

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

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

**COMMENTS OF CONTERRA BROADBAND SERVICES, SOUTHERN LIGHT, LLC  
AND UNITI GROUP INC.**

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**COMMENTS OF CONTERRA BROADBAND SERVICES, SOUTHERN LIGHT, LLC  
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**SUMMARY**

Conterra Broadband Services, Southern Light, LLC and Uniti Group, Inc. (“Competitive Fiber Providers” or “CFPs”) urge the Commission to use its broad powers under the Communications Act, including Section 253, to adopt rules that require all local governments to deal fairly with all companies that seek to deploy wireline and wireless broadband infrastructure in the public right-of-way. Through Section 253, Congress gave the Commission “a rule of preemption” that “articulates a reasonably broad limitation on state and local governments’ authority to regulate telecommunications providers.”<sup>1</sup> Given the prevalent and significant obstacles that CFPs face across the country, the Commission should use that broad authority to streamline the local government approval process, reduce unnecessary regulatory barriers, and unleash strong new investment in fixed and wireless broadband networks. Swift Commission action will enable CFPs and other infrastructure providers to devote scarce capital and resources

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<sup>1</sup> *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd. 3266, 3296, ¶100 (2017) (“*Wireline Infrastructure NPRM, NOI, and RFC*”), citing *Level 3 Commc’ns L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 531-32 (8th Cir. 2007) (“*Level 3*”).

to deploying new fiber and wireless infrastructure to bring broadband to the many Americans lacking access.

Section 253(d) provides the Commission ample latitude to elect the best procedure for utilizing its preemption power – declaratory ruling, complaint or legislative rulemaking. The Commission should find that certain practices fail to meet the safe harbors available to local governments under Sections 253(b) and (c). It should establish technology neutral, maximum shot clocks for processing franchise applications, permits and final approvals to turn on deployed networks, that would apply where states or local governments have failed to establish shorter timeframes in their statutes or regulations, including:

- extend the 60-day shot clock adopted in the *2014 Infrastructure Order* to new small cell/DAS deployments in the public right-of-way;
- establish a maximum of 90 days for a municipal authority, consistent with the *Local Franchise Reform Order*, to act where carriers amend their existing franchise (for example to add wireless capability where such service was not contemplated in the initial franchise);
- establish a maximum of 120 days for a municipal authority to act for new franchises where the carrier has already received a CPCN or its equivalent, from the state public utilities regulator authorizing it to provide facilities-based services; and
- establish a maximum of 180 days for a municipal authority to act where carriers that have not yet received such facilities-based license from the requisite state utilities regulator are seeking their first franchise.

Each municipal government should be limited to a single shot clock in which all levels of review, by all relevant agencies, must be concluded.

Because shot clocks could be ignored through pre-application process or without a self-effecting remedy, the Commission also should:

- prohibit municipal authorities from requiring an applicant to negotiate or engage in any processes prior to the filing of the application (similar to Section 76.41(c) of the video franchise rules); and

- adopt deemed granted remedies such that a telecommunications carrier should be required only to provide notice to the local government that its application has been “deemed granted” in order to proceed with construction.

Finally, the Commission should find that the following practices by any municipal agency violate Section 253(a) and cannot be saved by Section 253(b) or (c):

- moratoria on franchises, permits, construction, or turn-up of networks;
- local government demands for free or reduced-price access to facilities and services, including fiber or other in-kind payment; and
- fees or conditions that discriminate in favor of one type of carrier (typically incumbent) over another (typically competitive).

The Commission can reasonably conclude that local moratoria or requirements that result in delays exceeding those shot clocks “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>2</sup> The Commission can likewise reasonably conclude that such shot clocks give local governments ample time to take any steps to “protect the public safety and welfare.”<sup>3</sup>

The Commission must take the steps necessary to reduce the barriers to investment that are responsible for the lagging deployment of broadband. Streamlining the local right-of-way approval process by removing excessive costs and delays, and making the process more uniform and predictable will help remove that uncertainty and stimulate the deployment of fiber networks in areas where the risk right now is not worth the reward.

## **I. Introduction**

Conterra Broadband Services, Southern Light, LLC and Uniti Group, Inc. (“Competitive

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<sup>2</sup> 47 U.S.C. § 253(a).

<sup>3</sup> 47 U.S.C. § 253(b). Any local government that believes it needs more time to address a pending franchise application would always be free to seek a waiver from the Commission.

Fiber Providers” or “CFPs”) respectfully submit these Comments in response to the Commission’s two Infrastructure Notices of Proposed Rulemaking and Notices of Inquiry, the Wireline NPRM/NOI,<sup>4</sup> and the Wireless NPRM/NOI.<sup>5</sup>

Each of the CFPs provides a broad range of fiber-based telecommunications services and is consistently deploying new fiber-based networks to serve customers seeking innovative high-capacity broadband solutions. Southern Light is also an early adopter of DAS, helping its wireless carrier customers increase their capacity to provide next generation mobile broadband and laying the groundwork for 5G services when they come to market. The CFPs are:

Conterra is a national, facilities-based, fiber and wireless provider that offers high quality, high capacity backhaul and wide area telecommunications services to school districts, health care providers, select enterprises and wireless carriers located in rural and exurban America. Almost from its inception, Conterra has been providing purpose-built, carrier-class fiber and microwave network solutions that solve the problems of slow, unreliable Internet and telecommunications connections, as well as outdated data, media and video transport circuits. Conterra maintains an unwavering commitment to producing high-quality, scalable solutions that will meet the unique and constantly changing needs of high-bandwidth consuming organizations by providing flexible architectural designs and virtually unlimited bandwidth capacity.

Established in 1996, Conterra has an extensive background of service expertise in fiber optic based, highly reliable, highly scalable data transport network design, engineering, construction service implementation, and ongoing operations and maintenance. Conterra’s fiber footprint exceeds 7,000 route miles and 355,000 fiber miles, serving more than 3,500 “On-Net”

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<sup>4</sup> *Wireline Infrastructure NPRM, NOI, and RFC*, 32 FC Rcd. 3266.

<sup>5</sup> *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd. 3330 (2017) (“*Wireless Infrastructure NPRM/NOI*”).

locations including more than 500 owned and operated communication towers that support school districts and wireless carriers from coast to coast. Conterra specializes in providing private fiber networks to “multi-site” K-12 entities. Conterra operates in 23 states.

Established in 2001, Southern Light is currently a privately owned Alabama-based company and is a leading provider of fiber optic infrastructure solutions along the Gulf Coast.<sup>6</sup> The company focuses on delivering highly reliable, customized last-mile solutions and has invested approximately \$200 million in network and network-related activities. Its network includes approximately 6,100 fiber strand miles collectively in Alabama, Florida, Louisiana and Mississippi. The company has approximately 270 employees, serves 17 markets, serves approximately 5,000 on-net buildings, including 410 schools, and provides backhaul services to over 1,600 cell towers.

Uniti Fiber is a division of Uniti Group Inc., a publicly traded Real Estate Investment Trust (REIT) (NASDAQ: UNIT). Uniti Fiber is a leading provider of infrastructure solutions, including cell site backhaul and small cell for wireless operators, and Ethernet, Wavelengths and Dark Fiber for telecom carriers and enterprises. Uniti Fiber delivers custom-designed, technology-agnostic and access-agnostic solutions to meet its customers’ needs. Uniti Fiber’s infrastructure professionals have the expertise, dedication and customer focus to provide a variety of network connectivity options in lower-tier and rural markets where customers are struggling to find reliable, scalable and affordable solutions. The company’s ever-growing infrastructure currently spans 590,000 fiber strand miles and connects over 5,200 customer locations with local access to 2,600 municipalities and dozens of utilities.

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<sup>6</sup> In a transaction that is expected to close soon, Uniti Group will buy Southern Light. See *Domestic Section 214 Application Filed for the Transfer of Control of Southern Light, LLC to Uniti Group Inc.*, WC Docket No. 17-99, DA 17-474 (rel. May 16, 2017). It is expected that the approval for the transfer will be effective June 16, 2017.

## **II. The FCC Should Take Action to Streamline the Deployment of Fiber and Wireless Broadband Facilities**

The Commission should adopt rules that prospectively bar excessive state and local practices that impede the deployment of fiber and wireless broadband. Expanding the availability of robust fiber-based broadband and new wireless technology to bring more robust, diverse and higher-speed mobile broadband to more Americans requires that telecommunications carriers have reasonable and nondiscriminatory access to public right-of-way and publicly-owned facilities.

Given the continuing gaps that Americans face in broadband deployment, it is evident that there are flaws in the process companies must undergo as they deploy broadband infrastructure, including fiber and wireless facilities at the state and local level. Building broadband networks is hard work that requires significant investments in both time and capital. When time and capital are diverted away from actual facility installation and instead devoted to clearing regulatory roadblocks, consumers and enterprises, including local small businesses, schools and healthcare centers, suffer. Unnecessary regulatory delays that impede the delivery of broadband in one locality can often cause companies to devote their resources to other capital projects where the return on investment is more certain. Thus, streamlining the process for companies to obtain access to public right-of-way and publicly-owned infrastructure is critical to the expansion of both fixed and mobile broadband.

CFPs have explained to the Commission in the Business Data Services (“BDS”) proceeding that their margins for initial deployment of fiber builds are razor thin. Competitive carriers no longer build fiber networks on speculative business plans. To the contrary they are intently focused, as they should be, on the economics of any new broadband project, particularly the period of time before the carrier can be expected to recoup its initial investment (i.e., the



payback period). Their calculation of this payback period on the initial capital investment when evaluating whether to deploy fiber for that first customer in a new location or in a new market depends almost entirely on their ability to extend the planned network to serve other customers within a reasonable distance from the fiber within a certain timeframe and for a predictable cost.

As Uniti Fiber explained in the BDS proceeding:

Like other CFPs, most new services that Uniti Fiber provisions require some new construction. Like other CFPs, Uniti Fiber spends a substantial portion of its revenue on capital expenditures, predominantly construction to deploy and obtain fiber (and thus fresh competition) to a new customer or new customer location. Before bidding on projects that require new fiber deployment, Uniti Fiber analyzes the potential for return on its investment, including the payback period. As with other firms that build fiber networks, Uniti Fiber will only bid projects where it can predict a return on investment meets a target tied to exceeding the cost of capital.<sup>7</sup>

Lengthy permitting disputes and other unnecessary regulatory hurdles can delay and sink planned broadband infrastructure deployment when the uncertainty jeopardizes the CFP's ability to achieve a return on its investment. As Uniti Fiber explained, uncertainty is anathema to CFPs investing risk capital to deploy fiber:

adding uncertainty... may raise the cost of capital or reduce likely revenue. As a result there are likely to be projects that would be abandoned or never bid on in the first place because the return on investment is insufficient.<sup>8</sup>

Streamlining the local right-of-way approval process by removing excessive costs and delays, and making the process more uniform and predictable will help remove that uncertainty and stimulate the deployment of fiber networks in areas where the risk right now is not worth the reward.

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<sup>7</sup> Uniti Fiber Ex Parte Letter (J. Strenkowski, Counsel for Uniti Fiber to M. Dortch at 4, WC Docket No. 16-143 *et al.*, (filed Sept. 16, 2016).

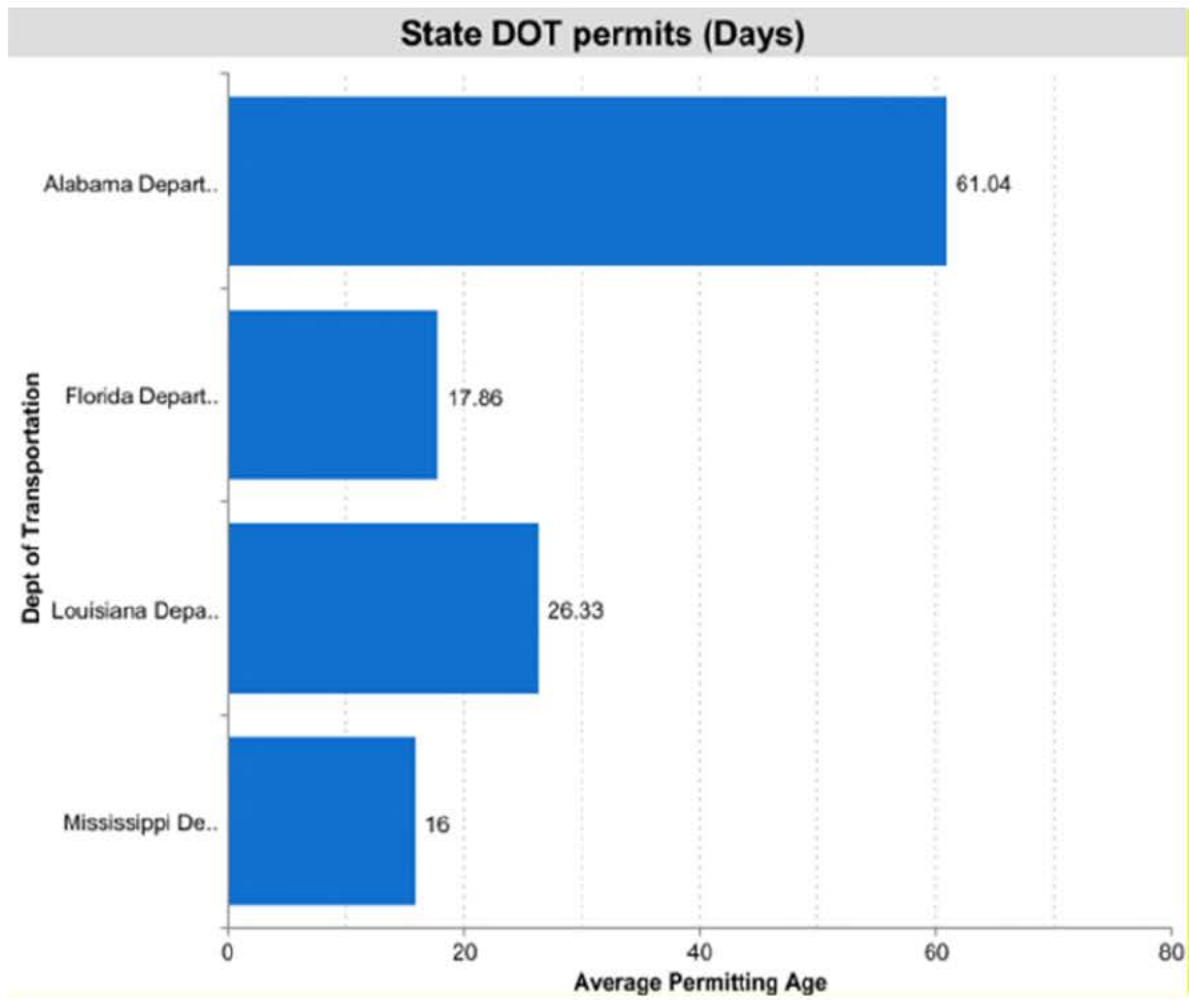
<sup>8</sup> *Id.*

### **III. The Commission Should Use its Authority Under Section 253 to Establish National Rules to Facilitate Deployment of Broadband**

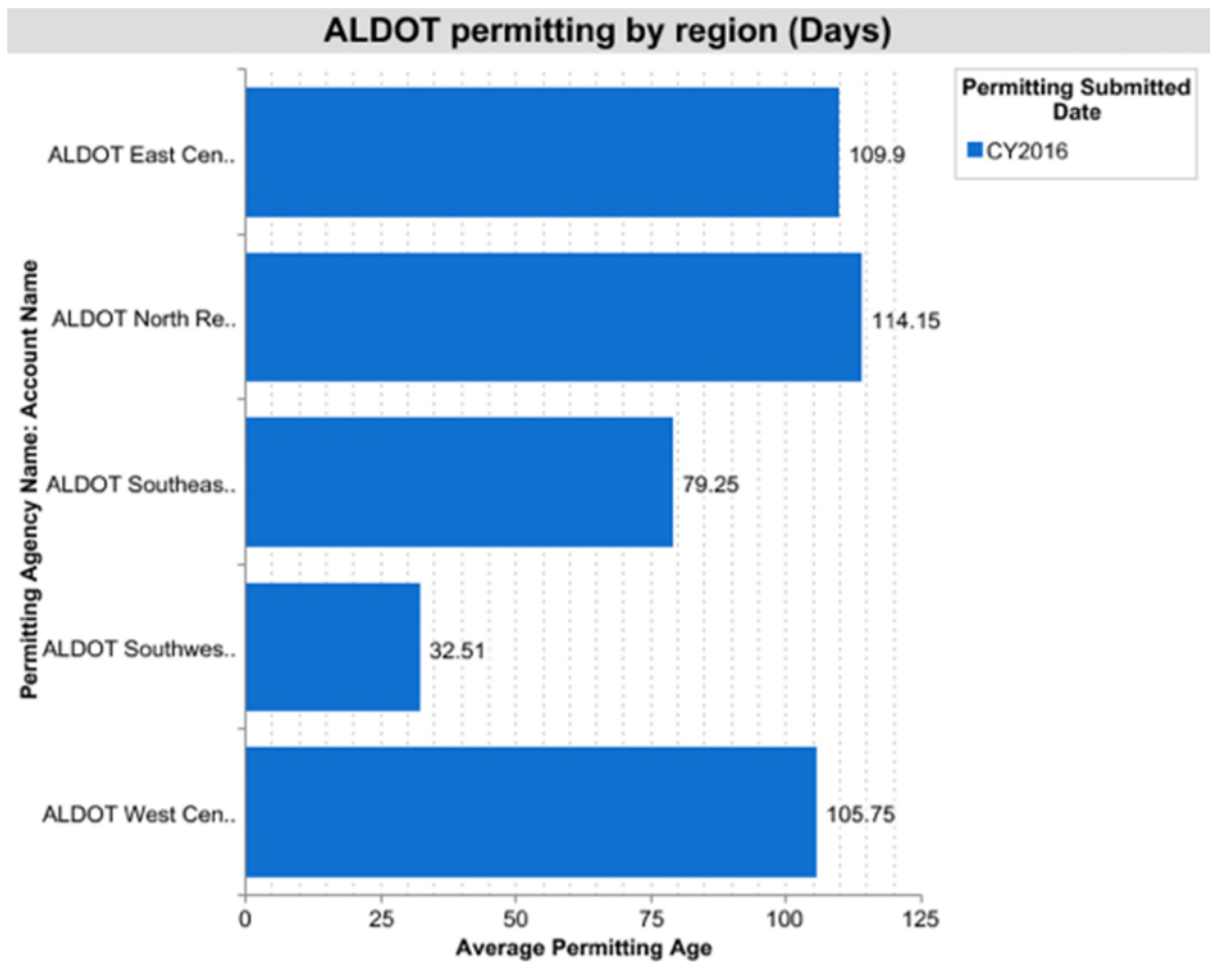
Deploying broadband networks today is a byzantine process, where carriers must navigate multiple and frequently overlapping jurisdictions in order to obtain the requisite franchises, permits, and zoning approvals. A typical deployment involves multiple local, county and state agency approvals, permits from state and federal highway officials and from railroads to cross their right-of-way.

The level of cooperation from these entities of course, varies from locality to locality, agency to agency and state to state. Even *within* some state agencies, CFPs can find some officials responsible for permitting in one geographic region to be much more or less willing to work collaboratively with the CFP than officials responsible for other geographic locations within the same agency.

This is illustrated in Southern Light's dealings with the Alabama Department of Transportation ("Alabama DOT"). The trends for Southern Light's permits before this particular agency have drastically worsened over time. In the fourth quarter of 2013 the Alabama DOT agency issued permits to Southern Light on average within 31 days. The average permit from this agency now takes over 50 days. As illustrated in the chart below, for Southern Light, this agency's performance is far worse than three peer agencies in several neighboring states, two of which take less than a third of the time to process permits and one less than half.



Most disturbing, however, is the variation within the four regions within the agency. As illustrated in the chart below, in 2016, three regions of this state agency average over 100 days to process Southern Light’s permits. The other regions processed permits in significantly shorter intervals, approximately 32 days and 80 days:



The multi-layered and complex approval process increases costs and lengthens deployments - in many cases to such levels that the project is no longer a worthy investment for the broadband provider.

It is thus critical that the Commission streamline the permitting and infrastructure access processes by standardizing the process across jurisdictions to the greatest extent possible, without infringing on state local zoning power where that power is exercised diligently and reasonably. Developing national rules creating such standards is thus critical.

Unfortunately, many local officials appear not to appreciate the significant role broadband infrastructure plays in improving the lives of the residents of the communities they serve. There are of course numerous localities that take seriously their responsibilities as

stewards of the public rights of way, and seek a proper balance between minimizing disruption of their roads and bridges in their communities and providing their citizens the broadband connectivity that is an engine for economic growth and key tool for connecting with communities across the country and the globe.

But other local government officials believe that the best way to serve their communities is by minimizing or outright preventing all potential infrastructure deployment disruptions and collecting as much revenue or other concessions as they can through excessive and burdensome fees for companies seeking access to public rights-of-way. The Commission has already established, however, that this conflicts with Congress' intent in adding Section 253 to the Communications Act in the Telecommunications Act of 1996. The Commission has determined that "the telecommunication interests of constituents ...are not only local. They are statewide, national and international."<sup>9</sup> Because Congress recognized this principle, it granted the Commission broad preemption authority under Section 253 to ensure that provincial concerns of local governments do not impede national goals for communications infrastructure modernization and deployment.

Congress clearly articulated a vision where the fees local governments charge for access to the public right of way must be reasonable and limited to compensating the government to costs it incurs in furnishing such access. But far too many local governments see infrastructure providers as piggybanks for extracting revenue for the locality's general use and impose the maximum charges they can possibly collect. In other cases, the local government, rather than trying to determine the compensation it is entitled to for disruption of its streets, demands that companies turn over core infrastructure such as fiber, conduit or even replacement lighting poles

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<sup>9</sup> *TCI Cablevision v. Oakland County*, 12 FCC Rcd. 21396, 21442, ¶ 106 (1997).

for the local government's use free of charge. At least one municipality demanded that a carrier pay for the municipality to hire consultants or employees in order to review right-of-way permitting applications. Another municipality demanded that the CFP not only replace existing city-owned decorative poles when the carrier sought permission to attach small cell equipment to these poles, but also insisted that the carrier provide a second decorative pole for the city's inventory for each pole replaced.

The CFPs have encountered significant obstacles in their efforts to bring state of the art broadband infrastructure to new communities. In some cases, municipalities have demanded that CFPs install hundreds of miles of 24-count fiber optic cable, with no guarantee that the municipality will not in turn use that fiber to compete with private enterprise.

Other cities, some with vibrant tech communities or government research centers, appear to have reasonable processes for obtaining access to rights of way, yet still issue franchise agreements that unlawfully bar the use of right-of-way for deploying wireless facilities, or grant such right-of-way access to a single party.

Other local agencies charge excessive per square foot charges to deploy fiber across bodies of water, leading CFPs to incur significant costs, delaying or preventing the delivery of broadband to schools, healthcare centers and other community institutions that are starving for broadband Internet access. For example, some local officials have explained to CFPs seeking access to right-of-way that they have "zero incentive" to help public utilities obtain permits to install communications facilities in their public rights of away. These impediments raised by misguided local governments conflict with Congress' vision in adopting Sections 253 and 332(c)(7) of the Act. Of course, current Commission policy requires utilities to seek court review in many such situations, a policy that few CFPs or other broadband providers are willing to

entertain.

With respect to wireless tower placements, some municipalities have used their building permit framework to impose significant and costly landscaping requirements around a tower, even where the tower is in a remote location (on the top of an uninhabited mountain), or in heavy industrial areas where there is no other vegetation or landscaping in the vicinity.

These anecdotes briefly touch on the impediments CFPs face while expanding the availability of broadband. CFPs have no objection to complying with permitting requirements that are legitimately related to the local government mission of protecting the health and safety of their citizens. But far too many of these demands are frivolous. While many local officials appreciate the importance of broadband as a factor in improving schools, education, healthcare and economic development, particularly in the poorest parts of rural America, many others believe that local governments should “use every tool in the toolbox” to make sure they are “not subsidizing the provider and infrastructure industries without obtaining significant benefits in return.”<sup>10</sup> Of course, Congress specifically rejected this paradigm by adopting Section 253 and giving the Commission “a rule of preemption” that “articulates a reasonably broad limitation on state and local governments’ authority to regulate telecommunications providers.”<sup>11</sup> This framework gives the Commission broad power to restrain efforts by local governments to deny their citizens the benefits of access to reasonably-priced competitive broadband connectivity. Given the prevalent and significant obstacles that CFPs face across the country, the Commission should now use that broad authority to streamline the local government approval process, reduce

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<sup>10</sup> Statement of The Honorable Gary Resnick, Mayor, Before The Senate Committee on Commerce, Science and Transportation, Investing In America’s Broadband Infrastructure: Local Government’s Efforts to Support Deployment While Properly Managing Public Rights-of-Way, at 7 (May 3, 2017).

<sup>11</sup> *Wireline Infrastructure NPRM, NOI, and RFC*, 32 FCC Rcd. at 3296, ¶ 100.

unnecessary regulatory barriers, and unleash strong new investment in fixed and wireless broadband networks.

**A. Sections 253 and 201(b) Provide the Commission with Statutory Authority to Adopt Prospective Rules**

The Commission has the statutory authority to adopt rules that “prospectively prohibit the enforcement of local laws that would otherwise prevent or hinder the provision of telecommunications service.”<sup>12</sup> The Supreme Court has established that “Congress ... unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication.”<sup>13</sup> Further, the Supreme Court has found that Section 201(b) of the Act confers on the Commission broad jurisdiction to “carry out” all of the Act’s local competition provisions, particularly those such as Section 253 added by the 1996 Act.<sup>14</sup>

The 1996 Act reordered the existing legal framework for regulating telecommunications services.<sup>15</sup> It rejected monopoly in favor of competition and it made it a national policy to foster the deployment of advanced telecommunications services — broadband. Congress gave the Commission power to “dismantl[e] existing legal barriers that would otherwise inhibit” such competition.<sup>16</sup> That includes authority for the Commission to preempt local regulation that interferes with the Act’s basic objectives — including both local competition and broadband deployment.

Nothing in Sections 253(b-d) bar the adoption of rules that prospectively preempt local

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<sup>12</sup> *Id.* at 3300, ¶ 109.

<sup>13</sup> *City of Arlington v. FCC*, 133 S.Ct. 1863, 1872 (2013).

<sup>14</sup> *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 378 (1999).

<sup>15</sup> *Id.* (holding that with respect to “the matters addressed by the 1996 Act,” Congress has unquestionably “taken the regulation of local telecommunications competition away from the States.”).

<sup>16</sup> *AT&T Corp.*, 525 U.S. at 748 *citing* 47 U.S.C. § 253(a) (J. Breyer concurring).



regulation that impedes the deployment of telecommunications services.<sup>17</sup> In adopting rules, the Commission can establish certain practices generally fail to meet the safe harbors available in Sections 253(b) and (c). For example, CFPs below urge the Commission to adopt a “shot clock” for negotiation of a local franchise for access to right-of-way and access to publicly-owned infrastructure (such as poles, *e.g.*), regardless of whether the company is seeking a franchise for deployment of wireless facilities, fiber optic facilities, or some combination of multiple services. The Commission can reasonably conclude that local requirements that result in delays exceeding those shot clocks “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>18</sup> The Commission can likewise reasonably conclude that such shot clocks give local governments ample time to take any steps to “protect the public safety and welfare.”<sup>19</sup>

Nor is the language in Section 253(d) that grants the Commission authority to preempt state or local requirements “to the extent necessary to correct such violation or inconsistency” an impediment to the adoption of prospective rules. The Commission, can, for each rule adopted, clarify that its preemption is limited and only applies to the extent necessary to resolve the legal requirements’ conflict with Section 253. Similarly, the notice and comment requirement would not impede adoption of rules either. The statute does not unambiguously require the agency to seek notice and comment for each single local requirement it seeks to preempt. Rather, Section 253(d) is drafted broadly and provides the Commission ample latitude to elect the best procedure for utilizing its preemption power – declaratory ruling, complaint or legislative rulemaking. At a

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<sup>17</sup> See *Wireline NPRM, NOI, and RFC*, 32 FCC Rcd. at 3300-01, ¶¶ 109-110.

<sup>18</sup> 47 U.S.C. § 253(a).

<sup>19</sup> 47 U.S.C. § 253(b). Any local government that believes it needs more time to address a pending franchise application would always be free to seek a waiver from the Commission.

minimum, reviewing courts must afford the Commission broad deference in construing the ambiguous provisions in Section 253.<sup>20</sup>

The Commission plainly has the statutory authority to take the actions contemplated in both the Wireless and Wireline notices. The Commission can easily dispose of concerns based on the “faux-federalism” arguments the Supreme Court rejected in *City of Arlington*<sup>21</sup> and *Iowa Utilities Board*,<sup>22</sup> and that the Fourth Circuit rejected in *Montgomery County v. FCC*.<sup>23</sup> As the Supreme Court found in *City of Arlington*, Congress has spoken to the issue by “explicitly supplant[ing] state authority by *requiring* zoning authorities to render ... decision[s]” consistent with federal law.<sup>24</sup>

Consistent with these decisions the Commission should dismiss claims of local governments that siting of telecommunications facilities in the right-of-way is an issue of primarily local concern. Congress has unambiguously provided otherwise. With respect to deployment of wireless communications, Congress has clearly spoken that local discretion over siting matters is limited under federal law through operation of both Section 332(c)(7)(B)(ii) of the Communications Act and Section 6409(a) of the Spectrum Act. As the Supreme Court has explained as “interstate commerce ... become[s] ubiquitous, activities once considered purely local have come to have effects on the national economy and have accordingly come within the

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<sup>20</sup> *City of Arlington*, 133 S.Ct. at 1872.

<sup>21</sup> *See id* at 1873.

<sup>22</sup> *AT&T Corp.*, 525 U.S. at 379.

<sup>23</sup> *Montgomery County v. FCC*, 811 F.3d 121, 128-29 (4th Cir. 2015) (rejecting the federalism-based claims of local governments opposing the Commission’s adoption of a deemed granted mechanism in the *2014 Infrastructure Order*).

<sup>24</sup> *City of Arlington*, 133 S. Ct. at 1863.

scope of Congress' commerce power.”<sup>25</sup>

#### **IV. The FCC Should Establish a Technology Neutral Shot Clock Regime for Processing Franchise Applications and Permits**

One of the most important achievements the Commission has made in the last twenty years has been adopting shot clocks to govern the deployment of wireless broadband infrastructure,<sup>26</sup> and the issuance of competitive cable franchises.<sup>27</sup> The Commission should expand its use of infrastructure related shot clocks under Section 253(a) to provide citizens and broadband providers certainty and predictability in planning for and investing in new broadband deployments. The *Wireline NPRM* seeks comment on “adopting rules to eliminate excessive delays in negotiations and approvals for rights-of-way agreements and permitting for telecommunications services.”<sup>28</sup>

##### **A. The Commission Should Establish a Shot Clock Regime for Franchise Applications**

The *Wireline NPRM* further seeks comment on whether the Commission's local video franchise process timeline are reasonable.<sup>29</sup> CFPs believe that they are reasonable and should be adopted for all local franchise applications, including those for fiber and wireless infrastructure

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<sup>25</sup> *New York v. U.S.*, 505 U.S. 144, 158 (1992).

<sup>26</sup> *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies et al.*, Report and Order, 29 FCC Rcd. 12865 (2014) *erratum*, 30 FCC Rcd. 31 (2015) (“2014 Infrastructure Order”), *aff'd* *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015); (establishing 60 day shot clock for collocations covered by Section 6409 of the Spectrum Act, Pub. L. No. 112-96, 126 Stat. 156 (2012) (“Spectrum Act”); *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd. 13994 (2009) (“2009 Declaratory Ruling”), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013) (adopting 90-day and 150-day shot clocks for local government review of wireless facility siting applications).

<sup>27</sup> *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*, 22 FCC Rcd. 5101 (2006) (“Local Franchise Reform Order”).

<sup>28</sup> *Wireline NPRM, NOI, and RFC*, 32 FCC Rcd. at 3297, ¶ 103.

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

deployment.

In the 2006 *Local Franchise Reform Order*, the Commission found that local franchise negotiation processes should not exceed six months.<sup>30</sup> The Commission found that “unreasonable delays in the franchising process deprive consumers of competitive video services, hamper accelerated broadband deployment, and can result in unreasonable refusals to award ... franchises.”<sup>31</sup> But the Commission also determined that a ninety (90) day timeframe was more appropriate for facilities-based companies that already had access to right-of-way or already had, by virtue of “obtaining a certificate for public convenience and necessity from a state... demonstrate[d] its legal, technical, and financial fitness to be a provider of telecommunications services.”<sup>32</sup>

The Commission should establish 120 days as the maximum amount of time for a local government to process and approve an initial local franchise application. Such a rule is consistent with the Commission’s Section 253(a) authority because local franchising processes that exceed 120 days “prohibit or have the effect of prohibiting the provision of service” in violation of Section 253(a).<sup>33</sup>

CFPs recognize that the 120 day period is two months shorter than the period for first time local video franchisees.<sup>34</sup> However, as the Commission observed such video franchisees

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<sup>30</sup> *Local Franchise Reform Order*, 22 FCC Rcd. at 5137, ¶ 72.

<sup>31</sup> *Id.* at 5134, ¶ 67; 47 C.F.R. § 76.41(d) (“When a competitive franchise applicant files a franchise application with a franchising authority and the applicant ... does not have existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must grant or deny the application within 180 days of the date the application is received by the franchising authority.”).

<sup>32</sup> *Local Franchise Reform Order*, 22 FCC Rcd. at 5136, ¶ 71.

<sup>33</sup> *See* 47 U.S.C. § 253(a).

<sup>34</sup> 47 C.F.R. § 76.41(d).

were frequently subject to the local franchise authority’s evaluation of the company’s “legal, technical, and financial fitness” to use the right-of-way.<sup>35</sup> This does not apply to telecommunications carriers negotiating local franchise agreements since in most instances , the state public utilities regulator has already evaluated the company’s “legal, technical, and financial fitness” as part of the process for approving a license to provide telecommunications service in the state. Thus a shorter timeline is appropriate. The CFPs recognize, however, that some local review is necessary in addition to that conducted by the state public utilities regulator. CFPs thus propose the Commission adopt a three part timeline, that would apply where states or local governments have failed to establish shorter timeframes in their statutes or regulations: 90 days, consistent with the *Local Franchise Reform Order*, for carriers amending their existing franchise (for example to add wireless capability where such service was not contemplated in the initial franchise); 120 days for new franchises where the carrier has already received a CPCN or its equivalent, from the state public utilities regulator authorizing it to provide facilities-based services; and 180 days for carriers that have not yet received such facilities-based license from the requisite state utilities regulator and are seeking their first franchise.

Similar to the Commission’s rules adopted for eliminating barriers to video competition under the Cable Act,<sup>36</sup> the Commission’s rules governing the timeline for local awards of franchises for telecommunications carriers should not allow for extensive and burdensome pre-application processes that allow local government the ability to delay approval and entry and avoid the timeline established by Commission rule. Section 76.41(c) of the Commission’s video franchise rules require that a “franchising authority may not require a competitive franchise applicant to negotiate or engage in any regulatory or administrative processes prior to the filing

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<sup>35</sup> *Local Franchise Reform Order*, 22 FCC Rcd. at 5136, ¶ 70.

<sup>36</sup> 47 C.F.R. § 76.41(c).

of the application.”<sup>37</sup> The Commission should adopt identical language applicable to telecommunications carrier franchises, finding that such process unreasonably delays deployment thereby effectively preventing the provision of telecommunications service without serving any countervailing purpose covered under Sections 253(b) or (c).

**B. The Commission Should Establish a Sixty Day Shot Clock For Applications to Deploy Small Cell Facilities in the Public Right-of-Way**

In many cases CFPs submit applications for permits to begin specific broadband infrastructure projects in conjunction with their franchise applications. But in other circumstances the processes are separate, as the CFP may need to regularly obtain new permits to expand its broadband infrastructure network to areas of the municipality covered by the franchise but where it has not yet installed facilities, either fiber or small cells. Under such circumstances the CFPs will apply for permits to deploy specific facilities, particularly wireless facilities in the right-of way.

The Commission wisely imposed shot clocks for deploying wireless facilities in the public right-of-way, first in 2009<sup>38</sup> pursuant to Section 332(c)(7) of the Act and again in 2014, pursuant to the Spectrum Act.<sup>39</sup> In those decisions, the Commission specifically brought small cells within the ambit of the *2009 Declaratory Ruling* and established shorter timeframes for collocations of wireless facilities where wireless infrastructure already exists.<sup>40</sup>

The *2014 Infrastructure Order* adopted a 60 day shot clock for wireless facility

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<sup>37</sup> *Id.*

<sup>38</sup> *2009 Declaratory Ruling*, 29 FCC Rcd. 13994.

<sup>39</sup> *2014 Infrastructure Order*, 24 FCC Rcd 12865.

<sup>40</sup> *Id.* at 12957, ¶ 216.

deployments meeting certain criteria under the *Spectrum Act*.<sup>41</sup> The *Wireless NPRM* now seeks comment on adopting similar shot clocks for deployments not currently covered by the FCC's 60 day shot clock under 47 C.F.R. § 1.40001.<sup>42</sup> At a minimum, the Commission should extend the 60 day shot clock adopted in the 2014 Infrastructure Order to new small cell/DAS<sup>43</sup> deployments in the public right of way.

The CFPs regularly encounter significant delays and obstacles from local government authorities when deploying small cells in the public right-of-way, even when the facilities will be attached to existing utility poles that already have numerous communications and electrical attachments. There is no legitimate reason why such permits should be subject to the same timeline as deploying infrastructure where no communications facilities have previously been deployed.<sup>44</sup>

Because of technological advancement, small cell wireless infrastructure has much more in common with everyday utility infrastructure than with its larger wireless "macrocell" relatives installed on private property. Because of the anticipated demand for broadband wireless networks, as well as the technical limits that small cells have with respect to geographic

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<sup>41</sup> *Id.* at 12956-57, ¶ 215; 47 C.F.R. 1.40001(b) 60 days hot clock applies to "request for a modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station")

<sup>42</sup> *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd. at 3337-38, ¶ 18.

<sup>43</sup> CFPs references to small cell cells in these comments also include DAS and other similar technologies that differ from microcells. *2014 Infrastructure Order*, 29 FCC Rcd. at 12878-79, ¶ 30, n. 42.

<sup>44</sup> For this same reason the Commission should clarify that under section 332(c)(7) it is unreasonable for municipalities to require lengthy permitting reviews where a company seeks to adjust the location of a tower within a single parcel of property of towers or otherwise modify existing structures. A clear directive from the Commission is necessary so carriers would not need to undertake costly and duplicative permitting reviews for same-parcel tower replacements, or to be required to go through lengthy permitting processes to modify existing structures. Such procedures should be subject to a shorter timeline than the 90/150 day period established in the *2009 Declaratory Ruling*.

coverage, carriers typically seek to locate small cell infrastructure in existing utility corridors (*i.e.*, where people that use wireless broadband services are located). In order to promote wider availability of robust wireless broadband the timeline for processing such applications should be adjusted to account for the limited impact associated with deploying small cell facilities in the public right-of-way.

The *2014 Infrastructure Order* distinguished the treatment of wireless facilities deployed in the public right-of-way from facilities deployed elsewhere, noting that “utility structures,” such as poles, are “often located in easements adjacent to vehicular and pedestrian rights-of-way ... [and] are more likely to raise aesthetic, safety, and other issues.” While this may be accurate it does not diminish the need for municipal officials to expeditiously conduct their review of such concerns. The overwhelming majority of these right-of-way corridors already have roads, utility poles with electric and communications facilities, power transformers, and various types of equipment boxes, traffic lights, traffic signs, streetlights, and a panoply of various ground furniture (e.g., trashcans, bus stops, phone booths, newspaper dispensers, utility and traffic signal cabinets, etc.).

Second, the need for local government review of such deployments is limited. The nature of existing aerial and underground right-of-way corridors already limit the size of any additional infrastructure that can be deployed. The size of wireless equipment, for instance, is inherently limited by the physics of what size and weight equipment can be attached to a utility pole or streetlight or, in some underground areas. Macrocell installations, in contrast, with multiple antennas and large equipment cabinets, are simply too big to place in these utility corridors. Any wireless equipment deployed in the utility corridor will, by necessity, already have a size and form factor to blend in with the surrounding environment.



Despite the limitations that should be inherent in processing applications to install small cell facilities in the public right-of-way, the CFPs have encountered significant delays in many localities when seeking to deploy small cells. For example, in some municipalities CFPs have encountered delays of more than five months for issuing permits. Some municipalities that lack a “small cell ordinance” have simply refused to discuss such installations with CFPs. In other municipalities significant delays occur because permits to install small cells on utility poles must be approved by the municipal electrical inspector. These inspections must occur even where the electric utility has already approved the application pursuant to a bilateral pole attachment agreement. There is simply no legitimate reason that a municipal electrical inspector — the office responsible for certifying electrical installations in businesses and residences — should have any role in reviewing permits on electrical utility poles where the utility has already approved the permits and the pole contains power equipment. For that reason, the Commission’s rules adopted pursuant to this NPRM should explicitly apply to all agencies of the municipal government. The sixty-day shot clock should not include 60 days for each layer of municipal government review; instead it should be limited to a single 60-day period in which all levels of review must be concluded. This is consistent with the Commission’s shot clock rules for local video franchises.<sup>45</sup> Further, the timeline for local government review should not require an applicant to “negotiate or engage in any regulatory or administrative processes prior to the filing of the application.”<sup>46</sup>

Further, once CFPs have made small cell installations on publicly-owned poles and other infrastructure, they should not be subject to significant rent increases imposed after the fact. In a

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<sup>45</sup> *Local Franchise Reform Order*, 22 FCC Rcd. at 5137, ¶ 73 (“LFA may engage in...multiple levels of review ...provided that a final decision is made within the time period established under [the Commission’s] *Order*.”)

<sup>46</sup> *See e.g.*, 47 C.F.R. § 76.41(c).

worst-case scenario, increases in fees could necessitate that CFPs decommission existing small cell deployments, or be forced to re-engineer and re-deploy such facilities. The FCC's framework should include measures to ensure that fees paid by small cell providers, which often need to collocate on hundreds or thousands of poles and other infrastructure facilities in a given municipality, should not be subject to sharp price increases following the installation of such facilities.

**C. The Commission Should Adopt a Shot Clock For Post Installation Approvals**

While the Commission has rightly focused its dual infrastructure rulemakings on the issues plaguing franchise approvals and permitting that allow broadband providers access to critical rights-of-way for installing broadband facilities, such a focus ignores the other side of the problem - namely delays in securing final inspections and approvals once the installations are complete and ready for turn-up. Typically, once the CFP has completed the permitting phase of a project - particularly a small cell installation, it will take numerous months to install the facilities and complete testing. Once the testing is complete most municipalities require inspections and approvals before the equipment can be powered on and used for providing services. It should then be no surprise that this process is also rife with delays by state and local officials. In order to facilitate and streamline this process, the Commission should apply its permitting shot clock to the post-installation inspection phase of a deployment.

**V. The Commission Should Expand its Use of Deemed Granted Remedies for State/Local Government Reviews that are Not Concluded Within a Reasonable Period**

The *2014 Infrastructure Order* adopted a deemed granted remedy for state/local government failure to approve relevant applications within the 60-day timeline for collocations

covered by the Spectrum Act and the Commission’s implementing rules.<sup>47</sup> The Commission however, declined to adopt a deemed granted remedy for non-Spectrum Act applications.<sup>48</sup> In the *Wireless NPRM*, the Commission now seeks comment on whether an eligible request should be “deemed granted” by “operation of law if a State or local government fails to act within a specified period of time.”<sup>49</sup> The CFPs recommend that at a minimum, the Commission establish a deemed granted remedy for the additional shot clock provisions proposed in these comments: a) for new local franchise applications for telecommunications carriers, both for new applications covered by the longer 180 day shot clock and for applications covered by the CFPs proposed shorter 120-day period; and b) for applications to locate small cell facilities in the public right-of-way covered by the proposed 60 day shot clock.

In the *2014 Infrastructure Order*, the Commission correctly observed that “withholding a decision on an application indefinitely, even if an applicant can seek relief in court or in another tribunal, would be tantamount to denying it.”<sup>50</sup> The Commission thus adopted a “deemed granted remedy” which will directly serve the broader goal of “promoting the rapid deployment of wireless infrastructure.”<sup>51</sup> The current regime plainly impedes deployment and encourages localities to defy federal law. Localities understand that applicants are reluctant to devote scarce resources to litigation, particularly when even at the end of the litigation the applicants must return to that local government for further authorization every time they seek to expand their network or modify existing facilities to provide upgraded broadband services. Under this

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<sup>47</sup> *2014 Infrastructure Order*, 29 FCC Rcd. at 12961, ¶ 226.

<sup>48</sup> *Id.* at 12978, ¶ 284.

<sup>49</sup> *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd. at 3334, ¶ 9.

<sup>50</sup> *2014 Infrastructure Order*, 29 FCC Rcd. at 12961, ¶ 227.

<sup>51</sup> *Id.*

paradigm, localities have every incentive to drag out the process, delay applications and burden providers with ever increasing demands for fees and in-kind compensation. And from the CFP's perspective, it is far easier simply to cancel the infrastructure deployment in such areas, which of course robs the local businesses and citizens of faster, more dependable, and more diverse broadband deployment in the community. A deemed granted remedy will thus encourage municipalities to adhere to federal deadlines and standards, lead to streamlined and lower cost deployments and thus wider availability of robust broadband services to the benefit of local persons and businesses.

The existing remedy of filing a preemption petition with the Commission or seeking a federal court injunction in practice provides no workable remedy for broadband providers. CFPs are generally unwilling to take municipalities to court in order to enforce Commission rules. Many times they do not want to upset the relationships that they have, or be perceived in the market as being difficult to work with. It generally takes egregious action or inaction by local officials before CFPs are willing to seek judicial redress. Municipalities are aware of this reluctance and exploit it by pushing the boundaries of reasonable demands on facilities construction. A deemed grant in effect makes the Commission's shot clock rules self-effectuating and will encourage greater compliance.

Consistent with the rule adopted in the *2014 Infrastructure Order*, once the time period has passed and a pending application has been deemed granted by operation of federal law, a telecommunications carrier should be required only to provide notice to the local government that its application has been "deemed granted" in order to proceed with construction.<sup>52</sup> Further, as it did in the *2014 Infrastructure Order*, the Commission should allow an aggrieved

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<sup>52</sup> *Id.* at 12961, ¶ 226.

municipality to seek redress in federal court if it believes an application was deemed granted in error.<sup>53</sup> The CFPs urge the Commission to adopt a deemed granted remedy to fulfill Congress's intent to streamline the process for upgrading and improving broadband infrastructure without egregious delay. Further, in such cases where a "deemed granted" remedy is used by a CFP, a second "deemed granted" remedy should be made available with respect to any final "close-out" permits that a CFP may need in order to "turn on" the installed facilities. The localities should not be allowed to use other incremental or final permitting procedures as a means of delaying the use of installed facilities. In sum: a small cell is only furthering the Commission's broadband deployment goals if the carrier is allowed to turn it on.

Lastly, the Commission should adopt a deemed granted remedy for violations of the 90-day and 150-day shot clocks adopted in the *2009 Declaratory Ruling*, using its preemptive power under Section 332(c)(7) to deny local zoning boards the ability to frustrate federal policy regarding the deployment of broadband wireless networks.

The Commission should establish a rule providing that when a local government fails to act within the "shot clock" time frames for wireless siting, the authority will be considered to have not acted within a reasonable period of time under Section 332(c)(7) and the application will be deemed granted.<sup>54</sup> This will avoid litigation such as *Crown Castle NG East v. Town of Greenburgh*. That case took over four years to reach a decision at the Second Circuit Court of Appeals ordering the granting of the permits.<sup>55</sup> In the meantime, the residents and businesses of the town suffered with sub-par wireless broadband than they otherwise would have had because

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<sup>53</sup> *Id.* at 12963, ¶ 234.

<sup>54</sup> *Wireless Infrastructure NPRM /NOI*, 32 FCC Rcd. at 3333, ¶ 8.

<sup>55</sup> *Crown Castle NG East Inc. v Town of Greenburgh*, No. 13-cv-2921, 2014 WL 185012 (2d. Cir. 2014).

of open hostility of a local government to small cell wireless facilities in the public rights-of-way.

The Commission's goal should be to direct resources to supporting broadband deployment, not costly and time-consuming litigation. A deemed granted remedy for all applications – both wireline and wireless — and regardless of the authority under which the shot clock is adopted, will ease the burden of local government approvals, streamline deployment and promote investment in expanding broadband.

#### **VI. The FCC Should Use its Authority Under Section 253(a) to Preempt Moratoria Imposed by State/Local Governments**

CFPs have encountered moratoria in numerous forms and municipalities where they have sought authorization to deploy telecommunications infrastructure, both wireline and wireless, in the public rights-of-way. In one municipality, applicants were informed there was a moratorium on competitive deployments, allowing incumbent phone companies and cable operators to operate without fear of competitive deployment on the horizon. In at least one instance, an agency has granted right-of-way access privileges to a single entity through a bidding process, thereby creating a monopoly on access to the rights-of-way in that jurisdiction. In other areas, state highway officials have refused to issue permits for deploying fiber on bridges, even where spare conduit is available. In addition, municipally-owned utilities frequently delay issuance of pole attachment applications or claim they have issued a moratorium on new construction thereby impeding the deployment of service to the community. While such municipally-owned utilities are not subject to the Pole Attachment Act, the Commission should take all available steps, including the use of Section 253 and recommending legislative action to Congress, to remove this significant impediment to broadband deployment.

The *Wireline NPRM* asks whether the FCC should adopt “rules prohibiting state or local

moratoria on market entry or the deployment of telecommunications facilities.”<sup>56</sup> The Commission has already established that moratoria do not toll any of the infrastructure deployment shot clocks in the FCC’s rules.<sup>57</sup> There is no reason to adopt a different policy with respect to any of the shot clocks adopted as a result of these rulemaking proceedings.

The Commission, however, in the event that it does not adopt a more expansive regime of shot clocks, should explicitly state that moratoria by any municipal agency clearly violates Section 253(a) and cannot be saved by either Section 253(b) or (c). A moratorium clearly effectively bars the provision of service.

Moratoria can impose significant costs that impede the deployment of broadband infrastructure. For some CFPs denied the ability to deploy fiber across bridges and highways, the only alternative is to bore underneath the body of water instead of using the conduit on the bridge. While deploying through existing conduit would cost approximately \$20,000, the cost to bore under a significant body of water can easily exceed \$500,000. That difference cannot be overcome and usually means the community at the other end of the bridge does not receive the same broadband as its mainland neighbors. Where school systems are involved, companies serving those schools can only deliver broadband to the mainland schools, while the schools across the water remain isolated and without the tools necessary to promote digital literacy. Such policies clearly exacerbate the digital divide.

In other cases, local governments cite to pending state or federal legislation as grounds to halt or delay the filing or processing of right-of-way permits or franchise applications.

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<sup>56</sup> *Wireline NPRM, NOI and RFC*, 32 FCC Rcd. at 3297, ¶ 102.

<sup>57</sup> *2014 Infrastructure Order*, 29 FCC Rcd. at 12971, ¶ 265; 47 C.F.R. 1.40001(c)(3) (“Tolling of the timeframe for review. The 60-day period begins to run when the application is filed, and may be tolled only by mutual agreement or in cases where the reviewing State or local government determines that the application is incomplete. The timeframe for review is not tolled by a moratorium on the review of applications.”).

Municipalities also can create a “moratorium” as a negotiating tactic to extract in-kind payments or fees from carriers, or simply to prevent carriers from installing facilities in the right-of-way because the local government does not want to issue a permit under any circumstance. Because carriers have strong incentives against seeking judicial redress or relief from the Commission in these situations, the Commission should prospectively preempt moratoria on deployment of facilities in the public right-of-way. Otherwise, carriers will refuse to deploy facilities in those areas, robbing citizens in that municipality of the benefits from increased and improved broadband services.

**VII. The Commission Should Hold That Local Government Demands For Free Or Reduced Price Access To Facilities And Services, Including Free Provision Of Fiber or Other In-Kind Payments, Violate Section 253(c).**

Many local governments, either as a substitute for or in addition to monetary payments for right-of-way access, insist that CFPs provide excessive in-kind payments, including free strands of fiber or free conduit. In some instances, the local government requires CFPs to deed over all conduit and pay the local government a fee to lease access to that conduit.<sup>58</sup> There are numerous problems with such requirements. First, the costs of the free fiber or conduit greatly exceeds the actual burden access to rights-of-way imposes on the community. Further, turning over free fiber strands or conduit to the local government may deprive the CFP of an ability to obtain a return on its investment and pay the franchise fees; particularly if the local government elects to use the free infrastructure it has received to build its own network rather than using the networks of private sector telecommunications companies.

The burden of negotiating these provisions is a significant impediment to the deployment

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<sup>58</sup> *Zayo Group LLC v Mayor and City of Baltimore et al.*, 2016 WL 3448261 (D. Md. 2016).



process, delaying, and in some cases denying communities access to fiber. The Commission should construe the term reasonable and fair compensation to exclude terms for rights-of-way access that require companies to relinquish ownership of facilities, or to provide free fiber or conduit for the local government's use.

### **VIII. Section 253(c) Plainly Demands That Fees Be Nondiscriminatory**

The Commission has long held that fees “imposed only on ...new entrants and not on ...incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.”<sup>59</sup> Courts have explained that what is required is “a rough parity between competitors”<sup>60</sup>, and have determined that local governments may not “impose a host of compensatory provisions on one service provider without placing any on another.”<sup>61</sup>

Despite the clear statutory command, local governments insist on imposing on CFPs fees and requirements that they do not impose on incumbents. The City of Baltimore serves as a prime example of the barriers local governments impose on competitive deployment of fiber. The City's “overall conduit scheme... allows only Verizon to maintain its own conduit system, and prevents [competitors] from using Verizon's conduit.”<sup>62</sup> But the scheme is even more discriminatory:

The City permits Verizon to operate and maintain its own, conduit system, allowing it to control its costs, and charges Verizon less than \$.07 per linear foot for the space that it leases in the public right-of-way. Further, Verizon's costs for renting the right-of-way have not changed since the 19th century.<sup>63</sup> In comparison, the City prohibits [CFPs] and other providers from building their own conduit systems; charges them \$3.33

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<sup>59</sup> *TCI Cablevision v. Oakland County*, 12 FCC Rcd. 21396, 21443, ¶ 108 (1997).

<sup>60</sup> *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 80 (2d. Cir. 2002).

<sup>61</sup> *Id.*

<sup>62</sup> *Zayo*, 2016 WL 3448261 \*6.

<sup>63</sup> *Id.* \*7.

per linear foot to lease space in the City's conduit; bars them from interconnecting their wires with Verizon's conduit; and when [CFPs] do install their own conduit, they must then deed ownership of the new conduit to the City, and pay the City fees for conduit that they themselves built.

Further, while “the City adjusts plaintiffs’ fees every year, Verizon and its predecessor have paid the same fees for right-of-way access since 1889.”<sup>64</sup> While Baltimore’s rights-of-way scheme is egregious, it has taken years of disputes and litigation to bring this regime into the light, and yet little has changed.

CFPs must work on a daily basis with local governments that impose discriminatory fees on CFPs. For example, it is common to encounter schemes requiring that CFPs pay double what incumbents pay for the same access to right-of-way. Newark, NJ, for example, charges telecommunications providers other than Verizon \$2.50 per foot per year even if the fiber occupies Verizon conduit.

Commission action is necessary to stop local governments from continuing to burden competitive deployment with discriminatory rights-of-way rates and conditions that are unlawful. The Commission’s declaratory ruling should specifically find that schemes that require CFPs to pay more than what incumbents pay are unlawful and inconsistent with the language of Section 253(c). Such schemes are inconsistent with the statutory command that fees for access to right-of-way must be “fair and reasonable” and imposed “on a competitively neutral and nondiscriminatory basis.”<sup>65</sup>

**IX. The Commission Should Mandate That Local Governments, Upon Request, Disclose The Right-of-way Fees Charged To Other Companies For Access To The Public Right-of-Way.**

Local governments, in order to avail themselves of the “safe harbor” of Section 253(c),

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<sup>64</sup> *Id.* \*7.

<sup>65</sup> *See* 47 U.S.C. § 253(c) (2012).

must make the rates charged to other telecommunications providers available to subsequent applicants for access to the rights-of-way. Without such disclosure, subsequent competitors will not be able to determine the fees that incumbents pay and could be compelled to pay right-of-way fees in excess of those previously charged and thus discriminatory. On this point the statute is explicit – section 253(c) applies *only* to fees that are “publicly disclosed”.

Nonetheless, some local governments are reluctant to provide information regarding the right-of-way fees they charge other providers, lest they forfeit the advantage they possess with respect to such information. Freely making such information available will make it hard for local governments to delay and obstruct competitive deployment by insisting on rates that are far above what previous providers have paid for similar use. The Commission should adopt this common sense construction of Section 253(c) without further delay.

## **X. Conclusion**

For the aforementioned reasons, the Commission should adopt the proposals herein to streamline and facilitate expanded broadband deployment.

Respectfully submitted,

*/s/ Joshua M. Bobeck*

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