

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

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

COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.

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SUMMARY

The arrival of next-generation wireless broadband networks has the potential to revolutionize the way Americans communicate, whether person-to-person, person-to-machine, or machine-to-machine. 5G wireless services will continue the transformation of the U.S. economy through increased use of high-bandwidth applications, expanded capacity of wireless communications, and the realization and growth of the Internet of Things.¹ As the Commission properly has recognized, “[b]ecause providers will need to deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next-generation technologies, there is an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise.”² The Wireless Telecommunications Bureau teed up many of these important issues in the *Streamlining PN*,³ but the Bureau’s authority is limited and commenters in that proceeding created a record showing the urgent need for action beyond what the Bureau can take on its own.

¹ See *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79, FCC 17-38 at ¶ 1 (rel. Apr. 21, 2017) (the “NPRM”).

² *Id.* ¶ 2.

³ See *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421, DA 16-1427 at 3 (WTB rel. Dec. 22, 2016) (the “*Streamlining PN*”). Many of the issues raised in that docket anticipated some of the questions raised by the Commission in this proceeding. For the convenience of the Commission, Crown Castle will re-submit relevant information in this proceeding, updated as appropriate, but the agency should feel free to take notice of any and all of the comments filed in response to the *Streamlining PN* in determining the content of its order here. The FCC has routinely considered the record in related proceedings when evaluating related issues. See, e.g. *In Re Forbearance from Applying Provisions of Commc’ns Act to Wireless Telecommunications Carriers*, First Report & Order, 15 FCC Rcd. 17414, ¶ 11 (2000) (addressing proposals set forth in comments on an NPRM and comments on a subsequent Public Notice).

The FCC wisely initiated this proceeding and its wireline companion to ensure that all of the issues slowing broadband deployment could be addressed.

The FCC must clear hurdles to the deployment of next-generation broadband networks required to satisfy our country's ever expanding technological needs and lay the groundwork for truly transformational change that will preserve America's technical leadership and benefit Americans for decades to come. And it must do so quickly. AT&T and Verizon have already announced plans to begin 5G pilots this year in several markets,⁴ while T-Mobile and Sprint have promised to launch their 5G networks in 2019.⁵ These initial launches reflect just the beginning of a process that will lead to many billions of dollars of investment by private industry to deliver the coverage and throughput our economy demands. But while this investment cannot happen overnight, delays in beginning this technological roll-out will have long-term implications that cannot be ignored.

Crown Castle is at the forefront of our country's broadband revolution, deploying fiber optic and wireless infrastructure and developing the small cell networks⁶ that will serve as the backbone for the broadband networks of the future. Over the past five years, Crown Castle has spent more than \$4.5 billion on small cell and fiber networks. Crown Castle has worked

⁴ Nick Statt, *AT&T is Starting its 5G Rollout with Austin and Indianapolis Later This Year*, The Verge (Feb. 1, 2017), <https://www.theverge.com/2017/2/1/14474434/att-5g-network-launch-austin-indianapolis-markets>; Chaim Gartenberg, *Verizon is Planning 5G Tests in 11 Cities This Year*, The Verge (Feb. 22, 2017), <https://www.theverge.com/2017/2/22/14696608/verizon-5g-testing-11-us-cities-2017>.

⁵ Anjali Athavaley, *T-Mobile to Begin Rolling Out 5G in U.S. in 2019*, Reuters (May 2, 2017), <http://www.reuters.com/article/us-t-mobile-us-5g-idUSKBN17Y1JI>; Chaim Gartenberg, *Sprint Plans to Launch a 5G Network by Late 2019*, The Verge (May 10, 2017), <https://www.theverge.com/2017/5/10/15609500/sprint-5g-network-late-2019-qualcomm-softbank-cellular>.

⁶ Except as otherwise specified, the term "small cell" as used herein includes both small cells and distributed antenna systems ("DAS").

cooperatively with many jurisdictions and has successfully deployed small cell networks in hundreds of places, taking advantage of densification to boost network capacity and throughput and provide millions of Americans with access to networks that are ready to meet the needs of an increasingly wireless future. Cities such as Cincinnati, Chicago, Pittsburgh, Minneapolis and the Louisville-Jefferson County Metro Government, along with smaller jurisdictions such as State College, Pennsylvania, Brookfield, Wisconsin, Little Elm, Texas, The Colony, Texas, and Texas City, Texas, have facilitated the deployment of these networks to bring these services to their residents.

While Crown Castle's successful partnerships in many cities have allowed broadband networks to flourish, some jurisdictions have created obstacles to the deployment of next-generation wireless systems in the public right-of-way (ROW). A number of jurisdictions impose unreasonable fees and conditions on wireless facilities that are particularly inappropriate in the context of small cells. These fees, which lack any rational relation to the cost of approving applications or maintaining the ROW, can make deploying networks to serve consumers and businesses in these jurisdictions cost prohibitive. Other jurisdictions, meanwhile, discriminate against wireless installations in the ROW. These discriminatory practices have the effect of stifling competition and slowing broadband deployment. Finally, in some cases, municipalities have unjustifiably prohibited installations of equipment to facilitate wireless telecommunications or imposed moratoria that have the effect of prohibiting wireless small cell installations in the public ROW.

Fortunately, the Commission has proposed three rational approaches to streamline state and local review of siting applications for facilities that will power next-generation broadband networks. First, the FCC should adopt its suggestion of a deemed granted remedy under Section

332 that would balance the interests of states and localities in promoting public safety against the strong federal interest in uniform deployment of broadband services. To be effective, a deemed granted remedy must be self-triggering and not require judicial intervention that can only serve to further delay the installation of new facilities. Accordingly, Crown Castle supports an authoritative ruling that states and localities lose their authority under Section 337(c)(7)(A) if they fail to act within a reasonable time. To the extent necessary, any remaining authority should be preempted.

Second, Crown Castle supports establishing a reasonable time of 60-days for states and localities to act on non-Spectrum Act collocation agreements and 90-days for applications for new small cell sites or those requiring substantial modification. These timeframes are consistent with those already adopted by several states and provide ample time for state and local review. They are particularly appropriate for applications to install small cell nodes, which promise to provide substantial benefits with a limited impact on areas of traditional local concern. To avoid unnecessary delay, the Commission also should clarify that the shot clock begins to run beginning with the first contact by the applicant, and that localities cannot end run the clock by creating elaborate “pre-application” processes that must be navigated before it starts ticking.

Third, the Commission should unambiguously reiterate that even temporary moratoria are prohibited barriers to entry.

In addition to these approaches to overcome delays experienced in some local jurisdictions, the Commission should alter the review processes under the National Historic Preservation Act and the National Environmental Protection Act to properly balance legitimate concerns about site preservation against the federal interest in streamlining the deployment of advanced broadband services. The FCC can eliminate inefficiencies in the Tribal review process

by clarifying certain categories that are so *de minimis* they should be exempt from Tribal review and establishing a shot clock for those categories for which review is appropriate. Similarly, the Commission should exclude certain facilities from Section 106 review and grandfather so-called “twilight towers” to clear them for beneficial use.

Finally, as proposed in the *Notice of Inquiry*, the Commission should clarify the application of the relevant statutory provisions to encourage rapid deployment of next-generation broadband networks. A broad, authoritative interpretation of Sections 253 and 332 of the Communications Act and Section 6409 of the Spectrum Act will provide a consistent, understandable level of local authority over siting decisions. While the existing statutory provisions have done a good job defining the scope of state and local authority over siting applications, the numerousness and overlap of these provisions has in some cases led to unnecessary delays and ineffective remedies. An authoritative, consistent interpretation of these provisions will help remove these barriers and streamline deployment of broadband facilities.

Crown Castle has already made substantial investments to develop state-of-the-art networks and is prepared to continue to make the investment necessary to deliver the promise of 5G and beyond. These efforts will spur innovation and unleash new technologies that will serve as economic drivers for decades to come. Without a more consistent regulatory framework, however, there is a risk that much of the United States will be left behind. As Chairman Pai observed earlier this year in his keynote address at the Mobile World Congress, “it’s not a forgone conclusion that we will fully realize this technological potential. After all, building, maintaining, and upgrading broadband networks is expensive.”⁷ Commissioner Michael O’Rielly

⁷ Keynote Address of FCC Chairman Ajit Pai, Mobile World Congress, at 2 (Feb. 28, 2017), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0228/DOC-343646A1.pdf (“Pai MWC Keynote”).

proclaimed more bluntly: “We can’t have cell sites rotting [because of] local governments.”⁸

Fortunately, as Chairman Pai more recently explained, “we’re all striving toward the same goal” (deployment of 5G spectrum).⁹ Crown Castle looks forward to working with the Commission and municipalities to create an environment that properly balances federal communications policy with state and local interests and helps realize the potential of next-generation broadband networks.

⁸ See Mike O’Rielly (@mikeofcc), Twitter (May 31, 2017), <https://twitter.com/mikeofcc/status/869950640700534784>.

⁹ Howard Buskirk, *Pai Wants Cooperation from Local Officials on Speeding Up Wireless Siting*, Communications Daily (June 1, 2017), at 2.

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Crown Castle International Corp. and its subsidiaries (“Crown Castle”) submit these comments in response to the Commission’s *Notice of Proposed Rulemaking* and *Notice of Inquiry* requesting comments on streamlining deployment of broadband infrastructure to support next-generation wireless networks. Crown Castle appreciates this opportunity to submit its views and encourages the FCC to act quickly to adopt the proposals in the *NPRM* and to address several of the issues raised in the *NOI* to create a regulatory environment that will allow the United States to maintain its position as a global leader in the deployment and utilization of broadband services and infrastructure.

I. INTRODUCTION

Broadband infrastructure provides the backbone for the deployment of advanced wireless services that are necessary to keep the United States at the forefront of the technological revolution. While our country’s existing wireless infrastructure was first built using macrocells, with relatively large antennas mounted on towers, as usage has grown and capacity needs have exploded, these networks have increasingly also required the deployment of small cell systems and fiber transport. This is a trend that will only increase with next-generation networks, as demand continues to accelerate and 5G services are deployed around the country. Small cells

address the growing demand for broadband services by providing for increased capacity and throughput in ways that existing networks cannot. Small cells also allow for the most efficient use of scarce spectrum resources, helping provide much needed capacity for our nation's rapidly expanding broadband ecosystem.

The challenge of developing the facilities and infrastructure needed to power next-generation broadband networks is substantial. As Chairman Pai recently explained, "building, maintaining, and upgrading broadband networks is expensive. . . . [O]perators will have to deploy millions of small cells, and many more miles of fiber and other connections to carry all this traffic. Doing all this will command massive capital expenditures."¹⁰ In addition to new small cells, existing network facilities across the country will need to be upgraded to take advantage of new technology and new spectrum resources.

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

¹⁰ Pai MWC Keynote at 2.

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

Crown Castle applauds the FCC's continued interest in creating a regulatory framework that allows for the deployment of services necessary to power a 21st century economy. Founded in 1994, Crown Castle is the country's largest independent owner and operator of shared wireless infrastructure, with more than 40,000 towers, 25,000 small cell installations, and over 26,500 miles of fiber. Crown Castle also has more than 15 years of experience deploying small cell networks.

Notably, Crown Castle does not hold commercial mobile radio service ("CMRS") licenses, and does not itself provide personal wireless services; rather its network offerings are predominantly wireline. Utilizing its fiber networks, Crown Castle provides (among other service offerings) wholesale wireline transport services to its wireless carrier customers.¹¹ These fiber networks provide the necessary carriage of the signals to and from radios used by the

¹¹ Crown Castle entities currently hold utility certifications in 45 states, the District of Columbia, and Puerto Rico. In all of these jurisdictions, utility commissions have issued Crown Castle entities certificates to provide its wholesale transport services. However, the status of these service offerings has recently come into question in Texas and Pennsylvania. *See Complaint of Extenet Network Sys., Inc. Against the City of Houston for Imposition of Fees for Use of Public Right of Way*, Proposal for Decision, SOAH Docket No. 473-16-1861, PUC Docket No. 45280 (Tex/ State Office of Admin. Hearings Feb. 24, 2017), attached hereto as Exhibit A (finding that unswitched point-to-point transport service to retail CMRS providers is not a wireless service); *but see Review of Issues Relating to Commission Certification of Distributed Antennae System Providers in Pennsylvania*, Motion of Robert W. Powelson, 2517831-LAW, Docket No. M-2016-2517831 (Penn. PUC Mar. 2, 2017), attached as Exhibit B (finding that that the FCC's regulatory classification of DAS "as 'personal wireless service' is persuasive" and that DAS networks should no longer be deemed utilities under Pennsylvania law because they are deemed CMRS facilities).

wireless carrier customers in a manner often referred to as “wireless backhaul.” These service offerings are a key component to every small cell deployment, and thus Crown Castle and other wireline network providers like it are a critical piece of this country’s broadband ecosystem, supporting the deployment of next-generation wireless services.

Crown Castle has been at the forefront of our country’s broadband success story and is committed to continue facilitating the use of wireless data to both bridge digital divides and serve as an engine for economic growth. According to the FCC’s most recent Wireless Competition Report, 99.5% of U.S. residents now have access to 4G LTE data service, and 98.6% have access to 4G LTE data service from two or more providers.¹² Americans use these networks to consume vast amounts of data: 9.65 trillion megabytes in 2015—a 138 percent increase from the prior year.¹³ In fact, the average smartphone subscriber consumes almost 3 gigabytes of data per month—a more than ten-fold increase over just the past five years.¹⁴ Modern broadband networks also help bridge the digital divide, as at least 7% of Americans now depend on wireless service to access the Internet, including a disproportionate percentage of low income and minority populations.¹⁵

Crown Castle has served as a catalyst for the growth in availability of high-speed wireless broadband services. As wireless providers have raced in recent years to expand their 4G LTE

¹² *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Nineteenth Report, 31 FCC Rcd. 10534 ¶ 39 (2016) (“Wireless Competition Report”).

¹³ *Id.* ¶ 126 (citing *CTIA Wireless Industry Indices; Annual Wireless Survey Results: A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry* at 97 (rel. Sept. 2015) (“CTIA Wireless Indices Year-End 2015”)).

¹⁴ *See id.* (citing *CTIA Wireless Indices Year-End 2015* at 97).

¹⁵ Pew Research Center, *U.S. Smartphone Use in 2015* (Apr. 1, 2015), *available at* http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf.

networks to meet the exponential growth in demand for wireless services, Crown Castle has provided a turnkey solution that has allowed for faster and wider deployment of high-speed wireless broadband networks.

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

As both an infrastructure provider and a telecommunications service provider, Crown Castle is also helping to lead the transition to 5G networks. Network densification will be critical to achieving the speed and capacity potential of next-generation wireless standards like 5G and the corresponding innovation benefits. Crown Castle already has working relationships with more than 460 municipalities and 450 utilities that allow attachment of small cell facilities to their poles. This, however, is only the beginning. As Crown Castle works to fulfill the FCC's vision of private companies investing billions of dollars to establish the networks necessary to support the broadband needs of the future, it recognizes the need to amend regulatory schemes

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

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

II. LOCAL RIGHTS OF WAY AND LAND USE RESTRICTIONS ARE IMPEDING EFFORTS TO DEPLOY BROADBAND INFRASTRUCTURE IN SEVERAL JURISDICTIONS.

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

Unfortunately, these success stories are far from universal. Crown Castle frequently faces resistance from other state and local governments that hinder efforts to deploy facilities necessary to support next-generation broadband networks. This resistance is particularly heightened when it comes to locating telecommunications networks in the public ROW—an issue that is increasingly critical for 5G deployment. Many municipalities charge excessive and

unreasonable fees to access the ROW that are completely unrelated to their maintenance or management, and instead serve merely to increase government revenues. Still other municipalities discriminate by erecting barriers that make it difficult for independent network and telecommunications service providers to deploy next-generation broadband networks in public ROW (instead favoring incumbent and sometimes CMRS providers). The patchwork of inconsistent local regulation serves as a barrier to deployment of regional or national networks. The local regulatory obstacles faced by Crown Castle and other network providers are not limited to accessing the public ROW, however. Many jurisdictions improperly apply onerous local zoning regulations to siting applications, adding to the cost and time required to deploy facilities. Left unaddressed, these impediments challenge the United States' role as a leader in delivering broadband services.

A. Crown Castle Works Diligently and Cooperatively with Municipalities That Adopt Reasonable Approaches to Siting Applications Consistent with Section 332, 253, and 6409.

Crown Castle has a strong record of working collaboratively with willing municipalities to facilitate deployment of next-generation broadband networks. As described above, Crown Castle has installed small cell networks in New York's Central Park and in Central Philadelphia that provide reliable and expandable wireless broadband services. Both networks have ample capacity to handle the influx of tourists in summer months, and Philadelphia's network also has supported large events such as the 2016 Democratic National Convention, concerts, Fourth of July fireworks, and more. In another positive example, after being ravaged by Hurricane Sandy in 2012, the Borough of Sea Bright, New Jersey, has turned to small cells to boost resiliency and increase capacity, transforming the Borough into a leader in broadband infrastructure.¹⁶

¹⁶ See Matt Leonard, *NJ City Boosts Communications Resiliency*, GCN (Dec. 20, 2016), available at <https://gcn.com/articles/2016/12/20/sea-bright-resilient-city.aspx>.

Other municipalities that recognize the potential of next-generation wireless broadband and have worked with Crown Castle to bring these services to their residents include large jurisdictions like Chicago, Illinois, Pittsburgh, Pennsylvania, Minneapolis, Minnesota and the Louisville-Jefferson County Metro Government, Kentucky, along with smaller jurisdictions such as State College, Pennsylvania, Brookfield, Wisconsin, Little Elm, Texas, The Colony, Texas, and Texas City, Texas. The City of Cincinnati, Ohio offers a particularly illustrative example of how local governments and stakeholders can work together. After the City presented a draft ordinance that would have hindered small cell deployments, City officials engaged in a collaborative stakeholder process, held facilitated meetings, and listened to and addressed stakeholder concerns. The result was a compromise ordinance that balances municipal and provider concerns and positions Cincinnati to be at the forefront of the next broadband revolution. Little Rock, Arkansas, likewise, will benefit if the May 22, 2017, draft of its municipal ordinance is passed. The current draft under consideration presents a balanced approach to the placement of small cells that will expedite deployment.

B. Onerous Municipal Zoning and Planning and Restrictions and Arbitrary Fees Have Hindered Deployment of Next-Generation Wireless Services.

For each example of a community that has welcomed advanced broadband services, however, there are several contrasting examples of state and local governments that have obstructed barriers that hinder the deployment of next-generation broadband networks. As long as the regulatory environment remains uncertain and downright impossible in many jurisdictions, next-generation broadband networks will be unable to flourish. As Chairman Pai has properly recognized that “the more difficult government makes the business case for deployment, the less

likely it is that broadband providers big and small will invest the billions of dollars needed to connect consumers with digital opportunity.”¹⁷

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

Crown Castle is aware of a number of instances where the imposition of unreasonable review procedures has precluded the deployment of infrastructure to support advanced wireless services. The Township of Upper St. Clair, Pennsylvania, for example, passed an ordinance in 2015 requiring a zoning application to place small cells in the public ROW, blocking small cell deployment in approximately 80% of the Township’s land area. Many nearby municipalities have adopted nearly identical versions of this regulation. In Abington Township, Pennsylvania, the Township subjected Crown Castle to discretionary zoning review not only for 21 proposed new nodes in the Township’s jurisdiction, but for two additional facilities on Pennsylvania

¹⁷ Pai MWC Keynote at 2.

Department of Transportation roads within the Township that are compliant with Section 6409. Before Crown Castle could even file its applications, the Township sought a preliminary injunction to prevent Crown Castle from construction. The Township’s request for preliminary injunction has recently been denied. And the Village of Lloyd Harbor, New York, is unapologetic about refusing to provide Crown Castle with authority to install facilities in one part of the Village unless it provides coverage for another portion of the Village—a classic instance of a municipality erecting an effective prohibition.¹⁸

In response to the Commission’s request for “information on the prevalence of barriers, costs thereof, and impacts on investments in and deployment of wireless services” and “the extent to which the Commission’s existing rules and policies have or have not been successful in addressing local siting review challenges,”¹⁹ Crown Castle offers the following (updated from its comments in response to the *Streamlining PN*).

1. Imposition of Unreasonable Fees and Conditions

Many jurisdictions impose onerous and discriminatory restrictions and fees that thwart deployment of small cell networks due to the mere presence of antennas in the network design. These restrictions and fees, which generally do not apply to wireline deployment (without antenna appurtenances) in the ROW, go beyond reasonable resource management, and appear designed to either deter small cell deployment or to merely generate revenue for cash-strapped local governments—all at the expense of broadband facility modernization and densification. Specifically, these jurisdictions fail to account either for the unobtrusive nature of small cells or the general nature of a small cell network design, which requires the installation of many relatively low-powered, fiber-connected nodes to provide maximum throughput and spectral

¹⁸ See Letter from Village of Lloyd Harbor, WT Docket No. 16-421 (Apr. 6, 2017) at 1-2.

¹⁹ *NPRM* ¶ 6.

efficiency. Moreover, some jurisdictions have challenged the ability of entities like Crown Castle, who have certificates from the state public utility commission, to provide backhaul service for wireless carriers. There is also a growing and unfortunate trend of municipalities challenging the validity of the certificates of public convenience and necessity (“CPCNs”) with the state public utilities commissions. Taken together, these actions (or inactions) disrupt the availability of next-generation broadband services. Below are just some of the examples that Crown Castle has observed across the country:

- **California:** A number of California municipalities have established such onerous requirements as to effectively prohibit small cell installations within their jurisdictions.
 - The City of Newport Beach has created an untenable situation by seeking excessive fees for use of the City’s poles and denying applications for new pole construction. Based on a CBRE, Inc. market rent survey commissioned by the City, Newport Beach has adopted a new wireless ordinance that recommends a baseline annual rent of \$10,800 per node site—more than 50 times the average FCC rate for wireless pole attachments. When Crown Castle determined that the most prudent approach would be to construct its own poles, Newport Beach denied Crown Castle’s applications, claiming that the proposal created aesthetic concerns. Thus, for Crown Castle to access the ROW, it must use the City’s poles and pay the monopolistic fees established by the City. As a result, Crown Castle has re-evaluated its planned deployment for Newport Beach.
 - In its comments to the *Streamlining PN*, Crown Castle cited issues related to deploying small cell networks within the City of Carlsbad, in particular, with respect to the imposition of substantial annual attachment fees. Since that time, Crown Castle has been encouraged by progress that has been made on agreements with the City and has been able to negotiate a reduction to the proposed market based rates.
- **Maryland:**
 - Montgomery County has some of the highest and most burdensome application fees in the country. Montgomery County applies a two-step “special exception” process for any new small cell node pole installations in public ROW that are not collocations on existing structures. First, a party must apply to the Telecommunications Facility Coordinating Group (“TFCG”) and pay an application fee of \$1,000 per collocation or \$2,000 for each new or replacement pole. Upon recommendation by the TFCG, the party must then

pay a \$20,000 application fee per new or replacement pole, and the hearing examiner must review the application—a process that could take 3-6 months.²⁰

- The City of Gaithersburg is considering a master ROW use and franchise agreement that would impose a non-refundable application fee of \$500 for each new pole or collocation, an annual attachment fee of \$500 for each facility on which equipment has been installed (subject to an annual increase), and a use fee of five percent (5%) of gross revenues.
- **New York:** The level of support toward small cell deployments varies greatly by jurisdiction in New York. While some municipalities have encouraged the deployment of next-generation broadband infrastructure and services, others have imposed some of the most draconian restrictions in the country.
 - The Town of Hempstead requires an escrow fee of \$3,000 per new small cell node pole and \$1,000 per collocation to cover “consultant review.”²¹ At this rate, a typical network deployment results in escrow fees of \$150,000 or more. In addition, the Town charges an application fee of \$900 for each new pole and \$650 for each new node on an existing pole. Hempstead also imposes a \$450 fee to modify an existing site, which is in addition to the \$650 fee charged by the Highway Department for a new pole application. All of these fees are in addition to the annual “voluntary” 5% gross revenue share for the Town.²²
 - In the Village of Brookville, Crown Castle filed under protest and received Zoning Board approval for the deployment of a small cell system. Nevertheless, it took one-and-a-half years for the village attorney to draft the approval resolution and negotiate the right-of-way of use agreement (“RUA”). Crown Castle had to deposit \$8,500 per node into escrow for “consultant review” and had to pay an additional application fee of \$2,000 per carrier, per

²⁰ Applications for collocation on an existing third-party wood utility pole are considered as of right and may proceed directly to permit upon recommendation by the TFCG. However, the existing wooden pole often cannot accommodate the additional small cell equipment and therefore, new poles must be installed.

²¹ In its *Streamlining PN* Reply Comments, the Town claimed that “[t]he need for consultant review is clear from the factual record of widespread safety and code violations.” See Reply Comments of Town of Hempstead, WT Docket No. 16-421 (Apr. 7, 2017), at 2. Setting aside the merits of the Town’s allegations, the examples cited by the Town involve alleged construction violations, not issues with the applications, and in any event do not involve small cell facilities.

²² The Town of Hempstead also has a wireless ordinance that has been the subject of pending litigation in federal court for more than six years. As of the date of this filing, a motion for summary judgment, asserting that the ordinance constitutes a prohibition and violates a variety of provisions of the Communications Act, has been fully briefed and awaiting decision for more than two years. *New York SMSA P’ship v. Town of Hempstead*, 2:10-cv-4997 (E.D.N.Y.).

node. In other words, for a collocation requiring no change to equipment, the cost would be \$4,000 per node. Crown Castle also had to pay almost \$20,000 in legal fees for the Village attorney.

- The Village of Laurel Hollow requires a \$3,000 escrow fee per small cell node and an application fee of \$900 for new poles and \$650 for collocated facilities on existing poles.²³ Although the Village has claimed that Crown Castle consented to these fees,²⁴ such a claim is disingenuous given that the Village refused to process Crown Castle's request until Crown Castle withdrew its express objection to the fees and reservation of rights. Moreover, the Village refused to negotiate a right of use agreement (including any applicable fees) until after the Village had issued special permits for the nodes, requiring Crown Castle to make certain assumptions about the fees it would command.
- In the Town of Oyster Bay, Crown Castle filed applications for 22 small cell nodes on November 15, 2016. On April 6, 2017, the Town issued the permits and Crown Castle began installing equipment. As a result of the outcry of citizens based on unfounded fears over health risks from radiofrequency radiation, on May 10, 2017, the Town issued a cease and desist order revoking the 22 permits. The Town Supervisor was quoted on video at a meeting the prior day stating "Going forward, we are to stop providing the right-of-way for cell companies to install repeaters." Crown Castle recently filed a complaint against the Town in District Court.
- **Virginia:** At the state level, the Virginia Department of Transportation ("VDOT") charges some of the most excessive and unreasonable annual fees in the country—\$24,000 for each new pole and \$12,000 per collocation on an existing pole, without regard for whether the pole is owned by the state or by a third party. At the county level, Fairfax County has established a Special Use Permit requirement for any new small cell node public installations in public ROW. In addition to the \$15,000 application fee per utility pole, applications must be reviewed and approved by the County Planning Commission, which could take up to six months. In response to these and other issues faced in Virginia with respect to the deployment of small cell systems, the Governor of Virginia recently signed into law legislation that potentially resolves many of these fee issues.²⁵ However, new poles are not specifically addressed in the new Virginia legislation and would continue to be subject to the County Special Exception review and will continue to carry excessive fees. Additionally, new poles in Fairfax County that fall within VDOT controlled ROWs will fall under the VDOT Land Use Regulations and are therefore subject to the \$24,000 annual recurring fee.

²³ See Reply Comments of Village of Laurel Hollow, WT Docket No. 16-421 (Apr. 7, 2017) at 2.

²⁴ See *id.*

²⁵ See Virginia SB 1282 (passed House and Senate on February 20, 2017, and the Governor signed the legislation into law on June 8, 2017).

2. Prohibition of Small Cell Deployment

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

- ***Alabama:*** Officials from the Alabama Department of Transportation (“ALDOT”) recently advised Crown Castle that the agency will not permit installation of small cell sites for any entities, including those certified by the Alabama Public Service Commission, in accordance with a standing policy of prohibiting “distribution” equipment in state-controlled ROW. Under this unwritten, interpretive policy, equipment placed in state-controlled ROW must be only for “transmission” rather than “distribution,” resulting in an absolute prohibition of small cell deployment in state-controlled ROW.
- ***California:*** Several California jurisdictions have imposed absolute or effective prohibitions on the installation of small cell nodes in ROW.
 - Redwood City previously included a statement on its website that “the City of Redwood City does not permit the installation of any new wireless communications facilities on City-owned property or in the right-of-way.” Only after Crown Castle identified this statement in its comments did the City remove it.²⁶ Crown Castle looks forward to working with Redwood City if it is, in fact, “open to installation of new wireless communications facilities on both City-owned property and in the public right-of-way.”
 - San Francisco has imposed a discriminatory pre-deployment aesthetic review requirement for ROW deployments despite the fact that San Francisco does not require an equivalent review for other (often more conspicuous) ROW deployments. An appeals court recently upheld San Francisco’s ordinance, though the matter is now under review by the California Supreme Court. The judicial review of this ordinance is now in its sixth year.
 - San Francisco has also entered into an exclusive arrangement with one entity to provide wireless service within the City parks. To provide service for a competing entity at one of San Francisco’s largest parks, Crown Castle designed a network utilizing existing wooden utility poles around the outside park perimeter. Notwithstanding significant negotiations and proposed accommodations, the City denied the application based on aesthetics grounds,

²⁶ See Reply Comments of City of Redwood City, WT Docket No. 16-421 (Apr. 7, 2017) at 1-2.

even though similar (and larger) designs were approved by the City for Crown Castle installations at other locations.

- One of the biggest issues that Crown Castle faces in California, in particular, is the position that although the municipality is required to approve or disapprove applications within the shot clock time frames, it is not required to “issue permits” within the same timeframes, thereby delaying if not completely obstructing infrastructure deployment. For example, the City of Rancho Palos Verdes does not agree that the 90-day shot clock applies to collocations of small cell equipment in the right-of-way. In addition, the City takes the position that the shot clock does not apply to collateral permits, such as encroachment permits, necessary for deployment of small cell networks. Other cities in California that have taken similar positions include Palo Alto, Monterey, Pacific Grove, Santa Cruz, Santa Cruz (County), Ceres, Santa Barbara, Santa Barbara (County), Cupertino, Hillsborough, Oakland, Piedmont, San Luis Obispo, Stockton, Santa Clara County and South Lake Tahoe.
- **Colorado:** The City of Greenwood Village has a lengthy pre-application process for all installations, including attachments to an existing pole. Applicants must send notifications to all households within a 2,000-foot radius of the deployment, hold a neighborhood input meeting with staff-coordinated attendance, and prepare a report addressing all the issues raised in the meeting. These requirements add considerable time to the process and, because they occur “pre-application,” the City takes the position that they do not trigger the shot clock. Once submitted, the application must be reviewed for approval by both the Planning Commission and the City Council. Although reply comments filed on the City’s behalf attempted to explain these restrictions, they did not deny them or otherwise refute their dilatory effect.²⁷
- **Delaware:** The Delaware Department of Transportation (“DelDOT”) has recently taken the position that although an entity has a CPCN from the Delaware Public Service Commission, if the service provided includes a cellular technology, the entity is not eligible for a permit to occupy the state’s ROW. DelDOT added, without explanation, that “an initial review of small cell site installations by the Department has found that such installation may not be safe to travelers and may interfere with the primary transportation purpose of the public roads.” Legislation is now under consideration in Delaware that would resolve this issue.
- **Florida:** The City of Fort Lauderdale has extended its small cell moratorium eight times over the past two-and-a-half years, citing the need to better understand and

²⁷ See Reply Comments of Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County, Washington, the Jersey Access Group and the Colorado Municipal League, WT Docket No. 16-421 (Apr. 7, 2017) at 4-6.

document best practices on how to administer wireless facilities in the public ROW. Finally, through the work of a consortium of facilities-based providers, Fort Lauderdale enacted a new wireless ordinance in March 2017.

- ***Illinois:*** Crown Castle has encountered significant delay regarding its applications to install small cell networks in a number of Illinois jurisdictions.²⁸
 - In one Illinois municipality, which Crown Castle initially contacted in October 2015 regarding the deployment of fiber optic lines and small cell nodes, municipal officials confirmed that a license agreement would be required for use of the public ROW, and Crown Castle provided a draft of such an agreement in November 2015. Only after Crown Castle submitted applications in October 2016 accompanied by a letter advising the municipality of its obligations under the FCC's shot clock, however, has the municipality agreed to move forward with negotiations.
 - Another Illinois municipality, meanwhile, required Crown Castle to enter into a license agreement to install fiber optics in the ROW notwithstanding the fact that similarly situated telecommunications providers had previously installed fiber optics in the ROW without a license or franchise agreement. It took the municipality approximately eight months to negotiate the license agreement.
- ***Indiana:*** Although Crown Castle successfully deployed a dozen small cell nodes and a fiber optic backbone in Evansville in 2015, a competitor's proposal caused the City to revise its procedures and prohibit the installation of new poles in the ROW, significantly delaying a planned 2016 expansion of Crown Castle's network. Without addressing the merits of Evansville's allegations in reply to Crown Castle's initial comments, Crown Castle notes that they all relate to supervision of construction, not to the City's overly burdensome application and processing requirements, which it "admits . . . are evolving."²⁹
- ***Hawaii:*** Crown Castle has been working for more than two years to reach an agreement with the City and County of Honolulu to authorize small cell network deployment. The City and County have raised bid policy and anti-competition concerns about Crown Castle's proposal despite having entered into master license agreements with Hawaiian Electric Industries and Hawaiian Telecom. They also have refused or been unable to provide clear direction regarding the procedure for placing new poles in the ROW, resulting in significant delay. Crown Castle is now evaluating a design that utilizes newly-installed utility poles.
- ***Louisiana:*** In January 2016, Jefferson Parish denied Crown Castle's application for a franchise notwithstanding the fact that it had granted a franchise to a competitor and allowed it to construct small cells in the Parish's ROW. Although

²⁸ Crown Castle is unable to identify the jurisdictions because of ongoing negotiations.

²⁹ See Reply Comments of City of Evansville, WT Docket No. 16-421 (Apr. 7, 2017) at 3.

Crown Castle has made several efforts to obtain reconsideration of the Parish's unjustifiable decision, the Parish has refused.

- **Massachusetts:** The Massachusetts Port Authority has been unwilling to discuss either collocation on existing poles or the installation of new poles in the ROW, claiming that it “will issue an RFP in the future.” This inaction has had the effect of prohibiting service. The City of Cambridge, meanwhile, has refused to allow attachment to City-owned light poles or to approve the installation of new poles, thereby effectively prohibiting installations in certain parts of the city.
- **Maryland:**
 - As an alternative to the burdensome and costly “special exception” process described above, Montgomery County has introduced a zoning text amendment to specifically address small cell installations in the ROW. While this amendment would greatly improve the application and approval process for small cells, the amendment has stalled in response to public opposition.
 - In one Maryland municipality,³⁰ the city has attempted to rescind an RUA that it negotiated with Crown Castle, arguing that the document did not receive the required municipal approvals. The city is now drafting a new ordinance to manage ROW access. While this process is ongoing, the city has imposed a *de facto* moratorium on wireless deployment in the ROW that remains in place and seems unlikely to be lifted soon.
 - A number of jurisdictions in Maryland have discussed at a public meeting the idea of forming a coalition to challenge the state-issued certificates held by neutral-host network providers like Crown Castle, in an attempt to prevent such providers from building facilities in the ROW.³¹
- **South Carolina:**
 - The City of Charleston has failed to act on applications to install fiber in the ROW that were submitted in December 2015. Recently, the City informed Crown Castle, that a franchise agreement would be required before obtaining any fiber installation permits. To date, the City has been unable to provide a process for submitting small cell node applications.
- **Texas:**

³⁰ Crown Castle is unable to identify the jurisdiction because of ongoing negotiations.

³¹ As discussed in footnote 11, *supra*, a motion pending before the Pennsylvania Public Utility Commission would preclude operators of DAS networks from certification as public utilities. Such state-by-state classification of small cell facilities further complicates the regulatory environment for network deployment, frustrating the federal policy favoring deployment of high-speed broadband networks.

- The City of Austin adopted an “administrative program” prohibiting any entity that is not a CMRS provider from deploying wireless equipment in public ROW, flatly prohibiting network providers from placing their own facilities unless they partner with a CMRS provider.³²
- The City of Sugarland has flatly denied requests to deploy small cell networks in its municipal ROW, claiming that Section 253 gives the City the right to prohibit all facilities used to support wireless services from deployment in its ROW. Comments filed on behalf of the City admit as much, improperly claiming that these actions are in the City’s “proprietary capacity” and thus permissible.³³
- In 2015, the City of Dallas denied permits for a small network stating that it was reviewing its small cell policy and Crown Castle could reapply once it had adopted a new policy. More than two years later, Dallas has not formally adopted a policy. City Staff indicates that if Crown Castle would like to move forward with its proposed network, each node pole will be subject to a \$1,000 license fee and the network will be subject to a fiber fee of \$6.41 per linear foot. Staff indicates this fiber fee is the commercial rate for real estate in the central business district and that the rate will vary throughout the City (based on adjacent market real estate values). This small 20 node network would result in nearly \$300,000 in annual license fees paid to Dallas. Crown Castle filed a complaint against the City of Dallas at the Texas Public Utilities Commission, which is currently pending.
- **Virginia:** Both Virginia state government agencies and municipalities have imposed onerous restrictions on ROW installations.
 - In contradiction of its obligations under a franchise agreement with Crown Castle, the City of Newport News has purported to apply its wireless zoning ordinance to Crown Castle’s deployment of small cell facilities in the ROW. Although a trial court sided with Crown Castle, the matter currently is on appeal.
 - In the unincorporated community of Tysons Corner, one of the densest communities in the Washington metropolitan area, installation of new structures within the public ROW is prohibited—purportedly to comply with the area’s comprehensive master plan. Although Crown Castle has received

³² Comments filed on behalf of the City of Austin admit that the administrative program only permits use of the ROW by an “agent of a CMRS.” *See* Reply Comments Texas Municipal League, WT Docket No. 16-421 (Apr. 7, 2017) at 10-11. This program will likely be affected by a recently passed statewide bill that defines “network provider” as both wireless service providers and persons that build and install on behalf of a wireless service provider and authorizes “network providers” to access the public ROW. *See* Tex. S.B. 1004 § 284.101 (2017).

³³ *See id.* at 11.

approval and permits for collocation on existing poles, this does not provide sufficient coverage for a small cell network. If Crown Castle wanted to pursue approval of new structures, it would first need to apply to the Tysons Corner Land Use Task Force and then be subject to the Fairfax County special exception process (as detailed above), which carries excessive fees and a low probability of success under the current guidelines and processes.

- **Washington:**
 - The City of Mercer Island requires parties applying to install small cell nodes in residential ROW to obtain consent from adjoining property owners despite the absence of similar requirements for other utilities operating in the same ROW.
 - The City of Seattle has imposed an onerous zoning review process for utility-pole mounted equipment which results in a recommendation to the utility responsible for issuing the permit. The City review fee is \$4,000 per pole reviewed.
- **Wisconsin:** Small cell network providers have encountered delays and obstruction in a number of Wisconsin jurisdictions. In response to Crown Castle's applications for the installation of fiber optics and small cell nodes, one city required Crown Castle to participate in a "pilot program" under which it had to provide drawings for specific locations and construct a custom-designed pole in locations where Crown Castle would be using city-owned streetlights. This city has recently provided comments regarding applications first submitted by Crown Castle in September 2015. Crown Castle has submitted revised pole drawings for the City's consideration. Another city informed Crown Castle that it preferred the use of existing infrastructure to the installation of new poles, but then was slow to negotiate an agreement for the use of the city's streetlights and has taken more than nine months to approve Crown Castle's request for fiber permits.³⁴

These examples reflect just a sample of the patchwork of ever-changing local regulations faced by Crown Castle and other entities working to deploy the fiber optic backbones and small cell nodes required to support the next-generation of wireless services, including 5G. Crown Castle calls attention to these examples not to reflect poorly on these jurisdictions, but to highlight the diverse and often discriminatory treatment faced across the nation. In many cases, the jurisdictions were either unprepared or ill-equipped to address the influx of new technology. In other cases, the jurisdictions may still not be aware of the growing need and economic benefit

³⁴ Crown Castle is unable to identify these jurisdictions due to ongoing negotiations.

that will be derived from future 5G deployments and, therefore, have not taken the steps to facilitate such deployment. Although Crown Castle is working diligently to reach resolution of these and other issues with multiple jurisdictions, without substantial changes to the way municipalities process and permit small cell deployments, it may be impossible to develop the uniform, national footprint of high-speed data services necessary to fuel the continued growth of the innovation economy.

3. Restrictions on Deployments Outside the Public Rights-of-Way.

With respect to facility deployment outside of the ROW, the Commission has done well at keeping pace with technological changes to fulfill the purposes of Sections 332 and 253 of the Communications Act and Section 6409 of the Spectrum Act, and to respond to the challenges faced in many jurisdictions. Nevertheless, more work remains. A number of localities continue to apply improper conditions on eligible facilities requests (“EFRs”) under Section 6409, to seek information from EFR applicants unrelated to the determination of whether the application meets the EFR requirements, and/or to simply deny these applications without justification. For example, the California cities of Lafayette and Concord impose management agreements as a condition to EFR permits, which include landscaping requirements and other provisions unrelated to health and safety, contrary to the FCC requirements. Other municipalities impose undue delays on siting applications covered by Section 332, whether or not they are located in the right of way, or hold these applications to an impermissibly high standard. These onerous requirements continue to impede the rollout of next-generation wireless facilities.

Some municipalities have been creative in their efforts to evade the intent and plain meaning of Section 6409, which requires that state and local governments “shall approve” and “may not deny...” any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base

station.”³⁵ For example, Vista, California, enacted an ordinance (virtually identical to ordinances adopted in Irvine, Santa Monica, and San Diego) governing the review process for wireless facilities that include an “amortization” provision effectively prohibiting the grant of new EFR permits for an existing facility. Under these ordinances, all new permits, including EFR permits, must comply with an amortization schedule under which existing structures must meet the new ordinance’s concealment requirements. As a result, in most cases, no additional EFR permits will be granted for the structure because the addition of antennas will “defeat the existing concealment” and therefore not qualify as EFRs. Within 10 years, these ordinances will effectively evade and totally negate the requirements of Section 6409.

In addition, some jurisdictions have adopted limited or unreasonably narrow readings of the Commission’s *2009 Declaratory Ruling* and *2014 Infrastructure Order* that hinder small cell deployment.³⁶ Under the timeframes adopted in the *2009 Declaratory Ruling*, jurisdictions must review completed collocation applications within 90 days and applications for other facilities within 150 days.³⁷ Nevertheless, the industry continues to face enormous delays in attempting to construct small cell and other infrastructure necessary to deploy broadband communications services. For example, as noted above, some jurisdictions, such as Greenwood Village, Colorado, require lengthy and burdensome “pre-submission” procedures before they will even accept an application triggering the “shot clock” timeframes. A proposal under consideration in the City of Gaithersburg, Maryland, would require submission of, *inter alia*, a technical description of the

³⁵ See Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”), Pub. L. 112-96, 126 Stat. 156 § 6409(a) (2012) (codified in 47 U.S.C. § 1455(a)).

³⁶ See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd. 13994 (2009) (“*2009 Declaratory Ruling*”); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865 (2014) (“*2014 Infrastructure Order*”).

³⁷ *2009 Declaratory Ruling* ¶¶ 45-48.

proposed facilities, a study showing the need for the proposed facilities, and a certified analysis that the new facility in addition to any existing facilities meets the FCC’s radiofrequency exposure guidelines—all prior to submitting a formal application.³⁸ During the pre-application review period, cities may request modifications to locations based on departmental or community feedback, evaluating each new proposal in a vacuum, resulting in a cycle of delay that may have no practical end. In other cases, jurisdictions such as Redwood City, California, have refused to accept applications while others have declared applications incomplete with no reasonable basis, thereby also attempting to evade the shot clock.

C. Applicants Are Rarely to Blame for Delays in Processing of Siting Applications.

In the *NPRM*, the Commission asks whether there are ways in which applicants contribute to unnecessary delays in the processing of siting applications.³⁹ While Crown Castle cannot speak for the industry as a whole, Crown Castle works collaboratively with willing jurisdictions to expeditiously complete the application process.

Where application requirements are clear and understandable, Crown Castle has no problem bringing the required information to the table and working with the local administration to receive a grant. It is, of course, in the interest of both Crown Castle and its wireless customers to receive approvals as quickly as possible and get facilities installed and on-air without delay. Indeed, the need to get facilities on-air quickly sometimes entails Crown Castle’s acquiescence to procedures that may be contrary to federal law but, without which, Crown Castle cannot obtain the permits it needs to deploy next-generation broadband infrastructure. There is no

³⁸ See City of Gaithersburg, *Small Cell Facilities in the Public Right-of-Way*, Mayor and City Council Work Session 18-20 (May 22, 2017), <http://sirepub.gaithersburgmd.gov/sirepub/cache/2/bxabirplai1n3t4x3utxl3h2/7441406152017075146644.PDF>, attached hereto as Exhibit C.

³⁹ *NPRM* ¶ 7.

reason to think that Crown Castle or any other infrastructure provider would deliberately slow down the application process.

When delays do occur, they most often are due to: (1) unclear or changing procedures for accepting new applications; or (2) the discovery of unanticipated costs or processing times that alter the business case for proceeding with the application. In the case of the former, Crown Castle will work with the jurisdiction to provide information reasonably needed to process the application. In the latter instance, however, Crown Castle may need to abandon or defer once-desirable projects that are no longer financially viable to unanticipated costs or processing times.

III. THE COMMISSION SHOULD ADOPT THE PROPOSALS IN THE *NPRM* FOR STREAMLINING STATE AND LOCAL REVIEW.

In the *NPRM*, the Commission proposes three specific measures to expedite local review and ensure that municipalities act promptly on siting applications: adopting a deemed grant remedy for missing shot clock deadlines; defining the reasonable time to act on applications; and reiterating that moratoria on wireless siting applications are not permissible under any circumstances.⁴⁰ For the great many jurisdictions that work collaboratively with broadband service providers, these proposals reflect business as usual and will not have any impact. However, these measures will provide an important incentive for the remaining municipalities to expeditiously review wireless siting applications while still preserving discretion over those matters appropriately reserved for local review. Accordingly, the FCC should adopt all three proposals as described more fully below.

A. A Robust “Deemed Granted” Remedy Will Provide Proper Incentives for Expeditious Processing Without Unduly Burdening Municipalities

⁴⁰ See *id.* ¶¶ 7-22.

As Crown Castle explained in its response to the *Streamlining PN*, a “deemed granted” remedy is necessary to effectuate the shot clock that the Commission adopted in the 2014 *Infrastructure Order*.⁴¹ There are two problems with the shot clock as currently applied, which frequently preclude it from fulfilling the purpose of the statute. First, Crown Castle has found that many municipalities improperly abuse the process described in Section 332(c)(7)(B)(v) to evade the shot clock and further delay consideration and approval of wireless facilities. Second, because the shot clock as currently implemented lacks a self-enforcement mechanism, many municipalities willfully choose not to comply with the review timelines, using the need to seek judicial enforcement as part of a general strategy of delay. To give meaning to Section 332(c)(7)(B)(ii) and ensure timely deployment of next generation wireless infrastructure, the Commission should revisit its earlier conclusion that a deemed grant remedy is not necessary in this context and clarify that if a municipality fails to act “within a reasonable period of time,” then the application shall be deemed granted.

In electing not to impose a deemed granted remedy in the 2009 *Declaratory Ruling*, the Commission relied on the availability of a judicial remedy in Section 332(c)(7)(B)(v).⁴² However, experience since the 2009 *Declaratory Ruling*, and even since the 2014 *Infrastructure Order*, continues to show that this remedy is inadequate. Judicial proceedings under Section 332 are costly to litigate and can easily stretch for years, depending on the jurisdiction in which they are brought—while some courts act quickly, other jurisdictions do not “expedite” Section 332 cases in any meaningful sense. In one of the most egregious examples, Sprint initially filed an application for zoning approval with the Borough of Paramus, New Jersey, in December 2004,

⁴¹ See Comments of Crown Castle Int’l Corp., WT Docket No. 16-421 (Mar. 8, 2017), at 33-38 (“Crown Castle Streamlining Comments”).

⁴² See 2009 *Declaratory Ruling* ¶ 39.

but the subject board did not issue a decision denying its application until August 2009.⁴³ Sprint filed suit in the U.S. District Court for the District of New Jersey the following month, but it took more than four-and-a-half years for Sprint to prevail following a bench trial. Including the subsequent appeal, it took more than ten years from Sprint’s initial application and more than five years from the date Sprint filed its complaint to achieve a final judicial resolution. Numerous other cases illustrate the delays that are inherent in a judicial remedy.⁴⁴ As a result, even if the applicant decides to invest in the cost of judicial review and ultimately prevails in litigation, its deployment of services can be substantially delayed and the federal interest in rapid deployment of advanced wireless services undermined. Moreover, the remedy for some courts is simply to give the jurisdiction more time. For example, the court in *Up State Tower Co. v. Town of Kiantone*, despite finding that a town had failed to act on a wireless siting application in a reasonable period of time in violation of Section 332(c)(7)(B)(ii), refused to issue an order requiring the town to grant the application.⁴⁵ Instead, the court gave the town an additional twenty days to issue a decision on the application. As a result, eighteen months after an application was filed, the court’s “remedy” for the failure to act in a timely manner was to give the town *more time* to act.

⁴³ See *Sprint Spectrum L.P. v. Zoning Bd. of Adjustment of the Borough of Paramus, N.J.*, 21 F. Supp. 3d 381, 383 (D.N.J. 2014), *aff’d sub nom. Sprint Spectrum, L.P. v. Zoning Bd. of Adjustment of the Borough of Paramus New Jersey*, 606 F. App’x 669 (3d Cir. 2015).

⁴⁴ See, e.g., *Town of Hempstead*, *supra* n. 17; *AT&T Mobility Servs. v. Village of Corrales*, 127 F. Supp. 3d 1169 (D.N.M.), *aff’d* 642 Fed. App’x 886 (10th Cir. 2016) (nineteen months from complaint to grant of summary judgment); *Orange Cty.-Poughkeepsie Ltd. P’ship v. Town of E. Fishkill*, 84 F. Supp. 3d 274, 293 (S.D.N.Y.), *aff’d sub nom. Orange Cty.-Cty. Poughkeepsie Ltd. P’ship v. Town of E. Fishkill*, 632 F. App’x 1 (2d Cir. 2015) (seventeen months from complaint to grant of summary judgment).

⁴⁵ *Up State Tower Co., LLC v. Town of Kiantone, N.Y.*, No. 1:16-CV-00069-MAT, 2016 WL 7178321, at *7 (W.D.N.Y. Dec. 9, 2016), *reconsideration denied*, No. 1:16-CV-00069-MAT, 2017 WL 957208 (W.D.N.Y. Mar. 13, 2017).

There is also no legal impediment to revising the FCC’s prior conclusion and adopting a “deemed grant” remedy. Nothing in the text of Section 332 or its legislative history indicates that Congress intended for judicial recourse to be the *sole* remedy available to an aggrieved party.⁴⁶ In other contexts—including enforcement of eligible facilities requests under Section 6409 of the Spectrum Act—the Commission appropriately has determined that an application should be deemed granted if the local jurisdiction does not act within a specified timeframe, even where a judicial remedy otherwise is available.⁴⁷ This approach both provides an incentive for municipalities to apply the proper urgency to their review and ensures that federal telecommunications policy will not be burdened if they do not. Given the need for expedited deployment of new wireless facilities, the evidence of delay by state and local jurisdictions, and the failure of some courts to act “on an expedited basis,” the FCC should declare that applications subject to Section 332 are deemed granted if a municipality fails to act within a reasonable period of time, in the same way as those covered by Section 6409.

To implement the “deemed granted” remedy, the Commission should both: (i) interpret Section 332(c), in totality, that states and localities forfeit their authority under Section 332(c)(7)(A) upon the expiration of the shot clock; and (ii) promulgate a preemption rule. First,

⁴⁶ See *2009 Declaratory Ruling* ¶ 26 (“[T]he fact that Congress provided for judicial review to remedy a violation of Section 332(c)(7) does not divest the Commission of its authority to interpret the provision or to adopt and enforce rules implementing Section 332(c)(7).”0).

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

the Commission should adopt an authoritative interpretation of Section 332(c)(7) that if a locality fails to meet its obligation under Section 332(c)(7)(B)(ii) to “act on [a] request for authorization to place, construct, or modify personal wireless facilities within a reasonable period of time,” then its “authority over decisions concerning” that request lapses and is no longer preserved.⁴⁸ Crown Castle agrees that “by failing to act on an application within a reasonable period of time, the agency would have defaulted its authority over such applications (*i.e.*, lost the protection of Section 332(c)(7)(A), which otherwise would have preserved such authority).”⁴⁹ Second, the Commission should promulgate a preemption rule deeming any applications not acted upon within a reasonable time to be granted as a matter of federal law—and, critically, that *no further permitting* is required in order to commence construction.

The lapse of authority approach and the preemption rule work in tandem to allow infrastructure providers to commence deployment, without delay, upon the expiration of the applicable shot clock. Crown Castle is concerned that under a lack of authority approach alone, some jurisdictions will still attempt to assert they have additional authority outside of “decisions concerning the placement, construction, and modification of personal wireless service facilities” covered by Section 332(c)(7)(A) that would not be affected by the expiration of the shot clock.

Adopting a preemption rule thus will allow the Commission to effectively and unambiguously remove all barriers to deployment upon the expiration of the shot clock. Under a preemption rule, the Commission could make clear that whatever jurisdiction municipalities have over the issuance of licenses, permits, and any other approvals needed to deploy network infrastructure terminates with the expiration of the shot clock, and that applicants can begin building immediately without the need for further action once that deadline has passed (and

⁴⁸ *NPRM* ¶ 14.

⁴⁹ *Id.*

proper notice has been given).⁵⁰ Importantly, this rule would preserve state and local jurisdiction as long as the approving entities act within the reasonable timeframes established by the Commission. It is only when state and local delay would interfere with important federal telecommunications policies that preemption would apply.

While an irrebuttable presumption that the shot clock deadlines are reasonable may achieve the Commission's goals from a legal standpoint, this approach would still be plagued by the same delays inherent in obtaining judicial relief described above, which could take months if not years to resolve. Such an approach, therefore, is inconsistent with the federal interest in rapid deployment of new wireless technologies.

Fortunately, the FCC has ample authority under both Section 332 and its general authority to adopt the lapse of authority approach and the preemption rule. As the U.S. Court of Appeals for the Fifth Circuit recognized in *City of Arlington*, the text of Section 332 makes plain that the limitations in Section 332(c)(7)(B) reflect "legitimate intrusions into state and local governments' traditional authority over zoning decisions."⁵¹ Accordingly, the FCC can and should clarify that states and localities that fail to satisfy their obligations under Section 332(c)(7)(B) to act within a reasonable period of time no longer have authority to act on those applications.

B. The Commission Should Adopt Specific Timelines for States and Localities to Act on Applications to Install Small Cell Facilities.

⁵⁰ This is critical, because even in the context of Section 6409 deemed grants, some jurisdictions insist that additional permits are required—and refuse to issue those permits, regardless of the law. The only option for a provider in that case is to enforce the deemed grant in court, a costly and time-consuming step that negates the benefits of this important protection.

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

The Commission asks whether it should adopt different timeframes for review of facility deployments not covered by the Spectrum Act.⁵² Crown Castle supports establishing a 60-day shot clock for non-Spectrum Act collocation agreements, as proposed in the *NPRM*,⁵³ and establishing a 90-days shot clock for applications for new small cell sites (involving the placement of new poles in the ROW) or sites (tower or small cell) requiring substantial modification, as proposed by CTIA in response to the *Streamlining PN*⁵⁴. A 60-day shot clock for collocation applications would address two critical barriers to network deployment: (1) efforts by some state and local governments to avoid the application of Section 6409 through a narrow interpretation of what constitutes an “existing . . . base station”; and (2) otherwise unreasonably long review periods for small cell applications. As CTIA explained, “[t]hese small collocations do not require 90 days to review; indeed, states already process similar collocation requests in even less time.”⁵⁵ Moreover, as Verizon pointed out, the 60 day shot clock is consistent with recent state legislation adopted in a number of jurisdictions.⁵⁶ As a result, any claim that 60 days is insufficient time to review collocations falls flat.

Furthermore, 90 days is ample time for jurisdictions to act on applications for new small cell sites or sites requiring substantial modification.⁵⁷ Several states have already reached the same conclusion, with Virginia and Michigan providing up to 90 days and other states, like

⁵² *NPRM* ¶ 18.

⁵³ *Id.*

⁵⁴ Comments of CTIA, WT Docket No. 16-421 (Mar. 8, 2017), at 34-36 (“CTIA Streamlining Comments”).

⁵⁵ *Id.* at 35.

⁵⁶ See Comments of Verizon, WT Docket No. 16-421 (Mar. 8, 2017), at 26-27.

⁵⁷ See CTIA Streamlining Comments at 36-37.

Minnesota and Kentucky, providing even less.⁵⁸ A 60-day shot clock for collocation applications and a 90-day shot clock for non-collocation applications strikes the proper balance between providing municipalities with a reasonable amount of time to review applications without needlessly delaying the benefits of small cell network installations.

The *NPRM* next asks whether to establish different time frames for deployment of small cell or DAS antennas or for requests that include “batches” of requests. Crown Castle believes the 60-day shot clock for collocations and the 90-day shot clock for new facilities is appropriate for macrocells and small cells alike, to the extent such applications require review under Section 332 at all. Crown Castle also does not support altering the deadline for “batches” of requests.⁵⁹ The deadlines proposed in the *NPRM* and by CTIA are more than adequate for localities to review batch requests, particularly for small cell facilities that tend to be similar and a very limited practical impact.

The *NPRM* also asks about whether the Commission “should provide further guidance to address situations in which it is not clear when the shot clock would start running.”⁶⁰ In Crown Castle’s experience, the notion that there are “situations in which it is not clear when the shot clock should start running” is a misnomer. Unfortunately, some states and localities use extensive pre-application processes to delay approval of siting applications. For the shot clock and the deemed granted remedies to have any teeth, it is critically important for the Commission to clarify that the shot clock begins running with the first contact on an application between the applicant and the local jurisdiction. Pre-application meetings and review processes faced by

⁵⁸ See *id.* at 37 (citing Mich. Comp. Laws Serv. § 125.3514(8); Va. Code Ann. § 15.2-2232(F); Minn. Stat. § 15.99, Subd. 2(A) (deeming applications granted after 60 days); Ky. Rev. Stat. § 100.987(4)(c) (same)).

⁵⁹ See *NPRM* ¶ 18.

⁶⁰ See *id.* ¶ 20.

Crown Castle and referenced in the *NPRM* needlessly delay the processing of siting applications. Indeed, these procedures and pre-application hoops and hurdles are often designed to intentionally delay the process and give the local jurisdiction extra time to consider the application outside the bounds of the shot clock. They are thus nothing more than attempts to circumvent federal law, and should be rejected.

To the extent a municipality determines that certain review procedures are a necessary part of its process, these procedures must be initiated and completed during the shot clock window. Of course, the Commission has determined that local jurisdictions can toll the shot clock when or if applications are incomplete; that provides sufficient protection for municipalities, who are not obligated to act on incomplete applications. The flip side is that the Commission should re-emphasize that in the absence of clear, understandable requirements, municipalities are obligated to accept reasonable applications and cannot postpone or delay acting on an application while they develop or draft new requirements.

Finally, the Commission asks whether there are additional steps that can help ensure that a deemed granted remedy achieves its purpose.⁶¹ The Commission should confirm that jurisdictions cannot evade the shot clock by approving the zoning permits but subsequently withholding or delaying additional permits, such as building permits necessary to begin the implementation of the project. And, for EFR requests and other potential deemed approved permits, when the shot clock deadline lapses without a permit decision, the Commission should confirm that the applicant may proceed after providing notice to the jurisdiction that the permit is deemed approved, notwithstanding a lack of a building permit. In addition, the Commission

⁶¹ See *id.* ¶ 21.

should require jurisdictions to publish their schedule of fees for ROW use for all utilities to ensure that small cell applications are not subject to discriminatory charges.

C. The Commission Should Reinforce That Moratoria Constitute Prohibited Barriers to Entry.

The Commission asks for specific information about the use of moratoria and the effect of such restrictions.⁶² In its comments in response to the *Streamlining PN*, Crown Castle identified a number of communities that implemented improper moratoria in violation of Sections 253, 332, and the *2014 Infrastructure Order*. While at least one community responded by seeking to clarify that its moratorium was in error and that it would continue to process applications, other communities continue to impose either *de jure* or *de facto* moratoria on the processing of siting applications for broadband networks. For example, just last week, the Town of Amherst, New York adopted a local law prohibiting the Town staff from “accept[ing]/process[ing] any applications, of any form, or issu[ing] any permits, of any form, relating to the placement or installation of telecommunication towers, facilities and antennae within the Town’s public rights-of-way until the moratorium is rescinded and/or a Local Law addressing this matter is adopted.”⁶³ In fact, in the time since publication of the *Streamlining PN*, moratoria have been instituted in the cities of Parkland, Florida, Vestal, New York, Orangetown, New Jersey, Tonawanda, New York, Amherst, New York, Cody, Wyoming, and Leon County, Florida, to name a few.

The Commission should reaffirm that a moratorium (whether spelled out in law or simply enacted in practice) on applications constitutes a *per se* violation of Section 253(a) and/or 332(c)(7)(B). Furthermore, the Commission should make abundantly clear that the shot clock

⁶² See *id.* ¶ 22.

⁶³ See Town of Amherst, New York, Resolution 2017-674 (adopted June 5, 2017).

begins to run with the good faith submission of an application, notwithstanding the existence of any moratorium. Should a municipality elect not to act on a properly submitted application, then the applications will be deemed granted once the maximum time for acting on the application has run.

IV. THE COMMISSION SHOULD STREAMLINE THE NHPA AND NEPA PROCESSES TO PROMOTE EFFICIENCY AND REDUCE DELAYS.

Crown Castle applauds the Commission for undertaking a “comprehensive fresh look” at its rules and procedures implementing the National Historic Preservation Act (“NHPA”) and National Environmental Policy Act (“NEPA”) to facilitate wireless infrastructure deployment.⁶⁴ Reform is needed to promote infrastructure deployment across the country which will support next-generation wireless broadband networks. As Chairman Pai recognized, “[t]o bring the benefits of the digital age to all Americans, the FCC needs to make it easier for companies to build and expand broadband networks. We need to reduce the costs of broadband deployment, and we need to eliminate unnecessary rules that slow down or deter deployment.”⁶⁵ Today, applicants wishing to construct or add wireless infrastructure often must undertake NHPA Section 106 review, which can involve Tribal consultation, NEPA review, and local government pre-construction review. In many cases, these processes must be completed sequentially and not simultaneously. In the course of these reviews, applicants often encounter delays and excessive fees, which impede and even sometimes halt infrastructure deployment. To address these issues, the Commission should: (1) adopt rules which would eliminate inefficiencies in the Tribal review process; (2) streamline the NHPA Section 106 review process; (3) grandfather so-called “Twilight Towers;” and (4) remove the requirement that applicants

⁶⁴ *NPRM* ¶ 23.

⁶⁵ Chairman Ajit Pai, FCC Blog, *Infrastructure Month at the FCC* (Mar. 30, 2017) <https://www.fcc.gov/news-events/blog/2017/03/30/infrastructure-month-fcc>.

placing facilities in a floodplain must conduct an Environmental Assessment (“EA”). These refinements to the existing rules and processes will pave the way for the private sector to build the wireless networks of the future and deliver groundbreaking services to consumers.

A. The Commission Should Eliminate Inefficiencies in the Tribal Review Process.

As part of their responsibilities under Section 106 of the NHPA, applicants requesting to site infrastructure in certain areas must consult with Tribal Nations that have an interest in the geographic area affected by the application. Frequently, such consultations—even for deployment of small cells—are riddled with unpredictability, delays, and excessive costs. For example, it can take several months after a Tribal Nation requests site information for the Tribe to clear the site. Tribal Nations also charge varying and at times excessive fees to applicants. On one proposed project in Houston, Texas, the Tribal consultation fees are estimated at \$6,350 per node and the fees for placement of 1,259 new poles in the ROW totaled an estimated \$7,994,650. The requirement to pay Tribal fees of this magnitude could jeopardize a project that would have otherwise enhanced service to underserved areas.

Despite the lengthy review times and significant fees, Tribes rarely conclude that an application would have an adverse effect on historic properties. Indeed, Crown Castle has never received a report or any negative response from a Tribal Nation regarding a proposed small cell deployment. Taking the following actions to streamline the Tribal review process will ensure rapid deployment of wireless infrastructure while also respecting and preserving sites with historic, religious, or cultural significance to Tribes.

Exemptions from Tribal Review. As an initial matter, the Commission can facilitate wireless infrastructure siting by excluding certain categories of infrastructure from the Tribal review process. First, new pole construction in the ROW for small cell deployment should be

excluded from Tribal review where the new pole is similar in size to existing utility poles. This exemption is merited as the ROW involves previously disturbed ground and it is unlikely that placement of a new pole would have any new impact on Tribal interests. Furthermore, it is consistent with the existing exemption for State Historic Preservation Officer (“SHPO”) review for new facilities in the ROW. Nonetheless, if the Commission declines to adopt this exclusion, it should, at minimum, establish a batched review process for new pole construction in the ROW to speed processing. To curb excessive costs, any fees associated with Tribal review should apply on a batched basis rather than a per pole basis.

Second, Crown Castle endorses the Commission’s proposal to exclude pole replacements in ROWs from Tribal review.⁶⁶ Conditioning the exclusion on prior Section 106 review is problematic, however, because in most cases, the new pole is replacing an existing utility pole which was never subject to Section 106 review. As with the new pole construction discussed above, pole replacements on previously disturbed ground are unlikely to raise additional Tribal concerns. Notably, utility companies can already place and replace poles in the ROW without going through the Tribal review process. This exclusion should be extended to telecommunications providers. Where a replacement pole is similar in size and aesthetics to the previous pole, there is no need for additional Tribal review.

Third, the Commission should eliminate Tribal review for all rooftop collocations. These types of deployment do not involve disturbing ground at all and are only additive to existing infrastructure that has already undergone review. While this type of categorical exclusion would be the most effective at eliminating delay and promoting deployment, other options could also balance the goals of facilitating infrastructure siting and accommodating Tribal Nation concerns.

⁶⁶ *NPRM* ¶ 67.

The Commission could exempt installations that will not exceed 20 feet above the highest point on the roof. This 20-foot cut-off would be consistent with the Federal Aviation Administration's ("FAA") exemption of antenna structures less than 20 feet in height from the FAA's notice requirements.⁶⁷ Although Crown Castle recognizes Tribal concerns about the impact of rooftop collocations on sacred vistas, an antenna protruding less than 20 feet above the highest point of the roof is unlikely to significantly change the roof's overall visual profile. Alternately, the Commission could limit the rooftop collocation exclusion to only apply to urban and suburban locations, or situations where the building is in proximity to other buildings of greater height.

Processes When a Tribal Nation is Non-Responsive. It is common for a wireless siting applicant to submit information about a proposed site to a Tribal Nation requesting consultation, pay a fee, and then never receive a conclusive response from the Tribal Nation regarding the site. This non-responsiveness adds much delay and unpredictability to the Tribal consultation process. To remedy this problem, the Commission should establish a strict 30-day timeframe for the Tribal Nation's response after their receipt of the application materials. This timeframe should not vary based on the type of infrastructure, because all types of deployment—new towers, small cells, or collocations—feasibly can be reviewed within 30 days.

In addition, Crown Castle supports the Commission's proposal to allow applicants to self-certify their compliance with the Tribal notifications required by Section 106 when a Tribal Nation becomes non-responsive after an initial request to consult.⁶⁸ While the *2005 Declaratory Ruling* addressed situations where a Tribal Nation failed to respond in any manner, it did not clarify next steps where a Tribal Nation becomes a consulting party but fails to respond in a

⁶⁷ 14 C.F.R. § 77.9(e)(4).

⁶⁸ See *NPRM* ¶ 61.

timely manner after receiving payment of a fee.⁶⁹ In both cases, the applicant should be permitted to follow the notification process established in the *2005 Declaratory Ruling* and self-certify that the applicant's obligations with respect to that Tribe are complete. If an issue about the consultation later arises, the applicant would have the burden of proving that it followed the process.

Tower Construction Notification System ("TCNS") Reform. The Commission seeks comment on whether it should make changes to TCNS, which is used to notify Tribal Nations of proposed constructions within relevant geographic areas.⁷⁰ To streamline the Tribal review process, the Commission should revise the TCNS form to track the Programmatic Agreement for Collocation.⁷¹ Namely, the form should include check boxes that the applicant can use to identify why Section 106 review was triggered (*e.g.*, compound expansion, addition of more than four cabinets, addition on more than one shelter, etc.). This information would help Tribal Nations more quickly understand the scope of the proposed project and determine the project's impact on Tribal properties.

Tribal Monitors. The Commission asks parties to comment on site monitoring when multiple Tribal Nations request to consult on the same project.⁷² Crown Castle has at times successfully reached agreement with multiple Tribal Nations to accept one Tribal monitor at a site. However, the various Tribes do not always agree to the arrangement, any may have differing expectations in their requirements for monitoring. For example, some Tribes require

⁶⁹ 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, ¶ 2 (2005) ("*2005 Declaratory Ruling*").

⁷⁰ *NPRM* ¶ 54.

⁷¹ See *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, 47 CFR Part 1, App'x B ("*Programmatic Agreement for Collocation*").

⁷² *NPRM* ¶ 55.

monitors to be present on-site during activities that other Tribes do not, such as during back-filling of soils, or require the use of two monitors from the Tribe for the entire period. Siting applicants encounter a wide range of Tribal monitoring costs as well. For instance, one Tribe charged \$1,557.60 for Tribal monitoring of placing a new tower while another Tribe charged \$27,062.50. These varying approaches lead to uncertainty and drive up costs for wireless infrastructure siting applicants.

Negotiated Alternative. Finally, the Commission asks whether the Commission should seek to develop consensus principles between industry stakeholders to resolve challenges to Tribal requirements.⁷³ While commendable, these types of efforts may not actually ease the burdens of broadband deployment. Tribal Nations operate as individual sovereign nations, making it difficult, if not impossible, to reach a single agreement on best practices that would be endorsed by all parties. It would not be a prudent use of resources to allocate great time and effort to develop best practices that could be disregarded by individual Tribal Nations.

B. The Commission Should Streamline the NHPA Section 106 Review Process.

Crown Castle commends the Commission's efforts, both in the past and in the current proceeding, to reform the NHPA Section 106 review process to promote expeditious and efficient infrastructure siting. Consistent with the goals of promoting and streamlining wireless broadband deployment, the Commission should undertake further reforms to eliminate burdensome requirements and speed deployments. Specifically, the Commission should: 1) exclude certain facilities from Section 106 review due to their limited impact on historic properties; and 2) expedite the process for SHPO review.

⁷³ *Id.* ¶ 59.

Exclusion for Expansions of Leaseholds or Fee Interests. The 2004 Programmatic Agreement excluded construction of a replacement tower that did not substantially increase the size of the existing tower and that did not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction or involve excavation outside these expanded boundaries.⁷⁴ Crown Castle seeks the same 30-foot allowance exclusion for compound expansions that would increase the leasehold or fee interest. This reform will have a significant impact in reducing delays and expenses, as an estimated 95% of all Crown Castle’s Section 106 reviews performed are triggered by fee or leasehold expansions. And the fees associated with Section 106 reviews can quickly accumulate—indeed, Crown Castle has spent over \$350,000 for Tribal consultation fees for such projects in the last six months.

A recent example illustrates the costs, delays, and uncertainty currently associated with expanding a leasehold. In 2016, Crown Castle engaged in a Section 106 review for expansion of a leasehold to accommodate a new collocation at a tower site located in the parking lot of a high school in Omaha, Nebraska. A photograph of the site at issue is included as Exhibit D. The expansion entailed adding a 14 x 10-foot area of land adjacent to the existing compound. Nevertheless, Crown Castle had to obtain a “no adverse effect” concurrence from the Nebraska SHPO and work with 24 Tribes who had expressed interest in the project through TCNS. Individual Tribal consultation fees ranged from \$0-\$1,500 and the Tribal fees for the whole project totaled \$12,825. This Tribal involvement also led to project delays. A detailed record of the response times for each Tribe consulting on this project is attached as Exhibit E. In all, the study took five months to complete and cost several thousand dollars (in addition to the Tribal

⁷⁴ Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 CFR Part 1, App’x C § III.B. (“2004 Programmatic Agreement”).

fees). This example highlights the lengthy timeframe and high cost faced by Crown Castle for a simple leasehold expansion—a project that occurs with regular frequency and which has minimal risk of adverse impact.

Expansion of NHPA Section 106 Right-of-Way Exclusion. The ROW exclusion in Section III.E. of the 2004 Programmatic Agreement is currently limited to utility and communications ROWs.⁷⁵ Under the 2004 Programmatic Agreement, facilities constructed in or within 50 feet of a communications or utility ROW that is in active use are excluded from SHPO review if the facility is not substantially larger than similar facilities in the ROW, it is not located in proximity to a historic property, and Tribal review is completed.⁷⁶ As previously discussed, there is a significant and growing need to place small cell facilities in the transportation ROW. In many cases, deployment of a small cell network will require the construction of new poles due to capacity issues of existing poles or the lack of an existing pole where a small cell needs to be placed. To expedite and streamline broadband deployment, the Commission should expand the current ROW exclusion to include transportation ROWs and should further revise the exclusion to only require Tribal consultation for new facilities in the ROW when there will be new ground disturbance (as previously defined by the Commission) and the facility will be located on property or districts listed in the National Register as having Tribal significance.

Exclusions for Placement of New Poles or Replacement of Existing Poles in the ROW. Crown Castle supports the Commission’s proposal to exclude replacement poles in the ROW from Section 106 review provided the replacement pole is not substantially larger than the pole it is replacing (as defined the 2004 Programmatic Agreement).⁷⁷ Crown Castle further urges the

⁷⁵ 2004 Programmatic Agreement § III.E.

⁷⁶ *Id.*

⁷⁷ *NPRM* ¶ 68.

Commission to adopt a similar exclusion for deployment of new poles that are of substantial similarity to existing poles in the ROW. These types of facilities should be excluded because their placement in the ROW would be consistent with the use of the ROW already endorsed by the municipality. Moreover, their comparable size and proximity to existing poles reduces the likelihood that their placement would have an adverse impact on historic properties.

Exclusions for Collocations. The Commission should exclude certain types of collocations from Section 106 review, as these types of projects generally have a minimal or nonexistent impact on historic properties. First, Crown Castle endorses the Commission’s proposal to exclude collocations located up to 50 feet from the boundary of a historic district from Section 106 review.⁷⁸ Second, the Commission should clarify that any antenna that is not visible from that 50-foot distance from the border of the historic district is excluded from Section 106 review. Third, the Commission should exclude antennas placed on rooftops of National Historic Landmark buildings from Section 106 review so long as the antennas are not visible from the street below. These reforms would properly balance the goals of facilitating infrastructure deployment and protecting historic properties.

Reforming SHPO Review. Although Stipulation VII.C. of the First Amendment to the Programmatic Agreement for Collocation has not yet become effective, some SHPOs have told Crown Castle that they are unsure how to perform the historic review process for a traffic structure, light pole or lamp post under this provision.⁷⁹ The First Amendment provides that when such structure is located within a historic district or within 250 feet of an historic district, the SHPO must determine whether such structure is a contributing or compatible element within

⁷⁸ *Id.* ¶ 73.

⁷⁹ 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, § VII.C. (WTB 2016) (“First Amendment”).

the historic district.⁸⁰ Rather than burden the SHPOs with making this determination, the Commission should allow the use of qualified historic preservation consultants to undertake this review.

The Commission asks whether the SHPO review process duplicates historic preservation review at the local level, “particularly when local review is conducted by a Certified Local Government.”⁸¹ The answer is yes—those processes can be duplicative and requiring applicants to complete both is unnecessary. To foster efficiency and avoid wasting resources, the Commission should allow Certified Local Government approval to supplant SHPO review, provided that the Certified Local Government also abides by the Programmatic Agreements.

C. The Commission Should Grandfather “Twilight Towers.”

As the Commission notes, a large number of towers were constructed between the adoption of the Programmatic Agreement for Collocation in 2001 and the 2004 Programmatic Agreement that “either did not complete Section 106 review or for which documentation of Section 106 review is unavailable.”⁸² As a result, thousands of these so-called “Twilight Towers” are in regulatory limbo, making parties wary of using them for wireless infrastructure siting. The Commission should resolve the status of Twilight Towers once and for all by grandfathering them and exempting them from the Section 106 review process. Doing so will expeditiously clear these towers for beneficial use. The risk of adverse effects on historical properties from grandfathering Twilight Towers is minimal because these towers have already been in place for 12 to 16 years without causing any issues. In many cases, the towers are no longer owned or operated by the entity that originally constructed the tower. Moreover, the public interest would

⁸⁰ *Id.*

⁸¹ *NPRM* ¶ 39.

⁸² *Id.* ¶ 79.

be furthered by this action, as it would facilitate efficient use of existing resources and promote broadband deployment.

D. The Commission Should Modify the Rule that Subjects Sites in Floodplains to the FCC’s Environmental Review Procedures.

The Commission should adopt its proposal to eliminate the requirement that applicants must conduct an EA for siting in a floodplain.⁸³ This requirement imposes an onerous requirement on a significant number of applications—Crown Castle estimates that 95% of all EAs are filed because the site will be located in a 100-year floodplain. This requirement is unnecessary because, in Crown Castle’s experience, these floodplain EAs always result in a Finding of No Significant Impact. Nonetheless, the need to prepare an EA causes at least a three-month delay in deployment and incurs consulting fees averaging \$2,000-\$3,000. Rather than subject applicants to these delays and costs when an adverse impact is rarely found, the Commission should eliminate the EA requirement for floodplains. The locality, through the zoning review process, has the expertise to determine whether the floodplain poses any environmental issues.

Taking this action would be a step towards conforming the FCC’s NEPA protocol with the less rigorous NEPA approach employed by other agencies. For example, the Department of Energy has a categorical exclusion for radio communication towers and associated facilities provided they are not in a governmentally designated scenic area.⁸⁴ The Commission should consider whether adopting further categorical exclusions or reforms to its NEPA requirements would promote the goals of broadband deployment without sacrificing environmental protection.

⁸³ *Id.* ¶ 65.

⁸⁴ *See* B1.19 as provided in 10 C.F.R. § 1021 App’x B to Subpart D (excluding “[s]iting, construction, modification, operation, and removal of microwave, radio communication, and meteorological towers and associated facilities, provided that the towers and associated facilities would not be in a governmentally designated scenic area”).

V. **THE COMMISSION SHOULD ACT SWIFTLY TO ADDRESS A NUMBER OF ISSUES RAISED IN THE NOTICE OF INQUIRY THAT WOULD REMOVE BARRIERS TO DEPLOYMENT OF NEXT-GENERATION BROADBAND NETWORKS.**

There are two other important actions the Commission can and should take, in order to ensure that existing laws achieve their purpose in removing barriers to the deployment of broadband facilities. First, the FCC should clarify that Sections 253 and 332 of the Communications Act and Section 6409 of the Spectrum Act work in tandem to promote deployment of telecommunications services and must not be viewed in a vacuum. Second, the Commission should provide additional clarity regarding the types of municipal actions that violate Section 253 and 332. By prospectively addressing these issues in a rulemaking or otherwise, the FCC will provide clarity to all parties involved in the siting process and avoid unnecessary delays due to any perceived or actual ambiguities in the statutory text.

A. **The FCC Should Clarify That Sections 253 and 332 of the Communications Act and Section 6409 of the Spectrum Act All Apply to Municipal Review of Small Cell Installations.**

The Commission can expedite deployment of next-generation wireless infrastructure by expressly clarifying something that its decisions already establish: that Sections 253 and 332 both apply to the deployment of small cells and other broadband facilities serving wireless networks in public ROW. Under Section 253(a), “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any* entity to provide *any* interstate or intrastate telecommunications service.”⁸⁵ Nevertheless, some state and local government agencies have taken the position that Section 332(c)(7)

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

exclusively applies to regulation of any wireless services, including small cells.⁸⁶ This argument is premised on the incorrect assumptions that either: (i) Crown Castle and other small cell providers do not provide a “telecommunications service”⁸⁷, or (ii) because Section 332 specifically applies to wireless facilities, Congress intended it to provide an exclusive remedy. Both of these assumptions are incorrect. Crown Castle agrees with the Commission’s conclusion that Sections 253 and 332 incorporate the same substantive obligations.⁸⁸ Furthermore, because the same siting application may implicate both Section 253 and 332, the FCC should take this opportunity to clarify that the remedies provided by those sections may both apply to applications for small cell installations.

As an initial matter, the permitting requests submitted by Crown Castle and others, at their core, are requests for approvals to build facilities that are necessary for the provision of telecommunications services. The Communications Act defines a telecommunications service as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used*.”⁸⁹ In addition to the antennas and radios necessary to transmit wireless signals, small cell nodes operated by Crown Castle and others are connected by fiber optic backbones. All of this equipment,

⁸⁶ See, e.g., *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 575 (9th Cir. 2008) (“The County argued that § 253(a) did not apply to the Ordinance, because 47 U.S.C. § 332(c)(7) exclusively governs wireless regulations, and that, in any event, the Ordinance is not an effective prohibition on the provision of wireless services.”).

⁸⁷ See *Crown Castle NG E. Inc. v. Town of Greenburgh, N.Y.*, No. 12-CV-6157 CS, 2013 WL 3357169, at *15 (S.D.N.Y. July 3, 2013) (“*Town of Greenburgh I*”) (“A threshold question under Section 253 is whether Plaintiff is offering to provide “telecommunications service” as defined by the TCA.”), *aff’d*, 552 F. App’x 47 (2d Cir. 2014).

⁸⁸ *NPRM* ¶ 89.

⁸⁹ 47 U.S.C. § 153 (emphasis added).

including the fiber optic networks,⁹⁰ constitute facilities necessary for telecommunications services subject to Section 253(a).

Any interpretation that attempts to draw a line between services governed by Section 253 and those governed by Section 332 is based on a flawed reading of the statutes.⁹¹ The Commission itself has strongly suggested that Section 253 applies to the full range of telecommunications services, as the plain language of the statute suggests. In the 2009 *Declaratory Ruling*, the FCC, while declining CTIA’s request to preempt all “blanket variance ordinances” pertaining to wireless facilities, nevertheless declared that “[t]o the extent specific evidence is presented to the Commission that a blanket variance ordinance is an effective prohibition of service, then we will in that context consider whether to preempt the enforcement of that ordinance in accordance with the statute.”⁹² In a recent speech, Chairman Pai went even further, observing that “Congress gave the Commission the express authority to preempt any state or local regulation that prohibits or has the effect of prohibiting the ability of any entity to provide wired or wireless service.”⁹³

⁹⁰ See *In the Matter of the Petition of the State of Minnesota for A Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transp. Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd. 21697 (1999).

⁹¹ To the extent that the Commission interprets Section 332(c)(7)(A) as carving out decisions involving personal wireless facilities from Section 253, the effect of such a carve out is limited and largely semantic. The fiber optic networks that provide telecommunications service to those personal wireless facilities are still plainly covered by Section 253, and the restrictions on local prohibitions are co-extensive between the two statutes.

⁹² 2009 *Declaratory Ruling* ¶ 67.

⁹³ Remarks of FCC Commissioner Ajit Pai at the CTIA Wireless Foundation Smart Cities Expo, Washington, DC, 2016 WL 6538281, at *1 (OHMSV Nov. 2, 2016); see also *Streamlining PN* at 2 (“Sections 253 and 332(c)(7) of the Communications Act and Section 6409(a) of the Spectrum Act are designed, among other purposes, to remove barriers to deployment of wireless network facilities by hastening the review and approval of signing applications by local land-use authorities.”).

Furthermore, although Section 332(c)(7) is entitled “Preservation of Zoning Authority,” the language of that statute applies broadly to all “regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof.”⁹⁴ Courts and the FCC have thus properly applied the limitations in Section 332(c)(7)(B) to all siting decisions, not just those subject to zoning review.⁹⁵ Indeed, nothing in the statute suggests that applying the shot clock and other provisions of Section 332 requires or implies that the underlying local regulation be “zoning” or land use regulation. As a result, the Commission should expressly confirm that Section 332 applies to ROW regulation, even though such regulation is generally separate from local zoning authority.

The Commission should also revisit its conclusion in the *2014 Infrastructure Order* and find that a “collocation” under Section 6409(a) of the Spectrum Act include deployment of small cells to existing utility poles, whether or not those poles have existing antennas or base stations. Under Section 6409(a), state and local governments must approve “any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” In the *2014 Infrastructure Order*, the Commission recognized that “[a]mbiguities in many of the terms in this provision and its accompanying definition of ‘eligible facilities request’ are likely to generate disputes about its proper application, which could in turn undermine the goal of Title VI of the Spectrum Act of advancing wireless broadband service for both public safety and commercial users.”⁹⁶

⁹⁴ 47 U.S.C. § 332(c)(7)(B).

⁹⁵ See, e.g., *GTE Mobilnet of Cal. Ltd. P'ship v. City & Cty. of San Francisco*, 440 F. Supp. 2d 1097, 1101 (N.D. Cal. 2006) (applying Section 332(c)(7) to permitting dispute and holding that “the statute's use of the word ‘zoning’ in the title of the section is not sufficient to restrict its reach”); *2014 Infrastructure Order* ¶ 245 (discussing applicability of Section 332(c)(7) to personal wireless service facilities sitings generally).

⁹⁶ *2014 Infrastructure Order* ¶ 135.

Nevertheless, the agency itself substantially undermined this goal by narrowly defining the term “existing . . . base station” only to include “a structure that, at the time of the application, supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a ‘base station’”⁹⁷

The Commission should revise its interpretation of the terms “existing” and “collocation” in Section 6409, and clarify that adding facilities to any existing structure, whether or not it currently supports wireless services, constitutes an “eligible facilities request” so long as all of the other statutory requirements are met. Under Section 6409(b), eligible facilities requests already include “collocation of new transmission equipment.”⁹⁸ Whether the equipment is being collocated on a pole currently used for telecommunications services or one used for some other purpose is a distinction without a difference, and revising the interpretation of the phrase “existing wireless tower or base station” in this manner would make the meaning of “collocation” in Section 6409 more consistent with the definition used in the National Programmatic Agreement.⁹⁹ In the interest of promoting rapid deployment of wireless infrastructure, as long as the new equipment “does not substantially change the physical dimensions of such tower or base station,” Section 6409(a) should apply. In addition, the Commission should extend Section 6409 applicability to situations where the existing pole must be replaced and the new structure will not be substantially increased in dimension as compared to the previous pole. It is not uncommon to have to replace existing utility poles when deploying

⁹⁷ *Id.* ¶ 168.

⁹⁸ *See* 47 U.S.C. 1455(a)(2)(A).

⁹⁹ *See* 47 C.F.R. Appendix B to Part 1, *Nationwide Programmatic Agreement for Collocation of Wireless Antennas* (defining “collocation” as “the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, whether or not there is an existing antenna on the structure”).

small cell equipment in the ROW. Provided that the replacement pole is substantially similar, Section 6409 should apply to collocations on the replacement pole.

B. The FCC Should Clarify That Review and Approval of Applications for Siting in the Public Rights-of-Way is a Regulatory Function.

The *NOI* asks about the extent to which Sections 253 and 332 apply to states and localities acting in a proprietary versus regulatory capacity.¹⁰⁰ Crown Castle respectfully submits that the Commission need not determine the scope of Section 253 or 332 as they apply to states and localities acting in their proprietary roles, or even determine definitively that the “regulatory v. proprietary” distinction is meaningful. Rather, the agency should clarify that regardless of whether this distinction exists, the regulation of the ROW is a “regulatory” act, not a “proprietary” act, and therefore is subject to the full range of protections under Sections 253 and 332. While some state and local property management activities may be considered proprietary (such as leasing space on the roof of a school),¹⁰¹ the ROW are public goods held in public trust, and do not constitute “property” owned by a local jurisdiction that can be used in whatever way the jurisdiction sees fit.¹⁰²

Congress recognized this distinction between ownership and management in Section 253(c), which “preserves the traditional authority of state and local governments to *manage* the public rights-of-way.”¹⁰³ However, to manage is not to own. Management of the ROW includes the “vital tasks necessary to preserve the physical integrity of streets and highways, to control the

¹⁰⁰ See *NPRM* ¶ 96.

¹⁰¹ See generally *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002) (discussing distinction between proprietary and regulatory actions).

¹⁰² Cf. *Liberty Cablevision Of Puerto Rico, Inc. v. Municipality Of Caguas*, 417 F.3d 216, 222 (1st Cir. 2005) (“Even when the fee of the streets is in the city, in trust for the public, it is a mistake to suppose that the city is constitutionally and necessarily entitled to compensation”).

¹⁰³ *BellSouth Telecommunications, Inc. v. City of Mobile*, 171 F. Supp. 2d 1261, 1274 (S.D. Ala. 2001) (emphasis added).

orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way,”¹⁰⁴ but the police power that localities have to carry out these functions is not the same thing as holding title in fee simple or its equivalent. Indeed, if localities owned the ROW, Congress would not have had to exclude ROW management from the scope of Section 253, and the Commission would not have needed to specify these tasks: they would have been assumed.¹⁰⁵ By explicitly preserving these management rights, Congress chose to demonstrate that localities do not have a proprietary interest in the ROW. Accordingly, the FCC should emphasize that all management of ROW access is subject to the provisions of federal law.

C. **The FCC Should Identify Actions that Constitute Unreasonable Discrimination Against Providers of Telecommunications Facilities.**

The *NOI* invites comment on whether certain facially neutral criteria constitute unreasonable discrimination under Section 253 and Section 332(c)(7). Under Section 253(c), municipalities may only manage the public ROW or require compensation “on a competitively neutral and nondiscriminatory basis, for use of public ROW on a nondiscriminatory basis.” This provision applies not only to the fees charged by municipalities, but also to their management of the public ROW, including their permitting decisions. Section 332(c)(7)(B) contains a corresponding provision barring discrimination, stating that jurisdictions “shall not unreasonably discriminate among providers of functionally equivalent services.”

Unfortunately, Crown Castle routinely has encountered instances of state and local governments discriminating in their management of the ROW based on the type of service

¹⁰⁴ *TCI Cablevision of Oakland Cty., Inc.*, 12 FCC Rcd. 21396, ¶ 103 (1997).

¹⁰⁵ *Cf. Classic Tel., Inc.*, 11 FCC Rcd. 13082 (1996) (Municipalities can only enact regulations that are “an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way”).

provided, the provider's status as an incumbent, or other arbitrary criteria. These actions have the effect of reducing competition for wireless services, slowing deployment, and jeopardizing the benefits of 5G and other next generation technologies. Accordingly, the Commission should clarify that state and municipal government entities must provide non-discriminatory treatment to small cell installations with regard both to fees and other management functions.

A fee is not competitively neutral and non-discriminatory if it exceeds the costs imposed on other providers for similar access. Thus, when a state entity such as VDOT regulates the installation of small cell node installations under its policies for communications tower sites, with the accompanying costs, rather than those for certified telecommunications service providers, it is managing the ROW in a discriminatory manner. Any such fees also should be commensurate with the cost to the jurisdiction of reviewing the application and maintaining the applicable ROW, rather than some purported estimate of the value to the provider. Courts currently are split on whether gross revenue fees and other charges unrelated to the upkeep of the ROW constitute "fair and reasonable compensation."¹⁰⁶ There is simply no justification, however, for a jurisdiction like the Town of Hempstead requiring consultant fees of more than \$150,000 on top of application fees and an annual voluntary 5% gross revenue share simply to provide access to the public ROW. These fees discriminate against small cell installations and have the effect of interfering with federal telecommunications policy objectives. Indeed, their

¹⁰⁶ Compare *Qwest Comms. Inc. v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir.2006) ("[W]e decline to read [past precedent] to mean that all non-cost based fees are automatically preempted, but rather that courts must consider the substance of the particular regulation at issue."); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624–25 (6th Cir. 2000) (applying totality of circumstances test to find gross revenue fees "fair and reasonable") with *Puerto Rico Tel. Co. v. Municipality Of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006) (finding that "fees should be, at the very least, related to the actual use of rights of way").

sole objective appears to be to raise money for the jurisdiction in a way that is unnoticed by local constituents, at the expense of broadband deployment.

The Commission should further clarify that charges imposed for use of the ROW are presumptively “fees,” and thus subject to the requirements in the Communications Act, and are not “taxes.” To assist carriers in determining whether the proposed fees are “competitively neutral and non-discriminatory,” the FCC should require localities to disclose upon request the charges they have imposed on all other utilities for access to ROW.

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

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

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

Second, municipalities should be prohibited from applying any fees or procedures to small cell facilities that are not also applied to all other utilities in the ROW, such as deployment of fiber, conduit for electric, cable services, and so forth. Sections 253 and 332 reflect Congress' intent to balance the interest in encouraging competition in state and local telephone markets with the interest of state and local governments in regulating consumer protection and public safety and management of their ROW.¹⁰⁷ Where local jurisdictions elect not to apply fees or regulations to certain utilities operating in the ROW, they are effectively conceding the lack of a local interest. Under these circumstances, the justification for allowing municipalities to burden federal telecommunications policy is lessened, if not completely eliminated, and the balance tips in favor of deploying critical telecommunications services.

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

The *NOI* asks about whether various actions by states and localities “prohibit or have the effect of prohibiting” service.¹⁰⁸ Under Section 253(a), “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Section 332 similarly bars regulations of the placement, construction, or modification of wireless facilities

¹⁰⁷ See *Puerto Rico Tel. Co.*, 450 F.3d at 15; *TC Sys., Inc. v. Town of Colonie, N.Y.*, 263 F. Supp. 2d 471, 480 (N.D.N.Y. 2003) (“Section 253 of the TCA embodies the balance between Congress’ new free market vision and its recognition of the continuing need for state and local governments to regulate telecommunications providers on grounds such as consumer protection and public safety.”) (internal quotation omitted).

¹⁰⁸ *NPRM* ¶¶ 90-94.

that “prohibit or have the effect of prohibiting the provision of personal wireless services.” The Commission has the legal authority to clarify what constitutes a “prohibition” under Sections 253 and 332, and it should do so here.¹⁰⁹

As an initial matter, the FCC should harmonize what constitutes an action that “prohibit[s] or has the effect of prohibiting” under both Sections 253 and 332. To date, most of the judicial determinations interpreting what constitutes a prohibition or effect of prohibiting service, whether applying a “heavy burden” to show the lack of alternative feasible sites or a “least intrusive means” test, have been in the context of Section 332. The FCC’s consideration of whether the action “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,” meanwhile, has been in the context of Section 253(a).¹¹⁰ Given the identical statutory language in Sections 253 and 332, the standard for what constitutes an action that “prohibit[s] or has the effect of prohibiting” should be the same under either Section.

A pure prohibition on service, such as barring facilities from the ROW or preventing deployment of wireless facilities necessary to close a coverage gap, should plainly constitute a prohibition under either standard. But the FCC should reemphasize that both Sections 253 and 332 also apply to actions that prevent the expansion of network capacity, or that prevent the offering of new and innovative services even if some services are already offered in a particular area.

¹⁰⁹ See, e.g., *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 248-52 (5th Cir. 2012) (affirming FCC’s authority to interpret what constitutes prohibition under Section 332), *aff’d*, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013); *Town of Greenburgh I* at *19 (deferring to FCC’s interpretation of Section 332).

¹¹⁰ See *California Payphone Association Petition for Preemption*, Memorandum Opinion and Order, 12 FCC Rcd. 14191 ¶ 31 (1997).

In this regard, the agency should underline that its *California Payphone* standard applies to both Sections 332 and 253, and that a material inhibition under either statute can be shown in a variety of different ways. The mere fact that a locality already has some level of coverage should be insufficient to defeat a claim of prohibition, where new facilities are needed to offer additional telecommunications services or capacity. As the Commission recognized, “use of wireless broadband service **and capacity** has been growing dramatically, and such growth is widely expected to continue due to the increasing use of high-bandwidth applications like mobile streaming, the greater expected capacity of 5G connections, and the deployment of the Internet of Things (IOT).”¹¹¹ Accordingly, federal telecommunications policy must be concerned not only with coverage, but also with capacity, and must recognize that local restrictions that attempt to freeze the current state of telecommunications contradict the stated purpose of the 1996 Telecommunications Act, which was to advance rapidly the deployment of new and innovative services. In particular, the Commission should identify specific actions taken by some local governments that presumptively meet this standard and “have the effect of prohibiting” the provision of service, in violation of federal law. Some of these facially prohibitory actions include:

- establishing blanket or general prohibitions on installing small cells in the ROW or refusing to take any action on a permit application;
- establishing moratoria for the permitting, construction or issuance of approval for small cell facilities;
- requiring applicants to provide a business justification for deploying the proposed infrastructure (*e.g.* customer demand, quality of service, propagation maps, traffic studies, etc.);

¹¹¹ *NPRM* ¶ 1 (emphasis added).

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

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

E. The Commission Should Interpret “Functionally Equivalent Services” Based on the Services Provided Rather than Their Regulatory Structure

Finally, the *NOI* seeks information about whether parties have experience discrimination among providers of “functionally equivalent services” and input on should constitute a “functionally equivalent service.”¹¹² As explained above, states and municipalities routinely attempt to subject Crown Castle to different rates and regulatory requirements notwithstanding the fact that Crown Castle entities hold utility certifications in 45 states, the District of Columbia, and Puerto Rico and utilize the public ROW for many of the same purposes as incumbent telephone and cable providers. A typical Crown Castle small cell deployment requires laying

¹¹² See *id.* ¶ 99.

miles of fiber in the ROW, terminating at a node that is connected to an above ground antenna that utilizes licensed radiofrequency spectrum to provide wireless communications services. There is no rational justification to subject Crown Castle to different fees or regulations than wireline or cable service providers laying fiber in the same portion of the ROW or wireless service providers using similarly sized antennas.

Furthermore, any discrimination, to be permissible, should be based on factors relevant to the operation of the proposed facility. Even then, any distinctions should be reasonably related to the facilities themselves, such as the relative volume of the equipment and its displacement of other facilities. Discrimination based on factors unrelated to the operation of the proposed facility should be prohibited. For instance, it is unreasonable to discriminate against a provider based on whether or not it is certificated as a public utility where the facilities ultimately will be used to provide telecommunications services. A non-discriminatory approach will encourage competition and help expedite the deployment of next-generation broadband services.

VI. CONCLUSION

Crown Castle appreciates this opportunity to submit its views on steps the Commission can take to ensure that all Americans receive the benefits of next-generation broadband networks. Fulfilling the FCC's vision for a broadband future that maintains America's role as an innovation leader will require not only spectrum, but also billions of dollars of infrastructure investment on a community-by-community basis. Crown Castle stands ready to do its part and looks forward to collaborating with the Commission, municipal leaders, and wireless service providers to deliver the networks that will satisfy Americans' broadband needs for decades to come.

