

**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)
Facilities Siting)

To: The Commission

**COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION AND
THE DAS FORUM (A MEMBERSHIP SECTION OF PCIA)**

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SUMMARY

Broadband technologies stand to benefit all Americans, be it through fostering economic growth, bolstering public safety, or driving subsequent technological innovations. President Obama and Chairman Genachowski have outlined ambitious goals to facilitate the delivery of broadband nationwide. However, broadband services are dependent upon infrastructure, and currently the deployment of new infrastructure and the effective use of existing infrastructure are subject to persistent and costly barriers. In order to achieve our national goal of ubiquitous broadband in a timely manner, the Federal Communications Commission must confront these barriers.

In recent years, the Commission has taken a number of steps to facilitate wireless deployment, which PCIA and the DAS Forum fully support. These steps include: adopting the *Shot Clock Ruling* in 2009; the *Pole Attachment Order* in 2011, and the two nationwide programmatic agreements between 2001 and 2004 that streamlined the historic review process under Section 106 of the National Historic Preservation Act. But while the Commission has taken steps in a positive direction, many challenges remain at the state and local levels.

Almost every decision involved in the placement of wireless facilities must consider state and local concerns and regulations. In recent years local regulation of the placement of wireless facilities has proven a persistent barrier to the deployment of wireless infrastructure. For example, some jurisdictions utilize onerous application review processes that can increase the costs of siting by over 20-percent, slowing billions in economic activity resulting from new broadband deployment.

For the reasons stated below, the PCIA and the DAS Forum urge the Commission to address these barriers through the following recommendations:

Clarifying “Shot Clock” rules to avoid abuse – While 2009’s *Shot Clock Ruling* was a step in the right direction, remaining ambiguities in the rules, such as a lack of clarity in the application of the *Shot Clock Ruling* to DAS, lead to numerous challenges at the local level. A lack of clarity and consistent treatment in the law has led to local jurisdictions drawing out the process, and the expense of taking a local jurisdiction to court presents applicants with no viable remedy. The Commission should amend the *Shot Clock Ruling* to reflect the shorter timeframes for collocation application review and then deem applications granted at the expiration of the review period.

Streamlining/clarifying the wireless siting process for DAS – DAS is a crucial part of the wireless network ecosystem, helping improve service and filling gaps in local service. The adaptability and scalability of DAS allow for improved wireless service where geography or other considerations would otherwise make it impossible. But because of ambiguities in Section 253 and Section 332(c)(7) of the Communications Act, DAS is often subjected to the same expensive and time-consuming review and approval processes as a wireless tower and other macro sites, which effectively cancels out many of the benefits DAS. The Commission should clarify the Shot Clock application to DAS, encourage policies that treat DAS as a system as opposed to its individual elements, and develop outreach initiatives to educate state and local governments about the benefits of DAS.

Supporting “collocation by right” – Collocations can improve coverage, capacity, and competition. However, many jurisdictions have procedures in place that unnecessarily burden collocation, further slowing the deployment of mobile broadband technologies. One particularly troubling phenomena is that of wireless “consultants,” who in many cases charge thousands in fees to applicants for unnecessary review procedures, increasing the cost of the process by up to 80 percent. Further, many jurisdictions enter into lengthy moratoria, where consideration of all applications for new sites and collocations are discontinued, in some cases for a year or more. These comments note best practices such as Georgia’s *Advanced Broadband Collocation Act*, as a way forward and further encourage the Commission to support “collocation by right” legislation at the federal level. Such legislation would reduce barriers to the expansion of wireless coverage and capacity through collocation and upgrade of existing equipment to next generation equipment.

Expanding efforts to educate state and local policy makers about the wireless industry – PCIA and the DAS Forum support the Technical Advisory Committee’s recommendation for additional educational efforts at the state and local level. By helping local policymakers understand the intricacies of mobile broadband technologies and the how and why of effective and reasonable siting policies.

The build out of broadband infrastructure is a top priority at the national level. In order to reach this objective the wireless industry must be able to quickly and efficiently add the new sites necessary for the provision of mobile broadband. PCIA and the DAS Forum urge the Commission to engage in outreach and pursue the best practices and legislative and regulatory solutions to improve rights of way access and wireless siting so that wireless infrastructure deployment can flourish and continue to meet the Nation’s growing mobile broadband needs.

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PCIA – The Wireless Infrastructure Association (“PCIA”) and The DAS Forum, a membership section of PCIA (“The DAS Forum”) submit these comments in response to the *Notice of Inquiry* seeking to develop a record on ways to improve rights-of-way policies and wireless facilities siting requirements.¹ PCIA and The DAS Forum support the Commission’s goal in this proceeding of identifying ways to “reduce the costs and time required for broadband deployment, both fixed and mobile, which will help unleash private investment in infrastructure, increase efficient use of scarce public resources (including spectrum), and increase broadband adoption.”²

PCIA is the trade association representing the wireless telecommunications infrastructure industry. PCIA’s members develop, own, manage, and operate more than 125,000 telecommunications towers and antenna structures upon which cell sites can be collocated.

¹ *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*, Notice of Inquiry, 26 FCC Rcd 5384 (2011) (“*NOI*”).

² *Id.* at 5384-85 ¶ 2 (citation omitted).

PCIA seeks to facilitate the widespread deployment of communications networks across the country, consistent with the mandate of the Telecommunications Act of 1996.³ The DAS Forum is a broad-based non-profit organization dedicated to the development of distributed antenna systems (“DAS”) as an element of the Nation’s wireless infrastructure.

DISCUSSION

Infrastructure deployment in all of its forms – including new tower sites, collocations on existing structures, and DAS – is essential to improving access to wireless services and stimulating broadband deployment. Yet, as the *NOI* recognizes, rights-of-way access and wireless siting challenges act as persistent barriers to infrastructure deployment. Accordingly, Section I below discusses the importance of confronting these barriers now in order to meet the broadband deployment goals of the Commission and the Administration. Section II outlines specific rights-of-way and wireless siting barriers to infrastructure investment and buildout, focusing initially on the unique challenges associated with collocations and DAS deployments before addressing general siting challenges – while noting throughout success stories to build upon. Section III proposes a combination of outreach activities, best practices and legislative and regulatory actions that should be pursued by the Commission to “reduce regulatory and other barriers to broadband deployment,” consistent with the goals of the Broadband Acceleration Initiative.⁴ Finally, Section IV details the Commission’s authority to implement these solutions.

³ Pub. L. No. 104-104, § 706(a), 110 Stat. 56, 153 (“1996 Act” or the “Telecommunications Act”) (directing the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . regulating methods that remove barriers to infrastructure investment”) (reproduced in the notes following 47 U.S.C. § 157).

⁴ *NOI*, 26 FCC Rcd at 5388 ¶ 8 (citing A National Strategy: The FCC’s Broadband Acceleration Initiative (Feb. 9, 2011) (“Broadband Acceleration Initiative”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304571A2.doc).

I. REMOVING BARRIERS TO INFRASTRUCTURE DEPLOYMENT IS ESSENTIAL TO MEETING THE NATION’S BROADBAND GOALS.

The Obama Administration and Chairman Genachowski have repeatedly emphasized the importance of building out the Nation’s broadband infrastructure. President Obama has set a national goal of enabling businesses to provide high-speed wireless services to at least 98 percent of all Americans within five years, recognizing that broadband “promises to benefit all Americans, bolster public safety, and spur innovation in wireless services, equipment, and applications.”⁵ The Chairman has similarly placed broadband at the top of his agenda,⁶ and has identified the removal of obstacles to robust and ubiquitous infrastructure buildout as “one of the Commission’s top priorities” needed to advance its broadband goals.⁷ PCIA and The DAS Forum strongly support these efforts.

A. Ubiquitous Mobile Broadband Requires Investment in and Expansion of Wireless Infrastructure.

As the National Broadband Plan explained, broadband is a critical driver of the economy and the country’s global competitiveness and an accelerator for job growth.⁸ Mobile broadband in particular is “a unique and powerful opportunity for the U.S., as well as a strategic challenge.”⁹ The Plan placed unprecedented emphasis on mobile broadband because no other

⁵ Fact Sheet, President Obama Details Plan to Win the Future through Expanded Wireless Access (Feb. 10, 2011) (“Fact Sheet”), available at <http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access>.

⁶ See Chairman Julius Genachowski, “The Clock Is Ticking,” Remarks on Broadband, Washington, DC, at 2 (Mar. 16, 2011) (“Genachowski March 16th Remarks”), available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0316/DOC-305225A1.pdf.

⁷ See *NOI*, 26 FCC Rcd at 5404 (Statement of Chairman Julius Genachowski); see also FCC Chairman Julius Genachowski Remarks, CTIA Wireless 2011, Orlando, FL (Mar. 22, 2011) (“Genachowski March 22nd Remarks”), available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0322/DOC-305309A1.pdf.

⁸ See CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, at 3 (Mar. 2010) (“NBP” or “Plan”).

⁹ Genachowski March 22nd Remarks at 4.

sector “now holds more promise for opportunity, for economic growth, for improvements to our quality of life, and for our global competitiveness.”¹⁰ Indeed, the rollout of next generation high-speed (4G) wireless networks promises considerable economic and societal benefits. According to the President:

Few technological developments hold as much potential to enhance America’s economic competitiveness, create jobs, and improve the quality of our lives as wireless high-speed access to the Internet. Innovative 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.¹¹

Many sectors of society and the economy are already reliant on mobile broadband as a platform for commerce and a powerful tool to connect friends and family.¹² And as access to broadband expands, it is expected to help spur innovative new businesses, enable cost-effective connections in rural areas, improve productivity, bolster public safety, and foster the development of mobile telemedicine, telework, distance learning, and other new transformative applications not yet developed.¹³ As a result, “the U.S. is well positioned in the global wireless revolution, with the opportunity to lead the world for years to come.”¹⁴

These benefits of mobile broadband, however, cannot be achieved without a robust wireless infrastructure. As was made clear during the Broadband Acceleration Conference

¹⁰ *Id.*

¹¹ The White House, Presidential Memorandum: Unleashing the Wireless Broadband Revolution, at 1 (Jun. 28, 2010) (“Presidential Memorandum”), *available at* <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution>.

¹² See Genachowski March 16th Remarks at 5.

¹³ See Presidential Memorandum at 1.

¹⁴ See Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, Broadband Acceleration Conference, Washington, DC (Feb. 9, 2011) (“Genachowski February 9th Remarks”), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A1.pdf.

earlier this year, “building a robust 21st century communications infrastructure is essential to growing our economy, creating jobs, and our global competitiveness,”¹⁵ and “[w]e can’t get to next generation broadband (4G) without new towers or new antennas.”¹⁶ In fact, the importance of wireless infrastructure and speeding deployment – by removing siting barriers and improving access – is essential to help the Commission achieve its goals of improving access to wireless services and stimulating broadband deployment to unserved areas. The Commission, the Chairman and others have repeatedly made this point:

- *Fifteenth Competition Report*: “Infrastructure facilities are a major input into the provision of mobile wireless service.”¹⁷ This is even more the case today, as the number of cell sites continues to grow in order to “accommodate additional airtime usage per subscriber largely caused by increased use of data services including broadband wireless and mobile Internet.”¹⁸
- *Chairman Genachowski*: “In the race for global competitiveness, the speed with which we can build America’s broadband networks is as important as the speed that is delivered over these networks. Broadband is indispensable infrastructure for improving America’s productivity in the 21st century – which is in turn the key to robust economic growth and job creation. The faster we can build out broadband, the faster we can help American workers and small businesses create the leading web-based enterprises of tomorrow.”¹⁹
- *Rural Broadband Report*: “Timely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas.”²⁰ “[W]ireless

¹⁵ *Id.* at 1.

¹⁶ Broadband Acceleration Initiative at 2.

¹⁷ *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*, Fifteenth Report, FCC 11-103, at ¶ 308 (Jun. 27, 2011) (“*Fifteenth Competition Report*”).

¹⁸ *Id.*

¹⁹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order on Reconsideration, 26 FCC Rcd 5240, 5378 (2011) (“*Pole Attachment Order*”) (Statement of Chairman Julius Genachowski), *recon. pending, appeal pending sub nom., American Elec. Power Serv. Corp., et al. v. FCC*, No. 11-1146 (D.C. Cir.).

²⁰ Chairman Julius Genachowski, *Bringing Broadband to Rural America: Update to Report on a Rural Broadband Strategy*, 2011 FCC LEXIS 2541, *55-56 (Jun. 17, 2011) (“2011 Rural Broadband Report”).

broadband development in rural areas will depend in part on the ability of providers to access towers and other structures for the deployment of their network facilities.”²¹

- *Technical Advisory Council (“TAC”)*: “Expediting 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.”²²

For all these reasons, the wireless industry’s need to site facilities is both significant and increasing.²³ An estimated 40,000 towers are needed to expand mobile broadband to virtually all Americans, the development and construction of which could create 53,000 jobs.²⁴ Accordingly, as the *NOI* correctly recognizes, “[b]oth new construction of wireless antenna structures and the availability of existing structures for purposes of collocating additional antennas have been, and will continue to be, integral to wireless build-out.”²⁵ Moreover, DAS in particular can be “especially useful to fill holes in wireless coverage areas, such as inside buildings, in urban areas, and in places where topography interferes with the delivery of a wireless signal from a single, higher-powered, taller facility.”²⁶

B. While the FCC Has Taken Significant Steps to Facilitate Wireless Deployment, Barriers Remain and More Can and Should Be Done.

Recognizing the critical role of infrastructure in sustaining the Nation’s broadband growth, the FCC is pursuing the “[r]emov[al] [of] obstacles to robust and ubiquitous 4G

²¹ *Id.* at *56; *see also Pole Attachment Order*, 26 FCC Rcd at 5243 ¶ 6 (“Obtaining access to poles and other infrastructure is critical to deployment of telecommunications and broadband services.”).

²² Technical Advisory Council, *Technology Policy Recommendations to Spur Jobs, Innovation*, at 2 (Apr. 22, 2011) (“TAC Report”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306065A1.pdf. The Technical Advisory Council, or “TAC,” is charged with identifying ways to use communications technologies and spectrum to drive job creation and economic growth.

²³ *NOI*, 26 FCC Rcd at 5385 ¶ 4 n.7.

²⁴ Genachowski February 9th Remarks at 4.

²⁵ *NOI*, 26 FCC Rcd at 5385 ¶ 3 n.3.

²⁶ *Id.* at 5393 ¶ 24 n.37.

deployment” as part of its comprehensive mobile broadband agenda.²⁷ Indeed, the Commission already has taken several significant steps to reduce barriers to broadband infrastructure deployment and investment.

First, in 2009, the Commission adopted its *Shot Clock Ruling*, which found that a “reasonable period of time” under Section 332(c)(7)(B) of the Communications Act (the “Communications Act” or the “Act”) for a state or locality to act on a wireless facility siting application is 90 days for collocation applications and 150 days for non-collocation applications.²⁸ The lack of a decision within these timeframes constitutes a “failure to act” that allows the applicant to seek redress in court.²⁹ The *Shot Clock Ruling* also found that denial of a wireless facility siting application solely because service is available from another provider constitutes an effective prohibition of service in violation of Section 332(c)(7)(B).³⁰

Second, in 2011, the Commission adopted its *Pole Attachment Order* to help ensure timely and rationally priced access to poles. Using its authority under Section 224 of the Act, the Commission set a maximum timeframe of 148 days for utility companies to allow pole attachments in the communications space, with a maximum of 178 days allowed for attachments of wireless antennas on pole tops, and an extra 60 days for large orders.³¹ It also set the rate for attachments by telecommunications companies at or near the rate paid by cable companies, and

²⁷ Genachowski March 22nd Remarks at 6.

²⁸ See *Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994, 14021 ¶ 71 (2009) (“*Shot Clock Ruling*”), *recon. denied*, 25 FCC Rcd 11157 (2010), *appeal pending sub nom., City of Arlington and City of San Antonio v. FCC*, Nos. 10-60039 & 10-60805 (5th Cir.).

²⁹ *Shot Clock Ruling*, 24 FCC Rcd at 14021 ¶ 71.

³⁰ *Id.*

³¹ *Pole Attachment Order*, 26 FCC Rcd at 5244 ¶ 8, 5252 ¶ 22.

confirmed that wireless providers are entitled to the same rate as other telecommunications carriers.³² Finally, the order required utilities to explain the capacity, safety, reliability, or engineering basis for denying an attachment request.³³

Third, predating these more recent efforts, the Commission executed two nationwide programmatic agreements (“NPAs”) between 2001 and 2004 that streamlined the historic review process under Section 106 of the National Historic Preservation Act for communications facilities. In March 2001, the Commission and national historic groups entered into an NPA to simplify procedures for review of antenna collocations, pursuant to which many collocations are exempted from the Section 106 review process.³⁴ In September 2004, the Commission and national historic and tribal groups executed an NPA that clarified and added predictability to the Section 106 review process for facilities not covered by the 2001 NPA, including new towers and non-exempt collocations.³⁵ Relatedly, the Commission has implemented the Tower Construction Notification System (“TCNS”), which facilitates communications with Indian Tribes in the context of the Section 106 review.³⁶

PCIA and the DAS Forum applaud these and other efforts as important initial steps. Yet, despite the importance of wireless and the billions of dollars invested, local regulation of the placement of wireless facilities remains a persistent barrier to the deployment of wireless

³² *Id.* at 5244 ¶ 8.

³³ *Id.*

³⁴ Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001), *available at* 47 C.F.R. Part I, Appendix B (“Collocation Agreement” or “2001 NPA”).

³⁵ Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (2004), *available at* 47 C.F.R. Part I, Appendix C (“2004 NPA”).

³⁶ *See* http://wireless.fcc.gov/outreach/index.htm?job=tower_notification (visited July 15, 2011).

infrastructure. State and local governments continue to impose significant burdens on wireless infrastructure deployment. For example, some jurisdictions utilize a review process for wireless facilities that are efficient to deploy, economical to construct and environmentally desirable, like collocations, that requires the same amount of documentation and review as an entirely new tower. DAS deployments face particular delays in many areas due to a lack of familiarity with the nature and benefits of a DAS system and the fact that a single system may cross jurisdictional boundaries or utilize multiple rights of way with fragmented government responsibility, necessitating compliance with a patchwork of requirements.

Such regulatory roadblocks – many of which are discussed in Section II below – are a significant obstacles to deployment and account for an estimated 20 percent of the cost of broadband buildout.³⁷ Indeed, it has been projected that “removing red tape and expediting approval processes could unleash \$11.5 billion in new broadband infrastructure investment over two years.”³⁸ As the Chairman has recognized, we need to “cut more red tape and pursue all smart policies to speed network deployment and ensure investment dollars go to building and upgrading networks, not the inefficiencies of the process.”³⁹ Doing so will “help unleash private investment in infrastructure, increase efficient use of scarce public resources (including spectrum), and increase broadband adoption.”⁴⁰

³⁷ *FCC Eyes Reducing Barriers to Broadband Buildout*, REUTERS, Feb. 8, 2011, available at <http://www.reuters.com/article/2011/02/09/us-usa-broadband-buildout-idUSTRE7180J820110209>; see also Genachowski February 9th Remarks at 2; NBP at 113.

³⁸ Genachowski February 9th Remarks at 2.

³⁹ Genachowski March 22nd Remarks at 7.

⁴⁰ *NOI*, 26 FCC Rcd at 5384-85 ¶ 2 (citation omitted).

Accordingly, PCIA and The DAS Forum agree with the National Broadband Plan that notwithstanding the important steps that have already been taken, “more can and should be done” and government must take “all appropriate steps” to ensure American access to broadband.⁴¹ This includes taking steps to remove barriers to wireless deployment. The *NOI* is an important first step toward removing those roadblocks and setting the stage for “further acceleration of broadband deployment in the future.”⁴² Recognizing these important goals, PCIA and The DAS Forum highlight some of the persistent wireless siting challenges that remain and suggest below steps the Commission should take to “spur the deployment and lower the costs of wireless buildout.”⁴³

II. THERE ARE SIGNIFICANT OBSTACLES TO BROADBAND BUILDOUT AND INVESTMENT, BUT SUCCESS STORIES CAN BE REPLICATED.

This section first discusses the application of the *Shot Clock Ruling* and its efficacy in reducing siting delays, given the significance of that decision and its focus in the *NOI*.⁴⁴ Next, it discusses the main obstacles that continue to impede broadband infrastructure investment and deployment,⁴⁵ while noting applicable success stories that can serve as models for regulatory reform, best practices and other outreach.⁴⁶ Because these obstacles vary depending on the type of infrastructure being deployed, they are addressed in the context of collocation installations,

⁴¹ NBP at 29, 109.

⁴² *FCC Promotes Robust, Affordable Broadband by Reducing Costs & Delays in Access to Infrastructure*, News Release, at 1 (Apr. 7, 2011), available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0407/DOC-305620A1.pdf.

⁴³ Genachowski March 22nd Remarks at 7.

⁴⁴ See *NOI*, 26 FCC Rcd at 5390 ¶ 13.

⁴⁵ See *id.* at 5389-95 ¶¶ 12, 14-33.

⁴⁶ See *id.* at 5388 ¶ 9 (“So that we might have a factual basis upon which to determine the nature and extent of any problems, we ask commenters to provide us with information on their experiences, both positive and negative, related to broadband deployment.”).

DAS deployments, and other siting challenges. Collocations and DAS challenges are discussed first, because rights-of-way and wireless siting problems in these areas are particularly acute and offer some of the greatest potential for reform.

As a threshold matter, it is useful to distinguish among the various types of wireless siting options that make up the Nation’s wireless infrastructure. A “tower” is “any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities,”⁴⁷ and includes lattice towers, guyed towers and monopoles. Towers offer the benefit of supporting wireless coverage across a wide geographic area and can accommodate, on average, five or six tenants.⁴⁸ A “collocation” means “the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.”⁴⁹ Traditionally, collocations are considered macro sites located on towers or buildings, water towers, steeples and the like, and are capable of providing wireless coverage to a broad geographic area.⁵⁰

DAS is a complementary and ancillary solution to towers and more traditional wireless infrastructure that enables competitive wireless deployments in a wide variety of unique scenarios. The use of DAS is growing as carriers continue to respond to the demand for wireless services. DAS networks are deployed by a variety of providers, including specialty DAS providers, traditional tower companies, and carriers themselves, creating a competitive dynamic similar to that of macro-site infrastructure. The FCC recently cited evidence indicating that the

⁴⁷ See Collocation Agreement at § I.B.

⁴⁸ See *Fifteenth Competition Report* at ¶ 309.

⁴⁹ Collocation Agreement at § I.A.

⁵⁰ See *Fifteenth Competition Report* at ¶ 309.

number of DAS nodes could double to 20,000 by the end of 2012 and reach as high as 150,000 by 2017.⁵¹ The choice of which solution to pursue in a given case – tower, collocation or DAS – is dependent upon a number of factors, including topography, RF (“radio frequency”) propagation, interference, local siting conditions, available land or space on an existing facility, environmental considerations, etc.⁵²

A. The *Shot Clock Ruling* Is an Important Step, but the Need to Litigate to Seek Redress and a Lack of Clarity Concerning the *Ruling’s* Applicability to DAS Limit Its Effectiveness.

The *NOI* seeks comment on the application of the *Shot Clock Ruling*, and whether it has been successful in reducing delays and speeding approvals in the local zoning process.⁵³ It also asks whether individual cases have been taken to district courts for zoning authorities’ failure to act and if so, how the *Shot Clock Ruling* was applied.⁵⁴ Each of these issues is addressed below.

1. It Is Unclear Whether the *Shot Clock Ruling* Has Reduced Processing Delays Associated with Tower and Collocation Applications.

While the *Shot Clock Ruling* provides that a local jurisdiction must act on an application within 90 days for collocations and 150 days for all other applications, it has been difficult to determine the practical effect that the ruling has had to date on applications for collocations and new towers. One of the largest barriers to the effectiveness of the ruling is the remedy it provides when a jurisdiction has taken longer than the permissible time to decide upon an application: an applicant can take the jurisdiction to court. In most cases, litigation will delay the

⁵¹ *Pole Attachment Order*, 26 FCC Rcd at 5243 ¶ 6 n.13.

⁵² Comments of PCIA and The DAS Forum, WT Docket No. 10-133, at 5 (July 30, 2010) (“Fifteenth Competition Report Comments”).

⁵³ *NOI*, 26 FCC Rcd at 5390 ¶ 13.

⁵⁴ *Id.*

project even more and certainly increase the costs, both for the applicant and for the jurisdiction. Applicants may conclude that it is more efficient from a time and cost perspective to extend the application process rather than proceed to court.⁵⁵

2. There Is a Lack of Clarity or Consensus Regarding the Applicability of the *Shot Clock Ruling* to DAS Deployments.

With respect to DAS projects, members of PCIA and The DAS Forum report that the *Shot Clock Ruling* has not been applied to DAS projects in jurisdictions where DAS networks have been deployed. Even though the FCC has recognized that DAS networks “provide wireless service,”⁵⁶ which places the siting of DAS facilities within the scope of the *Shot Clock Ruling*,⁵⁷ there appears to be a lack of clarity or consensus regarding the applicability of the *Shot Clock Ruling* as it applies to applications for DAS deployments in public rights of way.

As just one example, the City of Temecula, California, like many California jurisdictions, has declined to follow the *Shot Clock Ruling*’s requirement that a state or local government must act on a wireless facilities siting request within 150 days (five months) for siting applications other than collocations when processing a DAS application. The following is the permit chronology for a DAS project that a PCIA member is trying to construct in Temecula, CA. It took nearly *ten* months to reach a deployment agreement with the city after the initial application was filed – twice the timeframe set by the *Shot Clock Ruling*:

⁵⁵ See *Fifteenth Competition Report* at ¶ 314.

⁵⁶ Specifically, the FCC has recognized that DAS networks “provide wireless service,” *NOI*, 26 FCC Rcd at 5393 ¶ 24 n.37, using a “relatively large network of small cells that are connected by fiber optic cable and can be placed on such locations as utility poles, buildings, or traffic signal poles,” *Fifteenth Competition Report* at ¶ 308 n.878.

⁵⁷ The *Shot Clock Ruling* “define[d] timeframes for state and local action on wireless facilities siting requests.” See *Shot Clock Ruling*, 24 FCC Rcd at 13995 ¶ 1; see also discussion *infra* Section III.B.3.

Date	Action
June 17, 2010	DAS provider files a conditional use permit application
July 8, 2010	City of Temecula First Comment Letter
August 10, 2010	Provider's First Response
August 13, 2010	City of Temecula Second Comment Letter
August 25, 2010	Provider's Second Response
September 9, 2010	City and Provider meet at Provider's request
November 4, 2010	Third Provider Response and follow up to 09/09/10 meeting with City
January 13, 2011	Fourth Provider Response Letter
February 2, 2011	Fifth Provider Response Letter
March 16, 2011	First Planning Commission Hearing
April 14, 2011	Agreement reached regarding deployment

Relatedly, the ruling's failure to define what constitutes a "complete application" for purposes of triggering the processing timelines creates a loophole that allows jurisdictions to repeatedly seek information and delay processing.⁵⁸ The Temecula case is a good example. In addition to the initial application, five response letters were required before the first planning hearing on the proposal was held.

3. Although Courts Have Applied the *Shot Clock Ruling* in Only a Few Cases, the Results Highlight the Limitations of a Litigation-Only Remedy.

Since the Commission's adoption of the *Shot Clock Ruling*, courts have applied the ruling in a few cases.⁵⁹ In only one case did the court address the order in the context of a "failure to

⁵⁸ See *Shot Clock Ruling*, 24 FCC Rcd at 14010 ¶ 42 ("Finally, we have provided for further adjustments to the presumptive deadlines in order to ensure that the timeframes accommodate certain contingencies that may arise in individual cases, including ... where the application review process has been delayed by the applicant's failure to submit a complete application or to file necessary additional information in a timely manner.").

⁵⁹ See Matthew K. Schettenhelm, "Accelerated Wireless Build-Out: Responding to DAS and *Shot Clock*," INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION 2011 MID-YEAR SEMINAR WORK SESSION IV – TELECOMMUNICATIONS: THE NATIONAL INITIATIVE TO EXPAND BROADBAND — A FEDERAL/STATE/LOCAL PARTNERSHIP? OR FURTHER FEDERAL PREEMPTION?, at 8-9 (Apr. 10-12, 2011) ("*Wireless Buildout*"); see, e.g., *Clear Wireless LLC v. City of Wilmington*, 2010 U.S. Dist. LEXIS 89237 (D. Del. 2010) ("*Clear Wireless*"); *Bell Atlantic Mobile of Rochester, L.P. v. Town of Irondequoit*, No. 11-CV-6141 (W.D. N.Y. filed Mar. 18, 2011) ("*Bell Atlantic*"); *Maine RSA #1, Inc. v. Town of Albion, Maine*, No. 1:10-CV-279-GZS (D. Me. Dec. 9, 2010) ("*Maine RSA #1*").

act” claim;⁶⁰ the remaining cases have involved the ruling’s finding that it is an “effective prohibition” to deny a wireless service facility siting application because service is available from another provider.

In *Clear Wireless LLC v. City of Wilmington*, the city did not make a decision on the application of Clear Wireless to collocate a rooftop antenna until 110 days after the filing of the application, and did not notify the plaintiff of the decision until 188 days (more than 6 months) after filing.⁶¹ The court granted the defendants’ motion to dismiss Clear Wireless’s failure to act timely claim, reasoning that “the only reasonable relief for such a failure is to require a written decision, which defendants have already provided.”⁶² Thus, under the court’s holding in *Clear Wireless*, a local zoning authority can avoid repercussion for its failure to act in a timely manner as long as it issues a decision – even if well past the *Shot Clock Ruling* timelines – before the court makes its ruling. Clearly, this is not a result that the Commission intended when it established the timelines to “encourage the expeditious deployment of wireless broadband services.”⁶³ Other cases that have been taken to district courts for zoning authorities’ failure to act either have not been decided yet⁶⁴ or were never litigated fully due to the parties entering into a consent decree.⁶⁵

The remaining cases where courts have addressed the *Shot Clock Ruling* did so in the context of claims that denial of the applicant’s request amounted to an effective prohibition of

⁶⁰ See *Clear Wireless*, 2010 U.S. Dist. LEXIS 89237, at *12-14; see also *Wireless Buildout* at 8.

⁶¹ See *Clear Wireless*, 2010 U.S. Dist. LEXIS 89237, at *1-2.

⁶² See *id.* at *13-14.

⁶³ *Shot Clock Ruling*, 24 FCC Rcd at 14005 ¶ 32.

⁶⁴ See, e.g., *Bell Atlantic*, No. 11-CV-6141.

⁶⁵ See, e.g., *Maine RSA #1*, No. 1:10-CV-279-GZS.

the provision of personal wireless services in violation of Section 332(c)(7)(B)(i)(II) of the Act.⁶⁶ For example, several district courts in the Third Circuit have ruled that the Commission’s *Shot Clock Ruling* trumps the Third Circuit’s previous reading of the “effective prohibition” clause.⁶⁷ This includes the *Clear Wireless* case, in which the court applied the *Shot Clock Ruling* deferentially by not accepting the existence of a single provider in the relevant geographic market as sufficient grounds for denying the plaintiff’s application.⁶⁸ Similarly, in *Liberty Towers, LLC v. Zoning Hearing Bd.*,⁶⁹ the court interpreted the *Shot Clock Ruling* as requiring it to reject the defendants’ argument “that there [was] no ‘prohibition of service’ under section 332(c)(7)(B)(ii)(II) of the Act because other wireless service providers are able to provide telecommunication service in the area that would be affected by the proposed tower.”⁷⁰ And in *Sprint Spectrum L.P. v. The Zoning Bd. of Adjustment of the Borough of Paramus*, the court noted that the FCC explicitly rejected the Third Circuit’s one-provider approach for purposes of determining whether a significant gap exists and that the Commission’s interpretation is binding.⁷¹

⁶⁶ See, e.g., *Liberty Towers, LLC v. Zoning Hearing Bd.*, 748 F. Supp. 2d. 437 (E.D. Pa. 2010); *T-Mobile Northeast LLC v. Fairfax County Bd. of Supervisors*, 2010 U.S. Dist. LEXIS 133753 (E.D. Va. 2010); see also *Clear Wireless*, 2010 U.S. Dist. LEXIS 89237, at *8–12; *Wireless Buildout* at 8-9.

⁶⁷ *Clear Wireless*, 2010 U.S. Dist. LEXIS 89237, at *8-9; *Liberty Towers*, 784 F. Supp. 2d. at 444-45; see also *Sprint Spectrum L.P. v. The Zoning Bd. of Adjustment of the Borough of Paramus*, 2010 U.S. Dist. LEXIS 124749 (D. N.J. 2010) (“*Sprint Spectrum*”).

⁶⁸ *Clear Wireless*, 2010 U.S. Dist. LEXIS 89237, at *12. The court also noted that the *Shot Clock Ruling* had no effect on the other prong of the Third Circuit’s test for evaluating zoning determinations under Section 332(c)(7)(B)(i)(II), which requires plaintiffs to show that “the manner in which [they propose] to fill the significant gap in service is the least intrusive on the values that the denial sought to serve.” *Id.* at *10–11.

⁶⁹ 784 F. Supp. 2d. 437 (E.D. Pa. 2010).

⁷⁰ *Id.* at 444-46 (emphasis in original).

⁷¹ See *Sprint Spectrum*, 2010 U.S. Dist. LEXIS 124749, at *26 (citing precedent holding that courts may not ignore an administrative agency’s subsequent conflicting interpretation of an ambiguous statute).

At least one district court in the Sixth Circuit also has deferred to the Commission's *Shot Clock Ruling* in the same context. In *T-Mobile Central LLC v. City of Fraser*,⁷² the district court rejected the city's argument that the court should consider coverage provided by other carriers in evaluating whether a significant gap in coverage exists, concluding that the contrary view expressed by the Commission in the *Shot Clock Ruling* is determinative.⁷³

However, other cases indicate that some district courts are not applying the *Shot Clock Ruling* in a manner that "encourage[s] the expeditious deployment of wireless broadband services."⁷⁴ For example, a district court in the Sixth Circuit found that the Commission's *Shot Clock Ruling* does not encompass broadband communications.⁷⁵ In *Arcadia Towers LLC v. Colerain Twp. Bd. of Zoning Appeals*, the court held that "[the *Shot Clock Ruling*] does not overrule [a 2007 Declaratory Ruling finding that mobile wireless broadband Internet access is not a 'commercial mobile service' under the Telecommunications Act of 1996], nor does [the *Shot Clock Ruling*] hold that wireless broadband communication services are covered by the [Telecommunications Act]. Although the [*Shot Clock Ruling*] speaks in favor of broadband in dicta, it in no way states that broadband communications are encompassed by the [Telecommunications Act]."⁷⁶

⁷² 675 F. Supp. 2d 721 (E.D. Mich. 2009).

⁷³ See *id.* at 729.

⁷⁴ See *Shot Clock Ruling*, 24 FCC Rcd at 14005 ¶ 32.

⁷⁵ See *Arcadia Towers LLC v. Colerain Twp. Bd. of Zoning Appeals*, 2011 U.S. Dist. LEXIS 66623, *5 (S.D. Ohio 2011).

⁷⁶ *Id.*

Finally, in *T-Mobile Northeast LLC v. Fairfax County Bd. of Supervisors*,⁷⁷ a district court in the Fourth Circuit ruled that the Commission’s *Shot Clock Ruling* neither “applies, rejects ..., [n]or otherwise impacts the Court’s analysis.”⁷⁸ In that case, Fairfax County denied T-Mobile permission to extend an existing 100-foot transmission pole by ten feet in order to collocate its facilities where two other carriers were already present, citing negative visual impacts. The court reasoned that “the [*Shot Clock Ruling*] prohibits only the use of the one-provider rule.”⁷⁹ The court found that the zoning authority denied the plaintiff’s application on aesthetic grounds, not because other providers were present.⁸⁰ T-Mobile has appealed the decision to the Fourth Circuit and the case is still pending.⁸¹

B. Challenges to the Efficient Use of Existing Infrastructure through Collocation are Significant and Prevalent.

1. De Novo Zoning Review and the Requirement of a Special Use Permit for Collocations Are Hindering Wireless Broadband Deployment.

Zoning is a legislative function emanating from a jurisdiction’s police powers to protect public health, safety, and general welfare.⁸² In most jurisdictions, the construction of new towers and other support structures must undergo full zoning review and approval, which generally

⁷⁷ 2010 U.S. Dist. LEXIS 133753 (E.D. Va. 2010).

⁷⁸ *Id.* at *36–37.

⁷⁹ *Id.* at *37.

⁸⁰ *See id.* at *37–38.

⁸¹ *See T-Mobile Northeast LLC v. Fairfax County Bd. of Supervisors*, No. 11-1060 (4th Cir. appeal filed Jan. 13, 2011).

⁸² *See Village of Euclid v. Amber Realty Co.*, 47 S.Ct. 118 (1926) (noting that an ordinance, like “all similar laws and regulations, must find [its] justification in some aspect of the police power, asserted for the public welfare”); *see also Schaffer v. City of Omaha*, 248 N.W. 2d 764, 765 (1977) (“Cities of the metropolitan class are authorized by statute to make and enforce police regulations required for the good government, general welfare, health, safety, and security of the city and its citizens, including zoning regulations.”).

entails a substantial application process, public hearings, and the grant of a conditional or special use permit for the structure. When a tower is initially permitted, it passes the jurisdiction's health, safety and welfare review with regards to its placement and its use for the provision of wireless services. The collocation of additional antennas that do not substantially change the size of the tower⁸³ should not trigger a full zoning review because: public health issues (*i.e.*, RF emissions) are by statute exclusively within the purview of the FCC;⁸⁴ safety issues are addressed through the submission of an engineering report stamped by a licensed engineer at the building permit stage; and welfare issues (typically aesthetics, property value, etc.) are not an issue because the tower itself is essentially unchanged.

Most zoning ordinances encourage the collocation of antennas on existing towers and require a demonstration that no existing towers or structures can accommodate the wireless carrier's equipment before any new tower construction is permitted. Notwithstanding this, there are numerous jurisdictions that are thwarting the deployment of wireless broadband because of the unnecessary burdens placed on collocation in the zoning process. Foremost among the burdens is the requirement of a *de novo* zoning review for a collocation and the requirement of a special or conditional use permit to collocate facilities on an existing structure.

Some states have recognized the benefits of collocation and have taken steps to encourage collocations through expedited regulatory review.⁸⁵ Most recently the state of Georgia

⁸³ See Collocation Agreement at § I.C (defining a "substantial increase in the size of the tower").

⁸⁴ See 47 U.S.C. §§ 301, 302a, 303.

⁸⁵ For example, Tennessee Code Section 13-24-305 states that a jurisdiction cannot regulate placement of additional antennas on existing wireless transmission facilities. Jurisdictions are permitted to regulate collocations when doing so would increase the height of the facility, require lighting, or exceed the local height limit. Furthermore, applicants cannot be asked to prove the need for increased RF capacity in the area, and jurisdictions cannot make permit denials that would actually or effectively prohibit the provision of wireless services in the area. TENN. CODE (continued on next page)

has enacted the Advanced Broadband Collocation Act,⁸⁶ which streamlines the permitting process for collocations. In doing so, Georgia found that collocations should be deployed in a more efficient manner in order to “[e]nsure the ready availability of wireless communication services to the public to support personal communications, economic development, and the general welfare.”⁸⁷ The law requires that an application for collocation should be subject to only a building-permit level review for structures that are already approved to facilitate wireless sites and prevents localities from considering the business case for a particular collocation as an element of review.⁸⁸

2. “Legal, Non-Conforming Use” Designation of Infrastructure Unduly Limits the Efficient Use of Existing Infrastructure.

A further problematic trend that PCIA members are experiencing with the special or conditional use permitting process is re-review of an already approved underlying facility, most significantly in regards to towers that are designated “legal, non-conforming” status under the zoning process. A “legal” non-conforming” use is a use or structure which was legally established according to the applicable zoning and building laws of the time, but which does not meet current zoning and building regulations. A use or structure can become “legal, non-conforming” due to rezoning, annexation, or revisions to the zoning code.

ANN. § 13-24-305 (2010). Similarly, Florida Statute provides that collocations that do not increase the height of the tower or the size of compound “shall be subject to no more than building permit review.” FLA. STAT. §365.172 (12). Two bills also have been introduced in the New Jersey State Legislature that would deem the collocation of wireless communications equipment on existing infrastructure “a minor site plan, for which the requirements of notice and public hearin shall be waived.” Assemb. 3949, 214th Leg., Reg. Sess. (N.J. 2011); S. 2989, 214th Leg., Reg. Sess. (N.J. 2011).

⁸⁶ O.C.G.A. §§ 36-66B-1 – 36-66B-4 (2010).

⁸⁷ *Id.* § 36-66B-2(a)(2).

⁸⁸ *Id.* § 36-66B-4.

Many jurisdictions are requiring as a condition of collocation that the existing infrastructure be replaced or retrofitted at significant added costs.⁸⁹ Conditions for approval for collocation can include changing the landscaping of the underlying structure,⁹⁰ requiring that the structure be retrofitted into a stealth design,⁹¹ or even that the underlying structure itself be replaced with a new and often shorter structure.⁹² Such requirements go beyond being a disincentive to collocation to completely altering the network design of existing wireless systems. Often, because the economics of meeting the new code requirements cannot justify the addition of antennas, the collocation is abandoned. In sum, the significant benefits of collocation are negated by these processes.

Irvine, California is an example of the “legal, non-conforming” problem. A PCIA member’s original tower site was approved in December 2000 while the property was under the jurisdiction of Orange County. The approval was the product of months of tense discussions that also involved the City of Irvine. The original request was for a 110-foot monopole, but through negotiations the applicants settled for an 82-foot monopole with four radiation centers (*i.e.*, four

⁸⁹ See Exhibit B.

⁹⁰ For example in Suwanee, Georgia, a member reports that in order to collocate on a facility built before the jurisdiction’s ordinance was enacted, the member was required to have the property rezoned, obtain three variances and comply with new conditions for landscaping. This process of attempting to site on long-existing infrastructure took five months and three public hearings. Similarly, Pearland, Texas recently revised its ordinance so that any pre-existing tower must now undergo a special-use permitting process and comply with new landscaping requirements in order to host collocations. CITY OF PEARLAND, TX., ORDINANCE NO. 509-H CH. 32 (2002).

⁹¹ In the City of Carson, California, an attempt to collocate on a monopole in an industrial zone resulted in the City demanding that the monopole first be re-designed so that it is camouflaged as a mono-eucalyptus. In Commerce, California, the code requires denial of collocation on monopoles unless they are replaced with a new structure. CITY OF COMMERCE, CAL., CODE § 19.27.060(H) (2010). The City of Oceanside, California would not even renew the underlying permit of an existing structure (the permit renewal was the applicant’s only action) unless the applicant replaced a monopole with a mono-eucalyptus “stealth structure.”

⁹² In the City of Leawood, Kansas, for example, an attempt to collocate on an existing facility has resulted in the City requesting that the existing 180’ tower be replaced with a 150’ tower and that all antennas be flush-mounted.

antenna mounting height centerlines) and an approved “master plan” for the future placement of equipment on the site.

Later the property was annexed into the City of Irvine. Even though Irvine was a participant in the agreement to allow the monopole and its equipment, the City now maintains that the site is a “legal, non-conforming” use and cannot be modified or expanded even though the monopole owner has not reached the entitlement limits originally imposed by the City prior to incorporation. The monopole owner reports that a carrier is seeking to expand its coverage in the area with the first collocation installation on the monopole. To date, the City will not allow the collocation on the monopole because of its “legal, non-conforming” status, even stating that the non-conforming monopole has made the entire property “legal, non-conforming.”

3. Collocation Application Requirements Are Often Excessive, Burdensome, and Beyond the Scope of the Initial Zoning Decision.

The information required in support of an application to collocate antennas on an existing structure is often as extensive as that required to obtain a permit to construct a new tower. Despite the fact that the underlying structure has already been approved by the jurisdiction, collocation applicants are subject to application requirements that go far beyond the scope of the engineering and structural concerns associated with adding the additional antenna to the support structure. Indeed, application requirements and information requests are at the very heart of the problems with lengthy delays and excessive costs in the approval process.

As a jurisdiction continuously requests additional information from the applicant, the application itself remains incomplete and the 90-day timeframe for processing collocation applications established by the *Shot Clock Ruling* is tolled. The collocation application process

can be intentionally complex, requiring, among other things, RF propagation studies, engineering reports, drainage studies, and inventories of other wireless facilities within the jurisdiction. Considering the cumulative amount of time needed for an applicant to generate the requested information in order for an application to be deemed complete and for the jurisdiction to review the completed application, the time from application to permit can swell to a range of four months to one year for approval.

Burdensome application requirements not only increase time but also deployment costs. In many jurisdictions, these burdensome filing requirements are driven by a wireless facility zoning consultant. Jurisdictions often retain consultants to perform any number of administrative and public service functions. However, consultants that claim to specialize in wireless facility zoning prey upon a misperception that the permitting process for wireless facilities, especially collocations, is unique and/or more complex than other permitting processes. Wireless facility siting decisions are by nature land use decisions that are no different in substance than any other land use decision. To the extent the jurisdiction requires any technical or engineering documentation to be filed with an application, the jurisdiction's own professional staff likely has the training and expertise to review such information. For example, in many jurisdictions, planning staff is qualified to review this material.

As part of their retention by a jurisdiction, a consultant typically requires the jurisdiction to adopt a wireless facility siting ordinance favored by the consultant, which include numerous application requirements and fees and requires applicants to establish an escrow account to pay

for the application review.⁹³ In nearly all cases, jurisdictions' use of consultants to review wireless facility applications is paid for by the applicant through an escrow account. The consultant invoices the jurisdiction each time the application is reviewed. If the escrow account is depleted by the consultant, the applicant is required to replenish it.⁹⁴ The more information and application requirements that a consultant requires for a collocation, the more money the consultant can draw from the escrow to review the application – thus the consultant has a profit motive in requiring time-consuming and unnecessary information and studies in order to keep an application incomplete and subject to more review.

These application requirements create a no-win situation – generating significant delays in what should be a routine permitting process and imposing unnecessary and extensive expenses in the deployment of antennas on existing infrastructure. Exhibit B lists a few of the jurisdictions that utilize wireless consultants with a history of this problematic practice.

In July 2010, a federal court realized the detrimental impact that some consultants have on the siting of wireless infrastructure. In *MetroPCS v. the City of Mt. Vernon, NY*, the court found that the City, upon the consultant's recommendation, had unreasonably discriminated against MetroPCS by denying it the ability to collocate on a structure which already supported

⁹³ See PEORIA, IL. CODE App. B, Art. 3 §3.9(h) (2011) (requiring an escrow of \$8,500 for a new tower and \$2,000 for a collocation).

⁹⁴ See MONROE, OH CODIFIED ORDINANCES Ch. 1280.12(b) ("MONROE ORD."), available at http://www.monroehio.org/images/stories/development/ZoningCode/chapter1280_wirelesstelecommunicationfacilities.pdf ("The City's consultants/experts shall invoice the City for its services in reviewing the application, including the construction and modification of the site, once permitted. If at any time during the process this escrow account has a balance less than \$2,500.00, the applicant shall immediately, upon notification by the City, replenish the escrow account so that it has a balance of at least \$5,000.00. Such additional escrow funds shall be deposited with the City before any further action or consideration is taken on the application.").

three other wireless providers without a valid reason.⁹⁵ This collocation application process took 15 months and cost MetroPCS over \$16,000 in consultant fees. The court found the fees unreasonable and ordered disgorgement of some of the consultant fees paid because part of the review for which the consultant was compensated involved “repeatedly requesting unnecessary information and belaboring issues already resolved.”⁹⁶ Furthermore, the court noted that the City and its consultant failed to present “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.”⁹⁷ It is important to note that the ordinance in the Mt. Vernon case is the model ordinance of a consultant retained in over 150 jurisdictions across 22 states.⁹⁸

In another illustrative example, a carrier sought to collocate an antenna on a tower operated by a PCIA member in Monroe, Ohio – a jurisdiction that retains a wireless consultant. The proposed collocation did not require the extension of the tower or the expansion of the compound. The consultant in this case required the same application for collocation as is required for a new tower, which necessitated a new geotech study, drainage plans, an RF study, and a full set of zoning plans with a 500’ radius showing all residences, buildings, and lots, their parcel number and zoning determination within the radius.⁹⁹ A “Zone of Visibility Map” from different locations showing how the tower looks now and how it will look after the collocation

⁹⁵ *MetroPCS N.Y., LLC v. City of Mt. Vernon*, 739 F. Supp. 2d 409 (S.D.N.Y. 2010) (“*MetroPCS*”).

⁹⁶ *Id.* at 424.

⁹⁷ *Id.* at 425 (addressing the \$6,000 application fee for collocations and \$12,000 for a new tower required by the ordinance).

⁹⁸ *See* Exhibit B.

⁹⁹ MONROE ORD. Ch. 1280.04.

was also required.¹⁰⁰ In this case, the consultant's application review fee was \$2,500 and the escrow was required to be maintained at \$5,000. Again, the consultant invoiced for *each* review of the application. If the escrow account fell below \$2,500, the carrier was required to add another \$2,500 to \$5,000 before the consultant would review the next submission. In similar jurisdictions, the total costs will run, on average, from \$15,000 to \$25,000 if more than one review is required. In the end, the antenna installation at this tower never took place – the carrier elected to install its antenna on a nearby tower that was outside the jurisdiction despite the fact that the site was not ideal for its coverage needs.

By contrast, some jurisdictions, recognizing the benefits of collocation, require only the limited amount of information needed to issue a common building permit.¹⁰¹ In these cases, the information is readily available to the applicant, reducing the amount of time spent on compiling information, documents and studies. Furthermore, the cost of this information normally amounts to a small percentage of the cost of the installation, on average about 10%. The information required for a building permit, including a set of the collocation construction drawings, costs on average \$3,500 for a collocation. Therefore, the typical cost for a normal collocation without changes to the tower or the compound is \$3,750 – almost 80% less than jurisdictions with burdensome information requirements.

¹⁰⁰ *Id.*

¹⁰¹ See PERSON COUNTY, NC PLANNING ORDINANCE Note 9, Sec. V (2010), available at <http://www.personcounty.net/portals/0/zoning%20ordinance%20as%20of%20february%207%202011.pdf> (permitting collocations by administrative approval only in all zoning districts).

C. DAS and Other Infrastructure Solutions Are Subject to Inconsistent and Often Discriminatory Permitting Processes and Fees.

1. DAS Is Subject to Discriminatory Treatment Despite Clear Rules and Regulations.

DAS is a crucial part of the wireless network ecosystem. As discussed above, DAS is highly effective at providing increased coverage and capacity in areas where traditional macro sites are infeasible. DAS enables the efficient use of existing spectrum, is scalable to accommodate multiple carriers on the same system, and is generally easily upgraded to newer technologies.¹⁰² It is relied upon by large national wireless providers and competitive regional providers and exists today as a tool not only to improve coverage and capacity with existing spectrum but also to facilitate competition. In order to be competitive, new wireless carriers entering a market with limited spectrum are more likely to need larger, more comprehensive DAS coverage and a rapid, predictable time-to-market.

DAS providers rely on the use of public rights of way in order to provide wireless capacity and coverage over a specific area. DAS systems' use of the public rights of way include aerial or underground wiring connecting antenna nodes, as well as the nodes themselves (which include antennas and associated equipment boxes) attached to third party-owned utility poles or municipal-owned structures and infrastructure, such as street lights or traffic lights. DAS deployments are generally more capital intensive and typically involve targeted projects that are smaller and have fewer economies of scale than traditional wireline and cable deployments in the public rights of way.

¹⁰² See Letter from Brian Regan, Director - Government Relations, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 2 n.3 (filed Mar. 2, 2011) (noting the exhaustive record detailing the benefits of DAS in the FCC's Pole Attachment proceeding).

Because DAS is a relatively new technology and reliant upon the use of public rights of way, jurisdictions often struggle with the regulation and permitting of DAS. The design of DAS systems and their use in the delivery of wireless capacity and coverage often cause conflict in jurisdictions as to how to regulate their placement and what regime to use – rights-of-way rules or wireless facility siting ordinances. Most jurisdictions across the county have not specifically accounted for DAS and other wireless attachments in the right of way within their ordinances. Still others leverage the local zoning process to effectively bar the use of DAS in the right of way.¹⁰³ Even jurisdictions that have applicable regulations for the placement of wireless facilities in the right of way, however, often ignore those regulations, as well as other beneficial regulations that apply to utilities, in favor of inappropriate and burdensome regulations such as cable and ILEC franchises.¹⁰⁴ In sum, inconsistent and discriminatory treatment of DAS causes significant delays and costs to a vital tool in the expansion of wireless broadband services.

At the core of the problem is the confusion over the nature of DAS and DAS providers in the initial permitting process. Principally, DAS providers, including those with state utility designations, suffer delays while arguing with a jurisdiction for non-discriminatory, competitively-neutral permitting treatment consistent with existing state and municipal practices for permitting utility infrastructure in public rights of way. A primary contributing factor is that wireless service providers have traditionally been subject to land use and zoning regulations as

¹⁰³ For example, if a jurisdiction applies its wireless facility siting ordinance to DAS, the use of the right of way can be thwarted when applying setback requirements designed for macro sites.

¹⁰⁴ *See, e.g.,* THE COUNCIL OF THE CITY OF NEW YORK., Res. No. 191 (Aug. 25, 2010), *available at* http://www.nyc.gov/html/doitt/downloads/mobile/res_191_%20final.pdf. It is unreasonable to apply a franchise fee or other charge based on a percentage of revenues. This fee equates to a rental rate or even a tax. Collocators, such as DAS providers, are not typically in a position to recover any such tax because there are no end users. Further, the carriers are taxed on their subscribers' usage, and thus a percentage-based fee is duplicative and redundant of the taxes on end users, which generally are applied in a clear and transparent way.

opposed to utility-related regulations and processes in public rights of way. Negotiation of franchise agreements, rights-of-way licenses, and similar agreements, coupled with the related review and approval processes (public hearings, review and approval by elected bodies, etc.), contribute significantly to delays in application processing – placing the project at risk and creating barriers to wireless broadband investment.

Often, the discriminatory treatment is overtly counter to existing regulations.¹⁰⁵ In California, rights-of-way issues are regulated under California Public Utility Code Section 7901.¹⁰⁶ Section 7901.1 provides authority to local jurisdictions to regulate the “time, place and manner” of installations in the right of way, with the important proviso that control shall be reasonable and applied to all entities in a consistent manner.¹⁰⁷ Nevertheless, many jurisdictions in California ignore this law with respect to DAS installations in the right of way and impose discretionary zoning requirements including requiring conditional use permits.¹⁰⁸

Inconsistent and discriminatory treatment of DAS also translates into increased cost of deployment, excessive fees, and uncertainty. Where local conditional use permits are required for the placement of DAS in the right of way, DAS providers are subjected to the same

¹⁰⁵ See, e.g., Rules and Regulations of the Colorado Department of Transportation Pertaining to Accommodating Utilities in the State Highway Rights of Way, 2 C.C.R. 601-18 (2009), available at http://www.coloradodot.info/business/permits/utilitiesspecialuse/2CCR_601_18.pdf/at_download/file (establishing a utility permit system that includes uniform procedures and requirements necessary to allow utility accommodation in the right of way). A DAS Forum member reports that Jefferson County, Colorado takes the position that it has jurisdiction over wireless telecommunication attachments in the right of way. The Colorado Department of Transportation defers to the County if the installer is seeking a permit.

¹⁰⁶ CAL. PUB. UTIL. CODE § 7901 (2010), available at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=puc&group=07001-08000&file=7901-7912>.

¹⁰⁷ *Id.* at § 7901.1.

¹⁰⁸ See CITY OF IRVINE, CA ZONING ORDINANCE Ch. 2-37.5, §§ 2037.5-3, 2037.5-5 (1998) (requiring a conditional use permit only for specific types of wireless attachments in the right of way that are within 150 feet from a residential district). A DAS Forum member notes that the Irvine zoning process took approximately one year before resulting in denial. The issue is currently in litigation.

application fees and consultant-driven application requirements discussed above. Where a state or local rights-of-way agency charges for right of way access, the access fees should be consistent with those of any other utility operating in the right of way.¹⁰⁹ PCIA and The DAS Forum members have also encountered rights-of-way access fees based on the amount of the right of way that is occupied (measured linearly or otherwise), arbitrary annual fee amounts (perhaps equal to annual review and monitoring cost to the agency), and other fee schemes. Rights-of-way charges are more likely to be unreasonable where local and/or state regulations are absent or ambiguous with respect to rights-of-way fees applicable to telecommunications utilities.

Common criteria for the unreasonableness of fees include: charges that exceed those applied to a comparably-designated telecommunications utility; charges applied as a percentage of revenues; and charges that exceed the cost burden on the jurisdiction for placing and/or maintaining equipment and facilities in the public rights of way. Market-based rates are never appropriate given the monopoly power afforded to jurisdictions over public rights of way. The risks and uncertainties with any market-based scheme for rights-of-way access can have a prohibitive effect on prospective DAS investments. In short, no reasonable business will invest in a capital intensive project where costs are unknown or unpredictable.

Ultimately broadband subscribers are affected by burdensome DAS regulations. Higher project development costs and recurring fees are ultimately passed along to the broader subscriber base nationwide. More importantly, where traditional siting opportunities are non-existent and/or DAS is a preferred solution, public rights-of-way processes and charges that have

¹⁰⁹ See generally *Pole Attachment Order*.

a prohibitive effect on investments in capital intensive DAS projects may result in subscribers having inadequate or no mobile broadband service, or fewer competitive mobile broadband offerings – contrary to the intent of the National Broadband Plan. For example, the City of New York’s franchise agreement for wireless attachments requires a \$100,000 per year recurring fee, a 15-year term, and a minimum \$250/month per pole fee for attachment to City-owned assets in just one zone of the City. If the fees in this agreement were not such a barrier, wireless broadband infrastructure investment and network deployment would rapidly and significantly increase, improving subscriber service advancements and public safety communications in the largest city in the U.S.

2. DAS Permitting Often Does Not Account for the Entire System, Causing Significant Delays.

While a DAS network is composed of multiple nodes spread out over a broad geographic area, it is a single system. However, DAS providers are often required to undergo the application and permitting process on a node-by-node basis. For DAS systems that may include dozens, if not hundreds, of nodes, this can cause significant delays, especially in jurisdictions that require discretionary review and special or conditional use permits for each node.

Inconsistency and absence of uniformity of regulations among neighboring jurisdictions is also a significant problem for large DAS deployments. Typical DAS deployments are more likely to involve multiple jurisdictions for a single network project. As DAS systems can be utilized to provide capacity and coverage across sizable areas – for example, along a heavily travelled highway – DAS systems may cross jurisdictional boundaries, requiring coordination between multiple authorities using varying permitting processes. Furthermore, the use of rights of way is often subject to state as well as local regulation. In Bucks County, Pennsylvania, 20% of townships involved in one DAS project have delayed rights-of-way access and, due to the

interconnection of the system, have delayed the project's completion. As a result, all revenue generation has been stifled for several months – potentially indefinitely – on a seven-figure capital investment commitment. The application and approval process for DAS should be by the system, not by the node, and jurisdictions must endeavor to treat a DAS deployment as a singular system when regulating a multi-jurisdictional facility.

D. A Variety of Other Barriers to the Siting of Wireless Facilities Negatively Affect the Deployment of Wireless Networks.

1. Blanket Prohibitions of Wireless Facilities in Certain Zoning Districts Are Effective Prohibitions of Service.

Wireless facility regulation frequently rules out entirely some types of zoning districts for placement of wireless facilities.¹¹⁰ Most often these banned zones are residential districts and light commercial districts. This causes significant problems in the provision of effective coverage and capacity of wireless services in the places where consumers most use them. A recent study from the National Center for Health Statistics found that 23.9% of adults and 27.9% of children live in wireless only households.¹¹¹ As more Americans “cut the cord” and rely on wireless devices as their primary access to voice communications and internet access, the strategic placement of wireless facilities becomes an imperative for public safety. In some circumstances, these blanket bans on certain zoning districts amount to an effective prohibition of service.

¹¹⁰ See, e.g., CITY OF WALTHAM, MA GENERAL ORDINANCES AND ZONING CODE Part III, Art. X § 10.5 (1997) (listing types of wireless facilities and the zoning designations in which they are restricted); see also Exhibit B.

¹¹¹ Stephen J. Blumberg *et al.*, *Wireless Substitution: State-level Estimates From the National Health Interview Survey, January 2007–June 2010*, NATIONAL HEALTH STATISTICS REPORTS No. 39 (Apr. 20, 2011).

2. Moratoria Are Effective Prohibitions of Service.

The wireless infrastructure deployment process is significantly encumbered by jurisdictions that enact moratoria on the siting of wireless infrastructure. The Commission's *Shot Clock Ruling* on timelines for application review does not address moratoria and as a result many jurisdictions have enacted them in an effort to avoid the Commission's ruling altogether.¹¹² Often the moratorium extends even beyond new site development to include a moratorium on all collocations as well.¹¹³ Siting moratoria lasting longer than six months are contrary to the industry-community agreement signed in 1998, barring unusual circumstances.¹¹⁴ Yet in too many cases today, local jurisdictions have flouted this agreement and moratoria can stretch well beyond the six-month time period.¹¹⁵

Moratoria not only delay deployments for the length of the moratorium, but also make long-term planning for deploying in those jurisdictions difficult or impossible. Moratoria (particularly ones longer than six months) can have serious public safety, economic, and social

¹¹² For example, Long Beach, CA, the fourth largest City in the state, has enacted a moratorium on all siting on land zoned either Institutional or Residential. Their letter to those with pending applications states that "Any and all of your applications involving wireless telecommunications sites may be affected by this moratorium." Copy on file with PCIA.

¹¹³ See, e.g., Kendall Hatch, *Ashland Planners Put Cell Tower Permits on Hold*, METROWEST DAILY NEWS, Apr. 30, 2010, available at <http://www.metrowestdailynews.com/news/x457997697/Ashland-planners-put-cell-tower-permits-on-hold> ("The Planning Board last night voted to recommend that Town Meeting approve a six-month moratorium on permits for new cell phone antennas and upgrades to existing ones.") (emphasis added); Kyle Daly, *Aliso Viejo Ends Moratorium on Permits for Wireless Carriers*, ORANGE COUNTY REGISTER, June 2, 2011, available at http://articles.oregister.com/2011-06-02/news/29627079_1_wireless-carriers-urgency-ordinance-moratorium (noting the jurisdiction maintained a moratorium for two years).

¹¹⁴ See Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process, available at <http://transition.fcc.gov/statelocal/agreement.html>. These guidelines were agreed to by the FCC's Local and State Government Advisory Committee ("LSGAC"), PCIA, the Cellular Telecommunications Industry Association, and the American Mobile Telecommunications Association. The LSGAC is a body of elected and appointed local and state officials that was appointed by the Chairman of the Commission in March 1997.

¹¹⁵ See Comments of PCIA – The Wireless Infrastructure Association, WT Docket No. 08-165, at 10-11 (Sept. 29, 2008).

impacts upon the locality. Moratoria discourage wireless development at a time when its residents rely on wireless services where they live and work. Instituting a moratorium will likely set wireless development in a locality back for a period of years, not merely the duration of the moratorium. The lead-times of infrastructure development are such that refusing applications now would effectively not allow for more infrastructure to come online for up to two to three years, after factoring in the application and build-times involved. This could prove to be critical time lost, particularly given the advances in wireless technology, such as broadband technology, that could bring significant economic benefits to the jurisdiction's economy.

3. Local Authorities Have Established Burdensome Preferences that Deter Deployment.

In their attempts to influence the scope and scale of wireless networks and infrastructure within their jurisdiction, local authorities are setting inappropriate and often illegal preferences that dictate the types of wireless facilities that service providers can use and the location of such facilities on municipal property. Technical preferences within wireless siting ordinances can vary from a requirement for the use of monopoles over other tall structures to an outright mandate for the use of DAS over other wireless facilities. Technical preferences have a two-pronged effect on the deployment of wireless services. First, by limiting the type of facility and equipment that a provider can use, the jurisdiction is directly inserting itself into network architecture decisions. When attempting to construct the most efficient nationwide network, progress can be halted by a jurisdiction's preference against the use of certain facilities. Second, limitations on the types of facilities also affect the locations available to support the preferred technology, thereby impacting coverage and capacity in areas with an identified need for both.

For example, the City of Kansas City, Kansas recently announced its intent to only permit the use of DAS in any new wireless facility deployment.¹¹⁶ Similarly, the model ordinances of many wireless consultants include a preference for the use of DAS and other “alternate technology” over collocation or the construction of new sites.¹¹⁷ While DAS is effective in many situations, the network decisions must be left to those with the most experience in how to provide the best coverage and capacity to address the need – namely, the infrastructure and wireless service providers.

Preferences for the use of municipal property can also be problematic, even though the siting on municipal property generally can have many benefits. For example, placing wireless facilities on anchor institutions and municipal buildings within residential districts can reduce the aesthetic impact of wireless facilities that are vital to the provision of service in areas where it may be difficult to place a macro facility due to setbacks and other zoning limitations. As discussed above, DAS deployments rely on the use of the right of way and the often municipal-owned poles, light posts, and other structures found there.

However, when a preference is placed on the use of municipal property to the detriment of a fair and reasoned review of other possible siting locations, the placement of wireless

¹¹⁶ See Kansas City, KS Planning Commission, Minutes of City Planning Commission, June 6, 2011, *available at* <http://www.wycokck.org/WorkArea/DownloadAsset.aspx?id=30966>. Kansas City seeks to redefine “communications tower” within its ordinance to include any utility or public structure within the city with access to fiber lines. The amendment is designed to establish a preference for DAS. The City’s current ordinance states “communication towers shall not be located closer than one-half mile from another communication tower, unless an applicant proposes a stealth communication tower less than 80 feet in height.” WYANDOTTE COUNTY/KANSAS CITY, KS UNIFIED GOVERNMENT CODE Ch. 27, Sec. 27-593 (K) (a) (4) (v) (2011). With the definition of communications tower expanded to include almost any utility pole, the City is proposing an effective ban on macro sites in favor of DAS. Furthermore, the City is the largest owner of utility poles; therefore, this amendment is also a preference for siting on municipal-owned property.

¹¹⁷ See, e.g., *N.Y. SMSA Ltd. Partnership v. Town of Clarkstown*, 612 F.3d 97, 101-02 (2nd Cir. 2010) (“*Clarkstown*”) (citing a wireless facility siting ordinance that gave preferential review for DAS and other “alternate technology”).

facilities can be unduly delayed. Municipal properties preferences can vary from a list of priority locations within the jurisdiction – each requiring the applicant to show the unavailability of siting locations within the preferred zones before pursuing non-municipal siting options – to an outright requirement that wireless facilities must be placed on municipal property.¹¹⁸ These “preferences” become effective mandates by establishing high hurdles to pursuing non-municipal siting options. As a result, the applicant is faced with choosing a municipal location that is not its preference, spending time and money to overcome the hurdles needed to collocate on non-municipal property, or abandoning the proposal altogether.¹¹⁹

III. THE FCC SHOULD TAKE A COMBINATION OF STEPS TO ACCELERATE BROADBAND INFRASTRUCTURE BUILDOUT AND INVESTMENT.

This section discusses a number of steps the Commission can take by rule and by working with the Administration, Congress, state and local governments, and industry to accelerate broadband infrastructure buildout and investment.¹²⁰ Consistent with the approach taken in Section II, these solutions are discussed in the context of whether they apply to collocations, DAS, or siting issues generally.

¹¹⁸ See, e.g., EAST GREENWICH TOWNSHIP, NJ CODE OF ORDINANCES Ch. 16.53 (2008) (requiring an applicant to place any wireless facilities to “first contact the mayor and township committee to determine if land and/or existing facilities owned by the township are available to accommodate the proposed telecommunications facility”).

¹¹⁹ See, e.g., CITY OF DULUTH, MN UNIFIED DEVELOPMENT CHAPTER OF DULUTH LEGISLATIVE CODE § 50-20.4(E)(3) (2010), available at http://www.duluthmn.gov/planning/zoning_regulations/documents/Article3_000.pdf. Yet another element to the municipal preference is that the jurisdiction becomes the landlord and has unfettered discretion to increase the rent because of the barriers to siting wireless facilities on non-municipal property.

¹²⁰ See NOI, 26 FCC Rcd at 5395-98 ¶¶ 36-50.

A. **The Commission Should Engage in Outreach and Pursue Legislative and Regulatory Solutions to Improve the Collocation Siting Process.**

The Commission should take the following steps to improve the collocation siting process:

1. **The FCC Should Request that Congress Pass Legislation to Clarify Federal Law to Permit Collocations “By Right” Without Discretionary Review by a State or Local Government.**

As a threshold matter, the FCC should advocate for and support Congressional legislation to clarify federal law to permit collocations and modifications “by right” without any discretionary review by a state or local government.¹²¹ Such “by right” legislation should prescribe that if the land use decision for an underlying structure has already been made and approval rendered, or if the collocation of antennas on the structure previously has been permitted, then the zoning authority should not have the discretionary authority to review the future collocation or modification of antennas or equipment on that structure unless the collocation would substantially change its size. Such legislation would reduce barriers to the expansion of wireless coverage and capacity through collocation and upgrades of existing equipment to next-generation equipment, enhancing service and facilitating competition. For example, a substitute amendment to S. 911, the Rockefeller-Hutchison spectrum legislation, includes a section addressing wireless facilities deployment which, among other things, would require states or localities to approve modifications, including collocations or the removal or replacement of transmission equipment, that do not “substantially change the physical

¹²¹ See *id.* at 5397 ¶ 44; Genachowski March 22nd Remarks at 7 (“One area of potential opportunity: collocation. Initial reports suggest that in some places the obstacles are greater than they should be to adding or replacing an antenna on an existing tower. If so, that’s something we would work to address.”).

dimensions” of wireless towers.¹²² PCIA and The DAS Forum encourage the FCC to support this important legislation.

While national legislation is pending, the FCC should explore existing federal tools to support collocation “by right,” and urge states and localities to revise ordinances to permit collocations and modifications “by right” and without discretionary review. This solution is consistent with the recommendation of the TAC that “[t]he FCC should propose that states and municipalities ... permit co-location ‘by right’ ... absent special circumstances.”¹²³

2. The FCC Should Educate States and Localities about the Benefits of Expediting Wireless Facility Siting through Collocations and the Need for Collocation Reform.

In tandem with its outreach to lawmakers concerning the importance of “by right” legislation, the Commission should begin an extensive educational campaign to alert states and localities to the benefits of expediting wireless facility siting through collocations.¹²⁴ This advocacy should include the following points:

- Collocation “is often the most efficient and economical solution for existing and new wireless service providers that need new cell sites.”¹²⁵
- Collocation “is particularly useful in areas in which it is difficult to find locations to construct new towers.”¹²⁶
- Collocation “can ease and speed [wireless service providers’] entry into new geographic areas by eliminating the need to build a new tower.”¹²⁷

¹²² See S. 911, 112th Cong., § 528(a) (2011).

¹²³ See TAC Report at 2.

¹²⁴ See *NOI*, 26 FCC Rcd at 5396 ¶¶ 37, 39.

¹²⁵ *Fifteenth Competition Report* at ¶ 312.

¹²⁶ *Id.*

¹²⁷ *Id.* at ¶ 317.

- Collocation “reduces the capital requirements for both new entrants and existing wireless service providers because they only need to finance the purchase and installation of the transmission equipment to be used.”¹²⁸
- Collocation “is an environmentally desirable alternative to the construction of new facilities and is encouraged.”¹²⁹
- Bottom line: collocation creates a “win-win” situation for wireless carriers, consumers of wireless services, and the community. Making use of existing infrastructure can allow wireless carriers to bring new services to market in a cost-effective manner, increasing the coverage and capacity available to the end user with a minimal aesthetic impact upon the community. In particular, rapid collocation approvals can speed the development of local broadband access in communities, which in turn can improve their marketability to new employers and network access for local entrepreneurs.¹³⁰

3. The FCC Should Issue a Rule Interpreting Sections 253 and 332(c)(7) that Prohibits Denying New Requests to Collocate on a Structure Where Another Provider Is Already Located.

The FCC should adopt a rule interpreting Sections 253 and 332(c)(7) of the Act that prohibits collocation denials on existing towers or other structures where wireless communications facilities have previously been permitted/approved.¹³¹ As discussed above in Section II, local regulation of wireless facilities frequently subject collocations to very onerous application requirements, including high fees and a *de novo* review by local governmental bodies, even where other collocators are already present.¹³² This requested rule interpretation

¹²⁸ *Id.*

¹²⁹ 47 C.F.R. § 1.1306 note 1; *see also* Collocation Agreement, Preamble (recognizing that because collocations “reduce both the need for new tower construction and the potential for adverse effects on historic properties,” they should be encouraged).

¹³⁰ *See* TAC Report at 2.

¹³¹ *See NOI*, 26 FCC Rcd at 5397-98 ¶¶ 47-48. For additional discussion of Section 332(c)(7) and 253, including the legal rationale to support these and other rule changes recommended in this section, see Section IV.

¹³² *See, e.g., MetroPCS*, 739 F. Supp. 2d at 423 (“MetroPCS claims it has been subjected to unreasonable discrimination in violation of the TCA because its application was denied while the City approved applications for wireless facilities at the same site for three other competitive carriers. The record regarding the applications for the other carriers is sparse ... but one can see from the applications that MetroPCS applied to construct very similar (continued on next page)

would help the Commission and the Executive Branch achieve their wireless and broadband goals by streamlining the process for collocations, thereby reducing the time for deployment and promoting competition and choice among broadband providers.

Accordingly, the FCC should find that such denials are “unreasonably discriminat[ory]” under Section 332(c)(7)(B)(i)(I).¹³³ The FCC should specifically prescribe by rule that the preclusion of later collocators, including where a previously legal site with one or more providers is now non-conforming given changes in zoning laws since the underlying structure was built, is discriminatory under Section 332(c)(7), barring special circumstances (*e.g.*, demonstrable safety concerns, such as tower overloading). The FCC should similarly prescribe by rule that it is discriminatory to subject later collocators to more onerous, complex and costly application requirements – including those in “consultant” districts – than existing collocations. The FCC should also find that any such denials “have the effect of prohibiting” the provision of telecommunications services under Section 253(a) and personal wireless services under Section 332(c)(7)(B)(i)(II).

4. The FCC Should Shorten the “Shot Clock” Rule for Collocations on Existing Structures.

If states and municipalities do not agree to expedite collocation approvals, and while any “by right” legislation at the national level is pending, the Commission “should express its willingness to proceed with a new, shorter ‘shot clock’ rule for co-locations.”¹³⁴ As the Commission has previously found, “[c]ollocation applications are easier to process than other

wireless facilities on the same location.... Without demonstrating that MetroPCS’s proposed wireless facility had any other defect, the City of Mount Vernon unreasonably discriminated against MetroPCS.”).

¹³³ *See id.*

¹³⁴ *See* TAC Report at 2; *see also* NOI, 26 FCC Rcd at 5397-98 ¶¶ 47-48.

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.”¹³⁵

Accordingly, the Commission should adopt a 45-day period for reviewing collocation applications, as originally proposed in the “shot clock” petition.¹³⁶ The 45-day period was based on data that action on collocation applications is often rendered in as little as one day in many localities, and in many other areas final action is rendered in two weeks or less.¹³⁷ In its *Shot Clock Ruling*, the Commission did not dispute this data, recognizing that “many applications can and perhaps should be processed within the timeframes proposed by the Petitioner.”¹³⁸ Instead, it expressed concern that a 45-day timeframe might be “insufficiently flexible” for unique circumstances, such as cases where more time is needed “to explore collaborative solutions among the governments, wireless providers, and affected communities.”¹³⁹

Given that many collocation applications “can and perhaps should be processed” within 45 days, the current 90-day limit is not warranted for the few unique cases where more time may be needed. Rather, the Commission has already provided for a mechanism to account for such exigencies: the shot clock cut-off window for collocations can be extended by mutual consent of the applicant and the state or local government.¹⁴⁰ The Commission adopted such a mechanism

¹³⁵ *Shot Clock Ruling*, 24 FCC Rcd at 14012 ¶ 46.

¹³⁶ See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, at 24-25 (July 11, 2008) (“Shot Clock Petition”).

¹³⁷ See *id.* at 24-25.

¹³⁸ See *Shot Clock Ruling*, 24 FCC Rcd at 14011 ¶ 44.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 14013 ¶ 49.

based on the recognition that “a rigid application of this cutoff to cases where the parties are working cooperatively toward a consensual resolution” would be contrary to the public interest.¹⁴¹ Applicants are incented to work with states and localities to extend the cut-off in the face of exigencies to pursue a consensual solution rather than face a denial, which would invite the time and expense of litigation to challenge. Accordingly, the FCC should adopt a shorter 45-day “shot clock” rule for collocations on existing structures.

5. The FCC Should Adopt a Rule that Amends the *Shot Clock Ruling* to Deem Applications Granted at the End of the Review Period.

As discussed above, one of the shortcomings of the *Shot Clock Ruling* is that it requires applicants whose proposals have not been acted on within the requisite time frames to go to court to seek redress. Applicants in such a position must decide whether to pursue an adversarial litigation strategy at potentially great time and expense (and with the likelihood of creating ill-will by the jurisdiction toward the applicant in future cases), or continue to pursue the application with an uncertain time frame for action and outcome. And even if an applicant decides to expend the funds and risk future ill-will by taking the jurisdiction to court, it is still not guaranteed a positive outcome; as the *Clear Wireless* case makes clear, the relief for an aggrieved applicant is merely to receive a decision. As a result, a local zoning authority can avoid repercussion for its untimely failure to act as long as it issues a decision – even if well past the *Shot Clock Ruling* timelines – before the court acts.¹⁴²

¹⁴¹ *Id.*

¹⁴² See discussion *supra* Section II.A.3 (discussing *Clear Wireless*).

Accordingly, the Commission should revisit its decision not to apply a “deemed granted” rule to applications that jurisdictions fail to act on by the end of the “shot clock” cut-off periods.¹⁴³ Adding a “deemed granted” rule is critical to ensuring that states and localities act within the prescribed timelines and that the situation in *Clear Wireless* is avoided. It will also reduce costly and time-consuming litigation, allowing those resources to be used to fund rather than defend the expansion of broadband deployment. Thus, the Commission should declare by rule that when a jurisdiction fails to act within the “shot clock” time frames, the authority will be considered to have not acted within a reasonable period of time under Section 332(c)(7) and the application will be deemed granted.¹⁴⁴ At a minimum, the Commission should adopt a presumption that once a “failure to act” benchmark is triggered, a reviewing court should issue an injunction ordering grant of the applications barring the demonstration of exigent circumstances.¹⁴⁵

6. The FCC Should Issue a Rule that Ordinances Establishing Preferences for the Placement of Wireless Facilities on Municipal Property Are Unjustly Discriminatory.

While municipalities should be encouraged to expand access to municipal property as additional wireless siting options, they should not be able to effectively compel siting *only* on municipal property. As discussed above, municipalities are continuing to draft ordinances establishing preferences for placing wireless facilities on municipal property. These “preferences” become effective mandates by establishing high hurdles to pursuing non-municipal siting options. As a result, the applicant is faced with choosing a municipal location that is not

¹⁴³ See *Shot Clock Ruling*, 24 FCC Rcd at 14009 ¶ 39.

¹⁴⁴ See *NOI*, 26 FCC Rcd at 5397-98 ¶¶ 47-48; *Shot Clock Petition* at 27-29.

¹⁴⁵ See *Shot Clock Petition* at 29-30.

its preference, spending time and money to overcome the hurdles needed to site on non-municipal property, or abandoning the proposal altogether. The outcome is that later wireless entrants do not have the same siting flexibility as their predecessors in a given area, which “unreasonably discriminates among providers of functionally equivalent services,” contrary to Section 332(c)(7)(B)(i)(I) of the Act. The Commission should therefore issue a rule that ordinances establishing preferences for the placement of wireless facilities on municipal property are unreasonably discriminatory and are therefore precluded under Section 332(c)(7).¹⁴⁶

B. The Commission Should Engage in Outreach and Pursue Best Practices and Legislative and Regulatory Solutions to Facilitate DAS Deployments.

The Commission should take the following steps to facilitate DAS deployments:

1. The FCC Should Encourage Legislation to Clarify Federal Law to Set Out Clear, Uniform Processes and/or Standards for Accessing Public Rights of Way to Install DAS Facilities.

The FCC should encourage Congress to clarify federal law and set out clear, uniform processes and/or standards for accessing public rights of way to install DAS facilities, or at a minimum encourage states to adopt similar legislation.¹⁴⁷ Any such legislation should minimize the applicability of zoning/planning, public hearings and aesthetics reviews. The Michigan Metro Act, while not perfect, is a good example.¹⁴⁸

While any legislation is pending, the Commission also should explore existing federal tools to achieve these goals and use the model legislation as the basis for best practices that states

¹⁴⁶ See *NOI*, 26 FCC Rcd at 5397-98 at ¶¶ 47-48.

¹⁴⁷ See *id.* at 5397 ¶ 44.

¹⁴⁸ Metropolitan Extension Telecommunication Rights-of-Way Oversight (METRO) Act, PA 48, MCL 484.3101 *et seq.* (2002), available at <http://www.legislature.mi.gov/documents/2001-2002/publicact/pdf/2002-PA-0048.pdf>.

and localities should be encouraged to follow.¹⁴⁹ There are several practices that model legislation/best practices should contain, including:

- Prescribing a clear and unambiguous process to access the public right of way that includes reasonable terms of access, preferably on a “by right” basis;¹⁵⁰ otherwise, application of zoning/planning processes, including public comment, should be limited except for large or atypical projects;
- Requiring pre-meetings between the municipality and applicant to review process/requirements, plans, specs, etc.;
- Minimizing aesthetic review, especially if similar to existing utility infrastructure in the right of way;
- Limiting environmental review, particularly in areas where there is already existing infrastructure;
- Treating wireline and wireless installations in the right of way consistently, except in very limited circumstances (*e.g.*, verification of compliance with federal RF standards);
- Treating DAS proposals as a single project, whereby all nodes are submitted and processed under a single application, to avoid piecemeal treatment of a network;
- Requiring that any rate structure be based upon recovery of actual and justifiable costs incurred by the municipality as a result of administering the right of way;¹⁵¹
- Allowing for reasonable changes after initial submission of the project without delay or additional cost;¹⁵²
- Eliminating planning or zoning reviews for relatively smaller projects or projects that are limited to existing infrastructure;¹⁵³ and

¹⁴⁹ See *NOI*, 26 FCC Rcd at 5396-97 ¶¶ 38, 43.

¹⁵⁰ This generally means access to the public right of way, as a utility, through a simple encroachment or electrical permit.

¹⁵¹ The rate structure would need to clearly define what costs are permitted and/or would need to cap those costs at a reasonable amount.

¹⁵² When building a DAS network, there tend to be many revisions to the design of the project, but most are minimally intrusive or mildly different from the original (*e.g.*, moving an antenna from one pole to the next pole). Current practices often require total re-approval of the project.

- Increasing access to non-traditional or municipally owned infrastructure (e.g. streetlights and traffic poles), and limiting the rates for use of such infrastructure; and providing wireless applicants a clear right to set new poles in the right of way, particularly when other areas of access are limited.¹⁵⁴

Implementation of these practices will be great step toward minimizing the wireless infrastructure barriers related to rights-of-way access.

2. The FCC Should Educate State and Local Governments About the Nature and Benefits of DAS and Dispel False Safety and Aesthetic Concerns Sometimes Associated with DAS.

The FCC should begin a dialogue with states and municipalities to educate them about the nature and benefits of DAS, as recommended by the TAC.¹⁵⁵ This education should also include programs and publications designed to debunk and/or neutralize myths and misconceptions that opponents to wireless infrastructure deployments promulgate or promote in order to exert disproportionate political leverage. For example, the education should dispel key erroneous health and safety issues¹⁵⁶ and aesthetic concerns¹⁵⁷ erroneously associated with DAS. As also recommended by the TAC, the Commission should host a “road show” and/or

¹⁵³ Building an entirely new pole line would understandably need to go through more review than putting up a single pole or simply putting antennas on an existing pole.

¹⁵⁴ This is permitted for wireline utilities, but is often prohibited for wireless.

¹⁵⁵ See TAC Report at 2-3; see also *NOI*, 26 FCC Rcd at 5396-97 ¶¶ 37, 43.

¹⁵⁶ This would include educating elected officials and the public that radio frequency (“RF”) emissions are insignificant. Furthermore, RF compliance is a matter for the Commission and state and local regulation in this regard has been preempted. Specifically, Section 332(c)(7)(B)(iv) of the Act provides that “[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.”

¹⁵⁷ For example, as the Commission has recognized, “[b]ecause DAS sites are not visible beyond the immediate vicinity, they may be particularly desirable in areas with stringent siting regulations, such as historic districts.” *Fifteenth Competition Report* at ¶ 308 n.878.

workshops highlighting best identified practices that can help accelerate the deployment of DAS as an efficient way to deploy broadband.¹⁵⁸

3. The FCC Should Clarify that the *Shot Clock Ruling* Applies to Applications for DAS Deployments.

As noted above, members of PCIA and The DAS Forum report that the *Shot Clock Ruling* has not been followed by jurisdictions in which DAS networks have been developed. The FCC has recognized that DAS networks “provide wireless service,”¹⁵⁹ using a “relatively large network of small cells that are connected by fiber optic cable and can be placed on such locations as utility poles, buildings, or traffic signal poles.”¹⁶⁰ This places them within the scope of the *Shot Clock Ruling*, which “promotes the deployment of broadband and other wireless services” by “defin[ing] timeframes for State and local action on wireless facilities siting requests.”¹⁶¹ Given the lack of clarity or consensus regarding the applicability of the *Shot Clock Ruling*, the Commission should clarify that it applies to applications for DAS deployments. As a result, an application for a DAS network deployment should be reviewed within the 150-day timeframe “to process applications other than collocations.”¹⁶²

¹⁵⁸ See TAC Report at 2.

¹⁵⁹ *NOI*, 26 FCC Rcd at 5393 ¶ 24 n.37.

¹⁶⁰ *Fifteenth Competition Report* at ¶ 308 n.878.

¹⁶¹ See *Shot Clock Ruling*, 24 FCC Rcd at 13994-95 ¶ 1. Specifically, it defined what constitutes a “reasonable period of time” under Section 337(c)(7)(B)(ii) for a state or locality to “act on any request to for authorization to place, construct, or modify personal wireless facilities.” See *Shot Clock Ruling*, 24 FCC Rcd at 14003-13 ¶¶ 27-48. The Act defines “personal wireless services” as “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services,” 47 U.S.C. § 332(c)(7)(C)(i), and “personal wireless service facilities” as “facilities for the provision of personal wireless services,” 47 U.S.C. § 332(c)(7)(C)(ii).

¹⁶² See *Shot Clock Ruling*, 24 FCC Rcd at 14000 ¶ 19.

4. The FCC Should Clarify that DAS Providers that Elect to Operate As Telecommunications Carriers and Obtain CLEC Status Are Subject to the Protections of Section 253.

Neutral host DAS providers are often treated inconsistently by governing jurisdictions when installing infrastructure in the rights of way. In particular, many public entities refuse to acknowledge the status of DAS providers that elect to operate as telecommunications carriers. The local zoning approval process thus often results in effective barring of DAS nodes from public rights of way. Many public entities also impose unreasonable and discriminatory fees for use of public rights of way by arguing that Section 253 does not apply to DAS deployments. The Commission should therefore adopt a rule making it explicit that Section 253's protections (*e.g.*, against charging telecommunications providers unreasonable fees and treating them in a discriminatory manner) apply to DAS providers that elect to operate as telecommunications carriers and obtain competitive local exchange carrier ("CLEC") status.¹⁶³

While the FCC pursues the adoption of a rule, it should educate state and local governments that DAS providers that elect to operate as telecommunications carriers and obtain CLEC status are subject to the protections of Section 253 of the Act.¹⁶⁴ They should therefore be treated like all other utilities that place infrastructure in rights of way, which includes the right to (i) an expedited zoning and right-of-way access process that is predictable and reliable and (ii) fees not exceeding what other utilities pay. This outreach should begin immediately.

¹⁶³ See *NOI*, 26 FCC Rcd at 5397-98 ¶¶ 47-48.

¹⁶⁴ See *id.* at 5396 ¶ 37.

5. The FCC Should Adopt Rules to Clarify the Scope of Section 253 Provisions As They Relate to DAS Deployments and the Exceptions Available to States and Localities.

In addition to making clear the applicability of Section 253 to DAS providers that elect to operate as telecommunications carriers, the FCC should also clarify by rule the scope of a number of ambiguous provisions of Section 253 as they relate to DAS deployments in public rights of way, and the limitations on the exceptions available to states and local governments that oversee those deployments.¹⁶⁵ As discussed in Section IV below, Section 253 bans state or local regulations that “may prohibit or have the effect of prohibiting” the provision of telecommunications service, but allows states or localities to “manage the public rights-of-way” or “require fair and reasonable compensation” as long as done on a “nondiscriminatory basis.”¹⁶⁶ Thus, the FCC should issue rules interpreting these provisions, which are not defined in the Act,¹⁶⁷ as follows:

- First, the Commission should define the limitations and scope of the rights-of-way management exception. Specifically, it should make clear that management must be nondiscriminatory and relate to control over the right of way itself, not control over companies with facilities in the right of way. Reasonable management practices would include coordinating construction schedules, determining insurance requirements, establishing and enforcing building codes, and preventing conflict between the various systems using the right of way – but would not include imposing a time-consuming and/or complicated application process and unfettered discretion to reject an application for any reason.
- Second, the FCC should define “nondiscriminatory” to require access to the public rights of way without distinction between wireline and wireless facilities. The rule should create a presumption that treating wireline and wireless installations in the right of way inconsistently is therefore discriminatory, except in very limited circumstances (*e.g.*, verification of compliance with federal RF standards).

¹⁶⁵ *See id.* at 5397-98 ¶¶ 47-48.

¹⁶⁶ 47 U.S.C. § 253(a)-(c).

¹⁶⁷ *See discussion infra* Section IV.C.2.

- Third, the FCC should define “fair and reasonable” charges to be those that are based on a cost recovery structure rather than “market” rates. Such a rate structure would allow states and localities to recover their actual and justifiable costs incurred as a result of administering the right of way. The rate structure should clearly define what costs are permitted and/or cap those costs at a reasonable amount.¹⁶⁸
- Fourth, the FCC should declare that if an ordinance, statute, regulation or other requirement violates these rules, then the requirement of the state or local government “may ... have the effect of prohibiting” the provision of telecommunications service under Section 253(a), allowing the FCC to preempt the offending requirement under Section 253(d) after notice and comment.¹⁶⁹
- Finally, the FCC should provide provisions for efficient, expedited administrative relief for violations of these rules. For example, this could include requiring the applicant alleging a rule violation to file a substantiated petition asking the FCC to preempt enforcement of the offending requirement, which the FCC should place promptly on public notice.¹⁷⁰ Following public notice, the pleading timeframes in Section 1.45 of the FCC’s rules should generally apply,¹⁷¹ with the FCC issuing a decision promptly after the close of the pleading cycle.

6. The FCC Should Amend Its NEPA Rules to Fully Exclude DAS Deployments from FCC Environmental Processing.

The Commission should amend Note 1 to Section 1.1306 of the FCC’s rules to exclude DAS deployments from FCC environmental processing.¹⁷² Note 1 currently excludes from all environmental processing the installation of aerial or underground cable or wire along existing corridors “of prior or permitted use” as defined by the applicant or others,¹⁷³ and excludes

¹⁶⁸ See also discussion *infra* Section III.C.7.

¹⁶⁹ See 47 U.S.C. § 253(a), (d).

¹⁷⁰ See *id.* § 253(d).

¹⁷¹ Thus, oppositions to the petition would be due within 10 days after public notice, and replies to oppositions would be due within 5 days of when the oppositions are due. *Cf.* 47 C.F.R. § 1.45. Because Section 253(d) of the Act requires public notice, the pleading cycle would be triggered by public notice of the petition rather than the filing of the petition as otherwise provided in Section 1.45.

¹⁷² See *NOI*, 26 FCC Rcd at 5397 ¶ 47.

¹⁷³ 47 C.F.R. § 1.1306(a), Note 1. The “prior or permitted use” language has not been interpreted since its adoption in 1991, leaving room for reasonable interpretation. The order adopting the exclusion, did, however, make clear that it applies to both telecommunications and non-telecommunications routes, and therefore the exclusion encompasses (continued on next page)

collocation of antennas from all but historic processing and RF compliance.¹⁷⁴ The Note explains that “[t]he use of existing buildings, towers or corridors is an environmentally desirable alternative to the construction of new facilities and is encouraged.”¹⁷⁵

As described above, DAS systems typically consist of a series of small antenna nodes connected by fiber optic cable and placed on utility poles, traffic signal poles, etc. The fiber optic cable component of DAS deployments in areas of prior or permitted use is already excluded from environmental processing under Note 1, so making this exclusion explicit would serve simply to clarify existing law. The antenna node component of DAS networks is akin to a macro site collocation, but a DAS node has even less of an impact given its small size and discrete appearance. Indeed, the FCC has already recognized that DAS sites “are not visible beyond the immediate vicinity” and “may be particularly desirable in areas with stringent siting regulations, such as historic districts.”¹⁷⁶ Accordingly, given their beneficial use in historic areas, the DAS antenna nodes should also be excluded from all environmental processing, including the historic processing that applies to traditional macro collocation sites,¹⁷⁷ with the exception of RF compliance.¹⁷⁸

existing corridors used for utilities. *See Amendment of Environmental Rules*, Second Report and Order, 6 FCC Rcd 1716, 1717 (1991).

¹⁷⁴ 47 C.F.R. § 1.1306(a), Note 1.

¹⁷⁵ *Id.*

¹⁷⁶ *Fifteenth Competition Report* at ¶ 308 n.878.

¹⁷⁷ Notably, many collocations are excluded from environmental processing under the 2001 Collocation Agreement. *See Collocation Agreement* at §§ III-V.

¹⁷⁸ DAS systems also typically include a base station hub building. The FCC has previously held that the construction of buildings is outside its jurisdiction. *See Kitchen v. Bell Telephone Co. of Pennsylvania*, 31 FCC 2d 604 (1971), *aff'd*, 464 F2d 801 (D.C. Cir. 1972).

C. The Commission Should Engage in Outreach and Pursue Legislative and Regulatory Solutions to Remove Other Barriers to Wireless Buildout.

The Commission should take the following steps to remove other barriers to wireless infrastructure buildout:

1. The FCC Should Engage in Outreach to States and Localities to Recommend the Adoption of Model Siting Ordinances and Award Jurisdictions that Employ Siting Best Practices.

The FCC should engage in outreach to states and localities to highlight best practices for broadband wireless infrastructure deployment. This outreach should take two forms. First, the Commission should recommend model siting and rights-of-way ordinances and codes,¹⁷⁹ such as PCIA’s Model Wireless Telecommunications Facility Siting Ordinance attached as Exhibit A hereto. Second, the FCC should sponsor a “Race-to-the-Top-style awards/recognition program to identify a list of jurisdictions with the best practices in terms of broadband infrastructure deployment.”¹⁸⁰ As proposed by the TAC, such a program could rank top jurisdictions in terms of infrastructure planning, accommodation, and permitting/approvals processes, thereby providing them with an incentive to compete for appearance on the list so that they can use the listing as a tool to further new investment and economic development in their communities.

¹⁷⁹ See *NOI*, 26 FCC Rcd at 5396 ¶ 39.

¹⁸⁰ TAC Report at 1; see *NOI*, 26 FCC Rcd at 5396 ¶ 41. For example, as discussed above, the state of Georgia has enacted the “Advanced Broadband Collocation Act,” which streamlines the permitting process for collocations. See *supra* discussion Section II.B.1.

2. The FCC Should Engage in Outreach to Congress/the Executive Branch Regarding the Need to Improve Access to Federal Lands and Buildings.

The FCC should engage in outreach to Congress/the Executive Branch regarding the need for legislation and/or an Executive Order to improve access to federal lands and buildings.¹⁸¹ As the NBP notes, the federal government owns more than 650 million acres of land (representing nearly a third of the country's land mass) and owns or leases space in 8,600 buildings nationwide.¹⁸² These areas offer tremendous potential to support all forms of wireless broadband deployment.

Accordingly, the FCC should support legislation to improve access to federal lands and buildings for wireless facility siting. For example, a substitute amendment to the Rockefeller-Hutchison spectrum legislation would (i) permit federal agencies the ability to grant easements or rights of way to, in, over or on federal buildings needed to install and maintain wireless facilities, (ii) direct the General Services Administration to develop master contracts to site wireless facilities on federal properties, and (iii) establish cost-recovery based fees for access to those properties.¹⁸³ PCIA and The DAS Forum urge the FCC to support this legislation.

The FCC also should formally request that the President issue an Executive Order on broadband infrastructure deployment on federal land and in federal buildings.¹⁸⁴ With respect to federal rights of way and wireless antenna siting approvals, the Executive Order would mandate

¹⁸¹ See *NOI*, 26 FCC Rcd at 5396-97 ¶¶ 39, 44.

¹⁸² See NBP at 115.

¹⁸³ See S. 911, 112th Cong., § 528(b) (2011).

¹⁸⁴ See TAC Report at 2; see also *NOI*, 26 FCC Rcd at 5397 ¶ 44.

(i) a single document format for permitting, (ii) a single federal agency to coordinate the permit approval process, and (iii) a sixty day time frame for approvals.

3. The FCC Should Remind States and Localities that Any Siting Moratoria Should Not Last Longer than Six Months Under the Joint Industry-Community Agreement.

The FCC should remind states and localities of the joint industry-community agreement that siting moratoria should not last longer than six months.¹⁸⁵ As discussed above, the wireless infrastructure deployment process has been significantly retarded by jurisdictions that enact moratoria on the siting of wireless infrastructure. Moreover, the *Shot Clock Ruling* on timelines for application review does not address moratoria, allowing jurisdictions to use them to avoid the Commission's ruling altogether. The FCC should therefore emphasize through educational outreach that siting moratoria lasting longer than six months (barring unusual circumstances) are contrary to the industry-community agreement signed in 1998, and can have adverse consequences for the community by delaying or discouraging broadband deployments.

4. The FCC Should Issue a Rule that Prohibits Moratoria in Particular Geographic Areas or Lasting Longer than Six Months.

The FCC should adopt a rule interpreting Sections 253 and 332(c)(7) that prohibits local or state government bans on wireless facilities in particular zoning districts, or general bans that exceed the six month timeframe agreed to in the joint industry-community agreement on moratoria.¹⁸⁶ As discussed above, wireless facility regulation frequently rules out entirely some types of zoning districts for wireless sites. Often these are residential districts and light

¹⁸⁵ See Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process, available at <http://transition.fcc.gov/statelocal/agreement.html>; see also *NOI*, 26 FCC Rcd at 5396 ¶ 37.

¹⁸⁶ See *NOI*, 26 FCC Rcd at 5397-98 ¶¶ 47-48.

commercial districts. This action would allow wireless providers to bring better coverage and capacity into users' homes and businesses. Also, this action would also help ensure access as businesses and households increasingly rely on wireless services and will enable network operators to address the need to provide sites for 4G services closer to end users. Accordingly, the FCC should find that such moratoria "have the effect of prohibiting" the provision of telecommunications services under Section 253(a) and personal wireless services under Section 332(c)(7)(B)(i)(II) and are preempted.

5. The FCC Should Issue a Rule that Consideration of Technical or Operational Justifications for a Wireless Facility or the Type of Wireless Deployment Is Preempted by Federal Law.

The FCC should issue a rule that consideration of technical or operational justifications for a wireless facility or the type of wireless deployment is a technological and operational decision preempted by federal law.¹⁸⁷ Despite the fact that some circuits have already found technical or operational considerations to be preempted,¹⁸⁸ an FCC rule would bring needed certainty nationwide. Wireless networks are inherently national and international, not local. Despite a lack of technical knowledge or experience, zoning authorities frequently require wireless providers to prove they "need" a particular site in a particular location. Similarly, wireless deployments of every type will be needed to meet the Nation's broadband goals, and no one technology or approach should be favored or preferred above others. This rule would ensure that zoning authorities without expertise cannot undermine legitimate technological and

¹⁸⁷ See *id.* at 5397 ¶ 47.

¹⁸⁸ See, e.g., *Clarkstown*, 612 F.3d at 105-06 ("Federal law has preempted the field of the technical and operational aspects of wireless telephone service, and there is 'no room' for ... provisions ... that give a preference to [particular technologies]."); *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir. 2000) (The FCC is "responsible for determining the number, placement and operation of the cellular towers and other infrastructure.").

operational decisions of wireless siting applicants, and they will be limited to making local land use decisions as intended under the 1996 Act.¹⁸⁹

6. The FCC Should Issue a Rule Interpreting the “Prohibitions” Under Section 253 to Allow Facial Challenges to State or Local Siting Regulations.

The Commission should adopt a rule that addresses the recent conflict among the federal courts as to the proper interpretation of the phrase “may prohibit or have the effect of prohibiting” in Section 253(a).¹⁹⁰ Historically, most courts had interpreted the phrase as encompassing state or local restrictions that actually prohibit or *may* have the effect of prohibiting entry by competing telecommunications providers.¹⁹¹ In 2007, however, the Eighth Circuit announced that it was charting a different course: “[A] plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. We ... acknowledge that other courts hold otherwise and suggest that *possible* prohibition will suffice.”¹⁹² The Ninth Circuit followed suit in 2008, overruling its own precedent in the process.¹⁹³ The practical effect of the Eighth and Ninth Circuit rulings is potentially significant, as they could effectively preclude *any* facial challenge to unlawful right of way restrictions under Section 253(a). A Commission rule reaffirming the traditional view

¹⁸⁹ See *id.* at 106 (“While section 332(c)(7) ‘preserves the authority of State and local governments over zoning and land use matters,’ ... this authority does not extend to technical and operational matters, over which the FCC and the federal government have exclusive authority.”).

¹⁹⁰ See *NOI*, 26 FCC Rcd at 5397-98 ¶¶ 47-48.

¹⁹¹ See, e.g., *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir 2006) (“*P.R. Tel. Co.*”); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002); *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 481-84 (N.D. N.Y. 2003); *XO Mo., Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 996-98 (E.D. Mo. 2003).

¹⁹² *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007) (emphasis in original).

¹⁹³ *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (“*Sprint Telephony*”).

and permitting challenges to state or local regulations based on possible prohibition is therefore needed, so that providers may challenge overly burdensome and prohibitory regulations without having to first waste time and resources filing an application that has no possibility of favorable consideration.

7. The FCC Should Amend Its Rules to Provide that Fees Not Related to Costs Are Presumptively Unreasonable.

The Commission should amend its rules to include a uniform definition of the type and amount of right-of-way or wireless siting fees that will be presumed to (i) be not “fair and reasonable” under Section 253(c) or (ii) “have the effect of prohibiting” the provision of telecommunications services under Section 253(a) and personal wireless services under Section 332(c)(7)(B)(i)(II).¹⁹⁴ At a minimum, the rules should make it clear that any fee that exceeds a municipality’s legitimate costs of processing a right-of-way or wireless siting application and, in the case of a right-of-way application, making access available (including, for example, any reasonable maintenance thereof) will be presumed to (i) be not “fair and reasonable”¹⁹⁵ and (ii) “have the effect of prohibiting” the provision of telecommunications and personal wireless services. While the courts and the Commission have addressed the fee issue on a case-by-case basis, this approach has not fostered the sort of predictable and consistent regulatory environment necessary to encourage the substantial investment necessary for accelerated broadband deployment.

¹⁹⁴ Cf. *MetroPCS*, 739 F. Supp. 2d at 424-27 (finding the collection of over \$16,000 in consultant fees to be unreasonable under state law, and ordering disgorgement of fees relating to “repeatedly requesting unnecessary information and belaboring issues already resolved”); *supra* discussion Section II.B.3 (discussing the *MetroPCS* case). See also *NOI*, 26 FCC Rcd at 5397-98 ¶¶ 47-48.

¹⁹⁵ See *P.R. Tel. Co.*, 450 F.3d at 22 (“[F]ees should be, at the very least, *related* to the actual use of rights of way and ... ‘the costs [of maintaining those rights of way] are an essential part of the equation.’”) (citation omitted).

IV. THE FCC HAS AMPLE LEGAL AUTHORITY TO TAKE THE ACTIONS PROPOSED IN THE *NOI* AND RECOMMENDED HEREIN

The Commission has ample authority to (1) engage in educational efforts and other outreach to optimize how access to public rights of way and wireless facilities siting are regulated at the federal, state and local levels, and (2) adopt binding rules to address these issues.¹⁹⁶ As discussed below, this authority flows from the text and policy objectives of the Telecommunications Act and the Commission’s pre-existing authority under the Communications Act.

A. The 1996 Act Directs the Commission to Eliminate State and Local Barriers to Entry by Providers of Telecommunications Services.

Section 706(a) of the 1996 Act directed the Commission “[to] encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by “remov[ing] barriers to infrastructure investment.”¹⁹⁷ As highlighted in the *NOI*, the Commission concluded *2010 Sixth Broadband Deployment Report* that broadband was not being deployed to all Americans in a reasonable and timely manner.¹⁹⁸ When the Commission makes such a negative determination, Section 706(b) requires that the agency “take immediate action to

¹⁹⁶ See *NOI*, 26 FCC Rcd at 5398-400 ¶¶ 51-57.

¹⁹⁷ 47 U.S.C. § 1302(a); see also *NOI*, 26 FCC Rcd at 5384 ¶ 2; *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (“Congress enacted the Telecommunications Act of 1996 (TCA) to promote competition and higher quality in American telecommunications services and to ‘encourage the rapid deployment of new telecommunications technologies.’ One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers.”) (citations omitted).

¹⁹⁸ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9557 ¶ (2010) (“*2010 Sixth Broadband Deployment Report*”), cited in *NOI*, 26 FCC Rcd at 5398-99 ¶ 53.

accelerate deployment of [broadband] by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹⁹⁹

Furthermore, Congress identified State and local restrictions on siting or installation of wireless facilities as a specific item of concern:

The [House Commerce] Committee finds that current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible. Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.²⁰⁰

Accordingly, in addition to Section 706, the 1996 Act added two other statutory provisions of particular relevance to this proceeding: Sections 253 and 332(c)(7).

Section 253(a) bars state or local statutes, regulations, or other legal requirements that “prohibit or have the effect of prohibiting the ability of any entity to provide any [wired or wireless] interstate or intrastate telecommunications service.”²⁰¹ Section 253(b) provides state authorities with a “safe harbor” which permits them to demonstrate that the regulation or action in question imposes “on a competitively neutral basis ... requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of

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

²⁰⁰ H.R. Rep. No. 104-204, pt. 1, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10.61.

²⁰¹ *NOI*, 26 FCC Rcd at 5399 ¶ 54 (quoting 47 U.S.C. § 253(a)).

telecommunications service and safeguard the rights of consumers.”²⁰² Section 253(c) also preserves a state or local government’s authority to “manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis.” Section 253(d) authorizes the Commission to issue declaratory rulings preempting state or local government action that violates Section 253(a) or Section 253(b) and is not otherwise saved by Section 253(c).²⁰³

Section 332(c)(7) attacks the same general problem but is targeted specifically at state and local barriers to wireless facility siting. Subject to certain limitations, the statute states that “[t]he regulation of the placement, construction and modification of personal wireless service facilities by any State or local government or instrumentality thereof ... shall not prohibit or have the effect of prohibiting the provision of personal wireless service.”²⁰⁴ It also requires State or local authorities to act on any wireless siting request “within a reasonable period of time ... taking into account the nature and scope of such request.”²⁰⁵ Finally, Section 332(c)(7) gives an aggrieved wireless facility siting applicant the right to commence an action in court within 30 days of a final adverse action or failure to act by the relevant state or local authority.²⁰⁶

In sum, while they differ somewhat in their particulars, Sections 706, 253 and 332(c)(7) share a common objective: accelerating deployment of advanced services, including wireless

²⁰² *Id.* (quoting 47 U.S.C. § 253(b)).

²⁰³ *Id.* (citing 47 U.S.C. § 253(d)); *see also TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002) (discussing judicial deference afforded to Section 253(d) declaratory rulings that interpret the scope of Section 253(c)).

²⁰⁴ *NOI*, 26 FCC Rcd at 5399 ¶ 55 (quoting 47 U.S.C. § 332(c)(7)(B)(i)(II)).

²⁰⁵ *Id.* (quoting 47 U.S.C. § 332(c)(7)(B)(ii)).

²⁰⁶ *Id.* at 5399-400 ¶¶ 55 (citing 47 U.S.C. § 332(c)(7)(B)(v)). A provider may also petition the Commission for preemptive relief if a State or local authority’s denial of a siting application is impermissibly based on the environmental effects of RF emissions.

services, by eliminating state and local barriers to competitive entry.²⁰⁷ As emphasized Chairman Genachowski, the *NOI* and any future actions arising therefrom are essential steps toward achieving the Commission’s mandate under those statutory provisions.²⁰⁸

B. The Commission Has Authority to Engage in the Recommended Educational Efforts and Other Outreach.

The Commission has the necessary statutory authority to engage in educational activities and other voluntary outreach to “foster broadband deployment by encouraging improvements in policies regarding public rights of way and wireless facilities siting.”²⁰⁹ Under Section 4(i) of the Communications Act, “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”²¹⁰ Moreover, Section 706(a) directs the Commission to use its entire menu of regulatory tools when fulfilling its mandate to accelerate deployment of advanced services.²¹¹ This, as the Commission notes, gives it “broad flexibility” to engage in the educational and other voluntary activities suggested in the *NOI*. Not coincidentally, the National

²⁰⁷ See also *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700, 715 (9th Cir. 2007), *rev’d on other grounds*, 543 F.3d 571 (9th Cir. 2008) (“[B]oth §253(a) and §332(c)(7)(B)(i)(II) proscribe substantively the same local regulations: those that prohibit or have the effect of prohibiting personal wireless service.”).

²⁰⁸ See *NOI*, 26 FCC Rcd at 5404 (Statement of Chairman Julius Genachowski) (“Having determined that broadband is not being reasonably and timely deployed to all Americans, the Commission is required by Section 706 of the Telecommunications Act to ‘take immediate action to accelerate deployment ... by removing barriers to infrastructure investment.’ The Broadband Acceleration Initiative, and our actions today, are central to carrying out that duty.”).

²⁰⁹ *NOI*, 26 FCC Rcd at 5398 ¶ 51.

²¹⁰ 47 U.S.C. § 154(i). When exercising its authority pursuant to section 4(i), the Commission is not required to show that it has chosen “the only conceivably appropriate remedy.” *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987). All that is required is that the Commission’s chosen method be “appropriate and reasonable.” *Id.*

²¹¹ 47 U.S.C. § 1302(a) (directing the Commission to “utiliz[e], in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment”).

Broadband Plan (which too was mandated by Congress) includes a number of specific recommendations that entail exactly the sort of outreach contemplated by the *NOI*.²¹²

Nothing in Section 253 or Section 332(c)(7) suggests otherwise. Indeed, both statutes plainly complement Section 706(a)'s directive that the Commission take steps to encourage reasonable and timely broadband deployment by “remov[ing] barriers to infrastructure investment.”²¹³ Also, both statutes (along with the rest of the 1996 Act) postdate Section 4(i) and do not limit the Commission's preexisting authority thereunder to act as necessary to protect the public interest.²¹⁴ Nor is there any hint in the text of either statute or the legislative history thereof that Congress intended to constrain the Commission from addressing right-of-way and wireless siting issues via voluntary outreach. To the contrary, the educational efforts and other voluntary programs contemplated by the *NOI* and recommended herein will, as the Commission observes, “further the goals of sections 253 and 332 by reducing the likelihood of state or local actions that have the effect of prohibiting the provision of a telecommunications service or personal wireless service in violation of those sections.”²¹⁵ For the reasons discussed in Section

²¹² Compare, e.g., NBP at 113, Recommendation 6.6 (“In consultation and partnership with state, local and Tribal authorities, the FCC should develop guidelines for public rights-of-way policies that will ensure that best practices from state and local government are applied nationally.”) with *NOI*, 26 FCC Rcd at 5396 ¶¶ 38-39 (requesting comment on, *inter alia*, whether the Commission “[s]hould compile a set of best practices for public rights of way and wireless facilities siting policies,” and/or “increase uniformity in rights of way and wireless facilities siting governance among localities,” and/or “develop [in partnership with affected stakeholders] a model application process[] or other procedures or practices, to lower costs and streamline processes across multiple jurisdictions”).

²¹³ 47 U.S.C. § 1302(a).

²¹⁴ See *Building Owners and Managers Ass'n International v. FCC*, 254 F.3d 89, 92 (D.C. Cir. 2001) (“The 1996 Act left undisturbed the broad statutory directives contained in the Communications Act of 1934, including the Commission's mandate to ‘make [communications services] available . . . to all the people of the United States,’ 47 U.S.C. § 151, and the Commission's authority to ‘perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions.’ *Id.* § 154(i).”).

²¹⁵ *NOI*, 26 FCC Rcd at 5400 ¶ 56.

III above, the various outreach activities proposed in these comments will help achieve this result.

C. The Commission Has Authority to Adopt the Recommended Rules to Clarify Ambiguities in Sections 253 and 332(c)(7).

1. Section 201(b), Buttressed by Sections 4(i) and 303(r), Authorizes the FCC to Adopt Rules Interpreting Sections 253 and 332(c)(7).

The Commission “has broad rulemaking authority that would allow it to issue rules interpreting sections 253 and 332[(c)(7)].”²¹⁶ Section 201(b) of the Communications Act states that “[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”²¹⁷ In *AT&T Corp. v. Iowa Utilities Board*,²¹⁸ the United States Supreme Court stated in no uncertain terms that Section 201(b) “explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.”²¹⁹ The Court thus held that Section 201(b) gives the Commission the necessary authority to adopt rules implementing Sections 251 and 252 (both of which were added by the 1996 Act), and this reasoning applies with equal force to Sections 253 and 332(c)(7).²²⁰ Moreover, the Commission’s Section 201(b) rulemaking authority is buttressed by Section 4(i)

²¹⁶ *Id.* at 5400 ¶ 57.

²¹⁷ 47 U.S.C. § 201(b).

²¹⁸ 525 U.S. 366 (1999).

²¹⁹ *Id.* at 380 (emphasis in original); *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).

²²⁰ *See Cablevision of Boston v. Public Improvement Commission*, 184 F.3d 88, 97 (1st Cir. 1999) (“[R]ather than shielding incumbent telephone companies from competition, it requires them to provide other participants in the telecommunications market with competitive access to their networks and services. . . Three central provisions of the [1996 Act] – § 251, § 252, and § 253 – instantiate this policy . . . Section 253 is aimed at those who might impede the open competition engendered by §§ 251 and 252.”) (citation omitted).

and Section 303(r), the latter of which authorizes the Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.”²²¹

2. Ambiguous Terms in Section 253 Allow the FCC to Adopt the Interpretive Rules Recommended Herein, Which Are Entitled to Deference.

The Commission has the flexibility to interpret Section 253 broadly to advance its broadband goals. In its landmark *Chevron* decision, the United States Supreme Court “held that ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps ..., involves difficult policy choices that agencies are better equipped to make than courts.”²²² In other words, “*Chevron*’s premise is that it is for agencies, not courts, to fill statutory gaps.”²²³ And, a federal agency “remains the authoritative interpreter (within the limits of reason) of such statutes,” and is afforded judicial deference as such.²²⁴

Section 253 presents exactly the sort of ambiguities that the Commission is fully empowered (and, indeed, expected to) resolve under *Chevron*. For example, Section 253(a) does not provide any specifics as to what types of non-federal restrictions “may prohibit or have the effect of prohibiting” telecommunications service. Not surprisingly, a conflict over this issue

²²¹ 47 U.S.C. § 303(r); *see also Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). In adopting the *Shot Clock Ruling*, the Commission determined that Sections 201(b), 4(i) and 303(r) gave it the authority to interpret Section 332(c)(7). *See Shot Clock Ruling*, 24 FCC Rcd at 14001 ¶ 23.

²²² *National Cable v. Brand X Internet*, 545 U.S. 967, 980 (2005) (discussing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

²²³ *Id.* at 982.

²²⁴ *Id.* at 983.

has emerged in the federal judicial circuits.²²⁵ Similarly, Section 253(c) does not provide any specific guidance as to what types of conduct constitutes permissible management of public rights of way, what types of fees qualify as “fair and reasonable” or what the phrase “competitively neutral and nondiscriminatory” means.

Hence, while both the Commission and the courts have attempted to resolve some of the ambiguities in Section 253 on a case-by-case basis, the fact remains that the statute is ambiguous and service providers do not yet have the benefit of Commission rules that would give them certainty as to what the statute means or how the Commission would apply it in all situations. The Commission can remedy this problem by adopting such rules as proposed herein and, as discussed in the preceding section, it is fully authorized to do so.

3. Ambiguous Terms in Section 332(c)(7) Allow the FCC to Adopt the Interpretive Rules Recommended Herein, Which Are Entitled to Deference.

Courts have identified similar ambiguities in Section 332(c)(7) that, per *Chevron*, permit the Commission to “fill the gap” with interpretive rules, with an expectation of judicial deference. For example, when attempting to interpret the statute, the Second Circuit has noted that it “would be [a] gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity.”²²⁶ Likewise, the First Circuit has noted that “[b]eyond the statute’s language, the [1996 Act] provides no guidance on what constitutes an effective prohibition [on provision of personal wireless service], so courts, including this one, have added judicial gloss.”²²⁷ More

²²⁵ See, e.g., *Sprint Telephony*, 543 F.3d at 576-79; see also discussion *surpa* Section III.C.6 (discussing circuit split).

²²⁶ *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 641 (2nd Cir. 1999) (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (alteration in original)).

²²⁷ *Omnipoint Holdings v. City of Cranston*, 586 F.3d 38, 48 (1st Cir. 2009).

recently, one federal district court observed that “the [1996 Act] does not address whether denial of an application for personal wireless facilities siting can have ‘the effect of prohibiting the provision of personal wireless services’ when one or more competitors already serve the relevant geographic market.”²²⁸ The Court further noted that “after examining the text, legislative history, and purposes of the [1996 Act], conflicting Courts of Appeal have found [multiple] interpretations ‘reasonably within the pale of statutory possibility.’”²²⁹

While these examples are not exhaustive, they illustrate how case-by-case interpretations of Section 332(c)(7) actually provide wireless providers with *less* certainty as to what the statute means, particularly where a provider is deploying a regional or national network that encompasses multiple judicial circuits. Moreover, case-by-case resolution by the FCC only contributes to the problem where the FCC’s interpretation of the statute in an individual case is not consistent with those previously adopted by the courts.²³⁰ As with Section 253, the lack of clarity throughout Section 332(c)(7) gives the FCC ample basis for stepping forward and adopting a clear set of interpretive rules, as suggested by PCIA and The DAS Forum herein.

²²⁸ *Clear Wireless*, 2010 U.S. Dist. LEXIS 89237, at *9 n. 22. This “gap” was filled by the Commission in its *Shot Clock Ruling*.

²²⁹ *Id.* (citations omitted).

²³⁰ *See, e.g., id.* at *8 (“In a Declaratory Ruling dated November 18, 2009 ... the FCC determined that [Section 332(c)(7)’s ‘prohibition’] limitation of State/local authority applies not just to the first carrier to enter into the market, but also to all subsequent entrants. This Ruling directly contradicts the Third Circuit’s ‘one provider’ rule”) (footnote omitted).

CONCLUSION

For the foregoing reasons, the Commission should engage in outreach and pursue the best practices and legislative and regulatory solutions recommended in these comments to improve rights-of-way access and wireless siting so that wireless infrastructure deployment can flourish and continue to meet the Nation's growing mobile broadband needs.

Respectfully submitted,

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