**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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

# REPLY COMMENTS OF COMCAST CORPORATION


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# REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby replies to the comments filed in response to the Wireline Infrastructure Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment ("*Wireline Notice*") and the Wireless Infrastructure Notice of Proposed Rulemaking and Notice of Inquiry ("*Wireless Notice*") adopted by the Federal Communications Commission ("Commission") in the above-referenced dockets.[1] The record reinforces the importance – and wisdom – of addressing barriers to broadband infrastructure deployment in a comprehensive and technology-neutral manner, through a combination of constructive engagement with state and local governments and targeted action against particularly egregious practices.

## I. INTRODUCTION AND SUMMARY

The record reflects "the importance of deployment of advanced wireline and wireless communications technologies,"[2] as well as the benefits to communities when "businesses,

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[1] *See 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 Notice*"); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd. 3330 (2017) ("*Wireless Notice*").

[2] Smart Communities and Special Districts Coalition ("Smart Communities") Comments, WC Docket No. 17-84, at i; Conterra Broadband Services, et al. ("Conterra et al.") Comments at 1 ("Given the prevalent and significant obstacles that [competitive fiber providers] face across the country, the Commission should use that

residents, and visitors have access to the most advanced broadband networks available—whether those networks are wireless or wireline."[3] Widespread deployment of world-class broadband infrastructure "fuels business growth and makes our neighborhoods and communities better."[4]

The record, however, also includes evidence of and proposals for practices either that have the effect of prohibiting the provision of broadband facilities or that would unnecessarily place at risk existing networks and the customers that rely on them. Accordingly, the Commission should:

- Affirm that requiring additional authorizations or imposing extra fees on franchised cable operators merely because they offer new services over their existing facilities is unreasonable and contrary to numerous provisions of the Communications Act;
- Reject "one-touch make-ready" proposals, which inure solely to the benefit of new entrants while unnecessarily risking harm to existing attachers and their customers, and instead consider "right-touch make-ready" proposals to accelerate deployment of broadband facilities; and
- Take measured steps to eliminate unreasonable local permitting practices that have the effect of prohibiting the deployment of broadband facilities.

Importantly, the record evidence supports the Commission's authority to undertake these efforts, even with the re-classification of broadband Internet access service.

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broad authority to streamline the local government approval process, reduce unnecessary barriers and unleash strong new investment in fixed and wireless broadband networks."); Information Technology and Innovation Foundation ("ITIF") Comments at 1 ("Efficient access to rights of way and municipal infrastructure to deploy wireless and wireline infrastructure will be essential to securing U.S. leadership in developing a robust Internet ecosystem around advanced wireless capabilities."). Unless otherwise noted, all references to Comments are to those filed in either dockets 17-84 or 17-79 on June 15, 2017. If a party filed different comments in each docket, the citation will reflect the specific docket.

[3] City and County of San Francisco ("San Francisco") Comments, WC Docket No. 17-84, at 1; City of Chicago Comments, WC Docket No. 17-84, at 1 ("The City recognizes that the deployment of broadband infrastructure throughout its jurisdiction has led to economic development, job creation and improved lifestyle . . . [and] is vital to the economic well-being of its community and without adequate broadband facilities in place, it may be unable to meet the demands of its residents and businesses.").

[4] San Francisco Comments, WC Docket No. 17-84, at 1.

As it moves forward, the Commission should be guided by the principle of technological neutrality. Commenters agree that technological evolution and convergence have rendered the distinction between wireline and wireless superfluous as a matter of infrastructure policy.[5] As Charter explained, "robust fiber networks – and corresponding investment in wireline infrastructure – will be needed to support the growing data demands on wireless networks."[6] This is consistent with Chairman Pai's recent statement that the deployment of 5G wireless networks will necessarily require deployment of "many more miles of fiber and other connections to carry all [of the] traffic" generated by those networks.[7] Accordingly, to ensure that the Commission's deployment goals are fulfilled, it must pursue a holistic approach that promotes the deployment of all types of broadband technologies by all types of providers.

## II. THE IMPOSITION OF ADDITIONAL FEES AND REQUIREMENTS ON FRANCHISED CABLE OPERATORS IS UNREASONABLE AND CONTRAVENES THE COMMUNICATIONS ACT.

Comcast and other cable operators have worked closely with state and local governments and pole owners in the communities they serve for decades. They have done so while remitting some $2.6 billion per year in franchise fees to those states and communities pursuant to the revenue-based regime enacted by Congress in the 1984 Cable Act, as well as hundreds of millions of dollars per year in pole attachment and other fees. These efforts and payments,

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5 *See*, *e.g.*, California Public Utilities Commission ("California PUC") at 1 ("Although we will address the items in both proceedings, California offers one set of joint comments in light of our view that the wireless and wireline networks are ever less distinct."); NCTA – The Internet & Television Association ("NCTA") Comments at 30 (urging the Commission to adopt a technology-neutral approach and encouraging the "Wireline Competition Bureau and Wireless Telecommunications Bureau to coordinate closely on the policies they adopt to ensure a holistic approach that streamlines both wireline and wireless broadband deployment"); Conterra et al. Comments at 17 (urging the Commission to adopt technology-neutral shot clocks for local action).

6 Charter Communications, Inc. ("Charter") Comments at 5.

7 Ajit Pai, Chairman, FCC, Remarks at the Mobile World Congress, Barcelona, Spain, at 2 (Feb. 28, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0228/DOC-343646A1.pdf.

consistent with the regime established in the Communications Act, ensure that cable operators' use of public rights-of-way, poles, conduit, and other infrastructure is responsive to the reasonable needs and concerns of communities and pole owners, and more than adequately compensate for the use of that infrastructure.

Nevertheless, the record highlights that some parties would impose *additional* requirements and extraneous and unnecessary fees that would impede cable operators' ability to invest in and deploy broadband infrastructure, to the detriment of consumers and their communities. The Commission should unequivocally affirm that such actions are inconsistent with federal policy and, as appropriate, preempted by federal law.

### A. Franchised Cable Operators May Offer Additional Services and Functionality over Their Cable Systems Without Seeking Additional Authorizations.

Cable operators have long incorporated additional functionality into the services they provide over their cable systems, to the benefit of cable customers and their communities. But the record highlights that some entities would seek to slow – if not stop – that innovation and investment by requiring additional authorizations when incorporating equipment, simply because the equipment enables the provision of broadband services.[8] Regardless of whether such requirements are levied by local governments, utilities, or anyone else, their effect is to raise barriers to broadband deployment, contrary to well-established federal policy goals.

When Congress enacted Title VI, one of its goals was to prohibit the imposition of requirements on cable operators that restrict them from providing "other . . . services" over

[8] *See, e.g.*, Puget Sound Energy, Inc. Comments at 5; NCTA Comments at 28 ("[T]he California Public Utilities Commission has determined that a cable operator must obtain certification as a facilities-based CMRS carrier before it may install wireless equipment on poles."); Comcast Comments at 23-24.

facilities authorized under their franchises.[9] That goal is communicated through language in Sections 621, 622, and 624 that limits state and local authority over non-cable services.[10] Likewise, the Commission has long held that pole attachment rights under Section 224 apply to wireless facilities.[11] The wireless space exemplifies cable operators' potential to innovate and invest to the benefit of their communities – broader deployment of wireless services by cable operators will offer consumers competitive choice and promote innovation.

Overzealous state or local regulators or pole owners potentially stand in the way of those benefits accruing to consumers, despite the fact that this additional functionality adds no material burden to public rights-of-way or poles. For example, placement of wireless devices can be done without materially changing the physical load on a pole or strand, or the costs to the pole owners or other attachers.[12] To prevent these parties from obstructing unambiguous federal policy, the

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[9] *See* H.R. Rep. No. 98-934, at 44 (1984) ("A facility would be a cable system if it were designed to include the provision of cable services . . . along with communications services other than cable service."); *Heritage Cablevision Associates of Dallas, L.P. and Texas Cable TV Association, Inc. v. Texas Utils. Elec. Co.*, Memorandum Opinion and Order, 6 FCC Rcd. 7099, ¶ 24 (1991) (determining that, consistent with congressional policy established in Title VI, a cable operator's facilities are a "cable system" even if the operator provides non-cable communications services over the system).

[10] Nothing in the recent decision by the Sixth Circuit contradicts this. *See Montgomery County, Md. v. FCC*, Nos. 08-3023, 15-3578, 2017 WL 2961089 (6th Cir. July 12, 2017). First, although the court offered some opinions as to the scope of certain language in Section 602(7)(c), its decision rested on a procedural issue – the Commission merely did not adequately explain its application of the "mixed-use" rule to legacy cable operators. *Id.* at *6. Second, the language in the Communications Act that circumscribes local authority over other services offered via cable systems is not limited to the language in Section 602(7)(c) – as Comcast explained in its comments, Sections 621, 622, and 624 all include language that serves to limit the extent to which local authorities can burden the offering of other services. *See* Comcast Comments at 12-14.

[11] *See*, *e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (holding that wireless telecommunications providers' utility pole attachments were "attachments" covered by Act, regardless of whether attachments were of wireline facilities or of distinctively wireless equipment); 47 C.F.R. § 1.1420(e)(2), (f) (referring to wireless attachments).

[12] *See* Charter Comments at 34 ("[S]trand-mounted devices such as in-line amplifiers, tap enclosures and overlashed cable, and, more recently, fiber optic nodes, can be, and routinely are, installed without meaningfully adding to the physical burdens on aerial plant or to the administrative burdens on pole owners and other stakeholders."); NCTA Comments at 5 ("Cable operators have safely overlashed fiber and advanced electronics to their strand for decades, and upgraded their communications services by going from analog to digital, adding

Commission should affirm that Title VI and Section 224 allow cable operators to incorporate additional services and equipment – including wireless equipment – into their cable systems without the need to seek additional authorizations.

### B. Franchised Cable Operators May Use Their Cable Systems To Provide Additional Services Without Paying Additional Fees.

The record also demonstrates that some parties seek to impose taxes and fees for use of the rights-of-way *in addition to the franchise fees that cable operators already pay for access to public rights-of-way*.[13] Prompt Commission action to reaffirm that these fees – on services that pose no incremental burden on the rights-of-way – are unreasonable and contrary to the Communications Act is necessary because "[s]ome cities are considering [extra fees and taxes on broadband] with a confidence infused" by a recent, misguided state-court decision.[14]

Many commenters agreed with Comcast that these fees contravene clear federal policy.[15] For example, NCTA notes that the imposition of additional fees on broadband services "needlessly adds to the retail cost of broadband service, impeding deployment and adoption."[16]

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competitive voice and broadband, and upgrading associated electronics, without any untoward burden on the poles.").

[13] *See, e.g.*, Smart Communities Comments, WC Docket No. 17-84, at 21 & n.69 (June 15, 2017) (arguing that "cable operators may be charged for use of the public rights-of-way to provide telecommunications service in addition to the cable franchise fee").

[14] Oregon Telecomms. Ass'n Comments at 4, 6-7 (stating that these fees "are simply revenue generating schemes that really have nothing to do with protection or regulation of use of the right-of-way" and asking the FCC to "exercise its authority under Section 253(d) to preempt these ordinances") (citing *City of Eugene v. Comcast of Or. II, Inc.*, 375 P.3d 446 (2016)). CAGW similarly notes that "[c]ities and towns around the state [of Oregon] . . . are considering passing similar measures to increase their revenue base." Citizens Against Government Waste ("CAGW") Comments at 5.

[15] *See* Comcast Comments at 11; Oregon Telecomms. Ass'n Comments at 4; Charter Comments at 23; NCTA Comments at 26-27; CAGW Comments at 4-5 (explaining that additional fees applied to internet service providers for the delivery of broadband service "increase consumer costs and may result in duplicative and/or discriminatory hidden taxes").

[16] NCTA Comments at 26-27 (urging the FCC to "send a strong signal that the Oregon Supreme Court misinterpreted the language in the *Open Internet Order* and Title VI and that the Commission does not support ordinances that materially inhibit the provision of broadband or telecommunications services by imposing excessive

A coalition of public interest organizations similarly laments that when the cost of broadband service increases due to the imposition of revenue-generating broadband fees, "low-income individuals and families are the first to feel the financial burden[, which] impacts adoption and the ability of families to participate in a digital economy."[17]

Putting an end to this practice before it becomes widespread also would be well within the Commission's statutory authority.[18] First, the imposition of such fees is contrary to Title VI because, "[a]lthough the amount of fees to be charged is capped based on the provider's 'cable services,' the application of the section . . . extends to any 'franchise fees paid by a cable operator with respect to any cable system.'"[19] Consistent with that interpretation of the Act, the Commission already has tentatively concluded that "Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service."[20]

Second, the Commission can preempt such fees under Section 253. Cable operators already compensate state and local governments pursuant to the franchising regime established in Title VI, and offering new services over existing facilities does not add any material burden to

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fees and discriminating among providers of broadband service"); Charter Comments at 22-23 (expressing concern over the *Eugene* decision and noting that "absent . . . intervention by the Commission, there is a real risk that consumers in many areas will start seeing sharp increases in broadband prices (of 7% or more) as franchising authorities are tempted to impose broadband licensing fees as a lucrative new revenue source").

17 Multicultural Media, Telecom and Internet Council et al. Comments at 1 (expressing concern over the *Eugene* decision and asking the Commission to ban such fees).

18 *See ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (explaining that the FCC has "the ultimate responsibility for ensuring a 'national policy' with respect to franchise fees").

19 Charter Comments at 28 (emphasis omitted) (quoting 47 U.S.C. § 542(b)).

20 NCTA Comments at 24-25 (citing *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd. 4798, 4849-50 ¶ 102 (2002), *aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).

the use of the rights-of-way that would justify additional fees.[21] Preempting such additional fees as unfair and unreasonable compensation, in violation of Section 253(c), "would be comfortably in line with instances in which this Commission, and the federal courts," have used and approved of Section 253's use in the past.[22]

## III. THE COMMISSION MUST ENSURE THAT ANY CHANGES TO ITS CURRENT POLE ATTACHMENT REGIME PROTECT EXISTING ATTACHERS AND ARE CONSISTENT WITH ITS STATUTORY AUTHORITY AND PUBLIC INTEREST OBJECTIVES.

Some commenters propose that the Commission allow new attachers to unilaterally reposition equipment already installed on poles, ignoring years of Commission study of, and reasonable and balanced guidance on, the subject.[23] The Commission should reject these so-called "one-touch make-ready" ("OTMR") proposals because they would create an unwarranted risk of significant harm to existing providers and their customers. Instead, discrete reforms to the existing pole attachment regime, such as those in "right-touch make-ready" proposals, would more effectively advance the Commission's goal of facilitating "new attachments without creating undue risk of harm."[24]

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[21] Comcast Comments at 11; Charter Comments at 25 ("[T]he offering of BIAS over already-franchised cable systems creates no new burdens on the right of way[.]").

[22] Charter Comments at 25; *see also id.* at 25 n.61 (highlighting cases where municipal requirements exceeded the municipalities' authority in violation of Section 253(c)); Comcast Comments at 10 ("Courts' 'most favored interpretation' of Section 253(c)'s 'fair and reasonable compensation' provision 'requires that the fees charged by a municipality be related to the degree of actual use of the public rights-of-way.'" (citing *P.R. Tel. Co. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534, 543-44 (D.P.R. 2003)); Fiber Broadband Ass'n Comments at 25 (explaining that Commission precedent supports the notion that any fees beyond those directly related to actual costs incurred for managing the rights-of-way violate Section 253(c)).

[23] *See, e.g.*, Computer & Communications Industry Ass'n ("CCIA") Comments at 17-18; ExteNet Systems, Inc. ("ExteNet") Comments at 54-55; Fiber Broadband Ass'n Comments at 4-8; Google Fiber Inc. Comments at 5-8; R Street Institute Comments, WC Docket No. 17-84, at 12.

[24] *Wireline Notice* ¶ 6.

The record confirms the risks of substantial harm to existing attachments that would result from adoption of an OTMR scheme.[25] For example, the Communications Workers of America identifies a "wide array of safety and service issues caused by third parties," many of which existing attachers must correct because "[a]ll too frequently, third parties or their contractors simply cannot be held accountable for poor or unsafe work."[26] Frontier similarly "has experienced issues when others have moved its facilities and created safety code violations."[27] Charter indicates that its experience with OTMR policies has involved "significant difficulties with poor or nonexistent recordkeeping, insufficient or inaccurate notices, shoddy work, service disruptions and threats to public safety, and inadequate opportunities to inspect or remedy damage to [its] facilities."[28]

In addition, OTMR policies are inconsistent with the protections afforded by Section 224 because they typically permit new attachers to perform make-ready work that affects existing attachments with little or no notice. Section 224(h) plainly mandates that existing attachers be provided adequate prior notice of plans to modify or alter a pole.[29] In addition, Section 224(i) states that an existing provider "shall not be required to bear *any* of the costs of rearranging or

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25 CenturyLink Comments at 15.

26 Communications Workers of America ("CWA") Comments at 4-5.

27 Frontier Communications Corporation ("Frontier") Comments at 16-17; *see also* Comcast Comments at 20 (documenting outages its customers have suffered due to third parties moving attachments without Comcast's knowledge).

28 Charter Comments at 39.

29 *See* 47 U.S.C. § 224(h) ("Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner *shall provide written notification* of such action to any entity that has obtained an attachment to such conduit or right-of-way. . . .") (emphasis added); *see also* NCTA Comments at 13-14.

replacing its attachment."[30] As Comcast has explained, an OTMR regime that compensates an existing attacher only for damage to its equipment falls well short of this standard.[31]

Moreover, the record establishes that there is no sound reason at this time to introduce such a dramatic departure from the existing pole attachment regime.[32] As ITTA notes, OTMR policies fail to advance the goal of removing significant barriers to broadband infrastructure deployment and thus stand "as a solution to a problem different from the one [they are] proposed to remedy."[33] CenturyLink similarly observes that it is "unclear whether a one-touch process would actually accelerate broadband deployment in rural areas."[34]

Instead, the Commission should consider limited, reasonable reforms that would make the pole attachment process more efficient and transparent for all parties. Specifically, the Commission should limit burdensome application requirements by pole owners, including "unnecessary analysis or pole-by-pole engineering studies" and the use of "a two-step application process in order to determine and charge survey fees before they will even treat an application as submitted."[35]

To the extent the Commission wishes to implement additional reforms to improve the efficiency of the make-ready process, an approach based on "right-touch make-ready" proposals

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30 47 U.S.C. § 224(i) (emphasis added).

31 Comcast Comments at 22.

32 *See*, *e.g.*, Frontier Comments at 15 ("[I]t is premature to roll out dramatic changes to make-ready processes and timelines on a nationwide basis[.]"); *id.* at 20 ("Sweeping reforms remain largely untested, and it is too early for drastic changes nationwide without more data and certainty.").

33 ITTA – The Voice of America's Broadband Providers Comments at 29.

34 CenturyLink Comments at 15.

35 NCTA Comments at 6, 11; *see also* Charter Comments at 36.

would strike an appropriate balance between encouraging new, timely broadband deployment and safeguarding existing facilities and end-user customers against damage and disruption.[36] The record confirms that a properly designed "right-touch make-ready" regime would streamline existing timelines while affording existing attachers notice and an opportunity and incentive to modify their own equipment in a timely manner.[37] Commenters also agree that any new attacher that performs work without the involvement of the existing attacher should be required to indemnify the existing attacher and accept responsibility for correcting any damage to existing facilities.[38]

Moreover, the Commission should take steps to address transparency by requiring pole owners, including utilities, to make publicly available information about both their pole attachment rates and typical make-ready charges.[39] This would be consistent with the Commission's observation that "[m]aking more information publicly available . . . could lead to faster pole attachment timelines" and "more efficient pole attachment negotiations."[40] Mobilitie notes that obtaining this rate information today "can be difficult," thereby slowing and

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[36] *See*, *e.g.*, Comcast Comments at 18-20; NCTA Comments at 16 ("[A]ny new approach should be grounded in the 'right touch' principle that existing attachers must be provided with adequate prior notice of *all* planned work . . . and a meaningful opportunity to perform the required make-ready work, as is required by Section 224(h).").

[37] *See*, *e.g.*, Frontier Comments at 18; *cf.* CWA Comments at 7-8 (To the extent the Commission reduces the timelines governing pole attachment processes, it "must ensure that there is adequate time to complete each step (application review, cost estimate, make-ready work, and inspection) accurately, safely, and thoroughly.").

[38] *See*, *e.g.*, Frontier Comments at 18 (existing attachers and infrastructure owners must be "protected from customer-impacting outages, including by ensuring full compensation by new attachers when something goes wrong"); NCTA Comments at 16 ("[A] new entrant that performs work on facilities owned by another party should be required to accept full liability for improperly performed work and indemnify the existing attacher.").

[39] The Commission also should require incumbent LECs to publicly provide disaggregated pole cost data. As Comcast explained, ready access to pole cost data is both necessary to ensure a level playing field during negotiations over attachment rates and administratively efficient, promoting negotiated rate agreements and preventing unneeded and costly disputes. *See* Comcast Comments at 28.

[40] *Wireline Notice* ¶ 27.

complicating the pole attachment process.[41] In addition, AT&T correctly points out that the "public availability of pole attachment rate information . . . better permits potential attachers (and regulators) to scrutinize such rates."[42] NTCA notes that the ready availability of such rate information also would be helpful to new attachers by providing them with "an increased ability to plan for the costs of new construction."[43]

## IV. THE RECORD SUPPORTS COMMISSION ACTION TO ELIMINATE UNREASONABLE LOCAL PERMITTING PROCEDURES.

The Commission has made clear its interest in identifying reforms that would "streamline regulations that might otherwise slow down the deployment of broadband facilities, while balancing this goal against the long-standing and important role that State and local authorities play with respect to land-use decisions."[44] The initial comments include several common-sense proposals for eliminating particularly egregious requirements imposed by outlier state and local governments that needlessly delay and increase the cost of obtaining access to local rights-of-way and related permits. The Commission should adopt these proposals expeditiously.

For example, the Commission should prohibit local authorities from demanding "in-kind" contributions that are not reasonably related to the deployment of broadband infrastructure in the public rights-of-way.[45] As the R Street Institute notes, these obligations "reduce the overall rate

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41 Mobilitie, LLC ("Mobilitie") Comments at 10-11 (further noting that "[i]t is burdensome and time-consuming for providers to have to contact multiple sources in a utility to secure [cost] information, particularly where the utility operates across a large area and thus may have different charges in different areas").

42 AT&T Services, Inc. ("AT&T") Comments, WC Docket No. 17-84, at 24.

43 NTCA – The Rural Broadband Association Comments at 8.

44 *Wireless Notice* ¶ 87.

45 *See* AT&T Comments, WT Docket No. 17-79, at 18-19 (noting that in-kind contribution obligations represent one type of "unreasonable fee" that "discourage[s] providers from investing in or expanding their networks"); Comcast Comments at 5-6; Conterra et al. Comments at 30-31; Fiber Broadband Ass'n Comments at 24-25; R Street Institute Comments, WC Docket No. 17-84, at 7-9; *see also* Lightower Fiber Networks Comments, WT Docket No. 17-79, at 4-5 (outlining its experience with one township whose attorneys "appear more focused on

of deployment," and lead to a "misallocation of capital . . . to less valuable uses," "worse service," and "higher prices for consumers."[46] Moreover, commenters indicate that "[t]he burden of *negotiating* these provisions is a significant impediment to the deployment process."[47]

The Commission also should prohibit unnecessarily granular and duplicative permitting requirements.[48] Such requirements can discourage providers from undertaking large-scale deployment projects.[49] ITIF raises a comparable concern in the context of small cell deployment, suggesting that localities replace individual site permitting procedures with "generic or blanket installation permissions."[50] ITIF further notes that "[c]ities should . . . look to empower a single administrator to coordinate all approvals where possible."[51] Verizon similarly stresses the inefficiencies created by "multiple layers of review for each site,"[52] while many others describe the "onerous application processes" that needlessly delay or effectively prohibit broadband deployment.[53]

The record contains other recommendations for reforming local permitting processes that warrant serious consideration by the Commission. For example, the Fiber Broadband

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Lightower dedicating dark fiber for the township's use than on an actual path forward to obtain approval within the confines of any law").

46 R Street Institute Comments, WC Docket No. 17-84, at 7, 9.

47 Conterra et al. at 30-31 (emphasis added).

48 *See* Comcast Comments at 6.

49 *Id.*

50 ITIF Comments at 5; *see also* Verizon Comments, WT Docket No. 17-79 & WC Docket No. 17-84, at 35-36 (noting that site-by-site approval requirements for small facilities result in delayed deployment).

51 ITIF Comments at 5.

52 Verizon Comments, WT Docket No. 17-79 & WC Docket No. 17-84, at 35-36.

53 *See*, *e.g.*, ExteNet Comments at 30-31; Free State Foundation Comments at 4, 11; T-Mobile USA, Inc. ("T-Mobile") Comments at 38-39; Wireless Infrastructure Ass'n Comments at 33.

Association urges the Commission to adopt shot clocks for granting access to public rights-of-way – ninety days for existing occupants and six months for initial applicants.[54] The Wireless Internet Service Providers Association similarly favors a shot clock for state and local reviews of siting requests involving broadband infrastructure.[55]

A number of commenters also support a prohibition against express or *de facto* moratoria that suspend entirely the construction of new broadband infrastructure.[56] The Commission correctly has found that moratoria "inhibit the deployment of the infrastructure needed to provide robust" wireless and wireline services.[57] As AT&T indicates, moratoria do not "place reasonable limits on the time, place, and manner of access to rights-of-way."[58] Instead, they act as "blunt instruments that force providers either to delay or cancel their planned deployments,"[59] resulting in slowed broadband deployment, reduced competition, and higher prices for consumers.[60] Moreover, it is unclear that there is any justification for the use of moratoria. For example, Frontier notes that "it is difficult to think of a scenario where completely halting broadband deployment and the granting of permits is the correct response to a situation or issue."[61]

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54 Fiber Broadband Ass'n Comments at 22-24.

55 Wireless Internet Service Providers Ass'n ("WISPA") Comments, WC Docket No. 17-84, at 5.

56 *See*, *e.g.*, AT&T Comments, WC Docket No. 17-84, at 74; CCIA Comments at 13; ExteNet Comments at 10; Frontier Comments at 32-33; Mobilitie Comments at 7-8; T-Mobile Comments at 36-38; Verizon Comments, WT Docket No. 17-79 & WC Docket No. 17-84, at 33; WISPA Comments, WC Docket No. 17-84, at 5.

57 *Wireless Notice* ¶ 22; *see also Wireline Notice* ¶ 102.

58 AT&T Comments, WC Docket No. 17-84, at 74.

59 *Id.*

60 *See*, *e.g.*, R Street Institute Comments, WC Docket No. 17-84, at 13-14.

61 Frontier Comments at 32-33; *see also* R Street Institute Comments, WC Docket No. 17-84, at 13-14 ("[T]here is no adequate justification to ban new broadband deployment outright.").

Taken together, the targeted measures set forth above could meaningfully advance the Commission's goal of increasing consumer access to broadband services while still preserving localities' ability to review proposed projects. Importantly, these reforms also would promote greater efficiency and transparency in the broadband deployment process.

## V. THE COMMISSION HAS AMPLE AUTHORITY TO REMOVE REGULATORY BARRIERS TO THE DEPLOYMENT OF BROADBAND FACILITIES.

The record confirms that the narrowly targeted actions proposed by Comcast fall well within the bounds of the Commission's authority under Section 253.[62] Nevertheless, some parties attempt to throw a roadblock before the Commission's efforts by arguing that the success of the entire enterprise depends wholly on the regulatory classification of a single service that is offered over these facilities.[63] The Commission should reject such a myopic view of its authority as inconsistent with the plain language of the Communications Act and Commission precedent.

As the comments make clear, broadband facilities are *multipurpose* – they enable the delivery of a variety of services, from cable services to information services to telecommunications services.[64] T-Mobile, for example, explains that broadband facilities are "mixed-use facilities" capable of delivering both telecommunications services and information services, and urges the Commission to remove any doubt that the protections of Section 253

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[62] For example, while there appears to be some disagreement in the record over whether the Commission may adopt rules to implement Section 253, *compare* California PUC Comments at 9-11, *with* AT&T Comments, WC Docket No. 17-84, at 70-71, the targeted actions proposed by Comcast could be executed in the form of a declaratory ruling – an adjudicatory action that moots the question of the Commission's rulemaking authority under Section 253 while still materially improving the regulatory environment for the deployment of broadband facilities. *See* Charter Comments at 8-15; T-Mobile Comments at 23-24.

[63] *See, e.g.*, Public Knowledge Comments at 13-14; Colorado Communications and Utility Alliance et al. Comments at 15-16; Smart Communities Comments, WT Docket No. 17-79, at 55; WISPA Comments, WT Docket No. 17-79 & WC Docket No. 17-84, at 2.

[64] *See* Comcast Comments at 14-16; AT&T Comments, WC Docket No. 17-84, at 73-74.

apply to such facilities.[65] In addition, Charter explains that, to the extent state or local policies or regulations "deter investment and buildout in broadband facilities, they also have a significant effect on the offering of telecommunications services over the same facilities."[66]

This approach to the Commission's authority under Section 253 as to multipurpose facilities is consistent with Commission precedent, both in the Section 253 context and beyond. For example, the Commission has explained that the key to the Section 253 analysis is "whether the requirement has the effect of prohibiting the provision of *any telecommunications service*."[67] More recently, the Commission concluded that barriers to entry that limit the ability to offer any telecommunications service, even if the barrier is only nominally directed at infrastructure that may carry a telecommunications service, may be preempted under Section 253.[68] Notably, this approach also is fully consistent with the Commission's approach in the universal service context, where the Commission *unanimously* concluded in the *USF/ICC Transformation Order* that universal service support could be used for broadband facilities delivering information

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65 T-Mobile Comments at 53-54.

66 Charter Comments at 26.

67 *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, 14 FCC Rcd. 21697, ¶ 15 (1999) (emphasis added). *See id.* ¶ 21 ("[N]o state or local requirement may prohibit or have the effect of prohibiting any entity from providing *any offering of telecommunications* directly to the public for a fee[.]" (emphasis added)) (citing *Public Utility Commission of Texas, the Competition Policy Institute, IntelCom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc., Teleport Communications Group, Inc., City of Abilene, Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd. 3460 (1997)).

68 *Connect America Fund, Sandwich Isles Communications, Inc.; Petition for Waiver of the Definition of "Study Area" Contained in Part 36; Appendix-Glossary and Sections 36.611 and 69.2(hh) of the Commission's Rules*, Memorandum Opinion and Order, FCC 17-85, ¶ 15 (July 3, 2017).

services, so long as those facilities *also* are used for the delivery of telecommunications services.[69]

Despite this Commission precedent and the plain language of the statute, certain parties focus on one particular service and conclude that the question of the Commission's authority is entirely a question of the regulatory classification of that service. Public Knowledge, in particular, asserts that "[t]he Commission cannot declare broadband to no longer be a telecommunications service and yet continue to exercise Title II authority to promote broadband deployment."[70] But this objection improperly conflates the service with the facility. The "broadband" to which Public Knowledge refers in the first instance is, presumably, broadband Internet access *service* ("BIAS") – one of many services offered over broadband networks. The "broadband" to which Public Knowledge refers in the second instance is the *facility* – high-speed, high-capacity networks comprised of fiber, coax, and wireless connections, which can be utilized to deliver many diverse services.

That BIAS may be one of the primary services offered over broadband facilities does not give it any more or less legal importance than any of the other services provided over those facilities. The fact that some of the services offered over broadband facilities are unquestionably telecommunications services (and will continue to be *regardless* of how the Commission classifies BIAS), and that the barriers identified by Comcast and others have the effect of

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[69] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, ¶ 64 (2011).

[70] Public Knowledge Comments at 13-14; *see also* Smart Communities Comments, WT Docket No. 17-79, at 55 ("Section 253, by its terms, protects the provision of telecommunications service; even if it did apply to wireless facilities, it would not apply to broadband Internet access service, whether provided [via] wireless or . . . wireline, if the Commission were to reclassify the service.").

prohibiting the provision of such services, means that the regulatory classification of any other service utilizing the facilities is irrelevant, and the Commission is free to use its Section 253 authority to address those barriers.

## VI. CONCLUSION

For the foregoing reasons, the Commission should adopt technology-neutral reforms to spur the deployment of both wireless and wireline broadband infrastructure, including by: (1) reiterating that cable operators are permitted to offer broadband services over their facilities without obtaining additional authorizations or paying additional fees; (2) adopting changes to the pole attachment regime, such as "right-touch make-ready" proposals, that appropriately balance the interests of new attachers and existing attachers; and (3) eliminating unreasonable local permitting procedures.

Respectfully submitted,

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