

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

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

REPLY COMMENTS OF CTIA

Thomas C. Power
Senior Vice President, General Counsel

Scott K. Bergmann
Vice President, Regulatory Affairs

Brian M. Josef
Assistant Vice President, Regulatory Affairs

Kara D. Romagnino
Director, Regulatory Affairs

CTIA
1400 Sixteenth Street, NW, Suite 600
Washington, DC 20036
(202) 736-3200

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I. INTRODUCTION AND SUMMARY.

The comments in these proceedings¹ strongly support the Commission’s finding that promoting investment in broadband services directly serves the public interest. Parties document the many benefits to consumers, businesses, government, and the U.S economy that broadband delivers, and those benefits will grow even larger as new wireless services, including 5G, rapidly develop.² According to a study by Accenture, 5G is expected to generate three million new jobs and boost the U.S. GDP by half a trillion dollars, and a separate study by Deloitte confirmed that 5G will produce enormous economic and social benefits in areas as diverse as public safety,

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 Development by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017).

² Comments of CTIA, WT Docket No. 17-79 & WC Docket No. 17-84, at 4-6 (June 15, 2017) (“CTIA Comments”); Comments of Corning Incorporated, WC Docket No. 17-84, at 1-3 (June 15, 2017) (“Corning Comments”); Comments of Consumer Technology Association, WT Docket No. 17-79, at 2-4 (June 15, 2017); Comments of Samsung Electronics America, Inc., WT Docket No. 17-79, at 2-3 (June 15, 2017) (“Samsung Comments”).

energy, health, and transportation.³ A recent economic analysis commissioned by Corning finds that reducing regulatory barriers “could have a significant impact not only on new wireless and wireline broadband infrastructure investment, but could also positively impact job creation, economic output and consumer welfare.”⁴ This analysis also concluded that many of the benefits of reduced regulation will flow to rural and other less densely populated areas.

The record, however, also demonstrates multiple regulatory barriers that are seriously impeding broadband investment and deployment. Some jurisdictions are working cooperatively with the wireless industry to approve on a timely basis the network infrastructure that is critically needed, and CTIA commends those jurisdictions. But others are not. Commenters supply numerous examples of long government-imposed delays on siting applications, excessive up-front and recurring “rental” fees, refusals to issue permits, unreasonable requirements that micromanage network design, and discriminatory restrictions. These widespread problems are becoming more acute, and they are impeding network investment at the same time that much more investment is urgently needed to meet the public’s exploding demand for broadband.

The Commission should invoke its authority to interpret and apply Sections 253 and 332 of the Communications Act (“Act”) to eradicate those barriers. There are equally strong grounds for it to streamline its procedures that implement the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”). Taking these actions will

³ Accenture Strategy, *How 5G Can Help Municipalities Become Vibrant Smart Cities*, at 1 (2017), <https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf>; Deloitte, *Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation* (Jan. 2017), https://www.ctia.org/docs/default-source/default-document-library/deloitte_20170119.pdf.

⁴ Hal Singer et al., *Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment*, Economists Incorporated and CMA Strategy Consulting, at 2 (June 2017), *attached to* Corning Comments.

advance the national priority to build the infrastructure needed to support enhanced 4G and new 5G technologies, networks, and services. Setting consistent nationwide policies also will help reduce disputes as to the rights and responsibilities of providers and localities, thereby fostering more investment and deployment, in line with the objectives of the Act.

Commenters opposing Commission actions to accelerate broadband deployment make three principal arguments: (1) there are no problems the Commission need address; (2) the Commission lacks authority to address any such problems through rulemaking or general declaratory rulings, and instead can only act on a case-by-case basis to address particular laws; (3) localities have unfettered discretion to impose “market-based” prices, terms and conditions that control access to rights of way (“ROWS”). As CTIA and other commenters demonstrate, these arguments are factually and legally incorrect. They fundamentally misunderstand the bedrock federal policy, incorporated throughout the Communications Act, to promote the development of advanced communications services by removing regulatory barriers that impede those services.

The record supports the following Commission actions that will comprehensively and effectively promote broadband investment:

- **Reduce delays in the local review process.** The Commission should: (1) shorten the shot clocks to 60 days for collocations and 90 days for new facilities; (2) expand the deemed granted remedy to include all wireless facilities applications; (3) clarify that the shot clocks apply to facilities in ROWs and municipal-owned poles in ROWs; (4) clarify that the shot clocks apply to the entire local approval process; and (5) provide for batch processing of applications under the same shot clocks.
- **Interpret Sections 253 and 332 to achieve their objectives.** The Commission should rule that (1) Section 253 prohibits laws or other state and local actions that impose substantial barriers to service; and (2) Section 332 does not permit localities to condition approval of a facility on a showing that the facility is needed to close a gap in coverage. It should also establish an expedited process for ruling on complaints that specific laws or practices violate these provisions.

- **Apply guideposts to practices that are unlawful under Sections 253 and 332.** The Commission should deem unlawful: (1) express and *de facto* moratoria; (2) undergrounding requirements; (3) denials of access to new poles and municipal-owned facilities in ROWs; (4) unbounded subjective aesthetic conditions; (5) requirements to prove a need for coverage or a specific type of facility or technology; (6) restrictions on facilities upgrades; (7) certain procurement requirements; (8) zoning or other discriminatory requirements; and (9) requirements unrelated to ROW management.
- **Require government siting fees to be cost based.** The Commission should declare that Sections 253 and 332 prohibit up-front or recurring charges that exceed the actual costs to issue permits and manage ROW use, and higher charges for wireless providers than for other providers. It should also require that all charges be publicly disclosed.
- **Streamline NEPA and NHPA processes.** The Commission should broaden the exclusions for wireless facilities and collocations by: (1) excluding distributed antenna systems (“DAS”) and small cells from NEPA review; (2) modifying the rule that requires Environmental Assessments (“EAs”) for all sites in floodplains; and (3) excluding from NHPA Section 106 review (including Tribal consultation) five types of wireless facilities that pose no risk of affecting sites of historic (including Tribal) interest.

II. THE COMMISSION SHOULD SHORTEN THE SHOT CLOCKS AND MAKE THEM MORE EFFECTIVE IN STREAMLINING LOCAL SITING REVIEWS.

A. The Commission Should Reduce the Shot Clocks for all Facilities.

The record supports reducing the current shot clocks. Many commenters show why the existing shot clocks, which are now nearly eight years old, overstate what is a “reasonable time” under Section 332(c)(7)(B) for localities to act on siting applications, and propose that these times be substantially reduced from the current time periods of 150 days for new facilities and 90 days for collocations.⁵ CTIA proposed that the time periods be reduced to 60 days for all

⁵ E.g., Comments of Competitive Carriers Association, WT Docket No. 17-79 et al., at 13-14 (June 15, 2017) (“CCA Comments”) (30-day shot clock for collocations, 60-75 days for new sites); Comments of Mobilitie, LLC, WT Docket No. 17-79 & WC Docket No. 17-84, at 6 (June 15, 2017) (“Mobilitie Comments”) (single 60-day shot clock for new and collocated small cell facilities); Samsung Comments at 4-5 (60-day shot clock for all collocations); Comments of Sprint Corporation, WT Docket No. 17-79 & WC Docket No. 17-84 at 46 (June 15, 2017) (“Sprint Comments”) (same); Comments of T-Mobile USA, Inc., WT Docket No. 17-79 & WC Docket No. 17-84, at 18-21 (June 15, 2017) (“T-Mobile Comments”)

collocations and to 90 days for all new sites.⁶ The 60-day period will have the added benefit of harmonizing the review period for collocations that qualify as non-substantial modifications under the Commission’s rules implementing Section 6409(a) of the Act with the review period for all other collocations.

Parties that argue the existing shot clock periods should be retained fail to explain why those periods remain appropriate as deployment shifts toward much smaller equipment installed on much shorter – often existing – structures. In addition, localities today have extensive experience working with the wireless industry, and many have developed efficiencies in the siting review process that should allow faster processing. The Commission can and should refine its determination of what is a “reasonable time” to reflect those developments.

Some localities deny there is a need to shorten the shot clocks because they have processed applications without long delays,⁷ but they miss the point that the critical need now is for vast numbers of additional facilities, including densely spaced small cells. CTIA commends localities that work cooperatively with industry to get needed infrastructure built, but the record in WT Docket No. 16-421 and in these proceedings convincingly documents widespread delays and the need for action that will apply nationwide. Moreover, an increasing number of states have wireless siting review deadlines that are shorter than the Commission’s existing shot clocks

(60-day shot clock for collocations, 90-day shot clock for new sites); Comments of Verizon, WT Docket No. 17-79 & WC Docket No. 17-84, at 41-44 (June 15, 2017) (“Verizon Comments”) (60-day shot clock for collocations on all existing structures below Commission-adopted height limits); Comments of the Wireless Internet Service Providers Association, WT Docket No. 17-79, at 4-5 (June 15, 2017) (“WISPA Comments”) (60 day shot clock for all collocations).

⁶ CTIA Comments at 11-12.

⁷ Comments of the League of Minnesota Cities, WT Docket Nos. 17-79 & 15-180, at 4-5 (June 13, 2017) (“League of Minnesota Cities Comments”); Comments of the City and County of San Francisco, WT Docket No. 17-79, at 5 (June 15, 2017) (“San Francisco Comments”); Comments of the City of Springfield, Oregon, WT Docket No. 17-79, at 1-2 (June 14, 2017).

either for small cells or for all wireless facilities.⁸ These facts supply further grounds to find that shorter periods are reasonable and feasible.

Shortening the shot clocks will not, as one locality contends, unlawfully discriminate against non-wireless applicants.⁹ This argument was raised by localities but rejected by the Commission when the Commission adopted the Section 332 shot clocks in 2009¹⁰ and continues to lack merit. Section 332(c)(7)(B)(i) provides that state or local “regulation” of wireless facilities “shall not unreasonably discriminate among providers of functionally equivalent services.” However, in the context of wireless shot clocks, there is no state or local “regulation” that grants preferential treatment to wireless providers over non-wireless providers. Localities will not be “unreasonably discriminat[ing]” among providers; instead they will simply be complying with Commission action implementing Section 332(c)(7)(B).

B. The Deemed Granted Remedy Should Apply to All Wireless Siting Reviews.

Commenters show that the current Section 332 shot clock process often fails to achieve its objective to expedite siting because the process compels a provider to sue a city that does not act within the time periods. Litigation often takes years and results in the applicant being required to go back to the locality for action. As ExteNet notes, “[o]ver a two-year period (2015-2016), ExteNet would have had to file a federal lawsuit at least 47 times to obtain relief from shot clock violations. [These] lawsuits would have taken 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

⁸ CTIA Comments at 12 (citing statutes in Michigan and Florida (90-day deadline to act on applications for new wireless facilities); Minnesota (60-day deadline for applications for all facilities); Florida (45-day deadline for completed collocation applications); and New Hampshire and Wisconsin (45-day deadline for all applications)).

⁹ League of Minnesota Cities Comments at 14.

¹⁰ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14010 ¶ 42 (2009).

to remand the matter back to the local government with only an order to finally issue a decision.”¹¹ The costs and delays of this litigation undercut Section 332’s purpose and can cause wireless providers to abandon deployment.¹² Interpreting Section 332 to include a deemed granted remedy will rectify this problem.

Data on siting delays show that the shot clocks are regularly exceeded:

- T-Mobile reported that nearly one third of its applications were not acted on within the shot clock periods.¹³
- As Verizon notes, “Wireless carriers continue to experience delays in deploying small cells primarily because local zoning processes developed for larger, ‘macro’ towers have not been updated to account for the smaller profile and limited effects of small cells.”¹⁴
- The Wireless Infrastructure Association (“WIA”) reported that 70 percent of one member’s collocation applications and 47 percent of its new site applications were not acted on within the shot clock periods, and another member waited longer than those periods for more than a quarter of its applications.¹⁵
- Based on a survey of 100 communities where it sought to deploy facilities, ExteNet found that “*nearly half of all surveyed communities failed to act within the longest possible ‘reasonable’ period of time allowed by the Section 332(c)(7) shot clock.*”¹⁶

CTIA and industry commenters support each of the legal bases the Commission identifies for authority to adopt a deemed granted remedy, and explain that the Commission may adopt an irrebuttable presumption, adopt a deemed granted rule, or find that localities that fail to timely

¹¹ Comments of ExteNet Systems, Inc., WT Docket No. 17-79 & WC Docket No. 17-84, at 11 (June 15, 2017) (ExteNet Comments”) (citation omitted).

¹² Comments of AT&T, WT Docket No. 17-79, at 25 (June 15, 2017) (“AT&T Comments”); Sprint Comments at 46-47; Verizon Comments at 35-36.

¹³ T-Mobile Comments at 8.

¹⁴ Verizon Comments at 35.

¹⁵ Comments of the Wireless Infrastructure Association, WT Docket No. 17-79 & WC Docket No. 17-84, at 7-9 (June 15, 2017) (“WIA Comments”).

¹⁶ ExteNet Comments at 5-6 (emphasis in original).

act on an application waive their right to do so.¹⁷ Commenters also demonstrate that, because municipal poles and ROWs are public property held in trust and intended to serve as the locations for public services, municipal oversight serves a regulatory (not proprietary) function. The Commission should therefore rule that Section 332(c)(7), the shot clocks that implement that provision, and the deemed granted remedy fully apply to facilities that are attached to municipal poles or installed in ROWs.

Localities' arguments against a deemed granted remedy are invalid. Their claim that the Commission lacks authority to adopt a deemed granted remedy ignores court rulings that the Commission has authority to implement Section 332(c)(7)(B) in a way that may override local or state law.¹⁸ Others argue that the judicial relief provision of Section 332(c)(7)(B) requires applicants to go to court when a locality fails to act, precluding the Commission from adopting a deemed granted rule.¹⁹ To the contrary, while Section 332 provides for a court remedy, such remedy is neither exclusive nor mandatory. Further, a deemed granted remedy would not render the judicial relief provision superfluous, as some localities claim. The Commission would not be making a decision to grant a siting application. Rather, the expiration of the shot clock would result in the siting permit being deemed granted. The judicial remedy in Section 332 will allow a locality to challenge a deemed grant when it believes the applicant was not eligible for that relief.

¹⁷ AT&T Comments at 26-27; CCA Comments at 6; CTIA Comments at 10-11; ExteNet Comments at 12-14; Samsung Comments at 6-7; Sprint Comments at 46-47; Comments of the Telecommunications Industry Association, WT Docket No. 17-79, at 2-4 (June 15, 2017); T-Mobile Comments at 13-18; Verizon Comments at 37-40; Comments of the Computer & Communications Industry Association, WT Docket No. 17-79 & WC Docket No. 17-84, at 8-9 (June 15, 2017) ("CCIA Comments").

¹⁸ *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

¹⁹ Comments of the National League of Cities, WT Docket No. 17-79 & WC Docket No. 17-84, at 3-4 (filed June 15, 2017) ("NLC Comments"); Comments of Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at 41-43 (June 15, 2017) ("Smart Communities Comments").

One party argues that the deemed granted remedy would violate the Tenth Amendment.²⁰ But the Commission and the courts both rejected that argument when it was raised against the Commission's adoption of the deemed granted remedy in 2014.²¹ Finally, some localities threaten that a deemed granted remedy would cause them to deny siting permits rather than let the shot clock expire. To the extent that localities consider taking that obstructionist approach, the Commission should remind them that Section 332(c)(7)(B)(iii) requires that denials be based on "substantial evidence" and a written record. Localities would thus have to prove that their denial complied with both of these requirements.

C. The Shot Clocks Should Apply to the Full Siting Process.

Local requirements that providers negotiate a franchise or city-wide license agreement as a prerequisite to filing individual site applications cause exceedingly long delays. For example:

- It took more than six months for two providers to negotiate a franchise or license agreement in nearly 350 jurisdictions, and it took more than a year to negotiate an agreement in 75 of those jurisdictions.²²
- "Some jurisdictions, such as Greenwood Village, Colorado, require lengthy and burdensome 'pre-submission' procedures before they will even accept an application triggering the 'shot clock' timeframes."²³
- "A large Southwestern city requires applicants to obtain separate and sequential approvals from three different government bodies before it will consider issuing a temporary license agreement to access city rights-of-way."²⁴

²⁰ Comments of the Virginia Joint Commenters, WT Docket No. 17-79, at 2-3 (June 15, 2017) ("City of Alexandria Comments").

²¹ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12961-62 ¶ 228 (2014), *aff'd*, *Montgomery County v. FCC*, 811 F.3d 121, 128-29 (4th Cir. 2015) ("[W]e readily conclude that the FCC's 'deemed granted' procedure comports with the Tenth Amendment.").

²² Sprint Comments at 44-45.

²³ Comments of Crown Castle International Corporation, WT Docket No. 17-79, at 21 (June 15, 2017) ("Crown Castle Comments").

²⁴ Verizon Comments at 6.

- “Local governments currently have little incentive to complete negotiations within a reasonable period of time, as there is no penalty for stalling negotiations. 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 the southwest is now three years old and counting. Elsewhere, negotiation periods of a year or more are not uncommon.”²⁵

To address these drawn-out processes that undermine the shot clocks, the Commission should rule that the new shot clock periods apply to all local authorizations a locality may require, and are triggered when a provider seeks the first of those authorizations, whether in the form of a franchise, agreement, or permit.²⁶ This ruling properly construes Section 332(c)(7)(B)(ii), which requires that a locality must “act on any request for authorization to place, construct or modify personal wireless facilities within a reasonable period of time after the request is duly filed” When a locality compels a provider to request a franchise or other agreement, it is a “request for authorization.” To read Section 332 otherwise would enable localities to subvert the “reasonable period of time” mandate by imposing a pre-application agreement requirement that is not time-limited.

D. The Commission Should Allow Batch Processing of Applications.

The record supports CTIA’s proposal to allow providers to file applications for similar facilities in groups, under the same shot clock periods that exist for individual site applications.²⁷ Allowing batch processing for sites that are similar in size and nature and within a specified proximity can reduce burdens on both providers and localities.²⁸ Commenters and CTIA also agree that the Commission should rule that batch processing should not lengthen the shot clock

²⁵ ExteNet Comments at 15.

²⁶ CTIA Comments at 15; Mobilitie Comments at 6-7; WIA Comments at 24; T-Mobile Comments at 21-22; Verizon Comments at 42.

²⁷ CTIA Comments at 15-16.

²⁸ AT&T Comments at 21-22; CCIA Comments at 11; T-Mobile Comments at 21-22.

periods, and should decline to adopt multiple shot clocks for facilities of different heights or other narrowly defined types of facilities. Commenters correctly note that creating disparate shot clocks for disparate facilities will make the siting process more complex and would likely slow rather than speed deployment.²⁹

III. THE COMMISSION SHOULD INTERPRET AND APPLY SECTIONS 253 AND 332 TO REMOVE BARRIERS TO BROADBAND DEPLOYMENT.

A. The Commission Should Issue a Declaratory Ruling to Achieve the Objectives of Sections 253 and 332 to Promote Deployment and Address Conflicting Court Decisions.

There is consensus among providers that the Commission should issue a declaratory ruling interpreting Sections 253 and 332 to provide guideposts for the local siting review process. The record demonstrates that a ruling will promote the goals of these provisions to remove barriers to the rapid deployment of communications services, set consistent nationwide policy, and eliminate uncertainty and disputes that are frustrating investment. Parties demonstrate the Commission has clear authority to issue a declaratory ruling that interprets the Act to achieve these objectives.³⁰

Section 253: The Commission should resolve conflicting caselaw applying Section 253, reaffirm *California Payphone*,³¹ and declare that Section 253(a) prohibits a state or local law or practice that “materially inhibits or limits the ability of any competitor or potential competitor to

²⁹ Smart Communities Comments at 43; T-Mobile Comments at 21-22.

³⁰ Verizon Comments at 9-11; T-Mobile Comments at 23-24; WIA Comments at 29-30.

³¹ *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14191 (1997) (“*California Payphone*”).

compete in a fair and balanced legal and regulatory environment.”³² It should further declare that a law or practice “materially inhibits or limits” a carrier’s ability to compete if it imposes a “substantial barrier” to deployment.³³

The Commission correctly interpreted Section 253(a) in *California Payphone* by recognizing that laws or practices can effectively deter service even if they do not completely bar it. In an order subsequent to *California Payphone*, the Commission reiterated its interpretation, finding that “section 253(a) bars state or local requirements that restrict the means or facilities through which a party is able to provide service.”³⁴ Several courts followed the Commission’s approach, holding that a restriction need not be complete or insurmountable to violate Section 253, and agreeing that restrictions are unlawful if they inhibit or limit a provider from competing “in a fair and balanced legal and regulatory environment.”³⁵ But two other courts, while referencing and intending to follow *California Payphone*, in reality imposed a much stricter standard that effectively required carriers to demonstrate what services the challenged law had actually prohibited them from offering.³⁶ The Commission criticized that narrow approach in a joint brief with the Solicitor General in response to petitions for certiorari of those decisions:

Portions of the Ninth Circuit’s decision . . . could be read to suggest that a Section 253 plaintiff must show effective preclusion – rather than simply material interference – in order to prevail. . . .

³² AT&T Comments at 9; CTIA Comments at 19-20; ExteNet Comments at 23-24; T-Mobile Comments at 35-36; WIA Comments at 33-38.

³³ CTIA Comments at 19-20; T-Mobile Comments at 35-36; Verizon Comments at 11-12.

³⁴ *Petition of the State of Minnesota for Declaratory Ruling*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21708-09 ¶ 21 (1999).

³⁵ *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004).

³⁶ See, e.g., *Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008).

Limiting the preemptive reach of Section 253(a) to legal requirements that completely preclude entry would frustrate the policy of open competition Section 253 was intended to promote.³⁷

The Commission should address these conflicting decisions and reassert its interpretation of Section 253(a). It should confirm that laws or practices that materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment, by imposing substantial barriers or otherwise, are unlawful.

Section 332: Wireless providers must build an enormous number of new facilities to meet the public's exploding demand for faster and more robust broadband capabilities. No facilities are built that are not needed to meet that demand. But some localities have compelled providers to demonstrate the need for service from each proposed site, which has typically taken the form of a required showing that the site is needed to fill a geographic hole in coverage. Given the evolution of wireless services, conditioning siting approval on proof of a need for geographic coverage is anachronistic, effectively prohibits needed upgrades to wireless networks, and improperly injects unqualified zoning authorities into wireless network design determinations.³⁸ If a locality can bar a site merely because the applicant cannot prove the site is needed to close a coverage gap, the locality would have free license to deny a significant share of applications. More fundamentally, localities that condition siting approvals on a provider's ability to prove a particular site is needed unlawfully impinge on the Commission's plenary

³⁷ Brief of the United States as Amicus Curiae, *Level 3 Communications, L.L.C. v. City of St. Louis*, S. Ct. Nos. 08-626 & 08-759, at 14 (May 28, 2009). The Commission and Solicitor General recommended against granting certiorari, and it was denied. Their brief noted that the two decisions had approvingly cited *California Payphone*, and that the Commission could reaffirm its interpretation of Section 253(a) by declaratory ruling if necessary. Given the mounting barriers that wireless providers face today, now is clearly the time for the Commission to issue that ruling.

³⁸ AT&T Comments at 10; CTIA Comments at 20-21; ExteNet Comments at 28-30; Sprint Comments at 39-40; T-Mobile Comments at 41-45; WIA Comments at 38-40.

authority to regulate radio service, which does not allow localities to determine whether there is a need for service.

Courts also have issued divergent rulings on applying Section 332(c)(7)(B) to challenges of siting denials based on a finding that the applicant did not demonstrate a coverage gap.³⁹ These cases have generated confusion and uncertainty as to how that demonstration is to be met and where the burden of proof rests. The underlying problem, however, is that requiring *any* showing of coverage gap or business need not only effectively prohibits service, but interferes with the Commission's jurisdiction to regulate the provision of radio services. .

The Commission should adopt a forward-looking ruling affirming that Section 332 does not allow localities to require a wireless provider to show a geographic coverage gap or a business need for a particular site or technology. This ruling will appropriately interpret Section 332 to prohibit regulations that have the effect of impeding providers from upgrading their networks to provide 4G and 5G products and services. In contrast, narrowly interpreting these provisions to apply only when a wireless provider is barred from providing any service *at all* would permit localities to stop carriers from upgrading or optimizing their networks to add technologies and capabilities that benefit the public; they could be prevented from upgrading from 3G to 4G, or from 4G to 5G. That result would be antithetical to the underlying purpose of Section 332 to promote deployment of wireless services.

³⁹ See, e.g., *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005); *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999).

B. The Commission Also Should Rule that Certain Types of Barriers Effectively Prohibit Service.

The Commission asked for input on what types of laws or practices inhibit deployment, and the comments identify numerous such barriers. The Commission should rule that the following laws, regulations, and practices violate Sections 253 and 332:

Moratoria. The record contains many examples of express moratoria that bar deployment, as well as *de facto* moratoria, where localities do not accept siting applications or refuse to act on them.⁴⁰ One party incorrectly argues that there is no need for the Commission to act because “moratoria are not in widespread use.”⁴¹ The record is strongly to the contrary and documents numerous moratoria that expressly or effectively block new wireless infrastructure:

- T-Mobile reported that 15 localities where it seeks to install small cells have no clear application process, and at least five others refuse to process applications.⁴²
- Amherst, NY and Tonawonda, NY recently adopted moratoria on small cell applications.⁴³
- Myrtle Beach, SC and DeKalb County, GA have refused to process requests to deploy small cell facilities.⁴⁴
- Bryan, TX has a moratorium on all wireless facility permits, “putting at risk AT&T’s small cell deployment in the city.”⁴⁵

The Commission should rule that such actions are prohibited by Sections 253 and 332.

⁴⁰ AT&T Comments at 14; CCIA Comments at 14-15; CTIA Comments at 22-23; Samsung Comments at 7-8; Sprint Comments at 38-41; Verizon Comments at 33; WIA Comments at 55-56.

⁴¹ Smart Communities Comments at 33.

⁴² T-Mobile Com at 36-38.

⁴³ Verizon Comments at 6.

⁴⁴ WIA Comments at 11.

⁴⁵ AT&T Comments at 14.

Undergrounding requirements. Commenters supplied examples of requirements that facilities must be located underground.⁴⁶ Like moratoria, these requirements effectively prohibit service. Bryan, TX, for example, enacted a moratorium barring action on above-ground wireless facilities.⁴⁷ As T-Mobile noted, “[t]wo Michigan localities also have underground ordinances that effectively prohibit small cell deployments, and several municipalities in Texas and Kansas similarly prohibit above ground wireless facilities.”⁴⁸ Jurisdictions in California and Michigan also require all facilities to be located underground.⁴⁹ The Commission should declare that undergrounding mandates violate Sections 253 and 332.

Prohibiting new poles or access to municipal poles in ROWs. The record shows that some localities may allow antennas to be attached to *existing* poles that are located along ROWs, but bar any *new* poles or bar access to municipal poles.⁵⁰ For example, Cambridge, MA “has refused to allow attachments to City-owned light poles or to approve the installation of new poles, thereby effectively prohibiting installation in certain parts of the city.”⁵¹ The Massachusetts Port Authority similarly has refused to discuss either collocations or new pole installations in ROWs.⁵² These practices also effectively prohibit service and unlawfully intrude on a provider’s right to design its wireless network.⁵³

⁴⁶ AT&T Comments at 14-15; CTIA Comments at 24-25; Mobilitie Comments at 12-13; T-Mobile Comments at 38; Verizon Comments at 33; WIA Comments at 56.

⁴⁷ AT&T Comments at 15.

⁴⁸ T-Mobile Comments at 38.

⁴⁹ Mobilitie Comments, Att. A at 12-13.

⁵⁰ CTIA Comments at 25-26; Crown Castle Comments at 17; ExteNet Comments at 18; T-Mobile Comments at 9.

⁵¹ Crown Castle Comments at 17.

⁵² *Id.*

⁵³ AT&T Comments at 13-14; T-Mobile Comments at 8.

Unbounded subjective aesthetic conditions. Some localities impose vague and subjective aesthetic conditions by, for example, reserving unfettered discretion to deny a facility on appearance grounds.⁵⁴ For example:

- San Francisco imposes a discretionary aesthetic review for wireless ROW facilities that applies appearance-based compatibility standards determined solely by the location of the facility.⁵⁵
- A Pennsylvania locality requires a “stealth design” to make a wireless facility “more visually appealing and virtually indistinguishable from the structure that it is mounted to.”⁵⁶

The Commission should declare that such requirements effectively prohibit service. Two localities make the straw man argument that the Commission cannot impose specific or “one size fits all” rules governing aesthetics,⁵⁷ but no party asks it to do so; instead the Commission should simply require that if a locality wants to have aesthetics considerations included as a factor in siting reviews, they must be objective and give applicants clear notice of what is prohibited.

Requirements to prove a coverage gap or other business need. The record establishes that requiring applicants to demonstrate a coverage gap or other business need effectively prohibits service because providers need to build or modify facilities for reasons other than filling a geographic coverage gap; for example, to supply greater network capacity or upgrade service.⁵⁸ As one provider reported, “[n]early 40 California localities require propagation maps

⁵⁴ AT&T Comments at 16-17; CTIA Comments at 28-29; ExteNet Comments at 21; T-Mobile Comments at 39-40; Verizon Comments at 19-20, 33.

⁵⁵ Crown Castle Comments at 14; T-Mobile Comments at 40.

⁵⁶ AT&T Comments at 17.

⁵⁷ Comments of the City of New York, WT Docket No. 17-79, at 14 (filed June 15, 2017) (“New York City Comments”); San Francisco Comments at 28.

⁵⁸ CTIA Comments at 26-27.

that demonstrate the need for additional wireless infrastructure to fill a coverage gap.”⁵⁹ The Commission should rule that such requirements are prohibited under Sections 253 and 332.

Upgrading and site distance separation requirements. Some localities require that providers meet new, more stringent structural requirements to collocate equipment. Specifically, providers are being required to meet “Class III” structural requirements contained in the ANSI/TIA industry standard for construction, even though wireless communications facilities are appropriately categorized as “Class II” structures, and even where the state has incorporated the ANSI/TIA industry standard into its building codes. These requirements add substantial yet unjustified deployment costs.⁶⁰ Other requirements deter upgrading by requiring that sites be located at least a minimum distance apart, even from competitors’ sites.⁶¹ For example:

- “New York City prohibits mid-block placement of small cell facilities, whereas several municipalities in California do the exact opposite by prohibiting small cell facility placements in the intersections.”⁶²
- Buffalo Grove, IL requires small cells to be no closer than 1,000 feet to any other small cell (even if owned by another provider).⁶³
- “Two Nevada counties have imposed minimum spacing requirements between small cell facilities that impair network coverage.”⁶⁴

Localities’ wireless site design and distance separation requirements unlawfully intrude into providers’ right to design and upgrade their networks to best serve the rapidly expanding

⁵⁹ Mobilitie Comments, Att. 2 at 13.

⁶⁰ T-Mobile Comments at 40-41. As T-Mobile notes, “Class II standards are those commonly used for commercial wireless and broadcast services, whereas Class III standards apply to structures used primarily for essential communications like civil or national defense and military facilities. *See* William Garrett & Bryan Lanier, Wireless Infrastructure Association, *Classification of Tower Structures per ANSI/TIA-222-G, IBC and ASCE-7*, at 1-2 (July 2016).” *Id.*

⁶¹ AT&T Comments at 15-16; Sprint Comments at 43-44; Verizon Comments at 33.

⁶² AT&T Comments at 15-16.

⁶³ Verizon Comments at 8.

⁶⁴ Mobilitie Comments, Att. 2 at 13.

needs of their customers, and effectively prohibit service by precluding wireless providers from making needed network upgrades. .

Procurement requirements. Laws or practices that compel providers to purchase municipal facilities or provide free or discounted services to local governments are not reasonable ROW management, but instead unlawfully leverage localities' monopoly control of ROW access. For example:

- An Illinois city requires a provider to attach city-owned equipment at the provider's own cost as a condition to being allowed to install new poles.⁶⁵
- Washington, DC's supplemental agreement for installing wireless facilities in ROWs gives the city the ability to require an applicant to install, for free, Wi-Fi access points on its poles and run fiber to each access point.⁶⁶
- A Massachusetts city requires wireless operators to provide the city with free dark fiber as a condition of pole access, while another city in that state requires the transfer of dark fiber to it when the operator's access to the ROW ends.⁶⁷

These and other mandates that are unrelated to localities' ROW management should be barred under Sections 253 and 332.

Zoning or other discriminatory requirements. Some localities force wireless providers to endure burdensome zoning approvals in addition to the wireless permit process, but do not require other ROW occupants to obtain zoning approvals, or impose conditions on wireless facilities in ROWs that they do not impose on other ROW occupants, violating the nondiscrimination directives in Sections 253 and 332.

- Abingdon Township, PA subjects providers to discretionary zoning review even for non-substantial collocations subject to Section 6409(a).⁶⁸

⁶⁵ *Id.*

⁶⁶ Verizon Comments at 7.

⁶⁷ AT&T Comments at 19.

⁶⁸ Crown Castle Comments at 9-10.

- Mercer Island, WA requires small cell providers in residential areas to obtain consent from adjacent landowners “despite the absence of similar requirements for other utilities operating in the same ROW.”⁶⁹
- San Francisco “singles out wireless facilities in public ROWs for discretionary pre-deployment “aesthetic” review not imposed on similarly-sized landline or utility facilities.”⁷⁰
- “[I]n 2015 and 2016, 49% of the surveyed communities subjected ExteNet to processes and standards that differed from those required of wireline providers and utilities in public ROWs, even though ExteNet’s attachments are similarly-sized and impose no greater ROW management burden than their wireline or utility counterparts.”⁷¹

The Commission should find that laws or practices which discriminate among ROW users conflict with Sections 253 and 332.⁷² Wireless providers may not lawfully be subjected to more burdensome requirements than other users. This action will not prohibit localities from requiring zoning approvals, but will merely require them to apply those procedures even-handedly.

Requirements unrelated to ROW management. Commenters correctly argue that requiring providers to comply with disclosure and reporting requirements unrelated to ROW management, restricting ownership transfers, or reserving the right to unilaterally terminate the ROW agreement, are unreasonable because they are unrelated to a locality’s interest in ensuring the safe use of ROWs.⁷³ For example, Concord, CA and Lafayette, CA require management agreements “including landscaping requirements and other provisions unrelated to health and

⁶⁹ *Id.* at 19.

⁷⁰ T-Mobile Comments at 40.

⁷¹ ExteNet Comments at 17.

⁷² CTIA Comments at 27-28; Sprint Comments at 43.

⁷³ WIA Comments at 57-58.

safety.”⁷⁴ Such requirements that are outside the scope of ROW management should be prohibited under Sections 253 and 332.

C. The Commission Should Establish A Streamlined Complaint Process To Adjudicate Complaints That Specific Laws Or Practices Violate Section 253.

The Commission need not address all types of laws or practices that may violate Section 253 in this proceeding. But that section empowers the Commission and federal courts to adjudicate claims that particular state or local laws, regulations, or practices may have the effect of prohibiting service. AT&T proposes that the Commission establish a streamlined complaint process for these issues, including a shot clock setting a time period for it to act.⁷⁵ CTIA supports this proposal because it will provide carriers and localities alike with an expedited process to resolve disputes.

D. Localities That Oppose Removing Deployment Barriers Wrongly Interpret Sections 253 and 332.

Some localities incorrectly claim they have exclusive and unfettered “proprietary” rights to regulate wireless and other communications facilities, like private landowners, that can only be limited by state law. The Commission, they argue, cannot narrow those rights.⁷⁶ But, in fact, Sections 253 and 332 expressly limit local authority and bar laws and actions that prohibit or have the effect of prohibiting service, or are discriminatory. If these commenters were correct, localities could ignore those limits by asserting they are taking “proprietary” action, impairing the Commission’s ability to take actions to advance national broadband objectives. ROWs,

⁷⁴ Crown Castle Comments at 20.

⁷⁵ AT&T Comments at 28-29.

⁷⁶ New York City Comments at 2-3; 6-7; Joint Comments of League of Arizona Cities et al., WC Docket No. 17-84, at 2 (filed June 15, 2017) (“League of Arizona Cities Comments”).

however, are not private property; they are “held in trust for the use of the public.”⁷⁷ Here that interest is to enable communications services to benefit the public – just like other services that have always used ROWs.⁷⁸ In addition, localities have themselves adopted ROW regulations, underscoring that they act in their regulatory capacity (not like private landowners), and are subject to Sections 253’s and 332’s limits on regulatory action.⁷⁹

Other commenters wrongly contend that the Commission lacks authority to interpret Sections 253 and 332 through general declaratory rulings or rulemakings, but can *only* act case-by-case to adjudicate the legality of particular local laws.⁸⁰ The fact that these two provisions do not expressly grant rulemaking authority does not deprive the Commission of that authority, which flows from multiple provisions of the Act, including Sections 4, 201, and 301. The

⁷⁷ *AT&T v. Village of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993) (“Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public.”); *see also City and County of Denver v. Qwest Corp.*, 18 P.3d 748, 761 (Colo. 2001) (“It is well established that municipalities hold public rights-of-way in a governmental capacity.”).

⁷⁸ AT&T Comments at 11-12; CCIA Comments at 13; T-Mobile Comments at 48-51; Verizon Comments at 25-27; WIA Comments at 59-62. Indeed, “[b]ecause they manage public rights-of-way for the public good, and not solely their own interest, state and local governments do not possess a proprietary interest in rights of way. For this reason, many courts ‘have recognized that the ownership interest municipalities hold in their streets is ‘governmental’ and not ‘proprietary.’” Verizon Comments at 27 (quoting *Liberty Cablevision of P.R. Inc. v. Municipality of Caguas*, 17 F.3d 216, 221-22 (1st Cir. 2005)).

⁷⁹ *See, e.g., NextG Networks of New York, Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063 (S.D.N.Y. 2004) (city’s refusal to grant access to poles in ROWs and to require a franchise “are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy.”); *New Jersey Payphone Association v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001) (“[T]he control the municipality exerts over the easement is a function of its powers as trustee, conventionally expressed as the police power to manage the public right-of-way. Distinct from public parks or government buildings, the municipality does not possess ownership rights as a proprietor of the streets and sidewalks.”); *City of Albany v. State*, 21 A.D.2d 224, 225 (1964) (“We have no difficulty in finding that ... the land held for street purposes ... [was] held in a governmental rather than a proprietary capacity.” (citations omitted)).

⁸⁰ Comments of National Association of Regulatory Utility Commissioners, WC Docket No. 17-84, at 8-11 (filed June 15, 2017) (“NARUC Comments”); Smart Communities Comments at 61-62.

Commission is unquestionably empowered to interpret the Act through declaratory rulings or rulemakings, as well as by adjudicating the legality of specific local laws.⁸¹

Some localities assert that Section 253 does not apply to wireless facilities.⁸² They are incorrect. Section 253 applies to “any interstate or intrastate telecommunications service,” and Section 3 of the Act defines “telecommunications service” to include the offering of telecommunications “regardless of the facilities used.” These parties cite no Commission or court ruling that deprives wireless carriers of the protections of Section 253. Moreover, Section 332 operates in tandem with Section 253 to impose specific procedures for review of “personal wireless services” facilities. It does not carve out those facilities from Section 253.

Finally, some commenters incorrectly assert that because Sections 253 and 332 grant rights to providers of “telecommunications services” and “personal wireless services,” they may not apply to wireless broadband service if such service is returned to its longstanding regulatory classification as an information service and a private mobile service.⁸³ The Commission, however, previously addressed this issue: “We clarify that section 332(c)(7)(B) would continue to apply to wireless broadband Internet access service that is classified as an ‘information service’ where a wireless service provider uses the same infrastructure to provide its ‘personal wireless services’ and wireless broadband Internet access service.”⁸⁴ The same rationale would

⁸¹ See, e.g., *City of Arlington*, 668 F.3d at 241, 249 (affirming the Commission’s authority to adopt rules or issue a declaratory ruling to implement Section 332); *Central Texas Cooperative, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) (affirming the Commission’s authority to adopt declaratory rulings).

⁸² City of Alexandria Comments at 2; Smart Communities Comments at 69. Other localities disagree, observing that Section 253 does apply to wireless siting. See, e.g., League of Minnesota Cities Comments at 11.

⁸³ NARUC Comments at 8-11; Public Knowledge Comments at 14-16; Smart Communities Comments at 55-56.

⁸⁴ *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5923 ¶ 63 (2007).

apply to Section 253: That section would still apply for “mixed use” facilities, where a wireless service provider uses the same infrastructure to provide a telecommunications service and a broadband service.

E. Objections to Commission Action to Promote Access to Municipally-Owned Poles are Without Merit.

The American Public Power Association incorrectly argues that Section 253’s focus on ROWs and its concurrent adoption with amendments to Section 224 are evidence of Congress’s intent to exclude municipal pole attachments from the scope of the Commission’s authority in Section 253.⁸⁵ Commenters demonstrate, however, that the exclusion of municipally-owned poles from a definitional provision in Section 224(a) does not immunize municipal pole owners from regulation based upon other sources of Commission authority.⁸⁶ The definitional provisions in Section 224(a) are introduced and limited by the phrase “[a]s used in this section,” precluding any possibility that those definitions could have any broader effect on other parts of the Act. The prohibition in Section 253(a), moreover, is extremely broad and intentionally written to include every kind of state or municipal law or other requirement that might pose a barrier to entry. Repeal by implication is strongly disfavored in any statutory context,⁸⁷ and courts have interpreted Section 253 to cover a wide range of municipal actions, including: a town

⁸⁵ See, e.g., Comments of the American Public Power Association, WT Docket No. 17-79 & WC Docket No. 17-84, at 10 (June 15, 2017).

⁸⁶ See, e.g., CTIA Comments at 42; Verizon Comments at 34-35; AT&T Comments at 12; Comments of NCTA – The Internet & Television Association, WT Docket No. 17-79 & WC Docket No. 17-84, at 32-33 (June 15, 2017) (“NCTA Comments”); Comments of Comcast Corporation, WT Docket No. 17-79 & WC Docket No. 17-84, at 25 (June 15, 2017) (“Comcast Comments”); CCA Comments at 24; Comments of Frontier Communications Corporation, WC Docket No. 17-84, at 9-10 (June 15, 2017).

⁸⁷ See *Branch v. Smith*, 538 U.S. 254, 273 (2003) (noting that repeals by implication are strongly disfavored absent a clearly expressed congressional intent).

ordinance granting an exclusive franchise to one or two telephone providers;⁸⁸ a county ordinance that required companies to supply information not directly related to the county's management of its ROWs, vested the county with complete discretion to grant or deny franchise applications based on such factors as the applicant's managerial, technical, financial, and legal qualifications to construct and operate a telecommunications system, and charged a franchise fee unrelated to the cost of maintaining and improving ROWs;⁸⁹ and regulations that provided a town "unbounded discretion to pick and choose between providers."⁹⁰

Further, conspicuously absent from Section 253(a) is any cross-reference to Section 224(a) or vice versa. Nor is there anything in the "shall prescribe . . . regulations in accordance with this subsection" statutory command in Section 224(e) that would support the publicly-owned utilities' argument that other, discretionary authority is somehow limited by that specific mandate. The general definitions of wire and radio communication in the Act encompass not only the transmission itself, but "include[e] all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission."⁹¹ If there were any conflict between the definitional provisions in Section 224(a) and Sections 153(40) and (50), the latter would obviously bring municipally-owned poles within FCC authority outside of Section 224. Similarly, Section 253(a) contains no exclusionary language for pole attachment ordinances that

⁸⁸ See *New Jersey Payphone Association, Inc. v. Town of W. N.Y.*, 299 F.3d 235, 242 (3d Cir. 2002).

⁸⁹ See *Bell Atl. Maryland, Inc. v. Prince George's Cty., Md.*, 49 F. Supp. 2d 805, 816-17 (D. Md. 1999), *rev'd on other grounds*, *Bell Atl. Maryland, Inc. v. Prince George's Cty., Md.*, 212 F.3d 863 (4th Cir. 2000).

⁹⁰ See *TC Sys., Inc. v. Town of Colonie, N.Y.*, 263 F. Supp. 2d 471, 483 (N.D.N.Y. 2003).

⁹¹ See 47 U.S.C. § 153(40) (defining "[r]adio communication") and (59) (defining "[w]ire communications").

require revenue sharing or other tribute to be paid by carriers for use of municipal poles or other actions that impede network deployment.

The Commission has flexibility in how to ensure timely access to municipal poles at reasonable rates, terms, and conditions, and it can do so in a manner that addresses concerns raised by publicly owned utilities. As CTIA suggested in its initial comments, the Commission can adopt “safe harbors” that render municipal practices and pricing presumptively reasonable.⁹² The Commission should also clarify that attachers and potential attachers aggrieved by municipal laws, ordinances, or requirements that improperly limit access to municipally-owned poles can bring complaints before the Enforcement Bureau for violations of Sections 201(b), 202(a), and/or 253(a).

The Commission should clarify that shot clocks apply to municipally-owned poles in ROWs. The record provides clear evidence that access to municipal poles is essential to achieving the Commission’s objectives in these proceedings and ensuring that the wireless industry can meet the growing demands for 4G, and ultimately, 5G services. As explained in Section III.B above, the Commission should also adopt guideposts to clarify that certain practices are unlawful under Sections 253 and 332. The record in these proceedings confirms overwhelmingly that these provisions enable the Commission to address many of the problems carriers experience when they attempt to deploy in areas where municipalities own the poles.⁹³

⁹² CTIA Comments at 45.

⁹³ See, e.g., NCTA Comments at 33; Comcast Comments at 25; Verizon Comments at 34-35.

IV. SECTION 253(C) DOES NOT ALLOW LOCALITIES TO IMPOSE CHARGES THAT EXCEED THEIR COSTS TO ISSUE PERMITS AND MANAGE RIGHTS OF WAY OR THAT DISCRIMINATE AMONG PROVIDERS.

A. The Record Supports Interpreting Section 253(c) to Prohibit Excessive and Discriminatory Fees and to Require that Fees Be Publicly Disclosed.

Mobilitie's November 2016 Petition for Declaratory Ruling asked the Commission to interpret three separate phrases in Section 253(c) to prohibit the excessive fees that some localities were demanding from wireless providers. The record in WT Docket No. 16-421, which sought comments on the Petition and other barriers to small cell siting, demonstrated that excessive fees were being imposed nationwide, with many localities collecting up-front charges, annual rents, and other fees that far exceeded the costs they may incur, or the fees other ROW occupants paid.⁹⁴ The record in these new proceedings supplies numerous additional examples of excessive fees. For example:

- St. Paul, MN requested that AT&T pay a one-time administrative charge of \$5,000 and an annual fee of \$3,400 to attach to city structures, significantly more than the city charged other providers. "AT&T's refusal to agree to these exorbitant fees in Minnesota has delayed AT&T's small cell deployment."⁹⁵
- East Greenbush, NY and Santa Clara, UT require \$8,500 up-front escrow fees to cover consultants' charges, which are clearly not tied to the cities' costs to issue permits and manage the use of ROWs.⁹⁶
- Buffalo, NY and Rochester, NY, as well as many other jurisdictions, have proposed or require a five percent gross revenue fee, which again is unrelated to these cities' costs.⁹⁷

⁹⁴ AT&T Comments at 18-19.

⁹⁵ *Id.*

⁹⁶ Verizon Comments at 7.

⁹⁷ *Id.*

- Montgomery County, MD requires an initial application fee of \$1,000 for collocations or \$2,000 for a replacement pole, plus a subsequent per-pole fee of \$20,000 for a new or replacement pole.⁹⁸
- Three California cities charge fees of \$2,600, \$4,500 and \$8,000 per pole per year.⁹⁹
- “[I]n approximately 25% of the communities surveyed by ExteNet, the local government required ExteNet to pay fees that were not required of other telecommunications providers who deploy equipment on poles in the public rights-of-way.”¹⁰⁰

Given that localities continue to demand excessive fees that impede investment in wireless networks, the Commission should exercise its authority to interpret three phrases in Section 253(c) to promote the deployment of needed infrastructure.

First, it should rule that Section 253(c)’s language as to “fair and reasonable compensation” means payment that compensates a locality for its costs of reviewing siting applications and managing the deployment and operation of facilities in ROWs. The record supplies ample factual grounds for the Commission to address excessive fees, including types of charges that are on their face not tied to those costs, such as fees based on the providers’ revenues and outside consultant fees.¹⁰¹ The Commission should rule that charges that exceed a locality’s actual costs are not “fair and reasonable compensation.”

⁹⁸ Crown Castle Comments at 11-12.

⁹⁹ AT&T Comments at 19.

¹⁰⁰ ExteNet Comments at 21-22 (citation omitted).

¹⁰¹ AT&T Comments at 20-21; CTIA Comments at 30-32; CCA Comments at 17-18; CCIA Comments at 15-16; Mobilitie Comments at 4-5; T-Mobile Comments at 27-29; Verizon Comments at 13-14; WIA Comments at 40.

Second, it should rule that a locality cannot charge a wireless provider or new entrant more than it charged other providers, as doing so would violate Section 253(c)'s admonition that fees be "competitively neutral and non-discriminatory."¹⁰²

Third, it should declare that the phrase "publicly disclosed" in Section 253(c) means that localities must disclose the fees they charged other providers. This language would have no purpose if it did not enable ROW users to obtain information about those fees. In addition, transparency as to ROW fees is critical if the other phrases in Section 253(c) are to be effective.¹⁰³

B. Arguments That the Commission Cannot Interpret Section 253(c) to Address Excessive Local Government Fees Are Without Merit.

Several localities make arguments that boil down to the erroneous claim that they have a unilateral right to set whatever fees they want. Some contend

they can lawfully impose a "market" rent,¹⁰⁴ but they ignore the fact that there is no "market" for ROW access, because localities have monopoly control over that access.¹⁰⁵ Others wrongly assert that Commission action would force them to "subsidize" wireless providers,¹⁰⁶ or prevent them from recovering their actual costs such as moving poles or replacing equipment.¹⁰⁷

But no party asked the Commission to require localities to incur costs to review and approve wireless facilities that they cannot recoup, so that those costs must be subsidized by taxpayers or

¹⁰² AT&T Comments at 21; CTIA Comments at 32; CCA Comments at 21; Mobilitie Comments at 4-5; T-Mobile Comments at 31-33; WIA Comments at 40-41; WISPA Comments at 6-8.

¹⁰³ AT&T Comments at 24; CCA Comments at 21; Mobilitie Comments at 3-4.

¹⁰⁴ City of Alexandria Comments at 6-7; Smart Communities Comments at 26 ("[I]t is best . . . to allow market forces to dictate pricing of use of public property by telecommunications providers.").

¹⁰⁵ See, e.g., CTIA Comments, Att. 2 at 20 (citing comments in WT Docket No. 16-421 explaining that because localities hold exclusive control of the "supply" of ROWs, there is no "market").

¹⁰⁶ League of Arizona Cities Comments at 17; NARUC Comments at 12-15.

¹⁰⁷ League of Minnesota Cities Comments at 12.

by taking funds from other programs. The issue is precisely the opposite – it is localities that are forcing the wireless industry to subsidize unrelated local programs and expenses by compelling them to pay far more in ROW fees than the costs localities incur to manage ROW access.

Other localities take the extreme position that they may set whatever fees they want because, “like private landlords,” they have “proprietary” rights over ROWs.¹⁰⁸ As discussed above, providers effectively rebut this claim in the context of obstacles many cities have created in violation of Section 253(a). The claim is equally invalid as to Section 253(c). If a locality had unfettered discretion to set fees, Section 253(c) would be effectively nullified.

C. Interpreting Section 253(c) to Address Unreasonable Fees Is Not an Unlawful Taking.

Some localities argue that Commission regulation of municipal pole attachments would amount to an uncompensated taking.¹⁰⁹ These arguments assume that there is no way for the Commission to give effect to the language in Section 253 and remove barriers to wireless deployment posed by municipal pole regulations or requirements without conflicting with state constitutions or notions of just compensation and fair value. Indeed, on previous occasions, the Supreme Court has upheld the Commission’s pole attachment rate policies in the face of takings claims.¹¹⁰

These unwarranted concerns about potential takings issues do not justify narrowly construing the Commission’s authority over municipal-owned poles. In *United States v. Riverside Bayview Homes*, the Supreme Court held that fears that an Army Corps of Engineers’

¹⁰⁸ NLC Comments at 5 (“Local governments, like private landlords, are entitled to collect rent for the use of their property.”).

¹⁰⁹ See, e.g., Smart Communities Comments at 16.

¹¹⁰ See, e.g., *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987).

permit program might result in a taking did not justify adopting a more limited view of the Corps' authority than the terms of the regulation might otherwise support.¹¹¹ The Court emphatically rejected the "spurious constitutional overtones" the takings argument introduced into the case.¹¹² The Court has made clear that the Takings Clause applies to specific and final instances of governmental intrusion on property rights, not a general regulation that *might* result in a hypothetical future taking.

In addition, the Court's decisions have long made clear that to establish a "regulatory taking," the plaintiff must prove a near complete loss of economic value.¹¹³ Pole owners cannot make that showing here, where Commission regulations establish a reasonable system for compensation that has been upheld by the Supreme Court. The Fifth Amendment and Tenth Amendment concerns raised by some commenters are red herrings. Where Congress has clearly exercised its preemption authority over the instrumentalities of interstate commerce, such as necessary inputs of wireless communications, there is no Tenth Amendment concern. These ephemeral constitutional arguments should not deter the Commission from taking swift and definitive action in the face of this record's evidence of serious impediments to wireless deployment from certain state and local actions.

D. Localities Do Not Oppose the Other Actions the Commission Should Take on Fees.

Numerous parties demonstrate that the Commission should interpret Section 253(c) to exclude discriminatory fees and those that are not publicly disclosed from its safe harbor.

¹¹¹ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128–29 (1985).

¹¹² *Id.* at 129.

¹¹³ *See Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 645 (1993) ("[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking").

Localities fail to show why the Commission cannot interpret Section 253(c) in these ways. They do not defend discriminatory fees on new entrants or wireless carriers. And they do not oppose interpreting Section 253(c) to require localities to disclose the fees they have charged and the basis for those fees. Transparency enables providers to ensure the rates they are being charged are consistent with the statute.

V. THE COMMISSION SHOULD MODERNIZE ITS ENVIRONMENTAL AND HISTORIC PRESERVATION REVIEW PROCEDURES.

Commenters urge the Commission to revise its processes implementing NEPA and the NHPA. They demonstrate why these actions will achieve the goal of promoting more robust wireless service while fully protecting environmental and historic preservation interests. CTIA supports these proposals.

A. The Record Supports Commission Actions to Streamline Environmental Reviews.

Parties ask the Commission to establish shot clocks to process EAs and to act on permits for wireless facilities that remain subject to NEPA.¹¹⁴ Setting reasonable time periods will help speed actions while providing interested parties with sufficient time to raise any environmental concerns. Parties also advocate that the Commission exclude from environmental review small cell and other wireless facilities that pose no environmental risk, and to eliminate the obligation to file an EA for sites with support facilities located in a floodplain that will be built above the base flood elevation or that have already been reviewed by responsible agencies and determined

¹¹⁴ CCA Comments at 48-50; Samsung Comments at 8-9; T-Mobile Comments at 57-60; WIA Comments at 63-65.

to have no environmental effect.¹¹⁵ They correctly note that, in these situations, environmental reviews are unnecessary and unjustifiably delay new facilities.¹¹⁶

B. The Commission Should Streamline Historic Preservation Reviews by Adopting Additional Exclusions to the Section 106 Process.

CTIA filed joint comments with WIA that addressed issues the *Wireless NPRM/NOI* raised as to reforming the Tribal consultation process and the process for reviewing collocations on “twilight towers.” CTIA and WIA are today filing joint reply comments on those discrete issues. The *Wireless NPRM/NOI* also asked broader questions about streamlining its processes implementing the NHPA. CTIA addressed those questions in its own initial comments and addresses them as well in these reply comments.

Parties support the Commission’s proposals to broaden the categorical exclusions from the Section 106 process for: (1) replacement poles to include replacements for all poles; (2) facilities near historic districts to include facilities more than 50 feet away; and (3) facilities in ROWs to include those in transportation ROWs (in addition to those in utility and communications ROWs).¹¹⁷ The Commission has authority to adopt exclusions for “a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties [are] present.”¹¹⁸ These broader exclusions are warranted because these

¹¹⁵ AT&T Comments at 35; CTIA Comments at 35-36; ExteNet Comments at 47-48; T-Mobile Comments at 58-59; Verizon Comments at 63-64; WIA Comments at 62-63.

¹¹⁶ Two commenters raise the concern that migratory birds may be harmed if the Commission were to alter its tower lighting and marking rules. Comments of Cape Cod Bird Club, WT Docket No. 17-79, at 1-2 (June 6, 2017); Comments of the Defenders of Wildlife, WT Docket No. 17-79, at 2 (June 9, 2017). The Commission, however, is not proposing any changes to these rules, and commenters do not propose changes.

¹¹⁷ AT&T Comments at 30-32; CTIA Comments at 36-37; Sprint Comments at 32-33; T-Mobile Comments at 61-63; Samsung Comments at 9; Verizon Comments at 54-57; WIA Comments at 66-70.

¹¹⁸ 36 C.F.R. § 800.3(a)(1).

facilities have no effect on historic properties. For example, replacing a pole with another pole will not create increased visual impacts. Similarly, extension of the ROW exclusion to encompass transportation ROWs is warranted, because the ground already was disturbed when those ROWs were established and road pavement or railroad tracks were already laid. The installation of new wireless facilities in ROWs will thus not involve any new ground disturbance.

CTIA proposed additional exclusions from the Section 106 process (including Tribal consultation) for (1) indoor wireless facilities (to the extent they are not currently excluded); and (2) collocations on existing structures that involve no ground disturbance or no new ground disturbance and do not substantially increase the structure's size.¹¹⁹ Commenters support these exclusions.¹²⁰ The Commission should adopt them because they will streamline siting for additional categories of facilities that do not affect historic properties.

Other parties support additional NHPA exclusions for facilities that have no effect on historic properties, including: (1) small cell deployments on traffic and light structures when a qualified consultant confirms the structure is not identified as an element that contributes to the historic designation of the property; (2) collocations that have received local approval; and (3) ground equipment within 12 feet of an existing structure.¹²¹ CTIA agrees that these exclusions also should be adopted.

Finally, the Advisory Council on Historic Preservation ("ACHP") notes that it recently entered into a Program Comment with a number of federal agencies for the deployment of

¹¹⁹ CTIA Comments at 38.

¹²⁰ T-Mobile Comments 62; Verizon Comments at 58-61; WIA Comments at 70-72.

¹²¹ AT&T Comments at 30-32; Crown Castle Comments at 40-42; ExteNet Comments at 38-39; T-Mobile Comments at 62-63.

communications infrastructure on certain federal lands and properties.¹²² ACHP urges the Commission to consider adopting the standardized procedures in the Program Comment that are designed to expedite deployment.¹²³ The consistent practices to be followed by Bureau of Land Management (“BLM”), the U.S. Forest Service, the National Park Service, and other federal agencies included in the Program Comment will help to streamline the deployment of expanded and upgraded service on federal lands and properties. For example, the Program Comment adopts standardized definitions and review procedures for all covered agencies to assess effects on historic properties, which will give wireless providers more certainty as they work with those agencies. It also applies those standards both to sites in ROWs and sites that are not. This should prove to be of particular benefit in speeding the review of sites to be built off-road in the enormous, largely remote areas that BLM and other agencies administer. CTIA agrees with ACHP the Commission should examine whether some or all of those procedures should be adopted to facilitate broadband deployment generally.

VI. CONCLUSION.

To promote and streamline wireless broadband deployment, the Commission should take the following actions: (1) reduce delays that plague the local siting process by adopting shorter and more effective shot clocks and a deemed granted remedy, both of which apply to the entire review process; (2) adopt interpretations of Sections 253 and 332 to achieve the pro-deployment objectives of the Act; (3) apply Sections 253 and 332 to prohibit certain laws and practices that block or impede deployment; (4) require siting application and recurring fees to be cost-based, nondiscriminatory, and publicly disclosed; and (5) streamline NEPA and NHPA processes by

¹²² Comments of Advisory Council on Historic Preservation at 5 (June 15, 2017).

¹²³ *Id.*

adopting exclusions for facilities that do not raise environmental issues or adversely affect historic properties and adopting shot clocks to resolve environmental disputes.

Respectfully submitted,

/s/ Brian M. Josef

Brian M. Josef

Assistant Vice President, Regulatory Affairs

Thomas C. Power

Senior Vice President, General Counsel

Scott K. Bergmann

Vice President, Regulatory Affairs

Kara D. Romagnino

Director, Regulatory Affairs

CTIA

1400 Sixteenth Street, NW, Suite 600

Washington, DC 20036

(202) 736-3200

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