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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	)	WC Docket No. 11-59

MAILED
APR 12 2011
FCC Mail Room

NOTICE OF INQUIRY

Adopted: April 7, 2011 **Released: April 7, 2011**

Comment Date: 60 days after Federal Register publication
Reply Comment Date: 105 days after Federal Register publication

By the Commission:

I. INTRODUCTION

1. This Notice of Inquiry (Notice) concerns key challenges and best practices in expanding the reach and reducing the cost of broadband deployment by improving government policies for access to rights of way and wireless facilities siting. As such it is a leading element of the Commission's Broadband Acceleration Initiative. Increasing broadband deployment throughout the nation is one of the great infrastructure challenges of our time. Communications technology and services—particularly broadband—are critical to our country's economic success in the twenty-first century. Broadband can drive local and national economic growth, as well as improve education, healthcare, and energy efficiency.

2. Congress has directed this "Commission and each State commission with regulatory jurisdiction over telecommunications services [to] encourage the deployment on a reasonable and timely basis of [broadband] to all Americans" by working to "remove barriers to infrastructure investment" in a manner consistent with the public interest, convenience, and necessity.[1] Accordingly, in this proceeding we seek to work with stakeholders including state and local governments, other federal agencies, Tribal governments, consumer advocates, and the private sector to identify means of improving rights of way policies and wireless facilities siting requirements. By working together on these issues, we can reduce the costs and time required for broadband deployment, both fixed and mobile, which will help unleash private investment in infrastructure, increase efficient use of scarce public resources (including

[1] 47 U.S.C. § 1302(a) (2010). In this Notice, we use the term "broadband" interchangeably with "advanced telecommunications capability" as used in section 1302. We note that section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (the 1996 Telecommunications Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (BDIA), is now codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. § 1301 et seq.

spectrum),[2] and increase broadband adoption.

3. Providing broadband service requires the deployment and use of varied and physically dispersed communications infrastructure, including cables, antennas, poles, towers, and a variety of electronic equipment. This equipment is placed in public and private rights of way, such as in roads and railbeds or on towers and building roof tops.[3] Access to public rights of way, tower sites, and buildings is governed by federal, state, local, or Tribal[4] requirements depending on the location.[5] What type of facility is needed depends on the particular type of infrastructure being deployed.[6]

4. Policies for managing rights of way and siting wireless facilities, including the procedures and costs for acquiring permission to build, affect how long it takes and how much it costs to deploy broadband.[7] These issues are particularly complex because of the important and potentially competing interests that must be balanced, and the variety of different jurisdictions involved. Particular

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[2] We note that access to poles, towers, and other infrastructure is essential to "spatial reuse" of our nation's spectrum resource.

[3] Both new construction of wireless antenna structures and the availability of existing structures for purposes of collocating additional antennas have been, and will continue to be, integral to wireless build-out. These structures provide opportunities for future broadband use, for new technologies such as LTE or WiMax, and for new entrants into the broadband market.

[4] Tribal governments and individual owners or interest holders have authority concerning rights of way within their Native Nations and their individually owned Indian lands, respectively, wherein their consent and federal authority is required. The Department of Interior's Bureau of Indian Affairs also plays a critical role in the rights of way processes for lands held by the United States in trust for a Tribe, for lands to which title is held by the Tribe but are also subject to federal restrictions against alienation and encumbrance, and trust or trust-restricted lands individually owned by members of federally recognized Tribes. *See* 25 C.F.R. § 169, et seq. (Rights-Of-Way Over Indian Lands). Federal rules, in conjunction with the special legal trust status of Tribal and individually owned Indian lands, create application and review processes designed to reverse the historical methods by which Tribes and their members lost their lands, and instead preserve and efficiently develop these lands in coordination with the Tribal trustee. *See* 25 C.F.R. § 169.26 (telephone and telegraph lines; radio, television, and other communications facilities).

[5] Public rights of way are owned and controlled by a number of different government entities, including cities, towns, counties, states, and a number of federal government entities. In addition, telecommunications carriers, , railroads, utilities, and other private entities own or control private rights of way that are used for broadband and other communications facilities.

[6] For example, wireline transmission equipment, such as fiber optic cables, frequently are buried in underground conduits or attached to poles in public rights of way. Wireless equipment, such as antennas, can often be attached to existing infrastructure such as utility poles, water towers, billboards, and buildings, as well as to communications towers, both within and outside of established rights of way. *See generally Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, 16 FCC Rcd 5574 (Wireless Tel. Bur. 2001) (Collocation Agreement) and Fact Sheet (January 10, 2002).

[7] The wireless industry's need to site facilities is significant and growing. According to CTIA, the total number of cell sites in use by CTIA's members was 253,086 as of December 31, 2010. *See* CTIA, *Year-End 2010 Top-Line Survey Results* at 10 (2010), *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2010_Graphics.pdf. In addition, the *Rural Broadband Report* concluded that, in order to achieve ubiquitous mobile broadband coverage in the U.S., approximately 16,000 new towers will need to be constructed, disproportionately in rural areas. *See* BRINGING BROADBAND TO RURAL AMERICAN: REPORT ON A RURAL BROADBAND STRATEGY, ¶ 158 (May 22, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A1.doc. However, evidence suggests that this figure may have understated the growing need for new wireless infrastructure. *See* Presentation by Nadine Manjaro, ABI Research, *PCIA Wireless Infrastructure Show Debrief*, at 2009 Wireless Infrastructure Show, Oct. 1, 2009, *available at* http://www.rcrwireless.com/assets/pdf/PCIA_Wireless2009_Debrief.pdf.

administrative requirements often reflect significant public interest objectives of the government entities involved, such as ensuring public safety and maintaining roadways and other critical community infrastructure. Further, access to unique rights of way, tower sites, and other facilities suitable for the deployment of communications facilities can have scarcity value or quasi-monopoly characteristics given the need for access by infrastructure providers[8] and the lack of reasonable alternatives in many cases.[9] Additionally, fragmented property ownership creates a patchwork of requirements that providers must satisfy on a piecemeal basis. For example, a single broadband deployment project may need to access rights of way owned and regulated by multiple government entities—the federal government, states, and multiple localities, as well as private rights of way such as those along railroads.[10] Obtaining access to rights of way on fair and reasonable terms, and through a predictable process, is critical for all infrastructure providers.

5. The Commission, the National Telecommunications and Information Administration (NTIA), and the National Association of Regulatory Utility Commissioners (NARUC) examined these issues and potential solutions in the late 1990s and early 2000s and took steps to address these complex problems. In 2002, NARUC published a study that addressed rights of way practices[11] and rates at both the state and federal level and included a summary of state rights of way legislation, rights of way best practices, access to public lands, and federal policies to eliminate obstacles to the deployment of broadband.[12] In 2004, the Federal Rights of Way Working Group, led by NTIA, made recommendations for improving federal rights of way policy and included recommendations for information collection,

[8] We use the phrase "infrastructure providers" here to describe both facilities-based service providers (*i.e.*, companies that offer communications services over network facilities they own and operate) and other facilities providers who provide infrastructure to service providers (*i.e.*, entities that build and/or lease facilities to broadband providers but do not offer such service themselves).

[9] Public rights of way are especially critical to the deployment of communications facilities due to their widespread availability and efficiency for use in deploying communications networks. Indeed, there are relatively few roads or highways in America that do not have communications infrastructure running over, under, or alongside the roadway. The limited alternatives that exist for the placement of communications networks are often less efficient or have other drawbacks. For example, the use of long distance gas pipeline rights of way raises special safety concerns, and often do not connect population centers as directly as limited access highways. *See Petition of the State of Minnesota for Declaratory Ruling Regarding the Effect of Section 253 on an Agreement To Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights of Way*, CC Docket No. 98-1, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21709-12 (1999) (*Minnesota Order*).

[10] Further, different portions of broadband transmission networks often use different types of rights of way. For example, fiber optic facilities used primarily for long-haul broadband transmission frequently use rights of way along limited access highways controlled by the states. Such rights of way are also subject to Federal Highway Administration requirements in the case of federally funded highways. *See* Opposition of New York State Thruway Authority, *Level 3 Communications, LLC Petition for Declaratory Ruling That Certain Rights of Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253*, WC Docket No. 09-153, at 3 (dated October 15, 2009). A significant number of states have undertaken projects to facilitate the use of such rights of way for fiber optic transmission facilities. *See generally* FHA, RURAL INTERSTATE CORRIDOR COMMUNICATIONS STUDY REPORT TO STATES (February 2009) *available at* http://ops.fhwa.dot.gov/publications/fhwahop09021/fhwahop09021.pdf.

[11] For purposes of this proceeding, the term "rights of way practices" includes all procedural and administrative requirements associated with access to and use of rights of way or wireless facilities siting.

[12] *See generally* NARUC, PROMOTING BROADBAND ACCESS THROUGH PUBLIC RIGHTS OF WAY AND PUBLIC LANDS (2002).

more timely access, and simplification of fee structures for access to federal lands.[13]

6. The Commission recently has taken significant steps to reduce barriers to broadband infrastructure investment. For example, in 2009, the Commission established standards that ensure the timely processing of wireless tower siting requests while respecting the vital role of local government authorities in this area.[14] The Commission has also taken initial steps to improve pole attachment practices,[15] and today adopts an order that ensures timely and rationally priced access to poles.[16] In addition, the Commission has taken action to increase access to wireless spectrum and reduce barriers to using spectrum for mobile broadband, as well as facilitating the use of unlicensed "white spaces" spectrum.[17] The Commission previously took steps to "eliminate the unreasonable barriers to entry into the cable market."[18]

7. Last year, the National Broadband Plan (Plan) concluded that the rates, terms, and conditions for access to rights of way significantly impact broadband deployment.[19] The Plan made a number of recommendations for improving and streamlining access to rights of way. It stated that "[b]ecause local, state, Tribal and federal governments control access to important rights of way and facilities, a comprehensive broadband infrastructure policy necessarily requires a coordinated effort among all levels of government."[20] While recognizing differences on certain issues, the Plan found that

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[13] *See generally* FEDERAL RIGHTS OF WAY WORKING GROUP, NTIA, IMPROVING RIGHTS OF WAY MANAGEMENT ACROSS FEDERAL LANDS: A ROADMAP FOR GREATER BROADBAND DEPLOYMENT (2004), *available at* http://www.ntia.doc.gov/reports/fedrow/FROWReport_4-23-2004.pdf. The State of California also has identified rights of way access as a "lengthy, expensive, inconsistent [process,] . . . one of the most significant [barriers] to broadband deployment[,]"and cited the multiple permitting agencies, varied application forms, and inconsistent permitting criteria and fees as major contributors to the problem. CALIFORNIA PUBLIC UTILITIES COMMISSION, BROADBAND DEPLOYMENT IN CALIFORNIA 46, Ch. 6 (2005) *available at* http://docs.cpuc.ca.gov/published/comment_decision/43597.htm.

[14] *See Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994 (2009), *recon. denied*, 25 FCC Rcd 11157 (2010), *appeal pending sub nom.*, *City of Arlington and City of San Antonio v. FCC*, Nos. 10-60039 & 10-60805 (5th Cir.).

[15] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 (2010).

[16] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order on Reconsideration, FCC 11-50 (April 7, 2011).

[17] *See Unlicensed Operation in the TV Broadcast Band*, ET Docket No. 04-186, Second Memorandum Opinion and Order, 25 FCC Rcd 18661(2010).

[18] *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5103 (2007) (*Local Franchising Order*) (interpreting section 621(a)(1), which prohibits local franchising authorities from "unreasonably refusing to award" competitive cable franchises, and establishing time frames for local action on franchise applications with an interim franchise deemed granted if the time frames were not met), *aff'd sub nom.*, *Alliance for Community Media* v. *FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2821 (2009).

[19] OMNIBUS BROADBAND INITIATIVE, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 109 (2010) (NATIONAL BROADBAND PLAN).

[20] NATIONAL BROADBAND PLAN at 113. The Plan also recognized the important role of the federal government as a provider of rights of way and other forms of access to federally owned or leased property, and made a number of recommendations in this regard. *Id.* at 114-15. It noted that "[t]he federal government is the largest landowner in (continued....)

"nearly all [interested persons] agree that there can and should be better coordination across jurisdictions on infrastructure issues."[21] Accordingly, the Plan recommended that "the FCC . . . develop guidelines for public rights-of-way policies that will ensure that best practices from state and local government are applied nationally."[22]

8. In February 2011, the Commission announced a Broadband Acceleration Initiative to work with state, Tribal, and local governments, other federal agencies, and the private sector to identify and take steps to reduce regulatory and other barriers to broadband deployment.[23] The Initiative was announced at the Broadband Acceleration Conference,[24] which brought together leaders from federal, state, and local governments; broadband providers; telecommunications carriers; tower companies; equipment suppliers; and utility companies to identify ways to foster broadband deployment.[25] The Conference generated a broad range of ideas for accelerating broadband deployment, many of which are addressed in this Notice.[26]

9. This Notice is intended to update our understanding of current rights of way and wireless facilities siting policies, assess the extent and impact of challenges related to these matters, and develop a record on potential solutions to these challenges. This inquiry is a necessary step towards determining whether there is a need for coordinated national action to improve rights of way and wireless facilities siting policies, and, if so, what role the Commission should play in conjunction with other stakeholders. We seek a detailed record of the nature and scope of broadband deployment issues, including both best practices that have promoted deployment and matters that have resulted in delays. The Commission is most interested in systemic practices rather than individual or anecdotal situations, which are less suited for federal policies. So that we might have a factual basis upon which to determine the nature and extent of any problems, we ask commenters to provide us with information on their experiences, both positive and negative, related to broadband deployment. In the case of comments that name any state or local government or Tribal or federal entity as an example of barriers to broadband deployment, we strongly encourage the party submitting the comments to name the specific government entity it is referring to, and describe the actions that are specifically cited as an example of a barrier to broadband deployment, as this

(Continued from previous page)

the country[,]" adding that the "General Services Administration (GSA) owns or leases space in 8,600 buildings nationwide." *Id.* at 115.

[21] *Id* at 113.

[22] *Id.*

[23] *See* A NATIONAL STRATEGY: THE FCC'S BROADBAND ACCELERATION INITIATIVE (Feb. 9, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304571A2.doc.

[24] *See* Julius Genachowski, Chairman, FCC, *Remarks at Broadband Acceleration Conference* (Feb. 9, 2011), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A1.pdf.

[25] *See FCC to Hold Broadband Acceleration Conference*, Public Notice, DA 11-241 (Feb. 8, 2011).

[26] The Notice also reflects recent recommendations by the Technological Advisory Committee (TAC), a working group of industry and technology leaders formed by the Commission last year to consider a variety of issues and advise the Commission. In particular, on March 30, 2011, the TAC Broadband Infrastructure Deployment Working Group recommended, among other things, that the Commission: (1) work with other federal agencies to improve federal rights of way and wireless facilities siting processes; (2) promote best practices and uniformity in rights of way access and wireless facilities siting requirements, including rate development; (3) highlight the benefits of new technologies for accelerating broadband deployment; (4) work to reduce the time required for tower siting applications, especially those involving collocation on existing towers; and (5) encourage localities to develop means of notifying interested parties of upcoming open trenching projects so that they can install fiber simultaneously. *See generally* http://reboot.fcc.gov/video-archives. We note that many of the Working Group recommendations are discussed in this Notice, and that the Commission may be able to act on such recommendations independent of this proceeding.

is the best way to ensure that all affected parties – the relevant governmental entity, citizens and consumer groups, and other private parties that have sought access in the area – are able to respond to specific examples or criticisms. Identifying with specificity particular examples or concerns will ensure that the Commission has a complete understanding of the practices and can obtain additional background if appropriate. In turn, we ask government entities to explain the policy goals underlying their current practices and charges regarding rights of way and wireless facilities siting. We seek to identify best practices, systemic challenges and fully consider possible steps the Commission can take, in partnership with federal, state, local, and Tribal governments—with input from consumer groups and industry—to foster improvements in these areas.

10. This Notice explores specific steps that could be taken to identify and reduce unnecessary obstacles to obtaining access to rights of way and siting wireless facilities. For example, should the Commission:

- Identify and promote best practices and increased uniformity with respect to public rights of way and wireless facilities siting practices and policies?
- Make specific recommendations for action to Congress and the Administration?
- Sponsor voluntary mediation of public rights of way or wireless facilities siting disputes between state or local officials and industry?[27]
- Adopt policy guidelines, adopt rules, or adjudicate rights of way cases, under section 253 or 332 of the Communications Act?

11. Today, the Commission takes the next step in advancing its Broadband Acceleration Initiative by adopting this Notice and, in a companion item, by reforming pole attachment policies.[28] While this Notice covers a broad range of issues, the Commission may move forward in other contexts to act on individual issues raised here, as appropriate, without awaiting completion of this proceeding.

II. RIGHTS OF WAY AND WIRELESS FACILITIES SITING ISSUES

12. In this section, we describe the various types of possible issues regarding rights of way governance and wireless facilities siting requirements, and we seek input in order to obtain a more complete understanding of these areas.[29] We seek to develop a complete record of how rights of way and wireless facilities siting decisions influence build out and adoption of broadband and other communications services, both to inform Commission decision-making and to inform a broader public discussion of these issues. We believe that rights of way and wireless facilities siting issues can generally be broken into several broad categories: (1) timeliness and ease of the permitting process; (2) the reasonableness of charges; (3) the extent to which ordinances or statutes have been updated to reflect current communications technologies or innovative deployment practices; (4) consistent or discriminatory/differential treatment; (5) presence or absence of uniformity due to inconsistent or varying practices and rates in different jurisdictions or areas; (6) other rights of way concerns including "third tier" regulation or requirements that cover matters not directly related to rights of way use or wireless facilities siting. We ask commenters to describe the specific kinds of public rights of way and wireless facilities siting issues that exist in each of these areas. Do some of these issues particularly affect various

[27] We note that some of these ideas were suggested at the Broadband Acceleration Conference the Commission hosted on February 9, 2011. We incorporate the presentations made during that event in this record and ask interested parties to consider the perspectives and specific policy ideas raised during that event.

[28] *See supra* note 15.

[29] The scope of our request for information on current rights of way governance is not intended to prejudge the existence of significant problems or the need for any particular remedial approach.

categories of rights of way owners, wireless facilities siting authorities, network users, or network functions?[30] We also ask interested parties to describe best practices in each of these areas.

A. Timeliness and Ease of Permitting Process

13. The Commission recently addressed the timeliness of state and local permitting processes for tower siting in the *Shot Clock Ruling*, which set a timeline for action on collocation and other tower siting applications.[31] We seek comment on the application of the *Shot Clock Ruling*, and its efficacy in reducing delays in the local zoning process.[32] In particular, has the *Shot Clock Ruling* reduced the number of collocations pending before state and local government authorities for periods of longer than 90 days, and the number of applications other than collocations pending for longer than 150 days? Has this approached proved satisfactory from the perspective of the communities in resolving actions for collocation? Have individual cases been taken to district courts for zoning authorities' failure to act, and if so, how did the courts apply the *Shot Clock Ruling*? Do parties believe that adoption of the *Shot Clock Ruling* has resulted in faster rulings from state and local government authorities? In answering these questions, parties should provide as much specificity as possible.

14. We also seek updated information on the timeliness and ease of permit processing for rights of way and siting of wireless facilities. Are application processes defined with sufficient clarity? Is information on all necessary application procedures, forms, substantive requirements, and charges readily accessible? How do rights of way holders and wireless facilities siting authorities handle new or novel requests for access to rights of way or tower and antenna sites? Are there processes in place for addressing situations in which it is difficult to identify the rights of way holder? How could the application process be streamlined in certain situations, such as where an infrastructure provider seeks to collocate new facilities on an existing tower? Is the process for obtaining permits for accessing rights of way or siting wireless facilities timely? To the extent applications are not processed in a timely fashion, what factors are responsible for delays? Are there types of errors, omissions, or substantive requirements in applications that frequently lead to rejection, dismissal, or return of the applications? What application processing timeframes are reasonable? Are there particular practices that can improve processing time frames?

15. We also ask commenters to provide data about their experiences and situations. We ask commenters to submit data related to processing intervals for permit approval, both targeted and actual, for all relevant providers (data submitted by rights holders) and communities (data submitted by infrastructure providers). We ask that any submitted data be broken out in as disaggregated a fashion as possible. For example, we encourage commenters to include for each application the name of the provider; name of the location (*e.g.*, community name); type of project, including whether a project is wholly new or an augmentation of an existing facility (*e.g.*, wireless collocation on existing structure); whether the community is subject to comprehensive state franchising or rights of way laws; and total time to process applications.[33] To the extent that certain activities during a particular approval took an unusual

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[30] *See supra* note 5 (describing, for example, different types of entities that own or control rights of way).

[31] *Petition for Declaratory Ruling To Clarify Provisions of Section 332(c)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (*Shot Clock Ruling*); *Order on Reconsideration*, 25 FCC Rcd 11157 (2010), *appeal pending*.

[32] *See also* Letter from Ken Fellman, President, National Association of Telecommunications Officers and Advisors, to Ruth Milkman, Chief, Wireless Telecommunications Bureau, FCC, WT Docket No. 08-165 (filed May 25, 2010) (asking that the Commission undertake a proceeding to "analyze the impact" of the *Shot Clock Ruling*).

[33] Insofar as filing parties provide aggregated data, they should seek to ensure that such data involves similar applications and circumstances, rather than applications involving disparate circumstances.

length of time, we encourage participants to provide any relevant details, such as pre-processing time devoted to obtaining a complete-as-filed application, time spent negotiating, or time spent waiting for events external to the application process.[34] Commenters also should include any other relevant categories of data or explanations that will make their submissions more informative.

B. Reasonableness of Charges

16. To what extent and in what circumstances are rights of way or wireless facilities siting charges reasonable? Is it possible to identify rights of way or wireless facilities siting charges that all stakeholders agree are reasonable? If not, are there rate levels that most infrastructure providers agree are reasonable, and different rate levels that most government entities agree are reasonable? Are there instances and circumstances in which rights of way or facilities siting charges are unreasonable? What are appropriate criteria for determining the reasonableness of such charges? For example, are permitting or application fees unreasonable to the extent they exceed amounts that would recover administrative and other specifically identifiable costs?[35] Are "market based" rates for use of public rights of way or publicly-owned wireless facilities sites reasonable? In particular, how are market-based rates or other non-cost based rates for public rights of way determined when, in many situations, there does not appear to be a competitive market for public rights of way?[36] Are market-based rates substantially higher than cost-based rates?

17. We ask commenters to provide factual data to help the Commission understand existing charges and practices. We seek data on current permitting charges, including all recurring and non-recurring charges, as well as any application, administrative, or processing fees. In presenting these data, we ask commenters to identify such information as the type of facilities for which such charges are assessed; how such charges are structured (*e.g.*, per foot or percent of revenue in the case of rights of way fees); whether the community is subject to comprehensive state franchising or rights of way laws; whether the charges are published in advance or individually negotiated, designed to approximate market rates or merely recover costs (direct and/or indirect), and accompanied by comprehensive terms, and conditions; and the value of any in-kind contributions required for access or permit approval. We also request commenters to include information that enables us to determine the extent to which such charges are related to impacts on the local community, such as pavement restoration costs for projects that involve trenching in roadways. We recognize that certain information may disclose competitively sensitive information and we understand the need to aggregate such data across multiple communities or providers, or otherwise present it in a way that does not disclose any competitively sensitive data.

18. We also seek information on how a market-based charge is calculated in the context of various types of fees. For example, do per-foot fees and other usage fees vary depending on the number of providers that need access to the rights of way and the amount of fiber or other facilities each such provider places in the rights of way (a measure of demand)? To what extent do entities vary such fees based on other market factors, for example, the available supply, such as the remaining usable space within a conduit system in the rights of way, or the amount of land available to accommodate a new system? We also are interested in understanding how the levels of percent-of-revenue fees are set in

[34] We also note that processing times can be affected when a large number of applications are filed simultaneously.

[35] For example, this could include the cost of street repair necessitated by trenching.

[36] For example, in the case of local distribution of wireline communications services to subscribers, there do not appear to be reasonable alternatives to using local rights of way. Even in the case of long-haul transmission, alternatives to the use of public rights of way may be significantly less desirable and more expensive. *See Minnesota Order*, 14 FCC Rcd at 21709-12.

order to achieve a market-based rate.

19. We also invite comment on whether there are specific circumstances in which rights of way or wireless facilities siting charges are more likely to be unreasonable . For example, once an infrastructure provider has placed facilities in a public right of way, incurring sunk costs, is the public rights of way holder frequently in a position to exercise market power in establishing subsequent charges, such as on renewals of long-term contracts or requests to make changes to a vitally important network facility? Are there specific situations where such market power has been exercised? How can instances of the exercise of market power be identified? What situations are most likely to cause wireless facilities siting charges to be unreasonable? Do rights of way or wireless facilities site administrative and/or usage fees vary by the demographics of the customer base? For example, do holders of public rights of way, government owners of tower or antenna sites, and/or government entities regulating wireless facilities sites located in dense, urban, and/or suburban high-income areas tend to impose higher fees than government entities in other areas, and are such differences reasonable?

20. We also request comment on the ways in which rights of way or wireless facilities site processing or usage charges affect broadband subscribers. Are such charges imposed on a broadband provider ultimately passed on to that provider's customers? What fraction of a broadband provider's costs do public rights of way and governmental wireless facilities site or administrative fees typically represent? Insofar as broadband providers charge geographically averaged rates, high rights of way and wireless facilities siting charges will be recovered by providers in part from consumers in other jurisdictions rather than recovered directly from consumers within the jurisdiction imposing the high charges. To what extent should this affect the analysis of rights of way and wireless facilities siting charges? For example, should we be concerned about excessive charges if they are transparent and recovered solely from residents of the jurisdiction imposing the charge?

C. Qualitative Information

21. We also seek qualitative information that describes how the prices for rights of way and wireless facilities siting and the target timeframe for approval of infrastructure providers' applications are set, and that describe the process of receiving approval to access rights of way or site wireless facilities, particularly for broadband. How are we to distinguish and evaluate different policies and practices? To help create a record of existing and best practices, we ask infrastructure providers, localities, and other interested parties to submit examples of model, typical, and problematic franchising or access agreements.

22. Certain qualitative information we seek is best provided by states and localities. For instance, we request information on the policy goals and other objectives underlying practices and charges related to access to rights of way and approval of wireless facilities. To what extent are local requirements designed to achieve public interest goals, such as ensuring public safety, avoiding disruption of traffic, or maintaining roadways? What role do other civic goals play in guiding local rights of way and wireless governance decisions? For example, how do localities weigh such issues as preventing the public disruption and damage to roads that accompanies street cuts, or satisfying aesthetic, environmental, or historic preservation concerns, with goals of greater fixed and mobile broadband deployment and adoption through timely processing of permits, nondiscrimination, transparency, and reasonable charges?

23. Certain other information we seek may be best provided by infrastructure providers. For example, we seek information about how rights of way issues influence the deployment decisions of infrastructure providers. In this regard, we request information on both specific instances in which a provider chose not to build out broadband facilities due to rights of way concerns and comprehensive data or analysis that might demonstrate the extent to which rights of way concerns are impeding broadband infrastructure investment and broadband adoption. As providers prioritize capital investments, to what extent do rights of way and wireless siting governance issues have an effect? How do providers take into

account any uncertainty with regard to cost or timing? In areas where processes have been standardized, we ask providers to provide evidence of how this has affected their deployment decisions and quantify any benefits. Are there situations in which localities believe that infrastructure providers have unreasonably refused to build out broadband facilities despite best efforts on the part of the locality to encourage deployment through rights of way or wireless facility siting policies?

D. Extent To Which Ordinances or Statutes Have Been Updated To Reflect Current Communications Technologies or Innovative Deployment Practices

24. We ask interested parties whether state statutes or local ordinances have been updated to reflect current developments in the communications industry or recent changes in communications technologies that require access to public rights of way. Where such updates have not occurred, do providers experience problems or issues with application processing or delays? For example, do existing ordinances or other requirements successfully address the placement of small antennas on existing facilities in rights of way? In particular, we seek comment on any challenges that may apply to the deployment of microcells, picocells, femtocells, and Distributed Antenna Systems (DAS).[37] What, if anything, do states and localities require in order to permit the attachment of microcells, picocells, femtocells, and DAS antennas to existing infrastructure that is different from attaching any other antenna to a given structure? Do any states or localities allow all of the proposed DAS antennas within a DAS network to be combined in a single permit application, and is this or would this be helpful for DAS deployment? Are there any other ways in which microcells, picocells, femtocells, and DAS antennas are treated uniquely, and are there any ways in which states, localities, or wireless service providers think they should be treated differently? To what extent are these facilities treated as public utilities? To what extent are they subject to local zoning processes? To what extent should existing ordinances or statutes be revised to reflect changes in the communications industry and technology?

25. We also seek comment on how different jurisdictions treat the use of existing infrastructure for wireless services, both in and out of rights of way. Is there disparate treatment between a pole attachment, *i.e.*, the attachment of a wireless antenna to an existing public utility pole, and a collocation, where a wireless antenna is attached to some other existing structure? Are different or additional considerations required for some types of rights of way, such as those used for transportation, as compared to other types? Are there instances in which conflicting laws may apply to the attachment of a wireless antenna to an existing structure? What is the overall effect of these considerations on the ability and the likelihood that existing infrastructure can be effectively used to deploy wireless services? Do some regulations and policies encourage resource sharing, while others discourage it? Do states and localities show any preference for collocated antennas or for the placement of wireless facilities on public property? Are there particular approaches that facilitate wireless deployment, including DAS? Why do they work well?

[37] Microcells, picocells, and femtocells are relatively small, low-cost wireless base stations that typically cover a smaller area than ordinary macrocells and increase coverage and capacity of wireless networks. By allowing providers to increase the density of their network cost-effectively, these kinds of technologies enable more efficient "spatial reuse" of the nation's scarce spectrum resource. Similarly, a DAS is a network of antennas that provide wireless service within a given geographic area or structure. DAS antennas are generally smaller, lower-powered antennas that are located below the clutter level of nearby trees or buildings. DAS can be especially useful to fill holes in wireless coverage areas, such as inside buildings, in urban areas, and in places where topography interferes with the delivery of a wireless signal from a single, higher-powered, taller facility. *See generally* DAS Forum Comments at 12-13 and Next G Comments at 21, *Implementation of Section 224 of the Act and A National Broadband Plan*, WC Docket No. 07-245 and GN Docket No. 09-51; Letter from William J. Sill, Counsel, ATC Outdoor DAS, LLC, to Marlene H. Dortch, Secretary FCC, WC Docket No. 07-245 (filed Mar. 15, 2011).

E. Consistent or Discriminatory/Differential Treatment

26. How have ordinances addressed differences in rights of way users and wireless facilities siting applicants, the different uses they make of rights of way and sites, and the different equipment they seek to deploy? Are differing rights of way or wireless facilities siting practices or charges reasonable? Do they involve unreasonable or discriminatory differential treatment of various types of rights of way users or facilities siting applicants? What are appropriate methods to determine whether a practice or charge is unreasonable or discriminatory? For example, do publicly available fee schedules for various categories of rights of way use tend to be nondiscriminatory? Are zoning requirements for wireless facilities siting nondiscriminatory? Are there other criteria that can and should be used to determine whether charges or practices are discriminatory without fact-intensive and burdensome administrative or court proceedings?

F. Presence or Absence of Uniformity Due to Inconsistent or Varying Practices and Rates in Different Jurisdictions or Areas

27. In a given metropolitan area, the main city and various surrounding towns, villages, and counties may have differing practices and charges for rights of way usage and wireless facilities siting. To what extent do these practices and charges differ within a particular state? Does inconsistent treatment of infrastructure providers among states and localities make the deployment of broadband more difficult or time-consuming, or is inconsistency among states and/or localities not problematic as long as infrastructure providers have a clear path to follow within each jurisdiction? To what extent does the need to file multiple applications cause problems for infrastructure providers, regardless of the similarity or differences in the practices and charges involved?

28. To what extent do rights of way governance and wireless facilities siting requirements vary between different federal government agencies? Do different agencies require varying types of information or do different agencies require similar information to be presented in different formats? To what extent do any differences among agencies make it more difficult to obtain permits and build out broadband networks on federally controlled properties? Have there been efforts to increase uniformity? How successful have they been?

G. Other Issues

29. Other Rights of Way or Wireless Facilities Siting Issues: We ask interested persons to identify and describe any other rights of way or wireless facilities siting issues that have an impact on broadband deployment and adoption. We also ask interested parties to identify any other practices or approaches that have been particularly beneficial to facilitating broadband deployment. Do government rights of way owners or wireless facilities siting authorities impose requirements that are not directly relevant to intended use? For example, in some cases in the past, localities owning rights of way have required that infrastructure providers supply information of the type usually required for a certificate of operating authority from the state.[38] Is this an ongoing requirement for applicants seeking rights of way or siting permits? Are there other examples of such requirements? What are the policy reasons for such requirements? Are there adjustments that could be made to ensure that localities obtain necessary information and addressing legitimate concerns?

30. Private Rights of Way and Tower Sites: We ask interested persons to provide information on issues that arise in the context of private rights of way or tower sites to the extent such information might be helpful to the Commission in achieving a complete understanding of potential public rights of way issues or issues concerning tower siting on public lands.

31. General Scope of Concerns: We seek comment on whether specific rights of way and

[38] *See, e.g., TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21441 (1997).

wireless facilities siting concerns are widespread or generally limited to particular federal agencies, states, Tribes, and localities. Are rights of way and wireless facilities siting concerns generally less widespread in states that have adopted comprehensive rights of way laws than in other states? Are rights of way and wireless facilities siting concerns more common in certain types of areas, such as cities and surrounding suburbs, and less common in rural areas? We also ask interested persons to comment on the extent to which rights of way and wireless facilities siting concerns are likely to increase or decrease in the near future. For example in other contexts, it appears that many long-term rights of way contracts will expire in the next few years. Is this likely to cause a spike in rights of way disputes? Will the need for new facilities to provide next generation wireless services increase concerns regarding facilities siting?

32. Additional Data Gathering: We seek input on whether the Commission should take any additional steps to gather information on issues relevant to this proceeding, including workshops, surveys, and/or mandatory data collections. Are there any existing sources of relevant data the Commission could rely on for purposes of this proceeding?

33. We seek input on the costs and benefits of each of these approaches and whether any of these approaches should be pursued in this proceeding. Are there any other approaches that would yield better results with similar or smaller investments of time and effort?

III. SOLUTIONS

A. Prior Efforts To Resolve Concerns

34. We seek information on what interested parties have already done to address rights of way and wireless facilities siting concerns.

35. Have the federal government, states, localities, Tribes, and/or the organizations representing them developed best practices for rights of way and wireless facilities siting governance? We also seek comment on best practices proposed by private sector entities. Are there existing compendia of rights of way and wireless facilities siting best practices? Aside from state statutes, have there been efforts to develop consolidated rights of way application processes that cover multiple jurisdictions and reduce or eliminate the need to file multiple applications? Have other approaches to improving rights of way and wireless facilities siting governance been attempted? We request comment on the effects of previous efforts to address rights of way and wireless facilities siting governance. Have state statutes governing rights of way helped increase uniformity and reduce costs? We encourage states that have adopted such legislation to describe the approach adopted as well as the benefits and drawbacks.[39] In addition, we ask interested persons to submit information on instances in which government entities and industry have worked together in a positive manner to foster broadband deployment, and describe the factors or circumstances that led to such constructive collaboration.

B. Options – Possible Actions To Address Current Areas of Concern

36. In this section, we ask interested persons to comment on a number of actions the Commission might take to foster broadband deployment by addressing rights of way and wireless facilities siting concerns. For analytical purposes we have broken the options into two groups: One focused primarily on possible voluntary programs and educational activities coordinated or facilitated by the Commission, and the other involving the exercise of Commission rulemaking or adjudicatory authority. These sets of options are not mutually exclusive. We ask interested parties to comment on the benefits and costs of each of these potential actions, and to quantify those benefits and costs to the extent possible. We also ask interested parties to comment on the extent of the Commission's authority to take the various actions discussed below, particularly the Commission's authority to engage in rulemaking

[39] NTIA gathered extensive information on state rights of way statutes in 2003 and posted it online. *See* NTIA, RIGHTS OF WAY LAWS BY STATE, *available at* http://www.ntia.doc.gov/ntiahome/staterow/rowtableexcel.htm.

and/or adjudication. We also ask whether there are other effective options to foster broadband deployment through improvements in rights of way or wireless facilities siting governance.

1. Voluntary Programs and Educational Activities

37. Commission Educational Efforts and Voluntary Activities: Should the Commission address rights of way and wireless facilities siting concerns through educational efforts and voluntary activities? We ask interested parties to focus on the substantive scope of such educational voluntary activities described below.

38. Best/Worst Practices: Should the Commission compile a set of best practices for public rights of way and wireless facilities siting policies that are consistent with facilitating broadband deployment? If so, how should this be done? Should this effort focus on a limited set of problematic issues, or should we instead try to develop a comprehensive set of best practices?

39. Increased Uniformity: Closely related to the issue of best practices, although emphasized somewhat differently, is the issue of increased uniformity. Should the Commission work to increase uniformity in rights of way and wireless facilities siting governance among localities and/or within the federal government? Could the Commission, in partnership with affected stakeholders, develop a model application processes or other procedures or practices, to lower costs and streamline processes across multiple jurisdictions?

40. With respect to uniformity in practices and procedures within the federal government, what if any steps should the Commission take to help streamline the process of siting facilities on federal lands?[40] Should the Commission, for example, recommend convening or participating in an inter-agency task force to inventory current procedures and identify benchmarks for best practices?

41. Competitions and Awards: We also ask interested parties to comment on whether the Commission should encourage best practices and increased uniformity by initiating a "race to the top" type of competition. The Commission could promote streamlined processes that provide timely access to rights of way and wireless facilities siting by recognizing individual localities for their outstanding efforts on these issues. By doing so, the Commission would be encouraging more localities and states to implement rights of way or wireless facilities siting best practices and/or increase uniformity in these areas. What kinds of incentives would encourage participation by localities and states?[41]

42. Commission Sponsored Mediation: Should the Commission establish a process for voluntary mediation of rights of way and wireless facilities siting disputes by selected state or local representatives working in conjunction with industry?[42] How should such a process be structured, and how could participation be encouraged?

43. Improved Facilities Deployment Practices in Rights of Way: Should the Commission work to raise awareness about facilities deployment techniques that could reduce costs and speed deployment? For example, should the Commission promote micro trenching and deployment of Distributed Antenna

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[40] We note that the Commission is currently seeking comment in another proceeding on the effectiveness of the Tower Construction Notification System (TCNS) and the processes we should follow in deciding whether to grant requests for access to the TCNS to other federal agencies. *See Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, FCC 11-30, (Mar. 4, 2011).

[41] *See generally* America COMPETES Act, Pub. L. 110-69 §§ 1102(a)(11), 1006(b)(1)-(2), 1006(d)(1)., 121 Stat. 571, 575-79 (2007); America COMPETES Reauthorization Act of 2010, Pub. L. No. 111-358 § 803, 124 Stat. 3981, 4005 (2011).

[42] Memorandum to Sharon Gillett, Chief, Wireline Competition Bureau, FCC from Ken Fellman, President NATOA (Feb. 22, 2011).

System facilities on street light and traffic light poles where appropriate? We invite comment on other innovative rights of way or wireless facilities deployment practices that should be considered in this regard.

44. Recommendations to Congress or the Administration: The National Broadband Plan recommended that "Congress should consider allowing all agencies to set the fees for access to rights of way for broadband services on the basis of a direct cost recovery approach, especially in markets currently underserved or unserved by any broadband service provider."[43] The Plan also recommended that the Executive Branch "develop one or more master contracts for all federal property and buildings covering the placement of wireless towers."[44] Are there additional specific actions that the Commission should recommend to the Administration or to Congress that would remove roadblocks and encourage further broadband build out on federal properties? For example, should the Commission recommend that the Executive Branch formally permit wireless facility sites on federal property, including postal service property? Should the Commission make recommendations to Congress or the Administration concerning rights of way or wireless facilities siting concerns? For example, is legislation needed to address certain concerns? Would Congressional action promote uniformity? Should the Commission make recommendations to the Administration? We invite suggestions for specific legislative language recommended for Congress.

2. Rulemaking and Adjudication

45. In this section we discuss possible rulemaking and adjudication options. We note that these options may work well as backstops to voluntary action and Commission educational efforts or in combination with such options.

46. Adopt Policy Guidelines: Should the Commission adopt policy guidelines addressing rights of way or wireless facilities siting issues? Such guidelines could set out the Commission's views on various issues, such as application processing time frames, but would not be enforceable as rules. We invite comment on the policy benefits and drawbacks of this option.

47. Adopt Rules: Should the Commission adopt rules designed to foster broadband deployment by addressing rights of way or wireless facilities siting problems?

48. Substantive Scope of Policy Guidelines or Rules: What subjects should be addressed by any policy guidelines or rules adopted by the Commission? For example, should the Commission address the issues described below? Are there other substantive issues in this proceeding that the Commission should address through policy guidelines or rules?

- *Safe Harbors/Triggers*: Should the Commission adopt policy guidelines or rules establishing safe harbors for rights of way and wireless facilities siting procedures, practices, and charges; or triggers that would subject such procedures, practices, and charges to heightened scrutiny by the Commission or a court in particular circumstances? If so, what procedures, practices, and rates should be included in this approach?
- *Billing Practices*: Should the Commission adopt guidelines or rules allowing or requiring infrastructure providers to impose separate line item fees to recover rights of way or wireless facilities siting charges directly from subscribers in the jurisdiction imposing such charges in order to increase transparency and accountability and minimize cross-subsidies?

[43] NATIONAL BROADBAND PLAN at 133.

[44] *Id.*

- *Interpretation of Sections 253 and 332*:[45] Should the Commission adopt guidelines or rules interpreting the terms of these statutory provisions with respect to rights of way and wireless facilities siting requirements? If so, what provisions of each section should the Commission address and how should those provisions be interpreted?

49. Adjudication: Should the Commission address certain rights of way problems through adjudication under section 253? Would this approach be well suited to addressing problems that are not widespread, but may represent significant obstacles to broadband deployment in a particular locality or a small number of localities?

3. Other Proposals

50. We also invite interested parties to suggest other specific actions the Commission could take to improve policies regarding public rights of way and wireless facilities siting. In each case, we ask them to describe the problem or subject matter addressed and its effect on broadband deployment. We then ask them to explain their proposal. We also ask interested persons to describe the benefits of such proposals and to address potential drawbacks. In addition, we ask interested persons to identify proposals that can be implemented relatively quickly and those that would take longer to implement, along with suggested timelines.

IV. LEGAL AUTHORITY

51. We believe the Commission has authority to engage in educational activities to foster broadband deployment through improved policies regarding public rights of way and wireless facilities siting and to coordinate and participate in voluntary activities designed to achieve this goal. We also believe the Commission has authority to adopt policy guidelines and rules concerning these issues. We ask for comment on these views and on whether the Commission has authority to adjudicate rights of way cases under section 253. An analysis of these legal issues is set forth below. In this regard, we emphasize that the views described here do not represent final determinations on these issues and that our ultimate legal conclusions will reflect a careful consideration of the comments addressing these issues.

A. Background

52. We begin by reviewing the terms of the statutory provisions most relevant to this proceeding – section 706 of the 1996 Telecommunications Act and sections 253 and 332(c)(7) of the Communications Act. We also address a number of additional statutory provisions in this section.

53. Section 706(a) provides that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms). . . ."[46] In granting the Commission authority to fulfill this mandate, Congress specifically directed the Commission to use various regulatory

[45] As noted above, the Commission has previously interpreted several provisions in Section 332(c)(7). In the *Shot Clock Ruling*, to ensure a timely review of siting applications and to prevent unnecessary delay, the Commission interpreted a "reasonable period of time" under section 332(c)(7) of the Communications Act as 90 days for collocations and 150 days for all other applications. The Commission also found that it is a violation of section 332(c)(7)(B)(i)(II) of the Communications Act for a state or local government to deny a personal wireless service facility siting application because service is available from another provider. *See Shot Clock Ruling*, 24 FCC Rcd 13994 (2009).

[46] 47 U.S.C. § 1302(a); *see also* S. Rep. No. 104-23, at 51 (1995) ("The goal is to accelerate deployment of an advanced capability that will enable subscribers in all parts of the United States to send and receive information in all its forms—voice, data, graphics, and video—over a high-speed switched, interactive, broadband, transmission capability.").

methods, including those that "remove barriers to infrastructure investment."[47] In the *2010 Sixth Broadband Deployment Report*, the Commission concluded that broadband was not being deployed to all Americans in a reasonable and timely manner.[48] When the Commission makes such a negative determination, section 706(b) requires that the agency "take immediate action to accelerate deployment of [broadband] by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[49]

54. Section 253(a) bars state or local statutes, regulations, or other legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[50] Section 253(b) contains a safe harbor preserving state action imposing "on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[51] Section 253(c) also preserves the "authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis . . . ."[52] Section 253(d) expressly requires the Commission to preempt state or local government action in certain situations.[53]

55. Section 332(c)(7) of the Act applies to rights of way issues concerning wireless services, Section 332(c)(7) preserves state and local authority over decisions regarding the placement, construction, and modification of personal wireless service facilities subject to certain limitations."[54] Among other limitations, section 332(c)(7) states that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[55] It also requires the State or local government to act on any request to place, construct, or modify personal wireless service facilities "within a reasonable period of time . . . taking into account the nature and scope of such request."[56] It permits a person adversely affected by any final action or failure to act by the State or local government to commence an action in court within 30 days after such final action or failure to

[47] 47 U.S.C. § 1302(a).

[48] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket Nos. 09-137, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9557, para. 1 (2010) (*2010 Sixth Broadband Deployment Report*) (estimating that 14-24 million Americans still lacked access to broadband).

[49] 47 U.S.C. § 1302(b); *see also* S. Rep. No. 104-23, at 50 (1995) ("If the FCC makes a negative determination, it is required to take immediate action to accelerate deployment.").

[50] 47 U.S.C. § 253(a).

[51] 47 U.S.C. § 253(b).

[52] 47 U.S.C. § 253(c).

[53] 47 U.S.C. § 253(d).

[54] 47 U.S.C. § 332(c)(7)(A). Personal wireless service facilities are defined in section 332(c)(7)(C)(ii) as "facilities for the provision of personal wireless services" and personal wireless services are defined in section 332(c)(7)(C)(i) as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C. § 332(c)(7)(C)(i)-(ii).

[55] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[56] 47 U.S.C. § 332(c)(7)(B)(ii).

act.[57]

B Authority for Educational Activities and Voluntary Programs

56. We believe the Commission has ample authority to engage in educational efforts to foster broadband deployment by encouraging improvements in policies regarding public rights of way and wireless facilities siting. We also think the Commission has ample authority to participate in or facilitate voluntary endeavors to achieve this goal. Section 706(a) specifically charges the Commission with encouraging the deployment of broadband through the use of methods that remove barriers to infrastructure investment. Section 1 of the Act also states that the Commission was created to ensure rapid, efficient communication services. In addition, section 4(i) gives the Commission broad authority to take whatever actions are necessary to the execution of its functions as long as they are not otherwise inconsistent with the Act. Education and involvement in voluntary programs would advance the goals of section 706 and section 1 and come within the broad flexibility accorded the Commission under section 4(i). We believe that such activities also further the goals of sections 253 and 332 by reducing the likelihood of state or local actions that have the effect of prohibiting the provision of a telecommunications service or personal wireless service in violation of those sections. We seek comment on these issues.

C. Authority for Rulemaking

57. We also believe that the Commission has authority to engage in rulemaking to improve rights of way and wireless facilities siting governance. Section 201(b) states that the "Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[58] Section 303(r) contains a similar grant of rulemaking authority[59] and section 4(i) authorizes the Commission to, among other things, "make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."[60] Thus, we believe the Commission has broad general rulemaking authority that would allow it to issue rules interpreting sections 253 and 332. We seek comment on this view. Could the Commission, for example, adopt rules further defining when a state or local legal requirement constitutes an effective barrier to the provision of a telecommunications service under section 253(a)[61] or defining what constitutes fair and reasonable compensation under section 253(c)? We also seek comment on our authority to adopt rules concerning matters in this proceeding pursuant to section 706.

D. Adjudication of Rights of Way Cases Under Section 253

58. We also invite comment on whether the Commission has authority to adjudicate rights of way disputes under section 253. Some parties have argued that the Commission does not have such

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[57] 47 U.S.C. § 332(c)(7)(B)(v). In the case of an action or failure to act that is impermissibly based on the environmental effects of radio frequency emissions pursuant to section 332(c)(7)(B)(iv), a person adversely affected may also petition the Commission for relief. *Id.*

[58] 47 U.S.C. § 201(b). Commission authority to adopt rules pursuant to section 201(b) in the absence of a specific delegation of such authority has been upheld in the context of cable regulation. *See Alliance for Community Media*, 529 F.3d 763, 772-76 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2821 (2009).

[59] 47 U.S.C. § 303(r). Section 303(r) states in relevant part, "[e]xcept as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall-- . . . make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." *Id.*

[60] 47 U.S.C. § 154(i).

[61] *See 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*, 12 FCC Rcd 14191 (1997).

authority.[62] These arguments stem in large part from the language and legislative history of section 253(d). Section 253(d) requires the Commission to preempt if it finds a violation of section 253(a) (barring certain state or local requirements) or (b) (providing a safe harbor for specified state requirements), but does not address section 253(c) involving rights of way.[63] Other parties argue that the Commission has authority to adjudicate rights of way cases and preempt under section 253.[64] The Commission has not taken action to resolve this issue[65] and courts have taken differing approaches.[66] Moreover, to the extent that the statutory language is ambiguous,[67] the Commission is not bound by those courts' statutory interpretations.[68]

V. PROCEDURAL MATTERS

Paperwork Reduction Act

59. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

Ex Parte Presentations

60. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[69] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. It is generally required to have more than a one or two

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[62] *See, e.g., supra* note 10, Opposition of New York State Thruway Authority at 14-19.

[63] Section 253(d) originally required preemption in the case of violations of sections 253(a), (b) or (c), but the reference to section 253(c) was removed as the result of an amendment sponsored by Senator Gorton.

[64] *See, e.g.*, Level 3 Petition for Declaratory Ruling, *Level 3 Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253*, WC Docket No. 09-153 at 28-30 (filed July 23, 2009).

[65] *See Minnesota Order* at 21730. In the *Minnesota Order*, to address Minnesota's request for a declaratory ruling that its proposed actions were consistent with Section 253, the Commission considered the safe harbor provisions of section 253(c), finding that Minnesota's proposal did not come within the scope of that provision. However, the Commission cautioned that "[o]ur discussion of these issues should not be interpreted as addressing potential issues involving the Commission's jurisdiction under Section 253(c)." Although a number of parties asked the Commission to preempt Minnesota's proposed action, the Commission declined to act on those requests. *Id.*

[66] *See, e.g., BellSouth Telecomm. Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1189 (11th Cir. 2001) (discussing cases).

[67] *See id.* at 1187 ("[A]n analysis of the statutory language creates more questions than it answers about what causes of action Congress intended to create and who it intended to enforce them."). *See also, New Jersey Payphone Assn, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3rd Cir. 2002) ("Section 253 is quite inartfully drafted and has created a fair amount of confusion.").

[68] *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

[69] 47 C.F.R. § 1.1200 et seq. Although a Notice of Inquiry proceeding is generally exempt from the *ex parte* rules, we find that the public interest is best served by treating this important matter as a "permit-but-disclose" proceeding. *See* 47 C.F.R. §§ 1.1200(a), 1.1204(b)(1).

sentence description of the presented views and arguments.[70] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.[71]

Comment Filing Procedures

61. Pursuant to sections 1.415, 1.419, and 1.430 of the Commission's rules,[72] interested persons may file comments and replies regarding the Notice on or before the dates indicated on the first page of this document. **All filings related to this Notice should refer to WC Docket No. 11-59.** Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

- Paper Filers: Persons who choose to file by paper must file an original and four copies of each filing.

- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

Accessible Formats

62. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov; phone: 202-418-0530 or TTY: 202-418-0432.

[70] *See* 47 C.F.R. § 1.1206(b)(2).

[71] 47 C.F.R. § 1.1206(b).

[72] 47 C.F.R. §§ 1.415, 1.419, 1.430.

VI. ORDERING CLAUSES

63. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 253, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 253, 332, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. § 1302, this Notice of Inquiry IS ADOPTED.

64. IT IS FURTHER ORDERED that interested parties may file comments no later than 60 days after publication and replies no more than 105 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51

Re: *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving the Policies Regarding Public Rights of Way and Wireless Facilities Siting,* WC Docket No. 11- 59

Today, we take a major step in reducing barriers to broadband deployment, even as we set the stage for further progress on this vital goal. Our actions will enable and accelerate billions of dollars of private investment in the 21st century infrastructure America needs to create jobs, grow our economy, and compete globally.

Today's actions implement key recommendations of the National Broadband Plan and are central pillars of our Broadband Acceleration Initiative, announced on February 9. This Initiative is one of the Commission's top priorities: an agency-wide effort to speed the build-out of wired and wireless broadband by removing obstacles to deployment, particularly obstacles created by unneeded or inefficient regulation.

Having determined that broadband is not being reasonably and timely deployed to all Americans, the Commission is required by Section 706 of the Telecommunications Act to "take immediate action to accelerate deployment . . . by removing barriers to infrastructure investment." The Broadband Acceleration Initiative, and our actions today, are central to carrying out that duty.

The Initiative incorporates work being done by the Commission's Technological Advisory Council. I was pleased to revive the TAC, announce its new members on October 21, and give them a concrete charge: identify ways to use communications technologies and spectrum to drive job creation and economic growth. Under the excellent leadership of Tom Wheeler, and with participation from a host of private sector experts and Internet pioneers, the TAC has already identified several promising policy proposals that I look forward to the Commission considering in the coming year.

Another key milestone was the Broadband Acceleration Conference we held earlier this year, which yielded a number of strong ideas for policy reforms, many of which are included in the Notice of Inquiry the Commission adopts today.

Why is this Initiative so important? In the race for global competitiveness, the speed with which we can build America's broadband networks is as important as the speed that is delivered over these networks. Broadband is indispensable infrastructure for improving America's productivity in the 21st century – which is in turn the key to robust economic growth and job creation. The faster we can build out broadband, the faster we can help American workers and small businesses create the leading web-based enterprises of tomorrow. That's what the Broadband Acceleration Initiative is all about.

The Pole Attachments Order we adopt today comprehensively reforms the Commission's pole attachment rules for the first time since the 1990s, taking account of major changes in the marketplace and incorporating smart policies pioneered by various states.

Some might wonder what the connection is between utility poles and broadband service. Utility poles are essential to providing broadband service, wired and wireless, because that's where communications companies string cables and, increasingly, place wireless antennas. If every company that wanted to provide broadband service had to build its own separate set of poles to carry its equipment, we wouldn't have much broadband in this country—it would simply be too expensive, and often impossible, to build an entirely new network of poles. This is why the Commission has historically taken steps to ensure that communications providers have reasonable access to the poles that already exist throughout the country.

The record in this proceeding demonstrates that today, the process by which broadband providers get access to utility poles frequently is so unpredictable, takes so long, and costs so much that it discourages providers from entering the marketplace and significantly delays broadband build-out. So our Order provides for a fixed timeline for getting access to poles that providers can count on, for both wired and wireless broadband build-out.

It also provides a timeline for accessing the tops of poles, which are key for the deployment of wireless broadband technologies like distributed antenna systems – DAS for short. DAS deployments use multiple antennas to extend wireless coverage and provide service more efficiently than conventional wireless antennas. As a result of this Order, DAS providers estimate that their cumulative capital investment could total more than $15 billion over the next six years.

Importantly, the Order balances the need for efficient access to poles with protections for the safety and reliability of our electric grid, and empowers utilities to effectively prevent unauthorized attachments on their poles. Lineworkers perform jobs that are both valuable and dangerous, and we have been careful in developing this Order to make sure that we do nothing that would jeopardize their safety or the safety of others.

The Order also reforms policies for pole attachment rates. The record shows that pole rental rates vary widely and are often inefficiently high, which slants the competitive playing field, distorts infrastructure investment decisions, and deters broadband build-out. This is why incumbent phone companies argued that the Commission should regulate the prices they pay to access a utility's network of poles.

Reforming pole attachment rates is particularly important for rural America, where this Order will reduce pole rental costs for some broadband providers by more than 50%. This should spur broadband deployment where it is needed most, reduce the need for universal service funding to serve some hard-to-reach areas, and lower the cost of serving some rural households by as much as several dollars per month – which could mean real savings on consumers' bills. We expect these benefits to occur, and would be concerned – and would seriously consider modifying our approach to this issue – if we did not see evidence that these benefits were indeed occurring.

Today's Order is a testament to the strengths of our federal system and the importance of states as laboratories for policy development. Thanks to the thoughtful work of a number of states in crafting pole attachment rules over the last two decades, we have several effective models for pole attachment governance with proven track records. Our rules incorporate best practices from Oregon, Utah, New York, and other states.

While the Pole Attachments Order brings one proceeding to a close, we are simultaneously opening a new proceeding on Accelerating Broadband Deployment. This proceeding will examine key challenges and best practices for rights-of-way and wireless

facilities siting policies. Rights-of-way policies are the rules that govern access to the public spaces where broadband infrastructure – including wireless towers and antennas – are deployed, including roadways, sidewalks, public lands, and public buildings, but excluding utility poles.

This proceeding is focused on improving these policies in order to enable broadband providers to expand the reach and accelerate deployment of robust, affordable broadband to all Americans. The National Broadband Plan and our Technological Advisory Council have identified a number of potential barriers in this area, including:

- Poor coordination across jurisdictions on infrastructure issues, which delays broadband build-out and raises consumer costs;
- The expense and complexity of obtaining access to public rights of way;
- The fact that it's much harder than it should be to put another antenna on an existing cell tower;
- Failure to embrace "dig-once" policies that save money when workers dig a trench in the ground to lay fiber or cable; and
- Non-standard, confusing permitting processes for broadband infrastructure siting on federal property.

We will examine these issues with input from all interested parties, including states and localities, Tribes, other federal agencies, broadband providers, equipment providers, and consumer advocates. I look forward to learning what's working and can be replicated more broadly; what's not working and should be fixed; and, in general, what can be done to improve inefficient or burdensome policies.

I thank the staff, particularly the Wireline and Wireless Bureaus, for their hard work on these complex and important items. And I thank the TAC, and the FCC staff working with the TAC, for their continued efforts to develop proposals for further reform

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

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The National Broadband Plan clearly and rightly identified pole attachment policy as a key part of ensuring that all Americans have access to robust and affordable broadband service. It's not sexy or very exciting and you can quickly get lost in the weeds, but clarifying the rules surrounding rates and access to poles has been on the Commission's to-do list for longer than I've been here—and that's a long time. Pole attachments are without a doubt one of the critical inputs when communications providers assess the economics of deploying advanced telecommunications networks. Now, finally, and thanks to the leadership of the Chairman and the hard work of the staff, we can check it off the list. Today's action should do a lot to promote our ambitious broadband deployment goals. And, by the way, accelerating the roll out of advanced telecommunications services *is* exciting.

Our experience over the past fifteen years has demonstrated a need for a more detailed framework to govern pole attachments. I believe these revisions of the pole attachment rules will promote a more competitive broadband market and spur broadband's availability throughout the country. To that end, we establish a more balanced process to ensure timely and non-discriminatory access to poles for both wireline and wireless attachers, which will go a long way toward removing uncertainty and minimizing delays that have frustrated deployment. The disparities in pole attachment rates for different providers have also been a source of confusion and litigation, and hopefully the clarity we add today will discourage such outcomes. The provision in this item of a mechanism to ensure that incumbent local exchange carriers will have a forum to seek Commission remedies for rates that they believe to be unjust and unreasonable is a good step in the right direction.

We should always be mindful of, and build upon, the successful experiences at local and state levels. This much we know: in order to spread the wonders of broadband to every corner of this country we are going to need a set of best practices in place that will both expand the reach and reduce the costs of deployment. While we spirit ahead to make broadband a reality, we need to be cognizant of the authority that local, state and Tribal entities have over rights-of-way and the siting of wireless facilities. In beginning this conversation today with the Notice of Inquiry just presented by the Bureau, we need to be mindful of not impinging on local rights as we keep our important broadband objectives front-and-center. We need the right questions asked, the right data gathered and the input from all the relevant stakeholders. Getting high-speed, value-laden broadband out to every citizen in the land is, if it is to become reality, a partnership exercise—just as all the major infrastructure build-outs in this country have been, going back to the very beginning. That means the private sector and the public sector—the pubic sector including the federal, state and local levels. Working together, we can get this job done and keep the United States a world leader in technology, innovation and consumer opportunity.

My thanks to the Bureau for its hard work here and to the Chairman for bringing us another critical component of the National Broadband Plan.