Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF T-MOBILE USA, INC.

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T-Mobile USA, Inc. ("T-Mobile")[1] respectfully submits these comments in response to the Commission's *Wireless NPRM/NOI* and *Wireline NPRM/NOI*, which together seek input on ways to accelerate the deployment of next generation networks and services—including wireless services—by removing barriers to infrastructure deployment.[2]

INTRODUCTION AND SUMMARY

T-Mobile strongly supports the Commission's sustained focus on actions to expedite the deployment of new network infrastructure. Delivery on the promise of 5G will require the

[1] T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

[2] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) ("*Wireless NPRM/NOI*"); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) ("*Wireline NPRM/NOI*"); *see also Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Order, DA 17-525 (rel. May 26, 2017) (harmonizing deadlines so that comments and replies to both the *Wireless NPRM/NOI* and the *Wireline NPRM/NOI* are due by June 15, 2017, and July 17, 2017, respectively).

deployment of dense wireless networks and countless new small cells. Unfortunately, evidence already before the Commission confirms that federal, state, and local siting requirements adopted in the context of macro cell deployment stand in the way of this critically important work. The need to act is clear, and the time to act is now.

Coupled with the Bureau's *Public Notice* in WT Docket 16-421 released in December,[3] these new dual infrastructure proceedings afford the Commission the opportunity to facilitate broadband deployment by taking additional steps to reduce time-consuming and unnecessary regulatory obstacles to infrastructure siting, including small cells.

T-Mobile—with a rapidly expanding customer base that expects near-term access to advanced wireless services—is on the front lines of network upgrades and modernization essential for the future of the company and, in fact, the economic health of the Nation. T-Mobile's national wireless network presently contains approximately 66,000 cell sites, including macro sites, small cells, and distributed antenna system ("DAS") nodes.[4] Approximately 6,000 of these nodes or cell sites are located within public rights-of-way ("ROWs") in 24 different states, and the number of T-Mobile sites in ROWs is expected to grow to at least 50,000 nationwide in five years. Similar dramatic increases are expected industry-wide. T-Mobile's own plans underscore the importance of accommodating rapid network expansion that will be occurring across the industry, and highlight the need for clear federal

[3] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure*, Public Notice, 31 FCC Rcd 13360 (WTB 2016) ("*Public Notice*"). T-Mobile's comments and reply comments in WT Docket 16-421 are attached for inclusion in this record, and are hereby incorporated by reference.

[4] *See* T-Mobile US, Inc., Annual Report (Form 10-K) at 7 (filed Feb. 14, 2017), http://investor.t-mobile.com/Doc/Index?did=39446392.

guidance regarding the deployment of new sites, including small cells, as well as upgrades at existing base stations.

Unfortunately, unlike their citizens and businesses that now view mobile broadband as an indispensable service, local governments have failed to accommodate changes in network deployments and the need for advanced wireless networks in their communities. Too often, T-Mobile encounters local ordinances that remain grounded in the past, designed to address zoning concerns of two decades ago when the wireless industry primarily deployed tall towers to provide broad coverage. As a result, many local wireless regulations today remain rooted in the past and needlessly prevent or delay low-impact network deployments such as collocations, the installation of small cells and DAS networks, and the modernization of existing cell sites necessary to meet consumer demand for broadband. Indeed, in T-Mobile's experience, many municipalities flatly refuse to expedite the siting process, and some have established procedures to slow the process—or use the process to collect revenues that exceed costs—even in the face of Congressional mandates.

Evidence filed with the Commission confirms T-Mobile's experience is not isolated. Accordingly, while many policymakers are to be commended for efforts to date to facilitate the deployment of advanced wireless infrastructure, a real and immediate need exists for the Commission to adopt "guardrails" that further and more effectively bound reasonable siting practices and fees. The Commission should:

- ***Strengthen and expedite shot clocks applicable to wireless siting applications***. The FCC should interpret the Section 332 shot clocks as including a "deemed granted" remedy; accelerate those shot clocks to 60 days for all collocations (including small cells) and 90 days for other siting requests; clarify that the shot clocks cover all aspects of local approval (including any pre-application procedures or required ROW access/franchise agreements); and decline to adopt different shot clocks for certain narrowly defined classes of deployments or batch-filed small cell applications;

- ***Clarify the Scope of Sections 253 and 332 of the Communications Act (the "Act")***. The FCC should make clear that Section 253 is a broader statement of preemption than Section 332. Whereas Section 332(c)(7) is focused on "decisions regarding" and "regulation of" the placement of personal wireless facilities, Section 253 covers not only "regulation" but also any "legal requirement[s]" (including contracts for access to and use of ROWs) that create barriers to the provision of any "telecommunications service" (including wireless);

- ***Limit ROW charges and application fees, consistent with Sections 253 and 332***. The FCC should limit fees charged to use public ROWs and to process small cell and other wireless facility applications to actual ROW management and application processing costs. Those fees must be publicly disclosed and not discriminate among different classes of telecommunications providers. Any third-party consulting fees/expenses, licensing fees, or other charges designed to generate revenue rather than recover direct costs also should be prohibited;

- ***Clarify when state/local requirements "prohibit or have the effect of prohibiting" service***. The FCC should clarify that a regulation prohibits/effectively prohibits service contrary to Section 253 if it either (i) "materially inhibits or limits" the ability of any competitor to compete, *or* (ii) creates a "substantial barrier" to the provision of any telecommunication service. The FCC also should declare that carriers need not show an actual prohibition of service to trigger Section 253, and that all forms of moratoria, onerous application processes, and unfettered discretion to deny an application are effective prohibitions. And the FCC should declare that judicially-created coverage gap tests no longer apply, and the regulation of "need," technology, or other business issues violate Section 332;

- ***Clarify when state/local actions become discriminatory***. The FCC should clarify that the Section 253(c) requirement that ROW management be "nondiscriminatory" means providers deploying wireless facilities cannot be singled out for more onerous regulations that do not apply to other telecommunications providers (like landline companies). The FCC also should clarify that the Section 332(c)(7) bar against "unreasonably discriminat[ing]" among functionally equivalent providers means localities cannot prefer one type of installation or technology over another;

- ***Clarify that mixed-use facilities are covered by Sections 253 and 332***. The FCC should make clear that Sections 253 and 332 apply to "mixed-use" facilities—*i.e.*, facilities used to provide wireless or any other telecommunications service and mobile broadband service—should mobile broadband Internet access be classified once again as an information service and a private mobile service;

- ***Eliminate or streamline unnecessary environmental reviews***. The FCC should (i) expand its existing National Environmental Policy Act ("NEPA") categorical exclusions to cover additional small wireless facilities that will require new or replacement support poles in areas outside of ROWs; (ii) eliminate the obligation to file an environmental assessment ("EA") for sites located in a floodplain that will be built above the base flood

elevation ("BFE"); and (iii) establish shot clocks to process EAs and to resolve environmental delays and disputes;

- ***Eliminate or streamline unnecessary historic preservation reviews***. The FCC should expand and simplify its existing categorical exclusions from review under Section 106 of the National Historic Preservation Act ("NHPA") for small cells, pole replacements, facilities located in transportation ROWs, and collocations; and

- ***Improve the tribal review process and facilitate collocation on twilight towers***. The FCC should adopt the positions contained in the joint pleading filed by CTIA and WIA to improve the tribal review process and clear twilight towers for collocation. The FCC also should clarify that information provided in response to FCC Form 620 or 621 is sufficient for tribal consultation, and provide more transparency and objective checks for tribal and applicant use of TCNS.

DISCUSSION

I. AMPLE EVIDENCE CONFIRMS FCC ACTION IS NEEDED TO ADDRESS WIRELESS DEPLOYMENT BARRIERS.

Demand for wireless services continues to explode, and to meet that demand providers like T-Mobile require a ubiquitous infrastructure that can meet customer needs at home, work, and while commuting. That infrastructure includes traditional macro tower sites and collocations, but also increasingly requires the deployment of small cells as carriers seek to densify their networks and use spectrum in higher bands that propagate over shorter distances or utilize 5G technology. As the Commission has recognized, the wireless industry is "currently deploying and planning for additional construction of a large number of small cells, and the number of these facilities is expected to grow rapidly over the next decade" as 5G deployments accelerate.[5] An estimated 100,000 to 150,000 small cells will be constructed by the end of 2018, and these numbers will reach 455,000 by 2020 and 800,000 by 2026.[6] In addition to these trends, T-Mobile also has a critical need to remove deployment barriers, so that it can

[5] *Public Notice*, 31 FCC Rcd at 13363.

[6] *Id.* at 13363-64.

expeditiously build out and upgrade its network to utilize the 600 MHz spectrum it spent nearly $8 billion to acquire in the recently completed Broadcast Incentive Auction.[7]

Unfortunately, local siting and zoning barriers—including laws crafted to handle larger macro sites but not less impactful small cells—impede deployment of needed infrastructure to the detriment of consumers, the nation, and our economy. As Chairman Pai has recognized, "current rules and procedures impede the timely, cost-effective deployment of wireless infrastructure," and "[t]his will only become a bigger problem as our wireless networks evolve."[8] Commissioner O'Rielly has echoed this concern, explaining that "[i]nfrastructure siting is not a means to increase revenues," and "delaying application reviews, imposing *de facto* moratoria, preventing densification and upgrades of networks, among other tactics, is not acceptable."[9] And Commissioner Clyburn has highlighted the need to streamline deployment to achieve the country's broadband connectivity goals, explaining "[w]e must ensure that all providers are able to deploy and upgrade their infrastructure at the lowest cost and quickest pace."[10] T-Mobile agrees with the Chairman and the Commissioners that this proceeding is one of the most important proceedings before the Commission.[11]

While the FCC has taken a number of steps in recent years to accelerate the siting process—including adopting shot clocks and streamlining environmental reviews—and some

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[7] *See Incentive Auction Closing and Channel Reassignment Public Notice*, Public Notice, 32 FCC Rcd 2786 (2017).

[8] *Wireless NPRM/NOI*, 32 FCC Rcd at 3385 (statement of Commissioner Ajit Pai).

[9] *Id*. at 3388 (statement of Commissioner Michael O'Rielly).

[10] Mignon L. Clyburn, Comm'r, FCC, Remarks at #Solutions2020 Policy Forum, Georgetown University Law Center, at 4 (Oct. 19, 2016).

[11] *See, e.g.*, *Wireless NPRM/NOI*, 32 FCC Rcd at 3389 (statement of Commissioner Michael O'Rielly).

states and localities have amended their siting processes to speed deployments, significant local zoning and permitting barriers remain. These barriers—chronicled in the record of WT Docket 16-421 just this year—include excessive fees, needless delays, preferences for or against city-owned property, moratoria (both actual and *de facto*), discriminatory treatment of wireless providers compared to wireline companies or utilities, unbounded discretionary denials, and other barriers.

Excessive fees. Many local governments impose exorbitant one-time application fees,[12] annual recurring fees,[13] franchise or use fees,[14] and/or gross revenue fees[15] which are unreasonable and unrelated to actual cost recovery. In some cases, consultants themselves demand large permit application review fees to secure a recommendation of approval for new wireless facilities.[16] Many localities also view cell site deployment as a revenue stream—for example, requiring wireless facilities to be installed in ROWs or on municipal property so that the jurisdiction can assess large monthly or annual rent-like payments, or seeking information on expected profits from small cell installations to set pricing. One-time fees can range up to many tens-of-thousands of dollars per application,[17] while annual use fees can range up to tens-of-

[12] *See, e.g.*, Crown Castle International Corp. Comments, WT Dkt. No. 16-421, at 12-13 (Mar. 8, 2017) ("Crown"); Sprint Corporation Comments, WT Dkt. No. 16-421, at ii-iii, 25 (Mar. 8, 2017) ("Sprint").

[13] *See, e.g.*, AT&T Comments, WT Dkt. No. 16-421, at 18-20 (Mar. 8, 2017) ("AT&T"); Crown at 11, 13; ExteNet Systems, Inc. Comments, WT Dkt. No. 16-421, at 10 (Mar. 8, 2017) ("ExteNet"); Sprint at 25-26; Verizon Comments, WT Dkt. No. 16-421, App. A at 9 (Mar. 8, 2017) ("Verizon").

[14] *See, e.g.*, AT&T at 18; Sprint at 27; Verizon, App. A at 2.

[15] *See, e.g.*, Crown at 13; Sprint at 25, 27; T-Mobile USA, Inc. Comments, WT Dkt. No. 16-421, at 12 (Mar. 8, 2017) ("T-Mobile"); Verizon, App. A at 2.

[16] *See, e.g.*, T-Mobile at 6-8.

[17] *See, e.g.*, Crown at 12-13; Sprint at 25.

thousands of dollars per site.[18] These excessive and unfair fees are "a nationwide issue" that is "stalling broadband deployment."[19]

Unnecessary delays. Providers also continue to encounter significant delays despite the FCC's shot clocks, and lawsuits are rarely a viable option because they "damage the relationship between providers and municipalities, are expensive, lead to unpredictable delays, and are not practically scalable for deployments with more than a few nodes."[20] Delays faced by providers range from deliberate shot clock violations[21] to overly cumbersome or unclear regulations regarding the installation and operation of wireless facilities.[22] In T-Mobile's experience, for example, roughly 30% of all of its recently proposed sites (including small cells) involve cases where the locality failed to act in violation of the shot clocks.[23] Other delays include efforts to avoid triggering the shot clocks in the first instance by imposing lengthy "pre-application" procedures.[24] For ROW deployments in particular, most jurisdictions require master lease or

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[18] *See, e.g.*, AT&T at 18; Crown at 11, 13; ExteNet at 10; Sprint at 24, 26; Verizon at 9.

[19] Competitive Carriers Association Comments, WT Dkt. No. 16-421, at 15 (Mar. 8, 2017) ("CCA").

[20] AT&T at 15 n.25; *see* Lightower Fiber Networks Comments, WT Dkt. 16-421, at 5 (Mar. 8, 2017) ("Lightower") ("Given the significant amount of time, resources and expense associated with litigating even one federal lawsuit, it is neither practical nor an efficient use of time for Lightower to litigate against each and every jurisdiction …. Having to bring suit in every such case would … effectively prohibit Lightower from providing telecommunications service."); Sprint at 18 ("Litigation in federal court … directly undermines the ability of carriers to engage in negotiation of a reasonable implementing policy.").

[21] *See, e.g.*, Lightower at 4; T-Mobile at 8; The Wireless Infrastructure Association Comments, WT Dkt. No. 16-421, at 5 (Mar. 8, 2017) ("WIA").

[22] *See, e.g.*, ExteNet at 9 (noting that nearly 43% of delays encountered by ExteNet are caused by the lack of a clear process to handle the deployment of distributed small cell networks in public ROWs).

[23] T-Mobile at 8.

[24] *See, e.g.*, Crown at 16, 21.

license agreements ("MLAs"), which can take six months to a year or more to approve *before* the jurisdiction will even accept an application to install facilities in the ROW.[25]

Municipal infrastructure. Evidence confirms that access to and use of municipal poles and ROWs is a growing concern. In some areas, localities are requiring the use of municipal infrastructure to the exclusion of other siting options, often to garner monopoly rents. [26] In other areas, cities are making it difficult to access their infrastructure and ROWs.[27] Still other communities are denying access to municipal poles and/or ROWs altogether: Municipalities in Texas,[28] Massachusetts,[29] and Michigan[30] have refused requests to place small cell infrastructure in their ROWs, while a California community does not permit the installation of any wireless facilities on city-owned poles or ROWs,[31] and a Virginia suburb prohibits the installation of new structures in public ROWs.[32]

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[25] T-Mobile at 6. These MLAs often include a number of unfavorable provisions/conditions, *e.g.*, termination if a higher priority user would benefit from the cessation of carrier use, and carrier responsibility for all costs associated with inspections and approvals of construction work. *See also* Verizon at 7-8 (noting that in one Midwestern community, it took more than three years to reach an MLA).

[26] *See, e.g.*, Verizon, App. A at 1 (documenting that a northeastern suburb denied a proposed pole and directed the carrier to deploy small facilities on town-owned light poles to fill the coverage gap.).

[27] *See* WIA at 20. For example, two jurisdictions in Oregon require submission of an alternative site analysis demonstrating why small cells cannot be located on private property before considering use of municipal infrastructure. *See* Mobilitie, LLC Comments, WT Dkt. No. 16-421, at 13 (Mar. 8, 2017) ("Mobilitie").

[28] AT&T at 7-8.

[29] *Id*. at 7-8.

[30] Mobilitie at 11.

[31] Crown at 15.

[32] *Id*. at 18.

Moratoria (both actual and de facto). Although moratoria do not toll the shot clocks, localities continue to adopt them. Evidence demonstrates that "moratoria are a frequent, frustrating obstacle for competitive carriers seeking to deploy consumer demanded next-generation services."[33] Localities also simply fail to act on applications (in some cases while they develop small cell policies) or impose restrictions that result in *de facto* moratoria.[34] For example, in T-Mobile's experience, at least 15 municipalities have no clear application process at all, and some (five jurisdictions and growing) refuse to process small cell requests under ROW permitting processes.[35]

Discriminatory treatment. Evidence confirms that localities engage in discriminatory conduct, contrary to Sections 253 and 332.[36] Such conduct impedes new entry into the market and the competition that comes with it, and deters the use of beneficial wireless technologies by forcing wireless providers to pay more than landline providers and utility companies and subjecting them to additional requirements in order to secure ROW access.[37] For example, eighty percent of jurisdictions in T-Mobile's experience treat DAS and small cell deployments on poles in ROWs differently than they treat similar installations by landline, cable, or electric utilities.[38]

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[33] CCA at 31-32; *see also, e.g.*, AT&T at 7-8; Crown at 15-16; Mobilitie at 10-11.

[34] *See, e.g.*, Lightower at 11; *see also, e.g.*, Mobilitie at 10 (noting that nearly 30 localities in California have refused to negotiate ROW access agreements pending the acquisition of street lights from a privately-owned investor utility).

[35] T-Mobile at 7.

[36] 47 U.S.C. §§ 253, 332(c)(7); *see, e.g.*, Crown at 15, 19; ExteNet at 9; Sprint at 20; T-Mobile at 7.

[37] CTIA Comments, WT Dkt. No. 16-421, at 16-17 (Mar. 8, 2017) ("CTIA").

[38] T-Mobile at 7.

Unbounded discretionary denials and other barriers. Finally, many localities impose on small cell and ROW deployments requirements designed for macro installations like towers. These requirements are not imposed on other non-wireless ROW occupants (which also violates prohibitions in Sections 253 and 332 against discrimination), and range from the use of discretionary zoning procedures to demonstrations of need to fill a coverage gap. Yet, "small cells are not primarily intended to fill geographic gaps, but to fill 'capacity gaps' where the available bandwidth is or will soon be inadequate to accommodate the exploding volume of traffic and the fast speeds customers expect."[39] As a result, "[t]he old legal tests and coverage gaps simply no longer apply in a capacity-driven wireless world."[40]

For example, many jurisdictions require aesthetic review (with no objective limits on the ability to reject a site), and some restrict wireless deployments to city-owned assets, have specific form factor guidelines, allow only a single company to attach to a particular pole or structure, and/or require unreasonable minimum distances between wireless facilities in ROWs.[41] In addition, as many as half of all communities impose some kind of zoning process on the siting of small wireless facilities in the ROWs,[42] and these processes can be complex, time-consuming, and involve "multiple layers of discretionary review and public comment."[43] Indeed, applying macro zoning rules to small cells can produce absurd results. In one Pennsylvania community, a

[39] Mobilitie at 12.

[40] Sprint at 16.

[41] *Public Notice*, 31 FCC Rcd at 13367.

[42] WIA at 7; T-Mobile at 7.

[43] WIA at 8.

provider had to seek a variance from the requirement (clearly meant to apply to towers) to put an eight-foot fence around a small wireless attachment on a utility pole in a ROW.[44]

As these and other facts in the record clearly demonstrate,[45] T-Mobile and other wireless carriers and infrastructure providers have encountered significant challenges as they work to make network enhancements through upgrades to existing facilities and the deployment of new ones, including small cells, across the county. The record shows that FCC action is needed to establish clear guideposts for local jurisdictions to ensure these unreasonable and unjustified barriers to deployment do not continue. Such action is necessary to comply with the Act and to help achieve the Nation's broadband deployment goals.

II. THE FCC SHOULD TAKE STEPS TO REDUCE LOCAL PERMITTING DELAYS THAT SLOW DEPLOYMENT.

The FCC should revisit its prior findings interpreting the requirement in Section 332(c)(7) that localities "shall act" on wireless siting applications within a "reasonable" period of time.[46] In particular, the Commission should interpret the Section 332 shot clocks to include a deemed granted remedy when a state or locality fails to timely act; accelerate its shot clocks to 60 days (for all collocations) and 90 days (for all other siting requests); clarify that the shot clocks cover all aspects of local approval; and decline to adopt different shot clocks based on class or batch filing.

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[44] WIA at 9-10.

[45] Verizon, for example, has submitted an appendix containing six pages of specific examples of the siting challenges it has encountered. *See* Verizon, App. A.

[46] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3332-39 ¶¶ 4-21.

A. The FCC Should Adopt a Deemed Granted Remedy for Shot Clock Violations.

The Commission should interpret the Section 332 shot clocks as including a "deemed granted" remedy for all applications covered by 332, including small cell and ROW applications.[47] Currently, the Section 332 shot clocks require applicants to pursue time-consuming and costly judicial review. This introduces substantial delay into the process, and often results in a ruling that sends the matter back to the locality—which can still then act to deny the application, dragging the process out for years. Experience since the 2009 *Shot Clock Declaratory Ruling*[48] has shown that requiring providers to rely primarily on litigation to enforce their federal rights is simply not an effective solution, especially given the large number of expected deployments in the coming years.

For example, according to one provider, 70% of its applications to deploy small wireless facilities in the public ROW in the last two years exceeded the 90-day shot clock, and 47% exceeded the 150-day shot clock that applies to new towers.[49] Another provider reports that approximately 46 jurisdictions it works with have exceeded the 150-day shot clock.[50] And as noted above, T-Mobile has experienced similar delays, with roughly 30% of all of its recently proposed sites (including small cells) involving cases where the locality fails to act in violation of the shot clocks.[51]

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[47] *See id.* at 3333-34 ¶¶ 8-9.

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

[49] *See* WIA at 5.

[50] Lightower at 4.

[51] T-Mobile at 8.

Notably, even where courts have granted injunctions in response to a locality's inaction (directing the locality to issue the permit), relief can still take years. For example, in *Crown Castle v. Greenburgh*, Crown requested authority to install a DAS system and sought processing within Section 332 shot clocks.[52] Yet it took the locality nearly three years to act—requiring multiple filings, town proceedings, and a public hearing—and even then it denied the applications. Only after Crown challenged the denial in court did a district court direct issuance of the permits,[53] which the Second Circuit later affirmed.[54] This case, and others like it, demonstrate that adding a deemed granted rule is therefore critical to incentivize states and localities to act within the shot clocks for all siting requests. As Chairman Pai has stated:

> [T]he FCC has already established a shot clock within which local governments are supposed to review wireless infrastructure applications. But if a city doesn't process the application in that timeframe, a company's only remedy is to file a lawsuit. We should give our shot clock some teeth by adopting a "deemed-grant" remedy, so that a city's inaction lets that company proceed.[55]

Accordingly, the Commission should act now to make deemed granted relief available nationwide. The fact that many states have incorporated a deemed granted remedy at the state level shows that such an approach is reasonable and not unduly burdensome.[56] Further, where

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[52] *See Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 U.S. Dist. LEXIS 93699, *6-8 (S.D.N.Y. 2013) ("*Greenburgh*"), *aff'd*, 552 Fed. Appx. 47 (2d Cir. 2014).

[53] *Id*. at *84-87.

[54] 552 Fed. Appx. 47.

[55] Ajit Pai, Comm'r, FCC, Remarks at the CCA 2016 Annual Convention, Seattle, WA, at 2 (Sept. 21, 2016).

[56] *See, e.g.*, Cal. Gov't Code § 65964.1 ("A collocation or siting application for a wireless telecommunications facility ... shall be deemed approved if ... the city or county fails to approve or disapprove the application within a reasonable period of time in accordance with the time periods and procedures established by applicable FCC decisions."); N.H. Rev. Stat. Ann. § 12-K:10 ("[I]if the authority fails to act on a collocation application or modification application

an application has been deemed granted by operation of law, but the applicant still requires the formality of a paper permit issued by the locality (and one has not been issued), the Commission should express its view that it would be appropriate for courts to treat the locality's non-compliance with the shot clock as a significant factor weighing in favor of prompt injunctive relief directing the locality to issue the permit.[57]

Although the Commission has previously declined to include a deemed granted remedy for violation of its Section 332 shot clocks, circumstances have changed significantly since 2009 (when the FCC initially declined to adopt the remedy) and even since 2014 (when the FCC last examined the issue).[58] As the Commission has recognized, it chose to take a "cautious approach" when it put the shot clocks in place.[59] Now, with the benefit of lessons learned during implementation of the 2009 *Shot Clock Declaratory Ruling*, the Commission can and should revisit its approach. The revisions currently contemplated are clearly within its authority, as demonstrated by the Supreme Court decision in *City of Arlington*; that decision affirmed the FCC is authorized to adopt and interpret shot clocks to enforce Section 332(c)(7), even as the statute

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within the 45 calendar days review period, the collocation application or modification application shall be deemed approved."); Mich. Comp. Laws § 125.3514 ("[T]he body ... shall approve or deny the application not more than 60 days after the application is considered to be administratively complete. If the body ... fails to timely approve or deny the application, the application shall be considered approved ...."); Wis. Stat. § 66.0404(2)(d), (3)(c) (providing 90 days or deemed approved for new structures or 45 days or deemed approved for collocations).

[57] *Cf. Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12978 ¶ 284 (2014) ("*Wireless Infrastructure Order* "") (stating that in the case of a failure to act within the Section 332 shot clocks, and absent some compelling need, "we believe that it would also be appropriate for the courts to treat such circumstances as significant factors weighing in favor of [injunctive] relief"), *aff'd, Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

[58] *See Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009 ¶ 39; *Wireless Infrastructure Order*, 29 FCC Rcd at 12978 ¶ 284.

[59] *Wireless NPRM/NOI*, 32 FCC Rcd at 3334-35 ¶ 11.

preserves local zoning authority.[60] The current system's overreliance on case-by-case litigation where localities fail to act is simply not feasible, given the projections of up to 150,000 small cells by the end of 2018[61] and nearly 800,000 by 2026.[62]

The Commission should adopt each of its proposed approaches to implement a deemed granted remedy.[63] First, the FCC should convert its rebuttable presumption that the shot clocks are reasonable into an irrebuttable presumption; thus, the applicable shot clock deadline would set an absolute limit that, in the event of a failure to act, results in a deemed grant.[64] Second, the FCC should interpret the preservation of local authority "except as provided" in Section 332(c)(7) to mean that if a locality fails to meet its obligation under Section 332(c)(7)(B)(ii) to act within a reasonable period of time, then its authority concerning that request lapses and is no longer preserved.[65] Finally, the FCC should promulgate a "deemed granted" rule to implement Section 332(c)(7) under its general authority to make rules and regulations to carry out the Act.[66]

The Commission has the legal authority to adopt a deemed granted remedy.[67] Foremost, Sections 201(b) and 303(r) authorize the Commission to adopt rules or issue other orders to carry

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[60] *See* 133 S. Ct. at 1871, 1873-75.

[61] *Public Notice*, 31 FCC Rcd at 13363-64 (citing S&P Global Market Intelligence, John Fletcher, Small Cell and Tower Projections through 2026, SNL Kagan Wireless Investor (Sept. 27, 2016)).

[62] *Id*. at 13364.

[63] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3334-37 ¶¶ 9-16.

[64] *Id.* at 3334-36 ¶¶ 10-13.

[65] *Id.* at 3336 ¶ 14.

[66] *Id.* at 3336 ¶ 15.

[67] *See id.* at 3334-37 ¶¶ 11-16.

out the substantive provisions of the Act,[68] including Section 332(c)(7). In utilizing this authority, the Fifth Circuit found, and the Supreme Court affirmed, that the Commission has broad authority to render definitive interpretations of ambiguous provisions, such as those in Section 332(c)(7).[69] And as the Commission itself posits, Section 253(a) provides a further, independent basis to adopt a deemed granted remedy: State or local government requirements that result in the failure to act within reasonable time frames violate Section 253(a) if they have the "effect of prohibiting" wireless carriers' provision of service, and this justifies adopting a deemed granted rule to implement the policies of Section 253(a) as well as Section 332(c)(7).[70]

In fact, the Commission has already adopted a "deemed granted" remedy in a similar case involving the cable franchise statute. Like Section 332, Section 621(a)(1) of the Act provides that an aggrieved applicant (there, an applicant for a competitive franchise) "may" appeal, [71] but the FCC still adopted a deemed granted remedy.[72] As the Commission there explained, "[i]n

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[68] *See* 47 U.S.C. §§ 201(b), 303(r); *see also City of Arlington v. FCC*, 668 F.3d at 249 (affirming the Commission's authority to make rules to carry out Section 332(c)(7)(B)(ii) and (v)).

[69] *See City of Arlington*, 668 F.3d at 247-54, *aff'd*, 133 S. Ct. at 1874-75.

[70] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3336-37 n.30; 47 U.S.C. § 253(a). While the Commission references language in a Conference Report indicating that courts have exclusive jurisdiction over Section 332(c)(7), *see Wireless NPRM/NOI*, 32 FCC Rcd at 3337 ¶ 16 (citing S. Rep. No. 104-230, at 207-08 (1996)), that language does not trump the plain language of the statute. Section 332(c)(7)(B)(v) provides that a party aggrieved "may" commence an action in court, but it does not say that an applicant "must" do so. 47 U.S.C. § 332(c)(7)(v). To the contrary, the statute itself does *not* preclude other forms of relief, and the Act itself includes a savings clause providing that "[n]othing in this Act … shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 47 U.S.C. § 414; *see Jones v. RCC Atl., Inc.*, 2009 U.S. Dist. LEXIS 1858, at *9 (D. Vt. 2009) ("[T]his Court finds Congress did not … intend that § 332 provide an exclusive remedy.").

[71] 47 U.S.C. § 541(a)(1).

[72] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5103 ¶ 4, 5127-28 ¶ 54, 5132 ¶ 62, 5134-37 ¶¶ 68-73, 5139 ¶¶ 77-78 (2007) ("*Cable Franchise Order*"), *pet. for rev.*

selecting this [deemed granted] remedy, we seek to provide a meaningful incentive for local franchising authorities to abide by the deadlines … while at the same time maintaining [local] authority to manage rights-of-way."[73] The same rationale applies here.

B. The FCC Should Strengthen and Accelerate the Shot Clocks to Reflect Modern Siting Conditions and Clarify Their Scope.

The Commission should accelerate the Section 332 shot clocks for all sites to (i) 60 days for collocations, including small cells, and (ii) 90 days for all other sites.[74]

The Commission is to be applauded for its 2009 decision establishing shot clocks interpreting what is a "reasonable period of time" to act under Section 332(c)(7)(B)(ii)—90 days for state or local governments to process collocation applications and 150 days to process all other applications.[75] That ruling provided crucial relief at a point in time when no timeframes applied to local review of siting applications. These timeframes, however, are "longer than necessary and reasonable" to review not only small cell siting requests,[76] but also traditional collocations and new facilities. In addition, while Section 6409(a) of the Spectrum Act and FCC rules require localities to act on requests to collocate certain facilities on a tower or structure with

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denied sub nom. Alliance for Cmty. Media v. FCC, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009); *see also Cable Franchise Order*, 22 FCC Rcd at 5140 ¶ 80 (noting that "the deemed grant approach is consistent with other federal regulations designed to address inaction on the part of a State decision maker") (citing examples). Specifically, if a local cable franchising authority has not made a final decision on a franchise application within a specified period, the authority is deemed to have granted the applicant an interim franchise until it delivers a final decision.

[73] *Cable Franchise Order*, 22 FCC Rcd at 5138 ¶ 76; *cf. Wireless Infrastructure Order*, 29 FCC Rcd at 12961-64 ¶¶ 226-36 (upholding the constitutionality of a deemed granted remedy adopted to implement Section 6409(a) of the Spectrum Act), *aff'd, Montgomery County*, 811 F.3d at 128-29.

[74] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3337-38 ¶¶ 17-18.

[75] S*ee Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14012 ¶ 45.

[76] *See Public Notice*, 31 FCC Rcd at 13370.

an existing approved antenna within 60 days or it will be deemed granted,[77] they do not apply to collocations on non-tower structures like buildings and poles that lack an existing antenna—many of which are ideal for 5G deployments. Instead, these collocations are processed under the 90-day shot clock.

The accelerated shot clocks proposed herein are necessary and appropriate. First, as the Commission has long been aware, some jurisdictions already take less time to review wireless siting applications than the current 90- and 150-day shot clocks prescribe: 14 days or less to complete the review of collocation applications, and 75 days or less to review new facilities or major modifications.[78]

Second, some states already have adopted more expedited time frames to lower siting barriers and speed deployment, which demonstrates the reasonableness of the proposed 60-day and 90-day revised shot clocks. For example, collocation applications must be processed within 60 days in Minnesota,[79] within 45 business days in Florida,[80] and within 45 calendar days in New Hampshire and Wisconsin.[81] And in states like Virginia, small cell applications must now be reviewed in 60 days.[82] Likewise, non-collocation applications must be reviewed within 90

[77] *See* Spectrum Act § 6409(a), 126 Stat. 156, 232-33; 47 C.F.R. § 1.40001(c)(2), (c)(4); *Wireless Infrastructure Order*, 29 FCC Rcd at 12875 ¶ 21.

[78] S*ee Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14010-11 ¶ 43 (citing examples).

[79] Minn. Stat. § 15.99(2)(a). Minnesota requires any zoning application, including both collocation and non-collocation applications, to be processed in 60 days. *See id*.; *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14012 ¶ 47 (citing Minn. Stat. § 15.99); *see also* Mich. Comp. Laws Serv. § 125.3514(1)-(6) (subjecting certain collocations to a 60-day review period while exempting others from approval altogether).

[80] Fla. Stat. § 365.172(13)(d)(1).

[81] N.H. Rev. Stat. Ann. § 12-K:10; Wis. Stat. § 66.0404(3)(c).

[82] Va. Code Ann. § 15.2-2316.4.

days in Michigan, Virginia, and Wisconsin,[83] and non-collocation or new tower applications must be processed within 60 days in Minnesota and Kentucky.[84] While these states are to be commended for recognizing the importance of removing siting barriers to speed advanced wireless and broadband services to their communities, these state-specific actions are not occurring uniformly throughout the nation. The hodge-podge nature of wireless siting regulations is a major barrier to future deployments, particularly 5G, and a uniform set of baseline standards that promotes the deployment of advanced wireless networks would benefit all communities.

Third, since 2009 when the shot clocks were first adopted, localities have gained significant experience processing wireless siting applications. This experience, coupled with the increasing use of existing infrastructure to support smaller deployments—many of which require only minimal review and are already processed in 60 days or less—allow localities to speed processing times overall.

Fourth, for purposes of the review period for a collocation, there is no reason to differentiate between structures that already host wireless facilities and are subject to 60-day review under the Section 6409(a) shot clock, and those that do not and face a 90-day review. As CTIA has explained, "[t]his discrepancy needlessly subjects requests to site new 5G-enabling small cells on existing poles and other non-tower structures without antennas to processing times one-third longer than other similarly-situated small cell installation requests."[85] Harmonizing the

[83] Mich. Comp. Laws Serv. § 125.3514(8); Va. Code Ann. § 15.2-2232(F); Wis. Stat. § 66.0404(2)(d). Virginia requires *any* application for a telecommunications facility to be processed in 90 days. *See* Va. Code Ann. § 15.2-2232(F).

[84] Minn. Stat. § 15.99(2)(a); Ky. Rev. Stat. Ann. § 100.987(4)(c).

[85] CTIA at 34-35.

collocation shot clocks will encourage use of existing infrastructure that does not yet support an antenna, and therefore may be more likely to be able to accommodate new deployments.

For all these reasons, an accelerated 60-day shot clock for collocations (including small cells), and an accelerated 90-day shot clock for all other applications, are appropriate.

Finally, the FCC should clarify that its shot clocks cover *all* aspects of local approval, including any pre-application procedures or required ROW access/franchise agreements.[86] Evidence shows that some jurisdictions are requiring lengthy and burdensome "pre-application" procedures before they accept an application triggering the shot clock timeframes.[87] During this "pre-application" review period, cities may request modifications based on departmental or community feedback, resulting in "a cycle of delay that may have no practical end."[88] In the absence of clear guidance as to when shot clocks begin to run and what they encompass, jurisdictions have used these lengthy pre-application processes and/or ROW access negotiations to avoid triggering the shot clocks. For example, a Colorado jurisdiction has a lengthy pre-application process for all small cell installations—including notification to all nearby households, a public meeting, and preparation of a report—which the city contends does not trigger the shot clock.[89] A community in California has a similarly burdensome process.[90] Including these aspects of local approval within the shot clock review periods is consistent with

[86] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3338 ¶ 20; *Wireline NPRM/NOI*, 32 FCC Rcd at 3297-98 ¶ 103; *see also* Verizon at 30-31.

[87] *E.g.*, Crown at 21.

[88] *Id*. at 21-22.

[89] *Id*. at 16.

[90] *Id*. at 21.

the text of Section 332, which instructs states and localities to act promptly on "*any* request for authorization" to place, construct, or modify wireless facilities.[91]

C. Class-Based Shot Clocks Are Not Warranted and Would Make the Siting Process Needlessly Complex.

The Commission should decline to adopt different shot clock periods for certain narrowly defined classes of deployments, such as new structures of varying heights or structures located in ROWs.[92] Such distinctions among different types and sizes of facilities and sites would make the siting process needlessly more complex without any proven benefits. For example, following the adoption of a 60-day shot clock for certain eligible collocations covered by Section 6409(a), there was significant confusion regarding when a collocation fell under the new 60-day period or the standard 90-day collocation shot clock. CTIA and WIA worked with local representatives to issue guidance to ameliorate this confusion,[93] but the proposal to adopt a single 60-day shot clock for all collocations would restore needed simplicity. Adopting varying shot clocks for different classes of facilities would add confusion, not clarity, to the process.

The Commission should also decline to adopt longer processing times for batch-filed small cell applications.[94] Evidence before the Commission shows that wireline applications involving dozens or hundreds of poles are processed in days or weeks at most.[95] Thus, an application that batches together similar numbers of small cells of like character and in proximity

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[91] 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added).

[92] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3337-38 ¶¶ 18-19.

[93] *See* Press Release, CTIA, CTIA Statement on Joint Release of Model Ordinance and Checklist to Streamline Wireless Infrastructure Deployment, (Mar. 5, 2015); Press Release, PCIA, PCIA's Adelstein Lauds Joint Release of Materials to Aid Deployment of Broadband Across America (Mar. 5, 2015).

[94] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3337-38 ¶ 18.

[95] *See, e.g.*, ExteNet at 38.

to one another should also be able to be reviewed within the same time frame (assuming, as discussed below, the same standards are applied without discrimination).

III. THE FCC SHOULD ISSUE A DECLARATORY RULING CLARIFYING AND INTERPRETING SECTIONS 253 AND 332(c)(7) OF THE ACT.

The Commission should act now to better define the scope and application of Sections 253 and 332(c)(7).[96] More than twenty years after the enactment of the Telecommunications Act of 1996, and after hundreds of federal court cases applying and interpreting Sections 253 and 332(c)(7), courts are still struggling to find unanimity. The varying judicial interpretations of Sections 253 and 332(c)(7) among the U.S. Courts of Appeals have had an adverse effect on wireless deployment. It is well past time for a uniform national approach to wireless deployment to help the United States avoid falling further behind other nations in wireless broadband deployment and data transmission speeds.[97]

Specifically, the Commission should exercise its authority under Sections 253 and 332 to eliminate unreasonable ROW and application fees and charges, further streamline wireless facility deployments, and improve access to the public poles and ROWs that are critical to next generation deployments, including small cells.[98] Section 253 provides that while state or local

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[96] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3332-39 ¶¶ 4-22, 3360-66 ¶¶ 87-99; *Wireline NPRM/NOI*, 32 FCC Rcd at 3296-3301 ¶¶ 100-10.

[97] According to a new study, Mexico, Canada, France, the United Kingdom, as well as more than 50 other countries, offer faster LTE cellular data speeds than the United States. *See* Rob Pegoraro, *America has slower LTE wireless than Canada or Mexico*, Yahoo Finance (Jun 8, 2017) (citing OpenSignal, The State of LTE (June 2017), https://opensignal.com/reports/2017/06/state-of-lte).

[98] Sections 253 and 332(c)(7) of the Act were enacted to remove deployment barriers and speed the review and approval of siting applications by local land-use authorities. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 101, 704, 110 Stat. 56, 70, 151 (codified at 47 U.S.C. §§ 253, 332(c)(7)); Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156, 232-33 ("Spectrum Act") (codified at 47 U.S.C. § 1455(a)).

governments may manage public ROWs and seek "fair and reasonable compensation" for their use, such management and compensation must be "competitively neutral and nondiscriminatory," and any required compensation must be "publicly disclosed."[99] In addition, both Sections 253 and 332 prohibit state and local government actions that "prohibit or have the effect of prohibiting" an entity's ability to provide any telecommunications or personal wireless service.[100] Section 332 also provides additional authority that state and local land-use authorities may not "unreasonably discriminate among providers of functionally equivalent services."[101]

By issuing a declaratory ruling clarifying the scope and applicability of these two sections, and interpreting key terms, the Commission can make important strides to expedite the deployments needed to satisfy consumers' growing demand for wireless.[102] Importantly, T-Mobile and other providers are simply asking the FCC to adopt some basic guardrails to guide the application of statutory protections in Section 253 and 332 to remove siting barriers and facilitate deployment. The requested guardrails will not compromise the ability of localities to review applications and address legitimate safety and welfare concerns, as long as localities do so pursuant to clear, objective standards that are applied on a nondiscriminatory basis and do not have the effect of prohibiting service.

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[99] 47 U.S.C. § 253(c); *see also infra* note 187 (discussing FCC and appellate precedent confirming that these statutory requirements to apply to both compensation regulations *and* to the management of ROWs).

[100] *Id*. §§ 253(a), 332(c)(7)(B)(i)(II).

[101] *Id*. § 332(c)(7)(B)(i)(I).

[102] *See, e.g.*, CTIA, *Fostering 21st Century Wireless Connectivity: Key Spectrum & Infrastructure Issues for Policymakers*, at 8 (2017) ("CTIA White Paper") (calling on the FCC to "proactively address excessive and discriminatory right-of-way fees"), http://www.ctia.org/docs/default-source/default-document-library/ctia-white-paper-infrastructure.pdf.

A. The FCC Should Clarify the Scope of Sections 253 and 332.

As a threshold matter, the Commission should make clear that Section 253 is a broader statement of preemption than Section 332. While both sections address state and local actions that "prohibit or have the effect of prohibiting" certain services, Section 332(c)(7) is focused on "decisions regarding" and "regulation of" the placement of personal wireless facilities,[103] whereas Section 253 covers not only "regulation" but also any "legal requirement" that creates barriers to the provision of any telecommunications service.[104] As a consequence, Section 253 covers contracts for access to and use of ROWs, not just siting decisions.[105]

In addition, the Commission should clarify that Section 253's protections extend to *all* telecommunications services, including wireless services. Clarification is needed because some localities have taken the position that challenges to local zoning authority regarding wireless facilities are governed exclusively by Section 332, and therefore Section 253 does not apply, and courts have taken differing views.

For example, the court in *Crown Castle NG East, Inc. v. Town of Greenburgh* found that challenges to local decisions involving the placement of wireless facilities lie only under 332(c)(7),[106] whereas the court in *Verizon Wireless (VAW) LLC v. City of Rio Rancho* rejected the argument that 332(c)(7) is the exclusive vehicle to challenge local zoning authority regarding

[103] 47 U.S.C. § 332(c)(7)(A), (B)(i).

[104] *Id*. § 253(a).

[105] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3364 ¶ 95; *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21706-08 ¶¶ 16-19 (1999) ("The fact that Congress included the term 'other legal requirements' within the scope of section 253(a) recognizes that State and local barriers to entry could come from sources other than statutes and regulations. The use of this language also indicates that section 253(a) was meant to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services.").

[106] 2013 U.S. Dist. LEXIS 93699, *57-66 (S.D.N.Y. July 3, 2013).

wireless facilities, and held that such challenges may also be brought under 253.[107] The Commission should resolve the conflict by clarifying, consistent with its express language, that Section 253 applies to "any" telecommunications services,[108] including wireless. As the Supreme Court has recognized, "[a] provider of wireless telecommunications service is a provider of telecommunications service."[109]

The Commission also should clarify that Section 253 applies to all telecommunications services regardless of who owns the underlying facilities used to provide those services. The Commission should make clear that ownership of the facilities is irrelevant—such a restriction does not appear in the statute. To the contrary, Section 253 is designed to remove barriers to entry that prohibit or effectively prohibit "any entity" from providing telecommunications service.[110] Thus, even if the facilities themselves are not owned by a telecommunications carrier, if a state or local law or legal requirement creates a barrier to entry that impedes "any entity['s]" ability to provide any telecommunications services over those facilities, Section 253 applies.

B. The FCC Should Address Unreasonable and Discriminatory Fees for Wireless Facility Siting Requests.

To ensure that wireless facility siting fees and charges are reasonable and not excessive, the Commission should issue guideposts interpreting "fair and reasonable compensation" on a "competitively neutral and nondiscriminatory basis" under Section 253(c), and using its authority

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[107] 476 F. Supp. 2d 1325, 1333-39 (D.N.M. 2007); *see also Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F. Supp. 2d 886, 892 (S.D. Cal. 2005) ("[N]othing in section 332 precludes facial challenges of wireless regulations under section 253(a).") (citation omitted).

[108] 47 U.S.C. § 253(a).

[109] *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 340 (U.S. 2002) (internal quotations omitted).

[110] 47 U.S.C. § 253(a).

under Section 253(a) and 332(c)(7) to ensure that state and local actions do not "prohibit or have the effect of prohibiting" service. Jurisdictions that do not comply should be presumed to be in violation of the statute, and the Commission should express its view that it would be appropriate for courts to treat such non-compliance as a significant factor weighing in favor of prompt injunctive relief to bring the offending fee or charge into compliance and/or to afford relief to an applicant that may have already paid the offending fee.[111]

Unreasonable fees exist not only for requests to access and use ROWs for wireless deployments, but also for applications to site wireless facilities generally, including in non-ROW locations. For example, a western city imposes a $9,500 per site application fee, while a nearby community charges only $350 per application and $742 per year.[112] As a result, "residents of the jurisdiction with lower fees and a streamlined process are now enjoying the increased coverage and speed benefits of more than 100 small cells with hundreds more already approved, while mobile users in the high-fee areas of the jurisdiction next door continue to wait."[113] Such excessive fees are unrelated to cost recovery and are stalling broadband deployment.

[111] The FCC has stated that in the case of a failure to act within the Section 332 shot clocks, and absent some compelling need, "we believe that it would also be appropriate for the courts to treat such circumstances as significant factors weighing in favor of [injunctive] relief." *Wireless Infrastructure Order*, 29 FCC Rcd at 12978 ¶ 284. The same rationale should apply to judicial review of unreasonable or discriminatory charges. In addition to judicial relief, applicants also can file a petition with the Commission seeking a declaration that a particular fee or charge violates the FCC's pronouncements and is preempted. *See* 47 U.S.C. § 253(d); 47 C.F.R. § 1.2. The Commission should, however, give these procedures some "teeth" by processing any such petition on an expedited basis designed to lead to a written decision within 60 days from filing.

[112] Sprint at ii-iii

[113] *Id*.

In addition, many localities request fees that unlawfully discriminate against wireless technology, resulting in the impairment of new or improved service.[114] For instance, three cities in California assess annual fees ranging from $2,600 to $8,000 for each attachment on a municipal-owned pole, while a city in Missouri and a city in Texas assess an annual fee of $2,000 per attachment.[115] By comparison, utility pole attachment rates subject to the FCC's Section 224 regulations are less than $50 a year.[116] Likewise, a wireless ordinance in a California coastal community recommends a $10,800 per node baseline annual rent, which is more than 50 times the average FCC wireless pole attachment rate.[117] Elsewhere, a southern state Department of Transportation ("DOT") is demanding $24,000 per year for a single new wireless ROW pole, but charges the electric utility $0 for each of its poles in the ROW.[118] And two northeastern state DOTs assess annual fees for wireless attachments in the ROW of $9,000 and $37,000, respectively, but these do not apply to attachments by non-wireless utilities.[119]

Furthermore, wireless fees are increasingly used to generate revenue: In many cases, they are set to recover rates above fair and reasonable actual costs to process an application or, in the case of a public pole or ROW, to manage its use, and the fees can be recurring. For example, a Minnesota city is demanding annual fees of $7,500-$8,500 per pole from one provider—up to fourteen times higher than a $600 per pole annual fee it negotiated with another provider several

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[114] *See Public Notice*, 31 FCC Rcd at 13366-67; Mobilitie, LLC, Petition for Declaratory Ruling, Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way, at 14-16 (Nov. 15, 2016) ("Mobilitie Petition").

[115] AT&T at 18-19.

[116] *Id.*

[117] Crown at 11.

[118] ExteNet at 10 & n.10; *see also* Crown at 13.

[119] Verizon at 9.

years earlier.[120] Elsewhere, a northeastern city charges a one-time administration fee of $50,000 for the right to locate cells in the ROW in addition to per-cell fees,[121] while a county in Maryland includes some of the highest application fees in the country—more than $20,000 for each new small cell node pole installed in a public ROW.[122] Many other northeast suburban towns assess franchise fees of 5% of revenues for access to ROWs,[123] and numerous western localities demand gross revenue or franchise fees ranging from 3.5% to 7%.[124] And in the south, a large city assesses a $5,000 one-time application fee *and* 5% of gross revenues *and* an annual fee of $1,300 per pole or $700 per attachment.[125] Municipalities also require excessive escrow fees.[126]

Accordingly, localities should be limited to direct cost recovery with respect to ROW access and use charges, as well as application fees to site wireless facilities generally. As the Commission has repeatedly recognized, the "extraordinarily promising benefits" of 5G will require deployment of small cells—but municipalities charging more for them and other deployments is a hindrance to the rapid move to 5G.

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[120] CTIA at 16; WIA at 21. These new fees well exceed the Commission's cost-based pole attachment rates. *See id*.

[121] Sprint at 25.

[122] Crown at 12-13.

[123] Verizon Comments, WT Dkt. No. 16-421, App. A at 2 (Mar. 8, 2017) ("Verizon").

[124] Sprint at 27.

[125] Sprint at 25.

[126] Crown at 13. One New York municipality, for example, requires an escrow fee of $3,000 per new small cell node pole and $1,000 per collocation for consultant review, resulting in escrow fees of $150,000 or more for a typical network deployment. This in addition to an annual "voluntary" 5% gross revenue share for the Town. *Id*.

ROW access and use charges. With respect to charges to access and use ROWs,[127] the FCC should clarify that "fair and reasonable compensation" means charges that enable a locality to recoup the costs reasonably related to reviewing and issuing ROW permits, and any incremental ROW management costs associated with adding a new wireless facility and applied equally to all ROW users. Singling out wireless facilities for higher rates to use the ROW must be presumed unreasonable and in violation of the statutory text. Additional charges or those not related to actual use of the ROW, such as fees based on carriers' revenues, must be declared *per se* unreasonable actions that "prohibit or have the effect of prohibiting" services.[128]

Such an approach is reasonable, as demonstrated by steps already taken with respect to federal lands, and in some states. In the 2012 Spectrum Act, for example, Congress established that the fee for the grant of an easement, ROW, or lease on federal buildings or lands must be "based on direct cost recovery."[129] Some states, too, have acted to require that ROW fees be capped or based on the actual costs of managing the ROW, recognizing that doing so would encourage faster deployment of broadband in their communities.[130] Courts, however, have differing views regarding ROW fees,[131] making it clear that Commission action is necessary to establish a uniform standard nationwide.

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[127] *See Wireline NPRM/NOI*, 32 FCC Rcd at 3298-99 ¶¶ 104-05.

[128] *See* 47 U.S.C. § 253(a), (c).

[129] *Id*. § 1455(b)(3).

[130] *See, e.g.*, Wis. Stat. §§ 66.0404(4)(d)-(f); Iowa Code § 8C.3.9.

[131] *Compare City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1179 & n.19 (9th Cir. 2001) ("*Auburn*"), *cited in Public Notice*, 31 FCC Rcd at 13372 & n.72 (indicating that "non-cost-based fees" are "objectionable") *with TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (6th Cir. 2000) (upholding a four-percent gross revenue fee); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 77-79 (2d Cir. 2002) ("*TCG N.Y.*") (declining to reach the issue).

Relatedly, the Commission should specify that "competitively neutral and nondiscriminatory" means that rates imposed on one provider *(e.g.*, a wireless provider) may not exceed charges imposed on other providers (*e.g.*, a landline or cable operator) for similar access, without violating Section 253(c) and becoming an unlawful prohibition or effective prohibition under Section 253(a). And as required by the express language of Section 253(c), localities must "publicly disclose[]" to a provider seeking access to a ROW the charges they previously assessed on others for access—regardless of whether that prior access was for wireless or wired telecommunications.[132]

Application fees. With respect to application fees to site wireless facilities generally, including in non-ROW locations,[133] the FCC should clarify that a state or local authority shall only charge fees that recover the actual, direct, and reasonable costs incurred by the authority relating to the processing and granting of the application. Such fees should be reasonably related in time to the incurring of such costs. This means that consultant or third-party fees that are not directly related to demonstrable costs associated with the review, processing, and approval of an application should not be permitted, including third-party fees based on a contingency or a result-based arrangement. For example, numerous cities in Minnesota have agreements with a consultant, pursuant to which the consultant is compensated based on the rent charged—the higher the rent charged to the infrastructure provider, the higher the consultant's

[132] 47 U.S.C. § 253(c).

[133] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3363-64 ¶¶ 93-94.

compensation.[134] The FCC should declare that application fees that exceed costs effectively prohibit service, contrary to Section 253(a) and 332(c)(7)(B)(i)(II).[135]

These steps would align the Commission with the progressive steps already taken by some states. Missouri, for example, requires that application fees imposed by a local authority—whether for or directly by a third-party providing review or technical consultation to the authority— must be based on "actual, direct, and reasonable administrative costs incurred for the review, processing, and approval of an application."[136] In addition, Missouri also provides that "in no event shall an authority or any third-party entity include within its charges any travel expenses incurred in a third-party's review of an application," and "in no event shall an applicant be required to pay or reimburse an authority for consultation or other third-party fees based on a contingency or result-based arrangement."[137] The Commission should act now to make such a cost-based approach the law of the land and remove once and for all unnecessary fee barriers to infrastructure deployments.

Importantly, the Commission also must act now to foreclose additional required fees or requirements that are unrelated to the application review process and enable the assessment of fees that exceed actual costs. For example, as noted above, local municipalities in a few states are demanding that T-Mobile obtain business licenses for individual cell sites before approving applications for new or modified sites.[138] Not only are cell sites not "businesses," but localities

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[134] WIA at 20.

[135] 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II).

[136] Mo. Rev. Stat. § 67.5094(11).

[137] *Id*.

[138] Some localities also hold fees in escrow pending completion of construction without any timeframe for return. T-Mobile, for example, has waited over a year-and-a-half, and in some instances longer, to recover unused monies in escrow.

are also imposing unreasonable fee requirements on wireless providers to obtain these licenses and, in some circumstances, are refusing to issue cell site building permits for upgrades until the requirements are met. Indeed, a city in Missouri—notwithstanding the state laws just described— is demanding that carriers pay $6,000 per antenna to obtain a business license.[139] Extrapolated nationally, this would cost T-Mobile *over $2 billion per year in just business license fees alone* if other jurisdictions followed suit.

Elsewhere, several California jurisdictions require providers to pay a license fee based on a percentage of the revenue they derive from individual cell sites in each community.[140] As a practical matter, this type of fee is impossible to implement in any rational manner, because revenues are not calculated or collected based on cell site traffic. In addition, multiple cell sites can be involved in a single call or data transmission (*e.g.*, from a moving vehicle), and cell site usage is not limited to residents of the cities in which towers are located, resulting in carriers paying multiple times on the same transmissions—particularly because different jurisdictions use different methods for calculating fees. More importantly, the fees are clearly unrelated to application review and are instead solely employed to generate revenues. The Commission must ensure that loopholes like these that threaten to impair or derail infrastructure deployments are closed.

C. The FCC Should Clarify When State or Local Requirements "Prohibit or Have the Effect of Prohibiting" Service.

The Commission should clarify the meaning of the "prohibit or have the effect of prohibiting" language used in both Sections 253 and 332 of the Act.[141] The Commission and the

[139] *See* T-Mobile at 12.

[140] *See id.* at 12-13.

[141] *Wireless NPRM/NOI*, 32 FCC Rcd at 3361-63 ¶¶ 88-91.

courts have provided different interpretations of this language over the years, so this proceeding provides an opportunity to create uniformity and certainty.

In the *California Payphone* case, for example, the Commission found that a regulation prohibits/effectively prohibits service under Section 253 if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[142] Some courts interpreting Section 253 have held that requirements have the effect of prohibiting telecommunications if they "create a substantial … barrier to entry into or participation in … telecommunications markets," such as through an "onerous application process" or requirements that afford the locality "unfettered discretion" over the provision of telecommunications.[143] Other courts, however, have held that a regulation violates Section 253 only if it actually prohibits service.[144]

Courts interpreting Section 332 have required applicants to establish that a denial "prohibits or has the effect of prohibiting" service by showing that they "need" the site, *i.e.*, by showing a significant gap in service coverage and a lack of a feasible alternative location.[145] Courts also disagree about the showings needed to satisfy this standard, with some imposing a

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[142] *California Payphone Association Petition for Preemption*, Memorandum Opinion and Order, 12 FCC Rcd 14191 (1997) ("*California Payphone*").

[143] *See Auburn*, 260 F.3d at 1175-76; *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269-70 (10th Cir. 2004) ("*Qwest*"); *see also TCG N.Y.*, 305 F.3d at 76-77; *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006). The Ninth Circuit subsequently departed from the broader *Auburn* standard in favor of the narrower "actual or effective prohibition" test espoused by the Eighth Circuit. *See infra* note 144 and accompanying text. As discussed below, the *Auburn* standard, in combination with the *California Payphone* interpretation, is the better approach and the one that should be adopted by the Commission.

[144] *Level 3 Commc'ns, LLC v. St. Louis*, 477 F.3d 528, 533-34 (8th Cir. 2007); *Sprint Telephony PCS, L.P. v. San Diego*, 543 F.3d 571, 576-79 (9th Cir. 2008).

[145] *See Public Notice*, 31 FCC Rcd at 13369.

"heavy burden" to establish a lack of alternative feasible sites,[146] and others requiring an applicant to show that its proposed facilities are the "least intrusive means" for filling a coverage gap.[147] At least one circuit shifts the burden to the locality once the applicant makes a *prima facie* showing that its proposal is least intrusive.[148]

As the expert agency, the Commission should resolve these differences of interpretation and clarify both statutory provisions based on the standards discussed below.[149]

1. A Regulation Violates Section 253 if It Materially Inhibits or Is a Substantial Barrier to Telecommunications.

The Commission should clarify that a state or local rule, regulation, decision or impediment, including a failure to act, constitutes a prohibition or effective prohibition, contrary to Section 253, when it either: (1) "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,"[150] *or* (2) "create[s] a substantial … barrier to entry into or participation in" the provision of telecommunications, such as an "onerous application process" or unfettered discretion over those

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[146] *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 40 (1st Cir. 2014); *accord New Cingular Wireless PCS, LLC v. Fairfax County*, 674 F.3d 270, 277 (4th Cir. 2012); *T-Mobile Northeast LLC v. Fairfax County*, 672 F.3d 259, 266-68 (4th Cir. 2012) (en banc); *Helcher v. Dearborn County*, 595 F.3d 710, 723 (7th Cir. 2010).

[147] *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999); *APT Pittsburgh Ltd. P'ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999); *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056-57 (9th Cir. 2014); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995-99 (9th Cir. 2009).

[148] *Am. Tower Corp.*, 763 F.3d at 1056-57; *City of Anacortes*, 572 F.3d at 995-99.

[149] *See Public Notice*, 31 FCC Rcd at 13370; *see also Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14016 ¶ 56 (where courts disagree on statutory terms in the Act, FCC resolution of the controversy is appropriate); *id*. at n.175 (citing discordant court interpretations of the "effect of prohibiting" language).

[150] *California Payphone*, 12 FCC Rcd at 14206 ¶ 31, 14210 ¶ 42.

applications, among other things.[151] Once an applicant makes a *prima facie* showing that this standard has been violated, the burden should shift to the locality to rebut that showing. To further inform when local siting decisions violate this standard, the FCC should take the following actions.

No actual prohibition. The Commission should clarify that the "prohibit or have the effect of prohibiting" language does not require the actual prohibition of service.[152] Some authorities require wireless providers to demonstrate an "actual prohibition" of service, but that term does not appear in Section 253. In fact, such a requirement is inconsistent with the statutory text that preempts not only requirements that "prohibit" communications services, but also those that "have the effect" of prohibiting those services. Requiring an "actual prohibition" risks setting the bar so high that the statutory protections would never be triggered, rendering them practically meaningless.[153]

No moratoria. The Commission should declare that moratoria on the filing, receiving, processing, or approval of requests to construct or modify facilities to support wireless and other telecommunication services, including requests to site small cells on municipal poles or ROWs, are material inhibitors that "prohibit or have the effect of prohibiting" service contrary to

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[151] *See Auburn*, 260 F.3d at 1175-76.

[152] *See Qwest*, 380 F.3d at 1271 ("[A]n absolute bar on the provision of services is not required" to find prohibition of service and preemption of a local ordinance under 47 U.S.C.S. § 253. "It is enough that the ordinance would 'materially inhibit' the provision of services.").

[153] Courts have repeatedly rejected statutory interpretations that would render a statutory provision meaningless. *See, e.g., Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) ("Congress cannot be presumed to do a futile thing."); *RCA Global Commc'ns, Inc. v. FCC*, 758 F.2d 722, 733 (D.C. Cir. 1985) (a proposed statutory construction that "would deprive" a statutory exemption "of all substantive effect" would produce "a result self evidently contrary to Congress' intent").

Sections 253.[154] In the *Wireless Infrastructure Order*, the FCC held that moratoria do not toll the running of the Section 332 shot clocks, but it declined to prohibit all moratoria and did not examine the legality of moratoria under Section 253.[155] The Commission should do so now.[156]

Addressing moratoria is increasingly important because some states and localities do not know how to handle, or have procedures to address, requests to site facilities like small cells in ROWs or elsewhere. As a consequence, they adopt moratoria. For example, in Florida, wireless siting moratoria have been in place in one municipality for over two years,[157] and two others since September 2016.[158] Likewise, localities in Iowa, California, and Minnesota issued indefinite moratoria in August 2016 prohibiting new wireless and/or small cell facilities.[159] States too (or state DOTs) have refused requests to place wireless and/or small cell infrastructure in ROWs under their control.[160] Meanwhile, some localities have created *de facto* moratoria, by simply failing to act while they seek to develop policies and procedures. In one jurisdiction outside Indianapolis, for example, small cell ROW applications have been pending for nearly three years, but the jurisdiction will neither approve nor deny the applications.[161]

But consumers should not have to wait for improved or next generation services. The FCC should make clear that even while localities work to develop broader siting policies, they

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[154] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3339 ¶ 22; *Wireline NPRM/NOI*, 32 FCC Rcd at 3297 ¶ 102.

[155] *Wireless Infrastructure Order*, 29 FCC Rcd at 12971-72 ¶ 265.

[156] *See* CTIA White Paper at 8 ("[T]he FCC should prohibit moratoriums on new wireless deployments ….").

[157] AT&T at 7.

[158] Mobilitie at 10.

[159] *Id*. at 11.

[160] *See, e.g.*, AT&T at 7-8; Crown at 15-16.

[161] Lightower at 11.

must continue to address all wireless siting requests, including ROW applications, and that moratoria—whether express or *de facto*—are prohibited. The Commission also should clarify that the prohibition against moratoria applies not only to small cell requests but also approvals for substantial modifications or installations that require a variance.

No undergrounding. The Commission should declare that a requirement that all wireless communications facilities be located underground is an effective prohibition of communications service.[162] A California community, for example, requires all facilities to be located underground, and thus does not allow even small cells attached to existing poles.[163] Two Michigan localities also have underground ordinances that effectively prohibit small cell deployments,[164] and several municipalities in Texas and Kansas similarly prohibit above ground wireless facilities.[165] While undergrounding ordinances may make sense for landline facilities (or even backhaul) that can function underground, they cannot be permitted to restrict the ability of wireless carriers to deploy wireless antennas that allow consumers to communicate while at home, traveling, or at work.

No onerous application processes. The Commission should declare that an onerous application process that imposes burdensome requirements on applicants is an effective prohibition.[166] For ROW applicants, this would include the submission of information or undergoing a review process "that ha[s] nothing to do with the management or use of the right-

[162] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3365-66 ¶ 98.

[163] Mobilitie at 12.

[164] *Id*. at 13.

[165] AT&T at 8.

[166] *Cf*. *Auburn*, 260 F.3d at 1175-76.

of-way."[167] For example, a Midwest suburb requires full zoning review for ROW attachments, while a northeast town required a full zoning proceeding for a screened rooftop small cell (approval took almost one year).[168] Several mid-Atlantic and southern cities also require small facility attachments to undergo the same zoning review as a new tower.[169]

For wireless applicants generally, onerous application processes include the submission of corporate policies, documentation of licenses, and other information not necessary to meet objective public safety and welfare standards.[170] For instance, in one California community, if co-location cannot be accomplished, applicants must show that their proposed facility will be sited at least 1500 feet from any existing facility, unless the reviewing authority determines that a shorter distance (i) is required for technological reasons or (ii) would result in less visual obtrusiveness in the surrounding area. This requirement essentially renders the deployment of small cells in the ROW in this community infeasible.[171]

No unfettered discretion. The Commission should declare that local procedures affording a locality unfettered discretion as to whether to grant or deny an application—including unnamed or undefined discretionary factors like aesthetics that do not pertain directly to the management or use of the ROW, or treating one type of telecommunications provider

[167] *Id.* at 1176.

[168] Verizon, App. A at 4.

[169] *Id.*, App. A at 5.

[170] *See id.*; 47 U.S.C. § 253(b).

[171] *See also* AT&T at 8 (noting that local governments in Florida, Texas, Indiana, and Kansas have imposed minimum separation distances ranging between 100 to 1,000 feet between small cell facilities deployed in the ROW).

different than another—constitute an effective prohibition.[172] San Francisco, for example, has adopted an ordinance that singles out wireless facilities in public ROWs for discretionary pre-deployment "aesthetic" review not imposed on similarly-sized landline or utility facilities.[173] Litigation over the lawfulness of the ordinance is now entering its seventh year,[174] curtailing critical wireless buildout.

No other substantial barriers. The FCC should declare that state or local action or inaction that creates a substantial barrier to the provision of any telecommunications service—including new advanced wireless services like 5G, which will rely heavily on small cell ROW deployments—is an effective prohibition that violates Section 253.[175] Such barriers include, *e.g.*, bans against the installation of wireless facilities in residential areas, as well as requirements that effectively preclude future collocations or upgrades at existing facilities.

For example, some localities are requiring wireless providers who seek to collocate or upgrade equipment on *existing* towers properly constructed pursuant ANSI Class II structural reliability criteria to certify that the tower meets more stringent Class III structural requirements.[176] This is happening even where the state has incorporated the ANSI Class II

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[172] *Cf. Auburn*, 260 F.3d at 1176-78; *Qwest*, 380 F.3d at 1269-70; *see also Wireless NPRM/NOI*, 32 FCC Rcd at 3363 ¶ 92.

[173] S.F. Ord. No. 12-11 (as amended by S.F. Ord. No. 18-15) requires compliance with aesthetics-based compatibility standards, determined solely by the location of the facility. The ordinance was initially adopted in January 2011.

[174] *See T-Mobile West LLC v. City and County of San Francisco*, 3 Cal. App. 5th 334 (Cal. App. 1st Dist. 2016), *review granted*, 385 P.3d 411 (Cal. 2016); *see also* Brief of Plaintiffs-Appellants, T-Mobile West LLC v. City and County of San Francisco, S238001 (Cal. filed Jan. 20, 2017).

[175] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3338-39 ¶ 21; *Wireline NPRM/NOI*, 32 FCC Rcd at 3299 ¶ 106.

[176] Class II standards are those commonly used for commercial wireless and broadcast services, whereas Class III standards apply to structures used primarily for essential communications like civil or national defense and military facilities. *See* William Garrett & Bryan Lanier, *Wireless*

standard into its building code; in other words, the locality is substituting its judgment for that of the expert standards body by singling out towers proposed or used for wireless service and imposing additional requirements that do not apply to other structures. Requiring a Class III certification means a potential wireless service collocator must convince a tower owner to enhance an existing tower beyond the industry standard—with substantial associated costs and delay—and effectively makes that existing resource unavailable for future wireless collocations and equipment upgrades if the owner declines to do so. And even if the tower owner does decide to make those enhancements, meeting the Class III criteria frequently fail to achieve meaningful service benefits.[177] That is, structural reliability issues are rarely the cause of wireless service outages; rather, loss of power to the entire area, or loss of equipment due to damaging winds, are more often the cause for lack of service.

2. The Regulation of Need, Technology, or Other Business Issues Violates Section 332.

The FCC should make clear that the "prohibit or have the effect of prohibiting" language in Section 332 prohibits local regulations requiring a showing of "need" or other business imperatives—including an applicant's business decision on the type and location of wireless facilities, support structures, or poles, or decisions with respect to its technology deployed, coverage level, service, customer demand for service, or quality of service. While some states are to be commended for taking meaningful steps to eliminate obligations imposed on applicants

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Infrastructure Ass'n, Classification of Tower Structures per ANSI/TIA-222-G, IBC and ASCE-7, at 1-2 (July 2016).

[177] *See id*. at 1, 3, 10-11.

to justify their proposals for locating wireless equipment based on business needs,[178] FCC action is needed to create uniformity nationwide.

As noted, authorities making siting decisions under Section 332 frequently require wireless providers to prove they need a particular site in a particular location. For example, nearly 40 California localities require the submission of propagation maps to demonstrate additional wireless infrastructure is needed to fill a coverage gap, as do two cities in Illinois, five jurisdictions in Minnesota, and two jurisdictions in Ohio.[179] Likewise, several jurisdictions in Washington require small cell ROW applicants to demonstrate a significant gap in coverage, explain why using the ROW is the least intrusive means to fill that gap, and/or analyze the feasibility of alternative sites not in the ROW.[180] And a county in the mid-Atlantic requires applicants to "provide proof" of the need to upgrade coverage or capacity, and a consortium of cities in another state has proposed a model ordinance that contains a similar provision.[181]

These judicially-crafted showings—*i.e.*, a significant gap in service coverage, a lack of a feasible alternative and/or that the proposed facilities are the least intrusive means for filling that gap—were developed at a time when tall towers to expand coverage were the norm, and are simply ill-suited to modern deployments. In an era of near nationwide coverage, traditional "gaps" in coverage are becoming less prevalent, especially in urban areas; instead carriers increasingly require fill-in sites to increase capacity and upgrade technology necessary to meet

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[178] *See, e.g.*, Mo. Rev. Stat. § 67.5094(1) (an authority shall not evaluate applicant's "business decisions with respect to its designed service, customer demand for service, or quality of its service to or from a particular area or site"); 53 Pa. Cons. Stat. § 11702.3.3(a)(6) (a locality cannot require a collocation applicant "to justify the need for or the technical, business or service characteristics of the proposed wireless telecommunications facilities").

[179] Mobilitie at 13.

[180] *Id.*

[181] Sprint at 22.

consumer demand. These decisions are made every day by network engineers based on spectrum reuse and capacity demands. In addition, each one of these decisions must be justified to the carriers' business team, which weighs required capital expense against network demands. Therefore, the "need" for a site or modification should be presumed, not second guessed, by localities that lack the expertise to evaluate these decisions. The FCC should, therefore, preempt local government regulations requiring wireless applicants to prove the need for new or modified wireless facilities.

In the event the FCC nonetheless determines that localities may consider need-based criteria as part of their review under Section 332, the FCC should adopt guidelines regarding the appropriate scope of that consideration.

First, it should reject the "lack of a feasible alternative" and the "least intrusive means" tests. In the context of small cells or use of the ROW, showing that one pole is the least intrusive means of filling a gap over another pole that is mere feet away, or a showing that the selected pole is the only feasible alternative, will be virtually impossible, rendering the standard meaningless. Either test would put applicants in the potentially untenable position of enduring rejections of every other alternative site until only one viable site remains.

Second, the FCC should clarify that a gap in service is deemed to exist where a provider concludes that it does not have sufficient signal strength or system capacity to allow it to provide reliable service to consumers in residential and commercial buildings. The assessment of sufficient signal strength or system capacity should be made by the provider based on its expertise, not the local jurisdiction.

Third, once a provider makes a *prima facie* showing that it does not have sufficient signal strength or system capacity to allow it to provide reliable service to consumers in residential and

commercial buildings, the burden should shift to the local government to prove that a new wireless facility is not needed.[182]

Finally, the Commission should clarify that the "prohibit or have the effect of prohibiting" language prohibits state or local denials of a siting request that (i) are based on technical or operational justifications unrelated to health and safety,[183] or (ii) preclude an entity from making technology or capacity enhancements—regardless of whether other providers or the carrier itself are already serving the area. Indeed, localities are increasingly taking steps that restrict new or upgraded wireless facilities.[184]

Declaring such technical and operational considerations by jurisdictions to be contrary to the "prohibit or have the effect of prohibiting" language in Section 332 will ensure consistency with case law decided under Section 332(c)(3) of the Act, which prohibits states from regulating the entry of mobile service providers. For example, the Second Circuit has made clear that "Federal law has preempted the field of the technical and operational aspects of wireless telephone service."[185] Likewise, the Seventh Circuit has held that the FCC is "responsible for

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[182] *Cf. City of Anacortes*, 572 F.3d at 997.

[183] While a local authority may consider height and collocation opportunities, as well as objective aesthetic and safety issues, it may not unreasonably discriminate between the applicant and other communications service providers. *See* 47 U.S.C. § 332(c)(7)(B)(i)(I); *cf. Wireless Infrastructure Order*, 29 FCC Rcd at 12944-45 ¶ 188 (recognizing that under a companion statute impacting wireless siting, Section 6409(a) of the Spectrum Act, "States and localities may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety"); Mo. Rev. Stat. § 67.5094(2)-(3) (an authority shall not "[d]ictate the type of wireless facilities, infrastructure or technology to be used by the applicant," but "may require an applicant to state … that it conducted an analysis of available collocation opportunities on existing wireless towers within the same search ring defined by the applicant, solely for the purpose of confirming that an applicant undertook such an analysis").

[184] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3364-65 ¶ 96.

[185] *See N.Y. SMSA Ltd. P'ship. Town of Clarkstown*, 612 F.3d 97, 105-06 (2d Cir. 2010).

determining the number, placement *and operation* of the cellular towers and other infrastructure."[186]

D. The FCC Should Clarify When State or Local Actions Become "Discriminatory" or Discriminate Among "Functionally Equivalent" Services.

The FCC should clarify when state or local ROW management becomes "discriminatory" in violation of Section 253(c), and when state or local regulation of wireless siting "unreasonably discriminates" among providers of functionally equivalent services in violation of Section 332(c)(7)(B)(i)(I).

First, the Commission should make clear that state and local management of the use of ROWs is no longer "nondiscriminatory" or "competitively neutral" under Section 253(c),[187] and is an unlawful prohibition or effective prohibition of service under Section 253(a), when it disfavors one class of telecommunications provider in comparison to others.[188] ROWs are used in this country for telecommunications infrastructure, and wireless providers must be immediately afforded equal access on reasonable terms and conditions. For example, according to one provider, nearly 50 communities where it sought to deploy subjected it to different standards and processes compared to other entities deploying facilities on poles in the public

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[186] *Bastien v. AT&T Wireless Servs., Inc*., 205 F.3d 983, 989 (7th Cir. 2000) (emphasis added).

[187] As a threshold matter, it is important to note that the Commission has already found, and the Third and Tenth Circuits have affirmed, that these statutory requirements to "apply to both compensation regulations *and to the management of rights-of-way*." *Qwest*, 380 F.3d at 1272 (emphasis added) (citing *Classic Telephone, Inc*., Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103 (1996)); *see N.J. Payphone Ass'n v. Town of West New York*, 299 F.3d 235, 243-246 (3d Cir. 2002) ("[I]n looking at the statutory language in context, we find that the more logical reading of Section 253(c) requires management of public rights of way to be competitively neutral and nondiscriminatory."). *But see Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston*, 184 F.3d 88, 101 (1st Cir. 1999) (suggesting a narrower interpretation).

[188] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3365 ¶ 97.

ROWs—even though those other users deployed similarly-sized (or larger) facilities.[189] The FCC must halt this practice by making clear that the wireless industry has the right to occupy public ROWs, and that access to public ROWs should not be limited to or more favorable for one class of telecom provider (*e.g.*, wireline) compared to another (*i.e.*, wireless).

In particular, a wireless ROW applicant must not be required to provide more information or go through a more lengthy process or technical review to obtain a permit than telecommunications providers that are not deploying wireless facilities. For example, evidence before the Commission includes a San Francisco ordinance (discussed above), which imposes discretionary aesthetic review on wireless facilities but not similarly-sized landline (or utility) facilities.[190] Numerous jurisdictions also force wireless providers to pay more than landline carriers or utilities,[191] and subject wireless providers to additional requirements to secure ROW access.[192] A Washington community, for instance, requires applicants wishing to install small cells in residential ROWs to obtain consent from adjacent property owners, but utilities operating in the same ROWs are not subject to such a requirement.[193]

Nor should wireless applicants be subject to term limits on the permits they are granted, where such limits are not imposed on other ROW users. In T-Mobile's experience, this is a national issue. California, for example, allows local governments to impose a term limit on a

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[189] ExteNet at 9.

[190] *See supra* notes 173-74 and accompanying text. The Commission should disavow precedent that allows cities to impose aesthetic concerns on wireless facilities deployed in public ROWs, while no similar restrictions apply to wireline facilities located in those ROWs. *See Sprint PCS Assets L.C.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 723 (9th Cir. 2009).

[191] *See supra* notes 114-19 and accompanying text.

[192] *See* T-Mobile USA, Inc. Reply Comments, WT Dkt. No. 16-421, at 10 (Apr. 7, 2017) (citing examples).

[193] Crown at 19.

wireless permit,[194] but wireline permits are not subject to the same restrictions. The FCC should therefore preempt any local government regulation which imposes a limited term (*e.g.*, five, ten or fifteen-year term) only on wireless permits, and reject the judicial interpretation that time-limited wireless siting does not violate Section 253.[195]

Further, in the context of addressing legitimate safety and welfare concerns as part of ROW management, localities must do so pursuant to clear, objective standards that are applied on a nondiscriminatory basis and do not have the effect of prohibiting wireless service. The FCC also should encourage—for example, through the Broadband Deployment Advisory Committee ("BDAC")—the development of model codes and ROW regulations that objectively address these safety and welfare concerns on a competitively neutral and nondiscriminatory basis.[196]

Finally, the Commission should further clarify the prohibition in Section 332(c)(7)(B)(i)(I) against "unreasonably discriminat[ing]" among providers of "functionally equivalent" services.[197] First, the Commission should make clear that the prohibition requires all wireless facility requests, including small cell applications, to be processed on a nondiscriminatory basis. Second, the Commission should specify that preferences of any kind for siting wireless facilities on municipal property are unreasonably discriminatory. As the Commission has recognized, providers have encountered situations where a municipal property preference coupled with onerous regulations make it difficult to site on non-municipal

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[194] Cal. Gov't Code § 65964. Such wireless term limits cannot be "unreasonabl[e]," presumptively defined as less than ten years. *See id.*

[195] *See Am. Tower Corp.*, 763 F.3d 1035.

[196] Such issues can be examined by the BDAC working groups currently developing model codes for municipalities and states. *See FCC Announces the Membership of Two BDAC Working Groups: Model Code for Municipalities and Model Code for States*, Public Notice, DA 17-433 (May 8, 2017).

[197] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3366 ¶ 99.

property.[198] The FCC should find that such preferences unreasonably discriminate among providers by limiting the siting options of subsequent wireless entrants in a given area.

E. The FCC Should Clarify that Sections 253 and 332 Apply to Requests to Site Facilities on Municipal Poles and in Municipal ROWs.

The Commission should clarify that states and localities are not acting in their "proprietary capacity" when acting on requests to site facilities on, or setting access policies and rates for, municipal poles or ROWs—and therefore such requests are covered by both Sections 253 and 332.[199] ROWs, including municipal poles and ROWs, are the ideal way to deploy the tens of thousands of new small cells that are needed to meet demand and serve customers.[200] By making clear that the statutory protections in Sections 253 and 332 apply to requests to site facilities on municipal poles and ROWs, the Commission can take a further step to help ensure these critical assets are available to support next generation services, including 5G.

This clarification is needed because some municipalities have argued that when it comes to granting access to and use of municipal ROWs (including municipal poles in those ROWs), they are acting in a proprietary capacity and therefore Section's 253's provisions governing "regulation" that impedes telecommunications do not apply.[201] Likewise, some localities have

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[198] *See Wireless Infrastructure Order*, 29 FCC Rcd at 12976-77 ¶ 280.

[199] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3361 ¶¶ 88-89, 3364 ¶ 96.

[200] *See, e.g.*, Michael O'Rielly, Comm'r, FCC, Remarks at the Distributed Antenna Systems (DAS) and Small Cell Solutions Workshop (May 3, 2016) ("Site approvals in rights-of-way, which are especially important for small cell systems, appear to be particularly problematic."); Michael O'Rielly, Comm'r, FCC, Remarks Before Hogan Lovells' Technology Forum: "The 5G Triangle," at 2 (May 25, 2016) ("[A]n area that is ripe for attention is access to local rights of way…. Appropriate pressure will need to be applied to ensure that localities are not delaying access to rights of way—either intentionally or via sheer incompetence.").

[201] Essentially, these jurisdictions are trying to read proprietary loopholes into the statutory text. But their broad interpretation of what is proprietary inherently leaves open the ability to discriminate among providers by deciding what locations to lease and to whom, contrary to both

construed Section 332 narrowly to apply only to local "zoning" decisions, claiming that action on requests to site wireless facilities on municipal-owned poles or ROWs is a proprietary function that does not implicate Section 332's protections regarding "regulation of the placement" of wireless facilities. These interpretations have no basis in the text of Sections 253 and 332 and undermine the goals of those provisions, and the Commission must clarify that they are incorrect.

While at least one court has held that Section 253(a) preempts only "regulatory scheme[s]"[202]—and the FCC cited this decision in 2014 when it held that Section 6409(a) does not apply where states or localities act in a proprietary capacity[203]—the FCC has yet to draw a line between proprietary and regulatory action.[204] The issue is thus ripe for resolution. Two cases that arose in the Section 332 context are instructive. In *Sprint Spectrum L.P. v. Mills*, the court found that Section 332(c)(7) did not apply to a request to install an antenna on a school roof, because the school was acting in a proprietary capacity.[205] Likewise in *Omnipoint v. Huntington*, the court held that authorizing an antenna in a city-owned park also was a proprietary function.[206] However, access to municipal poles and ROWs is fundamentally different from access to a building or park, because municipal poles and ROWs are public property *intended to serve as the locations for public services.*

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the language and intent of Sections 253 and 332, and cannot be countenanced. This is particularly troublesome in the jurisdictions that impose municipal preferences for siting in their zoning codes.

[202] *See Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004).

[203] *See Wireless Infrastructure Order*, 29 FCC Rcd at 12964-65 ¶ 239.

[204] *Id*. at 12965 ¶ 240.

[205] *See Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 419-21 (2d Cir. 2002).

[206] *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 200-01 (9th Cir. 2013).

For example, in *NextG v. New York*, NextG demonstrated that light poles and public ROWs are "held by the City in trust for the public," and that requests to access those public resources is something "substantially different from seeking to lease space in a City-owned building."[207] At issue in that case was whether a two-year delay and refusal by the city to grant access to poles in public ROWs absent a costly franchise violated Section 253, which like Section 332, bars state or local regulatory action which has the effect of prohibiting communications.[208] The court agreed with NextG that the city's actions "are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy."[209] The Commission should adopt the same rationale here, and clarify that municipal ROWs and associated poles are property held in trust for the public, and intended to serve as the locations for public services.[210]

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[207] *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063 (S.D.N.Y. Dec. 10, 2004) ("*NextG Networks*"); *see also New Jersey Payphone Ass'n v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001) ("[T]he control the municipality exerts over the easement is a function of its powers as trustee, conventionally expressed as the police power to manage the public right-of-way. *Distinct from public parks or government buildings, the municipality does not possess ownership rights as a proprietor of the streets and sidewalks*. Consequently, the Town's analogies and hypotheticals likening the effect of the Ordinance to the Town's management of public parks and buildings are inapt.") (emphasis added) (citations omitted).

[208] *NextG Networks* at *16.

[209] *Id*. at *16-18. The court ultimately found irreparable harm had not been established, and therefore declined to grant injunctive relief. *Id*. at *28-30.

[210] *See also, e.g., City and County of Denver v. Qwest Corp.*, 18 P.3d 748, 761 (Colo. 2001) ("It is well established that municipalities hold public rights-of-way in a governmental capacity."); *AT&T v. Village of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. S.Ct. 1993) ("Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public."); *Village of Kalkaska v. Shell Oil Co.*, 446 N.W.2d 91, 95 n.18 (Mich. 1989) ("[T]he cities have no proprietary interest in city streets as their private property.") (internal quotation omitted); *City of Albany v. State*, 21 A.D.2d 224, 225 (N.Y. App. Div. 1964), *aff'd* 207 N.E.2d 864 (N.Y. 1965) ("We have no difficulty in

Specifically, the Commission should clarify that requests to access municipal poles and ROWs, and the terms and conditions of such access, implicate regulatory rather than proprietary functions and therefore the protections of Section 253 (including the requirement that ROW and pole use charges be "fair and reasonable") and Section 332 (including the shot clocks implementing the "reasonable period of time" to act), as well as Section 6409(a) (including collocation-by-right with respect to municipal poles with existing approved antennas), apply. Indeed, Section 253(c)'s provisions requiring "fair and reasonable compensation" for use of ROW on a "nondiscriminatory basis" apply explicitly to state and local management of "the public rights-of-way," and make no mention of any proprietary carve-outs or exceptions.[211] Likewise, Section 332's obligation to act within a "reasonable period of time" applies to "*any* request for authorization" to place, construct or modify a wireless facility,[212] again without any indication of a carve-out or exception for a request to construct such a facility on a municipal pole or ROW. If Congress meant to exclude municipal-owned poles or ROW from the statutes, it would have done so explicitly.

By taking these steps, the FCC will help ensure access pursuant to Sections 253 and 332(c)(7) to state and municipal poles and ROWs, which are not currently subject to Section 224 of the Act.[213] At a minimum, the FCC must ensure that wireless providers are afforded the right to build their own facilities in the public ROWs on the same terms that apply to other telecommunications and ROW users.

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finding that … the land held for street purposes … [was] held in a governmental rather than a proprietary capacity.") (citations omitted).

[211] *See* 47 U.S.C. § 253(c).

[212] *See id*. § 332(c)(7)(B)(ii).

[213] *See Wireline NPRM/NOI*, 32 FCC Rcd at 3276 ¶ 30, 3299-3300 ¶ 108.

F. The FCC Should Clarify that Mixed-Use Facilities are Covered by Sections 253 and 332.

The Commission should clarify that Sections 253 and 332 apply to "mixed-use" facilities—*i.e.*, facilities that are used to provide both "personal wireless service or any other telecommunications service"[214] *and* mobile broadband service— and thus would continue to govern mobile network facilities in the event mobile broadband Internet access is classified once again as an information service and a private mobile service. Although the FCC in its 2015 *Open Internet Order* reclassified broadband Internet access services, including mobile broadband, as a Title II telecommunications service and a commercial mobile radio service,[215] the FCC has initiated a proceeding re-examining those decisions and has proposed to reverse them.[216] The Commission should therefore act now to close the loophole that might open if mobile broadband is again classified as an information service and a private mobile service.

As discussed above, Section 253 applies to the provision of "telecommunications service[s]," a term that the Commission has rightly deemed mutually exclusive with the

[214] *Public Notice*, 31 FCC Rcd at 13364. The term "personal wireless service" means, among other things, "commercial mobile service," 47 U.S.C. § 332(c)(7)(C)(i), and Congress has noted that the definition of 'telecommunications service' is intended to include commercial mobile service, H.R. Rep. No. 104-458, at 114 (1996) (Conf. Rep.).

[215] *See Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601, 5778 ¶ 388. (2015) ("*Open Internet Order*"), *aff'd sub nom.*, *United States Telecomms. Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh'g denied*, 2017 U.S. App. LEXIS 7712 (D.C. Cir. May 1, 2017).

[216] *Restoring Internet Freedom*, Notice of Proposed Rulemaking, FCC 17-60, ¶ 24 (rel. May 23, 2017) ("Today, we propose to reinstate the information service classification of broadband Internet access service…. We also propose to reinstate the determination that mobile broadband Internet access service is not a commercial mobile service."); *see also FCC Proposes Ending Utility-Style Regulation of the Internet*, News Release (May 18, 2017).

information service category.[217] Likewise, Section 332(c)(7) applies to the provision of "personal wireless services," also known as "commercial mobile services,"[218] which—prior to 2015—also did not include information services like mobile broadband.[219] Accordingly, prior to the 2015 *Open Internet Order*, questions had arisen about the applicability of Section 332 to data services like mobile broadband. The FCC answered those questions in 2007: "We clarify that section 332(c)(7)(B) would continue to apply to wireless broadband Internet access service that is classified as an 'information service' where a wireless service provider uses the same infrastructure to provide its 'personal wireless services' and wireless broadband Internet access service."[220] The FCC should confirm that the same approach will apply to mixed use facilities should mobile broadband once again be treated as an information service.

For the same reasons, the Commission should clarify that mixed use facilities are covered by Section 253, and that its protections apply where a service provider uses the same facilities to provide telecommunications and information services.[221] Such a finding would be consistent

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[217] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11507 ¶ 59 (1998); *see also* 47 U.S.C. § 153(24) ("The term 'information service' … does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.).

[218] 47 U.S.C. § 332(c)(7)(B), (C)(i).

[219] In 2007, the Commission classified wireless broadband Internet access service as an information service and also found that mobile wireless broadband Internet access service was not a commercial mobile service. *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5915-20 ¶¶ 37-52 (2007) ("*Wireless Broadband Declaratory Ruling*").

[220] *Id*. at 5293 ¶ 63.

[221] Of course, the Commission cannot apply Title II provisions to information services when those services are not offered alongside telecommunications services in a mixed-use context. *See, e.g*., 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services ….").

with the FCC's 2007 finding that the pole attachment protections in Section 224 of the Act, which extend to providers of telecommunications services, also apply to mixed-use facilities: "We clarify that where a wireless service provider uses the same pole attachments to provide both telecommunications and wireless broadband Internet access services, section 224 would apply."[222]

G. The FCC Has Ample Authority to Take These Actions and to Proceed Via Declaratory Ruling.

It is well settled that agencies are authorized to interpret ambiguous provisions in the statutes they administer.[223] In the case of the FCC, the Supreme Court held that "Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act,"[224] and the Act itself states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders … as may be necessary in the execution of its functions."[225] Indeed, the Commission has already acted in a number of proceedings to interpret ambiguities in Sections 253 and 332 to remove deployment barriers, and the exercise of that authority has been recognized and upheld by the courts.

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[222] *Wireless Broadband Declaratory Ruling*, 22 FCC Rcd at 5922 ¶ 60.

[223] *Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("*Brand X*") ("[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps … involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute ….") (quotations omitted) (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44, 865-66 (1984)); *see also Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 174-76 (D.C. Cir. 1995) (agencies are empowered to interpret their organic statutes through rules and other mechanisms).

[224] *Brand X*, 545 U.S. at 980 (2005).

[225] 47 U.S.C. § 154(i).

For example, the Commission's *Shot Clock Declaratory Ruling* and *Wireless Infrastructure Order* resolved a number of controversies by adopting definitive interpretations of ambiguous provisions in Section 332(c)(7), and interpreting how their substantive and procedural requirements should be applied.[226] In particular, the Commission used its authority under the statute to clarify the maximum presumptively reasonable time frames for review of siting applications and the criteria local governments may apply in deciding whether to approve them. On judicial review, two Courts of Appeals and the Supreme Court confirmed that the Commission has authority to render such binding statutory interpretations and that courts must accord them deference.[227] And the Supreme Court's 2015 decision in *T-Mobile v. City of Roswell* reinforced that authority.[228] The Commission has likewise exercised its authority to interpret the term "has the effect of prohibiting" in Section 253(a) in its 1997 *California Payphone* decision,[229] and courts have recognized the FCC's ability to interpret ambiguous terms in Sections 253.[230]

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[226] *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14020 ¶ 67; *Wireless Infrastructure Order*, 29 FCC Rcd at 12866-69 ¶¶ 2-8, 12878-81 ¶¶ 29-34 .

[227] *See City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013); *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

[228] T-*Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 817 (2015).

[229] *California Payphone*, 12 FCC Rcd at 14206 ¶ 31; *see also id.* at 14209 ¶ 38.

[230] *See, e.g., TCG N.Y.*, 305 F.3d at 76 ("[T]he FCC's decisions interpreting the scope of § 253(c) merit some deference."); *id*. ("We agree with [FCC] precedent[]" in the *California Payphone* decision interpreting Section 253(a).); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 n.l (6th Cir. 2001) ("As the federal agency charged with implementing the Act, the FCC's views on the interpretation of Section 253 warrant respect."); *N.Y. State Thruway Auth. v. Level 3 Commc'ns, LLC*, 734 F. Supp. 2d 257, 265 (N.D.N.Y. 2010) (interpretations or applications of the terms "reasonable," "fair," "neutral," and "discriminatory" in Section 253(c) require the FCC's expertise and fall within its primary jurisdiction).

The FCC has ample authority to interpret and clarify Sections 253 and 332(c)(7), as proposed in this section, via declaratory ruling. As a threshold matter, the FCC has broad discretion as to how it conducts its proceedings,[231] and this includes whether to proceed by declaratory ruling.[232] As long as all interested parties "are afforded notice and an opportunity to present their position," the Commission "has discretion to proceed by means of rulemaking, waiver, declaratory ruling, or even adjudication in making policy."[233] This proceeding provides interested persons with that opportunity. Of course, while declaratory ruling here is appropriate, the Commission also has authority under Section 201(b), Section 253, and 332(c)(7) of the Act to "adopt rules that further define when a state or local legal requirement or practice constitutes an effective barrier to the provision of telecommunications."[234]

IV. THE FCC SHOULD STREAMLINE ENVIRONMENTAL, HISTORIC PRESERVATION, AND TRIBAL REVIEWS.

To further speed the deployment of both small cells and traditional deployments, the FCC should continue to eliminate and/or streamline unnecessary environmental, historic preservation, and tribal reviews under NEPA and Section 106 of the NHPA.

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[231] *FCC v. Schreiber*, 381 U.S. 279, 289-90 (1965); 47 U.S.C. § 154(j).

[232] *See* 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; *see also Viacom Int'l v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982) (FCC has discretion to proceed by declaratory ruling rather than rulemaking); *Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir. 1976) (FCC may adopt new statutory interpretation through declaratory ruling rather than rulemaking).

[233] *1998 Biennial Regulatory Review*, Report and Order and Further Notice of Proposed Rulemaking, 5 FCC Rcd 16673, 16691 ¶ 39 (2000).

[234] *Wireline NPRM/NOI*, 32 FCC Rcd at 3300 ¶ 109; *see* 47 U.S.C. §§ 201(b), 253(a); *Acceleration of Broadband Deployment: Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, 26 FCC Rcd 5384, 5400 ¶ 57 (2011).

A. The FCC Should Eliminate or Streamline Unnecessary NEPA Reviews.

The FCC should improve and further streamline its environmental regulations by expanding its existing NEPA categorical exclusions for small wireless facilities and associated support structures[235] to cover additional small wireless facilities that will require new or replacement support poles in areas outside of ROWs. It also should eliminate the obligation to file an EA for sites located in a floodplain that will be built above the BFE, and establish shot clocks to process EAs and to resolve environmental delays and disputes.

Expanded exclusion for small facility support structures. The FCC should exclude from NEPA review the deployment of small wireless facilities on replacement poles located outside communications or utility ROWs. While FCC rules categorically exclude small cells, DAS nodes, and other collocations from environmental review as long as historic preservation or RF compliance concerns are not present,[236] new or replacement support structures which could be used to support those facilities must still undergo full environmental review unless they fall within a narrow exclusion for certain size poles constructed in a ROW for communications towers or above-ground utilities.[237] Therefore, many replacement support poles in particular that

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[235] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3352-53 ¶ 65.

[236] *See* 47 C.F.R. § 1.1306 note 1.

[237] *See id*. § 1.1306(c). Specifically, construction of a wireless facility in a ROW, including deployment on a new or replacement pole, is excluded from NEPA (but not NHPA) review if: (i) the ROW is designated and actively used for communications towers or above-ground utility lines; (ii) the facility is no more than 10% or 20 feet taller or 20 feet wider than existing support structures in the ROW; (iii) the facility will not involve the installation of more than four new equipment cabinets/one new equipment shelter, and will not involve excavation outside the current site; and (iv) the facility will not exceed FCC RF exposure limits. *Id*. Even if the NEPA ROW exclusion applies, an applicant must still consider historic effects unless separately excluded from NHPA review. *See id*.

will be needed to support 5G deployments still require full environmental review if they are located outside such a ROW.

To address this, the Commission should expand its existing NEPA categorical exclusion to include the deployment of small wireless facilities[238] on a replacement pole located *outside* of a communications or utility ROW if the following criteria are met: (i) the new or replacement pole is of the same or similar height (*i.e.*, no more than 10% or 20 feet taller) as other nearby existing poles; and (ii) the facility will not exceed RF exposure limits.

No EAs for permitted floodplain sites above the BFE. The FCC should revise its NEPA rules so an EA is not required for siting in a floodplain, if the site will be built at least one foot above the BFE and a local building permit has been obtained.[239] Today, new facilities to be located in a floodplain still require an EA even where the facility will be constructed safely above the BFE and has received a local building permit.[240] While this requirement has been unnecessary for years, it is about to become unworkable as providers increasingly deploy new poles to support the small cells critical to next generation services. As one provider has cautioned:

> Practically speaking, much of the area along the Gulf Coast and other coastal regions fall within 100-year flood plains. In rural areas with little or no existing coverage, this may result in [the

[238] As used herein, the term "small wireless facility" should be defined to mean any wireless antenna and associated equipment that meets the volumetric limits in Section VI.A.5 of the First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (Aug. 3, 2016) ("Colo. Agmt."), 47 C.F.R. Pt. 1, App. B, or any such broader definition as the Commission may adopt.

[239] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3352-53 ¶ 65.

[240] *See* 47 C.F.R. § 1.1037(a)(6).

> need for] hundreds of new utility poles, each with an individual environmental assessment for construction in the right-of-way.[241]

Elimination of the EA filing requirement in this circumstance would address this critical issue without endangering the environment. In order to ensure that facilities constructed in a floodplain will not significantly affect the environment, FCC practice is to require applicants constructing facilities in a floodplain to show that (i) the structure is at least 1 foot (0.3 meters) above the BFE, and (ii) construction will comply with local building requirements for constructions in floodplains, as evidenced by a building permit.[242] Floodplain EAs that include these requirements are routinely approved, and T-Mobile is not aware of any instance where the FCC denied an EA that only triggered the floodplain factor and met these requirements. There is thus no environmental benefit to requiring such EAs, which require applicants and Commission staff to spend needless amounts of time and money—resources that will become increasingly strained with 5G deployments.

Environmental review shot clocks. The Commission should establish environmental review "shot clocks" for (i) the FCC processing of EAs for new and existing sites; (ii) resolution of sites referred to the Commission where the State Historic Preservation Office ("SHPO") has indicated it is foreclosed from reviewing the site; and (iii) resolution of environmental disputes.[243]

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[241] *See* Comments of Crown Castle, WT Docket No. 13-238, at 3-4 (Feb. 3, 2014).

[242] FCC, *Final Programmatic Envtl. Assessment for the Antenna Structure Registration Program*, at 5-8 (Mar. 13, 2012), https://apps.fcc.gov/edocs_public/attachmatch/DOC-312921A1.pdf; *Robert B. Jacobi, Esq., Counsel to CAAM P'Ship, LLC*, Letter, 26 FCC Rcd 3883, 3892 (MB 2011); *Andrew Skotdal, President, S-R Broad. Co.*, 23 FCC Rcd 8574, 8583 (MB 2008); *Am. Tower Corp.*, 21 FCC Rcd 1680, 1683-84 (WB 2006).

[243] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3345-46 ¶ 40, 3352-53 ¶ 65.

EAs, when required under the FCC's rules, are currently not subject to any processing timelines or dispute resolutions procedures.[244] This can allow EAs for new facilities to languish for an extended period of time—sometimes years.[245] Licensees may also file EAs to "clean-up" existing sites (often acquired from third parties, where legacy environmental records may not exist), and these EAs too can remain pending indefinitely. In other cases, sites may be referred to the Commission where SHPOs indicate that they are "foreclosed" from commenting on whether the tower will affect historic properties. And even where EAs are not filed, parties may file environmental objections under the FCC's rules with respect to a planned facility,[246] in which case no timelines apply to resolve such disputes. Environmental review shot clocks are needed to address all of these situations.

B. The FCC Should Eliminate or Streamline Unnecessary NHPA Reviews.

The FCC should expand and simplify its existing categorical exclusions from NHPA review for small cells, pole replacements, facilities located in transportation ROWs, and collocations.[247] While the FCC revised its rules in 2014 and last year amended the Collocation Agreement to categorically exclude certain collocations—including many small wireless antennas—these exclusions do not cover all collocations or support structures, are extensively qualified, and can be confusing to apply. Indeed, given the complexity of the existing exclusions, it has been T-Mobile's experience that some network planners chose to simply

[244] *See generally* 47 C.F.R. Pt. 1, Subpt. I.

[245] *See, e.g., SBA Towers III, LLC*, Memorandum Opinion and Order, 31 FCC Rcd 1755 (WTB 2016) (more than a year-and-a-half to process an EA).

[246] *See, e.g.*, 47 C.F.R. § 1.1307(c).

[247] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3353-56 ¶¶ 66-75.

complete the Section 106 process rather than risk misapplying one of the complex exclusions. T-Mobile thus supports the creation of broader, simplified exclusions.[248] Specifically:

Traffic and light pole exclusion. The exclusion for small wireless facility deployments on traffic control and lighting structures located in or near historic districts should be streamlined.[249] These deployments are currently excluded only case-by-case, if the deployment meets certain size and ground disturbance limitations *and* the SHPO agrees (or fails to object) within 30 days that the structure is not a contributing element.[250] This case-by-case vetting process is unworkable, given the importance of these structures to 5G deployments. The exclusion should be revised to eliminate the need for case-by-case SHPO consultation, replaced instead with a requirement that applicants use a qualified consultant to confirm that the structure is not a contributing element.

Pole replacement exclusion. Pole replacements should be excluded from Section 106 review, regardless of whether a pole is located in a historic district, provided that the replacement pole is not "substantially larger" (*i.e.*, no more than 10% or 20 feet taller or 20 feet wider) than the pole it is replacing. This exclusion would address replacements for poles that were constructed for a purpose other than supporting antennas, and thus do not fall within the "tower" replacement exclusion in the NPA,[251] but that have (or will have) an antenna attached to them.[252]

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[248] *See id.*

[249] Colo. Agmt. § VII.C (OMB approval pending, *see* 82 Fed. Reg. 14510 (Mar. 21, 2017)).

[250] *See id.*

[251] Nationwide Programmatic Agreement Regarding Section 106 National Historic Preservation Act Review Process, § III.B (Sept. 2004) ("NPA"), 47 C.F.R. Pt. 1, App. C. Section III.B of the NPA generally excludes the construction of a replacement "tower" that does not substantially increase the size or footprint of the existing tower. *See id.* Under the NPA, a tower is a structure built for the sole or primary purpose of supporting FCC-licensed antennas. *See id.* § II.A.14.

[252] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3353 ¶ 67.

ROW exclusion. The exclusion for construction of wireless facilities in ROWs should be further expanded. Current provisions of the NPA exclude from Section 106 review certain size-limited construction in or near utility and communications ROWs, subject to the need for tribal review and the avoidance of construction within the boundaries of a historic property.[253] The exclusion should be expanded to include the construction or collocation of communications infrastructure in *any* ROW, including a transportation ROW, and the need for tribal review should be eliminated where there is no new ground disturbance. The exclusion should also apply regardless of whether the ROW is located on a historic property.[254]

Collocation exclusion. The FCC should further streamline NHPA review of collocations in several ways.[255] First, Section 106 review should no longer be required for collocations "within 250 feet of the boundary of [a] historic district" that otherwise qualify for exclusion; only collocations within a historic district should trigger review.[256] Second, tribal review should not be required for any collocation where there is no new ground disturbance, the collocation is not on tribal land, and the collocation will not be located on a property or in a district identified in the National Register as having tribal significance.[257] Third, a collocation that has received local approval should be excluded from Section 106 review, regardless of whether it will be located in/on a historic property/district, as long as: (i) the proposed collocation has been

[253] *See* NPA § III.E.

[254] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3354-55 ¶¶ 69-71.

[255] *See id.* at 3355-56 ¶¶ 72-75.

[256] *See* Colo. Agmt. §§ V.A.2, VI.A.1.

[257] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3355 ¶ 73.

reviewed and approved by a Certified Local Government[258]; or (ii) the collocation has received approval, in the form of a Certificate of Appropriateness[259] or other similar formal approval, from a local historic preservation review body that has "reviewed the project pursuant to the standards set forth in a local preservation ordinance and has found that the proposed work is appropriate for the historic structure or district."[260]

C. The FCC Should Improve the Tribal Review Process and Facilitate Collocation on Twilight Towers.

The FCC must take steps to improve the tribal review process and ensure that collocations on twilight towers are excluded from historic preservation review in the same manner as towers constructed prior to March 16, 2001.[261] As CCA documented in its recently submitted white paper, tribal consultation can be a costly and time consuming process in both rural and urban areas.[262] In that regard, T-Mobile supports and hereby incorporates by reference the positions contained in CCA's white paper and the joint pleading filed by CTIA and WIA on this date in WT Docket 17-79 to improve the tribal review process and clear twilight towers for collocation.[263] In addition, to advance effective tribal consultation, while also furthering the

[258] A "Certified Local Government" is a local government whose local historic preservation program is certified under Chapter 3025 of the National Historic Preservation Act. *See* 54 U.S.C. §§ 300302, 302501 *et seq*.

[259] A "Certificate of Appropriateness" is an authorization from a local government allowing construction or modification of buildings or structures in a historic district.

[260] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3356 ¶ 75.

[261] *See id.* at 3346-52 ¶¶ 42-61, 3359 ¶ 82.

[262] Competitive Carriers Ass'n, Clearing the Path for America's Wireless Future: Addressing Hurdles to Meet the Pressing Need for our Nation's Wireless Infrastructure (June 8, 2017).

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

Commission's mission to enable rapid deployment of wireless infrastructure, the FCC should take the following steps:

Standardized tribal information packet. The FCC should clarify that information provided to SHPOs in response to FCC Form 620 or 621 is sufficient for the tribal consultation process, and that additional information may be required only upon a written explanation from the tribe regarding the information sought and why it is necessary. By standardizing the information applicants must provide during tribal consultation, the Commission will set a baseline against which requests for additional information can be assessed for reasonableness.

TCNS enhancements. The FCC should provide more transparency and objective checks for tribal and applicant use of TCNS. Specifically, TCNS should: (i) provide applicants with list of counties each tribe has identified as an area of interest, and that list should be updated at least twice per year; (ii) provide a preview step so applicants can identify all tribes that have expressed interest in projects in a county; and (iii) make available to users the location of wireless sites where tribes and SHPOs have made prior findings of no properties or no effect, and exclude new facilities at those sites from tribal review. Furthermore, the FCC should develop consensus on a list of facility types (*e.g.*, collocations with no new ground disturbance) that are unlikely to affect tribal historic properties, and encourage tribes to specify areas where no review is required.

CONCLUSION

By taking the steps described herein, the Commission will facilitate the siting of wireless facilities and help expedite the deployment of broadband where American consumers need it most.

Respectfully submitted,

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