Before the
Federal Communications Commission
Washington, DC 20554

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

To: The Commission

COMMENTS

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July 18, 2011

TABLE OF CONTENTS

EXECUTIVE SUMMARY

CTIA applauds the FCC's efforts to streamline the rights-of-way and wireless facilities siting process as part of a broad-based effort to expedite a nationwide roll-out of broadband facilities and infrastructure. The President has recognized the need to deploy ubiquitous wireless broadband, launching his National Wireless Initiative to stimulate innovation, investment, and job creation. Likewise, Congress has endorsed a national broadband initiative, providing for broadband stimulus programs and directing the Commission to develop the National Broadband Plan.

It is self-evident that wireless facilities cannot be constructed until the requisite, and often numerous, local, state and federal approvals are obtained. Without this infrastructure, broadband cannot be rolled out on a national scale. For these reasons, the Commission has recognized that time is of the essence in the siting process and that the local approval process can act as a bottleneck. In its *Shot Clock Declaratory Ruling*, the Commission clarified what constitutes a reasonable period of time for local zoning authority action on wireless facilities applications. The Commission also has worked to provide pole-top access on a timely basis to utility infrastructure for wireless attachments. While these efforts are significant, wireless broadband deployment would benefit from additional FCC action.

Local zoning delays arise from many sources. Restrictive ordinances threaten the ability of operators to find acceptable sites that meet their coverage needs. Laws limiting tower height effectively require deployment of multiple shorter towers, each of which must go through its own approval process. Because zoning procedures and requirements vary by jurisdiction, an inconsistent patchwork of regulations results.

CTIA urges the Commission to take steps to work more closely with local zoning authorities. Consistent with the recommendations of the FCC's Technical Advisory Committee ("TAC"), CTIA submits that wireless broadband deployment would be accelerated if the FCC would:

- Sponsor a municipal "race-to-the-top" program;
- Initiate a dialog with state and local authorities to further their understanding of technical matters and the FCC's role in addressing them;
- Urge localities to either employ a shortened shot clock for collocations or permit collocation by right (but at the same time, the Commission should make clear that it is prepared to shorten its own shot clock for collocations if the voluntary approach is unsuccessful), because collocations are critical to broadband roll-out and involve sites that have already received zoning approvals.

Opening this dialog will help local zoning authorities recognize the importance of leaving licensing-related determinations to the FCC, rather than injecting technically complex assessments into zoning decisions.

If the record shows that local rights-of-way approvals involve timeliness issues similar to those in local zoning, the Commission should adopt a Section 253 shot clock for such proceedings, as it did for zoning under Section 332. Any regulatory model that denies consumers access to new wireless services for an extended period of time due to a right-of-way dispute is contrary to the public interest. Thus, the Commission could adopt a rule providing that if the delay exceeds a specified period, the local authority will be presumed to have actually or effectively "prohibited" wireless service, and would thus be preempted under Section 253(a) unless the local authority rebuts that presumption by showing that the safe harbors in Section 253(b) or (c) apply.

The Commission should examine the reasonableness of unique communications-specific burdens imposed by state and local authorities. For example, some local authorities charge fees for wireless zoning approvals that are much higher than the fees for all other major construction projects. Some local authorities also require wireless applicants to pay the uncapped fees of the zoning boards' third party consultants. Such burdens create opportunity costs in the form of delays and uncertainty, disadvantaging subscribers and the entire Internet ecosystem, as well as adversely affecting public safety. The Commission should also consider whether educational or other FCC efforts are warranted with respect to the use of municipal tower siting consultants.

Further, the Commission can expedite the siting process by taking steps to clarify and speed its own NEPA and Section 106 processes. For example, the Commission should establish clear procedures for resolving Section 106 issues and set reasonable milestones for Staff review. The Commission should also expand its NEPA Team by hiring experienced professionals with environmental and historical expertise.

Additional significant delays in siting and obtaining rights-of-way occur when applicants attempt to site towers on federal land. As several federal agencies have jurisdiction over hundreds of millions of acres of land and thousands of buildings, coordination between agencies aimed at making federal properties more available should be a priority. The National Broadband Plan recognized this problem and called for cost-based fees and master contracts. CTIA supports these objectives. The Commission should work with the Administration and Congress to establish a clearly expressed right of access to federal lands, buildings, and rights-of-way. In addition, the Commission should also move forward with the TAC recommendation that the Commission request the President to issue an Executive Order streamlining access to federal rights-of-way and tower sites.

As the Commission recognizes, the benefits of expediting the siting process are manifold. In addition to the very positive work already completed by the FCC, streamlining the siting process will permit the virtuous cycle of innovation and investment that is a part of the wireless ecosystem to continue, thereby bringing the public the benefits of ever-increasing innovation, new services, increased capacity, and more ubiquitous coverage.

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COMMENTS

CTIA–The Wireless Association® ("CTIA")[1] respectfully submits these comments in response to the Commission's *Notice of Inquiry* ("*NOI*") concerning public rights-of-way and wireless facilities siting.[2]

I. THE FCC HAS UNDERTAKEN SIGNIFICANT EFFORTS TO MAKE THE WIRELESS FACILITIES SITING PROCESS MORE EXPEDITIOUS

Over the last several years, the FCC has contributed significantly to the efforts to deploy next generation wireless broadband infrastructure. CTIA hopes that the Commission will continue its focus on improving infrastructure deployment efforts. Indeed, the demands being placed on wireless and fiber-based broadband networks have made it more important than ever to speed and streamline the facilities siting process, not only at the state and local level, but at the

[1] CTIA–The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

[2] *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, *Notice of Inquiry*, 26 FCC Rcd 5384 (2011) ("*NOI*"), *summarized*, 76 Fed. Reg. 28397 (May 17, 2011).

federal level as well. By looking holistically at the siting process, the FCC can address remaining hurdles to expeditious siting of wireless facilities. The National Broadband Plan[3] documented the need for prompt deployment of the facilities that will allow broadband to become universally available in the United States. The National Broadband Plan observed that securing the rights to deploy infrastructure using public rights-of-way "is often a difficult and time-consuming process that discourages private investment" through regulations such as "permitting and zoning rules."[4] As the National Broadband Plan found, this process is made especially complex because of the great diversity among state and local jurisdictions concerning "access to and payment for accessing public rights-of-way."[5]

The Commission has long recognized the need for streamlining the process of facilities siting. The Commission has taken important strides in this direction, with its negotiation of two national programmatic agreements to implement Section 106 of the National Historic Preservation Act ("NHPA")[6] in connection with wireless facilities siting.[7] In 2009, the Commission also surveyed the impact of delays in local zoning approvals and compiled an extensive record regarding delays in the wireless siting process. In response, the FCC issued its

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3 FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010) ("National Broadband Plan"), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf.

4 *Id.* at 109.

5 *Id.* at 113.

6 16 U.S.C. § 470f ("Section 106").

7 *See* Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (Mar. 2001), 47 C.F.R. Part 1, App. B; Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (Sept. 2004), 47 C.F.R. Part 1, App. C.

Shot Clock Declaratory Ruling,[8] in which it provided a clear standard establishing when an applicant can appeal a failure to act by a state or local zoning authority. And just this spring, the Commission completed a major reformation of its pole attachment regulations, which had as two of its key goals guaranteeing wireless carriers access to utility poles and expediting the pole attachment process.[9] These significant efforts by the Commission have improved the process for deploying wireless broadband infrastructure. As CTIA details in these comments, a continued focus by the FCC on these issues will further help to strengthen and accelerate the deployment process.

II. CTIA SUPPORTS THE COMMISSION'S GOAL OF ACCELERATING BROADBAND DEPLOYMENT BY IMPROVING POLICIES ON PUBLIC RIGHTS-OF-WAY AND WIRELESS FACILITY SITING

At the outset, CTIA applauds the Commission's initiative in addressing the siting process in a holistic manner. The FCC clearly recognizes the need to candidly assess not only the local zoning process but the importance of public rights-of-way and wireless facility siting. Without such an all-encompassing approach, wireless infrastructure deployment may not be achieved rapidly enough to meet the Commission's universal broadband service goals.

The Broadband Acceleration Conference held in February 2011 was another important step toward meeting these goals. Chairman Genachowski's remarks at the conference were

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[8] *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 Declaratory Ruling*"), *recon. denied*, 25 FCC Rcd 11157 (2010), *pet. for rev. pending sub nom. City of Arlington v. FCC*, No. 10-60039 (5th Cir. filed Jan. 21, 2011).

[9] *Implementation of Section 224 of the Act*, WC Docket No. 07-245, GN Docket No. 09-51, *Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240 (2011) ("*Pole Attachment Order*"), *pets. for recon. pending, pets. for review pending sub nom. Electric Power Service Corp. v. FCC*, Case No. 11-1146 (D.C. Cir. filed May 18, 2011).

prescient, noting that "removing barriers to broadband build-out and speeding up processes to lower the cost of deployment" is a critical part of the Commission's broadband strategy.[10] Accordingly, he stated, "[w]e need rules that serve legitimate public needs without erecting costly or unnecessary barriers."[11] The Chairman pointed both to the high cost of obtaining access to rights-of-way for fiber deployment and to the "red tape" and delays — often a year or more — entailed in the wireless siting process, and observed that "removing red tape and expediting approval processes could unleash $11.5 billion in new broadband infrastructure investment over two years."[12] Under the Chairman's leadership, the Commission progressed rapidly from discussing accelerating broadband to adoption of an action plan just two months later, in the form of the *NOI.*

The direct link between expediting tower siting and the success of the broadband build-out was recently acknowledged by the Commission's own Technical Advisory Council ("TAC"). It concluded that "[e]xpediting the process for tower siting could have an important impact on the development of local broadband access in communities, boosting their marketability to new employers and network access for local entrepreneurs."[13]

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10 Prepared Remarks of FCC Chairman Julius Genachowski at the Broadband Acceleration Conference, Washington, D.C., at 2 (Feb. 9, 2011) ("Chairman's Broadband Acceleration Remarks"), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-304571A1.pdf.

11 *Id.*

12 *Id.* at 3.

13 *See* Memorandum from Tom Wheeler, Chairman, Technical Advisory Council, to Chairman Genachowski and Commissioners Copps, McDowell, Clyburn and Baker (Apr. 22, 2011) ("TAC Chairman's Report"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306065A1.pdf.

III. THE PUBLIC, THE PRESIDENT, THE CONGRESS, AND THE COMMISSION RECOGNIZE THE CRITICAL IMPORTANCE OF RAPID WIRELESS INFRASTRUCTURE BUILDOUT

A. In a Competitive Marketplace, Subscribers Demand Ubiquitous Coverage and Service Reliability

As the Commission has recognized, network coverage is a critical competitive metric for every wireless network operator seeking to "provide network coverage that is sufficient to attract new customers, including enticing customers to switch from their existing service providers."[14] In addition to coverage, wireless networks also differentiate themselves on factors such as service quality, reliability, capacity, and capabilities.[15] These demands have spurred network operators to undertake a wide variety of network technology upgrades, including HSPA+, LTE, and WiMAX.[16] Network operators also seek to compete in service quality based on their wireless device offerings, including smartphones, tablets, and laptop computer modems that offer a breathtaking array of features and technologies.

In short, wireless customers have ever-increasing expectations regarding where they can use their devices and how reliable the service will be.

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14 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services,* WT Docket No. 10-133, *Fifteenth Report,* FCC 11-103, at ¶ 63 (June 27, 2011) ("*Fifteenth Report*").

15 *Id.* at ¶¶ 104-05.

16 *Id.* at ¶¶ 108.

B. The Public Clamors for New Services, Further Spurring Demand for Broadband Capacity and Coverage in a Virtuous Cycle

1. The Wireless Virtuous Cycle Creates Ever-Increasing Innovation

Last year, the U.S. technology sector grew approximately twice as fast as the rest of the U.S. economy.[17] Much of this success can be attributed to the staggering growth of wireless. This growth, in turn, is the product of the cycle of wireless technological innovation. Indeed, the President has recognized the wireless industry's virtuous cycle, noting that "[i]nnovative new mobile technologies hold the promise for a virtuous cycle — millions of consumers gain faster access to more services at less cost, spurring innovation, and then a new round of consumers benefit from new services."[18]

Notably, innovation and investment are not confined to one segment of the mobile wireless ecosystem. As CTIA has previously noted, these developments occur in each link of the wireless "value chain."[19] But instead of thinking of a linear wireless value chain, the wireless market is best characterized by a virtuous cycle of innovation and investment:

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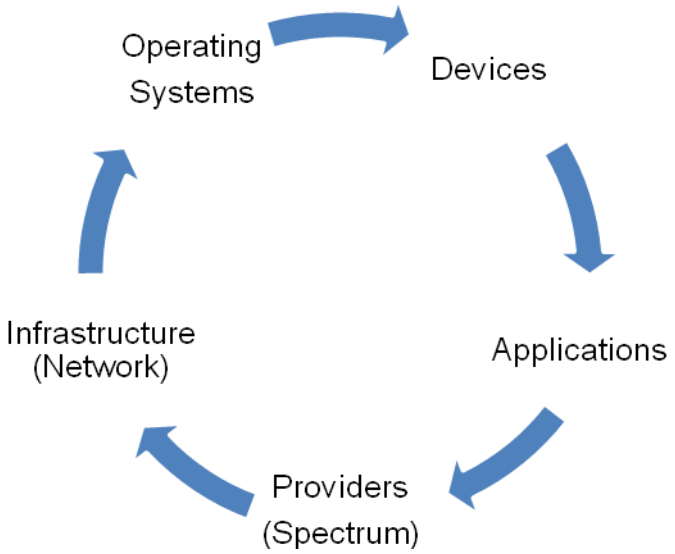
17 *See* FCC Chairman Julius Genachowski, "The Clock is Ticking," (Mar. 16, 2011), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305225A1.pdf.

18 The White House, *Memorandum on Unleashing the Wireless Broadband Revolution* (June 28, 2010) ("Presidential Memorandum"), 75 Fed. Reg. 38387 (July 1, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution.

19 *See* Comments of CTIA in response to the U.S. Department of Commerce Innovation Strategy Request for Information (Apr. 1, 2011) ("CTIA DOC Innovation Comments"), *available at* http://files.ctia.org/pdf/filings/110401_CTIA_DOC_Innovation_Comments_Final.pdf; *see also* Comments of CTIA–The Wireless Association®, GN Docket Nos. 09-157, 09-51 (Sept. 30, 2009).



This loop characterizes the ongoing interactions between all aspects of the industry as innovation and investment occur at any time along the circle depending on developments elsewhere on the circle.

For present purposes, the most critical aspect of this cycle is that innovations in devices, applications, and network services all lead to an increased demand for spectrum, capacity and coverage, spurring innovations and investment in infrastructure.

2. Increased Demand Leads to Network and Infrastructure Innovation

Since the introduction of cellular technology, increased demand has prompted network operators to split cells and distribute demand across a larger number of smaller cells. Recently, however, there have been a number of innovative developments that take this evolution to the next level and beyond. Microcells and picocells have long been used to enhance coverage and capacity in dense usage zones. Distributed Antenna Systems ("DASs") similarly have been used to provide highly focused coverage and capacity, in both indoor and outdoor environments.

Likewise, femtocells are used in homes or offices to provide immediate-area coverage, in most cases without direct management from the switch.

These various deployments now are combining in "heterogeneous networks" or "HetNets." HetNets comprise networks of macrocells that also incorporate and coordinate with even smaller cells, such as microcells, picocells, and DASs, to dynamically improve coverage and capacity where and when it is most needed (*e.g.*, in dense urban environments, at peak use hours, etc.). One approach to HetNets is to design intelligence into the lower-level cells that allow them to operate as nodes in "self-organizing networks" or "SONs" under the network operator's overall control, instead of requiring the network operator to directly manage each picocell or microcell as it might manage a macrocell.[20] SON features have been incorporated into the LTE specification for advanced networks, and operators are considering further enhancements.[21]

In addition to reducing cell size, infrastructure manufacturers have focused on reducing the size of cellular facilities themselves to allow placement in smaller spaces. For example,

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[20] *See, e.g.*, Zahid Ghadialy, *What Are Heterogeneous Networks (HetNets)?*, 3G & 4G WIRELESS BLOG (Dec. 14, 2010), http://3g4g.blogspot.com/2010/12/what-are-heterogeneous-networks-hetnets.html ("*HetNets*").

[21] *See id.*; Press Release, NEC Corp., *NEC Develops Self Organizing Network Technologies for Heterogeneous LTE Networks* (Feb. 11, 2011), *available at* http://www.nec.co.jp/press/en/1102/1101.html; Lynnette Luna, *AT&T's Rinne: HSPA+ to Set LTE Apart from Competitors*, FierceWireless (Mar. 23, 2011), http://www.fiercewireless.com/ctialive/story/att-cto-talks-hspa-advantage-when-it-rolls-out-lte/2011-03-23 ("Rinne also spoke in depth about AT&T's plans for heterogeneous networks. . . . AT&T is embracing small-cell network architecture in the form of microcells, distributed antenna systems and picocells at the street level. 'The LTE Advanced standards work includes many of the things required for heterogeneous networks,' Rinne said. 'We see exciting opportunities to enhance coverage and capacity through small [c]ells. The challenges of constructing, backhaul and interference is something we are working on.' AT&T is proposing to build some 80 new small-antenna tower sites on top of utility poles across downtown Palo Alto, Calif., in a bid to bolster voice and data capacity in areas that experience heavy data traffic.").

Alcatel-Lucent has developed the "lightRadio" solution, a wireless base station that is a cube only a few inches across (*i.e.*, roughly the size of a Rubik's cube), which incorporates the base station and antenna, requiring only power and a fiber optic connection. Other vendors are also contributing to the innovation effort — "Huawei is working on microcells while Ericsson is building integrated antennas and radios to reduce the footprint of equipment. Nokia Siemens Networks recently announced Liquid Radio, which uses distributed antennae and virtualized baseband processing to provide a highly distributed architecture built around small cells and miniature base station designs."[22]

The bottom line is that equipment vendors, wireless system operators, and infrastructure providers are engaging in wide-scale innovation as they integrate a wide variety of different network topologies and technologies. The goal remains constant — to allow highly-focused small-scale facilities to be interfaced with larger-scale facilities in a way that empowers network operators to efficiently target voice calls and broadband connections where they are needed, in the most efficient manner possible.

3. When the Public Expects to Use Innovative Wireless Services Everywhere, Providers Have a Powerful Incentive to Invest in Expanded and Improved Coverage

As wireless devices and networks have become more ubiquitous and powerful, wireless has become ever-present in consumers' lives. Subscriber growth has been continuous: In 1997,

[22] Lynnette Luna, *Microcells, oDAS and Picocells: Small-Cell Architecture to Stem Wireless Data Deluge*, FIERCEBROADBANDWIRELESS (Apr. 27, 2011), http://www.fiercebroadbandwireless.com/special-reports/microcells-odas-and-picocells-small-cell-architecture-stem-wireless-data-de.

there were approximately 55 million wireless telephone subscribers.[23] By year-end 2010, that number had risen to more than 302 million, as shown in Figure 1:[24]

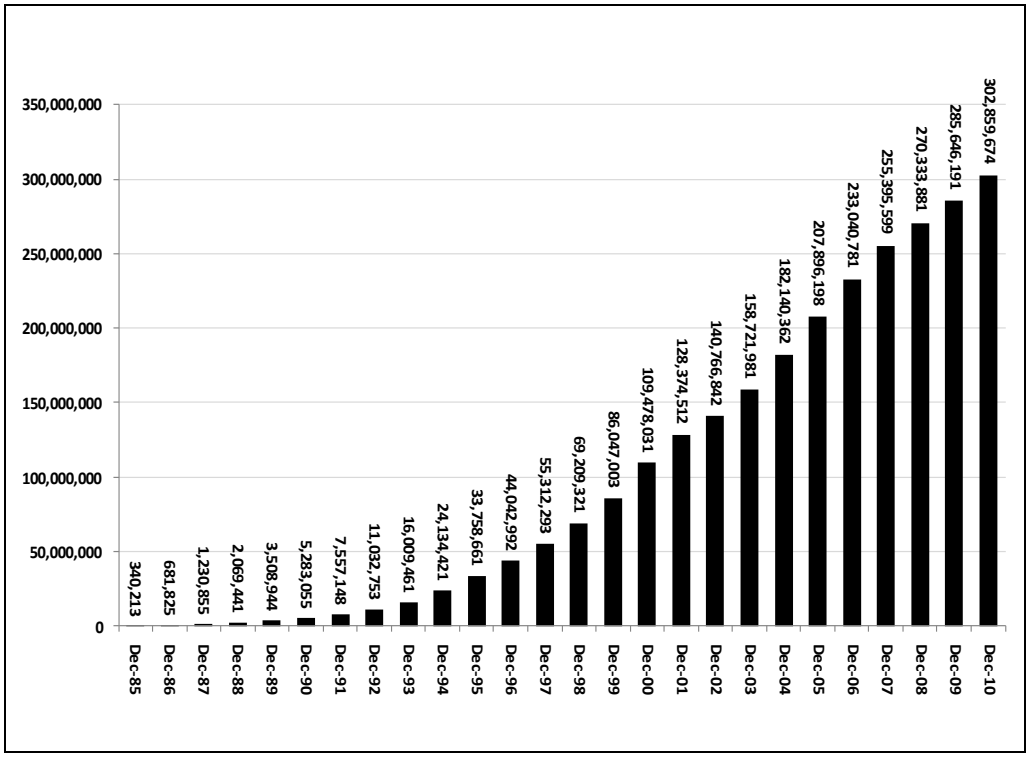

Figure 1. Year-End 2010 Estimated Wireless Connections
Source: CTIA Semi-Annual Survey

For service providers, the fact remains that network reliability, coverage, and capacity are critical to a carrier's ability to compete and attract customers. This competitive pressure drives wireless companies to invest billions of dollars each year to expand their service territories, improve the quality of their service, increase the capacity of their networks, and bring innovative services to consumers across the country. As shown in Figure 2, over the past 20 years, wireless

[23] *See* CTIA Year-End Top-Line Survey Results, at 7 (March 2011) ("CTIA Semi-Annual Survey"), *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2010_ Graphics.pdf.CTIA Semi-Annual Survey; *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Third Report,* 13 FCC Rcd 19746, App. B, at B-2 (1998) (chart is omitted from published FCC Record version).

[24] *See* CTIA Semi-Annual Survey; *see also Fifteenth Report*, FCC 11-103, at App. C, Table C-1.

carriers have made enormous investments in their networks, committing more than $310 billion in cumulative capital expenditures.[25] This enormous sum was spent solely on network build-out. The number would become even larger if it were to include expenditures on spectrum and expenditures by non-carrier members of the ecosystem.

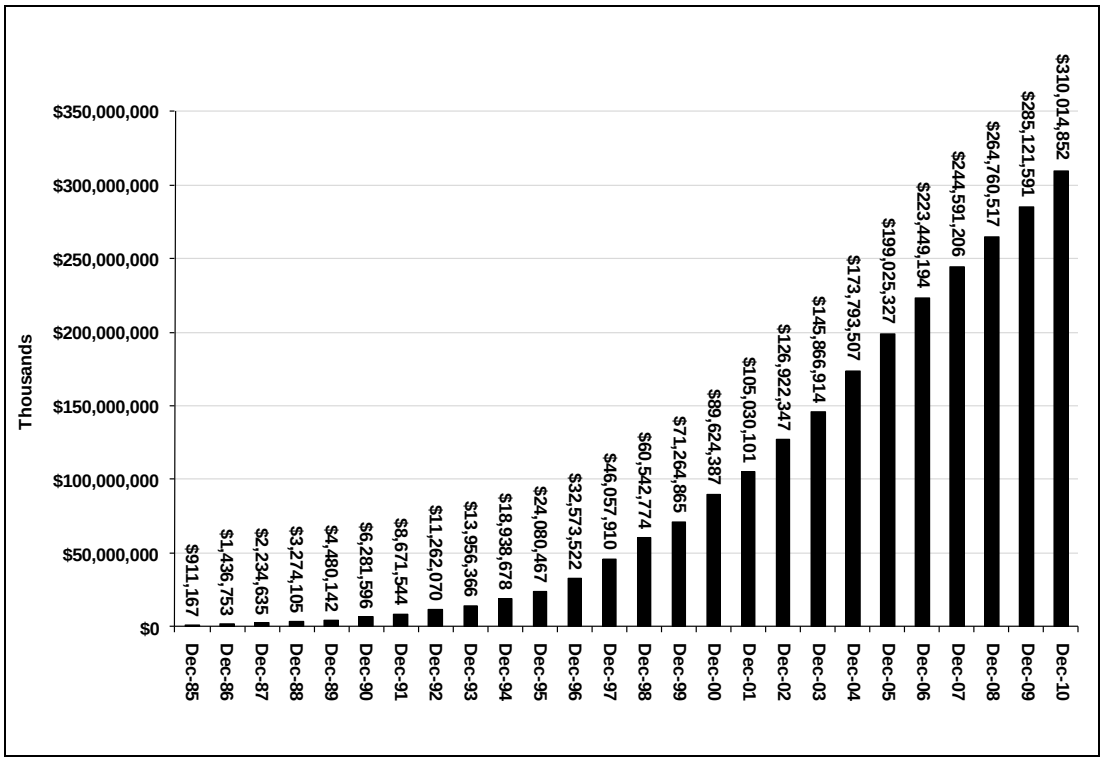

Figure 2. Cumulative Capital Investment
Source: CTIA Semi-Annual Survey

These investments are driven by twin market-based incentives: tremendous subscriber growth and spectacular increases in usage. The industry's continued investment in mobile broadband is a testament to the fact that, in a competitive industry, subscriber usage is a powerful incentive to invest and thereby stimulate continued growth.

The continuing growth of the mobile industry does not result in investment only in physical plant. It also stimulates job growth. Among the many benefits of the explosion of

[25] CTIA Semi-Annual Survey.

wireless innovation and consumer adoption is an ever-increasing array of high-paying, skilled jobs.

C. The National Broadband Initiative's Success Hinges on Expeditious Siting

1. The President, the Congress, and the FCC Have Recognized the Need for a National Broadband Initiative

During the 2011 State of the Union Address, the President shared his vision for a connected America: "Within the next five years, we'll make it possible for businesses to deploy the next generation of high-speed wireless coverage to 98 percent of all Americans. This isn't just about … faster Internet or fewer dropped calls. It's about connecting every part of America to the digital age."[26] Shortly thereafter, he launched his National Wireless Initiative to achieve this objective, recognizing that high-speed wireless is "how we'll spark new innovation, new investment, [and] new jobs."[27]

Congress, likewise, has recognized the need for a broadband initiative. The 2009 stimulus bill — the American Recovery and Reinvestment Act[28] — funded the Broadband Technologies Improvement Program at the Department of Commerce and the Broadband Initiatives Program at the Department of Agriculture. It also directed the FCC to prepare the National Broadband Plan, and recommend steps that could be taken across the entire government

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[26] President Barack Obama, State of the Union Address (Jan. 25, 2011) ("State of the Union Address"), *available at* http://www.white house.gov/the-press-office/2011/01/25/remarks-president-state-union-address.

[27] President Barack Obama, Remarks on the National Wireless Initiative (Feb. 10, 2011) ("President's Wireless Initiative Remarks"), *available at* http://www.whitehouse.gov/the-press-office/2011/02/10/remarks-president-national-wireless-initiative-marquette-michigan.

[28] Pub. L. No. 111-5, 123 Stat. 115, 516 (2009).

to "seek to ensure that all people of the United States have access to broadband capability and . . . establish benchmarks for meeting that goal."[29]

The FCC has taken its charge to heart, devoting extensive resources to completing its ambitious Plan and initiating dozens of proceedings to carry out its recommendations. This very proceeding provides further evidence of the Commission's commitment to make broadband universally available.

2. Without Expeditious Siting, the Objectives of the National Broadband Initiative Will Not Be Achieved Within the Desired Timeframes

The National Broadband Plan set ambitious targets for broadband deployment. Recognizing that wireless broadband will necessarily play a critical role in ensuring nearly universal broadband service, the National Broadband Plan recommended that "[t]he FCC should make 500 megahertz newly available for broadband use within the next 10 years, of which 300 megahertz between 225 MHz and 3.7 GHz should be made newly available for mobile use within five years."[30] But even if the FCC succeeds in allocating and licensing that spectrum in a timely fashion, the spectrum will not be "available" for mobile or broadband "use" unless and until wireless infrastructure can be deployed to utilize the spectrum for providing service. Just as you cannot pump gas into your car unless the pump has a hose and nozzle, spectrum cannot be utilized if transmission facilities are not built.

It often takes far longer to obtain the local and federal siting approvals and complete the National Environmental Policy Act ("NEPA")[31] and Section 106 review processes that are a

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29 *Id.* § 6001(k)(2), 123 Stat. at 516

30 National Broadband Plan at 84 (Recommendation 5.8).

31 42 U.S.C. § 4321 *et seq.*

prerequisite for tower construction than it takes to build the tower and begin providing service. Achievement of the Commission's broadband wireless deployment schedule, therefore, requires streamlining the siting process and reducing the time needed for site approvals wherever possible.

D. The FCC's Aggressive Buildout Schedules Leave No Room for Delays in Siting

In addition to the ambitious timeframes in the President's speech and the National Broadband Plan, there is another compelling reason for the Commission to streamline the wireless infrastructure process. The Commission has established strict build-out schedules in many of the bands it has already allocated for services that will assist in bringing wireless broadband to the American people, such as the Advanced Wireless Service and 700 MHz bands.[32] For example, some 700 MHz licensees must meet geographic area or population coverage benchmarks by June 13, 2013.[33] There is no room for delays in the siting process when licensees are under a licensed-based obligation to build out their networks in accordance with an aggressive deployment schedule.

Moreover, the Commission should take steps to motivate state and local authorities to eliminate delays and barriers to the placement of unlicensed as well as licensed wireless broadband facilities. Broadband wireless operators may use unlicensed spectrum (*e.g.*, Wi-Fi, WiMAX, or white space spectrum) as well as licensed spectrum for providing service. The Commission's commitment to rolling out broadband promptly is not limited to licensed spectrum.

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32 *See* 47 C.F.R. § 27.14 (establishing construction requirements).

33 47 C.F.R. § 27.14(g), (h), (i), (m).

IV. ESCALATING DELAYS ARE CRITICAL IMPEDIMENTS IN THE SITING PROCESS

A. Timeliness is "Of the Essence" in the Siting Process.

To its credit, the Commission has surveyed the state of local zoning approval processes and worked to expedite the process by establishing a "shot clock" for local zoning actions. In the *Shot Clock Declaratory Ruling,* the Commission found that "wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and emergency services."[34] In reaching this conclusion, the Commission cited data from CTIA and its members showing that more than 3,300 siting applications were pending before local jurisdictions with about 760 pending for more than a year, and 180 awaiting final action for *more than 3 years*.[35]

In the *Shot Clock* proceeding, wireless operators also provided evidence of delays based on their individual experiences. For example, Sprint Nextel stated that in several California communities the typical processing times ranged from 28 to 36 months.[36] NextG Networks described delays of 10-25 months for placing facilities in public rights-of-way even when only seeking to replace equipment.[37] Verizon Wireless reported delays of more than a year in the District of Columbia, and T-Mobile stated that one third of its 706 collocation applications had been pending for more than a year with 114 pending for over 3 years.[38] Based on this record, the

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34 *Shot Clock Declaratory Ruling,* 24 FCC Rcd at 14004-05 ¶ 32.

35 *Id*. at 14005 ¶ 33.

36 *Id.* (citing Sprint Nextel Comments at 5).

37 *Id.* (citing NextG Networks Comments at 5-8).

38 *Id*. (citing Verizon Wireless Comments at 6-7).

Commission ruled that actions taking longer than 90 days for collocations, and 150 days for new sites, are presumptively unreasonable under 47 U.S.C. § 332(c)(7)(B).[39]

Unfortunately, even with the shot clock, wireless operators continue to experience significant delays at the local level. For example:

- An application for the construction of an 80-foot tower disguised as a bell tower on a church property in Sterling, Virginia just recently reached the local board for action this past June after two years of review by the county planning staff and the Planning Commission.[40]

- Wireless opponents forced the cancellation of plans to build a cell-phone tower disguised as a tree at a Boy Scout camp in El Cerrito, California after opponents successfully obtained a two-year moratorium on the placement of new towers in the city; the operator had previously spent almost two years on the project.[41]

- It took more than a year to obtain clearance to construct a 190-foot tower in Albion, Maine; the main disagreement among the parties was whether the wireless operator had demonstrated a sufficient need for the site.[42]

- A network operator filed suit in federal district court after waiting nine months for a municipality to act on its special permit application to replace an existing tower with a new monopole structure with other collocated facilities.[43]

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39 *Id*. at 13995 ¶ 4.

40 *See Opposition Continues To Sterling Cell Tower Plan*, Leesburg Today (June 21, 2011), http://www.leesburg2day.com/news/article_93c25112-9c09-11e0-8e78-001cc4c03286.html.

41 *See* Charles Burress, *Camp Herms Cell Tower Plan Canceled by T-Mobile*, ElCerritoPatch (June 12, 2011), http://elcerrito.patch.com/articles/camp-herms-cell-tower-plan-canceled-by-t-mobile.

42 Scott Monroe, *US Cellular tower ready to go in Albion*, Morning Sentinel (Apr. 1, 2011), http://www.onlinesentinel.com/news/us-cellular-tower-ready-to-go_2011-03-31.html. U.S. Cellular had utilized the "shot clock" to file a complaint at a federal district court but the case never went to court because the parties instead entered into a consent agreement to allow for the tower's construction. *Id.*

43 Jonathan Kramer, *Lawsuit Tests Mettle of FCC Shot Clock*, AGL Bulletin (Apr. 4, 2011), http://cellularpcs.com/2011/04/04/agl-bulletin-lawsuit-tests-mettle-of-fcc-shot-clock/; Irondequoit, New York, *St. Paul Fire District Cell Tower Facts and Application, available at* http://www.irondequoit.org/content/view/342/1353/.

- A wireless operator filed suit in federal district court pursuant to the *Shot Clock Declaratory Ruling* after waiting over three years for action on an application to place an antenna inside a church steeple, where it will not be visible to the public.[44]

Broadband build-out requires a faster and more predictable siting process, not a slower and more fragmented one. Without an improved siting process, carriers will be unable to more widely deploy broadband and E-911 services without unnecessary delay, and the introduction of new services will be delayed. And even the continued use of existing facilities may be endangered — for example, San Francisco has adopted a new Wireless Ordinance and implementing regulations that would terminate existing site permits and require a new application process instead of allowing automatic renewal.[45] The shot clock has been very beneficial as it has helped to focus local officials earlier on in the process, but more assistance is needed.

B. Numerous Sources of Delay Can be Identified

With the economic and societal benefits of mobile broadband, local authorities and residents can do much more to expedite the construction of new wireless facilities in their communities. While many do welcome needed towers, too often a handful of people seek to use every conceivable procedural vehicle available at the state, local, and federal levels to unnecessarily delay the construction of a wireless facility for months, or even years.

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[44] *See* Adam Klasfeld, *Verizon Sues Muttontown over Antennas,* Courthouse News Service (Aug. 10, 2010), http://www.courthousenews.com/2010/08/10/29435.htm; *New York SMSA Limited Partnership d/b/a Verizon Wireless v. Incorporated Village of Muttontown,* Case No. CV-10-3573 (E.D.N.Y. filed Aug. 4, 2010).

[45] *See* S.F., Cal., Ordinance No. 12-11, § 4; San Francisco Public Works Code, Art. 25, §§ 1519, 1520.

Exacerbating the difficulties in tower siting is the fact that zoning procedures and requirements vary by jurisdiction. For wireless systems that span multiple communities, the inconsistent patchwork of regulations constitutes a formidable source of delay and can impair the establishment of an optimal network configuration. For example, instead of going with the most efficient option of building a single tall tower that can be used by multiple collocating carriers, a carrier — to address local opposition or satisfy local zoning restrictions — may instead have to build several smaller towers to replicate the same coverage. Smaller towers have little or no room for collocations, meaning that more towers will need to be built by competing carriers. This results in the need for more siting approvals, which, in turn, produces additional delay. A more detailed discussion of the sources of delay is set forth below.

1. Restrictive Local Zoning Ordinances Increase Siting Timelines by Making the Process of Finding a Site Difficult and Time Consuming

The wireless industry has made great strides to increase network coverage throughout the United States. As the Commission found in its recent *Fifteenth Report*, over 94 percent of the U.S. population is covered by four or more wireless carriers and about 90 percent are served by five or more providers.[46] As networks evolve in urban areas, operators are looking to increase system capacity by building their sites closer to where the end users live and work. Restrictive local zoning ordinances, however, threaten the ability of operators to find suitable site locations to meet their coverage needs.

For example, local jurisdictions like the Town of Ashland, Massachusetts prohibit the placement of wireless facilities in districts zoned residential absent a special showing as to need

[46] *Fifteenth Report*, FCC 11-103 at ¶ 44, Table 5.

and the lack of feasible alternatives, making it difficult to place sites near residential areas.[47] It is ironic that these prohibitions are in effect while the public is increasingly using wireless service in their homes instead of wireline telephone service.[48] Counties and municipalities, such as Prince George's County, Maryland and Mumford, Tennessee have significant setback requirements that typically increase depending on the height of the tower, thus limiting the placement of taller towers to large parcels that can accommodate the setback distance.[49] Other jurisdictions, such as Hempstead, New York prohibit the placement of wireless facilities near schools and churches.[50] Some localities even restrict the overall height of the tower and the structure type, while others place moratoria on the placement of new sites altogether.[51]

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47 ASHLAND, MASS., CODE ch. 282, § 8.3.3(3).

48 *See, e.g., Fifteenth Report,* FCC 11-103 at ¶ 365 (citing evidence that 21% of households had "cut the cord" as of mid-2009).

49 *See* PRINCE GEORGE'S COUNTY, MD., CODE § 27-416(a)(1) (requiring setback distance equal to the height of the structure in commercial and industrial zones, and residential zones owned by a public entity); MUNFORD, TENN., MUN. ZONING ORDINANCE art. IV, § 48.9 (requiring setback of greater of 70 percent tower height or district yard requirements when not constructed on existing utility structure and 100 percent of tower height when adjacent to residential district); *see also* ASHLAND, MASS., CODE ch. 282, § 8.3.3(4) (prohibiting wireless communication facilities within 300 feet of a residential building in residential zones and certain licensed schools).

50 *Hempstead, NY Adopts Ordinance Restricting Cell Towers/Antennas Near Schools, Day Care, Homes and Places of Worship, Limit Set at 1,500 Feet or Approximately 1/4 Mile*, ElectromagneticHealth.org (Sept. 25, 2010), http://electromagnetichealth.org/electromagnetic-health-blog/hempstead/ ("[Hempstead, Long Island, N.Y. . . . adopt[ed] ordinance restricting the placement of antennas and cell towers within 1,500 feet of schools, day care centers, places of worship and homes unless there is compelling evidence for 'need' and an application for a Special Use Permit").

51 *See* RIO ARRIBA COUNTY (NEW MEXICO) TOWER ORDINANCE, Ordinance No. 2007-02, art. III, § II(B)(1)-(2) (sets maximum height of towers at 70 feet, and lowers the maximum height to 36 feet if within one-half mile of a school, historic property, senior center, or other designated facilities), *available at* http://www.rio-arriba.org/pdf/ordinance_towers_2007-02_.pdf; MUNFORD, TENN., MUNICIPAL ZONING ORDINANCE art. IV, § 48.5 ("All telecommunication towers that exceed a height of 300 feet constructed in a lattice type manner and any tower that is not specifically permitted as a use permitted or permitted on appeal the City of Munford shall be

(continued on next page)

In any metropolitan service area, there will be numerous sets of zoning and land-use ordinances and regulations that are enforced by many different regulatory bodies. As a result, it is nearly inevitable that wireless operators will be faced with a daunting patchwork of inconsistent and restrictive requirements when they seek to locate a tower encompassing multiple jurisdictions located in or around an area needing better coverage or capacity. Restrictions such as those in the Mount Vernon, New York Zoning Code, which require that any wireless facility applicant demonstrate that its proposal will "provide service primarily and essentially within the City with service to adjacent municipalities to not exceed 40% of the total area to be covered by the proposed facility,"[52] frustrate tower siting without any conceivable public benefit. Such laws effectively require that wireless networks be designed according to municipal boundaries, rather than public demand or the provision of reliable and adequate coverage. Moreover, the fact that jurisdictions severely limit the height of towers means that more towers are needed to provide reliable service to the area, which, in turn, makes it more difficult to find "acceptable" sites, as defined by restrictive zoning codes.

(footnote continued)
specifically prohibited."); TOWN OF ASHLAND, MASS., CODE ch. 283, § 8.3.3(8) (prohibiting wireless communication facilities taller than ten feet above the average height of buildings, tree canopy or other structures within 300 feet and taller than ten feet above the height limit of the zoning district within the facility is located, unless completely camouflaged); CALABASAS, CAL., ORDINANCE No. 2011-286U (June 8, 2011) (imposing a temporary moratorium on all permits for wireless communication facilities); Charles Burress, *Camp Herms Cell Tower Plan Canceled by T-Mobile*, ElCerritoPatch (June 12, 2011), http://elcerrito.patch.com/articles/camp-herms-cell-tower-plan-canceled-by-t-mobile (reporting that City Council imposed two-year moratorium on the placement of cell towers in city).

52 MOUNT VERNON, N.Y., MUNICIPAL CODE § 267-28(J)(4)(d)(1).

2. The Insertion of Municipal Consultants into the Permitting Process Often Results in Additional Delay, Increased Costs, and Litigation

Another significant source of delay encountered at the local level is the unnecessarily elongated siting process that results when consultants are used by local authorities. Consultants are typically hired by municipalities to review tower proposals and the consultant's fee is often required to be paid by the applicant, rather than the municipality. Applicants complain that consultants frequently make multiple requests for additional information, and since the municipalities are not paying the consultants' fees, there is little meaningful oversight of the consultants' practices. Through these multiple requests, consultants often frustrate the goals of the *Shot Clock* by significantly delaying the progress of a wireless infrastructure proposal to a final zoning decision. Wireless operators have publicly raised the issue as to whether consultants are financially motivated to delay the process.[53] The FCC-convened TAC also noted the role of consultants in its report when it found that siting applications are too often being rejected multiple times for being incomplete.[54] The Commission should consider the potential negative effects consultants' can have on siting and consider whether educational or other FCC efforts are warranted.[55]

Last year, a federal district court in New York reviewed the City of Mount Vernon's denial of a wireless facility application where the city had relied on a consultant whose fees were

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53 This concern was noted by wireless operators at a recent event discussing the deployment of Distributed Antenna Systems. *See* Paul Kirby, *DAS Proponents Seek FCC Action to Streamline Siting of Facilities*, TR DAILY (June 21, 2011) ("Several audience members complained about consultants to local governments that drive up the cost of the review process."), *available at* http://www.multibriefs.com/briefs/pcia/PCIAstory.pdf.

54 *See* TAC Chairman's Report at 2; TAC Meeting, Mar. 30, 2011, Presentation Slides at 9, available at http://www.fcc.gov/oet/tac/TACMarch2011mtgfullpresentation.pdf.

55 *See infra* Section V.E.2.

required to be paid by the applicant. The court held that the city denied the applicant's application without substantial evidence and that the assessment of the consultant's fees from the applicant was unreasonable and illegal, and it ordered disgorgement of the fees and grant of all necessary permits.[56] In that case, MetroPCS had applied for a Special Use Permit for the collocation of six stealth antenna panels on a building rooftop where three other wireless carriers had already received local approval to install similar facilities.[57] In addition to an application fee, the city required MetroPCS to establish an $8,500 escrow account for the payment of fees incurred by the city's consultant, Center for Municipal Solutions ("CMS"), and the city later required MetroPCS to pay $5000 in additional fees to CMS.[58]

CMS subjected the wireless company to repeated requests for additional information over a period lasting more than a year, and ultimately recommended that the application be denied. The Planning Board denied the application.

The court held that the decision was unsupported by the record, which reflected that MetroPCS had supplied adequate information to justify a grant, and that the city and its consultant had improperly sought to require the use of alternative technology, given that the FCC, rather than the local jurisdiction, has authority over the technology to be used.[59] The court also found that the consultant's insistence on alternative technology unreasonably delayed a decision.[60] As to the fees charged MetroPCS, the court pointed out that the city, by requiring the carrier to cover the costs of the consultant's fees, had no incentive to expedite the siting process;

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56 *See MetroPCS New York, LLC v. City of Mount Vernon*, 739 F. Supp. 2d 409, 412 (S.D.N.Y. July 22, 2010).

57 *Id*.

58 *Id*. at 412, 416.

59 *Id.* at 419-23.

60 *Id.* at 424.

"[t]he City of Mount Vernon has unlimited discretion to charge a wireless carrier prohibitive fees by simply dragging out the process and utilizing consultants for its convenience — rather than out of necessity."[61] In particular, the court criticized the assessment of fees for the consultant's unlawful and discriminatory insistence on alternative technology in holding that MetroPCS was entitled to a disgorgement of the consulting fees charged beyond an amount related to "legitimate work."[62] The fact that local zoning authorities are retaining consultants who engage in such practices is a disturbing development that warrants Commission action to address and resolve in cooperation with state and local governments.

3. The Involvement of Other Federal Agencies in the Siting Process Often Results in Significant Delays in Siting

Timely access to public rights-of-way is essential for the deployment of mobile broadband networks. The experience of CTIA's members, however, shows that there are significant delays in dealing with the agencies that manage federal rights-of-way in the U.S. As the National Broadband Plan noted, "[t]he federal government is the largest landowner in the country—650 million acres, constituting nearly one-third of the land area of the United States."[63] Federal agencies have in their portfolios large swaths of land — for example, the Bureau of Land Management administers 261 million acres of public lands, the National Parks Service is responsible for 83 million acres, and the Forest Service manages 192 million acres.[64] In

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61 *Id.* at 425-26.

62 *Id*. at 426.

63 National Broadband Plan at 115.

64 NTIA, *Improving Rights-of-Way Management Across Federal Lands: A Roadmap for Greater Broadband Deployment* at 7-8 (Apr. 2004), http://www.ntia.doc.gov/reports/fedrow/frowreport_4-23-2004.pdf.

addition, there are federal lands under the jurisdiction of the Defense Department and thousands of buildings administered by the General Services Administration ("GSA").

The delays and difficulties associated with siting on federal land have a two-fold adverse effect: First, use of federal lands often results in an elongated siting timeline. Second, these difficulties give tower owners a disincentive to use federal lands, resulting in underutilization of those lands.

For example, providers are experiencing undue delays in getting the requisite approvals from agencies to build their sites. While the National Telecommunications and Information Administration ("NTIA") has established a targeted time frame for agency action on requests within 60 days of receiving a completed application,[65] in practice, agencies are taking much longer than that. In an era when both the Executive Branch and the Congress are exhorting carriers to expeditiously build out broadband infrastructure, such delays on the part of federal agencies should not be considered acceptable.

CTIA encourages the FCC's efforts to improve matters and notes that the federal government has repeatedly attempted to address the need of communications providers to have access to federal lands and buildings, and to federal rights-of-way. During the Clinton Administration, the GSA established guidelines for placing wireless antennas on federal land and buildings.[66] GSA also administers the National Antenna Program, under which wireless towers

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65 NTIA, *Federal Rights of Way: Application Process for Telecommunications Projects,* http://www.ntia.doc.gov/FROWsite/rowapplprocess.htm (last visited July 182, 2011) ("*Application Process*").

66 *See* 41 C.F.R. §§ 102-79.70–.100; President William J. Clinton, *Memorandum on Facilitating Access to Federal Property for the Siting of Mobile Services Antennas,* 31 WEEKLY COMP. PRES. DOC. 1424 (Aug. 10, 1995); *see also* National Broadband Plan at 115 & nn.58-59.

are placed on federal buildings pursuant to leases.[67] And NTIA sought to streamline the process of obtaining the right to use federal rights-of-way, based on recommendations in a 2004 working group report, by establishing a standard application form (which is of limited utility, since it is subject to supplementation by each agency) and setting time frames.[68]

Despite these positive steps, the federal government needs to go further to facilitate wireless facility siting and access to rights-of-way on federal properties. As siting on non-federal lands becomes harder to find, federal lands and buildings could play an important part in facilitating broadband build-out. The National Broadband Plan zeroed in on this issue and concluded that "the federal government can do more to facilitate access to its rights-of-way and facilities that it either develops or maintains," and recommended the establishment of cost-based fees and master contracts that would "standardize the treatment of key issues covering rooftop space, equipment and technology," thereby serving the twin goals of (a) lowering real estate costs for towers; and (b) streamlining zoning and permitting.[69] As discussed below in Section V.F, legislation has now been introduced that calls for these reforms to be instituted.

V. THE FCC CAN TAKE AFFIRMATIVE STEPS THAT WILL IMPROVE THE SITUATION

A. FCC Has Authority To Implement Provisions of the Communications Act

The United States Supreme Court has confirmed that Section 201(b) "explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies," even absent a

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67 *See* National Broadband Plan at 115 & n.60.

68 NTIA, *Improving Rights-of-Way Management Across Federal Lands: A Roadmap for Greater Broadband Deployment* at 19-21 (Apr. 2004), *available at* http://www.ntia.doc.gov/reports/fedrow/FROWReport_4-23-2004.pdf; *see also Application Process*.

69 National Broadband Plan at 115.

specific statutory mandate for a rulemaking.[70] Thereafter, in the context of Section 332(c)(7), the FCC confirmed that its statutory rulemaking authority is unaffected even where the 1996 Act specifically provides aggrieved parties with a judicial remedy.[71] Simply put, "[t]he 1996 Act left undisturbed the broad statutory directives contained in the Communications Act," including the FCC's expansive charter to conduct rulemakings and take other actions it deems necessary to protect the public interest.[72]

The Commission should not be deterred by the fact that any rules it might adopt to implement Section 332(c)(7) and/or Section 253 could implicate matters regulated by state or local authorities. The 1996 Act was adopted to remove state and local barriers to competition, and Congress directed the FCC to use its full menu of regulatory tools to achieve that objective.[73]

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70 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 380 (1999) ("*Iowa Utilities*"). *See also id.* at 377 ("Since Congress expressly directed that the 1996 Act, along with its local competition provisions, be inserted into the Communications Act of 1934, the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions.") (footnote and citations omitted); *Alliance for Community Media v. FCC*, 529 F.3d 763, 774 (6th Cir. 2008) (absence of a rulemaking mandate in cable franchising provision of the Communications Act "does not divest the agency of its express authority to prescribe rules interpreting that provision") ("*Alliance for Community Media*").

71 *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14003 ¶ 26. *See also 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, 5129 ¶ 56 (2006) ("The mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its otherwise undeniable rulemaking authority.") (footnote omitted), *aff'd, Alliance for Community Media*.

72 *Building Owners and Managers Ass'n International v. FCC,* 254 F.3d 89, 92 (D.C. Cir. 2001).

73 *See AT&T Communications, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998) ("Legislative history reveals that Congress's intent was to remove all barriers to entry in the provision of telecommunications services by preempting all state and local requirements that directly or indirectly prohibit market entry"), *citing* Senate Conference Report on the Telecommunications Act of 1996, S. Rep. 104-230 (1996), 1996 WL 54191 at *277-81, *vacated on other grounds*, 243 F.3d 928 (5th Cir. 2001)**;** 47 U.S.C. § 1302(a) (directing the FCC to encourage deployment of advanced telecommunications capability by utilizing, *inter alia*,

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Also, the United States Supreme Court has rejected the idea that the Commission's Section 201(b) rulemaking authority is limited only to matters involving interstate or foreign communications.[74]

B. The Commission Should Undertake an Initiative to Liaise with the Local Zoning Authorities

CTIA commends the Commission's TAC for addressing several aspects of the siting issue and providing thoughtful and concrete suggestions. CTIA agrees with the TAC's recommendation that the Commission take an active role in educating state and local governments on the benefits of wireless and new technologies for efficiently deploying broadband, *e.g.*, through a "road show" or series of workshops. Through increased communication and education many concerns voiced at the local level could be addressed, thereby eliminating many potential objections that would unnecessarily slow down build-out. In addition, CTIA supports the TAC's recommendation calling for the FCC to propose that "states and municipalities employ a shortened 'shot clock' for co-locations on existing structures or permit co-location 'by right' – absent special circumstances."[75]

(footnote continued)
"measures that promote competition in the local telecommunications market, and other regulating methods that remove barriers to infrastructure investment").

74 *See Iowa Utilities*, 525 U.S. at 378.

75 TAC Chairman's Report at 2.

1. The FCC Should Share Its Extensive Wireless Expertise with Local Zoning Authorities

a. TAC Report Recommendation #1 — Establishment of a "Municipal Race-to-the-Top Program" — Should Be Implemented Immediately

The FCC has long recognized that achievement of the 1996 Act's objectives requires a cooperative effort at the federal, state and local levels.[76] Representatives of state and local governments have expressed a similar view — indeed, as noted in the National Broadband Plan, "a comprehensive broadband infrastructure policy necessarily requires a coordinated effort among all levels of government."[77] CTIA thus applauds the FCC's commitment to working with state and local governments (among others) "to identify means of improving rights-of-way policies and wireless facilities siting requirements."[78]

To that end, CTIA suggests that the FCC create a forum through which the FCC, state and local governments and other interested parties can share relevant information and expertise they may have in wireless siting matters. This can be accomplished by implementing the recommendations in the TAC Chairman's Report. As a first step, the Commission should immediately implement TAC's Recommendation No. 1, *i.e.*, a "Municipal Race-to-the-Top"

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[76] *See TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21443 ¶ 110 (1997) ("[I]nterpreting the 1996 Act is not an easy task. It requires the combined efforts of state and local governments, along with those of the Commission."), *recon. denied*, 13 FCC Rcd 16400 (1998); National Broadband Plan at 110 ("Lowering the costs of infrastructure access involves every level of government; active consultation among all levels of government will be needed to put in place pro-deployment policies . . . .").

[77] National Broadband Plan at 113; *see also id.* at 117 n.37 ("[T]he Broadband Principles adopted by the National Association of Telecommunications Officers and Advisors (NATOA), an organization representing local government agencies, staff and public officials, state[] that '[t]he desired development of high capacity broadband networks and broadband services will require extensive collaboration among parties: local communities, regions, state governments, national government, the private sector, interest groups, and others.') (citation omitted).

[78] *NOI*, ¶ 2.

program to specifically identify, through a competitive process, those cities that have adopted the best practices for promoting broadband infrastructure deployment through, for example, infrastructure planning, accommodation, and permitting/approvals processes.[79] In turn, the "best practices" of the winning cities could form the basis for model codes that both industry and local governments could utilize later on.[80]

As a co-sponsor of the "Apps for Communities Challenge," the FCC has witnessed how effective a "race-to-the-top" challenge can be.[81] As the Commission observed when it announced that challenge, "[c]ontests can promote innovation in all sorts of unexpected ways."[82] CTIA believes this will be equally true if the Commission embraces the "race-to-the-top" paradigm endorsed by TAC.

b. TAC Report Recommendation #4 — "Best Practices/Technology Outreach to State and Local Governments" — Should Be Initiated

The FCC should employ a variety of strategies to implement TAC's Recommendation No. 4, titled "Best Practices/Technology Outreach to State and Local Governments."[83] This would include initiating a dialogue with states and municipalities to, among other things, eliminate (or at least mitigate) any lingering confusion or concerns about wireless technical

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79 TAC Chairman's Report at 1, Recommendation No. 1.

80 *Id.*

81 *See* Public Notice, "FCC and The Knight Foundation Announce New Apps Contest to Bring Local Information to Underserved Communities" (Apr. 14, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305781A1.doc (last viewed July 18, 2011).

82 *Id.* at 1.

83 TAC Chairman's Report at 2, Recommendation No. 4.

issues and the FCC's role in addressing technical matters that may arise in wireless siting disputes.[84]

CTIA suggests that the FCC also establish a means of providing state and local authorities with easier access to and disclosure of information about the FCC's processes and resources. This would complement the FCC's other efforts to make its processes and activities more transparent generally.[85] If, for instance, local zoning boards have a question about how the FCC regulates wireless service providers and tower owners, the FCC would be the best available resource and should be readily available as such. This is essential for creating a more cooperative atmosphere and promoting the partnerships necessary for achieving coordinated, meaningful reform of how rights-of-way management and wireless tower siting are addressed at the federal, state and local levels.[86]

Finally, CTIA urges the FCC to work with localities to help them better understand that zoning decisions regarding towers should be addressed similarly to other zoning decisions. It is appropriate for local zoning authorities to leave licensing-related determinations to the FCC, which has exclusive jurisdiction over such matters, instead of the zoning authorities engaging consultants who turn simple zoning decisions into technically complex assessments of alternative

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84 It is worth noting that the FCC's "Local Government Official's Guide to Transmitting Antenna RF Emission Safety" is over a decade old. *See* http://wireless.fcc.gov/siting/FCC_LSGAC_RF_Guide.doc (last viewed July 1, 2011). Any FCC outreach thus might include updating or even replacement of that document.

85 *See, e.g.*, Mary Bucher, *What's In A Name?*, OFFICIAL FCC BLOG ENTRY (Mar. 30, 2011) (noting plan to "place even more emphasis on adding additional transparency to Bureau processes and access to underlying data through the Bureau's online presence using latest web methodologies"), *available at* http://www.fcc.gov/blog/201103 (last viewed July 1, 2011).

86 *See NOI*, ¶ 9 (FCC is seeking to, *inter alia*, "fully consider possible steps the Commission can take, in partnership with federal, state, local, and Tribal governments . . . to foster improvements in these areas.").

wireless technologies. Rather than interject a municipal consultant into a local zoning proceeding, the local zoning authorities could turn to the expert federal agency — the FCC.[87]

2. The FCC Should Urge Municipalities to Employ a Shortened Shot Clock for Collocations (TAC Report Recommendation #3)

TAC also recommends that the FCC "propose that states and municipalities employ a shortened 'shot clock' for co-locations on existing structures or permit co-location 'by right' — absent special circumstances."[88] The TAC proposal advocates a graduated approach, namely that the Commission would first seek to persuade states and municipalities to *agree* to voluntarily provide this relief, but TAC goes on to say that "[i]f states and municipalities do not agree to expedite co-location approvals, the Commission should express its willingness to

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[87] The recent federal district court decision discussed above involving MetroPCS's tower siting dispute with the City of Mount Vernon, New York, found that the municipal consultant's efforts resulted in unnecessary delay as well as unacceptable costs:

> [The City of Mount Vernon] has not presented any evidence explaining why it is more labor intensive or time-intensive to review a special permit for a wireless telecommunications facility than another major construction project subject to the $500 special use permit application fee such that the fee for a telecommunications facility should be twelve to twenty-four times higher…The Court is also concerned that there is no limitation on the amount of consulting fees the applicant could be required to pay. The City of Mount Vernon has unlimited discretion to charge a wireless carrier prohibitive fees by simply dragging out the process and utilizing consultants for its convenience—rather than out of necessity. Furthermore, the Court has already determined that the City discriminated against MetroPCS by demanding information on the feasibility of using DAS and this led to an unacceptable delay. Therefore, the assessment of fees for work done by [the City's consultant] related to the City's continued insistence on using DAS was overstated as well.

MetroPCS of New York, 739 F.Supp.2d at 425.

[88] TAC Chairman's Report at 2, Recommendation No. 3.

proceed with a new, shorter 'shot clock' rule for co-locations."[89] The Commission's willingness to impose a mandatory shortened shot clock for collocations if states and local authorities do not voluntarily provide relief is critical. Otherwise, states and localities may lack motivation to seriously consider adopting a shorter timeframe.

The Commission's recent *Fifteenth Report* on competition in mobile wireless industry explains why collocation is a critical buildout issue to CMRS carriers:

> Collocating base station equipment on an existing structure is often the most efficient and economical solution for existing and new wireless service providers that need new cell sites. PCIA estimates that the average cost to build a new tower is between $250,000 and $300,000, whereas the average deployment cost for a collocation is between $25,000 and $30,000. Collocation is also commonly encouraged by zoning authorities to reduce the number of new communications towers. Due to the high cost to construct new towers, and the often considerable delay to obtain approvals from state and local authorities, wireless service providers will typically look first for existing towers or other suitable structures for new cell sites. Collocation is particularly useful in areas in which it is difficult to find locations to construct new towers.[90]

Further support for a shortened collocation shot clock is found in the FCC's *Shot Clock Declaratory Ruling.* In that order, the FCC found that "collocation applications are easier to

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89 *Id.*

90 *Fifteenth Report,* FCC 11-103 at ¶ 312 (footnotes omitted). *See also* Charles L. Jackson, "Observations on Pole Access For Wireless Carriers," at 1-2 (March 17, 2011), submitted as Attachment 1 to *Ex Parte* Letter dated March 17, 2011, from Brian M. Josef, Assistant Vice President–Regulatory Affairs and Christopher Guttman-McCabe, Vice-President–Regulatory Affairs, CTIA, WC Docket No. 07-245 ("Creating new cell sites brings with it several problems. First, cell sites are expensive facilities requiring installation of electronics, purchase of real estate or payment of rent to a landlord, and a backhaul connection to the carrier's network. Second, complying with and obtaining the necessary federal, state, local, environmental and land-use approvals and building the facilities require a significant expenditure of time, effort and money. The Commission has promoted, and the wireless industry has embraced, the concept of collocation because to the extent that a number of carriers can utilize the same platform to provide their desired coverage, the number of new facilities required, and the cost per carrier, declines.")

process than other types of applications as they do not implicate the effects upon the community that may result from new construction. In particular, the addition of an antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community."[91]

Requiring lengthy approval procedures for collocations delays the provision of new wireless services to consumers without any concomitant benefits to the public. The problem is likely to become more acute as carriers come under even greater pressure to deploy cell sites quickly in response to accelerating demand for 4G and other advanced wireless services.[92] In the *Fifteenth Report*, for example, the Commission cited data indicating that Verizon Wireless alone will need to add between 17,000 to 27,000 new cell sites in order to accommodate its current needs and the deployment of its LTE network.[93]

In accordance with the TAC proposal, the FCC should attempt to address these issues by asking state and local authorities to *voluntarily* (1) permit collocations on previously approved towers or other supporting structures as a matter of right, without a zoning process (and thus with no need for a shot clock) and (2) in circumstances where a zoning process (with the attendant waiting period) is necessary, impose a collocation shot clock shorter than the 90 days currently established for collocations by the FCC.[94] This approach will give wireless operators and local

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91 *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14012.

92 *See, e.g., Ex Parte* Letter dated March 8, 2011 from Brian M. Josef, Assistant Vice President – Regulatory Affairs, CTIA, WC Docket No. 07-245, at Attachment 1 (providing statistics on the anticipated growth of 4G deployments and wireless data usage generally).

93 *Fifteenth Report*, FCC 11-103 at ¶ 310.

94 To provide local authorities with comfort that collocations can be considered and approved in an accelerated timeframe, the FCC can point to existing state or local laws that require collocation applications to be processed in less than 90 days. *See, e.g., Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14012 (noting that California and Minnesota require both collocation and non-collocation applications to be processed within 60 days); *id.* at n. 149 (quoting letter from the State of Connecticut's Siting Council stating that "most applications to approve a tower-sharing request are processed by our agency in four to six weeks"). Further, in

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officials a fair opportunity to agree on procedures that will expedite collocation approvals (or render them unnecessary) without compromising the legitimate interests of affected communities, or require the FCC to spend additional resources overseeing the problem.

CTIA notes that recently introduced legislation, the Rockefeller-Hutchison ‘‘Public Safety Spectrum and Wireless Innovation Act,” S.911 and a discussion draft introduced by House Energy & Commerce Committee Chairman Upton and Communications & Technology Subcommittee Chairman Walden, currently contain provisions that would require state and local authorities to approve any “eligible facilities request” — defined to include collocation, removal, or replacement of equipment — that “does not substantially change the physical dimensions” of an existing tower.[95] It is encouraging that Congress is considering such measures, but passage of legislation by both houses of Congress (and its timing) is uncertain. With the clock ticking on the President’s five year goal for universal broadband, CTIA submits that the FCC can and should act with dispatch to implement the two-staged approach in TAC Recommendation #3.

C. The FCC Should Establish Additional Clear Procedures and Devote More Internal Resources to NEPA and Section 106 Siting Issues

1. FCC Resources Are Often Overwhelmed by the NEPA and Section 106 Issues that Come Before It.

The number of cell sites continues to grow to satisfy the rising demand for wireless products and services. With the increasing number of wireless facilities, FCC involvement in

(footnote continued)
CTIA’s initial Petition in that proceeding requesting a 45-day period for action on requests for collocation, CTIA presented evidence that each of the wireless providers surveyed reported receiving collocation zoning approvals within 14 days – and all but one obtained approvals within one week.

[95] S. 911, 112th Cong., 1st Sess., § 528(a), as reported from the Committee on Commerce, Science, and Transportation as amended on June 8, 2011; House Energy and Commerce Discussion Draft Sec. 205.

siting issues continues to grow. The FCC's rules require it to conduct NEPA and Section 106 reviews of applications for new facilities whenever an Environmental Assessment ("EA") is filed.[96] Furthermore, the 2004 National Programmatic Agreement ("NPA") established the FCC as the initial arbiter of disputes between an applicant and a State Historical Preservation Office ("SHPO").[97] In addition, tower opponents are increasingly using the Commission to delay the construction of facilities; a single complaint from a tower opponent to the Commission merely alleging an environmental issue can result in a delay from several months to over a year. Moreover, as a result of a D.C. Circuit decision,[98] the Commission is overhauling its Antenna Structure Registration ("ASR") program to include a public notice period, with the likely result that the ASR review process will require greater time and attention from Commission Staff.[99]

The Commission's Staff has worked admirably to address the increasing portfolio of environmental issues, but there is a disconcerting trend of increasing delays for resolving even the more routine matters. The TAC seemed to recognize this trend when finding that "inconsistent and non-concurrent time frames for environmental assessments" are a significant impediment to tower siting.[100] Devoting sufficient resources to the Commission's environmental team is an important first step in reducing avoidable delays.

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96 *See* 47 C.F.R. §§ 1.1306-1307.

97 Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (Sept. 2004) ("2004 NPA"), 47 C.F.R. Part 1, Appendix C, at §§ VI.D.3, VII.B.4, VII.C.4, VII.D.5.

98 *See American Bird Conservancy v. FCC,* 516 F.3d 1027 (D.C. Cir. 2008).

99 *See Wireless Telecommunications Bureau Invites Comment on Draft Environmental Notice Requirements and Interim Procedures Affecting the Antenna Structure Registration Program,* WT Docket Nos. 08–61 & 03–187, *Public Notice,* 26 FCC Rcd 4099 (WTB 2011) ("*Interim ASR PN*").

100 TAC Chairman's Report at 2.

2. The FCC Should Establish a Process and Definite Milestones for Resolving Referred Section 106 Cases

The FCC plays a central role in Section 106 process as an arbiter between an Applicant and the SHPO when a dispute arises or when the SHPO declares that it is foreclosed from reviewing a matter. While the 2004 NPA clearly delineates the procedures used to bring the matter to the FCC's attention,[101] neither the 2004 NPA nor the Commission's rules prescribe a formal procedure for resolution nor are there any milestones for when the various parts of the Section 106 review process are expected to be completed. It is not surprising that in the absence of understood timing parameters, there is little predictability in how and when such cases will be resolved.

Given the importance of prompt and predictable action regarding wireless facility siting, CTIA urges the Commission to establish procedures that will provide more certainty to applicants as to how reviews will be conducted in such cases and establish reasonable but concrete milestones for prompt Staff review in Section 106 cases that a SHPO refers to the FCC. In addition, staff action on such cases should be subject to a shot clock, as discussed below.

3. The FCC Should Increase the NEPA Team's Resources So It Can More Quickly Resolve Disputed Cases

The NEPA Team in the Wireless Telecommunications Bureau does an admirable job of moving cases forward, given the limited number of staff and resources. Broadband buildout, ever-increasing public demand for service, and the proposed revised ASR process will place significant additional demands on the NEPA Team. Without additional resources it is highly likely that administrative delay will increase. Moreover, environmental assessments subjected to administrative delays may very well have the unintended – and unwelcome – effect of

[101] *See* 2004 NPA, 47 C.F.R. Part 1, Appendix C, at §§ VI.D.3, VII.B.4, VII.C.4, VII.D.5.

encouraging opponents to file frivolous environmental claims solely as a tactic to delay the tower siting approval process and thereby "game the system." The opposite is also true – if the Commission acts promptly on these requests, it will discourage frivolous claims and be able to devote fewer resources while addressing truly meritorious claims. To meet these increased demands, the Commission should consider adding additional resources to the NEPA Team Staff .

D. The Commission's Local Zoning Shot Clock Could Be Used as a Template to Improve Other Permitting Processes

1. A Shot Clock Could Expedite the Right-of-Way Process

a. A Shot Clock for Rights-of-Way Would Place an Outer Bound on Time Involved in this Permitting Process

CTIA recommends that the FCC impose a Section 332(c)(7)-like shot clock on local right-of-way procedures under Section 253 if the record in this proceeding shows the same magnitude of problems with timely rights-of-way decisionmaking as it did with local zoning boards in the *Shot Clock Declaratory Ruling*.

Section 332(c)(7) and Section 253 are alternative avenues for achieving the same Congressional objective, *i.e.*, elimination of state and local barriers to competitive entry by providers of telecommunications services, including wireless carriers. In the Section 332(c)(7) context, the Commission found that state or local approval of tower siting is a "crucial requirement" for successful deployment of wireless services.[102] This is equally true where the state or local approval at issue involves a wireless carrier's use of a public right-of-way.[103]

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102 *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 13995.

103 *See, e.g.*, National Broadband Plan at 109 ("[W]ireless and wired networks rely on cables and conduits attached to public roads, bridges, poles and tunnels. Securing rights to this infrastructure is often a difficult and time-consuming process that discourages private

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Yet, as observed in the National Broadband Plan, "a coordinated approach to rights-of-way policies has not taken hold," and "disputes under Section 253 have lingered for years, both before the FCC and in federal district courts."[104] Thus, even where a wireless operator is able to establish that a local authority has unlawfully delayed processing of its right-of-way request under Section 253, it must still endure extensive delays either before the FCC or the courts before it is able to provide service via the right-of-way. Simply put, any regulatory model that potentially denies consumers access to new wireless services for years due to a right-of-way dispute is not in the public interest and warrants reexamination.[105]

CTIA believes that the FCC can address these problems by imposing a shot clock on a state or local authority's disposition of a wireless operator's application for approval to use a public right-of-way. Thus, for example, where a local authority fails to act on a wireless carrier's right-of-way application within a specified period of time (*e.g.*, 45 days), by rule such failure to act should be automatically deemed as "prohibiting" or "having the effect of prohibiting" wireless service, and thus should be deemed automatically preempted under Section 253(a) unless the relevant local authority is able to demonstrate that the safe harbors in Section 253(b) or Section 253(c) apply. The reason for implementing a right-of-way shot clock under

(footnote continued)
investment. Because of permitting and zoning rules, government often has a significant role in network construction.")

104 *Id.* at 113.

105 *Compare, e.g.*, *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14007-8 ("Delays in the processing of personal wireless service facility siting applications are particularly problematic as consumers await the deployment of advanced wireless communications services, including broadband services, in all geographic areas in a timely fashion. . . State and local practices that unreasonably delay the siting of personal wireless service facilities threaten to undermine achievement of the goals that the Commission sought to advance. . . Moreover, they impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996 and more recently in the Recovery Act.") (footnotes omitted).

Section 253 is the same as that adopted by the Commission under the existing local zoning shot clock — to "provide guidance, remove uncertainty and encourage the expeditious deployment of . . . broadband services" by minimizing delays that impede delivery of advanced services to consumers.[106]

b. There Is a Solid Legal Basis for Employing a Right-of-Way Shot Clock

The legal foundation for the Commission's authority to impose a Section 253 shot clock by rule mirrors that for the Section 332(c)(7) shot clock, *i.e.*, Sections 4(i), 201(b) and 303(r) of the Communications Act.[107] Just as those statutory provisions gave the Commission the authority to interpret the phrase "reasonable amount of time" in Section 332(c)(7) as, presumptively, 90 days and 150 days to process collocation and non-collocation wireless siting proposals, respectively,[108] they also provide firm authority for the Commission to adopt a similar policy here — interpretation of "prohibit" or "have the effect of prohibiting" in Section 253(a), as creating a rebuttable presumption that delay beyond some set period, such as 45 days, amounts to an actual or effective prohibition.[109]

c. How the Shot Clock Would Work

Once the specified Section 253 shot clock expires without a final decision from the relevant state or local authority, the aggrieved provider would file a petition for declaratory ruling with the Commission pursuant to 47 U.S.C. § 253(d), and the Commission, in turn, would adjudicate whether the state or local authority has demonstrated that its failure to comply with

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106 *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14005.

107 *See id.* at 14001 (*quoting* 47 U.S.C. §§ 154(i), 210(b) and 303(r)).

108 *Id.* at 14002-3.

109 *See also* Section V.A above and discussion of Section 201(b) and *Iowa Utilities* therein.

the shot clock falls under any of the safe harbors set forth in 47 U.S.C. § 253(b) or (c) and thus rebuts the presumptive violation of Section 253(a).[110] If the state or local authority fails to make such a showing, the Commission would issue a declaratory ruling preempting the authority's procedures and granting whatever other relief is warranted under the circumstances. In effect, this model is no different than what the Commission currently already does in Section 253(d) cases, but would save time by eliminating the need for the Commission to make a threshold determination of whether a Section 253(a) violation has occurred, since the state or local authority will be presumed to have violated the statute by failing to act within the time allotted by the shot clock.

2. The Commission Should Establish "Shot Clocks" for Its Own Siting-Related Actions

a. Shot Clock for SHPO Referrals

When a SHPO declines to make a Section 106 determination and refers the matter to the FCC, there should be a rebuttable presumption, established through rulemaking, specifying a reasonable amount of time for the FCC to act. This would create uniform expectations, bring certainty to a currently open-ended process, and provide a party with an agreed-upon timeframe by which it could seek review by filing a petition for a writ of mandamus in the court of appeals.

[110] For example, were a local authority to argue that its failure to comply with the shot clock qualifies as legitimate management of public rights-of-way under Section 253(c), the Commission would evaluate the merits of that claim under its existing Section 253(c) precedent and relevant court decisions. *See, e.g., Petition of the State of Minnesota,* 14 FCC Rcd 21697 (1999), and cases cited therein; *TCI Cablevision of Oakland County, Inc.,* 12 FCC Rcd 21396 (1997); *Classic Telephone, Inc.,* 11 FCC Rcd 13082, 13102-03 (1996).

b. Shot Clock for Disputed Section 106 and NEPA Cases

In disputed Section 106 and NEPA cases, as with SHPO referrals, there should be a rebuttable presumption, established through rulemaking, regarding the amount of time for FCC action. This would accomplish the same goals as in Section V.D.2.a — namely, provide uniform expectations, establish a finite process, and provide a party with a basis for seeking review.

The NEPA guidelines established by the Council on Environmental Quality ("CEQ") specifically opine that agencies have the discretion to set time limits for their own NEPA activities. In particular, the CEQ guidelines provide that an agency may "[s]et overall time limits or limits for each constituent part of the NEPA process."[111] Consistent with this provision, the Wireless Telecommunications Bureau established an informal policy concerning the time required for its own review of NEPA and NHPA submissions and for the overall time limits for other agencies' contributions when the FCC is the lead agency. The following statement is included in an "Initiation Letter" sent to a CTIA member:

> It is the policy of the Bureau that the NEPA/NHPA review process for the proposed construction of wireless telecommunications facilities should be completed within three months from the date that the Bureau commences an environmental review proceeding. The Council on Environmental Quality ("CEQ") has stated that "[f]or cases in which only an environmental assessment will be prepared, the NEPA process should take no more than 3 months, and in many cases, substantially less, as part of the normal analysis and approval process for the action." Furthermore, according to CEQ rules [40 C.F.R. § 1501.8(b)(2)] the Commission, as lead NEPA agency, may set overall time limits or limits for each constituent part of the NEPA process. . . .[112]

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111 40 C.F.R. § 1501.8(b)(2).

112 Excerpt from an Initiation Letter from late 2009 (footnotes omitted); *see also* Council on Environmental Quality, Executive Office of the President, *Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,* 46

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What CTIA is asking is little more than transforming this informal policy into a formal procedure, in the interest of transparency. Accordingly, CTIA asks that the Commission leverage its position as the lead NEPA agency in the vast majority of tower siting cases and establish, by rule, time limits for the NEPA and Section 106 process.

c. In Addition, a Shot Clock for FCC Action on ASR Applications Should be Part of the Final ASR Rules

The Commission is currently considering Interim ASR rules that would establish procedures for determining how avian mortality concerns will be considered.[113] It may also consider further changes to its ASR rules after it has completed its Programmatic Environmental Assessment of the ASR rules.[114]

Given the need for prompt action on the Interim rules, CTIA does not support making significant changes to the processes under consideration there. If and when the Commission considers further long-term changes to its ASR rules, however, CTIA suggests consideration of the following two proposals:

- If there is no request by a third party for environmental processing and there is no EA filed, the rule should provide that after a specified time an ASR application will be automatically granted or deemed granted.
- In cases where there is a request for environmental processing, or an EA has been filed, there should be a rebuttable presumption, established by rule, regarding the amount of time for FCC action that is reasonable for each stage of the process.

(footnote continued)
Fed. Reg. 18026 (Mar. 23 1981), *available at* http://nepa.energy.gov/nepa_documents/TOOLS/GUIDANCE/Volume1/4-1-40_questions.html.

113 *See Interim ASR PN*, *supra* note 99.

114 *See Federal Communications Commission Announces Public Meetings and Invites Comment on the Environmental Effects of its Antenna Structure Registration Program*, WT Docket Nos. 08–61 & 03–187, *Public Notice*, 25 FCC Rcd 15953 (WTB 2010).

Both of these rule changes would speed the FCC's ASR process. The first rule change would ensure prompt handling of uncontested and routine ASR applications, while the second would establish a shot clock for action when environmental processing is necessary. Given the Wireless Telecommunications Bureau's existing three-month processing policy and the CEQ's guidance that three months should be more than enough time for handling an EA,[115] CTIA suggests that three months (*i.e.*, 90 days) should be the outside limit for cases where environmental processing is required, and that if 90 days has passed without action, a party would be free to seek review by filing a petition for a writ of mandamus in the court of appeals.

E. The Commission Should Conduct a Rulemaking to Consider the Reasonableness of Unique Communications-Specific Burdens Imposed by State and Local Authorities

1. Communications-Specific Burdens in the Siting Process Impose Opportunity Costs that Harm the Public

Costs and other burdens uniquely imposed on communications providers result in delays in tower siting, which creates opportunity costs in the form of delays and uncertainty. For example, in the Mount Vernon case discussed above, the permit fee for a collocated wireless telecommunications facility was set at $6000.00, twelve times the normal $500.00 permit fee for other major construction projects, and the wireless applicant also had to establish an escrow fund for payment of the board's consultant that resulted in unlimited opportunities for delay.[116] This delay is more than an irritant to wireless operators; it also disadvantages their subscribers, the people with whom they communicate, the content and service providers that the customers seek

115 *See* text at note 112 *supra*.

116 *MetroPCS of New York*, 739 F.Supp.2d at 425 (excerpted at note 87 *supra*).

to access, and the entire Internet ecosystem. Similarly, given the importance of wireless to public safety service provision, this delay also will likely have an adverse affect on public safety.

2. The Commission Should Address the Adverse Impact that Results from the Increasing Use of Municipal Tower Siting Consultants

As discussed above, the increasingly common use of municipal tower siting consultants can result in considerable delays, particularly if they have a financial incentive, based on their fee structure, to elongate the process by establishing unnecessarily complex review processes. Accordingly, the Commission should consider the potential adverse effects their involvement can have on siting in general and specifically on broadband buildout, and consider whether educational or other FCC efforts are warranted.

F. The Commission Should Work With the Administration and Congress to Facilitate Placement of Wireless Facilities on Federal Property and to Permit Liberal Access to Federal Rights-of-Way

CTIA strongly supports the proposals in the National Broadband Plan discussed in ¶ 44 of the *NOI* — setting fees for access to federal rights-of-way on the basis of direct cost recovery and establishing master contracts for placement of towers on federal property.[117] These are, obviously, not subject to unilateral FCC action. However, the FCC, as the lead federal telecommunications licensing agency, has both the expertise and the opportunity to help frame the issues and the solutions.

CTIA is cognizant that the Congress is considering some of these issues but, rather than adopting a "wait and see" approach, the FCC can take concrete steps now. The FCC should work with the Administration and Congress to establish a clearly expressed right of access to

[117] *See* National Broadband Plan at 115; *NOI* ¶ 44.

federal rights-of-way and a right to place towers on federal property, at standardized rates, except when such usage would raise homeland security issues, interfere with carrying out an agency's functions, or violate federal laws. In addition, CTIA urges the Commission to move forward with the TAC Report Recommendation #2, pursuant to which the FCC would request that the President issue an Executive Order mandating that for federal rights-of-way and antenna siting approvals, there be a single document format, a single agency to coordinate the permit approval process, and a 60-day time frame for approvals.

VI. CONCLUSION

The wireless industry has a history of meeting challenges and building out systems to meet ever-increasing public demand. However, in order for the National Broadband Plan and the President's National Wireless Initiative to succeed and increase broadband deployment and availability in the coming years, building the necessary infrastructure in a timely manner is

crucial. Accordingly, CTIA requests that the above suggestions be implemented so that the wireless industry can help to achieve the President's, Congress's and the FCC's broadband goals.

Respectfully submitted,

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July 18, 2011