*, attached hereto as Exhibit D (the "Vista Draft Ordinance"); Palos Verdes Estates, *Draft Amendment to Chapter 18.55, Wireless Communications Facilities*, attached hereto as Exhibit E (the "PVE Draft Ordinance").

<sup>26</sup> See Vista Draft Ordinance § 18.90.100; PV Draft Ordinance § 18.55.047.

<sup>27</sup> See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd. 13994 (2009) ("2009 Declaratory Ruling"); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865 (2014) ("2014 Infrastructure Order").

<sup>28</sup> *2009 Declaratory Ruling* ¶¶ 45-48.

cycle of delay that may have no practical end. In other cases, jurisdictions such as Redwood City, California, have refused to accept applications while others have declared applications incomplete with no reasonable basis, thereby also attempting to evade the shot clock.

3. Existing Remedies Are Insufficient to Provide for Rapid Deployment of Next Generation Wireless Infrastructure

Despite the provisions of Section 332, enforcing rights in court can be challenging: cases can take years to resolve (despite the statutory expedition requirement), they are costly, and different circuits around the country employ different standards, as the Bureau has noted.<sup>29</sup>

Crown Castle has utilized litigation as a tool of last resort, but even where this has had a successful outcome, it nevertheless has resulted in substantial delays in the deployment of wireless broadband infrastructure. By way of example, in November 2009, Crown Castle submitted an application and proposed RUA to the Town of Greenburgh, New York, for permission to build a DAS network.<sup>30</sup> After the Town ignored its initial submission, Crown Castle submitted a site-specific application and first participated in a hearing before the Town's Antenna Review Board ("ARB") on June 28, 2010. In a series of meetings, the Town's staff continued to find new "deficiencies" that it claimed precluded it from reviewing Crown Castle's applications, ranging from a failure to submit an application for each individual site to the ARB's claimed lack of authority to determine whether the proposed sites qualified for "as-of-right" treatment (even after the Commissioner of the Town's Department of Community Development and Conservation had determined that they did). The Town Board held its first public hearing on the applications on November 30, 2011, and finally, on July 24, 2012, issued a determination denying Crown Castle's applications based on Crown Castle's alleged failure to demonstrate that

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<sup>29</sup> See Public Notice ¶¶ 10-11.

<sup>30</sup> Although Crown Castle did not believe that an application was necessary for the construction of DAS facilities, it nevertheless submitted an application under the Town's wireless ordinance.

the facilities were “needed” under the Town’s applicable ordinance and whether the proposed facilities were of “minimal height and aesthetic intrusion” necessary to provide service.<sup>31</sup>

Crown Castle filed suit against the Town in the Southern District of New York alleging, among other things, violation of 47 U.S.C. 332(c)(7)(B)(ii) for the Town’s failure to act on Crown Castle’s applications in a reasonable time, and 47 U.S.C. 332(c)(7)(B)(iii) for the Town’s failure to support its decision by substantial evidence. The court found that the only equitable relief available for the 332(c)(7)(ii) claim would have been to require a written decision by the Town, and therefore that the claim was moot. Although the court instead found that the Town violated Section 332(c)(7)(iii) and required Greenburgh to issue permits for the construction of Crown Castle’s facilities, the Town’s actions resulted in nearly four years of delay after appeals and significant legal expense before the network could be constructed.<sup>32</sup>

In Newport News (discussed above on page 18), Crown Castle obtained a declaratory judgment that the City violated its franchise agreement with Crown Castle and the Virginia Code when the City revoked four right-of-way permits that the City’s Department of Engineering had already granted to Crown Castle.<sup>33</sup> The district court’s opinion noted that the local phone company, cable company, and electric company each had installed equipment on utility poles in the public rights-of-way “similar in size and sometimes larger than the Crown Castle equipment” without having to obtain zoning approval or conditional use permits. Three years after Crown

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<sup>31</sup> See *Crown Castle NG E. Inc. v. Town of Greenburgh, N.Y.*, No. 12-CV-6157 CS, 2013 WL 3357169, at \*15 (S.D.N.Y. July 3, 2013) (“*Town of Greenburgh I*”), *aff’d*, 552 F. App’x 47 (2d Cir. 2014).

<sup>32</sup> The Town appealed the district court decision, and the Second Circuit did not issue its Summary Order affirming the district court’s grant of summary judgment to Crown Castle until January 17, 2014. See *Crown Castle NG E. Inc. v. Town of Greenburgh*, No. 13-2921 [Dkt. No. 80-1] (2d Cir. Jan 17, 2014), attached hereto as Exhibit F.

<sup>33</sup> See *Crown Castle NG Atlantic LLC v. City of Newport News*, No. 4:15-cv-93 [Dkt. No. 58] (E.D. Va. Aug. 8, 2016).

Castle applied for and received its right-of-way permits, however, the case remains pending on appeal.

### **III. THE COMMISSION CAN EXPEDITE DEPLOYMENT OF ADVANCED WIRELESS NETWORKS BY CLARIFYING HOW FEDERAL LAW APPLIES TO MUNICIPAL REVIEW OF SMALL CELL INSTALLATIONS**

The Commission can take a number of concrete steps to address the challenges that Crown Castle and others in the industry have confronted, using the existing authority conferred to it under the Communications Act and the Spectrum Act. These include clarifying the reach and scope of Sections 253 and 332, ensuring that discriminatory practices are covered by Sections 253(c) and 332, and identifying specific actions taken by local jurisdictions that presumptively constitute “prohibitions” under the relevant statutory language.

#### **A. The FCC Should Clarify That Both Sections 253 and 332 Apply to the Deployment of Small Cells in the Right-of-Way.**

The Commission can expedite deployment of next generation wireless infrastructure by expressly clarifying something that its decisions already establish: that Section 253 applies to the deployment of small cells in public rights-of-way. Under Section 253(a), “[n]o 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.”<sup>34</sup> Nevertheless, some state and local government agencies have taken the position that Section 332(c)(7) exclusively applies to regulation of any wireless services, including small cells.<sup>35</sup> This argument is premised on the incorrect assumptions that either: (i) Crown Castle and

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<sup>34</sup> 47 U.S.C. § 253(a) (emphasis added).

<sup>35</sup> See, e.g., *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 575 (9th Cir. 2008) (“The County argued that § 253(a) did not apply to the Ordinance, because 47 U.S.C. § 332(c)(7) exclusively governs wireless regulations, and that, in any event, the Ordinance is not an effective prohibition on the provision of wireless services.”).



other small cell providers do not provide a “telecommunications service”<sup>36</sup>, or (ii) because Section 332 specifically applies to wireless facilities, Congress intended it to provide an exclusive remedy. Both of these assumptions are incorrect. The FCC should take this opportunity to clarify the applicability of Section 253(a) to small cell installations.

As an initial matter, the permitting requests submitted by Crown Castle and others, at their core, are requests for approvals to build facilities that are necessary for the provision of telecommunications services. The Communications Act defines a telecommunications service as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used.*”<sup>37</sup> Small cell nodes operated by Crown Castle and others are connected by fiber optic backbones. As the FCC has previously recognized, these fiber optic networks constitute facilities necessary for telecommunications services subject to Section 253(a).<sup>38</sup>

Furthermore, any interpretation that attempts to draw a line between services governed by Section 253 and those governed by Section 332 is based on a flawed reading of the statutes.<sup>39</sup> The Commission itself has strongly suggested that Section 253 applies to the full range of telecommunications services, as the plain language of the statute suggests. In the *2009 Declaratory Ruling*, the FCC, while declining CTIA’s request to preempt all “blanket variance ordinances” pertaining to wireless facilities, nevertheless declared that “[t]o the extent specific

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<sup>36</sup> See *Town of Greenburgh I* at \*15 (“A threshold question under Section 253 is whether Plaintiff is offering to provide “telecommunications service” as defined by the TCA.”).

<sup>37</sup> 47 U.S.C. § 153 (emphasis added).

<sup>38</sup> See *In the Matter of the Petition of the State of Minnesota for A Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transp. Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd. 21697 (1999).

<sup>39</sup> To the extent that the Commission interprets Section 332(c)(7)(A) as carving out decisions involving personal wireless facilities from Section 253, the effect of such a carve out is limited and largely semantic. The fiber optic networks that provide telecommunications service to those personal wireless facilities are still plainly covered by Section 253, and the restrictions on local prohibitions are co-extensive between the two statutes.

evidence is presented to the Commission that a blanket variance ordinance is an effective prohibition of service, then we will in that context consider whether to preempt the enforcement of that ordinance in accordance with the statute.”<sup>40</sup> In a recent speech, Chairman Pai went even further, observing that “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.”<sup>41</sup>

Furthermore, although Section 332(c)(7) is entitled “Preservation of Zoning Authority,” the language of that statute applies broadly to all “regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof.”<sup>42</sup> Courts and the FCC have thus properly applied the limitations in Section 332(c)(7)(B) broadly to all siting decisions, not just those subject to zoning review.<sup>43</sup> Indeed, nothing in the statute suggests that applying the shot clock and other provisions of Section 332 requires or implies that the underlying local regulation be “zoning” or land use regulation. As a result, the Commission should clarify that Section 332 applies to right-of-way regulation, even though such regulation is generally separate from local zoning authority.

In particular, the agency should reject the argument raised by a number of jurisdictions that regulation of the rights-of-way is a “proprietary” act that is not subject to Sections 253 and 332. While some state and local property management activities may be considered proprietary

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<sup>40</sup> 2009 Declaratory Ruling ¶ 67.

<sup>41</sup> Remarks of FCC Commissioner Ajit Pai at the CTIA Wireless Foundation Smart Cities Expo, Washington, DC, 2016 WL 6538281, at \*1 (OHMSV Nov. 2, 2016); *see also* Public Notice at 2 (“Sections 253 and 332(c)(7) of the Communications Act and Section 6409(a) of the Spectrum Act are designed, among other purposes, to remove barriers to deployment of wireless network facilities by hastening the review and approval of signing applications by local land-use authorities.”).

<sup>42</sup> 47 U.S.C. § 332(c)(7)(B).

<sup>43</sup> *See, e.g., GTE Mobilnet of Cal. Ltd. P'ship v. City & Cty. of San Francisco*, 440 F. Supp. 2d 1097, 1101 (N.D. Cal. 2006) (applying Section 332(c)(7) to permitting dispute and holding that “the statute’s use of the word ‘zoning’ in the title of the section is not sufficient to restrict its reach”); *2014 Infrastructure Order* ¶ 245 (discussing applicability of Section 332(c)(7) to personal wireless service facilities sitings generally).

(such as leasing space on the roof of a school),<sup>44</sup> the rights-of-way are public goods held in public trust, and do not constitute “property” owned by a local jurisdiction that can be used in whatever way the jurisdiction sees fit. Section 253(c)’s reservation of rights for non-discriminatory rights-of-way management demonstrates conclusively that Congress did not intend to recognize a broad “proprietary” exemption from the provisions of the Communications Act. The FCC should take this opportunity to emphasize that all management of right-of-way access is subject to the provisions of federal law.

**B. The FCC Should Clarify That Discriminating Against Small Cell Service Offerings in the Right-of-Way Violates Sections 253(c) and 332(c)(7).**

Under Section 253(c), municipalities may only manage the public rights-of-way or require compensation “on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis.” This provision applies not only to the fees charged by municipalities, but also to their management of the public rights-of-way, including their permitting decisions. Section 332(c)(7)(B) contains a corresponding provision barring discrimination, stating that jurisdictions “shall not unreasonably discriminate among providers of functionally equivalent services.”

Unfortunately, Crown Castle routinely has encountered instances of state and local governments discriminating in their management of the rights-of-way based on the type of service provided, the provider’s status as an incumbent, or other arbitrary criteria. These actions have the effect of reducing competition for wireless services, slowing deployment, and jeopardizing the benefits of 5G and other next generation technologies. Accordingly, the Commission should clarify that state and municipal government entities must provide non-

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<sup>44</sup> See generally *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002) (discussing distinction between proprietary and regulatory actions).

discriminatory treatment to small cell installations with regard both to fees and other management functions.

Crown Castle agrees with Mobilitie that a fee is only “competitively neutral and non-discriminatory” if it does not exceed the costs imposed on other providers for similar access.<sup>45</sup> Thus, when a state entity such as VDOT regulates the installation of small cell node installations under its policies for communications tower sites, with the accompanying costs, rather than those for certified telecommunications service providers, it is managing the rights-of-way in a discriminatory manner. Any such fees also should be commensurate with the cost to the jurisdiction of reviewing the application and maintaining the applicable rights-of-way, rather than some purported estimate of the value to the provider. Courts currently are split on whether gross revenue fees and other charges unrelated to the upkeep of the rights-of-way constitute “fair and reasonable compensation.”<sup>46</sup> There is simply no justification, however, for a jurisdiction like the Town of Hempstead requiring consultant fees of more than \$150,000 on top of application fees and an annual voluntary 5% gross revenue share simply to provide access to the public rights-of-way. These fees discriminate against small cell installations and have the effect of interfering with federal telecommunications policy objectives.

The Commission should further clarify that charges imposed for use of the rights-of-way are presumptively “fees,” and thus subject to the requirements in the Communications Act, and are not “taxes.” To assist carriers in determining whether the proposed fees are “competitively neutral and non-discriminatory,” Crown Castle supports Mobilitie’s proposal to “declare that

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<sup>45</sup> See Public Notice at 14 (citing Mobilitie Petition at 31-34).

<sup>46</sup> Compare *Qwest Comms. Inc. v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir.2006) (“[W]e decline to read [past precedent] to mean that all non-cost based fees are automatically preempted, but rather that courts must consider the substance of \*22 the particular regulation at issue.”); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624–25 (6th Cir. 2000) (applying totality of circumstances test to find gross revenue fees “fair and reasonable”) with *Puerto Rico Tel. Co. v. Municipality Of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006) (finding that “fees should be, at the very least, related to the actual use of rights of way”).

localities must at least disclose to a carrier [or other utility seeking access to the right-of-way] upon request the charges they have imposed on all utilities for access to rights-of-way.”<sup>47</sup>

It is not enough for the Commission to focus on fees alone, however, in determining whether municipalities are complying with Sections 253(c) and 332(c)(7). The Commission also should look to other actions taken by some municipalities that presumptively are discriminatory or not competitively neutral.

First, municipalities should be prohibited from requiring applicants to engage in a full zoning review solely to install small cell facilities in the right-of-way. In Crown Castle’s experience, municipalities increasingly use the zoning review process as a dilatory tactic to halt the deployment of small cell facilities, despite their unobtrusive nature. These installations do not implicate the same local zoning concerns as installations of towers and other large infrastructure, and there simply is no justification for subjecting them to the same or even comparable levels of scrutiny. Indeed, the imposition of local zoning review specifically on small cell facilities, and not on similar utility and telecommunications infrastructure with an equal impact on the rights-of-way, raises serious issues of discrimination under Sections 253 and 332. Further, regulations of this type focused solely on wireless facilities are often driven by misplaced public concerns over potential environmental effects of RF emissions, which implicates Section 332(c)(7)(B)(iv)’s prohibition on local regulation of these issues.

That is not to say that local jurisdictions should have no role in approving small cell installations. Rather, the local role should be limited to the issuance of building permits, permits to construct in the right-of-way, and other generally applicable construction permitting requirements.

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<sup>47</sup> See Public Notice at 14 (citing Mobilite Petition at 35).

Second, municipalities should be prohibited from applying any fees or procedures to small cell facilities that are not also applied to all other utilities in the right-of-way, such as deployment of fiber, conduit for electric, cable services, and so forth. Sections 253 and 332 reflect Congress' intent to balance the interest in encouraging competition in state and local telephone markets with the interest of state and local governments in regulating consumer protection and public safety and management of their rights-of-way.<sup>48</sup> Where local jurisdictions elect not to apply fees or regulations to certain utilities operating in the right-of-way, they are effectively conceding the lack of a local interest. Under these circumstances, the justification for allowing municipalities to burden federal telecommunications policy is lessened, if not completely eliminated, and the balance tips in favor of deploying critical telecommunications services.

**C. The FCC Should Identify Specific Actions That Presumptively “Have the Effect of Prohibiting” An Entity from Providing Wireless or Telecommunications Services.**

Under Section 253(a), “[n]o 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.” Section 332 similarly bars regulations of the placement, construction, or modification of wireless facilities that “prohibit or have the effect of prohibiting the provision of personal wireless services.” The Commission has

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<sup>48</sup> See *Puerto Rico Tel. Co.*, 450 F.3d at 15; *TC Sys., Inc. v. Town of Colonie, N.Y.*, 263 F. Supp. 2d 471, 480 (N.D.N.Y. 2003) (“Section 253 of the TCA embodies the balance between Congress’ new free market vision and its recognition of the continuing need for state and local governments to regulate telecommunications providers on grounds such as consumer protection and public safety.”) (internal quotation omitted).

the legal authority to clarify what constitutes a “prohibition” under Sections 253 and 332, and it should do so here.<sup>49</sup>

Although the Public Notice refers singularly to “the demonstration needed to establish that a state or local government’s actions have prohibited or had the effect of prohibiting the provision of service for purposes of either Section 253 or 332” as if the same substantive requirement should apply to each, in practice, this has not been the case. Each of the judicial decisions cited in the Public Notice, whether applying a “heavy burden” to show the lack of alternative feasible sites or a “least intrusive means” test, interpret the prohibition in Section 332. Meanwhile, the FCC’s consideration, also cited in the Public Notice, of whether the action “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,” has been in the context of Section 253(a).<sup>50</sup> Given the identical statutory language in Sections 253 and 332, the standard for what constitutes an action that “prohibit[s] or has the effect of prohibiting” the provision of service should be harmonized explicitly.

The Commission also should identify specific actions taken by some local governments that presumptively “have the effect of prohibiting” the provision of service, in violation of federal law. In particular, state and local governments should be prohibited from:

- establishing blanket or general prohibitions on installing small cells in the right-of-way or refusing to take any action on a permit application;
- establishing moratoria for the permitting, construction or issuance of approval for small cell facilities;

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<sup>49</sup> See, e.g., *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 248-52 (5th Cir. 2012) (affirming FCC’s authority to interpret what constitutes prohibition under Section 332), *aff’d*, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013); *Town of Greenburgh I* at \*19 (deferring to FCC’s interpretation of Section 332).

<sup>50</sup> See Public Notice at 10 (citing *California Payphone Association Petition for Preemption*, Memorandum Opinion and Order, 12 FCC Rcd. 14191 ¶ 31 (1997)).

- requiring applicants to provide a business justification for deploying the proposed infrastructure (*e.g.* customer demand, quality of service, propagation maps, traffic studies, etc.);
- requiring applicants to place new support structures in an alternative location (although they may consider collocation on existing support structures);
- imposing any unreasonable requirements/obligations regarding the appearance of a structure;
- imposing any requirement to purchase, subscribe to, use or employ facilities owned, provided, or operated in whole or part by the authority (or any other entity in which an authority has an interest);
- denying insubstantial modifications; and
- blocking the deployment of small cell facilities by imposing utility “undergrounding,” which is fundamentally at odds with providing wireless service.

The Commission should emphasize that a “prohibition” under Sections 253 and 332 occurs both when network providers are unable to offer *any* service, whether existing or new, and when network providers are unable to *improve* or *expand* existing service. The mere fact that a locality already has some level of coverage should be insufficient to defeat a claim of prohibition, where new facilities are needed to offer additional telecommunications services or capacity. As the Commission recognized, demand for mobile wireless data is expected to grow six fold by 2022, and will “continue to grow even more with the proliferation of the Internet of Things.”<sup>51</sup> Accordingly, federal telecommunications policy must be concerned not only with coverage, but also with capacity, and must recognize that local restrictions that attempt to freeze the current state of telecommunications contradict the stated purpose of the 1996 Telecommunications Act, which was to advance rapidly the deployment of new and innovative services.

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<sup>51</sup> Public Notice at 3.



The Commission also should clarify that Section 253 and 332 apply to all facilities used to provide small cell telecommunications facilities, whether or not those facilities are also used to provide information services. The ability of network providers to deploy the facilities necessary to deliver the benefits of next generation wireless broadband services should not be held hostage by the regulatory *mode du jour*, and local jurisdictions are ill-suited to determine which services are being provided at any given moment by particular pieces of infrastructure.

**IV. THE FCC SHOULD REVISIT TWO ISSUES RAISED IN THE 2014 INFRASTRUCTURE ORDER**

In addition to the new steps set out above, the Commission should revisit two of its prior conclusions in the *2014 Infrastructure Order*. Experience since the *2014 Infrastructure Order* was issued has shown that a “deemed grant” remedy is the only way to ensure that local zoning reviews are concluded in a timely fashion; despite the “expedited” review called for in Section 332, court challenges are often ineffective at vindicating these rights. The Commission’s decision to limit “collocation” under Section 6409 to structures that already are approved for wireless facilities should also be reviewed. Where small cell equipment can be installed on existing facilities without a “substantial change” in those structures, these uses should be considered “collocation” under Section 6409, regardless of whether there are already wireless facilities on those structures.

**A. The FCC Should Clarify That Applications Subject to Zoning and Not Granted Within a “Reasonable Period of Time” Are Deemed Granted.**

Under Section 332(c)(7)(B)(ii), jurisdictions must act on a request for authorization to install personal wireless service facilities “within a reasonable period of time.” In the *2009 Declaratory Ruling*, the FCC established a presumption that a “reasonable period of time” means 90 days for review of collocation applications and 150 days for review of siting applications

other than collocations.<sup>52</sup> The Commission further clarified in the *2014 Infrastructure Order* that, to the extent Section 332 applies, the shot clock covers small cell applications, “including third-party facilities such as neutral host DAS deployments.”<sup>53</sup> There are two problems with the shot clock as currently applied, however, that frequently preclude it from fulfilling the purpose of the statute. First, Crown Castle has found that many municipalities improperly abuse the process described in Section 332(c)(7)(B)(v) to evade the shot clock and further delay consideration and approval of small cell applications. Second, because the shot clock as currently implemented lacks a self-enforcement mechanism, many municipalities willfully choose not to comply with the review timelines, using judicial enforcement as part of a general strategy of delay. To give meaning to Section 332(c)(7)(B)(ii) and ensure timely deployment of next generation wireless infrastructure, the Commission should further clarify certain aspects of the shot clock and revisit its earlier conclusion that a “deemed grant” remedy is not necessary in this context.

As an initial matter, the Commission must curtail efforts by some municipalities to evade the intent, if not the plain language of Section 332(c)(7)(B)(ii), by imposing lengthy and burdensome “pre-application” procedures prior to commencement of their shot clock review. Section 332 does not require an entity to submit a formal application to trigger the obligation of a state or local government or instrumentality to act “within a reasonable period of time.” To the contrary, Section 332(c)(7)(B)(ii), by its plain language, requires consideration of the “nature and scope” of the request. In implementing the shot clock, the FCC expressly declined to apply a “deemed complete” standard for the commencement of the shot clock.<sup>54</sup> Nevertheless, the

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<sup>52</sup> *2009 Declaratory Ruling* ¶¶ 3, 32, 45-48.

<sup>53</sup> *2014 Infrastructure Order* ¶ 270.

<sup>54</sup> See *2014 Implementation Order* ¶ 258 (explaining that “the presumptively reasonable timeframe begins to run when an application is first submitted, not when it is deemed complete”).

Commission specified that the time for review begins with the submission of an application.<sup>55</sup> It also imposed detailed requirements for tolling the shot clock based on the incompleteness of an application and clarified that, following a determination of incompleteness, the shot clock should begin running upon the applicant’s submission of supplemental information.<sup>56</sup>

Several jurisdictions have attempted to turn the Commission’s prior guidance into an ambiguity to delay the deployment of small cell facilities. For example, the lengthy “pre-application” procedure required by The City of Greenwood Village, Colorado, can more than double the approval timeline despite a utility’s best efforts to expedite the process. Requiring such an elaborate notification and hearing process should presumptively be unreasonable for a ministerial task such as adding a small cell node to an existing pole, but in any event these “pre-application” procedures are self-evidently nothing but a way to circumvent the shot clock. While this appears clear from the *2014 Infrastructure Order* and *2009 Declaratory Ruling*, the Commission should take this opportunity to underline that the shot clock begins with the formal request by a utility to install telecommunications infrastructure and should only be tolled due to bona fide errors or omissions by the applicant. Any procedures that a local jurisdiction adopts to process applications or requests should be completed within the time frame called for by the shot clock.

The FCC also should revisit its earlier conclusion that a “deemed grant” remedy is not necessary, and clarify that if a municipality fails to act “within a reasonable period of time,” then the application shall be deemed granted. In electing not to impose a “deemed grant” remedy, the Commission relied on the availability of a judicial remedy in Section 332(c)(7)(B)(v). However, experience since the *2009 Declaratory Ruling*, and even since the *2014 Infrastructure Order*,

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<sup>55</sup> *See id.*

<sup>56</sup> *Id.* ¶¶ 259-60.

continues to show that this remedy is often inadequate. Judicial proceedings under Section 332 can easily stretch for years, depending on the jurisdiction in which they are brought—while some courts act quickly, other jurisdictions do not “expedite” Section 332 cases in any meaningful sense. In one of the most egregious examples, Sprint initially filed an application for zoning approval with the Borough of Paramas, New Jersey, in December 2004, but the Board did not issue a decision denying its application until August 2009.<sup>57</sup> Sprint filed suit in the U.S. District Court for the District of New Jersey the following month, but it took more than four-and-a-half years for Sprint to prevail following a bench trial. Including the subsequent appeal, it took more than ten years from Sprint’s initial application and more than five years from the date Sprint filed its complaint to achieve a final judicial resolution. Numerous other cases illustrate the delays that are inherent in a judicial remedy.<sup>58</sup> As a result, even if the applicant prevails in litigation, its deployment of services can be substantially delayed and the federal interest in rapid deployment of advanced wireless services undermined.

There is also no legal impediment to revising the FCC’s prior conclusion and adopting a “deemed grant” remedy. Nothing in the text of Section 332 or its legislative history indicates that Congress intended for judicial recourse to be the *sole* remedy available to an aggrieved party. In other contexts—including enforcement of eligible facilities requests under Section 6409 of the Spectrum Act—the Commission appropriately has determined that an application should be deemed granted if the local jurisdiction does not act within a specified timeframe, even

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<sup>57</sup> See *Sprint Spectrum L.P. v. Zoning Bd. of Adjustment of the Borough of Paramas, N.J.*, 21 F. Supp. 3d 381, 383 (D.N.J. 2014), *aff’d sub nom. Sprint Spectrum, L.P. v. Zoning Bd. of Adjustment of the Borough of Paramas New Jersey*, 606 F. App’x 669 (3d Cir. 2015).

<sup>58</sup> See, e.g., *Town of Hempstead, supra* n. 17; *AT&T Mobility Servs. v. Village of Corrales*, 127 F. Supp. 3d 1169 (D.N.M.), *aff’d* 642 Fed. App’x 886 (10th Cir. 2016) (nineteen months from complaint to grant of summary judgment); *Orange Cty.-Poughkeepsie Ltd. P’ship v. Town of E. Fishkill*, 84 F. Supp. 3d 274, 293 (S.D.N.Y.), *aff’d sub nom. Orange Cty.-Cty. Poughkeepsie Ltd. P’ship v. Town of E. Fishkill*, 632 F. App’x 1 (2d Cir. 2015) (seventeen months from complaint to grant of summary judgment).

where a judicial remedy otherwise is available.<sup>59</sup> This approach both provides an incentive for municipalities to apply the proper urgency to their review and ensures that federal telecommunications policy will not be burdened if they do not. Given the need for expedited deployment of small cell facilities, the evidence of delay by state and local jurisdictions, and the failure of some courts to act “on an expedited basis,” the FCC should declare that applications subject to Section 332 are deemed granted if a municipality fails to act within a reasonable period of time, in the same way as those covered by Section 6409.

Relatedly, the Public Notice asks several questions about whether the timeframes established in the *2009 Declaratory Ruling* are appropriate for small cell installations.<sup>60</sup> In Crown Castle’s experience, the presumptive 90 day timeframe for collocation applications and the 150 day timeframe for new construction are too long. In the *2014 Infrastructure Order*, the Commission adopted a 60 day shot clock for state or local review of eligible facilities requests based on “the more restricted scope of review applicable to applications under Section 6409(a).”<sup>61</sup> This same rationale applies to state and local review of applications to install small cell equipment and facilities. Even where some jurisdictions have improperly subjected small cell applications to local zoning review, such review can be completed expeditiously. Many municipalities approve permit applications within 30-45 days, applying a simple site plan review to make sure the proposal complies with construction rules for the right-of-way. Where

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<sup>59</sup> See *2014 Infrastructure Order* ¶¶ 226-236 (establishing a deemed granted remedy for failure to issue a decision within 60 days on an application submitted pursuant to Section 6409(a)); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 ¶ 54 (2007) (adopting deemed granted remedy for failure to act on a local franchise application); *Application of Bellsouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd. 20599 ¶ 176 (1998) (finding that under 47 C.F.R. § 1.1403(b), a pole owner “must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted”).

<sup>60</sup> Public Notice at 11-12.

<sup>61</sup> See *2014 Infrastructure Order* ¶¶ 215-16.

jurisdictions properly subject small cell applications only to local permitting requirements, the process is even more efficient. Accordingly, a 60 day review period would appropriately balance the need for local review with the Commission’s interest in expeditious deployment of next generation broadband networks.

Finally, there is no reason to extend the deadline for “batches” of requests given the ministerial nature of permit applications for placement of facilities in the right-of-way.<sup>62</sup> The deadlines established in the *2009 Declaratory Ruling* and the *2014 Infrastructure Order* are more than adequate for localities to review batch requests, particularly given that these requests tend to involve similar facilities with a very limited practical impact. If the Commission elects to adjust the timeframes at all, it should shorten them so they are commensurate with the limited footprint of small cell nodes or at least apply a non-discrimination standard, whereby jurisdictions must take no longer to issue a decision on small cell applications than they would for any other application to use the rights-of-way. These approaches properly balance local interests in public safety regulation with the strong federal interest in consistent deployment of broadband infrastructure nationwide.

**B. The FCC Should Clarify That a “Collocation” Under Section 6409(a) of the Spectrum Act Includes Deployment of Small Cells to Existing Utility Poles, Whether or Not Those Poles Have Existing Antennas or Base Stations**

Under Section 6409(a), state and local governments must approve “any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” In the *2014 Infrastructure Order*, the Commission recognized that “[a]mbiguities in many of the terms in this provision and its accompanying definition of ‘eligible facilities request’ are likely to generate disputes about its

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<sup>62</sup> See Public Notice at 11-12.

proper application, which could in turn undermine the goal of Title VI of the Spectrum Act of advancing wireless broadband service for both public safety and commercial users.”<sup>63</sup>

Nevertheless, the agency itself substantially undermined this goal by narrowly defining the term “existing . . . base station” only to include “a structure that, at the time of the application, supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a ‘base station’ . . . .”<sup>64</sup>

The Commission should revisit its interpretation of the terms “existing” and “collocation” in Section 6409, and clarify that adding facilities to any existing structure, whether or not it currently supports wireless services, constitutes an “eligible facilities request” so long as all of the other statutory requirements are met. Under Section 6409(b), eligible facilities requests already include “collocation of new transmission equipment.”<sup>65</sup> Whether the equipment is being collocated on a pole currently used for telecommunications services or one used for some other purpose is a distinction without a difference, and revising the interpretation of the phrase “existing wireless tower or base station” in this manner would make the meaning of “collocation” in Section 6409 more consistent with the definition used in the National Programmatic Agreement.<sup>66</sup> In the interest of promoting rapid deployment of wireless infrastructure, as long as the new equipment “does not substantially change the physical dimensions of such tower or base station,” Section 6409(a) should apply.

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<sup>63</sup> 2014 Infrastructure Order ¶ 135.

<sup>64</sup> *Id.* ¶ 168.

<sup>65</sup> See 47 U.S.C. 1455(a)(2)(A).

<sup>66</sup> See 47 C.F.R. Appendix B to Part 1, *Nationwide Programmatic Agreement for Collocation of Wireless Antennas* (defining “collocation” as “the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, whether or not there is an existing antenna on the structure”).

