

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 VERIZON

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I. INTRODUCTION AND SUMMARY.

Americans’ access to broadband services depends on smart infrastructure policy. Removing barriers to wireless broadband infrastructure – small cells in particular – is essential to maintain U.S. leadership in advanced wireless broadband services and to realize the numerous benefits that 4G densification and 5G offer.² In many locations, outdated local requirements effectively prohibit carriers from placing small cells in state and local rights-of-way and on state or municipally owned utility, light, and traffic signal poles.³ Zoning ordinances designed for much larger, traditional “macro” towers often require carriers to seek local zoning approval for small cells even after negotiating agreements with localities to access rights-of-way. And historic preservation and environmental requirements adopted more than a decade ago impose unnecessary delays and costs on carrier efforts to deploy small cells.

¹ The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

² The term “small cells,” as used herein, encompasses small wireless facilities including small cells, distributed antenna system nodes, and small 5G base station equipment.

³ For ease of reference, the term municipally owned poles refers to poles within a state or local right-of-way that are owned by a state or local government.

Broadband is the critical infrastructure of the 21st Century. Government action to speed deployment will unlock transformative economic and social benefits – from smart cities and access to education and healthcare to gains in productivity, sustainability, and public safety.⁴ To remove barriers to wireless broadband facility deployment and pave the way for enhanced 4G and 5G networks, the Commission should take several actions consistent with the proposals and requests for comment in the *Wireless Infrastructure Notice*⁵ and *Wireline Infrastructure Notice*.⁶

The Commission should:

- Clarify that Sections 253 and 332(c)(7) of the Communications Act⁷ bar state or local actions that erect substantial barriers to wireless facilities deployment;
- Adopt rules under Section 253 barring certain state or local actions as *per se* unlawful;
- Deem applications granted when the applicable Section 332(c)(7) shot clock expires without action;
- Adopt a 60-day shot clock for certain small cell applications;
- Exclude certain small cells from tribal reviews, provide guidance on when tribal fees are appropriate, and adopt a 30-day shot clock for tribal reviews;
- Modify existing exclusions from historic preservation reviews and adopt a new exclusion for “twilight towers”; and
- Exclude certain facilities constructed in flood plains from redundant environmental reviews.

⁴ See, e.g., Deloitte, *Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation* (Jan., 2017), https://www.ctia.org/docs/default-source/default-document-library/deloitte_20170119.pdf (concluding that governments must streamline the deployment of wireless infrastructure or communities will miss out on energy, health, transportation, and public safety benefits of 5G).

⁵ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79 (Apr. 21, 2017) (“*Wireless Infrastructure Notice*”).

⁶ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WC Docket No. 17-84 (Apr. 21, 2017) (“*Wireline Infrastructure Notice*”). In these comments, Verizon addresses issues in the *Wireline Infrastructure Notice* pertaining to prohibiting state and local laws inhibiting broadband deployment. *Wireline Infrastructure Notice* at ¶¶ 100-112. Verizon is filing separate comments addressing the other issues raised in the *Wireline Infrastructure Notice*.

⁷ 47 U.S.C. §§ 253, 332(c)(7).

Each of these actions is well within the Commission’s authority under Sections 253 and 332(c)(7) of the Act and applicable historic preservation and environmental law. Each action also strikes the appropriate balance between preserving state, local, and tribal authority to review and act upon applications and eliminating requirements that impose unnecessary and costly burdens on wireless small cell deployment.⁸ And collectively, these steps would remove many of the regulatory impediments to broadband investment and encourage more robust deployment of and investment in broadband, including 5G.

II. SMALL WIRELESS FACILITIES ARE CRITICAL TO MEET GROWING DEMAND FOR BROADBAND SERVICES, ADD JOBS, AND IMPROVE THE ECONOMY.

Providers must deploy small cells to meet the exploding demand for wireless data services. New data intensive capabilities like smart communities, connected cars, smart farming, and the Internet of Things, all made possible by advanced 4G and 5G networks, are driving this demand. Cisco reports that global mobile data traffic will increase sevenfold between 2016 and 2021.⁹ The total traffic in mobile networks increased by 70 percent between the end of the first

⁸ Many of the issues raised in these proceedings were raised in the December 2016 Public Notice issued by the Wireless Telecommunications Bureau. *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, 13371 (WTB 2016) (“*WTB Infrastructure Notice*”). Verizon addressed many of these same issues in its comments and reply comments in that proceeding and incorporates each filing by reference into this proceeding. See Comments of Verizon, WT Docket No. 16-421 (Mar. 8, 2017) (“Verizon Small Facility Comments”); Reply Comments of Verizon, WT Docket No. 16-421 (Apr. 7, 2017) (“Verizon Small Facility Reply Comments”).

⁹ See Cisco, *The Zettabyte Era: Trends and Analysis* (updated Jun. 7, 2017), <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/vni-hyperconnectivity-wp.html> (“Cisco Trends and Analysis”).

quarter in 2016 and the end of the first quarter in 2017.¹⁰ Wireless smartphone data consumption in North America is expected to reach 6.9 gigabytes per device per month by the end of 2017 and 26 gigabytes per month by 2022.¹¹ Video is the largest contributor to mobile traffic volumes.¹² Globally, video traffic will be 82 percent of all IP traffic by 2021, and it would take more than five million years to watch the amount of video that will cross IP networks each month in 2021.¹³ Accenture estimates that United States telecommunications operators will invest approximately \$275 billion in the next seven years to deploy next-generation technology. That investment will enable new wireless capabilities, create about three million new jobs, and grow the gross domestic product (“GDP”) by \$500 billion.¹⁴

To meet this demand and unlock the economic promise of more advanced 4G and 5G, carriers’ networks will require an estimated 10 to 100 times more antenna locations than today’s 3G or 4G networks.¹⁵ Many 5G networks also are likely to incorporate millimeter wave spectrum that the Commission recently made available.¹⁶ Millimeter wave spectrum, unlike lower band spectrum traditionally used for wireless service, generally supports service over

¹⁰ Ericsson Mobility Report, (Jun., 2017), <https://www.ericsson.com/assets/local/mobility-report/documents/2017/ericsson-mobility-report-june-2017.pdf>, at 2 (“Ericsson Mobility Report”).

¹¹ *Id.* at 14.

¹² *Id.* at 13.

¹³ Cisco Trends and Analysis at 2.

¹⁴ See Majed Al Amine et al., Accenture Strategy, Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities 3 (2017), <http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf> (“Accenture Smart Cities Paper”).

¹⁵ *Id.* at 1.

¹⁶ See *Use of Spectrum Bands Above 24 GHz For Mobile Radio Services*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 8014 (2016) (“*Above 24 GHz Order*”).

shorter distances and with direct lines-of-sight.¹⁷ Thus carriers using millimeter wave bands will need to deploy small facilities in many more locations that are both closer to the ground (30-50 feet in height) and closer to the customer than traditional wireless cell sites. Existing poles (including utility poles, light poles, traffic control poles, and street signs) in rights-of-way are ideal locations for 5G antennas. These facilities are significantly smaller than traditional “macro” antennas and blend more easily into the environment. Yet, as discussed below, many local ordinances and officials (or their consultants) do not take into account these significant differences, and instead burden the small cell siting process with requirements at least if not more cumbersome than those that apply to much larger facilities.

III. THE COMMISSION SHOULD CLARIFY THAT THE COMMUNICATIONS ACT BARS STATE AND LOCAL ACTION THAT ERECT SUBSTANTIAL BARRIERS TO WIRELESS FACILITIES DEPLOYMENT.

A. State and Local Requirements and Fees Effectively Prohibit Providing Advanced Broadband Service to Customers.

Even in the early stages of small cell deployment, Verizon has encountered a variety of practices that have the effect of delaying or preventing small cell deployment. These include barriers in gaining access to state and local rights-of-way, and municipally owned poles within them, and outdated local zoning requirements. These practices are already slowing the deployment of 4G small cells, and costs and delays will only grow as providers transition to more advanced 5G networks. Federal law, most notably Sections 253 and 332 of the Act, exists to block local actions and requirements that threaten important federal interests such as broadband and 5G deployment.¹⁸ The Commission has authority to address these local obstacles to deployment, and it should do so expeditiously.

¹⁷ *Id.* at 8020, ¶ 6.

¹⁸ 47 U.S.C. §§ 253, 332(c)(7).

One of the most significant challenges carriers face in deploying small cells is gaining access to state or local rights-of-way and municipally owned poles within them.¹⁹ Barriers to right-of-way and municipal pole access include refusal to negotiate right-of-way access agreements, substantial delays in negotiating such agreements, excessive and often discriminatory fees for access to rights-of-way and municipal poles, and unreasonable conditions for such access.²⁰

Verizon continues to face substantial barriers to deploying small cells. For example, the towns of Tonawanda, New York, and Amherst, New York, recently adopted moratoria on processing and approving small cell applications. A Minnesota town has proposed barring construction of new poles in rights-of-way. A large Southwestern city requires applicants to obtain separate and sequential approvals from three different governmental bodies before it will consider issuing a temporary license agreement to access city rights-of-way. Other jurisdictions, like a Midwestern suburb, where Verizon has been trying unsuccessfully to get approval for small cells since 2014, have no established procedures for small cell approvals and are extremely slow to respond.

Excessive fees are another substantial barrier to small cell deployment. Carriers encounter fees at multiple steps of the application and approval process. Fees are assessed for permission to access rights-of-way, for renting space on municipal poles, for application processing, for consultants hired by localities to review wireless applications, and to renew existing facility permits. In many cases, the fees assessed are not related to costs incurred. For example, a Midwestern city which requires, with few exceptions, small cells in the rights-of-way

¹⁹ See Verizon Small Facility Comments at 6-10 & App'x A (Mar. 8, 2017).

²⁰ *Id.*

to be placed on city owned structures, is currently demanding \$6,000 per pole per year to attach small cells to city owned light poles. This city also requires applicants to obtain a special use permit for each proposed small cell facility and charges \$11,000 per application – a charge that includes an escrow fee to cover the expected cost of the city’s consultant to review wireless applications. Many other localities, like East Greenbush, New York, and Santa Clara, Utah, require \$8,500 escrow fees for consultant reviews.²¹ And many jurisdictions, like Rochester and Buffalo, New York, have proposed or require a five percent gross revenue fee, again unrelated to the cost of wireless attachments, for accessing local rights-of-way. The New York State Department of Transportation (“NYDOT”) and Onondaga County (New York) require carriers to obtain rights-of-way permits for small cells on utility poles through their agent. The agent requires wireless providers to enter into an agreement that includes a \$750/month pole rental fee.²²

Even where carriers can gain approval to access rights-of-way and agree on fees, many localities place unreasonable conditions on right-of-way or pole access that make it extremely difficult, if not impossible, to deploy small cells. For example, Washington, D.C., recently released a supplemental agreement for installing wireless facilities in the right-of-way. That agreement would give the city the ability to require applicants to install, for free, WiFi access points (provided by the city) on the poles used by the applicant and to run fiber to each access point. Many localities require all utilities to be located underground – thus dramatically increasing the costs of deployment – and one Midwestern town compounds the problem by

²¹ Many jurisdictions have adopted wireless ordinances proposed and written by wireless engineering consultants. These ordinances impose charges from \$5,000 to over \$10,000 for those consultants to review applications to determine, among other things, if the facility is needed.

²² NYDOT’s agent assesses the rental fee even for utility poles not owned by NYDOT.

proposing to prohibit small cells on existing above-ground infrastructure. Many jurisdictions also impose unreasonable set-back requirements, minimum separation distances, and height and equipment size limitations for small facilities in the rights-of-way. For example, Buffalo Grove, Illinois, requires small cells to be at least 100 feet away from any residential building and no closer than 1,000 feet to any other small cell (even if owned by another provider); it also requires equipment to be mounted at least eight feet above ground, and limits antenna height to 35 feet above ground level.

The Commission should exercise its authority under Sections 253 and 332(c)(7) of the Act to remove these barriers to small cell deployment by clarifying the applicable legal standards and adopting rules prohibiting actions that impose substantial barriers to providing service or deploying small cells.

B. The Commission Should Find that “Prohibit or Have the Effect of Prohibiting” Has the Same Meaning in Sections 253 and 332.

As the Commission noted in the *Wireless Infrastructure Notice*, Section 253 and Section 332(c)(7) contain nearly identical operative language limiting the ability of state and local governments to prevent the provision of personal wireless telecommunications service.²³ While both statutes preserve limited state and local government authority,²⁴ both also bar state or local governments from passing laws or taking actions that “prohibit or have the effect of prohibiting”

²³ *Wireless Infrastructure Notice* at ¶ 88.

²⁴ See 47 U.S.C. §253(b) (permitting states to impose “requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers”) and § 253(c) (permitting state and local governments to “require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis”); *id.* § 332(c)(7)(A) (preserving state and local “authority . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities”).

service.²⁵ But as the Commission has noted, courts have construed this identical language to create different standards under Sections 253 and 332(c)(7).²⁶ The Commission has interpreted “prohibit or have the effect of prohibiting” service in Section 253(a) as barring any local government action that “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”²⁷ Meanwhile, absent any guidance from the Commission, most courts of appeals have held that a local action will “prohibit or have the effect of prohibiting” the provision of wireless service under Section 332(c)(7) if and only if a carrier has a “significant gap” in wireless service and it lacks other feasible siting options to close that gap.²⁸

The Commission should rectify this discrepancy in the interpretation of the identical term in two provisions of the same statute. “[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning.”²⁹ This presumption of consistent usage yields only where surrounding text or context suggests that

²⁵ See 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.”); *id.* § 332(c)(7)(B)(i) (“The 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.”).

²⁶ *Wireless Infrastructure Notice* at ¶¶ 89-91.

²⁷ *California Payphone Ass’n Petition for Preemption*, Memorandum Opinion & Order, 12 FCC Rcd 14191, 14206 at ¶ 31 (1997) (“*California Payphone*”).

²⁸ See, e.g., *MetroPCS, Inc. v. City of S.F.*, 400 F.3d 715, 731-34 (9th Cir. 2005), *abrogated on other grounds by T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808 (2015); *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999).

²⁹ *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (internal quotation marks omitted); see also *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (“Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.”).

identical language should bear different meaning.³⁰ Nothing in the text or context of Sections 253(a) and 332(c)(7) suggests that those terms should be given different meanings. Indeed, the opposite is true: These sections of the Communications Act both limit state and local governments' abilities to restrict the provision of wireless telecommunications service. As one court of appeals noted, this identical language should lead to "the same" legal standard, as there is "nothing suggesting that Congress intended a different meaning of the text ... in the two statutory provisions, enacted at the same time, in the same statute."³¹

The Commission should harmonize the interpretations of "prohibit or have the effect of prohibiting" in Sections 253(a) and 332(c)(7) by applying its current interpretation of Section 253 to both statutory provisions. For 20 years, the Commission has held that a local action prohibits or has the effect of prohibiting the provision of telecommunications service where it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."³² Because that standard is open to differing interpretations, and has engendered disagreement in the courts of appeals as to its proper interpretation,³³ the Commission should provide additional guidance on its meaning to ensure

³⁰ See Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 170-73 (2012) ("Scalia and Garner").

³¹ *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008) (en banc); see also *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 991-93 (9th Cir. 2009); Scalia & Garner at 173 (noting that where parallel language is enacted at the same time and deals with the same subject, the presumption of consistent usage is particularly strong).

³² *California Payphone*, 12 FCC Rcd 14206 at ¶ 31.

³³ Compare, e.g., *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 534 (8th Cir. 2007) (finding that a right-of-way fee, in connection with other restrictions, does not materially inhibit the provision of service), with *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 19 (1st Cir. 2006) ("*Puerto Rico Tel. Co.*") (holding that a right-of-way fee, in connection with other restrictions, does "materially inhibit[] or limit[]" the provision of service) (citation and internal quotation marks omitted).

that the types of local actions described above do not frustrate national goals for broadband and 5G deployment.

1. An Action “Prohibits or Ha[s] the Effect of Prohibiting” the Provision of Service Where It Erects a “Substantial Barrier” to Service.

The Commission should declare that a local regulation or siting decision “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment” where it erects a “substantial barrier” to the provision of telecommunications service.³⁴ A substantial barrier exists where the regulation or action either (1) significantly increases a carrier’s costs;³⁵ or (2) otherwise meaningfully strains the ability of a carrier to provide telecommunications service.³⁶ This interpretation finds support in a decision of the First Circuit, which rejected a locality’s five percent franchise fee to use a right-of-way, finding that it constituted an effective prohibition because it would “negatively affect [the provider’s] profitability”; give rise to “a substantial increase in costs for [the provider]”; and “place a significant burden on [the provider],” thereby “strain[ing the provider’s] ability to provide telecommunications services.”³⁷

This standard provides a sensible framework for evaluating both state and local statutes, regulations, and legal requirements under Section 253(a) and individual “decisions regarding the placement, construction, and modification of personal wireless service facilities” under Section

³⁴ See Verizon Small Facility Comments at 11-14 (internal quotation marks omitted).

³⁵ See *Puerto Rico Tel. Co.*, 450 F.3d at 19 (noting that the regulations at issue would lead to “a substantial increase in costs” to the carrier); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270-71 (10th Cir. 2004) (“*City of Santa Fe*”) (noting that where a requirement will lead to a “massive increase in cost,” it acts as an effective prohibition under 253(a)).

³⁶ See *Puerto Rico Tel. Co.*, 450 F.3d at 19 (noting that the requirements at issue would “strain [the carrier’s] ability to provide telecommunications services”).

³⁷ *Id.* at 18-19.

332(c)(7).³⁸ When applied to a locality’s siting scheme as a whole under Section 253(a) (including any statutes, ordinances, regulations, or policies, or other “legal requirements”), the “substantial barrier” framework would consider all aspects of that scheme together, in order to determine whether a municipality’s disparate requirements together erect a substantial barrier.³⁹ And because of the cumulative effect of ordinances and actions of multiple localities that limit carrier access to rights-of-way, the Commission should make clear that carriers can demonstrate that local requirements significantly increase costs, or otherwise meaningfully strain their ability to provide service, by showing the effect of numerous municipalities employing similar restrictions.⁴⁰

a. The Commission Should Clarify the Meaning of “Prohibits or Ha[s] the Effect of Prohibiting” in Section 253(a).

This articulation of the substantial barrier standard provides a workable test under Section 253(a) to address the types of state and municipal requirements and actions described above. A state or locality’s refusal to negotiate or unreasonable delays in negotiating access to public rights-of-way would constitute a substantial barrier. Likewise, actions or conditions that prevent or substantially inhibit a carrier from making necessary upgrades (such as deploying small cells to densify networks or to deploy 5G) to its network in those localities would constitute a

³⁸ 47 U.S.C. § 332(c)(7)(A). For a discussion of the different situations to which Sections 253 and 332 apply, see Section II.C, *infra*.

³⁹ See *Puerto Rico Tel. Co.*, 450 F.3d at 19; *City of Santa Fe*, 380 F.3d at 1270-71.

⁴⁰ See *Puerto Rico Tel. Co.*, 450 F.3d at 17-18 (taking into account that a carrier could face not just the restriction at issue from a single municipality, but also from other localities in which it operates). See *Wireless Infrastructure Notice* at ¶ 91; compare *Puerto Rico Tel. Co.*, 450 F.3d at 18; *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *City of Santa Fe*, 380 F.3d at 1270 & n.9 (all stating that preemption under Section 253(a) is proper if a requirement *may* have the effect of prohibiting a carrier from providing telecommunications service), with *Sprint Telephony PCS*, 543 F.3d at 578 and *Level 3 Commc’ns*, 477 F.3d at 532-33 (both requiring that there be actual or effective prohibition).

substantial barrier. And other unreasonable conditions on the provision of wireless service – such as excessive separation requirements between facilities, overly restrictive equipment size limits, and unreasonable set-back requirements from residential properties – would similarly strain a carrier’s ability to provide service.

Many right-of-way fees charged by states or municipalities also impose substantial burdens on carriers. States and localities charge carriers a wide variety of fees for the use of rights-of-way and access to municipally owned poles, and those fees often are unrelated to the actual cost to municipalities.⁴¹ Under the “substantial barrier” standard, fees that significantly increase a carrier’s costs operate as a substantial burden and run afoul of Section 253(a), unless the locality can demonstrate that such fees recover its actual costs and thus constitute fair and reasonable compensation for use of public rights-of-way under Section 253(c).⁴² This is especially true when considering the cumulative impact of fees imposed on a carrier by thousands of localities across the county.

To prevent excessive fees from inhibiting deployment, the Commission should conclude any fees imposed by states or localities should be cost-based. Applying the substantial barrier test to limit states and localities to the recovery of cost-based charges is fully consistent with the statute. Under Section 253(c), a state or municipality must show that any compensation for use of public rights-of-way is “fair and reasonable” and charged on a “competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”⁴³ To give proper meaning to

⁴¹ See Section III.A, *supra*; Verizon Small Facility Comments at 8-10.

⁴² See 47 U.S.C. § 253(c).

⁴³ *Id.*

this provision, while also fulfilling the goals of Section 253(a), the Commission should interpret Section 253 to permit localities to impose fees that cover their reasonable costs for managing the rights-of-way, but not fees that raise additional revenues above and beyond those costs.⁴⁴ The phrase “fair and reasonable compensation” as used in Section 253(c) is ambiguous, empowering the Commission to interpret it.⁴⁵ Compensation is defined as “[r]emuneration ... in return for services rendered” or a payment that “makes the injured person whole,”⁴⁶ which suggests the recoupment of costs or recovery of what was lost. In numerous contexts, the Commission and other agencies have found that cost-based fees are “reasonable.”⁴⁷ This interpretation often is adopted in situations where the provider does not operate in a competitive market – which is directly analogous to localities’ monopoly control of public rights-of-way and municipally owned structures. In many other cases, market forces are sufficient to ensure reasonable rates.⁴⁸ But those competitive options do not exist for access to rights-of-way.

⁴⁴ For a more detailed discussion of the interplay between Section 253(a) and (c) relative to state and local fees, *see* Verizon Small Facility Comments at 14-18.

⁴⁵ *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“*Brand X*”).

⁴⁶ *Compensation*, Black’s Law Dictionary (10th ed. 2014).

⁴⁷ *See, e.g., Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, 2537 at ¶ 6 (2005), *aff’d*, *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50 (2011) (requiring that a local exchange carrier provide access to entrance facilities at cost-based rates where the statute states that rates must be “just, reasonable, and nondiscriminatory”); *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944) (upholding a Federal Power Commission order setting “just and reasonable” rates as a method of cost recovery); *Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm’n of Mo.*, 262 U.S. 276, 291 (1923) (espousing that a utility obliged to provide service to the public ought to be able to recover “the reasonable cost of conducting the business”).

⁴⁸ *See Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

The legislative history of the Telecommunications Act supports a cost-based limitation under Section 253. Senator Feinstein made clear in a floor statement that Section 253(c) would permit a municipality to “[r]equire a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation.”⁴⁹ And in contexts like this one, the Commission has expressed skepticism of fees not tied to costs, stating that there “is a serious question whether a gross revenues based fee is ‘fair and reasonable compensation ... for use of [a public right-of-way]’ within the meaning of section 253(c).”⁵⁰ Consequently, in order for a locality to claim that it is charging only “fair and reasonable compensation,” those charges must be cost-based.

Clarifying that the substantial barrier test applies to municipal actions and requirements such as unreasonable delays, zoning restrictions, and right-of-way fees would ensure that where states or municipalities charge fees for access to rights-of-way, they justify those fees as fair, cost-based compensation for a carrier’s use of local resources.⁵¹ This limit achieves the balance that Congress struck in Section 253 between the deployment of fast and reliable telecommunications service, and protecting the reasonable exercise of local authority.⁵²

⁴⁹ 141 Cong. Rec. S8134, S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein).

⁵⁰ Brief of FCC and United States as Amici Curiae at 14 n.7, *TCG N.Y., Inc .v. City of White Plains*, Nos. 01-7213, 01-7255, (2d Cir. Jun. 13, 2001).

⁵¹ *See* 47 U.S.C. § 253(c) (allowing municipalities to “require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way”); *see* Verizon Small Facility Comments at 14-17 (describing the proper application of Section 253(c)).

⁵² One court of appeals rejected its own previous use of a “substantial burden” test under Section 253(a). *See Sprint Telephony*, 543 F.3d at 577-78 (overruling *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001)). But this decision does not preclude the Commission from adopting the “substantial burden” standard. As the Commission noted before the Supreme Court, the Ninth Circuit accepted that *California Payphone* provides the relevant standard for effective prohibition under Section 253(a), though it applied that standard in a way that was arguably

b. The Commission Should Clarify the Meaning of “Prohibits or Ha[s] the Effect of Prohibiting” in Section 332(c)(7).

In addition to the obligation to craft local permitting ordinances to conform with Section 253, localities must also process individual siting applications for wireless services in a way that does not erect a substantial barrier to the provision of service under Section 332(c)(7).

Consistent with the same provision in Section 253, a siting decision would create a substantial barrier if it significantly increases a carrier’s costs or meaningfully strains the carrier’s ability to provide service. Because the Act balances local zoning authority against the need to remove barriers to the deployment of wireless service, not every action or decision by a permitting authority adverse to a siting applicant will create a “substantial barrier” to the provision of service. For example, where a local authority denies an application for bona fide and specific aesthetic reasons,⁵³ that decision does not erect a substantial barrier so long as other sites are available that do not present such concerns. But where a permitting decision prevents a carrier from densifying its existing network in order to provide or enhance broadband-speed service and no equivalent site is feasible and available, that act meaningfully strains that carrier’s ability to provide wireless service.

In some circumstances, the up-front application fees that localities charge may also act as a substantial barrier under Section 332(c)(7). Where those fees significantly increase a carrier’s

unduly narrow. *See* Brief of United States as Amicus Curiae on Petitions for Writs of Certiorari at 14-15, *Level 3 Commc’ns, LLC v. City of St. Louis*, No. 08-626 (U.S. Jun. 26, 2008) (*cert. denied*, 557 U.S. 935 (2009)). If the Commission now explains the proper application of that standard – that it requires a substantial burden test – the Ninth Circuit should continue to apply the *California Payphone* standard, but with the added benefit of the Commission’s additional interpretation. The Commission’s interpretation would be entitled to deference under *Brand X*, 545 U.S. at 984-85 (2005).

⁵³ *See* Section III.B.2, *infra*, for a discussion of the appropriate consideration by zoning authorities of aesthetic considerations.

costs, they would “have the effect of prohibiting” service. As under Section 253, localities would be free to argue that those fees are justified by their underlying costs of processing and reviewing the application, and where those fees are cost-based, they do not run afoul of Section 332(c)(7). But where those fees both significantly raise carriers’ costs and do not simply recoup the locality’s costs, they effectively prohibit service and violate Section 332(c)(7).

Harmonizing the interpretations of Sections 253 and 332(c)(7) so that both prevent state and local governments from erecting substantial barriers to the provision of service also acts to correct the unduly narrow, textually untethered interpretation of Section 332(c)(7) adopted by the courts of appeals. Section 332(c)(7) was meant to remove barriers to wireless facilities siting by preempting local siting decisions that have the effect of prohibiting wireless service. But judicial interpretation of the statute has not kept pace with the evolution of wireless networks. Several courts of appeals have held that a local action will have the effect of prohibiting the provision of wireless service under Section 332(c)(7) if and only if a carrier has a “significant gap” in wireless service, and where it lacks other feasible siting options to close that gap.⁵⁴ The courts reached this conclusion, however, without any guidance from the Commission and when considering earlier wireless technology. The courts also did not find that the text of the statute mandates this conclusion or that this is the only permissible construction of the statute.

⁵⁴ See, e.g., *City of S.F.*, 400 F.3d at 731-34; *Willloth*, 176 F.3d at 643. Courts have agreed that the significant gap analysis is highly fact-specific, but have generally found that in order for such a gap to exist, there must be a substantial area – larger than a mere “dead spot” – where a provider does not have any coverage. See, e.g., *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 631 (1st Cir. 2002); *Willloth*, 176 F.3d at 643. Meanwhile, courts are split on what kind of showing is necessary for the second prong of the analysis. Some require the carrier to show not only that its application has been rejected, but also that efforts to find another solution will be fruitless, see, e.g., *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 40 (1st Cir. 2014), while others require only that the applicant show that its proposed siting is the least intrusive means of filling the gap, see, e.g., *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1057 (9th Cir. 2014).

The current standard is doubly problematic. First, it is out of step with technological developments: It makes little sense to define a gap as the absence of any coverage whatsoever. The Commission has made clear that wireless broadband technology, and the required investment to improve coverage, speed, and capacity beyond the capability of 3G networks, is vital to the nation’s economic growth, to civic life, and to individual consumers.⁵⁵ But the current test would allow localities to refuse applications simply because a carrier already supplies 3G service. Second, by demanding that carriers (at minimum) show that their site is the least intrusive means of closing any gap in coverage, the “significant gap” standard places a heavy burden on carriers to show that no other site could fulfill their purposes. Adhering to this standard undercuts the Commission’s stated goal of supporting rapid deployment of the next generation of wireless technology. Conversely, aligning the interpretations of Section 332(c)(7) and Section 253, and doing so through the “substantial burden” framework, is both more faithful to the text and structure of the Act and better addresses the balance between respecting local authority and encouraging the development of the next generation of cellular technology.⁵⁶

⁵⁵ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12869-70 at ¶¶ 6-7 (2014) (“2014 Infrastructure Order”), erratum, 30 FCC Rcd 31 (2015), *aff’d Montgomery Cnty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

⁵⁶ As discussed above, Verizon believes that the Commission should make clear that the “significant gap” standard is improper under Section 332(c)(7). Should the Commission determine that this standard is proper, however, it should alter the standard by not requiring the absence of *any* wireless coverage. The inability of a carrier to provide broadband-level speed ought to be enough to create a “significant gap.” Nor should the Commission adopt the position of those courts that have required carriers to show that “further reasonable efforts [to find another solution] are so likely to be fruitless that it is a waste of time to even try.” *Green Mountain Realty Corp.*, 750 F.3d at 40 (citation and internal quotation marks omitted). This standard places such a heavy burden on providers that it renders Section 332(c)(7) all but powerless as a check on local government action.

2. Denying Applications for Aesthetic Reasons Is Proper Only Where the Record Contains Specific and Detailed Evidence of the Aesthetic Impact of the Proposed Facility.

As the Commission notes in its *Wireless Infrastructure Notice*, courts have routinely held aesthetic considerations may be relevant to the local approval process, so long as the denial of an application for aesthetic reasons is supported by “substantial evidence in a written record.”⁵⁷ Courts have also held that “substantial evidence” does not mean merely “generalized concerns,” but instead local zoning authorities must rely on evidence of the specific impact of the particular proposed facility at issue.⁵⁸ Even where a locality produces the necessary evidence of aesthetic impact, “its decision is nevertheless invalid if it operates as a prohibition on the provision of wireless service in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II).”⁵⁹

The Commission should provide guidance, in line with the case law, that denial of an application based on aesthetic concerns is valid only where it is based on specific and detailed evidence of the aesthetic effect of a particular facility in that particular location. The Commission should clarify that references to issues like the flatness of the terrain, the presence of nearby residential neighborhoods, and general concerns by neighbors that a facility will have a negative visual impact are not specific enough to qualify as substantial evidence.⁶⁰ Moreover, reliance on a photo simulation of a facility alone is not sufficient to serve as substantial

⁵⁷ 47 U.S.C. 332(c)(7)(iii); *see, e.g., City of Anacortes*, 572 F.3d at 994-95; *U.S. Cellular Corp. v. City of Wichita Falls*, 364 F.3d 250, 256 (5th Cir. 2004).

⁵⁸ *See, e.g., T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty.*, 546 F.3d 1299, 1312 (10th Cir. 2008); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 496 (2d Cir. 1999).

⁵⁹ *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 725-26 (9th Cir. 2009).

⁶⁰ *See Unified Gov't of Wyandotte Cnty.*, 546 F.3d at 1312; *Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1219-20 (11th Cir. 2002).

evidence.⁶¹ Instead, only where a local authority provides a detailed justification “grounded in the specifics of the case” regarding the aesthetic impact of a particular facility at a particular location can such explanations serve as substantial evidence.⁶² And as noted above, even then, where such a decision would create a “substantial barrier” to providing wireless service, the denial of that application would “effectively prohibit” the provision of wireless service.⁶³

Finally, the Commission should issue a rule excepting certain small cell facilities from review by local authorities for aesthetic concerns. Where a small cell meets size limits previously adopted by the Commission for small cells⁶⁴ and is mounted on an existing structure or a similar replacement structure designed to accommodate small cells, it will never present an aesthetic concern that will justify denial of a siting application. The Commission should rule that denial of applications for these small facilities, which do not require new construction that alters the visual appearance of a neighborhood in a meaningful way, will never be supported by the kind of detailed, specific findings necessary to serve as substantial evidence. Instead, a denial on aesthetic grounds of such small facilities, which are incapable of meaningfully altering the appearance of an existing structure, would appeal only to “generalized concerns.” For that reason, the Commission should adopt a general rule that precludes consideration of aesthetic concerns for small cells mounted on existing and replacement structures.

⁶¹ See *Unified Gov't of Wyandotte Cnty.*, 546 F.3d at 1312.

⁶² *Id.*

⁶³ See *City of Palos Verdes Estates*, 583 F.3d at 725-26; 47 U.S.C. § 332(c)(7)(B)(i)(II).

⁶⁴ The Commission should apply the size limits applicable to small facility exclusions from historic preservation reviews – three cubic feet per antenna, no more than six cubic feet for all antennas, and 28 cubic feet for associated equipment. See *Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 8824 (WTB 2016), codified at 47 C.F.R. Pt. 1, App'x B, § VI.A.5 (a) and (b)(i) (“*Collocation Agreement Amendment*”).

C. The Commission Should Find that Sections 253 and 332 Apply Broadly to State and Local Actions.

Sections 253 and 332(c)(7) use broad language to describe the types of local actions that are subject to preemption under those statutes, and the Commission should in turn interpret those terms broadly to apply to all manner of local actions that prohibit or effectively prohibit the provision of wireless service. Section 253(a) provides that “[n]o State or local *statute or regulation, or other State or local legal requirement*, may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service.”⁶⁵ As the Commission has noted previously, this statute “recognizes that State and local barriers to entry could come from sources other than statutes and regulations,” and, consequently, “was meant to capture a broad range of state and local actions.”⁶⁶ Thus, where a state made an agreement with a single provider of telecommunications service that deprived other providers of access to its rights-of-way, the Commission found that this agreement was a “legal requirement” under Section 253(a) because it acted to “legally bind[]” the state’s action with regard to providers of telecommunications services.⁶⁷

For purposes of Section 253(a), the Commission should interpret the term “statute” to encompass any law passed by a state or local legislative body.⁶⁸ The context of the provision – in particular, the proximity of “regulation” to “statute” and “other ... legal requirement” – makes

⁶⁵ 47 U.S.C. § 253(a) (emphasis added).

⁶⁶ See *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21707 at ¶ 18 (1999) (“*Minnesota Preemption Order*”).

⁶⁷ See *id.* at 21706-07, ¶ 17 (internal quotation marks omitted).

⁶⁸ See *Statute*, Black’s Law Dictionary (10th ed. 2014) (defining a statute as “[a] law passed by a legislative body”).

clear that the term “regulation” should be defined as an official rule or order issued by a state or local government that carries the force of law.⁶⁹ And “other State or local legal requirement” should, in keeping with the Commission’s previous rulings, be defined as any state or local policy, practice, or legally binding action that could pose a barrier to entry to a telecommunications provider.⁷⁰ This interpretation comports with general principles of statutory interpretation, in which two specific terms followed by a more general term widens the scope of the group to include a broader set of items in the same general category.⁷¹

The Commission should likewise apply a broad interpretation of the terms “decisions” and “regulation” in Section 332(c)(7). The term “decisions” in Section 332(c)(7)(B)(iii) is best understood to refer to particular actions taken by a state or locality regarding a pending application or request for a personal wireless siting facility.⁷² Similarly, “regulation” in Section 332(c)(7)(B)(i) refers to state or local control over the process of making a particular siting decision.⁷³ The Commission should make clear that these terms encompass any action taken by a state or locality that applies any statute, regulation, or other legal requirement in a particular case.

⁶⁹ See *Regulation*, Black’s Law Dictionary (10th ed. 2014) (defining regulation as “[a]n official rule or order, having legal force”).

⁷⁰ See *Minnesota Preemption Order*, 14 FCC Rcd 21707 at ¶ 18.

⁷¹ See Scalia & Garner, at 199-200.

⁷² *Cox Commc’ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002) (“Where 47 U.S.C. § 253 provides a cause of action against *local regulations*, section 332 gives a cause of action against *local decisions*.”) (emphasis in original).

⁷³ See *Regulation*, Black’s Law Dictionary (10th ed. 2014) (defining regulation as “[c]ontrol over something by rule or restriction”).

This interpretation makes sense of both Sections 253(a) and 332(c)(7). Section 332 applies to “decisions regarding the placement, construction, and modification of personal wireless service facilities”⁷⁴ – that is, to individual siting decisions rendered by state or local governments. Section 332 offers an avenue of relief for these individualized decisions that apply general rules. Section 253, on the other hand, targets for preemption “State or local statute[s] or regulation[s], or other State or local legal requirement[s].”⁷⁵ As courts have consistently recognized, Section 253 applies to a state or local government’s statute, regulation, or other legally binding action or policy that governs wireless providers’ attempts to provide telecommunications service – such as ordinances that require large separation distances between facilities, impose right-of-way fees, or adopt restrictive equipment size limits.⁷⁶ Where a local government applies such a statute, regulation, or policy to take adverse action – or simply avoids taking any action at all – against a carrier, Section 332 applies.⁷⁷

The Commission has sought guidance on how Sections 253 and 332 apply in particular cases.⁷⁸ As noted above, as a general matter, Section 253 applies when a carrier challenges a state or local ordinance, regulation, or policy, while Section 332 bars individual siting decisions

⁷⁴ Verizon Small Facility Reply Comments at 3-4 (Apr. 7, 2017); 47 U.S.C. § 332(c)(7)(A).

⁷⁵ 47 U.S.C. § 253(a).

⁷⁶ See *Verizon Wireless (VAW) LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325, 1336 (D.N.M. 2007) (“Section[] 253 ... proscribe[s] ordinances that have the effect of prohibiting the ability to provide telecommunications services Section 332(c)(7) provides similar proscriptions on individual zoning decisions. The statutes thus provide parallel proscriptions for ordinances and individual zoning decisions.”); *City of San Marcos*, 204 F. Supp. 2d at 1277 (“Where 47 U.S.C. § 253 provides a cause of action against *local regulations*, section 332 gives a cause of action against *local decisions*.”) (emphasis in original).

⁷⁷ See *City of Rio Rancho*, 476 F. Supp. 2d at 1336; *City of San Marcos*, 204 F. Supp. 2d at 1277.

⁷⁸ See *Wireless Infrastructure Notice* at ¶ 89.

that prohibit or effectively prohibit the provision of wireless service. These categories are not entirely distinct, meaning that some local actions can be challenged under both Section 253 and 332. To take the Commission's examples,⁷⁹ where a locality has a policy that leads it to deny a wireless facility siting application in a manner that effectively prohibits the provision of wireless service, that locality would violate both Sections 253 and 332. Under Section 253, a carrier would need to show that the town had a policy (that is, a "legal requirement") that effectively prohibits the provision of service. Alternatively, the carrier could challenge the denial (or failure to act) itself under Section 332, as the denial is a "regulation" of the placement, construction, or modification of a wireless siting facility. But where a locality fails to act within a reasonable time on a siting application in violation of Section 332, that action would also violate Section 253 only if the carrier could show that this failure to act was pursuant to a policy, practice, or other legally binding requirement.

⁷⁹ *See id.*

D. State and Local Actions Pertaining to Access to Rights-of-Way, Other Public Lands, and Structures Within Them Are Subject to Sections 253 and 332.

Contrary to claims of some localities, Sections 253 and 332 apply to state and local actions that deny wireless providers access to state or municipally owned or managed rights-of-way and poles in those rights-of-way. Sections 253 and 332, as well as Section 6409 of the Spectrum Act,⁸⁰ make no distinction between states and localities acting in their proprietary⁸¹ versus regulatory capacities. Congress was well aware that state and local governments act in both capacities but did not create any exception in the statutes for governments acting in their proprietary capacities. This implies that Congress intended for the Act to apply to actions taken by state and local governments, even where they operate in a proprietary capacity.⁸² At minimum, Congress did not unambiguously indicate that the Communications Act applies only to state and local governments acting in their regulatory capacity, and the Commission could reasonably interpret Sections 253 and 332 as applying to state and local governments regardless of whether they act in a proprietary or regulatory capacity.

Should the Commission determine, however, that Sections 253 and 332 do not apply to state and local governments when they act in their proprietary roles, the Commission should make clear that public rights-of-way and other property held by governments for public purposes are subject to the Communications Act. Under this interpretation, Sections 253 and 332 would

⁸⁰ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)) (“Section 6409”).

⁸¹ For example, a proprietary action might be when a local government is a property owner and acts in the same way as would a private actor that owned the same property.

⁸² See *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 231-32 (1993) (where Congress provides an “implied indication ... that a State may not manage its own property when it pursues its purely proprietary interests,” such a restriction is proper).

not apply only where a local government acts in the same way as would a private actor that owned the same property. Courts have applied this stringent test to determine whether an action is proprietary under the Communications Act. They have looked to whether the municipality’s “interactions with the market [are] so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.”⁸³ In making this determination, courts consider “(1) whether ‘the challenged action essentially reflect[s] the entity’s own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances,’ and (2) whether ‘the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.’”⁸⁴ Consequently, the burden rests on state and local governments to show that their interactions are “so narrowly focused” on the “efficient procurement of needed goods and services” – and not instead to “encourage a general policy” – that their interest is “purely proprietary” in nature.

Under this framework, states and localities manage public rights-of-way in their regulatory capacities. As the Commission has noted, “[c]ourts have held that municipalities generally do not have compensable ‘ownership’ interests in public rights-of-way, but rather hold the public streets and sidewalks in trust for the public.”⁸⁵ “It is a widely accepted principle of

⁸³ *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002) (quoting *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)) (internal quotation marks omitted).

⁸⁴ *Id.* (alteration in original) (quoting *Cardinal Towing*, 180 F.3d at 693).

⁸⁵ See *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, 5160 at ¶ 134 (2007) (“*Cable Franchising Report and Order*”), petition for review denied, *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

long standing that ‘[t]he interest [of a city in its streets] is exclusively publici juris, and is, in any aspect, totally unlike property of a private corporation, which is held for its own benefit and used for its private gain or advantage.’”⁸⁶ Because they manage public rights-of-way for the public good, and not solely their own interest, state and local governments do not possess a proprietary interest in rights-of-way. For this reason, many courts “have recognized that the ownership interest municipalities hold in their streets is ‘governmental,’ and not ‘proprietary.’”⁸⁷ Thus, even though a state or municipality can “own” the land beneath a public street, it holds that land in trust for public use, making its decisions regarding that land governmental or regulatory, as opposed to proprietary, in nature. No such analogous responsibility applies to private actors in most circumstances.

This framework makes clear that state and local governments act in a regulatory or governmental capacity when they take actions that deny wireless providers access to state or municipally owned or managed rights-of-way and poles in those rights-of-way, thus bringing these actions within the ambit of Sections 253 and 332(c)(7). When a state or locality imposes requirements that a wireless carrier must follow in order to site its equipment or renders an adverse siting decision, its actions do not resemble those of a private party acting in its own narrow interest, but those of a regulatory body that manages land use decisions on land held in public trust. Consequently, where a city’s franchising and permitting decisions denied a

⁸⁶ Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 Dick. L. Rev. 209, 213 (2002) (alterations in original) (quoting *People v. Kerr*, 27 N.Y. 188, 200 (1863)).

⁸⁷ *Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 221-22 (1st Cir. 2005) (citing *City of Denver v. Qwest Corp.*, 18 P.3d 748, 761 (Colo. 2001) (en banc)); *Am. Tel. & Tel. Co. v. Vill. of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993); *City of N.Y. v. Bee Line, Inc.*, 284 N.Y.S. 452, 457 (App. Div. 1935), *aff’d*, 3 N.E.2d 202 (N.Y. 1936)); *see also City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 781, 785 (Ohio 1901); *Hodges v. W. Union Tel. Co.*, 18 So. 84, 85 (Miss. 1895).

payphone company access to the city's rights-of-way, that decision was regulatory in nature and subject to preemption under Section 253.⁸⁸ The same is true of the placement of wireless facilities. Moreover, states and localities negotiating with wireless providers generally act not on a case-by-case basis, but instead pursuant to master lease or license agreements and local zoning ordinances.⁸⁹ These requirements put in place for all wireless providers indicate that the "primary goal [i]s to encourage a general policy rather than address a specific proprietary problem."⁹⁰ Because state or local government rules or actions regarding rights-of-way or poles within those rights-of-way are regulatory in nature, preemption is proper under Sections 253 and 332(c)(7).

Applying the same standard, states and localities also own and manage lampposts, water towers, and utility conduits in their regulatory capacities. States and municipalities do not own and operate such structures purely for their own benefit. As with rights-of-way, they oversee these structures as a way of managing public resources – whether it be the water held in city owned towers or the fiber optic cable threaded through city utility conduits. And states and localities own and operate lampposts in order to manage rights-of-way and enhance public safety – a classic regulatory role. States and localities do not construct and operate these lampposts to advance their economic agendas. They therefore do not act solely in their own economic

⁸⁸ *Coastal Commc'ns Serv., Inc. v. City of N.Y.*, 658 F. Supp. 2d 425, 443 (E.D.N.Y. 2009).

⁸⁹ See Verizon Small Facility Comments at 7-8, 18-19 (noting Verizon's experience that negotiating with local governments generally involves master lease agreements and zoning ordinances).

⁹⁰ *Sprint Spectrum L.P.*, 283 F.3d at 420 (quoting *Cardinal Towing*, 180 F.3d at 693) (internal quotation marks omitted).

interest, as would a private party, in operating these structures.⁹¹ Instead, they act primarily “to encourage a general policy rather than address a specific proprietary problem.”⁹² Thus, for these structures, which states and localities operate not as market participants in their own spheres of economic activity, but instead as managers of public goods, the governmental interests are regulatory and the restrictions of Sections 253 and 332 apply in full.

IV. THE COMMISSION SHOULD ADOPT RULES BARRING STATE AND LOCAL ACTIONS THAT PROHIBIT THE PROVISION OF TELECOMMUNICATIONS SERVICES.

A. The Commission Has Authority to Adopt Rules Under Section 253.

Text and precedent make clear that the Commission has authority to adopt rules that preempt local laws that violate Section 253. Earlier in the same chapter of the statute, the Communications Act provides: “The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”⁹³ The

⁹¹ See *Minnesota Preemption Order*, 14 FCC Rcd at 21707-08 at ¶ 19 (noting that preemption under Section 253 was appropriate because “Minnesota is not merely acquiring fiber optic capacity for its own use”). Where a governmental entity could show that the water in its tower or the light from its light pole was being used solely for government purposes, and not for the public at large, then a governmental entity would be able to argue that it was operating the water tower or lamppost in its proprietary capacity. But so long as it is engaging in the provision of public services, the state’s or locality’s interest would fall squarely on the regulatory side of the divide. This analysis is consistent with the approach taken by the Commission in 2014 with regard to the Spectrum Act. There, the Commission distinguished between a local government acting similarly to a private property owner and pursuing its “purely proprietary interests,” and its actions as a regulator of public lands or other resources. *2014 Infrastructure Order*, 29 FCC Rcd at 12964 at ¶ 239.

⁹² *Sprint Spectrum L.P.*, 283 F.3d at 420 (quoting *Cardinal Towing*, 180 F.3d at 693) (internal quotation marks omitted).

⁹³ 47 U.S.C. § 201(b).

Commission has expressed its view that this grant of authority provides it with “broad general rulemaking authority that would allow it to issue rules interpreting section[] 253.”⁹⁴

Likewise, the United States Supreme Court has repeatedly confirmed the Commission’s authority to issue rules that interpret and implement the Communications Act. “We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the provisions of [the Communications] Act, which include[s provisions] . . . added by the Telecommunications Act of 1996.”⁹⁵ As it has done with other provisions of the Communications Act, the Commission can use its authority pursuant to Section 201(b) to issue rules that explain which practices “prohibit or have the effect of prohibiting” the provision of telecommunications service.

Nothing in Section 253(b) or (c) undermines the Commission’s authority to promulgate rules interpreting Section 253(a).⁹⁶ These sections merely prescribe specific limits on the reach

⁹⁴ *Acceleration of Broadband Deployment: Expanding the Reach and Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, 26 FCC Rcd 5384, 5400 at ¶ 57 (2011).

⁹⁵ *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (internal quotation marks omitted); *see also Brand X*, 545 U.S. at 980-81 (where the Communications Act is ambiguous, Section 201(b) “give[s] the Commission the authority to promulgate binding legal rules” that “fill the statutory gap in reasonable fashion”); *City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1866, 1871-73 (2013) (upholding FCC authority, pursuant to Section 201(b), to issue rules interpreting Section 332).

⁹⁶ *See Wireline Infrastructure Notice* at ¶ 109; 47 U.S.C. § 253(b) (“Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”); *id.* § 253(c) (“Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”).

of any rule the Commission may adopt.⁹⁷ Section 253(b) and (c) offer localities a safe harbor: if they can show their actions fall within the purview of these provisions, Section 253(a)'s limitations do not apply.⁹⁸ Thus, where a state or local authority can show that it has put in place competitively neutral “requirements *necessary* to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, [or] safeguard the rights of consumers,” it may in those limited circumstances enact policies that effectively prohibit the provision of service.⁹⁹ The term “necessary,” however, establishes a high bar. States and localities must show that the requirement at issue is *essential* to one of the goals enumerated in Section 253(b).¹⁰⁰ And, as discussed above, Section 253(c) limits states and localities to cost-based compensation for the use of public rights-of way.¹⁰¹

Nor does Section 253(d) limit the Commission’s authority to adopt rules interpreting Section 253(a). Section 253(d) provides:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.¹⁰²

⁹⁷ See Section III. B.1.a, *supra*.

⁹⁸ See 47 U.S.C. § 253(b), (c) (exempting from the limitations of Section 253 certain listed state and local duties and powers).

⁹⁹ 47 U.S.C. § 253(b) (emphasis added).

¹⁰⁰ See *Necessary*, Black’s Law Dictionary (10th ed. 2014) (defining necessary as “essential”).

¹⁰¹ See Section III.B.1.a, *supra*.

¹⁰² 47 U.S.C. § 253(d).

Section 253(d) thus imposes an affirmative obligation on the Commission: If, after notice and comment, the Commission finds a violation of Section 253(a) or (b), it must take action. But that mandate does not suggest that the Commission can act only in this manner, or otherwise deprive the Commission of its authority to interpret Section 253.¹⁰³ On the contrary, Section 253(d) constrains the Commission’s discretion in one respect only (requiring it to preempt violations of Section 253(a) or (b) presented to it), thereby leaving unaffected its discretion in all other respects, including its discretion to interpret Section 253. Absent any such restraint, the Commission is free, under black letter administrative law, to proceed via either rulemaking or adjudication in interpreting a statute within its jurisdiction.¹⁰⁴

For this reason, the Commission is correct to propose that it interpret Section 253(d)’s adjudicatory process as one non-mandatory approach for determining violations of Section 253, but one that does not prevent the Commission from adopting binding rules interpreting the other provisions of Section 253.¹⁰⁵ The authority – and indeed the obligation – to correct violations of a statute via an adjudication after notice and comment in no way precludes the Commission from defining such violations through adoption of general rules. In any event, at minimum, the effect of Section 253(d) on the Commission’s authority to adopt rules implementing the other

¹⁰³ *C.f. N. Cnty. Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1158 (9th Cir. 2010) (holding that even where the plain language of Section 201(b) of the Communications Act arguably indicated that no Commission guidance was necessary, because the statute possesses broad language, “it is within the Commission’s purview to determine whether a particular practice constitutes a violation for which there is a private right to compensation”).

¹⁰⁴ *See City of Arlington v. FCC*, 668 F.3d 229, 240 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013) (“Agencies typically enjoy ‘very broad discretion [in deciding] whether to proceed by way of adjudication or rulemaking.’”) (quoting *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001)); *see SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”).

¹⁰⁵ *See Wireline Infrastructure Notice* at ¶ 110.

provisions of Section 253 is ambiguous. Under *Chevron* and *City of Arlington*, the Commission has the latitude to construe the extent of its statutory authority so long as that interpretation is reasonable.¹⁰⁶ Construing Section 253 to allow the Commission to adopt general rules meets this standard.

B. The Commission Should Adopt Rules Preempting Requirements and Fees that Effectively Prohibit Providing Broadband Services to Customers.

To overcome the documented barriers to broadband deployment, the Commission should adopt rules prohibiting certain requirements or actions as *per se* unlawful under Section 253.¹⁰⁷

Based on the challenges Verizon has experienced in deploying small facilities in rights-of-way, discussed above, the Commission should prohibit:

- Moratoria, either explicit or *de facto*, that result in a state or locality refusing to negotiate or consider agreements to access public rights-of-way or access to municipally owned structures in rights-of-way;
- Failure to negotiate rights-of-way or pole access agreements in good faith;
- Fees, including application fees, right-of-way access fees, pole rental fees, escrow fees, consultant review fees, and permit renewal fees that are either not cost-based or not charged for similar facilities in the right-of-way;
- Undergrounding requirements that effectively prohibit locating small cells above ground in public rights-of-way;
- Requirements that applicants demonstrate a gap in coverage, need for service, or the need for a particular technology or facility type to place facilities in public rights-of-way;
- Excessive minimum separation and set-back requirements for facilities in public rights-of-way;
- Failure to provide applicants a finite list of requirements for accessing rights-of-way and municipally owned poles;

¹⁰⁶ See *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *City of Arlington*, 133 S. Ct. at 1868-69.

¹⁰⁷ See *Wireline Infrastructure Notice* at ¶¶ 100-12. Although the request for comment about rules the Commission should adopt under Section 253 appears in the *Wireline Infrastructure Notice*, any rules adopted would promote both wireless and wireline infrastructure deployment. In this section, we address rules needed from the wireline and wireless perspective.

- Subjective or vague aesthetic requirements – reasonable aesthetic concerns should be addressed in the list of requirements and not adjudicated on an ad hoc basis;
- Requirements to install additional facilities not planned by the applicant or to provide services at a discount or free of charge as a condition of approval to access rights-of-way or municipally owned poles;
- Requirements that favor or require placement of facilities on state or municipally owned structures within rights-of-way; and
- Requirements that impose conditions that conflict with the Commission’s copper retirement rules or impose unreasonable conditions beyond what the Commission’s rules require.

Rules prohibiting these impediments to broadband deployment would strike an appropriate balance between preserving state and local authority over public rights-of-way and speeding deployment by clearly proscribing actions or requirements that unreasonably prohibit applicants from providing service.

C. The Commission Should Use Its Section 253 Authority to Regulate Access to Municipally-Owned Poles and to Require Baseline Standards in States that Regulate Pole Attachments.

The Commission should use its Section 253 authority to ensure access to poles owned by railroads, states, municipalities, and cooperatives in situations where actions by these entities prohibit or effectively prohibit the provision of telecommunications service.¹⁰⁸ Section 224(a)’s definition of “utility” excludes, among other things, “any railroad, any person who is cooperatively organized . . . or any person owned by . . . any State.” The definition of “State” includes “any political subdivision, agency, or instrumentality” of a state.¹⁰⁹ Thus, poles owned by railroads, cooperatives, and states (including municipalities) generally are not subject to the Commission’s pole attachment jurisdiction. But in some instances these entities’ actions could amount to a prohibition of service under Section 253(a). The Commission should find that

¹⁰⁸ See *Wireline Infrastructure Notice* ¶ 108.

¹⁰⁹ See 47 U.S.C. § 224(a)(3).

Section 253 applies and allows it to assert jurisdiction over access to poles owned by railroads, cooperatives, and states (including municipalities) in those instances.

More generally, the Commission should use its Section 253 authority to ensure that reverse-preemption states are effectively regulating the rates, terms, and conditions of pole attachments. Under Section 224(c)(1), the Commission does not have jurisdiction over pole attachments in the states that have certified that they regulate pole attachments. But if a state's pole attachment regulations allow utilities or others to set rates, terms, and conditions that prohibit or effectively prohibit the provision of telecommunications service, then the Commission should stand ready to act on a case-by-case basis.

V. THE COMMISSION SHOULD ADOPT RULES UNDER SECTION 332(c) TO PROMOTE WIRELESS INFRASTRUCTURE DEPLOYMENT.

A. The Commission Should Adopt a Deemed Granted Remedy for the Section 332(c) Shot Clocks.

1. Carriers Continue to Experience Delays Getting Approvals for Small Cells.

Wireless carriers continue to experience delays in deploying small cells primarily because local zoning processes developed for larger, “macro” towers have not been updated to account for the smaller profile and limited effects of small cells. For example, many localities, such as Duluth, Minnesota, Amherst, New York, and Pasco, Washington, require special use permits involving multiple layers of approval to locate small cells in some or all zoning districts. Many others require site-by-site approval for small facilities, even after reaching agreement to place facilities in public rights-of-way.¹¹⁰ The ordinances in many localities impose requirements that are either not suited for small cells or are overly restrictive. These include multiple layers of review for each site, overly broad property owner notification requirements,

¹¹⁰ See Verizon Small Facility Comments at 18-19.

fall protection requirements, landscaping and fencing requirements, proof of need and the lack of suitable alternative structures, engineering consultant review requirements, property value impact analyses, overly restrictive height and equipment size limits, and minimum separation and set back requirements. As a result of these outdated and burdensome requirements, many zoning authorities fail to review and act on zoning applications within the shot clock time periods.¹¹¹ And carriers are generally reluctant to initiate court action to enforce the shot clock.¹¹²

The existing shot clocks, if appropriately modified, can be effective in reducing delays. In some locations, where ordinances are tailored to small facilities and skilled staff monitor the Commission shot clock periods, the shot clocks have reduced delays and eliminated contentious processes. For example, the town attorneys in Draper, Utah, and Jackson, Wyoming understand the Commission shot clocks and how they apply. Applicants are generally able to work with these jurisdictions to gain approval of small cells in a timely manner. Commission action to modify the existing Section 332(c)(7) shot clock by adopting a deemed granted remedy and to shorten the shot clock for small cells should encourage more localities to streamline processes to facilitate timely reviews. And shorter shot clocks for small cells will likewise encourage localities to adopt appropriately tailored zoning ordinances to address small cells.

2. The Commission Has Authority to Adopt a Deemed Granted Remedy.

The Commission has authority to deem applications granted if not acted upon in a reasonable period of time. Section 332(c)(7) requires that state and local governments act on siting requests “within a reasonable period of time” and states that applicants are “adversely

¹¹¹ *Id.*

¹¹² *See id.*, at 23.

affected” by a “failure to act.”¹¹³ Pursuant to this authority, the Commission adopted shot clocks of “presumptively, 90 days to process personal wireless service facility siting applications requesting collocations, and, also presumptively, 150 days to process all other applications.”¹¹⁴ But these shot clocks currently lack teeth, making them largely ineffective. The Commission should reconsider its decision not to adopt a deemed granted remedy for state or local government failures to act within the presumptively legal time limits under Section 332(c)(7).¹¹⁵

The Supreme Court confirmed the Commission’s authority to adopt rules implementing Section 332(c)(7) in *City of Arlington v. FCC*, rejecting claims from state and local governments that the adoption of shot clocks for siting decisions impinged upon state and local authority.¹¹⁶ Adopting a deemed granted remedy when there is a “failure to act” by localities fits squarely within this Commission authority.

Verizon agrees that the Commission has sufficient authority to convert the rebuttable presumption adopted in the *332 Shot Clock Ruling* into an irrebuttable presumption.¹¹⁷ Although the *332 Shot Clock Ruling* stated that Section 332(c)(7)(B)(v) indicated congressional intent that courts fashion “case-specific” remedies in “individual” cases, the Fifth Circuit in *City of*

¹¹³ 47 U.S.C. § 332(c)(7)(B)(ii), (v).

¹¹⁴ See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14005 at ¶ 32 (2009) (“*332 Shot Clock Ruling*”), *aff’d City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d City of Arlington v. FCC*, 133 S.Ct. 1863 (2013).

¹¹⁵ See *id.* at 14009 at ¶ 39; *2014 Infrastructure Order*, 29 FCC Rcd at 12978 at ¶ 284.

¹¹⁶ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871-73 (2013).

¹¹⁷ See *Wireless Infrastructure Notice* at ¶¶ 10-13.

Arlington v. FCC did not adopt this view.¹¹⁸ Instead, it found that the statute provides no indication of Congressional intent as to whether the Commission could promulgate rules regarding the proper interpretation of Section 332(c)(7)(B)(ii).¹¹⁹ “Accordingly, one could read § 332(c)(7) as a whole as establishing a framework in which a wireless service provider must seek a remedy for a state or local government's unreasonable delay in ruling on a wireless siting application in a court of competent jurisdiction while simultaneously allowing the FCC to issue an interpretation of § 332(c)(7)(B)(ii) that would guide courts' determinations of disputes under that provision.”¹²⁰ The court then affirmed the Commission’s authority to interpret ambiguous provisions of the statute, such as what constitutes a “reasonable period of time” for local action.¹²¹

Establishing a deemed granted remedy in the form of an irrebuttable presumption would be consistent with the text of the statute and this judicial precedent. Although Section 332(c)(7)(B)(ii) requires that a locality act on each application “within a reasonable period of time... taking into account the nature and scope of such request,”¹²² the requirement to examine the individual scope of each request is directed at the local government, not to a reviewing court. It is consequently entirely consistent with the text of Section 332(c)(7) for the Commission to provide guidance regarding the maximum amount of time that may be deemed “reasonable” for

¹¹⁸ *City of Arlington v. F.C.C.*, 668 F.3d 229, 250-51 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

¹¹⁹ *See Id.* at 251.

¹²⁰ *Id.* at 255.

¹²¹ *Id.*

¹²² 47 U.S.C. 332(c)(7)(B)(ii).

localities to review different categories of applications.¹²³ The Commission should make clear in establishing an irrebuttable presumption that it is setting only a maximum period of time, beyond which a failure to rule on an application is unreasonable in all circumstances. The Commission should preserve courts' ability to determine, on a case-by-case basis, that periods less than the 90 and 150 days to process applications may in fact be reasonable under the circumstances.

Adoption of a shot clock is fully consistent with the Commission's approach under analogous statutes, and those remedies have been affirmed by the courts. For example, Section 621(a)(1) of the Communications Act prevents local cable franchising authorities from "unreasonably refus[ing] to award an additional competitive franchise."¹²⁴ The Commission adopted a shot clock under this section and provided that if a franchising authority did not render a decision on an application within the applicable time period, the franchising authority would be deemed to have granted the application.¹²⁵ The Sixth Circuit denied a challenge to the order, rejecting the argument that the deemed granted remedy exceeded the Commission's authority and "den[ied] community needs and interests."¹²⁶ The court upheld the Commission's determination that the chosen shot clock was reasonable and that enforcing it through the deemed granted remedy was proper in order to prevent potential market entrants from abandoning the

¹²³ See *City of Arlington*, 668 F.3d at 255 (noting that "reasonable period of time" is inherently ambiguous and that the Commission has authority to provide guidance regarding its meaning).

¹²⁴ 47 U.S.C. § 541(a)(1).

¹²⁵ See *Cable Franchising Report and Order*, 22 FCC Rcd 5103 at ¶ 4, 5127-28 at ¶ 54, 5132 at ¶ 62, 5134-35 at ¶ 68, 5139-40 at ¶¶ 77-78.

¹²⁶ *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 778 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009).

market altogether due to “excessive delays” and “unreasonable refusals.”¹²⁷ Similarly, in the *2014 Infrastructure Order*, the Commission adopted a deemed granted remedy for the shot clock under Section 6409 of the Spectrum Act,¹²⁸ which the Fourth Circuit upheld as a valid exercise of agency authority consistent with the statute’s purpose of preventing a “protracted approval process.”¹²⁹ Establishing an irrebuttable presumption for the shot clock under Section 332(c)(7) is not only supported by the Commission’s authority to interpret that provision, but also by its construction of similar statutes and the decisions upholding those interpretations.

Alternatively, Verizon agrees that the Commission could interpret Section 332(c)(7) as depriving state and local governments of authority to act on applications after a reasonable period for review has expired. Section 332(c)(7)(A) preserves state and local authority over siting applications “[e]xcept as provided in this paragraph,” and section 332(c)(7)(B)(ii) states that those authorities “shall act on any request ... within a reasonable time.” The statute does not state the consequences of failure to act in a reasonable period of time, and the agency has authority to fill this gap by shifting approval authority away from localities that fail to act. Because states and localities would consequently lack the authority that is otherwise preserved by Section 332(c)(7)(A), they would not be able to approve or deny any application. The Commission could make clear that in such circumstances, the applicant would be free of the need to secure local approval.

Finally, the Commission has authority to implement Section 332(c)(7) by promulgating a rule that establishes a “deemed granted” remedy. “The FCC has rulemaking authority to carry

¹²⁷ *Id.*, 529 F.3d at 780 (citation and internal quotation marks omitted).

¹²⁸ *See* 47 U.S.C. § 1455.

¹²⁹ *See Montgomery Cty. v. F.C.C.*, 811 F.3d 121, 128 (4th Cir. 2015).

out the provisions of [the Communications] Act, which include[s provisions] ... added by the Telecommunications Act of 1996.”¹³⁰ The Fifth Circuit and the Supreme Court confirmed this authority with respect to Section 332 in *City of Arlington v. FCC*, locating the Commission’s broad rulemaking authority in Section 201(b) to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”¹³¹ The Supreme Court has thus confirmed that the Commission’s general rulemaking authority applies with full force to Section 332(c)(7). Given that the Commission possesses such authority, it can permissibly promulgate a deemed granted remedy to account for situations where localities fail to act within the prescribed time period.

B. The Commission Should Adopt a 60-day Shot Clock for Certain Small Cells.

The Commission should adopt a 60-day shot clock for action on applications to place small cells on existing structures, provided that the facility meets reasonable size limits established by the Commission.¹³² The 60-day shot clock should also apply to small cells placed on new or replacement poles, provided the poles are no more than 50 feet tall and are located in public rights-of-way with existing above-ground utility (including light and traffic) poles. In 2009, when the Commission adopted the 90-day shot clock for placements and modifications on existing structures, it did not specifically contemplate small cells, which have less potential for

¹³⁰ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (internal quotation marks omitted).

¹³¹ 47 U.S.C. § 201(b); *see* 133 S. Ct. at 1866, 1871–73 (finding that the Commission has the authority to interpret Section 332); 668 F. 3d at 249.

¹³² The Commission should apply the size limits applicable to small facility exclusions from historic preservation reviews – three cubic feet per antenna, no more than six cubic feet for all antennas, and 28 cubic feet for associated equipment. *See Collocation Agreement Amendment*, § VI.A.5 (a) and (b)(i).

aesthetic and other impacts than macrocells.¹³³ A 60-day shot clock is consistent with the shot clock the Commission adopted under Section 6409 and with recent state legislation adopting shot clocks of not more than 60 days for covered small wireless facilities.¹³⁴

The same 60-day shot clock should apply to applications proposing multiple facilities – so called “batch applications.”¹³⁵ Batch applications generally are used when several similar facilities are proposed in the same area and have similar (if any) effects on the surrounding area. They benefit applicants, by streamlining application processes, and reviewing authorities, by enabling the review of many applications simultaneously. The Commission should follow the lead of states that have recently adopted small facility statutes that apply the same shot clock to batch applications and single applications.¹³⁶

The Commission should also make clear that the Section 332(c)(7) shot clocks apply to all local government decisions related to the placement of covered wireless facilities. Local governments apply a variety of requirements to small facility deployments in rights-of-way. In some cases, local requirements for gaining access to rights-of-way and municipal poles either supplant or exist in addition to the local zoning process.¹³⁷ Allowing localities to exempt parts of the approval process from the applicable deadlines frustrates the purpose of the shot clocks.

¹³³ See *WTB Infrastructure Notice* 31 FCC Rcd. at 13371 (asking “whether the presumptive deadlines adopted in the *2009 Declaratory Ruling* reflect an approach more appropriate for traditional macrocells than for the types of cells discussed here, which are much smaller and can be placed on light poles, utility poles, buildings, and other structures either on private property or in the public rights of way”).

¹³⁴ *Id.* at 13370.

¹³⁵ See *Wireless Infrastructure Notice* at ¶ 18.

¹³⁶ See *Verizon Small Facility Comments* at 27.

¹³⁷ *Id.*, at 18-19.

Clarifying that the shot clocks apply to all aspects of the approval process, including accessing the rights-of-way and placing small facilities on municipally owned poles, is necessary to speed local siting decisions. This clarification will also encourage local authorities to adopt streamlined approval processes. Clarifying the shot clocks in this manner is consistent with the statute. Section 332(c)(7) applies to decisions that regulate the placement of wireless facilities, and it does not limit the terms of the statute to (or even mention) the local zoning process.¹³⁸

The Commission should rule that the shot clock starts to run once an application is filed pursuant to a published state or local application process.¹³⁹ The clock would begin to run whether the application is for access to rights-of-way, a permit or permits to place facilities on municipally owned poles, or a zoning application. In localities that have not yet adopted formal, published application processes (particularly to place facilities in rights-of-way or on municipal poles), the clock should begin to run once an entity submits a written request for approval. To ensure that applications are complete and that localities have all of the information that they need to review, the rules should allow localities that have published their application procedures and forms to have 15 days to review applications for completeness and toll the clock for incomplete applications. Limiting the ability to toll the clock in this manner would prevent localities from employing “floating” application requirements and encourage them to adopt and publish formal requirements.

The Commission should treat moratoria under the Section 332(c)(7) shot clocks consistent with the treatment of moratoria under the Section 6409 shot clock.¹⁴⁰ There, in the

¹³⁸ See 47 U.S.C. § 332(c)(7)(B)(i) and (ii).

¹³⁹ See *Wireless Infrastructure Notice* at ¶ 20 (seeking comment on when the shot clock should start for processes where there might be a lack of clarity).

¹⁴⁰ *2014 Infrastructure Order*, 29 FCC Rcd at 12865 at ¶ 265.

context of adopting rules to implement a shot clock under Section 6409, the Commission clarified “that the shot clock runs regardless of any moratorium.”¹⁴¹ There is no reason to deviate from that position here.

VI. THE COMMISSION SHOULD STREAMLINE HISTORIC PRESERVATION AND ENVIRONMENTAL REVIEWS.

A. The Commission Should Modernize the Tribal Consultation and Review Process.

The need for many thousands of small cell and 5G antenna locations to densify wireless networks requires significant changes to the conduct of historic preservation reviews, including tribal reviews. The changes proposed below target only facilities not located on tribal lands and preserve tribal authority to review facility types most likely to affect tribal historic properties.¹⁴² Under the current framework, tribal reviews place a heavy burden on wireless facility deployment without corresponding benefits because the vast majority of tribal reviews are unnecessary. Of 8,100 requests for tribal review Verizon submitted between 2012 and 2015, only 29 (.3 percent) resulted in findings of an adverse effect to tribal historic properties.¹⁴³ To speed wireless facility deployment, the Commission should adopt targeted reforms aimed at eliminating unnecessary reviews while preserving a reasonable role for tribal review where legitimate interests are implicated.

Both the number of tribal reviews and cost of each review are growing. Tribes’ self-designated “areas of interest” subject to review are expanding rapidly – meaning more tribes involved in nearly every project. Tribal fees associated with these reviews also are

¹⁴¹ *Id.*

¹⁴² Neither Verizon nor the Commission is proposing changes to the process for reviewing facilities to be constructed on tribal lands.

¹⁴³ Verizon Small Facility Comments at 36.

increasing.¹⁴⁴ Tribal reviews impose delays of 75 days on average, with many taking much longer to complete. And the average cost is now almost \$2,500 per site.¹⁴⁵ Unless the Commission acts to reform the review process, the trend toward more costly and cumbersome tribal reviews at the same time the wireless industry is planning to deploy hundreds of thousands of new small cells and 5G facilities will greatly exacerbate the cost and delays associated with wireless broadband infrastructure deployment.

Fortunately, there is a path forward that respects tribal interests in reviewing new facilities that pose a legitimate threat to tribal historic properties, while relieving wireless carriers of the need to conduct reviews where no such threat exists. Certain facility types – such as facilities that disturb new ground and tall towers – are far more likely to affect tribal properties than small cells. The Commission should exclude from tribal reviews facility types that lack the potential to affect tribal properties, and, where reviews are necessary, place firm time limits on tribal reviews. The Commission should also reform the current tribal review process by: (1) limiting when tribes can assess fees for tribal reviews and limiting the amount of those fees; (2) adopting a 30-day shot clock for tribal historic preservation reviews; (3) clarifying that the information on FCC Forms 620 (for new towers) and 621 (for collocations) is sufficient information for tribal reviews; and (4) establishing a process for reviewing tribal areas of interest.

¹⁴⁴ *Wireless Infrastructure Notice* at ¶ 35 (providing data from the Commission’s Tribal Construction Notification System (“TCNS”) indicating a dramatic increase in the areas where tribes express an interest in reviewing wireless facilities, in the number of tribes assessing up-front fees for tribal reviews, and in the amount of such fees).

¹⁴⁵ *See Verizon Small Facility Comments* at 34-35.

1. The Commission Should Exclude Tribal Reviews for Certain Small Cell Facility Types.

As a starting point, the Commission should recognize that some types of small cell facilities do not affect tribal historic properties and should be excluded altogether from tribal reviews. Generally, the risks posed by wireless facilities to tribal properties of cultural or religious significance come in one of two ways: by physically harming properties – such as tribal artifacts and human remains – when excavating, or by placing a structure in a location that impedes a sacred tribal viewshed. Neither outcome is possible when locating a small cell on an existing structure, or when erecting a new pole (subject to certain size limits) that involves no new ground disturbance. Verizon’s experience with tribal reviews confirms the absence of harm to tribal historic properties in these contexts. Of 8,100 requests for tribal review submitted between 2012 and 2015, there were *no* adverse effects from projects with no new ground disturbance.¹⁴⁶

Excluding these small cell facility types from tribal reviews would remove a substantial barrier to small cell deployment while still preserving tribal interests in protecting tribal historic properties.¹⁴⁷ The Commission should exclude small cells that are either mounted on existing structures or mounted on new structures, provided that the small cells involve no new ground disturbance¹⁴⁸ and meet existing Commission size limits for small cells.¹⁴⁹ New poles should be

¹⁴⁶ See Verizon Small Facility Comments at 35-37.

¹⁴⁷ See *Wireless Infrastructure Notice* at ¶ 74 (seeking comment on whether to exclude certain collocations from tribal reviews).

¹⁴⁸ See *Collocation Agreement Amendment*, § VI.A.6.

¹⁴⁹ The Commission should apply the size limits applicable to small facility exclusions from historic preservation reviews – three cubic feet per antenna, no more than six cubic feet for all antennas, and 28 cubic feet for associated equipment. *Collocation Agreement Amendment*, § VI.A.4 (a) and (b)(i).

limited to 50 feet in height or not greater than ten percent taller than other structures in the area of the pole, whichever is greater.¹⁵⁰ This narrowly-tailored exclusion will benefit the public interest by eliminating tribal reviews for small cell facility types that do not affect tribal properties, while allowing tribes to focus their limited resources on reviewing those wireless facility types that are more likely to harm tribal properties.

The Commission has authority to adopt this exclusion. The Advisory Council on Historic Preservation (“ACHP”) – the federal agency responsible for implementing the Historic Preservation Act – rules provide that federal agencies have no further obligations to conduct historic preservation reviews if they conclude that the agency undertaking “is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties [are] present.”¹⁵¹ The proposed tribal exclusion easily satisfies this rule. The parameters of the exclusion ensure that no tribal historic properties will be affected. Verizon’s experience conducting actual reviews between 2012 and 2015 further demonstrates that facilities meeting these parameters do not affect tribal properties. Even if tribal historic properties are present, the proposed parameters (in particular the requirement that there be no new ground disturbance) ensure that such properties will remain unharmed.

2. The Commission Should Preclude Tribal Fees for Initial Consultations.

The Commission could likewise curb abuses of the tribal review process by declaring that carriers are not required to pay fees to tribes for performing initial reviews of proposed projects submitted by carriers for tribal review. As noted by the Commission, the ACHP has advised that

¹⁵⁰ See *Collocation Agreement Amendment*, §I.E.1 (defining what constitutes a substantial increase in height).

¹⁵¹ 36 C.F.R. § 800.3(a)(1).

applicants are under no obligation to pay tribal fees to review applications, but fees might be appropriate when a tribe is performing professional services such as those performed by hired consultants or contractors.¹⁵²

When tribes indicate through the Commission's Tower Construction Notification System ("TCNS") that they have an interest in reviewing a proposed facility not located on tribal lands, they are treated as "consulting parties" in the historic preservation review process, not as hired consultants or contractors. They have the right to receive notices, copies of submission packets, correspondence and other documents provided to the State Historic Preservation Officer ("SHPO"), and have the right to have their views taken into account by the applicant. Although there are special rules for conducting tribal reviews due to tribes' sovereign status, the work they perform is the same as that of any other consulting party, such as a local historic preservation society, that expresses a legal or economic interest in a proposed project.¹⁵³ Applicants do not hire tribes as consultants, enter into contractual agreement with tribes, or ask for specific information from the tribe(s) during the consultation process. Rather, tribes are given the opportunity, like any other consulting party, to concur or disagree with the applicant's proposed finding of effect. Those findings are prepared by expert environmental consultants hired by the applicant and are based on information compiled from site history review, observations, and publicly available documentation of the area's historical land use and relevance.

Because tribes are not performing the work of consultants or contractors for projects not located on tribal lands, the Commission should declare that tribal fees are neither necessary nor

¹⁵² See *Wireless Infrastructure Notice* at ¶ 43.

¹⁵³ See *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073 (2004) (codified at 47 C.F.R. Part 1, App'x C ("NPA")) at §§ V.F and G.

appropriate for the tribe's initial review of an application. If a tribe refuses to review a project based on nonpayment of a requested fee, the Commission should deem the tribe to have no further interest in the project and that the applicant has completed the tribal consultation with respect to that tribe.

In other cases, tribes may perform work similar to that of a hired consultant and fees might be appropriate for specific sites. For example, if during the initial consulting party review, a tribe finds evidence of an intact historic property within the footprint of the project, then it may be necessary for the tribe to perform professional services to investigate whether that property would be affected. In that case, any tribal fees should be negotiated by the tribe and the applicant. To assist in these negotiations and avoid prolonged fee disputes, the Commission should declare that fees commensurate with those paid to other cultural resource contractors of similar education and experience are presumptively reasonable, and that travel and related expenses commensurate with such fees paid to other contractors are likewise presumptively reasonable.

3. The Commission Should Take Steps to Curb the Unreasonable Expansion of Tribal Areas of Interest.

The Commission should conduct oversight into tribes' self-designation of their areas of interest and modify TCNS to require tribes to identify areas of interest at the county level. Historically, tribes have had unfettered discretion to designate the areas where each tribe wants to review projects. Many tribes designate entire states as areas of interest, and the areas of interest designated by tribes has dramatically expanded in recent years.¹⁵⁴ To curb the unchecked expansion of tribal areas of interest, and reduce the number of unnecessary tribal reviews required for each project, the Commission should work with tribes to review both

¹⁵⁴ See *Wireless Infrastructure Notice* at ¶ 35.

existing areas of interest and requests to expand areas of interest. This review should require tribes to demonstrate the likelihood that tribal historic properties are located in existing areas of interest and proposed expansion areas. If the Commission and the tribe agree upon the expansion, applicants should be notified of the expansion and provided a six-month transition period before the changes take effect.

The Commission should also modify TCNS to improve how areas of interest are designated and to provide information about these areas to applicants. The Commission should require tribes to designate areas of interest at the county level rather than designating entire states. It should encourage tribes to designate certain facility types (such as collocations) within their areas of interest that do not require tribal review, and modify the TCNS to accommodate those designations. Finally, applicants should be given visibility into TCNS to determine early in the planning stage whether and to what extent tribal reviews will be necessary for a proposed project in any particular area. Currently, applicants do not learn that a proposed site is within a tribe's designated area of interest until after they have submitted the required documentation into TCNS, making it difficult if not impossible for applicants to select sites outside those areas and to plan their network deployment in the most efficient manner.

4. The Commission Should Require Tribal Responses in 30 Days.

The Commission should require completion of tribal historic preservation reviews within 30 days of submission of the required documentation through TCNS. Delays in obtaining tribal responses constitute a significant barrier to facilities siting, and those delays will likely get worse as carriers submit many thousands of applications for small cells for tribal reviews. In a July 2016 examination of 2,450 Verizon requests for tribal review that were pending at the time, more than half had been pending for more than 90 days, almost a third had been pending for more than

six months, and 20 had been pending for more than a year. For projects Verizon submitted between 2014 and 2016, the average time for tribes to complete reviews was 75 days.¹⁵⁵

The Commission has authority to adopt a shot clock for tribal responses. The Commission previously determined that it has authority to interpret and clarify the application of the provisions in the *Nationwide Programmatic Agreement* (“NPA”).¹⁵⁶ In the *Tribal Declaratory Ruling*, the Commission adopted a 60-day shot clock for tribes that fail to respond to a request submitted through TCNS to indicate whether the tribe wants to be a consulting party on a wireless facility request.¹⁵⁷ The Commission found that adopting a tribal shot clock in that context “satisfies the Commission’s obligation to make reasonable and good faith efforts to identify Indian tribes and [Native Hawaiian Organizations] that may attach religious and cultural significance to historic properties that may be affected by an undertaking, as specified under the Nationwide Agreement and as required under the NHPA and the rules of the Advisory Council on Historic Preservation.”¹⁵⁸ Just as it had authority to adopt a shot clock in 2005, the Commission has authority to place a shot clock on all tribal responses in this proceeding.

The current lack of any firm deadline for tribal review contributes to delays in the review process, and to speedy deployment. The shot clock adopted in 2005 only applies when tribes fail to respond to the initial inquiry made to tribes through TCNS. But that process does not apply when the tribe responds that it wants to be a consulting party, but then fails to render an opinion

¹⁵⁵ See Verizon Small Facility Comments at 34-35.

¹⁵⁶ See *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) (“*Tribal Declaratory Ruling*”) at 16092, 16096 at ¶¶ 1, 9.

¹⁵⁷ *Id.* at 16095 at ¶ 9.

¹⁵⁸ *Id.*

about whether the proposed facility affects tribal historic properties. The Commission now has an informal “Good Faith Protocol” to attempt to obtain tribal responses within 60 days,¹⁵⁹ but that process still requires applicants to wait until Commission staff authorizes the applicant to proceed and has been only marginally effective in curbing tribal delays.

Thirty days is an appropriate amount of time for tribes to review projects for effects to tribal historic properties. The *NPA* provides that 30 days is the appropriate amount of time for SHPOs to respond to requests to review projects for effects on historic properties, and likewise states, “[o]rdinarily, 30 days from the time the relevant tribal [] representative may reasonably be expected to have received an inquiry shall be considered a reasonable time.”¹⁶⁰ While the *Tribal Declaratory Ruling* and Good Faith Protocol (which is based on the *Tribal Declaratory Ruling*) allow 60 days, the *Tribal Declaratory Ruling* was adopted more than 10 years ago at a time when TCNS was new and tribes were not yet accustomed to the process for reviewing wireless facilities. Advances in electronic communication since that time together with the need for applicants to build new facilities and bring them online quickly to address capacity needs warrant a shorter time period.¹⁶¹ And, as discussed below, the Commission could extend that time period when necessary and appropriate.

In conjunction with a 30-day shot clock for tribal reviews, the Commission should also adopt a uniform documentation requirement for tribal reviews. Absent a standard, the start of the shot clock may be delayed by disputes over whether the applicant submitted the appropriate level of information for the tribe to review the project. Existing FCC Forms 620 and 621, which are

¹⁵⁹ See *Wireless Infrastructure Notice* at ¶ 31.

¹⁶⁰ *NPA* at § IV.F.4.

¹⁶¹ See *Wireless Infrastructure Notice* at ¶ 60.

the documentation required for SHPO historic preservation reviews, contain the “information reasonably necessary for the [] tribe [] to evaluate whether Historic Properties of religious and cultural significance may be affected.”¹⁶² These forms contain information including contact information for the applicant, the location of the proposed facility, the facility type (including pictures), and an evaluation by a qualified consultant as to the potential effect on historic properties in the vicinity of the project. Absent a showing by a tribe demonstrating the need for more information based on the specifics of the proposed facility, the Form 620 and 621 information should be deemed to satisfy the *NPA* information standard.

The Commission should establish a process for implementing the 30-day shot clock similar to that developed in the *Tribal Declaratory Ruling*. The shot clock should start running on the date the applicant uploads the Form 620 or 621 information into TCNS. Tribes expressing an interest in reviewing projects in the area of the proposed facility would then have 15 days to request more information based on a demonstration of need. If any tribe fails to respond by day 30, the tribe would be deemed to have no interest in the project and the applicant will have concluded its responsibility as to that tribe. If the tribe responds to the applicant before the end of the 30-day period that more time is needed, the applicant and the tribe would be permitted to mutually agree to an extension of not more than 15 additional days. Any disputes arising during the process would be resolved by the Commission.

B. The commission should adopt reasonable exclusions from historic preservation review.

To speed deployment and investment, the Commission should adopt appropriate exclusions to avoid unnecessary or redundant historic preservation reviews.¹⁶³ For each of the

¹⁶² *NPA* at § IV.F.3.

¹⁶³ See *Wireless Infrastructure Notice* at ¶¶ 66-75.

exclusions discussed below, the costs and delays that result from requiring historic preservation reviews far outweigh any benefits that derive from such reviews. Verizon has analyzed its historic preservation reviews between 2012 and 2015 and estimates that each historic preservation review on average takes 100 days to complete and adds almost \$4,000 to the cost of each facility, although the timelines and costs for each project vary greatly depending on the circumstances.¹⁶⁴ And those costs have likely increased since 2015 given the increase in tribal fees noted by the Commission.¹⁶⁵ Because, as explained below, the reviews currently required under Commission rules do not result in findings that historic or tribal properties are adversely affected, the costs and delays far exceed the benefits.

1. The Commission Should Exclude Pole Replacements that Meet Certain Conditions.

The current historic preservation process excludes pole replacements; the Commission should extend that exclusion to the replacement non-tower structures such as utility, light, and traffic poles, provided that conditions designed to protect historic properties are met.¹⁶⁶ There is no valid reason to exclude replacing “towers,” which are defined as structures built primarily for supporting Commission-licensed antenna,¹⁶⁷ and not exclude other poles that meet similar conditions.

¹⁶⁴ These costs include the costs for consultants to review the site and prepare the relevant FCC forms for submission, tribal review and monitoring fees, and fees associated with preparing and submitting environmental assessments and memoranda of agreement to resolve adverse effects.

¹⁶⁵ See *Wireless Infrastructure Notice* at ¶ 35.

¹⁶⁶ See *id.* at ¶¶ 67-68.

¹⁶⁷ See *NPA* at § II.A.14.

The Commission should adopt conditions similar, but not identical, to the conditions required for the exclusion of tower replacements from historic preservation review.¹⁶⁸ Non-tower poles should be excluded if:

1. The pole being replaced is an existing structure and is being replaced in the same location, meaning no more than 30 feet from the original location;
2. The project does not involve excavation more than 30 feet from the original pole location, or, if the project is located within an existing right-of-way, the project footprint remains within the boundaries of the right-of-way;
3. The new pole does not increase the height by more than 10 percent or 10 feet above the height of the original pole, whichever is greater;
4. No existing historic preservation complaints are open against the pole being replaced;¹⁶⁹ and
5. The replaced pole is not listed on the National Register of Historic Places or located within a National Historic Landmark District.

These conditions place reasonable limits on pole replacements designed to ensure that no historic properties are affected. And Verizon's review of 332 pole replacement projects between 2014 and 2017 revealed that *none* of its pole replacements meeting these parameters had an adverse effect on any historic property.

The Commission has authority to adopt this reasonable expansion. The new exclusion "is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties [are] present."¹⁷⁰ If historic properties are present in the vicinity of the pole being replaced, the existing pole is already part of the landscape surrounding that historic property. Replacing the existing pole with another pole of a similar size and footprint will not

¹⁶⁸ See *id.* at § III.B. For example, it does not make sense to require that the pole being replaced was subject to an historic preservation review. Such a requirement would obviate the exclusion since utility, light, and traffic poles typically do not undergo such reviews.

¹⁶⁹ See *Collocation Agreement Amendment*, § IV.A.4.

¹⁷⁰ See 36 C.F.R. § 800.3(a)(1).

change that landscape. And the proposed limitation on excavation will ensure that any historic properties in the ground are not affected.

2. The Commission Should Exclude Construction in Rights-of-Way and Industrial Zones that Meets Certain Conditions.

The Commission likewise should expand its rules excluding from review new construction in rights-of-way and industrial zones that are unlikely to affect legitimate historic preservation interests.¹⁷¹ Today, both exclusions, where applicable, only relieve applicants from consulting with SHPOs; tribal consultation is still required. Also, the rights-of-way exclusion applies only to construction in utility and communications rights-of-way, but not to construction in transportation rights-of-way.¹⁷² These requirements severely limit the benefit of each exclusion because tribal consultations are the most costly aspect of historic preservation reviews and impose the most delays. These limitations should be removed.

Amending the industrial zone and rights-of-way exclusions by eliminating the need for tribal consultation and including construction in transportation rights-of-way is warranted because these changes, subject to certain conditions, will not increase the likelihood of effects to historic properties. To ensure that tribal historic properties are not affected, the Commission should exclude applicants from the requirement to consult with tribes only if the project involves no new ground disturbance. And to address the concern that some transportation rights-of-way run through historic districts, the Commission should limit the height of new poles in historic districts to 50 feet or no more than ten percent taller than other structures in the area of the pole,

¹⁷¹ See *Wireless Infrastructure Notice* at ¶¶ 69-71. The Commission seeks comment on expanding the rights-of-way exclusion, but not on the industrial zone exclusion.

¹⁷² See NPA at §§ III.D (industrial zone exclusion) and III.E (rights-of-way exclusion).

whichever is greater.¹⁷³ The size of facilities in historic districts should likewise be limited, consistent with other Commission rules that apply to small cells.¹⁷⁴ Verizon’s review of a random sample of 58 sites that meet these proposed criteria between 2014 and 2016 produced no sites that resulted in adverse effect findings.

3. The Commission Should Exclude Collocations Not Closer than 50 Feet to a Historic District.

The Commission should amend the exclusion for small cells located outside historic districts to exclude from the historic preservation review process small cells located at least 50 feet from a historic district.¹⁷⁵ The current 250-foot “buffer zone” between facilities and historic districts has its origins in the original Collocation Agreement adopted in 2001 in the context of much larger, macro cells.¹⁷⁶ Applying the 250-foot buffer zone to small wireless facilities does not account for the reduced visibility and impact of these facilities. Even if the small facilities are visible from ground level within an historic district, they are not likely to have an effect on historic properties because of their small size. Therefore, the Commission should reduce the size of the buffer zone to 50 feet to reflect the minimal impact of smaller wireless facilities.

¹⁷³ See *Collocation Agreement Amendment*, § I.E.1 (defining what constitutes a substantial increase in height).

¹⁷⁴ The Commission should apply the size limits applicable to small facility exclusions from historic preservation reviews – three cubic feet per antenna, no more than six cubic feet for all antennas, and 28 cubic feet for associated equipment. *Collocation Agreement Amendment*, §VI.A.5 (a) and (b)(i).

¹⁷⁵ See *Wireless Infrastructure Notice* at ¶¶ 72-75. The current small facility collocation exclusion is located at § VI of the *Collocation Agreement Amendment*.

¹⁷⁶ *Collocation Agreement Amendment*, §V.A.2.

C. The Commission Should find that mounting small cells on existing structures is not a federal undertaking.

The Commission should remove the requirement that applicants seeking to mount small cells on existing structures undergo the burdensome historic preservation review procedures mandated by the National Historic Preservation Act (“NHPA”).¹⁷⁷ As explained below, it is well within the Commission’s authority and would advance the goals of this proceeding by removing barriers to the deployment of small cell infrastructure. And it would promote historic preservation efforts by allowing state and tribal historic preservation authorities, as well as this Commission, to focus their limited resources on activities that pose an actual threat of damage to historic properties.

The NHPA defines federal undertakings as activities that are financed, authorized, or licensed by a federal agency.¹⁷⁸ Once the agency determines that an activity constitutes a federal undertaking, the activity is subject to a costly and time-consuming historic review process.¹⁷⁹ Courts have explained that the NHPA, “by its terms, has a narrower reach and is triggered only if a federal agency has the authority to license a project or approve expenditures for it.”¹⁸⁰ The NHPA’s applicability depends on the degree of federal involvement in the project. Where the federal agency’s role in private activity is *de minimis*, that activity does not constitute a federal

¹⁷⁷ See 54 U.S.C. §§ 306108, 300320. Doing so would obviate the need for additional exclusions, or to amend existing exclusions, applicable to such facilities.

¹⁷⁸ 54 U.S.C. § 300320 (defining undertaking to include a project or activity under the jurisdiction of a Federal agency “requiring a Federal permit, license, or approval”); see also *Sheridan Kalorama Historical Ass’n v. Christopher*, 49 F.3d 750, 755 (D.C. Cir. 1995) (“Congress intended to expand the definition of an ‘undertaking’ – formerly limited to federally funded or licensed projects – to include projects requiring a federal ‘permit’ or merely federal ‘approval.’”).

¹⁷⁹ See 36 C.F.R. § 800 *et seq.*

¹⁸⁰ *Lee v. Thornburgh*, 877 F.2d 1053, 1055 (D.C. Cir. 1989).

undertaking.¹⁸¹ Courts review an agency’s determination that an action is or is not a federal undertaking for “reasonableness under the circumstances.”¹⁸²

The Commission’s blanket determination that construction of cellular facilities constitutes a federal undertaking is outdated. That determination was made in reference to a previous generation of cellular technology, which relied on macro cells mounted on large purpose-built towers. The Commission found that construction of those towers is a federal undertaking because, although no preconstruction authorization was required, the Commission retained authority to “rule on” the environmental assessments submitted by applicants.¹⁸³

Since then, the Commission has recognized that small cells do not pose a comparable risk of damage to historic properties. Small cells “are a fraction of the size of macrocell deployments, and can be installed – with little or no impact – on utility poles, buildings, and

¹⁸¹ See, e.g., *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001) (holding that agency action that involves little or no discretion is not a federal undertaking); *Yerger v. Robertson*, 981 F.2d 460, 465 (9th Cir. 1992) (holding that agency action that “does not affect the historic character of the site” is not a federal undertaking); *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453, 465 (5th Cir. 1989) (holding that federal permit authorizing “inconsequential activities” did not create federal undertaking); *Lee*, 877 F.2d at 1057-58 (holding that “negligible” involvement of Department of Justice in decision where to site prison project did not render it a federal undertaking); *Ringsred v. City of Duluth, a Minnesota Home-Rule Charter City*, 828 F.2d 1305, 1308 (8th Cir. 1987) (holding that agency’s authority to approve contracts for construction of a parking ramp was not a federal undertaking because agency’s involvement was minimal); see also *McMillan Park Comm. v. Nat’l Capital Planning Comm’n*, 968 F.2d 1283, 1290 (D.C. Cir. 1992) (Randolph, J., concurring) (stating that agency’s review of amendments to project plan was “simply too tangential to make those amendments ‘federal undertakings’ under section 106”).

¹⁸² *Sugarloaf Citizens Ass’n v. F.E.R.C.*, 959 F.2d 508, 512 (4th Cir. 1992).

¹⁸³ See *In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 Nat’l Historic Pres. Act Review Process*, 20 FCC Rcd 1073, 1082-83 at ¶¶ 24-26 (2004); see also *CTIA-Wireless Ass’n v. F.C.C.*, 466 F.3d 105, 114-15 (D.C. Cir. 2006) (affirming FCC determination).

other existing structures.”¹⁸⁴ They are often installed on structures within or near utility rights-of-way, causing minimal ground disturbance and almost no additional visual effect. These deployments have “limited or no potential to cause adverse effects on historic properties.”¹⁸⁵ Indeed, the Commission has recognized that small cells “are ... particularly useful to address capacity or coverage needs in areas with stringent siting regulations, such as historic districts.”¹⁸⁶

In view of these differences, the Commission has put in place various exclusions and agreements to reduce the regulatory burden on small cell deployments.¹⁸⁷ Although helpful, these efforts fall short of eliminating unnecessary barriers to deployment in all instances. Rather than add to the existing patchwork of exemptions and agreements, the Commission should categorically exclude the mounting of small cells on existing structures from environmental processing.¹⁸⁸ Given the minimal potential for this activity to create substantial environmental impacts or damage to historic properties, submission of environmental assessments and completion of environmental processing are unnecessary. Once this federal approval

¹⁸⁴ See *2014 Infrastructure Order*, 29 FCC Rcd at 12867 at ¶ 3.

¹⁸⁵ *Collocation Agreement Amendment* at 2.

¹⁸⁶ *2014 Infrastructure Order*, 29 FCC Rcd at 12880 at ¶ 33. The Commission recognized numerous other benefits of small cell technologies over macro cells, including increasing connectivity in areas where it is not feasible to install traditional towers, improving coverage inside buildings, and meeting increased demand for wireless broadband services in a cost-effective way. *Id.* at ¶¶ 32-34.

¹⁸⁷ See *Collocation Agreement Amendment* (revising agreement between FCC and various federal conservation bodies to exempt small cells from the Section 106 review collocations on buildings more than 45 years old in most circumstances); *2014 Infrastructure Order*, 29 FCC Rcd at 12906 at ¶ 88 (exempting from Section 106 review small facilities mounted on utility structures and buildings in certain circumstances).

¹⁸⁸ See 47 C.F.R. § 1.1306. The Council on Environmental Quality regulations promulgated under Section 204 of NEPA authorize the Commission to create categorical exclusions for “actions which do not individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4; 42 U.S.C. § 4344.

requirement is removed, there will be no basis to treat installation of small cells on existing structures as a federal undertaking.¹⁸⁹

In the alternative, the Commission should exercise its authority to determine that mounting small cells on existing structures is not a federal undertaking, and therefore is not subject to NHPA review.¹⁹⁰ This determination is entirely consistent with the language of the NHPA and judicial precedent. Even without a categorical exclusion from environmental processing, the Commission's involvement in the deployment of small cell infrastructure is *de minimis*. It does not finance or otherwise assist with small cell deployments, does not require preconstruction authorization, does not license or approve individual facilities, and has no involvement in siting decisions. The Commission's only role is its retained authority to "rule on" environmental assessments.¹⁹¹ Because the Commission has already determined that small cells can be mounted on existing structures with "little or no impact,"¹⁹² its duty to "rule on" environmental assessments is peripheral, at best, to small cell infrastructure projects. Such negligible federal involvement does not transform private activities into a federal undertaking, and should not trigger the onerous federal historic review process.

For the foregoing reasons, the Commission should determine that mounting small cells on existing infrastructure is not a federal undertaking triggering NHPA review. Doing so would

¹⁸⁹ See 47 C.F.R. § 1.1312(c) ("If a facility covered by paragraph (a) of this section is categorically excluded from environmental processing, the licensee or applicant may proceed with construction and operation of the facility in accordance with the applicable licensing rules and procedures.").

¹⁹⁰ In the *NPA*, the Commission reserved authority to make this determination: "The Commission has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA." *NPA* § I (B).

¹⁹¹ See 47 C.F.R. §§ 1.1311, 1.1312.

¹⁹² *2014 Infrastructure Order*, 29 FCC Rcd at 12867 at ¶ 3.

advance the public interest in ubiquitous and reliable cellular connectivity by removing unnecessary and burdensome federal historic review procedures.

D. The Commission should exclude twilight towers from historic preservation reviews.

The Commission should exclude from historic preservation review wireless facilities mounted on towers built between March 16, 2001 and March 7, 2005 (“twilight towers”).¹⁹³ This period is significant because March 16, 2001 is the date the *Collocation Agreement* was adopted.¹⁹⁴ That agreement, which was negotiated among the Commission, the ACHP, and the National Conference of State Historic Preservation Officers, adopted a number of exclusions for wireless facilities. One such exclusion applies to wireless facilities mounted on previously built towers. The idea was that towers built after that date would require documentation of a completed historic preservation review.¹⁹⁵ But those formal historic preservation reviews were not possible until the *NPA*, which adopted the rules and process for these reviews, took effect on March 7, 2005. So while many (if not most) facilities built during this four-year period were subject to some form of historic preservation review, those towers generally lack the type of documentation that is generated by reviews under today’s rules. And carriers are unable to place additional wireless facilities on these towers without working with Commission staff, state historic preservation officers, and tribes to approve each proposed facility. Given that twilight towers have been standing for more than 12 years, the likelihood of there being any previously undetected adverse effects is very small. To free these long-standing towers for collocations, the

¹⁹³ See *Wireless Infrastructure Notice* at ¶¶ 78-85.

¹⁹⁴ See Public Notice, *Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with Respect to Collocating Wireless Antennas on Existing Structures*, 16 FCC Rcd 5574 (WTB 2001).

¹⁹⁵ See *Collocation Agreement Amendment* §§III, IV.

Commission should rule that, like towers built before March 16, 2001, collocations on towers built before 2005 are excluded from historic preservation reviews.

E. The Commission should Eliminate Redundant Environmental Reviews for Certain New Towers in Flood Plains.

The requirement to prepare and submit environmental assessments for every new facility constructed in a flood plain imposes unnecessary delays and should be amended.¹⁹⁶ Commission rules implementing the National Environmental Policy Act (“NEPA”)¹⁹⁷ require applicants to prepare an environmental assessment (“EA”) when a proposed facility may significantly affect the environment.¹⁹⁸ For most categories of environmental concern, the Commission defers to the expertise of other federal agencies to determine if there may be a significant effect. So, for example, if the United States Fish and Wildlife Service reviews a project and determines that it will not affect endangered species, the Commission does not require the applicant to submit an EA.¹⁹⁹ But the Commission’s interpretation of its rule concerning flood plains differs.²⁰⁰ There, even if the applicant obtains a finding from the expert agency – the Federal Emergency Management Agency (“FEMA”), the Army Corps of Engineers, or a local authority that participates in the FEMA National Flood Insurance Program – that the project will not significantly affect the environment, the Commission nonetheless requires the applicant to separately prepare and file an EA. As a result, more than 80 percent of Verizon’s EA filings over the last three years have been for facilities in flood plains.

¹⁹⁶ See *Wireless Infrastructure Notice* at ¶ 65.

¹⁹⁷ 42 U.S.C. §§ 4321 *et seq.*

¹⁹⁸ See 47 C.F.R. § 1.1307(a).

¹⁹⁹ See <https://www.fcc.gov/general/tower-and-antenna-siting>.

²⁰⁰ 47 C.F.R. § 1.1307(a)(6).

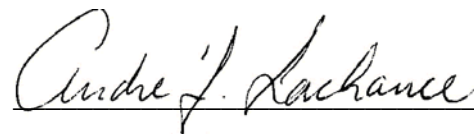
Flood plain EAs are unnecessary and redundant and should be eliminated. When an EA is required, the applicant must hire expert consultants to prepare the EA, then file the EA with the Commission and wait at least 30 days to allow interested parties to comment. For the three-year period Verizon reviewed, however, we have not received a single negative comment for facilities receiving approval from any of the expert agencies on flood plains, and the Commission approved every site without change. That is little surprise, given that other agencies with environmental expertise had previously signed off on these projects. So the Commission should eliminate the EA filing requirement for facilities to be located in flood plains either by changing its interpretation of the existing rule, or amending the rule to make clear that EAs are required only when an expert agency finds that a flood plain may be significantly affected.

VII. CONCLUSION.

As discussed above, the Commission should act quickly to exercise its statutory authority to eliminate barriers to wireless small facility deployment and pave the way for continued leadership in wireless broadband.

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