

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

In the Matter of)	
)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment)	WT Docket No. 17-79
)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment)	WC Docket No. 17-84
)	

COMMENTS OF CTIA

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I. INTRODUCTION AND SUMMARY.

CTIA¹ commends the Commission for instituting these landmark proceedings to determine the actions it should take to accelerate the deployment of broadband services nationwide.² The Commission correctly recognizes that reaping the enormous promise that broadband holds for all communities depends on massive investment in deploying advanced communications networks across the nation.³ That deployment is urgently needed to

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

² *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) (“*Wireless NPRM/NOI*”); *Accelerating Wireline Broadband Development by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (“*Wireline NPRM/NOI*”).

³ See *Wireless NPRM/NOI* ¶ 1 (citing *Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities*, ACCENTURE STRATEGY (Jan. 2017), <https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf> (“Accenture Report”)).

accommodate the exploding demand for broadband. The Commission rightly notes some impediments and asks whether there are other barriers to broadband deployment that the Commission should address and remove.

The Commission has unquestionable authority under numerous provisions of the Communications Act (the “Act”) to foster the critical national policy objective of promoting ubiquitous broadband services. It can and should take concerted actions to clear away barriers that impede and delay building and enhancing the networks that are essential to achieving that objective. While some local governments recognize the urgent need for greatly enhanced wireless networks and act efficiently to approve them, others impose multiple barriers including long delays, onerous requirements and restrictions, and high fees. Those barriers are real and widespread. By dismantling them, the Commission will drive faster and more robust investment in the infrastructure needed to provide advanced communications services nationwide. The Commission should also attempt to harmonize its rules across platforms and broadband technologies. Questions about the type of transmission facilities used (*e.g.*, fiber, distributed antenna system (“DAS”), small cell, or coaxial cable) are irrelevant to the overriding goal of encouraging all broadband deployment.

Consistent with the goals of promoting and streamlining wireless broadband deployment and removing obstacles to that deployment, the Commission should:

- **Speed deployment by reducing delays in approving facilities.** The Commission should: (1) expand the deemed granted remedy to include all facilities applications; (2) adopt a 60-day shot clock for all collocations and a 90-day shot clock for all new facilities; (3) clarify that the shot clocks apply to wireless facilities in rights of way (“ROWs”) and on municipal-owned poles and other property in ROWs; and (4) clarify that the shot clocks set time limits on the entire local review process.
- **Adopt effective enforcement mechanisms for the shot clocks.** The Commission has authority under each of the legal rationales it proposes in the *Wireless NPRM/NOI* to hold that, if the shot clock is violated, the siting application is “deemed granted.”

If the Commission can adopt a shot clock, it must have the authority to ensure its enforcement.

- **Interpret Sections 253 and 332 to achieve their objectives.** Congress enacted these provisions to meet a common objective: to promote network deployment. Divergent court decisions interpreting each of these provisions have, however, created uncertainty as to their scope and application that has impaired their effectiveness. The Commission should adopt a declaratory ruling to resolve this uncertainty and interpret the scope and standard to be applied to resolution of disputes under these statutory provisions. The core of that declaratory ruling should be that any state or local law or practice that poses a substantial barrier to timely deployment of broadband facilities, be it pole attachment, access to rights of way, or zoning requirements, violates Sections 253 and 332(c)(7) of the Act.
- **Declare that specific practices are unlawful under Sections 253 and 332.** The Commission also should take the further step to adopt specific “guideposts” that prohibit the following laws, regulations, or practices under Sections 253 and 332: (1) express and *de facto* moratoria; (2) undergrounding requirements; (3) denials of access to muni-owned facilities in ROWs; (4) requirements that providers demonstrate a need for service or a specific facility, type of facility, or technology; (5) minimum distance separations between sites; (6) requirements that discriminate among providers; (7) unbounded subjective aesthetic requirements; or (8) requirements that providers use municipal-owned facilities or supply free or discounted services to localities as a condition for obtaining a permit.
- **Require government fees to be cost-based.** The Commission should declare that Sections 253 and 332 prohibit state and local governments from imposing up-front or recurring siting charges that exceed their actual costs to manage the ROW or issue permits, or from discriminating against certain providers by charging them higher fees than other providers were charged for ROW access. It should apply that same statutory interpretation to localities’ fees for access to municipal-owned poles and other structures in ROWs.
- **Streamline NEPA and NHPA processes.** The Commission should broaden the exclusions for wireless facilities and collocations in its rules implementing the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”). It should (1) exclude DAS and small cells from NEPA review; (2) modify the rule that requires Environmental Assessments for all sites in floodplains; and (3) exclude five types of wireless facilities from NHPA Section 106 review (including the tribal consultation process).
- **Adopt additional measures to ensure timely access to poles at reasonable rates, terms, and conditions.** The Commission has statutory authority to regulate poles owned by municipalities and it should exercise this authority to harmonize regulations and ensure access to poles nationwide. It should also compress the

timelines for pole access under its current rules to conform to the 60-day timeline for other facilities.

II. WIRELESS BROADBAND HAS A SIGNIFICANT IMPACT ON OUR ECONOMY AND COMMUNITIES TODAY, AND 5G WILL UNLEASH FURTHER INNOVATION AND GROWTH.

Wireless broadband is transforming how we live, work, and communicate, and is unlocking opportunities for all Americans, including low-income individuals, people with disabilities, and those living in rural areas. It also contributes substantially to the U.S. economy. Today, more than 4.6 million Americans have jobs that depend directly or indirectly on the wireless industry,⁴ and employing one person in the wireless industry results in 6.5 more people finding employment.⁵ All told, the wireless industry generates more than \$400 billion in total U.S. spending.⁶

With the introduction of 5G networks and technologies, these benefits will continue to grow. A study by Accenture, released in January, estimates that wireless providers will invest \$275 billion dollars over the next decade to deploy 5G to consumers,⁷ which is expected to create three million new jobs in communities across the country and boost the U.S. GDP by half a trillion dollars.⁸ Furthermore, smart grid adoption could add \$1.8 trillion in revenue to the

⁴ Roger Entner, *The Wireless Industry: Revisiting Spectrum, the Essential Engine of US Economic Growth*, RECON ANALYTICS, at 18 (Apr. 2016), <http://www.ctia.org/docs/default-source/default-document-library/entner-revisiting-spectrum-final.pdf>.

⁵ Coleman Bazelon & Giulia McHenry, *Mobile Broadband Spectrum: A Vital Resource for the American Economy*, THE BRATTLE GROUP, at 2, 20 (May 11, 2015), http://www.ctia.org/docs/default-source/default-document-library/brattle_spectrum_051115.pdf.

⁶ *Id.* at 10.

⁷ Accenture Report at 1.

⁸ *Id.*

economy.⁹ Connected devices enabled by 5G technologies could result in \$305 billion in savings for the health sector, and self-driving cars could save almost 22,000 lives and \$447 billion each year.¹⁰

Building the network infrastructure needed to support the broadband services that can deliver these benefits to consumers and the economy cannot wait, because the public's demand for those services is not waiting. In fact, it is growing exponentially. Wireless providers are ready to make the massive additional investment required to upgrade broadband networks and deploy next-generation 5G services because they know those investments are vital for them to compete and to ensure their customers continue to receive high-quality, reliable service. The encouragement of investment in broadband facilities and the elimination of any barriers to that investment is at the center of the Commission's mandate in numerous provisions of the Act. The decisions the Commission makes in these proceedings will profoundly affect tens of millions of Americans, both those who have broadband access now and those who should be provided that access in the future.

The Commission has repeatedly found that broadband is already delivering important economic, social, and other benefits to the public, and 5G will expand and enhance those benefits. Chairman Pai, Commissioner Clyburn, and Commissioner O'Rielly have all recognized the urgent need to build densified broadband networks and the critical importance of removing regulatory barriers.¹¹ By modernizing the infrastructure deployment process, the

⁹ *Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation*, DELOITTE, at 3 (Jan. 2017), http://www.ctia.org/docs/default-source/default-document-library/deloitte_20170119.pdf.

¹⁰ *Id.*

¹¹ Statement of Chairman Ajit Pai, *Wireless NPRM/NOI* at 3385 ("A key feature of the transition from 4G to 5G is a change in network architecture. The future of wireless will evolve from large, macro-cell

Commission will foster broadband investment, promote its availability to all Americans, and advance the United States' leadership in 5G.

III. LOCALITIES ARE IMPOSING BARRIERS THAT THREATEN THE RAPID DEPLOYMENT OF BROADBAND AND 5G.

Many localities are partnering with the wireless industry to enable needed enhanced network infrastructure to be built. They have modified their wireless siting review procedures to accommodate the transition from cell towers to numerous, closely spaced small cells. However, despite the clear national interest in promoting wireless broadband and 5G, some localities are erecting multiple barriers to new and upgraded wireless deployment. These barriers frustrate and deter investment in wireless networks and can suppress new competition and the benefits it brings by deterring new entrants.

Laws, regulations, and practices that impede deployment warrant immediate Commission action because they threaten the deployment of broadband and, soon, 5G networks that are needed to provide advanced services. In its prior comments and reply comments in WT Docket No. 16-421,¹² which are attached hereto and incorporated by reference, CTIA submitted numerous examples of these barriers. Other parties submitted dozens more. The record demonstrates that these barriers have been erected in jurisdictions across the country, and take many forms. Some directly block new service through moratoria, outright prohibitions on

towers to include thousands of densely-deployed small cells, operating at lower power.”); Statement of Commissioner Mignon Clyburn, *Wireline NPRM/NOI* at 3328 (“The time is ripe for opening up pole attachment reform, for taking a look at how we can work with local governments to remove barriers to deployment, and for generally evaluating how we can further streamline processes for rolling out new services.”); Statement of Commissioner Michael O’Rielly, *Wireless NPRM/NOI* at 3388 (“The Commission can continue to release spectrum into the marketplace, but wireless services only become a reality if the infrastructure is in place to deliver them to the American consumer.”).

¹² *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360 (2016); Comments of CTIA, WT Docket No. 16-421 (filed Mar. 8, 2017) (“CTIA PN Comments”); Reply Comments of CTIA, WT Docket No. 16-421 (filed Apr. 7, 2017) (“CTIA PN Reply Comments”).

facilities, failures to act on permit applications, and interminable delays that can extend more than a year. Other barriers take the form of onerous conditions and restrictions that make deployment far more difficult and costly, such as detailed site design requirements, location restrictions, minimum site separation rules, and burdensome showings of the need for each facility, type of facility, or technology. Many jurisdictions impose exceedingly high charges in the form of upfront application fees, annual rental fees, or both, that make deployment cost-prohibitive. And frequently, these barriers and requirements were not imposed on other ROW users, thus discriminating against wireless providers and new entrants. Since CTIA filed its previous comments, its members have seen no lessening of these barriers.

IV. THE COMMISSION SHOULD TAKE MULTIPLE ACTIONS TO STRENGTHEN ITS SHOT CLOCKS TO PREVENT DELAYS.

As a first step toward updating its infrastructure siting processes, the Commission should (1) adopt a “deemed granted” remedy for applications that are not processed within the time periods set by the siting review “shot clocks,”¹³ and (2) modify and strengthen its current shot clocks to make them more effective in preventing unreasonable siting delays, as proposed in the *Wireless NPRM/NOI*.¹⁴

Adoption of the Section 332(c)(7) shot clocks in 2009 helped expedite wireless deployment,¹⁵ but the shot clocks do not reflect the evolution of the industry toward small cells, which warrants modifying the timelines that are now more than seven years old. Moreover, the wireless industry’s experience with the shot clocks has demonstrated that they often fail to

¹³ *Wireless NPRM/NOI* ¶ 9

¹⁴ *Id.* ¶ 18.

¹⁵ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009), *aff’d sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013) (“Shot Clock Declaratory Ruling”).

achieve their objective of streamlining siting, and should be modified to make them more effective.¹⁶

Given the continuing delays that afflict the siting process and impair broadband deployment, the Commission should take several actions in addition to those it identifies. It should also (1) clarify that the shot clocks apply to wireless facilities in ROWs and to the use of municipal facilities in ROWs; (2) clarify that the shot clocks are reasonable time periods for the entire local review process; and (3) adopt a procedure to allow providers to apply for multiple facilities that are similar in nature through a single application and confirm that the same shot clocks apply to reviewing such “batch” applications. These actions will streamline siting reviews and are fully within the Commission’s legal authority.

A. The Commission Should Adopt a “Deemed Granted” Remedy When Localities Fail to Act on Siting Applications Within Reasonable Times.

The Commission should interpret Section 332(c)(7) of the Act as including a deemed granted remedy, similar to that provided in Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012.

Section 332(c)(7) requires that localities act on applications for personal wireless service facilities “within a reasonable period of time.”¹⁷ For a subset of facilities, Section 6409(a) provides that a state or local government “may not deny, and shall approve” any request for collocation, removal, or replacement of equipment on an existing wireless tower or base station that does not substantially change the dimensions of the tower or base station. The Commission has adopted rules requiring that governments “shall approve” siting applications covered by

¹⁶ CTIA PN Comments at 17-18.

¹⁷ 47 U.S.C. § 332(c)(7)(B)(ii).

Section 6409(a) within 60 days; if a locality fails to act within that timeframe, the application is deemed granted.¹⁸ The Commission also has adopted shot clocks containing different time periods to implement Section 332(c)(7), but, in contrast to the remedy under Section 6409(a), the Section 332(c)(7) shot clocks require only that applications be acted on within the established presumptively reasonable time frames and provide that the applicant may go to court if the locality fails to act. The Commission should remove this disparity and apply the deemed granted remedy to all failures to act within the applicable shot clock periods.

The record in WT Docket No. 16-421 shows that some localities run the time out and fail to act, which forces wireless providers to expend time and money on litigation to challenge that failure to act.¹⁹ Some courts have issued injunctive relief after localities fail to act within the shot clock, but others have required applicants to go back to the locality and wait yet again for it to act, vitiating the shot clocks' effectiveness.²⁰ Even if litigation is successful in securing a grant, the delays and costs it imposes deter deployment. Particularly for small cells, the expense of litigation can rarely be justified. Chairman Pai aptly described this problem and the solution: "If a city doesn't process the application in that timeframe, the company's only remedy is to file a lawsuit. We should give our shot clock some teeth by adopting a 'deemed grant' remedy, so that a city's inaction lets the company proceed."²¹ By applying its deemed granted remedy to all

¹⁸ 47 C.F.R. § 1.40001(c)(2).

¹⁹ *See, e.g.*, CTIA PN Comments at 18.

²⁰ *See, e.g.*, CTIA PN Comments at 44 (citing *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063 at *28-*30 (S.D.N.Y. 2004)); CTIA Reply Comments at 23; Comments of the Wireless Infrastructure Association, WT Docket No. 16-421, at 61-62 (filed Mar. 8, 2017) ("WIA PN Comments"); Comments of ExteNet Systems, Inc., WT Docket No. 16-421, at 19 (filed Mar. 8, 2017) ("ExteNet PN Comments").

²¹ Remarks of FCC Commissioner Ajit Pai at the Competitive Carriers Association 2016 Annual Convention, at 2 (Sept. 21, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341365A1.pdf.

siting reviews, the Commission will make the shot clocks far more effective in achieving its goal to streamline siting.

The Commission correctly notes that it has ample legal authority to adopt a deemed granted rule when jurisdictions fail to make siting decisions subject to Section 332(c)(7).²² It identifies three bases for such authority; each independently supports adopting a deemed granted remedy. First, the Commission has broad authority to adopt a rule implementing Section 332(c)(7), including one that may have the effect of superseding local or state law, which was squarely confirmed in *City of Arlington*.²³ It also can adopt an order converting the current rebuttable presumption that the shot clocks set reasonable time periods for jurisdictions to act to an irrebuttable presumption, which, by the express language of the statute, would result in the application being deemed granted if a decision is not made within those periods.²⁴ Finally, it can rule that when a locality fails to meet its obligations reserved for it under Section 332(c)(7) to act on an application within a reasonable time as specified by the shot clocks, the locality's authority over such decisions is waived and the application will thus be deemed granted.²⁵

Section 332(c)(7) supports each of these interpretations because, while it provides a judicial remedy for state or local inaction, it does not make that remedy exclusive—it states that a provider “may” initiate litigation, not that it “must” do so. And, as CTIA explained, the Commission has adopted a “deemed granted” remedy under Section 621(a)(1) of the Act, which prohibits localities from unreasonably refusing to act on cable franchises.²⁶ That section, like

²² See generally *Wireless NPRM/NOI* ¶¶ 8-16.

²³ *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

²⁴ *Wireless NPRM/NOI* ¶ 10.

²⁵ *Id.* ¶ 14.

²⁶ CTIA PN Comments at 42-43.

Section 332(c)(7)(B), provides that a franchise applicant “may” appeal that refusal to court. The Commission ruled that the locality will be deemed to have granted the franchise on an interim basis until it issues a final decision. The Commission’s rationale is directly applicable to the siting delays wireless providers face: “[W]e seek to provide a meaningful incentive for local franchising authorities to abide by the deadline contained in the Order while at the same time maintaining [local] authority to manage rights of way.”²⁷ The Commission should also rule that the Enforcement Bureau has delegated authority to issue an order confirming that the application has been deemed granted, or alternatively the applicant can seek an order in federal district court compelling the municipality, as a matter of federal law, to grant the application forthwith.

B. The Commission Should Shorten and Align the Shot Clocks Between Section 332(c)(7) and Section 6409(a).

The Commission should also exercise its authority to determine what is a reasonable period of time for localities to act under Section 332(c)(7). It should adjust the existing shot clocks to reflect localities’ increased experience in reviewing all facility applications, and also the reality that wireless deployment is increasingly relying on small cells, which localities can and should review and approve far more quickly. Specifically, the existing 150-day review period for new wireless sites should be shortened to **90 days**, and the existing 90-day review period for collocations should be shortened to **60 days**.

Shorter 90-day and 60-day shot clocks establish reasonable time periods.²⁸ Some states have adopted similar or even shorter periods to remove infrastructure siting barriers and facilitate

²⁷ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5138 ¶ 76 (2007).

²⁸ CTIA PN Reply Comments at 20-21.

deployment, demonstrating the reasonableness of those periods.²⁹ For example, Michigan and Virginia require non-collocation applications to be reviewed within 90 days, Kentucky and Minnesota set 60-day deadlines to process non-collocation or new tower applications, Florida requires completed collocation applications to be processed in 45 business days, and New Hampshire and Wisconsin require processing in only 45 calendar days.³⁰ Furthermore, although larger macro cells and towers are still being constructed, the shift toward small cell deployments has simplified local reviews, freeing up resources so that localities can reduce processing times on all facilities.

The Commission's authority to adopt shot clocks specifying reasonable time periods for localities to act under 332(c)(7) has been upheld by the Fifth Circuit and the Supreme Court.³¹ It has the same authority to shorten or otherwise modify those time periods based on a finding that different times are reasonable and that siting reviews that take longer constitute "unreasonable delay"³² and an effective prohibition of deployment under both Sections 253 and 332(c)(7).

Setting a consistent shot clock for all collocations will also eliminate the current disparity between procedures that apply to different types of "non-substantial" modifications to sites. Currently, modifications to a facility that holds wireless equipment qualify for the streamlined Section 6409(a) process, while modifications to a facility that does not are processed under the

²⁹ See, e.g., Comments of Louisville/Jefferson County, Kentucky Metro Government, WT Docket No. 16-421, at 6 (filed Mar. 8, 2017).

³⁰ See CTIA PN Comments at 37-38 (citing MICH. COMP. LAWS SERV. § 125.3514(8); VA CODE ANN. § 15.2-2232(F); MINN. STAT. § 15.99, Subd. 2(a); KY Rev. Stat. § 100.987(4)(c); FLA. STAT. ANN. § 365.172(13)(d)(1)-(2); N.H. REV. STAT. ANN. § 12-K:10; *id.* § 12-K:2; WIS. STAT. §§ 66.0404(3)(c); 66.0404(1)(e); 66.0404(1)(t)).

³¹ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009), *aff'd sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

³² *Id.*

Section 332(c)(7) shot clocks, even if it the two facilities and the modifications to them are virtually identical. A single period will provide a bright-line standard that will avoid the uncertainty and disputes that result from determining whether a non-substantial modification qualifies under the Section 6409(a) review deadline (60 days) or the current Section 332(c)(7) shot clock period (90 days).

C. The Commission Should Clarify that Its Shot Clocks Apply to Municipal Poles and Rights of Way.

Access to ROWs and municipal poles located within ROWs is essential to achieving high-quality, reliable broadband that will meet the public’s growing demand for 4G and, soon, 5G services. However, many localities are failing to act on applications for permits to install facilities on these poles and in ROWs. A Commission ruling declaring that the shot clocks govern these applications will significantly expedite wireless deployment. That ruling is soundly grounded in Section 332(c)(7)’s language, which proscribes state and local “regulation” that can impede the timely siting of facilities. As CTIA and other commenters demonstrated in WT Docket No. 16-421, ROWs are public property, which are regulated through state and local laws, ordinances, and rules in order to facilitate the provision of transportation and other public services.³³ Several courts have indicated that a locality’s decisions on access to ROWs implicate its regulatory functions.³⁴ Moreover, local practices governing access to ROWs and municipal facilities in ROWs constitute “regulations” and “decisions” subject to these provisions. The limits that Section 332(c)(7) (as well as other relevant provisions of the Act including Sections

³³ See, e.g., CTIA PN Comments at 43-46; Comments of T-Mobile USA, Inc., WT Docket No. 16-421, at 30-33 (filed Mar. 8, 2017) (“T-Mobile PN Comments”).

³⁴ See, e.g., *NextG Networks of New York, Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063 (S.D.N.Y. 2004); *Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 U.S. Dist. LEXIS 93699 (S.D.N.Y. 2013); *Sprint Spectrum L.P. v. Town of Durham*, 1998 U.S. Dist. LEXIS 23941 (D.N.H. 1998).

253 and 6409(a)) places on local siting regulations and decisions thus apply to municipal-owned poles.

Some localities, however, asserted in WT Docket No. 16-421 that Section 332(c)(7) does not apply to municipal poles and ROWs because local decisions on access to these locations are “proprietary.” While they do not base this claim on any language in the Act, and no language supports their view, they point to several court decisions that find local siting decisions to be outside the scope of Section 332(c)(7).³⁵ However, those cases involved denials of permits to deploy facilities on city-owned buildings or parkland where the city was acting as a private landowner, not access to public ROWs. The original decision to allow the purchase and erection of the poles and to lease space on them was an exercise of regulatory authority. Any monies collected for lease of the poles goes into the municipal treasury. That the municipality owns the pole is irrelevant to the provisions of the Act that allow the Commission to target and eliminate barriers to deployment. And municipalities have the same monopoly power over price and conditions as private pole owners do.

That the municipalities rely upon cases involving municipal buildings is itself cause for concern. They underscore why a Commission ruling is essential: If a locality can deny indefinitely a decision on a permit seeking access to ROW or facilities therein, it can effectively “wall off” virtually all of its streets, and deployment will be severely delayed, if not blocked

³⁵ See, e.g., Comments of the Florida Coalition of Local Governments, WT Docket No. 16-421, at 10 (filed Mar. 8, 2017) (citing, for example, *Omnipoint Communications v. City of Huntington Beach*, 738 F.3d 192 (9th Cir. 2013)).

altogether.³⁶ The Commission should thus rule that the shot clocks govern applications to locate wireless facilities in ROWs and on municipal facilities along those ROWs.

D. The Commission Should Clarify that the Shot Clocks Apply to the Entire Local Review Process.

The Commission correctly notes that there have been disputes as to when the shot clocks begin to run.³⁷ Some localities impose multiple, sequential stages of review by, for example, requiring providers to enter into a license or franchise agreement to have ROW access, but then requiring the separate submission and approval of individual site applications. They assert that the shot clocks do not apply to the agreement negotiation process, but begin to run only after the provider files individual site applications.³⁸ The localities' position effectively nullifies the shot clocks because there is no time limit that applies to the upfront agreement process.

The Commission should declare that the shot clocks apply to the entire local review process. If a locality requires multiple steps, the shot clocks should apply to all steps together. This action is necessary to ensure that the shot clocks effectively achieve the Commission's goal of streamlining the siting process. Further, this ruling is appropriate under Section 332(c)(7)(B), because that provision broadly requires that a locality "shall act on any request for authorization to place, construct or modify personal wireless services facilities within a reasonable period of time."³⁹ If a locality requires a provider to request and enter into an agreement for authorization, that request should trigger the shot clock. Any other reading would enable localities to bypass the shot clock simply by imposing pre-application requirements.

³⁶ For this reason, a locality's denial of access to muni-owned poles and ROWs also violates Section 253(a), because that denial "effectively prohibits" the deployment of service. *See infra* Section V.B.

³⁷ *Wireless NPRM/NOI* ¶ 20.

³⁸ *Id.*

³⁹ 47 U.S.C. § 332(c)(7)(B).

E. The Commission Should Allow Providers to Submit Applications for A Group of Similar Facilities.

The Commission asks whether it should adopt different shot clocks for localities to review and act on (1) different types of wireless facilities based on the height or other characteristics of the proposed facilities, or (2) applications for multiple facilities (what it refers to as “batch” processing).⁴⁰ The Commission should not adopt additional shot clocks for facilities that differ in terms of height. Doing so would require it to draw additional, potentially arbitrary distinctions, which would add unnecessary complexity to the existing shot clocks without helping to streamline approvals. For example, what heights would trigger longer (or shorter) shot clocks? How many different time periods would be warranted? What would each be based on?

The Commission should, however, establish a process to allow providers to submit applications for similar facilities in batches, because it will make the review process more efficient for both providers and reviewing government agencies. Small cell deployments are typically planned for multiple, closely-spaced, interdependent sites to ensure that coverage and service quality are optimized. Reviewing agencies would also benefit from batch processing because small cell deployments typically involve identical or very similar equipment in a discrete area that can be reviewed as a group (for example, the same antenna design may be installed on ten poles of similar height along a single street). Moreover, in the event the agency has issues with multiple or all facilities within a single application, those may be resolved for all sites together. For these reasons, batch processing will speed deployment.

⁴⁰ *Wireless NPRM/NOI* ¶ 18.

There is, however, no need for the Commission to establish different shot clocks for batch processing of similar facilities, because reviewing agencies' workloads are actually reduced by batch applications; reviewing, for example, ten sites within a single application is more efficient than reviewing ten individual applications. As numerous parties pointed out in WT Docket No. 16-421, attempting to set a variety of shot clocks would also require the Commission to draw fine distinctions, such as how many sites would trigger the different time periods and how many different time periods should be created, which would create unwarranted confusion and complexity without speeding deployment.⁴¹ For these reasons, the shot clocks applicable to batched applications should be the same as for individual applications.

In sum, the Commission should shorten the overall shot clock periods to 60 and 90 days, provide for voluntary batch application processing within those shot clock periods, and ensure those time periods effectively streamline siting deployment by adopting the deemed granted remedy for all siting reviews that are not completed within those time periods. And it should clarify that the shot clocks apply to ROW access, to municipal-owned ROW structures, and to the entire local agreement and permitting process.

⁴¹ CTIA PN Reply Comments at 22; *see also* Comments of Verizon, WT Docket No. 16-421, at 27 (filed Mar. 8, 2017) ("Verizon PN Comments"); Comments of Crown Castle International Corp., WT Docket No. 16-421, at 37-38 (filed Mar. 8, 2017) ("Crown Castle PN Comments"); Comments of Sprint Corporation, WT Docket No. 16-421, at 43-44 (filed Mar. 8, 2017) ("Sprint PN Comments").

V. THE COMMISSION SHOULD INVOKE ITS AUTHORITY TO INTERPRET SECTIONS 253 AND 332 TO REMOVE BARRIERS TO BROADBAND DEPLOYMENT.

A. A Declaratory Ruling Will Provide All Parties With Needed Guidance and Speed Needed New Facilities.

A principal objective of the Telecommunications Act is to promote the deployment of new and expanded telecommunications services.⁴² Section 253 implements that objective by prohibiting state or local laws or regulations that “may prohibit or have the effect of prohibiting” telecommunications services, which includes both wireless or wireline services;⁴³ Section 332 contains similar language to promote “personal wireless service facilities.”⁴⁴ At their core, Sections 253 and 332 share the same objective: to encourage deployment and remove barriers to providers’ ability to do so.

The Commission and courts have applied Sections 253 and 332 to adjudicate the validity of specific laws, regulations, or local agency decisions.⁴⁵ But the Commission has not to date interpreted these provisions to proactively address the many regulatory obstacles to wireless broadband deployment demonstrated in the record in WT Docket No. 16-421. And courts necessarily adjudicate only the specific controversy presented to them. Moreover, a number of judicial decisions reviewing denials of specific wireless facilities applications address whether the locality can require the applicant to demonstrate a coverage gap or other need, or to show that

⁴² See *Wireless NPRM/NOI* ¶ 5 (citing 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.’”)).

⁴³ 47 U.S.C. § 253(a).

⁴⁴ 47 U.S.C. § 332(c)(7)(B)(i).

⁴⁵ See, e.g., *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009), *aff’d sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

the site is the “least intrusive” location.⁴⁶ Given the coverage achieved by the wireless industry, it is inappropriate to require any such showing, and these requirements can block wireless providers from making the upgrades to their networks needed to offer advanced services.

The Commission should issue a declaratory ruling, as outlined below, that interprets Sections 253 and 332 consistent with their common language and purpose. This ruling will foster the deployment of broadband infrastructure. It will provide clarity and certainty to providers and localities, which will forestall disputes that delay deployment and consume all parties’ resources, and provide expert agency guidance to the courts.

B. The Commission Should Resolve Conflicting Caselaw and Confirm that Section 253(a) Prohibits Laws and Practices that Impose Substantial or Discriminatory Barriers That Thereby Limit Providers From Competing in a Fair and Balanced Regulatory Environment.

In its 1997 *California Payphones Order*, the Commission declared that a law “may prohibit or have the effect of prohibiting” service, and thus violates Section 253(a), if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁴⁷ Although some laws (*e.g.*, moratoria or undergrounding ordinances) block deployment outright, others impose regulations or fees that make it more economically difficult for new entrants to compete.⁴⁸ The *California Payphones*

⁴⁶ See, *e.g.*, *Wireless NPRM/NOI* ¶ 91 (citing *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999); *APT Pittsburgh Ltd. P’ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999); *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056-57 (9th Cir. 2014); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995-99 (9th Cir. 2009)).

⁴⁷ *California Payphone Association Petition for Preemption of Ordinance No. 576NS of the City of Huntington Park, California*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14195, 14206 (1997) (“*California Payphone Order*”).

⁴⁸ CTIA PN Reply Comments at 8-9.

Order prohibited those ordinances as equally inimical to the language and purpose of Section 253(a).⁴⁹

Some courts have adopted the Commission’s interpretation, but others have deviated from it, asserting a far narrower reading of Section 253(a) and deciding that the law or regulation must explicitly or actually prohibit service to be an unlawful barrier.⁵⁰ The split has sowed uncertainty over the respective rights of providers and localities, which only generates additional litigation and deployment delays.

The Commission should squarely address and resolve that uncertainty. It should confirm its longstanding interpretation of Section 253(a) in the *California Payphones Order* and reiterate that this provision makes unlawful any law or regulation that materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment. The Commission should confirm that this standard captures not only regulations that actually prohibit service, but also those that “effectively prohibit” service by imposing substantial barriers to deployment. As discussed in more detail below,⁵¹ such barriers include restrictions or requirements that discourage deployment by increasing costs or imposing other obligations, or by discriminating against a provider by subjecting it to restrictions, fees, or requirements that were not imposed on other providers. Such one-sided regulations are antithetical to a “fair and balanced legal and regulatory environment.” They injure consumers directly by deterring deployment of competing providers, thus denying consumers the price and service benefits that only competition can create.

⁴⁹ See *California Payphone Order*.

⁵⁰ See *Wireless NPRM/NOI* ¶ 91, n.176 (citing *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc); *Level 3 Commc’ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532–33 (8th Cir. 2007)).

⁵¹ See *infra* Section V.D.

C. The Commission Should Resolve Conflicting Caselaw and Rule that Section 332(c)(7) Bars Localities from Requiring a Showing of a Gap in Coverage or Other Business Need for a Particular Site or Technology.

The Commission should also rule that Section 332(c)(7) does not allow localities to require as a condition for approving a wireless facility that the applicant demonstrate the facility, or type of facility or technology, is necessary to fill a geographic “gap” in coverage or that it is the “least intrusive means” to provide coverage. Some courts have interpreted Section 332(c)(7) to allow localities to impose these requirements but have issued diverse and conflicting rulings on how they apply in practice.⁵² The range of judicial rulings evaluating whether a facility fills a coverage gap or is the least intrusive means to secure coverage has generated enormous uncertainty as to how these tests apply to particular situations. Worse, these types of requirements have drawn localities and courts into second-guessing providers’ decisions as to how best to serve their customers. Local governments and courts should not be making technical assessments of how a provider can best provide service. That is the task of the provider. The most obvious evidence of this is that many local governments only recognize a gap in coverage as warranting additional deployment. However, the concept of determining the need for coverage is anachronistic, because wireless providers are generally deploying small cells, DAS, and other small facilities to increase capacity to handle the massive growth in traffic generated by the public’s exploding use of smartphones and other devices, not to expand coverage. For this reason, interpreting Section 332(c)(7) to permit a locality to block a new wireless site unless the provider can demonstrate the site is needed to cover an area where there is no coverage

⁵² *Wireless NPRM/NOI* ¶ 91, n. 178 (citing *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999); *APT Pittsburgh Ltd. P’ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999); *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056-57 (9th Cir. 2014); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995-99 (9th Cir. 2009)).

would effectively deny needed service—an interpretation that is flatly at odds with the purpose of that provision. The Commission should put an end to local government and judicial evaluations of whether a wireless provider has adequately shown a site is needed. It should interpret Section 332 to prohibit those evaluations and declare that localities may neither consider the need for service in their siting decisions nor require providers to prove that need.

D. The Commission Should Build on the Above Interpretations to Prohibit Specific Actions or Practices That Impede Deployment or that Discriminate Against Wireless Providers.

The Commission recognizes that Sections 253 and 332 have been interpreted by the courts in a variety of ways, and asks whether it should supply additional guidance on how to apply these statutory mandates to specific types of laws, regulations, or other governmental restrictions.⁵³ Although it is important that the Commission announce interpretations of Sections 253 and 332 that will effectuate those provisions and resolve uncertainty resulting from disparate court decisions, it is equally important that it apply those interpretations now to address the legality of specific local siting practices.

Announcing “guideposts” as to practices that violate Sections 253 and/or 332 will provide needed certainty and clarity to the industry and localities, head off disputes, and provide practical guidance to courts that may be called on to adjudicate disputes over the application of these statutes. The Commission should declare that the following actions and requirements are unlawful:

Express and *de facto* moratoria. Some localities have imposed siting moratoria that block wireless deployment.⁵⁴ Although some claim they need time to develop regulations

⁵³ *Wireless NPRM/NOI* ¶¶ 88-91.

⁵⁴ CTIA PN Comments at 12 (providing five examples of express and *de facto* moratoria); CTIA PN Reply Comments at 14; Comments of Mobilitie, LLC, WT Docket No. 16-421, at 10-12 (filed Mar. 8,

governing small cell deployments, that justification does not warrant the indefinite, open-ended moratoria that CTIA’s members are encountering.⁵⁵ For example, the record in WT Docket No. 16-421 showed:

- Three localities in Florida enacted moratoria—two of the laws were enacted in 2014 and the other in September 2016.⁵⁶
- A locality in Iowa issued moratorium against small cells in August 2016.⁵⁷
- A locality in California passed a moratorium in August 2016.⁵⁸
- A locality in Minnesota passed a moratorium prohibiting wireless and small cell/DAS systems in August 2016.⁵⁹
- A locality in Washington passed a moratorium in September 2016 that is expected to remain in place until August 2017 or later.⁶⁰

The Commission previously held that moratoria do not toll the running of Section 332 shot clocks, but it did not ban all moratoria under Section 332.⁶¹ Moreover, the Commission did

2017) (“Mobilitie PN Comments”); Initial Comments of Lighttower Fiber Networks, WT Docket No. 16-421, at 10 (filed Mar. 8, 2017) (“Lighttower Fiber Networks PN Comments”); Comments of Mobile Future, WT Docket No. 16-421, at 3-4 (filed Mar. 8, 2017) (“Mobile Future PN Comments”); *see also* *Wireless NPRM/NOI* ¶ 22; *Wireline NPRM/NOI* ¶ 102.

⁵⁵ *E.g.*, Karsten Burgstahler, *Council confirms Cell Tower Moratorium*, JOURNAL GAZETTE & TIMES COURIER (Nov. 10, 2014) (describing a “newly passed” moratorium on “new cellphone towers” in Charlestown, Illinois that will last “for at least six months.”); Kimberly Jordan, *Commissioners Vote On Cell Tower Moratorium*, LEBANON DEMOCRAT (Dec. 7, 2015) (describing a “moratorium on new cell tower applications” in Lebanon, Tennessee for a period “up to 365 days”); BJ Bangs, *Eustis Cell Tower Public Hearing Heated, Moratorium Extended*, THE IRREGULAR (Oct. 31, 2012) (discussing a “moratorium on cell towers” within the city of Eustis, Maine that could be extended indefinitely “if needed”).

⁵⁶ Mobilitie PN Comments at 10-11.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Wireless NPRM/NOI* ¶ 22 (citing *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12971 ¶ 265 (2014)).

not there address the legality of moratoria under Section 253(a). It now asks whether it should “take any additional actions necessary, such as issuing an order or declaratory ruling providing more specific clarification of the moratorium ban or preempting specific State or local moratoria.”⁶² It should rule that any ordinance or regulation that expressly blocks processing of siting applications is unlawful under Sections 253(a) and 332(c)(7)(B)(i), both of which outlaw regulations that have the effect of prohibiting wireless service.

Although laws and regulations that expressly prohibit deployment clearly violate Section 253(a), *de facto* moratoria, where localities do not enact an ordinance but instead freeze or decline to act on applications for wireless facilities, have the same harmful impact.⁶³ CTIA’s members have experienced localities that refuse to process applications, or that tell applicants to wait until the locality develops siting policies, without making any commitment as to whether, if ever, they will do so. There is no reason why localities cannot act on applications for individual sites while they are also developing general siting policies. The Commission should thus also rule that *de facto* moratoria through failures to act are equally unlawful.

Undergrounding requirements. Some jurisdictions require facilities to be placed underground. Undergrounding ordinances are obviously not feasible for wireless networks, which require over-the-air transmission.⁶⁴ These ordinances operate as *de facto* prohibitions on wireless service and discriminate against wireless technologies, violating Sections 253(a) and

⁶² *Id.*

⁶³ CTIA PN Reply Comments at 8; Lighttower Fiber Networks PN Comments at 10; Mobile Future PN Comments at 3-4; Mobilitie PN Comments at 11-12.

⁶⁴ See *Wireless NPRM/NOI* ¶ 98 (“Obviously, it is impossible to operate wireless network facilities underground. Undergrounding of utility lines seems to place a premium on access to those facilities that remain above ground, such as municipally-owned street lights.”).

332(c)(7)(B)(i).⁶⁵ Undergrounding mandates are particularly arbitrary to the extent that cities have poles in their ROWs on which small cells can be installed without impeding the flow of traffic or pedestrians. Nothing in these provisions justifies cities in restricting deployment through undergrounding requirements. To the contrary, Congress intended to preserve localities' authority to impose "time, place and manner" regulation to "manage" deployment, not bar it entirely.⁶⁶ For example, the record in WT Docket No. 16-421 showed:

- A western city required equipment cabinets to be placed underground, with few exceptions.⁶⁷
- A city in California required all facilities to be underground and would not allow for the installation of new poles or small cells on existing poles.⁶⁸
- Two localities in Michigan required all facilities to be installed underground and would not allow Mobilitie to deploy any small cells.⁶⁹

Denial of access to municipal infrastructure in ROWs. The Commission asks whether it should address the practice undertaken by some localities prohibiting access to their own

⁶⁵ CTIA PN Comments at 26-27; CTIA Reply Comments at 8; Sprint PN Comments at 20-21; WIA PN Comments at 70; Verizon PN Comments at Appendix A; Comments of AT&T, WT Docket No. 16-421, at 10-11 (filed Mar. 8, 2017) ("AT&T PN Comments") (citing *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008)).

⁶⁶ See, e.g., Town of Edgewood, New Mexico Ordinance 2003-11 ("All utilities at a Wireless Telecommunications Facilities site shall be installed underground and in compliance with all Laws, ordinances, rules and regulations of the Town."); City of Gadsden, Alabama Ordinance 2015/015 ("All utilities at a facility site shall be installed underground and in compliance with all laws."); see also Lu Ann Franklin, *State vs. Local Control of Cell Tower Placement*, NORTHWEST INDIANA TIMES (Apr. 29, 2017), http://www.nwitimes.com/news/local/state-vs-local-control-of-cell-tower-placement/article_53643ad9-9e66-5abf-bd14-ff91586d9763.html (discussing Town of Schereville, Indiana - Ordinance #1904, which established "an underground and buried utility district," and Town of Dyer, Indiana - Ordinance #2017-03, which established an "underground and buried utilities district." The latter will be in effect "in all areas of the Town.").

⁶⁷ Verizon PN Comments at Appendix A.

⁶⁸ Mobilitie PN Comments at 12.

⁶⁹ *Id.* at 13.

facilities in ROWs.⁷⁰ The record provides examples of such prohibitions. For example, one California community refused to allow any small cell installations on municipal infrastructure in ROWs, and a Florida community prohibited any small cell installations on municipal light poles.⁷¹ The Commission should declare that these restrictions are unlawful barriers to deployment. Neither Sections 253 nor 332 empower localities to deny access to their facilities in ROWs. Conversely, allowing localities to deny access would undermine those provisions, which seek to *promote* ROW access. Moreover, as noted above, localities' management of their ROWs is a regulatory function and thus must comply with the requirements of Sections 253 and 332.⁷²

Requirements to prove a coverage gap or other business need for a site or technology. As noted above, compelling a wireless provider to prove a site is needed for geographic network coverage is improper and has no place in current siting policy.⁷³ Ensuring customers can obtain adequate wireless services requires not merely coverage but sufficient network capacity; denying a new site can thus also prevent service or degrade it by slowing data speeds or increasing latency. Yet there are, for example, multiple cities in California that require wireless providers to demonstrate gaps in service coverage as a condition of ROW access.⁷⁴ Other localities compel providers to demonstrate a business need for the facility, or defend the

⁷⁰ See *Wireless NPRM/NOI* ¶ 96.

⁷¹ CTIA PN Comments at 14.

⁷² See *supra* Section IV.C.

⁷³ CTIA PN Reply Comments at 25-26; see also Comments of Competitive Carriers Association, WT Docket No. 16-421, at 35-37 (filed Mar. 8, 2017) (“CCA PN Comments”); Comments of NTCH, Inc., WT Docket No. 16-421, at 1 (filed Mar. 8, 2017) (“NTCH PN Comments”); Comments of NTCA—The Rural Broadband Association, WT Docket No. 16-421, at 5 (filed Mar. 8, 2017) (“NTCA PN Comments”).

⁷⁴ CTIA PN Comments at 14, Reply Comments of T-Mobile USA, Inc., WT Docket No. 16-421, at 11-12 (filed Apr. 7, 2017) (“T-Mobile PN Reply Comments”).

type of equipment or the technology the provider seeks to deploy. Localities have no legal right to compel providers to demonstrate a business need for a particular site or to justify the type of equipment or the technology chosen.⁷⁵ These mandates improperly intrude on providers' technical judgement as to how best to serve their customers. The Commission should declare that any requirements to prove a site is needed to fill a coverage gap or meet any business need, or to justify the equipment or technology to be deployed, violate Sections 253(a) and 332(c)(7)(B)(i). Beyond violating these provisions, regulations that police the technology or service the provider seeks to deploy are clearly preempted by the Commission's plenary jurisdiction under Title III of the Communications Act to regulate the licensing and operation of radio facilities.⁷⁶

Distance separation requirements. Some localities require wireless facilities to be at least a certain distance apart, even from competing providers' facilities. For example, one city in Florida limited the number of small cell installations to 13 sites in one square mile regardless of the provider. There are also several Illinois jurisdictions that imposed minimum distance requirements of up to 1,000 feet between small cell installations, even when the installations serve different providers.⁷⁷ These requirements effectively block efficient network design and impose arbitrary limits on where sites can be built. As with the "business need" regulations discussed above, these requirements unlawfully intrude on a provider's rights under the Act to deploy and operate radio facilities. Moreover, they clearly discriminate against new providers and violate Sections 253 and 332 for that reason as well. The first provider in a locality can

⁷⁵ CTIA PN Reply Comments at 25-26; *see also* CCA PN Comments at 35-37; NTCH PN Comments at 1; NTCA PN Comments at 5.

⁷⁶ 47 U.S.C. § 303.

⁷⁷ CTIA PN Comments at 14; AT&T PN Comments at 12-13.

deploy sites anywhere subject to the locality's site separation rules, but subsequent providers will be constrained not only by those rules but by where incumbent providers built their sites, making its deployment far more difficult if not impractical. As long as the provider complies with safety-related and similar requirements for deployment, it should be able to deploy cells to meet its network needs, regardless of the proximity to other sites.

Discriminatory requirements. The clear command of both Sections 253 and 332 is to prohibit localities from imposing differing obligations on similarly situated providers, or on new entrants but not on incumbents. Some localities impose requirements on wireless providers for use of ROWs that they do not impose on others, for example, utilities that install wireless monitoring devices along ROWs. Some discriminate against wireless providers by requiring them to meet multiple, arbitrary requirements, such as a franchise agreement, zoning approvals (typically following the delay and expense of public hearings), and permits for individual sites. The record in WT Docket No. 16-421 contains numerous examples of such discriminatory regulations and practices. One provider reported that nearly 50 communities imposed different standards on it compared to other ROW users, even though those other users deployed similarly sized or even larger facilities.⁷⁸ The Commission correctly states that singling out providers for more processes or obligations than other ROW users can violate Sections 253 and 332.⁷⁹ It should prohibit such discrimination.

Unbounded subjective aesthetic restrictions. Some localities grant reviewing agencies discretion to deny a siting application based on vaguely worded or subjective visual or other

⁷⁸ See ExteNet PN Comments at 9; *see also, e.g.*, T-Mobile PN Reply Comments at 10 (listing examples of discriminatory practices in other localities).

⁷⁹ *Wireless NPRM/NOI* ¶¶ 97, 99.

aesthetic interests.⁸⁰ As the Commission notes, consideration of the aesthetic impact of a facility is not inherently improper.⁸¹ However, small cells and DAS systems are designed to blend in to the streetscape with minimal if any visual impact. In any event, a “we know it when we see it” standard is no standard at all, because it unlawfully fails to supply sufficient advance notice to providers as to the restrictions they must build to. Unbounded, subjective limits also cannot be justified as related to a locality’s interest in managing the use of the ROW to address traffic, safety, or related concerns. The Commission should deem such regulations unlawful and require localities that want to consider the visual impact of facilities to craft objective rules.

Procurement requirements. The Commission also asks whether it should address local requirements that compel providers to purchase or use muni-owned facilities, or to furnish services to the locality for free or at a discount.⁸² The Commission should deem that these requirements are unlawful barriers to service. They are irrelevant to a locality’s legitimate interest in managing the use of its ROWs. Rather, they improperly leverage localities’ monopoly control of ROW access to generate additional revenues.

VI. THE COMMISSION SHOULD PROHIBIT SITING FEES THAT ARE UNREASONABLE OR THAT DISCRIMINATE AMONG PROVIDERS.

In WT Docket No. 16-421, the Commission compiled an extensive record that demonstrates localities are imposing excessive fees on wireless providers seeking to construct needed facilities, and those fees are impeding deployment. Localities often request multiple separate payments, including up-front application fees, recurring site fees, charges based on a

⁸⁰ CTIA PN Reply Comments at 8-9; CTIA PN Comments at 12-14; AT&T PN Comments at 4, 15-16; Crown Castle PN Comments at 12-13; CCA PN Comments at 29-30.

⁸¹ *Wireless NPRM/NOI* ¶ 92.

⁸² *Wireline NPRM/NOI* ¶ 106.

percentage of the provider's revenues, and more.⁸³ High per-site fees are particularly burdensome because providers may need to deploy dozens or even hundreds of small cell sites in an area to provide sufficient coverage and capacity.⁸⁴ And fees based on some percentage of gross revenues tax providers without regard to ROW use. For example, the record in WT Docket No. 16-421 showed:

- A city in the northeast required fees of \$6,000 per year for attachments to third-party poles in the ROW.⁸⁵
- A city in the west charged an annual fee of \$2,300 per pole in the ROW.⁸⁶
- A city in California adopted an ordinance recommending a baseline annual rent of \$10,800 per node site.⁸⁷
- A town in New York required an escrow fee of \$3,000 per new small cell pole and \$1,000 per collocation for "consultant review."⁸⁸
- A county in Virginia required a \$15,000 application fee per utility pole.⁸⁹

The Commission now revisits this issue more broadly, asking whether governmental fees are not "fair and reasonable" as Section 253(c) requires.⁹⁰ It asks whether it should prohibit excessive fees and require them to be based on governmental costs. In WT Docket No. 16-421, the wireless industry uniformly urged the Commission to interpret Section 253(c) to require that

⁸³ See CTIA PN Reply Comments at 10; CTIA PN Comments at 14; Crown Castle PN Comments at 11-14; AT&T PN Comments at 21; Sprint PN Comments at 25-26; CCA PN Comments at 16.

⁸⁴ CTIA PN Comments at 15-16.

⁸⁵ Verizon PN Comments at Appendix A.

⁸⁶ *Id.*

⁸⁷ Crown Castle PN Comments at 11.

⁸⁸ *Id.* at 13.

⁸⁹ *Id.* at 14.

⁹⁰ See *Wireline NPRM/NOI* ¶¶ 104-105.

fees for facilities within the ROW be limited to a locality's costs incurred in issuing permits and managing ROWs.⁹¹ It should issue that ruling, and also address the application of Sections 253(a) and 332(c)(7) to fees for facilities to be located outside of ROWs.

The Commission has the authority to take these actions related to Sections 253(a), 253(c), and 332(c)(7). Sections 201(b) and 303(r), as well as other provisions of the Communications Act, empower the Commission to issue declaratory rulings or adopt rules to implement the substantive provisions of the Act, and the courts have repeatedly upheld the Commission's authority to act either through a declaratory ruling or by rule.⁹²

A. The Commission Should Clarify That “Fair and Reasonable” ROW Fees Under Section 253(c) Must Be Cost-Based.

Section 253(c) allows localities to impose charges with respect to facilities to be located in the ROW that constitute “fair and reasonable compensation.”⁹³ The Commission can and should interpret that language to mean that localities may recover the costs to review and issue siting permits, supervise the installation of facilities that impact rights of way, and ensure those

⁹¹ CTIA PN Reply Comments at 2, 17-18; Comments of Globalstar, Inc., WT Docket No. 16-421, at 14 (filed Mar. 8, 2017); Lightower Fiber Networks PN Comments at 27, 29; Mobile Future PN Comments at 6; Mobilitie PN Comments at 17; Sprint PN Comments at 23, 33, 36-37; WIA PN Comments at 69; AT&T PN Comments at 17, 20-21; Verizon PN Comments at 11.

⁹² See, e.g., *City of Arlington*, 668 F.3d at 241, 249 (affirming Commission's authority to adopt rules or issue a declaratory ruling to implement Section 332); *Central Texas Cooperative Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) (affirming its authority to issue declaratory rulings).

⁹³ 47 U.S.C. § 253(c).

facilities are properly maintained. Conversely, Section 253(c) does not allow cities to leverage wireless providers' need for ROW access to serve their customers as a means to raise revenues.⁹⁴

Although many courts have found that Section 253(c)'s "fair and reasonable compensation" language limits permissible fees to those that are based on the locality's costs, and have invalidated revenues-based fees,⁹⁵ others have adopted a looser interpretation by, for example, allowing a locality to consider the wireless provider's ability to pay.⁹⁶ These divergent decisions have engendered uncertainty as to how Section 253(c) applies to ROW fees.⁹⁷

The Commission should resolve the courts' disparate interpretations, dispel the resulting uncertainty (and further risk of litigation), and promote the purpose of Section 253(c) by declaring that ROW access and use fees must be based on localities' incremental costs of managing the siting process and supervising use of ROWs. Localities can recoup the costs they would not have incurred but for the wireless facility, but no more. This ruling will ensure that localities can recover the costs they incur to review and process permit applications and to

⁹⁴ CTIA PN Reply Comments at 11.

⁹⁵ CTIA PN Comments at 30 (citing *PECO Energy Company v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409, * 24 (E.D. Pa. 1999) ("Revenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of-way."); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1100 (N.D. Ca. 2001) ("Fees charged against telecommunications carriers must be directly related to the carrier's actual use of the local ROWs."); *N.J. Payphone Ass'n Inc. v. Town of West York*, 130 F. Supp. 2d 631, 637-8 (D.N.J. 2001), *aff'd*, 299 F.3d 235 (3d Cir. 2002) (stating that "fair and reasonable compensation" is limited to "recoupment of costs directly incurred through the use of the public rights-of-way. . . . A fee that does more than make a municipality whole is not compensatory in the literal sense."); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 113-14 (D.P.R. 2005) (locality failed to prove that right-of-way fee complied with Section 253(c); "Absent evidence of costs the Court cannot determine whether the Ordinance results in fair and reasonable compensation as opposed to monopolistic pricing."), *aff'd*, 450 F.3d 9 (1st Cir. 2006)).

⁹⁶ CTIA PN Comments at 31 (citing *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (2000); *City of Portland, Oregon v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1074-75 (D. Or. 2005)).

⁹⁷ *Id.*

oversee the installation and maintenance of wireless facilities in ROWs, while precluding excessive fees that impede deployment.

B. The Commission Should Declare that Several Specific Types of ROW Fees are Unlawful Under Section 253(c).

In addition to the clarification regarding cost-based fees, discussed above, the Commission should also declare that several specific types of fees are unlawful. Charging the provider a certain percentage of its revenues, or fees that are based on the market value of adjacent property, are by definition not related to the locality's costs of managing ROWs and are thus not "fair and reasonable compensation." Fees set by third-party consultants are similarly unrelated to the locality's costs of managing ROWs and should also be prohibited. The record in WT Docket No. 16-421 demonstrates that those fees can be substantial.⁹⁸

Section 253(c) also authorizes localities to impose fees if they are "competitively neutral and nondiscriminatory."⁹⁹ Fees that vary depending on the provider are neither neutral nor nondiscriminatory, regardless of their magnitude. Thus, for example, if a locality charges a particular up-front permit fee and/or a recurring rental fee on a telephone company to install and maintain a pole, it cannot charge higher fees on a wireless company to deploy a comparable pole to support its own service. By declaring that Section 253(c) does not permit such discriminatory pricing, the Commission will promote technological neutrality and foster essential broadband deployment.

⁹⁸ Comments of California Wireless Association, WT Docket No. 16-421, at 11 (filed Mar. 7, 2017); T-Mobile PN Comments at 7-8; WIA PN Comments at 12 ("WIA's members have frequently encountered situations where a consultant will create a "model" local ordinance that in turn will essentially require the municipality to then hire the consultant to perform detailed reviews of applications, all at the expense of the applicant").

⁹⁹ 47 U.S.C. § 253(c).

C. The Commission Should Confirm that Section 253(c) Applies to Fees Imposed for Access to Municipal-Owned Poles in ROWs.

The Commission should also confirm that Section 253(c) applies to the fees localities can impose for access to municipal-owned poles that are located in ROWs. CTIA and other parties have demonstrated why Section 253(a) prohibits localities from denying access to muni-owned facilities in ROWs.¹⁰⁰ For the same reasons, Section 253(c) also applies to fees charged for those facilities: those fees constitute regulatory action that affects providers' ability to provide service using ROWs and thus must be limited to "fair and reasonable compensation" that is "nondiscriminatory and competitively neutral."

D. The Commission Should Confirm that Sections 253(a) and 332(c)(7) Likewise Require Cost-Based Fees for Facilities Outside of the ROW.

The Commission also should confirm that Sections 253(a) and 332(c)(7), which are not limited in scope to the ROW, require that application and other fees that localities assess for reviewing proposed wireless facilities to be located either within or outside of ROWs must be based on the actual costs associated with their consideration of such applications.¹⁰¹ Both statutory provisions outlaw "regulation" that "may prohibit or have the effect of prohibiting" the provision of service. Application fees are imposed pursuant to such local regulation, whether in the form of rules or ordinances. And, as the record in WT Docket No. 16-421 demonstrates, excessive siting fees deter wireless deployment by making it cost-prohibitive to build facilities, whether deployment is planned for ROWs or elsewhere.

¹⁰⁰ CTIA PN Reply Comments at 3; CCA PN Comments at 12; T-Mobile PN Comments at 30-31; Verizon PN Comments at 30-31.

¹⁰¹ See *Wireless NPRM/NOI* ¶ 93.

VII. THE COMMISSION SHOULD STREAMLINE ITS NEPA AND NHPA PROCESSES.

The Commission should revise its rules and procedures for reviewing wireless sites under NEPA and NHPA because they are unnecessarily impeding broadband deployment.¹⁰² The rules are exceedingly long and complex, with multiple exceptions to exclusions that make detailed distinctions between similar types of facilities that are unwarranted for purposes of protecting the environment and historic properties. These NEPA and NHPA procedures impose delays and costs that hinder deployment. Providers must devote resources to complying with those procedures even though adverse environmental effects, or impacts on historic properties, rarely occur. For example:

- The screen for environmental effects under Section 1.1307 of the Commission’s rules costs approximately \$2,000 per site.¹⁰³
- Sprint estimates it has done NEPA checklists for 20,000 to 30,000 sites, approximately 250 of which required the Section 1.1037 environmental assessment costing an additional \$1,300 per site.¹⁰⁴

Modifying those rules and procedures in several ways will lower barriers and speed deployments while also fully protecting the environmental and historic preservation objectives of those statutes.

¹⁰² *See generally Wireless NPRM/NOI* ¶ 32 (noting that providers “face challenges in their efforts to obtain authorizations for deploying this necessary infrastructure, not only from local governments but also in completing the Commission’s environmental and historic preservation review processes under NEPA and Section 106 of the NHPA”).

¹⁰³ Sprint PN Comments at 48.

¹⁰⁴ *Id.*

CTIA is filing joint comments in this proceeding with the Wireless Infrastructure Association¹⁰⁵ addressing the topics in Sections II.B.2 and II.B.3 of the *Wireless NPRM/NOI*, which raise questions about reforming the tribal consultation process and resolving longstanding issues as to collocations on so-called “twilight towers,” which were built between 2001 and 2005.¹⁰⁶ The Commission also raises broader issues about the NEPA and NHPA processes, which CTIA addresses here.

A. The Commission Should Exclude Support Structures for Small Cell and DAS Facilities from NEPA Review and Modify its Rule for All Facilities in Floodplains.

The Commission should take two actions that will simplify and expedite deployment without creating any risk of environmental harm.

First, it should modify Section 1.1307 of its rules to adopt a categorical exclusion from environmental review for the support poles associated with all small cell and DAS facilities. This rule currently excludes these support facilities only if they do not fall into one of the multiple categories of locations that trigger an environmental assessment or other exceptions previously adopted by the Commission. Although Section 1.1307(a) states that environmental assessments are intended for facilities that “may significantly affect the environment,” there is no factual basis to determine that the poles supporting small cells and DAS could have an adverse environmental impact. The Commission should simply exclude those facilities from environmental processing under NEPA.

¹⁰⁵ See Joint Comments of CTIA and the Wireless Infrastructure Association, WT Docket No. 17-79 (filed June 15, 2017).

¹⁰⁶ See generally *id.* ¶¶ 42-85.

Second, the Commission should revise its rule that currently requires environmental assessments for all sites to be located in a designated floodplain,¹⁰⁷ to provide that an assessment is required only for those sites that would not be located at least one foot above the base elevation of the floodplain. Sites that are higher than that elevation pose no environmental risk. This revision is consistent with Executive Order 11988 and associated guidelines from the Federal Emergency Management Agency implementing the Executive Order, both of which were referenced in the *Wireless NPRM/NOI*,¹⁰⁸ as well as the Commission's own Environmental Assessment Checklist.¹⁰⁹ Moreover, as CTIA and other commenters previously noted, other agencies are specifically charged with protecting floodplains, and providers may not construct until they secure those agencies' approval.¹¹⁰ Commission review is thus superfluous.

B. The Commission Should Exclude Five Types of Wireless Facilities from NHPA Review.

The Commission identifies three types of facilities in the *Wireless NPRM/NOI* that are not expected to affect historic properties and thus should be categorically excluded from Section 106 review.¹¹¹ There are two additional types of facilities that should be excluded for the same reason. The Commission should adopt each of those exclusions, including as applied to reviews by Tribes.

¹⁰⁷ 47 C.F.R. § 1.1307(a)(6).

¹⁰⁸ *Wireless NPRM/NOI* ¶ 65, n124.

¹⁰⁹ The Environmental Assessment Checklist can be found at http://wireless.fcc.gov/nepa/_checklist.pdf.

¹¹⁰ CTIA PN Comments at 27; T-Mobile PN Comments at 39-41; Verizon PN Comments at 38-39.

¹¹¹ *Wireless NPRM/NOI* ¶ 66.

First, pole replacements are currently excluded if the original pole meets the definition of “tower” because it holds a wireless facility, but other pole replacements are subject to Section 106 review.¹¹² The Commission should expand the current exclusion to cover replacements for *all* poles, as there is no reason to distinguish between poles that already host wireless facilities and those that do not. Thus, for example, if a provider replaces a telephone pole with a new pole designed to hold a wireless antenna, it should be excluded from review.

Second, the Commission proposes to exclude small cells that are more than 50 feet from the boundary of a historic district and those located on structures that previously received local approval.¹¹³ This would appropriately reduce the current distance separation, which requires facilities to be at least 250 feet from the historic district in order to be eligible for the exclusion. Given the minimal visual impact of small cells, a 50-foot buffer is sufficient to protect against potential adverse visual effects on the historic district.

Third, the Commission should adopt its proposal to expand the current exemption from Section 106 review for facilities in communications and utility ROWs to include facilities to be located in transportation ROWs.¹¹⁴ The Commission also should expand this exemption to exempt those facilities from Tribal consultation.¹¹⁵ These modifications would correctly

¹¹² *Id.* ¶ 67 (citing Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, §§ III.B; II.A.14).

¹¹³ *Id.* ¶ 73.

¹¹⁴ *Id.* ¶ 69.

¹¹⁵ Under the Nationwide Programmatic Agreement, facilities that are subject to the ROW exclusion must still undergo the tribal consultation process. *See* Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 C.F.R. Part 1, App. C, Section III.E.

recognize that the placement of facilities in the ROW minimizes any potential adverse visual or direct impact and thus warrants expanding the current ROW exclusion.¹¹⁶

Fourth, the Commission should categorically exclude from Section 106 review all indoor wireless facilities to the extent they are not already excluded (for example, when the building is 45 or more years old or is located in or near a historic district).¹¹⁷ The industry is increasingly locating facilities inside buildings to supply enhanced coverage and capacity to occupants. This practice should be encouraged, not discouraged. There can be no possible effect on historic properties or properties with historic or cultural significance to Tribes because by definition there is no change to the exterior of the building and thus no visual effect or ground disturbance.

Fifth, all collocations to existing structures that involve either no ground disturbance or no new ground disturbance, and that do not substantially increase the structure's size, should be categorically excluded. The Collocation Agreement currently excludes collocations that do not substantially increase a structure's size, subject to several exceptions to that exclusion.¹¹⁸ There is, however, no factual basis for subjecting any collocations to that review where there is either no ground disturbance or no new ground disturbance and also no substantial increase in the size of the structure.

¹¹⁶ The Commission also recognizes that “transportation corridors are among the areas where customer demand for wireless service is highest, and thus where the need for new facilities is greatest.” *Wireless NPRM/NOI* ¶ 69.

¹¹⁷ Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Part 1, App. B, Section V (“Collocation Agreement”).

¹¹⁸ Collocation Agreement, Section IV.A.

VIII. THE COMMISSION SHOULD ADOPT ADDITIONAL MEASURES TO ENSURE TIMELY ACCESS TO POLES AT REASONABLE RATES, TERMS, AND CONDITIONS.

A. The Commission Has Authority to Regulate Poles Owned by Municipalities.

For years prior to the enactment of Section 224, the Commission took the position that it had no jurisdiction over pole attachments.¹¹⁹ With Section 224, Congress intended to ensure that utility pole owners did not abuse their unfair bargaining position in agreements for pole access. Congress recognized that pole access was a necessary input for increasing access to cable television.¹²⁰ Congress also recognized that the communications space on poles was an essential facility, and that all pole owners had the market power and the ability to charge high rates for pole space or impose unfair terms and conditions. Thus, Section 224 did not merely grant the Commission authority to regulate pole attachments; Congress ordered the Commission to adopt regulations governing rates, terms, and conditions as specified by the statute, as well as a means to hear and resolve complaints. The pertinent part of the statute provides:

“[S]ubject to the provisions of subsection (c) of this section [limiting authority over states that regulate pole attachments], the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions.”¹²¹

¹¹⁹ *CATV Pole Attachment Rights*, Memorandum Opinion and Order, 64 F.C.C.2d 753, 1977 WL 38620 (1977).

¹²⁰ *See* S. REP. NO. 95-580, at 18 (1977); 124 CONG. REC. S963-70 (daily ed. Jan. 31, 1978) (statement of Sen. Hollings).

¹²¹ 47 U.S.C. § 224(b) (emphasis added).

For states that regulated poles on their own, Congress was very deliberate in providing an express exemption from Commission jurisdiction both in the mandate in Section 224(b) (*e.g.*, “subject to the provisions of subsection (c)”), and in Section 224(c):

“Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section [addressing non-discriminatory access] for pole attachments in any case where such matters are regulated by a State.”¹²²

In 1984, Congress limited this exemption further. The 1984 amendments to Section 224 required several affirmative actions by the certifying state, including the adoption and effectiveness of regulations and timely remedies for complaining attachers.¹²³ The amendments also allowed the Commission to reclaim jurisdiction and take action if a state certified regulation of pole attachments, but failed to take action on complaints within the specified time frames.¹²⁴

In contrast, the provision that has been called the “muni exemption” for decades is derived solely from the exclusion of municipalities from the definition of the statutory term “utility,” which, in turn, is used in the definition of “pole attachments.”¹²⁵ Poles subject to the specific mandate in Section 224 are only those owned by local exchange carriers, electric, gas, steam, or other public utilities. Structurally, this so-called exemption is not grounded in the kind of language normally found when Congress intends to create an exception from agency authority. It is conspicuously unlike the language found in Section 224(c), which states “[n]othing in this Section shall be construed to apply to, or to give the Commission jurisdiction

¹²² *Id.* § 224(c) (emphasis added).

¹²³ Pub. L. No. 98–549, 98 Stat 2779 (Oct. 30, 1984).

¹²⁴ 47 U.S.C. § 224(c)(2).

¹²⁵ *Id.* § 224(a)(1).

over . . .” poles that are regulated by the states. That language is clearly the language of exception—making clear that the agency has no authority where states regulate pole attachments and meet the other statutory requirements. If Congress wished to adopt a categorical exclusion from poles owned by municipalities, it would have done so in Section 224(c) or another similarly worded provision expressly limiting agency authority or jurisdiction.¹²⁶

The word “utility” in Section 224(a)(1) is better read, in the context of the statutory structure and purpose, as exempting poles only from the rules the Commission is expressly required to regulate in Section 224(b). Congress could not have intended to limit agency authority in an oblique way, particularly when the true exceptions in the statute use the language of exception clearly and unambiguously in Section 224(c). Accordingly, Section 224 did not expressly exempt poles owned by municipalities from any Commission jurisdiction, nor did the definition in Section 224(a)(1) rob the Commission of its ability to take lawful actions consistent with its broader statutory authority to regulate interstate telecommunications by wire or radio and its authority or ensure timely deployment of broadband facilities.

Using well-settled canons of statutory construction, it is clear that poles owned by municipalities are excluded only from the specific directives in Section 224, but not from the Commission’s general authority over telecommunications, or any ancillary authority it has under Sections 4(i), 201(b), and 303(r). Municipal poles are certainly not excluded from the authority the Commission has under Section 253 to preempt state or local laws that prohibit or have the effect of prohibiting telecommunications services. Nor could the definition of “utility” in Section 224 preclude the exercise of grants of authority that post-date Section 224. Section 253

¹²⁶ Congress generally acts intentionally when it uses particular language in one section of a statute, but omits it in another. *Russello v. United States*, 464 U.S. 16, 23 (1983).

clearly gives the Commission authority over poles, to the extent that a state or local law or regulation contravenes the prohibition in 253(a). In addition, if Section 706 is an independent grant of authority, as the D.C. Circuit has held, the Commission could reach pole attachments, regardless of ownership, if the matter threatened investment and deployment of broadband facilities.¹²⁷

The legislative history of Section 224 is consistent with the statutory interpretation outlined above. Congress was less concerned about municipalities because it assumed these types of utilities would welcome cable services to their communities and had little incentive to charge high rates or extract unreasonable terms and conditions.¹²⁸ In the legislative history, the Commission itself suggested that state and local entities were in a better position to determine appropriate rates, terms, and conditions for the poles they owned. At the time, there was no evidence of abuse of monopoly power by municipalities.

Much has changed since Congress enacted Section 224. Today, telecommunications and cable service providers consistently face abuses by municipalities, including abrupt contract terminations followed by unilateral rate increases of several times the prior rate. These unilateral rate increases are frequently made without any attempt at showing a cost-based justification. Providers seeking to attach to pole tops complain of being denied access, or of being offered access at rates so high as to effectively deny access altogether.¹²⁹ Some states have attempted to

¹²⁷ See *Verizon v. F.C.C.*, 740 F.3d 623, 637 (D.C. Cir. 2014).

¹²⁸ See S. REP. NO. 95-580, at 18 (1977); 124 CONG. REC. S963-70 (daily ed. Jan. 31, 1978) (statement of Sen. Hollings). The reasoning was that, unlike private utilities, municipal utilities are closer to “grassroots level of government” and are already required to act with the interests and needs of their customers and constituents in mind.

¹²⁹ See, e.g., *P.R. Tel.Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir.2006) (challenging ordinance charging five percent of gross revenue for use or physical occupancy of rights of way controlled by municipality).

resolve these issues through the enactment of statutes, but even these measures have had mixed results.¹³⁰ And, since 1978, Congress has enacted statutes with broader mandates encouraging competition and deployment and granting the Commission broader powers to achieve these important goals. These later-enacted statutes provide the agency with broader authority, and here, there is ample evidence of the need for intervention.¹³¹

The history of Section 224, its text, its purpose, and subsequent grants of authority to the Commission all point in one direction—the Commission does have authority to address impediments to the provision of telecommunications services caused by municipal-owned poles. As discussed in greater detail in Sections V and VI herein, Section 253 provides the Commission with ample authority to address state and local laws that impede access to poles or apply discriminatory rates or fees to pole attachments.¹³² The Supreme Court has held that the Commission has the power to interpret the scope of its own statutory authority, if ambiguity is found in the statute.¹³³ To the extent the Commission perceives any ambiguity in jurisdiction

¹³⁰ See, e.g., N.C. GEN. STAT. § 62-350 (requiring municipalities to allow communications service provider to utilize its poles, ducts, and conduits at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements); *Memphis Light, Gas & Water Div. v. Comcast of Arkansas/Florida/Louisiana/Minnesota/Mississippi/Tennessee, Inc.*, No. 2:14-cv-02713, 2016 WL 8376738, at *2–3 (W.D. Tenn. Mar. 30, 2016) (challenging unilateral pole attachment rates increase to \$34.37 when prior rate was \$8.45 and ordinance fixed rate at \$11.00); *Time Warner Entm't Advance/Newhouse P'ship v. Town of Landis*, No. 10 CVS 1172, 2014 WL 2921723, at *13 (N.C. Sup. Ct. June 24, 2014); *City of Chattanooga, Tenn. v. BellSouth Telecommunications, Inc.*, 1 F. Supp. 2d 809, 811 (E.D. Tenn. 1998) (declaratory action seeking judgment on rights-of-way ordinance that imposed franchise fee of five percent of gross revenues and required franchisees to provide the City an exclusive underground duct, pole space, dark fiber optic fibers, and engineering assistance). See also Complaint, *NextG Networks of CA v. City of Carlsbad, et al*, Case No. 3:06-CV-00650, Dkt. No. 1 at ¶ 74 (filed Mar. 23, 2006) (seeking relief from pole attachment fees of \$12,000 per pole per year).

¹³¹ See *United States v. Fausto*, 484 U.S. 439, 453 (1988) (“[The] classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.”).

¹³² As stated above, Congress generally acts intentionally when it uses particular language in one section of a statute, but omits it in another. *Russello v. United States*, 464 U.S. 16, 23 (1983).

¹³³ *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1874 (2013).

over poles owned by municipalities, it should exercise its prerogative to effectuate the core purpose of the statute.

B. The Commission Should Amend its Regulations to Cover Poles Owned by Municipalities.

Based on the Commission's statutory authority and ancillary authority detailed above, the Commission should amend its existing regulations that govern investor-owned utilities, including complaint processes, to cover poles owned by municipalities. This result would be an appropriate means of harmonizing regulations to ensure both fairness and effectiveness. As discussed above, past justifications for excluding municipalities from any Commission pole attachment regulations no longer apply, and the Commission has a strong mandate to remove barriers that impede and delay network expansion. It is undeniable that poles owned by municipalities play an integral role in the nationwide telecommunications network. Providers seeking to attach to these poles must have some assurance that rates are non-discriminatory and cost-based, and that terms and conditions of attachment are just and reasonable. They should also have a forum within the Commission when pole attachment disputes arise.

If the Commission decides to interpret its authority more restrictively, the Commission should exercise its authority under Section 253 to adopt guidelines to govern municipal pole attachments. At a minimum, such guidelines should declare that municipal rates that are consistent with the federal rate calculation are presumptively reasonable, and further, that any municipal pole attachment rate must be cost-based. Municipalities must be prohibited from charging attachers percentages of gross revenues. The Commission should also harmonize shot clock deadlines to ensure attachment agreements for municipal-owned poles are signed and approvals for attachments are received within the 60-day timeline for collocation. Attachers

should also have their choice of fora where applications are not granted within the 60-day timeline, as proposed above in Section IV.C.

IX. CONCLUSION.

Consistent with the goals of promoting and streamlining wireless broadband deployment and removing obstacles to that deployment, the Commission should take the following actions: (1) speed deployment by alleviating delays in the local approval process; (2) adopt interpretations of Sections 253 and 332 to achieve the objectives of those provisions; (3) declare that specific laws, regulations, and practices that impede or discourage deployment, or place discriminatory burdens on wireless providers, are unlawful; (4) require local government fees to be cost-based; (5) streamline the NEPA and NHPA processes by adopting exclusions for facilities that do not raise environmental issues or adversely affect historic properties; and (6) adopt additional measures to ensure timely access to poles at reasonable rates, terms, and conditions.

Respectfully submitted,

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Dated: June 15, 2017

Attachment

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

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

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COMMENTS OF CTIA

CTIA¹ respectfully submits these comments on the Public Notice² released by the Wireless Telecommunications Bureau of the Federal Communications Commission (“Commission”) seeking input on what actions the Commission should take to promote and modernize wireless broadband deployment. The Public Notice correctly recognizes that removing barriers to wireless deployment will bring substantial benefits to American consumers and the U.S. economy. CTIA strongly supports prompt and comprehensive Commission actions to remove those barriers – actions that can be taken while fully protecting localities’ interests in overseeing the installation of wireless facilities and managing rights-of-way (“ROWs”).

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

² *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360 (2016) (“Public Notice”).

I. INTRODUCTION AND SUMMARY.

Wireless broadband services are creating unprecedented opportunities for American consumers and businesses. They enable people to identify and pursue job opportunities, obtain education and training, secure government services, and stay connected with family and friends through video as well as voice, messaging, and email. And the next generation of wireless – 5G – promises even more advanced capabilities that will enable the Internet of Things, connected vehicles, and other new services to deliver additional benefits to American consumers, create jobs, and add billions of dollars to the U.S. economy. Speeding the rapid deployment to broadband and 5G is appropriately a Commission priority. Indeed, Chairman Pai recently announced the establishment of a Broadband Deployment Advisory Committee to recommend reforms to encourage and expedite broadband deployment across the country. CTIA urges the Commission to take steps to facilitate the build out of networks that support this connectivity.

5G will require dense wireless networks, deployment of hundreds of thousands of new small cells, and expanded backhaul and transport facilities to provide needed capacity and coverage. Rapid, affordable access to state and local ROWs and other locations is critical to the successful deployment of these services. This access is particularly important because of the signal propagation limits of the high-band radio spectrum that are viewed as an initial platform for 5G. High-band signals offer tremendous capacity but also travel short distances. Moreover, the backhaul and transport facilities required to connect small cells with core networks and provide customers with reliable Internet connectivity need to be located in ROWs.

The tremendous promise of 5G is, however, threatened by a growing web of local siting restrictions and requirements that delay, discourage, or outright block the new infrastructure needed to accommodate the public's growing demand. Many local requirements were adopted to regulate large macrocell towers and are not appropriately applied to small cell deployments,

given the fact that small cells are far less visually intrusive and that most can be installed on existing structures with no ground disturbance. Rather than remove or at least minimize these requirements, some localities are imposing *higher* barriers, *more* burdensome regulations, and *higher* charges. They are stalling deployment, declining to process permit applications, imposing long waiting periods, or telling wireless providers that they must wait indefinitely for the locality to develop a long-term plan for ROWs use (without committing that such use will ever be allowed). Some are effectively prohibiting the installation of facilities through moratoria, bans on upgrading existing facilities, or ordinances that require all telecommunications infrastructure to be placed underground. Some of those that do allow access are charging very high up-front access fees as well as recurring rents and other charges, deterring broadband investment and deployment. Of course, some localities are modifying their siting policies to embrace new wireless deployments, which CTIA commends. The Commission should take action, however, to ensure that reasonable policies are implemented in all localities.

CTIA agrees with the Public Notice that “the Commission has a statutory mandate to facilitate the deployment of network facilities needed to deliver more robust wireless services to consumers throughout the United States,” and that it has the “responsibility to ensure that this deployment of network facilities does not become subject to delay caused by unnecessarily time-consuming and costly siting review processes that may be in conflict with the Communications Act.”³

The Public Notice correctly states that Sections 253 and 332 of the Communications Act and Section 6409 of the Spectrum Act “are designed, among other purposes, to remove barriers to deployment of wireless network facilities by hastening the review and approval of siting

³ Public Notice at 13361.

applications by local land-use authorities.”⁴ These provisions reflect Congress’s recognition that expanding the reach and capacity of networks directly benefits the public and the economy. The Commission has both the authority and the responsibility to apply these provisions to foster the national policy goal of promoting ubiquitous, advanced, and affordable wireless services.

Consistent with this goal, CTIA urges the Commission to:

- **Declare that Section 253(a) prohibits regulations that inhibit or limit the ability of a wireless provider to compete.** The Commission held twenty years ago that a regulation “may prohibit or have the effect of prohibiting” service, and is thus unlawful under Section 253, if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” But some courts have interpreted Section 253 more narrowly, finding that to be unlawful the regulation must actually prohibit service. The Commission should remove the uncertainty resulting from these rulings and reaffirm its interpretation of Section 253 to prohibit laws that physically block wireless deployment as well as those that indirectly deter deployment by imposing requirements or charges that make it cost-prohibitive or economically difficult to offer service.
- **Declare that Section 253(a) prohibits moratoria.** Whether localities adopt an express moratorium, or refuse to act on siting applications through a *de facto* moratorium, Section 253 prohibits these barriers to service.
- **Declare that Section 253(a) prohibits a locality from requiring facilities to be placed underground or from preventing technology upgrades.** Such regulations in effect prohibit wireless broadband services.
- **Declare that Section 253(c) does not permit localities to impose charges for ROW access that exceed their incremental costs to manage the siting process and supervise use of ROWs, and/or discriminate among providers.** That section allows localities to obtain “fair and reasonable compensation” that is “competitively neutral and nondiscriminatory.” The Commission should declare these provisions to mean that fees must be no more than necessary to cover a locality’s actual costs to manage its ROWs and that localities must not impose different charges on different providers seeking similar ROW access.
- **Interpret Section 332(c)(7) to include a new 60-day shot clock for collocations not covered by Section 6409(a).** Collocations on non-tower structures that would otherwise be covered by Section 6409(a) but for the absence of an existing approved

⁴ *Id.*

antenna should be subject to the same 60-day period that applies to Section 6409(a) collocations.

- **Tighten and true up shot clocks between Section 332(c)(7) and Section 6409(a).** The existing shot clocks for localities to act on all new site and collocation permit applications should be reduced to 90 days and 60 days, respectively. Given the trend toward installing small cells and their far smaller impact, what is a reasonable time to act should be commensurately shortened.
- **Adopt a “deemed granted” remedy for the Section 332(c)(7) shot clocks.** The statute supports adoption of this remedy, which will speed small cell deployments while fully protecting the interests of localities in managing those deployments.
- **Apply shot clocks to requests to place facilities in ROWs and on municipal-owned poles.** The Commission should declare that Section 332 applies to siting applications that seek to use ROWs and municipal-owned poles in those ROWs, because localities act in their regulatory capacity when managing ROWs.
- **Declare that small cell deployments are not federal undertakings or major federal actions.** Given that small cells have no adverse impact on the environment or historic properties, the Commission should exempt them from its procedures to assess those impacts.

In addition to the barriers to broadband deployment that CTIA’s Comments address, the current process for tribal reviews of wireless facilities also imposes significant obstacles, frustrates deployment, and adds substantial costs.⁵ Given that wireless facilities deployment in many cases – particularly with regard to small cells – poses no risk to tribal interests, the current breadth of tribal reviews, the delays that are endemic to those reviews, and the substantial fees that providers find they must pay to secure approvals, all pose unnecessary barriers to network deployment nationwide. The goals of this proceeding cannot be fully achieved without also modernizing these review processes. CTIA urges the Commission to take up those issues as soon as possible.

⁵ Discussions herein to tribal siting review speak to reviews on non-tribal lands. CTIA is not suggesting in these Comments any changes to the review processes applicable to wireless infrastructure deployment on tribal lands.

II. WIRELESS BROADBAND HAS A SIGNIFICANT IMPACT ON OUR ECONOMY AND COMMUNITIES TODAY, AND 5G WILL UNLEASH FURTHER INNOVATION AND GROWTH.

In communities across the country and in nearly every sector of the economy, wireless broadband is transforming how we live, work, and communicate. In just seven years, wireless providers spent \$200 billion in network improvements to deliver 4G LTE mobile broadband nationwide.⁶ Today, 99.7 percent of Americans have access to 4G LTE service, and 95.9 percent can choose from three or more 4G LTE providers.⁷

This nationwide mobile broadband deployment has unlocked opportunities for all Americans, including low-income individuals, people with disabilities, and those living in rural areas. Communities across the country, and industries including agriculture, automobiles, healthcare, appliance manufacturing, and energy, are harnessing the power of wireless connectivity. For example, through wireless technology, farmers can prevent the over- and under-watering of crops and preserve resources during droughts.⁸ Wireless technologies are also helping break down barriers for consumers with disabilities, enabling people with vision-, hearing-, dexterity- and cognition-related conditions to participate meaningfully in our fast-paced

⁶ See CTIA Press Release, Americans' Data Usage More than Doubled in 2015 (May 23, 2016), <http://www.ctia.org/industry-data/press-releases-details/press-releases/americans-data-usage-more-than-doubled-in-2015> (“CTIA May 23 Press Release”).

⁷ *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993*, Nineteenth Report, 31 FCC Rcd 10534, ¶ 39, Chart III.A.2 (2016).

⁸ David L. Sunding, Martha Rogers & Coleman D. Bazelon, *The Farmer And The Data: How Wireless Technology Is Transforming Water Use In Agriculture* (Apr. 27, 2016), <http://www.mondaq.com/unitedstates/x/487024/Telecommunications+Mobile+Cable+Communications/The+Farmer+And+The+Data+How+Wireless+Technology+Is+Transforming+Water+Use+In+Agriculture>.

society.⁹ And medical researchers are using wireless technologies to make substantial advancements in how we monitor and treat a variety of medical conditions, including by using wearables and movement sensors to monitor and improve the progression of diseases such as Parkinson's.¹⁰

Mobile broadband also contributes substantially to the U.S. economy. Today, more than 4.6 million Americans have jobs that depend directly or indirectly on the wireless industry,¹¹ and employing one person in the wireless industry results in 6.5 more people finding employment.¹² All told, the wireless industry as a whole generates more than \$400 billion in total U.S. spending.¹³

With the introduction of 5G networks and technologies, these benefits will only continue to grow. Next-generation 5G networks will be ten times faster and five times more responsive than today's networks, and they will be able to support 100 times more devices. One recent study estimates that wireless operators will invest \$275 billion dollars over the next decade to deploy 5G to consumers. As a result of that investment, 5G is expected to create three million

⁹ See, e.g., PN Comments of CTIA – Accessibility of Communications Technologies, CG Docket No. 10-213 (filed June 22, 2016) (describing the various service plans, devices, and applications that benefit the accessibility community).

¹⁰ See Intel, *Using Wearable Technology to Advance Parkinson's Research* (2015), <http://www.intel.com/content/dam/www/public/us/en/documents/white-papers/using-wearable-technology-mjff.pdf>.

¹¹ See Roger Entner, *The Wireless Industry: Revisiting Spectrum, the Essential Engine of US Economic Growth*, RECON ANALYTICS, at 18 (Apr. 2016), <http://www.ctia.org/docs/default-source/default-document-library/entner-revisiting-spectrum-final.pdf>.

¹² Coleman Bazelon & Giulia McHenry, *Mobile Broadband Spectrum: A Vital Resource for the American Economy*, THE BRATTLE GROUP, at 2, 20 (May 11, 2015), http://www.ctia.org/docs/default-source/default-document-library/brattle_spectrum_051115.pdf.

¹³ *Id.* at 10.

new jobs in communities of all sizes across the country and boost the U.S. GDP by half a trillion dollars.¹⁴

5G will unlock the Internet of Things, enable a new generation of smart communities, and unleash innovation for industries across the country. With 5G, integrated technologies that assist in the management of vehicle traffic and electrical grids will produce \$160 billion in benefits and savings through reductions in energy usage, traffic congestion, and fuel costs.¹⁵ And wireless-enabled smart grids could create \$1.8 trillion for the U.S. economy, saving consumers hundreds of dollars per year.¹⁶ Improvements made by advanced wireless connectivity could also save lives. One recent study showed that a one-minute improvement in emergency response time as a result of wireless connectivity translates to a reduction of eight percent in mortality, and wireless-powered self-driving cars could translate to 21,700 lives saved.¹⁷

Construction of the network infrastructure needed to support wireless broadband cannot wait, because the public's use of mobile broadband is not waiting; in fact it is growing exponentially. The amount of data flowing over U.S. wireless networks more than doubled in

¹⁴ See *How 5G Can Help Municipalities Become Vibrant Smart Cities*, ACCENTURE STRATEGY, at 1 (Jan. 12, 2017), <http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf>.

¹⁵ See *id.* at 1.

¹⁶ See *Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation*, DELOITTE, (Jan. 2017), http://www.ctia.org/docs/default-source/default-document-library/deloitte_20170119.pdf.

¹⁷ *Id.*

2015¹⁸ to a level 25 times greater than in 2010.¹⁹ And there is no end in sight when it comes to growth in mobile demand. The most recent Cisco study of mobile data, for example, predicted that mobile data traffic worldwide will grow seven-fold from 2016 to 2021, and will in 2021 be 122 times the level of traffic just ten years before that, in 2011. Mobile video, which requires fast speeds and substantial network capacity, is expected to increase nearly nine times from 2016 to 2021 and will represent 78 percent of all mobile traffic by 2021.²⁰

Wireless providers are ready to make the major investments required to expand broadband networks because they know those investments are vital for them to compete and to ensure their customers continue to receive high-quality, reliable service. And the benefits of infrastructure investment in creating jobs and strengthening the U.S. economy are unquestionable.

Indeed, Chairman Pai, Commissioner Clyburn, and Commissioner O’Rielly have all recognized the urgent need to build densified broadband networks and the critical importance of removing regulatory barriers obstructing that deployment:

- **Chairman Pai:** “Future 5G technologies will require ‘densification’ of wireless networks. That means providers are going to deploy hundreds of thousands of new antennas and cell sites, and they are going to deploy many more miles of fiber to carry all of this traffic. Without a paradigm shift in our nation’s approach to wireless siting and broadband deployment, our creaky regulatory approach is going to be the bottleneck that holds American consumers and businesses back.”²¹

¹⁸ CTIA May 23 Press Release.

¹⁹ *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021 White Paper*, CISCO (Feb. 9, 2017), <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/mobile-white-paper-c11-520862.html>.

²⁰ *Id.*

²¹ Remarks of FCC Commissioner Ajit Pai, Remarks at the Brandery: A Digital Empowerment Agenda Cincinnati, OH, at 2 (Sept. 13, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf; *see also* Remarks of FCC Chairman Ajit Pai at the Mobile World Congress, Barcelona, Spain, at 2 (Feb. 28, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0228/DOC-343646A1.pdf

- **Commissioner Clyburn:** “Lack of affordability remains one of the larger barriers to connected communities in this country. . . . Streamlining deployment is central to this effort. We must ensure that all providers are able to deploy and upgrade their infrastructure at the lowest cost and quickest pace.”²²
- **Commissioner O’Rielly:** “Standing in the way of progress . . . are some localities, Tribal governments and states seeking to extract enormous fees from providers and operating siting review processes that are not conducive to a quick and successful deployment schedule. At some point, the Commission may need to exert authority provided by Congress to preempt the activities of those delaying 5G deployment without justifiable reasons.”²³

By clarifying and modernizing the federal, state, local, and tribal infrastructure deployment requirements, the Commission can enable wireless providers to invest resources more quickly, thereby expediting connectivity, providing jobs to more Americans, and advancing the United States’ wireless leadership.

III. BARRIERS AT THE LOCAL LEVEL THREATEN THE RAPID DEPLOYMENT OF BROADBAND AND 5G.

Congress and the Commission have both sought to promote investment in broadband services because that investment clearly serves the public interest. In 2009, Congress directed

(stating “our 5G future will require a lot of infrastructure, given the ‘densification’ of 5G networks” and that “the key to realizing our 5G future is to set rules that will maximize investment in broadband. For if we don’t, the price could be steep. After all, networks don’t have to be built. Risks don’t have to be taken. Capital doesn’t have to be spent in the communications sector. And the more difficult government makes the business case for deployment, the less likely it is that broadband providers big and small will invest the billions of dollars needed to connect consumers with digital opportunity.”).

²² FCC Commissioner Mignon L. Clyburn, Keynote Remarks at the #Solutions2020 Policy Forum, Georgetown University Law Center, at 4 (Oct. 19, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341824A1.pdf.

²³ FCC Commissioner Michael O’Rielly, Statement Before the Senate Committee on Commerce, Science, and Transportation, Oversight of the Federal Communications Commission, at 1-2 (Sept. 15, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341263A1.pdf.

the Commission to evaluate actions to foster expanded broadband.²⁴ The resulting 2010 National Broadband Plan identified many actions that federal, state, and local government agencies should take, and specifically warned that barriers to ROWs were a clear threat to expanded broadband.²⁵ Increasing broadband's availability through expanded wireless infrastructure is particularly important for connecting low-income and minority Americans, because data show that these groups are particularly dependent on wireless devices and services.²⁶

Despite the clear national interest in promoting wireless broadband and 5G, many localities are erecting multiple barriers to wireless deployment. These barriers are proliferating. They comprise restrictions that prevent both new and upgraded infrastructure, and mandates that providers pay excessive up-front and perpetual permit fees. These regulations frustrate and deter the investment in wireless networks necessary to support wireless broadband and 5G by imposing unjustified delays and severe financial burdens on broadband providers. They also suppress new competition and the benefits it brings by deterring new entrants from building new facilities and offering competitive service.

²⁴ American Recovery and Reinvestment Act of 2008, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115 (2009).

²⁵ FCC, *Connecting America: The National Broadband Plan*, at 109 (2010), <http://transition.fcc.gov/national-broadband-plan.pdf> (“Securing rights to [ROWs] is often a difficult and time-consuming process that discourages private investment. . . . [G]overnment should take steps to improve utilization of existing infrastructure to ensure that network providers have easier access to poles, conduits, ducts and rights-of-way. . . . The cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands.”).

²⁶ Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CENTER (Apr. 1, 2015), http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf.

These concerns are borne out by the facts on the ground: Local ordinances and regulations are blocking or delaying broadband deployment, driving up providers' costs, and deterring investment. Although a wide variety of local practices are impeding deployment, the following are the most prevalent and warrant prompt Commission action.

Moratoria. Some localities have adopted siting moratoria that expressly prohibit any new wireless deployment in ROWs. Others have imposed *de facto* moratoria by declining to process applications to locate new wireless facilities or modify existing facilities, informing providers that new regulations governing small cells must first be adopted. Although localities claim that they need time to enact those new regulations, that claim does not justify the long or open-ended moratoria that CTIA's members are encountering. Moratoria unquestionably violate Section 253(a) because they constitute a total bar to a provider's construction of new facilities needed to provide service. Examples of these absolute barriers to wireless service include the following:

- An Illinois city has denied all permits to locate small cells along ROWs. Another city in that state is refusing to process permit applications until it can enact a new ordinance on small cells.
- A Florida county has a moratorium blocking all ROW installations. At the time of filing, CTIA is aware of at least 17 other city or county moratoria in Florida, with seven others pending.
- Two cities in Massachusetts have refused to act on any multiple small cell permit applications that have been pending for many months.
- A Texas city is refusing to allow any wireless facilities in ROWs.
- A New Jersey city requires a public bidding process to attach facilities to utility poles but has failed to seek bids for more than six months.

Restrictions on Deployment. Some jurisdictions require all telecommunications facilities to be placed underground. While undergrounding is feasible for wireline, it is

obviously not for wireless networks, which require over-the-air transmission. These ordinances thus operate as *de facto* prohibitions on wireless technologies that also discriminate against them. Undergrounding mandates are particularly arbitrary because all cities have poles in their ROWs that hold streetlights, traffic signals, and signage. Small cells can be installed on these poles without impeding the flow of traffic or pedestrians. In effect, these localities have unilaterally determined that they do not want new wireless facilities in their ROWs at all, thereby deterring the entry of new competitors and the expansion of the networks of existing providers.

Other jurisdictions impose severe restrictions on the locations and dimensions of new equipment. Although not absolute prohibitions like moratoria, these regulations block the provision of new service and impair the quality of existing service. As the Public Notice acknowledges,²⁷ small cells require dense deployments to provide sufficient capacity and coverage. And localities are imposing restrictions on how many small cells may be deployed and where, effectively prohibiting wireless providers from designing their networks for reliable, robust service. Others are imposing severe height limits that as a practical matter preclude deployment because the small cells cannot sufficiently cover an area at those low heights. Upgrades to antennas and supporting equipment such as batteries and electrical connections are frequently necessary. For example, a wireless provider replaces or modifies existing antennas when it needs to add new bandwidth to accommodate increasing traffic, or to operate on new radio frequencies that it has secured a license from the Commission to use. Additionally, a provider may need to upgrade fiber connections to transport ever-increasing volumes of traffic to and from small cell antennas, its core network, and the Internet.

²⁷ Public Notice at 13360.

But localities either restrict these upgrades, or require providers to pay additional fees, apply for more permits, and wait long periods for approvals. These regulations and practices are not based on a locality's legitimate interest in managing ROWs, for example, the safety of pedestrians or vehicles. Instead they illustrate how localities micromanage wireless investment in ways that deter and distort that investment. Examples of these barriers to deployment include the following:

- A California city refuses to allow any small cell installations on municipal infrastructure.
- Several California cities require providers to demonstrate gaps in service coverage as a condition of ROW access.
- One Florida city flatly prohibits any small cell installations on municipal light poles.
- A Florida city limits the number of small cell installations (regardless of the number of providers) to 13 sites in one square mile.
- Several Illinois jurisdictions impose minimum distance requirements of up to 1,000 feet between small cell installations, even when the installations serve different wireless providers.
- Other Illinois jurisdictions impose rigid height limits for poles supporting small cells of as short as 40 feet.

Excessive and/or Discriminatory ROW Fees. Numerous localities and state highway administrations are demanding exorbitant fees as a condition to access ROWs.²⁸ Localities often request multiple separate payments, including up-front application fees, recurring fees, and charges based on a percentage of the wireless provider's revenues. Recurring fees are particularly onerous and harm investment because they are typically imposed on each small cell or other facility the provider seeks to construct and must be paid every year. And, they are

²⁸ See *Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, at 16-19 (filed Nov. 15, 2016) (providing numerous examples of excessive fees); *see also* Public Notice at 13371-72.

typically escalated automatically each year without being tied to inflation indices such as the consumer price index, driving providers' costs even higher. Given that wireless providers often need to install dozens or even hundreds of small cell sites to provide sufficient coverage and capacity across a city, a fee on the order of \$1,000 per pole, which some of CTIA's members are being asked to pay, can quickly add up to hundreds of thousands of dollars per year, and over time can cost millions. But localities are demanding fees that are even higher. For example:

- One California city is demanding up to \$20,000 in annual ROW fees. Two other California cities charge ROW fees per pole of over \$1,000 per month and \$2,300 per month respectively.
- A Massachusetts city requires a \$5,000 up-front fee before it will negotiate an ROW use agreement. Another city in that state is demanding a \$6,000 per pole annual fee.
- A Minnesota city is demanding a \$6,000 annual per pole fee.
- An Oklahoma city charges more than \$2,500 per year per small cell.
- A Virginia city charges a one-time fee of \$5,000 for ROW access.
- A county in Washington state charges \$10,000 for an antenna array and \$3,000 for a single antenna per year.
- A company that holds a contract with New York to manage wireless facilities is demanding fees of \$9,000 per year for small cells.
- The New Jersey Department of Transportation is requesting \$37,000 per year per for each new facility located in state highway ROWs.
- The Virginia Department of Transportation charges \$24,000 per year for each new structure in state highway ROWs.

High per-site fees are especially detrimental to small cell deployments because they make installation cost-prohibitive. Wireless providers facing these fees must add them to the substantial up-front costs of purchasing and installing the equipment. But given that such fees far exceed expected revenues that would ordinarily come from deploying larger macrocell sites

serving far more subscribers, a deployment the provider would otherwise make becomes no longer financially viable, frustrating investment and new or improved service.

Revenues-based fees are improper for a different reason: They have nothing to do with the provider's use of a locality's streets, because instead they tax the carrier based on its gross revenues, not on the extent of its buildout. Two providers with equivalent revenues will pay the same fee, even though one has two sites and one has 200. And two providers with similarly-sized buildouts will pay widely different fees if one has many customers and the other has few. These fees are thus clearly not related to the locality's costs of managing the permitting process or the use of its streets. Localities requesting these fees are instead seeking to profit from their monopoly control of ROWs by leveraging wireless providers' growing need to access ROWs. Again, however, these fees can preclude small cell deployment by making investment in new infrastructure cost-prohibitive.

Local charges for accessing ROWs are often much higher than the fees paid previously by other ROW users, even for locating facilities on the same streets. For example, the price a city charges a wireless provider to install a new pole to hold small cell equipment is often many times higher than the price it charges a landline provider (if the landline provider is charged anything at all). Some localities also charge competing wireless providers different fees for constructing similar poles or attaching equipment on poles. For example, a Minnesota city negotiated a \$600 per pole annual fee with one provider but is now demanding annual fees of \$7,500-\$8,500 per pole from another – more than ten times higher. Those charges vastly exceed annual attachment fees under the Commission's cost-based, pole attachment rate. They also discriminate against new entrants, deterring investment and impeding the competition that such investment can generate. Moreover, they discriminate among technologies by forcing wireless

providers to pay more for ROW access than landline carriers. For example, charges for laying fiber can be far higher for wireless providers than for local exchange carriers, even though the disturbance to streets is identical.

Inconsistent Collocation Reviews. Although Section 6409(a) of the Spectrum Act and the Commission’s rules require localities to act on eligible requests to collocate facilities on a tower or structure with an existing approved antenna within 60 days or it will be deemed granted,²⁹ they do not apply to collocations on non-tower structures (including many 5G deployments) that lack an existing antenna. Instead, they are processed under the Commission’s 90-day Section 332 shot clock. This artificial distinction discourages the use of existing buildings and other non-tower structures that lack an antenna – the very infrastructure that may have space to support new small cell facilities – despite the clear preference for collocation where possible because of its minimal impact on the environment.³⁰

Unnecessarily Long Review Periods. The Commission adopted the 150-day and 90-day shot clocks more than seven years ago when macrocells were the norm, prior to the enactment of Section 6409(a) and well before the anticipated significant use of small cell deployments to support 5G.³¹ Even at the time they were adopted, evidence before the Commission showed that

²⁹ See Spectrum Act, § 6409(a), 47 U.S.C. §1455; 47 C.F.R. § 1.40001(c)(2), (c)(4); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12875, ¶ 21 (2014) (“*Wireless Infrastructure Order*”).

³⁰ See 47 C.F.R. § 1.1306 n. 1 (“The use of existing buildings, towers or corridors is an environmentally desirable alternative to the construction of new facilities and is encouraged.”).

³¹ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (“*Shot Clock Order*”), *aff’d sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013) (“*City of Arlington*”).

many states and localities took far less time to complete their reviews.³² This is even more so today. Moreover, Section 6409(a)'s "shall approve" mandate has eliminated many reviews, and the increasing use of less impactful small cells means more deployments should be easier to review. Yet, the shot clocks have not reflected these developments: An application to install a small cell on a building without an antenna is allowed to take *three months*, while an application to site a new 5G support pole is allowed to take *five months*. These processing times are simply not necessary or workable given the hundreds of thousands of anticipated new small cells.

Lengthy and Costly Court Remedy for Shot Clock Violations. Although siting requests covered by Section 6409(a) are deemed granted if not approved within 60 days, siting requests covered by the Section 332 shot clocks include no such remedy. Applicants facing inaction on requests to site facilities on existing non-tower structures without an antenna (processed under the 90-day shot clock) and requests for new support structures (processed under the 150-day shot clock) must instead await an uncertain outcome, abandon their applications, or seek court review at the end of the shot clock periods. This results in costly and time-consuming litigation that discourages investment in new facilities. The costs and delays associated with litigation are onerous enough for macrocell deployments. But when providers seek to deploy small cells, those costs and delays make deployment cost-prohibitive. Because individual small cells provide more limited coverage and thus generate less traffic and revenues, incurring the time and expense of litigating with localities for the right to deploy them is not an effective remedy.

³² *Shot Clock Order* at 14010-11, ¶ 43 (“[T]he City of Saint Paul, Minnesota has processed personal wireless service facility siting applications within 13 days, on average, since 2000.”); *id.* (“[T]he City of LaGrande, Oregon, has processed applications on average in 45 days in the last ten years.”).

Blocked or Delayed Access to Municipal Poles and ROWs. The problems above are magnified when localities refuse to act on applications to install facilities on municipal poles or ROWs, which are typically optimal locations for small cells. Some jurisdictions claim that granting access is a proprietary function not subject to Sections 253 or 332, and thus they can deny access at will, or condition it on providers' concessions to whatever terms, conditions, and payments the jurisdictions demand. The resulting patchwork of local mandates and restrictions further deters deployment.

IV. THE COMMISSION SHOULD INVOKE ITS AUTHORITY TO INTERPRET SECTION 253 AND REMOVE BARRIERS TO BROADBAND DEPLOYMENT.

A. A Declaratory Ruling Will Provide All Parties With Needed Guidance That Will Speed New Broadband Facilities.

Section 253 implements Congress' directive to avoid government overreach by prohibiting state or local laws or regulations that "may prohibit or have the effect of prohibiting" wireless or wireline services. Section 253's legislative history indicates that Congress intended its scope to be sweeping and to limit localities to managing their ROWs in ways that did not impede the statute's goals. Senator Gorton, who offered the language that ultimately became Section 253, emphasized that "the reach of this provision is broad," and Senator Feinstein noted that it should preserve localities' authority to supervise excavation work and to coordinate construction activities to protect unimpaired use of ROWs.³³ But the local regulations CTIA's members face go far beyond these limited management functions.

³³ 141 Cong. Rec. S8212 (June 13, 1995) (statement of Sen. Gorton) (stating that Section 253 is a "very, very broad prohibition against state and local" regulation); 141 Cong. Rec. S8170-71 (June 12, 1995) (statement of Sen. Feinstein).

Chairman Pai has noted correctly that Section 253 was intended to stop regulatory actions that stand in the way of new services, and that the Commission should use that provision to clear the path for investment in those services:

[T]he FCC must aggressively use its statutory authority to ensure that local governments don't stand in the way of broadband deployment. In section 253 of the Communications Act, for example, Congress gave the Commission the express authority to preempt any state or local regulation that prohibits or has the effect of prohibiting the ability of any entity to provide wired or wireless service. So where states or localities are imposing fees that are not "fair and reasonable" for access to local ROWs, the FCC should preempt them. Where local ordinances erect barriers to broadband deployment (especially as applied to new entrants), the FCC should eliminate them. And where local governments are not transparent about their application processes, the FCC should require some sunlight. These processes need to be public and streamlined.³⁴

Now is the time for the Commission to act. The proliferating regulatory barriers localities are erecting are directly impeding achievement of national policy goals. In the past, the Commission has addressed and on occasion struck down individual laws through its Section 253(d) preemption authority. But those decisions have been necessarily confined to the facts in a particular jurisdiction, such as the language of the law or its impact on particular wireless providers. The best way for the Commission to achieve the purpose of Section 253 and stop regulatory barriers threatening ubiquitous availability of wireless connectivity and 5G is to issue a declaratory ruling pursuant to Section 253 and applying it to remove those barriers.

The Commission has repeatedly interpreted the Communications Act through declaratory rulings because it has recognized the benefits in doing so.³⁵ It has well-settled authority, granted

³⁴ Remarks of FCC Commissioner Ajit Pai, Remarks at the Brandery: A Digital Empowerment Agenda, Cincinnati, OH, at 7 (Sept. 13, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf.

³⁵ See, e.g., *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act*, Declaratory Ruling, 26 FCC

by Congress under Section 5(d) of the Administrative Procedure Act, to issue declaratory rulings.³⁶ Courts have widely and frequently upheld this authority,³⁷ and also have acknowledged the Commission’s lead role in applying the Communications Act.³⁸ And, the Commission has adopted declaratory rulings specifically to promote broadband wireless deployment. For example, in 2009 the Commission issued a declaratory ruling interpreting Section 332(c)(7) of the Communications Act to impose “shot clocks” for local zoning action on wireless siting applications. That ruling was designed to “promote[] the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks.”³⁹

A Commission interpretation of the Communications Act will have nationwide application and thus will provide clarity and certainty to all providers and localities. It will

Rcd 8259, ¶ 1 (2011) (“*CRC Communications of Maine*”) (“[O]ur decision will provide clarity and guidance to incumbent local exchange carriers (LECs), competitive providers and state commissions about the rights and obligations regarding negotiation and arbitration under Section 251.”).

³⁶ 5 U.S.C. § 554(e) (stating that an “agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty”); 47 C.F.R. § 1.2(a) (“The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

³⁷ *Central Texas Cooperative, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) (“47 C.F.R § 1.2 [is] a provision giving the Commission the authority to issue declaratory orders. Section 1.2 refers to § 554(e) of the APA, which . . . is a subsection of the provision governing formal adjudication. . . . [T]here is some authority to the effect that the declaratory ruling provision in § 554(e) may be used in informal adjudication.”); *City of Arlington* at 241 (“Section 1.2 grants the FCC the power to issue declaratory orders and is derivative of § 554(e) of the APA”), *aff’d*, 133 S. Ct. 1863 (2013).

³⁸ *See, e.g., BellSouth v. Town of Palm Beach*, 252 F.3d 1169, 1188 n.1 (6th Cir. 2001) (“As the federal agency charged with implementing the Act, the FCC’s views on the interpretation of Section 253 warrant respect.”); *TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 152 (D.C. Cir. 1989).

³⁹ *Shot Clock Order* at 13994, ¶ 1.

prevent or resolve disputes that have delayed deployment and consumed the resources of all parties. And it will provide expert agency guidance to the federal courts when they adjudicate complaints brought under Section 253. CTIA urges the Commission to act as soon as possible. The sooner it acts, the sooner the benefits of its ruling in promoting the nation’s wireless policy objectives will flow. Specifically, it should adopt a declaratory ruling that interprets Section 253 in four respects, as detailed below.

B. Laws Effectively Prohibit Service if They Limit Providers From Competing in a Fair and Balanced Regulatory Environment.

In one of its first rulings interpreting Section 253(a), the 1997 *California Payphone* decision, the Commission declared that a law “may prohibit or have the effect of prohibiting” service if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁴⁰ That ruling correctly implemented Congress’ objective in Section 253 and its overall goals in the 1996 Telecommunications Act to “promote competition and reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies.”⁴¹ The Commission relied on *California Payphone* in several other decisions.⁴² However, it has not reaffirmed that seminal decision recently, and several courts have adopted a conflicting, incorrectly narrow reading of

⁴⁰ *California Payphone Association Petition for Preemption of Ordinance No. 576NS of the City of Huntington Park, California*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14195, 14206 (1997) (“*California Payphone*”).

⁴¹ Telecommunications Act of 1996, Preamble, Pub. L. 104-104, 110 Stat. 56 (1996); *see also* 47 U.S.C. § 1302 (noting that the Commission should take actions to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”).

⁴² *Public Utilities Comm’n of Texas Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utilities Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997); *TCI Cablevision of Oakland City*, Memorandum Opinion and Order, 12 FCC Rcd 21396 (1997).

Section 253(a), creating uncertainty as to providers' and localities' respective rights and obligations. Given the harmful impact of that uncertainty on the national policy goals of expediting wireless broadband deployment, the Commission should explicitly reaffirm *California Payphone*.

While some laws such as moratoria or undergrounding ordinances physically block wireless broadband deployment and thus expressly violate Section 253(a), others more indirectly deter deployment by imposing requirements or charges that make it cost-prohibitive or at least more economically difficult for new or existing providers to offer service.⁴³ That harmful impact is particularly acute because wireless broadband will require massive investment in hundreds of thousands of small cells, plus innumerable miles of fiber or other network connections using ROWs to support small cells and connect them to core networks. Local regulations and fees that increase the already substantial burden of this investment inevitably discourage it. And, where regulatory burdens and costs are high, investment will simply not happen. This is why both express prohibitions on deployment, as well as regulations and fees that deter deployment, undermine the 1996 Telecommunications Act's purposes. And this is why *California Payphone* held that Section 253(a) prohibited both.

The First, Second, and Tenth Circuits have followed *California Payphone* in adjudicating complaints of violations of Section 253(a).⁴⁴ The Tenth Circuit, for example, struck down a local ordinance that resulted in high rental fees for ROWs use, finding that a regulation "need not

⁴³ In particular, and as discussed in Section III.E, *infra*, ROW charges that exceed a locality's incremental costs to issue permits and manage the ROW prohibit service in violation of Section 253(a) by limiting providers' ability to compete in a fair and balanced regulatory environment.

⁴⁴ See, e.g., *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006) (invalidating revenues-based fee for use of ROWs because of the "strain" the fee would have on the provider's provision of service).

erect an absolute barrier to entry in order to be found prohibitive.”⁴⁵ The Eighth and Ninth Circuits, however, deviated from the Commission’s interpretation, finding that regulations (such as high franchise fees) that did not specifically prohibit construction of new facilities complied with Section 253(a).⁴⁶ In response to providers’ petitions for certiorari of the Eighth and Ninth Circuit decisions, the Commission and the Solicitor General filed a joint brief that criticized the narrow approach those courts took:

Portions of the Ninth Circuit’s decision . . . could be read to suggest that a Section 253 plaintiff must show effective preclusion – rather than simply material interference – in order to prevail. . . . Limiting the preemptive reach of Section 253(a) to legal requirements that completely preclude entry would frustrate the policy of open competition Section 253 was intended to promote.⁴⁷

They nonetheless urged the Supreme Court to decline certiorari because the two courts had approvingly cited *California Payphone* and because the Commission could address any lack of uniformity through declaratory rulings. The Supreme Court denied certiorari, but the Commission has not issued a ruling to address the uncertainty that several court decisions have created as to the proper scope of Section 253(a).

The Commission has adopted declaratory rulings in other contexts precisely to resolve that type of confusion and “provide clarity and guidance” to affected parties and the courts.⁴⁸ It should adopt such a ruling on Section 253(a) that reaffirms *California Payphone* and reiterates

⁴⁵ *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004) (approving *California Payphone*’s standard for applying Section 253(a) and invalidating city’s ROWs fee); *see also RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268-69 (10th Cir. 2000) (stating that a regulation need not be “insurmountable” in order to conflict with Section 253(a)).

⁴⁶ *See, e.g., Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008).

⁴⁷ Brief of the United States as *Amicus Curiae*, *Level 3 Communications, L.L.C. v. City of St. Louis et al.*, 557 U.S. 935 (2009) (No. 08-626).

⁴⁸ *CRC Communications of Maine* at 8259, ¶ 1.

that a law is prohibited if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁴⁹ It should expressly reject the interpretations by some courts that have much more narrowly construed Section 253(a) to apply only to an absolute prohibition on service. The Commission clearly has the authority to take this action, which will merely reaffirm its prior ruling,⁵⁰ and it should do so promptly to fulfill the language and achieve the purpose of Section 253(a).⁵¹

C. Moratoria Unlawfully Prohibit Deployment.

There can be no more absolute prohibition than moratoria because they block deployment altogether and thus unquestionably violate Section 253(a). *De facto* moratoria, where localities simply fail to act to grant permits for wireless facilities, are equally pernicious because they have the same practical impact. Although localities often argue that they need time to develop comprehensive regulations governing deployment, that argument does not justify moratoria. Section 253(a) does not allow prohibitions that may end at some future date; it does not countenance *any* prohibition. There is also no reason why localities cannot process and grant applications for individual sites at the same time they seek to develop a broader policy.

⁴⁹ *California Payphone* at 14191, 14206.

⁵⁰ The Supreme Court has held that courts must defer to an agency’s interpretation under the *Chevron* framework even when the agency’s construction contradicts pre-existing case law. “[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute ... would allow a court's interpretation to override an agency's.” *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005), *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

⁵¹ Commentators have also urged the Commission to reaffirm the *California Payphone* test for when a regulation violates Section 253(a), noting that this action is needed to resolve the uncertainty resulting from disparate court rulings and to promote new services and competition. *See, e.g.,* Thomas W. Snyder & William Fitzsimmons, *Putting a Price on Dirt: The Need for Better Defined Limits on Government Fees for Use of the Public Right-of-Way Under Section 253 of the Telecommunications Act of 1996*, 64 FED. COMM. L. J. 137 (2011).

The Commission briefly addressed moratoria in its 2014 *Wireless Infrastructure Order*, finding that they undermine Section 332(c)(7)'s objective to foster the rapid deployment of wireless facilities. It thus held that moratoria do not toll the running of the shot clocks and that “any moratorium that results in a delay of more than 90 days for a collocation application or 150 days for any other application will be presumptively unreasonable.”⁵² It declined to rule that moratoria extending longer than the shot clock periods were *per se* unlawful because of its prior determination that Section 332(c)(7) granted courts the authority to rule on whether a locality had unreasonably delayed action. However, this case-by-case approach has created uncertainty as to the legality of moratoria. In any event, the *Wireless Infrastructure Order* did not address the legality of moratoria under Section 253(a). That provision is broader than Section 332 because it flatly outlaws any regulations that may prohibit or have the effect of prohibiting service. That is precisely what moratoria do. The Commission should thus declare that express moratoria and *de facto* moratoria that effectively preclude a locality from approving permits to place new or wireless facilities or modifications to existing facilities in ROWs violate Section 253(a).

D. Undergrounding Ordinances and Laws That Restrict Upgrades Also Unlawfully Prohibit Deployment.

Requirements that all communications facilities be placed underground violate Section 253(a) because wireless facilities of course must be located above ground. Neither the language nor the legislative history of Section 253 authorizes localities to restrict deployment in this way. Congress intended to preserve localities' authority to impose “time, place and manner” regulation to “manage” deployment – not bar it entirely. At least one federal circuit court of

⁵² *Wireless Infrastructure Order* at 12972, ¶ 267.

appeals has agreed that undergrounding ordinances “effectively prohibit” deployment.⁵³

Undergrounding ordinances also unlawfully discriminate among telecommunications technologies because, while wireline services can still be provided even if they must be buried in conduits, wireless cannot. For this reason they also do not fit within Section 253(c), which provides that, while localities can adopt ROWs regulations, those regulations must be “competitively neutral and nondiscriminatory.”

There is also no valid policy rationale for localities to prohibit wireless infrastructure as part of their undergrounding policies. Even in areas where utility lines must be undergrounded, streetlights and traffic light or signal control poles remain in place. Small cells can be attached to those existing poles and connected to networks through either microwave transmitters or underground fiber without adding any overhead wires. In short, small cells impose no additional disturbance of the ROWs.

Some localities also prevent or restrict providers from upgrading their infrastructure in ROWs by modifying or replacing wireless facilities and associated equipment. These regulations also conflict with Section 253(a) and undermine its purpose. Telecommunications networks are not static but instead must continuously evolve to accommodate changes in wireless technologies. For example, upgrades to wireless facilities are often necessary to utilize new spectrum resources that the provider has obtained and to provide enhanced capacity to handle growing traffic. A wireless provider may also need to replace or supplement existing backhaul infrastructure to, for example, add fiber to augment existing microwave-based

⁵³ In *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008), which concerned the legality of a franchise fee, the court identified undergrounding as problematic under Section 253(a): “If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services.”

backhaul. Local laws and regulations that impede providers from making these upgrades effectively block their deployment of upgraded services. CTIA does not ask the Commission to prohibit localities from adopting reasonable regulations for review and approval of upgrades, just as they may have regulations for new facilities. But the Commission should declare that Section 253(a) makes it unlawful for localities to prevent or impede upgrades altogether.

E. Section 253(c) Does Not Permit Rights-of-Way Charges That Exceed a Locality's Incremental Costs to Issue Permits and Manage Rights-of-Way and/or That Discriminate Among Providers.

Section 253(c) allows localities to impose charges that constitute “fair and reasonable compensation.” Localities can, for example, recoup their costs to review and issue siting permits, to supervise the installation of small cells, fiber and other facilities that impact the ROWs, and to ensure those facilities are properly maintained. The Commission should, however, declare that (1) Section 253(c) does not allow cities to profit from providers’ need for ROW access and raise revenues to spend for other purposes, and (2) ROW permit and other fees that exceed a municipality’s actual costs constitute an economic barrier under Section 253(a).⁵⁴ This ruling is particularly important now because, although localities control the supply of access to ROWs, demand will grow as wireless providers confront the need to build many more facilities to accommodate exponentially-growing traffic, incenting some localities to demand even higher prices for access. By ruling that a locality’s charges for access to ROWs that exceed its incremental costs to issue permits and manage its ROWs do not fit within Section 253(c) or 253(a), the Commission will ensure that localities can be fully compensated for their costs

⁵⁴ See, *supra*, Section IV.B.

related to issuing permits and managing their ROWs, while also ensuring that providers do not face exorbitant fees that would suppress broadband deployment.⁵⁵

The language and legislative history of Section 253(c) both support this interpretation. Congress' choice of the term "compensation" is significant because "compensation" denotes a payment that makes a party whole by recouping its expenses.⁵⁶ The legislative history also indicates that localities' right to recover "fair and reasonable compensation" was intended to mean fees that are related to a locality's costs. Senator Feinstein discussed the need to ensure that localities could assess fees "to cover the costs of reviewing plans and inspecting excavation work" and "to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation."⁵⁷ Nowhere does the legislative history indicate that Congress was giving a blank check to localities to use their control over ROWs to generate as much money as the "market" would bear.⁵⁸

A number of courts have concluded that "fair and reasonable compensation" limits fees qualifying under Section 253(c) to those that are based on the locality's costs, and have

⁵⁵ Indeed, although localities may assess revenues-based franchise fees on cable operators, wireless attachments do not occupy rights-of-way on the same scale that cable operators necessitate to serve the same communities. An individual wireless provider's revenues are not a measure of a locality's costs.

⁵⁶ "Compensation" connotes payment that recoups an expense or outlay, not an ability to profit by collecting as much revenue as possible. *See* Black's Online Dictionary (2d ed.) (defining "compensation" as "indemnification; payment of damages; making amends; that which is necessary to restore an injured party to his former position. An act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person indemnified may receive equal value for his loss, or be made whole in respect of his Injury.").

⁵⁷ 141 Cong. Rec. S8170 (June 12, 1995) (statement of Sen. Feinstein); *see also* 141 Cong. Rec. S8212 (June 13, 1995) (statement of Sen. Gorton) (stating that Section 253 is a "very, very broad prohibition against state and local" regulation).

⁵⁸ Indeed, CTIA submits that no "market" exists for access to municipal rights-of-way.

invalidated revenues-based fees.⁵⁹ Several have pointed out that any other reading would remove any meaningful limits on what cities could charge. For example, in *Bell Atlantic-Maryland, Inc. v. Prince George's County*, a district court rejected the county's requirement that a provider pay a charge set at three percent of its gross revenues. The court explained its reasoning as follows:

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

. . . If local governments were permitted under Section 253(c) to charge franchise fees that were unrelated either to a telecommunications company's use of the public rights-of-way or to a local government's costs of maintaining and improving its rights-of-way, then local governments could effectively thwart the [1996 Telecom Act's] pro-competition mandate and make a nullity

⁵⁹ See, e.g., *PECO Energy Company v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409, *24 (E.D. Pa. 1999) ("Revenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of-way."); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1100 (N.D. Ca. 2001) ("Fees charged against telecommunications carriers must be directly related to the carrier's actual use of the local ROWs."); *N.J. Payphone Ass'n Inc. v. Town of West York*, 130 F. Supp. 2d 631, 637-8 (D.N.J. 2001) ("*N.J. Payphone*"), *aff'd*, 299 F.3d 235 (3d Cir. 2002) (stating that "fair and reasonable compensation" is limited to "recoupment of costs directly incurred through the use of the public rights-of-way. . . . A fee that does more than make a municipality whole is not compensatory in the literal sense."); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 113-14 (D.P.R. 2005) (locality failed to prove that right-of-way fee complied with Section 253(c); "Absent evidence of costs the Court cannot determine whether the Ordinance results in fair and reasonable compensation as opposed to monopolistic pricing."), *aff'd*, 450 F.3d 9 (1st Cir. 2006).

out of Section 253(a). Congress could not have intended such a result.⁶⁰

Similarly, in *XO Missouri, Inc. v. City of Maryland Heights*, the Eastern District of Missouri held that fees based on providers' revenues are not permitted by Section 253(c):

The Court adopts the reasoning supporting other courts' decisions that revenue-based fees are impermissible under the [1996 Telecom Act]. *Thus, to meet the definition of "fair and reasonable compensation" a fee charged by a municipality must be directly related to the actual costs incurred by the municipality when a telecommunications provider makes use of the rights-of-way. . . [P]lainly a fee that does more than make a municipality whole is not compensatory in the literal sense, and instead risks becoming an economic barrier to entry.*⁶¹

A few courts, however, have adopted a broader interpretation of Section 253(c) by allowing other factors in addition to the locality's costs to manage ROWs access. In *TCG Detroit v. City of Dearborn*, for example, the Sixth Circuit approved a gross revenue fee after examining the extent of the use contemplated, the amount other telecommunications providers would be willing to pay, and the impact on the profitability of the business to determine whether a fee scheme is fair and reasonable."⁶² Another court has noted the varying approaches to determining when a right-of-way fee is fair and reasonable:

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

⁶⁰ *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 817 (D. Md. 1999), *vacated on other grounds*, *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 212 F. 3d 863 (4th Cir. 2000) (emphasis added).

⁶¹ *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 994 (E.D. Mo. 2003) (emphasis added).

⁶² *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (2000); *see also City of Portland, Oregon v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1074-75 (D. Or. 2005).

municipalities to recoupment of costs directly incurred through the use of the public right-of-way.⁶³

The courts' different approaches, coupled with wireless providers' growing need to locate facilities along ROWs, make Commission guidance essential. It should declare that to fit within Section 253(c), ROW access and use charges must be based on localities' incremental costs to review and approve siting permits and to manage the ROWs. Put another way, localities can recoup the costs they incurred due solely to the wireless facilities. This ruling will provide more certainty to localities and wireless providers nationwide as to what fees are permissible, and thereby head off disputes that might otherwise land in court. It also will ensure that localities can fully recoup their costs to review and process permit applications and to oversee the installation and maintenance of wireless facilities, while stopping the practice of profiting through high fees – a practice that Section 253(c) does not authorize. And most importantly, it will remove a major obstacle to new entrants and existing providers that are ready to invest in new infrastructure to meet Americans' rapidly growing dependence on wireless connectivity.

For these same reasons, the Commission should declare that fees that charge a provider a certain percentage of its revenues, or that are based on the market value of adjacent property, are clearly not based on the locality's costs of managing its rights -of -way; they do not even relate to those costs. These fees are not “fair and reasonable compensation” – they are transparent efforts to generate as much revenue as possible from the public's growing demand for wireless broadband.

⁶³ *N.J. Payphone* at 637-38; *see also Qwest Corporation v. City of Santa Fe*, 380 F.3d 1258, 1272-73 (10th Cir. 2004) (striking down local ROWs access fee, but noting that courts were split on whether fees must be cost-based or could include other factors).

Section 253(c) also provides that ROW charges must be “competitively neutral and nondiscriminatory.” Fees that vary depending on the provider are by definition neither neutral nor nondiscriminatory. Thus, for example, if a locality charges a particular up-front permit fee and/or a recurring rental fee on a wireline company to install and maintain a pole, higher fees on a wireless company to deploy a pole to support its own service would not qualify under Section 253(c). By declaring that Section 253(c) does not authorize such discriminatory pricing, the Commission will promote technological neutrality and foster essential broadband deployment.

V. THE COMMISSION SHOULD FURTHER INTERPRET SECTION 332 TO ADDRESS UNREASONABLE SITING DELAYS AND MORE EFFECTIVELY STREAMLINE SITING.

The Public Notice recognizes that “the successful deployment of wireless networks depends in large part on how quickly providers are able to obtain the necessary regulatory approvals.”⁶⁴ The Commission’s adoption of the Section 332(c)(7) shot clocks in 2009 helped to expedite wireless deployment. But the shot clocks do not reflect the evolution of the industry toward small cells and the evidence that localities can complete reviews more quickly, which warrant modifying the time lines that are now more than seven years old. In addition, the wireless industry’s experience with seeking to enforce the shot clocks has demonstrated that they should be modified to enhance their effectiveness.

The Public Notice asks whether the Commission should modify the shot clocks and/or take other actions to speed deployment. It correctly observes that the shot clocks “may be longer than necessary and reasonable to review a small cell siting request,” because “small cells may have less potential for aesthetic and other impacts than macrocells.”⁶⁵ CTIA agrees and urges

⁶⁴ Public Notice at 13364.

⁶⁵ *Id.* at 13371.

the Commission to shorten the shot clock periods. Issues with the current shot clocks, however, go beyond the fact that they do not reflect the trend toward small cells. The Commission should take further action. As detailed below, it should also (1) remove the disparate time periods that apply to similar facilities; (2) expand the deemed granted remedy; and (3) clarify that the shot clocks apply to wireless facilities placed in the ROWs or on municipally-owned poles and other structures in those ROWs.

A. The Commission Should Interpret Section 332 to Include a 60-Day Shot Clock for Collocations Not Covered by Section 6409(a).

The Commission should interpret Section 332(c)(7) to adopt a 60-day shot clock for collocations on non-tower structures that would otherwise be covered by Section 6409(a) but for the absence of an existing approved antenna. This will resolve the problem that the current shot clocks discourage the use of an entire class of otherwise 5G-eligible structures.

The Commission currently applies a 60-day shot clock to collocations covered by Section 6409(a), *i.e.*, collocations on towers or structures with existing approved antennas that do not result in a substantial change to the underlying structure.⁶⁶ But left out are similar requests to collocate on structures without an existing approved antenna, which are processed instead under the longer 90-day Section 332(c)(7) shot clock. This discrepancy needlessly subjects requests to site new 5G-enabling small cells on existing poles and other non-tower structures without antennas to processing times one-third longer than other similarly-situated small cell installation

⁶⁶ Section 6409(a) provides, in part, that states and localities “shall approve” a collocation request on “an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” The Commission adopted a 60-day shot clock to implement the “shall approve” mandate, and interpreted “base station” as “a structure that currently supports or houses an antenna, transceiver, or other associated equipment” that “ha[s] been reviewed and approved under the applicable local zoning or siting process.” *See Wireless Infrastructure Order* ¶¶ 172-74, 216; 47 C.F.R. § 1.40001.

requests. The net result is to discourage use of some of the very structures that are ideal for new 5G deployments precisely because they do not already have an existing approved antenna.

The Commission should eliminate this discordant treatment by adopting a new 60-day shot clock for non-substantial collocations not covered by Section 6409(a).⁶⁷ By definition, Section 6409(a) collocation requests are non-substantial,⁶⁸ and the proposed rule would merely apply the same 60-day processing period to similar collocations on non-tower structures that lack an existing approved antenna. These small collocations do not require 90 days to review; indeed, states already process similar collocation requests in even less time. For example, both New Hampshire and Wisconsin have adopted 45-day review periods for non-substantial collocations on existing towers, buildings, or other structures, regardless of whether the structure already supports an existing antenna.⁶⁹ This change will subject all similar collocation requests to the same processing times. And, it will encourage use of existing infrastructure which, because it lacks an existing antenna, may be more likely to have space to support a new deployment.

⁶⁷ Likewise, as discussed below, the Commission should add a deemed granted rule to its Section 332 shot clocks to further align the Section 6409(a) and Section 332 shot clocks.

⁶⁸ See 47 C.F.R. § 1.40001(a).

⁶⁹ See N.H. REV. STAT. ANN. § 12-K:10(II) (“The [reviewing] authority, within 45 calendar days of receiving a collocation application or modification application, shall [m]ake its final decision to approve or disapprove the collocation application or modification application”); *id.* § 12-K:2(X) (“‘Collocation’ means the placement or installation of new [personal wireless service facilities, or PWSFs] on existing towers or mounts, including electrical transmission towers and water towers, as well as existing buildings and other structures capable of structurally supporting the attachment of PWSFs in compliance with applicable codes. ‘Collocation’ does not include a ‘substantial modification.’”); WIS. STAT. § 66.0404(3)(c) (“Within 45 days of its receipt of a complete [Class 2 collocation] application, a political subdivision shall [m]ake a final decision whether to approve or disapprove the application.”); *id.* § 66.0404(1)(e) (a “Class 2 collocation” is “the placement of a new mobile service facility on an existing support structure such that the owner of the facility does not need to ... engage in substantial modification”); *id.* § 66.0404(1)(t) (a “support structure” is “an existing or new structure that supports or can support a mobile service facility, including a mobile service support structure, utility pole, water tower, building, or other structure”).

The Commission has ample authority to interpret Section 332(c)(7) to add a new 60-day shot clock for collocations on non-tower structures that would otherwise be covered by Section 6409(a) but for the absence of an existing approved antenna. Section 332(c)(7) directs states and localities to act on any request to place, construct, or modify personal wireless service facilities “within a reasonable period of time,”⁷⁰ and both the Fifth Circuit and the Supreme Court have upheld the Commission’s authority to adopt shot clocks specifying what is a reasonable period of time to act under 332(c)(7).⁷¹ As the Supreme Court explained, “Congress has unambiguously vested the Commission with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation [of what is a presumptively ‘reasonable period of time’ under Section 332(c)(7)(B)(ii)] was promulgated in the exercise of that authority.”⁷² The Commission should exercise that authority here.

B. The Commission Should Tighten and True Up the Shot Clocks Between Section 332(c)(7) and Section 6409(a).

The Commission should also exercise its authority to determine what is a presumptively reasonable period of time to act under Section 332(c)(7) by adjusting the existing shot clocks to account for current market realities. Specifically, the existing 150-day review period for new wireless sites or substantial modifications should be shortened to **90 days**, and the existing 90-day review period for collocations should be shortened to **60 days**.⁷³ Section 332(c)(7) gives the Commission discretion to determine what is a “reasonable period of time” for a locality to act on

⁷⁰ 47 U.S.C. § 332(c)(7)(B)(ii).

⁷¹ *See City of Arlington*.

⁷² *City of Arlington* at 1874; *see Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

⁷³ If the Commission revises its Section 332(c)(7) shot clock to provide for 60-day review for all non-substantial collocations, then the relief described in Part IV(A) of these comments would be unnecessary.

a siting application,⁷⁴ and the Commission can modify its interpretation of a term in the Communications Act based on changed facts as long as it provides a reasoned explanation.⁷⁵ Here, 90-day and 60-day review periods are warranted.

First, state and local processes support tightened shot clocks. The Commission has already recognized that jurisdictions can take less time to review wireless siting applications than the current shot clocks prescribe – with some taking as little as 75 days or less to review new facilities or major modifications, and as little as 14 days or less to complete the review of collocation applications.⁷⁶ A number of state statutes already require the processing of complete non-collocation/substantial modification applications in 90 days or less, and collocation applications in 60 days or less. For example, Michigan requires non-collocation applications to be reviewed within 90 days,⁷⁷ as does Virginia,⁷⁸ while Minnesota and Kentucky impose 60-day deadlines to process non-collocation or new tower applications.⁷⁹ Likewise Minnesota requires collocation applications to be processed within 60 days,⁸⁰ and in Michigan certain collocations

⁷⁴ See *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013).

⁷⁵ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁷⁶ See *Shot Clock Order* at 14010-11, ¶ 43; see also *id.* (“[T]he City of Saint Paul, Minnesota has processed personal wireless service facility siting applications within 13 days, on average, since 2000.”); *id.* (“[T]he City of LaGrande, Oregon, has processed applications on average in 45 days in the last ten years.”).

⁷⁷ MICH. COMP. LAWS SERV. § 125.3514(8).

⁷⁸ See VA. CODE ANN. § 15.2-2232(F). Virginia requires any application for a telecommunications facility to be processed in 90 days.

⁷⁹ See MINN. STAT. § 15.99, Subd. 2(a) (requiring non-collocation applications to be processed within 60 days); KY. REV. STAT. § 100.987(4)(c) (requiring new tower applications to be processed in 60 days).

⁸⁰ MINN. STAT. § 15.99, Subd. 2(a). Minnesota requires any zoning application, including both collocation and non-collocation applications, to be processed in 60 days. See *id.*; *Shot Clock Order* at 14012, ¶ 47 (citing MINN. STAT. § 15.99).

are also subject to a 60-day review period while others are exempt from approval altogether.⁸¹ And Florida requires completed collocation applications to be processed in 45 business days,⁸² while New Hampshire and Wisconsin require processing in only 45 calendar days.⁸³ These examples show that processing siting applications within the tighter time frames proposed herein is reasonable.

In addition, given localities' extensive experience and the increasing shift toward smaller facilities, siting reviews can be completed more quickly than when the Commission determined seven years ago that 150 and 90 days were presumptively reasonable. Unlike in 2009 when the current shot clocks were established for macrocells, many new sites today are for small cells that have far less visual and other impact and take less time to review. And although larger macrocells and towers remain important parts of today's networks, the increasing shift toward smaller deployments – coupled with the fact that Section 6409(a)'s "shall approve" mandate eliminates the need for localities to evaluate many collocation requests – frees up resources that can reduce processing times overall. For example, many small cells will need to be housed on new poles because existing poles are not sufficiently tall, do not provide needed coverage, or cannot support the extra load. The current 150-day (five-month) shot clock is an unreasonably long period of time given the minimal visual impact of these small cells and associated poles.

⁸¹ MICH. COMP. LAWS SERV. § 125.3514(1)-(6).

⁸² FLA. STAT. ANN. § 365.172(13)(d)(1)-(2).

⁸³ See N.H. REV. STAT. ANN. § 12-K:10; *id.* § 12-K:2; WIS. STAT. §§ 66.0404(3)(c); 66.0404(1)(e); 66.0404(1)(t).

C. The Commission Should Adopt a “Deemed Granted” Remedy for its 332(c)(7) Shot Clocks.

The Commission should revise its Section 332(c)(7) shot clocks to adopt a “deemed granted” remedy for those applications not covered by Section 6409(a). Although applications covered by Section 6409(a) are deemed granted if not approved within 60 days,⁸⁴ the Section 332(c)(7) shot clocks currently require only that applications be acted on within the established presumptively reasonable time frames or the applicant may go to court.⁸⁵ The Commission should revise its rules to eliminate this discrepancy going forward. As Chairman Pai has explained:

[T]he FCC has already established a shot clock within which local governments are supposed to review wireless infrastructure applications. But if a city doesn’t process the application in that timeframe, a company’s only remedy is to file a lawsuit. We should give our shot clock some teeth by adopting a “deemed-grant” remedy, so that a city’s inaction lets that company proceed.⁸⁶

In the absence of a deemed granted rule, localities can and do run the Section 332(c)(7) shot clocks out and fail to act. This forces applicants to decide whether to litigate, involving considerable time and expense,⁸⁷ or continue to pursue the application with an uncertain time frame for action. Even if an applicant decides to expend the funds and litigate, it risks future ill will by taking the jurisdiction to court. The net results are potentially long, multi-year delays and

⁸⁴ 47 C.F.R. § 1.40001(c)(2), (c)(4).

⁸⁵ *Shot Clock Order* ¶¶ 39, 45; *see also Wireless Infrastructure Order* at 12978, ¶ 284.

⁸⁶ Remarks of FCC Commissioner Ajit Pai at CCA’s 2016 Annual Convention, Seattle, WA, at 2 (Sept. 21, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341365A1.pdf.

⁸⁷ Indeed, courts have ignored Section 332(c)(7)(B)(v)’s direction that they “hear and decide” actions “on an expedited basis.” As the Supreme Court has noted, for example, the district court in one case did not act on respondent’s complaint until 16 months after filing, notwithstanding Section 332(c)(7)(B)(v). *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 118 (2005) (“*Abrams*”).

substantially increased costs, which frustrate building the densified networks needed for broadband and, soon, 5G.

Crown Castle v. Greenburgh is a prime example.⁸⁸ There, Crown Castle first sought authority to install a distributed antenna system (“DAS”) in 2009 and requested processing within the Section 332(c)(7) shot clock timeframes. But it was not until nearly three years later, after multiple applications, questions and responses, revisions, town board proceedings, and a public hearing – what the court called a “ping-pong match” – that the town ultimately acted and denied the applications. Only after Crown Castle brought suit to challenge the denial did a district court direct issuance of the permits – nearly four years after authority was first requested – and the Second Circuit later affirmed.⁸⁹ This costly four-year effort to improve service and enhance competition would have been avoided under a deemed granted rule. Thus, adding a deemed granted rule is critical to ensuring that states and localities act within the prescribed timelines for *all* siting applications, regardless of whether they are covered by Section 332 or Section 6409(a). Doing so will also reduce costly and time-consuming litigation, allowing resources to be used to invest in, rather than litigate, the expansion of broadband deployment.

The Commission has ample authority to apply a deemed granted rule to applications not covered by Section 6409(a) when jurisdictions fail to act. The Commission may adopt a deemed granted rule using its broad authority to adopt rules to carry out the objectives of the Communications Act,⁹⁰ and to facilitate broadband deployment under the Telecommunications

⁸⁸ See *Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 U.S. Dist. LEXIS 93699 (S.D.N.Y. 2013) (“*Greenburgh*”), *aff’d*, 552 Fed. Appx. 47 (2d Cir. 2014).

⁸⁹ 552 Fed. Appx. 47 (2d Cir. 2014).

⁹⁰ See 47 U.S.C. §§ 154(i), 201(b), 303(r); see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (“[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act.’”).

Act.⁹¹ In particular, the Commission may use its authority to implement Section 332(c)(7), which provides that states and localities must act on siting requests “within reasonable period of time” and that applicants are aggrieved when there has been a “failure to act.”

The Commission’s authority to adopt a rule implementing Section 332(c)(7) that may have the effect of overriding local or state law was squarely confirmed by the Supreme Court in *City of Arlington*. There, the Supreme Court rejected the claim that the statute, by preserving local authority over zoning, denied the Commission authority to implement Section 332(c)(7) through establishment of the presumptively reasonable time for action by local zoning authorities. The fact that the Commission’s ruling appeared to impinge on a matter of traditional local concern was found to be “faux-federalism,” because Section 332(c)(7) “explicitly supplants state authority” by requiring decisions under local law to be made within a reasonable period of time.⁹² Consistent with that ruling, adopting a deemed granted approach to address “failure[s] to act” on siting applications within “a reasonable period of time” falls well within the Commission’s interpretive authority under Section 332(c)(7).⁹³

Accordingly, the Commission should revisit its prior decisions not to apply a deemed granted rule to applications when jurisdictions fail to act.⁹⁴ Much has changed since 2009 when the Commission initially declined to adopt a deemed granted rule, and even since 2014 when the

⁹¹ 47 U.S.C. § 1302(a); *Verizon v. FCC*, 740 F.3d 623, 641 (D.C. Cir. 2014) (agreeing that the Commission has the authority under Section 706(b) of the Telecommunications Act “to take steps to accelerate broadband deployment if and when it determines that such deployment is not ‘reasonable and timely’”).

⁹² *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1873 (2013).

⁹³ *Id.* at 1874-75 (courts must defer to a reasonable interpretation by the agency as long as the agency does not overstep the lines drawn by Congress and “the agency’s answer is based on a permissible construction of the statute”).

⁹⁴ *See Shot Clock Order* at 14009, ¶ 39; *Wireless Infrastructure Order* at 12978, ¶ 284.

Commission last examined the issue. It is now clear following the *City of Arlington* case that the Commission is authorized to adopt rulings to enforce Section 332(c)(7). And the need for hundreds of thousands of small cells mean that case-by-case court review in cases where localities fail to act is no longer a viable option.

The text of Section 332 supports a ruling that the remedy that section provides is not exclusive.⁹⁵ Section 332(c)(7)(B)(v) provides only that a party aggrieved “may” commence action in court, not that it “must” do so. Indeed, the Commission has adopted a “deemed granted” remedy in analogous circumstances when it implemented Section 621(a)(1) of the Communications Act, which prohibits franchising authorities from unreasonably refusing to award competitive cable franchises.⁹⁶ That section provides that an applicant whose application for a competitive franchise is denied “may” appeal, but the Commission still adopted a deemed granted rule: If a local cable franchising authority has not made a final decision on a franchise application within a specified period, the authority will be deemed to have granted the applicant an interim franchise until it delivers a final decision.⁹⁷ As the Commission there explained, “[i]n

⁹⁵ See *Abrams* at 122. Although the Supreme Court has held that the expedited court remedy in Section 332(c)(7)(b)(v) precludes other inconsistent judicial remedies (like requests for damages and attorney’s fees under 42 U.S.C. § 1983), *see id.*, neither the Court nor the statute itself precludes other forms of relief. Moreover, there is a savings clause included in Communications Act providing that “[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.” 47 U.S.C. § 414; *see also Jones v. RCC Atl., Inc.*, 2009 U.S. Dist. LEXIS 1858, at *9 (D. Vt. 2009) (“[T]his Court finds Congress did not ... intend that § 332 provide an exclusive remedy.”).

⁹⁶ 47 U.S.C. § 541(a)(1).

⁹⁷ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶¶ 4, 54, 62, 68-73, 77-78 (2007), *pet. for rev. denied sub nom. Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009); *see also id.* at 5140, ¶ 80 (noting that “the deemed grant approach is consistent with other federal regulations designed to address inaction on the part of a State decision maker”) (citing examples).

selecting this [deemed granted] remedy, we seek to provide a meaningful incentive for local franchising authorities to abide by the deadlines contained in this Order while at the same time maintaining [local] authority to manage rights-of-way.”⁹⁸

D. The Commission Should Clarify That Its Shot Clocks Apply to Municipal Poles and Rights-of-Way.

Finally, the Commission should declare that its shot clocks apply to requests to install wireless facilities on municipal poles or in municipal ROWs. As discussed above, some municipalities take the position that they are acting in a “proprietary” rather than a regulatory capacity in processing such requests, and therefore the shot clocks do not apply. The Commission should declare that these periods *do* apply to these facilities requests. This is a significant issue because many localities are failing to act on these requests and have no legal incentive to do so in the absence of clarity about whether granting access to public poles and ROWs is a regulatory function. A Commission ruling that the shot clocks apply will provide that incentive.⁹⁹

Section 332(c)(7) proscribes certain state and local “regulation” that can impede the timely siting of personal wireless facilities, but some courts have held that Section 332(c)(7) does not apply when localities act in their “proprietary” capacity.¹⁰⁰ The Commission cited this

⁹⁸ *Id.* at 5138, ¶ 76.

⁹⁹ Although Section 224 does not extend protections designed to ensure reasonable and timely access to utility-owned infrastructure to municipal poles and ROWs, *see* 47 U.S.C. § 224(a)(1); *Implementation of Section 224*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5243 n.14 (2011) (explaining that Section 224 “exempts poles owned by municipalities, cooperatives, and non-utilities”), Section 332(c)(7) includes no such exclusion for municipal poles and ROWs. *See* 47 U.S.C. § 332(c)(7). This indicates Congress intended two distinct approaches as between the separate sections.

¹⁰⁰ *See Omnipoint Commc’ns., Inc. v. City of Huntington Beach*, 738 F.3d 192, 200-01 (9th Cir. 2013) (“*Huntington*”).

principle in 2014 but declined to elaborate on how it would apply to particular circumstances.¹⁰¹ Courts have not squarely addressed whether local management of ROWs access is a proprietary or regulatory function. Commission action is needed to make clear that action on a request to site wireless facilities on municipal or other public poles or ROWs is a *regulatory*, rather than a proprietary, function and is subject to the shot clocks.

At least two courts have indicated that access to public poles and ROWs implicates *regulatory* functions. In *NextG v. New York*,¹⁰² the Southern District of New York considered whether the city's two-year delay and refusal to grant access to poles in public ROWs absent a costly franchise violated Section 253 of the Communications Act which, similar to Section 332, bars state and local regulatory action which has the effect of prohibiting communications.¹⁰³ NextG argued that light poles and public ROWs are "held by the City in trust for the public," and that requests to access those public resources is something "substantially different from seeking to lease space in a City-owned building." The court agreed and held that the city's actions "are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy."¹⁰⁴

Crown Castle v. Greenburgh, discussed above, also highlights the need for regulatory relief to curb unreasonable delays in access to poles and ROWs. In that case, the town ignored

¹⁰¹ See *Wireless Infrastructure Order* at 12964-65, ¶¶ 239-40.

¹⁰² *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063 (S.D.N.Y. 2004) ("*NextG*").

¹⁰³ Section 332, *inter alia*, proscribes state or local regulation that prohibits (or has the effect or prohibiting) personal wireless services, whereas Section 253, *inter alia*, proscribes any regulation that prohibits (or has the effect of prohibiting) telecommunications services. Compare 47 U.S.C. § 253 with *id.* § 332(c)(7).

¹⁰⁴ *NextG*, 2004 U.S. Dist. LEXIS 25063 at *16-*18. The court ultimately declined to grant injunctive relief, however, finding irreparable harm had not been established. See *id.* at *28-*30.

the shot clocks and took nearly three years to finally act and deny a request to deploy a DAS system.¹⁰⁵ Crown Castle challenged the denial in court, contending that it violated Section 322(c)(7)'s obligations to process the application "within a reasonable period" and be supported "by substantial evidence." The court ultimately found the timing issue was moot because a decision had issued, but the delay influenced its finding that the decision was not supported by substantial evidence. The court thus found that Section 322(c)(7) *does* apply to requests to install facilities on public poles and ROWs, even though the shot clock issue itself was rendered moot.

In other instances, however, courts have found actions to be proprietary, rather than regulatory. In *Omnipoint v. Huntington*, for example, the Ninth Circuit held that a city's decision to require a company to obtain voter approval before licensing an antenna in a city-owned park was proprietary, and therefore was not preempted by Section 332.¹⁰⁶ Conversely, a New Hampshire district court held in *Sprint Spectrum v. Durham* that a request for permission to locate a wireless facility at a town landfill *is* subject to Section 332.¹⁰⁷ There, the court found that Section 332 "does not allow local governments to shield themselves from acts which violate the [statute] by characterizing those actions as taken pursuant to a town's proprietary functions."¹⁰⁸

The Commission should resolve this issue by specifying by rule that both the Section 332(c)(7) shot clocks, as well as the Section 6409(a) shot clock, *do* apply to requests to site

¹⁰⁵ *Greenburgh*, 2013 U.S. Dist. LEXIS 93699 at *6-*8.

¹⁰⁶ *Huntington*, 738 F.3d at 200-01.

¹⁰⁷ *Sprint Spectrum L.P. v. Town of Durham*, 1998 U.S. Dist. LEXIS 23941, *1, *18-*20 (D.N.H. 1998) ("*Durham*").

¹⁰⁸ *Id.* at *19-*20.

wireless facilities on municipal poles and in municipal ROWs. Municipal poles and ROWs are public property intended to serve as the locations for public services. In such circumstances, municipal oversight serves a regulatory, rather than a proprietary, function as indicated in *NextG*, and therefore Sections 332(c)(7) and 6409(a) – and the shot clocks that implement them – apply. In fact, localities have detailed laws, ordinances, and rules dealing with ROW access, confirming that localities managing ROWs are not acting as private landowners. Moreover, nothing in either statute exempts applications to site wireless facilities on municipal pole or ROWs sites.¹⁰⁹ Failure to adopt the requested rule will allow potentially multi-year delays like those suffered in *NextG* and *Greenburgh* to continue in the absence of clear and consistent guidance from the Commission.

As discussed above, the Commission has ample authority to interpret Section 332(c)(7)¹¹⁰ as well as Section 6409(a).¹¹¹ As Chairman Pai has noted, “Congress clearly and specifically granted the Commission the power to remove barriers to infrastructure deployment.”¹¹² The Commission should exercise this authority to declare that its shot clocks apply to requests to site facilities on municipal poles and ROWs.

¹⁰⁹ *Cf. Durham*, 1998 U.S. Dist. LEXIS 23941 at *19-*20.

¹¹⁰ *See City of Arlington*, 133 S. Ct. at 1866-75 (affirming FCC authority to interpret what is a “reasonable period of time” for a state or local government to “act on any request for authorization to place, construct, or modify personal wireless service facilities” for purposes of Section 332(c)(7)).

¹¹¹ *See Montgomery County v. FCC*, 811 F.3d 121, 126-33 (4th Cir. 2015) (affirming FCC authority to interpret requirement that a state or local government “may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station” that does involve a substantial change).

¹¹² Remarks of FCC Commissioner Ajit Pai at the CTIA Wireless Foundation Smart Cities Expo, Washington, D.C., at 2 (Nov. 2, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-342032A1.pdf.

VI. THE COMMISSION SHOULD DECLARE THAT THE DEPLOYMENT OF SMALL CELLS DOES NOT CONSTITUTE A MAJOR FEDERAL ACTION OR AN UNDERTAKING.

Finally, the Commission should determine that the deployment of small cells is neither a “major federal action” under the National Environmental Policy Act (“NEPA”) nor a “federal undertaking” under the National Historic Preservation Act (“NHPA”). This ruling will directly promote the objectives of this proceeding – to speed the deployment of broadband and reduce deployment costs – because it will obviate the need for the Commission and wireless providers to follow the complex procedures that apply to major federal actions and undertakings. It will also conserve the resources of the Commission, state and tribal preservation offices, and wireless providers.

This determination is also supported by the applicable statutes. “Major federal actions” and “undertakings” are defined to occur when the government finances, authorizes, or licenses the construction of facilities or other projects.¹¹³ But the government does not assist in the funding of small cell deployments. And, because wireless providers hold geographic licenses that do not require Commission approval and licensing of individual small cell sites, there is no licensing process for particular facilities. Nor is the government involved in the applicants’ determination of where to affix small cells, which often do not involve construction of new towers and, instead, utilize existing structures. In short, there is no “action” that the Commission undertakes for a small cell outside of the current NEPA and/or NHPA process, and this is the case whether the small cell is installed on an existing or a new structure. Funding, licensing, or approvals are the triggers for agency actions to potentially constitute a major federal action or a

¹¹³ See 40 C.F.R. § 1508.8; 16 U.S.C. § 470w(7) (defining undertaking to include a project or activity under the jurisdiction of a Federal agency “requiring a federal permit, license, or approval.”).

federal undertaking, but those triggers do not occur specifically to the placement of small cells. Accordingly, given the lack of federal involvement in small cell deployments, the Commission can properly find they are not major federal actions or undertakings and thus fall outside the scope of NEPA and NHPA.

In considering how to approach small cells and DAS, the Commission wisely categorically excluded them from certain reviews, but declined to find that such deployments are not “undertakings.”¹¹⁴ This conclusion was based on a flawed reading of the statute and should be reexamined. The agency noted that “while the Commission has generally waived the requirement of preconstruction approval for geographic-area licensees, as permitted by Section 319(d), the Commission has also retained authority under Section 1.1312 of the Commission’s rules to review the environmental effect of all ‘facilities,’ including their effects on historic properties.”¹¹⁵ The statutory language, however, does not reach general claims of “retained authority”; it specifically applies to those actions that “require a federal permit, license, or approval.” The agency properly determined as a general matter that there is no public interest benefit in conducting site-by-site review of each facility subject to a geographic license. One result of this determination is that no “federal permit, license, or approval” is required to construct a small cell site. The agency should stick to the plain language of the statute and find that small cell deployments are not “undertakings” under federal law. Such an approach is most faithful to the goals of Congress and will expedite the deployment of unobtrusive small cells that are critical to next-generation communications services.

¹¹⁴ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd 14238, ¶ 25 (2013).

¹¹⁵ *Wireless Infrastructure Order*, 29 FCC Rcd 12865, 12915, ¶ 84.

Should the Commission decline to determine that small cell deployments are not federal “undertakings,” it should, at a minimum, conclude that small cells and DAS have no potential to affect tribal or historic preservation or have a significant environmental impact and should thus be excluded from those reviews. Such a finding would be consistent with prior, related Commission findings, reflect the lack of impact or *de minimus* impact of DAS and small cell facilities, preserve tribal, historic preservation, and environmental resources for reviewing those deployments that may be more likely to have an impact, and speed buildout of wireless networks.

VII. CONCLUSION.

CTIA urges the Commission to act quickly to remove regulatory barriers to wireless infrastructure deployment that have the effect of slowing, or outright prohibiting, the delivery of mobile wireless services to consumers. Adopting the recommendations discussed herein will fully respect the prerogatives of localities to oversee the deployment of small cells and other wireless facilities and to manage their ROWs while expediting and modernizing the infrastructure siting requirements and promoting the massive broadband investment that is

needed to provide all Americans with advanced, ubiquitous, and high-quality wireless networks and services.

Respectfully submitted,

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**Before The
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Washington, D.C. 20554**

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

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

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

REPLY COMMENTS OF CTIA

CTIA respectfully submits these reply comments on actions the Commission should take to promote and streamline wireless broadband deployment.¹ The record confirms CTIA’s concern that multiple local regulatory barriers are stalling or outright blocking critically needed new infrastructure. The record supports prompt, decisive and comprehensive Commission actions to remove those barriers.²

I. INTRODUCTION AND SUMMARY.

The initial comments show both an urgent need and a clear legal basis to remove regulatory barriers to wireless siting. While some jurisdictions process siting applications in a timely manner and impose reasonable fees, the record contains numerous examples of the many obstacles that are impeding the expansion of wireless networks. These examples provide compelling grounds for the Commission to interpret Sections 253 and 332 of the Communications Act to identify and remove those barriers. Prompt Commission action will

¹ *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360 (2016) (“Public Notice”). Comments cited herein were filed on or about March 8, 2017 in WT Docket No. 16-421.

² CTIA similarly appreciates that the Commission is preparing to consider two additional rulemakings to further modernize its wireless and wireline infrastructure policies. CTIA looks forward to meaningfully participating in those proceedings.

jumpstart substantial new investment in the infrastructure that is urgently needed to meet the nation's growing reliance on wireless broadband and other services – \$275 billion in the next seven years according to one recent report by Accenture Strategy.³ Moreover, the record establishes that the Commission has ample statutory authority to act. It should:

- Reaffirm its longstanding interpretation that Section 253(a) prohibits any law, regulation or practice that “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” The Commission should remove uncertainty caused by a few inconsistent court rulings and confirm its test for determining when a regulation is a “substantial barrier” and thus is unlawful.
- Give practical impact to that interpretation and provide needed guidance to courts, wireless providers, and localities by declaring that Section 253(a) at a minimum prohibits (1) express moratoria on the processing of facility applications or the installation of wireless facilities in rights of way (“ROWS”); (2) *de facto* moratoria that block deployment; (3) undergrounding requirements; (4) prohibitions on technology upgrades and/or new poles in ROWs; (5) subjective aesthetic requirements with unfettered ability to reject siting requests; (6) excessive or discriminatory fees; and (7) zoning processes that are applied to wireless facilities but not to other ROW users.
- Declare that a locality's charges for access to ROWs under Section 253(c) must be cost-based and limited to the actual and direct costs associated with application processing and ROW management.⁴
- Declare that regardless of the absolute level of these charges, if they are higher than charges imposed on other ROW users, they unlawfully discriminate among providers and thus separately violate Section 253(c).⁵

³ See *How 5G Can Help Municipalities Become Vibrant Smart Cities*, ACCENTURE STRATEGY, at 1 (Jan. 12, 2017), <http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf> (“Accenture Report”), attached to Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-421 (filed Jan. 13, 2017).

⁴ Globalstar Comments at 14; Lightower Fiber Networks Comments at 27, 29; Mobile Future Comments at 6; Mobilitie Comments at 17; Sprint Comments at 33, 36-37; WIA Comments at 69; AT&T Comments at 17.

⁵ See WIA Comments at 2.

- Declare that Section 253(c) also requires localities to disclose the fees they have charged ROW users.⁶
- Interpret Section 332(c)(7) to include a new 60-day shot clock for collocations on structures not covered by Section 6409(a) solely because there is no preexisting antenna or, alternatively, interpret Section 6409(a) to cover eligible collocations on structures without a preexisting antenna.
- Exercise authority under Section 332(c)(7) to adopt shorter shot clocks for localities to act on all new site and collocation permit applications. The unreasonable delays associated with zoning review should be reduced given the increasing deployment of small cells, which should involve much simpler and faster reviews.
- Declare that Section 332(c)(7) prohibits requirements that a carrier must prove a coverage gap or other business need as a condition for processing and granting a siting application.⁷
- Adopt a “deemed granted” remedy for the Section 332(c)(7) shot clocks. The statute and the record support adoption of this remedy, which will speed deployment while fully protecting the interests of localities in managing those deployments.⁸
- Declare that Section 332 applies to siting applications that seek to use ROWs and municipal-owned poles in those ROWs, because localities act in their regulatory capacity when managing ROWs.⁹
- Exclude small wireless facilities from National Environmental Policy Act (“NEPA”) and National Historic Preservation Act (“NHPA”) reviews.¹⁰

Numerous localities and organizations representing them flatly oppose Commission action, but they fail to present any credible arguments to substantiate the status quo. The weakness of their comments starkly contrasts with the overwhelming evidence of numerous

⁶ Section 253(c) provides that states may require telecommunications providers “fair and reasonable compensation” for ROW access, provided such charges are levied on a “competitively neutral basis” and are “publicly disclosed.” 47 C.F.R. § 253(c); *see also* Comments of Conterra Broadband Services and Uniti Fiber at 23; Lighttower Fiber Networks Comments at 27, 29.

⁷ Mobile Future Comments at 3-4; Mobilitie Comments at 12-13, 18; T-Mobile Comments at 20.

⁸ A number of jurisdictions have already adopted this approach. *See, e.g.*, Kenton County Mayors Group Comments at 1; Lighttower Fiber Networks Comments at 13; San Francisco, CA Comments at 26.

⁹ *See, e.g.*, CCA Comments at 12; T-Mobile Comments at 30-31; Verizon Comments at 30-31.

¹⁰ *See, e.g.*, CCA Comments at 35-37; CTIA Comments at 47; NTCH Comments at 1, 7; NTCA Comments at 5; Sprint Comments at 44, 47-48; T-Mobile Comments at 36-37.

barriers, long delays, and exorbitant fees that are frustrating investment in new infrastructure. Some deny a problem exists because the industry has successfully deployed many cell towers.¹¹ They miss the point that, as the Public Notice recognizes, the critical need now is for *additional* facilities that are densely-spaced small cells. In any event, the many examples of long delays, excessive charges, and outright refusals to approve new facilities undercut arguments that the Commission need not act.

Other opponents argue that providers are asking the Commission to preempt their authority to supervise ROW and impose rigid “one-size-fits-all” rules that dictate ROW management and set fees.¹² To the contrary, the proposals put forward by CTIA and others would not wrest control of ROWs away from localities, but would provide guideposts to determine when state or local regulations or fees violate the Communications Act. And others argue that the Commission lacks authority to act, and that localities can set whatever ROW access terms and prices they want.¹³ But their position directly conflicts with Sections 253 and 332, which explicitly limit localities’ authority to restrict ROW access, impose excessive fees, and regulate the installation of wireless facilities.¹⁴

The record is clear: swift, definitive Commission action is needed to remove multiple obstacles that are standing in the way of the national priority for ubiquitous, advanced wireless services that will benefit all Americans.

¹¹ See, e.g., Austin, TX Comments at 5.

¹² See, e.g., Virginia Department of Transportation Comments at 11; Austin, TX Comments at 3; Columbia, SC Comments at 12-13.

¹³ See Cities of Coral Gables, Coral Springs, Gainesville, Tallahassee, Tampa, and Winter Haven; Towns of Gulf Stream and Pembroke Park; Florida Association of Counties, Inc.; Florida League of Cities, Inc. (“Florida Coalition of Local Governments”) Comments at 10.

¹⁴ See 47 U.S.C. §§ 252, 332.

II. THE RECORD CONFIRMS THAT NEW WIRELESS INFRASTRUCTURE IS NEEDED – BUT THAT NUMEROUS LOCAL BARRIERS ARE IMPEDING IT.

A. New Investment Nationwide in Wireless Networks is Essential to Meet the Public’s Exploding Demand for Wireless Services, and Will Generate Substantial Economic Benefits.

The record bears out the Public Notice’s observation that promoting investment in broadband services directly serves the public interest. Parties document the economic, social, and other benefits broadband delivers – benefits that will grow even larger when 5G is introduced.¹⁵ The record also demonstrates a direct link between the availability of broadband services and ROW access.¹⁶ Without that access, advanced wireless services will be delayed or not offered at all.¹⁷

Groups representing minorities note that increasing broadband’s availability is particularly important for connecting low-income and minority Americans because data show that these groups are particularly dependent on wireless devices and services.¹⁸ As highlighted by the U.S. Black Chambers, “no longer considered a luxury, wireless broadband has become a lifeline,” and a crucial part of economic opportunity and success for individuals and

¹⁵ ITIF Comments at 2; Tech Freedom Comments at 3-4; Verizon Comments at 1-2; T-Mobile Comments at 10-11.

¹⁶ ITIF Comments at 1-2. Indeed, the Commission has recognized this in the past, noting in a 2011 infrastructure Notice of Inquiry that “[p]ublic rights of way are especially critical to the deployment of communications facilities due to their widespread availability and efficiency for use in deploying communications networks. . . . The limited alternatives that exist for the placement of communications networks are often less efficient or have other drawbacks.” *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, 26 FCC Rcd 5384, 5386, n.9 (2011).

¹⁷ WISPA Comments at 2-3 (“[U]nnecessary regulations and obstacles by State and municipal governments delay the ability of Americans to receive fast Internet service and force Internet providers to spend money that could have otherwise been spent deploying next-generation technologies.”).

¹⁸ U.S. Black Chambers Comments at 1; Latino Coalition Comments at 1-2.

businesses.¹⁹ Further delays of broadband deployment caused by municipalities will delay the closure of the digital divide.²⁰ The U.S. Black Chambers and the Latino Coalition²¹ urge the Commission to act to lower any barriers that stand in the way of robust broadband investment.

The benefits of broadband investment to the economy are also clear. CTIA submitted into the record of this proceeding a report by Accenture that quantifies the economic benefits of 5G, concluding that “this next generation of wireless technology is expected to create 3 million new jobs and boost annual GDP by \$500 billion, driven by a projected \$275 billion investment from telecom operators.”²² These benefits will be brought to large and small cities alike.

B. The Record Reveals Numerous Barriers Impairing That Investment.

In its Public Notice, the Commission sought data on three potential types of barriers: (1) laws, rules or practices that block or deter deployment; (2) delays in acting on permits and other required authorizations; and (3) fees.²³ The record contains substantial data on all three and supplies ample grounds for the Commission to interpret Sections 253 and 332 to remove these barriers.

Some localities process siting applications promptly and do not impose high fees. CTIA commends these localities for partnering with industry to promote broadband deployment and the benefits it brings to their citizens. But these localities stand in sharp contrast to the many other localities that *are* imposing obstacles. Moreover, the fact that some localities work with

¹⁹ U.S. Black Chambers Comments at 1.

²⁰ *Id.*

²¹ U.S. Black Chambers Comments at 1; Latino Coalition Comments at 1-2.

²² Accenture Report at 1.

²³ Mobilite Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way*, WT Docket No. 16-421 (Nov. 15, 2016).

carriers to deploy new facilities underscores that the Commission can and should take actions that align with these localities' practices. For example, the fact that many localities process ROW permits in less than 60 days provides a metric for adjusting the shot clocks.²⁴

Some parties assert there is no need for the Commission to act because wireless facilities are already extensively deployed.²⁵ These parties ignore the imperatives that require many *additional* facilities nationwide, including the skyrocketing demand for broadband and, with the use of high-band spectrum, the need for more densely packed cell sites. The network deployment build of 5G will involve 10 to 100 times more antenna locations than 4G or 3G.²⁶ As the Accenture Report shows, localities that obstruct new deployment cost their citizens jobs and cost their economies the benefits of significant capital investment, which will flow elsewhere.²⁷ Although localities may believe they may be serving the public interest of their communities by attempting to collect additional revenues in the short term, they are disadvantaging consumers for years to come. Every commenting service provider documents how it is being prevented from deploying needed new facilities.

Other localities wrongly assert that it is reasonable for them to enact moratoria on new facilities in ROWs or to impose practices that block new facilities because they need time to adopt new policies governing ROW access. But the wireless industry's need for and interest in deploying small cells in ROWs is hardly new; these deployments have been occurring for several

²⁴ Kenton County Mayors Group Comments at 7; T-Mobile Comments at 24 (citing Minn. Stat. § 15.99(2)(a); Fla. Stat. § 365.172(13)(d)(1); N.H. Rev. Stat. Ann. § 12-K:10; Wis. Stat. § 66.0404(3)(c); S.B. 1282, 2017 Sess. (Va. 2017).

²⁵ *See, e.g.*, San Francisco, CA Comments; *see also* Austin, TX Comments (“The reality in Austin is that more than 175 macro cell towers and 70 macrocell placements on facilities have been deployed.”).

²⁶ Accenture Report at 1.

²⁷ *Id.* at 1, 13-15.

years. Moreover, NATOA and other organizations representing localities, as well as CTIA, have held programs, webinars, and other events to discuss small cell technologies and the need for ROW access.²⁸ No city can legitimately claim it has had insufficient time to adopt procedures. This is an invalid excuse for inaction.

C. Certain Local Laws and Practices Are Blocking Deployment.

Parties identify dozens of local regulatory barriers, in the form of laws, regulations, or practices, which either expressly prohibit or have the effect of prohibiting new service and thus violate Section 253(a).

- **Express moratoria.** The record identifies laws that expressly prohibit new wireless deployments for long and in many cases indefinite time periods.²⁹
- **De facto moratoria.** Other localities may not have enacted ordinances that put new deployments on hold, but in practice they are not considering new siting applications. These *de facto* moratoria equally block deployment.³⁰
- **Undergrounding ordinances.** Some jurisdictions require all telecom facilities to be placed underground.³¹ This is impossible for wireless networks, which require over-the-air transmission. These ordinances thus operate as effective prohibitions that are also unlawful because they discriminate against wireless technologies.³²
- **Prohibitions on network expansion.** Some jurisdictions prevent wireless infrastructure providers and carriers from upgrading their existing equipment to accommodate new spectrum technologies or impose severe restrictions on the dimensions of new equipment, which has the same practical impact as outright bans on new sites. Others impose unreasonable and unbounded aesthetic

²⁸ See, e.g., Public Notice, FCC and NATOA Announce Workshop on DAS / Small Cell Deployment (Mar. 25, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DA-16-315A1.pdf.

²⁹ Mobilite Comments at 10-11.

³⁰ Lightower Fiber Networks Comments at 10; Mobile Future Comments at 3-4; Mobilite Comments at 11-12 (for example, some localities have ceased processing siting applications until the FCC's proceeding and/or state legislatures have acted).

³¹ See, e.g., Westleigh Community Comments at 1-4.

³² CTIA Comments at 26-27; Sprint Comments at 20-21; WIA Comments at 70; Verizon Comments at Appendix A; AT&T Comments at 10-11 (citing *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008)).

requirements and retain complete discretion to deny a facility based on a subjective determination of visual impact.³³

These obstacles are not merely slowing necessary infrastructure investment or making it more expensive – they are outright blocking it. These are precisely the types of regulatory barriers that Congress acted to prohibit.

D. Some Localities Impose Lengthy and Unjustified Delays.

The record also contains numerous examples of the long time periods that many localities take to authorize wireless facilities in ROWs.³⁴ Given the much smaller dimensions of small cells and the frequent use of existing structures to hold them, small cell siting should be much faster, but it is often slower. Many providers point out that a major source of delay is the requirement many localities impose that the provider enter into a franchise or other license agreement as a prerequisite to filing individual site applications.³⁵ While these agreements impose multiple requirements and fees on the provider, they do not grant it a right to build anything at all. This agreement process adds an entire layer of bureaucracy on locating facilities in ROWs. Even after it secures a franchise or license agreement, the provider must then file individual permit applications – each of which requires extensive time to process and may incur delays – with no assurance that the locality will grant any particular application.

Commenters show that some localities add yet another bureaucratic obstacle – zoning review – to this already lengthy process, even though no other ROW occupants had to secure

³³ CTIA Comments at 12-14; AT&T Comments at 4, 15-16; Crown Castle Comments at 12-13; CCA Comments at 29-30 (one city in Virginia requires antennas with dimensions exceeding 1400 square inches to obtain special approval, which can sometimes require two public hearings).

³⁴ Sprint Comments at 28-30; Verizon Comments at Appendix A; WIA Comments at 5-6.

³⁵ Sprint Comments at 29-30 (explaining, there are some cities that require a franchise agreement before considering applications, but then will not negotiate the terms of a franchise agreement); T-Mobile Comments at 6-7.

zoning approval for their new poles or installations.³⁶ According to ExteNet, during a period of two years, “41 percent of the communities applied to by ExteNet demanded that ExteNet’s applications be subject to some form of discretionary review, with 36 of the 41 communities requiring ExteNet to go through formal zoning.”³⁷ Furthermore, many of these communities “demand[ed] that any installation that involves an antenna, even in the public rights of way, must go through zoning.”³⁸

Lastly, parties also explain that the current Commission shot clocks are often ineffective because if the locality fails to act, the carrier’s remedy is to file suit, which only begins what can be an interminable period of litigation. According to Lightower Fiber Networks, as of the day its comments were filed, it had 190 siting applications that were pending for 475 days on average.³⁹

Multiple and overlapping franchising, zoning, and permitting requirements force wireless providers to undergo long, burdensome, and expensive reviews. The fact that other ROW occupants often are not subjected to such multiple requirements creates a competitive disparity that further underscores why Commission action is essential.

E. Some Localities Charge Excessive and Discriminatory Fees.

Commenters also supplied extensive, detailed evidence of the high fees that localities demand as a condition to allowing ROW access.⁴⁰ The amount of ROW fees varies

³⁶ See ExteNet Systems Comments at 7-8; AT&T Comments at 23; Verizon Comments at 18-19.

³⁷ ExteNet Systems Comments at 7.

³⁸ *Id.*

³⁹ Lightower Fiber Networks Comments at 3 (Furthermore, “[i]n 12 of the 46 municipalities exceeding 150 days in their consideration of Lightower’s deployment request, representing 101 small cells, more than a year has passed. In five of these 46 jurisdictions, representing 34 pending small cells, Lightower has spent more than two years trying to gain approval.”).

⁴⁰ Crown Castle Comments at 11-14; CTIA Comments at 14; AT&T Comments at 21; Sprint Comments at 25-26; CCA Comments at 16.

tremendously across localities, even among localities in the same state or area, which strongly suggests that the higher fees are not tied to the localities' costs.⁴¹ The data reveal that a number of localities are aggressively demanding the highest possible fees⁴² and view ROW access as an opportunity to raise revenues. Providers also submitted data showing that fees imposed for small cell facilities are higher than the fees that were charged other ROW users.⁴³ This disparity underscores that many ROW fees are not being set based on localities' costs but rather on what they can collect. The outcome is that carriers are forced to make an unfortunate choice: "pay excessive rates (thus reducing the number of facilities the carrier can deploy), delay deployment while attempting to negotiate a fair rate, or abandon plans to locate small facilities in the jurisdiction altogether."⁴⁴

III. THE COMMISSION SHOULD AFFIRM ITS INTERPRETATION OF SECTION 253 AND APPLY THAT INTERPRETATION TO SPECIFIC PRACTICES THAT IMPEDE WIRELESS DEPLOYMENT.

There is broad agreement among small and large wireless providers and infrastructure providers that the Commission should issue a declaratory ruling interpreting Section 253 to

⁴¹ WIA Comments at 19; Tech Freedom Comments at 5; Conterra Broadband Services and Uniti Fiber Comments at 19-20.

⁴² Verizon Comments at Appendix; Crown Castle Comments at 11-14 (different jurisdictions across the same state have dramatically different fees; in negotiations to renew a ten-year-old license, one city has proposed a 2100% increase in fees); CTIA Comments at 14; AT&T Comments at 21; Sprint Comments at 25-26; CCA Comments at 16.

⁴³ Crown Castle Comments at 14 ("Many other jurisdictions discriminate against right-of-way small cell installations while permitting infrastructure for other utilities in the same zones."); Verizon Comments at 8-10, Appendix; Conterra Broadband Services and Uniti Fiber Comments at 8; 21-22 ("[I]t is common to encounter schemes requiring that CFPs pay double what incumbents pay for the same access to right-of-way."); WISPA Comments at 7-8.

⁴⁴ Verizon Comments at 9.

streamline wireless siting.⁴⁵ The record demonstrates the multiple benefits such a ruling would have in promoting the Act’s objectives, setting consistent nationwide policy, and eliminating uncertainty and disputes that are frustrating investment in needed wireless infrastructure. Importantly, no locality or group representing localities challenged the Commission’s authority to issue a declaratory ruling to interpret the Act to achieve these objectives.

First, the Commission should reaffirm its longstanding interpretation that Section 253(a) prohibits governmental actions that materially limit a provider’s ability to compete, and also confirm that Section 253(a) applies to wireless providers. Second, it should specifically identify as barred under Section 253 those practices that the record shows are effectively prohibiting new service. Third, it should reject the invalid argument that localities have an unfettered right to set the terms and prices for granting access to ROWs for wireless facilities.

A. The Commission Should Prohibit Actions that Materially Limit a Provider’s Ability to Compete.

The Commission should reaffirm its longstanding interpretation of Section 253(a) in *California Payphones* and declare that Section 253(a) prohibits any law, regulation, or practice that “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁴⁶ It should further declare that a law, regulation or practice “materially inhibits or limits” a carrier’s ability to compete if it imposes a “substantial barrier” to deployment.⁴⁷

⁴⁵ WIA Comments at 1; AT&T Comments at 4-5; Conterra Broadband Services and Uniti Fiber Comments at 15-16; Sprint Comments at 13.

⁴⁶ CTIA Comments at 22 & n.40 (citing *California Payphone Association Petition for Preemption of Ordinance No. 576NS of the City of Huntington Park, California*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14195, 14206 (1997) (“*California Payphone*”)).

⁴⁷ *Id.*

Parties show that some courts have interpreted Section 253(a) too narrowly by holding that the challenged regulation must actually prohibit service to be unlawful, while other courts have ruled that the determinative issue is whether the effect of the regulation is to deter service. The Commission should remove the uncertainty created by these decisions and confirm its test for determining when a regulation is an unlawful barrier. That test is fully anchored in Section 253(a)'s language and purpose.

The “materially inhibit/substantial barrier” standard supplies a meaningful but flexible standard for resolving future siting issues. The Commission cannot anticipate every local action that may violate Section 253(a). But with this standard in place, it will provide parties and courts with a single, clear benchmark for evaluating that action. Because the Commission’s interpretation is supported by the language of Section 253(a), the agency should reaffirm it.

At least one locality wrongly asserts that Section 253 does not apply to wireless facilities because those facilities are governed by Section 332(c)(7) of the Act.⁴⁸ The plain language of the statute contradicts this argument, however, because the provision applies to any requirement that “may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service,” which clearly includes entities that transmit wireless traffic. The locality cites no Commission or court ruling that deprives wireless carriers of the protections of Section 253. Moreover, Section 332(c)(7) operates in tandem with Section 253 to impose specific procedures for review of “personal wireless services” facilities. It does not carve out those facilities from Section 253. The Commission should accordingly confirm that the protections of this provision encompass wireless services.

⁴⁸ See, e.g., Newport Beach, CA Comments at 1.

B. The Commission Should Prohibit Specific Barriers Identified in the Record.

The Commission should supply providers and localities with practical guideposts to address and prohibit local regulations or practices that go beyond those limits. Providing this clarity will help resolve disputes that are hampering broadband deployment along ROWs today and head off future disputes. The record demonstrates that localities invoke a variety of regulations and practices that effectively hinder deployment. In particular, the Commission should rule that Section 253(a) prohibits the following:

- **Enacted moratoria.** There can be no question that laws and ordinances imposing moratoria on new facilities in ROWs violate Section 253(a).
- **De facto moratoria.** Some localities have implemented *de facto* moratoria by refusing to permit new wireless facilities in ROWs, indefinitely delaying approval of those facilities, or refusing to allow upgrades to existing facilities needed to provide capacity to meet rapidly growing consumer demand.⁴⁹ These practices are equally in violation of Section 253(a)'s prohibition on practices which "may prohibit" service, because they have the same result – carriers are blocked from providing service.
- **Undergrounding requirements.** Requiring all communications facilities to be located underground is, like a moratorium, a *per se* violation of Section 253(a) because it does not permit use of ROWs for wireless facilities.⁵⁰ Localities cannot persuasively argue, let alone demonstrate, that such ordinances are lawful.
- **Prohibition on new poles in ROWs.** The record shows that some localities may allow antennas to be attached to *existing* poles, but bar any *new* poles. This practice also effectively prohibits service and thus violates Section 253(a). As parties demonstrate, the practice intrudes on a provider's right under the Act to design its wireless networks.⁵¹
- **Unreasonable aesthetic requirements.** Commenters demonstrate that some localities are refusing to approve wireless facilities in ROWs for vague and

⁴⁹ WIA Comments at 5-6 (one member company reports that more than 70 percent of its applications exceeded the 90-day shot clock and 47 percent of wireless attachment applications for existing poles exceeded the 150-day shot clock for new poles).

⁵⁰ Sprint Comments at 21; CTIA Comments at 26-27; WIA Comments at 70; AT&T Comments at 10-11 (citing *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008)).

⁵¹ Verizon Comments at Appendix A; WIA Comments at 69-70.

subjective aesthetic reasons, which are often applied discriminatorily.⁵² Some localities condition ROW access on their reservation of discretion to deny any facility on appearance grounds, but fail to specify any objective standards for denial. Commenters show that denying facilities applications on these grounds effectively prohibits new service.⁵³ The Commission should declare that such unreasonable and unbounded aesthetic requirements run afoul of Section 253(a).

- **Unreasonable fees.** Commenters demonstrate that excessive or discriminatory ROW fees materially inhibit investment in new facilities and thus violate Section 253(a).⁵⁴ A Commission ruling that prohibits such fees – while still allowing localities to recover their costs of issuing permits and managing the ROWs – achieves the balance Congress struck between promoting rapid deployment of new services and protecting localities’ interests.
- **Zoning or other requirements not imposed on other ROW users.** Forcing providers to secure zoning approvals to install small cells in ROWs on new or existing poles or other structures is flatly discriminatory because it imposes burdens on one competitor but not others.⁵⁵ The Commission should declare that the practice violates the nondiscrimination provision of Section 253(a). Doing so will not restrict localities’ decision to require zoning procedures for the use of ROWs – but if they do so, they must apply those procedures to all users even-handedly. The Commission should declare that other requirements that are imposed on wireless providers but not on utilities or other ROW users similarly violate Section 253(a).

⁵² AT&T Comments at 4, 15; WIA Comments at 41-42.

⁵³ AT&T Comments at 16 (“[A]esthetic requirements can likewise materially inhibit or limit the ability to provide wireless service, especially if, without an engineering or safety justification, they limit the configuration of equipment so severely as to preclude its deployment technically or require extraordinary efforts to enable a deployment.”); WIA Comments at 42.

⁵⁴ Sprint Comments at 23, 25-26; AT&T Comments at 19-21; WIA Comments at 64; CCA Comments at 15.

⁵⁵ These requirements also cause significant delays. WIA Comments at 12 (explaining that one county near San Francisco takes 150 days for architectural board review for each application as part of the zoning review).

C. Localities Do Not Have Blanket Authority That Overrides Section 253(a).

Some localities claim they have the exclusive and unfettered “proprietary” right to set the terms and prices for ROW access, including barring new deployment, and that the Commission is thus powerless to put limits on that right.⁵⁶ They are incorrect for multiple reasons.

Localities managing ROWs are not like landowners that control private property.⁵⁷ To the contrary, courts have held that ROWs serve a *public* interest, not a private one, and localities must manage ROWs as a public trust to serve the public interest.⁵⁸ In this case, that interest is to facilitate a national wireless infrastructure that will support the public’s demand for, and reliance on, wireless communications. ROWs are the *public’s* property, and localities must manage them to benefit the public. For that reason, localities act in their regulatory capacity by enacting ordinances and regulations that are voted on by city councils and other bodies to govern ROW access and use. As Sprint points out, the historic purpose of managing ROWs is to maximize their use by subsidizing the installation of services that benefit the public – not by maximizing fees like a private building owner.⁵⁹

The pre-1996 cases that some parties cite are superseded by Section 253.⁶⁰ Whatever relevance pre-1996 cases may have had as to localities’ authority to block telecommunications deployment, Congress explicitly determined that year to adopt as national policy the promotion

⁵⁶ See, e.g., Florida Coalition of Local Governments Comments at 10; see also League of Minnesota Cities and the Minnesota Municipal Utilities Association Comments at 13; San Antonio, TX Comments at 14-16; Texas Municipal League Comments at 6; Smart Communities Siting Coalition at 52-53.

⁵⁷ CTIA Comments at 43-46; T-Mobile Comments at 30; CCA Comments at 26; Crown Castle Comments at 27.

⁵⁸ Sprint Comments at 34; T-Mobile Comments at 31-33.

⁵⁹ Sprint Comments at 34.

⁶⁰ For example, some parties relied on the case of *St. Louis v. Western Union Telegraph Company*, which was decided by the court in 1893. See, e.g., Arlington, TX Comments at 7; National League of Cities, *et al.* Comments at 17-20.

of telecommunications services and to outlaw laws or regulations that “may prohibit or have the effect of prohibiting” those services.

Some localities assert that the Commission cannot preempt them from managing use of ROWs, but localities’ authority to manage ROWs to protect public safety, manage traffic, and provide other public benefits is not the issue here. Rather, the basis for a Commission ruling arises from some localities’ actions to block new wireless facilities through moratoria and other blanket bans, to impose conditions that make deployment technically or economically infeasible, and to demand discriminatory fees that are unrelated to ROW management. The record shows that those practices are impeding critically needed network infrastructure, and the Commission has equally clear legal authority to address those practices.

In short, localities do not establish a valid legal basis for their claim that they have unilateral authority over ROW access. To the contrary, Congress explicitly limited that authority to promote the deployment of new communications services that would, in turn, provide more competition and more consumer choice. Decisive action prohibiting each of the barriers discussed above is fully consistent with the language and purpose of the Act.

IV. SECTION 253(C) DOES NOT ALLOW CHARGES THAT EXCEED A LOCALITY’S COSTS TO ISSUE PERMITS AND MANAGE RIGHTS OF WAY OR THAT DISCRIMINATE AMONG PROVIDERS.

Wireless providers, infrastructure providers, and third-party groups support all three of Mobilitie’s requests in its petition for declaratory ruling. They show why the Commission has authority to declare that “fair and reasonable compensation” means payment that compensates a

locality for its actual and direct costs, and why that ruling will provide consistency and certainty to providers and localities and speed siting.⁶¹

Wireless providers, infrastructure providers, and third-party groups also explain why the Commission has authority to rule that, whatever those “reasonable costs” are, a locality may not charge a wireless provider or new entrant more than it charged other providers, because doing so would violate Section 253’s admonition that fees must be “competitively neutral and non-discriminatory.”⁶² Finally, they support the request that the Commission rule that the phrase “publicly disclosed” in Section 253 means that localities must disclose the fees they charged other providers.⁶³ Such transparency is critical if the other phrases in that provision are to be effective.

Localities do not attempt to demonstrate that the Commission lacks authority to adopt these three interpretations of Section 253(c). None, for example, explain why that provision allows them to not disclose the fees they charge, or to charge new ROW users far more than prior users. Instead, they make arguments that are factually incorrect or boil down to the erroneous claim that they have a unilateral right to set whatever fees they want.⁶⁴

First, some localities raise a red herring: that the Commission is being asked to impose “one size fits all” or “cookie cutter” requirements for fees that would dictate to localities what

⁶¹ Sprint Comments at 23; Verizon Comments at 11; AT&T Comments at 20-21.

⁶² 47 U.S.C. § 253; Sprint Comments at 35; AT&T Comments at 21-22; Verizon Comments at 14.

⁶³ Sprint Comments at 35; WIA Comments at 70 (municipal fees should be “publicly disclosed in advance”); Verizon Comments at 18.

⁶⁴ Smart Communities Siting Coalition Comments at 9 (“[T]he Commission cannot dictate rents charged for proprietary property, or (consistent with the Constitution) limit recovery to marginal costs as is apparently requested by Mobilite.”).

they can charge.⁶⁵ But commenters are not asking the Commission to set fees,⁶⁶ recognizing that different cities may have different costs. None suggested that localities should not be entitled to recover their costs, or that (as some localities incorrectly suggested⁶⁷) the localities should subsidize wireless providers. Mobilitie and those commenters simply asked that, whatever a particular locality's costs were, its fees must be tied to those costs. This result implements the language and purpose of Section 253(c) to prevent excessive ROW fees while allowing fees to be based on each city's actual and direct costs.

Second, other localities argue that because Section 253(d) authorizes the Commission to preempt a legal requirement that violates Sections 253(a) and (b), but does not refer to Section 253(c), the Commission cannot preempt a city from imposing particular fees.⁶⁸ But Mobilitie and other wireless providers are not seeking preemption of any locality's ROW fees; rather they ask the Commission to interpret several terms and phrases in the statute.⁶⁹ And the Commission has unquestionable authority to interpret the Act. In any event, wireless providers show why excessive and discriminatory ROW fees separately violate Section 253(a) – and thus can be preempted under Section 253(d) – because they have the effect of prohibiting service, and Section 253(d) expressly grants the Commission authority to preempt such barriers.⁷⁰

⁶⁵ Virginia Department of Transportation Comments at 11.

⁶⁶ *See, e.g.*, Verizon Comments at 14.

⁶⁷ Community Wireless Consultants Comments at 4; Ottawa County Road Commission Comments at 1.

⁶⁸ Smart Cities Comments at 56; New York City Comments at 8.

⁶⁹ As Mobilitie stated in its Petition, it is not “seeking preemption of any specific state or local law or regulation.” Petition at 6, n.10.

⁷⁰ *See, e.g.*, T-Mobile Comments at 13 (“additional charges or those not related to actual use of the ROWs, such as fees based on carriers’ revenues, must be declared per se unreasonable actions that “prohibit or have the effect of prohibiting services.”).

Third, others argue that they are entitled to impose a “market” rent or other charge, but cite no legal basis for a right to do so.⁷¹ This argument also ignores the fact that there is no “market” for ROW access – localities have monopoly control over ROWs.⁷² They essentially assert the right to demand monopoly rents.⁷³ Section 253(c) grants no such right.

Finally, other localities take the extreme position that they may set whatever fees they want because they have “proprietary” rights over ROWs.⁷⁴ As discussed above, numerous commenters effectively rebut this claim in the context of obstacles many cities have created in violation of Section 253(a).⁷⁵ The claim is equally invalid as to Section 253(c). Were a locality free to impose whatever fee it wanted without limit, Section 253 would be effectively nullified.

There is no persuasive rebuttal to the request to interpret Section 253(c) to outlaw such discrimination, and this request should be granted. The nondiscrimination mandate of Section 253(c) does not require that different types of access must be priced the same. But the record shows examples of wireless providers being required to pay fees to install small cells on ROW poles that were not imposed on utilities that installed their own wireless equipment on poles.⁷⁶ According to T-Mobile, “[e]ighty percent of jurisdictions in T-Mobile’s experience treat DAS

⁷¹ See, e.g., Newport Beach Comments at 1; Oakland County Comments at 9; San Antonio, TX Comments at 27-28.

⁷² Verizon Comments at 15 (explaining “[i]n many other cases, market forces are sufficient to ensure reasonable rates. But those competitive options do not exist for access to rights-of-way.”).

⁷³ AT&T Comments at 18; ExteNet Comments at 41; Sprint Comments at 33; Tech Freedom Comments at 5; WIA Comments at 69; Conterra Broadband Services and Uniti Fiber Comments at 7; NTCA Comments at 3-4.

⁷⁴ Florida Coalition of Local Governments Comments at 10; see also League of Minnesota Cities and the Minnesota Municipal Utilities Association Comments at 13; San Antonio, TX Comments at 14-16; Texas Municipal League Comments at 6; Smart Communities Siting Coalition at 52-53.

⁷⁵ See *supra* Section III.C.

⁷⁶ T-Mobile Comments at 7; see also Crown Castle Comments at 14.

and small cell deployments on poles in ROWs differently than they treat similar installations by landline, cable, or electric utilities.”⁷⁷ That is precisely the type of discrimination that Section 253(c) prohibits, and the Commission should confirm that.

There is also no opposition to the request that the Commission should interpret Section 253(c) to require localities to disclose the fees they have charged and the basis for those fees to any new ROW applicant. Transparency enables providers to ensure the rates they are being charged are consistent with the statute.

V. THE COMMISSION SHOULD STRENGTHEN THE SHOT CLOCKS, CONFIRM THEY APPLY TO ROW ACCESS, AND PROVIDE GUIDEPOSTS FOR COMPLIANCE.

A. Reduce the Shot Clocks for all Facilities.

The comments support the Public Notice’s observation that the current shot clocks “may be longer than necessary and reasonable to review a small cell siting request” because “small cells may have less potential for aesthetic and other impacts than macrocells.”⁷⁸ The record also suggests that shot clocks for macrocells also may be longer than necessary. The Commission should exercise its authority to determine what is a presumptively reasonable period of time to act under 332(c)(7) by substantially shortening the existing shot clocks.

Every industry commenter supports much shorter shot clocks. Some address only small cells and demonstrate that a 60-day period is reasonable.⁷⁹ Others, including CTIA, advocate tightening the shot clocks for all facilities, noting that the evolution toward small cells means that

⁷⁷ T-Mobile Comments at 7.

⁷⁸ Public Notice at 13371; CTIA Comments at 18; WIA Comments at 3.

⁷⁹ Crown Castle Comments at 37; ExteNet Systems, Inc. Comments at 19; Lightower Fiber Networks Comments at 23; Mobile Future Comments at 4-5.

fewer macrocell sites are now being constructed and localities also have long experience with them.⁸⁰ Both approaches are supported by the record and consistent with the Public Notice.

Those localities that addressed processing times do not dispute the Commission's statutory authority to set shot clocks.⁸¹ Instead, they argue that the existing periods were appropriate. But they fail to explain why time frames adopted to install macrocell sites are also reasonable for antennas that are no more than a few feet tall. There also are several examples of localities that process small cell and macrocell siting requests in less time than the shot clocks presently allow, suggesting that a reduction in the timeframes is both appropriate and feasible.⁸²

The Public Notice sought input on whether the Commission should adopt different shot clocks for "batch" processing of small cell applications. Wireless commenters oppose adopting different time frames.⁸³ CTIA agrees. Different shot clocks are not warranted and would complicate the process by adding additional timelines. Some localities may find batch processing to be more efficient and may request carriers to submit applications in groups, but they should not be allowed to extend the shot clocks in return for batch processing. Instead, the Commission should "follow the lead of states that have recently adopted small facility statutes that apply the same shot clock to batch applications that applies to single applications."⁸⁴

⁸⁰ CTIA Comments at 36-38; Mobilite Comments at 18-21. In particular, CTIA urged the Commission to shorten the timelines under Section 332(c)(7) for siting facilities on existing non-tower structures without an antenna (from 90 days to 60 days) and for requests for new support structures or substantial modifications (from 150 days to 90 days). CTIA Comments at 36.

⁸¹ *See, e.g.*, Smart Communities Siting Coalition Comments at 46-48.

⁸² *See, e.g.*, Louisville, KY Comments at 6; San Francisco, CA Comments at 2.

⁸³ *See, e.g.*, Verizon Comments at 27; Crown Castle Comments at 37-38; Sprint Comments at 43-44.

⁸⁴ *Id.*

B. Apply a 60-Day Shot Clock to Collocations Not Covered by Section 6409(a).

CTIA demonstrated why the Commission should interpret Section 332(c)(7) of the Act to add a new 60-day shot clock for collocations on non-tower structures that would otherwise be covered by Section 6409(a) but for the absence of an existing approved antenna.⁸⁵ CTIA continues to support this approach. In the alternative, however, the Commission could revise its Section 6409(a) shot clock and determine that an eligible facilities request for collocation under Section 6409(a) should include collocations on non-tower structures that may not already have an existing antenna.⁸⁶ Section 6409(a) collocation requests are non-substantial and the additional shot clock would merely apply the same 60-day processing period to similar non-substantial collocations on non-tower structures that lack an existing approved antenna.

C. Adopt a Deemed Granted Remedy for the Section 332 Shot Clocks.

The current Section 332 shot clock process is often ineffective in achieving its objective of streamlining siting because it only creates a presumption of reasonableness which then requires a carrier to sue a city that exceeds the timelines. Alternatively, as described by AT&T, “[m]any applicants, wary of the cost, inherent delays, and uncertainty of litigation and hopeful of a more direct and less contentious path to approval, agree to tolling or other demands from local officials.”⁸⁷ And, as CTIA and others demonstrated, while some courts have issued injunctive relief after localities failed to act within the shot clock timeframe, others have required applicants to go back to the locality and wait for the locality to act on the application.⁸⁸ These costs and

⁸⁵ CTIA Comments at 17.

⁸⁶ CTIA Comments at 34-35; Verizon Comments at 27-30.

⁸⁷ AT&T Comments at 25.

⁸⁸ CTIA Comments at 44; *see also* WIA Comments at 61-62 (“courts faced with shot clock claims have failed to provide a meaningful remedy”); ExteNet Systems, Inc. Comments at 19.

practical difficulties simply cause wireless providers to give up on deployment, which fails to achieve the statute's objectives. Interpreting Section 332 to include a deemed granted remedy will rectify this problem.⁸⁹

Localities' contention that the Commission is without authority to take this action⁹⁰ ignore the fact that the Supreme Court in *City of Arlington* squarely affirmed the Commission's authority to interpret Section 332(c)(7) in a way that may have the effect of overriding local or state law.⁹¹ As the Supreme Court explained, "Congress has unambiguously vested the Commission with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation [of what is a presumptively 'reasonable period of time' under Section 332(c)(7)(B)(ii)] was promulgated in the exercise of that authority."⁹²

A deemed granted remedy would not render the judicial relief provisions of Section 332(c)(7)(b)(v) superfluous or inconsistent with Congressional intent. Even with a deemed granted remedy, applicants may still need to seek injunctive relief where a state or locality fails to act in order to compel the issuance of a permit, where needed. The language in Section 332(c)(7)(b)(v) does not "preclude" other remedies to remove barriers to deployment.⁹³

⁸⁹ CCA Comments at 11-13; AT&T Comments at 25-26; Crown Castle Comments at 33-34; Globalstar Comments at 12; Mobile Future Comments at 4-5; Sprint Comments at 22-27; T-Mobile Comments at 25; Verizon Comments at 23; WIA Comments at 3-4, 24, 61.

⁹⁰ See, e.g., City of Alexandria, Arlington County, Fairfax County, and Henrico County ("Virginia Joint Commenters") Comments at 32-33.

⁹¹ See *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

⁹² *City of Arlington* at 1863.

⁹³ AT&T Comments at 26.

D. Declare that the Shot Clocks Apply to Municipal Poles and Rights of Way.

Given localities' assertion that they can unilaterally deny ROW access, it is essential for the Commission to confirm that the shot clocks do apply to facilities to be located in ROWs, including on muni-owned light poles and similar structures. CTIA urged the Commission to issue this ruling because of its concern that some localities were asserting "proprietary" rights over ROW access.⁹⁴ Comments of some localities underscore this concern because they assert they are acting in a proprietary capacity in the context of managing access to municipal poles and ROWs, and thus the shot clocks do not apply at all.⁹⁵ This is a significant issue because many localities do not have a process for small cell siting. Many are simply not acting for a variety of reasons, but there is no legal incentive for them to adopt a process. Shot clocks will provide that incentive. Municipal poles and ROWs are public property intended to serve as the locations for public services.⁹⁶ In such circumstances, municipal oversight serves a regulatory rather than proprietary function, and therefore Sections 332(c)(7) and 6409(a) – and the shot clocks that implement them – apply.

E. Declare that Requiring a Showing of a Coverage Gap or Other Business Need Violates Section 332(c)(7).

The record demonstrates that some localities continue to force carriers to prove that a particular site is needed to fill a coverage gap and that there is no feasible alternative site, or that the site will meet some business need.⁹⁷ CTIA agrees with commenters that ask the Commission

⁹⁴ CTIA Comments at 43-46.

⁹⁵ See e.g., Florida Coalition of Local Governments Comments at 10; League of Arizona Cities and Towns Comments at 9-10; Smart Communities Siting Coalition at 52-53.

⁹⁶ Sprint Comments at 34; T-Mobile Comments at 31-33.

⁹⁷ See AT&T Comments at 5; Mobile Future Comments at 3-4; Mobilitie Comments at 12-13, 17-18; Verizon Comments at 21-22; WIA Comments at 53; *but c.f.* Bowman, North Dakota Comments at 1; GlobalStar, Inc. Comments at 10-11.

to clarify that these requirements violate Section 332(c)(7)'s prohibition on regulations that “prohibit or have the effect of prohibiting” service. Today, the issue providers often face is not filling geographic coverage gaps, but providing sufficient capacity to accommodate rapidly increasing demand for wireless services. Small cells are optimal for adding capacity but may not necessarily fill coverage gaps due to their shorter propagation ranges. Forcing carriers to demonstrate a physical gap in coverage or that there is some other business need for a site at a particular location is thus tantamount to prohibiting service.⁹⁸

VI. THE COMMISSION SHOULD EXCLUDE SMALL CELL FACILITIES FROM NEPA AND NHPA REVIEWS.

Commenters urge the Commission to limit the application of the National Environmental Policy Act and the National Historic Preservation Act to wireless facilities by excluding small cells. They document how the lengthy processes that NEPA/NHPA review require significantly delay small cell deployment, even though small cells do not typically raise environmental or historic preservation concerns.⁹⁹ Some commenters also highlighted how costly these lengthy and complex processes have become.¹⁰⁰ For example, the Commission's NEPA rules—which require applicants to prepare and file environmental assessments if certain conditions are met, even if there is no likelihood of an environmental impact—have “required Sprint to spend tens of millions of dollars to investigate a minimal likelihood of harm.” Sprint estimates it has done NEPA checklists for 20,000 to 30,000 sites, but less than 250 required preparation of an environmental assessment, and “every single one of those environmental assessments resulted in

⁹⁸ See Verizon Comments at 20-22; Mobilite Comments at 10-13, 17-18.

⁹⁹ CCA Comments at 35-37; NTCH Comments at 1 (the review processes are having “deleterious effects on the speed and cost-effectiveness of tower construction”); NTCA Comments at 5 (the federal review process requires “inefficient and repetitive” studies).

¹⁰⁰ Sprint Comments at 47-48; CCA Comments at 35.

a finding of no significant impact.”¹⁰¹ Therefore, the Commission should invoke that authority to categorically exclude small cells from NEPA/NHPA reviews.¹⁰²

As commenters request, the Commission should also exclude from NEPA review those wireless facilities that trigger that review only because they are located on floodplains, as other agencies can and do conduct their own reviews to protect against any damage to these sensitive areas.¹⁰³ Requiring providers to go through a duplicative Commission review needlessly adds costs and delays to investment in new infrastructure.

VII. CONCLUSION.

CTIA urges the Commission to act quickly to remove regulatory barriers to wireless infrastructure deployment that have the effect of slowing, or outright prohibiting, the delivery of mobile wireless services to consumers. Adopting the recommendations discussed herein will

¹⁰¹ Sprint Comments at 47-48.

¹⁰² CTIA appreciates that the Commission is considering these issues as part of its Wireless Infrastructure NPRM and looks forward to providing additional comments in that proceeding.

¹⁰³ T-Mobile Comments at 39-41; Verizon Comments at 38-39.

fully protect the interests of localities while expediting and modernizing the massive investment that is needed to provide all Americans with advanced wireless networks and services.

Respectfully submitted,

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