Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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

REPLY COMMENTS OF EXTENET SYSTEMS, INC.

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July 17, 2017

EXECUTIVE SUMMARY

The record compiled in these proceedings establishes that Distributed Network Systems ("DNS") will be a critical component of the Nation's transition to 5G services. Yet, DNS providers face substantial impediments to deployment. These impediments include excessive delays and unreasonable and discriminatory ROW restrictions, which "prohibit or have the effect of prohibiting" telecommunications services contrary to Section 253(a). DNS providers also experience exorbitant ROW access fees not imposed on their wireline or utility counterparts, in violation of Section 253(c)'s requirements that such fees be "fair and reasonable" and "nondiscriminatory." The record confirms the need for prompt Commission action to address these barriers.

Specifically, there is substantial record support for shortening the Section 332(c)(7) shot clock for collocations, including DNS facilities, from 90 to 60 days, and for shortening the shot clock for new DNS poles and other new facilities from 150 to 90 days. In addition, the record demonstrates the need for a "deemed granted" remedy when a State or local government fails to act within the Section 332(c)(7) shot clocks, and confirms the Commission has the requisite statutory authority to adopt such a remedy. There also is ample justification for the Commission to limit any pre-application negotiation period to 60 days, if not less.

The record supports Commission clarification of the permissible scope of State and local action under Section 253. First, the Commission should define Section 253(a)'s "prohibit or have the effect of prohibiting" standard in accordance with the Commission's *California Payphone* ruling and the Ninth Circuit's approach in *City of Auburn*. Second, the Commission should reject the use of unbridled discretionary factors, particularly aesthetics. Third, the Commission should define a State or local government's right to "manage the public rights-of-way" narrowly to include only those tasks necessary to preserve the physical integrity of ROWs, control the flow of vehicles and pedestrians, and otherwise protect public health and safety. Commenters demonstrate that such a definition is necessary to establish what State and local governments may regulate under the "ROW management" exception in Section 253(c).

Further, commenters urge the Commission to declare that restrictions imposed on DNS and other small wireless providers – but not on other public rights-of-way users – are discriminatory, violate Section 253(a), and are not "saved" by Section 253(c). Notably, the record shows that such discrimination persists even though DNS pole attachments usually impose no greater burden on the public ROW than wireline or utility attachments – in fact, they are often smaller. This discriminatory imbalance has substantially impeded the efforts of ExteNet and other DNS providers to offer telecommunications service.

Commenters also urge the Commission to clarify that "fair and reasonable" compensation per Section 253(c) means that State and local governments may not charge ROW fees that exceed their costs of evaluating permit applications and managing the public ROW. This is well within the Commission's purview. "Fair and reasonable" is undefined in Section 253(c), and the Commission has authority to interpret ambiguous terms in a manner that is a permissible construction of the statute. Limitation of "fair and reasonable" fees to those that are cost-based is consistent with Congress's pro-competitive intent behind Section 253 and the

Telecommunications Act of 1996 generally. Moreover, contrary to some claims, nothing in Section 253(d) precludes the Commission from interpreting Section 253(c) in this fashion.

With respect to unnecessary environmental delays and other barriers, the record supports broadening the NEPA categorical exclusions for DNS and other small wireless facilities, and elimination of the Commission's environmental assessment requirement for facilities built in floodplains. Commenters also urge the Commission to take steps to streamline and expedite NHPA reviews of DNS and other small wireless facilities. Indeed, some municipalities and historical preservation groups remain open to the possibility of further dialogue on NHPA issues, which may pave the way for meaningful reform. And, ExteNet supports the joint comments and reply comments filed by CTIA and WIA on Tribal review issues in WT Docket No. 17-79.

The Commission should not abandon its current interpretation of Sections 251(b)(4) and 224, which prohibits ILECs from obtaining mandatory access to competitive LEC poles, ducts, conduit and rights-of-way at regulated rates. Those urging the Commission to reverse itself have not presented any evidence that market changes justify a departure from the Commission's long-standing interpretation of Section 224, affirmed in the *2011 Pole Attachment Order*, that precludes ILECs from obtaining access to competitive LEC poles based not on the extent of competition in retail markets, but on concerns of possible bottleneck control. Accepting the ILECs' invitation to reverse the status quo could discourage the broadband deployment these proceedings are designed to promote, impose discriminatory costs and obligations on only one type of owner of competitive poles, and reverse decades of light touch regulation for competitive providers.

In sum, by taking the above-described steps and those recommended in ExteNet's initial comments, the Commission will help speed the deployment of 5G-enabling DNS facilities, to the benefit of consumers.

TABLE OF CONTENTS

Before the
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In the Matter of	)	
	)	
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COMMENTS OF EXTENET SYSTEMS, INC.

ExteNet Systems, Inc. ("ExteNet") hereby submits its reply comments in response to the Commission's *Notices of Proposed Rulemaking* and *Notices of Inquiry* in the above-captioned proceedings.[1]

INTRODUCTION

The record confirms that advanced wireless services will require significant densification of wireless facilities, and wireless providers will need flexibility to strategically place thousands of DNS facilities throughout the country in the next few years.[2] Timely deployment of DNS

[1] *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*"). As discussed in its initial comments, ExteNet is a provider of Distributed Network Systems ("DNS"), which include individual nodes in a DAS network, stand-alone small cell installations that are not part of a DAS network, and other similar small deployments using alternate technologies that satisfy certain volumetric and height/location limitations. *See* Comments of ExteNet Systems, Inc., WT Docket No. 17-79 & WC Docket No. 17-84 (filed June 15, 2017) ("ExteNet Comments").

[2] *See, e.g.*, Comments of 5G Americas, WT Docket No. 17-79, at 4 (filed June 12, 2017) ("5G Americas Comments").

facilities thus will be critical to the success of advanced wireless services, including 5G. While progress has been made, commenters demonstrate that regulatory impediments continue to substantially delay or foreclose DNS deployments in public rights-of-way (alternatively referred to herein as "ROW" or "ROWs"). As one party notes, "[i]n practical terms, deployment delayed is deployment denied."[3]

The record shows that the Commission can and should use a variety of tools to eliminate or at least ameliorate these impediments. Those tools include, for example:

- Shortening the Commission's Section 332(c)(7) shot clocks for DNS and other collocations from 90 days to 60 days and for new DNS poles and other new facilities from 150 days to 90 days, and imposing a "deemed granted" remedy when a State or local government fails to act within the Section 332(c)(7) shot clocks;

- Clarifying the meaning of "prohibit or have the effect of prohibiting" in Section 253(a) and "manage the public rights-of-way" in Section 253(c), and identifying conduct which violates those standards;

- Declaring that State and local government discrimination against DNS facilities violates Section 253(a) and is not "saved" by Section 253(c); and

- Confirming that a local government's ROW fees must be limited to its costs of managing the ROW, and cannot be based on concepts such as "fair market value."

Those who oppose these and other reforms proposed by ExteNet and others are at odds with the facts and the law. For instance, some commenters have suggested that local ROW processes are working fine and there is no need for Commission action at all,[4] but the record says otherwise. Indeed, the chilling effect those processes are having on deployment has already been

[3] Comments of Liberty Cablevision of Puerto Rico LLC, WT Docket No. 17-84, at 14-15 (filed June 15, 2017); *see also* Comments of Starry, Inc., WT Docket No. 17-79, at 1-2 (filed June 15, 2017).

[4] *See, e.g.*, Comments of the City of Arlington, Texas, WT Docket No. 17-79 & WC Docket No. 15-180, at 2 (filed June 15, 2017); Comments of Colorado Communications and Utility Alliance et al., WT Docket No. 17-79, at ii (filed June 14, 2017) ("CCUA Comments"); Comments of the National Association of Regulatory Utility Commissioners, WT Docket No. 17-84, at 12-15 (filed June 15, 2017) ("NARUC Comments").

recognized at the highest levels of the Commission,[5] and the comments in these proceedings confirm that the problem is significant and requires Commission intervention.[6] The record also reaffirms that the Commission has the necessary statutory authority to take remedial action.

While other commenters suggest that the recommended reforms would effectively turn the Commission into a federal zoning authority that would abrogate the rights and duties reserved to local governments under Sections 253 and 332(c)(7),[7] this is clearly not the case. Rather, ExteNet and other commenters are merely asking the Commission to more precisely define the parameters within which local governments may regulate ROW access without

[5] *See, e.g.*, Statement of Ajit Pai, Chairman, Federal Communications Commission, re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79, at 1 (Apr. 21, 2017), https://apps.fcc.gov/edocs_public-/attachmatch/FCC-17-38A2.pdf ("I have heard time and time again how current rules and procedures impede the timely, cost-effective deployment of wireless infrastructure . . . This will only become a bigger problem as our wireless networks evolve."); Michael O'Rielly, Commissioner, Federal Communications Commission, Remarks Before the 2017 Wireless Infrastructure Show, Orlando, FL, at 4 (May 23, 2017), https://apps.fcc.gov/edocs_public/-attachmatch/DOC-345021A1.pdf ("[I]ndustry is still experiencing excessive delays and moratoria when filing siting applications for access to locality rights of way. The record is replete with reports of long pre-application processes before an application can be filed or is deemed complete and applications going through two years or more of review before a decision is actually made. These long, intentional delays are also turning into de facto moratoria, with endless tolling agreements and excuses about insufficient resources or the need for new local laws.").

[6] *See, e.g.*, ExteNet Comments at 5-8, 16-22; Comments of AT&T, WT Docket No. 17-79, at 6-7 (filed June 15, 2017) ("AT&T 17-79 Comments"); Comments of Crown Castle International Corp., WT Docket No. 17-79, at 20-23 (filed June 15, 2017) ("Crown Castle 17-79 Comments"); Comments of CTIA, WT Docket No. 17-79 & WC Docket No. 17-84, at 6-7 (filed June 15, 2017) ("CTIA Comments"); Comments of T-Mobile USA, Inc., WT Docket No. 17-79 & WC Docket No. 17-84, at 8-9 (filed June 15, 2017) ("T-Mobile Comments"); Comments of Verizon, WT Docket No. 17-79 & WC Docket No. 17-84, at 5-8 (filed June 15, 2017) ("Verizon Comments"); Comments of the Wireless Infrastructure Association, WT Docket No. 17-79 & WC Docket No. 17-84, at 7-9 (filed June 15, 2017) ("WIA Comments").

[7] *See, e.g.*, Comments of the Virginia Joint Commenters et al., WT Docket No. 17-79, at 4 (filed June 15, 2017) (filed as City of Alexandria, VA et al.) ("Virginia Joint Comments"); Comments of the City of Austin, Texas, WT Docket No. 17-79, at 3 (filed June 15, 2017).

running afoul of the limitations in Sections 253 and 332(c)(7). The legitimate rights and obligations of local governments under those statutes would remain intact.

Further, the record confirms that expedited Commission action on these matters is essential, that the Commission has ample authority to adopt rules shortening the shot clock and imposing a deemed granted remedy, and that the Commission has equally ample authority to issue guidance via declaratory ruling as to the proper interpretations of ambiguous language in Sections 253 and 332(c)(7).[8] Although some parties have suggested that the Commission should instead develop "best practices" through its Broadband Development Advisory Committee ("BDAC")[9] – and ExteNet supports the BDAC's important efforts – formal Commission action remains critical to achieving meaningful reform.

As to environmental matters, the Commission should broaden the NEPA exclusions for DNS and other small wireless facilities. In addition, the record supports elimination of the environmental assessment requirement for many floodplain sites, and adoption of shot clocks to govern the Commission's environmental review process. While the wireless industry and preservation groups disagree as to whether the existing NHPA exclusions should be streamlined, the comments of the ACHP and certain other preservation groups strongly suggest that common ground may be achievable. ExteNet also supports the joint comments and reply comments filed

[8] *See* ExteNet Comments at 45-46; Comments of Charter Communications, Inc., WT Docket No. 17-79 & WC Docket No. 17-84, at 8 (filed June 15, 2017) ("Charter Comments") ("[O]ne effective step the Commission can take, rather than playing 'whack-a-mole' with each barrier as it is brought to the Commission's attention, is to empower other actors to challenge such barriers without requiring Commission involvement. To that end, the Commission should issue a declaratory ruling specifying the broad reach and effect of Section 253 of the Communications Act. Clarifying Section 253 will enable the federal courts to do their jobs more effectively by evaluating potential barriers to investment with the benefit of the Commission's guidance. It will also provide a more certain legal environment that allows interested parties to avoid disputes in the first instance.").

[9] *See, e.g.*, Comments of California Association of Competitive Telecommunications Companies, WC Docket No. 17-84, at 18 (filed June 15, 2017).

by CTIA and the Wireless Infrastructure Association ("WIA") on Tribal review issues in WT Docket No. 17-79, and incorporates those comments and reply comments herein by reference.[10]

Finally, for the reasons set forth in Section IV *infra*, the Commission should not abandon its current interpretation of Sections 251(b)(4) and 224, which prohibits ILECs from obtaining mandatory access to competitive LEC poles, ducts, conduit and rights-of-way.

I. COMMENTERS SUPPORT ACCELERATING THE SECTION 332(C)(7) SHOT CLOCKS AND ADOPTING A "DEEMED GRANTED" REMEDY.

A. There is Substantial Support in the Record for the Commission to Shorten Its Section 332(c)(7) Shot Clocks for DNS and Other Wireless Facilities.

The record confirms the need for shot clock reform, as local approval processes are substantially delaying DNS deployments. For example, ExteNet's internal review of deployments during 2015 and 2016 revealed that ExteNet could have filed a complaint for a shot clock violation in at least 47 of the 100 communities studied, with some local approvals taking more than a year and in some cases more than two years.[11] T-Mobile similarly documents that "roughly 30% of all of [T-Mobile's] recently proposed sites (including small cells) involve cases where the locality violated the shot clocks."[12] And Lightower states that "[i]n 2016, the average timeframe for [permit] approval was 300 days. In March 2017, the average was 475 days without a clear process or determination, and it is now approximately 570 days. Many

[10] *See* Joint Comments of CTIA and the Wireless Infrastructure Association, WT Docket No. 17-79 (filed June 15, 2017) ("Joint CTIA/WIA Comments"); Joint Reply Comments of CTIA and the Wireless Infrastructure Association, WT Docket No. 17-79 (filed July 17, 2017) ("Joint CTIA/WIA Reply Comments").

[11] ExteNet Comments at 5-6.

[12] T-Mobile Comments at 8 (citation omitted). *See also* Crown Castle 17-79 Comments at 21 ("[T]he industry continues to face enormous delays in attempting to construct small cell and other infrastructure necessary to deploy broadband communications services."); CTIA Comments at 6-7; Comments of Free State Foundation, WT Docket No. 17-79, at 6 (filed June 15, 2017) ("Free State Comments"); Comments of ACT – The App Association, WT Docket Nos. 17-79 & 15-180, at 10 (filed June 15, 2017).

jurisdictions are still at a complete standstill for approximately 190 DAS and small cell locations. . . . If Lightower were to engage in litigation in an effort to require action by the applicable municipalities, it would still have approximately 46 Shot Clock Order lawsuits . . . ."[13]

At the association level, WIA reports that "[i]t is common for [WIA] members to have multiple jurisdictions where application processing delays have reached two years or more."[14] According to one WIA member, an application has been pending with a New Jersey township for nearly a year, and applications have been pending in municipalities in New Hampshire and Maine for more than two years. Still another member reports that applications in five different jurisdictions have been pending for nearly *three years*.[15]

Many of these delays are attributable to the fact that local governments frequently require DNS facilities to go through formal zoning procedures that are more appropriate for "macro" towers, and which are not imposed on wireline or utility occupants of the ROW.[16] In other cases, communities have no clear process for applications to install DNS facilities on poles in the public ROW.[17] As one commenter explains, "[t]he advent of small cells and smart city technologies [has] brought these problems into sharp focus . . . .The lack of defined procedures leads to inefficiencies and haphazard results. Moreover, while Congress and the Commission

[13] Comments of Lightower Fiber Networks, WT Docket No. 17-79, at 5-6 (filed June 15, 2017) ("Lightower Comments") (citation omitted).

[14] WIA Comments at 8.

[15] *Id.*

[16] *See, e.g.*, ExteNet Comments at 6-7; Verizon Comments at 35; T-Mobile Comments at 3 ("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.").

[17] *See, e.g.*, ExteNet Comments at 7.

have acted to remedy some of these inefficiencies, jurisdictions that lack defined procedures are often not familiar with the legal landscape intended to remove barriers to deployment."[18]

This record evidence supports the Commission's proposal to shorten its Section 332(c)(7) shot clocks. In its initial comments, ExteNet recommended that the Commission shorten the Section 332(c)(7) shot clock for collocations (including DNS facilities) from 90 to 60 days, thereby harmonizing the collocation shot clock with 60-day shot clock for "eligible facilities requests" under Section 6409(a) of the Spectrum Act.[19] ExteNet also recommended that the Commission shorten the shot clock for new DNS poles and other new facilities from 150 days to 90 days.[20]

Like ExteNet, many commenters support the Commission's proposal to shorten the Section 332(c)(7) collocation shot clock to 60 days to achieve parity with the current timeline for processing Spectrum Act collocation requests.[21] The record also includes support for shortening the Section 332(c)(7) shot clock for non-collocation requests, including new DNS poles, to 90 days or less.[22]

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[18] Comments of Nokia, WT Docket No. 17-79, at 5 (filed June 15, 2017) ("Nokia Comments").

[19] ExteNet Comments at 8.

[20] *Id.*

[21] *See, e.g.*, Comments of Computer & Communications Industry Association, WT Docket No. 17-79 and WT Docket No. 17-84, at 10 (filed June 15, 2017) ("CCIA Comments"); Comments of Critical Infrastructure Coalition, WT Docket No. 17-79, at 18 (filed June 15, 2017) ("CIC Comments"); CTIA Comments at 11-12; Comments of Mobile Future, WT Docket No. 17-79, at 8 (filed June 15, 2017) ("Mobile Future Comments"); Crown Castle 17-79 Comments at 29; T-Mobile Comments at 3, 18-21; Verizon Comments at 41-42; WIA Comments at 20-23; Free State Comments at 3, 9-11; Comments of Samsung Electronics America, Inc., WT Docket No. 17-79, at 4-5 (filed June 15, 2017) ("Samsung Comments").

[22] *See, e.g.,* CTIA Comments at 11-12; Crown Castle 17-79 Comments at 29; T-Mobile Comments at 18-21; Comments of Competitive Carriers Association, WT Docket No. 17-79 et al., at 13-14 (filed June 15, 2017) ("CCA Comments"). The League of Arizona Cities *et al.* and others contend that the shot clocks should not be shortened for small wireless facilities because they can be "just as large and intrusive" as a macro site. Joint Comments of League of Arizona

These shorter timeframes are reasonable, especially when compared to processing timelines for other similarly-situated ROW users. For example, wireline ROW applications are usually processed in a matter of a few days, or a few weeks at most, involving dozens or hundreds of poles.[23] Further, DNS attachments are often the same size as or smaller than wireline and utility attachments, and impose no greater burden on the public ROW.[24] Thus, there is no reason why DNS deployment requests cannot be processed under the accelerated timelines proposed above.

B. The Record Demonstrates that the Commission Should Exercise Its Authority to Impose a "Deemed Granted" Remedy Where a Jurisdiction Fails to Timely Act.

Parties recognize that shortening the Commission's Section 332(c)(7) shot clocks will have limited practical impact unless the Commission also imposes a "deemed granted" remedy similar to that already in place for Spectrum Act requests. As Verizon explains, "many zoning authorities fail to review and act on zoning applications within the shot clock time period. And carriers are generally reluctant to initiate court action to enforce the shot clock."[25]

Cities et al., WT Docket No. 17-79, at 29 (filed June 15, 2017) ("Arizona Cities 17-79 Comments"); *see also* Comments of Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at 44 (filed June 16, 2017) ("Smart Communities Comments"). This is not the case. ExteNet and WIA proposed to define DNS and other small wireless facilities based on the definitions in the Commission's Collocation Agreement and in legislation recently passed in Ohio (SB 331) and Virginia (SB 1282). *See, e.g.*, ExteNet Comments at 2 n.2. ExteNet has incorporated these definitions into its own definition of DNS. ExteNet Comments at 2.

[23] *See* Comments of ExteNet Systems, Inc., WT Docket No. 16-421, at 38 n.69 (filed Mar. 8, 2017).

[24] *See* WIA Comments at 41-47.

[25] Verizon Comments at 36 (citation omitted); *see also, e.g.*, Comments of the Telecommunications Industry Association, WT Docket No. 17-79, at 2 (filed June 15, 2017) ("TIA Comments"); Comments of Arctic Slope Regional Corporation, WT Docket No. 17-79 & WC Docket No. 17-84, at 7-8 (filed June 15, 2017); AT&T 17-79 Comments at 25-27; CTIA Comments at 8-11; T-Mobile Comments at 13-18.

Commenters are wrong when they suggest that case-by-case litigation of shot clock violations is a feasible solution.[26] As noted above, in the last two years alone ExteNet would have had to file a federal lawsuit at least 47 times to obtain relief from shot clock violations. Those lawsuits would take months to reach summary judgment and, even if a court found a shot clock violation, there is a risk that the court's "remedy" may be to remand the matter back to the local government with only an order to finally issue a decision. Nor can DNS facilities be constructed while local approvals are tied up in court. Clearly, litigation over shot clock violations "is neither an efficient use of resources nor a productive path for obtaining timely approval for broadband infrastructure."[27]

Also without merit is the claim that adoption of a deemed granted remedy in combination with shortening the shot clocks would "unfairly move small wireless facility requests to the top of the permit review," and that this would "detrimentally prejudice[] and discriminate[] against other like providers."[28] To the contrary, wireline requests for ROW access are typically processed in a matter of days or weeks at most, and the same is true of utility attachments.[29] Even with a shorter shot clock and a deemed granted remedy, local approvals of DNS installations will still lag behind their wireline and utility counterparts. Moreover, it is ironic to

[26] *See, e.g.*, Comments of the National League of Cities, WT Docket No. 17-79 & WC Docket No. 17-84, at 3-4 (filed June 15, 2017).

[27] Lightower Comments at 6; *see also* T-Mobile Comments at 13 ("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.").

[28] Comments of the League of Minnesota Cities, WT Docket No. 17-79 & WC Docket No. 17-84, at 14 (filed June 15, 2017).

[29] *See supra* note 23 and accompanying text.

suggest that DNS facilities might be the beneficiaries of discrimination, given the ample evidence in the record of discrimination *against* DNS facilities by local governments.

The Commission has the necessary legal authority to adopt a "deemed granted" remedy for violations of the Section 332(c)(7) shot clocks, and may do so using one or more of the three legal theories proposed in the *Wireless NPRM/NOI.*[30] The basis for the Commission's authority has already been discussed at length in the *Wireless NPRM/NOI* and in the comments filed by other parties.[31] In sum, the record shows that Sections 201(b) and 303(r) authorize the Commission to adopt rules or issue other orders to carry out the substantive provisions of the Act, including Section 332(c)(7).[32] 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).[33]

Moreover, the plain language of Section 332(c)(7)(B)(v) does *not* state that an aggrieved party must seek redress in court where a local government fails to act. Rather, the statute states that such a party "*may* . . . commence an action in any court of competent jurisdiction." The judicial remedy is not exclusive, and thus does not preclude the Commission from adopting a deemed granted remedy where a local jurisdiction fails to observe the shot clocks.[34] But at the same time, adding a deemed granted remedy does not render the judicial remedy in the statute

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[30] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3333-37 ¶¶ 8-16; ExteNet Comments at 12-14.

[31] *See, e.g.*, AT&T 17-79 Comments at 25-27; CTIA Comments at 8-11; Crown Castle Comments at 26; T-Mobile Comments at 13-18; TIA Comments at 3-4; Verizon Comments at 36-38; WIA Comments at 17-19.

[32] T-Mobile Comments at 16-17.

[33] *Id.* at 17 (citing *City of Arlington*, 668 F.3d 229, 247-54 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863, 1874-75 (2013)).

[34] As pointed out in the *Wireless NPRM/NOI*, courts have held that the plain language of a statute governs even where its legislative history suggests an alternative interpretation. *See Wireless NPRM/NOI*, 32 FCC Rcd at 3337 ¶ 16 & n.33 and the cases cited therein.

superfluous. As WIA notes, "[a] deemed granted remedy does not obviate the judicial remedy that exists in Section 332(c)(7)(B)(v), which will continue to provide a vehicle for resolving specific local siting disputes and allow localities to challenge a deemed grant."[35]

Lastly, Section 253(a) provides an alternative basis for the Commission's authority to impose a "deemed granted" remedy, since a State or local government's failure to act within the Section 332(c)(7) shot clocks necessarily prevents construction of DNS facilities and therefore "prohibit[s] or ha[s] the effect of prohibiting . . . telecommunications services."[36] Both the Commission and the courts have recognized that unreasonable delay is a violation of Section 253(a).[37]

C. The Record Supports Limiting Pre-Application Negotiation Periods to 60 Days.

The record shows that pre-application negotiations are unreasonably delaying deployments. Sprint, for example, reports delays arising from the refusal of municipalities to consider siting applications until a master license agreement is in place. Specifically, Sprint found that as of March 2017, 343 jurisdictions took more than six months to reach agreement. Of those, 75 have taken more than a year, 11 have taken more than 18 months, and two have taken more than two years.[38] ExteNet likewise has found that even under optimal circumstances pre-application negotiations can take at least six months and in some cases more than a year.[39] Crown Castle put it bluntly:

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[35] WIA Comments at 20.

[36] 47 U.S.C. § 253(a).

[37] *See* ExteNet Comments at 14 n.36 and the cases cited therein.

[38] Comments of Sprint Corporation, WT Docket No. 17-79 & WC Docket No. 17-84, at 44-45 (filed June 15, 2017) ("Sprint Comments").

[39] ExteNet Comments at 15; *see also id.* ("In one city in a mid-Atlantic State, it took ExteNet three years to successfully negotiate a license agreement, and its negotiation with a large city in

> Pre-application meetings and review processes faced by Crown Castle and referenced in the *NPRM* needlessly delay the processing of siting applications. Indeed, these procedures and pre-application hoops and hurdles are often designed to intentionally delay the process and give the local jurisdiction extra time to consider the application outside the bounds of the shot clock. They are thus nothing more than attempts to circumvent federal law, and should be rejected.[40]

Ideally, and as Crown Castle has recommended, the Commission should require that all pre-application procedures be initiated and completed during the shot clock window.[41] At a minimum, however, the Commission should adopt a rule – in tandem with its revised shot clocks and a deemed granted remedy – limiting all pre-application negotiation periods to 60 days, commencing when either the applicant or the State or local government makes a written request for negotiations.[42]

II. THE RECORD CONFIRMS THE NEED TO INTERPRET SECTION 253 TO ADDRESS DNS DEPLOYMENT BARRIERS.

A. The Record Includes Robust Evidence that Delay Is Far from the Only Serious Impediment to DNS and Other Small Wireless Deployments.

The record amply documents the barriers that impede DNS and other small deployments. For instance, a substantial number of communities have required ExteNet to follow application processes and deployment standards different than those of similarly-situated wireline providers and utilities, even though ExteNet's pole attachments impose no greater burden on the public

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the southwest is now three years old and counting. Elsewhere, negotiation periods of a year or more are not uncommon").

[40] Crown Castle 17-79 Comments at 30-31.

[41] *Id.* at 31.

[42] ExteNet Comments at 15. If negotiations are not successful by day 60, the applicant must be permitted to file its application for approval, which would be subject to the shot clock. The applicant should also have the option to continue negotiating or enter into a "safe harbor" license agreement that would permit the applicant to proceed with installation under reasonable terms and conditions. A model safe harbor agreement might be developed through the BDAC, in consultation with industry and State officials. *Id.* at 15-16.

ROWs.[43] Particularly troubling is the fact that "ExteNet's facilities must often go through discretionary, lengthy and burdensome zoning processes, whereas non-wireless attachers in the public ROW do not."[44]

Moreover, local governments impose restrictions on ExteNet that have nothing to do with management of public ROWs and thus do not fall within the "ROW management" exception in Section 253(c). For example, local governments often slow the permitting process down by inquiring as to matters such as finances, ownership, system design and technical need.[45] In other cases, local governments impose aesthetic requirements based entirely on subjective considerations that effectively give local governments latitude to block a deployment for virtually any aesthetically-based reason.[46]

Similarly, WIA reports that "in some communities, non-CMRS telecommunications carriers and utility companies are not required to obtain ***any*** site-specific permits before installing equipment on existing utility poles. Yet, for small wireless facility installations on such poles, many cities are refusing to process the deployments under the traditional ROW permit process. Or the cities impose additional requirements or restrictions on small wireless

[43] *Id.* at 17 ("[I]n 2015 and 2016, 49% of [ExteNet's] surveyed communities subjected ExteNet to processes and standards that differed from those required of wireline providers and utilities in public ROWs . . . . Also, 17% of the surveyed communities refused to allow ExteNet to proceed under a standard rights-of-way permitting process, at least in part because ExteNet's facilities use an antenna.").

[44] *Id.*; *see also* AT&T 17-79 Comments at 7 ("There is no sound reason for any municipality to subject small cell deployments to the same review processes that apply to macro cells. Because of their unobtrusive size, small cells simply do not pose similar considerations as to environment or aesthetic impacts. But these measures threaten to significantly slow down the deployment of advanced wireless infrastructure that holds so much promise for consumers, businesses, and our economy at large.").

[45] ExteNet Comments at 20, 36.

[46] *Id.* at 37.

facilities that are not imposed on other ROW users."[47] As Crown Castle explains, "[m]any jurisdictions impose onerous and discriminatory restrictions and fees that thwart deployment of small cell networks due to the mere presence of antennas in the network design. These restrictions and fees, which generally do not apply to wireline deployment (without antenna appurtenances) in the ROW, go beyond reasonable resource management, and appear designed to either deter small cell deployment or to merely generate revenue for cash-strapped local governments—all at the expense of broadband facility modernization and densification."[48]

In addition, undergrounding ordinances increasingly hamper deployments. According to Verizon, "[m]any localities require all utilities to be located underground – thus dramatically increasing the costs of deployment – and one Midwestern town compounds the problem by proposing to prohibit small cells on existing above-ground infrastructure. Many jurisdictions also impose unreasonable set-back requirements, minimum separation distances, and height and equipment size limitations for small facilities in the rights-of-way."[49]

Also, CTIA states that barriers to deployment take the form of, *inter alia*, "onerous conditions and restrictions that make deployment far more difficult and costly, such as detailed site design requirements, location restrictions, minimum site separation rules, and burdensome showings of the need for each facility, type of facility, or technology. . . . And frequently, these barriers and requirements were not imposed on other ROW users, thus discriminating against wireless providers and new entrants. Since CTIA filed its previous comments [in WT Docket No. 16-142], its members have seen no lessening of these barriers."[50]

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[47] WIA Comments at 12 (emphasis in original).

[48] Crown Castle Comments at 10.

[49] Verizon Comments at 7-8

[50] CTIA Comments at 7.

The foregoing confirms the need for the Commission to bring predictability to the marketplace by clarifying the permissible scope of State and local action under Section 253. As Lightower explains, "[t]he lack of consistent guidance regarding statutory interpretation is creating uncertainty at the state and local level, with many local jurisdictions seeming to simply make it up as they go. Differences in the federal courts are only exacerbating the patchwork of interpretations at the state and local level . . . . This is why it is critical that the Commission provide clarity regarding key federal statutes."[51]

B. Commenters Recognize the Need to Clarify the Meaning of "Effect of Prohibiting" and "Manage the Public Rights-of-Way" in Section 253.

Commenters agree the Commission should define Section 253(a)'s "prohibit or have the effect of prohibiting" standard in accordance with the Commission's *California Payphone* ruling and the Ninth Circuit's approach in *City of Auburn*.[52] Under *California Payphone*, the Commission examines whether a particular State or local restriction "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced regulatory environment."[53] Under the *City of Auburn* approach, the Commission would examine whether the restriction(s) at issue impede, in combination or as a whole, the provision of any telecommunications service, including but not limited to requirements that leave local

[51] Lightower Comments at 3. *See also* 5G Americas Comments at 5, 6 ("[T]he Commission is in a strong position under its existing statutory authority to set standards that will create more uniformity across states and municipalities . . . 'Applying [the] same policies on [a] national basis will simplify and incentivize rollout of denser network[s].'") (footnotes omitted) (internal brackets in original); Comments of Fiber Broadband Association, WC Docket No. 17-84, at 18 (filed June 15, 2017) ("FBA Comments").

[52] ExteNet Comments at 23-28; *see also* WIA Comments at 34.

[53] A number of parties support use of the *California Payphone* standard (or some variation) as a linchpin of Section 253(a). *See, e.g.*, AT&T 17-79 Comments at 9 n.22; Charter Comments at 9-10, CTIA Comments at 19-20; WIA Comments at 34; Crown Castle Comments at 55; T-Mobile Comments at 35; Verizon Comments at 10-11.

governments unfettered discretion over applications, significantly increase cost, and impose lengthy or onerous application processes. Such a dual-pronged standard is necessary to ensure that a broad range of State and local restrictions on deployment are covered, consistent with the purpose of Section 253(a).

Applying this dual standard, the record shows that the Commission should reject the use of unbridled discretionary factors, particularly aesthetics.[54] Contrary to some claims,[55] providers are not asking the Commission to "come up with a one-size-fits-all" rule that would dictate how all local governments may address aesthetic issues in the permitting process. To the contrary, ExteNet has only asked the Commission to declare that State or local restrictions based on aesthetics are not permitted unless they are imposed on *all* ROW occupants and are based on measurable, *objective* standards that can be readily understood, such as size of equipment (using the FCC's volumetric safe harbor), placement on the pole and painting requirements.[56] Entirely subjective "character of the neighborhood" standards essentially leave DNS providers at the mercy of local governments, which is the opposite of what Section 253 is supposed to achieve.[57]

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[54] *See, e.g.*, T-Mobile Comments at 39-40 ("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 . . . constitute an effective prohibition.") (citation omitted).

[55] *See* CCUA Comments at 17-18.

[56] ExteNet Comments at 37.

[57] Consistent with the showings by ExteNet, Mobile Future and others, the Commission should declare that undergrounding requirements imposed on wireless providers "prohibit or have the effect of prohibiting the ability of [entities] to provide telecommunications service" and thus are preempted under Section 253(a). *See, e.g.*, ExteNet Comments at 19; Mobile Future Comments at 9; T-Mobile Comments at 38; Verizon Comments at 33-34; WIA Comments at 56; AT&T 17-79 Comments at 14-15; CTIA Comments at 24; Samsung Comments at 8.

In clarifying the meaning of "prohibit or have the effect of prohibiting," the Commission should reject the argument that Section 253 does not apply to wireless services.[58] The statute applies to "*any* interstate or intrastate telecommunications service,"[59] which the Supreme Court has recognized includes wireless services.[60] The Commission also should not be dissuaded by the possibility that it may reclassify broadband Internet access service ("BIAS") as an information service.[61] Regardless of how BIAS is classified, the Commission should clarify that Section 253(a) would still apply to "mixed use" facilities that provide both traditional telecommunications service and BIAS.[62]

Finally, the Commission should define a local government's right to "manage the public rights-of-way" under Section 253(c) narrowly, such that it only includes those tasks necessary to preserve the physical integrity of the ROWs, control the orderly flow of vehicles and pedestrians, and otherwise protect the health and safety of the travelling public and users of the ROWs. In so doing, the Commission should rely on the guidance it provided in its *TCI Cablevision* decision.[63]

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[58] Smart Communities Comments at 69-70; Arizona Cities 17-79 Comments at 37-39.

[59] 47 U.S.C. § 253(a) (emphasis added).

[60] *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 340 (2002) (recognizing that "a provider of wireless telecommunications service is a 'provider of telecommunications service'").

[61] Smart Communities Comments at 55-56; Joint Comments of League of Arizona Cities et al., WT Docket No. 17-84, at 1-2 (June 15, 2017) ("League of Arizona Cities 17-84 Comments").

[62] *See* CCA Comments at 23-24; T-Mobile Comments at 52-54.

[63] *See* ExteNet Comments at 35 (quoting *TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21441 ¶ 103 (1997) ("*TCI Cablevision*") ("We recognize that section 253(c) preserves the authority of [S]tate and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way. We previously described the types of activities that fall within the sphere of appropriate rights-of-way management . . . . These matters include coordination of construction schedules, determination

Commenters also demonstrate that Commission clarification of "manage the public rights-of-way" is necessary to establish what localities may or may not regulate under the rubric of ROW management.[64] As Sprint explains, "a national framework provides direction and clarity to state and local government authorities responsible for managing public [ROWs]."[65]

C. The Record Confirms that Discriminatory Treatment of DNS Providers Compared to Other ROW Users Violates Section 253(a).

The record supports a Commission declaration that restrictions imposed on DNS and other small wireless providers – but not on other public ROW users – are discriminatory, violate Section 253(a), and are not "saved" by Section 253(c).[66] Importantly, as discussed above, DNS pole attachments usually impose no greater burden on the public ROW than wireless or utility attachments – in fact, they are often smaller. Nevertheless, local governments continue to subject DNS facilities but not their wireline or utility counterparts to a variety of deployment restrictions.[67] This discriminatory imbalance has substantially impeded the efforts of ExteNet

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of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.").

[64] *See* FBA Comments at 21; Comments of PTA-FLA, Inc., WT Docket No. 17-79, at 19-20 (filed June 15, 2017); Comments of R Street Institute, WT Docket No. 17-79, at 7-9 (filed June 15, 2017) ("R Street Comments").

[65] Sprint Comments at 47-48.

[66] *See, e.g.*, ExteNet Comments at 37-40; WIA Comments at 55; Comments of AT&T Services, Inc., WC Docket No. 17-84, at 72-73 (filed June 15, 2017); Comments of Crown Castle International Corp., WC Docket No. 17-84, at 45-46 (filed June 15, 2017); CTIA Comments at 18-20.

[67] As explained by AT&T: "Most ROWs support light poles, traffic control poles, utility poles, equipment cabinets, and devices installed on those poles or cabinets, such as electric transformers, sensors, traffic cameras, solar panels, and Wi-Fi antennas and other equipment placed by cable companies and local government entities. This equipment, often placed at regular intervals along the ROW, is no less, and typically substantially more, visually obtrusive than small cell antennas. And yet, municipalities often subject small cell facilities to more onerous restrictions." AT&T 17-79 Comments at 16.

and other DNS providers to provide telecommunications service. As such, it "prohibit[s] or [has] the effect of prohibiting" the ability of entities to provide telecommunications service, in that it "materially inhibits or limits" the ability of ExteNet and other DNS providers to "compete in a fair and balanced legal and regulatory environment." The Commission acknowledged as much in *TCI Cablevision* and should do so again now.[68]

D. DNS Providers Demonstrate that Excessive ROW Fees Continue to Be a Significant Problem that Should Be Addressed by the Commission.

While Section 253(c) permits State and local governments to require "fair and reasonable compensation . . . on a competitively neutral and nondiscriminatory basis" for use of public ROWs,[69] the record shows that DNS providers are being charged excessive ROW fees that bear no relationship to the relevant State or local government's costs of ROW management.[70]

For example, in one city in the State of New York, ExteNet has been asked to pay fees as high as $30,000 per year plus $708 per node per year for each of ExteNet's nearly 60 nodes.[71] A city in the Midwest required ExteNet to pay $15,000 per year for three DNS nodes.[72] According

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[68] *See* ExteNet Comments at 38-39 (quoting *TCI Cablevision*, 12 FCC Rcd at 21443 ¶ 108 ("One clear message from section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. *Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.*") (emphasis added).

[69] 47. U.S.C. § 253(c).

[70] *See* CTIA Comments at 29-30 ("In WT Docket No. 16-421, the Commission compiled an extensive record that demonstrates localities are imposing excessive fees on wireless providers seeking to construct needed facilities, and those fees are impeding deployment. Localities often request multiple separate payments, including up-front application fees, recurring site fees, charges based on a percentage of the provider's revenues, and more. High per-site fees are particularly burdensome because providers may need to deploy dozens or even hundreds of small cell sites in an area to provide sufficient coverage and capacity.") (citations omitted).

[71] ExteNet Comments at 21.

[72] *Id.*

to Crown Castle, it has experienced application fees as high as $20,000 per pole, and annual rent as high as $24,000 for each new pole and $12,000 per collocation on an existing pole.[73] As WIA explains:

> [O]ne city in the suburbs of Seattle requires a $5,000 fee before it will begin review of the required ROW agreement. Similarly, a Virginia city seeks a one-time fee of $5,000 to evaluate ROW permits for small wireless facility attachments to existing structures. These fees historically were not assessed against utilities or other telecommunications providers. . . . In addition to one-time fees, localities often charge excessive recurring charges for small wireless facility installations in ROWs. For example, one Massachusetts city seeks an annual $6,000 per pole fee for the right to use the public ROW. This would trigger a $300,000 annual fee merely to maintain fifty small wireless facilities in the ROW. Similarly, a northeast state Department of Transportation ("DOT") imposes an annual $37,000 *per node* fee, a fee that is not applied to "public utilities" (including wireline telecommunications providers).[74]

In addition to exorbitant one-time and annual fees, localities are demanding high escrow fees and/or fees based on gross revenues. For example, Verizon reports that a Midwestern city "charges $11,000 per application – a charge that includes an escrow fee to cover the expected cost of the city's consultant to review wireless applications," and that "[m]any other localities, like East Greenbush, New York, and Santa Clara, Utah, require $8,500 escrow fees for consultant reviews."[75] Further, "many jurisdictions, like Rochester and Buffalo, New York,

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[73] Crown Castle 17-79 Comments at 11-13.

[74] WIA Comments at 14; *see also id.* at 15 ("WIA members have reported other wide-ranging municipal fee demands for use of the public ROWs—anywhere from percentages of gross revenues (as high as 5.4%), to linear foot charges of more than six dollars per foot, to $10,000 in up-front 'deposits' for application review. WIA understands that such fees, which generally have no relation to ROW management costs, are not imposed on other utilities."); Nokia Comments at 7-9; Comments of Oregon Telecommunications Association, WT Docket No. 17-84, at 2-4 (filed June 15, 2017); Comments of Mobilitie, LLC, WT Docket No. 17-79 and WC Docket No. 17-84, at 4-5 (filed June 15, 2017).

[75] Verizon Comments at 7 (citation omitted); *see also* AT&T 17-79 Comments at 17-19; T-Mobile Comments 27-29; CCA Comments at 20-21.

have proposed or require a five percent gross revenue fee, again unrelated to the cost of wireless attachments, for accessing local rights-of-way."[76]

Accordingly, there is substantial support in the record for the Commission to declare that "fair and reasonable" in Section 253(c) means that State and local governments may not charge ROW fees that exceed their costs of evaluating permit applications and/or managing the ROW.[77] This is well within the Commission's purview – "fair and reasonable" is undefined in Section 253(c), and the Commission has authority to interpret ambiguous terms in a manner that is a permissible construction of the statute.[78] Limitation of "fair and reasonable" fees to those that are cost-based would be consistent with the pro-competitive intent behind Section 253.[79] It is difficult to believe that Congress thought otherwise, as it is impossible to achieve a truly competitive marketplace if State and local governments are permitted to block market entry by charging exorbitant ROW fees.[80]

[76] Verizon Comments at 7.

[77] *See, e.g.*, Comments of the Wireless Internet Service Providers Association, WC Docket No. 17-84, at 6 (filed June 15, 2017); R Street Comments at 5-7; AT&T 17-79 Comments at 20; CCA Comments at 17-18; CCIA Comments at 15-16; CIC Comments at 7; CTIA Comments at 29-31; ExteNet Comments at 43; FBA Comments 24-25; T-Mobile Comments at 31-33; Verizon Comments at 13-14; WIA Comments at 41-53.

[78] *See City of Arlington*, 668 F.3d at 255.

[79] *See TCI Cablevision*, 12 FCC Rcd at 21440 ¶ 102 (quoting *Classic Telephone*, 11 FCC Rcd 13082, 13096 ¶ 25 (1996)) ("Section 253 is a critical component of Congress's . . . deregulatory national framework that it put into place by enacting the 1996 Act. . . 'Congress intended primarily for competitive markets to determine which entrants shall provide telecommunications services demanded by consumers, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.'").

[80] Some courts have agreed that ROW fees should be cost-based. *See* ExteNet Comments at 40-41 (citing cases).

Although a number of local governments continue to insist that they are entitled to act like private property owners and demand fees above costs or which reflect fair market value,[81] these assertions lack merit. As shown in ExteNet's comments, governmental stewardship of public ROWs and associated poles is not akin to private property ownership – courts have long established that local governments do not have proprietary rights in the public ROWs.[82] Moreover, there is no "market" for public ROWs, which exist as a function of the sovereign power used to establish corridors for the movement of people, electric energy, and communications. Distinct from public parks or government buildings, a municipality does not possess ownership rights as a proprietor of the streets and sidewalks. Instead, local governments have *regulatory authority* over the use of the streets and rights of way, which is limited by Section 253.[83]

E. Section 253(d) Does Not Preclude the Commission from Issuing Interpretations of Section 253(c) in These Proceedings.

Some commenters erroneously contend that Section 253(d) – which authorizes the Commission to preempt State or local regulations under Section 253(a) or 253(b) on a case-by-

[81] *See, e.g.*, Comments of Minnesota Cities Coalition, WT Docket No. 17-84, at 12-18 (filed June 15, 2017); Comments of American Association of State Highway and Transportation Officials, WT Docket No. 17-79, at 3 (filed June 19, 2017); League of Arizona Cities 17-84 Comments at 8-10.

[82] *See* ExteNet Comments at 41-43 (citing cases).

[83] In some areas, the local government prohibits any ROW poles other than its own, and refuses to allow any other entity to install alternative poles. The government-owned poles thus are the only above ground structures on which to deploy DNS, and fees above costs can, in effect, prevent construction. Thus, regardless of whether municipal poles resemble property held by private entities, the *manner* in which the local authorities leverage them to impose regulations and fees on small wireless networks is a function of local regulation.

case basis[84] – precludes the Commission from interpreting Section 253(c).[85] Once again, these arguments lack merit.

The Commission's authority to interpret Section 253(c) does not derive from Section 253. Rather, Section 201(b) of the Act gives the Commission broad authority to carry out the substantive provisions of the Communications Act.[86] Likewise, the Supreme Court has confirmed that Section 201(b) empowers the Commission to implement the Communications Act's provisions – including those added via the Telecommunications Act of 1996 (which would include Section 253(c)).[87] Nothing in the text of Section 253(d) overrides this authority. Accordingly, as pointed out by Verizon, the Commission is correct to interpret Section 253(d)'s adjudicatory process as one non-mandatory approach for determining violations of Section 253, but one that does not prevent the Commission from interpreting the other provisions of Section 253, including Section 253(c).[88]

[84] 47 U.S.C. § 253(d).

[85] *See, e.g.*, NARUC Comments at 8-11; Comments of the City of New York, WC Docket No. 17-84, at 5 (filed June 15, 2017); Comments of the City of Norfolk, Virginia, WC Docket No. 17-84, at 3-4 (filed June 15, 2017).

[86] *See* 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act].").

[87] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3336 n.28 (quoting *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 380 (1999) and *City of Arlington*, 133 S. Ct. at 1866).

[88] *See* Verizon Comments at 31-33. The Virginia Joint Commenters argue that "Section 253(c) creates a safe harbor, and Section 253(d) grants the power to enforce that safe harbor only to the courts." Virginia Joint Comments at 5. Whether any given legal requirement prohibits or has the effect of prohibiting any telecommunications service in violation of Section 253(a) requires analysis of whether that requirement falls within the safe harbor of Section 253(c). Hence, for the Commission to consider challenges under Sections 253(a), it *must* have the authority to consider Section 253(c).

III. THE RECORD SUPPORTS FURTHER STREAMLINING OF ENVIRONMENTAL REVIEWS TO SPEED DNS DEPLOYMENT.

The record supports further streamlining of environmental, preservation, and Tribal reviews to speed DNS deployments while protecting the environment.

First, commenters recognize the need to broaden the NEPA categorical exclusions for DNS and other small wireless facilities. For example, the Competitive Carriers Association ("CCA") agreed with ExteNet that the Commission should clarify that deployments of small wireless facilities such as DAS and small cells are categorically excluded from NEPA review.[89] CTIA likewise asked the Commission to include a categorical exclusion for support structures that support small cell and DAS facilities.[90]

Second, ExteNet agrees with WIA, CCA, the Computer and Communications Industry Association, Mobile Future, and Samsung that the Commission should adopt shot clocks to govern the FCC's environmental review and dispute resolution processes.[91] "The environmental review process is a significant source of delay for wireless infrastructure deployment, unbounded by any timelines to speed resolution and draw proceedings to a timely close. In some cases, EAs filed with the Commission remain pending for years. Adoption of shot clocks for EAs will eliminate unnecessary delays and provide concrete timelines for the resolution of disputes."[92]

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[89] CCA Comments at 49; *see also* ExteNet Comments at 47.

[90] CTIA Comments at 36; *see also* WIA Comments at 64-65. While certain groups raised concerns about the possibility that the Commission might weaken existing tower lighting requirements that protect migratory birds as part of any NEPA rule changes, no party has asked the FCC to do so. *See* Comments of Cape Cod Bird Club, Inc., WT Docket No. 17-79, at 1-2 (filed June 6, 2017); Comments of Defenders of Wildlife, WT Docket No. 17-79, at 2 (filed June 9, 2017).

[91] *See* WIA Comments at 65; CCA Comments at 48; CCIA Comments at 10; Mobile Future Comments at 10; Samsung Comments at 8.

[92] WIA Comments at 65 (citation omitted).

Third, the record strongly supports eliminating the requirement to file environmental assessments ("EA") for non-collocated facilities that are built in floodplains, provided those facilities are constructed above the base flood elevation.[93] As Verizon pointed out, "[f]lood plain EAs are unnecessary and redundant and should be eliminated. When an EA is required, the applicant must hire expert consultants to prepare the EA, then file the EA with the Commission and wait at least 30 days to allow interested parties to comment. For the three-year period Verizon reviewed, however, we have not received a single negative comment for facilities receiving approval from any of the expert agencies on flood plains, and the Commission approved every site without change."[94]

Fourth, commenters urged the Commission to take steps to streamline and expedite NHPA reviews of DNS and other small wireless facilities. For example, ExteNet recommended that the Commission revise its NHPA categorical exclusions to provide greater clarity and maximize the exclusions applicable to minimally impactful DNS facilities,[95] and other facilities providers strongly support similar streamlined exclusions.[96] While some municipalities and historical preservation groups prefer the status quo, others remain open to the possibility of further dialogue on NHPA issues, which may pave the way for meaningful reform. For instance, the Rhode Island SHPO acknowledges that the best way to shorten SHPO timelines is to adopt

[93] ExteNet Comments at 47; WIA Comments at 63-64; Comments of the Association of American Railroads, WT Docket No. 17-79, at 27-31 (filed June 15, 2017); AT&T 17-79 Comments at 35; Crown Castle 17-79 Comments at 43; CTIA Comments at 37.

[94] Verizon Comments at 64.

[95] ExteNet Comments at 48-49.

[96] *See, e.g.*, AT&T 17-79 Comments at 29-32; CTIA Comments at 37-39; T-Mobile Comments at 60-63.

more exclusions.[97] Likewise, the Advisory Council on Historic Preservation ("ACHP") recommends that the Commission determine what efficiencies might apply to 5G deployments.[98]

Finally, ExteNet supports the joint comments and reply comments filed CTIA/WIA on Tribal review issues in WT Docket No. 17-79, and incorporates those filings herein by reference.[99] "The current state of affairs is untenable and will only worsen absent Commission action. Indeed, given the many hundreds of thousands of expected new wireless deployments, the [Tribal] consultation process as it is currently administered will result in the imposition of substantial burdens on limited Tribal resources. This in turn will result in additional delay, frustrating the critical mission of rapidly deploying wireless broadband and 5G technologies. . . . It is critical that the Commission act now to remedy the flaws in the process."[100]

IV. THE COMMISSION SHOULD NOT REVERSE ITS INTERPRETATION OF SECTIONS 251(B)(4) AND 224 TO GRANT ILECS MANDATORY ACCESS TO COMPETITIVE LEC POLES.

ExteNet disagrees with AT&T's, CenturyLink's, and US Telecom's suggestion that the Commission abandon its current interpretation of Sections 251(b)(4) and 224 which prohibits ILECs from obtaining mandatory access to competitive LEC poles, ducts, conduit and rights-of-way (hereafter, "poles") at regulated rates. These commenters have not presented any evidence that market changes justify a departure from the Commission's long-standing interpretation of

[97] Comments of the Rhode Island Historical Preservation and Heritage Commission, WT Docket No. 17-79, at 2 (filed May 31, 2017).

[98] Comments of the Advisory Council on Historic Preservation, WT Docket No. 17-79, at 5 (filed June 15, 2017) (corrected June 16, 2017). The ACHP also encourages the FCC to consider additional efficiencies for pole replacements; endorses the exclusion of collocations in transport ROWs; does not oppose revisions to the current ROW exclusions; and is amenable to discussing other collocation efficiencies, including non-substantial collocations that do not create ground disturbance or that have been reviewed and cleared locally. *See id*. at 5-6.

[99] *See* Joint CTIA/WIA Comments and Joint CTIA/WIA Reply Comments, *supra* note 10.

[100] Joint CTIA/WIA Comments at 6.

Section 224, affirmed in the *2011 Pole Attachment Order*, that precludes ILECs from obtaining access to competitive LEC poles based not on the extent of competition in retail markets, but on concerns of possible bottleneck control. Accepting the ILECs' invitation to reverse the status quo could discourage the broadband deployment this proceeding is designed to promote, impose discriminatory costs and obligations on only one type of owner of competitive poles, and reverse decades of light touch regulation for competitive providers.

As a provider certified to offer competitive telecommunications and/or local exchange service in more than 40 states, today ExteNet does not have a mandatory obligation to offer ILECs access to its poles. As of this filing, no ILEC has requested access to ExteNet poles. Given that the majority of ExteNet's network attaches to poles controlled by ILECs or electric utilities,[101] it is not surprising that no ILEC has sought access to the few poles owned or controlled by ExteNet. Neither AT&T, CenturyLink, nor US Telecom allege, let alone provide evidence to support, any claim that ILECs need access to competitive LEC poles, have been denied such access, or have paid more than the rate they would have paid if such access were governed by the Commission's pole attachment rate rules. In short, there is no evidence of changed circumstances that justifies a departure from the Commission's current interpretation of its pole access rules.

Absent changed circumstances, there is no rational basis for the Commission to deviate from its decision in the 1996 *Local Competition Order*, affirmed in the *2011 Pole Attachment Order*,[102] that ILECs may not obtain compulsory access to competitors' poles. Reversing the

[101] As ExteNet noted in initial comments, "ExteNet has been prohibited from constructing new poles solely because it is facilitating provision of wireless service." ExteNet Comments at 18.

[102] *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, Report and Order and Order on Reconsideration (2011) ("*2011 Pole Attachment Order*") (subseq. hist. omitted).

Commission's 1996 and 2011 interpretation would conflict with the Commission's rationale in the *2011 Pole Attachment Order*, recent decisions that found ILECs continue to exercise exclusive control over critical infrastructure needed to deploy new broadband networks, and the *BDS Order*[103] that found recent cable buildout dwarfs competitive LEC buildout. A reversal also would be arbitrary and capricious because its burdens would fall disproportionately on competitive LECs but not cable companies, who control the majority of competitive broadband infrastructure.

In the *Local Competition Order*, the Commission found that ILECs may not "seek access to the facilities or rights-of-way of a LEC under either Section 224 or Section 251(b)(4)."[104] The Commission reasoned that since Section 224 expressly withheld access rights from ILECs, the general provisions of Section 251(b)(4) cannot be interpreted as restoring such access.[105] In other words, a specific provision of the Communication Act makes clear that ILECs do not have the right to access competitive LEC poles. And the Commission's reasoning is sound, as it reflects the commonplace canon of statutory construction that the "specific governs the general."[106] Accordingly, a separate general statutory provision that addresses a number of different issues must not be interpreted as in conflict with a specific provision that directly addresses access to

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[103] *See Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 32 FCC Rcd 3459 (2017) ("*BDS Order*"), *pet for rev. pending sub nom.* Access Point, Inc., et al v. FCC, et al. No. 17-1168 (D.C. Cir.) (2017).

[104] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16104 ¶ 1231 (1996) *("Local Competition Order")* (subseq. history omitted).

[105] *Id.*

[106] *See, e.g., National Labor Relations Board v. SW General Inc.*, 137 S.Ct. 929, 941 (2017) ("'[I]t is a commonplace of statutory construction that the specific governs the general.'") (internal citations omitted).

poles.

Sections 224 and 251(b)(4), read together, make clear that there is no inconsistency between these two provisions. While Section 251(b)(4) provides that "each local exchange carrier" has the duty to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions *that are consistent with section 224*,"[107] Section 224(a)(5) provides that "the term 'telecommunications carrier' does not include any [ILEC]."[108] Section 224(f)(1)'s requirement that a "utility shall provide … any telecommunications carrier with nondiscriminatory access to its poles, ducts, conduits, or rights-of-way owned or controlled by it"[109] does not apply in instances where an ILEC seeks access to a competitive LEC's poles. The only interpretation of Sections 224 and 251(b)(4) that withstands scrutiny is that the entirety of the last clause of Section 251(b)(4) – "that are consistent with section 224 of this title" – modifies the preceding clause – "The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions . . . ." Section 251(b)(4) is simply giving effect to the provisions of Section 224 and not establishing a separate right of ILEC access to competitive LEC poles in conflict with Section 224. Accordingly, there is no ambiguity allowing the Commission to reinterpret Section 251(b)(4) in a manner that would allow the Commission to establish an independent right of access by ILECs to competitive LEC poles.

[107] 47 U.S.C. § 254(b)(4) (emphasis supplied).

[108] *Id.* § 224(a)(5).

[109] *Id.* § 224(f)(1).

The Ninth Circuit reached a different conclusion, finding that Section 251(b)(4) and Section 224 could be interpreted in a manner where there would be no conflict.[110] Specifically, the Ninth Circuit concluded that Section 224 concerns all utilities, whereas Section 251(b) concerns only telecommunications carriers.[111] Aside from being *dicta*, this interpretation gives no effect to the purpose of the 1996 Act which was to introduce competition to the telecommunications marketplace. Competitors, not ILECs, required access to essential facilities, *i.e.*, poles, ducts, conduit and rights-of-way, in order to effectively compete with entrenched ILEC providers of telecommunications services. Indeed, the Commission recognized that Sections 224 and 251(b)(4) were enacted to ensure "that ILECs' control over poles, ducts, conduits, and rights-of-way does not create a bottleneck for the delivery of telecommunications services . . . ."[112] Section 224, as enacted in 1978, ensured "that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television systems that use poles and rights-of-way."[113] As amended by the 1996 Act, Congress "intended to ensure… that [I]LECs' control over poles, ducts, conduits, and rights-of-way does not create a bottleneck for the delivery of telecommunications services and certain other services."[114] The Commission explained that because

> an incumbent LEC is a utility and not a telecommunications carrier for purposes of [S]ection 224, an incumbent LEC must grant other telecommunications carriers and cable operators access to its poles, ducts,

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[110] *See US West Communications, Inc. v. Hamilton*, 224 F.3d 1049 (2000).

[111] *See id.* at 1053-54.

[112] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19464 ¶ 99 (2005) ("*Omaha Forbearance Order"*), *aff'd, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[113] *Omaha Forbearance Order*, 20 FCC Rcd at 19464 ¶ 99 n.243.

[114] *Id.* at 19464 ¶ 99.

> conduits, and rights-of-way, even though an incumbent LEC has no rights under [S]ection 224 with respect to those of other utilities. This is consistent with Congress's intent that [S]ection 224 promote competition by ensuring the availability of access to new telecommunications entrants.[115]

It would be inconsistent to give ILECs "reciprocal" access to competing carriers' poles while the Communications Act forecloses ILEC access to utility poles, when utilities have far more ubiquitous pole networks, and other critical infrastructure when compared to competing carriers. Construing the statute as providing a right of ILEC access would be at odds with the text, structure and purpose of the Communications Act.

Although the Commission adopted "a new interpretation of [S]ection 224(b)" to permit ILECs to challenge under Section 224(b)(1) the rates, terms and conditions when ILECs gained access to utility poles through provisions other than Section 224 mandatory access, it rejected arguments that its interpretation created an inconsistency with Section 251(b)(4). Rather, the Commission affirmed that the *2011 Pole Attachment Order* did "not grant incumbent LECs an access right under [S]ection 251(b)(4) that does not exist under [S]ection 224."[116] Based on record evidence presented in that proceeding, the Commission revised its interpretation of Section 224(b) because ILEC control of vast and ubiquitous pole networks vis-a-vis electric and other utilities had diminished. Specifically, ILEC pole ownership changed from virtual parity with utilities in 1996 to 25-30 percent of poles at the time the *2011 Pole Attachment Order* was adopted.[117] The Commission found that the imbalance in control of pole ownership (25-30 percent owned by ILECs and 65-70 percent owned by electric utilities) could result in unequal

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[115] *Id.* at n.243 citing Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, 104th Cong., 2d Sess. 98-100, 113.

[116] *2011 Pole Attachment Order* at 5333 ¶ 212 n.643.

[117] *Id.* at 5329 ¶ 206 and n.617.

bargaining power, which would increase the rates the ILECs would have to pay.[118] In contrast, the Commission has not found, and the ILECs have not shown, that ILECs are in an inferior bargaining position[119] or face unreasonable costs for access to competitive LEC poles.[120]

"Reciprocal" access is a misnomer, because reversal of the Commission's statutory interpretation – aside from being unlawful – would place a greater burden on only certain competitors. With respect to the relationship between the ILEC and a competitor, the ILEC would exercise leverage over its competitors who have exponentially fewer poles than the ILECs.[121] Following the logic of the *2011 Pole Attachment Order*, this imbalance supports preserving competitive LEC bargaining power vis-a-vis ILECs, not putting the Commission's thumb on the scale in favor of the party that owns a much greater percentage of poles. The fact that there is competition for retail broadband services in some areas is a red herring. As the Commission found, "the underlying section 224 access obligation … is not dependent on whether or not there is competition. It functions as an incentive to the BOCs to continue to provide nondiscriminatory access to poles and the other infrastructure even as the BOCs continue to compete and deploy new facilities."[122]

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[118] *Id.* at 5329 ¶ 206, n.618.

[119] *Id.* at 5327 ¶ 199, *see also id*. at 5328-29 ¶ 206.

[120] *Id*. ("ILECs estimate that in aggregate, they annually pay pole attachment rates that are $320 to $350 million greater than they would pay at the cable rate").

[121] *See id.*

[122] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) From Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks Lifeline and Link Up Reform and Modernization, Connect America Fund*, 31 FCC Rcd 6157, 6171 ¶ 22 (2015).

Nor is there any validity to the ILECs' claim that competitors are on a similar footing when it comes to deployment of broadband infrastructure.[123] For example, ExteNet explained in its initial comments that one state department demanded $24,000 per year for one new ExteNet pole but that same department charges the electric utility nothing for its poles.[124] Similarly, ExteNet found that the local governments in approximately 25% of the communities it surveyed required ExteNet to pay fees that were not required of other telecommunications providers who deploy equipment in the public rights-of-way.[125]

Reversing course to require that competitive LECs grant ILECs access to their poles would not only be unlawful but also would be arbitrary and capricious because it would impose inequitable burdens on only certain competitors based on their classification as a LEC. The *BDS Order* relied on competition from both competitive LECs and cable providers to find the likelihood of competition sufficient to reduce retail rate regulation of ILEC broadband services.[126] Importantly, the Commission found that "recent buildout by cable companies dwarfs that of traditional competitive LECs."[127] But the *BDS Order* also determined that cable operator BDS is private carriage.[128] Therefore when cable companies deploy BDS they are not LECs providing "telecommunications service" subject to the obligations of Section 251(b).[129]

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[123] Comments of CenturyLink, WC Docket No. 17-84, at 24 (filed June 15, 2017) ("ILECs have no special advantages in deploying last-mile infrastructure that would justify special regulatory burdens. In today's market, all providers are equally capable of constructing conduit and many competitors can – and do – engage in such construction.").

[124] ExteNet Comments at 22.

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

[126] *BDS Order*, 32 FCC Rcd at 3512-13, 3521, ¶¶ 117, 119, 134.

[127] *Id*. at 3521 ¶ 134.

[128] *Id.*at 3569 ¶ 272.

[129] *See BDS Order*, 32 FCC Rcd at 3568 ¶¶ 269-270. See also Section 153(51)'s definition of a "telecommunications carrier" ("a telecommunications carrier shall be treated as a common

The burden of so-called "reciprocal" access thus would fall not on the cable operators with ubiquitous networks within their service territory but on LECs like ExteNet. Unlike cable operators who have local franchises to deploy their networks pursuant to Title VI of the Act,[130] and who have compulsory access to poles under Section 224,[131] competitive providers like ExteNet rely on their status as telecommunications carriers to obtain access to poles. Competitive broadband providers without cable franchises cannot obtain access to rights-of-way necessary to deploy poles and conduit without becoming local exchange carriers and would be the only competitors classified as LECs that are required to offer ILECs access to their poles. This would be arbitrary as the Commission has acknowledged the need for compulsory access is tied to the potential of such infrastructure to become a bottleneck, and that competitive LECs lack the ubiquitous distribution networks of either ILECs or cable operators.

Regulating access to and rates for competitive LEC poles would depart from decades of Commission precedent encouraging competitive entry through light touch regulation. In the *BDS Order*, the Commission sought to "avoid imposing undue regulatory burdens on this highly competitive segment of the market"[132] and recognized that additional pricing regulation would add "an additional layer of regulatory complexity that would undermine predictability and ultimately hinder investment, including in entry, and growth."[133] Any Commission reversal that leaves uncertain whether ILECs could file pole rate complaints against competitive LECs would increase the competitive LECs' costs and could discourage them from investing in new poles.

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carrier under this Act only to the extent that it is engaged in providing telecommunications service."). 47 U.S.C. § 153(51).

[130] 47 U.S.C. § 541(a)(2) and (b)(3).

[131] *Id.* § 224(f)(1).

[132] *BDS Order*, 32 FCC Rcd at 3502 ¶ 93.

[133] *Id.*

AT&T, CenturyLink, and US Telecom do not offer evidence of any market changes, competitive LEC bottleneck control, or unreasonable rates as a reason for departing from decades of Commission precedent that refrained from regulating competitors' pole rates. The Commission should not reverse its interpretation of Sections 251(b) and 224 of the Act.

CONCLUSION

The record confirms that DNS providers are poised to play an essential role in the coming transition to 5G services, but regulatory obstacles are impeding critical DNS deployments. The situation is not, as some local jurisdictions contend, a solution in search of a problem. It is real, and compounded by the fact that consumer demand is increasing exponentially. Congress has given the Commission the authority to take remedial action, and it should now do so as recommended herein and in ExteNet's initial comments.

Respectfully submitted,

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July 17, 2017