

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

In the Matter of	)	
	)	
Accelerating Wireless Broadband	)	WT Docket No. 17-79
Deployment by Removing Barriers to	)	
Infrastructure Investment	)	
	)	
Revising the Historic Preservation Review	)	WT Docket No. 15-180
Process for Wireless Facility Deployment	)	
	)	
Accelerating Wireline Broadband	)	WC Docket No. 17-84
Deployment by Removing Barriers to	)	
Infrastructure Investment	)	
	)	

**COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION**

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## EXECUTIVE SUMMARY

Competitive Carriers Association (“CCA”), on behalf of its members, appreciates this opportunity to substantively address barriers to advanced broadband services deployment. Longstanding issues regarding delay and cost throughout federal and local siting review are growing exponentially as the industry moves away from chiefly constructing large towers, and toward deploying dense small cell networks and fiber. Noting Federal Communications Commission (“FCC” or “Commission”) Chairman Pai’s concrete steps to remove deployment barriers, including creating the Broadband Deployment Advisory Committee (“BDAC”) and staffing the BDAC with a wide range of stakeholders, including competitive providers, the Commission is poised to make sweeping, urgently-needed changes to the federal, state and local siting review processes. As CCA has previously noted, the well-documented economic stimulus that will accompany increased broadband investment and deployment will be particularly realized in rural, historically-underserved areas. To achieve these laudable goals, the Commission should take the below outlined actions.

First, the Commission should exercise its authority to streamline state and local siting procedures. In doing so, the Commission should adopt a “deemed granted” remedy when Section 332 shot clocks expire, and shorten those shot clocks to 30 days for collocations and 60 days for all other deployments. Creating a mechanism for batched application review will further expedite next-generation deployment. More roundly prohibiting *de facto* and *de jure* moratoria will remove substantial deployment barriers, as will limiting permissible local fees to nondiscriminatory, publicly-disclosed actual costs. Explicitly clarifying the import of identical provisions within Sections 332 and 253 of the Communications Act, the Commission should clarify when certain practices “prohibit or have the effect of prohibiting” broadband deployment

under Sections 253(a) and 332(c)(7); this will help to create certainty and support ubiquitous deployment. CCA supports the Wireline Competition Bureau and Wireless Telecommunications Bureau proposals to interpret Section 253(a) as “preempting conduct by a locality that materially inhibits or limits the ability of a provider to compete in a fair and balanced legal and regulatory environment.” The Commission should use its authority to extend this interpretation to the same language in Section 332(c)(7). Last, the Commission should clarify that both Sections 253 and 332 apply to facilities used by providers of wireless broadband Internet access service, where the provider is also using those facilities to provide personal wireless services (in the case of Section 332) or telecommunications services (in the case of Section 253).

Second, the Commission should streamline the historic review process under the National Historic Preservation Act (“NHPA”) and the Commission’s own National Programmatic Agreement (“NPA”). Tribal fees and administrative burdens attached to the historic review process have escalated sharply in recent years. The Commission effectively requires siting applicants to shoulder extra costs and delays never mentioned or mandated by the NHPA or NPA, and that do not support the goals of the NHPA itself. The Commission should declare that Tribal fees are not required, limit the scope of information applicants must submit to Tribes, and establish Tribal response shot clocks throughout the historic review process. Expanding historic review exclusions—especially for small cells and ancillary equipment—also will hasten the siting process without compromising Historic Properties.

Third, the Commission should streamline the National Environmental Protection Act (“NEPA”) environmental review process by creating timelines for environmental assessment review and broadening siting exclusions.

Fourth, the Commission should adopt its proposed Twilight Towers review process exempting from historic review collocations meeting certain reasonable criterion. Any adopted remedy regarding Twilight Towers must involve a timed dispute resolution process.

Fifth, the Commission should preserve certain network discontinuance and change rules that boost transparency throughout the process by providing needed warning to competitive carriers that may rely on retiring services.

Prompt attention to these issues will provide competitive carriers with the strong regulatory foothold needed to plan and site next-generation broadband, especially considering the novel deployment paradigms for small cell and distributed antenna systems (“DAS”). It is time for the Commission to resolve persistent, unnecessary sources of delay and unnecessary cost throughout the siting process, setting the stage for economic growth and American wireless leadership.

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**COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION**

Competitive Carriers Association (“CCA”)<sup>1</sup> hereby comments on the Federal Communications Commission’s (“FCC”) Notice of Proposed Rulemaking and Notice of Inquiry<sup>2</sup> regarding accelerating wireless broadband deployment (“Wireless NPRM” or “Wireless NOI”), as well as the Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment regarding wireline broadband deployment (“Wireline NPRM,” “Wireline NOI,” or “Wireline RFC”) (collectively, “the items”).<sup>3</sup> Because wireless and wireline infrastructure challenges and

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<sup>1</sup> CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents approximately 200 associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

<sup>2</sup> *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 17-38 (WTB 2017) (hereafter “Wireless NPRM” or “Wireless NOI,” where appropriate).

<sup>3</sup> *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry and Request for Comment,

opportunities are inextricably linked and for administrative ease, CCA offers joint comments in both proceedings.

## **I. INTRODUCTION AND SUMMARY.**

CCA appreciates that the Commission took into account CCA's<sup>4</sup> and others' filings responding to the *Streamlining Public Notice*<sup>5</sup> and now seeks comment on a broader array of proposals to reduce barriers throughout the siting process. As reflected in the title of these proceedings, creating navigable, fair siting standards are a precursor to increasing broadband infrastructure investment. Expanded broadband deployment will create new jobs,<sup>6</sup> and will enrich connectivity and quality of life in rural and urban areas alike.<sup>7</sup> "Collectively, over the past seven years, wireless carriers invested an average of more than \$30 billion annually in next-generation networks and wireless infrastructure,"<sup>8</sup> a trend predicted to continue in coming years. CCA appreciates the opportunity to address delays, ambiguities and inappropriate costs endemic

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WC Docket No. 17-84, FC 17-37 (WCB 2017) (hereafter "Wireline NPRM," or "Wireline NOI" or "Wireline RFC," where appropriate).

<sup>4</sup> See Comments of Competitive Carriers Association, WT Docket No. 16-421 (filed Mar. 8, 2017) ("CCA Streamlining Comments"); see also Reply Comments of Competitive Carriers Association, WT Docket No. 16-421 (filed Apr. 7, 2017) ("CCA Streamlining Reply Comments").

<sup>5</sup> *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd. 13 (WTB 2016) ("*Streamlining Public Notice*").

<sup>6</sup> See CCA Streamlining Comments at 5.

<sup>7</sup> See *id.* ("Smaller and more remote communities may have the most to gain: in areas where network construction creates first-time broadband users, the U.S. could see "an additional \$90 billion in GDP, and 870,000 in job growth." And in "small to medium-sized cities with a population of 30,000 to 100,000," 5G deployment could create, respectively, "300 to 1,000 jobs" per city").

<sup>8</sup> Comments of CTIA, WT 17-69, at 29 (filed May 8, 2017) ("CTIA MCR Comments").

to the siting lifecycle. By confronting these issues head-on, the FCC will empower competitive providers to bridge the digital divide where needed as well as to achieve fifth-generation (“5G”) networks.<sup>9</sup>

CCA’s concerns are not abstract, and the Commission is correct to conclude that the need to address siting barriers is “urgent.”<sup>10</sup> Competitive carriers of all sizes responding to the *Streamlining Public Notice* provided a litany of examples when state and local authorities have hindered deployment efforts by misconstruing federal rules, imposing arbitrary restrictions or fees, implementing abusive *de facto* or *de jure* moratoria, adopting local code that confuses small cells with macro cells or towers, or simply refusing to advance the application review process despite expired shot clocks.<sup>11</sup> This is the case both for traditional towers and new small cell and distributed antenna systems (“DAS”) technologies. Even though 5G standards are not likely to be released until 2020, the industry already is investing, making strategic plans and deploying needed infrastructure. As a result, the industry is feeling the negative impact of various local siting policies on next generation deployment.<sup>12</sup> The consequences of these roadblocks, delayed

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<sup>9</sup> Wireless NPRM ¶ 1; *see also* Comments of the Free State Foundation, WT Docket No. 17-69, at 14 (filed May 8) (Asserting that the FCC must focus on its efforts on streamlining cell tower, antennae, and small cell infrastructure deployment processes, and remove burdensome restrictions on wireless infrastructure siting).

<sup>10</sup> Wireless NPRM ¶ 2.

<sup>11</sup> *See, e.g.*, CCA Streamlining Comments at 13 (explaining how CCA members have experience with local authorities that require additional, unnecessary procedures and impose size requirements on eligible facilities which may require “special exemption” permitting and new fees); *see also id.* at 16-17 (“another CCA member has had a long-running dispute with a large southern city over unreasonable public ROW access fees. The city at issue has attempted to charge a seemingly desultory yearly fee for public ROW access on a “per foot” basis. This regional carrier entered into litigation over the matter in 2014, which has since stalled, and so has fiber deployment to this area”).

<sup>12</sup> *See id.*



or denied connectivity opportunities, are quickly realized, to the detriment of consumers and competition.<sup>13</sup> The establishment of the Broadband Deployment Advisory Committee (“BDAC”), and the varied representation of its membership, suggests the Commission understands that dysfunctional infrastructure practices need to be collaboratively addressed.<sup>14</sup>

Fortunately, the Commission appears prepared to employ various tools at its disposal to eliminate barriers to infrastructure deployment, including its wide latitude to interpret Sections 332 and 253 of the Communications Act (the “Act”)<sup>15</sup> and Section 6409(a) of the Spectrum Act.<sup>16</sup> The Commission also has authority to interpret certain aspects of its National Programmatic Agreements,<sup>17</sup> and to interpret certain aspects of its obligations under the National

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<sup>13</sup> See Comments of CCA, *Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition*, WT Docket No. 17-69, at 32 (filed May 8, 2017) (“Strong national siting standards are important to competitive carriers, who are severely taxed from both a capital and personnel perspective when forced to contend with varied siting rules between state and local authorities. Infrastructure reform is often discussed in terms of paving the way for 5G network deployment, but the Commission should not overlook infrastructure as a mobile competition issue”).

<sup>14</sup> See FCC News Release, *FCC Chairman Ajit Pai Announces Broadband Deployment Advisory Committee Members, Working Groups, and Leadership* (rel. Apr. 6, 2017).

<sup>15</sup> See 47 U.S.C. § 332 (“Section 332”); *id.* § 253 (“Section 253”). The Commission’s wide latitude to interpret these provisions was upheld in federal court. See, e.g., *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (*2009 Declaratory Ruling*), *aff’d*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014) (*2014 Infrastructure Order*), erratum, 30 FCC Rcd 31 (2015), *aff’d*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

<sup>16</sup> In pertinent part, the Spectrum Act provides that, “a State or local government may not deny, and shall approve,” applications to deploy or modify certain types of wireless facilities.” See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (Spectrum Act), *codified at* 47 U.S.C. § 1455(a).

<sup>17</sup> See Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1, App’x B and *Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless*

Historic Preservation Act (“NHPA”)<sup>18</sup> and the National Environmental Protection Act (“NEPA”).<sup>19</sup> The FCC’s efforts to remove siting barriers is timely given the White House’s stated intent to introduce a comprehensive infrastructure spending initiative.<sup>20</sup> CCA’s recommendations would not impose costs on any government body, and will result in a net positive from an economic opportunity perspective. CCA offers the below suggestions to facilitate faster, investment-friendly broadband deployment.

## **II. THE COMMISSION SHOULD STREAMLINE STATE AND LOCAL REVIEW.**

The delays and excessive fees endemic to the state and local review process should be promptly addressed in this proceeding. Adopting a “deemed granted” remedy for missed Section 332 shot clocks, shortening those shot clocks, and adopting a mechanism for batch application review will inject much-needed certainty into the siting process. The Commission also should clarify the definition of “moratoria” and more explicitly ban moratoria, clarify that localities may

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*Antennas*, Public Notice, 31 FCC Rcd 4617 (WTB 2016). (“Collocation NPA”); Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 CFR Part 1, App’x C (“NPA”). *See also* *Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 8824 (WTB 2016).

<sup>18</sup> 54 U.S.C. § 300101 *et seq.*

<sup>19</sup> 42 U.S.C. § 4321 *et seq.*

<sup>20</sup> Gary Cohn, Chief Economic Advisor to President Trump recently addressed infrastructure deployment hurdles, acknowledging that “[i]n many areas we’re falling behind, and falling behind is affecting economic growth in the United States.” “Time is money,” Cohn said. “The cost of infrastructure goes up dramatically as time goes on in the approval process.” *See, e.g.,* John Wagner, *Trump plans week-long focus on infrastructure, starting with privatizing air traffic control*, THE WASHINGTON POST (June 3, 2017), available at [https://www.washingtonpost.com/politics/trump-plans-week-long-focus-on-infrastructure-starting-with-privatizing-air-traffic-control/2017/06/03/12aacb04-47c5-11e7-a196-a1bb629f64cb\\_story.html?utm\\_term=.c2a8dbf50aa8](https://www.washingtonpost.com/politics/trump-plans-week-long-focus-on-infrastructure-starting-with-privatizing-air-traffic-control/2017/06/03/12aacb04-47c5-11e7-a196-a1bb629f64cb_story.html?utm_term=.c2a8dbf50aa8).

only charge non-discriminatory cost-based fees for right-of-way (“ROW”) access and use, and require those fees be made public. Last, the Commission should resolve statutory interpretation conflicts surrounding Sections 332 and 253. Clarifying these issues will establish strong national infrastructure deployment rules and expedite competitive communications stakeholders’ siting efforts to bridge the digital divide and create next-generation connectivity.

**A. A “Deemed Granted” Remedy for Missing Shot Clock Deadlines is Needed and is Within the Commission’s Scope of Authority.**

A “deemed granted” remedy is necessary to ensure Section 332 shot clocks actually function as intended.<sup>21</sup> “Case-by-case” review of stagnant siting applications is not acceptable and does not promote deployment. A “deemed granted” remedy, on the other hand, would inject much-needed certainty and fulfill the purpose of Section 332. CCA joins the chorus of stakeholders advocating for this remedy.<sup>22</sup> Nearly “100,000 to 150,000 small cells will be constructed by the end of 2018, and these numbers will reach 455,000 by 2020 and 800,000 by 2026. [And a]ccording to another study, approximately 300,000...small cells will be needed in the next three to four years.”<sup>23</sup> It is hard to imagine these projections will be achieved under the current legal framework, under which delays, statutory misapplications, and confusion are

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<sup>21</sup> See *2009 Shot Clock Declaratory Ruling* ¶¶ 37-42, 49-50. Currently, State or local agencies are obligated to approve or deny non-Spectrum Act siting applications within a presumptively “reasonable period of time.” Interpreting this statutory language, the Commission created a 90-day shot clock for collocation applications and a 150-day shot clock for other applications. If an agency fails to act once a shot clock expires, the siting applicant, under Section 332(c)(7)(B)(v), has 30 days to sue the local authority.

<sup>22</sup> Footnoted comments, unless specified, were filed in WT Docket No. 16-421. See CCA Streamlining Comments at 13; see also, e.g., AT&T Comments at 25-26; Crown Castle Comments at 33-34; CTIA Comments at 39-43; Globalstar Comments at 12; Sprint Comments at 22-27; T-Mobile Comments at 25; Verizon Comments at 23; WIA Comments at 61-62.

<sup>23</sup> CTIA MFR Comments at 64.

normative.<sup>24</sup> As CCA has explained, the current “case-by-case” litigation remedy established in 2009 has not proved helpful and disadvantages competitive carriers without the personnel or resources to effectively litigate; even for nationwide carriers capable of petitioning the highest Court, litigation indefinitely delays and at times eliminates important projects.<sup>25</sup> Some local jurisdictions, such as those subject to the State of California’s recently-enacted statute codifying the Commission’s shot clocks, already implement a “deemed granted” remedy for non-Spectrum Act siting applications.<sup>26</sup> Therefore, FCC action on this issue would merely align the remaining local authorities while providing much-needed certainty and fulfilling the purpose of Section 332.

CCA supports the Commission’s proposal to adopt an “irrebuttable presumption” under Section 332, which would operate similar to the “irrebuttable presumption” construct under Section 6409(a)’s deemed granted remedy.<sup>27</sup> While *2014 Infrastructure Report and Order* does not explicitly establish an irrebuttable presumption, the “deemed granted” remedy has the same

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<sup>24</sup> See CCA Streamlining Comments at 6 (“CCA members’ experience with state and local siting is, with few exceptions, marked by unreasonable delays, inflated fees unconnected to actual administrative or human resource costs, and a total disregard for “shot clocks” and review timelines. A common refrain among CCA members is their struggle to secure timely approval from state and local entities that do not understand, or will not acknowledge or enforce, the applicable federal requirements. Localities often enforce poorly-drafted policies, many imposing fees unrelated to the actual cost of application review or any ongoing maintenance work on an approved site”).

<sup>25</sup> See *id.* at 14, 17.

<sup>26</sup> See, e.g., Kenton County Mayors Letter at 1; see also Initial Comments of Lightower Fiber Networks at 13, WT Docket No. 16-421 (filed Mar. 8, 2017); Comments of the City and County of San Francisco at 26, WT Docket No. 16-421 (filed Mar. 8, 2017) *citing* Cal. Gov. Code § 65964.1 and *id.* § 65964.1(d)(1).

<sup>27</sup> See Wireless NPRM ¶ 10 fn. 18, *citing 2014 Infrastructure Order* ¶ 226 (“describing impact of irrebuttable presumption in context of applications subject to the Spectrum Act”).

result in effect. The *2014 Infrastructure Report and Order* clarifies that under Section 6409(a) and the Commission’s implementing rules, the deemed granted remedy applies when a state or local authority fails to act on a properly-submitted siting application within a reasonable time frame or shot clock.<sup>28</sup> But, “a deemed grant does not become effective until the applicant notifies the reviewing jurisdiction in writing, after the time period for review by the State or municipal reviewing authority as prescribed in our rules has expired, that the application has been deemed granted.”<sup>29</sup> A state or local authority may nonetheless “challenge an applicant’s written assertion of a deemed grant in any court of competent jurisdiction when it believes the underlying application did not meet the criteria in Section 6409(a) for mandatory approval, would not comply with applicable building codes or other non-discretionary structural and safety codes, or for other reasons is not appropriately ‘deemed granted.’”<sup>30</sup> The Commission can use this same model to implement a deemed granted remedy for a Section 332(c)(7) shot clock.

The Commission has authority to modify its existing rules adopted pursuant to Section 332 “to counteract delays in State and local governments’ consideration of wireless facility siting applications which thwart timely rollout and deployment of wireless service.”<sup>31</sup> Under the FCC’s current interpretation of Section 332(c)(7)(B), established in the *2009 Declaratory Ruling*, when a siting applicant sues a local authority under Section 332(c)(7)(B)(v) and the applicable shot clock expires without action, the local agency must “rebut the presumption that

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<sup>28</sup> *2014 Infrastructure Report and Order* ¶ 226.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* ¶ 231.

<sup>31</sup> Wireless NPRM ¶ 5.

the established timeframes are reasonable,”<sup>32</sup> and the court is instructed to “issu[e] . . . an injunction granting the [siting] application”<sup>33</sup> if the local authority fails to meet its statutory burden.

In adopting this “rebuttable” presumption framework, the Commission interpreted the ambiguous language in Section 332(c)(7)(B), which was upheld on review.<sup>34</sup> A well-supported decision to replace this remedy with an “irrebuttable” presumption to ensure that States and localities act on requests “within a reasonable period of time” would still fall under the Commission’s authority to interpret the ambiguous language in the statute, and would survive *Chevron* review as it is permissible under the statute and there are clear reasons for modifying the prior policy.<sup>35</sup> Further, as the Wireless NPRM suggests, the Commission has authority to adopt rules to implement the policies set forth in Section 332(c)(7) under Sections 201(b) and 303(r).<sup>36</sup>

The Commission is correct that such an approach is not limited by an argument that courts somehow have the “[sole] responsibility to fashion remedies’ on a ‘case-by-case’ basis”

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<sup>32</sup> As noted in the Wireless NPRM, for example, a “locality could rebut the presumption that the established deadlines are reasonable” by showing that, in light of the “nature and scope of the request” in a particular case, it “reasonably require[d] additional time” to negotiate a settlement or to prepare a written explanation of its decision.” *See id.* ¶ 10, fn. 5, *citing 2009 Declaratory Ruling* ¶ 44.

<sup>33</sup> *2009 Declaratory Ruling* ¶ 38.

<sup>34</sup> *City of Arlington v. FCC*, 668 F.3d at 254.

<sup>35</sup> *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (An “agency must show that there are good reasons” for a new agency policy).

<sup>36</sup> Wireless NPRM ¶ 15, n.28.

under Section 332(c)(7), as it had suggested in its *2009 Declaratory Ruling*.<sup>37</sup> The Conference Report cited in the Wireless NPRM issued in connection with the Telecommunications Act of 1996 does not prevent the FCC from promulgating rules implementing Section 332(c)(7)(B). While the Conference Report notes that “[i]t is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) . . . the courts shall have exclusive jurisdiction over all . . . disputes arising under this section,” and that “[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated,”<sup>38</sup> this is distinguishable from the Commission’s ability to “implement § 332(c)(7)(B)’s limitations,” as the Fifth Circuit Court of Appeals confirmed.<sup>39</sup> Specifically, the Fifth Circuit stated that just because Section “332(c)(7)(B)(v) vests exclusive jurisdiction in the courts to consider specific *disputes* arising under § 332(c)(7)(B) does not limit the FCC’s ability to implement § 332(c)(7)(B)’s limitations.”<sup>40</sup> The Fifth Circuit confirmed that “the FCC is entitled to deference with respect to its exercise of authority to implement § 332(c)(7)(B)(ii) and (v).”<sup>41</sup> If the FCC did not divest the courts of exclusive jurisdiction under the *2009 Declaratory Ruling* than they would not do so again under an “irrebuttable

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<sup>37</sup> *Id.* ¶ 11.

<sup>38</sup> S. Rep. No. 104-230, at 207-08 (1996) (Conf. Rep.).

<sup>39</sup> *City of Arlington v. FCC*, 668 F.3d at 254.

<sup>40</sup> *Id.* (emphasis added). *See also id.* at 250-51 (“Had Congress intended to insulate § 332(c)(7)(B)’s limitations from the FCC’s jurisdiction, one would expect it to have done so explicitly[.] \* \* \* Here, however, Congress did not clearly remove the FCC’s ability to implement the limitations set forth in § 332(c)(7)(B) . . .”).

<sup>41</sup> *City of Arlington v. FCC*, 668 F.3d at 254 (emphasis added). *See also id.* at 250-51 (“Had Congress intended to insulate § 332(c)(7)(B)’s limitations from the FCC’s jurisdiction, one would expect it to have done so explicitly[.] \* \* \* Here, however, Congress did not clearly remove the FCC’s ability to implement the limitations set forth in § 332(c)(7)(B) . . .”).

presumption.” Under an “irrebuttable presumption” framework that functions like the Section 6409(a) “deemed grant” remedy, the courts would indeed play a deciding role and local agencies would have ample opportunity to make a case against a siting applicant.<sup>42</sup> In that sense, then, “irrebuttable” is a misnomer considering a state or local authority could still sue to challenge an applicant’s “deemed granted” claim; in other words, the courts would still be entitled to resolve any actual dispute surrounding a complete application or any shot clock tolling provisions. Indeed, the *2014 Report and Order* contemplates numerous litigation scenarios that might stem from dispute regarding whether a “deemed granted” remedy was properly administered.<sup>43</sup> It is appropriate for local agencies to bear a greater burden of proof, and supports Congressional intent to proliferate broadband connectivity.<sup>44</sup>

Further, the actual text of Section 332(c)(7)(B)(v) does not specify whether the applicant or local authority must petition a court, stating only that “any person adversely affected by any

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<sup>42</sup> See Wireless NPRM ¶10; *see also id.* fn. 14 (explaining how the Section 6409(a) “deemed granted” remedy operates, as described by the *2014 Infrastructure Report and Order*. After a shot clock expires, applicants may sue to and seek a declaratory judgment “confirming that an application was ‘deemed granted’ due to the State or local agency’s failure to act within the 60-day shot clock deadline status, while an agency could sue to challenge an applicant’s claim that an application was ‘deemed granted.’ ... ‘Deemed grant’ status takes effect only after applicant notifies the reviewing jurisdiction in writing,” and “a locality could raise in litigation to challenge an applicant’s claimed “deemed grant”. The Commission clarified that, prior to the 60-day deadline, State and local agencies may review applications to determine whether they constitute covered requests” and may “continue to enforce and condition approval [of such applications] on compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes.” *Id.* ¶ 211; *see also id.* ¶¶ 202, 214 n.595”).

<sup>43</sup> *2014 Report and Order* ¶ 236.

<sup>44</sup> *See, e.g.,* Telecommunications Act of 1996, S. Rep. 104-230, at 1 (Feb. 1, 1996) (conf. report) (“Congress enacted the Telecommunications Act of 1996 as a “pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans . . .”); *see also* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (Spectrum Act), codified at 47 U.S.C. § 1455(a).



final action or failure by a State or local government...*may*” seek redress in “any court of competent jurisdiction.”<sup>45</sup> Given that “person” may encompass an applicant or a local authority, the Commission should not feel unduly constrained to move forward with adopting an “irrebuttable presumption” solution as proposed. As the Commission highlighted in the Wireless NPRM, Section 332(c)(7)(B)(ii) provides that a locality must act on each application “within a reasonable time, *taking into account the nature and scope of such request*”<sup>46</sup> but does not explicitly assign the determination of “the nature and scope” of requests to a reviewing court. CCA agrees that “the Commission is well-positioned to take into account the ‘nature and scope’ of particular categories of applications in determining the maximum reasonable amount of time for localities to address each type.”<sup>47</sup>

The proposed deemed granted remedy also is workable from a local level and, if embraced in good faith by local jurisdictions, will not result in outsize cost. At least one local authority states that they will assess higher fees should the FCC adopt shorter timeframes attached to a “deemed granted” remedy.<sup>48</sup> The FCC should not be persuaded by this threat. Competitive carriers are willing to pay actual costs to ensure timely processing of federally-compliant siting applications.<sup>49</sup> However, there are a handful of local authorities who are

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<sup>45</sup> 47 U.S.C. 332(c)(7)(B)(v).

<sup>46</sup> 47 U.S.C. § 332(c)(7)(B)(ii).

<sup>47</sup> Wireless NPRM ¶ 12.

<sup>48</sup> *See, e.g.*, Letter from Gerard Lavery Lederer, Outside Counsel for Montgomery County, Best & Krieger, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-421, et al., at 3 (filed May 12, 2017). This same local authority urges the Commission to allot “sufficient time frames. . .to allow public participation in the siting of new wireless facilities,” yet does not describe why, for example, thirty days to process a collocation application would not suffice.

<sup>49</sup> *Id.*

charging fees clearly designed for outsized profit and that are so clearly divorced from actual costs so as to suggest bad faith. The FCC must ensure that its efforts to reduce deployment barriers don't create a game of whack-a-mole, where just as it adopts rules to address local siting timing issues, additional issues related to fees materialize.

The Commission should, however, be mindful that siting applicants that benefit from a "deemed grant" often are left in the uneasy position of deploying without an actual permit. Applicants asserting their 6409(a) rights often will install wireless infrastructure after sending a letter to the locality declaring a "deemed grant," but members report local authorities will refuse to acknowledge the grant. Instead, local authorities tend to retaliate against current and future siting applicants by insisting they cannot accept new applications due to an "open proceeding" regarding the deemed grant, or allege "illegal equipment" has been deployed. The Commission should clarify that effectuating a "deemed grant" is a final action that results in legal deployment. Wireless infrastructure is real property that is often bought and sold; it is important, therefore, that any infrastructure deployed under a "deemed grant" remain attached to an apparently clean "chain of title" regarding the structure's compliance with applicable law.

#### **B. The Commission Should Clarify and Shorten Section 332 Shot Clocks.**

The Commission should revise its interpretation of what comprises a "reasonable period of time" under Section 332 to reflect today's network buildout norms and challenges. CCA and many others in response to the *Streamlining Public Notice* urged the Commission to adopt shorter shot clocks.<sup>50</sup> CCA asked the Commission to create a 30-day shot clock for collocations,

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<sup>50</sup> See, e.g., T-Mobile Comments at 23 ("The Commission should accelerate the Section 332 shot clocks for all sites to (i) 60 days for collocations, including small cells, and (ii) 90 days for all other sites"); see also Comments of AT&T at 25; CTIA Comments at 14; WIA Comments at 27.

and a 60-to-75-day shot clock for all other siting applications.<sup>51</sup> Many jurisdictions have already established shorter review windows on their own, which provides ample evidence that shortening the shot clocks for application review will not overwhelm state and local authorities.<sup>52</sup>

By clarifying that Section 332 shot clocks apply to any negotiations typically accompanying a siting application, the Commission will mitigate right-of-way (“ROW”) negotiation and approval process delays.<sup>53</sup> CCA agrees that establishing new shot clocks for discrete siting projects may be helpful. It may be helpful, for example, to apply different shot clocks for deployments within, versus outside a ROW.

The Commission also should clarify that public hearings and consideration of public complaints do not stop any shot clock, either under Section 332 of the Communications Act or Section 6409(a) of the Spectrum Act. There is no justification for stopping a shot clock to perform routine tasks associated with an application. It is likewise imperative that the Commission clarify that a locality cannot use delay mechanisms to extend the shot clock, such as issuing needless requests for more information (assuming the applicant initially submitted all necessary information). At a minimum, a shot clock erroneously stopped for information the applicant already provided should be considered to have been running as though never paused.

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<sup>51</sup> CCA Streamlining Reply Comments at 7.

<sup>52</sup> *See, e.g.*, CCA Streamlining Reply Comments at 7-8 (“For example, Dublin, Ohio completes collocation reviews in 28 days or less. In Houston, Texas, the review process for small cell deployments, such as collocations, “usually takes 2 weeks, but no more than 30 days to process and complete the site review.” In Kenton County, Kentucky, the maximum time permitted to act upon new facility siting requests is 60 days. Louisville, Kentucky generally processes small cell siting requests within 30 days, and Matthews, North Carolina generally processes wireless siting applications within 10 days”).

<sup>53</sup> *See* Wireline NOI ¶ 103 (seeking comment on what rules would “eliminate excessive delays in negotiations and approvals for rights-of-way agreements and permitting for telecommunications services”).

As described in more detail above, the Commission has the authority to adopt these timing-related clarifications because it has the authority to interpret reasonable timeframes under these sections, as confirmed on review.<sup>54</sup>

### **C. The Commission Should Create a Mechanism for “Batch” Application Review and Apply Shot Clocks.**

The Commission should provide an opportunity for carriers to submit “batch” applications for a network—as opposed to each individual site—under applicable shot clocks.<sup>55</sup> This is appropriate and helpful since next-generation networks are increasingly comprised of dozens, even hundreds of small cells, potentially supported by dozens or hundreds of poles. As Sprint has highlighted, “the very nature of [small cell] applications leads to systematic review in batches,” and “the burden of processing multiple sites in one application is not appreciably higher than processing one site at a time.”<sup>56</sup>

A batch application policy could be accomplished without compromising historic or environmental review. The Commission already has indicated that small cells “have less potential for aesthetic and other impacts than macrocells” and therefore warrant different treatment.<sup>57</sup> CCA has suggested the Commission adopt a rule allowing a certain amount of applications per geographic area, such as a square mile.<sup>58</sup> A policy allowing batch application

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<sup>54</sup> See *2009 Declaratory Ruling* ¶¶ 23-26, *aff’d*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013) (affirming Commission authority to interpret Section 332(c)(7)); *2014 Infrastructure Order* ¶¶ 212-215, *aff’d*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015) (affirming Commission authority to interpret Section 6409(a)).

<sup>55</sup> See CCA Streamlining Comments at 15.

<sup>56</sup> See Sprint Comments at 43-44.

<sup>57</sup> See *Streamlining* Public Notice at 12.

<sup>58</sup> See CCA Streamlining Comments at 15.

review for projects with uniform topography may also streamline deployment. The FCC also should ensure that batch applications are not saddled with a longer shot clock than those afforded to individual siting applications, and emphasize that batch applications are a voluntary procedure that carriers can elect to undertake to streamline the review process. This will provide entities the ability to choose which sites are most appropriate for “batch” applications, and avoid bundling applications with a single site that could slow approval of the group.

Ideally, a parallel structure for NEPA and NHPA compliance should accompany any local batch application review structure. Since carriers must often complete local, NHPA and NEPA review at the same time, failing to provide for streamlined batch NHPA and NEPA review will seriously diminish efficiencies achieved by reforming local review. Likewise, as discussed in greater detail below, CCA agrees that some provisions of the Positive Train Control (“PTC”) Program Comment could serve as a potential model for batching siting applications.<sup>59</sup> Acknowledging that NEPA and NHPA batching rules will take time to develop, the Commission should promptly adopt a local batch application review framework in this proceeding.

#### **D. The Commission Should Curtail Moratoria and Other Practices Undermining Broadband Deployment.**

The Commission should specify that moratoria, either *de facto* or *de jure*, do not toll Section 332 shot clocks.<sup>60</sup> The current Section 332 framework does not encompass *de facto*

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<sup>59</sup> See Wireless NPRM ¶¶ 62-63; *see also* *Wireless Telecommunications Bureau Announces Adoption of Program Comment to Govern Review of Positive Train Control Wayside Facilities*, WT Docket 13-240, Public Notice, 29 FCC Rcd 5340, Attachment (WTB 2014) (“PTC Program Comment”); *Batching Guidance for TCNS and E106 Submissions Under the Positive Train Control Program Comment* (rev. Dec. 19, 2014), [http://wireless.fcc.gov/ptc/Batching\\_Guidance\\_121914.pdf](http://wireless.fcc.gov/ptc/Batching_Guidance_121914.pdf) (“PTC Guide”).

<sup>60</sup> See CCA Streamlining Reply Comments 14-15.

moratoria where a local authority refuses to negotiate with a carrier.<sup>61</sup> The Commission also should find that moratoria “prohibit or have the effect of prohibiting” broadband services under Section 332 (personal wireless facilities) and Section 253 (telecommunications service).<sup>62</sup> This finding should include instances where localities ban attachments in ROWs, and where localities lack a process to accept and review siting applications.

However, the Commission could provide a relief mechanism applicable when moratoria are genuinely needed, such as during a hurricane, earthquake, or other natural disaster. In such situations, applicable shot clocks could extend for a brief period of time, such as 30 days, or until a federal body declares the end of a state of emergency. Otherwise, the FCC could simply clarify that shot clocks may be extended if both applicant and locality consent.

#### **E. Fees Throughout the Local Siting Process are Inflated and Harming Deployment.**

The Commission should exercise its authority under Sections 253 and 332(c)(7)(B) to curb application processing fees and ROW-related fees. The Commission may do so by clarifying the meaning of “fair and reasonable compensation” on a “competitively neutral and nondiscriminatory basis” under Section 253(c) and on the basis of Sections 253(a) and 332(c)(7)(B), which preempt state and local actions that “prohibit or have the effect of prohibiting” services under those sections.<sup>63</sup> Not only does Section 253(d) give the Commission

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<sup>61</sup> See Sprint Comments at 17.

<sup>62</sup> See Wireline NPRM ¶ 102; see Wireless NPRM ¶ 22.

<sup>63</sup> See T-Mobile Streamlining Comments at 10; see also Wireline NOI ¶ 100 (seeking comment on whether the Commission should enact rules under Section 253 preempting actions that fall outside of, for example, the “safe harbor” provided by Section(c) permitting state and local authorities to charge “fair and reasonable compensation”); see *id.* ¶ 104 (seeking comment on adopting rules prohibiting excessive fees and other costs that may have the effect of prohibiting the provision of telecommunications service).

express authority to preempt actions that “prohibit or have the effect of prohibiting” services, but the courts also have upheld the Commission’s authority to implement rules under Section 332(c)(7), as described above.<sup>64</sup> CCA urges the Commission to move away from defining “excessive” fees as a means to address what fees are preempted under Section 253.<sup>65</sup> The record is replete with evidence that siting fees are in fact prohibitive, “directly impacting the evolution to 5G networks”<sup>66</sup> and “threaten the economics of a deployment.”<sup>67</sup> Accordingly, a fee outside the meaning of “fair and reasonable compensation” would implicate Section 253(a)’s “prohibition” language, and would arguably extend to the identical language in Section 332(c)(7)(B).

CCA likewise reiterates the recommendations stated in our filings to the *Streamlining Public Notice*. First, the Commission should clarify that application processing fees and any ROW-related fees should be based on authorities’ actual costs.<sup>68</sup> This limitation would not overwhelm local and state authorities as some states already narrow siting and ROW fee collections to actual associated costs,<sup>69</sup> and is appropriate, considering Congress’s statutory goals

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<sup>64</sup> See *City of Arlington v. FCC*, 668 F.3d at 254.

<sup>65</sup> See Wireline NOI ¶ 105.

<sup>66</sup> See T-Mobile Streamlining Comments at 10.

<sup>67</sup> See Nokia Comments at 6.

<sup>68</sup> By siting fees, CCA refers to “those fees including, but not limited to, fees that states or local authorities impose for access to rights-of-way, permitting, construction, licensure, providing a telecommunications service, or any other fees that relate to the provision of telecommunications service.” Wireline NOI ¶ 104. See CCA Streamlining Reply Comments at 10; *see also* Globalstar Comments at 14; Lightower Fiber Networks Comments at 27, 29; Mobilitie Comments at 17; Sprint Comments at 32; WIA Comments at 69; T-Mobile Comments at 24.

<sup>69</sup> See CCA Streamlining Reply Comments at 11, *citing* Comments of the Association of Washington Cities at 2, WT Docket No. 16-421 (filed Mar. 8, 2017); Comments of Mid-Ohio

to promote deployment and not to create a revenue opportunity for permitting authorities.<sup>70</sup>

Further, “actual costs” should exclude licensing or consultant fees,<sup>71</sup> including fees charged on a contingency basis or a result-based arrangement.

“Franchise fees” or any other revenue-based fees, which in no way are related to the locality’s direct costs,<sup>72</sup> should also be declared outside the scope of “fair and reasonable compensation” and within the bounds of “prohibitive” conduct.<sup>73</sup> As CCA has noted, “[franchise] fees also discourage deployment, as some carriers will, as a rule, refuse to pay a gross annual revenue fee and, therefore, will not deploy services in such areas.”<sup>74</sup>

The Commission also should specify that requiring siting applicants to “obtain business licenses for individual cell sites” is outside the scope of Sections 253 and 332. These “loopholes” expose carriers to immense financial liability and are completely disparate from direct review or management costs.<sup>75</sup>

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Regional Planning Commission at 2, WT Docket No. 16-421 (filed Mar. 8, 2017); WIA Comments at 69 n.158 (citing statutes from California, Minnesota, and Utah).

<sup>70</sup> See Sprint Comments at 33 (noting that “fair and reasonable” fees cannot include fees set by a fictional “market rate” construct; “local governments possess a monopoly power over the public rights of way and other essential public infrastructure,” and frequently abuse that power by “extracting unjustified sums of money from carriers who have no choice but to pay what the municipalities demand”).

<sup>71</sup> See CCA Streamlining Reply Comments at 11.

<sup>72</sup> See AT&T Comments at 19; Comments of Conterra Broadband Services and Uniti Fiber at 18-19, WT Docket No. 16-421 (filed Mar. 8, 2017) (“Conterra Broadband Services and Uniti Fiber Comments”); CTIA Comments at 16; Sprint Comments at 27-28; Chamber of Commerce Letter at 3.

<sup>73</sup> See CCA Streamlining Reply Comments at 11.

<sup>74</sup> CCA Streamlining Comments at 18.

<sup>75</sup> See, e.g., T-Mobile Comments at 12. The Commission also should be aware of the growing number of local authorities incorrectly applying ANSI/TIA-222-G structure classes to



The Commission also should address inequitable ROW management charges, which includes fees to actually use public poles or install new poles in a ROW. CCA agrees that the Commission should “use its authority under Section 253 to regulate access to municipally-owned poles when the actions of the municipality are deemed to be prohibiting or effectively prohibiting the provisions of telecommunications service.”<sup>76</sup> CCA and others have highlighted the exorbitant pole attachment fees that providers are forced to pay for access to poles outside the scope of Section 224.<sup>77</sup> CCA previously noted that “one member reports that Chicago, San Francisco and New York City all charge escalating annual municipal pole attachment fees starting from \$4,000 per pole, per year. This cost does not accurately reflect the cost of review and maintenance expenses, especially when compared to the FCC-regulated attachment rate for investor-owned poles, generally \$240 per pole, per year,”<sup>78</sup> and attachment fees under state law

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communication towers and equipment. These structure classes, which are directly based on ASCE-7 and the International Building code, are “historically related to building occupancy or other factors that have little correlation to communication tower use and function.” Local authorities will determine that a certain tower or support structure falls within Structure Class II or Structure Class III, even though these categories are only appropriate for non-redundant structures which might put human lives at risk if felled. The hardening and resiliency requirements required when siting involves Structure Class II and III labels under ANSI/TIA-222-G are very expensive, yet do not materially improve public safety since “[i]nherent redundancy exists in the vast majority of wireless tower supported networks, including networks that support emergency services such as E911.” *See, e.g.,* Wireless Infrastructure Association, *Classification Tower Structures per ANSI/TIA-222-5, IBC and ASCE-7* (rel. July 2016), [http://wia.org/wp-content/uploads/Structure\\_Class.pdf](http://wia.org/wp-content/uploads/Structure_Class.pdf). To the extent possible, the Commission should consider whether these practices—which impose exorbitant cost without any legitimate public safety benefit—“prohibit” deployment within the meaning of the Communications Act.

<sup>76</sup> Wireline NOI ¶ 108.

<sup>77</sup> *See* CCA Streamlining Comment at 17-18.

<sup>78</sup> *See* CCA Streamlining Comments at 14, *citing* 47 U.S.C § 224(e) (describing the “telecom rate formula” for pole attachments) *and* Pub. L. No. 104-104, 110 Stat. 61, 149-151, codified at 47 U.S.C. § 222(f)(1) (affording telecommunications carriers an affirmative right of access to poles owned by investor-owned electric utilities and incumbent local exchange carriers).

ranging from \$10 to \$500. For example, Arizona recently adopted a \$50 per pole attachment rate, accompanied by a \$50 ROW access fee and a \$100 application fee cap for the first five sites, dropping to a \$50 application fee for all subsequent sites.<sup>79</sup> Minnesota also adopted legislation limiting attachments to \$150 per attachment, plus a \$25 maintenance fee.<sup>80</sup> Starting September 1, 2017, Texas will limit pole attachment fees to \$20 per year for municipal owned light poles, traffic lights, and signs in the ROW.<sup>81</sup> Adopting reasonable pole attachment rates will likely boost deployment and infrastructure investment in these states.

Finally, consistent with the express language of Section 253(c), the Commission also should declare that any charges imposed by localities must be non-discriminatory, and all fees must be publicly disclosed or are otherwise impermissible.<sup>82</sup>

**F. Clarifying the Applicability of and Relationship Between Sections 235(a) and 332(c) is an Important Precursor to Bridging the Digital Divide and Promoting 5G Networks.**

*i. Certain Aspects of Sections 253(a) and 332(c)(7) Should Be Interchangeably Interpreted.*

CCA reiterates its call for the Commission to pronounce a “clear, national interpretation” of “prohibit or have the effect of prohibiting” in Sections 253(a) and 332(c),<sup>83</sup> to address and

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<sup>79</sup> Ariz. Stat. H.B.2365 (2017), <https://legiscan.com/AZ/text/HB2365/id/1482295>.

<sup>80</sup> Minn. Stat. S.F. 1456 (2017), [https://www.revisor.mn.gov/bills/text.php?number=SF1456&version=3&session=ls90&session\\_year=2017&session\\_number=0](https://www.revisor.mn.gov/bills/text.php?number=SF1456&version=3&session=ls90&session_year=2017&session_number=0).

<sup>81</sup> Tex. Stat. SB 1004, <https://legiscan.com/TX/bill/SB1004/2017>.

<sup>82</sup> See CCA Streamlining Reply Comments at 12-13; see also Mobilitee Petition at 34-35; see also Comments of Conterra Broadband Services and Uniti Fiber Comments at 23; Lightower Fiber Networks Comments at 27-28.

<sup>83</sup> See CCA Streamlining Reply Comments 14-15; see also Wireless NPRM ¶ 89-90 (seeking comment on the “prohibit or have the effect of prohibiting” language).

resolve inconsistent court interpretations. As part of this national interpretation, the Commission should declare that carriers need not show an actual prohibition of service to trigger Section 253 or 332(c)(7). CCA previously has supported T-Mobile's request for the Commission to clarify that a regulation prohibits or effectively prohibits service contrary to Section 253(a) if it either (i) "materially inhibits or limits" the ability of any competitor to compete, *or* (ii) creates a "substantial barrier" to the provision of any telecommunication service.<sup>84</sup> The interpretation posited by both items, although slightly different than the language CCA previously endorsed, accomplishes the Commission's goal of accelerating broadband deployment.

The interpretation discussed in both the Wireless NPRM and Wireline NOI will provide siting applicants and localities with a firm legal foothold when dealing with siting-related conflicts. The Bureaus both suggest, drawing from *California Payphone*, that the Commission should interpret Section 253(a) as "preempting conduct by a locality that materially inhibits or limits the ability of a provider to compete in a fair and balanced legal and regulatory environment."<sup>85</sup> The Commission should extend this interpretation to the same language in Section 332(c)(7). As described in greater depth above, the Commission has authority to clarify

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<sup>84</sup> See CCA Streamlining Reply Comments at 13-14, *citing* T-Mobile Comments at 17 (quotations omitted).

<sup>85</sup> See Wireless NPRM ¶ 90; *see also* Wireline NOI ¶ 108, *citing California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCB Pol. 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14209, para. 38 (1997) (*California Payphone*); *see also TCG N.Y., Inc., v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (agreeing with the precedent set forth in *California Payphone*); *Illinois Bell Tel. Co. v. Vill. of Itasca*, 503 F. Supp. 2d 928, 940 (N.D. Ill. 2007) (citing *California Payphone* for the proposition that "the FCC considers 'whether the Ordinance materially inhibits or limits the ability of any competition or potential competitor to compete in a fair and balanced legal and regulatory environment'" in order to show a violation of Section 253(a)) (citations omitted).

the ambiguous language in statutes, and should do so to address the identical language in these two provisions.

*ii. Mixed-Use Services are Covered by Both Sections 253 and 332.*

In addition to other clarifications, the Commission should clarify that both Sections 253 and 332 apply to facilities used by providers of wireless broadband Internet access service, where the provider also is using those facilities to provide personal wireless services (in the case of Section 332) or telecommunications services (in the case of Section 253).<sup>86</sup> This is a needed clarification if the Commission reclassifies broadband service as an information service.<sup>87</sup> The Commission should ensure reclassifying broadband as an information service will not undercut infrastructure deployment efficiencies that Congress intended to promote when enacting Sections 253 and 332.

The Commission should clarify that Section 253 will apply where a provider offers both information and telecommunications services, so that Section 253 will continue to streamline siting projects. Section 332(c)(7)(B)'s provisions apply to "personal wireless service," which includes, among other things, "commercial mobile service."<sup>88</sup> Section 253 covers "telecommunications service[s]," which could also become problematic in the event that broadband as reclassified as an "information service."<sup>89</sup> The Commission has addressed this

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<sup>86</sup> See Wireless NPRM ¶ 87 (seeking comment generally on the scope of Sections 253(a) and 332(c)(7)).

<sup>87</sup> See *Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108 (rel. Apr. 27, 2017) ("Restoring Internet Freedom NPRM").

<sup>88</sup> See T-Mobile Comments at 33, *citing* 47 U.S.C. § 332(c)(7)(C)(i) and H.R. Rep. No. 104-458, at 114 (1996) (Conf. Rep.).

<sup>89</sup> See 47 U.S.C. § 153(24) (emphasis added).

potential impact of broadband classification when it made a similar clarification with respect to Section 332(c)(7). In 2007, when classifying wireless broadband Internet access service as an “information service,” the Commission clarified that “personal wireless service” under Section 332(c)(7)(B) did not include wireless broadband Internet Access, but that the provision *would* “continue to apply to wireless broadband Internet access service . . . where a wireless service provider uses the same infrastructure to provide its “personal wireless services” and wireless broadband Internet access service.”<sup>90</sup> At the same time, the Commission made the same clarification with respect to pole attachments under the Pole Attachment Act, codified in Section 224 of the Communications Act, which includes as part of its definition any attachment by “a provider of telecommunications service.” In that context, the Commission clarified “that where a wireless service provider uses the same pole attachments to provide commingled services (i.e., both telecommunications and wireless broadband Internet access services), Section 224(e) would apply.” Now, in this antecedent period to another reclassification, the Commission should declare that Section 253 will apply “where a service provider uses the same facilities to provide telecommunications and information services.”

### **III. HISTORIC REVIEW COMPLIANCE PROCESSES SHOULD BE CLARIFIED, STREAMLINED, AND UPDATED TO REFLECT CHANGES IN TECHNOLOGY.**

The historic review process is a material impediment to deployment. CCA members are helpless against rising Tribal fees throughout the historic review process, increasing information requests, including detailed, bespoke ethnographic studies. The Commission should consider the

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<sup>90</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, WT Docket No. 07-53, FCC 07-30 ¶ 63 (WTB 2007) (“2007 Declaratory Ruling”).

following recommendations to oversee the historic review process in accords with the letter and intent of the NHPA and NPA.

**A. The Commission Should Clarify that Paying Tribal Fees is Not Required for NHPA Compliance.**

The Commission should explicitly state that paying Tribal fees—either for review or for subsequent consultation activities—is not required under the NHPA or the NPA. CCA agrees that “the cumulative Tribal fees that [carriers] pay both per site and for...overall deployment programs have increased precipitously,”<sup>91</sup> greatly “increase[s] the urgency of reexamining the Commission’s rules and policies to ensure that they are clear on licensees’ and applicants’ obligations, and that these rules and policies at present are effectively requiring that applicants pay fees that are not legally required by law.”<sup>92</sup>

By declaring Tribal fees unnecessary for NHPA compliance, the Commission would merely be clarifying existing law. Neither the NHPA’s or Advisory Council for Historic Preservation’s (“ACHP”) implementing rules require payment of Tribal fees, or indicate paying Tribal fees is required to comply with the NHPA; both regulations are silent on that account.<sup>93</sup> As the Commission points out, the ACHP issued guidance regarding fees, first in a memorandum in 2001; this advice was reiterated in ACHP handbooks ever since, most recently in 2012. The ACHP 2001 Fee Guidance explains that “[w]hen the Federal agency or applicant is seeking the views of an Indian tribe to fulfill the agency’s legal obligation to consult with a tribe under a specific provision of ACHP’s regulations, the agency or applicant is not required to pay the tribe

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<sup>91</sup> Wireless NPRM ¶ 36.

<sup>92</sup> *Id.*; see CCA Streamlining Comments at 35-36; see also CCA Streamlining Reply Comments at 16-19.

<sup>93</sup> See Wireless NPRM ¶ 43.

for providing its views,”<sup>94</sup> and that “[i]f the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.”<sup>95</sup> Most importantly, the guidance provides that “[No] portion of the NHPA or the ACHP’s regulations require[s] an agency or an applicant to pay for any form of tribal involvement.”<sup>96</sup>

In CCA members’ experience, however, FCC staff administrates historic review so as to effectively require siting applicants to pay Tribal fees and secure Tribal consent to proceed with

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<sup>94</sup> See ACHP, Fees in the Section 106 Review Process (2001), <http://www.achp.gov/regs-fees.html> (ACHP 2001 Fee Guidance).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* See also ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook, at 13 (2012), <http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf> (ACHP 2012 Handbook) (“However, during the identification and evaluation phase of the Section 106 process when the agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe, it may ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor. Since Indian tribes are a recognized source of information regarding historic properties of religious and cultural significance to them, federal agencies should reasonably expect to pay for work carried out by tribes. The agency or applicant is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the duties of obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on those historic properties, through reasonable methods.”). The ACHP 2012 Handbook also indicates that with respect to properties where the agency concludes that no historic properties are affected, Tribal concurrence in that decision is not required, though Tribal Nations and NHOs can state any objections to the ACHP, which if it agrees may provide its opinion to the agency. See *id.* at 23.

a project, even where no statutorily-defined Historic Property is found.<sup>97</sup> Such practices have no basis in the NHPA nor the NPA, and were never adopted as an actual rule through notice and comment. Accordingly, the current regulatory environment represents both unwarranted inflation of the FCC's authority and a harmful deployment barrier.

Without Commission action, Tribal fees will become an increasingly exorbitant cost barrier to the ubiquitous deployment of small cell and DAS equipment. Sprint's Super Bowl deployment—a 23-cell-site project that ended up costing \$173,305 in Tribal fees—illustrates why the current historic review framework is unsustainable, and must be addressed.<sup>98</sup> This year, to enhance coverage to meet increased consumer demand during the Super Bowl at NRG Stadium in Houston, Sprint paid \$6,850 per site to twelve Tribes, even though the small cells were deployed on long-disturbed ground.<sup>99</sup> Another CCA member is currently facing a staggering \$19,550 in Tribal review costs for a new tower in Wisconsin; the \$19,550 figure comprises Tribal fees from 38 Tribes ranging from \$200 to \$1,500 per Tribe with five Tribes charging \$1,000 or more. In 2016, the same CCA member applicant built a similar tower in the same Wisconsin town costing \$13,075 in Tribal fees; the jump in Tribal fees from \$13,075 to \$19,550 over one year in the same general deployment area was never explained. Other members report similar experiences with escalating fees among an increasing number of Tribal interest claimants. White Buffalo Environmental, Inc., (“White Buffalo”) a consulting firm

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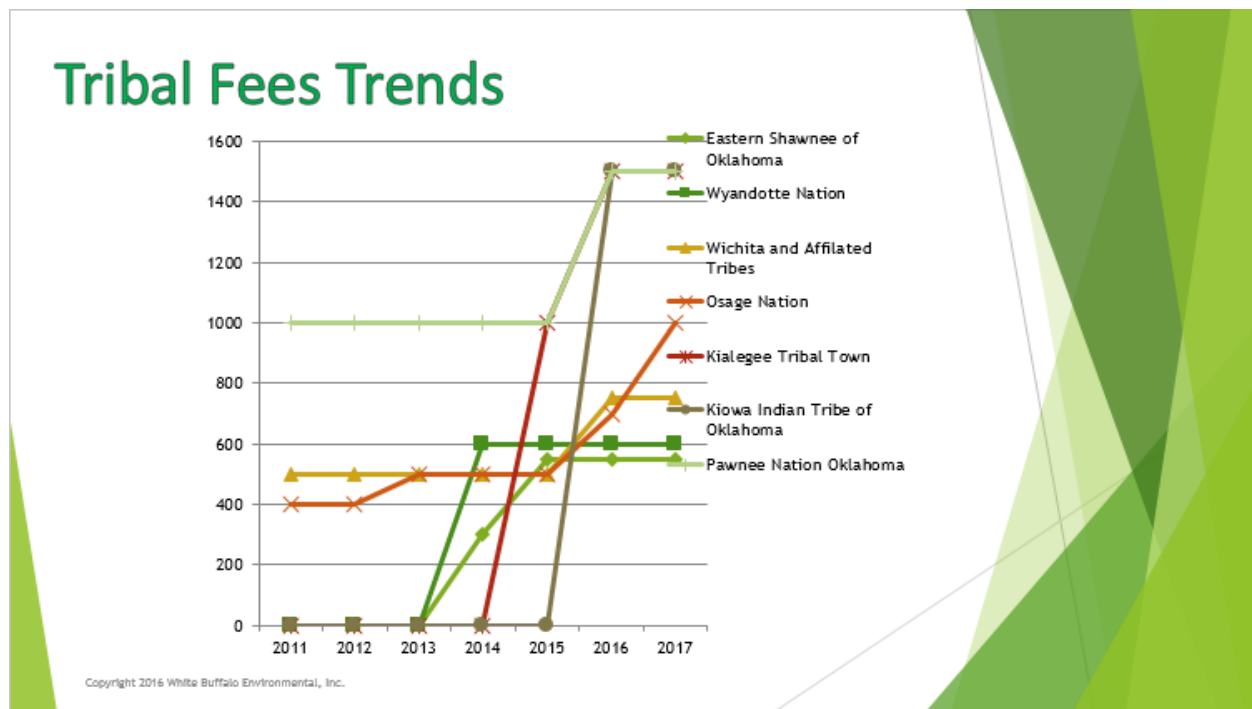
<sup>97</sup> See NPA § II.A.9 (defining “Historic Property,” explaining that “properties of traditional religious and cultural importance to an Indian Tribe or NHO” must “meet the National Register criteria” to be afforded protection).

<sup>98</sup> See Ex Parte Letter from Keith Buell, Senior Counsel, Sprint, to Marlene H. Dotch, Secretary, FCC, WT Docket No. 16-421 (Filed May 16, 2017) (“Sprint Super Bowl Ex Parte”).

<sup>99</sup> *Id.* at 3.



providing historic and environmental review services, has made available the following examples of increasing Tribal fees in the areas in which it provides consulting services.



*Figure 1. Tribal fees trend examples.*

*Source: White Buffalo Environmental, Inc., 2017.*

## Tribal Fees Trends

Tribe	2011	2012	2013	2014	2015	2016	2017
Ponca Tribe of Nebraska	NA	NA	NA	\$200.00	\$200.00	\$200.00	\$350.00
Iowa Tribe of Kansas and Nebraska	NA	NA	NA	NA	\$300.00	\$300.00	\$300.00
Crow Tribe	NA	NA	NA	NA	\$350.00	\$350.00	\$350.00
Shawnee Tribe	\$50.00	\$50.00	\$50.00	\$400.00	\$400.00	\$400.00	\$400.00
Miami Tribe of Oklahoma	NA	NA	NA	\$400.00	\$400.00	\$400.00	\$400.00
Keweenaw Bay Indian Community	\$50.00	\$50.00	\$50.00	\$300.00	\$500.00	\$500.00	\$500.00
Ponca Tribe of Indians of Oklahoma	NA	NA	NA	NA	\$500.00	\$500.00	\$750.00
Absentee Shawnee Tribe of Indians of Oklahoma	NA	NA	NA	NA	\$500.00	\$500.00	\$500.00
Omaha Tribe of Nebraska	NA	NA	NA	NA	NA	\$500.00	\$500.00
Eastern Shawnee of Oklahoma	NA	NA	NA	\$300.00	\$550.00	\$550.00	\$550.00
Wyandotte Nation	NA	NA	NA	\$600.00	\$600.00	\$600.00	\$600.00
Wichita and Affiliated Tribes	\$500.00	\$500.00	\$500.00	\$500.00	\$500.00	\$750.00	\$750.00
Osage Nation	\$400.00	\$400.00	\$500.00	\$500.00	\$500.00	\$700.00	\$1,000.00
Kialegee Tribal Town	NA	NA	NA	NA	\$1,000.00	\$1,500.00	\$1,500.00
Kiowa Indian Tribe of Oklahoma	NA	NA	NA	NA	NA	\$1,500.00	\$1,500.00
Pawnee Nation Oklahoma	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,500.00	\$1,500.00
<b>Total Fees:</b>	<b>\$2,000.00</b>	<b>\$2,000.00</b>	<b>\$2,100.00</b>	<b>\$4,200.00</b>	<b>\$7,300.00</b>	<b>\$10,750.00</b>	<b>\$11,450.00</b>

Copyright 2016 White Buffalo Environmental, Inc.

Figure 2. Tribal fees examples by tribe from 2011 to 2017.

Source: White Buffalo Environmental, Inc., 2017.

White Buffalo also supplied summaries of Tribal fees assessed for “review” responding to respective Tower Construction Notification System (“TCNS”) notices for recent tower deployments in Monroe County, Montana, attached below. One 2016 deployment drew 24 requests for Tribal fees totaling \$11,500. The documentation shows that all but three Tribes required detailed information beyond the FCC Form 620, including cultural and/or ethnographic reports.<sup>100</sup> White Buffalo also provided documentation showing a 255’ tower deployment in 2017 which involved Tribal fee requests adding up to \$15,100 and demands for additional documentation,<sup>101</sup> and another 2017 tower deployment that required \$14,450 to cover Tribal fees

<sup>100</sup> See Tribal Consultation Process Table for the “Philadelphia” site (attached hereto as “Attachment A”).

<sup>101</sup> See Tribal Consultation Process Table for the “Granville” site (attached hereto as “Attachment B”).

from 25 Tribes.<sup>102</sup> White Buffalo paid these fees, viewing Tribal fee payment as essentially mandatory for moving a project along. These deployments further validate CCA member reports that siting applicants generally expect to spend between 90-120 days to wade through the initial Tribal notification process, a far cry from the 30-40 days provided for in the NPA. For the 2016 deployment, an initial TCNS notice went out to Tribes on June 3, 2016, but as Attachment A reflects most Tribes did not respond until August, and the Tribal consultation process did not conclude until October of 2016.<sup>103</sup>

CCA recently submitted a white paper that discusses the historic review process and narrating two fictional competitive carriers deploying small cells and replacement poles.<sup>104</sup> In it, CCA highlights costs associated with Tribal fees. For example, “a review of fee demands from members as of February 2017 shows that at least one Tribe has raised its review fees to \$1,650 per project, another Tribe charges \$1,500, another Tribe is at \$1,200, and six additional Tribes have fees of \$1,000.” Further, one member reported that in 2011, the average fees per site was \$381.67 and the average fee demand per Tribe was just over \$250. What’s more, recent trends show that the increase is continuing, with an average of more than \$6,300 having been reported for projects in late 2016 to early 2017.<sup>105</sup>

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<sup>102</sup> See Tribal Consultation Process Table for the “Duncan’s Bridge” site (attached hereto as “Attachment C”).

<sup>103</sup> See Attachment A.

<sup>104</sup> Competitive Carriers Association, Clearing the Path for America’s Wireless Future; Addressing Hurdles to Meet the Pressing Need for Our Nation’s Wireless Infrastructure (rel. June 8, 2016) (“CCA White Paper”), <https://ccamobile.org/wp-content/uploads/2017/06/Clearing-the-Path-for-Americas-Wireless-Future-June-2017.pdf>.

<sup>105</sup> *Id* at 14-15. In 2012, for one competitive carrier, the average site received payment requests from just under two Tribes, while in 2016, the number of Tribes reviewing each site was more than 10. And, the average charge per Tribe more than doubled over that time period, from \$254.44 in 2011 to \$513.01 in 2016. *Id*.

The Commission's own statistics show Tribal fees are rising exponentially. TCNS data reveals that the average number of Tribal Nations notified per tower project "increased from eight in 2008 to 13 in August 2016 and 14 in March 2017."<sup>106</sup> The Commission also confirms that "[s]ix of the 19 Tribal Nations claiming ten or more full States within their geographic area of interest in March 2017 had increased that number since August 2016, with three Tribal Nations claiming 20 or more full States in addition to select counties."<sup>107</sup>

Additionally, wireless carriers and infrastructure providers indicate that for the vast majority of applications on-file through TCNS, Tribes do not opt to consult after the initial "review" fees are paid.<sup>108</sup> This casts doubt as to whether many Tribes' initial interest claims, and fee requests, were made to protect Historic Property.

Under the current framework, applicants and consulting parties are typically forced into standoffs regarding increasingly-exorbitant fees before parties ever determine whether or not a Historic Property is present. The ACHP's implementing rules and the Commission's NPAs are designed so consulting parties, including Tribal Nations, and applicants can work together to determine *whether a siting project will have an adverse effect on Tribal ancestral land or*

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<sup>106</sup> Wireless NPRM ¶ 35.

<sup>107</sup> *Id.* Further, "[i]n 2015, 50 Tribal Nations noted fees associated with their review process in TCNS; by March 2017, Commission staff was aware of at least 95 Tribal Nations routinely charging fees, including 85 with fees noted in TCNS and 10 that staff was aware of from other sources. This data further suggests that the average cost per Tribal Nation charging fees increased by 30% and the average fee for collocations increased by almost 50% between 2015 and August 2016." *See id.*

<sup>108</sup> Comments of Crown Castle, WT Docket No. 15-180, at 3 (Sept. 28, 2015) ("Crown Castle Comments").

property and mitigate adverse effects<sup>109</sup> where that property is in or is eligible for inclusion in the National Register of Historic Places.<sup>110</sup>

Under the NHPA and Commission rules, not every site containing Tribal artifacts or burials is eligible for inclusion on the National Register<sup>111</sup> (the definition of Historic Property is problematically vague under the NPA<sup>112</sup> and statute<sup>113</sup>) yet the FCC administers the historic review process in a way that provides Tribes an opportunity to equate “ancestral lands” with “Historic Property,” and charge fees accordingly. CCA notes that many letters from Tribal Nations assume any area with Tribal artifacts or historical significance should be afforded

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<sup>109</sup> NPA, §§ IV.B, IV.C; *see* 54 U.S.C. § 302706(b).

<sup>110</sup> *See* NPA § II.A.9.

<sup>111</sup> Note that the historic review process does not relieve applicants from the obligation to notify Tribes if human remains are discovered. Siting applicants that discover human remains during a project are required to halt activity, alert the appropriate THPO(s), and follow applicable federal and state laws protecting human or burial remains. *Id.* § 9.D.

<sup>112</sup> The definition of “Historic Property” includes “[a]ny prehistoric or historic district site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. . . . The term includes properties of traditional religious and cultural importance to an Indian Tribe . . . that meet the National Register criteria.” *Id.* § II.A.9.

<sup>113</sup> The National Register criterion for Historic Property is as follows: “The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history.” 36 C.F.R. § 60.4.

protections under the NPAs.<sup>114</sup> State Historic Preservations Officers (“SHPO”), too, tend to conflate aged objects, buildings, and sites with eligible Historic Properties protected by the NHPA. For example, in a small Georgia town, a competitive carrier attempting to cite a new wireless project has experienced significant delays and increased costs as a result of the local SHPO misinterpreting the NPA rules regarding Historic Properties and therefore delaying mobile deployment in this small town. This is not a sustainable arrangement, especially considering future networks require dense deployment.

Fortunately, CCA notes many Tribes appear willing to compromise regarding fee issues.<sup>115</sup> To further collaboration, CCA suggests creating a third-party database to collect interests and fees reported by Tribes. Streamlining the process for Tribal fees, and collecting a uniform database of all culturally significant areas will expedite the siting process and assuage concerns, and confusion, surrounding siting applications.

Accordingly, the Commission may make this declaration without the need to make changes to the programmatic agreements, and therefore without the need to seek approval from the ACHP or National Conference of State Historic Preservation Officers (“NCSHPO”). Since the Commission is merely charged with implementing the ACHP’s rules,<sup>116</sup> and neither the Collocation NPA nor the NPA sets a contrary precedent (both are silent as to fees), the

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<sup>114</sup> *See, e.g.*, Comments of Wampanoag Tribe of Gay Head (Aquinnah), WT Docket No. 17-79 et al., at (filed May 15, 2017) (stating that the “role of the tribe in the TCNS process is to protect *all* tribal sites...” (emphasis added)).

<sup>115</sup> *See, e.g.*, Comments of the Miami Tribe of Oklahoma, WT Docket No. 17-79, at 2 (filed April 17, 2017) (“Miami Tribe Comments”) (stating that the Tribe supports a “fair fee structure which may be broken down by tower type”).

<sup>116</sup> *See* 54 U.S.C. § 306108; 26 C.F.R. § 800, et seq.; 26 C.F.R. § 800.2(a) (“It is the statutory obligation of the Federal agency to fulfill the requirements of section 106”).

Commission is free to reiterate longstanding ACHP guidance with respect to fees, consistent with its own rules.

The Commission has issued clarifying guidance successfully in the past. In 2005, the FCC issued a Declaratory Ruling clarifying certain response timelines and remedies surrounding early communications with Tribal Nations within the NPA.<sup>117</sup> The Commission was allowed to do so without rebuke, and the Commission's Declaratory Ruling interpreting the provisions of the NPA was not inconsistent with ACHP's implementing rules or the NHPA.<sup>118</sup> Commission clarification of its existing NPAs and existing ACHP guidance on the subject of fees will serve as a necessary regulatory backstop when competitive carriers work with the Commission to resolve disputes throughout the Section 106 process. For example, in competitive carriers' experience, the Commission will allow a project to languish if a carrier refuses to pay Tribal fees, either for TCNS review or in the case that Tribes request compensation for site monitoring. This occurs even where a carrier allows a Tribal representative on site to monitor a project, and freely provides project information. Confirming ACHP guidance on fees, as it relates to the Commission's NPAs is good policy, as it does not reduce Tribal Nations' rights to consult, or impinge on their ability to monitor sites or even to request more information.

**B. The Commission Should Clarify Its Role and Authority Regarding NHPA-Related Fee Disputes.**

The Commission should declare its authority to allow a siting project to move forward if a Tribe refuses to comment on the presence or absence of effects to potential Historic Property

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<sup>117</sup> Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement, Declaratory Ruling FCC 05-176, 20 FCC Rcd 16092 (2005) ("*2005 Declaratory Ruling*").

<sup>118</sup> 36 C.F.R. § 800.14.

without compensation, or without additional customized archaeological work product. The Commission also should explicitly provide that it may resolve disagreements regarding whether an applicant has submitted the required “information necessary” to make a determination regarding the presence of Historic Properties. Currently, the Commission administers the historic review process so that applicants must secure Tribal consent to move forward with a project—typically in conjunction with paying an arbitrary “review” fee or producing ancillary archaeological material, before an actual or potential Historic Property is found. This is not reasonable, and results in substantial cost and delay.

The Commission would adjudicate the dispute on the basis of whether the threshold of “reasonable and good faith effort” to identify Historic Properties has been met.<sup>119</sup> This is explicitly allowed under ACHP guidance<sup>120</sup> and is consistent with both the ACHP’s rules and the NPA. It also is consistent with Tribes’ own admission that “Section 106 does not require the federal government to obtain tribal consent before taking action.”<sup>121</sup> Further, the Commission interpreted its obligations under NHPA and NPA under a “reasonable and good faith effort” standard in the *2005 Declaratory Ruling* and can do so again.

Under the NPA, when a Tribal Nation or NHO refuses to comment on the presence or absence of effects to Historic Properties without compensation, the applicant can refer the

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<sup>119</sup> See Wireless NPRM ¶ 56.

<sup>120</sup> The ACHP 2001 Fee Guidance states that “if an agency or applicant attempts to consult with an Indian tribe and the tribe demands payment, the agency or applicant may refuse and move forward.” See ACHP 2001 Fee Guidance.

<sup>121</sup> See *Improving Tribal Consultation Infrastructure Projects, A report by the Advisory Council on Historic Preservation*, at 7 (May 24, 2017) (nothing that Tribes would like to change the ACHP to afford them decision-making power in the Section 106 process, which they do not currently possess).



procedural disagreement to the Commission.<sup>122</sup> More precisely, applicants are instructed to “seek guidance” from the FCC in the event of “any substantive or procedural disagreement...or if the Indian tribe or NHO does not respond to the Applicant’s inquiries.”<sup>123</sup> But, if there is a disagreement regarding “identification or eligibility of a property,” the FCC must use ACHP’s rules.<sup>124</sup> A dispute resolving fees would seem to be a “substantial or procedural disagreement,” that the FCC is empowered to resolve under the NPA, so long as the issue is detached from a dispute regarding “identification or eligibility of a property.” Accordingly, the Commission should declare that resolving fee disputes, namely, allowing a project to progress if a Tribe refuses to participate without funds, is a “substantial or procedural” disagreement under the NPA.

The *2005 Declaratory Ruling* indicates the Commission may again issue a declaration to clarify ambiguous NPA language. In 2005, on its own motion, the FCC clarified certain notice and timeline provisions within the NPA and established a protocol for initial communications between a Tribal Nation and an applicant. If the Tribal Nation does not respond to the applicant over the approximately 60 days allotted in the *2005 Declaratory Ruling*, the Tribal Nation would be deemed to have “no interest in pre-construction review” and “the Applicant’s obligations with respect to that Indian tribe or NHO under Section IV of the Nationwide Agreement are complete.”<sup>125</sup> The Commission alone determined that the adopted process satisfies the Commission’s obligation to make “reasonable and good faith efforts” to identify Indian tribes

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<sup>122</sup> NPA, § IV.G.

<sup>123</sup> *Id.*

<sup>124</sup> *See Id.* § VI.D.3.

<sup>125</sup> *2005 Declaratory Ruling* ¶ 2.

and NHOs that may attach religious and cultural significance to Historic Properties that may be affected by an undertaking, as specified under the Nationwide Agreement and as required under the NHPA and the rules of the ACHP.<sup>126</sup>

### **C. Addressing NHPA Process Issues Will Expedite Deployment.**

#### *i. Timelines/Lack of Response*

Clarifying various deadlines throughout the historic review process is needed, and will assist both siting applicants and Tribes.<sup>127</sup> As a start, the Commission should limit to 30 days the initial review period after Tribes receive TCNS notification. If no response is received after 30 days, the Commission should provide that the Tribe waives its right to object or consult and the applicant may move to the next review step without further obligation to contact the Tribe, unless artifacts or burial sites are discovered during excavation. The NPA stops short of establishing a firm deadline for Tribal response to initial notice—30 days is considered only a “reasonable opportunity” to respond—but siting applicants are essentially dependent on the FCC’s discretion regarding when a project can move forward if Tribes fail to timely communicate. Although the *2005 Declaratory Ruling* established a process for advancing a siting project if Tribes fail to respond to initial notice, only the “Good Faith Protocol” exists to safeguard applicants against further communication-related delays. This is cold comfort for CCA members, as the Good Faith Protocol was never described in an FCC document, including the Wireless NPRM, where the Good Faith Protocol is not cited and is not available online.<sup>128</sup>

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<sup>126</sup> See *2005 Declaratory Ruling* ¶ 9; see also *id.* ¶ 11 (emphasizing that applicants are still obligated to cease construction and notify potentially affected Tribal Nations if a previously unidentified site that may be a historic property is discovered during construction).

<sup>127</sup> See Miami Tribe Comments at 2 (indicating project timeframes would be helpful, particularly one set of project timeframes for all projects).

<sup>128</sup> See Wireless NPRM ¶ 29 (“The Commission staff, in collaboration with industry, has subsequently developed a similar process (the “Good Faith Protocol”) to address situations

Many CCA members were not aware of the Good Faith Protocol. Yet another reason that the FCC should act to inject more certainty into the timing of the historic review process.

The PTC Program Comment serves as precedent that implementing response deadlines is possible and helpful to the siting process.<sup>129</sup> Further, there is evidence that Tribal Nations are willing to compromise. One Tribe, for example, explicitly approved of the “shot clock” concept provided that sufficient time is given for the Tribe to consult and respond.<sup>130</sup>

*ii. Batch Applications for Historic and Environmental Review*

Allowing batch application review for NHPA and NEPA compliance, and not just local review, is important to expediting deployment. Without a process for “batching” application review under the NPAs or the Commission’s NEPA rules, network projects falling under any new local “batch application” review program and any accompanying shot clock might not actually expedite deployment if the same well-documented historic and environmental review delays still plague the siting process. Some Tribes note that batching is “becoming prevalent in the TCNS process for 5G deployment” yet “Tribes have not been properly consulted on the

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where a Tribal Nation or NHO expresses initial interest in a project, but then fails to communicate further with the Applicant after having been provided any additional information or fees that it has requested”).

<sup>129</sup> See PTC Program Comment, § VII.D (“The relevant SHPO and Indian tribe(s) have 30 days from receipt of a submission under Section VII.A... Any request for additional information, and any request for monitoring, will explain the basis for the request and will not suspend the 30-day review period once it commences... If an Indian tribe or SHPO has not responded within these 30 days, the railroad will refer the matter to the FCC. The Indian tribe or SHPO will have no further opportunity to participate in this review unless the FCC determines otherwise within 10 business days”).

<sup>130</sup> See Miami Tribe Comments at 2.

batching method.”<sup>131</sup> The record indicates Tribes understand that batch applications are appropriate for small cell and DAS deployment, yet Commission guidance and clarification is needed.<sup>132</sup>

CCA members have experienced positive outcomes with the ability to batch sites, up to 20 sites per county, on a single TCNS filing. This type of approach would be particularly useful on DAS and small cell installations. The record indicates Tribes and SHPOs are open to adopting a batch review process, which should encourage the FCC. For example, the NCSHPO’s comments in this proceeding provide that batch application review is a “possible” approach in the historic review context, especially where a project involves “the exact same product being installed in a consistent manner in a homogenous geographic area with a repetitive impact on a historic resource.”<sup>133</sup> The Commission should be encouraged by such feedback, and begin the process of working with stakeholders to develop a batch application process spanning local, environmental and historic review. As noted above, a batch application program would be especially useful for projects across uniform topography.

CCA agrees that certain portions of the PTC Program Comment may serve as a viable model for broadband siting batch application review. Under the PTC Program Comment, applicants file by county, and may submit between 100-200 poles within a two-week period. Poles exempt from historic review must be submitted as well.

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<sup>131</sup> See, e.g., Comments of the Chippewa Cree Tribe, WT Docket No. 17-79, et al., at 7 (filed Apr. 13, 2017) (“Chippewa Cree Comments”).

<sup>132</sup> See *id*; see also Miami Tribe Comments at 2 (providing that the “Tribe is not opposed to batching projects under one TCNS number provided that there is a specific limit on the number of projects that can be batched,” pointing to an 8-10 application maximum).

<sup>133</sup> Comments of the National Conference of State Historic Preservation Officers, WT Docket No. 17-79, at 4 (filed Apr. 13, 2017) (“NCSHPO Comments”).

### *iii. Designating Areas of Interest*

The Commission should revise its policy regarding designating Tribal areas of interest. CCA supports PTA-FLA's proposal to require Tribal Nations to "identify under objective, independently verifiable criteria the areas where construction could reasonably be deemed to have an impact on tribal grounds,"<sup>134</sup> and do so by county.<sup>135</sup> CCA also supports a policy directing Tribes to designate areas of interest that, rather than encompassing an entire state, county, or other geographic boundary, are specific to an actual documented site.<sup>136</sup>

Some Tribes elect to receive tower notifications "for the entire United States," and the FCC informs applicants that they are still "required to use reasonable and good faith efforts to determine if the Tribe or NHO may attach religious and cultural significance to historic properties that may be affected by its proposed undertaking." This geographic reach is not reasonable, especially in light of evidence of escalating Tribal claimants per site.

At a minimum, the Commission should allow applicants to identify areas in which Tribes have expressed an interest, allowing applicants to proactively address Tribal interests.<sup>137</sup> The FCC should identify and adopt categorical exclusions where Tribal review is not needed, such as collocations on non-Tribal lands where there is no new ground disturbance. In addition, the Commission should keep a record of areas cleared by Tribes from past projects, and make those

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<sup>134</sup> See PTA-FLA Petition at 14-15.

<sup>135</sup> See Wireless NPRM ¶ 53.

<sup>136</sup> See *Ex Parte* Letter from Dr. Thomas J. Sloan, Kansas' 45<sup>th</sup> District Representative, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 3 (filed May 9, 2017).

<sup>137</sup> See CCA Streamlining Comments at 41-42; see also CCA Streamlining Reply Comments at 18.

areas visible to siting applicants seeking to streamline the historic review process.<sup>138</sup> Further, applicants with projects similar to previously-cleared projects should be able to rely on prior clearances.

#### iv. *Information and Site Monitoring*

The Commission should clarify that the information required by Forms 620 and 621 sufficiently comprise “all information reasonably necessary” for Tribes to “evaluate whether Historic Properties of religious and cultural significance may be affected.”<sup>139</sup> Additionally, the Commission should stipulate that information required for a Form 620 or 621, whichever applies, and potentially site photos, should be submitted to TCNS as part of the initial notification to Tribes. This policy would alleviate the need for Tribal review fees, since Tribes would have all “reasonably necessary” information up front, and would streamline procedures considering siting applicants must complete a Form 620 or 621 as part of any non-exempt project. Tribes should be required to justify any further information requests.

Clarifying the scope of information “reasonably necessary” for initial Tribal screening is important because, under the Commission’s current historic review administration practices, Tribes are allowed to demand without explanation bespoke historic review as part of a Tribe’s first response to TCNS notice, including ethnographic studies and soil sample testing. The Tribal Consultation Process examples attached hereto provide an example of the frequency with

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<sup>138</sup> See Wireless NPRM ¶ 54 (“To what extent should applicants be able to rely on prior clearances, given that resources may continue to be added to the lists of historic properties?”).

<sup>139</sup> Applicants are also required to provide the Tribal Nation or NHO with a reasonable opportunity to respond. See NPA, § IV.F. The Commission seeks comment whether FCC Form 620 or FCC Form 621 command sufficient information to meet the requirement that “all information reasonably necessary...” has been provided to the Tribal Nation. See Wireless NPRM ¶ 46.

which siting applicants are forced to conduct individualized archaeological reports without any suggestion that a documented Historic Property could be impacted, which is a significant waste of time and resources, especially for the smallest carriers.<sup>140</sup> CCA members have received official FCC emails following a TCNS notice providing information about various Tribes declaring an initial interest in the underlying project and demanding separate archaeological review under the Tribe's own procedures, which must be obtained via fax. One member explained that a certain Tribe declares it "will object to the construction of all towers where field work and reporting do not accommodate [the Tribe's own] procedures." In some cases, such as where a Tribe can show a given APE touches or implicates a documented historic site, additional archaeological review may be necessary, but siting applicants should not be asked to assume extra administrative work and cost before that point. CCA members report that Tribes often demand services and tests far beyond what is required by a SHPO.

Regarding Tribal requests to monitor a site, and receive compensation for doing so, the Commission should clarify that allowing and financing site monitoring is not required for historic review compliance. At a minimum, the Commission should provide that site monitoring is only permitted where the Tribe identifies an eligible Historic Site and has previously elected to participate in the historic review process as a consulting party. The Commission requires Tribes to justify additional information or site monitoring requests under the PTC Program Comment, and can do so with respect to other siting projects.<sup>141</sup> Members have had positive results using the clear terms of the PTC Program Comment to avoid tens of thousands of dollars in site survey

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<sup>140</sup> See Attachment A; *see also* Attachment B; Attachment C.

<sup>141</sup> See PTC Program Comment at VII.D ("Any request for additional information, and any request for monitoring, will explain the basis for the request and will not suspend the 30-day review period once it commences").

requests that they would have likely been forced to pay in a non-PTC deployment.<sup>142</sup> To reduce unnecessary cost and streamline administrative processes without compromising Tribal rights, the Commission should at least clarify that siting applicants need not conduct these individualized reviews, and then enforce the policy accordingly.

**D. Expanding NHPA Exclusions for Small Wireless Facilities and Supporting Structures is Appropriate and Will Facilitate Deployment.**

*i. Pole Replacements*

The Commission should take additional steps to exempt new poles, including pole replacements, from the strictures of historic review. As the Commission acknowledges, deploying small cells often requires deploying new poles and support structures, an activity not optimally addressed by the NPA.<sup>143</sup> As the Commission points out, the current framework provides that pole replacements are excluded from historic review only if the replacement meets certain requirements, and, even then, there are further restrictions based on the location of the pole replacement.<sup>144</sup> First, a pole must equate to a “tower” under the NPA, the replacement cannot substantially increase the size of the existing tower or increase the boundaries of the property by 30 feet in any direction, and if constructed after March 16, 2001, the pole being

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<sup>142</sup> On a recent PTC project, a Tribe contacted a CCA member to request the coordinates of all poles within a batch filing. After this information was provided, the wireless provider received an invoice totaling nearly \$50,000 to conduct site surveys on five PTC TCNS projects. While the invoice had a break-down of the cost per TCNS number, it did not provide justification for the monitoring nor did it address cost discrepancies between excluded and non-excluded poles. The entity notified the Tribe that, per the PTC Program Comment Tailored to PTC, exempt PTC towers are not subject to a site survey or monitoring provisions, and are therefore exempt from compensation fees. Using the parameters of the PTC Program Comment, then, the Tribe recanted their request and the application moved forward without issue.

<sup>143</sup> See Wireless NPRM ¶ 67.

<sup>144</sup> *Id.*



replaced itself must have undergone historic review to be exempted.<sup>145</sup> Further, pole replacements or siting activity in or near communications or utility ROWs are excluded only if the facility does not constitute a substantial increase in size over nearby structures and it is not within the boundaries of a historic property.<sup>146</sup> This exception is of limited utility, however, considering qualifying siting activity must still go through the Tribal review aspect of Section 106 review.<sup>147</sup>

In light of these challenges, CCA supports the solution described by the Commission under which replacement of poles are excluded from Section 106 review, regardless of whether a pole is located in a historic district, provided that the replacement pole is not “substantially larger” than the pole it is replacing, as defined in the NPA.<sup>148</sup> This exclusion also would apply to pole replacements within all ROWs, including those in historic districts. As the Commission acknowledges, this would relieve providers from the need to determine whether the original pole was designed to support antennas, an unnecessary and restrictive policy. Last, the Commission should clarify that pole replacements also are exempt outside the public ROW.

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<sup>145</sup> NPA, § III.B; *see also* § II.A.14 (definition of “Tower”).

<sup>146</sup> *See* Wireless NPRM ¶ 67, *citing* NPA, § III.E; *see also* Collocation NPA § I.E (defining “substantial increase” in size as (1) when the new antenna, with exceptions, would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; or (2) result in the installation of more than four equipment cabinets or one new equipment shelter; or (3) the antenna would involve an appurtenance protruding more than twenty feet of the edge of a building; or (4) a collocation what would involve “excavation outside the current tower site” within the boundaries of the leased or owned property surrounding the tower).

<sup>147</sup> *See* NPA § III.E. “Substantial increase in size” is defined by reference to Section I.E of the Collocation NPA.

<sup>148</sup> *See* Wireless NPRM ¶ 68.

*ii. Rights-of-Way*

The Commission should, as proposed, adopt a broader ROW historic review exclusion paralleling the current framework for communications and utility ROWs, but cover construction or collocation of communications infrastructure in any public or utility rights of way. ROWs are public spaces designated for useful infrastructure; broadband connectivity is a community investment, imparting a public good that justifies such an exclusion, especially considering that the vast majority of ROWs are already disturbed. This reform is needed even though current provisions of the NPA exclude from Section 106 review construction in utility and communications rights of way, subject to certain limitations.<sup>149</sup> Accordingly, the Commission should adopt historic review exclusions for construction of a wireless facility in transportation, utility, or communications rights-of-way, regardless of whether the ROW is located on or near a historic property, subject to the “substantial increase in size” rules in the Collocation NPA.<sup>150</sup>

*iii. Collocations*

The Commission should exempt from Tribal review all collocations. Otherwise, CCA reiterates its request for the following targeted solutions, which CCA originally submitted in comments leading up to the adoption of the amended Collocation Agreement.<sup>151</sup> The Commission should amend the Collocation NPA and declare that collocations are excluded from review, for example, where a collocation “would require historic preservation review only

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<sup>149</sup> See NPA, § III.E.

<sup>150</sup> *Id.*

<sup>151</sup> Comments of Competitive Carriers Association, WT Docket No. 15-180, at 4 (filed June 27, 2016) (“CCA Collocation Comments”).

because the structure on which it is mounted is over 45 years old.”<sup>152</sup> Currently, for example, a collocation is excluded on a building or non-tower structure if the “building or structure is over 45 years old, and the collocation does not meet the criteria established . . . for collocations of small antennas.”<sup>153</sup> If a collocation meets certain size criteria, it is unlikely a building’s or structure’s age alone raises enough concern to justify the tremendous expense and delay created by historic review.

The Commission also should omit the Collocation NPA provisions requiring that collocations within or visible from 250 feet of the boundary of a historic district undergo historic review.<sup>154</sup> The Commission should eliminate the boundary and eliminate the visual requirement.<sup>155</sup> Given their small size and potential to be camouflaged with stealth techniques, the Commission should streamline the Collocation NPA’s treatment of small cells and DAS within historic districts or on historic properties.<sup>156</sup> The Commission also should omit language subjecting to Section 106 review small antenna deployment on the interior of a building.<sup>157</sup>

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<sup>152</sup> See Ex Parte Letter by Brian M. Josef, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 13-238 et al. (filed Oct. 10, 2014).

<sup>153</sup> Collocation NPA § V.1

<sup>154</sup> See, e.g., Collocation NPA IV.A.1.

<sup>155</sup> If the Commission is unwilling to eliminate the boundary rule, it should at least shorten that boundary to 50 feet. See CCA Collocation Comments at 5.

<sup>156</sup> See *id.* at 6-7.

<sup>157</sup> See *id.* (“Interiors likely are subject to a host of other regulatory regimes (including building codes and other historic-property specific local ordinances) that would adequately address any preservation concerns. Small antenna deployments on interior surfaces are especially unlikely to disrupt the appearance of a historic area or to damage historic property. This is especially true where the small antenna is placed in the interior of a historic building in a portion of the building that has been updated and remodeled and is not visible from the exterior”).

Adopting these changes will assist deploying carriers provide improved and new connectivity without contravening the NHPA.

*iv. Scope of Undertaking and Action*

The Commission should find that small cells and DAS deployments are outside the scope of a “federal undertaking” under the NHPA.<sup>158</sup> This conclusion is in line with the underlying statutes and would support the Commission’s policy goals.

First, the Commission does not need to fund, approve, or separately license small cell and DAS deployments, therefore it is unclear that the respective definitions of “major federal action” and “federal undertaking” encompass these deployments. As the Commission explains, it long ago relieved siting applicants from the need to petition the Commission for a siting construction permit<sup>159</sup> and spectrum licensees or other siting applicants “now authorize transmissions over a particular band of spectrum within a wide geographic area without further limitation as to transmitter locations.”<sup>160</sup>

Next, small cells and DAS are materially different than their tower and macrocell predecessors, regarding both size and visual or actual impact. Accordingly, the Commission should, in this rulemaking, determine that small cells and DAS do not have the potential to cause effects to Historic Properties, and exclude small cell and DAS deployments from Section 106 review upon.<sup>161</sup> Adopting a program alternative, which would be required for deployments

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<sup>158</sup> A federal “undertaking” under NHPA includes projects, activities, or programs that “requir[e] a Federal permit, license, or approval[.]” *See* 54 U.S.C. § 300320(3); *see also* 40 CFR § 1508.18(b).

<sup>159</sup> *See* Wireless NPRM ¶ 26.

<sup>160</sup> *Id.*

<sup>161</sup> *See* 36 CFR § 800.3(a)(1). Based on its authority under Section 800.3(a)(1), the Commission has established targeted unilateral exclusions from historic preservation review requirements for

where potential effects are foreseeable and likely to be minimal or not adverse,<sup>162</sup> is not necessary. Alternatively, the Commission should amend the NPAs to more broadly excuse small cells and DAS and certain supporting structures.

#### **IV. THE COMMISSION SHOULD STREAMLINE NEPA COMPLIANCE REQUIREMENTS AND PROCESSES.**

The Commission's NEPA compliance regime costs members millions of dollars each year in administrative costs, often without any finding of environmental harm. The Commission will enable broadband deployment by streamlining the NEPA administration process and adopting broader, clearer exclusions for siting projects unlikely to harm the environment, such as small cells.

##### **A. The Commission Should Establish Dispute Resolution and Environmental Assessment Processing Timelines.**

CCA maintains that the Commission should establish shot clocks governing the environmental review process and resolution of environmental disputes.<sup>163</sup> This would create a more deployment-friendly compliance regime and aid more efficient project planning and budgeting. CCA suggests that the Commission establish a 30-day time limit for reviewing environmental assessments. In addition or alternatively, the FCC should clarify that an applicant has met its responsibilities to Tribes if there is no response after a certain period, thereby mitigating the need to expend Commission and provider resources to "resolve" the dispute.

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certain small facility collocations on utility structures and on buildings and other non-tower structures, provided they meet certain specified criteria. *2014 Infrastructure Order*, 29 FCC Rcd at 12901-12, ¶¶ 76-103.

<sup>162</sup> 36 CFR § 800.14(c).

<sup>163</sup> See CCA Streamlining Reply Comments at 19.

## **B. Small Cells and Certain Ancillary Equipment Should be More Broadly Outside the Scope of Environmental Review.**

### *i. Pole Replacements*

Providing regulatory relief for pole attachments under NEPA also is important to expedite broadband deployment, either as part of a broader categorical exclusion for small cells and DAS facilities or as a standalone matter.<sup>164</sup>

### *ii. Rights-of-Way*

The *2014 Infrastructure Report and Order* also adopted a categorical exclusion for certain wireless facilities deployed in above-ground utility and communications rights-of-way. This includes new or replacement poles, but only if the facility is in an existing designated *communications* ROW in active use, and the facility will not constitute a substantial increase in size over existing support structures in the ROW. The Commission should expand this exemption to all ROWs.

### *iii. Small Cell Exclusion*

The Commission should clarify that deployments of small wireless facilities such as DAS and small cells are categorically excluded from NEPA review.<sup>165</sup> The implementing regulations of NEPA direct agencies to categorize actions for NEPA review.<sup>166</sup> The Commission has already excluded certain wireless deployments from NEPA review, and can make a similar finding for small cells and DAS deployments. Under Section 1.1306 of the Commission's rules, "wireless facility deployments, including deployments of new wireless towers, are categorically

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<sup>164</sup> See Wireless NPRM ¶ 65.

<sup>165</sup> 40 C.F.R. § 1508.4.

<sup>166</sup> 40 C.F.R. § 1507.3.

excluded from review if they fall outside of [certain] environmentally sensitive categories.”<sup>167</sup>

Mounting antennas on *existing buildings or towers* is categorically excluded under NEPA unless the project “may affect historic properties protected by Section 106” or “if the proposed installation would result in human exposure to radiofrequency “RF” emissions in excess of health and safety guidelines.”<sup>168</sup> Due to the unobtrusive nature of small cells and DAS deployments, the Commission should extend this categorical exclusion to these smaller wireless facilities.

## **V. TWILIGHT TOWERS**

CCA is pleased the Commission is poised to address the lingering Twilight Towers regulatory gap. Competitive carriers will need a streamlined, reasonable historic review process to collocate on Twilight Towers, and CCA urges the Commission to adopt its proposal and to avoid a tower-by-tower approach.

### **A. The Commission Should Avoid Reviewing Twilight Towers on a Case-By-Case Basis.**

CCA generally supports the Commission’s proposed method for bringing Twilight Towers into full compliance. Competitive carriers appreciate that the Commission proposes solutions for shepherding into compliance Twilight Towers<sup>169</sup> through the Section 106 review, to spur collocation opportunities.

CCA generally supports the Commission’s proposed approach, which would exclude collocations on Twilight Towers from historic review, subject to the same exceptions that

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<sup>167</sup> 2014 *Infrastructure Report and Order* ¶ 38.

<sup>168</sup> *Id.*

<sup>169</sup> See Wireless NPRM ¶ 79. Twilight Towers are towers built between the adoption of the Collocation NPA in 2001 and when that NPA became effective in 2005 that either did not complete Section 106 review, or are not relieved by documentation that Section 106 took place.

currently apply to collocations on towers built before March 16, 2001. Collocations on Twilight Towers would be exempt unless: “(1) the mounting of the antenna will result in a substantial increase in size of the tower; (2) the tower has been determined by the Commission to have an adverse effect on one or more historic properties; (3) the tower is the subject of a pending environmental review or related proceeding before the Commission involving compliance with Section 106 of the National Historic Preservation Act; or (4) the collocation licensee or the owner of the tower has received written or electronic notification that the Commission is in receipt of a complaint from a member of the public, a Tribal Nation, a SHPO or the ACHP that the collocation has an adverse effect on one or more historic properties.”<sup>170</sup> With respect to the last proposed exemption, the Commission should clarify that complaints in this context refer to complaints filed with the FCC, rather than complaints made at the local or Tribal level.

As part of any path forward, the Commission should clearly waive enforcement for the duration of the Twilight Tower review process, and providers should be able to utilize towers during review. The Commission should ensure any process has firm review timelines, and that substantial documentation must be provided for any adverse effect claim. Any dispute resolution program attached to review also should be structured around clear, hard timelines. These towers are not officially cleared under the NHPA often due to regulatory backlog, not industry neglect.

In addition to the exemptions, the FCC must avoid using a tower-by-tower approach. Case-by-case review will further delay deployment and is more likely to provide yet another opportunity for third parties to extract various fees from siting applicants. The Commission’s findings justify the “light touch” method detailed in the Wireless NPRM. Further, the record indicates some Tribes may be willing to compromise on this point, provided subsequent

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<sup>170</sup> Collocation NPA, § III.



collocations do not cause ground disturbance.<sup>171</sup> The FCC notes that Twilight Towers have been standing for 12 years or more and, in the “vast majority of cases, no adverse effects” have been brought to the Commission’s attention,<sup>172</sup> and that “the vast majority of [both Twilight and non-Twilight] towers that have been reviewed under the NPA have had no adverse effects on historic properties.”<sup>173</sup>

**VI. SECTION 214(a) NETWORK DISCONTINUANCE AND NETWORK CHANGE RULES CREATE TRANSPARENCY AND SHOULD NOT BE ENTIRELY UNDONE.**

**A. Expediting the Copper Retirement and Network Change Notification Process Need Not Entail Reducing Transparency.**

In the past, CCA has expressed concern that ILECs would use the TDM-to-IP transition to undermine competition.<sup>174</sup> The *2015 Technology Transitions Order*<sup>175</sup> assuaged many of those concerns, and the Commission should not disturb the current level of transparency surrounding the copper retirement and network change notification process.<sup>176</sup>

ILECs subject to Section 251(c)(5) and Part 51 of the Commission’s rules must provide public notice of network changes, including copper retirement, that would affect a competing

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<sup>171</sup> See Miami Tribe

<sup>172</sup> See Wireless NPRM ¶ 82.

<sup>173</sup> *Id.*

<sup>174</sup> In comments to the NPRM preceding the 2015 Technology Transitions Order, CCA argued that the Commission require ILECs to provide adequate notice before retiring copper facilities or discontinuing TDM-based services. See Comments of Competitive Carriers Association, GN Docket No. 13-5, et al., 1 (filed Feb. 5, 2015) (“CCA Tech Transition Comments”).

<sup>175</sup> See *Technology Transitions*, et al., Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, GN Docket No. 13-5, FCC 15-97 (WCB 2015) (“*2015 Technology Transitions Order*”).

<sup>176</sup> See Reply Comments of Competitive Carriers Association, PS Docket No. 16-128 et al., at 8 (filed Jan. 3, 2017) (“CCA 2016 Biennial Review Comments”).

carrier's performance or ability to provide service.<sup>177</sup> The Commission is effectively revisiting the *2015 Technology Transitions Order* by seeking comment "on eliminating some or all of the changes to the copper retirement process adopted by the Commission."<sup>178</sup> The 2015 rules require ILECs to wait 180 days, following release of a Public Notice.<sup>179</sup> Additionally, ILECs must directly notify retail customers, states, Tribal entities, and the Secretary of Defense.<sup>180</sup> ILECs should be obliged on a continual basis to provide "reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks."<sup>181</sup>

The Commission also should continue to require ILECs to provide a minimum 180 days' advance notice of any planned copper retirements consistent with their obligations under Section 251(c)(5) and Part 51 of the Commission's rules; as CCA has noted, in some cases even 180

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<sup>177</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*), corrected by *Triennial Review Order Errata*, 18 FCC Rcd 19020, *aff'd in part, remanded in part, vacated in part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564-93 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, 543 U.S. 925 (2004), *on remand*, *Unbundled Access to Network Elements et al.*, Order on Remand, 20 FCC Rcd 2533, 2541, para. 12 (2004) (*Triennial Review Remand Order*) *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); see also *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 et al.*, CC Docket No. 96-98 et al., Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19471, para. 168 (1996) (*Second Local Competition Order*).

<sup>178</sup> See Wireline NPRM ¶ 57.

<sup>179</sup> *2015 Technology Transitions Order* ¶¶ 24-25, 28-29, 39-40, & 70-71.

<sup>180</sup> *Id.*

<sup>181</sup> 47 U.S.C. § 251(c)(5).

days is not sufficient lead time to make the upgrades or reconfigurations necessary to transition to IP-based service or make alternative arrangements.<sup>182</sup>

**B. Streamlining the Section 214(a) Discontinuance Process Should Not Come at the Expense of Transparency.**

Section 214(a) requires carriers to obtain authorization from the Commission before discontinuing, reducing, or impairing<sup>183</sup> service to a community or part of a community.<sup>184</sup> CCA urges the Commission to exercise caution when abbreviating timeframes after which a carrier may be allowed to discontinue service after filing a discontinuance application. A competitive carrier receiving discontinuance notice from an ILEC between 30-60 days prior to discontinuance “would be inadequate in many cases for a competitive LEC to make appropriate network changes or alternative service arrangements, and thus could result in lapses of service (or degraded service) to the carrier’s customers.”<sup>185</sup>

**VII. CONCLUSION**

CCA members and their corresponding siting applicants are at the front line of next-generation-broadband, absorbing the multiplex costs of purchasing equipment, designing networks, and navigating federal, state, and local compliance regimes. In practice, siting applicants actually break down technological barriers, and flip on the power for the incredible,

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<sup>182</sup> CCA Tech Transition Comments at 11.

<sup>183</sup> For convenience, in certain circumstances this item uses “discontinue” (or “discontinued” or “discontinuance,” etc.) as shorthand that encompasses the statutory terms “discontinue, reduce, or impair” unless the context indicates otherwise.

<sup>184</sup> 47 U.S.C. § 214(a).

<sup>185</sup> CCA Tech Transitions Comments at 13.

innovative technology supporting the entire Internet ecosystem.<sup>186</sup> The Commission is right to support these efforts, and eliminate both avoidable fees and delay barriers. CCA appreciates the Commission's robust, thoughtful proposals in support of CCA members' goals. CCA and its members remain committed to working with the Commission and all interested stakeholders to create strong national standards for broadband deployment.

Respectfully submitted,

/s/ Rebecca Murphy Thompson  
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Rebecca Murphy Thompson  
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June 15, 2017

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<sup>186</sup> See, e.g., Comments of ACT the App Association, WT Docket No. 17-79 et al., at 2 (filed April 28, 2017) (urging the Commission to “reduce barriers for deploying new infrastructure” to achieve the massive economic and employment benefits 5G networks will provide).

## ATTACHMENT A

**Tribal Consultation Process****TCNS # 139556****Site: Philadelphia. Site type: 255' SST****Initial TCNS Tribal Contact: June 3, 2016**




<b>Indian Tribe or Nation</b>	<b>Submission Requirements</b>	<b>Second Tribal Contact Date</b>	<b>Response Received from Tribe or Additional Info Requested and Sent</b>	<b>Fee Paid to Tribe</b>	<b>Referred to FCC</b>	<b>Tribal Clearance</b>
	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	8/10/2016	8/15/2016	\$400.00	NA	Cleared
	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	8/10/2016	9/13/2016	\$400.00	NA	Cleared
	Cover ltr, SHPO ltr, Archeology Report, photos and topo and consultation fee.	8/10/2016	8/18/2016	\$1000.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	8/10/2016	8/17/2016	\$200.00	NA	Cleared
	Cover ltr, Form 620, photos, topo and consultation fee.	8/10/2016	30 days no response	\$500.00	NA	Cleared
	Cover ltr, Archeology Report, SHPO ltr, photos, topo and consultation fee.	8/10/2016	10/4/2016	\$300.00	NA	Archaeologist required on site.

[REDACTED]	No submission required.	6/3/2016	30 days no response	NA	NA	Cleared
[REDACTED]	No submission required.	6/3/2016	30 days no response	NA	NA	Cleared
[REDACTED]	Cover ltr, Form 620, photos, topo and consultation fee.	8/10/2016	9/14/2016	\$500.00	NA	Cleared
[REDACTED]	Cover ltr, Form 620, SHPO ltr, photos, topo and consultation fee.	8/10/2016	8/31/2016	\$500.00	NA	Cleared
[REDACTED]	Cover ltr, Archeology Report, photos, topo and consultation fee.	8/10/2016	8/16/2016	\$1000.00	NA	Cleared
[REDACTED]	Cover ltr, Form 620, SHPO ltr, photos, topo and consultation fee.	8/10/2016	8/22/2016	\$500.00	NA	Cleared
[REDACTED]	Cover ltr, Archeology Report, photos, topo and consultation fee.	8/10/2016	9/8/2016	\$350.00	NA	Cleared
[REDACTED]	Cover ltr, CD, Archeology Report, photos, topo and consultation fee.	8/10/2016	8/31/2016	\$400.00	NA	Cleared
[REDACTED]	No submission required.	6/3/2016	6/3/2016	NA	NA	Cleared
[REDACTED]	Cover ltr, Archeology Report, photos, topo and consultation fee.	8/10/2016	8/26/2016	\$500.00	NA	Cleared
[REDACTED]	Cover ltr, Archeology Report, photos, topo and consultation fee.	8/10/2016	8/26/2016	\$1000.00	NA	Cleared
[REDACTED]	Cover ltr, Form 620, SHPO ltr, photos, topo and consultation fee.	8/10/2016	8/19/2016	\$500.00	NA	Cleared
[REDACTED]	Cover ltr, CD, Archeology Report, photos, topo and consultation fee.	8/10/2016	9/7/2016	\$500.00	NA	Cleared









	Cover ltr, CD, Archeology Report, photos, topo and consultation fee.	8/10/2016	9/19/2016	\$1000.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	8/10/2016	9/8/2016	\$550.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	8/10/2016	9/26/2016	\$400.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	8/10/2016	9/27/2016	\$600.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	8/10/2016	8/31/2016	\$400.00	NA	Cleared
<b>Fees Total:</b>				\$11,500.00		










## ATTACHMENT B

**Tribal Consultation Process****TCNS # 154882****Site: Granville. Site type: 255' SST****Initial TCNS Tribal Contact: April 07, 2017**

Indian Tribe or Nation	Submission Requirements	Second Tribal Contact Date	Response Received from Tribe or Additional Info Requested and Sent	Fee Paid to Tribe	Referred to FCC	Tribal Clearance
	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	05/08/2017	05/11/2017	\$400.00	NA	Cleared
	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	05/08/2017	05/16/2017	\$1500.00	NA	Cleared
	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	05/08/2017	06/07/2017	\$400.00	NA	Cleared







	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	05/08/2017	05/18/2017	\$1,000.00	NA	Cleared
	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	05/08/2017	06/15/2017	\$750.00	NA	Cleared
	Cover ltr, SHPO response, Form 620, photos, topo and consultation fee.	05/08/2017	05/17/2017	\$500.00	NA	Cleared
	Cover ltr, SHPO response, photos, topos and consultation fee.	05/08/2017	06/05/2017	\$500.00	NA	Cleared
	Cover ltr, Archeology Report, SHPO ltr, photos, topo and consultation fee.	05/08/2017	Referred to FCC 06/12/2017	\$300.00	FCC Final Contact 06/15/2017	Wait Period Expiration 07/05/2017
	No submission required.	05/08/2017	30 Days No Interest	NA	NA	30 days no interest clearance
	Cover ltr, Form 620, photos, topo and consultation fee.	05/08/2017	06/02/2017	\$500.00	NA	Cleared
	Cover ltr, SHPO response, Form 620, photos, topo and consultation fee.	05/08/2017	05/19/2017	\$750.00	NA	Cleared












	Cover ltr, Form 620, photos, topo and consultation fee.	05/08/2017	06/07/2017	\$750.00	NA	Cleared
	Cover ltr, Form 620, SHPO ltr, photos, topo and consultation fee.	05/08/2017	06/01/2017	\$500.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	05/08/2017	06/15/2017	\$900.00	NA	Cleared
	Cover ltr, Form 620, SHPO ltr, photos, topo and consultation fee.	05/08/2017	06/06/2017	\$550.00	NA	Cleared
	Cover ltr, Form 620, SHPO ltr, photos, topo and consultation fee.	05/08/2017	06/08/2017	\$500.00	NA	Cleared
	Cover ltr, CD, Archeology Report, photos, topo and consultation fee.	05/08/2017	06/07/2017	\$750.00	NA	Cleared
	No submission required.	04/07/2017	06/08/2017	\$0.00	NA	Cleared
	Cover ltr, steet maps, topo and consultation fee.	05/08/2017	30 Days No Interest	\$650.00	NA	Cleared
	Cover ltr, Form 620, SHPO ltr, photos, topo and consultation fee.	05/08/2017	05/19/2017	\$500.00	NA	Cleared



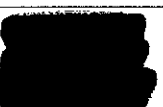

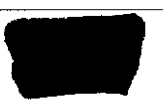





	Cover ltr, CD, Archeology Report, photos, topo and consultation fee.	05/08/2017	06/12/2017	\$500.00	NA	Cleared
	Cover ltr, CD, Archeology Report, photos, topo and consultation fee.	05/08/2017	05/22/2017	\$1000.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	05/08/2017	05/24/2017	\$550.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	05/08/2017	Referred to FCC 06/13/2017	\$600.00	FCC Final Contact 06/15/2017	Wait Period Expiration 07/05/2017
	Cover ltr, Archeology Report, photos, topo and consultation fee.	05/08/2017	06/07/2017	\$400.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	05/08/2017	05/22/2017	\$350.00	NA	Cleared
			<b>Fee Totals</b>	<b>15,100.00</b>		

## ATTACHMENT C

**Tribal Consultation Process****TCNS # 154018****Site: Duncan's Bridge. Site type: 255' SST****Initial TCNS Tribal Contact: March 24, 2017**

<b>Indian Tribe or Nation</b>	<b>Submission Requirements</b>	<b>Second Tribal Contact Date</b>	<b>Response Received from Tribe or Additional Info Requested and Sent</b>	<b>Fee Paid to Tribe</b>	<b>Referre d to FCC</b>	<b>Tribal Clearance</b>
	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	05/03/2017	05/08/2017	\$400.00	NA	Cleared
	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	05/03/2017	05/11/2017	\$1500.00	NA	Cleared
	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	05/03/2017	06/02/2017	\$400.00	NA	Cleared
	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	05/03/2017	05/12/2017	\$1,000.00	NA	Cleared

	Cover ltr, SHPO response, Archeology Report, photos, topo and consultation fee.	05/03/2017	06/06/2017	\$750.00	NA	Cleared
	Cover ltr, SHPO response, Form 620, photos, topo and consultation fee.	05/03/2017	05/17/2017	\$500.00	NA	Cleared
	Cover ltr, SHPO response, photos, topos and consultation fee.	05/03/2017	06/05/2017	\$500.00	NA	Cleared
	Cover ltr, Archeology Report, SHPO ltr, photos, topo and consultation fee.	05/03/2017	06/09/2017	\$300.00	NA	Cleared
	No submission required.	05/03/2017	30 Days No Interest	NA	NA	30 days no interest clearance
	No submission required.	05/03/2017	05/22/2017	\$500.00	NA	Cleared
	Cover ltr, SHPO response, Form 620, photos, topo and consultation fee.	05/03/2017	05/08/2017	\$750.00	NA	Cleared
	Cover ltr, Form 620, photos, topo and consultation fee.	05/03/2017	06/06/2017	\$750.00	NA	Cleared
	Cover ltr, Form 620, SHPO ltr, photos, topo and consultation fee.	05/03/2017	05/18/2017	\$500.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	05/03/2017	06/05/2017	\$900.00	NA	Cleared
	Cover ltr, Form 620, SHPO ltr, photos, topo and consultation fee.	05/03/2017	05/17/2017	\$550.00	NA	Cleared

	Cover ltr, Form 620, SHPO ltr, photos, topo and consultation fee.	05/03/2017	06/08/2017	\$500.00	NA	Cleared
	Cover ltr, CD, Archeology Report, photos, topo and consultation fee.	05/03/2017	05/31/2017	\$750.00	NA	Cleared
	No submission required.	05/03/2017	06/08/2017	\$0.00	NA	Cleared
	Cover ltr, Form 620, SHPO ltr, photos, topo and consultation fee.	05/03/2017	05/15/2017	\$500.00	NA	Cleared
	Cover ltr, CD, Archeology Report, photos, topo and consultation fee.	05/03/2017	06/05/2017	\$500.00	NA	Cleared
	Cover ltr, CD, Archeology Report, photos, topo and consultation fee.	05/03/2017	05/22/2017	\$1000.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	05/03/2017	05/22/2017	\$550.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	05/03/2017	Referred to FCC 06/12/2017	\$600.00	FCC Final Contact 04/15/2017	Wait Period Expiration 07/05/2017
	Cover ltr, Archeology Report, photos, topo and consultation fee.	05/03/2017	05/30/2017	\$400.00	NA	Cleared
	Cover ltr, Archeology Report, photos, topo and consultation fee.	05/03/2017	05/12/2017	\$350.00	NA	Cleared
			<b>Fees Total:</b>	14,450.00		