

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

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

COMMENTS OF AT&T

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I. INTRODUCTION AND SUMMARY

AT&T Services Inc. (“AT&T”), on behalf of the subsidiaries and affiliates of AT&T Inc. (collectively, “AT&T”), submits these comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Notice of Proposed Rulemaking and Notice of Inquiry.¹ Over the next few years, providers will need to deploy hundreds of thousands of wireless facilities—equal to or more than they have deployed over the last few decades—to meet the country’s exponentially growing wireless broadband needs and provide the infrastructure necessary for soon to be deployed 5G networks. AT&T therefore welcomes this initiative by the Commission to reduce regulatory obstacles to the deployment of wireless infrastructure.

AT&T’s wireless data traffic has grown by 250,000% since 2007 and is expected to grow 10x more by 2020.² Massive small cell deployments will be essential for carriers to meet this growing demand. They also are necessary to the deployment of 5G networks, which will revolutionize the way consumers and businesses use mobile broadband services, and of the

¹ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) (“*NPRM*”).

² AT&T Investor Update, 2nd Quarter Earnings Conference Call at 13 (2016), *available at* https://www.att.com/Investor/Earnings/2q16/slides_2q16.pdf.

emerging Internet of Things (“IoT”), which is predicted to grow 15-fold from 2016 to 2021.³ And massive new wireless infrastructure will also be necessary to AT&T’s nationwide buildout of an interoperable high-speed public safety broadband network for the First Responder Network Authority (“FirstNet”), which will support millions of first responders and public safety personnel.⁴

Unfortunately, state and local regulations and fees create unnecessary impediments to this network investment. Prohibitions on small cell placement, unreasonable aesthetic restrictions, excessive right-of-way (“ROW”) access fees, overly complicated permitting processes, and other unreasonably burdensome requirements impair the ability of carriers to deploy broadband facilities. And, these actions have real costs. High taxes and fees bleed off network resources, reducing the capital available for investment; burdensome bureaucratic processes not only bog down the rate of small cell deployment, but artificially distort it as well, as carriers move their resources from areas of greatest network need to areas with lower regulatory costs and less burdensome regulation. As demonstrated in examples provided below, AT&T has already redeployed planned small cell investment when faced with unreasonable municipal burdens.

To remove these barriers, the Commission should establish standards and guidelines for state and local processes, timelines, and fees associated with wireless infrastructure deployment. And, the Commission should make clear that it will use its authority under Sections 253 and

³ Cisco, United States – Potential M2M Connections http://www.cisco.com/c/dam/assets/sol/sp/vni/forecast_highlights_mobile/index.html#~Country .

⁴ See Press Release, AT&T, AT&T Selected by FirstNet to Build and Manage America’s First Nationwide Public Safety Broadband Network Dedicated to First Responders, (Mar. 30, 2017), http://about.att.com/story/firstnet_selects_att_to_build_network_supporting_first_responders.html. As 5G network capabilities evolve, FirstNet and AT&T will collaborate on enabling public safety users to experience 5G’s exponential increases in video and data speeds. *Id.*

332(c)(7) of the Communications Act to preempt state and local processes that deviate from these guidelines or otherwise impede wireless infrastructure deployment.⁵

Among other measures, the Commission should take the following actions to remove state and local barriers to wireless broadband deployment:

- Declare that state and local action that materially inhibits or limits the ability of a competitor to provide wireless service has the effect of prohibiting the provision of telecommunications service under Section 253(a).
- Declare that burdensome and unreasonable regulations that materially inhibit and limit the ability to provide wireless service include:
 - moratoria and other unreasonable prohibitions on the placement of wireless facilities, such as prohibitions on facilities above-ground, in all or part of a ROW, or on municipally-owned poles;
 - unreasonable prohibitions on adding or upgrading facilities to add *capacity* or *capabilities* even if *coverage* is already available;
 - unreasonable, vague, and subjective aesthetic restrictions that are applied discriminatorily to small cell facilities, but not to the facilities of other entities using the ROW in a like manner; and
 - unreasonable administrative processes and delays.
- Declare that cost-based, rather than market-based, rates to access the ROW and municipally-owned ROW structures are “fair and reasonable.”
- Declare that siting applications not acted upon within the Section 332(c)(7) shot clock are deemed granted.
- Establish a streamlined complaint process to resolve disputes between municipalities and providers arising under Section 253.

The Commission also should reduce burdens associated with time-consuming and costly environmental and historic review processes under the National Environmental Policy Act (“NEPA”) and National Historic Preservation Act (“NHPA”). In particular, the Commission’s NEPA and NHPA processes need to be refined to further reduce the review of small cell facility

⁵ 47 U.S.C. §§ 253, 332(c)(7).

deployments, as small cells are, by definition, small and unobtrusive. The Commission should resolve inefficiencies in the NHPA Tribal review process, which today can involve excessive fees and burdensome delays. Finally, the Commission should take this opportunity to address longstanding ambiguities associated with so-called “Twilight Towers,” which have had the effect of limiting collocations on thousands of existing structures. Resolving these inefficiencies will speed and simplify the wireless infrastructure deployment process and help providers deliver increased capacity and coverage to consumers and advance the United States’ status as a leader in wireless.

II. THE COMMISSION SHOULD TAKE STEPS TO PROMOTE THE DEPLOYMENT OF NEXT-GENERATION WIRELESS BROADBAND.

As evidenced by a recent Senate Committee on Commerce, Science, and Transportation hearing, improving the nation’s wireless infrastructure and delivering robust wireless broadband to consumers is a national priority.⁶ Chairman Thune noted that “[A] major part of our continuing discussion on improving the nation’s infrastructure should include solutions to reducing any unnecessary hurdles to broadband deployment. As we look at potential solutions, we must be mindful of the tremendous investment made to deploy these services and look for opportunities to cut through red tape.”⁷ Commissioner O’Rielly noted that the wireless industry “is still experiencing excessive delays and moratoria when filing siting applications” which in some cases

⁶ See *Investing in America’s Broadband Infrastructure: Exploring Ways to Reduce Barriers to Deployment*, 115th Cong. (May 3, 2017) (statement of Sen. Bill Nelson, Ranking Member, U.S. Senate Committee on Commerce, Science, and Transportation) (“Everyone – from those of us in the Senate to our mayors and local officials around the country – want Americans to benefit from the availability of robust wireless broadband.”); *Id.* (statement of Brian M. Hendricks, Head of Technology Policy and Public Affairs for the Americas Region, Nokia Corp.) (“[B]roadband providers of all kinds . . . stand ready to invest significantly in broadband infrastructure to support” a connected society.”).

⁷ *Id.* (statement of Sen. John Thune, Chairman, U.S. Senate Committee on Commerce, Science, and Transportation).

are “blatantly illegal.”⁸ Chairman Pai has acknowledged the toll that unreasonable siting barriers impose on consumers, remarking that “cities shouldn’t impose unreasonable demands or moratoria on wireless siting requests. This simply penalizes their own constituents who want better mobile service.”⁹

Facilitating faster broadband deployment and avoiding unnecessary delays will help carriers provide exciting and innovative next generation wireless services to consumers and drive economic growth. Fueled by the American public’s insatiable demand for data and connected devices, service providers are shifting to denser, more efficient networks by reusing spectrum in smaller cells, closer to the customer. These denser networks will set the foundation for 5G wireless technologies, which will offer ultra-high data rates and reliability with low latency and power demands, revolutionizing mobile broadband service, and enabling groundbreaking IoT applications such as wearables, connected healthcare devices, and autonomous vehicles. Indeed, 5G networks are expected to create 3 million new jobs and boost annual U.S. gross domestic product by \$500 billion, driven by a projected \$275 billion investment from telecom operators.¹⁰

To deliver these benefits, wireless carriers still need to deploy and upgrade traditional macro facilities, but they must also install “hundreds of thousands of new small cells” around the country over the next few years.¹¹ For example, AT&T has announced plans to install over 1,000

⁸ Remarks of Michael O’Rielly, FCC Commissioner, 2017 Wireless Infrastructure Show, 4 (May 23, 2017) *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-345021A1.pdf (“O’Rielly Wireless Infrastructure Show Remarks”).

⁹ *NPRM*, 32 FCC Rcd at 3385 (Statement of Chairman Ajit Pai).

¹⁰ Accenture Strategy, *Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities*, 1 (2017) <https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf> (“Accenture Strategy Report”).

¹¹ Comments of CTIA, WT Docket No. 16-421 at 2 (filed Mar. 8, 2017).

small cell antennas across the Bay Area alone in 2017,¹² with many other small cell projects underway or planned across the country. CTIA estimates about 300,000 small cells will be needed in just the next 3-4 years to support the evolution to 5G.¹³ Indeed, the industry's 5G network deployment build is expected to involve 10 to 100 times more antenna locations than 4G or 3G.¹⁴ With small cell deployments by the thousands, an extended review of each application has the potential to create massive backlogs and delay deployments.

Yet, despite Commission efforts to streamline federal, state, and local siting processes, some local governments continue to place obstacles in the way of wireless facility expansion, even for unobtrusive small cell equipment. AT&T's contrasting experiences trying to deploy state-of-the-art showcase small cell networks in Indianapolis and a Texas city provide an excellent example. Indianapolis worked cooperatively with AT&T from day one to facilitate small cell placement in the ROW, which has allowed AT&T, in about 18 months, to construct an expected 43 of approximately 105 planned small cell nodes as of the end of June 2017, with the remainder on track for timely deployment by year end 2017. In contrast, the Texas city refused to allow small cell placement on any structures in the ROW and allowed only a limited deployment after adoption of a Master License Agreement in February 2017. Since that date, AT&T has worked closely with the city and its contractor to develop procedures to file for and obtain permit approval, but, more than two years after initially approaching the City, has not yet received any permits to begin construction of 100+ planned nodes. Even so, the Master License Agreement and related rules

¹² Doug Irwin, *AT&T Deploys Network of Small Cells in San Francisco*, Radio Magazine (Feb. 21, 2017), available at <http://www.radiomagonline.com/mobile/0022/att-deploys-network-of-small-cells-in-san-francisco/38638>.

¹³ *Ex Parte*, CTIA, WT Docket No. 16-421 at Attachment, 4 (filed Apr. 13, 2017).

¹⁴ Accenture Strategy Report at 1.

continue to limit small cell deployment to traffic signal poles (no light poles), prohibit placement beyond the downtown area for an undetermined time—projected to be up to two years—limit any carrier to 25 nodes in that downtown area, and prohibit all deployment in parks. This type of regulation can only result in delays to delivering 5G services.¹⁵

There is no sound reason for any municipality to subject small cell deployments to the same review processes that apply to macro cells. Because of their unobtrusive size, small cells simply do not pose similar considerations as to environment or aesthetic impacts. But these measures threaten to significantly slow down the deployment of advanced wireless infrastructure that holds so much promise for consumers, businesses, and our economy at large. As Chairman Pai has stated, “[w]ithout 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.”¹⁶

III. THE COMMISSION HAS THE AUTHORITY TO PREEMPT ARTIFICIAL BARRIERS TO WIRELESS FACILITY DEPLOYMENTS.

The Commission has clear authority under Sections 253 and 332(c)(7) of the Communications Act to foster the critical national policy goal of promoting broadband services.¹⁷ These two sections contain almost identical language barring state and local actions that “prohibit or have the effect of prohibiting” service¹⁸ and they should be read in harmony. Courts have

¹⁵ Tex. S.B. 1004, signed by the Governor on June 9, 2017 over the strong opposition of cities, resolves many, but not all, of the barriers to small cell deployment that cities in Texas have previously imposed.

¹⁶ Chairman Ajit Pai, Remarks at the Brandery: A Digital Empowerment Agenda, at 7 (Sept. 13, 2016) *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf.

¹⁷ 47 U.S.C. §§ 253, 332(c)(7).

¹⁸ *Compare* 47 U.S.C. § 253(a) (“No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”) *with* 47 U.S.C. § 332(c)(7)(B) (“The

interpreted Section 253 as restricting the content of local regulation and legal requirements, prohibiting state and local governments from adopting laws or entering contracts that prohibit or have the effect of prohibiting service.¹⁹ Section 332, on the other hand, restricts the application of local regulation to individual deployment requests.²⁰

Despite the nearly identical phrasing, there is little consistency in how courts have interpreted the phrase “prohibit or have the effect of prohibiting” as it appears in both statutes.²¹

regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”).

¹⁹ 47 U.S.C. § 253(a) (“No State or local statute or regulation . . .”); *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1269 (10th Cir. 2004) (“47 U.S.C. § 253 contains a clear expression by Congress of an intent to preempt local ordinances which prohibit the provision of telecommunications services.”).

²⁰ See 47 U.S.C. § 332(c)(7) (limiting state and local “*decisions* regarding the placement, construction, and modification of personal wireless service facilities.”) (emphasis added); see also *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 576 (9th Cir. 2008) “[Section 332(c)(7)] preserves the authority of local governments over zoning decisions regarding the placement and construction of wireless service facilities, subject to enumerated limitations.”; *Cox Commc’ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002) (“These sections of the telecommunications act only allow for a cause of action if the local authority has made a *decision*. This rule is made clear by § 332(c)(7)(B)(v), which specifically grants a cause of action to those who have been ‘adversely affected by *any final action*’ of a local government.”) (emphasis in original).

²¹ See, e.g., *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002) (“[A] prohibition does not need to be complete or ‘insurmountable’ to run afoul of § 253(a).”); *Level 3 Communications, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 533 (8th Cir. 2007) (“The plaintiff need not show a complete or insurmountable prohibition . . .”); *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) (“Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it.”). But see, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 576 (9th Cir. 2008) (“[W]e held that a locality runs afoul of [Section 332] if (1) it imposes a “city-wide general ban on wireless services” or (2) it actually imposes restrictions that amount to an effective prohibition . . . a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.”); see also *T-Mobile Ne. LLC v. Fairfax City Bd. of Sup’rs*, 672 F.3d 259, 266 (4th Cir. 2012) (“[A] plaintiff can prevail in asserting a violation of [Section 332] by showing that a local governing body has a general policy that essentially guarantees rejection of all wireless facility applications or by demonstrating that the denial of an application for one particular site is tantamount to a general prohibition of service.”).

Given these inconsistent interpretations, the Commission should clarify the scope and interaction of these two complementary sections of the Communications Act. The agency should affirm that the “effective prohibition” standard is met, under both Sections 253 and 332, when a state or local action materially inhibits or limits the ability of any competitor or potential competitor to provide telecommunications services.²² This standard recognizes that in order to pose a barrier to entry, state or local requirements or decisions need not be absolute prohibitions; rather, even actions that *inhibit* the provision of service are problematic, as they have the effect of prohibiting the provision of service.

Construing the statutes in this manner would best advance their underlying purpose: facilitating the rapid deployment of new technologies such as broadband.²³ Indeed, a lesser standard—one that requires a categorical prohibition or barrier—would be flatly inconsistent with the statutory purpose by failing to address municipal actions that reduce investment in new services and capabilities through unnecessary regulations and excessive fees.²⁴ Investment decisions need not be made on an all or nothing basis; they are generally a matter of degree. The Commission has ample authority to recognize that reality in its interpretation of these statutory provisions.²⁵

²² This is similar to the standard adopted by the Commission in the seminal *California Payphone Ass’n*, Memorandum Opinion & Order, 12 FCC Rcd 14191, ¶ 38 (1997).

²³ Telecommunications Act of 1996, Pub. L. 104-104 (1996) (“An Act to promote competition and reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies.”); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 991 (9th Cir. 2009).

²⁴ Statutory language should be interpreted to effectuate the purpose of the statute. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) (“As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve.”); *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419–420 (1973) (“We cannot interpret federal statutes to negate their own stated purposes.”).

²⁵ *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863 (2013).

The Commission should also reject the “significant gap” standard that some courts have articulated in some Section 332 cases.²⁶ This standard requires the provider to show that there is a significant gap in coverage and that its proposed facility is the least intrusive means of filling that gap.²⁷ With its sole focus on “gaps” in coverage, this test is far too narrow and allows many prohibitory practices and decisions to persist, in contravention of the letter and the spirit of Section 332. It is particularly ill-suited for analyzing small-cell deployments, which are by definition used to expand capacity and throughput in circumstances where coverage already exists. Blocking small cells, or materially interfering with their deployment, will undoubtedly stand as a barrier to the provision of services, even if some level of coverage already exists. For the same reasons that the FCC rejected the “one provider” rule in 2009,²⁸ it should recognize that a test focused only on whether there is “coverage” or a “gap” in coverage does not adequately embody the statutory commitment to encourage wireless deployment.

The significant gap standard would also plunge local jurisdictions into analyzing technical network issues, a task for which they have neither the expertise nor the authority. By requiring

²⁶ *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999) (“[L]ocal governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines.”); *APT Pittsburgh Ltd. P’ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999) (“In order to show a violation of [Section 332] an unsuccessful provider applicant must show . . . that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network . . . [and] that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve.”); *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056-57 (9th Cir. 2014) (“A locality violates this provision “if it prevent[s] a wireless provider from closing a ‘significant gap’ in service coverage.”).

²⁷ *Willoth*, 176 F.3d at 643.

²⁸ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, Declaratory Ruling, 24 FCC Rcd 13994, ¶ 56 (2009) (“[T]he fact that another carrier or carriers provide service to an area is an inadequate defense under a claim that a prohibition exists, and we conclude that any other interpretation of this provision would be inconsistent with the Telecommunications Act’s pro-competitive purpose.”).

local jurisdictions to determine the “least intrusive means” to fill a gap in coverage, this standard compels zoning boards to opine on the availability and technological feasibility of, *inter alia*, “less sensitive sites, alternative system designs, alternative tower designs, placement of antenna[s] on existing structures, etc.,” to determine if they are more or less intrusive.²⁹ Yet neither local governments nor courts are positioned to substitute their judgments for those of service providers with regard to the design and deployment of wireless networks.

Further, the Commission should confirm that municipalities act in a regulatory capacity—subject to preemption—in managing their rights of way and that those actions are not protected from Section 253 and 332 review by categorizing them as “proprietary.” As an initial matter, this distinction finds no support in the text of Sections 253 or 332, which do not use the term “proprietary.” Moreover, these arguments ignore the distinction between ROWs and other government owned property. A municipality holds the ROW in trust for the public,³⁰ not as an owner, and, subject to state law, can regulate the time, place, and manner of its use. In contrast, a municipality’s role as a private property owner involves complete discretion to buy, sell, and manage property as it deems appropriate.³¹ Insulating local government regulatory action from preemption by categorizing it as “proprietary” would effectively rewrite Sections 253 and 332, allowing municipalities to bar wireless facilities deployment in ROWs with impunity. Such an

²⁹ *APT Pittsburgh Ltd. P’ship*, 196 F.3d at 480.

³⁰ *Meriwether v. Garrett*, 102 U.S. 472, 513 (1880) (“In its streets, wharves, cemeteries, hospitals, court-houses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses.”).

³¹ *See generally Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002); *Omnipoint Commc’ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 200 (9th Cir. 2013).

interpretation runs contrary to the explicit language and purpose of these provisions,³² and their consistent interpretation by courts.³³

Likewise, the Commission should reject arguments that Section 224 of the Communications Act insulates municipal ROW management from Commission oversight. Section 224 gives the Commission authority to regulate rates, terms, and conditions for telecommunications attachments to poles owned by a utility, but not those owned by a state.³⁴ Nevertheless, state and municipal-owned poles are still subject to Section 253.³⁵ Section 253's requirement that state and local governments adopt competitively neutral and nondiscriminatory regulations does not carve out pole attachments or other portions of the Act.³⁶ Otherwise, municipal pole regulations and fees could discriminate without repercussion, frustrating the purpose of the Act. Accordingly, the Commission should assert its authority over these structures and preempt local regulations that conflict with the Communication Act's requirements.

IV. TO REDUCE STATE AND LOCAL BARRIERS TO SMALL CELL DEPLOYMENTS, THE COMMISSION SHOULD DECLARE THAT SECTIONS

³² See, e.g., 47 U.S.C. § 253(a) (“No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”). Section 253(c), which carves out “reasonable” rights of way management, would hardly be necessary if all ROW decisions were proprietary and shielded from the statute’s sweep.

³³ See, e.g., *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005) (“[Section 332] imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless] facilities.”); *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 721 (9th Cir. 2009) (“The [Telecommunications Act] seeks a balance by placing certain limitations on localities' control over the construction and modification of [wireless communications facilities].”).

³⁴ 47 U.S.C. §§ 224(a)(1), (4).

³⁵ See 47 U.S.C. § 253(a) (“No state or local regulation . . .”).

³⁶ 47 U.S.C. § 253(c).

253 AND 332 PROHIBIT CERTAIN ACTIONS AND PRACTICES.

While AT&T commends the Commission's work to date on streamlining federal, state, and local siting practices, progress with regard to siting small cell facilities has been uneven in practice. Local governments continue to impede small cell deployments, particularly in public ROWs, generating obstacles that threaten the promise of advanced wireless services. The Commission should clarify that state and local regulations, such as those discussed below, that materially inhibit or limit the ability to provide wireless service violate Sections 253 and/or 332 of the Communications Act.

A. Direct Prohibitions on Wireless Small Cell Placement Violate Sections 253 and 332.

Carriers must deploy small cell facilities to enhance 4G network capacity, throughput, and reliability and to set the foundation for 5G technology. Local ROWs are the best areas to deploy these facilities because of their inventory of existing densely-spaced, low-elevation vertical structures. But municipalities have enacted a plethora of barriers to prevent carriers from deploying these facilities in ROWs. These direct prohibitions materially inhibit or limit a service provider's ability to offer services that customers seek and have the effect of prohibiting their ability to provide wireless service under 253(a). The following are examples of these barriers.

ROW prohibitions. Prohibiting small cell deployment in a ROW and on municipally-owned poles reduces the number of available sites for infrastructure placement. Many state and local governments have restricted the placement of small cell facilities in the ROW and on structures they control within the ROW, such as light poles and traffic control poles. Examples of ROW prohibitions include:

- At least two states have refused requests to place small cell infrastructure in the ROWs under their control, impacting state highways, major roads, and some arterial roadways in suburban and urban areas. As a result, in one of these states, AT&T was forced to alter its plans to locate 16 nodes along a highway ROW.

- AT&T has faced similar local government barriers in Texas and Massachusetts targeted at small cell facilities in the ROW.
- AT&T has delayed a 10-node small cell deployment in a Georgia County that refuses to allow wireless only poles in the ROW.
- One city in New York proposes to restrict installation of small cells to existing poles, which may not be properly spaced for small cells.

Moratoria. A moratorium is an express prohibition on the ability to deploy broadband infrastructure in the ROW. Ostensibly passed to allow a municipality to manage the deployment process or formulate policy, moratoria are often extended long beyond the time needed for any articulated purpose. Moratoria also include situations where a municipality, without formal action, simply refuses to accept or rule on siting applications. Examples of burdensome moratoria include:

- A Florida city imposed a “six-month” moratorium on ROW wireless siting that was extended multiple times over two years. As a result, AT&T had to cancel plans to deploy over 120 nodes.
- Bryan, Texas issued a moratorium on all wireless facility permits in 2016 that remains in effect, putting at risk AT&T’s small cell deployment in the city.
- An Ohio municipality enacted a 145-day moratorium on permits for construction in the ROW.
- A New York town has adopted a 140-day moratorium on the placement of new wireless facilities, including small cells placed on utility poles.

Above-ground facility prohibitions. Usually intended to avoid the visual impact from electric, telephone, and cable lines and big wireless towers, prohibitions on above-ground facilities and requirements to place infrastructure underground have a disproportionate impact on the provision of wireless broadband service via small cells, blocking such service entirely. Wireless service simply cannot be provided in some areas, such as residential areas, without the ability to place facilities above ground in the ROW. Indeed, underground requirements impede, and in some instances, will prevent, the deployment of millimeter wave spectrum to support 5G technologies. As the Ninth Circuit has recognized, an ordinance imposing an undergrounding requirement on a carrier “would

effectively prohibit it from providing services,”³⁷ which would violate Sections 253 and 332. The following are examples of such prohibitions:

- Bryan, Texas issued its moratorium on above-ground wireless facility permits upon receipt of an application to place wireless facilities in the ROW, finding that the application was a “current and immediate threat to the public health, safety, and welfare,” an unsupportable finding in light of extensive above-ground utilities deployed in most areas of the city.
- Three municipalities in Kansas prohibit above-ground facilities in certain areas.
- One city in New York is considering whether to apply its undergrounding requirements to wireless facilities.
- A municipality in Massachusetts refuses to consider the attachment of small cells in the city. That municipality also has a rule requiring that all new cable attachments be undergrounded except in the case where an existing company already has above-ground attachments on the poles, effectively discriminating against new carriers without existing attachments on poles.
- An Alabama city prohibits overhead facilities in certain areas and requires entities having such facilities already in place to relocate them underground, at their cost.
- An Indiana municipality requires all utilities to be placed underground unless a waiver is obtained.

Location prohibitions. Even where municipalities permit placement of small cell facilities in ROWs, they often arbitrarily limit where such facilities may be located. Location prohibitions materially inhibit or limit the ability of a service provider to offer wireless service. The following are examples of location prohibitions:

- Local governments in the States of Texas and Kansas, among others, require a minimum distance (*e.g.*, 100, 300, 500, or 1000 feet) between each small cell facility in the ROW.
- A local government in Texas prohibits small cell facility placements on municipally-owned light poles in the ROW and in parks.
- New York City prohibits mid-block placement of small cell facilities, whereas several municipalities in California do the exact opposite by prohibiting small cell facility placements in the intersections. In one of those California communities, the inability to

³⁷ *Sprint Telephony PCS, L.P. v. City of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008).

place small cell facilities in the intersection combined with process burdens delayed AT&T's small cell placements for over two years.

These direct prohibitions are not saved by the safe harbors in Section 253(b) and (c) because they typically are not applied in a competitively neutral or nondiscriminatory manner. For instance, location prohibitions on small cell deployments in the ROW are inherently discriminatory because they disadvantage later ROW entrants. There is only one ROW, and arbitrary restrictions on the placement of small cells leave later entrants unable to place facilities in necessary locations. Similarly, ROW access restrictions selectively applied to wireless providers only are inherently discriminatory. Most ROWs support light poles, traffic control poles, utility poles, equipment cabinets, and devices installed on those poles or cabinets, such as electric transformers, sensors, traffic cameras, solar panels, and Wi-Fi antennas and other equipment placed by cable companies and local government entities. This equipment, often placed at regular intervals along the ROW, is no less, and typically substantially more, visually obtrusive than small cell antennas. And yet, municipalities often subject small cell facilities to more onerous restrictions. Such discriminatory regulations hinder the deployment of small cells in violation of Section 253.³⁸

B. Unreasonable Aesthetic Restrictions on Wireless Small Cell Facilities in the ROW Violate Sections 253 and 332.

Some local governments that have not enacted direct prohibitions on wireless small cell facilities have instead enacted unreasonable aesthetic restrictions that can have the same effect.

Examples of these ordinances include:

- Local governments in Texas and New York allow for a single size and configuration for small cell equipment, while requiring case-by-case approval of any non-conforming equipment, even if smaller and upgraded in design and performance. As a practical matter,

³⁸ In WT Docket 16-421, AT&T demonstrated, via contrasting illustrative deployments in a fictional downtown area, how prohibitions on the placement of small cell equipment can materially inhibit or limit the ability of a service provider to offer wireless service. AT&T incorporates those comments in this docket. *See* Comments of AT&T, WT Docket No. 16-421 at 11-12 (filed March 8, 2017).

service providers must incur the added expense of conforming their equipment designs to the approved size and configuration, even if newer equipment is smaller, to avoid the delays associated with the approval of an alternative equipment design and the risk of rejection of that design.

- Elsewhere in California, an AT&T project to install 90 small cell nodes on municipal light poles were delayed approximately one year waiting for design approval.
- Two local governments in Illinois require wireless equipment to be painted a “color that blends with the surroundings of the pole, structure, or infrastructure on which it is mounted.”
- An ordinance adopted by a local government in Pennsylvania requires a “stealth design” for wireless facilities that makes them “more visually appealing and virtually indistinguishable from the structure that it is mounted to.” Similar ordinances throughout the country require service providers to “camouflage” small cell equipment.
- Local governments in California and Pennsylvania prohibit the placement of wireless facilities in and around historic properties and districts, regardless of the size of the equipment or the presence of existing more visually intrusive construction near the property or district, and even if they are categorically excluded from Section 106 review under Commission rules.

These restrictions are particularly problematic because they are vague and often applied discriminatorily. Municipalities often apply these laws only to equipment of licensed wireless providers, but not to other utility equipment, including wireless equipment of cable providers, running afoul of Sections 253 and 332. Worse, these restrictions can materially inhibit or limit the ability to provide service, especially if they limit the configuration of equipment. Network equipment manufacturers are actively innovating with respect to small cell equipment form and function. Regulations that limit the configuration of equipment or define acceptable equipment in overly narrow terms, such as size or configuration requirements, are especially burdensome.

C. ROW and Municipal Pole Access Fees That Are Not Cost-Based Violate Section 253.

In addition to unreasonable regulations, state and local governments often subject providers to exorbitant fees for placing facilities in the ROW. Although Section 253 permits these fees, it requires that they be “fair and reasonable.” But municipalities frequently exceed this standard and

treat ROWs as a revenue generator at the expense of broadband deployment. Municipalities have become creative in the different types of fees they charge for ROW access and the utility of the ROW for small cell deployment leaves carriers like AT&T with few other options but to pay.

Examples of unreasonable fees AT&T has encountered are:

- *Application/Permit fee.* One-time permit application fees are common, depending on whether the support structure is municipally-owned, and some are excessive. Bloomington, Minnesota, in an attempt to recover purportedly lost revenue when recently passed statewide small cell legislation imposed standard ROW access rates, has proposed to raise its application fee from \$35 to \$1,500 per node. Four California municipalities require traffic-control plans that cost over \$10,000, with two requiring plans that exceed \$20,000. The City of St. Paul sought to charge a one-time administrative charge of \$5,000, and another Minnesota city recently assessed a one-time administrative charge of \$4,000 for an application for a wireless carrier to attach to a city structure, in addition to applicable permit fees.
- *Recurring charges.* Recurring charges take the form of flat fees, revenue-based fees, in-kind contributions, or some combination of the foregoing and appear to be set based on a perceived “market rate”—a faulty premise when there is no true “market” for access to the ROW. In practice, every municipality has a monopoly of the ROW and the discretion to dictate the terms of access.
 - *ROW usage fee.* These fees are charged for the placement of equipment in the ROW. For example: A Washington local government can charge an annual fee of up to \$10,000 per facility. Before the passage of small cell legislation, Arizona municipalities charged annual per-node fees in the range of \$3,000 to \$4,000 and a Texas municipality sought a \$3,000 annual fee for access.³⁹ A Pennsylvania municipality sought an annual fee of \$8,000 to access the ROWs, which has caused AT&T to abandon deployments. Another municipality has “Annual Registration Maintenance Fees” to occupy the ROW of \$10,000 for less than 1 mile, \$20,000 from 1 to 15 miles, \$30,000 from 16 to 50 miles and \$40,000 for over 50 miles. One Oregon City has published rates of \$5,500 for attachments to city-owned poles downtown and \$3,500 for city-owned poles outside the downtown core. These wide-ranging ROW usage fees extend nationwide and speak to the arbitrary nature in which the amounts are determined.
 - *Municipal structure attachment fee.* This fee is imposed as rent to attach to municipally-owned poles, and is often excessive, acting as an income generator for the local government. Whereas utility pole attachment rates subject to the Commission’s Section 224 regulations are below \$50 annually, municipalities may

³⁹ See Ariz. H.B. 2365 (2017); Tex. S.B. 1004 (2017) (limiting the fees that municipalities can charge for the use of the ROW).

charge thousands for a similar small cell attachment. Three cities in California assess fees of \$2,600, \$4,500, and \$8,000 annually per attachment. In Texas, one city charges \$2,000 annually per attachment with a 2% annual escalator while another city charges \$1,500 per attachment with an unfettered right to raise the fee every two years.⁴⁰ A Georgia municipality is considering an annual fee of \$6,000 per node. An Illinois city charges over \$2,500 annually for streetlight attachments and over \$5,000 for traffic light attachments and has a 5% annual escalator. The City of St. Paul, Minnesota, acting through a contractor that receives a portion of any increase in revenues generated, sought an annual fee of \$3,400 to attach to city structures and rejected AT&T's request to opt-in to the city's agreements with other wireless carriers, all of which carry an annual fee of less than \$1,000, inclusive of the cost of electricity. AT&T's refusal to agree to these exorbitant fees in Minnesota has delayed AT&T's small cell deployment, not an insignificant development in light of efforts needed to enhance service in anticipation of the Super Bowl in 2018.⁴¹ Another Minnesota city recently assessed a one-time administrative charge of \$4,000 to a wireless carrier for an application to attach to a city structure, in addition to applicable permit fees. These exorbitant fees are unsupported except for the municipalities' monopoly on ROW access.

- *In-kind contributions.* In-kind contributions are negotiated and occur in addition to or instead of ROW usage fees and municipal attachment fees. A municipality in Massachusetts requires small cell operators to provide the city with free dark fiber as a condition of using city light poles, while another local municipality in Massachusetts requires the transfer of dark fiber to the city when the service provider's access to the ROW ends. Other municipalities saddle small cell service providers with maintenance of the pole and surrounding ROW area.
- *Gross-revenue fees.* Multiple municipalities around the country require 5% of a provider's gross revenue as part of providing access to the ROWs, while a local government in Georgia charges 3% of annual revenue.

These fees discourage providers from investing in or expanding their networks. As a result, providers forgo deploying small cells in certain municipalities or diminish the size of or even abandon a project. If, as S&P Global Market Intelligence estimates, small-cell deployments reach

⁴⁰ See *supra* n.16.

⁴¹ Minnesota's recently adopted small cell legislation eliminates cities' excessive charges for attachment to municipal structures and access to the ROW. See Minn. S.F. 1456, Article 9 (2017) (amending Minn. Statutes §§ 237.162-63).

nearly 800,000 by 2026,⁴² a ROW fee of \$1,000 per year (a modest sum relative to current ROW access and attachment fees) would result in nearly \$800 million *annually* in foregone investment. This lost investment would harm consumers and materially inhibit or limit a service provider's ability to provide wireless services.

To avoid this potential for lost investment, the Commission should clarify that a “fair and reasonable” fee to locate in a ROW and on municipally-owned ROW structures must be cost-based (*i.e.* allowing the local government to recover 100% of its real costs arising from the presence of the wireless attachment in the ROW or on its support structure). As an initial matter, the Commission should categorically prohibit revenue-based fees as, by definition, they are not related to management or use of the ROW.⁴³ Municipalities should be allowed to recover their costs to process an application (in the case of a ROW permit fee), manage the ROW (in the case of accessing the ROW to place a pole or attach to an investor-owned utility pole), and manage the pole in the ROW (in the case of attaching to a municipal pole). In the case of attaching to municipality-owned structures, fair and reasonable fees should be nominal and only compensate the local government for the additional costs of providing the attachment. Without a cost-based approach, service providers are locked into a cycle of ever higher fees to access the ROWs and poles in ROWs.

⁴² *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13364 n.23 (citing *SNL Kagan Wireless Investor*).

⁴³ *See, e.g., TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002) (invalidating fees based on percentage of revenue); *Qwest Corp. v. City of Santa Fe, New Mexico*, 224 F. Supp. 2d 1305, 1327 (D.N.M. 2002), *aff'd in part, remanded in part*, 380 F.3d 1258 (10th Cir. 2004) (“[I]n order to fall within the savings clause of Section 253(c), the compensation required by a local government must directly relate to actual use of local rights-of-way.”); *Peco Energy Co. v. Twp. of Haverford*, 1999 WL 1240941, at *8 (E.D. Pa. Dec. 20, 1999) (“Revenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of-way.”).

Further, both Sections 253 and 332 require nondiscriminatory and competitively neutral application of regulations. Yet, wireless service providers are often subject to higher fees than other ROW occupants, even though wireless service providers use considerably less of the ROW. The Commission should clarify that Sections 253 and 332 require that wireless providers only be assessed fees that are proportionate to their use of the ROW. Consistent and rational fees will allow all wireless providers to compete on an equal basis and expedite broadband deployment.

To alleviate some of the issues associated with excessive fees, the Commission could establish a presumptively reasonable safe harbor fee for use of the ROW and municipally-owned structures in the ROW. A reasonable safe harbor fee to locate in the ROW could be in the range of \$50 annually, based on the model adopted by the State of Arizona.⁴⁴ A reasonable safe harbor fee for placement of small cell equipment on municipal structures could also be about \$50 annually per structure, more than the pole attachment fees AT&T typically pays to utilities. Fees that fall within these safe harbors would be predictable and could be relied on by service providers and municipalities. To address the fact that, in many instances, multiple parties use the ROW and may reasonably be expected to share costs, the Commission should clarify that a fair and reasonable municipal pole-attachment fee is the lesser of (i) the Section 253(c) safe harbor fees above; or (ii) the ROW access fees charged to other ROW occupants for proportional use.

D. Burdensome Permitting Processes Violate Section 253 by Injecting Unnecessary Costs and Delays into the Wireless Siting Process.

Local governments also enact burdensome permitting and zoning processes that discourage the deployment of wireless broadband facilities. These requirements range from requiring the submission of detailed maps of all wireless facilities in a jurisdiction, to refusing to accept batched

⁴⁴ Ariz. Rev. Stat. §9-592, D.4, adopted in Ariz. H.B. 2365 (2017).

applications, to imposing the same burdensome processes on minor facility modifications as to new deployments, each of which can cause extensive delays. One of AT&T's early Distributed Antenna Systems ("DAS") projects in California took over 800 days to deploy because local government officials scrutinized the design and operational details of each node, including issues such as whether a macro site or DAS node would best cover an area, antenna designs, RF exposure, property values analyses, stealthing, equipment placement (above or below ground level), acoustic noise studies, screening, placement away from intersections, and network performance. The Commission should clarify that onerous processes, such as those described above, discourage wireless providers from deploying small cells in large numbers, as is needed for 5G technologies, and contravene Section 253. In order to streamline and expedite processing, the Commission should limit what local governments can review when considering applications and clarify that prohibiting "batched" applications has the effect of materially inhibiting the provision of wireless services.

E. The Commission Should Preempt Local Regulations That Would Inhibit Small Cell Deployments in Particular.

The Commission should clarify that local regulations that inhibit the deployment of small cells are preempted under Section 253. This includes local ordinances that, absent legitimate space, safety, or historic preservation considerations, materially inhibit or limit the placement of small cell equipment and supporting poles that meet the following criteria:

- Small cell antennas fitting, or that could fit, within an enclosure of six cubic feet in volume;
- Equipment associated with the small cell antennas, excluding electric meters, concealment elements, power transfer switches, telecommunications demarcation boxes, battery back-up power systems, cut-off switches, cable, conduit, and equipment concealed from public view or camouflaged and that are no more than 28 cubic feet in volume; and
- New or replacement poles in the ROW that are no taller than 50 feet above ground level or 10 feet higher than the highest pole or other structure within 500 feet of the ROW.

These size limitations are consistent with limitations codified in small cell legislation recently adopted by multiple states.⁴⁵ Those states are to be applauded for having the forethought to recognize that unreasonable regulation of small cells limits the deployment of wireless services and can and should be removed throughout their state, in favor of reasonable standards that allow for wireless use of the ROW while still protecting the character of their communities.

States have also implemented other small cell deployment process reforms. For example, the Texas legislature recently passed a bill that streamlines network providers' access to the public ROW and establishes both timeframes for expeditious processes and fair terms and conditions, including fees.⁴⁶ Virginia also recently enacted a law that allows providers to batch up to 35 nodes in a single application and gives applicants a deemed approved remedy for delayed review.⁴⁷ These common-sense reforms have streamlined the review process and will lead to significant benefits for providers, local governments, and consumers alike. Nevertheless, Commission action still is needed to ensure that wireless infrastructure can be deployed expeditiously in localities across the country.

⁴⁵ See, e.g. Ariz. H.B. 2365 (2017); Minn. S.F. 1456, Art. 9 (2017); Fla. S.B. 596 (2017); Iowa S.F. 431 (2017); Ind. S.B. 213 (2017); Ohio S.B. 331 (2017).

⁴⁶ Tex. S.B. 1004 (2017).

⁴⁷ Va. Code Ann § 15.2-2316.4 (2017).

F. Section 253(c) Requires Local Governments to Unilaterally Disclose ROW Compensation to the Public.

Section 253 does not prevent state or local governments from requiring “fair and reasonable compensation” for use of the ROW if the “compensation required is publicly disclosed.”⁴⁸ Nevertheless, municipalities make very little effort to disclose ROW fees, and some of them argue that they meet the disclosure requirements of Section 253(c) merely by providing compensation information in response to state open records act requests. This interpretation would render Section 253(c) superfluous. To have meaning, Section 253(c) must require more than merely complying with existing state freedom of information law requirements.

The most reasonable interpretation of Section 253(c) is that a local government must unilaterally disclose compensation information to members of the general public, such as on its municipal website, in a standard schedule, or, by some other readily available means. This level of transparency would allow wireless providers to budget for small cell deployments in the ROW, compare small cell deployments in different locales, and confirm that ROW compensation is “competitively neutral and nondiscriminatory” as required by Section 253(c).⁴⁹ This Commission interpretation would also promote small cell facilities by removing the significant uncertainty that currently exists when planning for their deployment.

⁴⁸ 47 U.S.C. §253(c).

⁴⁹ See *Peco Energy Co. v. Township of Haverford*, 1999 WL 1240941 at *7 (E.D. Pa. 1999)(“[T]he Township’s failure to publish a schedule of fees is in direct violation of §253(c), which requires that ‘the compensation required [must be] publicly disclosed’ The failure to publicize the fees also renders us unable to determine if Haverford has complied with §253(c)’s requirement that compensation be imposed ‘on a competitively neutral and nondiscriminatory basis.’”).

V. THE COMMISSION SHOULD ADOPT REMEDIES AND PROCEDURES TO PROVIDE GREATER PREDICTABILITY FOR SITING APPLICANTS.

While the Commission should provide as much clarity and specificity as possible in establishing rules and guidelines to govern the site approval process, substantive rules alone are not sufficient. The Commission must also ensure that site applications are addressed in a timely manner. To that end, the Commission should rule that any wireless siting application that is not acted upon with the Section 332(c)(7) shot clock is “deemed granted.” In addition, the Commission should establish a streamlined complaint process to ensure expeditious handling of section 332(c)(7)(B)(ii) complaints.

A. The Commission Should Adopt a “Deemed Granted” Remedy Under Section 332.

Although establishment of the Commission’s shot clocks have brought more structure to the wireless siting application process,⁵⁰ some municipalities continue to find ways to sidestep the shot clock deadlines. For example, many of them announce moratoria on new applications that effectively delay their processing; others establish procedures to prevent or delay shot clock countdowns from ever beginning (*e.g.*, “pre-application” meetings). Further, for applications not covered by Section 6409,⁵¹ applicants must resort to judicial action to obtain relief, an expensive and time-consuming process that gives local governments considerable leverage. Applicants will often agree to tolling or other demands from local officials due to their wariness of the uncertainty, delay, and expense of litigation. This wariness is compounded in cases where applicants are deploying multiple small cells projects with dozens, if not hundreds, of nodes requiring approval.

⁵⁰ See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, ¶ 4 (2009) (“2009 Declaratory Ruling”).

⁵¹ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, § 6409 (2012) (“Spectrum Act”) *codified at* 47 U.S.C. § 1455(a).

To address this problem, the Commission should rule that wireless infrastructure applications not covered by Section 6409 should be “deemed granted” if a jurisdiction fails to act on the application within the time limits of the Section 332(c)(7) shot clock, allowing construction to proceed. In addition, the Commission should specify that the shot clock begins running when an application is filed. As with Section 6409, to avail itself of this remedy an applicant would inform the local jurisdiction by letter that the deadline has passed. A “deemed granted” remedy would add greater consequence to violations of the shot clock and relieve applicants of the uncertainty, delay, and expense of bringing litigation against a municipality to enforce their rights.

Deeming site applications granted after a specified period of time is a better approach than merely specifying that the shot clocks constitute an “irrebuttably” reasonable period of time for municipal action on siting applications.⁵² Under the latter, alternative approach, applicants would still have to file suit in court seeking relief from the local government’s inaction, inevitably leading to delays, expense, and uncertainty. In contrast, a “deemed granted” remedy like the one adopted for Section 6409 and by a number of states⁵³ would enable applicants to avoid most litigation.

The Commission has ample legal authority to establish a “deemed granted” remedy. First, as the Commission notes, the Fourth Circuit upheld the “deemed granted” remedy adopted in the Spectrum Act,⁵⁴ finding that the remedy was permissible under the Tenth Amendment, consistent with the Spectrum Act’s statutory purpose, and well within the Commission’s authority.⁵⁵ Second,

⁵² *NPRM*, 32 FCC Rcd at 3334, ¶ 10.

⁵³ *See, e.g.* Cal. A.B. 57 (2015); Iowa H.F. 655 (2015); Ind. H.B. 1318 § 23 (2015).

⁵⁴ *NPRM*, 32 FCC Rcd at 3335-36, ¶ 13 (discussing *Montgomery Cty., Md. v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015)).

⁵⁵ *Id.*

a deemed granted remedy would not contravene the language in Section 332(c)(7)(B)(v), which permits aggrieved parties to pursue judicial relief but does not preclude other remedies.

Nor does the legislative history foreclose a deemed granted remedy. Although there is language in the legislative history stating that courts shall have exclusive jurisdiction over all disputes arising under this section,⁵⁶ that language is not inconsistent with remedies focused on avoiding delays in decision-making so that applicants can avail themselves of their judicial remedies in a timely fashion. And in all events, the D.C. Circuit has affirmed that “a plain reading of an unambiguous statute cannot be eschewed in favor of a contrary reading, suggested only by the legislative history and not by the text itself,”⁵⁷ and that “[w]e will not permit a committee report to trump clear and unambiguous statutory language.”⁵⁸ In this case, Section 332(c)(7)(B)(v) does not rest exclusive jurisdiction in the courts. Moreover, the Commission has broad authority to render definitive interpretations of ambiguous provisions such as Section 332(c)(7) and there is no clear Congressional intent that the Commission could not exercise that authority and “issue an interpretation of § 332(c)(7)(B)(v) that would guide courts’ determinations of disputes under that section[.]”⁵⁹ Accordingly, it is appropriate for the Commission to adopt a “deemed granted” remedy.

B. The Commission Should Establish a Streamlined Complaint Process for

⁵⁶ S. Rep. No. 104-230, at 207-08 (1996) (Conf. Rep.) (“It is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) . . . the courts shall have exclusive jurisdiction over all . . . disputes arising under this section.”).

⁵⁷ *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987) (quoting *Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F. Supp. 1305, 1310 (S.D.N.Y. 1982)).

⁵⁸ *ACLU*, 823 F.2d at 1569.

⁵⁹ *City of Arlington v. FCC*, 668 F.3d 229, 251 (5th Cir. 2012). *See also id.* at 250-51 (“Had Congress intended to insulate § 332(c)(7)(B)’s limitations from the FCC’s jurisdiction, one would expect it to have done so explicitly[.] * * * Here, however, Congress did not clearly remove the FCC’s ability to implement the limitations set forth in § 332(c)(7)(B) . . .”).

Violations of Section 253.

The Commission should also establish a concrete process for exercising its preemption authority in an expedited manner when disputes arise between municipalities and applicants under Section 253. Carriers rarely escalate disputes about municipal regulations to the Commission under Section 253 because the process is unwieldy and the timeframe for resolution is unclear. To help address these issues, the Commission should establish a streamlined complaint process for resolution of disputes involving violations of Section 253.

Under this proposed process, if a state or local government enacts a regulation violating Section 253, an aggrieved party could bring the dispute to the Commission. The Commission would hear the complaint and determine whether the regulation should be preempted. This process would include a shot clock for Commission action, which could be tolled as necessary for additional development of facts. The Commission has experience acting in this capacity, as the pole attachment process under Section 224 includes a similar complaint procedure.⁶⁰ Institution of this streamlined complaint process would facilitate timely dispute resolution and minimize delay.

⁶⁰ Under Section 224, utilities can file a complaint with the Enforcement Bureau, which evaluates the complaints and determines a proper remedy. *See* 47 U.S.C. § 224(b)(1) (directing the Commission to “adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary.”)

VI. THE COMMISSION SHOULD UPDATE ITS APPROACH TO THE NHPA AND NEPA TO REMOVE CHALLENGES TO DEPLOYING NECESSARY WIRELESS INFRASTRUCTURE.

AT&T applauds the Commission for its work to date on streamlining the NHPA and NEPA review processes. Although these efforts have been helpful, the NHPA and NEPA processes should be further refined to accommodate the increasing deployment of small cell technologies. Taking action in this proceeding to refine these processes will foster the critical national policy goal of promoting ubiquitous, advanced, and affordable broadband services without compromising the interests the NHPA and NEPA were adopted to protect.

A. The Commission Should Eliminate Inconsistencies in Application of its Section 106 Categorical Exclusions and Further Streamline NHPA Review.

While expanded categorical exclusions have streamlined processing for certain categories of deployments, these exclusions have also led to their own set of administrative burdens. The existing categorical exclusions include numerous conditions with sometimes very nuanced differences, limiting the applicability of the exclusions and slowing deployment. The Commission should eliminate these inconsistencies through adoption of broader and clearer categorical exclusions while also protecting historic and Tribal properties.

Specifically, previous streamlining efforts have introduced inconsistencies:

- Replacement *towers* are categorically excluded from Section 106 review, but replacement *poles* are not.
- Tribal Nations' review may be required solely due to the age of the non-tower support structure (*i.e.*, over 45 years) or due to the support structure's proximity to a historic district even though these factors do not implicate Tribal concerns.
- Tribal review is required to place poles for small cell deployments in urban area ROWs, even in previously disturbed ground.
- Tower Construction Notification System ("TCNS") inquiries are "deemed approved" if a Tribal Nation does not respond, but not if a Tribal Nation responds with an interest in reviewing a site and then never approves or denies the request.

To promote the efficient and timely deployment of critical wireless broadband infrastructure, the Commission should eliminate these inconsistencies and further streamline NHPA review for small cell facilities through the following actions:

Categorical Exclusion for Small Cells. The Commission should adopt a broad categorical exclusion from Section 106 for small cell facilities.⁶¹ Consistent with the Collocation NPA, all small cell facilities that fit within an enclosure (or if the antenna is exposed, within an imaginary enclosure) that totals no more than six cubic feet in volume would be categorically excluded from Section 106 review unless they are located on a national historic landmark.⁶² The Collocation NPA establishes an exclusion for placement of antennas that fit within a real or imaginary enclosure of three cubic feet in volume if the aggregate of all antennas fits within an enclosure of six cubic feet or less in volume and the associated equipment comprises a volumetric limit of 21 cubic feet or more, depending on the support structure.⁶³ The Commission should clarify that this categorical exclusion would allow for the combination of small cell antennas (and potentially associated equipment) in a single shroud that does not exceed the six cubic feet in volume limit. Doing so would give providers much needed flexibility to arrange small cell equipment in different configurations to accommodate different pole types and enable operation over multiple bands. In the alternative, if the Commission does not adopt the proposed clarification, the agency should amend the Collocation NPA to establish a categorical exclusion for small cell facilities as outlined above.

⁶¹ See *NPRM*, 32 FCC Rcd at 3353, ¶ 66.

⁶² Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Part 1, App'x B (“Collocation NPA”).

⁶³ *Id.* § VI.A.5.

Requiring Section 106 review for advanced networks such as small cells subjects licensees, structure owners, and network operators to unjustified delays, costs, and administrative burdens, with no attendant benefits to historic resources. If this categorical exclusion is not adopted, the Commission should, at minimum, limit NHPA review of small cell and DAS facility deployments to the State Historic Preservation Officers (“SHPO”) when review is required and not require Tribal consultation unless ground disturbance outside a ROW is involved. The SHPO review process is more predictable, making it easier to plan infrastructure deployments, and qualifying small cell deployments without ground disturbance would rarely implicate Tribal interests.

Categorical Exclusion for Replacement Poles. Poles often require replacement to support small cell facilities. Thus, AT&T supports the Commission’s proposal to exclude the replacement of poles from Section 106 review, regardless of whether a pole is located in a historic district, provided that the replacement pole is not “substantially larger” than the pole it is replacing (as defined in the Collocation NPA).⁶⁴ The proposed exclusion should encompass replacements for poles that were constructed for a purpose other than supporting antennas—such as light, traffic, and utility poles—and thus are not “towers” under the existing definitions. In addition to speeding deployment, excluding replacement poles from Section 106 review will encourage carriers to site facilities on existing poles rather than undertake new constructions.

Categorical Exclusion for New Poles in the ROW. The Commission should also adopt a categorical exclusion for deployments on new poles, regardless of placement in a historic district, if: (1) the facility will be located in a ROW designated for communications towers or utility transmission; (2) the ROW is in active use for such purposes; and (3) the facility will not constitute a substantial increase in size (as defined in the Collocation NPA) over existing support structures

⁶⁴ *NPRM*, 32 FCC Rcd at 3353-54, ¶ 68.

in the ROW within the vicinity of the proposed construction. Adopting this exclusion would be consistent with the exclusion for new poles already adopted for the NEPA review process.⁶⁵ Such new poles would have minimal impact because their placement would be consistent with the existing use adopted by the locality and their size would not be substantially larger than the existing poles. As the Commission has noted, “[w]here such structures will be located near existing similar poles, . . . the likelihood of an incremental adverse impact on historic properties is minimal.”⁶⁶ Further, such new pole placement would not generally involve new ground disturbance because “constructing the existing facilities likely disturbed the ground already.”⁶⁷

Categorical Exclusion for Nearby Ground Equipment. The Commission should exclude the placement of ground equipment such as handholes within a 12-foot radius of an existing pole from Section 106 review. The pole itself will have already undergone the necessary historic and environmental review processes, making a second review for nearby ground equipment unnecessary. Excluding this equipment from Section 106 review will expedite its placement and use.

Batching Applications. The Commission should adopt a streamlined process allowing applicants to submit filings to SHPOs and through the TCNS that include multiple poles and infrastructure.⁶⁸ The Advisory Council on Historic Preservation (“ACHP”) already permits applications associated with building out Positive Train Control facilities to be submitted in

⁶⁵ 47 C.F.R. § 1.1306(c).

⁶⁶ *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, ¶ 63 (2004).

⁶⁷ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, ¶ 65 (2014).

⁶⁸ *See NPRM*, 32 FCC Rcd at 3352, ¶ 63.

batches.⁶⁹ This modification would simplify application procedures and be extremely beneficial to licensees seeking to deploy thousands of small cell facilities.

Shot Clock for Tribal Nation Review. The Commission should establish a “shot clock” for Tribal consultation—after a period of 60 days, the Tribal representative must complete its review of a project and provide a conclusive response to the applicant. A 60-day timeline would be consistent with the process and timeline adopted by the Commission in its 2005 Declaratory Ruling⁷⁰ for inquiries to which a Tribal Nation fails to respond, but would close the loophole that currently exists when a Tribal Nation initially requests review but subsequently provides no decision.

Applications would be “deemed approved” if a Tribal Nation fails to provide a conclusive response within that 60-day period. Escalations to the Commission, both formal and informal, would no longer be performed.⁷¹ Instead, applicants could self-certify through the TCNS their compliance with the Tribal notifications required by Section 106.⁷² Applicants could then proceed with construction without direct Commission involvement. The Commission could ensure that certifications are truthful and well-founded by treating the certification obligation the same as other Commission obligations—subject to existing enforcement processes with the risk of forfeitures for abuse.

⁶⁹ See *Batching Guidance for TCNS and E106 Submissions Under the Positive Train Control Program Comment* (rev. Dec. 19, 2014), http://wireless.fcc.gov/ptc/Batching_Guidance_121914.pdf.

⁷⁰ *Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement, Declaratory Ruling*, 20 FCC Rcd 16092 (2005).

⁷¹ In AT&T’s experience, escalations have proved to be ministerial only, as AT&T personnel working on Section 106 issues cannot recall a single escalation that has resulted in the THPO requesting that AT&T mitigate or abandon a site.

⁷² *NPRM*, 32 FCC Rcd at 3352, ¶ 61.

Site Monitors. The Commission need not adopt new rules related to site monitors.⁷³ Today, site monitors are retained by applicants on an as-needed basis. The Section 106 NPA already includes a mechanism for addressing inadvertent or post-review discoveries of historic properties such as artifacts, evidencing the signatories' view that site monitors would not be routinely used.⁷⁴ Carriers already evaluate the characteristics of a site using preconstruction analyses and employ diligent processes, and a lot of common sense, to avoid disrupting important archeological and historic sites. For example, when AT&T's subsurface tests for an infrastructure site indicates the presence of artifacts, AT&T proceeds as required to mitigate any impact, occasionally even cancelling a project. Rules regarding site monitors are not necessary to protect sensitive sites and carriers should not be required to utilize site monitors just to be assured of Tribal Nation review.

Forms 620 and 621. The Commission need not modify the requirement that, once a Tribal Nation or Native Hawaiian Organization ("NHO") has been notified of a project, an applicant must provide "all information reasonably necessary for the Indian tribe or NHO to evaluate whether Historic Properties of religious and cultural significance may be affected" and provide the Tribal Nation or NHO with a reasonable opportunity to respond.⁷⁵ Tribal Nations and NHOs can today easily evaluate whether properties of religious and cultural significance may be affected by reviewing the information provided in Form 620 and the 621 Submission Packet. The purpose of

⁷³ See *NPRM*, 32 FCC Rcd at 3350-51, ¶ 55.

⁷⁴ Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by The Federal Communications Commission, 47 C.F.R. Part 1 Appendix C, § IX ("Section 106 NPA").

⁷⁵ Section 106 NPA, § IV.F.

Form 620 and Form 621 is for interested entities to be able to assess whether additional consultation is needed. No change to this information is merited at this time.

B. The Commission Should Refine its NEPA Review Policies to Foster Infrastructure Deployment.

With respect to NEPA, the Commission should revise its rules so that an environmental assessment (“EA”) is not required for siting in a floodplain when appropriate engineering or mitigation requirements have been met.⁷⁶ Under the current rules, a provider siting a tower in a floodplain must file an EA even though the provider can easily mitigate the potential impact of the floodplain through constructing the tower above flood level and/or getting a permit from the U.S. Army Corps of Engineers. An EA is required even though, following appropriate mitigation, the construction would not present an adverse impact to the floodplain. This requirement is not necessary and should be eliminated. Doing so will streamline the process and ease the burdens of NEPA review, thereby facilitating wireless infrastructure deployment.

VII. THE COMMISSION SHOULD REFORM THE TRIBAL REVIEW PROCESS TO ELIMINATE EXCESSIVE FEES AND DELAYS.

Excessive fees charged by some Tribal Nations for review of wireless siting applications are another barrier to broadband deployment. As Commissioner O’Rielly recently stated, infrastructure siting issues “are compounded by the escalating costs of the Tribal approval process,” and the “endless delays” associated with that process.⁷⁷ AT&T has frequently encountered these types of obstacles, which have had a negative impact on network infrastructure deployment. For example:

- The number of Tribal Nations charging fees for Section 106 review has increased dramatically. AT&T’s experience between 2010 and 2017 has been that the number of

⁷⁶ See *NPRM*, 32 FCC Rcd at 3352-53, ¶ 65.

⁷⁷ O’Rielly Wireless Infrastructure Show Remarks at 5.

Tribal Nations charging fees for Section 106 review tripled in the Northeast and more than quintupled in the Southeast (areas where AT&T has the best data).

- The amount of the Section 106 review fee charged by Tribal Nations has also increased dramatically. One Tribal Nation that charged a \$50 fee for site review in 2010 now charges \$500 for the same review. Other Tribal Nations have imposed first time charges of \$1,000 or more. More broadly, AT&T's experience between 2010 and 2017 has been that the standard fee per project charged by Tribal Nations in the aggregate has increased by 1400% in the Northeast and by 2500% in the Southeast.
- In AT&T's experience, 58 Tribal Nations charge an average of \$500 or more for Tribal review; 15 Tribal Nations charge \$1,000 or more.
- Within the last three years, AT&T has spent over \$13 million on Tribal fees and, although total fees fluctuate depending on build plans, fees in some years have reached nearly \$8 million.
- A single new macro site build in Illinois generated interest from 26 Tribal Nations seeking approximately \$15,000 in fees. Fees for the same Tribal Nations to review the same site would have totaled just \$3,000 a few years ago.
- Collocations have also unnecessarily generated tribal interest and the payment of fees, despite the absence of any cognizable tribal interest. For example, a collocation on a Marriott hotel in Hannepin, Minnesota generated interest from 36 tribes costing \$13,525; separate collocations in Denver, Colorado on the Civic Center and a 10-story apartment building each generated interest from 13 tribes and required payment of \$8,000; and a collocation on the County Court House in Suak, Wisconsin interest from 14 tribes, requiring payment of \$7,750.
- Sprint incurred costs of \$173,305 in Tribal fees for 23 cell sites deployed around NRG Stadium in Houston, Texas in advance of the Super Bowl.⁷⁸

The Commission should take the following actions to address the growing problem of excessive fees.

Geographic Areas of Interest. The Commission can help curb excessive fees by ensuring that only Tribal Nations with a cognizable interest in a site review a project. Today, Tribal Nations can designate large geographic areas in the United States as significant without disclosing any additional information about the Tribal Nation's interest. Some Tribal Nations even identify half

⁷⁸ *Ex Parte* Letter from Keith Buell, Sprint, to Marlene H. Dortch, FCC, WT Docket No. 16-421 (filed May 16, 2017).

the states in the country as their areas of interest. The Commission should modify the TCNS to require Tribal Nations to explain why they are designating geographic areas of interest before the area is designated and to describe areas with more particularity, such as by county.⁷⁹ AT&T supports the proposal in the PTA-FLA Petition for Declaratory Ruling that Tribal Nations be “required to identify under objective, independently verifiable criteria the areas where construction could reasonably be deemed to have an impact on Tribal grounds.”⁸⁰

To protect the sensitive nature of the information submitted by the Tribal Nation, it could be submitted only to the Commission prior to the area being included in TCNS and the information would be kept confidential. The Tribal Nations could be required to provide only basic details of their interest—just enough information to allow the Commission to understand the nature of the concern—and provide information by county to avoid detailed descriptions of the area of concern and avoid all-too-frequent statewide designations. Requiring the provision of this type of information about significant Tribal locations will give carriers a better idea of what geographic areas to avoid before tower planning and ensure that those Tribal Nations seeking consultation have an actual interest in the site, while continuing the Commission’s obligation to evaluate the potential for impacting areas important to Tribal Nations.

Role as Contractor or Consultant. The existing ACHP guidance on whether and under what circumstances Tribal Nations may seek compensation provides insufficient guidance.⁸¹ The Commission should clearly delineate when a Tribal representative is performing his or her standard

⁷⁹ See *NPRM*, 32 FCC Rcd at 3350, ¶ 54.

⁸⁰ PTA-FLA, Inc., Petition for Declaratory Ruling, WT Docket No. 15-180, at 14 (filed May 3, 2016).

⁸¹ ACHP, Fees in the Section 106 Review Process (2001), <http://www.achp.gov/regs-fees.html> (explaining that if an applicant asks a Tribe to fulfill the role of a consultant or contractor, the Tribe would be justified in requiring payments for its services).

duty of review in the Section 106 process, for which no fee may be collected, versus acting as a consultant or contractor for which payment is warranted. The Commission should clarify that a Tribal representative may not charge fees for the ordinary course of review of project materials or surveys. Instead, establishment of an official, mutually agreed consultant or contractor relationship should be required before a Tribal representative may charge fees.

The line between asking a Tribal Nation to provide comment and act as a consultant or contractor is blurred, with many Tribal Nations taking advantage of the ambiguity to impose fees for all aspects of their review, even if the project has only a tangential relationship to Tribal interests. When a carrier asks a Tribal Nation to review a project because the Tribal Nation has expressed interest in the project in TCNS or elsewhere, the carrier is giving the Tribal Nation the opportunity to participate in the Section 106 review and the information needed to participate. It is not commissioning a contractor or consultant relationship. To clarify this issue, the Commission should establish that if the carrier does not ask for “specific information and documentation” from the Tribal Nation, pursuant to the ACHP Handbook,⁸² then no contractor relationship has been established and no payment is necessary.

Relatedly, the Commission should clarify that a carrier does not become obligated to utilize a Tribal representative as a contractor or consultant solely because a Tribal Nation asks to inspect

⁸² ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook, at 23 (2012), <http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf> (“[No] portion of the NHPA or the ACHP’s regulations require[s] an agency or an applicant to pay for any form of tribal involvement. However, during the identification and evaluation phase of the Section 106 process when the agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe, it may ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor.”)

a site. If a site presents a real risk of being in or near a significant Tribal location and the Tribal Nation seeks to monitor construction, then the carrier, at its discretion, can elect to use a Tribal representative to act as a contractor and consultant and the parties will negotiate the terms of the relationship, including compensation. Carriers have extensive experience retaining contractors and consultants, including for performing NEPA and NHPA reviews. However, in AT&T's experience, it is rare that a carrier needs to hire a Tribal representative as a contractor to avoid adverse effects to a significant Tribal property. The overwhelming majority of Tribal reviews are merely requests to review because the tribe has expressed an interest. This proposed clarification would help both Tribal Nations and carriers by removing ambiguity and increasing the predictability of the process, which in turn will reduce misunderstandings and conflicts between the parties.

VIII. THE COMMISSION SHOULD EXEMPT TWILIGHT TOWERS FROM THE SECTION 106 HISTORIC PRESERVATION REVIEW PROCESS.

Commissioner O'Rielly noted that his goal "is to ensure that we put an end to the twilight towers issue once and for all" in this proceeding.⁸³ AT&T supports that goal and encourages the Commission to resolve the status of so-called "Twilight Towers"⁸⁴ by grandfathering them and towers constructed on or before March 16, 2001. Such action would insulate owners of towers, many of which were acquired in the last 10 years, from the uncertainty of potential enforcement action arising from a lack of preconstruction Section 106 documentation and resolve the longstanding ambiguity regarding the status of these towers that has had a chilling effect on their use.

⁸³ O'Rielly Wireless Infrastructure Show Remarks at 2.

⁸⁴ "Twilight Towers" are those constructed after March 16, 2001 and before March 7, 2005. See *NPRM*, 32 FCC Rcd at 3358, ¶ 79.

First, the Commission should grandfather all Twilight Towers and all pre-March 16, 2001 towers, removing the cloud of potential enforcement action against tower owners for failure to complete preconstruction Section 106 review. Prior to the Collocation NPA in 2001, it was unclear whether the Commission's rules required consultation with the relevant SHPO and/or Tribal Historic Preservation Officers ("THPO") or Tribal engagement. Prior to the Section 106 NPA in 2005, it was unclear how applicants were to facilitate that engagement or what other procedures were needed to ensure compliance with the Commission's Section 106 obligations. As a result, many tower owners did not complete Section 106 review at all or within the requirements of the Section 106 NPA. This ambiguity about the Commission's past requirements leaves current tower owners in limbo, many of whom purchased their towers in the secondary market and could not have conducted preconstruction review.

The Commission should expeditiously resolve the status of these towers by grandfathering them. This action would not undermine the protection of historic or significant properties. These towers have now been in place for at least 12 years. If no adverse impact has emerged during this period, then there is little probability that one has occurred or would emerge in the future. It would be illogical to deny these towers grandfathering because of a potential impact that has not yet been and may never be discovered. This action would also finally allow for adding all Twilight Towers to the inventory of structures available for collocations.

Second, the Commission should facilitate collocations on non-compliant towers constructed after March 7, 2005 by establishing a method for bringing these towers into compliance.⁸⁵ Towers that have been acquired in mergers and other transactions do not always come with documentation demonstrating that Section 106 reviewed was performed. Rather than

⁸⁵ See *NPRM*, 32 FCC Rcd at 3360, ¶ 85.

tie up the site, allow unmitigated adverse effects to remain, or keep the tower owner in compliance limbo, the Commission should establish a process for bringing such sites into compliance that would be voluntary (*e.g.* when a tower owner has a potential collocator), involve definitive timelines for review, and utilize existing TCNS and E-106 processes. Such a clearance process would make the tower available for collocation and allow for mitigation of any adverse effects. These actions will make additional towers available for collocations and further facilitate the delivery of broadband to consumers.

IX. CONCLUSION

Delivering wireless broadband and 5G services to consumers will require carriers to expand coverage with macro towers and densify their networks with thousands of new small cells. AT&T applauds the Commission's efforts to date to streamline wireless infrastructure deployments. In this proceeding, the Commission should use its authority under the Communications Act to take concrete steps to promote wireless infrastructure deployment by removing state and local barriers and encouraging the expeditious resolution of historic and environmental review processes.

Respectfully submitted,

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