

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

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

REPLY COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.

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Introduction and Summary

The initial comments reflect general agreement between industry and municipal commenters about the importance of delivering the benefits of next generation wireless broadband to consumers. The only question is whether further FCC action is required to ensure consistent and unimpeded deployment of the infrastructure required to power 5G networks and beyond, including small cells and other broadband wireless facilities. As the record makes clear, the answer is a resounding yes.

Many communities around the country already embrace the potential of small cells and other wireless broadband facilities, and work with service providers to facilitate deployment of facilities that will keep their communities at the forefront of the innovation economy.¹ These communities and the policies that they have adopted are not the issue. In too many other communities, however, including many that did not participate in this proceeding, broadband deployment is an afterthought, resulting in patchwork networks and a growing wireless broadband divide. In other areas, because of NIMBYism or other unwarranted concerns, local governments have adopted policies that are actively hostile to broadband deployment. The record thus reflects an overwhelming need for the Commission to adopt new rules and clarifications to ensure that municipal disengagement does not impede federal telecommunications policy. Indeed, inconsistent experiences by different service providers in the same jurisdictions underline the urgent need for a consistent federal policy for infrastructure deployment.²

¹ See Comments of Crown Castle Int'l Corp., WT Docket No. 17-79 at 7-8 (June 15, 2017) ("Crown Castle Comments").

² See Comments of Smart Communities and Special Districts Coalition, WT Docket No. 17-79 at 13-14 (June 15, 2017) ("SCSDC Comments") (identifying different industry experiences with the same municipalities).

As Crown Castle explained in its comments in response to the *Streamlining PN*, infrastructure deployment is not an issue that requires the FCC to pick winners and losers. Rather, the Commission should adopt a balanced policy that respects the authority of states and municipalities with regard to public safety and welfare while also ensuring that service providers encounter a consistent regulatory structure that allows for rapid and efficient deployment of broadband networks to satisfy America's exponentially growing demand for mobile data. The FCC's role is not to proscribe specific processes or procedures that jurisdictions must follow in evaluating applications to access the public rights-of-way ("ROWS") or to install small cell infrastructure, but rather to establish guidelines within which states and localities can exercise their reasonable discretion. The proposals in the *NPRM* and the accompanying *NOI* are consistent with this approach, and Crown Castle urges the Commission to swiftly adopt them.

Where relevant, the Commission must also account for the differences in broadband facility providers. As notable in the record, Crown Castle differs from many other carriers that deploy broadband networks in the ROW, both in its business plan and its approach to network design and deployment. First, Crown Castle does not, itself, deploy wireless service in the ROW, but rather utilizes exclusively wireline networks to provide next generation broadband services. Crown Castle entities currently hold utility certifications in 45 states, the District of Columbia, and Puerto Rico to provide these services. Second, Crown Castle goes to great efforts to utilize facilities that are aesthetically pleasing and consistent with their surroundings.³ Crown Castle utilizes existing utility poles or high quality new poles that are typically no more than 30-40 feet

³ For example, in Wildwood, New Jersey, Crown Castle purchased poles for the boardwalk from the same manufacturer as the existing poles to ensure that they had a consistent appearance. See Christopher South, *Wildwood to Get Wireless Boost with New Relay Poles*, The Leader (Mar. 28, 2017), available at http://www.shorenwstoday.com/wildwood/wildwood-to-get-wireless-boost-with-new-relay-poles/article_35efb2f4-cc61-5a23-a766-e44aab1a2cde.html?utm_medium=social&utm_source=email&utm_campaign=user-share.

in height, in contrast to other providers whose poles can be as much as three times that height. Despite these differences, all too frequently, Crown Castle's projects are stalled by municipalities applying a lowest common denominator approach that subjects Crown Castle to regulations more applicable to traditional wireless towers than to fiber optic networks with discreet nodes. In order to promote the rapid deployment of next generation broadband networks, the Commission must account for the many different types of facilities used and the different levels of scrutiny that are appropriate for each type of facility.

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Crown Castle International Corp. and its subsidiaries (“Crown Castle”) submit these reply comments in response to the *Notice of Proposed Rulemaking* and *Notice of Inquiry* requesting comments on streamlining deployment of broadband infrastructure to support next-generation wireless networks.⁴

I. THE RECORD REFLECTS BROAD SUPPORT FOR A BALANCED APPROACH TO STREAMLINING STATE AND LOCAL REVIEW OF SMALL CELL INSTALLATIONS.

A. The FCC Should Adopt a “Deemed Granted” Remedy and Has Ample Authority to Do So.

The record demonstrates that existing rules and remedies are insufficient. The rules and remedies permit (and in some cases may even promote) unnecessary delays, justifying the adoption of a deemed granted remedy.⁵ A number of commenters agreed with Crown Castle that even where there is a clear and indisputable shot clock violation, the need to seek a judicial

⁴ See *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79, FCC 17-38 at ¶ 1 (rel. Apr. 21, 2017) (the “NPRM”).

⁵ See, e.g., Comments of AT&T, WT Docket No. 17-79 at 25 (June 15, 2017) (“AT&T Comments”); Comments of CTIA, WT Docket No. 17-79 at 6-7 (June 15, 2017) (“CTIA Comments”); Comments of Verizon, WT Docket No. 17-79 at 35-36 (June 15, 2017) (“Verizon Comments”).

remedy creates a substantial impediment to infrastructure deployment.⁶ The three options considered by the Commission preserve local authority and merely recognize that it should be exercised in a manner that is consistent with federal telecommunications policy. This balanced approach is appropriate and permissible under the statute. Importantly, a deemed granted remedy will not alter the scope of municipal review. What a deemed granted remedy will do, however, is require all municipalities to conduct such review within a reasonable time—just as many do today.

Municipal opposition to a deemed granted remedy appears to be based more on a knee-jerk reaction to any effort to impose federal procedural guidelines than on valid concerns. For example, arguments that a deemed granted remedy “would simply encourage providers to submit incomplete applications” are a red herring.⁷ Of course, no municipality can be expected to review an application that is incomplete, so industry applications would continue to be subject to tolling of the shot clock (and the deemed granted remedy) if their applications are faulty. These tolling procedures are the proper means for aligning the incentives of both providers and local jurisdictions—they encourage localities to promote simple, easy to follow procedures, and they encourage providers to follow those procedures and submit complete applications from the beginning. Where an application is properly submitted, the reviewing authority should be obligated to complete its review (including any appropriate locally-imposed procedures) within a reasonable time—and there should be a straightforward means of automatically enforcing that deadline where the locality does not.

⁶ See, e.g., AT&T Comments at 25-26 (“Further, for applications not covered by Section 6409,51 applicants must resort to judicial action to obtain relief, an expensive and time-consuming process that gives local governments considerable leverage.”); Comments of Wireless Infrastructure Association, WT Docket No. 17-79 at 16 (June 15, 2017) (“WIA Comments”).

⁷ See, e.g., Comments of Fairfax County, Virginia, WT Docket No. 17-79 at 7-9 (June 15, 2017); Comments of Illinois Department of Transportation, WT Docket No. 17-79 at 2-4 (June 15, 2017).

There is no validity to arguments that the FCC lacks authority to implement a deemed granted remedy. Courts have upheld the FCC’s design of similar programs and have deferred to the agency in interpreting and giving more specific meaning to ambiguous language in Section 253 and 332.⁸ Claims like those made by the Cities of Austin, Arlington (TX), Irvine, and Lansing that the FCC does not have the authority to regulate the ROW contradict the plain terms of the statute and Commission precedent.⁹ As Crown Castle explained in its opening comments, courts have consistently found that management of the ROW is not a proprietary function, so arguments relating to municipal “property” are misguided.¹⁰ Moreover, as explained more fully below, the mere fact that a restriction pertains to proprietary interests is not enough to escape the scope of Section 253.¹¹

There is also no limitation in the statute that would prevent the FCC from adopting regulations dealing with aesthetic issues, as the City and County of San Francisco suggest.¹² Although certain cases cited by municipalities have found that Sections 253 and 332 do not explicitly prevent local governments from relying on specific aesthetic concerns, this is not the equivalent of finding that municipalities have carte blanche to deny siting or permitting applications as long as they cite aesthetic concerns as the justification. In fact, courts have found just the opposite, rejecting claimed aesthetic intrusions where they were not supported by

⁸ See, e.g., *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 250 (5th Cir. 2012) (finding that the limitations of Section 332(c)(7)(B) reflect “legitimate intrusions into state and local governments’ traditional authority over zoning decisions”), *aff’d*, 133 S. Ct. 1863 (2013).

⁹ See, e.g., Comments of City of Austin, WT Docket No. 17-79 at 6 (June 15, 2017); Comments of City of Arlington (TX), WT Docket No. 17-79 at 3 (June 15, 2017); Comments of City of Irvine, WT Docket No. 17-79 at 3-5 (June 15, 2017); Comments of City of Lansing, WT Docket No. 17-79 at 2-3 (June 15, 2017).

¹⁰ See Crown Castle Comments at 49-50.

¹¹ See *infra*, at III.B.

¹² See Comments of City and County of San Francisco, WT Docket No. 17-79 at 27-28 (June 15, 2017) (“CCSF Comments”).

substantial evidence as required by Section 332(c)(7)(B)(iii).¹³ The Commission, as the expert agency, certainly has the power to set guardrails for the proper exercise of aesthetic review. As part of this proceeding, it can and should interpret what role aesthetic concerns may play under the statutes.

Finally, the notion that the FCC may only proceed by adjudication, as suggested by the California Public Utilities Commission, is both legally inaccurate and disastrous from a policymaking perspective.¹⁴ As even the CPUC recognizes, the agency has broad authority to act in whatever manner it deems appropriate.¹⁵ This is particularly true when it comes to balancing federal and state interests under Sections 253 and 332.¹⁶ Moreover, as a policy matter, an adjudicatory approach would be no different from the status quo, in which there is uncertainty about the scope of federal protections in key areas and some municipalities use the threat of lengthy delays from adjudication as a sword to delay meritorious applications.¹⁷

To encourage rapid and widespread deployment of next generation wireless networks, the FCC must adopt prospective policies and procedures that provide clear guidance regarding

¹³ See, e.g., *Crown Castle NG East Inc. v. Town of Greenburgh, N.Y.*, 52 Fed. App'x 47, at *50 (2d Cir. 2014) (rejecting as speculative claim of aesthetic intrusion); *Crown Castle NG East Inc. v. Town of Greenburgh N.Y.*, 2013 WL 3357169, at *20 (S.D.N.Y. July 3, 2013) ("While it is certainly true that aesthetics can be a valid ground for local zoning decisions . . . the evidence in the Board's record does not support that the size of Plaintiff's proposed shroud box correlates with aesthetic intrusion.").

¹⁴ See Comments of California Public Utilities Commission, WT Docket No. 17-79 at 9-11 (June 15, 2017).

¹⁵ *Id.* at 9 (quoting *Conference Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013)).

¹⁶ See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Red. 13994 ¶ 67 (2009) (declaring that "[t]o the extent specific evidence is presented to the Commission that a blanket variance ordinance is an effective prohibition of service, then we will in that context consider whether to preempt the enforcement of that ordinance in accordance with the statute"); Remarks of FCC Commissioner Ajit Pai at the CTIA Wireless Foundation Smart Cities Expo, Washington, DC, 2016 WL 6538281, at *1 (OHMSV Nov. 2, 2016) (observing that "Congress gave the Commission the express authority to preempt any state or local regulation that prohibits or has the effect of prohibiting the ability of any entity to provide wired or wireless service.").

¹⁷ See Crown Castle Comments at 24-25.

practices that are acceptable and unacceptable and a defined path for enforcement, such as a deemed granted remedy.

B. The FCC Should Adopt the Specific Shot Clock Timelines Proposed in the NPRM.

The initial comments reflect widespread support for the Commission’s proposal to adopt new shot clock timelines for applications not covered by Section 6409(a).¹⁸ Support was particularly strong for establishing a specific shot clock for small cell applications, which are relatively simple to review.¹⁹ Commenters who oppose the new shot clock timelines fail to justify why longer timeframes for review are reasonable—particularly for small cell facilities. The adoption of similar timeframes by several states confirms their reasonableness, and the Commission should apply these deadlines on a nationwide basis.

C. The FCC Should Reiterate Its Prohibition on Moratoria.

The record reflects widespread agreement that actual and de facto moratoria on wireless applications violate Sections 253, 332, and the *2014 Infrastructure Order*, and unreasonably prohibit or delay network deployment and the provision of wireless services.²⁰ Even the Smart Communities and Special Districts Coalition recognizes that “[t]he FCC’s rules are clear that

¹⁸ See, e.g., Comments of American Cable Association, WT Docket No. 17-79 at 41 (June 15, 2017); Comments of Arctic Slope Regional Corp., WT Docket No. 17-79 at 7 (June 15, 2017) (“ASRC Comments”); Comments of Competitive Carriers Association, WT Docket No. 17-79 at 13-15 (June 15, 2017) (“CCA Comments”); Comments of Computer & Communications Industry Association, WT Docket No. 17-79 at 8-10 (June 15, 2017); CTIA Comments at 11-15; Comments of Free State Foundation, WT Docket No. 17-79 at 9-11 (June 15, 2017); Comments of Samsung, WT Docket No. 17-79 at 4-5 (June 15, 2017).

¹⁹ See, e.g., Comments of ACT The App Association, WT Docket No. 17-79 at 10 (June 15, 2017) (60 day shot clock for small cells); Comments of Computing Technology Industry Association, WT Docket No. 17-79 at 2 (June 15, 2017) (same); Verizon Comments at 41-44 (same); WIA Comments at 20-22 (same).

²⁰ See, e.g., AT&T Comments at 14; CCA Comments at 16-17; Comments of Conterra Broadband Services et al., WT Docket No. 17-79 at 14-17 (June 15, 2017); CTIA Comments at 22-24; Comments of Mobile Future, WT Docket No. 17-79 at 9 (June 15, 2017) (“Mobile Future Comments”); Comments of Nokia, WT Docket No. 17-79 at 6-7 (June 15, 2017) (“Nokia Comments”); Comments of Sprint, WT Docket No. 17-79 at 41-42 (June 15, 2017) (“Sprint Comments”); Comments of T-Mobile, WT Docket No. 17-79 at 36-38 (June 15, 2017) (“T-Mobile Comments”); Verizon Comments at 33.

moratoria do not stop the shot clock.”²¹ Nevertheless, a handful of municipalities and other groups acting on behalf of certain state and local governments seek to justify the continued application of moratoria that, by definition, delay the deployment of next generation wireless networks.²² There is, however, no justification for a practice that the FCC has unambiguously prohibited. The existing shot clocks and those proposed above give municipalities a reasonable time to evaluate siting and permitting applications. Accordingly, the Commission should reaffirm that a moratorium on applications constitutes a *per se* violation of Section 253(a) and/or 332(c)(7)(B). Moreover, the Commission should provide that the shot clock begins to run with the good faith submission of an application, notwithstanding the existence of a moratorium.

II. THE RECORD JUSTIFIES STREAMLINING THE NHPA AND NEPA PROCESSES TO PROMOTE EFFICIENCY AND REDUCE DELAYS.

A. The Tribal Review Process is Unwieldy and Must Be Refocused on Projects Reasonably Likely to Cause Concerns.

The record demonstrates that the FCC should take steps to ensure that the tribal review process achieves its original purpose without imposing unnecessary delays and costs on the deployment of next generation networks. Commenters overwhelmingly agreed with Crown Castle that consultations with Tribal Nations are riddled with unpredictability, delays, and excessive costs.²³ Even a number of tribal interests acknowledged that some Tribal Nations appear to exploit the Section 106 process for reasons unrelated to the preservation of historic properties.²⁴ Industry and tribal interests alike support at least some categorical exclusions for

²¹ SCSDC Comments at 33.

²² See Comments of American Association of State Highway and Transportation Officials, WT Docket No. 17-79 at 2 (June 15, 2017); Comments of Illinois Municipal League, WT Docket No. 17-79 at 2 (June 15, 2017); Comments of League of Minnesota Cities, WT Docket No. 17-79 at 15 (June 15, 2017).

²³ See, e.g., AT&T Comments at 35-39; CCA Comments at 34-38; Joint Comments of CTIA and WIA, WT Docket No. 17-79 at 6-7, 11-13 (June 15, 2017) (“Joint CTIA and WIA Comments”); Verizon Comments at 44-45.

²⁴ See, e.g., Catawba Indian Nation Tribal Historic Preservation Office, WT Docket No. 17-79 at 2 (June 15, 2017) (recognizing that some Tribal Nations charge excessive fees); Fond du Lac Band of Lake Superior Chippewa, WT

projects that would not cause effects to historic properties.²⁵ As the National Congress of American Indians explained, “Considering that many installations of small facilities will not disturb the ground at all, these exclusions could be well received in Indian Country.”²⁶ The Choctaw Nation of Oklahoma, meanwhile, recognized that pole replacements that are within the footprint of the existing pole should be excluded from review.²⁷ These common sense exclusions will help focus Tribal Review on those circumstances where there is a reasonable possibility that the installation will raise legitimate concerns. The Commission should go further, however, and exclude categories such as small cells and collocations that also cannot reasonably be expected to cause any ground disturbance as well as projects that involve minimal excavation of previously-disturbed areas, such as ROWs.

The strident opposition by some tribal interests to even the most common-sense exclusions is both unreasonable and not constructive. For example, rather than commenting on what should constitute a “substantial increase” in size for a ROW exclusion, Bad River Band of the Lake Superior Tribe of Chippewa merely opposes the exclusion as “too general.”²⁸ Similarly, the Santa Clara Pueblo objects to the creation of new exclusions solely because the “minimal potential impact cannot be assumed.”²⁹ Yet, it provides no counter argument for why any impact

Docket No. 17-79 at 2 (June 15, 2017); Comments of National Congress of American Indians et al., WT Docket No. 17-79 at 11 (June 15, 2017) (“NCAI Comments”) (acknowledging that “the actions of a few Tribal Nations may be driving this conversation in a way that will impact all Tribal Nations”); Comments of Quapaw Tribe of Oklahoma, WT Docket No. 17-79 at 2 (June 15, 2017) (reciting discussions with FCC about excessive tribal fees).

²⁵ See, e.g., CCA Comments at 45-47; Sprint Comments at 32-33; NCAI Comments at 19-20.

²⁶ See NCAI Comments at 19-20; Comments of The Muscogee (Creek) Nation, WT Docket No. 17-79 at 10 (June 15, 2017).

²⁷ See, e.g., Comments of Choctaw Nation of Oklahoma, WT Docket No. 17-79 at 4 (June 15, 2017) (“Choctaw Nation Comments”).

²⁸ See Comments of Bad River Band of the Lake Superior Tribe of Chippewa, WT Docket No. 17-79 at 3 (June 15, 2017).

²⁹ See Comments of Santa Clara Pueblo, WT Docket No. 17-79 at 3 (June 15, 2017).

should be assumed from the kinds of minimally intrusive projects that have been proposed as exclusions. The Commission should resist such an unfounded assumption of impact, particularly because the current system results in well-documented regulatory burdens that result in unnecessary costs and delays in network deployment.

The initial comments also reflect broad support for establishing reasonable timelines for tribal review and/or permitting self-certification of compliance with tribal notifications.³⁰ Even many tribal commenters recognize the need for established timelines as long as there is an exception where the delay is caused by an incomplete or otherwise deficient application.³¹ A 30-day timeframe for review is appropriate, subject - as with municipal applications - to the submission of complete application materials. When a Tribal Nation becomes non-responsive, there is simply no reason not to permit self-certification.

B. The Section 106 Review Process Also Should Be Streamlined.

The record reflects widespread support for expanding exclusions from Section 106 review—particularly for small cell facilities.³² As Crown Castle explained, additional exclusions for compound expansions that would increase the leasehold or fee interest, transportation ROWs, replacement poles in ROWs, and collocation are consistent with the 2004 Programmatic Agreement and would expedite infrastructure deployment without any measurable effect on the

³⁰ See AT&T Comments at 33; CCA Comments at 37-38; Mobile Future Comments at 11; Sprint Comments at 21-23; Verizon Comments at 50-53.

³¹ See, e.g., Choctaw Nation Comments at 6 (explaining that “deemed granted” remedy is reasonable where no response provided); Comments of Lower Brule Sioux Tribe, WT Docket No. 17-79 at 9 (June 15, 2017) (finding 30-day time period appropriate once notice is complete).

³² See, e.g., AT&T Comments at 30-32; CTIA Comments at 38-39; Comments of Lightower Fiber Networks, WT Docket No. 17-79 at 16-17 (June 15, 2017); T-Mobile Comments at 60-62; Comments of Utilities Technology Council, WT Docket No. 17-79 at 2 (June 15, 2017); Verizon Comments at 54-61.

protection of historic properties.³³ The Commission should also permit Certified Local Government approval to supplant SHPO review.

C. There is No Valid Basis to Require Section 106 Review for Collocations on Twilight Towers.

Finally, the initial comments support excluding twilight towers—all of which are now more than 12 years old—from Section 106 review.³⁴ Although some preservationists and tribal interests oppose exclusion or support consultation for new collocations, they offer no valid basis for this position. Given the longstanding existence of these towers, the risk of an adverse effect on historical properties is virtually nil. In any event, the Commission should provide regulatory certainty so these existing resources can be effectively utilized.

III. THE RECORD SUPPORTS SWIFT FCC ACTION TO ADDRESS THE ISSUES RAISED IN THE NOTICE OF INQUIRY.

A. The Commission Should Broadly Interpret the Types of Municipal Actions Subject to Sections 253 and 332.

There is substantial support in the record for the FCC adopting an expansive view of Sections 253 and 332 that would define the scope of, but not unduly interfere with, municipal review of siting and permit applications.³⁵ The FCC should move forward by providing clarity on this important topic as soon as possible.

Several municipal commenters continue to advance an incorrect interpretation of Section 332 that they say prohibits the application of Section 253 to small cell networks used to offer

³³ Crown Castle Comments at 38-41.

³⁴ See, e.g., Comments of American Petroleum Institute, WT Docket No. 17-79 at 3 (June 15, 2017); AT&T Comments at 39-41; Joint CTIA and WIA Comments at 35-39; Sprint Comments at 33; T-Mobile Comments at 63; Verizon Comments at 62.

³⁵ See, e.g., ASRC Comments at 7-8; AT&T Comments at 7-12; CTIA Comments at 19-22; Lighttower Comments at 19-20; Sprint Comments at 45-48; T-Mobile Comments at 23-26 & 52-54; Verizon Comments at 8-11; 29-33.

wireless services.³⁶ There are two flaws with this argument. First, the municipal commenters ignore both the plain statutory language and the established Commission precedent that call for an expansive interpretation of Section 253 to all telecommunications services, regardless of the technology used. Second, even if the interpretation advanced by these municipalities was correct as to networks and facilities that are only designed to provide wireless services, it is inapplicable to Crown Castle's advanced wireline fiber optic and small cell networks.

As an initial matter, the municipal commenters' reliance on Section 332(c)(7)(A) as precluding the application of Section 253 to small cell networks is based on a flawed interpretation of the statute that the Commission already has rejected. Section 332(c)(7)(A) states, "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."³⁷ "Personal wireless service facilities" are defined as facilities for the provision of "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."³⁸ While the municipal commenters argue that this language serves as an absolute barrier to applying Section 253 to small cell networks,³⁹ this is a bridge too far.

The municipal commenters make no attempt to reconcile the text of Section 332(c)(7)(A) with that of Section 253(a), which states that "[n]o State or local statute or regulation, or other

³⁶ See, e.g., CCSF Comments at 22-26; Comments of Fairfax County, Virginia, WT Docket No. 17-79 at 15-17 (June 15, 2017); Comments of League of Arizona Cities and Towns, WT Docket No. 17-79 at 37-47 (June 15, 2017); Comments of National League of Cities, WT Docket No. 17-79 at 5-6 (June 15, 2017); Comments of City of Philadelphia, WT Docket No. 17-79 at 2 (June 15, 2017).

³⁷ See 47 U.S.C. § 332(c)(7)(A).

³⁸ See *id.* § 332(c)(7)(C).

³⁹ See, e.g., SCSDC Comments at 56-57 (arguing that "Section 253 has no role whatsoever" with regard to wireless facilities).

State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any* entity to provide *any* interstate or intrastate telecommunications service.”⁴⁰ The municipal commenters’ interpretation would effectively rewrite Section 253(a) to replace “any entity” with “any entity that does not provide or facilitate the provision of personal wireless services.” This, of course, is not what Congress said in Section 253(a).⁴¹ Rather, Congress drafted Section 253(a) to apply broadly to any telecommunications service, which the Act defines as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used*.”⁴²

As Crown Castle explained in its opening comments, the Commission has long recognized that Section 253 applies to all facilities used to provide any telecommunications services, including wireless services.⁴³ In fact, just this month the agency applied Section 253 to a dispute involving the provision of CMRS services.⁴⁴

Furthermore, any attempt to reconcile the application of Sections 253 and 332 must account for the specific nature of the services provided and the equipment used. Advanced fiber optic and small cell networks clearly fall within Section 253 in ways that other facilities may not. Crown Castle’s small cell networks, for example, typically include a fiber optic backbone in the ROW, providing high capacity, high speed connectivity to the nodes that Crown Castle installs

⁴⁰ See *id.* § 253(a) (emphasis added).

⁴¹ See *Franklin Nat’l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding “no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances”); *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, “it has done so clearly and expressly”).

⁴² 47 U.S.C. § 153 (emphasis added).

⁴³ See Crown Castle Comments at 46.

⁴⁴ See *In the Matter of Connect America Fund Sandwich Isles Communications, Inc.*, Memorandum Opinion and Order, FCC 17-85, WC Docket No. 10-90, CC Docket No. 96-45 (rel. July 3, 2017) (“*Sandwich Isles Order*”).

on existing or new poles that are typically no more than 30-50 feet in height.⁴⁵ These facilities provide a fundamentally different type of telecommunications service than some other wireless facilities, such as macro sites. Just as with traditional wireline service, small cells must be deployed deep in the network, close to the customers, and rely on wired infrastructure to carry traffic to and from these small, localized wireless facilities. While there might be a reasonable basis to apply a different regulatory framework to 120 foot towers, the same cannot be said of fiber-based small cell networks like those that Crown Castle provides. Access to the public ROWs on non-discriminatory terms, therefore, is critical to deliver the benefits of next generation networks, and Section 253 should apply to those efforts.

B. The Commission Should Clarify that Review and Approval of Applications for Siting in the Public Rights-of-Way is Subject to Section 253.

Various municipal commenters continue to incorrectly suggest that an attempt by the Commission to set reasonable limits for local rates for ROW use interferes with municipal property interests so as to constitute a taking under the Fifth Amendment.⁴⁶ This allegation is meritless. First, municipalities lack a proprietary interest in the ROWs. Instead, the ROWs are public goods held in public trust. This simple reality fatally undercuts any takings claim—local governments are not being deprived of any “property” when the federal government limits their restrictions on ROW use. Second, it is well established that FCC regulation of rates—even for use of privately owned property—does not constitute a regulatory taking. Finally, as several courts have recognized, given the de facto monopoly that municipalities have over ROWs in addition to their ability to influence use of even privately owned land, there is no such thing as a

⁴⁵ See Ken Schmidt, *A Tale of Two Small Cell Proposals – Crown Castle v. Mobilitie*, <http://www.steelintheair.com/Blog/2016/04/tale-of-two-small-cell-proposals-crown-castle-vs-mobilitie.html> (Apr. 14, 2016).

⁴⁶ See, e.g., City and County of San Francisco Comments at 29-30; League of Arizona Towns Comments at 47-54; SCSDC Comments at 77-78.

“fair market value” in this context, which makes alternative methods of calculating compensation not only reasonable, but absolutely necessary.

1. Municipal Management of the Right-of-Way Does Not Amount to a Cognizable Property Interest.

It is a prerequisite to any takings claim that the party asserting a taking must have a legally cognizable property interest.⁴⁷ A cognizable property interest is based on one’s ownership of property.⁴⁸ But here, the municipalities have no such interest because while municipalities manage the ROWs, they do not own them. The ROWs are public goods held in trust by municipalities.⁴⁹ Courts across the country have recognized that “the ownership interest municipalities hold in their streets is governmental, and not proprietary.”⁵⁰ As such, although a local government may regulate certain aspects of the ROWs and conduct limited proprietary activities there, it does not possess a property interest in that space.⁵¹ True ownership lies with the public.

Congress recognized this distinction between ownership and management in Section 253(c), which “preserves the traditional authority of state and local governments to *manage* the public rights-of-way.”⁵² To “manage” is not to own. Management of ROWs includes the “vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly

⁴⁷ See *Acceptance Ins. Companies, Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009).

⁴⁸ See *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215 (Fed. Cir. 2005) (“[A] claimant seeking compensation from the government for an alleged taking of private property must, at a minimum, assert that its property interest was actually taken by the government action”).

⁴⁹ Cf. *Liberty Cablevision Of Puerto Rico, Inc. v. Municipality Of Caguas*, 417 F.3d 216, 222 (1st Cir. 2005) (“Even when the fee of the streets is in the city, in trust for the public, it is a mistake to suppose that the city is constitutionally and necessarily entitled to compensation”).

⁵⁰ *Id.*

⁵¹ See generally *Sprint Spectrum L.P. v. Mills*, 283 F. 3d 404, 417-21 (2d Cir. 2002) (discussing distinction between proprietary and regulatory actions).

⁵² *BellSouth Telecommunications, Inc. v. City of Mobile*, 171 F. Supp. 2d 1261, 1274 (S.D. Ala. 2001) (emphasis added).

flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way.”⁵³ If localities owned the ROWs, Congress would not have had to single out management of the ROW as an authority preserved by the Act.⁵⁴

Moreover, even if localities could claim some level of ownership in the ROWs, that does not excuse them from compliance with Section 253. Earlier this month in the *Sandwich Isles Order*, the Commission reaffirmed the limits of proprietary ownership, recognizing that “the relevant inquiry in determining whether Section 253(a) applies is the legal requirement’s effect on the provision of telecommunications service, not how the requirement could be characterized or the purported subject matter of the requirement.”⁵⁵ Because the actions proposed in the *NPRM* would extend only to the ability of states and localities to enter into or refuse to enter into legal requirements governing the provision of telecommunications service, Section 253(a) applies regardless of whether ROWs are “property” owned by localities.

2. The Rate-Setting and Access Requirements Contemplated in the *NPRM* Are Not a Regulatory Taking.

Even if there were a municipal property interest, a takings claim would nonetheless fail on the merits. While the municipal commenters argue that FCC regulation of rates and access would effectuate a regulatory taking,⁵⁶ this is hardly the case. None of the Commission actions contemplated in the *NPRM* would prevent municipalities from charging reasonable application

⁵³ *TCI Cablevision of Oakland Cty., Inc.*, 12 FCC Rcd. 21396, ¶ 103 (1997).

⁵⁴ *Cf. Classic Tel., Inc.*, 11 FCC Rcd. 13082 (1996) (municipalities can only enact regulations that are “an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way”).

⁵⁵ *Sandwich Isles Order* ¶¶ 13-14.

⁵⁶ *See, e.g.*, CCSF Comments at 29-30; Comments of the Virginia Joint Commenters, WT Docket No. 17-79 at 49-52 (June 15, 2017).

fees to recover the costs to review and issue permits, reasonable fees for supervising the construction of facilities and ensuring their compliance, and reasonable management fees to cover the costs of monitoring the facilities and maintaining the ROWs. Municipalities, therefore, will still be justly compensated for providing access to their ROWs. The only things that would change are that localities would be unable to discriminate amongst services and their fees would be unable to exceed their reasonable costs.

There is ample precedent for FCC regulation of fees for accessing infrastructure—even outside the public ROWs. For example, the Commission already regulates the amount utilities can charge for pole attachments under the Pole Attachment Act, which requires “just and reasonable” rates.⁵⁷ The Supreme Court upheld the Commission’s regulations, holding that these rates “do[] not authorize a taking of property within the meaning of the Fifth Amendment.”⁵⁸ “It is of course settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible.”⁵⁹ The only limitation is that these rates cannot be “confiscatory.”⁶⁰ The Commission’s regulation of the maximum rate “provid[ed] for the recovery of fully allocated cost, including the actual cost of capital,” so it could not “seriously be argued” that these rates were confiscatory.⁶¹

That same reasoning applies here. Imposing a reasonable limitation on what a municipality can charge for accessing the ROWs is certainly less intrusive than regulating rates, and thus is clearly permissible. Local governments will still be able to collect fees from utilities

⁵⁷ 47 U.S.C. § 224(b)(1).

⁵⁸ *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 254 (1987).

⁵⁹ *Id.* at 253.

⁶⁰ *Id.*

⁶¹ *Id.* at 254.

seeking to use their ROWs. As proposed, the Commission would not be setting a standard rate, nor capping costs or imposing a formula for determining reasonable costs, but only limiting what a municipality can charge. Like with pole-attachment rates, these rates provide for the recovery of fully allocated costs. They are hardly confiscatory. The similarities between the proposed Commission action here and what the Commission already does – and the Supreme Court upheld – with pole attachments are unavoidable. The only significant difference between the two is that pole-attachment rates regulate compensation for *private* property,⁶² whereas these rates would compensate for publicly-*managed* property. If Commission regulation of compensation rates for private property does not effectuate a taking, then ensuring that municipalities do not impose unreasonable charges for land held in public trust does not either.

C. The FCC Should Establish Bright Line Rules for What Constitutes Discrimination.

The overwhelming majority of commenters agree with Crown Castle that rules for accessing the ROW must be applied consistently among all utilities.⁶³ As Crown Castle explained in its initial comments, the manner in which it uses the ROW is functionally similar to that of other utilities that access the ROW, such as ILECs, cable operators, and even electric companies.⁶⁴ Any definition of “functionally equivalent services” must account for these similarities, consistent with the statute and federal telecommunications policy.

While some municipalities continue to argue that strict undergrounding policies are appropriate and nondiscriminatory, others appear to recognize the need to balance local aesthetic

⁶² *Id.* at 253 (“It is of course settled beyond dispute that regulation of rates chargeable from the employment of *private* property devoted to public uses is constitutionally permissible”) (emphasis added).

⁶³ *See, e.g.*, AT&T Comments at 14-15, 21; CTIA Comments at 28; Comments of Extenet, WT Docket No. 17-79 at 40 (June 15, 2017); Sprint Comments at 43; T-Mobile Comments at 45-48; WIA Comments at 14-15.

⁶⁴ *See* Crown Castle Comments at 52, 56-57.

and other concerns against the practical need for above ground facilities to provide wireless services.⁶⁵ Crown Castle supports such a balanced approach. There may be valid reasons for municipalities to favor undergrounding regulations, but those regulations cannot be so strict as to preclude deployment of infrastructure to support wireless networks or create an artificial monopoly on above-ground structures. The FCC should clarify that undergrounding regulations must make reasonable accommodations for wireless services that must be provided above ground.

⁶⁵ Compare SDSCC Comments at 72 (justifying the creation of “unserved area[s]” under strict undergrounding policies *with* Comments of City of Chicago, WT Docket No. 17-79 at 15-16 (June 15, 2017) (recognizing that “there must be sufficient installation capacity above ground for wireless facilities”).

IV. CONCLUSION

Crown Castle appreciates this opportunity to submit its views on steps the Commission can take to ensure that all Americans receive the benefits of next generation wireless networks. For the reasons stated above and in its initial comments, Crown Castle encourages the Commission to act swiftly to develop a consistent regulatory framework for the deployment of small cell facilities nationwide.

Respectfully submitted,

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