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19-70146, 19-70147, 19-70326, 19-70339, 19-70341, and 19-70344

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SPRINT CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of Orders of
the Federal Communications Commission

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

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

NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY

Adopted: April 20, 2017

Released: April 21, 2017

Comment Date: (30 days after date of publication in the Federal Register)

Reply Comment Date: (60 days after date of publication in the Federal Register)

By the Commission: Chairman Pai and Commissioner O’Rielly issuing separate statements;
Commissioner Clyburn concurring and issuing a statement.

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I. INTRODUCTION

1. The deployment of next-generation wireless broadband has the potential to bring enormous benefits to the Nation’s communities. By one assessment, the next generation of wireless broadband is expected to directly involve \$275 billion in new investment, and could help create 3 million new jobs and boost annual GDP by \$500 billion.¹ Reflecting these benefits, use of wireless broadband service and capacity has been growing dramatically, and such growth is widely expected to continue due to the increasing use of high-bandwidth applications like mobile streaming, the greater expected capacity of 5G connections, and the deployment of the Internet of Things (IoT).² Continuing to meet this demand and realizing the potential benefits of next-generation broadband will depend, however, on having an updated regulatory framework that promotes and facilitates next generation network infrastructure facility deployment.

2. This Notice of Proposed Rulemaking and Notice of Inquiry (NPRM and NOI, respectively) commences an examination of the regulatory impediments to wireless network infrastructure investment and deployment, and how we may remove or reduce such impediments consistent with the law and the public interest, in order to promote the rapid deployment of advanced wireless broadband service to all Americans. Because providers will need to deploy large numbers of wireless cell sites to meet the country’s wireless broadband needs and implement next generation technologies, there is an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise.

3. We expect the measures on which we seek comment to be only a part of our efforts to expedite wireless infrastructure deployment. We invite commenters to propose other innovative approaches to expediting deployment. Further, our process for implementing Section 106 of the National Historic Preservation Act is governed by certain Nationwide Programmatic Agreements and affects States as well as federally recognized Tribal Nations. We look forward to working with these partners on

¹ See accenturestrategy, “Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities,” <http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf> (“Smart Cities Paper”).

² See Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021, at 15 (100 Mbps 5G connections are expected to drive high traffic volumes). Cisco estimates that a 5G connection will generate 4.7 times more traffic than the average 4G connection. See *id.* at 3. Another estimate projects that peak period bandwidth demand will increase at a compounded annual rate of 52 percent. See Information Technology & Innovation Foundation, “5G and Next Generation Wireless: Implications for Policy and Competition,” June 2016, at 1, <http://www2.itif.org/2016-5g-next-generation.pdf>. Overall, it is estimated that, by 2019, mobile data traffic in the United States will have grown by nearly six times over the traffic level that existed in 2014, when the Commission last addressed wireless facility siting issues in a rulemaking. See CTIA-The Wireless Association®, “Mobile Data Demand: Growth Forecasts Met,” Thomas K. Sawanobori, Dr. Robert Roche, June 22, 2015, at 1, <http://www.ctia.org/docs/default-source/default-document-library/062115mobile-data-demands-white-paper-new.pdf>.

proposals involving the Section 106 review process that require amendments or supplements to these agreements.³

II. NOTICE OF PROPOSED RULEMAKING

A. Streamlining State and Local Review

4. This NPRM examines regulatory impediments to wireless infrastructure investment and deployment and seeks comment on measures to help remove or reduce such impediments. In this section, we address the process for reviewing and deciding on wireless facility deployment applications conducted by State and local regulatory agencies. We seek comment on several potential measures or clarifications intended to expedite such review pursuant to our authority under Section 332 of the Communications Act.

5. Congress enacted the Telecommunications Act of 1996 as a “pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans”⁴ One provision of that enactment, Section 332(c)(7), strikes a balance between “preserv[ing] the traditional authority of state and local governments to regulate the location, construction, and modification of wireless communications facilities like cell phone towers” and “reduc[ing] . . . the impediments imposed by local governments upon the installation of facilities for wireless communications.”⁵ Thus, Section 332(c)(7)(A) preserves “the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities,” subject to significant limitations – including Section 332(c)(7)(B)(ii), which requires States and local governments to “act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with [the relevant] government or instrumentality, taking into account the nature and scope of such request.”⁶ The purpose of the latter provision is to counteract delays in State and local governments’ consideration of wireless facility siting applications, which thwart timely rollout and deployment of wireless service. Congress took further action to streamline this process in 2012 by enacting Section 6409(a) of the Spectrum Act, which provides that “a State or local government may not deny, and shall approve,” applications to deploy or modify certain types of wireless facilities.⁷

6. The Commission has taken a number of important actions to date implementing Section 332(c)(7) of the Communications Act (Act) and Section 6409(a) of the Spectrum Act, each of which has been upheld by federal courts.⁸ We seek to assess the impact of the Commission’s actions to date, in

³ See Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1, App’x B (Collocation NPA); Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 CFR Part 1, App’x C (NPA). See also *Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 8824 (WTB 2016).

⁴ Telecommunications Act of 1996, S. Rep. 104-230, at 1 (Feb. 1, 1996) (Conf. Report).

⁵ *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808, 814 (2015); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

⁶ See 47 U.S.C. § 332(c)(7)(B)(ii). Such decisions must be “in writing and supported by substantial evidence contained in a written record.” *Id.* § 332(c)(7)(B)(iii).

⁷ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (Spectrum Act), *codified at* 47 U.S.C. § 1455(a).

⁸ See, e.g., *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (*2009 Declaratory Ruling*), *aff’d*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014) (*2014 Infrastructure Order*), erratum, 30 FCC Rcd 31 (2015), *aff’d*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

order to evaluate the measures we discuss in the NPRM, as well as other possible actions, and to determine whether those measures are likely to be effective in further reducing unnecessary and potentially impermissible delays and burdens on wireless infrastructure deployment associated with State and local siting review processes. Thus, we ask parties to submit facts and evidence on the issues discussed below and on any other matters relevant to the policy proposals set forth here. We seek information on the prevalence of barriers, costs thereof, and impacts on investment in and deployment of wireless services, including how such costs compare to the overall costs of deployment. We seek information on the specific steps that various regulatory authorities employ at each stage in the process of reviewing applications, and which steps have been most effective in efficiently resolving tensions among competing priorities of network deployment and other public interest goals. In addition, parties should detail the extent to which the Commission's existing rules and policies have or have not been successful in addressing local siting review challenges, including effects or developments since the *2014 Infrastructure Order*, the Commission's most recent major decision addressing these issues.⁹

7. Further, in seeking comment on new or modified measures to expedite local review, we invite commenters to discuss what siting applicants can or should be required to do to help expedite or streamline the siting review process. Are there ways in which applicants are causing or contributing to unnecessary delay in the processing of their siting applications? If so, we seek comment on how we should address or incorporate this consideration in any action we take in this proceeding. For example, to what extent have delays been the result of incomplete applications or failures to properly respond to requests to the applicant for additional information, and how should measures we adopt or revise to streamline application review ensure that applicants are responsible for supplying complete and accurate filings and information? Further, are there steps the industry can take outside the formal application review process that may facilitate or streamline such review? Are there siting practices that applicants can or should adopt that will facilitate faster local review while still achieving the deployment of infrastructure necessary to support advanced wireless broadband services?

1. "Deemed Granted" Remedy for Missing Shot Clock Deadlines

8. The Commission has previously considered, but not adopted, proposals to establish a "deemed granted" remedy for violations of Section 332(c)(7)(B)(ii) in the context of applications outside the scope of the Spectrum Act.¹⁰ That is, the Commission has declined to establish that a non-Spectrum Act siting application would be "deemed granted" if a State or local agency responsible for land-use decisions fails to act on it by the applicable shot clock deadline. The Commission's existing policy for non-Spectrum Act siting applications provides that State or local agencies are obligated to act within a presumptively "reasonable period of time" – *i.e.*, the 90-day shot clock for collocation applications and the 150-day shot clock for other applications – and, upon the agency's "failure to act" by the pertinent deadline, the applicant may sue the agency pursuant to Section 332(c)(7)(B)(v) within 30 days after the date of that deadline.¹¹ In such litigation, the agency may attempt to "rebut the presumption that the established timeframes are reasonable" – for example, by demonstrating that slower review in a particular

⁹ To the extent that parties have submitted information in response to the Wireless Telecommunications Bureau's *Streamlining PN* that is relevant to these questions, we invite them to submit such data in the present docket. See *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13368 (WTB 2016) (*Streamlining PN*); comment period extended by *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, Order, 32 FCC Rcd 335 (WTB 2017). In addition, to the extent parties discuss the conduct or practices of government bodies or wireless facility siting applicants, we strongly urge them to identify the particular entities that they assert engaged in such conduct or practices.

¹⁰ *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39. The Commission reaffirmed this ruling as to applications not subject to the Spectrum Act in the *2014 Infrastructure Order*. See 29 FCC Rcd at 12961, para. 226.

¹¹ *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14008-10, 14013-14, paras. 37-42, 49-50.

case was reasonable in light of the “nature and scope of the request,” or for other reasons.¹² If the agency fails to make such a showing, it may face “issuance of an injunction granting the application.”¹³ By contrast, for applications subject to Section 6409(a) of the Spectrum Act, the Commission adopted a “deemed granted” remedy: if a State or local agency fails to act on such an application by the 60-day deadline, the application will be “deemed granted.”¹⁴

9. We now take a fresh look and seek comment on a “deemed granted” remedy for State and local agencies’ failure to satisfy their obligations under Section 332(c)(7)(B)(ii) to act on applications outside the context of the Spectrum Act. We invite commenters to address whether we should adopt one or more of the three options discussed below regarding the mechanism for implementing a “deemed granted” remedy. We describe each of these options below and explain our analysis of the Commission’s legal authority to adopt each of them. We seek comment on the benefits and detriments of each option and invite parties to discuss our legal analysis. We also seek comment on whether there are other options for implementing a “deemed granted” remedy.

10. *Irrebuttable Presumption.* In the *2009 Shot Clock Declaratory Ruling*, the Commission created a “rebuttable presumption” that the shot clock deadlines established by the Commission were reasonable. The Commission anticipated that this would give State and local regulatory agencies “a strong incentive to resolve each application within the time frame defined as reasonable.”¹⁵ Thus, when an applicant sues pursuant to Section 332(c)(7)(B)(v) to challenge an agency’s failure to act on an application by the applicable deadline, the agency would face the burden of “rebut[ting] the presumption that the established timeframes are reasonable,”¹⁶ and if it fails to satisfy this burden, the court could “issu[e] . . . an injunction granting the application.”¹⁷ We believe one option for establishing a “deemed granted” remedy for a State or local agency’s failure to act by the applicable deadline would be to convert this *rebuttable presumption* into an *irrebuttable* presumption. Thus, our determination of the reasonable time frame for action (*i.e.*, the applicable shot clock deadline) would “set an absolute limit that – in the event of a failure to act – results in a deemed grant.”¹⁸

11. We believe we have legal authority to adopt this approach, for the following reasons. First, we see no reason to continue adhering to the cautious approach articulated in the *2009 Shot Clock Declaratory Ruling* – *i.e.*, that Section 332(c)(7) “indicates Congressional intent that courts should have

¹² *Id.* at 14010-11, paras. 42, 44.

¹³ *Id.* at 14009, para. 38; *see also City of Rancho Palos Verdes*, 504 U.S. 116 (proper remedies for Section 332(c)(7) violations include injunctions but not constitutional-tort damages).

¹⁴ *2014 Infrastructure Order*, 29 FCC Rcd at 12957, para. 216. In such cases, applicants may sue and seek a declaratory judgment confirming that an application was “deemed granted” due to the State or local agency’s failure to act within the 60-day shot clock deadline status, while an agency could sue to challenge an applicant’s claim that an application was “deemed granted.” *Id.* at 12963-64, paras. 234-36. *See also id.* at 12961, para. 226 (“deemed grant” status takes effect only after applicant notifies the reviewing jurisdiction in writing); *id.* at 12962, para. 231 (listing issues a locality could raise in litigation to challenge an applicant’s claimed “deemed grant”). The Commission clarified that, prior to the 60-day deadline, State and local agencies may review applications to determine whether they constitute covered requests” and may “continue to enforce and condition approval [of such applications] on compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes.” *Id.* at 12955, para. 211; *see also id.* at 12951, 12956, paras. 202, 214 n.595.

¹⁵ *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 38.

¹⁶ For example, the locality could rebut the presumption that the established deadlines are reasonable” by showing that, in light of the “nature and scope of the request” in a particular case, it “reasonably require[d] additional time” to negotiate a settlement or to prepare a written explanation of its decision. *Id.* at 14011, para. 44.

¹⁷ *Id.* at 14008-09, para. 38.

¹⁸ *2014 Infrastructure Order*, at 12991, para. 226 (describing impact of irrebuttable presumption in context of applications subject to the Spectrum Act).

the [sole] responsibility to fashion . . . remedies” on a “case-specific” basis.¹⁹ The Commission advanced that theory without citing any legislative history or other sources, and the Fifth Circuit, in its decision upholding the *2009 Shot Clock Declaratory Ruling*, apparently declined to rely on it. Instead, the Fifth Circuit found *no* indication in the statute and its legislative history of any clear Congressional intent on whether the Commission could “issue an interpretation of § 332(c)(7)(B)(v) that would guide courts’ determinations of disputes under that section,” and went on to affirm that the Commission has broad authority to render definitive interpretations of ambiguous provisions such as this one in Section 332(c)(7).²⁰ The Fifth Circuit further found – and the Supreme Court affirmed – that courts must follow such Commission interpretations.²¹

12. We thus believe we have authority to adopt irrebuttable presumptions establishing as a matter of rule the maximum reasonable amount of time available to review a wireless facilities application, and seek comment on this conclusion. As the Fifth Circuit found, the inherent ambiguity in “the phrase ‘reasonable period of time,’ as it is used in § 332(c)(7)(B)(ii),” leaves ample “room for agency guidance on the amount of time state and local governments have to act on wireless facility zoning applications.”²² We see nothing in the statute that explicitly compels a case-by-case assessment of the relevant circumstances for each individual application, nor any provision specifically requiring that those time frames be indefinitely adjustable on an individualized basis, rather than subject to dispositive maximums that may be deemed reasonable as applied to specified categories of applications.²³ While Section 332(c)(7)(B)(ii) provides that a locality must act on each application “within a reasonable time, *taking into account the nature and scope of such request*,”²⁴ this does not necessarily mean that a reviewing court “must consider the specific facts of individual applications”²⁵ to determine whether the locality acted within a reasonable time frame; the Commission is well-positioned to take into account the “nature and scope” of particular categories of applications in determining the maximum reasonable amount of time for localities to address each type.

13. Moreover, the Fourth Circuit, in affirming the *2014 Infrastructure Order*, held that the “deemed granted” remedy adopted in the context of the Spectrum Act was permissible under the Tenth Amendment, was consistent with the statutory purpose (*i.e.*, ensuring that deployment “applications are not mired in the type of protracted approval processes that the Spectrum Act was designed to avoid”),²⁶ and was well within the Commission’s authority. We do not view Sections 332(c)(7)(B)(ii) and (v) as materially different from the Spectrum Act in this regard, and we therefore believe that the same “deemed granted” remedy is within the Commission’s authority under those statutory provisions as well, where the Commission exercises its statutory authority in accordance with *City of Arlington* to establish standards,

¹⁹ *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39.

²⁰ *City of Arlington v. FCC*, 668 F.3d at 251. *See also id.* at 250-51 (“Had Congress intended to insulate § 332(c)(7)(B)’s limitations from the FCC’s jurisdiction, one would expect it to have done so explicitly[.] * * * Here, however, Congress did not clearly remove the FCC’s ability to implement the limitations set forth in § 332(c)(7)(B) . . .”).

²¹ *City of Arlington v. FCC*, 668 F.3d at 249-50; 133 S. Ct. at 1871-73. *See also National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (Commission’s interpretation of an ambiguous statutory provision overrides earlier court decisions interpreting the same provision).

²² *City of Arlington*, 668 F.3d at 255.

²³ *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39.

²⁴ 47 U.S.C. § 332(c)(7)(B)(ii).

²⁵ *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 39.

²⁶ *Montgomery County*, 811 F.3d 121, 128.

in specific contexts, for what constitutes “a reasonable period of time after the request is duly filed.”²⁷ We seek comment on this analysis.

14. *Lapse of State and Local Governments’ Authority.* In the alternative (or in addition) to the irrebuttable presumption approach discussed above, we believe we may implement a “deemed granted” remedy for State and local agencies’ failure to act within a reasonable time based on the following interpretation of ambiguous provisions in the statute. Section 332(c)(7)(A) assures these agencies that their “authority over decisions concerning the placement, construction, and modification of personal wireless service facilities” is preserved—but significantly, qualifies that assurance with the provision “*except as provided*” elsewhere in Section 332(c)(7). We seek comment on whether we should interpret this phrase as meaning that if a locality fails to meet its obligation under Section 332(c)(7)(B)(ii) to “act on [a] request for authorization to place, construct, or modify personal wireless facilities within a reasonable period of time,” then its “authority over decisions concerning” that request lapses and is no longer preserved. Under this interpretation, by failing to act on an application within a reasonable period of time, the agency would have defaulted its authority over such applications (*i.e.*, lost the protection of Section 332(c)(7)(A), which otherwise would have preserved such authority), and at that point no local land-use regulator would have authority to approve or deny an application. Arguably, we could establish that in those circumstances, there is no need for an applicant to seek such approval. We seek comment on this interpretation and on the desirability of taking this approach.

15. *Preemption Rule.* A third approach to establish a “deemed granted” remedy—standing alone or in tandem with one or both of the approaches outlined above—would be to promulgate a rule to implement the policies set forth in Section 332(c)(7). Sections 201(b) and 303(r), as well as other statutory provisions, generally authorize the Commission to adopt rules or issue other orders to carry out the substantive provisions of the Communications Act.²⁸ Further, the Fifth Circuit affirmed the determination in the *2009 Shot Clock Declaratory Ruling* that the Commission’s “general authority to make rules and regulations to carry out the Communications Act includes the power to implement § 332(c)(7)(B)(ii) and (v).”²⁹ Accordingly, we seek comment on whether we could promulgate a “deemed granted” rule to implement Section 332(c)(7). We also seek comment on whether Section 253, standing alone or in conjunction with Section 332(c)(7) or other provisions of the Act, provides the authority for the Commission to promulgate a “deemed granted” rule.³⁰

²⁷ See *City of Arlington*, 133 S. Ct. at 1868; 47 U.S.C. § 332(c)(7)(B)(ii).

²⁸ See 47 U.S.C. §§ 201(b) (“The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”), 303(r) (directing 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 Act”). See also 47 U.S.C. § 154(i); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 380 (1999) (“§ 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.”) (emphasis in original); *City of Arlington*, 133 S. Ct. at 1866 (in specific context of Section 332(c)(7), stating: “Section 201(b) . . . empowers the . . . Commission to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions.’ Of course, that rulemaking authority extends to the subsequently added portions of the Act.”) (quoting § 201(b) and citing *Brand X*).

²⁹ *City of Arlington*, 668 F.3d at 249; see also *id.* at 252-54 (finding that the Commission’s interpretation was a permissible construction of the ambiguous provisions in § 332(c)(7), and the interpretation was entitled to deference); *id.* at 247 & n.83 (summarizing Commission’s analysis and citing 47 U.S.C. §§ 151, 154(i), 201(b), and 303(r) as basis for the Commission’s general authority to adopt rules and orders to implement the Act), *aff’d in pertinent part*, 133 S. Ct. at 1866. See also *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14001-03, paras. 23-26 (legal analysis interpreting Sections 332(c)(7), 201(b), and 303(r)).

³⁰ State or local governments’ failures to act within reasonable time frames arguably could violate Section 253(a) if they have the “effect of prohibiting” wireless carriers’ provision of service; and this might justify our addressing this problem by adopting a rule to implement the policies of Section 253(a) as well as Section 332(c)(7). See *infra* Sections III.A and C (discussing implications of the overlapping provisions in Sections 253(a) and

(continued....)

16. In considering adoption of rules implementing Section 332(c)(7)(B)(i), (ii), and (iii), we are aware of a statement in the Conference Report issued in connection with the Telecommunications Act of 1996 that “[i]t is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) . . . the courts shall have exclusive jurisdiction over all . . . disputes arising under this section.”³¹ Does this statement, standing alone, affect our authority to adopt rules governing disputes about localities’ failure to comply with their obligations under Section 332(c)(7)(B)(ii) to act on siting applications within a reasonable time? Or is a generic rule distinguishable from a proceeding addressing a dispute between a particular applicant and a particular State or local regulator? Can a statement in legislative history foreclose us from complying with an explicit mandate elsewhere in the Communications Act? Does it prevent us from exercising the rulemaking authority explicitly granted by Sections 201(b) and 303(r)?³² We are mindful of the D.C. Circuit’s admonition that “a plain reading of an unambiguous statute cannot be eschewed in favor of a contrary reading, suggested only by the legislative history and not by the text itself,” and that “[w]e will not permit a committee report to trump clear and unambiguous statutory language.”³³ We invite commenters to address these issues.

2. Reasonable Period of Time to Act on Applications

17. In 2009, the Commission determined that, for purposes of determining what is a “reasonable period of time” under Section 332(c)(7)(B)(ii), 90 days should be sufficient for localities to review and act on (either by approving or denying) complete collocation applications, and that 150 days is a reasonable time frame for them to review and act on other types of complete applications to place, construct, or modify wireless facilities.³⁴ In its *2014 Infrastructure Order*, the Commission implemented Section 6409(a) of the Spectrum Act (enacted by Congress in 2012)³⁵ by, among other things, creating a new 60-day shot clock within which localities must act on complete applications subject to the definitions in the Spectrum Act.³⁶

18. We ask commenters to discuss whether the Commission should consider adopting different time frames for review of facility deployments not covered by the Spectrum Act. For example, we seek comment on whether we should harmonize the shot clocks for applications that are not subject to the Spectrum Act with those that are, so that, for instance, the time period deemed reasonable for non-Spectrum Act collocation applications would change from 90 days to 60 days.³⁷ Alternatively, should we establish a 60-day shot clock for some subset of collocation applications that are not subject to the

(Continued from previous page) _____

253(c)(7)(B)(i)(II) banning State or local legal requirements that “prohibit or have the effect of prohibiting” the provision of wireless telecommunications service).

³¹ S. Rep. No. 104-230, at 207-08 (1996) (Conf. Rep.).

³² See *supra*.

³³ *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987). See also *United States v. Gonzales*, 520 U.S. 1, 6 (1997) (rejecting “resort to legislative history” to interpret a “straightforward statutory command,” where “the legislative history only muddies the waters.”); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (even where there are “contrary indications in the statute’s legislative history[,] . . . we do not resort to legislative history to cloud a statutory text that is clear.”).

³⁴ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14004, 14012-13, paras. 32, 45-48 (2009) (*2009 Shot Clock Declaratory Ruling*), *aff’d*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

³⁵ Section 6409(a) of the Spectrum Act, 47 U.S.C. § 1455(a), mandates that State and local land-use regulators “must approve, and may not deny” applications to deploy wireless facilities within a specified, narrow category.

³⁶ *2014 Infrastructure Order*, 29 FCC Rcd at 12956-57, para. 215. The Commission also defined each of the terms used in the Spectrum Act to specify the types of facilities subject to mandatory approval. See *id.* at 12926-51, paras. 145-204; 47 CFR § 1.40001(b).

³⁷ *2014 Infrastructure Order*, 29 FCC Rcd at 12957, para. 215; 47 CFR § 1.40001(c)(2).

Spectrum Act, for example, applications that meet the relevant dimensional limits but are nevertheless not subject to the Spectrum Act because they seek to collocate equipment on non-tower structures that do not have any existing antennas?³⁸ Should we adopt different presumptively reasonable time frames for resolving applications for more narrowly defined classes of deployments such as (a) construction of new structures of varying heights (*e.g.*, 50 feet tall or less, versus 50 to 200 feet tall, versus taller than 200 feet); (b) construction of new structures in or near major utility or transportation rights of way, or that are in or near established clusters of similar structures, versus those that are not; (c) deployments in areas that are zoned for residential, commercial, or industrial use, or in areas where zoning or planning ordinances contemplate little or no additional development; or (d) replacements or removals that do not fall within the scope of Section 6409(a) of the Spectrum Act (for example, because they exceed the dimensional limits for requests covered by that provision)? We also request comment on whether to establish different time frames for (i) deployment of small cell or Distributed Antenna System (DAS) antennas or other small equipment versus more traditional, larger types of equipment or (ii) requests that include multiple proposed deployments or, equivalently, “batches” of requests submitted by a single provider to deploy multiple related facilities in different locations, versus proposals to deploy one facility.³⁹ Should we align our definitions of categories of deployments for which we specify reasonable time frames for local siting review with our definitions of the categories of deployments that are categorically excluded from environmental or historic preservation review?⁴⁰

19. We seek comment on what time periods would be reasonable (outside the Spectrum Act context) for any new categories of applications, and on what factors we should consider in making such a decision. For what types or categories of wireless siting applications may shorter time periods be reasonable than those established in the *2009 Shot Clock Declaratory Ruling*? We invite commenters to submit information to help guide our development of appropriate time frames for various categories of deployment. We ask commenters to submit any available data on whether localities already recognize different categories of deployment in their processes, and on the actual amounts of time that localities have taken under particular circumstances.

20. We also seek comment on whether the Commission should provide further guidance to address situations in which it is not clear when the shot clock should start running, or in which States and localities on one hand, and industry on the other, disagree on when the time for processing an application begins. For instance, we have heard anecdotally that some jurisdictions impose a “pre-application” review process, during which they do not consider that a request for authorization has been filed. We seek comment on how the shot clocks should apply when there are such pre-application procedures; at what point should the clock begin to run? Are there other instances in which there is a lack of clarity or disagreement about when the clock begins to run? We ask parties to address whether and how the Commission should provide clarification of how our rules apply in those circumstances.

21. Finally, we seek comment on whether there are additional steps that should be considered to ensure that a deemed granted remedy achieves its purpose of expediting review. For example, to what extent can the attachment of conditions to approvals of local zoning applications slow the deployment of infrastructure? Are applicants encountering requirements to comply with codes that are not reasonably

³⁸ See *2014 Infrastructure Order*, 29 FCC Rcd at 12935, para. 168 (finding that the term “existing . . . base station” in Section 6409(a)(2) covers only structures that, at the time of the application, supports or houses base station equipment); 47 CFR § 1.40001(b)(1)(iv).

³⁹ The Wireless Telecommunications Bureau also sought comment on these issues in the *Streamlining PN*. See 31 FCC Rcd at 13370-71.

⁴⁰ See 47 CFR §§ 1.1306, 1.1307.

related to health and safety?⁴¹ To the extent these conditions present challenges to deployment, are there steps the Commission can and should take to address such challenges?

3. Moratoria

22. Another concern relating to the “reasonable periods of time” for State and local agencies to act on siting applications is that some agencies may be continuing to impose “moratoria” on processing such applications, which inhibit the deployment of the infrastructure needed to provide robust wireless services. If so, such moratoria might contravene the *2014 Infrastructure Order*, which clearly stated that the shot clock deadlines for applications continue to “run[] regardless of any moratorium.”⁴² The Commission explained that this conclusion was “consistent with a plain reading of the *2009 Declaratory Ruling*, which specifies the conditions for tolling and makes no provision for moratoria,” and concluded that this means that “applicants can challenge moratoria in court when the shot clock expires without State or local government action.”⁴³ We see no reason to depart from this conclusion. We ask commenters to submit specific information about whether some localities are continuing to impose moratoria or other restrictions on the filing or processing of wireless siting applications, including refusing to accept applications due to resource constraints or due to the pendency of state or local legislation on siting issues, or insisting that applicants agree to tolling arrangements. Commenters should identify the specific entities engaging in such actions and describe the effect of such restrictions on parties’ ability to deploy or upgrade network facilities and provide service to consumers. We propose to take any additional actions necessary, such as issuing an order or declaratory ruling providing more specific clarifications of the moratorium ban or preempting specific State or local moratoria. Commenters should discuss the benefits and detriments of any such additional measures and our legal authority to adopt them.

B. Reexamining National Historic Preservation Act and National Environmental Policy Act Review

23. In the following sections, we undertake a comprehensive fresh look at our rules and procedures implementing the National Environmental Policy Act (NEPA)⁴⁴ and the National Historic Preservation Act (NHPA)⁴⁵ as they relate to our implementation of Title III of the Act in the context of wireless infrastructure deployment, given the ongoing evolution in wireless infrastructure deployment towards smaller antennas and supporting structures as well as more frequent collocation on existing structures.

24. We note that any revisions to our rules or procedures implementing NEPA require consultation with the Council for Environmental Quality (CEQ).⁴⁶ In addition, any changes to the programmatic agreements governing our review under the NHPA would require the agreement of the Advisory Council on Historic Preservation (ACHP) and the National Conference of State Historic Preservation Officers (NCSHPO), and other revisions to our rules governing NHPA review may benefit

⁴¹ In the context of the deemed granted remedy under the Spectrum Act, the Commission clarified that localities could “continue to enforce and condition approval [of such applications] on compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes.” See *2014 Infrastructure Order*, 29 FCC Rcd at 12955, para. 211.

⁴² *2014 Infrastructure Order*, 29 FCC Rcd at 12971, para. 265; see generally *id.* at 12971-72, paras. 263-67.

⁴³ *Id.* at 12971, para. 265.

⁴⁴ 42 U.S.C. § 4321 *et seq.*

⁴⁵ 54 U.S.C. § 300101 *et seq.*

⁴⁶ 40 CFR § 1507.3(a) (“Each agency shall consult with [CEQ] while developing its procedures and before publishing them in the Federal Register for comment. ... The procedures shall be adopted only after an opportunity for public review and after review by [CEQ] for conformity with [NEPA] and [CEQ’s] regulations.”).

from their perspectives.⁴⁷ Furthermore, some of the changes discussed below might significantly or uniquely affect Tribal governments and their land and resources. The ACHP, in a filing in this proceeding, has stressed that the expertise and experience of these and other stakeholders is crucial to understanding the issues raised herein, and we emphasize that we intend to continue to work closely with ACHP and others.⁴⁸ We direct the Wireless Telecommunications Bureau (WTB), in coordination with the Consumer and Governmental Affairs Bureau, Office of Intergovernmental Affairs, and other Bureaus and Offices as appropriate, to consult with other agencies and organizations, including the CEQ, ACHP, and NCSHPO, as warranted to develop the record and obtain their perspectives on the issues herein. We further direct the Office of Native Affairs and Policy (ONAP), in coordination with WTB and other Bureaus and Offices as appropriate, to conduct government-to-government consultation as appropriate with Tribal Nations. Tribal Nations may notify ONAP of their desire for consultation via email to tribalinfrastucture@fcc.gov.

1. Background

25. *NEPA and the NHPA.* NEPA requires agencies of the Federal Government to identify and evaluate the environmental effects of proposed “major Federal actions significantly affecting the quality of the human environment”⁴⁹ In turn, Section 106 of the NHPA states that “prior to the issuance of any license,” the head of a Federal agency “shall take into account the effect of the undertaking on any historic property” and “shall afford the [ACHP] a reasonable opportunity to comment with regard to the undertaking.”⁵⁰ Similar to a “major Federal action,” an “undertaking” includes, among other things, projects, activities, or programs that “requir[e] a Federal permit, license, or approval[.]”⁵¹ Courts have generally treated Federal actions under NEPA as closely analogous to undertakings under the NHPA.⁵²

26. *Commission Precedent: Scope of Obligations.* The Commission has assumed responsibility for NEPA and NHPA review of wireless communications facilities construction based on the Commission’s actions in two areas: licensing and antenna structure registration (ASR). As a historical matter, the Commission’s initial focus on antenna sites made sense, reflecting the relatively more involved role the Commission played in the space. For instance, in 1974, when the Commission first promulgated rules implementing NEPA,⁵³ all licenses conferred authority to operate from a specific site, and the Commission was required to issue a construction permit for that site before granting the license.⁵⁴ In 1982, however, Congress amended the Communications Act to eliminate construction permits by default in some services and to authorize the Commission to waive the construction permit

⁴⁷ Agency implementation of Section 106 of the NHPA is governed by the rules of the ACHP, which specify the process under which Federal agencies shall perform their historic preservation reviews. 36 CFR § 800.2(a).

⁴⁸ See Letter from Milford Wayne Donaldson, FAIA, Chairman, Advisory Council on Historic Preservation, to the Honorable Ajit Pai, Chairman, FCC, WT Docket Nos. 17-79, 15-180 (filed Apr. 13, 2017) at 1.

⁴⁹ 42 U.S.C. § 4332(2)(C).

⁵⁰ 54 U.S.C. § 306108.

⁵¹ 54 U.S.C. § 300320(3). See also 40 CFR § 1508.18(b).

⁵² See, e.g., *Karst Env’tl Educ. and Prot., Inc. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007); *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001). But see *Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385, 1401 (D.D.C. 1991) (“Congress appears to have established different thresholds in the NHPA and in NEPA for determining whether an activity triggers the obligation”).

⁵³ *Implementation of the National Environmental Policy Act*, Report and Order, 49 FCC 2d 1313, 1333, para. 46 (1974).

⁵⁴ See 47 U.S.C. § 319 (a) (“[n]o license shall be issued . . . for the operation of any station unless a permit for its construction has been granted”).

requirement in the public interest in other services.⁵⁵ Currently, the Commission requires construction permits only in the broadcast services. Furthermore, licenses in many services, including most licenses in the commercial wireless services, now authorize transmissions over a particular band of spectrum within a wide geographic area without further limitation as to transmitter locations. In 1990, the Commission amended Section 1.1312 of the rules to specify that where construction of a Commission-regulated radio communications facility is permitted without prior Commission authorization (*i.e.*, without a construction permit), the licensee or applicant determines prior to construction whether the facility may have a significant environmental effect.⁵⁶ The D.C. Circuit subsequently found that the Commission's retention of limited approval authority over tower construction in Section 1.1312 to the extent necessary to ensure this review was not arbitrary and capricious.⁵⁷

27. *The Commission's Rules.* The Commission's rules require an applicant to prepare and file an environmental assessment (EA)⁵⁸ if its proposed construction meets any of several environmentally sensitive conditions specified in the rules.⁵⁹ If an EA is required, the application will not be processed and the applicant may not proceed with construction until environmental processing is completed.⁶⁰ All other constructions are categorically excluded from environmental processing unless the processing bureau determines, in response to a petition or on its own motion, that the action may nonetheless have a significant environmental impact.⁶¹

⁵⁵ 47 U.S.C. § 319(d); *see* Pub.L. 97-259, 96 Stat. 1087, § 119 (1982).

⁵⁶ 47 CFR § 1.1312(a); *see Amendment of Environmental Rules*, Report and Order, 5 FCC Rcd 2942 (1990) (*Pre-Construction Review Order*).

⁵⁷ *CTIA – The Wireless Ass'n v. FCC*, 466 F.3d 105, 114 (D.C. Cir. 2006). In the underlying Report and Order, the Commission had declined to revisit whether it should treat tower construction as an undertaking under the NHPA, while noting its belief that under Section 319 and Federal environmental statutes, it “has sufficient approval authority to trigger the requirements of section 106.” *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1093 para. 24 (2004) (*NPA Order*). Two Commissioners dissented in part, expressing the view that in the absence of a construction permit or a site-by-site license, the Commission's retention of jurisdiction to require historic preservation review exceeded its statutory authority. *See id.* at 1230 (Statement of Commissioner Kathleen Q. Abernathy), 1233 (Statement of Commissioner Kevin J. Martin).

⁵⁸ Under CEQ rules, an EA is to be prepared for actions that ordinarily may have a significant environmental impact. *See* 40 CFR §§ 1501.4(b), 1507.3(b)(2)(iii). If an EA shows that a proposed action will have no significant environmental impact, then the agency issues a Finding Of No Significant Impact, 40 CFR § 1508.13, and the proposed action can proceed. However, if an EA indicates that the action will have a significant environmental impact, the action cannot proceed unless the agency prepares an environmental impact statement (EIS). *See* 40 CFR § 1501.4 (requiring an EIS for actions that normally have a significant environmental impact).

⁵⁹ *See* 47 CFR §§ 1.1307(a), 1.1308(a), 1.1312(b). These are facilities that are to be located in an officially designated wilderness area, an officially designated wildlife preserve, or a flood plain; that may affect listed threatened or endangered species or their critical habitats, or are likely to jeopardize proposed threatened or endangered species or destroy or adversely modify proposed critical habitats; that may affect districts, sites, buildings, structures or objects that are listed, or eligible for listing, in the National Register of Historic Places; that may affect Native American religious sites; that will involve significant change in surface features (*e.g.*, wetland fill or deforestation); that will be located in residential neighborhoods and equipped with high intensity white lights; that will cause human exposure to radiofrequency emissions that exceed specified levels; or that will exceed 450 feet in height. *See* 47 CFR § 1.1307(a), (b), (d) Note.

⁶⁰ 47 CFR §§ 1.1308(d), 1.1312(b).

⁶¹ *See* 47 CFR § 1.1307 (c), (d). An agency may establish categorical exclusions to cover actions “which do not individually or cumulatively have a significant effect on the human environment” and thus require no EA or EIS. *See* 40 CFR §§ 1508.4, 1507.3(b)(2)(ii). CEQ regulations require that an agency that chooses to establish categorical exclusions must also provide for “extraordinary circumstances,” 40 CFR § 1508.4, under which a normally excluded action may have a significant effect.

28. The Commission fulfills its obligations under the NHPA with respect to radio spectrum licensees through Section 1.1307(a)(4) of the rules, which requires an EA if the proposed construction may affect historic properties.⁶² In particular, Section 1.1307(a)(4) directs licensees and applicants, when determining whether a proposed action may affect historic properties, to follow the procedures in the ACHP's rules as modified by the Collocation NPA and the NPA, two programmatic agreements that took effect in 2001 and 2005, respectively.⁶³ These programmatic agreements, which were executed pursuant to Section 800.14(b) of the ACHP's rules, substitute for the procedures that Federal agencies must ordinarily follow in performing their historic preservation reviews.⁶⁴

29. Under the Collocation NPA, most antenna collocations on existing structures are excluded from Section 106 historic preservation review, with a few exceptions to address potentially problematic situations. The NPA establishes detailed processes for reviewing new towers and those collocations that remain subject to review. Among other efficiencies, in cases where the applicant has not found that the proposed construction will have an adverse effect, the NPA permits the applicant's determination to become final if the State Historic Preservation Officer (SHPO) does not respond to the applicant's submission within 30 days without any affirmative action by the Commission.⁶⁵

30. In addition, the NPA requires applicants to use reasonable and good faith efforts to identify and contact any Tribal Nation or Native Hawaiian Organization (NHO) that may attach religious and cultural significance to historic properties that may be affected by an undertaking.⁶⁶ To facilitate this process, the Commission developed the Tower Construction Notification System (TCNS), which automatically notifies Tribal Nations and NHOs of proposed constructions within geographic areas that they have confidentially identified as potentially containing historic properties of religious and cultural significance to them. The NPA provides that use of the TCNS constitutes a reasonable and good faith effort to identify potentially interested Tribal Nations and NHOs.⁶⁷

31. While Tribal Nations and NHOs, like SHPOs, are subject to a 30-day guideline for responses,⁶⁸ applicants are required to seek guidance from the Commission if a Tribal Nation or NHO

⁶² 47 CFR § 1.1307(a)(4).

⁶³ See Collocation NPA; NPA. The Collocation NPA was amended in 2016 to establish further exclusions from review for small antennas. See *Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 4617 (WTB 2016).

⁶⁴ 36 CFR § 800.14(b)(2). See generally 36 CFR Part 800, Subpart B (historic preservation review procedures that Federal agencies must follow in the absence of an approved program alternative under Section 800.14(b)).

⁶⁵ NPA, §§ VII.B.2, VII.C.2 (providing that if the applicant determines that no historic properties exist within the Area of Potential Effect (APE) or that the undertaking will have no effect on historic properties, that determination is deemed final unless the SHPO objects within 30 days; if the applicant determines that the project will have no adverse effect, after 30 days it may provide a copy of its submission to the Commission, which has 15 days to notify the applicant of any concerns or else the process is complete). Another efficiency is that within the APE for visual effects, and with the exception of resources significant to Tribal Nations and Native Hawaiian Organizations, applicants are only required to consider effects on resources that are listed on the National Register of Historic Places or that have been previously identified as eligible for listing, rather than making affirmative efforts to identify unidentified eligible resources. *Id.*, § VI.D.1.a.

⁶⁶ NPA, §§ IV.B, IV.C. See also 54 U.S.C. § 302706(b).

⁶⁷ NPA, § IV.B.

⁶⁸ *Id.*, § IV.F.4 (“[o]rdinarily, 30 days from the time the relevant tribal or NHO representative may reasonably be expected to have received an inquiry shall be considered a reasonable time”).

does not respond to the applicant's inquiries.⁶⁹ In 2005, the Commission issued a Declaratory Ruling establishing a process that enables an applicant to proceed toward construction when a Tribal Nation or NHO does not timely respond to a TCNS notification.⁷⁰ The Commission staff, in collaboration with industry, has subsequently developed a similar process (the "Good Faith Protocol") to address situations where a Tribal Nation or NHO expresses initial interest in a project, but then fails to communicate further with the Applicant after having been provided any additional information or fees that it has requested.

2. Updating Our Approach to the NHPA and NEPA

a. Need for Action

32. Improving spectrum efficiency for future 4G and 5G services by providing end users with higher quality connections, more bandwidth and lower latency will require significant densification of DAS and small cell facilities.⁷¹ To achieve this anticipated level of service, wireless providers will need flexibility to strategically place thousands of DAS and small cell facilities throughout the country within the next few years. Yet, they face challenges in their efforts to obtain authorizations for deploying this necessary infrastructure, not only from local governments but also in completing the Commission's environmental and historic preservation review processes under NEPA and Section 106 of the NHPA.

33. Many wireless providers have raised concerns about the Commission's environmental and historic preservation review processes because, they say, these reviews increase the costs of deployment and pose lengthy and often unnecessary delays, particularly for small facility deployments.⁷²

34. The historic preservation review process under Section 106 of the NHPA has raised particular concerns among wireless providers. This process not only requires that providers make their own determinations as to whether a project will have effects on historic properties, but also requires obtaining input from SHPOs and Tribal Nations, and wireless providers argue that this process results in significant delays in the execution of their deployment plans.⁷³

35. A large number of wireless providers complain that the Tribal component of the Section 106 review process is particularly cumbersome and costly.⁷⁴ Providers have argued that Tribal Nation

⁶⁹ *Id.*, § IV.G; *see also id.*, § IV.H (providing that TCNS contact is only an initial effort to contact the Tribal Nation or NHO, and does not in itself fully satisfy the applicant's obligations or substitute for government-to-government consultation unless the Tribal Nation or NHO affirmatively disclaims further interest).

⁷⁰ *See Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement*, Declaratory Ruling, 20 FCC Rcd 16092 (2005) (2005 Declaratory Ruling).

⁷¹ *See, e.g.*, Joint Venture Publications, Bridging the Gap: 21st Century Wireless Telecommunications Handbook at 12-15 (Sept. 2016), <http://www.jointventure.org/publications/joint-venture-publications/1473-bridging-the-gap-21stcentury-wireless-telecommunications-handbook> (Bridging the Gap Report); Ixia, Small Cells, Big Challenge: A Definitive Guide to Designing and Deploying HetNets at 41 (Nov. 2013), <https://www.ixiacom.com/resources/small-cells-big-challenge>.

⁷² *See, e.g.*, Sprint Comments, WT Docket No. 16-421, at 44-48; Verizon Comments, WT Docket No. 16-421, at 34-39.

⁷³ *See, e.g.*, Competitive Carrier Association Comments, WT Docket No. 16-421, at 35-36; Crown Castle Comments, WT Docket No. 15-180, at 3-4; Verizon Comments, WT Docket No. 16-421, at 37; Verizon Comments, WT Docket No. 15-180, at 4-5.

⁷⁴ *See, e.g.*, Competitive Carrier Association Comments, WT Docket No. 16-421, at 35-36; Crown Castle Comments, WT Docket No. 15-180, at 3-4; CTIA Comments, WT Docket No. 16-421, at 5; NTCH, WT Docket No. 16-421, Comments at 7-9; Sprint Comments, WT Docket No. 16-421, at 45. Verizon Comments, WT Docket No. 16-421, at 37; Verizon Comments, WT Docket No. 15-180, at 4-5.

review has caused substantial delays⁷⁵ that significantly exceed those attributable to the SHPO review process,⁷⁶ and Tribal compensation in connection with the review of submissions to TCNS has become a highly contentious subject. These Tribal reviews do not relate to Tribal lands, but to areas of Tribal interest, which include Tribal burial grounds and other sites that Tribes regard as sacred off Tribal lands.⁷⁷ We observe that TCNS data reveals that, in recent years, the areas of interest claimed by Tribal Nations have increased. TCNS data reveals that the average number of Tribal Nations notified per tower project increased from eight in 2008 to 13 in August 2016 and 14 in March 2017. Six of the 19 Tribal Nations claiming ten or more full States within their geographic area of interest in March 2017 had increased that number since August 2016, with three Tribal Nations claiming 20 or more full States in addition to select counties. In 2015, 50 Tribal Nations noted fees associated with their review process in TCNS; by March 2017, Commission staff was aware of at least 95 Tribal Nations routinely charging fees, including 85 with fees noted in TCNS and 10 that staff was aware of from other sources. This data further suggests that the average cost per Tribal Nation charging fees increased by 30% and the average fee for collocations increased by almost 50% between 2015 and August 2016.

36. Many wireless providers argue that, as a result, the cumulative Tribal fees that they pay both per site and for their overall deployment programs have increased precipitously. According to Sprint, its costs associated with Tribal participation “have become prohibitive and are unnecessarily diverting capital from deployment” as its per site costs have “increased 14-fold in the last six years, from less than \$500 per site in 2011 to more than \$6,300 today.”⁷⁸ Furthermore, the progression toward smaller and more numerous cell sites is likely increasing the number of submissions that are subject to fee requests. Moreover, Verizon notes that the total fees it pays for Tribal participation “increased from just over \$300,000 in 2012 to almost \$4 million in 2015. And the average spend per site is now \$2,344.”⁷⁹ Further, Competitive Carriers Association (CCA) contends that one of its members “reports that rooftop macrocell collocations in Chicago have generated between \$11,000 -12,000 per site in Tribal fees, and that does not even account for the necessary expenses to collocate on a site,” though CCA recognizes “a duty to protect Tribal ancestral lands and properties,” and states a desire to “work collaboratively with Tribes to more clearly define the pre-consultation process and cost.”⁸⁰

37. Wireless providers and facility owners argue that these developments have combined to increase the urgency of reexamining the Commission’s rules and policies to ensure that they are clear on licensees’ and applicants’ obligations, and that these rules and policies at present are effectively requiring that applicants pay fees that are not legally required by law. We seek concrete information on the amount of time it takes for Tribal Nations to complete the Section 106 review process and on the costs that Tribal participation imposes on facilities deployment and on the provision of service. We also seek comment and specific information on the extent of benefits attributable to Tribal participation under the

⁷⁵ See, e.g., Crown Castle Comments, WT Docket No. 15-180, at 3-4; Verizon Comments, WT Docket No. 15-180, at 4-5.

⁷⁶ Verizon Comments, WT Docket No. 16-421, at 36-40. Verizon states that in July 2016 it had 2,450 pending requests for Tribal review, and that “more than half had been pending for more than 90 days, almost a third had been pending for more than six months, and 20 had been pending for more than a year.”

⁷⁷ See *infra* para. 50-51.

⁷⁸ Sprint Comments, WT Docket No. 16-421, at 45.

⁷⁹ Verizon Comments, WT Docket No. 16-421, at 35.

⁸⁰ Tim Donovan, SVP of Legislative Affairs, CCA, and Rebecca Murphy Thompson, EVP & General Counsel, CCA, A Game of Monopoly: Mobility Fund II & Infrastructure (Feb. 24, 2017), <http://ccablog.tumblr.com/post/157659003646/a-game-of-monopoly-mobility-fund-ii>.

Commission's Section 106 procedures, particularly in terms of preventing damage to historic and culturally significant properties.⁸¹

38. In addition, in May 2016, PTA-FLA filed a Petition for Declaratory Ruling arguing that "Tribal fees have become so exorbitant in some cases to approach or even *exceed* the cost of actually erecting the tower."⁸² PTA-FLA states that the Commission should "prohibit the payment of fees to Tribal Nations" because the payment of such fees "has demonstrably contributed to the expansion of required reviews and attendant delays."⁸³ In the alternative, PTA-FLA states that "the reviewing fees should be limited to no more than \$50" unless a Tribal Nation "demonstrates that the review is exceptionally complex," and that the total fee should never exceed \$200.⁸⁴ In addition, PTA-FLA argues that Tribal Nations "should be required to identify under objective, independently verifiable criteria the areas where construction could reasonably be deemed to have an impact" on an area in which Tribal Nations "actually resided or habituated" so that tower constructors can have a better idea of what sites to avoid before tower planning even begins.⁸⁵ In cases where Tribal Nations "need to preserve secrecy of particular sacred sites to avoid unwanted intrusions," PTA-FLA states that "such sites should be identified to the Commission in confidence" so that the Commission can "advise prospective constructors in the area that a site" will require consultation with a Tribal Nation.⁸⁶ Finally, PTA-FLA argues that the NPA and Collocation Agreement "should be amended to exempt from review sites that will obviously have no effects" on a Tribal Nation's sacred burial grounds.⁸⁷ We incorporate PTA-FLA's petition into this proceeding, and we seek comment below on its proposals.

39. Some wireless providers contend that the SHPO review process also results in significant delays in deployment. We seek comment on the costs associated with SHPO review under the Commission's historic preservation review process, including direct financial costs; costs that delay imposes on carriers, tower owners, and the public; and any other costs. What are the costs associated with SHPO review of typical small facility deployments, and how do these compare with the costs for tower construction projects? Does the SHPO review process duplicate historic preservation review at the local level, particularly when local review is conducted by a Certified Local Government or a governmental authority that issues a Certificate of Appropriateness?⁸⁸ In addition, we seek comment on how often SHPO review results in changes to a construction project due to a SHPO's identification of potential harm to historic properties or confers other public benefits.

40. Some argue that NEPA compliance imposes extraordinarily high costs on wireless providers and results in significant delays.⁸⁹ Sprint notes that it has spent "tens of millions of dollars" to investigate pursuant to NEPA requirements deployments which, it alleges, present "minimal likelihood of

⁸¹ See, e.g., Letter from Gary D. Batton, Chief, Choctaw Nation of Oklahoma, to Ajit Pai, Chairman, FCC, WT Docket No. 17-79, at 1-2 (filed Mar. 30, 2017).

⁸² Petition for Declaratory Ruling, PTA-FLA, Inc., WT Docket No. 15-180, at 8 (filed May 3, 2016) (PTA-FLA Petition for Declaratory Ruling) (emphasis in original).

⁸³ *Id.* at 14.

⁸⁴ *Id.*

⁸⁵ *Id.* at 14-15.

⁸⁶ *Id.* at 15.

⁸⁷ *Id.* at 16.

⁸⁸ A "Certified Local Government" is a local government whose local historic preservation program is certified under Chapter 3025 of the National Historic Preservation Act. See 54 U.S.C. §§ 300302, 302501 *et seq.* A "Certificate of Appropriateness" is an authorization from a local government allowing construction or modification of buildings or structures in a historic district.

⁸⁹ See, e.g., Verizon Comments, WT Docket 16-421, at 34-39; Sprint Comments, WT Docket 16-421, at 44-48.

harm.”⁹⁰ It states that the Commission’s NEPA rules impose huge network costs with little or nothing in the way of corresponding benefits to the environment.⁹¹ More specifically, some commenters complain about delays associated with EAs – which T-Mobile states may “languish for an extended period of time—sometimes years,”⁹² partly because when EAs are required, the Commission is not subject to any processing timelines or dispute resolution procedures.⁹³ T-Mobile also complains that in cases where an EA is not filed, parties may file environmental objections under the Commission’s rules with respect to a planned facility, and such cases are not subject to timelines for resolution.⁹⁴ A number of commenters propose that EAs for deployments on flood plains should be eliminated if a site will be built at least one foot above the base flood elevation and a local building permit has been obtained.⁹⁵ We seek comment on the costs and relative benefits of the Commission’s NEPA rules. What are the costs associated with NEPA compliance, other than costs associated with historic preservation review? How do the costs of NEPA compliance for tower construction compare to such costs for small facilities, and what specific benefits does the review confer?

41. Finally, some note that facilities requiring Federal review must also undergo pre-construction review by local governmental authorities, and assert that the inability to engage in these dual reviews simultaneously can add significant time to the process. Verizon states that local siting and Federal historic preservation “reviews cannot and do not run concurrently, because the local reviews may result in changes to the location or parameters (height, width, and size) of the facility which must be established before the historic preservation review process can begin.”⁹⁶ Verizon also states that providers cannot commence construction of their facilities until after completion of the historic preservation review process, which they state typically takes several months.⁹⁷ We seek comment on whether local permitting, NEPA review, and Section 106 review processes can feasibly be conducted simultaneously, and on whether there are barriers preventing simultaneous review to the extent it is feasible. To what extent do significant siting changes or the potential for such changes during the local process make simultaneous review impractical or inefficient? Alternatively, have reviewing or consulting parties in the Commission’s NEPA or Section 106 review processes declined to process an application until a local permitting process is complete? We seek comment on whether and under what circumstances simultaneous review would, on the whole, minimize delays and provide for a more efficient process and what steps, if any, the Commission should take to facilitate or enable such simultaneous review.

b. Process Reforms

(i) Tribal Fees

42. In this section, we identify and seek comment on several issues relevant to fees paid to Tribal Nations in the Section 106 process. In addition to commenting on the legal framework and on potential resolutions to the issues, we encourage commenters to provide specific factual information on current Tribal and industry practices and on the impacts of those practices on licensees/tower owners, Tribal Nations, and timely deployment of advanced broadband services to all Americans. We further welcome information on the practices of other Federal agencies for our consideration.

⁹⁰ Sprint Comments, WT Docket No. 16-421, at 47-48.

⁹¹ See, e.g., T-Mobile Comments, WT Docket No. 16-421, at 39.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See, e.g., Verizon Comments, WT Docket No. 16-241, at 38-39.

⁹⁶ Verizon Comments, WT Docket No. 15-180, at 4-5.

⁹⁷ *Id.*

43. Neither the NHPA nor the ACHP's implementing regulations address whether and under what circumstances Tribal Nations and NHOs may seek compensation in connection with their participation in the Section 106 process. The ACHP has, however, issued guidance on the subject in the form of a memorandum in 2001 and as part of a handbook last issued in 2012. The ACHP 2001 Fee Guidance explains that "the agency or applicant is not required to pay the tribe for providing its views."⁹⁸ Further, "[i]f the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process."⁹⁹ The guidance also states, however, that when a Tribal Nation "fulfills the role of a consultant or contractor" when conducting reviews, "the tribe would seem to be justified in requiring payment for its services, just as any other contractor," and the company or agency "should expect to pay for the work product."¹⁰⁰ As we explain below, we seek comment on how the ACHP's guidance can be applied in the context of our existing procedures and the proposals in this proceeding. Moreover, we seek comment on practices or procedures of other Federal agencies with respect to addressing the various roles a Tribal Nation may play in the Section 106 process and how to identify those services for which a Tribal Nation would be justified in seeking fees.

44. *Circumstances When Fees Are Requested.* The NPA requires applicants to make a reasonable and good faith effort to identify Tribal Nations and NHOs that may attach religious and cultural significance to historic properties affected by an undertaking, and this effort is commonly accomplished through the TCNS. Some Tribal Nations require the payment of a fee prior to performing even preliminary review of all or nearly all projects submitted to them via the TCNS.

45. The ACHP Handbook clearly states that no "portion of the NHPA or the ACHP's regulations require[s] an agency or an applicant to pay for any form of tribal involvement."¹⁰¹ We note that ACHP guidance permits payments to a Tribal Nation when it fulfills a role similar to any other consultant or contractor. At what point in the TCNS process, if any, might a Tribal Nation act as a contractor or consultant?¹⁰² We seek comment on any facts that might affect the answer to that question. Does the particular request of the applicant determine whether a Tribal Nation is acting as a contractor or

⁹⁸ See ACHP, Fees in the Section 106 Review Process (2001), <http://www.achp.gov/regs-fees.html> (ACHP 2001 Fee Guidance).

⁹⁹ *Id.*

¹⁰⁰ *Id.* See also ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook, at 13 (2012), <http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf> (ACHP 2012 Handbook) ("[No] portion of the NHPA or the ACHP's regulations require[s] an agency or an applicant to pay for any form of tribal involvement. However, during the identification and evaluation phase of the Section 106 process when the agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe, it may ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor. Since Indian tribes are a recognized source of information regarding historic properties of religious and cultural significance to them, federal agencies should reasonably expect to pay for work carried out by tribes. The agency or applicant is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the duties of obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on those historic properties, through reasonable methods."). The ACHP 2012 Handbook also indicates that with respect to properties where the agency concludes that no historic properties are affected, Tribal concurrence in that decision is not required, though Tribal Nations and NHOs can state any objections to the ACHP, which if it agrees may provide its opinion to the agency. See *id.* at 23.

¹⁰¹ ACHP 2012 Handbook at 13.

¹⁰² See PTA-FLA Petition at 14 (asserting that the payment of fees for Tribal review should be prohibited).

consultant? For example, the ACHP Handbook notes that if an applicant asks for “specific information and documentation” from a Tribal Nation, then the Tribal Nation is being treated as a contractor or consultant.¹⁰³ Should we infer if the applicant does not ask explicitly for such information and documentation, then no payment is necessary? We also seek comment on whether Tribal review for some types of deployment is less in the nature of a contractor or consultant. For example, would collocations or applications to site poles in rights of way be less likely to require services outside of the Tribal Nation’s statutory role? In reviewing TCNS submissions for collocations or for siting poles in rights of way, under what circumstances might a Tribal Nation incur research costs for which it or another contractor might reasonably expect compensation?

46. Once a Tribal Nation or NHO has been notified of a project, an applicant must provide “all information reasonably necessary for the Indian tribe or NHO to evaluate whether Historic Properties of religious and cultural significance may be affected” and provide the Tribal Nation or NHO with a reasonable opportunity to respond.¹⁰⁴ We seek comment on this requirement and on any modifications the Commission can and should make. In particular, we seek comment on whether the information in FCC Form 620 or FCC Form 621 is sufficient to meet the requirement that “all information reasonably necessary...” has been provided to the Tribal Nation. If not, are there modifications to these forms that would enable the Commission to meet this requirement? For example, should the FCC Form 620 and FCC Form 621 be amended to address the cultural resources report that an applicant prepares after completing a Field Survey?¹⁰⁵ Additionally, we seek comment on whether a Tribal Nation’s or NHO’s review of the materials an applicant provides under NPA Section VII is ever, and if so under what circumstances, the equivalent of asking the Tribal Nation or NHO to provide “specific information and documentation” like a contractor or consultant would, thereby entitling the Tribal Nation to seek compensation under ACHP guidance and the NPA. If a Tribal Nation chooses to conduct research, surveying, site visits or monitoring absent a request of the applicant, would such efforts require payment from the applicant? If an archaeological consultant conducted research, surveying, site visits, or monitoring absent a request of the applicant, would the applicant normally be required to pay that contractor or consultant? We seek comment on how the ACHP Handbook’s statement that an “applicant is free to refuse [payment] just as it may refuse to pay for an archaeological consultant,” as well as its statement that “the agency still retains the duties of obtaining the necessary information [to fulfill its Section 106 obligations] through reasonable methods,” impacts our analysis of payments for Tribal participation.¹⁰⁶

47. We note that some Tribal Nations have indicated that they assess a flat upfront fee for all applications as a way to recover costs for their review of all TCNS applications, thereby eliminating the administrative burden of calculating actual costs for each case. We seek comment on this manner of cost recovery and whether such cost recovery is consistent with ACHP’s fee guidance in its 2012 Handbook.¹⁰⁷ Tribal Nations have also indicated that they have experienced difficulties in collecting compensation after providing service as a reason for upfront fee requests. We seek comment on whether this concern could be alleviated if we clarify when a Tribal Nation is acting under its statutory role and when it is being hired as a contractor or consultant under our process. We also seek comment on whether there might be a more appropriate way to address this concern.

48. What steps, if any, can the Commission take to issue our own guidance on the circumstances in our process when the Tribal Nation is expressing its views and no compensation by the

¹⁰³ ACHP 2012 Handbook at 13.

¹⁰⁴ NPA, § IV.F.

¹⁰⁵ *See id.* at § VI.D.2.

¹⁰⁶ ACHP 2012 Handbook at 13.

¹⁰⁷ *See id.*

agency or the applicant is required under ACHP guidance, and the circumstances where the Tribal Nation is acting in the role of a consultant or contractor and would be entitled to seek compensation? We seek comment on what bright-line test, if any, could be used. How does the reasonable and good faith standard for identification factor, if at all, fit into when a Tribal request for fees must be fulfilled in order to meet the standard? We seek comment on how disputes between the parties might be resolved when a Tribal Nation asserts that compensable effort is required to initiate or conclude Section 106 review. We seek comment on whether there are other mechanisms to reduce the need for case-by-case analysis of fee disputes. While we seek comment generally on our process, we also seek comment particularly in the context of deployment of infrastructure for advanced communications networks.

49. To the extent that supplementing current ACHP guidance would help clarify when Tribal fees may be appropriate while both facilitating efficient deployment and recognizing Tribal interests, what input, if any, should the Commission provide to the ACHP on potential modifications to ACHP guidance?

50. *Amount of Fees Requested.* One factor that appears to be driving tower owners and licensees to seek Commission guidance in the fee area is not the mere existence of fees, but instead the amount of compensation sought by some Tribal Nations. How, if at all, does the “reasonable and good faith” standard for identification factor fit into or temper the amount of fees a Tribal Nation may seek in compensation? Are there any extant fee rates or schedules that might be of particular use to applicants and Tribal Nations in avoiding or resolving disputes regarding the amount of fees?

51. One party has requested in a petition that the Commission establish a fee schedule or otherwise resolve fee disputes.¹⁰⁸ We seek comment on the legal framework applicable to this request. How might the impact of fee disputes on the deployment of infrastructure for advanced communications networks provide a basis for establishing a fee schedule in this context using the Communications Act as authority? Do the NHPA or other statutes limit our ability to establish such a fee schedule, and if so, how? How might the Miscellaneous Receipts Act (MRA)¹⁰⁹ and General Accountability Office (GAO) precedent on improper augmentation temper the parameters of our actions in the area?¹¹⁰ We seek comment on whether other Federal agencies have established fee schedules or addressed the matter in any way, *e.g.*, either formally or informally or with respect to particular projects. How does due regard for Tribal sovereignty and the Government’s treaty obligations affect our latitude for action in this area?

52. If we were to establish a fee schedule, we seek comment on what weight or impact it might have on our process. For example, to what extent would fees at or below the level established by a fee schedule be considered presumptively reasonable? We further seek comment on what legal framework would be relevant to resolution of disputes concerning an upward or downward departure from the fee schedule.¹¹¹ Should the fees specified in such a schedule serve as the presumptive maximum

¹⁰⁸ See, PTA-FLA Petition at 14 (contending that “reviewing fees should be no more than \$50 unless the tribe demonstrates that the review is exceptionally complex. In no event should the fee exceed \$200”).

¹⁰⁹ 31 U.S.C. § 3302(b).

¹¹⁰ While a fee schedule or direction to make certain payments to a Tribal Nation would not directly involve money being received by the Commission, the GAO has explained both in the MRA context and in the context of improper augmentation that control over funds (who receives, who pays) is a significant part of its analysis. For example, directing a party to pay a fee that an agency might itself properly pay out of its appropriation can raise questions relating to both the MRA and improper augmentation of the agency’s appropriation. See B-300248 (January 15, 2004) (Small Business Administration both violated the MRA and improperly augmented its appropriation by having parties pay fees to a third party instead of using its appropriation to fund the activity).

¹¹¹ We observe that around the time the NPA was completed, the Commission and the United South and Eastern Tribes (USET) agreed to Voluntary Best Practices to promote cooperation between the Commission’s applicants and USET’s members. USET appended to the Best Practices a model cost recovery schedule that it stated was intended solely to cover Tribal costs. Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review Pursuant to Section 106 of the National Historic Preservation Act (Oct. 25, 2004). The cost

(continued....)

an applicant would be expected to pay, and under what circumstances might an upward departure from the fee schedule be appropriate? In addition to the concepts cited in the prior paragraph, are there other legal principles at play in the resolution of a dispute over a fee that might not arise in the context of merely setting a fee schedule? Have any other Federal agencies formally or informally resolved fee disputes between applicants and Tribal Nations, and if so, under what legal parameters? We also seek comment on what categories of services should be included, and whether the categories should be general or more specific. How would we establish the appropriate level for fees? How could a fee schedule take into account both regional differences and changes in costs over time, *i.e.*, inflation?¹¹² We also seek comment on whether the Commission should only establish a model fee schedule and whether that would be consistent with the Tribal engagement requirements contemplated by Section 106.

53. *Geographic Areas of Interest.* Tribal Nations have increased their areas of interest within the TCNS as they have improved their understanding of their history and cultural heritage. As a result, applicants must sometimes contact upwards of 30 different Tribal Nations and complete the Section 106 process with each of them before being able to build their project. We seek comment on whether there are actions the Commission can and should take to mitigate this burden while complying with our obligation under the NHPA and promoting the interests of all stakeholders. For example, the TCNS allows Tribal Nations and NHOs to select areas of interest at either a State or county level, but many Tribal Nations have asked to be notified of any project within entire States, and in a few instances, at least 20 different States. We seek comment on whether we could and should encourage, or require, the specification of areas of interest by county. We also seek comment on whether we should require some form of certification for areas of interest, and if so, what would be the default if a Tribal Nation fails to provide such certification.¹¹³

54. We seek comment on whether TCNS should be modified to retain information on areas where concerns were raised and reviews conducted, so that the next filer knows whether there is a concern about cultural resources in that area or not. To what extent should applicants be able to rely on prior clearances, given that resources may continue to be added to the lists of historic properties? To the extent we consider allowing applicants to rely on prior clearances, how should we accommodate Tribal Nations' changes to their areas of interest? We further seek comment on how the Commission can protect information connected to prior site reviews, especially those areas where a tower was not cleared because there may be artifacts. We also seek comment on whether the Commission can make any other changes to TCNS or our procedures to improve the Tribal review process.

55. In addition, applicants routinely receive similar requests for compensation or compensable services from multiple Tribal Nations. While we recognize that each Tribal Nation is sovereign and may have different concerns, we seek comment on when it is necessary for an applicant to compensate multiple Tribal Nations for the same project or for the same activity related to that project, in particular site monitoring during construction. We also seek comment on whether, when multiple Tribal Nations request compensation to participate in the identification of Tribal historic properties of religious and cultural significance, whether there are mechanisms to gain efficiencies to ensure that duplicative

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recovery schedule indicated that there should be no charge for identification of potentially interested Tribal Nations and for the initial contact, but that charges for review of survey material and site visitation would range between \$300 and \$500, as appropriate to recover the Tribal Nation's costs and accounting for regional differences. *See id.* at Attachment, "USET Model Explanatory Cost Recovery Schedule." We are unaware that any USET Member Tribe (or other Tribal Nation) ever formally adopted the model cost recovery schedule.

¹¹² We note that the fee ranges found in the Cost Recovery Schedule associated with the USET Voluntary Best Practices are now 13 years old.

¹¹³ *See, e.g.*, PTA-FLA Petition at 14-15 (proposing a requirement for Tribal Nations to "identify under objective, independently verifiable criteria the areas where construction could reasonably be deemed to have an impact on tribal grounds").

review is not conducted by each Tribal Nation. Is it always necessary to obtain such services from all responding Tribal Nations that request to provide the service, and if so, why? Might one Tribal Nation when functioning in the role of a contractor perform certain services and share the work product with other Tribal Nations, *e.g.*, site monitoring? Could an applicant hire a qualified independent site monitor and share its work product with all Tribal Nations that are interested? How would we ensure that such a monitor is qualified so that other Tribal Nations' interests will be adequately considered? Should we require that such a monitor meet some established minimum standards? We also seek comment on whether monitors should be required to prepare a written report and provide a copy to applicants.

56. *Remedies and Dispute Resolution.* While the ACHP has indicated that Tribal concurrence is not necessary to find that no historic properties of religious and cultural significance to Tribal Nations or NHOs would be affected by an undertaking,¹¹⁴ the agency is responsible for getting the information necessary to make that determination.¹¹⁵ We seek comment on how these two directives interact. The ACHP 2001 Fee Guidance states that “if an agency or applicant attempts to consult with an Indian tribe and the tribe demands payment, the agency or applicant may refuse and move forward.”¹¹⁶ We seek comment on whether and under what circumstances the Commission should authorize a project to proceed when a Tribal Nation refuses to respond to a Section 106 submittal without payment.

57. Under the NPA, when a Tribal Nation or NHO refuses to comment on the presence or absence of effects to historic properties without compensation, the applicant can refer the procedural disagreement to the Commission.¹¹⁷ We seek comment on whether the Commission can adjudicate these referrals by evaluating whether the threshold of “reasonable and good faith effort” to identify historic properties has been met, given that the Tribal Nation can always request government-to-government consultation in the event of disagreement.

58. We seek comment on when the Commission must engage in government-to-government consultation to resolve fee disputes, including when the compensation level for an identification activity has been established by a Tribal government.

59. *Negotiated Alternative.* We note that since September 2016, the Commission has been facilitating meetings among Tribal and industry stakeholders with the goal of resolving challenges to Tribal requirements in the Section 106 review process, including disagreements over Tribal fees.¹¹⁸ We seek comment on whether the Commission should continue seeking to develop consensus principles and, if so, how those principles should be reflected in practice. For example, we seek comment on whether we should seek to enter into agreements regarding best practices with Tribal Nations and their representatives.

(ii) Other NHPA Process Issues

60. *Lack of Response.* As discussed above, while both SHPOs and Tribal Nations/NHOs are expected ordinarily to respond to contacts within 30 days, the NPA and the Commission's practice establish different processes to be followed when responses are not timely.¹¹⁹ We seek comment on what measures, if any, we should take to further speed either of these review processes, either by amending the NPA or otherwise, while assuring that potential effects on historic preservation are fully evaluated. What

¹¹⁴ See ACHP 2012 Handbook at 23. See also 36 CFR § 800.4.

¹¹⁵ See 36 CFR § 800.4 (imposing the requirement to identify historic properties on “the agency”).

¹¹⁶ See ACHP 2001 Fee Guidance.

¹¹⁷ See NPA, § IV.G.

¹¹⁸ See *id.* at § IV.J (“the Commission will use its best efforts to arrive at agreements regarding best practices with Indian tribes and NHOs and their representatives”).

¹¹⁹ See Section II.B.1, *supra*.

effect would such proposals have on addressing Section 106-associated delays to deployment? Should different time limits apply to different categories of construction, such as new towers, DAS and small cells, and collocations? Have advances in communications during the past decade, particularly with respect to communications via the Internet, changed reasonable expectations as to timeliness of responses and reasonable efforts to follow up?

61. With respect to Tribal Nations and NHOs, we seek comment on whether the processes established by the *2005 Declaratory Ruling* and the Good Faith Protocol adequately ensure the completion of Section 106 review when a Tribal Nation or NHO is non-responsive.¹²⁰ We seek comment on whether the process can be revised in a manner that would permit applicants to self-certify their compliance with our Section 106 process and therefore proceed once they meet our notification requirements, without requiring Commission involvement, in a manner analogous to the “deemed granted” remedy for local governments.¹²¹ Would such an approach be consistent with the NPA and with the Commission’s legal obligations? We note that Commission staff has discovered on numerous occasions that applicants have failed to perform their Tribal notifications as our processes require. If we were to permit applicants to self-certify that they have completed their Tribal notification obligations, we seek comment on how we could ensure that the certifications are truthful and well-founded.

62. *Batching*. In the PTC Program Comment,¹²² the ACHP established a streamlined process for certain facilities associated with building out the Positive Train Control (PTC) railroad safety system. Among other aspects of the PTC Program Comment, eligible facilities may be submitted to SHPOs and through TCNS in batches.¹²³

63. We seek comment on whether we should adopt either a voluntary or mandatory batched submission process for non-PTC facilities. What benefits could be realized through the use of batching? What lessons can be learned from the experience with PTC batching? What guidelines should we provide, if any, regarding the number of facilities to be included in a batch, their geographic proximity, or the size of eligible facilities? Should there be other conditions on eligibility, such as the nature of the location or the extent of ground disturbance? Should different time limits or fee guidelines, if any are adopted, apply to batched submissions? What changes to our current TCNS and E-106 forms and processes might facilitate batching? We seek comment on these and any other policy or operational issues associated with batching of proposed constructions.

64. *Other NHPA Process Reforms*. We seek comment on whether there are additional procedural changes that we should consider to improve the Section 106 review process in a manner that does not compromise its integrity.

(iii) NEPA Process

65. We seek comment on ways to improve and further streamline our environmental compliance regulations while ensuring we meet our NEPA obligations. For example, should we consider new categorical exclusions for small cells and DAS facilities? If so, under what conditions and on what basis? Should we revise the Commission’s rules so that an EA is not required for siting in a floodplain¹²⁴

¹²⁰ *See id.*

¹²¹ *See* Section II.A.1, *supra*.

¹²² *See Wireless Telecommunications Bureau Announces Adoption of Program Comment to Govern Review of Positive Train Control Wayside Facilities*, WT Docket 13-240, Public Notice, 29 FCC Rcd 5340, Attachment (WTB 2014) (PTC Program Comment).

¹²³ *See id.* at § VII.A. *See also* Batching Guidance for TCNS and E106 Submissions Under the Positive Train Control Program Comment (rev. Dec. 19, 2014), http://wireless.fcc.gov/ptc/Batching_Guidance_121914.pdf.

¹²⁴ For more information on floodplain definitions and management, see Executive Order 11988 as amended by Executive Order 13690 and accompanying guidance, Guidelines for Implementing Executive Order 11988,

(continued....)

when appropriate engineering or mitigation requirements have been met?¹²⁵ Are there other measures we could take to reduce unnecessary processing burdens consistent with NEPA?

c. NHPA Exclusions for Small Facilities

66. As part of our effort to expedite further the process for deployment of wireless facilities, including small facility deployments in particular, we seek comment below on whether we should expand the categories of undertakings that are excluded from Section 106 review. With respect to each of the potential exclusions discussed below, we seek comment on the alternatives of adopting additional exclusions directly in our rules, or incorporating into our rules a program alternative pursuant to the ACHP rules. The Commission may exclude activities from Section 106 review through rulemaking upon determining that they have no potential to cause effects to historic properties, assuming such properties are present.¹²⁶ Where potential effects are foreseeable and likely to be minimal or not adverse, a program alternative under the ACHP's rules may be used to exclude activities from Section 106 review.¹²⁷ We seek comment about whether the exclusions discussed below meet the test for an exclusion in 36 CFR § 800.3(a)(1) or whether they would require a program alternative. To the extent that a program alternative would be necessary, we seek comment on which of the program alternatives authorized under the ACHP's rules would be appropriate.¹²⁸ Particularly, for those potential exclusions where a program alternative would be required, commenters should discuss whether a new program alternative is necessary or whether an amendment to the NPA or a second amendment to the Collocation NPA would be the appropriate procedural mechanism.

(i) Pole Replacements

67. We seek comment on whether the Commission should take further measures to tailor Section 106 review for pole replacements. As noted above, wireless companies are increasingly deploying new infrastructure using smaller antennas and supporting structures, including poles. Under the existing NPA, pole replacements are excluded from Section 106 review if the pole being replaced meets the definition of a "tower" under the NPA (constructed for the sole or primary purpose of supporting Commission-authorized antennas), provided that the pole being replaced went through Section 106 review.¹²⁹ The NPA also more generally excludes construction in or near communications or utility rights of way, including pole replacements, with certain limitations. In particular, the construction is excluded if the facility does not constitute a substantial increase in size over nearby structures and it is not within the boundaries of a historic property. However, proposed facilities subject to this exclusion must complete the process of Tribal and NHO participation pursuant to the NPA.¹³⁰

68. We seek comment on whether additional steps to tailor Section 106 review for pole replacements would help serve our objective of facilitating wireless facility siting, while creating no or foreseeably minimal potential for adverse impacts to historic properties. For example, should the

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Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (October 8, 2015).

¹²⁵ See, e.g., Verizon Comments, WT Docket No. 16-241, at 38-39.

¹²⁶ 36 CFR § 800.3(a)(1). Based on its authority under Section 800.3(a)(1), the Commission has established targeted unilateral exclusions from historic preservation review requirements for certain small facility collocations on utility structures and on buildings and other non-tower structures, provided they meet certain specified criteria. *2014 Infrastructure Order*, 29 FCC Rcd at 12901-12, paras. 76-103.

¹²⁷ 36 CFR § 800.14(c).

¹²⁸ 36 CFR § 800.14.

¹²⁹ NPA, § III.B; see also § II.A.14 (definition of "Tower").

¹³⁰ NPA § III.E. "Substantial increase in size" is defined by reference to Section I.E of the Collocation NPA.

replacement of poles be excluded from Section 106 review, regardless of whether a pole is located in a historic district, provided that the replacement pole is not “substantially larger” than the pole it is replacing (as defined in the NPA)? We envision that this proposed exclusion could address replacements for poles that were constructed for a purpose other than supporting antennas, and thus are not “towers” within the NPA definition, but that also have (or will have) an antenna attached to them. This exclusion would also apply to pole replacements within rights of way, regardless of whether such replacements are in historic districts. We seek comment on this proposal and on whether any additional conditions would be appropriate. For example, consistent with the existing exclusion for replacement towers, commenters should discuss whether the exclusion should be limited to projects for which construction and excavation do not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction. How would the “leased or owned property” be defined within a utility right of way that may extend in a linear manner for miles?

(ii) Rights of Way

69. We seek comment on whether to expand the NPA exemption from Section 106 review for construction of wireless facilities in rights of way. First, as noted above, current provisions of the NPA exclude from Section 106 review construction in utility and communications rights of way subject to certain limitations.¹³¹ We seek comment on whether to adopt a similar exclusion from Section 106 review for construction or collocation of communications infrastructure in transportation rights of way and whether such an exclusion would be warranted under 36 CFR § 800.3(a)(1). We recognize the Commission’s previous determination in the *NPA Order* that, given the concentration of historic properties near many highways and railroads, it was not feasible to draft an exclusion for transportation corridors that would both significantly ease the burdens of the Section 106 process and sufficiently protect historic properties.¹³² The Commission also recognized, however, that transportation corridors are among the areas where customer demand for wireless service is highest, and thus where the need for new facilities is greatest.¹³³

70. In addition, since the *NPA Order*, wireless technologies have evolved and many wireless providers now deploy networks that use smaller antennas and compact radio equipment, including DAS and small cell systems. In view of the changed circumstances that are present today, we find that it is appropriate to reconsider whether we can exclude construction of wireless facilities in transportation rights of way in a manner that guards against potential effects on historic properties. We seek comment on whether such an exclusion should be adopted, subject to certain conditions that would protect historic properties, and, if so, what those conditions should be. For example, should we require that poles be installed by auguring or that cable or fiber be installed by plow or by directional drilling? What stipulations are needed if a deployment may be adjacent to or on National Register-eligible or listed buildings or structures, or in or near a historic district? Would it be appropriate to have any limitation on height, in addition to the requirement in the current rights of way exclusion that the structures not constitute a substantial increase in size over existing nearby structures? How should any new exclusion address Tribal and NHO participation, especially for historic properties with archaeological components?¹³⁴ We also seek comment on how to define the boundaries of a transportation right of way for these purposes.

71. In addition to considering whether to adopt an exclusion for construction in transportation rights of way, we also seek comment on whether to amend the current right of way exclusion to apply

¹³¹ NPA, § III.E.

¹³² *NPA Order*, 20 FCC Rcd at 1097, para. 62.

¹³³ *Id.*

¹³⁴ In its Petition for Declaratory Ruling, PTA-FLA argues that sites falling within designated utility or highway rights of way should be excluded from Tribal review. See PTA-FLA Petition at 16.

regardless of whether the right of way is located on a historic property. As noted above, the current right of way exclusion applies only if (1) the construction does not involve a substantial increase in size over nearby structures and (2) the deployment would not be located within the boundaries of a historic property.¹³⁵ We seek comment on whether this provision should be amended to exclude from Section 106 review construction of a wireless facility in a utility or communications right of way located on a historic property, provided that the facility would not constitute a substantial increase in size over existing structures. To the extent that utility and communications rights of way on historic properties already are lined with utility poles and other infrastructure, would allowing additional infrastructure have the potential to create effects? Commenters should discuss whether, if the exclusion is extended to historic properties, any additional conditions would be appropriate to address concerns about potential effects, for example any further limitation on ground disturbance.¹³⁶ If so, how should ground disturbance be defined?¹³⁷ We also seek comment about whether Tribal and NHO participation should continue to be required if an exclusion is adopted for facilities constructed in utility or communications rights of way on historic properties.

(iii) Collocations

72. Next, we seek comment on options to further tailor our review of collocations of wireless antennas and associated equipment. The Commission's rules have long excluded most collocations of antennas from Section 106 review, recognizing the benefits to historic properties that accrue from using existing support structures rather than building new structures. The Commission has also recently expanded these exclusions in the First Amendment to the Collocation NPA to account for the smaller infrastructure associated with new technologies. We seek comment now on whether additional measures to further streamline review of collocations are appropriate, whether as a matter of 36 CFR § 800.3(a)(1) or under program alternatives, including those discussed below and any other alternatives.

73. First, we seek comment on whether some or all collocations located between 50 and 250 feet from historic districts should be excluded from Section 106 review. Under current provisions in the Collocation NPA, Section 106 review continues to be required for collocations on buildings and other non-tower structures located within 250 feet of the boundary of a historic district to the extent those collocations do not meet the criteria established for small wireless antennas.¹³⁸ We seek comment on whether this provision should be revised to exclude from Section 106 review collocations located up to 50 feet from the boundary of a historic district. We seek comment on this proposal and on whether any additional criteria should apply to an exclusion under these circumstances.

74. Next, we seek comment on the participation of Tribal Nations and NHOs in the review of collocations on historic properties or in or near historic districts. Although, as stated above, the Collocation NPA excludes most antenna collocations from routine historic preservation review under Section 106, collocations on historic properties or in or near historic districts are generally not excluded,¹³⁹ and in these cases, the NPA provisions for Tribal and NHO participation continue to apply.

¹³⁵ NPA, § III.E.

¹³⁶ The existing definition of "substantial increase in size" prevents excavation outside the current tower site. Collocation NPA, § I.E.

¹³⁷ See, e.g., Collocation NPA, § VI.A.6 (limiting application of small antenna exclusion to where the "depth and width of any proposed collocation does not exceeds the depth and width of any previous ground disturbance (including footings and other anchoring mechanisms)," with an exception for up to four lightning rods).

¹³⁸ Collocation NPA, § V.A.2.

¹³⁹ Collocations on structures located on historic properties or in historic districts are excluded from Section 106 review in certain circumstances. The 2016 Amendments to the Collocation Agreement created exclusions from Section 106 review for small or minimally visible wireless antennas and associated equipment on structures in historic districts or on historic properties and replacements of small wireless antennas and associated equipment. Collocation NPA, §§ VII.A, B, C, VIII.

Consistent with our effort in this NPRM to take a fresh look at ways to improve and facilitate the review process for wireless facility deployments, we seek comment on whether to exclude from the NPA procedures for Tribal and NHO participation collocations that are subject to Section 106 review solely because they are on historic properties or in or near historic districts, other than properties or districts identified in the National Register listing or determination of eligibility as having Tribal significance. For instance, should we exclude from review non-substantial collocations on existing structures involving no ground disturbance or no new ground disturbance, or non-substantial collocations on new structures in urban rights of way or indoors? Should we exclude from the NPA provisions for Tribal and NHO participation collocations of facilities on new structures in municipal rights of way in urban areas that involve no new ground disturbance and no substantial increase in size over other structures in the right of way? Should we exclude collocations of facilities on new structures in industrial zones or facilities on new structures in or within 50 feet of existing utility rights of way? Commenters should discuss whether collocations in these circumstances have the potential to cause effects on properties significant to Tribal history or culture. If so, are any effects likely to be minimal or not adverse? Does the likelihood of adverse effects depend on the circumstances of the collocation, for example whether it will cause new ground disturbance?¹⁴⁰ We also seek comment on alternatives to streamline procedures for Tribal and NHO participation in these cases, for example different guidance on fees or deeming a Tribal Nation or NHO to have no interest if it does not respond to a notification within a specified period of time.

75. Finally, we seek comment on whether we can or should exclude from routine historic preservation review certain collocations that have received local approval. In particular, one possibility would be to exclude a collocation from Section 106 review, regardless of whether it is located on a historic property or in or near a historic district, provided that: (1) the proposed collocation has been reviewed and approved by a Certified Local Government¹⁴¹ that has jurisdiction over the project; or (2) the collocation has received approval, in the form of a Certificate of Appropriateness¹⁴² or other similar formal approval, from a local historic preservation review body that has reviewed the project pursuant to the standards set forth in a local preservation ordinance and has found that the proposed work is appropriate for the historic structure or district. By eliminating the need to go through historic preservation review at both local and Federal levels, creating an exclusion for collocations under these circumstances might create significant efficiencies in the historic preservation review process. We seek comment on this option and on any alternatives, including whether any additional conditions should apply and whether the process for engaging Tribal Nations and NHOs for these collocations should continue to be required.

d. Scope of Undertaking and Action

76. We also invite comment on whether we should revisit the Commission's interpretation of the scope of our responsibility to review the effects of wireless facility construction under the NHPA and NEPA. In the *Pre-Construction Review Order*, the Commission retained a limited approval authority over facility construction to ensure environmental compliance in services that no longer generally require construction permits.¹⁴³ In light of the evolution of technology in the last 27 years and the corresponding changes in the nature and extent of wireless infrastructure deployment, we seek comment on whether this

¹⁴⁰ For example, in its Petition for Declaratory Ruling, PTA-FLA contends that constructions on sites that will have no effect on Tribal burial grounds, including sites which have been previously disturbed, should be exempted from Tribal review. See PTA-FLA Petition at 16.

¹⁴¹ A "Certified Local Government" is a local government whose local historic preservation program is certified under Chapter 3025 of the National Historic Preservation Act. See 54 U.S.C. §§ 300302, 302501 *et seq.*

¹⁴² A "Certificate of Appropriateness" is an authorization from a local government allowing construction or modification of buildings or structures in a historic district.

¹⁴³ *Pre-Construction Review Order*, 5 FCC Rcd at 2943, paras. 9-11; see also *CTIA – The Wireless Association v. FCC*, 446 F.3d at 115 (holding that this interpretation was not arbitrary and capricious).

retention of authority is required and, if not, whether and how it should be adjusted. Commenters should address the costs of NEPA and NHPA compliance and its utility for environmental protection and historic preservation for different classes of facilities, as well as the extent of the Commission's responsibility to consider the effects of construction associated with the provision of licensed services under governing regulations and judicial precedent.¹⁴⁴ For example, should facilities constructed under site-specific licenses be distinguished from those constructed under geographic area licenses? Can we distinguish DAS and small cell facilities from larger structures for purposes of defining what constitutes the Commission's action or undertaking, and on what basis?¹⁴⁵ Should review be required only when an EA triggering condition is met, as PTA-FLA suggests, and if so how would the licensee or applicant determine whether an EA is required in the absence of mandatory review?¹⁴⁶ To the extent there is a policy basis for distinguishing among different types of facilities, would exclusions from or modifications to the NEPA and/or NHPA review processes be a more appropriate tool to reflect these differences? Are the standards for defining the scope of our undertaking or major Federal action different under the NHPA than under NEPA? We also invite comment on whether to revisit the Commission's determination that registration of antenna structures constitutes the Commission's Federal action and undertaking so as to require environmental and historic preservation review of the registered towers' construction.¹⁴⁷

77. In addition, since our environmental rules were adopted, an industry has grown of non-licensees that are in the business of owning and managing communications sites, so that most commercial wireless towers and even smaller communications support structures are now owned from the time of their construction by non-licensees. We seek comment on how this business model affects our environmental and historic preservation compliance regime. For example, how does the requirement to perform environmental and historic preservation review prior to construction apply when the licensee is not the tower owner? If the tower is built pursuant to a contract or other understanding with a collocator, what marketplace or other effects would result from interpreting the environmental obligation to apply to the licensee? What about cases where there is no such agreement or understanding? Does the requirement in the Collocation NPA to perform review for collocations on towers that did not themselves complete Section 106 review create problems in administration or market distortions where the owner of the underlying tower may not have been subject to our rules at the time of construction?¹⁴⁸ We invite comment on these and any related questions.

¹⁴⁴ See, e.g., 40 CFR § 1508.8 (providing that "significant effects" under NEPA include indirect effects that are "caused by the action and are later in time or [more distant but] still reasonably foreseeable"); 36 CFR § 800.5(a)(1) (providing that under the NHPA, effects to be considered include "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative"); 40 CFR § 1502.4(a) (forbidding segmentation of an action into its component parts to obviate NEPA review).

¹⁴⁵ See CTIA Comments, WT Docket No. 16-421, at 47; *but see 2014 Infrastructure Order*, 29 FCC Rcd at 12903-4, para. 83 (finding no basis to draw this distinction with respect to NHPA undertakings).

¹⁴⁶ See PTA-FLA Petition at 13 (requesting ruling "that site construction by non-licensees and/or licensees where neither FCC registration nor a Section 1.1308 environmental assessment by the Commission is required do not constitute a federal undertaking and therefore are not subject to the Section 106 process"); *id.* at 9-13 (argument supporting this interpretation).

¹⁴⁷ *Streamlining the Commission's Antenna Structure Clearance Procedure; Revision of Part 17 of the Commission's Rules Concerning Construction, Marking, and Lighting of Antenna Structures*, Report and Order, 11 FCC Rcd 4272, 4289, para. 41 (1995); see, e.g., *Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n*, 959 F.2d 508 (4th Cir. 1992) (finding that FERC's certification of an incinerator was a ministerial action and not a major Federal action or undertaking where FERC had no discretion to deny certification or to consider environmental values).

¹⁴⁸ Collocation NPA, § IV.A.1.

3. Collocations on Twilight Towers

78. Section 1.1307(a)(4) of the Commission's rules directs licensees and applicants, when determining whether a proposed action may affect historic properties, to follow the procedures in the ACHP's rules as modified by the Collocation NPA and the NPA, two programmatic agreements that took effect in 2001 and 2005 respectively.¹⁴⁹ Under the Collocation NPA, collocations on towers constructed on or before March 16, 2001 are generally excluded from routine historic preservation review regardless of whether the underlying tower has undergone Section 106 review.¹⁵⁰ The Collocation NPA provides that collocations on towers constructed after March 16, 2001, by contrast, are excluded from historic preservation review only if the Section 106 review process for the underlying tower and any associated environmental reviews has been completed.¹⁵¹ The NPA, which became effective on March 7, 2005, establishes detailed procedures for reviewing the effects of communications towers on historic properties.

79. There are a large number of towers that were built between the adoption of the Collocation NPA in 2001 and when the NPA became effective in 2005 that either did not complete Section 106 review or for which documentation of Section 106 review is unavailable. These towers are often referred to as "Twilight Towers." Although during this time the Commission's environmental rules required licensees and applicants to evaluate whether proposed facilities may affect historic properties,¹⁵² the text of the rule did not at that time require parties to perform this evaluation by following the ACHP's rules or any other particular process. Thus, some in the industry have argued that, prior to the NPA, it was unclear whether the Commission's rules required consultation with the relevant SHPO and/or THPO, Tribal engagement, or any other procedures, and that this uncertainty was the reason why many towers built during this period did not go through the clearance process.¹⁵³ Because the successful completion of the Section 106 process is a predicate to the exclusion from review of collocations on towers completed after March 16, 2001, licensees cannot collocate on these Twilight Towers unless either each collocation completes Section 106 review or the underlying tower goes through an individual post-construction review process.

80. The Commission has worked with stakeholders in an effort to develop a programmatic solution that would allow Twilight Towers more readily to be used for collocations.¹⁵⁴ Most recently, in

¹⁴⁹ See 47 CFR § 1.1307(a)(4).

¹⁵⁰ Collocation NPA, § III. Collocations on towers constructed on or before March 16, 2001 are excluded from Section 106 review unless (1) the mounting of the antenna will result in a substantial increase in size of the tower; or (2) the tower has been determined by the Commission to have an adverse effect on one or more historic properties; or (3) the tower is the subject of a pending environmental review or related proceeding before the Commission involving compliance with Section 106 of the National Historic Preservation Act; or (4) the collocation licensee or the owner of the tower has received written or electronic notification that the Commission is in receipt of a complaint from a member of the public, a Tribal Nation, a SHPO or the ACHP, that the collocation has an adverse effect on one or more historic properties.

¹⁵¹ Collocation NPA, § IV.

¹⁵² See 47 CFR 1.1307(a)(4) (2004) (requiring EA if facility may affect property listed or eligible for listing in the National Register of Historic Places).

¹⁵³ See, e.g., Letter from Brian M. Josef, Ass't Vice Pres. Reg. Affairs, CTIA and D. Zachary Champ, Dir. Gov't. Affairs, PCIA-The Wireless Infrastructure Assoc. to Chad Breckinridge, Assoc. Chief, Wireless Telecommunications Bureau (filed Feb. 19, 2016) at 3-4 (CTIA/PCIA Feb. 19th Letter); *but see* "Fact Sheet, Antenna Collocation Programmatic Agreement," Public Notice, 17 FCC Red 508, 511 (2002) ("this evaluation process includes consultation with the relevant [SHPO] and/or [THPO], as well as compliance with other procedures set out in the ACHP rules, 36 C.F.R. Part 800, Subpart B").

¹⁵⁴ See, e.g., CTIA/PCIA Feb. 19th Letter; Email from Jennifer Sigler, Tribal Archaeologist, Eastern Shawnee Tribe of Oklahoma, to January2016TowerMtg@fcc.gov (Feb. 12, 2016); Email from Jan Biella, Pilar Cannizzaro, and Andy Wakefield, New Mexico Historic Preservation Division, to January2016TowerMtg@fcc.gov (Feb. 18, 2016).

August 2016, WTB circulated for discussion a draft term sheet (2016 Twilight Towers Draft Term Sheet) outlining a potential streamlined process for Twilight Towers to complete individual review.¹⁵⁵

81. We seek comment on steps the Commission should take to develop a definitive solution for the Twilight Towers issue. As we undertake this process, our goal remains to develop a solution that will allow Twilight Towers to be used for collocations while respecting the integrity of the Section 106 process. Facilitating collocations on these towers will serve the public interest by making additional infrastructure available for wireless broadband services and the FirstNet public safety broadband network.¹⁵⁶ Moreover, facilitating collocations on existing towers will reduce the need for new towers, lessening the impact of new construction on the environment and on locations with historical and cultural significance.

82. In particular, we seek comment on whether to treat collocations on towers built between March 16, 2001 and March 7, 2005 that did not go through Section 106 historic preservation review in the same manner as collocations on towers built prior to March 16, 2001 that did not go through review. Under this approach, collocations on such towers would generally be excluded from Section 106 historic preservation review, subject to the same exceptions that currently apply for collocations on towers built on or prior to March 16, 2001, *i.e.*, collocations would be excluded from Section 106 review unless (1) the mounting of the antenna will result in a substantial increase in size of the tower; (2) the tower has been determined by the Commission to have an adverse effect on one or more historic properties; (3) the tower is the subject of a pending environmental review or related proceeding before the Commission involving compliance with Section 106 of the National Historic Preservation Act; or (4) the collocation licensee or the owner of the tower has received written or electronic notification that the Commission is in receipt of a complaint from a member of the public, a Tribal Nation, a SHPO or the ACHP that the collocation has an adverse effect on one or more historic properties.¹⁵⁷ We seek comment on whether allowing collocations without individual Section 106 review in these circumstances would rapidly make available a significant amount of additional infrastructure to support wireless broadband deployment without adverse impacts. In particular, we note that the vast majority of towers that have been reviewed under the NPA have had no adverse effects on historic properties, and we are aware of no reason to believe that Twilight Towers are any different in that regard. Moreover, these towers have been standing for 12 years or more and, in the vast majority of cases, no adverse effects have been brought to our attention.

83. Although we seek comment on such an approach, we are mindful of the concerns that have been expressed by Tribal Nations and SHPOs throughout the discussions on this matter that simply allowing collocations to proceed would not permit review in those cases where an underlying tower may have undetermined adverse effects. In particular, Tribal Nations have expressed concern that some of the towers that were constructed between 2001 and 2005 may have effects on properties of religious and cultural significance that have not been noticed because their people are far removed from their traditional homelands. We seek comment on these concerns. As an initial matter, we seek comment on our underlying assumption regarding the likelihood that Twilight Towers had in their construction or continue to have adverse effects that have not been noted. To the extent such effects exist, what is the likelihood

¹⁵⁵ See National Association of Tribal Historic Preservation Officers, <http://nathpo.org/wp/wp-content/uploads/2016/08/Twilight-Towers-Discussion-Draft-Term-Sheet-081916.pdf>. The term sheet proposed for discussion a process that would include identification of Twilight Towers by their owners, limits on the number of towers each owner may submit for review per month, deadlines for submission to be set by the Commission, review fees consistent with customary practices subject to adjustment to reflect the circumstances of Twilight Tower review, a 60-day review deadline, and a dispute resolution process.

¹⁵⁶ See 47 U.S.C. § 1426(c)(3) (providing that “the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing (A) commercial or other communications infrastructure; and (B) Federal, state, tribal, or local infrastructure”).

¹⁵⁷ Collocation NPA, § III.

that they could be mitigated, and what is the likelihood that a new collocation would exacerbate those effects?¹⁵⁸

84. We further seek comment on any alternative approaches. For example, should we consider a tower-by-tower process under which proposed collocations on Twilight Towers would trigger a streamlined, time-limited individual review, along the lines of the process discussed in the 2016 Twilight Towers draft term sheet?¹⁵⁹ If the Commission were to adopt such an approach, what elements should be included? For example, some in the industry have recommended a tower-by-tower approach that is voluntary and allows tower owners to submit a tower for review as market conditions justify, involves same processes and systems that are used for new and modified towers, asks ACHP to direct SHPOs and THPOs to submit prompt comments on such towers, and imposes no monetary penalty on tower owners.¹⁶⁰ We seek comment on whether to adopt this approach. Should towers be categorized, such that, for example, public safety towers receive priority for streamlined review? Alternatively, to what extent are there existing processes that function efficiently to allow collocations on Twilight Towers? Generally, given what we say above about the text of our rule, we do not anticipate taking any enforcement action or imposing any penalties based on good faith deployment during the Twilight Tower period.

85. We also seek comment on the procedural vehicle through which any solution should be implemented. Would permitting collocation on Twilight Towers require either an amendment to the Collocation NPA or another program alternative under 36 CFR § 800.14(b)? Is one form of program alternative preferable to another, and if so, why? If we were to pursue a streamlined or other alternative review procedure, would that require an amendment to the Collocation NPA or other program alternative?¹⁶¹

4. Collocations on Other Non-Compliant Towers

86. Finally, we invite comment on whether we should take any measures, and if so what, to facilitate collocations on non-compliant towers constructed after March 7, 2005. We note that unlike in the case of the Twilight Towers, the rules in effect when these towers were constructed explicitly required compliance with the review procedures set forth in the NPA. We invite commenters to propose procedures, including review processes, time frames, criteria for eligibility, and other measures, to address any or all of these towers.

III. NOTICE OF INQUIRY

87. In Sections 253 and 332(c)(7) of the Act, Congress codified its intent to streamline regulations that might otherwise slow down the deployment of broadband facilities, while balancing this goal against the long-standing and important role that State and local authorities play with respect to land-use decisions. In this section, we examine and seek comment on the scope of these statutory provisions and any new or updated guidance or determinations the Commission should provide pursuant to its authority under those provisions, including through the issuance of a Declaratory Ruling.

¹⁵⁸ The premise of the Collocation NPA is that collocations falling within its terms are unlikely to adversely affect historic properties. *See* Collocation NPA, para. 8 (“Whereas, the parties hereto agree that the effects on historic properties of collocations of antennas on towers, buildings and structures are likely to be minimal and not adverse . . .”).

¹⁵⁹ *See* National Association of Tribal Historic Preservation Officers, <http://nathpo.org/wp/wp-content/uploads/2016/08/Twilight-Towers-Discussion-Draft-Term-Sheet-081916.pdf>.

¹⁶⁰ CTIA/PCIA Feb. 19th Letter at 6-7.

¹⁶¹ *See* 36 CFR § 800.2(a) (requiring Federal agencies to perform Section 106 review pursuant to either Subpart B of the ACHP’s rules or a valid program alternative).

A. Intersection of Sections 253(a) and 332(c)(7)

88. We start our examination with the relevant statutory terms. Sections 253 and 332(c)(7) of the Act contain very similar language addressing State and local regulations. Section 253(a) says that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹⁶² Section 332(c)(7) generally preserves State and local governments’ “authority . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities,”¹⁶³ but provides that their “regulation of [such activities] . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”¹⁶⁴ Section 332(c)(7) imposes additional limitations as well, stating that State or local regulation of facility siting “shall not unreasonably discriminate among providers of functionally equivalent services”;¹⁶⁵ that State and local governments must act on siting requests “within a reasonable period of time”;¹⁶⁶ that any decision to deny a siting request “shall be in writing and supported by substantial evidence contained in a written record”;¹⁶⁷ and that State and local governments may not regulate wireless facility siting based on the environmental effects of radiofrequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.¹⁶⁸

89. Both Section 253(a) and Section 332(c)(7) ban State or local regulations that “prohibit or have the effect of prohibiting” service.¹⁶⁹ Both sections also proscribe State and local restrictions that unreasonably discriminate among service providers.¹⁷⁰ These sections thus appear to impose the same substantive obligations on State and local governments, though the remedies provided under each are different. There are court decisions holding that “the legal standard is the same under either [Section 253 or 332(c)(7)],” and that there is “nothing suggesting that Congress intended a different meaning of the text ‘prohibit or have the effect of prohibiting’ in the two statutory provisions, enacted at the same time, in the same statute.”¹⁷¹ We seek comment on whether there is any reason to conclude that the substantive obligations of these two provisions differ, and if so in what way. Do they apply the same standards in the same or similar situations? Do they impose different standards in different situations? We invite commenters to explain how and why. We also seek comment on the interaction between Sections 253 and 332(c)(7). For instance, if a locality exceeds its authority over access to rights of way by denying (or failing to act on) a wireless facility siting application in a manner that effectively prohibits the provision of wireless telecommunications service, does the locality violate not only Sections 253(a) and (c), but also Section 332(c)(7)? Similarly, does a locality that violates Section 332(c)(7) by failing to act within a reasonable time also violate Section 253(a) if its failure to act effectively prohibits the provision of telecommunications service?

¹⁶² 47 U.S.C. § 332(c)(7)(B)(i)(II).

¹⁶³ *Id.* § 332(c)(7)(A).

¹⁶⁴ *Id.* § 332(c)(7)(B)(i)(II).

¹⁶⁵ *Id.* § 332(c)(7)(B)(i)(I).

¹⁶⁶ *Id.* § 332(c)(7)(B)(ii).

¹⁶⁷ *Id.* § 332(c)(7)(B)(iii).

¹⁶⁸ *Id.* § 332(c)(7)(B)(iv).

¹⁶⁹ *Id.* §§ 253(a), 332(c)(7)(B)(i)(II).

¹⁷⁰ Compare 47 U.S.C. § 332(c)(7)(B)(i)(I) with 47 U.S.C. § 253(b) & (c) (specifying categories of State and local legal requirements that may be preempted unless they are “competitively neutral” and “nondiscriminatory”).

¹⁷¹ *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008) (en banc); see also *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 991-93 (9th Cir. 2009).

B. “Prohibit or Have the Effect of Prohibiting”

90. In interpreting the phrase “prohibit or have the effect of prohibiting,” the Commission has made clear that Section 253(a) “proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality,”¹⁷² and, similarly, that under Section 332(c)(7), State or local government decisions to deny a siting application on the basis that one or more carriers other than the applicant already provides wireless service in the geographic area have “the effect of prohibiting” the provision of wireless service, in violation of Section 332(c)(7)(B)(i)(II).¹⁷³ The Commission has also indicated that the relevant question in interpreting the phrase “prohibit or have the effect of prohibiting” is whether an action “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”¹⁷⁴ We seek comment on whether the Commission should provide further guidance on how to interpret and apply this statutory language, and on what interpretations it should consider.

91. A number of courts have interpreted the phrase “prohibit or have the effect of prohibiting,” as it appears in both Sections 253(a) and 332(c)(7), but they have not been consistent in their views. Under Section 253(a), the First, Second, and Tenth Circuits have held that a State or local legal requirement would be subject to preemption if it *may* have the effect of prohibiting the ability of an entity to provide telecommunications services,¹⁷⁵ while the Eighth and Ninth Circuits have erected a higher burden and insisted that “a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.”¹⁷⁶ By the same token, different courts have imposed inconsistent burdens of proof to establish that localities violated Section 332(c)(7) by improperly denying siting application. The First, Fourth, and Seventh Circuits have imposed a “heavy burden” of proof on applicants to establish a lack of alternative feasible sites, requiring them to show “not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try.”¹⁷⁷ By contrast, the Second, Third, and Ninth Circuits have held that an applicant must show only that its proposed facilities are the “least intrusive means” for filling a coverage gap in light of the aesthetic or other values that the local authority seeks to serve.¹⁷⁸ We invite commenters to address these issues of statutory interpretation so we may have the benefit of a full range of views from the interested parties as we determine what action, if any, we should

¹⁷² See *Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13095, para. 25 (1996).

¹⁷³ See *2009 Declaratory Ruling*, 24 FCC Rcd at 14016-19, paras. 56-65.

¹⁷⁴ *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Calif.*, 12 FCC Rcd 14191, 14206, para. 31 (1997).

¹⁷⁵ *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 & n.9 (10th Cir. 2004).

¹⁷⁶ *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc); *Level 3 Commc’ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532–33 (8th Cir. 2007). But see Letter from Michael Pastor, General Counsel, New York City Dept. of Information Technology and Telecommunications, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-3 (filed Apr. 12, 2017) (offering alternative interpretation).

¹⁷⁷ *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 40 (1st Cir. 2014); accord *New Cingular Wireless PCS, LLC v. Fairfax County*, 674 F.3d 270, 277 (4th Cir. 2012); *T-Mobile Northeast LLC v. Fairfax County*, 672 F.3d 259, 266–68 (4th Cir. 2012) (en banc); *Helcher v. Dearborn County*, 595 F.3d 710, 723 (7th Cir. 2010).

¹⁷⁸ *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999); *APT Pittsburgh Ltd. P’ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999); *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056–57 (9th Cir. 2014); *City of Anacortes*, 572 F.3d at 995–99.

take to resolve them.¹⁷⁹ We also invite parties to address whether there is some new theory altogether that we should consider.

92. We also seek comment on the proper role of aesthetic considerations in the local approval process. The use of aesthetic considerations is not inherently improper; many courts have held that municipalities may, without necessarily violating Section 332(c)(7), deny siting applications on the grounds that the proposed facilities would adversely affect an area's aesthetic qualities, *provided* that such decisions are not founded merely on “generalized concerns” about aesthetics but are supported by “substantial evidence contained in a written record”¹⁸⁰ about the impact of specific facilities on particular geographic areas or communities.¹⁸¹ We seek comment on whether we should provide more specific guidance on how to distinguish legitimate denials based on evidence of specific aesthetic impacts of proposed facilities, on the one hand, from mere “generalized concerns,” on the other.

93. Finally, we note that WTB's *Streamlining PN* sought comment on application processing fees and charges for the use of rights of way.¹⁸² We invite parties to comment on similar issues relating to the application of section 332(c)(7)'s “prohibit or have the effect of prohibiting” language on infrastructure siting on properties beyond rights of way. For instance, we seek comment on the up-front application fees that State or local government agencies impose on parties submitting applications for authority to construct or modify wireless facilities in locations other than rights of way. Can those fees, in some instances, “prohibit or have the effect of prohibiting” service? For instance, are those fees cost based? If commenters believe a particular State or locality's application fees are excessive, we invite them to provide detailed explanations for that view and to explain how such fees might be inconsistent with section 332 of the Act. Relatedly, do wireless siting applicants pay fees comparable to those paid by other parties for similar applications, and if not, are there instances in which such fees violate section

¹⁷⁹ *Brand X*, 545 U.S. at 982-83 (when “Congress has delegated to an agency the authority to interpret a statute,” any “ambiguity [is to] be resolved . . . by the agency,” and a contrary “judicial precedent [does not] foreclose the agency from an interpreting an ambiguous statute.”).

¹⁸⁰ 47 U.S.C. § 332(c)(7)(B)(iii) (“Any decision . . . to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.”). “In a number of cases, courts have overturned denials of permits [for lack of ‘substantial evidence’], finding (for example) that safety concerns and aesthetic objections rested upon hollow generalities and empty records.” *Town of Amherst v. Omnipoint Communic'ns Enterprises, Inc.*, 173 F.3d 9, 16 (1st Cir. 1999) (dictum).

¹⁸¹ See, e.g., *Sprint PCS Assets LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 725-26 (9th Cir. 2009); *City of Anacortes*, 572 F.3d at 994-95; *T-Mobile Central, LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299, 1312 (10th Cir. 2008); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999); *AT&T Wireless PCS, Inc. v. City of Virginia Beach*, 155 F.3d 423, 427, 430-31 (4th Cir. 1998). It is also indicative – although not dispositive – that the legislative history of the Telecommunications Act of 1996 refers to giving “localities the flexibility to treat facilities that create different *visual, aesthetic*, or safety concerns differently to the extent permitted under generally applicable zoning requirements” S. Rep. No. 104-230, at 208 (1996) (Conf. Rep.). Notably, NEPA requires Federal agencies to consider the aesthetic effects of Federal actions, and in some cases may warrant an agency's requiring an applicant to modify a proposed project so as to avoid or mitigate adverse aesthetic impacts, see 42 U.S.C. § 4331(b) (“it is the continuing responsibility of the Federal Government to use all practicable means . . . [to] assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings”); 40 CFR § 1508.8(b); *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973); and the Commission itself has applied aesthetic considerations in some cases involving NEPA review. See, e.g., *SBA Towers III, LLC Petitions to Deny and Requests for Environmental Review, Copper Harbor, Mich.*, 31 FCC Rcd 1755, 1765-67, paras. 38-42 (WTB/CIPD 2016); *AT&T Mobile Services, Inc. Construction of Tower at Fort Ransom, N.D.*, 30 FCC Rcd 11023, 11032, para. 28 (WTB/CIPD 2015).

¹⁸² See *Streamlining PN*, 31 FCC Rcd at 13371-73 (Section II.B.3). The Public Notice also sought comment on local governments' practices that may “prohibit or have the effect of prohibiting” the provision of wireless service, see *id.* at 13369-70 (Section II.B.1), and raised questions about the reasonable period of time for State and local governments to process siting applications. 31 FCC Rcd at 13370-71 (Section II.B.2); cf. *supra*, Section II.A.1 & 2.

332’s prohibition of regulations that “unreasonably discriminate among providers of functionally equivalent services”?

94. We also seek similar information about the recurring charges – as well as the other terms, conditions, or restrictions – that State or local government agencies impose for the siting of wireless facilities on publicly owned or controlled lands, structures such as light poles or water towers, or other resources other than rights of way. Do such fees or practices “prohibit or have the effect of prohibiting” service, or do they “unreasonably discriminate among providers of functionally equivalent services? Are there disparities between the charges or other restrictions imposed on some parties by comparison with those imposed on others? Do any agencies impose charges or other requirements that commenting parties believe to be particularly burdensome, such as franchise fees based on a percentage of revenues? Are other aspects of the process for obtaining approval particularly burdensome? Commenters should explain their concerns in sufficient detail to allow State and local governments to respond and to allow the Commission to determine whether it should provide guidance on these issues.¹⁸³

C. “Regulations” and “Other Legal Requirements”

95. The terms of Section 253(a) specify that a “statute,” “regulation,” or “other legal requirement” may be preempted,¹⁸⁴ while the terms of Section 332(c)(7) refer to “decisions” concerning wireless facility siting and the “regulation” of siting.¹⁸⁵ We seek comment on how those terms should be interpreted. For instance, do the terms “statute,” “regulation,” and “legal requirement” in Section 253(a) have essentially the same meaning as the parallel terms “regulation” and “decisions” in Section 332(c)(7)? The Commission has held in the past that the terminology in Section 253(a) quoted above “recognizes that State and local barriers to entry could come from sources other than statutes and regulations” and “was meant to capture a broad range of state and local actions” that could pose barriers to entry—including agreements with a single party that result in depriving other parties of access to rights of way.¹⁸⁶ We believe there is a reasonable basis for concluding that the same broad interpretation should apply to the language of Section 332, and we seek comment on this analysis.

96. We also seek comment on the extent to which these statutory provisions apply to States and localities acting in a proprietary versus regulatory capacity, and on what constitutes a proprietary capacity. In the *2014 Infrastructure Order*, the Commission opined that the Spectrum Act and the rules and policies implementing it apply to localities’ actions on siting applications when acting in their capacities as land-use *regulators*, but not when acting as managers of land or property that they own and operate primarily in their *proprietary* roles.¹⁸⁷ The Order cited cases indicating that “Sections 253 and 332(c)(7) do not preempt non-regulatory decisions of a State or locality acting in its proprietary capacity.”¹⁸⁸ We seek comment on whether we should reaffirm or modify the *2014 Infrastructure*

¹⁸³ Cf. *infra* Section III.C (discussing State and local government agencies’ roles as “proprietors” versus “regulators” of public resources including, but not limited to, rights of way).

¹⁸⁴ See 47 U.S.C. § 253(a) (“No State or local *statute or regulation, or other State or local legal requirement*, may prohibit or have the effect of prohibiting the ability of any entity to provide any . . . telecommunications service”) (emphases added).

¹⁸⁵ See 47 U.S.C. §§ 332(c)(7)(A) (“Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over *decisions* regarding the placement, construction, and modification of personal wireless service facilities.”) (emphasis added), 332(c)(7)(B)(i)(II) (“The *regulation* of the placement, construction, and modification of personal wireless service facilities . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services”) (emphasis added).

¹⁸⁶ See *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transmission Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21704, para. 11 (1999) (*Minnesota Preemption Order*).

¹⁸⁷ *2014 Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 239-40.

¹⁸⁸ *Id.* at 12965, para. 239 & n.646 (citations omitted).

Order's characterization of the distinction between State and local governments' regulatory roles versus their proprietary roles as "owners" of public resources. How should the line be drawn in the context of properties such as public rights of way (e.g., highways and city streets), municipally-owned lampposts or water towers, or utility conduits? Should a distinction between regulatory and proprietary be drawn on the basis of whether State or local actions advance those government entities' interests as participants in a particular sphere of economic activity (proprietary),¹⁸⁹ by contrast with their interests in overseeing the use of public resources (regulatory)?¹⁹⁰ What about requests for proposals (RFPs) or contracts involving state or local entities? We invite commenters to identify any States or local governments that have imposed restrictions on the installation of new facilities or the upgrading of existing facilities in public rights of way, and describe those restrictions and their impacts. Do such restrictions have characteristics or effects that are comparable to moratoria on processing applications?¹⁹¹

D. Unreasonable Discrimination

97. We seek comment on whether certain types of facially neutral criteria that some localities may be applying when reviewing and evaluating wireless siting applications could run afoul of Section 253, Section 332(c)(7), or another provision of the Act.¹⁹² For instance, we ask commenters to identify any State or local regulations that single out telecom-related deployment for more burdensome treatment than non-telecom deployments that have the same or similar impacts on land use, to explain how, and to address whether this type of asymmetric treatment violates Federal law.

98. We also seek comment on the extent to which localities may be seeking to restrict the deployment of utility or communications facilities above ground and attempt to relocate electric, wireline telephone, and other utility lines in that area to underground conduits. Obviously, it is impossible to operate wireless network facilities underground.¹⁹³ Undergrounding of utility lines seems to place a premium on access to those facilities that remain above ground, such as municipally-owned street lights. Is there a particular way that Section 253 or 332(c)(7) should apply in that circumstance? More generally, we seek comment on parties' experience with undergrounding requirements, including how wireless facilities have been treated in communities that require undergrounding of utilities. We also seek comment on whether and how the Communications Act applies in such instances. For instance, may localities deny applications to construct new above-ground wireless structures in such areas, or deny applications to install collocated equipment on structures that may eventually be dismantled? Could

¹⁸⁹ See *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993) (finding State agency acted in proprietary capacity, and not as a regulator, when establishing requirements for prospective subcontractors in context of procuring services for construction of a wastewater treatment project, because the actions under review were "analogous [to] private conduct" of non-governmental parties overseeing large construction projects).

¹⁹⁰ *Minnesota Preemption Order*, 14 FCC Rcd at 21707-08, para. 18 (finding preemption appropriate because, "[i]n this case, Minnesota is not merely acquiring fiber optic capacity for its own use; it is providing a private party with exclusive physical access to the freeway rights-of-way[,] . . . [which] has the potential to adversely affect competitors that do not have similar access. *This situation is very different from a traditional government procurement of telecommunications facilities or services.*") (emphasis added).

¹⁹¹ Cf. *supra* Section II.A.3.

¹⁹² See, e.g., 47 U.S.C. § 253(a), (c); 47 U.S.C. § 332(c)(7)(B)(i)(I).

¹⁹³ Cf. *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d at 580 ("If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services."); *Cox Communic'ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260, 1269 (S.D. Cal. 2002) (holding that alleged discrimination caused by city ordinance that treated gas utility more favorably than wireless carrier was not *unreasonable*, because "the gas company installs most of its facilities underground, which impacts the City's zoning and visual concerns differently than above-ground facilities").

“undergrounding” plans “prohibit or have the effect of prohibiting” service by causing suitable sites for wireless antennas to become scarce? We seek comment on parties’ experiences with undergrounding generally.

99. Section 332(c)(7)(B)(i)(I) prohibits States and localities from unreasonably discriminating among providers of “functionally equivalent services.”¹⁹⁴ We seek comment on whether parties have encountered such discrimination, and ask that they provide specific examples. We also seek comment on what constitutes “functionally equivalent services” for this purpose. For instance, should entities that are considered to be utilities be viewed as an appropriate comparison? For the limited purpose of applying Section 332(c)(7)(B)(i)(I), can wireless and wireline services be considered “functionally equivalent” in some circumstances? Which types of discrimination are reasonable and which are unreasonable?

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

100. Pursuant to the Regulatory Flexibility Act (RFA),¹⁹⁵ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in this NPRM. The IRFA is set forth in the Appendix. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).¹⁹⁶

B. Initial Paperwork Reduction Act Analysis

101. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.¹⁹⁷ In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.¹⁹⁸

C. Other Procedural Matters

1. Ex Parte Rules – Permit-but-Disclose

102. Except to the limited extent described in the next paragraph, this proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁹⁹ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda

¹⁹⁴ 47 U.S.C. § 332(c)(7)(B)(i)(I).

¹⁹⁵ See 5 U.S.C. § 603.

¹⁹⁶ See 5 U.S.C. § 603(a).

¹⁹⁷ See Paperwork Reduction Act of 1995, Public Law 104-13.

¹⁹⁸ See 44 U.S.C. § 3506(c)(4).

¹⁹⁹ 47 CFR § 1.1200 *et seq.*

or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

103. In light of the Commission's trust relationship with Tribal Nations and Native Hawaiian Organizations (NHOs), and our obligation to engage in government-to-government consultation with them, we find that the public interest requires a limited modification of the *ex parte* rules in this proceeding.²⁰⁰ Tribal Nations and NHOs, like other interested parties, should file comments, reply comments, and *ex parte* presentations in the record in order to put facts and arguments before the Commission in a manner such that they may be relied upon in the decision-making process. But we will exempt *ex parte* presentations involving elected and appointed leaders and duly appointed representatives of federally-recognized Tribal Nations and NHOs from the disclosure requirements in permit-but-disclose proceedings²⁰¹ and the prohibitions during the Sunshine Agenda period.²⁰² Specifically, presentations from elected and appointed leaders or duly appointed representatives of federally-recognized Tribal Nations or NHOs to Commission decision makers shall be exempt from disclosure. To be clear, while the Commission recognizes that consultation is critically important, we emphasize that the Commission will rely in its decision-making only on those presentations that are placed in the public record for this proceeding.

2. Comment Filing Procedures

104. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). **All filings related to this NPRM and NOI shall refer to WT Docket No. 17-79.**

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.

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

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325,

²⁰⁰ *See, e.g., Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement*, Policy Statement, 16 FCC Rcd 4078 (2000) ("The Commission will endeavor to identify innovative mechanisms to facilitate Tribal consultation in agency regulatory processes that uniquely affect telecommunications compliance activities, radio spectrum policies, and other telecommunications service-related issues on Tribal lands.").

²⁰¹ 47 CFR 1.1206.

²⁰² 47 CFR 1.1203.

Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

106. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

107. *Additional Information.* For additional information on this proceeding, contact Aaron Goldschmidt, Aaron.Goldschmidt@fcc.gov, of the Wireless Telecommunications Bureau, Competition & Infrastructure Policy Division, (202) 418-7146, or David Sieradzki, David.Sieradzki@fcc.gov, of the Wireless Telecommunications Bureau, Competition & Infrastructure Policy Division, (202) 418-1368.

V. ORDERING CLAUSES

108. Accordingly, IT IS ORDERED, pursuant to Sections 1, 2, 4(i), 7, 201, 253, 301, 303, 309, and 332 of the Communications Act of 1934, as amended 47 U.S.C. §§ 151, 152, 154(i), 157, 201, 253, 301, 303, 309, and 332, Section 102(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(C), and Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108, that this Notice of Proposed Rulemaking and Notice of Inquiry IS hereby ADOPTED.

109. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX**Initial Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),²⁰³ the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) concerning the possible significant economic impact on small entities of the policies and rules proposed in this Notice of Proposed Rulemaking (“Notice”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).²⁰⁴ In addition, the Notice and IRFA (or summaries thereof) will be published in the *Federal Register*.²⁰⁵

A. Need for, and Objectives of, the Proposed Rules

2. In this Notice, we examine how we may further remove or reduce regulatory impediments to wireless infrastructure investment and deployment in order to promote the rapid deployment of advanced mobile broadband service to all Americans. First, the Notice seeks comment on certain measures or clarifications to expedite State and local processing of wireless facility siting applications pursuant to our authority under 332 of the Communications Act, including a “deemed granted” remedy in cases of unreasonable delay. Next, we undertake a comprehensive fresh look at our rules and procedures implementing the National Environmental Policy Act (“NEPA”) and Section 106 of the National Historic Preservation Act (“Section 106”). As part of this review, we seek comment on potential measures to improve or clarify the Commission’s Section 106 process, including in the area of fees paid to Tribal Nations in connection with their participation in the process, cases involving lack of response by relevant parties including affected Tribal Nations, and batched processing. We also seek comment on possible additional exclusions from Section 106 review, and we reexamine the scope of our responsibility to review the effects of wireless facility construction under the NHPA and NEPA. Finally, the Notice seeks comment on so-called “Twilight Towers,” wireless towers that were constructed during a time when the process for Section 106 review was unclear, that may not have completed Section 106 review as a result, and that are therefore not currently available for collocation without first undergoing review. We seek comment on various options addressing Twilight Towers, including whether to exclude collocations on such towers from Section 106 historic preservation review, subject to certain exceptions, or alternatively subjecting collocations on Twilight Towers to a streamlined, time-limited review. We expect the measures on which we seek comment in this Notice to be only a part of our efforts to expedite wireless infrastructure deployment and we invite commenters to propose other innovative approaches to expediting deployment.

B. Legal Basis

3. The authority for the actions taken in this Notice is contained in Sections 1, 2, 4(i), 7, 201, 253, 301, 303, 309, and 332 of the Communications Act of 1934, as amended 47 U.S.C. §§ 151, 152, 154(i), 157, 201, 253, 301, 303, 309, and 332, Section 102(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(C), and Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108.

²⁰³ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

²⁰⁴ See 5 U.S.C. § 603(a).

²⁰⁵ See *id.*

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.²⁰⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²⁰⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²⁰⁸ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.²⁰⁹ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. The Notice seeks comment on potential rule changes regarding State, local, and Federal regulation of the siting and deployment of communications towers and other wireless facilities. Due to the number and diversity of owners of such infrastructure and other responsible parties, particularly small entities that are Commission licensees as well as non-licensees, we classify and quantify them in the remainder of this section. The Notice seeks comment on our description and estimate of the number of small entities that may be affected by our actions in this proceeding.

6. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive small entity size standards that could be directly affected herein.²¹⁰ First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.²¹¹ These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.²¹² Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”²¹³ Nationwide, as of 2007, there were approximately 1,621,215 small organizations.²¹⁴ Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”²¹⁵ U.S. Census Bureau

²⁰⁶ 5 U.S.C. § 603(b)(3).

²⁰⁷ 5 U.S.C. § 601(6).

²⁰⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²⁰⁹ 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

²¹⁰ See 5 U.S.C. § 601(3)-(6).

²¹¹ See SBA, Office of Advocacy, “Frequently Asked Questions, Question 1 – What is a small business?” https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

²¹² See SBA, Office of Advocacy, “Frequently Asked Questions, Question 2- How many small business are there in the U.S.?” https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

²¹³ 5 U.S.C. § 601(4).

²¹⁴ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2010).

²¹⁵ 5 U.S.C. § 601(5).

data published in 2012 indicate that there were 89,476 local governmental jurisdictions in the United States.²¹⁶ We estimate that, of this total, as many as 88,761 entities may qualify as “small governmental jurisdictions.”²¹⁷ Thus, we estimate that most governmental jurisdictions are small.

7. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.²¹⁸ The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.²¹⁹ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.²²⁰ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.²²¹ Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

8. The Commission’s own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today.²²² The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.²²³ Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.²²⁴ Thus, using available data, we estimate that the majority of wireless firms can be considered small.

9. *Personal Radio Services*. Personal radio services provide short-range, low-power radio for personal communications, radio signaling, and business communications not provided for in other services. Personal radio services include services operating in spectrum licensed under Part 95 of our

²¹⁶ U.S. Census Bureau, Statistical Abstract of the United States: 2012 at 267, Table 429 (2011), <http://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf> (citing data from 2007).

²¹⁷ The 2012 U.S. Census data for small governmental organizations are not presented based on the size of the population in each organization. There were 89,476 local governmental organizations in the Census Bureau data for 2012, which is based on 2007 data. As a basis of estimating how many of these 89,476 local government organizations were small, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000 in 2011. See U.S. Census Bureau, City and Town Totals Vintage: 2011, <http://www.census.gov/popest/data/cities/totals/2011/index.html>. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small.

²¹⁸ NAICS Code 517210. See <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517210>.

²¹⁹ 13 CFR § 121.201, NAICS Code 517210.

²²⁰ U.S. Census Bureau, Subject Series: Information, tbl. 5, “Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210.”

²²¹ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “100 employees or more.”

²²² See <http://wireless.fcc.gov/uls>. For the purposes of this IRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

²²³ See *Trends in Telephone Service* at tbl. 5.3.

²²⁴ See *id.*

rules.²²⁵ These services include Citizen Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service.²²⁶ There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. All such entities in this category are wireless, therefore we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which the SBA's small entity size standard is defined as those entities employing 1,500 or fewer persons.²²⁷ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.²²⁸ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.²²⁹ Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. We note that many of the licensees in this category are individuals and not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities that may be affected by our actions in this proceeding.

10. *Public Safety Radio Licensees.* Public Safety Radio Pool licensees as a general matter, include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.²³⁰ Because of the vast array of public safety licensees, the Commission has not developed a small business size standard specifically applicable to public safety licensees. For this category we apply the SBA's definition for Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications and for which the small entity size standard is defined as those entities employing 1,500 or fewer persons.²³¹ For this industry,

²²⁵ 47 CFR Part 90.

²²⁶ The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by subpart D, subpart A, subpart C, subpart B, subpart H, subpart I, subpart G, and subpart J, respectively, of Part 95 of the Commission's rules. See generally 47 CFR Part 95.

²²⁷ 13 CFR § 121.201, NAICS Code 517210.

²²⁸ U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

²²⁹ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

²³⁰ See subparts A and B of Part 90 of the Commission's Rules, 47 CFR §§ 90.1-90.22. Police licensees serve state, county, and municipal enforcement through telephony (voice), telegraphy (code), and teletype and facsimile (printed material). Fire licensees are comprised of private volunteer or professional fire companies, as well as units under governmental control. Public Safety Radio Pool licensees also include state, county, or municipal entities that use radio for official purposes. State departments of conservation and private forest organizations comprise forestry service licensees that set up communications networks among fire lookout towers and ground crews. State and local governments are highway maintenance licensees that provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. Emergency medical licensees use these channels for emergency medical service communications related to the delivery of emergency medical treatment. Additional licensees include medical services, rescue organizations, veterinarians, persons with disabilities, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities.

²³¹ See 13 CFR § 121.201, NAICS Code 517210.

U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.²³² Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.²³³ Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. With respect to local governments, in particular, since many governmental entities comprise the licensees for these services, we include under public safety services the number of government entities affected. According to Commission records, there are a total of approximately 133,870 licenses within these services.²³⁴ There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.²³⁵ We estimate that fewer than 2,442 public safety radio licensees hold these licenses because certain entities may have multiple licenses.

11. *Private Land Mobile Radio Licensees.* Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically applicable to PLMR users. The SBA's definition for Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications and for which the small entity size standard is defined as those entities employing 1,500 or fewer persons.²³⁶ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.²³⁷ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.²³⁸ Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. According to the Commission's records, there are a total of 3,374 licenses in the frequencies range 173.225 MHz to 173.375 MHz, which is the range affected by this Notice.²³⁹ The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under

²³² U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

²³³ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

²³⁴ This figure was derived from Commission licensing records as of June 27, 2008. Licensing numbers change on a daily basis. We do not expect this number to be significantly smaller today. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of public safety licensees that have less than 1,500 employees.

²³⁵ Based on an FCC Universal Licensing System search of March 29, 2017. Search parameters: Radio Service = PA – Public Safety 4940-4990 MHz Band; Authorization Type = Regular; Status = Active.

²³⁶ *See* 13 CFR § 121.201, NAICS Code 517210.

²³⁷ U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

²³⁸ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

²³⁹ This figure was derived from Commission licensing records as of August 16, 2013. Licensing numbers change on a daily basis. We do not expect this number to be significantly smaller today. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of licensees that have fewer than 1,500 employees.

this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

12. *Multiple Address Systems.* Entities using Multiple Address Systems (MAS) spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses.

13. With respect to the first category, Profit-based Spectrum use, the size standards established by the Commission define “small entity” for MAS licensees as an entity that has average annual gross revenues of less than \$15 million over the three previous calendar years.²⁴⁰ A “Very small business” is defined as an entity that, together with its affiliates, has average annual gross revenues of not more than \$3 million over the preceding three calendar years.²⁴¹ The SBA has approved these definitions.²⁴² The majority of MAS operators are licensed in bands where the Commission has implemented a geographic area licensing approach that requires the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission’s licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission’s licensing database indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission’s licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS licenses in 176 EAs was conducted.²⁴³ Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

14. With respect to the second category, Internal Private Spectrum use consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definition developed by the SBA would be more appropriate than the Commission’s definition. The applicable definition of small entity is the “Wireless Telecommunications Carriers (except satellite)” definition under the SBA rules.²⁴⁴ Under that SBA category, a business is small if it has 1,500 or fewer employees.²⁴⁵ For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.²⁴⁶ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees

²⁴⁰ See Amendment of the Commission’s Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008 para. 123 (2000).

²⁴¹ *Id.*

²⁴² See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 4, 1999).

²⁴³ See “Multiple Address Systems Spectrum Auction Closes,” Public Notice, 16 FCC Rcd 21011 (2001).

²⁴⁴ 13 CFR § 121.201, NAICS Code 517210.

²⁴⁵ *Id.*

²⁴⁶ U.S. Census Bureau, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210,” https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

or more.²⁴⁷ Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our action.²⁴⁸

15. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).²⁴⁹

16. *BRS* - In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.²⁵⁰ The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.²⁵¹ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules.

17. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.²⁵² The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.²⁵³ Auction 86 concluded in 2009 with the sale of 61 licenses.²⁵⁴ Of the ten winning bidders, two bidders that claimed small business status won

²⁴⁷ Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

²⁴⁸ *See id.*

²⁴⁹ *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

²⁵⁰ 47 CFR § 21.961(b)(1).

²⁵¹ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard of 1500 or fewer employees.

²⁵² *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

²⁵³ *Id.* at 8296 para. 73.

²⁵⁴ *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

18. *EBS* - The SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,436 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.²⁵⁵ Thus, we estimate that at least 2,336 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.²⁵⁶ The SBA's small business size standard for this category is all such firms having 1,500 or fewer employees. U.S. Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small. To gauge small business prevalence for these cable services we must, however, use the most current census data for the previous category of Cable and Other Program Distribution and its associated size standard which was all such firms having \$13.5 million or less in annual receipts.²⁵⁷ According to U.S. Census Bureau data for 2007, there were a total of 996 firms in this category that operated for the entire year.²⁵⁸ Of this total, 948 firms had annual receipts of under \$10 million, and 48 firms had receipts of \$10 million or more but less than \$25 million.²⁵⁹ Thus, the majority of these firms can be considered small.

19. *Location and Monitoring Service (LMS)*. LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$15 million.²⁶⁰ A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$3 million.²⁶¹ These definitions have been approved by the SBA.²⁶² An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

²⁵⁵ The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

²⁵⁶ U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012>.

²⁵⁷ 13 CFR § 121.201, NAICS Code 517110.

²⁵⁸ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Receipts by Enterprise Employment Size for the United States: 2007, NAICS Code 517510 (rel. Nov. 19, 2010).

²⁵⁹ *Id.*

²⁶⁰ Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, *Second Report and Order*, 13 FCC Rcd 15182, 15192 para. 20 (1998); *see also* 47 CFR § 90.1103.

²⁶¹ *Id.*

²⁶² *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Feb. 22, 1999).

20. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”²⁶³ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.²⁶⁴ These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.²⁶⁵ The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of \$25,000,000 or less, 25 had annual receipts between \$25,000,000 and \$49,999,999 and 70 had annual receipts of \$50,000,000 or more.²⁶⁶ Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

21. The Commission has estimated the number of licensed commercial television stations to be 1,384.²⁶⁷ Of this total, 1,264 stations (or about 91 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on February 24, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 394.²⁶⁸ Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

22. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations²⁶⁹ must be included. Our estimate, therefore likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive.²⁷⁰

²⁶³ U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017>.

²⁶⁴ U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017>.

²⁶⁵ 13 CFR § 121.201; 2012 NAICS Code 515120.

²⁶⁶ U.S. Census Bureau, Table No. EC1251SSSZ4, “Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 (515120 Television Broadcasting),” https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

²⁶⁷ *Broadcast Station Totals as of December 31, 2016*, Press Release (MB, rel. January 5, 2017) (*January 5, 2017 Broadcast Station Totals Press Release*), <https://www.fcc.gov/document/broadcast-station-totals-december-31-2016>.

²⁶⁸ *January 5, 2017 Broadcast Station Totals Press Release*.

²⁶⁹ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.” 13 CFR § 21.103(a)(1).

²⁷⁰ There are also 2,344 LPTV stations, including Class A stations, and 3689 TV translator stations. Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

23. *Radio Stations.* This Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.”²⁷¹ The SBA has established a small business size standard for this category as firms having \$38.5 million or less in annual receipts.²⁷² Economic Census data for 2012 shows that 2,849 radio station firms operated during that year.²⁷³ Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.²⁷⁴ Therefore, based on the SBA’s size standard the majority of such entities are small entities.

24. According to Commission staff review of the BIA Publications, Inc. Master Access Radio Analyzer Database as of June 2, 2016, about 11,386 (or about 99.9 percent) of 11,395 commercial radio stations had revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition. The Commission has estimated the number of licensed commercial radio stations to be 11,415.²⁷⁵ We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,101.²⁷⁶ Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

25. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.²⁷⁷ The Commission’s estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, to be determined a “small business,” an entity may not be dominant in its field of operation.²⁷⁸ We further note, that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these basis, thus our estimate of small businesses may therefore be over-inclusive.

26. *FM Translator Stations and Low Power FM Stations.* FM translators and Low Power FM Stations are classified in the category of Radio Stations and are assigned the same NAICS Code as licensees of radio stations.²⁷⁹ This U.S. industry, Radio Stations, comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.²⁸⁰ The SBA has established a small business size standard which consists of all radio stations whose annual receipts are \$38.5 million dollars or less.²⁸¹

²⁷¹ <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.

²⁷² 13 CFR § 121.201, NAICS Code 515112 Radio Stations.

²⁷³ U.S. Census Bureau, Table No. EC1251SSSZ4, “Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 (515112 Radio Stations),” https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

²⁷⁴ *Id.*

²⁷⁵ *January 5, 2017 Broadcast Station Totals Press Release.*

²⁷⁶ *January 5, 2017 Broadcast Station Totals Press Release.*

²⁷⁷ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both.” 13 CFR § 121.103(a)(1).

²⁷⁸ 13 CFR § 121.102(b).

²⁷⁹ NAICS Code 515112.

²⁸⁰ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515112&search=2007 NAICS Search>.

²⁸¹ 13 CFR 121.201.

U.S. Census data for 2012 indicate that 2,849 radio station firms operated during that year.²⁸² Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.²⁸³ Based on U.S. Census data, we conclude that the majority of FM Translator Stations and Low Power FM Stations are small.

27. *Multichannel Video Distribution and Data Service (MVDDS)*. MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years.²⁸⁴ These definitions were approved by the SBA.²⁸⁵ On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.²⁸⁶ Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.²⁸⁷

28. *Satellite Telecommunications*. This category comprises firms “primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”²⁸⁸ The category has a small business size standard of \$32.5 million or less in average annual receipts, under SBA rules.²⁸⁹ For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.²⁹⁰ Of this total, 299

²⁸² U.S. Census Bureau, Table No. EC1251SSSZ4, “Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 (515112 Radio Stations),” https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

²⁸³ *Id.*

²⁸⁴ Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission’s Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2–12.7 GHz Band, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, 9711, para. 252 (2002).

²⁸⁵ See Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 13, 2002).

²⁸⁶ See “Multichannel Video Distribution and Data Service Spectrum Auction Closes,” *Public Notice*, 19 FCC Rcd 1834 (2004).

²⁸⁷ See “Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63,” *Public Notice*, 20 FCC Rcd 19807 (2005).

²⁸⁸ U.S. Census Bureau, 2012 NAICS Definitions, “517410 Satellite Telecommunications,” <http://www.census.gov/naics/2012/def/ND517410.HTM>.

²⁸⁹ 13 CFR § 121.201, NAICS Code 517410.

²⁹⁰ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, “Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012, NAICS Code 517410,” https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

firms had annual receipts of less than \$25 million.²⁹¹ Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

29. *All Other Telecommunications.* The “All Other Telecommunications” category is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.²⁹² The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less.²⁹³ For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million.²⁹⁴ Thus, a majority of “All Other Telecommunications” firms potentially affected by our action can be considered small.

30. *Fixed Microwave Services.* Microwave services include common carrier,²⁹⁵ private-operational fixed,²⁹⁶ and broadcast auxiliary radio services.²⁹⁷ They also include the Local Multipoint Distribution Service (LMDS),²⁹⁸ the Digital Electronic Message Service (DEMS),²⁹⁹ the 39 GHz Service (39 GHz),³⁰⁰ the 24 GHz Service,³⁰¹ and the Millimeter Wave Service³⁰² where licensees can choose between common carrier and non-common carrier status.³⁰³ The SBA nor the Commission has defined a small business size standard for microwave services. For purposes of this IRFA, the Commission will use the SBA’s definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an

²⁹¹ *Id.*

²⁹² <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS.2012.517919>.

²⁹³ 13 CFR § 121.201, NAICS Code 517919.

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https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

²⁹⁵ *See* 47 CFR Part 10, Subpart I.

²⁹⁶ Persons eligible under Parts 80 and 90 of the Commission’s rules can use Private-Operational Fixed Microwave services. *See* 47 CFR Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

²⁹⁷ Auxiliary Microwave Service is governed by Part 74 and Part 78 of Title 47 of the Commission’s rules. Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. Auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes TV pickup and CARS pickup, which relay signals from a remote location back to the studio.

²⁹⁸ *See* 47 CFR Part 101, Subpart L.

²⁹⁹ *See* 47 CFR Part 101, Subpart G.

³⁰⁰ *See* 47 CFR Part 101, Subpart N.

³⁰¹ *See id.*

³⁰² *See* 47 CFR Part 101, Subpart Q.

³⁰³ *See* 47 CFR §§ 101.533, 101.1017.

entity with no more than 1,500 persons is considered small.³⁰⁴ Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁰⁵ U. S. Census Bureau data for 2012, show that there were 967 firms in this category that operated for the entire year. Of this total, 955 had employment of 999 or fewer, and 12 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our proposed action.³⁰⁶

31. According to Commission data in the Universal Licensing System (ULS) as of September 22, 2015 there were approximately 61,970 common carrier fixed licensees, 62,909 private and public safety operational-fixed licensees, 20,349 broadcast auxiliary radio licensees, 412 LMDS licenses, 35 DEMS licenses, 870 39 GHz licenses, and five 24 GHz licenses, and 408 Millimeter Wave licenses in the microwave services. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

32. *Non-Licensee Owners of Towers and Other Infrastructure.* Although at one time most communications towers were owned by the licensee using the tower to provide communications service, many towers are now owned by third-party businesses that do not provide communications services themselves but lease space on their towers to other companies that provide communications services. The Commission's rules require that any entity, including a non-licensee, proposing to construct a tower over 200 feet in height or within the glide slope of an airport must register the tower with the Commission's Antenna Structure Registration ("ASR") system and comply with applicable rules regarding review for impact on the environment and historic properties.

33. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a "Constructed" status and 13,987 registration records reflecting a "Granted, Not Constructed" status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.³⁰⁷ Regarding towers that do not require ASR registration, we do not collect information as to the number of such towers in use and therefore cannot estimate the number of tower owners that would be subject to the rules on which we seek comment. Moreover, the SBA has not developed a size standard for small businesses in the category "Tower Owners." Therefore, we are unable to determine the number of non-licensee tower owners that are small entities. We believe, however, that when all entities owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands, and that nearly all of these qualify as small businesses under the SBA's definition for "All Other Telecommunications."³⁰⁸ The SBA has developed a small business size standard for "All Other Telecommunications," which consists of all such firms with gross annual receipts of \$32.5 million or less.³⁰⁹ For this category, U.S. Census data for 2012 show that

³⁰⁴ 13 CFR § 121.201, NAICS Code 517210.

³⁰⁵ 13 CFR § 121.201, NAICS Code 517210.

³⁰⁶ See U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210," http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

³⁰⁷ We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

³⁰⁸ 13 CFR § 121.201, NAICS Code 517919. Under this category, a business is small if it has \$32.5 million or less in annual receipts.

³⁰⁹ 13 CFR § 121.201, NAICS Code 517919.

there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million.³¹⁰ Thus, a majority of “All Other Telecommunications” firms potentially affected by our action can be considered small. In addition, there may be other non-licensee owners of other wireless infrastructure, including Distributed Antenna Systems (DAS) and small cells, that might be affected by the measures on which we seek comment. We do not have any basis for estimating the number of such non-licensee owners that are small entities.

D. Description of Projected Reporting, Recordkeeping, and other Compliance Requirements for Small Entities

34. The Notice seeks comment on potential rule changes that may affect reporting, recordkeeping and other compliance requirements. Specifically the Notice seeks comment on a specific NHPA submission process known as batching. Currently, a streamlined process for certain facilities associated with building out the Positive Train Control (PTC) railroad safety system is in effect whereby eligible facilities may be submitted to State Historic Preservation Officers (SHPOs) and through the Tower Construction Notification System (TCNS) in batches instead of individually. The Notice seeks comment on whether we should require SHPOs and Tribal Historic Preservation Officers (THPOs) to review non-PTC facilities in batched submissions as well. If adopted, this may require modifications to reporting or other compliance requirements for small entities and or jurisdictions to enable such submissions. We anticipate that batch rather than individual submissions will add no additional burden to small entities and may reduce the cost and delay associated with the deployment of wireless infrastructure. In addition, the Notice seeks comment on whether the current Section 106 process can be revised in a manner that would permit applicants to self-certify their compliance with our Section 106 process and therefore proceed once they meet our notification requirements, without requiring Commission involvement. This self-certifying process may also require additional reporting or other compliance requirements for small entities. Similarly, we anticipate that a self-certification process will reduce the cost and delay associated with the deployment of wireless infrastructure for small entities by expediting the current Section 106 process.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

35. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.³¹¹

36. In this proceeding, the Commission seeks to examine regulatory impediments to wireless infrastructure investment and deployment, and how we may remove or reduce such impediments consistent with the law and the public interest. We anticipate that the steps on which the Notice seeks comment will help reduce burdens on small entities that may need to deploy wireless infrastructure by reducing the cost and delay associated with the deployment of such infrastructure. As discussed below, however, certain proposals may impose regulatory compliance costs on small jurisdictions.

37. The Notice seeks comment on potential ways to expedite wireless facility deployment. First, it seeks comment on certain measures or clarifications to expedite State and local processing of wireless facility siting applications pursuant to our authority under Section 332 of the Communications

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https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

³¹¹ See 5 U.S.C. § 603(c).

Act. Specifically, the Notice proposes to adopt one or more of three mechanisms for implementing a “deemed granted” remedy for State and local agencies’ failure to satisfy their obligations under Section 332(c)(7)(B)(ii) to act on applications outside the context of the Spectrum Act, including irrebuttable presumption, lapse of State and local governments’ authority, and a preemption rule. The Notice also seeks comment on how to quantify a “reasonable period of time” within which to act on siting applications. Specifically, the Notice asks commenters to discuss whether the Commission should consider adopting different time frames for review of facility deployments not covered by Section 6409 of the Spectrum Act, by identifying more narrowly defined classes of deployments and distinct reasonable time frames to govern such classes. The Notice also seeks comment on what time periods would be reasonable (outside the Spectrum Act context) for any new categories of applications, and on what factors the Commission should consider in making such a decision. The Notice also seeks comment on whether the Commission should provide further guidance to address situations in which it is not clear when the shot clock should start running, or in which States and localities on one hand, and industry on the other, disagree on when the time for processing an application begins, and on whether there are additional steps that should be considered to ensure that a deemed granted remedy achieves its purpose of expediting review.

38. In addition, the Notice seeks comment on Moratoria. The Commission clarified in the *2014 Infrastructure Order* that the shot clock deadline applicable to each application “runs regardless of any moratorium.”³¹² The Notice asks commenters to submit specific information about whether some localities are continuing to impose moratoria or other restrictions on the filing or processing of wireless siting applications, including identification of the specific entities engaging in such actions and description of the effect of such restrictions on parties’ ability to deploy network facilities and provide service to consumers. The Notice also proposes to take any additional actions necessary, such as issuing an order or declaratory ruling providing more specific clarifications of the moratorium ban or preempting specific State or local moratoria. The proposed measures should reduce existing regulatory costs for small entities that construct or deploy wireless infrastructure. We invite commenters to discuss the economic impact of any of these proposed measures on small entities, including small jurisdictions, and on any alternatives that would reduce the economic impact on such entities.

39. Second, the Notice undertakes a fresh look at our rules and procedures implementing NEPA and the NHPA as they relate to our implementation of Title III of the Act in the context of wireless infrastructure deployment. The Notice seeks comment on potential measures in several areas that could improve the efficiency of our review under the NHPA and NEPA, including in the areas of fees, addressing delays, and batched processing. Specifically, the Notice seeks comment on the costs, benefits, and time requirements associated with the historic preservation review process under Section 106 of the NHPA, including SHPO and Tribal Nation review, as well as on the costs and relative benefits of the Commission’s NEPA rules. The Notice also seeks comment on potential process reforms regarding Tribal Fees, including fee amounts, when fees are requested, the legal framework of potential fee schedules, the delineation of Tribal Nation’s geographic area of interest, and on potential remedies, dispute resolution, and possible negotiated alternatives.

40. The Notice then seeks comment on other possible reforms to our NHPA process that may make it faster, including time limits and self-certification when no response to a Section 106 submission is provided, on whether we should require SHPOs and THPOs to review non-PTC facilities in batched submissions, and if so, how such a process should work and what sort of facilities would be eligible, and finally, whether there are additional procedural changes that we should consider to improve the Section 106 review process in a manner that does not compromise its integrity.

41. Further, the Notice seeks comment on ways to improve and further streamline our environmental compliance regulations while ensuring we meet our NEPA obligations. Toward that end,

³¹² *2014 Infrastructure Order*, 29 FCC Rcd at 12971, para. 265.

the Notice seeks comment on whether to revise the Commission's rules so that an EA is not required for siting in a floodplain when appropriate engineering or mitigation requirements have been met and on whether to expand the categories of undertakings that are excluded from Section 106 review, to include pole replacements, deployments in rights-of-way, and collocations based on their minimal potential to adversely affect historic properties. The Notice also seeks comment on whether we should revisit the Commission's interpretation of the scope of our responsibility to review the effects of wireless facility construction under the NHPA and NEPA. These potential changes to our rules and procedures implementing NEPA and the NHPA would reduce environmental compliance costs on entities that construct or deploy wireless infrastructure. These potential revisions are likely to provide an even greater benefit for small entities that may not have the compliance resources and economies of scale of larger entities. We invite comment on ways in which the Commission can achieve its goals, but at the same time further reduce the burdens on small entities.

42. Third, the Notice seeks comment on steps the Commission should take to develop a definitive solution for the Twilight Towers issue that will allow Twilight Towers to be used for collocations while respecting the integrity of the Section 106 process. Facilitating collocations on these towers will serve the public interest by making additional infrastructure available for wireless broadband services and the FirstNet public safety broadband network³¹³, as well as reduce the need for new towers, lessening the impact of new construction on the environment and on locations with historical and cultural significance, thereby reducing the associated regulatory burden, particularly the burden on small entities.

43. In particular, the Notice seeks comment on whether to treat collocations on towers built between March 16, 2001 and March 7, 2005 that did not go through Section 106 historic preservation review in the same manner as collocations on towers built prior to March 16, 2001 that did not go through review. Under this approach, collocations on such towers would generally be excluded from Section 106 historic preservation review, subject to the same exceptions that currently apply for collocations on towers built on or prior to March 16, 2001. We seek comment on whether allowing collocations without individual Section 106 review in these circumstances would rapidly make available a significant amount of additional infrastructure to support wireless broadband deployment without adverse impacts. The Notice also seeks comment on any alternative approaches and on the procedural vehicle through which any solution should be implemented. Finally, the Notice invites comment on what measures, if any, should be taken to facilitate collocations on non-compliant towers constructed after March 7, 2005, including whether we should pursue an alternative review process, or any other alternative approach, for any or all of these towers. These proposals would reduce the environmental compliance costs associated with collocations, especially for small entities that have limited financial resources. We invite commenters to discuss the economic impact of any of the proposals for the solution to the Twilight Towers issue on small entities, including small jurisdictions, and on any alternatives that would reduce the economic impact on such entities.

44. For the options discussed in this Notice, we seek comment on the effect or burden of the prospective regulation on small entities, including small jurisdictions, the extent to which the regulation would relieve burdens on small entities, and whether there are any alternatives the Commission could implement that could achieve the Commission's goals while at the same time minimizing or further reducing the burdens on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

45. None.

³¹³ See Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act), 47 U.S.C. § 1426 (c)(3) (providing that "the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing (A) commercial or other communications infrastructure; and (B) Federal, state, tribal, or local infrastructure.").

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79

As a football fan, I'm still shaking my head at the Atlanta Falcons' epic collapse in the Super Bowl against the New England Patriots. As a regulator, what concerns me even more are the stories I've heard about the roadblocks to deploying wireless infrastructure that companies encountered leading up to the big game.

Tens of thousands of fans flooded Houston's NRG Stadium in February to send many terabytes of data in the form of texts, pictures, and videos. In order to handle this massive increase in network traffic, wireless carriers knew in advance they'd have to upgrade their infrastructure in order to boost network capacity in and around the stadium.

But meeting this commitment was much harder than it should've been. For instance, one company ended up paying thousands of dollars per utility pole for purposes of meeting historic preservation requirements. Now, it's hard to imagine that there is much to preserve, historically speaking, in the parking lot of NRG Stadium. After all, initial construction started in the early 2000s. Yet this company was forced to pay hundreds of thousands of dollars in total to complete this review—excessive costs that both delayed construction and were ultimately passed on to consumers.

This case isn't unique. I have heard time and time again how current rules and procedures impede the timely, cost-effective deployment of wireless infrastructure.

This will only become a bigger problem as our wireless networks evolve. A key feature of the transition from 4G to 5G is a change in network architecture. The future of wireless will evolve from large, macro-cell towers to include thousands of densely-deployed small cells, operating at lower power.

As networks evolve, our rules should too. Historic preservation and environmental review regulations designed for large macro-cell towers just don't make sense for small cells that can be the size of a pizza box. And cities shouldn't impose unreasonable demands or moratoria on wireless siting requests. This simply penalizes their own constituents who want better mobile service. To address these issues, we are seeking ideas for updating state, local, and Tribal infrastructure review to meet the realities of the modern marketplace.

If we do our job—if we can make the deployment of wireless infrastructure easier, consistent with the public interest—then we can help close the digital divide in our country. This is especially true for low-income and minority communities, which disproportionately rely on wireless service as their primary or sole on-ramp to the Internet. Working with our partners at the federal, state, local, and Tribal levels, I hope we can take another meaningful step towards bringing high-speed Internet access to all Americans and maintaining our nation's global leadership in the wireless space.

I'd like to thank the dedicated staff of the Wireless Telecommunications Bureau, including Paul D'Ari, Steve DelSordo, Angela DeMahy, Chas Eberle, Aaron Goldschmidt, Garnet Hanly, Leon Jackler, Don Johnson, Erica Rosenberg, Hilary Rosenthal, Jennifer Salhus, David Sieradzki, Michael Smith, Jill Springer, Jeff Steinberg, Joel Taubenblatt, Suzanne Tetreault, Peter Trachtenberg, and Mary Claire York. I would also like to thank David Horowitz, Andrea Kelly, Marcus Maher, Lee Martin, Linda Oliver, and Anjali Singh from the Office of General Counsel; Lyle Ishida and Dan Margolis from the Office of Native Affairs and Policy; and Michael Wagner from the Media Bureau. All of your efforts are much appreciated.

**CONCURRING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79

We have all seen the statistics and read the headlines about the predicted explosive growth when it comes to the demand for wireless services. We are also very aware that consumers expect us to take our policy role seriously, when it comes to ensuring that the nation is prepared to meet this demand. Part of that preparation is ensuring that we can readily deploy the necessary infrastructure to support current, and future wireless offerings. 5G and IoT are just around the corner, and we are all eager to see how innovative wireless technologies will improve the way we live, work and play.

I have yet to come across a single community that wants to be left behind or overlooked as we embark on this new frontier. With that in mind, it is noteworthy that we all support efforts to streamline infrastructure deployment. But we must do so in a way that allows all sides to come to the table with a willingness to negotiate and work together.

As I have said before, approving applications to site antennas and other infrastructure, are difficult policy challenges for local governments. Many are overwhelmed by the increased volume of siting and permitting applications in a 4G and 5G world. Indeed, the localities considering siting applications vary immensely from geographic and demographic differences, to financial considerations, to differences in local law. They are on the front lines addressing the challenges of cost, complexity, and time faced by siting applicants, while answering and addressing the never ending questions, concerns and needs, of their communities.

We cannot afford to deal with any of these elements in a vacuum. Local officials and industry must work together to identify challenges, engage in coordinated efforts to update outdated regulations, and brainstorm deployment plans that are minimally disruptive to communities, and they must do so in an efficient and timely way. A collaborative local process and open dialogue between the public and private sector will minimize conflict, introduce predictability, and create incentives for information sharing and transparency.

I have met with industry representatives, as well as those from local governments, and I understand each of their grievances. Some localities charge fees that applicants view as excessive for permit applications, access to rights-of-way, and public structures, while others find themselves economically underwater after the negotiations are complete. And while it is important that municipalities are properly compensated for use of their rights-of-way and public structures, a balanced and equitable system would ensure that those fees paid by the companies are both fair and reasonable.

Siting applicants have themselves been criticized for submitting incomplete applications, which some localities point to as a source of delay in processing permits. That must be appropriately addressed. Some applications lack field engineering expertise, propose locations that are clearly not viable, or are submitted by entities that lack clear legal authority to do so. That cannot be ignored. Review of incomplete or inadequate applications, adds to the costs, burdens, and time imposed on local governments, and impacts the ability of localities to timely review properly completed applications. This cannot be denied. Applicants could help speed the review process by ensuring that their submissions are complete and reflect all necessary underlying work and municipalities must recognize that infrastructure builds enable, empower and improve their communities.

I think it is important to acknowledge that there are actions that can be taken on both sides of the aisle, and I thank my colleagues for agreeing to my requests to seek comment on actions applicants can take to help streamline the process, as well as to seek comment on the “deemed granted” approach, rather than proposing it outright.

The *NPRM* also proposes to take a “fresh” look at our rules implementing the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA), and while I am not opposed to reviewing our rules, we must be careful not to subvert statutory intent, as we update our rules to reflect the evolving wireless landscape.

I encourage all parties to fully participate in this proceeding, and propose creative solutions that will allow us all to work together towards our common goal. In the end, it is the American consumer who will benefit from our efforts. They are ever most in mind when I make decisions, as they should be in yours.

Many thanks to the hard-working staff of the Wireless Telecommunications Bureau for your work on this item.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket 17-79

I am pleased to support today's notice of proposed rulemaking and notice of inquiry seeking comment on potential ways to overcome some of the barriers being put in front of wireless infrastructure siting. Since I joined the Commission, I have engaged on this topic with many interested parties and discussed the importance of facilitating network deployments in many fora. The Commission can continue to release spectrum into the marketplace, but wireless services only become a reality if the infrastructure is in place to deliver them to the American consumer. While today's notice is narrower in scope than I would have liked, I recognize that stakeholders commented on several issues in response to last December's Wireless Telecommunications Bureau public notice.¹ Hopefully, the Commission will also consider those ideas expeditiously.

I have heard some argue that there should be more outreach to stakeholders before taking today's step, but I must respectfully disagree. While conversations can be productive, the Commission, in an open and transparent fashion, should obtain all the facts and ask the difficult questions to holistically consider any barriers placed before wireless infrastructure siting. The Commission cannot continuously hear accounts of deployment hurdles and sit idly by. If this generates the need for preemption, I have no hesitation to use authority provided by Congress to get new wireless services deployed.

Take, for instance, the tortured history of twilight towers, the resolution of which I have been urging since I came to the Commission and which has been outstanding since 2005. Twelve years later, there has been a lot of talk, but no action. It makes no sense to have towers upon which no collocations can occur. Facilities are needed as industry participants build out newly available bands and densify their systems. This issue must be resolved once and for all, and immediately.

I have also met with many people about the delays and expense of seeking the necessary local permitting and tribal approvals. This has been especially problematic for small cell systems, which should not require the same review and fees as a macro tower. Many localities and tribes are, undoubtedly, acting in good faith, and I thank them for their cooperation in approving the deployments necessary to provide Americans with the wireless services they demand, but bad actors are ruining it for everyone. Infrastructure siting is not a means to increase revenues; and delaying application reviews, imposing de facto moratoria, preventing densification and upgrades of networks, among other tactics, is not acceptable.

As we go forward, I am interested in hearing the suggestions of all interested parties and, as always, I will consider all views before making a final decision. I will review with particular interest submissions regarding our statutory authority to impose a deemed granted remedy under section 332. While I like the idea, the wording of the statute may complicate our ability to bypass the judicial system. Further, I have concerns about one petitioner's suggestion that the Commission set a fee schedule or resolve disputes with tribes. I generally do not believe this is the Commission's role.

I appreciate that the Chairman incorporated my requested edits, such as providing additional information about alternative twilight tower solutions, adding a statement that twilight towers should not

¹ *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, 31 FCC Rcd 13360 (WTB 2016).

be subject to any type of enforcement action or penalties, discussing potential improvements that we can make to the Commission's Tower Construction Notification System and our internal processes, seeking comment on whether the current Commission forms are sufficient to provide all the required upfront information for tribal review, and exploring whether specific types of collocations, such as those on existing structures with no ground disturbance or indoors, should be exempt from historic preservation and environmental reviews, amongst others.

Finally, I thank the staff for their efforts on this item and for all the work to come on what is one of the most important proceedings before the Commission.

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

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

NOTICE OF PROPOSED RULEMAKING, NOTICE OF INQUIRY, AND REQUEST FOR COMMENT

Adopted: April 20, 2017

Released: April 21, 2017

Comment Date: [30 days after date of publication in the Federal Register]

Reply Comment Date: [60 days after date of publication in the Federal Register]

By the Commission: Chairman Pai and Commissioner O’Rielly issuing separate statements; Commissioner Clyburn concurring and issuing a separate statement.

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APPENDIX A - Draft Proposed Rules for Public Comment

APPENDIX B - Initial Regulatory Flexibility Analysis

I. INTRODUCTION

1. High-speed broadband is an increasingly important gateway to jobs, health care, education, information, and economic development. Access to high-speed broadband can create economic opportunity, enabling entrepreneurs to create businesses, immediately reach customers throughout the world, and revolutionize entire industries. Today, we propose and seek comment on a number of actions designed to accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment.

2. This *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment* seeks to better enable broadband providers to build, maintain, and upgrade their networks, which will lead to more affordable and available Internet access and other broadband services for consumers and businesses alike. Today's actions propose to remove regulatory barriers to infrastructure investment at the federal, state, and local level; suggest changes to speed the transition from copper networks and legacy services to next-generation networks and services; and propose to reform Commission regulations that increase costs and slow broadband deployment.

II. NOTICE OF PROPOSED RULEMAKING

A. Pole Attachment Reforms

3. Pole attachments are a key input for many broadband deployment projects. Reforms which reduce pole attachment costs and speed access to utility poles would remove significant barriers to broadband infrastructure deployment and in turn increase broadband availability and competition in the provision of high-speed services.

4. The Communications Act of 1934, as amended (Act), grants the Commission authority to regulate attachments to utility-owned and -controlled poles, ducts, conduits, and rights-of-way (collectively, poles).¹ Among other things, the Act authorizes the Commission to prescribe rules² ensuring “just and reasonable” “rates, terms, and conditions” for pole attachments³ and “nondiscriminatory access” to poles,⁴ rules defining pole attachment rates for attachers that are cable television systems and telecommunications carriers,⁵ rules regarding the apportionment of make-ready⁶ costs between utilities and attachers,⁷ and rules requiring all local exchange carriers (LECs) to “afford

¹ 47 U.S.C. § 224(b)(1).

² 47 U.S.C. § 224(b)(2).

³ Section 224(a)(4) of the Act defines a pole attachment as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4). Accordingly, unless specified otherwise, we use the term “pole attachment” in this Notice to refer to attachments not only to poles, but to ducts, conduits, and rights-of-way as well.

⁴ 47 U.S.C. § 224(f).

⁵ 47 U.S.C. § 224(d), (e).

⁶ “Make-ready” generally refers to the modification of poles or lines or the installation of certain equipment (e.g., guys and anchors) to accommodate additional facilities. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18056 n.50 (1999).

⁷ 47 U.S.C. § 224(h), (i).

access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications service”⁸ The Act also allows states to reverse-preempt the Commission’s regulations so long as they meet certain federal standards.⁹

5. We seek to exercise this authority to accelerate the deployment of next-generation infrastructure so that consumers in all regions of the Nation can enjoy the benefits of high-speed Internet access as well as additional competition.

1. Speeding Access to Poles

6. We seek comment on proposals to streamline and accelerate the Commission-established timeline for processing pole attachment requests, which currently envisions up to a five-month process (assuming all contemplated deadlines are met).¹⁰ Several proposals to speed pole access allow telecommunications and cable providers seeking to add equipment to a utility pole (a “new attacher”) to adjust, on an expedited basis, the preexisting equipment of the utility and other providers already on that pole (“existing attachers”). We emphasize at the outset that we are seeking to develop an approach that balances the legitimate needs and interests of new attachers, existing attachers, utilities, and the public. In particular, we recognize that speeding access to poles could raise meaningful concerns about safety and protection of existing infrastructure. We intend to work toward an approach that facilitates new attachments without creating undue risk of harm. We intend for the proposals below to be a starting point that will stimulate refinements as we work toward potential adoption of a final pole attachment process.

a. Speeding the Current Commission Pole Attachment Timeline

7. We seek comment on potential reforms to the various steps of the Commission’s current pole attachment timeline to facilitate timely access to poles. Access to poles, including the preparation of poles for new attachments, must be timely in order to constitute just and reasonable access under Section 224 of the Act.¹¹ The Commission’s current four-stage timeline for wireline and wireless requests to access the “communications space” on utility poles, adopted in 2011, provides for periods that do not exceed: application review and engineering survey (45 days), cost estimate (14 days), attacher acceptance (14 days), and make-ready (60-75 days).¹² It also allows timeline modifications for wireless attachments above the communications space and for large requests.¹³

8. *Application Review.* We seek comment on whether we should require a utility to review and make a decision on a completed pole attachment application within a timeframe shorter than the current 45 days.¹⁴ Is 15 days a reasonable timeframe for utilities to act on a completed pole attachment application? Is 30 days? We seek comment on, and examples of, current timelines for the consideration of pole attachment applications, especially in states that regulate their own rates, terms, and conditions for pole access. If we adopt a shorter timeline, we also seek comment on situations in which it might be

⁸ 47 U.S.C. § 251(b)(4).

⁹ To date, twenty states and the District of Columbia have reverse-preempted Commission jurisdiction over the rates, terms, and conditions of pole attachments in their states. *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541, 5542 (WCB 2010).

¹⁰ See 47 CFR § 1.1420.

¹¹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11873, para. 17 (2010).

¹² *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5252, paras. 22-23 (2011) (*2011 Pole Attachment Order*).

¹³ 47 CFR § 1.1420.

¹⁴ See 47 CFR §§ 1.1403(b), 1.1420(c).

reasonable for the utility's review of a pole attachment application to extend beyond the new shortened timeline.

9. In addition, we seek comment on retaining the existing Commission rule allowing utilities 15 extra days to consider pole attachment applications in the case of large orders (i.e., up to the lesser of 3,000 poles or five percent of the utility's poles in a state).¹⁵ We also seek comment on capping, at a total of 45 days, utility review of those pole attachment applications that are larger than the lesser of 3,000 poles or five percent of a utility's poles in a state. We seek comment on possible alternatives by which we may take into account large pole attachment orders. We seek comment regarding the expected volume of pole attachment requests associated with the 5G rollouts of wireless carriers and whether the extended timelines for larger pole attachment orders might help utilities process the large volume of requests we anticipate will be associated with the 5G buildouts.

10. *Survey, Cost Estimate, and Acceptance.* We seek comment on whether the review period for pole attachment applications should still include time for the utility to survey the poles for which access has been requested.¹⁶ With regard to the estimate and acceptance steps of the current pole access timeline, should we require a timeframe for these steps that is shorter than the current 28 days?¹⁷ Would it be reasonable to combine these steps into a condensed 14-day (or 10-day) period? Could we wrap these two steps into the make-ready timeframe?¹⁸ Would it be reasonable to eliminate these two steps entirely? If so, without the estimate and acceptance steps, then what alternatives should there be for requiring utilities and new attachers to come to an agreement on make-ready costs?

11. *Make-Ready.* We also seek comment on approaches to shorten the make-ready work timeframe. The Commission currently requires that utilities give existing attachers a period not to exceed 60 days after the make-ready notice is sent to complete work on their equipment in the communications space of a pole.¹⁹ In adopting a 60-day maximum period for existing attachers to complete make-ready work, the *2011 Pole Attachment Order* recommended as a "best practice" a make-ready period of 30 days or less for small pole attachment requests and 45 days for medium-size requests.²⁰ Should the Commission adopt as requirements the "best practices" timeframes set forth in the *2011 Pole Attachment Order*? What other timeframes would be reasonable, recognizing the safety concerns and property interests of existing attachers and utilities when conducting make-ready work on a pole? We seek comment on any state experience with this phase of the make-ready process—how long is it taking existing attachers to perform make-ready work in states that are not subject to Commission pole attachment jurisdiction? Do existing attachers require the full make-ready periods to move their attachments such that the total timeline for a new attacher exceeds the Commission's existing pole attachment timeline?²¹ Are there situations in which it is reasonable for existing attachers to go beyond the current Commission timeframes to complete make-ready work? Further, are there ways that the Commission can eliminate or significantly reduce the need for make-ready work? For example, what can the Commission do to encourage utilities to proactively make room for future attachers by consolidating

¹⁵ See 47 CFR § 1.1403(g).

¹⁶ See 47 CFR § 1.1403(c).

¹⁷ See 47 CFR § 1.1420(d).

¹⁸ See 47 CFR § 1.1420(e).

¹⁹ 47 CFR § 1.1420(e)(1)(ii).

²⁰ *2011 Pole Attachment Order*, 26 FCC Rcd at 5258, para. 32.

²¹ See Letter from Austin C. Schlick, Director, Communications Law, Google Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 3-4 (filed July 19, 2016) (submitting that "[r]epetitive climbs by multiple teams" unreasonably slow down the pole attachment process).

existing attachments, reserving space on new poles for new attachers, and allowing the use of extension arms to increase pole capacity?²²

12. In addition, the Commission has adopted longer maximum periods for existing attachers and utilities to complete make-ready work in the case of large pole attachment orders (an additional 45 days) and in the case of wireless attachments above the communications space (a total of up to 90 days for such attachments or up to 135 days in the case of large wireless attachment orders).²³ We seek comment on whether it is reasonable to retain these extended time periods for large pole attachment orders and for wireless attachments above the communications space. We seek comment on reasonable alternatives to these timelines, bearing in mind the safety concerns inherent in make-ready work above the communications space on a pole and the manpower concerns of existing attachers and utilities when having to perform make-ready on large numbers of poles in a condensed time period.

b. Alternative Pole Attachment Processes

13. We seek comment generally on possible alternatives to the Commission's current pole attachment process that might speed access to poles. We also seek comment on potential remedies, penalties, and other ways to incent utilities, existing attachers, and new attachers to work together to speed the pole attachment timeline. If the Commission were to adopt any of the revisions proposed below or other revisions to our process, would Section 224 of the Act support such an approach? What other statutory authority could the Commission rely on in adopting such changes? In considering the proposals below for alternatives to the pole attachment timeline, we seek comment on the need to balance the benefits of these alternatives against the safety and property concerns that are paramount to the pole attachment process. For example, we seek comment on the extent to which any of the proposals may violate the Fifth Amendment protections of utilities and existing attachers against the taking of their property without just compensation.

14. *Use of Utility-Approved Contractors to Perform Make-Ready Work.* We seek comment on whether the Commission should adopt rules that would allow new attachers to use utility-approved contractors to perform "routine" make-ready work and also to perform "complex" make-ready work (i.e., make-ready work that reasonably would be expected to cause a customer outage) in situations where an existing attacher fails to do so. Under the Commission's current pole attachment timeline, utilities may allow existing attachers up to 60 days to complete make-ready work on their equipment in the communications space and utilities have the right to ask for an additional 15 days to complete the work when the existing attacher fails to do so.²⁴ Only after that period of up to 75 days has run, and neither the existing attachers nor the utilities have met their deadlines, can new attachers begin to perform make-ready work using utility-approved contractors. The timelines are even longer in cases of larger pole attachment requests and for wireless make-ready work above the communications space on a pole.²⁵ We seek comment on whether it would be reasonable to expand the use of utility-approved contractors to perform make-ready work, especially earlier in the pole attachment process. Would it be reasonable to eliminate the utility's right to complete make-ready work in favor of a new attacher performing the make-ready work after an existing attacher fails to meet its make-ready deadline?

15. We seek comment on balancing the benefits of allowing new attachers to use utility-approved contractors to perform make-ready work against any drawbacks of allowing contractors that may not be approved by existing attachers to move existing equipment on a pole. We urge commenters, whenever possible, to provide quantifiable data or evidence supporting their position. We note that

²² See, e.g., Gigabit Communities, *Technical Strategies for Facilitating Public or Private Broadband Construction in Your Community*, at 47-49, <http://www.ctcnet.us/wp-content/uploads/2014/01/GigabitCommunities.pdf>.

²³ 47 CFR § 1.1420(e)(2).

²⁴ 47 CFR § 1.1420(e)(1).

²⁵ See 47 CFR §§ 1.1420(e)(2)(ii), 1.1420(g).

AT&T, in its federal court challenge of Louisville, Kentucky’s pole attachment ordinance, argued that utility-approved contractors “have on occasion moved AT&T’s network facilities, with less-than-satisfactory results,” while Comcast argued in its federal court challenge to Nashville, Tennessee’s pole attachment ordinance that third-party contractors “are significantly more likely to damage Comcast’s equipment or interfere with its services.”²⁶ We seek comment on other safety and property concerns that the Commission should account for in considering whether to allow an expanded role in the make-ready process for utility-approved contractors. We also seek comment on liability safe harbors that would protect the property and safety interests of existing attachers, utilities, and their customers when new attachers use utility-approved contractors to perform make-ready work on poles and existing equipment on the poles. For example, to ensure protections for existing attachers and utilities, would it be reasonable to impose on new attachers requirements such as surety bonds, indemnifications for outages and damages, and self-help remedies for utilities and existing attachers to fix problems caused by new attacher contractors? Are there other safeguards that we can adopt to protect existing attachers, utilities, and their customers in the event that the new attacher’s contractors err in the performance of make-ready work?

16. For make-ready work that would be considered “routine” in the communications space of a pole, is it reasonable to allow a new attacher to use a utility-approved contractor to perform such work after notice has been sent to existing attachers? Would it be reasonable to allow new attachers to use utility-approved contractors to perform complex make-ready work as well? Also, because of the special skills required to work on wireless attachments above the communications space on a pole,²⁷ we seek comment on whether utilities should be required to keep a separate list of contractors authorized to perform this specialized make-ready work.²⁸ Should utility-approved contractors that work for new attachers be allowed to perform make-ready work on wireless attachments above the communications space on a pole?

17. We also seek comment on the following proposals that address the safety and property concerns of existing attachers and utilities:

- requiring all impacted attachers (new, existing, and utilities) to agree on a contractor or contractors that the new attacher could use to perform make-ready work; and/or
- requiring that existing attachers (or their contractors) be given the reasonable opportunity to observe the make-ready work being done on their existing equipment by the new attachers’ contractors.

We seek comment on the benefits of these and other alternative proposals involving the use of utility-approved contractors to perform make-ready work.

18. *New Attachers Performing Make-Ready Work.* We seek comment on whether we should adopt rules to allow new attachers (using utility-approved contractors) to perform routine make-ready work in lieu of the existing attacher performing such work.²⁹ Recognizing that existing attachers may

²⁶ See Plaintiff’s Reply in Support of its Motion for Summary Judgment, and Opposition to Defendants’ Cross-Motion for Summary Judgment or for Alternative Relief at 19, *BellSouth Telecommunications, LLC v. Louisville/Jefferson Cty. Metro Gov’t*, No. 3:16cv00124 (W.D. Ky. Oct. 31, 2016); Complaint at 2, para. 3, *Comcast of Nashville I, LLC, v. Metro. Gov’t of Nashville & Davidson Cty., Tenn.*, No. 3:16cv2794 (M.D. Tenn. Oct. 25, 2016).

²⁷ *2011 Pole Attachment Order*, 26 FCC Rcd at 5276, para. 78.

²⁸ Currently, utilities are required to make available and keep up-to-date a reasonably sufficient list of contractors authorized to perform make-ready work in the communications space on a utility pole. 47 CFR § 1.1422(a).

²⁹ See, e.g., Nashville Ordinance No. BL2016-343, § 13.18.020 (A); Louisville Ordinance No. O-427-15, § 116.72(D)(2).

oppose such proposals,³⁰ we seek comment on alternatives that would address their safety and property concerns, while still shortening the make-ready timeline. Allowing the new attacher to perform make-ready work would save time over the current Commission timeline by permitting the new attacher to initiate routine make-ready work after giving brief (or no) notice to existing attachers.³¹ We recognize that such a process would exclude existing attachers from the opportunity to perform routine make-ready work and we seek comment on whether such an exclusion is reasonable. We note that in crafting the pole attachment timeline adopted in 2011, the Commission sought to strike a balance between the goals of promoting broadband infrastructure deployment by new attachers and safeguarding the reliability of existing networks.³² We seek comment on the risks and drawbacks of any proposal that seeks to change that balance by letting new attachers conduct routine make-ready work without allowing existing attachers the opportunity to do so.

19. We also recognize that a number of carriers have raised concerns about allowing new attachers to conduct routine make-ready work on equipment belonging to existing attachers. As AT&T pointed out in its challenge to Louisville's pole attachment ordinance, the movement and rearrangement of communications facilities has public safety implications; we thus seek comment on AT&T's claim that the "service provider whose pre-existing facilities are at issue plainly is in the best position to determine whether required make-ready work could be service-affecting or threaten the reliability of its network."³³ Charter, in a separate challenge to Louisville's ordinance, argues that allowing competitors to perform make-ready work on its equipment could intentionally or unintentionally "damage or disrupt [Charter]'s ability to serve its customers, creating an inaccurate perception in the market about [Charter]'s service quality and harming its goodwill."³⁴ We seek comment on Charter's claim and whether make-ready procedures that exclude existing attachers could lead to consumer misunderstandings in the event of service disruptions that occur during make-ready work by other attachers. Should new attachers that perform make-ready work be required to indemnify, defend, and hold harmless existing attachers for damages or outages that occur as a result of make-ready work on their equipment?

20. *Post Make-Ready Timeline.* If existing attachers are not part of the make-ready process, then we seek comment on an appropriate timeline for inspections and/or surveys by the existing attachers after the completion of make-ready work. For example, Nashville, Tennessee's pole attachment ordinance allows for a 30-day timeline for the inspection and resolution of problems detected by existing attachers to the make-ready work done on their equipment.³⁵ Is 30 days enough time to detect and rectify problems caused by improper make-ready work? Are there reasonable alternative time periods for existing attachers to review make-ready work and fix any detected problems? For example, the Louisville, Kentucky pole attachment ordinance allows for a 14-day inspection period.³⁶ Further, is it

³⁰ See *infra* para. 19 (objections of AT&T and Charter to the ability of new attachers to perform make-ready work on existing equipment on a pole).

³¹ See, e.g., Nashville Ordinance No. BL2016-343, § 13.18.020 (A); Louisville Ordinance No. O-427-15, § 116.72(D)(2).

³² *2011 Pole Attachment Order*, 26 FCC Rcd at 5270, para. 61.

³³ Plaintiff's Reply in Support of its Motion for Summary Judgment, and Opposition to Defendants' Cross-Motion for Summary Judgment or for Alternative Relief at 19, *BellSouth Telecommunications, LLC v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:16cv00124 (W.D. Ky. Oct. 31, 2016).

³⁴ Complaint at 3, *Insight Kentucky Partners II, LP. v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:16cv00124 (W.D. Ky. Oct. 31, 2016) (according to Charter, the Louisville ordinance improperly shifts responsibility for negligent make-ready work from the new attacher (the entity performing the work) to Charter).

³⁵ Nashville Ordinance No. BL2016-343, § 13.18.020 (D).

³⁶ Louisville Ordinance No. O-427-15, § 116.72(D)(2).

reasonable to allow the existing attacher to elect to fix the defective make-ready work on its own (at the new attacher's expense) or to require the new attacher to fix the problems caused by its work?

21. *One-Touch, Make-Ready.* We seek comment on the potential benefits and drawbacks of a pole attachment regime patterned on a “one-touch, make-ready” (OTMR) approach, which includes several of the concepts discussed above as part of a larger pole attachment framework. Both Nashville, Tennessee and Louisville, Kentucky have adopted pole attachment regimes that involve elements of an OTMR policy.³⁷ The Commission has noted that OTMR policies “seek to alleviate ‘a significant source of costs and delay in building broadband networks’ by ‘lower[ing] the cost of the make-ready process and speed[ing] it up.’”³⁸ Would a new pole attachment timeline patterned on an OTMR approach help spur positive decisions on broadband infrastructure deployment? According to the Fiber to the Home Council, an OTMR approach “minimizes disruption in the public rights-of-way and protects public safety and aesthetics” while also speeding broadband deployment.³⁹ We seek other assessments and analysis of the benefits and drawbacks of an OTMR pole attachment process. Would some blend of an OTMR approach coupled with the current Commission pole attachment timeline and protections help spur timely access to poles?

22. Under the Nashville OTMR ordinance, the pole attachment process works as follows: (1) a new attacher submits an attachment application to the utility and after approval of the application, the new attacher notifies the utility of the need for make-ready work; (2) the new attacher then contracts with a utility-approved contractor to perform all of the necessary make-ready work; (3) the new attacher gives 15 days' prior written notice to existing attachers before initiating make-ready work; (4) within 30 days after the completion of make-ready, the new attacher sends written notice of the make-ready work to existing attachers; (5) upon receipt of such notice, the existing attachers may conduct a field inspection of the make-ready work within 60 days; (6) if an existing attacher finds a problem with the make-ready work, then it may notify the new attacher in writing (within the 60-day inspection window) and elect to either fix the problem itself at the new attacher's expense or instruct the new attacher to fix the issue; and (7) if a new attachment involves “complex” make-ready work, then the new attacher must notify each existing attacher of the make-ready work at least 30 days before commencement of the work in order to allow the existing attachers the opportunity to rearrange their equipment to accommodate the new attacher — if such work is not performed by the existing attachers within 30 days, then the new attacher can perform the required make-ready work using utility-approved contractors.⁴⁰ We seek detailed comment on the benefits and drawbacks of this approach. Are there steps in the Nashville pole attachment process where utilities, new attachers, and existing attachers could all benefit from streamlined access to poles, especially as compared to the current Commission pole attachment timeline? Rather than adopting a

³⁷ See Nashville Ordinance No. BL2016-343, Title 13 of the Metropolitan Code, § 13.18 *et seq.*; Louisville Ordinance No. O-427-15, Series 2015, Chapter 116 of the Louisville Metro Code, §§ 116.70(J), 116.72(D). We note that both the Nashville and Louisville OTMR ordinances currently are being challenged by existing attachers in separate cases in federal district court. See *BellSouth Telecommunications, LLC v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, No. 3:16cv2794 (M.D. Tenn. 2016), consolidated with *Comcast of Nashville I, LLC, v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, No. 3:16cv2794 (M.D. Tenn. 2016); *BellSouth Telecommunications, LLC v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:16cv00124 (W.D. Ky. 2016), consolidated with *Insight Kentucky Partners II, L.P. v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:16cv00124 (W.D. Ky. 2016).

³⁸ Federal Communications Commission, *Connecting America: The National Broadband Plan* at 111, Recommendation 6.2 (2010), <https://www.fcc.gov/general/national-broadband-plan>.

³⁹ Fiber to the Home Council, *Role of State and Local Governments in Simplifying the Make-Ready Process for Pole Attachments*, at 2 (Nov. 2015), http://www.ct.gov/broadband/lib/broadband/ctgig_project/attachment_c_ftth_council_makereadywhitepaper25october2015.pdf.

⁴⁰ Nashville Ordinance No. BL2016-343, § 13.18.020.

wholesale OTMR approach to the pole attachment process, are there individual OTMR elements that could form the basis of a more preferable timeline than what currently exists in the Commission's rules?

23. The Louisville OTMR ordinance differs from the one in Nashville in that it does not require new attachers to send pre-make-ready notices to existing attachers for routine requests, it shortens the timeline for the post-make-ready field inspection for routine make-ready work from 60 days to 14 days, it requires existing attachers to notify the new attacher of any problems (and the election of how to fix those problems) within 7 days after the field inspection, and it requires new attachers to correct any problems within 30 days of the notice.⁴¹ We seek comment on the alternatives advanced in the Louisville OTMR ordinance and whether the Commission should incorporate any or all of these concepts into a new pole attachment regime. Does the Louisville ordinance better balance the concerns of existing attachers and utilities than the Nashville approach?

24. In addition, CPS Energy, a utility based in San Antonio, Texas, has implemented an OTMR approach for access to its poles.⁴² Under the CPS Energy policy, the timeline for the pole attachment process is as follows: (1) 21 days for CPS Energy to review completed pole attachment applications (with a unilateral option for an additional 7 days), survey affected poles, and produce a make-ready cost estimate; (2) 21 days for the new attacher to approve the make-ready cost estimate and provide payment; (3) CPS Energy notice to existing attachers of impending make-ready work; (4) 60 days for CPS Energy to complete any required make-ready work in the electrical space, and 90 days for the new attacher to complete all other routine make-ready work at its expense using contractors approved by CPS Energy (with option to request additional 30 days); (5) new attachers must give 3 days' notice to existing attachers of impending make-ready work and must specify whether the work is complex, such that it "poses a risk of disconnection or interruption of service to a Critical Communications Facility";⁴³ (6) 15 days' notice from new attachers to affected existing attachers after completion of make-ready work; (7) 15 days for existing attachers to inspect make-ready work on their equipment; and (8) 15 days for new attachers to fix any problems after notice from existing attachers. We seek comment on this approach, which varies from the ordinances adopted in Nashville and Louisville, especially in terms of the timing of the various pole attachment stages and the ability of new attachers to perform complex make-ready work themselves. What are the benefits and drawbacks of the process adopted by CPS Energy? Is it significant that this process is a utility-adopted approach as opposed to a government-adopted approach? What can the Commission do to encourage other utilities to adopt pole attachment policies like the one instituted by CPS Energy?

25. *Other Pole Attachment Process Proposals.* Another pole attachment proposal, advanced by members of the Nashville City Council who opposed the OTMR ordinance, is styled "right-touch, make-ready" (RTMR), and it would provide a utility 30 days in which to review a pole attachment application, then provide existing attachers 45 days to complete make-ready work.⁴⁴ Existing attachers failing to meet the 45-day deadline would be charged \$500 per pole per month until required make-ready work is completed. We seek comment on the reasonableness of this approach. What are the advantages and drawbacks of a RTMR approach as opposed to an OTMR approach? Could elements of both

⁴¹ See Louisville Ordinance No. O-427-15, § 116.72(D)(2).

⁴² See CPS Energy, *Pole Attachment Standards*, at 55-69 (issued May 6, 2016), <https://www.cpsenergy.com/content/dam/corporate/en/Documents/PoleAttachments/Pole%20Attachment%20Standards.pdf>.

⁴³ *Id.* at 68, para. 5(g). Any complex make-ready work must be completed by the new attacher within 30 days after notice is provided to affected existing attachers. *Id.* at 69, para. 6.

⁴⁴ See Jamie McGee, *Google Fiber plan faces new hurdles*, The Tennessean (Sep. 14, 2016), <http://www.tennessean.com/story/money/2016/09/14/google-fiber-plan-faces-new-hurdles/90368764/>; Nashville Resolution No. RS2016-380, sponsored by Nashville City Councilwoman Sheri Weiner (Sep. 20, 2016), http://www.nashville.gov/mc/resolutions/term_2015_2019/rs2016_380.htm.

approaches be blended together to form a better alternative to the Commission's current pole attachment timeline? Would the \$500 per pole per month charge be enough of an incentive to encourage existing attachers to complete make-ready work by the 45-day deadline? Would it be reasonable to include in a RTMR approach the ability of new attachers (or the utility) to perform make-ready work at the expense of existing attachers who fail to meet the 45-day deadline?

26. As another way to incent accelerated make-ready timelines, could there be a standard "bonus" payment or multiplier applied to the make-ready reimbursements sought by existing attachers from new attachers if the *overall* timelines are met? By basing such incentive payments on the overall timeline being achieved by existing attachers, does this create effective incentives for parties to collaborate and find opportunities for efficiency? For instance, might multiple existing attachers agree to use the same make-ready contractor so they all can reap the reward of the incentive payments? While such incentives could theoretically be arranged through private contracting, would using this as the default system benefit smaller, new attachers who may find complicated negotiations a challenge?

27. Making more information publicly available regarding the rates, location, and availability of poles also could lead to faster pole attachment timelines. We seek comment on the types of pole attachment data resources currently available. Are there ways the Commission could incentivize utilities to establish online databases, maps, or other public information sources regarding pole rates, locations, and availability? To what extent are utilities or other entities already aggregating pole information online, either for internal tracking purposes or externally for potential or existing attachers? What pole-related information other than rates, location, and availability could utilities make publicly available (e.g., number of existing attachers, physical condition, available communications space, the status of make-ready work, status of pole engineering surveys)? Should similar information also be made publicly available for ducts, conduits, and rights-of-way? We recognize that increasing transparency of cost information could lead to more efficient pole attachment negotiations. What steps should the Commission take to facilitate access to information regarding pole attachment rates and costs from pole owners subject to Section 224? For instance, should pole owners be required to make pole attachment rates publicly available online? What are the benefits and drawbacks of making pole attachment rate information publicly available? Could the Commission facilitate the creation of a centralized clearinghouse of pole attachment rate information, and if so how?

28. We seek comment on these proposals and any others (or combinations thereof) that could help speed the pole attachment process, yet still address the safety and property concerns of existing attachers and utilities. Might there be "hybrid" approaches that incent parties to expeditiously complete the make-ready process when private negotiations fail within a given time period? For instance, if utilities, existing attachers, and new attachers cannot agree on make-ready plans within 15 days, could the following arrangement be used: first, the new attacher would select a "default" contractor (approved by the utility); second, the existing attachers would be able to accept the default contractor or do the make-ready work themselves (and be reimbursed by the new attacher) within a specified timeframe with penalties for failure to meet the make-ready deadline? If having a single default contractor do all the work at once will speed deployment, are there ways within this framework to incent existing attachers to allow the new attacher to use the default contractor? For instance, might existing attachers choosing to do make-ready work themselves be limited in the amount they charge for the work? Could such a limit be set as a proportional split among existing attachers that is based on the total make-ready costs that the new attacher would have incurred under an OTMR approach? Would such incentives encourage existing attachers to choose the default contractor in situations where they have little concern about harm to their equipment but still allow them to do the work themselves when they have concerns?

29. We seek discussions of the relative merits and drawbacks of these pole attachment approaches or combinations thereof. For example, would an OTMR approach (or some variant thereof) benefit consumers through increased efficiencies that could lower the costs of deployment? Is there any evidence to show how much less pole attachment costs are if using an OTMR approach as compared with the Commission's current pole attachment timeline? How should we balance the benefits to society from greater speed of deployment and cost savings versus the need to ensure that safety and property concerns

are not compromised?

30. We also recognize that some broadband providers encounter difficulties in accessing poles, ducts, conduits, and rights-of-way owned by entities that are not subject to Section 224 of the Communications Act, such as municipalities, electric cooperatives, and railroads.⁴⁵ We seek comment on actions that the Commission might be able to undertake to speed deployment of next generation networks by facilitating access to infrastructure owned by entities not subject to Section 224. How can the Commission encourage or facilitate access to information about pole attachment rates and costs with respect to these entities, and what are the benefits and drawbacks of these potential steps? Would increased transparency regarding pole attachment rates and costs for Commission-regulated pole owners, discussed above, benefit potential attachers to non-Commission-regulated poles by providing data that would be useful in contractual negotiations? If so, would this facilitate broadband deployment?

31. *Access to Conduit.* We seek comment on ways to make the process of gaining access specifically to utility conduit more transparent. We ask whether there are existing online databases or other publicly-available resources to aid telecommunications and cable providers in determining where available conduit exists. Do utilities or municipalities have readily available information on the location and cost of access to conduit? Are there “best practices” that utilities or municipalities have established that make it easier for providers to obtain crucial information on conduit access? We seek comment on whether any local or state jurisdictions have policies on making conduit information more transparent and widely available, especially with regard to alerting the public and providers about the timing and location of conduit trenches being dug by utilities.

2. Re-examining Rates for Make-Ready Work and Pole Attachments

a. Reasonableness of “Make-Ready” Costs

32. We seek comment on proposals to reduce make-ready costs and to make such costs more transparent. In general, make-ready charges must be just and reasonable under Section 224(b)(1) of the Act.⁴⁶ Currently, however, make-ready fees are not subject to any mandatory rate formula set by the Commission. We seek comment on whether the make-ready costs being charged today are just and reasonable, and whether such costs represent a barrier to broadband infrastructure deployment. Further, we seek comment on ways to encourage utilities, existing attachers, and new attachers to resolve more make-ready pole attachment cost and responsibility issues through private negotiations.

33. *Requiring Utilities to Make Available Schedules of Common Make-Ready Charges.* We seek comment on whether we should require utilities to provide potential new attachers with a schedule of common make-ready charges to create greater transparency for make-ready costs. To what extent does the availability of schedules of common make-ready charges help facilitate broadband infrastructure deployment? INCOMPAS suggests that the Commission should revisit its 2011 decision refraining from requiring utilities to provide schedules of common make-ready charges upon request.⁴⁷ According to INCOMPAS, “make ready charges are not predictable or verifiable in many cases, making it difficult for competitors to plan their builds and accurately predict construction.”⁴⁸ We seek comment on the benefits and any potential burdens associated with requiring utilities to provide schedules of make-ready charges.

⁴⁵ See Letter from Thomas Cohen, Counsel for the American Cable Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-421, et al., at 3-4 (filed April 3, 2017). ACA members also submit that there are instances where accessing infrastructure owned by municipalities, electric cooperatives, and railroads is cost prohibitive due to the pole attachment rates charged. See *id.*

⁴⁶ 47 U.S.C. § 224(b)(1).

⁴⁷ See Letter from Chip Pickering, CEO, INCOMPAS, to Ajit Pai, Chairman, FCC, WT Docket No. 16-138 et al., at 3 (filed Feb. 3, 2017) (INCOMPAS *Ex Parte* Letter).

⁴⁸ *Id.*

34. Further, we seek comment on whether and how schedules of common make-ready charges are made available, used, and implemented by both utilities and potential new attachers today. In the *2011 Pole Attachment Order*, the Commission received evidence from utilities that many already make information about common make-ready charges available on request.⁴⁹ Is that practice still prevalent today and, if so, what methods are most frequently used to provide such schedules (e.g., websites, paper schedules, telephonically)? We also seek comment on which make-ready jobs and charges are the most common, and thus most easily included in a generalized schedule of charges. In addition, we seek comment on any comparable state requirements that require utilities to publish or make available schedules of common make-ready charges. We also seek comment on whether there are other mechanisms currently in use, such as standardized contract terms, that provide the necessary information and transparency to the make-ready process.

35. *Reducing Make-Ready Charges.* We seek comment on reasonable ways to limit the make-ready fees charged by utilities to new attachers. Would it provide certainty to the make-ready process if the Commission adopted a rule limiting make-ready fees imposed on new attachers to the actual costs incurred to accommodate a new attachment? As part of the pole attachment complaint process, the Commission has held that utilities “are entitled to recover their costs from attachers for reasonable make-ready work necessitated by requests for attachment. Utilities are not entitled to collect money from attachers for unnecessary, duplicative, or defective make-ready work.”⁵⁰ Would codifying the holding that new attachers are responsible only for the cost of make-ready work made necessary because of their attachments help to ensure that make-ready costs are just and reasonable?

36. We also seek comment on other alternatives for reducing make-ready costs. For example, would it be reasonable to allow utilities to set a standard charge per pole that a new attacher may choose in lieu of a cost-allocated charge? Should the choice belong to the utility or the new attacher? Would a per-pole charge of, for example, \$300, \$400, or \$500 permit utilities to recover their reasonable make-ready costs and provide new attachers with an affordable alternative to negotiating with the utility over the applicable costs to be included in make-ready charges? We seek comment on the viability of such an approach. We also ask whether it would be reasonable to require utilities to reimburse new attachers for make-ready costs for improvements that subsequently benefit the utility (e.g., the modification allows utilities to use additional space on a pole for its own uses or creates a vehicle for the utility to receive additional revenues from subsequent attachers). If so, then how would the new attachers and utilities manage that process? We seek comment on the potential tradeoffs of such an approach, which may help to keep make-ready costs low for new attachers, but also pose new challenges for utilities and new attachers to administer. We note that pursuant to Section 1.1416(b) of the Commission’s rules, attachers who directly benefit from a new pole or attachment already are required to proportionately share in the costs of that pole or attachment.⁵¹ In adopting this requirement, the Commission “intended to ensure that new entrants, especially small entities with limited resources, bear only their proportionate costs and are not forced to subsidize their later-entering competitors.”⁵² Should we interpret (or modify) this rule to apply to utilities when make-ready improvements subsequently benefit the utility? Conversely, we seek comment on whether requiring utilities to pass a percentage of additional attachment benefits back to parties with existing attachments would result in a disincentive to add new competitors to

⁴⁹ *2011 Pole Attachment Order*, 26 FCC Rcd at 5279, para. 86 & n.252.

⁵⁰ *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24625, para. 26 (2003); see also *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 (Cable Serv. Bur. 1999).

⁵¹ 47 CFR § 1.1416(b); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 16097, para. 1214 (1996) (*1996 Local Competition Order*). The proportionate share of the costs attributable to the subsequent attacher are reduced to take into account depreciation to the pole that occurs after the modification. *Id.*

⁵² *1996 Local Competition Order*, 11 FCC Rcd at 16097, para. 1214.

modified poles.

37. We also seek comment on whether the Commission's complaint process provides a sufficient mechanism by which to ensure that make-ready costs are just and reasonable. Commenters arguing that the Commission's complaint process is not a sufficient limitation on make-ready costs should propose specific alternatives to ensure the reasonableness of make-ready charges and explain why the benefits of such alternatives would outweigh the burdens of a new Commission-imposed mandate for make-ready charges. Are there state regulatory approaches or alternatives governing the reasonableness of make-ready charges that the Commission should consider implementing?

b. Excluding Capital Expenses from Pole Attachment Rates

38. *Capital Expenses Recovered via Make-Ready Fees.* We propose to codify a rule that excludes capital costs that utilities already recover via make-ready fees from pole attachment rates. Almost forty years ago, the Commission found that “where a utility has been directly reimbursed by a [cable television] operator for non-recurring costs, including plant, such costs must be subtracted from the utility's corresponding pole line capital account to insure that [cable television] operators are not charged twice for the same costs.”⁵³ Since that time, the Commission has made clear that “[m]ake-ready costs are non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation.”⁵⁴ As such, “if a utility is required to replace a pole in order to provide space for an attachers [and] the attachers pays the full cost of the replacement pole,”⁵⁵ the capital expenses associated with the installation of those poles should be wholly excluded from pole attachment rates for all attachers. Nonetheless, it appears that not all attachers benefit from lower rates in these circumstances, in part because our rules do not explicitly require utilities to exclude already-reimbursed capital costs from their pole attachment rates. We seek comment on how utilities recalculate rates when make-ready pays for a new pole, what rate reductions pole attachers have experienced when poles are replaced through the make-ready process, and whether attachers have experienced the inclusion of already-reimbursed capital costs in their pole attachment rates. We similarly seek comment on how utilities treat capital expenses associated with their own make-ready work. When utilities replace poles to accommodate their own needs or to create additional electrical space, do they appropriately treat associated capital expenses as make-ready work that is wholly excluded from pole attachment rates? How do existing attachers know when new attachers or the utility have fully paid the capital expenses as make-ready costs so that those expenses should be wholly excluded from rates going forward?

39. We seek comment on whether amending Section 1.1409(c) of our rules to exclude capital expenses already recovered via make-ready fees from “actual capital costs” is sufficient to ensure no double recovery occurs by utilities.⁵⁶ We seek comment on whether any other changes to the Commission's rules are necessary and reasonable to provide certainty to attachers and utilities about the treatment of pole capital costs that already have been recovered via make-ready.

40. *Capital Costs Not Otherwise Recovered Via Make-Ready Fees.* We seek comment on whether we should exclude capital costs that are not otherwise recoverable through make-ready fees from

⁵³ See *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Second Report and Order, 72 FCC 2d 59, 72, para. 27 (1979); *Florida Cable Telecom. Assn., Inc. et al. v. Gulf Power Co.*, EB Docket No. 04-381, Decision, 26 FCC Rcd 6452, 6455-56, para. 9 (2011).

⁵⁴ *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Report and Order, 15 FCC Rcd 6453, 6472-73, para. 28 (2000); *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(E) of the Telecommunications Act of 1996*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12118, n.120 (2001) (*Pole Attachment Fees Recon Order*).

⁵⁵ *Pole Attachment Fees Recon Order*, 16 FCC Rcd at 12118, para. 24.

⁵⁶ 47 CFR §§ 1.1409(c), (e).

the upper-bound cable and telecommunications pole attachment rates. In setting those rates, the Commission previously found it appropriate to allow utilities to include in the rates some contribution to capital costs aside from those recovered through make-ready fees.⁵⁷ In revisiting this issue, we seek comment on the extent to which the capital costs of a pole, other than those paid through make-ready fees, are caused by attachers other than the utility (especially when there is space already available on the pole). If none or only a small fraction of the capital costs, other than those paid for through make-ready fees, are caused by attachers other than the utility, would this justify the complete exclusion of these capital costs from the pole attachment rate? To what extent would the exclusion of such capital costs further reduce pole attachment rates? To what extent would the exclusion of these particular capital costs from the rate formulas burden the ratepayers of electric utilities? What policy justifies charging pole attachers, whose costs of deployment may determine the scope of their investment in infrastructure, anything more than the incremental costs of attachment to utilities?

41. We note that although the rate formula for operators “solely” providing cable service sets an upper bound explicitly tied to “actual capital costs,” the rate formula for telecommunications carriers is tied only to “costs.”⁵⁸ The Commission has previously interpreted the term “cost” in the latter formula to exclude at least some capital costs.⁵⁹ Should we revisit this interpretation and interpret the term “cost” in the telecommunications pole attachment formula to exclude all capital costs? Would doing so avoid the awkward interpretation contained in our present rules that defines the term “cost” in two separate different ways at the same time?

42. Similarly, we note that our more general authority over pole attachments only requires that rates be “just and reasonable.”⁶⁰ We seek comment on the appropriate rate for commingled services, including when a cable operator or a telecommunications carrier offers information services as well as cable or telecommunications services over a single attachment.⁶¹ Should we set that rate for commingled services based on the upper bound of the cable rate formula, the telecommunications rate formula, or some third option? Should we exclude capital costs from the rate formula we use to determine the commingled services rate? The cable rate formula also sets a lower bound of “the additional costs of providing pole attachments.” How would that differ from any of the rates discussed heretofore? Should we set the commingled services rate equal to the lower bound of the cable rate formula?

43. We seek comment on what specific amendments we should consider to Section 1.1409 of our rules to effectuate any changes.

c. Pole Attachment Rates for Incumbent LECs

44. In the *2011 Pole Attachment Order*, the Commission declined to adopt a pole attachment rate formula for incumbent LECs, opting instead to evaluate incumbent LEC complaints on a case-by-case basis to determine whether the rates, terms, and conditions imposed on incumbent LEC pole attachments are consistent with Section 224(b) of the Act.⁶² The Commission held that it is “appropriate to use the rate of the comparable attacher as the just and reasonable rate for purposes of section 224(b)”

⁵⁷ *2011 Pole Attachment Order*, 26 FCC Rcd at 5304, para. 149.

⁵⁸ Compare 47 U.S.C. § 224(d) with 47 U.S.C. § 224(e).

⁵⁹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration, 30 FCC Rcd 13731, 13742, para. 37 (2015).

⁶⁰ 47 U.S.C. § 224(b)(1).

⁶¹ Cf. *National Cable & Telecommunications Ass’n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (“Congress may well have chosen to define a ‘just and reasonable’ rate for pure cable television service, yet declined to produce a prospective formula for commingled cable service. The latter might be expected to evolve in directions Congress knew it could not anticipate.”).

⁶² *2011 Pole Attachment Order*, 26 FCC Rcd at 5238, para. 203; *id.* at 5334, para. 214.

when an incumbent LEC enters into a new agreement with a utility and can demonstrate “that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators.”⁶³ Conversely, when the incumbent LEC attacher cannot make such a demonstration, the Commission found that a higher rate based on the Commission’s pre-2011 telecommunications rate formula should serve as a “reference point” for evaluating whether pole attachment rates charged to incumbent LECs are just and reasonable.⁶⁴ In the years since adoption, this formulation has led to repeated disputes between incumbent LECs and utilities over appropriate pole attachment rates.

45. To end this controversy, we propose that the “just and reasonable rate” under Section 224(b) for incumbent LEC attachers should presumptively be the same rate paid by other telecommunications attachers, i.e., a rate calculated using the most recent telecommunications rate formula. Under this approach, the incumbent LEC would no longer be required to demonstrate it is “comparably situated” to a telecommunications provider or a cable operator; instead the incumbent LEC would receive the telecommunications rate unless the utility pole owner can demonstrate with clear and convincing evidence that the benefits to the incumbent LEC far outstrip the benefits accorded to other pole attachers. We seek comment on this proposal. What demonstration should be sufficient to show that an incumbent LEC attacher should not be entitled to the telecommunications rate formula? For instance, should an incumbent LEC have to own a majority of poles in a joint ownership network? Should an incumbent LEC have to have special access to modify a utility’s poles without prior notification? How should the relative rates charged to the utility and the incumbent LEC factor into the analysis? If an incumbent LEC has attachments on utility poles pursuant to the terms of a joint use agreement, should the incumbent LEC entitlement to the telecommunications rate be conditioned on making commensurate reductions in the rates charged to the utility for attaching to the incumbent LEC’s poles? We also seek comment on the rate that should apply to incumbent LECs in the event the utility owner can demonstrate the telecommunications rate should not apply. In these instances, should the Commission use the pre-2011 telecommunications rate formula? We also seek comment on an alternative pole attachment rate formula approaches for incumbent LECs. Commenters supporting alternative approaches should provide specific inputs and methodology that could be used in such a formula.

46. Given that the Commission based its decision in the *2011 Pole Attachment Order* to refrain from establishing pole attachment rates for incumbent LECs in part on the high levels of incumbent LEC pole ownership, we seek comment on the relative levels of pole ownership between utilities, incumbent LECs, and other industry participants. If pole ownership levels have changed, what bearing should that have on the rates charge to incumbent LECs?

3. Pole Attachment “Shot Clock” For Pole Attachment Complaints

47. *Establishing a 180-Day Shot Clock.* We propose to establish a 180-day “shot clock” for Enforcement Bureau resolution of pole access complaints filed under Section 1.1409 of our rules.⁶⁵ We seek comment on this proposal. The *2011 Pole Attachment Order* noted that “a number of commenters expressed concern about the length of time it takes for the Commission to resolve pole attachment complaints,” but the Commission determined that the record at the time did not warrant the creation of new pole attachment complaint rules.⁶⁶ We now seek comment on whether we should revisit that earlier

⁶³ *Id.* at 5336, para. 217.

⁶⁴ *Id.* at 5337, para. 218.

⁶⁵ 47 CFR § 1.1409. A “pole access complaint” is a complaint that alleges a complete denial of access to utility poles. This term does not encompass a complaint alleging that unreasonable rates, terms, or conditions that the utility demands as a condition of attachment (e.g., adherence to certain engineering standards) amounts to a denial of pole access.

⁶⁶ *2011 Pole Attachment Order*, 26 FCC Rcd at 5286, para. 102 & nn.317-18.

conclusion by creating a shot clock and whether 180 days is a reasonable timeframe for the Enforcement Bureau to resolve pole access complaints. We note that under Section 224(c)(3)(B) of the Act, a state that has asserted jurisdiction over the rates, terms, and conditions of pole attachments could lose the ability to resolve a pole attachment complaint if it does not take final action within 180 days after the complaint is filed with the state.⁶⁷ Should this statutory time period for state resolution of a pole attachment complaint inform our consideration as to what constitutes a reasonable timeframe for Enforcement Bureau consideration of a pole attachment complaint? We additionally seek alternatives to the 180-day time period. For example, are there shorter state timelines for the resolution of pole attachment complaints? Would 150 days, 120 days, 90 days, or an even shorter timeframe be reasonable for the Enforcement Bureau to resolve a pole access complaint? What would be the benefits and drawbacks for a shorter timeframe for resolution of pole access complaints? Also, we seek comment regarding whether the current length of Enforcement Bureau consideration of pole access complaints has burdened broadband infrastructure deployment. How, if at all, would a shot clock (whether it be 180 days or some different time period) affect new attacher decisions to deploy broadband infrastructure? We seek comment on the ramifications of the Enforcement Bureau exceeding the shot clock and on reasonable consequences for the Enforcement Bureau exceeding the clock.

48. *Starting the Shot Clock at the Time a Complaint Is Filed.* We seek comment on when to start the proposed 180-day shot clock. We propose starting the shot clock at the time the pole access complaint is filed, as is the case for state complaints under Section 224(c)(3)(B) of the Act,⁶⁸ and we seek comment on this proposal. We also seek comment on alternatives that would start the shot clock later in the process, such as when a reply is filed by the complainant pursuant to Section 1.1407(a) of our rules⁶⁹ or, if discovery is requested, when discovery is complete. Starting the clock at these later junctures would allow the Enforcement Bureau sufficient time to review the relevant issues involved in a pole access complaint and would not disadvantage the timing of the Enforcement Bureau's review if the pleading cycle or discovery takes longer than expected. Are there instructive alternative starting points adopted by states for the initiation of their pole attachment complaint proceedings? If the shot clock does not start until sometime after a pole access complaint is filed, would it make sense to institute a shot clock that is shorter than 180 days?

49. *Pausing the Shot Clock.* We seek comment on whether the Enforcement Bureau should be able to pause the proposed shot clock for a reasonable time in situations where actions outside the Enforcement Bureau's control are responsible for delaying its review of a pole access complaint. In the transactions context, the reviewing Bureau pauses the shot clock when the parties need additional time to provide key information requested by the Bureau.⁷⁰ We propose to allow the Enforcement Bureau the discretion to pause the shot clock in that situation, as well as when the parties decide to pursue informal dispute resolution or request a delay to pursue settlement discussions after a pole access complaint is filed. We ask whether these are valid reasons to pause the shot clock, and we seek comment on objective criteria for the Enforcement Bureau to use in deciding whether such situations are significant enough to warrant a pause in the shot clock. We also seek comment on when the Enforcement Bureau should resume the shot clock. Are there objective criteria that the Enforcement Bureau could use to judge the

⁶⁷ 47 U.S.C. § 224(c)(3)(B)(i). A state also could lose jurisdiction over a pole attachment complaint if it fails to take final action within the time period prescribed in the state's rules, provided such period does not extend beyond 360 days after the filing of a complaint. 47 U.S.C. § 224(c)(3)(B)(ii). If a state does not meet the statutory deadlines for resolving a pole attachment complaint, then jurisdiction for the complaint falls to the Commission. 47 U.S.C. § 224(c).

⁶⁸ 47 U.S.C. § 224(c)(3)(B).

⁶⁹ 47 CFR § 1.1407(a).

⁷⁰ See, e.g., Letter from Matthew S. DelNero, Chief, Wireline Competition Bureau, FCC, to Bryan Tramont, Adam Krinsky, and Jennifer Kostyu, Counsel to Verizon, and Thomas Cohen and Edward Yorkgitis, Jr., Counsel to XO Holdings, WC Docket No. 16-70 (July 20, 2016).

satisfactory resolution of an outstanding issue such that the shot clock could be resumed? Further, we propose to alert parties to a pause in the shot clock (and to a resumption of the shot clock) via written notice to the parties. We seek comment on this proposal.

50. *Establishment of Pre-Complaint Procedures.* We seek comment on whether we should require the parties to resolve procedural issues and deadlines in a meeting to be held either remotely or in person prior to the filing of the pole access complaint (and prior to the starting of the shot clock). We seek comment on the types of issues that the parties should resolve in a pre-complaint meeting. We note that it has been our standard practice to request that parties participate in pre-complaint meetings in order to resolve procedural issues and deadlines; we find that the complaint process has proceeded much more smoothly as a result. We seek comment on the benefits and drawbacks of requiring a pre-complaint meeting and ask whether there are any state pre-complaint procedures that could inform the rules that we develop.

51. *Use of Shot Clock for Other Pole Attachment Complaints.* We seek comment on whether the Commission should adopt a 180-day shot clock for pole attachment complaints other than those relating to access. We also request comment on whether the length of time to resolve other pole attachment complaints has stymied the deployment of broadband infrastructure. We additionally seek comment on reasonable alternatives to a 180-day shot clock and ask whether there are state shot clocks for other pole attachment complaints that could help inform our review. Should the procedures set forth above for pole access complaints also apply to other pole attachment complaints? What alternatives could we adopt that would further streamline the pole attachment complaint process?

4. Reciprocal Access to Poles Pursuant to Section 251

52. *Background.* Section 251 of the Act provides that “[e]ach local exchange carrier” has the duty “to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 [of this Act].”⁷¹ Section 224(a) defines a “utility” that must provide telecommunications carriers nondiscriminatory pole access at regulated rates to include both incumbent LECs and competitive LECs.⁷² However, the definition of “telecommunications carrier” used in Section 224 “does not include” incumbent LECs, thus denying incumbent LECs the benefits of Section 224’s specific protections for carriers.⁷³

53. According to CenturyLink, the disparate treatment of incumbent LECs and competitive LECs in Section 224(a) prevents incumbent LECs from gaining access to competitive LEC-controlled infrastructure and in doing so dampens the incentives for all local exchange carriers to build and deploy the infrastructure necessary for advanced services.⁷⁴ The Commission initially examined this issue during its implementation of the 1996 Act in the *1996 Local Competition Order*, where it determined that Section 251 cannot “[restore] to an incumbent LEC access rights expressly withheld by section 224.”⁷⁵ CenturyLink requests the Commission revisit our interpretation.⁷⁶ Other commenters in the latest

⁷¹ See 47 U.S.C. § 251(b)(4).

⁷² See 47 U.S.C. § 224(a)(1).

⁷³ See 47 U.S.C. § 224(a)(5).

⁷⁴ CenturyLink Comments, WC Docket No. 16-132, at 12-13 (Dec. 5, 2016) (CenturyLink Biennial Comments).

⁷⁵ *1996 Local Competition Order*, 11 FCC Rcd at 16102-16104, paras. 1226-31. The Ninth Circuit Court of Appeals disagreed in dicta, noting that Sections 224 and 251 could “be read in harmony” to support a right of access for incumbent LECs on other LEC poles. *US West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1053-54 (9th Cir. 2000). Despite its skepticism of the Commission’s analysis in the *1996 Local Competition Order*, the Ninth Circuit held it was obligated to adhere to that analysis because the parties had not directly challenged the *1996 Local Competition Order* via the Hobbs Act. See *id.* at 1054-55.

⁷⁶ CenturyLink Biennial Comments at 12-13.

Biennial Review contend that the Commission's interpretation remains valid given incumbent LECs' "first-mover advantage" and "the ability of large incumbent LECs to abuse their market positions to foreclose competition."⁷⁷

54. *Discussion.* We seek comment on reading the statutes in harmony to create a reciprocal system of infrastructure access rules in which incumbent LECs, pursuant to Section 251(b)(4) of the Act, could demand access to competitive LEC poles and *vice versa*, subject to the rates, terms, and conditions described in Section 224. Further, we seek comment on necessary amendments to our rules to effectuate the changed interpretation in the event we decide to do so. We also seek comment on how similar the rules for incumbent LEC access under Section 251 must be to those for other carriers under Section 224 for the rules to be "consistent" with each other.

55. Additionally, we seek comments and data that will help establish how often incumbent LECs request access to competitive LEC infrastructure. How often do incumbent LECs request access to infrastructure controlled by competitive LECs, how frequently are incumbent LECs denied access, and how much of an effect does this have on competition and broadband deployment? Would the frequency of incumbent LEC requests for access to competitive LEC poles change if we decide to change our interpretation, and how would that impact broadband deployment?

B. Expediting the Copper Retirement and Network Change Notification Process

56. Section 251 of the Act⁷⁸ imposes specific obligations on incumbent LECs to promote competition so as to allow industry to bring "increased innovation to American consumers."⁷⁹ To that end, Section 251(c)(5) and the Commission's Part 51 implementing rules require incumbent LECs to provide public notice of network changes, including copper retirement, that would affect a competing carrier's performance or ability to provide service.⁸⁰ We propose revisions to our Part 51 network change disclosure rules to allow providers greater flexibility in the copper retirement process and to reduce associated regulatory burdens, to facilitate more rapid deployment of next-generation networks. We also seek comment on streamlining and/or eliminating provisions of the more generally applicable network change notification rules.

1. Copper Retirement

57. We seek comment on revisiting our copper retirement and notice of network change requirements to reduce regulatory barriers to the deployment of next-generation networks. First, we seek comment on eliminating some or all of the changes to the copper retirement process adopted by the Commission in the *2015 Technology Transitions Order*. We seek comment on the Commission's authority to impose the copper retirement notice requirements adopted in the *2015 Technology Transitions Order*.⁸¹ Among other things, the new rules doubled the time period during which an

⁷⁷ CCA Reply, WC Docket No. 16-132, at 7 (Jan. 3, 2017); INCOMPAS Reply, WC Docket No. 16-132, at 11 (Jan. 3, 2017).

⁷⁸ 7 U.S.C. § 251.

⁷⁹ *1996 Local Competition Order*, 11 FCC Rcd at 15506, para. 4.

⁸⁰ *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*), corrected by *Triennial Review Order Errata*, 18 FCC Rcd 19020, *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564-93 (D.C. Cir. 2004) (*USTA II*), cert. denied, 543 U.S. 925 (2004), on remand, *Unbundled Access to Network Elements et al.*, Order on Remand, 20 FCC Rcd 2533, 2541, para. 12 (2004) (*Triennial Review Remand Order*) *aff'd, Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *see also See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 et al.*, CC Docket No. 96-98 et al., Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19471, para. 168 (1996) (*Second Local Competition Order*).

⁸¹ *2015 Technology Transitions Order*, 30 FCC Rcd 9372, 9383-9425, paras. 15-97.

incumbent LEC must wait to implement a planned copper retirement after the Commission's release of public notice from 90 days to 180 days, required direct notice to retail customers, states, Tribal entities, and the Secretary of Defense, and expanded the types of information that must be disclosed.⁸²

58. *Repeal of Section 51.332 and Return to Prior Short-Term Network Change Notification Rule.* We seek comment on how best to handle incumbent LEC copper retirements going forward to prevent unnecessary delay and capital expenditures on this legacy technology while protecting consumers. First, we seek comment on eliminating Section 51.332 entirely and returning to a more streamlined version of the pre-2015 *Technology Transitions Order* requirements for handling copper retirements subject to Section 251(c)(5) of the Act. Specifically, prior to the 2015 *Technology Transitions Order*, incumbent LEC copper retirement notices of less than six months were regulated under the more flexible Commission rule that applied to short-term network change notices.⁸³ We seek comment on whether to repeal Section 51.332 and whether to reinstate the prior copper retirement notice rules. Have the delays and increased burdens introduced by the revised rules hindered next-generation network investment?⁸⁴ Have the changes been effective in protecting competition and consumers? What are their costs and benefits? Would adopting our pre-2015 rule, without modification, provide incumbent LECs with sufficient flexibility to facilitate their transition to next-generation networks? Should we retain our existing rule in substantially similar format?

59. The 2015 *Technology Transitions Order* eliminated the process by which competitive LECs can object to and seek to delay an incumbent LEC's planned copper retirement when it increased the "deemed approved" timeframe from 90 to 180 days.⁸⁵ If we return incumbent LEC copper retirements to the prior network notification process, should we nonetheless retain this change, and, if so, how should we incorporate it into our rules? Is some other notice timeframe more appropriate?

60. The 2015 *Technology Transitions Order* also adopted an expanded definition of copper retirement that added (1) the feeder portion of copper loops and subloops, previously excluded, and (2) "the failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removal or disabling"—i.e., *de facto* retirement.⁸⁶ Maintenance of existing copper facilities remains a concern when an incumbent LEC does not go through the copper retirement process. If we return incumbent LEC copper retirements to the prior network notification process, should we nonetheless retain this expanded definition?

61. The 2015 *Technology Transitions Order* also broadened the recipients of direct notice from "each telephone exchange service provider that directly interconnects with the incumbent LEC's network" to "each entity within the affected service area that directly interconnects with the incumbent LEC's network." It also added a notice requirement to the Secretary of Defense as well as the state public utility commission, Governor of the State, and any Tribal entity with authority over Tribal lands in which the copper retirement is proposed. Have these direct notice changes adopted by the Commission meaningfully promoted facilities investment or preserved competition in the provision of next-generation facilities, and what costs have the changes imposed? Have these direct notice changes meaningfully promoted understanding and awareness of copper retirements and their impacts, and what have been the benefits of these changes? Returning to a version of our pre-2015 copper retirement rules would reduce the number of direct notice recipients from "each entity" to "each telephone exchange service provider,"

⁸² 2015 *Technology Transitions Order*, 30 FCC Rcd at 9387-90, 9396-97, & 9411-9413, paras. 24-25, 28-29, 39-40, & 70-71.

⁸³ See 47 CFR § 51.333 (2015).

⁸⁴ See Frontier Communications Corp. Reply, WC Docket No. 16-132, at 16 (Jan. 3, 2017) (Frontier Biennial Reply).

⁸⁵ 47 CFR § 51.332(f).

⁸⁶ 47 CFR § 51.332(a).

and eliminate the other expanded notice requirements from the *2015 Technology Transitions Order*. We seek comments on the effects of such a change.

62. *Full Harmonization with General Network Change Notification Process.* Alternatively, we seek comment on eliminating all differences between copper retirement and other network change notice requirements, rendering copper retirement changes subject to the same long-term or, where applicable, short-term network change notice requirements as all other types of network changes subject to Section 251(c)(5). Even under the Commission's rules prior to the *2015 Technology Transitions Order*, there were differences in the treatment of copper retirements and other short-term network change notices. Whereas short-term network change notices become effective ten days after Commission issuance of a public notice, copper retirement notices became effective ninety days thereafter.⁸⁷ Moreover, an objection to a copper retirement notice was deemed denied 90 days after the Commission's public notice absent Commission action on the objection, while there is no "deemed denied" provision for other short-term network change objections.⁸⁸ Is there a basis to continue to have a different set of network change requirements for copper retirement? In this regard, we note that the transition from copper to fiber has been occurring for well more than a decade now.⁸⁹ We anticipate that interconnecting carriers are aware that copper retirements are inevitable and that they should be familiar by now with the implications of and processes involved in accommodating such changes. We seek comment on this expectation.

63. *Modification of Section 51.332.* A second alternative to eliminating Section 51.332 entirely would be to retain but amend Section 51.332 to streamline the process, provide greater flexibility, and reduce burdensome requirements for incumbent LEC copper retirements. We seek comment on how we should change the rule to afford flexibility and maximize incentives to deploy next-generation facilities. We seek comment on whether we should adopt these changes, and whether additional or different changes should also be adopted:

- Requiring an incumbent LEC to serve its notice only to telephone exchange service providers that directly interconnect with the incumbent LEC's network, as was the case under the predecessor rules, rather than "each entity within the affected service area that directly interconnects with the incumbent LEC's network."
- Reducing the waiting period to 90 days from 180 days after the Commission releases its public notice before the incumbent LEC may implement the planned copper retirement.
- Providing greater flexibility regarding the time in which an incumbent LEC must file the requisite certification.
- Reducing the waiting period to 30 days where the copper facilities being retired are no longer being used to serve any customers in the affected service area.

Should we adopt different timing thresholds than those specified above, and if so, what thresholds and why would different thresholds be better? Should we reduce the waiting period to one month and remove the notification requirements in emergency situations?⁹⁰ Should we modify the existing requirements for the content of the notice, and if so, how? Have competitive LECs availed themselves of the good faith communication requirement, and if so, has that requirement caused any difficulties? If we eliminate the good faith communication requirement, should we include an objection period, and what form should it

⁸⁷ 47 CFR § 51.333(b)(1)-(2) (2015).

⁸⁸ 47 CFR § 51.333(e)-(f) (2015).

⁸⁹ See *Triennial Review Order*, 18 FCC Rcd at 16978; *Triennial Review Remand Order*, 20 FCC Rcd at 2541, para. 12.

⁹⁰ See *Frontier Biennial Reply* at 16.

take? Alternatively, should we retain the good faith communication requirement and not include an objection period?

64. If we modify Section 51.332, we seek comment on eliminating the requirement that incumbent LECs provide direct notice of planned copper retirements to retail customers, both residential and non-residential. Specifically, we seek comment on eliminating Sections 51.332(b)(3), (c)(2), (d)(6)-(8), and (e)(3)-(4). What would be the likely impact of eliminating such notice to consumers, including consumers who have disabilities and senior citizens? How do the benefits of notification compare with the costs in terms of slower transitions to next-generation networks? Are there alternative ways in which the Commission can streamline these retail customer notice rules to make the process more flexible and less burdensome on carriers retiring their copper, while still ensuring consumers are protected? Finally, how, if at all, should we modify the requirements for providing notice under current Section 51.332(b)(4) to the states, Tribal entities, and the Secretary of Defense?

65. *Additional Considerations.* We seek comment on additional methods by which we can provide further flexibility in the copper retirement process in conjunction with or separate from the proposals described above while still affording interconnecting entities and other impacted parties the notice they need. For instance, should the Commission consider an even shorter waiting period in certain circumstances, and if so, in what circumstances and how much shorter? How, if at all, should that affect the timing for filing the required certification? Are there any other measures we could take to make the copper retirement process less burdensome on carriers? Are there any other measures we could take to make the copper retirement process more helpful for consumers and other impacted parties? Are any technical changes to our rules necessary to accommodate reforming the copper retirement process? For example, should we revise Section 51.329(c)(1) to eliminate the titles specific to copper retirement notices, if there would no longer be a defined term?

2. Network Change Notifications Generally

66. Next, we seek comment on methods to reduce the burden of our network change notification processes generally. The Commission's network change notification process is the process by which incumbent LECs provide "reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks."⁹¹ Aside from the copper retirement notice expansions adopted by the *2015 Technology Transitions Order*, we last revisited our general Section 251(c)(5) rules in 2004. Do changes to the telecommunications marketplace since that time warrant changes to these rules, more generally, and if so, what changes? We seek comment on two specific changes below and invite commenters to identify other possible reforms to our network change notification processes.

67. *Section 51.325(c).* We specifically propose eliminating Section 51.325(c) of our rules, which prohibits incumbent LECs from disclosing any information about planned network changes to affiliated or unaffiliated entities prior to providing public notice.⁹² We seek comment on this proposal. This prohibition appears to unnecessarily constrain the free flow of useful information that such entities may find particularly helpful in planning their own business operations. We seek comment on this view. Alternatively, we could revise Section 51.325(c) of our rules to permit disclosures to affiliated and unaffiliated entities, but only to the extent that the information disclosed is what the incumbent LEC would include in its required public notice under Section 51.327. A third possibility would be to revise Section 51.325(c) to allow such disclosure, but only to the extent the carrier makes such information available to all entities that would be entitled to direct notice of the network change in question. We seek

⁹¹ 47 U.S.C. § 251(c)(5).

⁹² *Cf.* BT Americas, Inc. Reply, WC Docket No. 16-132, at 5 (Jan. 3, 2016); Windstream Services, LLC Reply, WC Docket No. 16-132, at 10-11 (Jan. 3, 2016).

comment on these proposals and any other alternative approaches. If we permit disclosure to affiliated or unaffiliated entities prior to public notice, should we specify any particular timeframe within which public notice must follow?

68. What are the potential advantages and disadvantages of eliminating or revising Section 51.325(c)?⁹³ When this rule was first adopted, the goal was to prevent “preferential disclosure to selected entities.”⁹⁴ Are these concerns still warranted? We anticipate that providing incumbent LECs greater flexibility to disclose information and discuss contemplated changes before cementing definitive plans would benefit these carriers, interconnecting carriers, and any other interested entities to which disclosure may be useful by providing all such entities greater time to consider or respond to possible network changes. We seek comment on this expectation. To the extent that concerns about some entities receiving advanced notice remain warranted, do any of the specific revisions proposed above obviate such concerns, and if not, what approach can we adopt to address such concerns while still introducing additional flexibility?

69. *Objection Procedures.* Should we revise or eliminate the procedures set forth in Section 51.333(c) of the Commission’s rules by which a telecommunications service provider or information service provider that directly interconnects with the incumbent LEC’s network may object to the timing of short-term network changes?⁹⁵ What costs, if any, has the uncertainty introduced by this procedure imposed? What public interest benefits are associated with this requirement? Have competitive LECs made use of this procedure? Should we adopt a “deemed denied” timeframe with respect to objections on which the Commission has not acted within some specified timeframe? Should we revise the objection procedure in any other way?

3. Section 68.110(b)

70. We seek comment on eliminating or modifying Section 68.110(b) of our rules, which requires that “[i]f . . . changes [to a wireline telecommunications provider’s communications facilities, equipment, operations or procedures] can be reasonably expected to render any customer’s terminal equipment incompatible with the communications facilities of the provider of wireline telecommunications, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance, the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service.”⁹⁶ We seek comment on the benefits and costs of the current rule and whether the benefits outweigh the costs. How is such notice under that rule provided today, and specifically, how would a carrier be able to know whether “any” terminal equipment would be affected? Do customers still rely on or benefit from the notice required by Section 68.110(b)? To what extent do individuals with disabilities still rely on TTYs or other specialized devices or services in an analog environment? To what extent have individuals with disabilities adopted alternative means of communications, whether using telecommunications relay services, texting, videophones, or other online communications? To what extent have such individuals relied on terminal-equipment-incompatibility notices in the past, and are alternative means available that would be more effective at targeting affected individuals with disabilities? We seek comment on the benefits and costs of the current rule and whether the benefits outweigh the costs. Alternatively, should the rule be retained but certain types of changes categorically exempted? The Commission’s current copper retirement rules require incumbent LECs to

⁹³ See Verizon Comments, WC Docket No. 16-132, at 11 (Dec. 5, 2016) (noting that “the Commission’s new copper retirement rules and notification structure would still provide a fulsome and timely notification in connection with a provider’s actual filing”).

⁹⁴ See *Second Local Competition Order*, 11 FCC Rcd at 19494, para. 221.

⁹⁵ 47 CFR § 51.333(c).

⁹⁶ 47 CFR § 68.110(b).

certify compliance with Section 68.110(b).⁹⁷ If we eliminate Section 68.110(b), we propose eliminating this certification requirement, and we seek comment on this proposal.

C. Streamlining the Section 214(a) Discontinuance Process

71. Among other things, Section 214(a) requires carriers to obtain authorization from the Commission before discontinuing, reducing, or impairing⁹⁸ service to a community or part of a community.⁹⁹ With respect to Section 214(a)'s discontinuance provision, generally, and the Commission's implementing rules¹⁰⁰ specifically, carriers have asserted "that exit approval requirements are among the very most intrusive forms of regulation."¹⁰¹ In this section, we seek comment on targeted measures to shorten timeframes and eliminate unnecessary process encumbrances that force carriers to maintain legacy services they seek to discontinue.

72. We believe that modifying our discontinuance processing for legacy systems to reduce burdens and protect customers will facilitate carriers' ability to retire legacy network infrastructure and will accelerate the transition to next generation IP-based networks.¹⁰² We seek comment on this view.

1. Applications That "Grandfather" Existing Customers

73. *Streamlining the Public Comment Period.* We propose to streamline the Section 214(a) discontinuance process for applications that seek authorization to "grandfather" low-speed legacy services for existing customers. "Grandfathering" a service in Section 214 parlance means that a carrier requests permission to stop accepting new customers for the service while maintaining service to existing customers.¹⁰³ We specifically propose to reduce the public comment period to a uniform 10 days for all

⁹⁷ 47 CFR § 51.332(d)(8).

⁹⁸ For convenience, in certain circumstances this item uses "discontinue" (or "discontinued" or "discontinuance," etc.) as shorthand that encompasses the statutory terms "discontinue, reduce, or impair" unless the context indicates otherwise.

⁹⁹ 47 U.S.C. § 214(a).

¹⁰⁰ 47 CFR § 63.71.

¹⁰¹ CenturyLink Comments, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593, at 6 (Feb. 5, 2015).

¹⁰² See, e.g., USTelecom Comments, WC Docket No. 16-132, at 13-14 (Dec. 5, 2016) (USTelecom Biennial Comments) (stating that the "successful deployment of broadband technologies will rely in great part on the replacement of TDM-based switches and copper wire with fiber- and IP-based networks and other facilities and technologies that are better suited to handle the feature-rich services that consumers demand"); Frontier Biennial Reply at 15-16 (entreaty the Commission to reform its section 214 discontinuance process when carriers seek authorization to upgrade their networks from copper to fiber, arguing that, by "removing the obligations and processes associated" with network upgrades, "the Commission has an opportunity to incentivize and speed next-generation deployments"); CenturyLink Biennial Comments at 19 & 20 (contending that the current Section 214 discontinuance rules create unnecessary burdens and dramatically slow the IP transition, and advocating that the Commission modify its "Section 214 process to expedite the IP transition").

¹⁰³ See, e.g., *Comments Invited on Applications of AT&T Services, Inc. on Behalf of Bellsouth Telecommunications, LLC D/B/A AT&T Southeast to Discontinue Certain Domestic Business Telecommunications Services in Trial Wire Centers*, WC Docket Nos. 15-274 et al., Public Notice, 30 FCC Rcd 13319, 13319, para. 1 (2015) (stating that AT&T's plans to grandfather three domestic business telecommunications services would entail "continued service to existing customers and the offer of only next generation wireless and wireline Internet Protocol (IP)-based alternatives for new orders"); see also AT&T Proposal for Wire Center Trials, GN Docket Nos. 13-5 & 12-353, at 10-11 (filed Feb. 27, 2014), <https://ecfsapi.fcc.gov/file/7521090526.pdf>; Sean Buckley, Verizon to grandfather TDM-based voice, data services in Northeast wiring centers, FierceTelecom (Sept. 27, 2016), <http://www.fiercetelecom.com/telecom/verizon-to-grandfather-more-tdm-based-voice-data-services-multiple-northeast-wiring-centers>.

applications seeking to grandfather legacy low-speed services regardless of whether the provider filing the application is a dominant or non-dominant carrier.¹⁰⁴ We seek comment on this proposal.

74. As a threshold matter, we seek comment on whether expediting the review and authorization of applications to grandfather low-speed services offers benefits to discontinuing carriers generally. Will grandfathering a particular service create greater regulatory parity for telecommunications carriers compared to other segments of the industry? What sort of costs does such a requirement impose on carriers and customers relative to the benefits it imparts? We believe that Section 214 provides us ample authority to implement the streamlining measures we propose. We seek comment on this belief.

75. More specifically, we seek comment on the streamlined 10-day comment period we have proposed. Will this comment period allow adequate time for interested parties to review and consider discontinuance applications from carriers and to file comments on these applications, if necessary? Is there a different time period we should consider, e.g., some temporal interval that is either shorter or longer than the 10-day comment period we have proposed? Should we reduce the time period for reviewing and granting applications to grandfather higher-speed services as well, and if so, how? While we have proposed to subject applications from both dominant and non-dominant carriers to a uniform 10-day comment period, we seek comment on whether there is reason to maintain disparate comment periods for dominant versus non-dominant carriers in this context?

76. *Streamlining the Auto-Grant Period.* We propose that all applications seeking to grandfather low-speed legacy services be automatically granted on the 25th day after public notice unless the Commission notifies the applicant that such a grant will not be automatically effective.¹⁰⁵ We seek comment on this proposal. Like our proposed uniform 10-day comment period for all applications to grandfather low-speed legacy services, we see no reason to maintain disparate auto-grant periods for such applications. Will this streamlined auto-grant period for carriers allow adequate time for the Commission and other parties to review their applications? Will the shorter auto-grant period incent providers to more rapidly resolve end-user concerns, if any?

77. Is there a different auto-grant period we should consider when reviewing applications to grandfather low-speed services, periods that are either shorter or longer than the 25-day interval we have proposed? Is there reason to maintain disparate auto-grant periods for dominant versus non-dominant carriers rather than subject both types of carriers to a uniform auto-grant period as we have proposed to do? Alternatively, what role should an objection from a potential customer or other interested party take in the application for grandfathering? Should such an objection result in an application being taken off of streamlined treatment?

78. In addition to potentially reducing the auto-grant period for applications seeking to grandfather low-speed services, we seek comment on whether to adopt an even more abbreviated auto-grant period for grandfathered discontinuance applications that receive no comments during the specified comment period. In conjunction with our efforts to expedite the automatic granting of these applications, we seek comment on whether we should establish a “shot-clock” applicable to the time period within which the Commission receives applications to grandfather low-speed legacy services and when the Commission releases the Public Notice seeking comment on such applications. Have carriers filing Section 214 discontinuance applications experienced seemingly unreasonable delay between the time the Commission receives their applications and when they are placed on Public Notice?

¹⁰⁴ See 47 CFR § 63.71(a)(5)(i) (non-dominant carriers); 47 CFR § 63.71(a)(5)(ii) (dominant carriers).

¹⁰⁵ Under our current rules, an application by a domestic, dominant carrier will be automatically granted on the 60th day after its filing unless the Commission notifies the applicant that the grant will not be automatically effective, whereas an application by a domestic, non-dominant carrier will be automatically granted on the 31st day after its filing unless the Commission notifies the applicant that the grant will not be automatically effective. See 47 CFR § 63.71(f).

79. *Eligibility of Grandfathered Services for Streamlined Processing.* We seek comment on the scope of services to which streamlined processing would apply. We propose, at a minimum, to apply any streamlined discontinuance process to grandfathered low-speed TDM services at lower-than-DS1 speeds (below 1.544 Mbps), as these are services that are rapidly being replaced with more advanced or higher-speed IP-based services. We seek comment on whether this is an appropriate speed threshold, or whether higher-speed grandfathered services—e.g., any legacy copper-based or other TDM services below 10 Mbps or 25 Mbps or even higher—should also qualify for this more streamlined processing. Should we limit our streamlined comment and auto-grant periods to a narrower set of circumstances than we propose? Should we adopt a separate sets of auto-grant periods for lower and higher speed services? Are there other service characteristics we should consider besides speed in deciding which applications may qualify for streamlined comment and auto-grant periods?

80. *Additional Steps.* Beyond condensing the comment and auto-grant periods, we seek comment on any additional steps we might take to further streamline the review and approval process for applications to grandfather low-speed services. We specifically seek comment on whether there are certain circumstances under which applications to grandfather low-speed legacy services could be granted once the application is accepted for filing without any period of public comment or under which we should dispense with requiring applications entirely. Does the Commission have authority under Section 214(b) to permit grants without any period of public comment or to determine that an application is not necessary? Would limited forbearance from the requirements of Section 214 be necessary to dispense with requiring an application or to grant certain applications without any period of public comment, and if so, are the criteria for forbearance met in this instance? Would pursuing either of these options harm existing or potential customers, and if so, do those harms outweigh the benefits of streamlining?

81. If the Commission grants certain applications to grandfather low-speed services without a period of public comment, what criteria should applications satisfy in order to qualify for such a grant? For example, there may be cases in which the carrier has not sold the service to any new customer for a particular period of time and only a limited number of existing customers continue to take the service, and we seek comment on whether there is a particular period of time and/or number of customers that warrants automatic grant without a comment period. Should such grants be contingent on a baseline showing, attestation, or affirmative statement in a carrier's application that there are reasonable alternatives to the service that is to be grandfathered? If so, what type of certification or showing should be required?

82. *Government Users.* Finally, we seek comment on how we should take into account the needs of federal, state, local, and Tribal government users of legacy services in deciding whether and how best to streamline the process for reviewing Section 214 applications that seek to grandfather low-speed services. The National Telecommunications and Information Administration (NTIA) has stated that federal government agencies face particular challenges as customers of telecommunications services and are different from many other customers given the budget and procurement challenges they face and “the mission-critical activities they perform for the public benefit.”¹⁰⁶ In its Petition, NTIA asserts that government agencies must make budgetary and technical plans far in advance to convert or adapt their networks, systems, and services to new infrastructure.¹⁰⁷ We agree with NTIA that transitions from the provision of old communications services to new “must not disrupt or hamper the performance of mission-critical activities, of which safety of life, emergency response, and national security are the most prominent examples.”¹⁰⁸ To the extent these proposed rules accelerate retirement of systems for national

¹⁰⁶ Petition for Reconsideration or Clarification of the National Telecommunications and Information Administration, GN Docket No. 13-5 et al., at 2 (filed Oct. 12, 2016) (NTIA Petition).

¹⁰⁷ *See id.* at 12.

¹⁰⁸ *See id.* at 3.

security emergency preparedness (NS/EP) communication,¹⁰⁹ we seek comment on the impact to these capabilities. In particular, what will be the impact to NS/EP priority services such as the Government Emergency Telecommunications Service (GETS) and the Telecommunications Service Priority (TSP) system? How will accelerating copper retirement impact these policy goals? Should Section 214 applications demonstrate how priority services will continue to be provisioned to government users? How will the transition from the provision of old services to new ones affect other national security interests?¹¹⁰ How should we take into account the needs of potential government and Tribal customers when considering whether and how to streamline the comment and/or auto-grant periods for applications to grandfather legacy services? Should applications affecting government end users be eligible for any streamlined process we adopt? If we adopt special requirements in relation to applications that may affect government or Tribal users, how can we identify such applications, given that grandfathering affects only non-customers of the service at issue?

83. NTIA suggests that the Commission must ensure that carriers provide information to federal agencies, including the direction and pace of any network changes, so that agencies are able to plan and fund the service, equipment, and systems upgrades needed to maintain critical operations without interruption.¹¹¹ NTIA asks that the Commission require carriers to state in their Section 214 discontinuance applications: (1) whether and to what extent they have discussed the proposed network or service change with affected federal customers; and (2) what actions they have taken or what plans, if any, they have made to ensure the continuity of mission-critical agency communications networks, systems, and services.¹¹²

84. We seek comment on this proposal both in general and in the context of our Section 214 proposals herein. How would such requirements benefit federal customers, and would such requirements benefit others in the communications ecosystem? How could we measure compliance with any such requirements? Would such requirements prove unduly burdensome on carriers relative to any potential benefit for government users? We seek comment on whether the service agreements or contracts into which carriers enter with government entities could sufficiently include provisions that address the types of concerns NTIA raises generally. With respect to grandfathering, would prong (1) of NTIA's proposed certification have any relevance since it is addressed to present customers, and how could carriers undertake the consultation described in prong (2)? Are there specific concerns applicable to Tribal, state, or local government customers? If so, would the NTIA proposal address them? If not, what additional or alternative steps would?

2. Applications to Discontinue Previously Grandfathered Legacy Data Services

85. We propose to streamline the discontinuance process for any application seeking authorization to discontinue legacy data services that have previously been grandfathered for a period of no less than 180 days. We propose to adopt a streamlined uniform comment period of 10 days and an

¹⁰⁹ Assignment of National Security and Emergency Preparedness Communications Functions, Exec. Order 13,618, 3 CFR § 273 (July 6, 2012), states the following as policy of the United States: "The Federal Government must have the ability to communicate at all times and under all circumstances to carry out its most critical and time sensitive missions. Survivable, resilient, enduring, and effective communications, both domestic and international, are essential to enable the executive branch to communicate within itself and with: the legislative and judicial branches; State, local, territorial, and tribal governments; private sector entities; and the public, allies, and other nations. Such communications must be possible under all circumstances to ensure national security, effectively manage emergencies, and improve national resilience. The views of all levels of government, the private and nonprofit sectors, and the public must inform the development of national security and emergency preparedness (NS/EP) communications policies, programs, and capabilities."

¹¹⁰ See 47 U.S.C. § 151.

¹¹¹ NTIA Petition at 12.

¹¹² *Id.* at 13-14.

auto-grant period of 31 days for both dominant and non-dominant carriers. We seek comment on these proposals and on other potential alternatives. We believe that Section 214 provides us ample authority to streamline the process for reviewing and granting applications to discontinue legacy data services that have previously been grandfathered for a period of at least 180 days. Do commenters agree with this conclusion? Why or why not?

86. Should this proposed streamlined process be restricted to only previously grandfathered legacy data services below a certain speed? Should dominant and non-dominant carriers continue to be subject to different comment and auto-grant timeframes for discontinuing legacy data services that have previously been grandfathered, as is currently the case? If so, what should these timeframes be? We encourage commenters to advance specific alternative proposals they believe would better address the Commission's objective to accelerate the deployment of next-generation networks by eliminating unnecessary delays in the discontinuance process. To that end, are there other steps we could take, beyond condensing the comment and auto-grant periods, which would help streamline the review and authorization of applications to discontinue legacy data services that have previously been grandfathered? Please explain.

87. We propose to require carriers seeking this streamlined discontinuance processing for legacy data services to make a showing that they received Commission authority to grandfather such services at least 180 days previously. Is the 180-day grandfathering requirement too restrictive? Should we consider a shorter grandfathering timeframe? Should we require any additional showings to qualify for this streamlined treatment? For example, should we require a statement identifying one or more alternative comparable data services available from the discontinuing provider or a third party provider at the same or higher speeds as the service being discontinued? If so, how should we define "comparable" service? Should we require that any such "comparable" service be available throughout the entire affected service area?

88. We also propose to require only a statement from the discontinuing carrier demonstrating that it received Commission authority to grandfather the services at issue at least 180 days previously. Is a statement sufficient, or should some other showing be required? If commenters believe we should require more than a statement, what type of showing should a carrier be obligated to make? If we adopt a requirement that carriers must demonstrate the availability of one or more alternative comparable data services from the discontinuing provider or a third party, would a statement identifying such alternative services be sufficient to satisfy this requirement? For carriers seeking to rely on a third-party service, what type of showing would be necessary to demonstrate the existence of alternative data services? Would such a statement suffice for this purpose?

89. Finally, we seek comment on whether special consideration should be given to applications seeking to discontinue previously grandfathered legacy data services to federal, state, local, and Tribal government users for the same reasons we address this question in considering streamlining grandfathered and legacy voice service discontinuance applications.¹¹³ Should providers be required to make some additional showing beyond what we have proposed when seeking to discontinue previously grandfathered legacy data services to government users? If so, with what additional conditions should they be required to comply and why?

3. Clarifying Treatment Under Section 214(a) of Carrier-Customers' End Users

90. We seek comment on reversing the Commission's 2015 "clarification" of Section 214(a) that substantially expanded the scope of end users that a carrier must consider in determining whether it is required to obtain Section 214 discontinuance authority.¹¹⁴ In the *2015 Technology Transitions Order*,

¹¹³ See NTIA Petition at 2-3, 12-14.

¹¹⁴ *2015 Technology Transitions Order*, 30 FCC Rcd at 9428, para. 102.

the Commission “provided guidance and clarification” that Section 214(a) of the Act applies not only to a carrier’s *own* retail customers, but also to the retail end-user customers of that carrier’s wholesale carrier-customers.¹¹⁵ We seek comment on our proposal to reverse the 2015 interpretation and, going forward, interpret Section 214(a) to require a carrier to take into account only its own retail end users when evaluating whether the carrier will “discontinue, reduce, or impair service to a community, or part of a community.”¹¹⁶

91. We seek comment on the practical effect of the 2015 interpretation. What benefits flow to the retail end-user customers of the carrier’s wholesale carrier customers as a result of that interpretation? Does it make sense to take away those benefits? Does it make sense to maintain a regulatory obligation that requires a carrier, most often an incumbent LEC, to obtain information about third parties, i.e., its carrier-customer’s retail end users, with whom it generally has no relationship, before it can execute its own business plans to discontinue its service?¹¹⁷ What can the upstream carrier be expected to know about who the end-user customers of its carrier-customers are and how the discontinuance will affect them? Does the current application of the requirement impose undue compliance costs and burdens on a discontinuing carrier that harm the public by delaying the transition to newer, more technologically advanced services? Or, are those costs reasonable in light of the potential harm to end-user customers? Have there been other effects on the market for legacy services and on the transition to IP services that we should consider?

92. We also seek comment on how carrier-customers’ discontinuance obligations should inform our interpretation. What weight should we give to the fact that a carrier-customer is itself obligated to file a discontinuance application under Section 214(a) and Section 63.71 of the Commission’s rules¹¹⁸ if it discontinues, reduces, or impairs service as a result of the loss of a wholesale input from an upstream carrier? Can we find that the objectives of Section 214(a) are met because the carrier-customer itself is subject to Section 214(a)’s requirement to obtain Commission approval if a change in the inputs relied on by the carrier-customer results in a discontinuance, reduction, or impairment of services to the carrier-customer’s retail end users?¹¹⁹ Or, are there situations in which end-user customers would be inadequately protected by such an interpretation? Do the contractual and business relationships between upstream carriers and their carrier-customers provide additional safeguards to retail end users?

93. We also seek comment on the relationship between Section 214(a) and Section 251(c)(5) of the Act. When Section 214(a) was enacted during World War II, “one of Congress’s main concerns was that [domestic telegraph] mergers might result in a loss or impairment of service during this war time period.”¹²⁰ By contrast, 53 years later, Congress revised the Act “to promote competition and reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies.”¹²¹ Congress enacted Section 251(c)(5) of the Act to require incumbent LECs to “provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier’s facilities or networks, as well as of any other changes that would affect the

¹¹⁵ *Id.*

¹¹⁶ 47 U.S.C. § 214(a).

¹¹⁷ *2015 Technology Transitions Order*, 30 FCC Rcd at 9438, para. 121.

¹¹⁸ 47 CFR § 63.71.

¹¹⁹ *2015 Technology Transitions Order*, 30 FCC Rcd at 9438, para. 120 n.421 (“[C]arrier-customers that discontinue, reduce, or impair service to retail end users as a result of the elimination of a wholesale input must also comply with section 214(a) of the Act and the Commission’s implementing rules.”).

¹²⁰ *Western Union Telegraph Company Petition for Order to Require the Bell System to Continue to Provide Group/Supergroup Facilities*, Memorandum Opinion and Order, 74 FCC 2d 293, 295 n.4 (1979) (*Western Union*).

¹²¹ See Title, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

interoperability of those facilities and networks.”¹²² The Commission’s regulations implementing Section 251(c)(5), require, among other things, that an incumbent LEC “must provide public notice regarding any network change that [w]ill affect a competing service provider’s performance or ability to provide service.”¹²³ In enacting Section 251(c)(5), did Congress signal its intent that incumbent LECs need only provide notice, not obtain approval, when making changes to wholesale inputs relied upon by competing carriers? At the time of the 1996 Act, the Commission interpreted its Section 214(a) discontinuance authority not to apply to wholesale customers.¹²⁴ Did that interpretation have any bearing on Congress’s intent when enacting Section 251(c)(5)? How should we reconcile the Congressional mandates in Section 214(a) and Section 251(c)(5) to best eliminate regulatory barriers to the deployment of next-generation networks and services, avoid unnecessary capital expenditure on legacy services, and protect consumers and the public interest? Alternatively, was the Commission’s statutory interpretation in the *2015 Technology Transitions Order* correct? Are there other interpretations of the interaction between these two provisions that would be more consistent with Congressional intent? If so, what are they?

94. Finally, we seek comment on whether the Commission correctly interpreted the precedent upon which it relied to support its expansive 2015 clarification. Prior to the *2015 Technology Transitions Order*, it appears that the Commission had held that discontinuances to wholesale purchasers were not cognizable under Section 214(a).¹²⁵ The *2015 Technology Transitions Order* acknowledges that distinction, stating in a footnote that “[t]he Commission will . . . continue to distinguish discontinuance of service that will affect service to retail customers from discontinuances that affect only the carrier-customer itself.”¹²⁶ Relying on *BellSouth Telephone*,¹²⁷ however, the Commission adopted the view that upstream carriers have responsibility for carrier-customers’ end-user customers under Section 214(a). Did the Commission correctly interpret *BellSouth Telephone*, particularly in light of the facts of that case?¹²⁸ Did the Commission incorrectly read *BellSouth Telephone* to protect the business models of certain downstream retail carriers, regardless of the availability of the same or comparable alternatives in the community? All of the other cases cited in the *2015 Technology Transitions Order* found that Section 214(a) did not apply.¹²⁹ Accordingly, did the Commission properly interpret and rely on those cases? Considering that all but one of the cases predated the adoption of the 1996 Act and its specific protections for wholesale customers, including Section 251(c)(5), what continuing probative value do the cases have?

¹²² 47 U.S.C. § 251(c)(5).

¹²³ 47 CFR § 51.325(a).

¹²⁴ See *Lincoln County Tel. Sys., Inc. v. Mountain States Tel. and Tel. Co.*, File No. TS-39, Memorandum Opinion and Order, 81 FCC 2d 328, 332 (1980) (“[F]or Section 214(a) purposes, we must distinguish those situations in which changes in a carrier’s reconfiguration of plant will result in an actual discontinuance, reduction or impairment to the latter carriers’ customers as opposed to a discontinuance, reduction or impairment of interconnection to only the carrier itself.”) (*Lincoln County*); *Western Union*, 74 FCC 2d at 296 (“[W]e believe that there are some important differences between [a carrier-to-carrier] relationship and the more usual type involving a carrier and its non-carrier customer. In determining the need for prior authority to discontinue, reduce or impair service under Section 214(a), the primary focus should be on the end service provided by a carrier to a community or part of a community, *i.e.*, the using public.”).

¹²⁵ See *Graphnet, Inc. v. AT&T Corp.*, File No. E-94-41, Memorandum Opinion and Order, 17 FCC Rcd 1131, 1140 (2002) (“[I]n situations where one carrier attempts to invoke Section 214(a) against another carrier, concern should be had for the ultimate impact on the community served rather than on any technical or financial impact on the carrier itself.”) (*Graphnet*); *Lincoln County*, 81 FCC 2d at 332; *Western Union*, 74 FCC 2d at 296.

¹²⁶ *2015 Technology Transitions Order*, 30 FCC Rcd at 9434, para. 114 n.407.

¹²⁷ *BellSouth Telephone Companies Revisions to Tariff FCC No. 4*, Transmittal No. 435, Memorandum Opinion and Order, 7 FCC Rcd 6322 (1992) (*BellSouth Telephone*).

¹²⁸ *Id.* at 6322-23.

¹²⁹ *Graphnet*, 17 FCC Rcd at 1140-41; *Lincoln County*, 81 FCC 2d at 335; *Western Union*, 74 FCC 2d at 296-98.

Indeed, the only Commission precedent cited in the *2015 Technology Transitions Order* that postdated the 1996 Act did not explicitly consider the applicability of Section 251(c)(5).¹³⁰ Did the Commission grant to carrier-customers in 2015 rights beyond Congress's intent in the 1996 Act in an attempt to protect carrier-customers' end users, even though those end users have the benefit of the Section 214(a) discontinuance process from their own provider? What is the proper interplay between Section 251 and Section 214 in this context?

4. Other Part 63 Proposals

95. *Further Streamlining of 214(a) Discontinuances.* In addition to the proposals discussed above, we seek comment on methods to streamline Section 214(a) applications more generally. Specifically, we seek comment on whether it would be appropriate for the Commission to conclude that Section 214(a) discontinuances will not adversely affect the present or future public convenience and necessity, provided that fiber, IP-based, or wireless services are available to the affected community. What type of showing would be required on the part of discontinuing carriers to demonstrate the existence of alternative services? What types of fiber, IP-based, or wireless services would constitute acceptable alternatives, and under what circumstances? Would a demonstration regarding the availability of third-party services satisfy this kind of test, or would only services offered by the discontinuing carrier suffice?

96. We also seek comment on the best approach for granting streamlined treatment to these types of discontinuances. In circumstances where a discontinuing carrier's service overlaps with an alternative fiber, IP-based, or wireless service, should we require a Section 214 discontinuance application? If not, should we either grant limited blanket discontinuance authority or forbear on a limited basis from Section 214? If we require an application, would a grant of the Section 214 application upon acceptance for filing be appropriate or would allowing for public notice and comment be necessary to satisfy the requirements of Section 214(a)? If we maintain a comment period, should we reduce the comment and automatic grant timeframe? As another alternative, should we instead require carriers to file only a notice of discontinuance accompanied by proof that fiber, IP-based, or wireless alternatives are available to the affected community, in lieu of a full application for approval? If so, what proof would suffice, and how should the Commission review that filing?

97. *Section 63.71(g) Applications to Discontinue Service With No Customers.* We specifically propose to maintain but modify the provision adopted in the *2016 Technology Transitions Order* for streamlined treatment of Section 214 discontinuance applications for all services that have not had customers for a period of six months prior to submission of the application.¹³¹ Under this rule, which was based on a proposal submitted to the Commission by AT&T, carriers may certify to the Commission that the service to be discontinued is "a service for which the requesting carrier has had no customers or reasonable requests for service during the 180-day period immediately preceding submission of the application," and the application will be granted automatically on the 31st day after filing, unless the Commission has notified the applicant that the grant will not be automatically effective.¹³² We note that at least one carrier representative has recently endorsed this provision of the rules adopted in the *2016 Technology Transitions Order* as an effective tool for reducing barriers to next generation infrastructure deployment.¹³³ We propose to shorten the timeframe during which a carrier must demonstrate that it has had no customers for a given service, from 180 days to 60 days, and seek comment on this modification. Because this proposed rule applies only to services without customers, consumer harm from further

¹³⁰ See *Graphnet*, 17 FCC Rcd at 1140-41.

¹³¹ 47 CFR § 63.71(g).

¹³² *Id.*; see also *2016 Technology Transitions Order*, 31 FCC Rcd at 8309, para. 77; Letter from David L. Talbott, Assistant Vice President, Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, Attach. 1 at 1 (filed May 31, 2016).

¹³³ See USTelecom Biennial Comments at 14 n.34.

streamlining these kinds of discontinuance applications appears unlikely. We seek comment on retaining and modifying Section 63.71(g) as proposed, and on any other additions or amendments to the rule, such as shortening the time in which the application is automatically granted, that may further our goal of removing regulatory barriers to broadband investment. Would a different timeframe during which a carrier must demonstrate that it has had no customers be more appropriate to balance the interests of discontinuing carriers and potential consumers of these services?

98. *Section 63.71(i) Auto-grants for Competitive LECs Upon Copper Retirement.* We seek comment on revising Section 63.71(i), which was adopted in the *2016 Technology Transitions Order* to provide for automatic discontinuance authority, subject to certain conditions, for competitive LECs that must discontinue service on a date certain due to an incumbent LEC's effective copper retirement.¹³⁴ Specifically, to the extent we eliminate Section 51.332,¹³⁵ we seek comment on revising Section 63.71(i) to include as a condition that the relevant network change notice provides no more than six months' notice. We also seek comment on how, if at all, we should modify Section 63.71(i) to further harmonize it with any revisions we adopt herein to the incumbent LEC copper retirement process under Part 51 of our rules. We seek to ensure our rules take into account situations, where, through no fault of its own, a competitive LEC is unable to comply with our Section 214(a) discontinuance requirements as a result of an incumbent LEC's transition to a next-generation network. To the extent we reduce the waiting period for implementing planned copper retirements, would this eliminate the need for or necessitate any changes to Section 63.71(i)?

99. *2016 Technology Transitions Order Revisions to Sections 63.71(a)-(b).* We seek comment on whether we should retain, modify, or eliminate the changes made by the *2016 Technology Transitions Order* to Section 63.71(a) and the introduction of new Section 63.71(b). The *2016 Technology Transitions Order* modified Section 63.71(a) by requiring carriers to provide notice of discontinuance applications to any federally-recognized Tribal Nations with authority over the Tribal lands in which the discontinuance, reduction, or impairment of service is proposed.¹³⁶ It also modified Section 63.71(a) to clearly permit carriers to provide e-mail notice to customers of discontinuance applications, and it established requirements in Section 63.71(b) that carriers must meet when using e-mail to satisfy the written notice requirements.

III. NOTICE OF INQUIRY

A. Prohibiting State and Local Laws Inhibiting Broadband Deployment

100. We seek comment on whether we should enact rules, consistent with our authority under Section 253 of the Act, to promote the deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment. Section 253(a), which generally provides that no state and local legal requirements "may prohibit or have the effect of prohibiting" the provisioning of interstate or intrastate telecommunications services,¹³⁷ provides the Commission with "a rule of preemption" that "articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers."¹³⁸ Section 253(b), provides exceptions for state and local legal requirements that are competitively neutral, consistent with Section 254 of the Act, and necessary to preserve and advance universal service.¹³⁹ Section 253(c) provides another exception described by the

¹³⁴ See 47 CFR § 63.71(i); see also *2016 Technology Transitions Order*, 31 FCC Rcd at 8358, para. 202.

¹³⁵ 47 CFR § 51.332.

¹³⁶ See 47 CFR § 63.71(a); *2016 Technology Transitions Order*, 31 FCC Rcd at 8353-54, paras. 189-91.

¹³⁷ 47 U.S.C. § 253(a).

¹³⁸ *Level 3 Comm'ns L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 531-32 (8th Cir 2007) (*Level 3*).

¹³⁹ 47 U.S.C. § 253(b); see also *Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, File No. CWD 98-90, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16231-32, para. 9 (2000).

Eighth Circuit as a “safe harbor functioning as an affirmative defense” which “limits the ability of state and local governments to regulate their rights-of-way or charge ‘fair and reasonable compensation.’”¹⁴⁰ Under Section 253(d), Congress directed the FCC to preempt the enforcement of any legal requirement which violates 253(a) or 253(b) “after notice and an opportunity for public comment.”¹⁴¹

101. While we recognize that not all state and local regulation poses a barrier to broadband development, we seek comment below on a number of specific areas where we could utilize our authority under Section 253 to enact rules to prevent states and localities from enforcing laws that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹⁴² In our preliminary view, restrictions on broadband deployment may effectively prohibit the provision of telecommunications service, and we seek comment on this view. What telecommunications services are effectively prohibited by restrictions on broadband deployment? In each case described below, we seek comment on whether the laws in question are inconsistent with Section 253(a)’s prohibition on local laws that inhibit provision of telecommunications service.¹⁴³

102. *Deployment Moratoria.* First, we seek comment on adopting rules prohibiting state or local moratoria on market entry or the deployment of telecommunications facilities. We also seek comment on the types of conduct such rules should prevent. We invite commenters to identify examples of moratoria that states and localities have adopted. How do state and local moratoria interfere with facilities deployment or service provision? What types of delays result from local moratoria (e.g., application processing, construction)? How do moratoria affect the cost of deployment and providing service, and is this cost passed down to the consumer? Are there any types of moratoria that help advance the goals of the Act? If we adopt the proposal to prohibit moratoria, should we provide an exception for certain moratoria, such as those that are limited to exigent circumstances or that have certain sharply restricted time limits? If so, what time limits should be permissible?

103. *Rights-of-Way Negotiation and Approval Process Delays.* Second, we seek comment on adopting rules to eliminate excessive delays in negotiations and approvals for rights-of-way agreements and permitting for telecommunications services. We invite commenters to identify examples of excessive delays. How can the Commission streamline the negotiation and approval process? For instance, should the Commission adopt a mandatory negotiation and/or approval time period, and if so, what would be an appropriate amount of time for negotiations? For purposes of evaluating the timeliness of negotiations, when should the Commission consider the negotiations as having started and having stopped? For example, the Commission adopted rules placing time limits on applicants for cable franchises.¹⁴⁴ We seek comment on similar rules for telecommunications rights-of-way applicants. How have slow negotiation or approval processes inhibited the provision of telecommunications service? Are there any examples of delays that jeopardized investors or deployment in general? How can local governments expedite rights-of-way negotiations and approvals? Are there any examples of successful expedited processes? How should regulations placing time limits on negotiations address or recognize delays in processing applications or negotiations that result from local moratoria? For example, in 2014, the Commission clarified that the shot clock timeframe for wireless siting applications runs regardless of any moratorium.¹⁴⁵ Are stalled negotiations and approvals ever justified, and if so how could new rules take

¹⁴⁰ 47 U.S.C. § 253(c); *Level 3*, 477 F.3d at 532.

¹⁴¹ 47 U.S.C. § 253(d).

¹⁴² 47 U.S.C. § 253(a), (d).

¹⁴³ Berin Szoka, Matthew Starr, and Jon Henke, “Don’t Blame Big Cable. It’s Local Governments that Choke Broadband Competition,” *Wired* (July 16, 2013), <https://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/>.

¹⁴⁴ 47 CFR § 76.41(d)-(g).

¹⁴⁵ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies et al.*, WT Docket Nos. 13-238, 11-59, and 13-32, Report and Order, 29 FCC Rcd 12865, 12971, para. 265 (2014).

these situations into account?

104. *Excessive Fees and Other Excessive Costs.* Third, we seek comment on adopting rules prohibiting excessive fees and other costs that may have the effect of prohibiting the provision of telecommunications service. We invite commenters to identify examples of fees adopted by states and localities that commenters consider excessive. For example, we note that many states and localities charge rights-of-way fees. Our preliminary view is that Section 253 applies to fees other than cable franchise fees as defined by Section 622(g) of the Act and we seek comment on this view.¹⁴⁶ By “rights-of-way fees,” we refer to those fees including, but not limited to, fees that states or local authorities impose for access to rights-of-way, permitting, construction, licensure, providing a telecommunications service, or any other fees that relate to the provision of telecommunications service. We recognize Section 622 of the Act governs the administration of cable franchise fees,¹⁴⁷ and that Section 622(i) limits the Commission’s authority to “regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees,” except as otherwise permitted elsewhere in Section 622.¹⁴⁸ Our preliminary view is that Section 622(i) would prevent the Commission from enacting rules pursuant to Section 253 to address “excessive” cable franchise fees, but that such franchise fees could be taken into account when determining whether other types of fees are excessive. We seek comment on this view. Also, we seek comment on whether there are different types of state or local fees, authorized under the provisions of the Act other than 622, for which application of Section 253 would not be appropriate.

105. We recognize that states and localities have many legitimate reasons for adopting fees, and thus our focus is directed only on truly excessive fees that have the effect of cutting off competition. We seek comment on how the Commission should define what constitutes “excessive” fees. For example, should rights-of-way fees be capped at a certain percentage of a provider’s gross revenues in the permitted area? If so, at what percentage? For example, Section 622 of the Act provides that for any twelve-month period, the franchise fees paid by a cable operator with respect to a cable system shall not exceed five percent of the cable operator’s gross revenues derived from a cable service.¹⁴⁹ When a provider seeks to offer additional services using the rights-of-way under an existing franchise or authorization, are there circumstances in which it may be excessive to require the provider to pay additional fees in connection with the introduction of additional services? More broadly, are fees tied to a provider’s gross revenues “fair and reasonable” if divorced from the costs to the state or locality of allowing access? If we look at costs in assessing fees, should we focus on the incremental costs of each new attacher? Should attachers be required to contribute to joint and common costs? And if so, should we look holistically at whether a state or locality recovers more than the total cost of providing access to the right of way from all attaching entities? We seek comment on evaluating other fees in a similar manner. Are states and localities imposing fees that are not “fair and reasonable” for access to local rights-of-way?¹⁵⁰ How do these fees compare to construction costs? Should fees be capped to only cover

¹⁴⁶ 47 U.S.C. § 542(g).

¹⁴⁷ See 47 U.S.C. § 542; see also *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5144-5151, paras. 94-109 (2007) (*Cable Services Order*); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Second Report and Order, 22 FCC Rcd 19633, 19637-8, paras. 10-11 (2007); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Order on Reconsideration, 30 FCC Rcd 810, 814-816, paras. 11-13 (2015).

¹⁴⁸ See 47 U.S.C. § 542(i).

¹⁴⁹ 47 U.S.C. § 542(b).

¹⁵⁰ 47 U.S.C. § 253(c).

costs incurred by the locality to maintain and manage the rights-of-way? Should we require that application fees not exceed the costs reasonably associated with the administrative costs to review and process an application? Should any increase in fees be capped or controlled? For example, should fees increases be capped at ten percent a year? What types of fees should we consider within the scope of any rule we adopt? How do excessive fees impact consumers?

106. *Unreasonable Conditions.* Fourth, we seek comment on adopting rules prohibiting unreasonable conditions or requirements in the context of granting access to rights-of-way, permitting, construction, or licensure related to the provision of telecommunications services. For example, we seek comment on rights-of-way conditions that inhibit the deployment of broadband by forcing broadband providers to expend resources on costs not related to rights-of-way management. Do these conditions make the playing field uneven for smaller broadband providers and potential new entrants? If the Commission were to adopt such rules, how should the Commission define what constitutes an “unreasonable” rights-of-way condition? We seek comment from both providers and local governments on conditions that they consider are reasonable and unreasonable. Should the Commission place limitations on requirements that compel the telecommunications service provider to furnish service or products to the right-of-way or franchise authority for free or at a discount such as building out service where it is not demanded by consumers, donating equipment, or delivering free broadband to government buildings? Should non-network related costs be factored into any kind of a fee cap? For instance, the Commission determined that non-incident franchise-related costs and in-kind payments unrelated to the provision of cable service required by local franchise authorities for cable franchises count toward the five percent cable franchise fee cap.¹⁵¹ We seek comment on whether the Commission should adopt similar rules for telecommunication rights-of-way agreements.

107. *Bad Faith Negotiation Conduct.* Fifth, we seek comment on whether the Commission should adopt rules banning bad faith conduct in the context of deployment, rights-of-way, permitting, construction, or licensure negotiations and processes. We seek comment on what types of bad faith conduct such rules should prohibit and examples of such conduct. Should the Commission ban bad faith conduct generally, specific forms of bad faith conduct, or both? Should the Commission establish specific objective criteria that define the meaning of “bad faith” insofar as the Commission prohibits “bad faith” conduct generally? If so, we seek comment on proposed criteria. What types of negotiation conduct have directly affected the provision of telecommunications service? Would a streamlined process for responding to bad faith complaints help negate such behavior? What would that process look like?

108. *Other Prohibitive State and Local Laws.* Finally, we seek comment regarding any other instances where the Commission could adopt rules to preempt state or local legal requirements or practices that prohibit the provision of telecommunications service. For instance, should the Commission adopt rules regarding the transparency of local and state application processes? Could the Commission use its authority under Section 253 to regulate access to municipally-owned poles when the actions of the municipality are deemed to be prohibiting or effectively prohibiting the provisions of telecommunications service? If so, could the Commission use its Section 253 authority in states that regulate pole attachment under Section 224(c)?¹⁵² Are there any other local ordinances that erect barriers to the provision of telecommunications service especially as applied to new entrants? Are there any other specific rights-of-way management practices that frustrate, delay or inhibit the provision of telecommunications service? The Commission has described Section 253(a) as preempting conduct by a locality that materially inhibits or limits the ability of a provider “to compete in a fair and balanced legal and regulatory environment.”¹⁵³

¹⁵¹ *Cable Services Order*, 22 FCC Rcd at 5147-49, paras. 99-105.

¹⁵² 47 U.S.C. § 224(c).

¹⁵³ *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCB Pol. 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14209, para. 38 (1997) (*California Payphone*); see also *TCG N.Y., Inc., v.*

(continued...)

Is this the legal standard that should apply here? We seek comment on identifying particular practices, regulations and requirements that would be deemed to violate Section 253 in order to provide localities and industry with greater predictability and certainty.

109. *Authority to Adopt Rules.* The Commission has historically used its Section 253 authority to respond to preemption petitions that involve competition issues and relationships among the federal, state and local levels of government.¹⁵⁴ We seek comment on our authority under Section 253 to adopt rules that prospectively prohibit the enforcement of local laws that would otherwise prevent or hinder the provision of telecommunications service. Our view is that under Section 201(b)¹⁵⁵ and Section 253, the Commission has the authority to engage in a rulemaking to adopt rules that further define when a state or local legal requirement or practice constitutes an effective barrier to the provision of telecommunications service under Section 253(a).¹⁵⁶ We seek comment on this approach. We also recognize that state and local governments have authority, pursuant to Sections 253(b) and (c) to, among other things, regulate telecommunications services to protect the public safety and welfare, provide universal service, and to manage public rights-of-way on a non-discriminatory basis. How can we ensure that any rules we adopt comport with Sections 253(b) and (c)? Should we adopt the text of Sections 253(b) and (c), to the extent relevant, as explicit carve-outs from any rules that we adopt? Could we include the substance of Sections 253(b) and (c) in rules without an explicit, verbatim carve-out? Would enacting rules conflict with Section 253(b) or (c)?

110. Would adopting rules to interpret or implement Section 253(a) be consistent with Section 253(d), which directs the Commission to preempt the enforcement of particular State or local statutes, regulations, or legal requirements “to the extent necessary to correct such violation or inconsistency”?¹⁵⁷ Subsection (d) directs the Commission to preempt such particular requirements “after notice and an opportunity for public comment.” Does this preclude the adoption of general rules? Would notice, comment, and adjudicatory action in a Commission proceeding to take enforcement action following a rule violation satisfy these procedural specifications? Can we read Section 253(d) as setting forth a non-

(Continued from previous page)

_____ *City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (agreeing with the precedent set forth in *California Payphone*); *Illinois Bell Tel. Co. v. Vill. of Itasca*, 503 F. Supp. 2d 928, 940 (N.D. Ill. 2007) (citing *California Payphone* for the proposition that “the FCC considers ‘whether the Ordinance materially inhibits or limits the ability of any competition or potential competitor to compete in a fair and balanced legal and regulatory environment’” in order to show a violation of Section 253(a)) (citations omitted).

¹⁵⁴ See *Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act*, FCC 98-295, Public Notice, 13 FCC Rcd 22970 (1998) (stating that to date the Commission received over 25 petitions seeking preemption under Section 253 and that the petitions primarily involved issues regarding competition and the relationship between different federal, local and state levels of government); see also *Amigo.Net for Declaratory Ruling Regarding the Effect of Sections 253 and 257 of the Telecommunications Act of 1996 on an Agreement for Multi-Use Network: Infrastructure Development, Statewide Telecommunications Service Aggregation, and Network Management*, CC Docket No. 00-220, Memorandum Opinion and Order, 17 FCC Rcd 10964 (WCB 2002) (finding no Section 253 issue in response to petition involving contract between the State of Colorado and US West for the provision of advanced telecommunications services); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, CCB Pol. 97-1, Memorandum Opinion and Order, 12 FCC Rcd 15639 (1997) (granting Section 253 preemption petition regarding a Wyoming commission order to deny a local exchange service).

¹⁵⁵ 47 U.S.C. § 201(b) (“The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”); see also *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 380 (1999) (“Section 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.”).

¹⁵⁶ 47 U.S.C. § 253(a); *Acceleration of Broadband Deployment: Expanding the Reach and Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, Notice of Inquiry, 26 FCC Rcd 5384, 5400, para. 57 (2011).

¹⁵⁷ 47 U.S.C. § 253(d) (emphasis added).

mandatory procedural vehicle that is not implicated when adopting rules pursuant to Sections 253(a)-(c)? If the Commission were to adopt rules pursuant to Section 253, we seek comment on whether Section 622 of the Act limits the Commission's authority to enact rules with respect to non-cable franchise fee rights-of-way practices that might apply to cable operators in their capacities as telecommunications providers.¹⁵⁸

111. *Collaboration With States and Localities.* We also seek comment on actions the Commission can take to work with states and localities to remove the barriers to broadband deployment. The Commission's newly formed Broadband Deployment Advisory Committee (BDAC) includes members from states and localities, and it has been charged with working to develop model codes for municipalities and states.¹⁵⁹ The BDAC will also consider additional steps that can be taken to remove state and local regulatory barriers.¹⁶⁰ Are there additional actions outside of the BDAC that the Commission can take to work with states and localities to promote adoption of policies that encourage deployment?

112. We recognize that states and localities play a vital role in deployment and addressing the needs of their residents. How can we best account for states' and localities' important roles? Are collaborative efforts such as the development of recommendations through the BDAC sufficient to address the issues described above? What are the benefits and burdens of such an approach? To what extent should we rely on collaborative processes to remove barriers to broadband deployment before resorting to preemption?

B. Preemption of State Laws Governing Copper Retirement

113. We seek comment on whether there are state laws governing the maintenance or retirement of copper facilities that serve as a barrier to deploying next-generation technologies and services that the Commission might seek to preempt. For example, certain states require utilities or specific carriers to maintain adequate equipment and facilities.¹⁶¹ Other states empower public utilities commissions, either acting on their own authority or in response to a complaint, to require utilities or specific carriers to maintain, repair, or improve facilities or equipment or to have in place a written preventative maintenance program.¹⁶² First, we seek comment on the impact of state legacy service quality and copper facilities maintenance regulations. Next, we seek comment on the impact of state laws restricting the retirement of copper facilities. In each case, how common are these regulations, and in how many states do they exist? How burdensome are such regulations, and what benefits do they provide? Are incumbent LECs or other carriers less likely to deploy fiber in states that continue to impose service quality and facilities maintenance requirements than in those states that have chosen to deregulate?

114. We seek comment on whether Section 253 of the Act provides the Commission with authority to preempt state laws and regulations governing service quality, facilities maintenance, or copper retirement that are impeding fiber deployment.¹⁶³ Do any such laws "have the effect of prohibiting

¹⁵⁸ 47 U.S.C. § 542.

¹⁵⁹ *FCC Announces the Membership and First Meeting of the Broadband Deployment Advisory Committee*, GN Docket No. 17-83, Public Notice, DA 17-328 (Apr. 6, 2017).

¹⁶⁰ *Id.*

¹⁶¹ *See, e.g.*, Ark. Code Ann. § 23-3-113; Cal. Pub. Utils. Code § 451; Colo. Rev. Stat. Ann. § 40-3-101(2); Idaho Code § 40-3-101; Ill. Compiled Stat. Ann. § 5/8-101; Ind. Code Ann. § 8-1-2-4; N.D. Century Code Ann. § 49-04-01; N.J. Stat. Ann. § 48:2-23; 66 Pa. Cons. Stat. Ann. § 1501; 27 L.P.R. Ann. § 1201; Utah Code Ann. 1953 § 54-3-1.

¹⁶² *See, e.g.*, Ark. Admin. Code § 126.03.9-8.01; Ky. Admin. Regs. 5:061 § 23; Miss. Admin. Code § 39-1-2:4; N.C. Gen. Stat. Ann. § 62-42; 807.

¹⁶³ 47 U.S.C. § 253.

the ability of [those incumbent LECs] to provide any interstate or intrastate telecommunications service?”¹⁶⁴ Are such laws either not “competitively neutral” or not “necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers,” such that state authority is not preserved from preemption under Section 253(b)?¹⁶⁵ Commenters arguing in favor of preemption should identify specific state laws they believe to be at issue. Would preemption allow the Commission to develop a uniform nationwide copper retirement policy for facilitating deployment of next-generation technologies? Are there other sources of authority for Commission preemption of the state laws being discussed that we should consider using?

IV. REQUEST FOR COMMENT

A. The “Functional Test” Standard

115. In November 2014, the Commission adopted a *sua sponte* Declaratory Ruling determining that when analyzing whether network changes contemplated by a carrier constitute a discontinuance, reduction, or impairment of service for purposes of determining whether Section 214(a) discontinuance authority is required, the Commission applies a “functional test.”¹⁶⁶ We seek comment on whether we should revisit, and ultimately the proper scope of, the Commission’s 2014 Declaratory Ruling and subsequent 2015 Order on Reconsideration expanding what constitutes a “service” for purposes of Section 214(a) discontinuance review.¹⁶⁷ Specifically, we seek comment on “the functional test,” an interpretation of Section 214(a) that obligates the Commission to look beyond the terms of a carrier’s tariff and instead consider the totality of the circumstances from the perspective of the relevant community when analyzing whether a service is discontinued, reduced, or impaired under Section 214.¹⁶⁸

116. We seek comment on whether a carrier’s description in its tariff—or customer service agreement in the absence of a tariff—should be dispositive as to what comprises the “service” within the meaning of the Section 214(a) discontinuance requirement, and we seek comment on this proposal. We anticipate that our proposed approach will allow all parties to determine clearly when a discontinuance occurs based on objective criteria, and we seek comment on this proposed conclusion. How would this interpretation impact investment in next-generation services and consumers? How would this interpretation impact the consumers and communities whose service is being discontinued?

117. Does what the carrier describes and holds itself out as offering determine the scope of the service offering in question? Is this interpretation consistent with principles of contract and the filed rate

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See *Technology Transitions et al.*, GN Docket No. 13-5 et al., Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 15015-16, para. 115 (2014) (*2014 Technology Transitions NPRM and Declaratory Ruling*).

¹⁶⁷ See *2014 Technology Transitions NPRM and Declaratory Ruling*, 29 FCC Rcd at 15015-18, paras. 114-19; *2015 Technology Transitions Order*, 30 FCC Rcd at 9471-78, paras. 181-201; see also 47 CFR § 1.2. We distinguish this proposal and the proposal below as a “Request for Comment” because they would be adjudicatory in nature, unlike the proposals in the *Notice of Proposed Rulemaking*.

¹⁶⁸ See *2014 Technology Transitions NPRM and Declaratory Ruling*, 29 FCC Rcd at 15018, para. 117. In response to a petition for reconsideration filed by USTelecom, the Commission reaffirmed this Declaratory Ruling in the *2015 Technology Transitions Order*. See *2015 Technology Transitions Order*, 30 FCC Rcd at 9471-78, paras. 181-201. USTelecom appealed to the U.S. Court of Appeals for the D.C. Circuit, and the case remains pending. See generally Brief for Petitioner USTelecom, *United States Telecom Ass’n v. FCC*, No. 15-1414 (D.C. Cir. June 14, 2016) (USTelecom Brief).

doctrine?¹⁶⁹ Under the filed rate doctrine, carriers are specifically prohibited from “extend[ing] to any person any privileges” with respect to a tariffed service except as specified in the tariff.¹⁷⁰ Thus, under this doctrine, no person or community can enforce or rely on any aspect of a tariffed service that is not described in the tariff.¹⁷¹ Under traditional principles of contract law, the terms of a carrier’s service agreement with a customer, whatever form it may take, define its obligations to that customer and vice versa.¹⁷² However, under traditional principles of contract law, a contract is construed against the drafter of the contract. How should this inform our interpretation of whether a consumer is adequately protected by the four corners of a contract or tariff? Does this lead to a more consistent reading of Sections 203 and 214 than the “functional test”? Alternatively, does this approach inadequately protect consumers and communities? Should we take into account what some have asserted is unequal bargaining power between carriers and customers in evaluating whether consumers are adequately protected?¹⁷³ What are the impacts associated with transitioning from a functional test to the narrower test we seek comment on here? Is it consistent with the language of Section 214(a), which puts the burden on the discontinuing carrier, to evaluate the broader impact of the discontinuance rather than simply the narrow terms of the contract?

118. Beyond the filed rate doctrine and traditional principles of contract law, we seek comment on whether this more narrow definition of “service” is consistent with Commission precedent. Proponents of defining service from the perspective of tariffs or contracts claim this to be the Commission’s long-held view.¹⁷⁴ Do commenters agree or disagree with this assertion? For example, USTelecom points out that *Carterfone* held that customers could attach third-party devices to the telephone service they purchased, while noting that if the underlying telephone network technology and standards changed, the device must be “rebuilt to comply with the revised standards” or the customer would have to “discontinue its use.”¹⁷⁵ The Commission went on to explain that such is “the risk inherent in the private ownership of any equipment to be used in connection with the telephone system.”¹⁷⁶ Similarly, during the era when telephone exchanges operated for only limited hours during the day, USTelecom reminds us that the Commission’s rules allowed carriers to adjust the particular hours of telephone exchange operation without Commission approval, so long as the total number of hours

¹⁶⁹ The filed rate doctrine is intended to prevent price discrimination against end users by guaranteeing providers offer similarly situated customers equivalent terms and conditions. *See 2015 Technology Transitions Order*, 30 FCC Rcd at 9474, para. 191. For a general description of the filed rate doctrine, *see, e.g., Qwest Commc’ns Corp. v. Farmers & Merch. Mut. Tel. Co.*, 24 FCC Rcd 14801, 14810, para. 21 (2009); *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

¹⁷⁰ 47 U.S.C. § 203(c).

¹⁷¹ *See AT&T Co.*, 524 U.S. at 221-24 (explaining that the doctrine applies not just to rates because rates “have meaning only when one knows the services to which they are attached”).

¹⁷² *See Tanadgusix Corp. v. Huber*, 404 F.3d 1201, 1205 (9th Cir. 2005) (stating that the “terms of the contract control, regardless of the parties’ subjective intentions shown by extrinsic evidence”); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150-51 (2009) (recognizing that “it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties’ subjective intent” (citing 11 Williston on Contracts § 30:4 (4th ed. 1999)); Restatement (Second) of Contracts § 29 cmt. (1981).

¹⁷³ *See, e.g., Consumers Union Comments*, GN Docket No. 14-28, at 7 (asserting that carriers “have unequal bargaining power and dominant market power over consumers.”).

¹⁷⁴ USTelecom Brief at 15.

¹⁷⁵ *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, 424 (1968) (*Carterfone*).

¹⁷⁶ *Id.* at 424.

remained constant.¹⁷⁷ We seek comment on how this and other precedent should influence our interpretation. Are there other sources of law, including Commission rules or actions, that should inform our interpretation?

119. We also seek comment on whether the “functional test” is too vague and prohibitively broad for carriers and consumers trying to determine what services do and do not trigger the requirement to obtain Section 214(a) discontinuance authority. We note that there appears to be a lack of objective criteria by which a carrier may determine whether an application is necessary. How can we ensure that carriers do not need to acquire Commission permission before discontinuing almost “every [network] feature no matter how little-used or old-fashioned”?¹⁷⁸ How do we appropriately balance the needs of consumers and communities in this context? USTelecom has claimed that the “functional test” results in unnecessary and costly Section 214 discontinuance filings and creates additional burdens on carriers, delaying the transition to new networks and technologies.¹⁷⁹ Do commenters agree or disagree, and why?

120. We seek comment on the validity of several legal arguments that have been raised in support of the functional test. Is there a reason to conclude, as the Commission did in its 2014 Declaratory Ruling, that the right to attach devices established in *Carterfone* should be relevant to our interpretation of Section 214(a)?¹⁸⁰ We seek comment on whether the existence of de-tariffed services counsels against our proposal to treat a tariff or customer service agreement as dispositive as the “service” being offered for purposes of Section 214(a). Does the Supreme Court’s finding in *National Cable & Telecommunications Association v. Brand X Internet Services* require a conclusion contrary to the one we propose? In that case, the Court held that it was reasonable for the Commission to consider “the consumer’s point of view” in determining whether cable modem service included an “offering” of telecommunications because that question “turn[ed] on the nature of the functions the *end user* is offered.”¹⁸¹

121. As a further alternative to the discussion above, is there a different interpretation of “service” beyond our proposed approach or the “functional test” that we should consider for determining what constitutes a discontinuance, reduction, or impairment of service under Section 214(a)? If so, describe and explain how any such interpretation would better comport with Section 214(a) and serve the objectives of this proceeding.

122. Finally, we seek comment on whether a Declaratory Ruling is again warranted to “terminat[e] a controversy or remov[e] uncertainty.”¹⁸² Does a controversy and uncertainty remain as to what comprises the “service” being offered for purposes of determining the applicability of, and need for, Section 214(a) discontinuance authority? If so, why, and how should we resolve it? Does the “functional test” in its current form give carriers and consumers regulatory certainty when carriers decide to no longer make particular offerings available? If so, why, or why not? Indeed, there appears to be continued opposition to this “functional test” as the correct lens through which to examine this issue.¹⁸³ If this is indeed the case, we would likely issue a Declaratory Ruling to resolve this controversy. We seek comment on this course of action.

¹⁷⁷ USTelecom Brief at 15; *Extension of Lines and Discontinuance of Service by Carriers*, 28 Fed. Reg. 13229, 13232 (Dec. 5, 1963) (codified at 47 CFR § 63.60).

¹⁷⁸ *2014 Technology Transitions NPRM and Declaratory Ruling*, 29 FCC Rcd at 15018, para. 118.

¹⁷⁹ See USTelecom Biennial Comments at 15.

¹⁸⁰ See *2014 Technology Transitions NPRM and Declaratory Ruling*, 29 FCC Rcd at 15017, para. 117.

¹⁸¹ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 988 (2005) (internal quotation marks omitted).

¹⁸² 47 CFR § 1.2(a).

¹⁸³ See generally USTelecom Brief at 29.

B. Determining Whether “Service” Goes Beyond a Single Offering or Product

123. We seek comment on interpreting “service” within the meaning of Section 214’s discontinuance requirement as encompassing the entire range of offerings that are available to a community, or part of a community. In the past, the Commission has interpreted “service” to refer to each individual tariffed or contracted-for offering that a carrier makes available.¹⁸⁴ As a result, carriers must seek discontinuance authority separately for numerous “services,” even when those offerings are related or similar and readily replaced with other offerings on the market.¹⁸⁵ In contrast, under this proposed interpretation, a carrier that decides to cease providing any particular offering to customers would be permitted to do so without the need to first seek Commission authority so long as the overall “service” that a community receives is not discontinued, reduced, or impaired. In other words, no application would be required so long as a service offering of a similar type and quality is available in the affected area. We seek comment on this interpretation and whether it is supported by the text of Section 214(a). Does the proviso in section 214(a) stating that no authorization is required where a carrier’s action “will not impair the adequacy or quality of service provided” support this interpretation? Do the Commission’s prior interpretations of section 214 counsel against this interpretation? Would this interpretation adequately protect consumers and the community? We further seek comment on whether this interpretation is supported by the legislative history of Section 214(a)’s discontinuance provision.¹⁸⁶ In potentially implementing this interpretation, how might we ensure that a “similar type and quality” of service would be available? If we adopt this interpretation, how would it impact the proposals we advance herein for streamlining grandfathered and legacy data services? We seek comment on whether a Declaratory Ruling is warranted to terminate a controversy or remove uncertainty regarding (a) the fidelity of the Commission’s prior approach with the Act and (b) the question of when an application is required.

C. Comment Timeframes

124. For administrative convenience and to provide commenters with additional time to consider the issues raised herein, we adopt a simultaneous comment deadline for this *Request for Comment* as for the remainder of this item, notwithstanding that Federal Register publication is not required to trigger the computation of time for this *Request for Comment*.¹⁸⁷ Thus, comments on this *Request for Comment* will be due 30 days after the *Notice of Proposed Rulemaking* and *Notice of Inquiry* are published in the Federal Register, and reply comments on this *Request for Comments* will be due 60 days after the *Notice of Proposed Rulemaking* and *Notice of Inquiry* are published in the Federal Register.

¹⁸⁴ The Commission has construed Section 214(a) to require Commission approval before a carrier can discontinue, reduce, or impair “the end service provided by a carrier to a community or part of a community.” Brief for Respondents FCC, *United States Telecom Ass’n v. FCC*, No. 15-1414, at 5 (D.C. Cir. June 14, 2016) (FCC Brief) (citing *Western Union Tel. Co.*, 74 FCC 2d 293, 296, para. 7 (1979)).

¹⁸⁵ See, e.g., *Comments Invited on Application of City of Brookings Municipal Telephone Department to Discontinue Domestic Telecommunications Services*, WC Docket No. 15-293, Public Notice, 30 FCC Rcd 13639 (2015); *Comments Invited on Application of Progressive Rural Telephone Cooperative to Discontinue Domestic Telecommunications Services*, WC Docket No. 15-272, Public Notice, 30 FCC Rcd 13281 (2015).

¹⁸⁶ See 89 Cong. Rec. 786 (1943) (indicating that Congress intended to ensure that not *all* service to a community was terminated or abandoned without Commission review); see also *id.* (containing the following Conference-Committee manager quote: “I do not believe that the Congress or the country is interested in whether the telegraph company should abandon or take out a certain insulator or pole or even close down one office, if the community is adequately served by another office.”); H.R. Rep. No. 78-69, at 2, 10.

¹⁸⁷ 47 CFR § 1.4(b)(2).

V. PROCEDURAL MATTERS

A. *Ex Parte* Rules

125. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁸⁸ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

B. Initial Regulatory Flexibility Analysis

126. Pursuant to the Regulatory Flexibility Act (RFA),¹⁸⁹ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in this NPRM. The text of the IRFA is set forth in Appendix B. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.¹⁹⁰

C. Paperwork Reduction Act

127. This document contains proposed new and modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.¹⁹¹

D. Filing of Comments and Reply Comments

128. Pursuant to Sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

¹⁸⁸ 47 CFR. §§ 1.1200 *et seq.*

¹⁸⁹ *See* 5 U.S.C. § 603.

¹⁹⁰ *See* 5 U.S.C. § 603(a).

¹⁹¹ *See* 44 U.S.C. § 3506(c)(4).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <https://www.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

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

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.
- People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

E. Contact Person

129. For further information about this proceeding, please contact Michele Berlove, FCC Wireline Competition Bureau, Competition Policy Division, Room 5-C313, 445 12th Street, S.W., Washington, D.C. 20554, (202) 418-1477, Michele.Berlove@fcc.gov, or Michael Ray, FCC Wireline Competition Bureau, Competition Policy Division, Room 5-C235, 445 12th Street, S.W., Washington, D.C. 20554, (202) 418-0357, Michael.Ray@fcc.gov.

VI. ORDERING CLAUSES

130. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1-4, 201, 202, 214, 224, 251, 253 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 202, 214, 224, 251, 253, 303(r), this Notice of Proposed Rulemaking IS ADOPTED.

131. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), and 403 of the Communications Act of 1934, as amended, 47 U.S.C §§ 151, 154(i), 154(j), and 403, this Notice of Inquiry IS ADOPTED.

132. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1-4, 201-203, 214, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-203, 214, 403, this Request for Comment IS ADOPTED and SHALL BE EFFECTIVE upon release.

133. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Draft Proposed Rules for Public Comment

For the reasons set forth above, Parts 1, 51, and 63 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority for part 1 continues to read as follows:

AUTHORITY: 15 U.S.C. 79 et seq., 47 U.S.C. 151, 154(i) and (j), 155, 157, 160, 201, 224, 225, 227, 303, 309, 301, 332, 1403, 1404, 1451, 1452, and 1455.

SUBPART J – POLE ATTACHMENT COMPLAINT PROCEDURES

2. Amend section 1403 by revising paragraphs (a) and (b) to read as follows:

§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. A utility that is a local exchange carrier shall provide any incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding either of the foregoing obligations, a utility may deny a cable television system or any telecommunications carrier, and a utility that is a local exchange carrier may deny an incumbent local exchange carrier, access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits, or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 15 days of the request for access, the utility must confirm the denial in writing by the 15th day (or within the timelines set forth in section 1.1420(g)). The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

* * * * *

3. Amend section 1404 by revising paragraph (k) to read as follows:

§ 1.1404 Complaint.

* * * * *

(k) The complaint shall include:

(1) A certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient

authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute; and

(2) A certification that the complainant and respondent have, in good faith, engaged in discussions to resolve procedural issues and deadlines associated with the pole attachment complaint process. Such certification shall include a statement that the complainant has contacted the Commission to disclose the results of the pre-complaint discussions with respondent.

(3) A refusal by a respondent to engage in the discussions contemplated in this paragraph shall constitute an unreasonable practice under section 224 of the Act.

* * * * *

4. Amend section 1409 by revising paragraph (c) to read as follows:

§ 1.1409 Commission consideration of the complaint.

* * * * *

(c) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way. The Commission shall exclude from actual capital costs those reimbursements received by the utility from cable operators and telecommunications carriers for non-recurring costs as set forth in sections 1.1404(g)(1)(xiii) and 1.1404(h)(1)(ix).

* * * * *

5. Amend section 1416 by revising the heading and paragraphs (b) and (c), and adding paragraph (d) to read as follows:

§ 1.1416 Imputation of rates; make-ready costs.

* * * * *

(b) The cable television system operator or telecommunications carrier requesting attachment shall be responsible only for the actual costs of make-ready made necessary solely as a result of its new attachments.

(c) The costs of modifying a facility shall be borne by all attachers and utilities that obtain access to the facility as a result of the modification and by all attachers and utilities that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. An attacher or a utility with a preexisting attachment to the modified facility shall be

deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, an attacher or utility with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If an attacher or utility makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

(d) If a utility performs make-ready, the utility shall make available to the cable television system operator or telecommunications carrier requesting attachment a schedule of its common make-ready charges that the new attacher may be charged.

6. Amend section 1420 by revising paragraphs (c) through (e), (g), and (i) to read as follows:

§ 1.1420 Timeline for access to poles, ducts, conduits, and rights of way.

* * * * *

(c) *Survey.* A utility shall respond as described in §1.1403(b) to a cable television system operator or telecommunications carrier within 15 days of receipt of a complete application to attach facilities to its utility poles (or within the timelines set forth in paragraph (g) of this section). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) *Estimate.* Where a request for access is not denied, a utility shall present to a cable television system operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 7 days of providing the response required by §1.1420(c), or in the case where a prospective attacher's contractor has performed a survey, within 7 days of receipt by the utility of such survey.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 7 days after the estimate is presented.

(2) A cable television system operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.

(e) * * *

(1) * * *

(ii) Set a date for completion of make-ready that is no later than 30 days after notification is sent (or 75 days in the case of larger orders as described in paragraph (g) of this section).

* * * * *

(g) * * *

(3) A utility may add 30 days to the survey period described in paragraph (c) of this section to pole attachment orders larger than the lesser of (i) 3000 poles or (ii) 5 percent of the utility's poles in a state.

(4) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

* * * * *

7. Amend section 1422 by revising the heading and paragraphs (a) and (c) to read as follows:

§ 1.1422 Contractors for survey and make-ready.

(a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles. A utility shall separately identify on that list the contractors it authorizes to perform make-ready above the communications space on its utility poles.

* * * * *

(c) A cable television system operator or telecommunications carrier that hires a contractor for survey or make-ready work shall provide a utility and existing attachers with a reasonable opportunity for their representatives to accompany and consult with the authorized contractor and the cable television system operator or telecommunications carrier requesting attachment.

* * * * *

8. Amend section 1424 by revising to read as follows:

§ 1.1424 Complaints by incumbent local exchange carriers.

Complaints by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part, as relevant. In complaint proceedings, there will be a rebuttable presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions. In pole attachment rate complaint proceedings, it is presumed that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with section 1.1409(e)(2), unless a utility can rebut the presumption by demonstrating that this maximum rate presumption should not apply.

8. Add new section 1425 to subpart J to read as follows:

§ 1.1425 Review Period for Pole Access Complaints.

(a) Except in extraordinary circumstances, final action on a complaint where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit, or

right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission.

(b) The Commission shall have the discretion to pause the 180-day review period in situations where actions outside the Commission's control are responsible for unreasonably delaying Commission review of an access complaint.

PART 51 – INTERCONNECTION

1. The authority for part 51 continues to read as follows:

AUTHORITY: 47 U.S.C. 151–55, 201–05, 207–09, 218, 220, 225–27, 251–54, 256, 271, 303(r), 332, 1302.

SUBPART D – ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS

2. Amend section 51.325 by removing paragraph (c) and redesignating paragraphs (d) and (e) as (c) and (d).

PART 63 – EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. The authority for part 63 continues to read as follows:

AUTHORITY: Sections 1, 4(i), 4(j), 10, 11, 201–205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 201–205, 214, 218, 403, and 571, unless otherwise noted.

2. Amend section 63.60 by redesignating paragraphs (d) through (h) as (e) through (i), and adding new paragraph (d), to read as follows:

§ 63.60 Definitions.

* * * * *

(d) *Grandfather* means to maintain the provision of a service to existing customers while ceasing to offer that service to new customers.

* * * * *

3. Amend section 63.71 by deleting paragraph (d), redesignating paragraphs (e) through (f) as (d) through (e), adding new paragraph (f), and revising paragraphs (a), (c), and (g), to read as follows:

§ 63.71 Procedures for discontinuance, reduction or impairment of service by domestic carriers.

(a) * * *

(5) * * *

(iii) Notwithstanding paragraphs (a)(5)(i) and (ii) above, if any carrier, dominant or non-dominant, seeks to: (1) grandfather legacy service operating at speeds lower than 1.544

Mbps; or (2) discontinue, reduce, or impair legacy data service that has been grandfathered for a period of no less than 180 days consistent with the criteria established in paragraph (a)(8) below, the notice shall state: The FCC will normally authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected. If you wish to object, you should file your comments as soon as possible, but no later than 10 days after the Commission releases public notice of the proposed discontinuance. You may file your comments electronically through the FCC's Electronic Comment Filing System using the docket number established in the Commission's public notice for this proceeding, or you may address them to the Federal Communications Commission, Wireline Competition Bureau, Competition Policy Division, Washington, DC 20554, and include in your comments a reference to the § 63.71 Application of (carrier's name). Comments should include specific information about the impact of this proposed discontinuance (or reduction or impairment) upon you or your company, including any inability to acquire reasonable substitute service.

* * * * *

(8) For applications to discontinue, reduce, or impair a legacy data service that has been grandfathered for a period of no less than 180 days, in order to be eligible for automatic grant under paragraph (f) of this section, an applicant must include in its application a statement confirming that they received Commission authority to grandfather the service at issue at least 180 days prior to filing the current application.

* * * * *

(c) The carrier shall file with this Commission, on or after the date on which notice has been given to all affected customers, an application which shall contain the following:

- (1) Caption - "Section 63.71 Application";
- (2) Information listed in § 63.71(a) (1) through (4) above;
- (3) Information listed in § 63.71(a) (6) through (8) above, if applicable;
- (4) Brief description of the dates and methods of notice to all affected customers;
- (5) Whether the carrier is considered dominant or non-dominant with respect to the service to be discontinued, reduced or impaired; and
- (6) Any other information the Commission may require.

* * * * *

(f) Notwithstanding the above, an application filed by any carrier seeking to grandfather legacy service operating at speeds lower than 1.544 Mbps for existing customers shall be automatically granted on the 25th day after its filing with the Commission without any Commission notification to the applicant unless the Commission has notified the applicant that the grant will not be automatically effective. For purposes

of this section, an application will be deemed filed on the date the Commission releases public notice of the filing.

(g) An application seeking to: 1) discontinue, reduce, or impair a service for which the requesting carrier has had no customers or reasonable requests for service during the 60-day period immediately preceding the filing of the application; or 2) discontinue, reduce, or impair a legacy data service that has been grandfathered for no less than the 180-day period immediately preceding the filing of the application, shall be automatically granted on the 31st day after its filing with the Commission without any Commission notification to the applicant, unless the Commission has notified the applicant that the grant will not be automatically effective.

* * * * *

APPENDIX B
Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rule Making (Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in paragraph 133 of this Notice. The Commission will send a copy of this Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. The Notice proposes new steps designed to accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment. Access to high speed broadband creates economic opportunity, enabling entrepreneurs to create businesses, immediately reach customers throughout the world and revolutionize entire industries. This proceeding aims to better enable broadband providers to build, maintain, and upgrade their networks, which will spur job growth and ultimately lead to more affordable and accessible Internet access and other broadband services for all Americans. Today's action proposes to remove regulatory barriers to infrastructure at the state and local level, proposes changes to speed the transition from copper networks and legacy services to next-generation networks and services dependent on fiber, and proposes to reform Commission regulations that are raising costs and slowing broadband deployment rather than facilitating it. Thus, the Commission seeks comment on a variety of issues in the following areas.

3. First, the Notice proposes and seeks comment on changes to the Commission's pole attachment rules that would: (1) adopt a streamlined timeframe for gaining access to utility poles; (2) reduce charges paid by attachers to utilities for work done to make a pole ready for new attachments; (3) codify the elimination of certain capital costs from the formulas used to confirm the reasonableness of rates charged by utilities for pole attachments by telecommunications and cable providers; (4) establish a 180-day shot clock for Commission consideration of pole attachment complaints; (5) adopt a formula for computing the maximum pole attachment rate that may be imposed on an incumbent LEC, and (6) adopt rules that would interpret the interconnection rules for telecommunications carriers in Section 251 of the Act and the pole attachment rules of Section 224 in a manner that allows for competitive LECs to demand access to incumbent LEC poles and *vice versa*.⁴

4. Second, the Notice seeks comment on changing the Commission's Part 51 copper retirement rules to expedite the copper retirement process and reduce associated regulatory burdens to facilitate more rapid deployment of next-generation networks, as well a proposal and other potential changes to streamline and/or eliminate provisions of the more generally applicable network change notification rules. It also seeks comment on eliminating Section 68.110(b) of the Commission's rules.⁵

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ See Notice Section II.A.

⁵ See Notice Section II.B.

5. Third, the Notice seeks comment on proposals to streamline the Section 214(a) discontinuance process by reducing the comment and automatic-grant timeframes for two specific categories of discontinuance applications: “grandfathered” low-speed legacy services for existing customers, and legacy data services that have been grandfathered for a period of no less than 180 days.⁶ Fourth, the Notice seeks comment on reversing the Commission’s 2015 “carrier-customer’s retail end user” interpretation of the scope of Section 214(a) discontinuance authority.⁷

6. Fifth, the Notice seeks comment on other Section 63.71 changes to further streamline the Section 214 (a) discontinuance process for carriers.⁸

B. Legal Basis

7. The proposed action is authorized under Sections 1, 2, 4(i), 214, 224, 251, and 253 of the Communications Act of 1934, as amended; 47 U.S.C. Sections 151, 152, 154(i), 214, 224, 251, 253.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

8. The RFA directs agencies to provide a description and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules and by the rule revisions on which the Notice seeks comment, if adopted.⁹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁰ In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.¹¹ A “small-business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹²

9. The majority of our proposals and the changes on which we seek comment in the Notice will affect obligations on incumbent LECs and, in some cases, competitive LECs. Certain pole attachment proposals also would affect obligations on utilities that own poles, telecommunications carriers and cable television systems that seek to attach equipment to utility poles, and other LECs that own poles.¹³ Our actions, over time, may affect small entities that are not easily categorized at present. Other entities, however, that choose to object to network change notifications for copper retirement under the changes on which we seek comment and Section 214 discontinuance applications may be economically impacted by the proposals in this Notice.

10. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards that encompass

⁶ See Notice Sections II.C.1.-3.

⁷ See Notice Section II.C.4.

⁸ See Notice Section II.C.5.

⁹ See 5 U.S.C. § 603(b)(3).

¹⁰ See 5 U.S.C. § 601(6).

¹¹ See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

¹² See 15 U.S.C. § 632.

¹³ The definitions of utility and telecommunications carrier for purposes of our pole attachment rules are found in 47 U.S.C. § 224(a)(1) and (a)(5), respectively.

entities that could be directly affected by the new and revised rules adopted today. According to the most currently available SBA data, there are 28.8 million small businesses in the U.S., which represent 99.9% of all businesses in the United States.¹⁴ Additionally, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”¹⁵ Nationwide, as of 2007, there were approximately 1,621, 215 small organizations.¹⁶ Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹⁷ Census Bureau data for 2012 indicate that there were 89,476 governmental jurisdictions in the United States.¹⁸ We estimate that, of this total, as many as 88,718 entities may qualify as “small governmental jurisdictions.”¹⁹ Thus, we estimate that most governmental jurisdictions are small.

11. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”²⁰ The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.²¹ Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.²² Thus, under this size standard, the majority of firms in this industry can be considered small.

12. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest

¹⁴ See Small Business Administration, Office of Advocacy, “Frequently Asked Questions,” https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (last visited Mar. 15, 2017).

¹⁵ 5 U.S.C. § 601(4).

¹⁶ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2010).

¹⁷ 5 U.S.C. § 601(5).

¹⁸ U.S. Census Bureau, *Statistical Abstract of the United States: 2012* at 267, Table 429 (Effective Oct 2011), <http://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf> (citing data from 2007).

¹⁹ The 2012 U.S. Census data for small governmental organizations are not presented based on the size of the population in each organization. There were 89,476 local governmental organizations in the Census Bureau data for 2012, which is based on 2007 data. As a basis of estimating how many of these 89,476 local government organizations were small, we note that there were a total of 758 cities and towns (incorporated places and minor civil divisions) with populations over 50,000 in 2015. See U.S. Census Bureau, *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2015 Population: April 1, 2010 to July 1, 2015*, <https://www.census.gov/data/tables/2015/demo/popest/total-cities-and-towns.html> (last visited Mar. 14, 2017). If we subtract the 758 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,718 are small.

²⁰ U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Categories,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

²¹ See 13 CFR § 120.201, NAICS Code 517110.

²² 2012 U.S. Economic Census, NAICS Code 517110, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodTpe=table.

applicable NAICS Code category is for Wired Telecommunications Carriers, as defined in paragraph 12 of this IRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.²³ Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.²⁴ The Commission therefore estimates that most providers of local exchange carrier service are small entities that may be affected by the rules adopted.

13. *Incumbent Local Exchange Carriers (incumbent LECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 13 of this IRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁵ According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees.²⁶ Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted. One thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.²⁷ Of this total, an estimated 1,006 have 1,500 or fewer employees.²⁸

14. *Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers*. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined in paragraph 12 of this IRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees.²⁹ Based on this data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.³⁰ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.³¹ In addition, 72 carriers have reported that they are Other Local Service Providers.³² Of this total, 70 have 1,500 or fewer employees.³³ Consequently, the Commission estimates that most providers of competitive

²³ See 13 CFR § 120.201, NAICS Code 517110.

²⁴ 2012 U.S. Economic Census, NAICS Code 517110, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

²⁵ See 13 CFR § 120.201, NAICS Code 517110.

²⁶ 2012 U.S. Economic Census, NAICS Code 517110, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

²⁷ See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

²⁸ *Id.*

²⁹ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

³⁰ See *Trends in Telephone Service*, at tbl. 5.3.

³¹ *Id.*

³² *Id.*

³³ *Id.*

local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by the adopted rules.

15. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 13 of this IRFA. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.³⁴ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.³⁵ Of this total, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.³⁶ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted.

16. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers, as defined in paragraph 13 of this IRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁷ Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.³⁸ Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.³⁹ Of these, an estimated 279 have 1,500 or fewer employees.⁴⁰ Consequently, the Commission estimates that most Other Toll Carriers that may be affected by our rules are small.

17. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves, such as cellular services, paging services, wireless internet access, and wireless video services.⁴¹ The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had fewer than 1,000 employees.⁴² Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services.⁴³ Of this total, an estimated 261 have 1,500 or fewer employees.⁴⁴

³⁴ 13 CFR § 121.201, NAICS code 517110.

³⁵ See *Trends in Telephone Service*, at tbl. 5.3.

³⁶ *Id.*

³⁷ 13 CFR § 121.201, NAICS code 517110.

³⁸ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

³⁹ See *Trends in Telephone Service*, at tbl. 5.3.

⁴⁰ *Id.*

⁴¹ NAICS Code 517210. See <https://www.census.gov/econ/isp/sampler.php?naicscode=517210&naicslevel=6#>.

⁴² http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

⁴³ See *Trends in Telephone Service*, at tbl. 5.3.

⁴⁴ *Id.*

Consequently, the Commission estimates that approximately half of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

18. *Cable Companies and Systems (Rate Regulation)*. The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.⁴⁵ Industry data indicate that there are currently 4,600 active cable systems in the United States.⁴⁶ Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard.⁴⁷ In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.⁴⁸ Current Commission records show 4,600 cable systems nationwide.⁴⁹ Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.⁵⁰ Thus, under this standard as well, we estimate that most cable systems are small entities.

19. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000 are approximately 52,403,705 cable video subscribers in the United States today."⁵¹ Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁵² Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.⁵³ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.⁵⁴ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

⁴⁵ 47 CFR § 76.901(e)

⁴⁶ Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing August 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS)). See www.fcc.gov/coals).

⁴⁷ See SNL KAGAN at <https://www.snk.com/interactiveX/MyInteractive.aspx?mode=4&CDID=A-821-38606&KLPT=8> (subscription required).

⁴⁸ 47 CFR § 76.901(c).

⁴⁹ See *supra* note 46.

⁵⁰ *Id.*

⁵¹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appendix E para. 23 (2016) (citing Office of Management and Budget (OMB) Memorandum M-10-06, Open Government Directive, Dec. 8, 2009).

⁵² 47 CFR § 76.901(f).

⁵³ *Assessment & Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appendix E para. 23 (2016).

⁵⁴ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to Section 76.901(f) of the Commission's rules. See 47 CFR § 76.901(f).

20. *All Other Telecommunications.* “All Other Telecommunications” is defined as follows: “This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client supplied telecommunications connections are also included in this industry.”⁵⁵ The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less.⁵⁶ For this category, Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than \$25 million.⁵⁷ Consequently, we conclude that the majority of All Other Telecommunications firms can be considered small.

21. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: “This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.”⁵⁸ This category includes electric power distribution, hydroelectric power generation, fossil fuel power generation, nuclear electric power generation, solar power generation, and wind power generation. The SBA has developed a small business size standard for firms in this category based on the number of employees working in a given business.⁵⁹ According to Census Bureau data for 2012, there were 1,742 firms in this category that operated for the entire year.⁶⁰

22. *Natural Gas Distribution.* This economic census category comprises: “(1) establishments primarily engaged in operating gas distribution systems (e.g., mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers.”⁶¹ The SBA has developed a small business size standard for this industry, which is all such

⁵⁵<https://www.census.gov/econ/isp/sampler.php?naicscode=517919&naicslevel=6>.

⁵⁶ 13 CFR § 121.201; NAICS Code 517919.

⁵⁷ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC0751SSSZ1, Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 NAICS Code 517919, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ1&prodTtype=table.

⁵⁸ U.S. Census Bureau, 2017 NAICS Definitions, “2211 Electric Power Generation, Transmission and Distribution,” https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

⁵⁹ U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

⁶⁰ U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS codes 221111, 221112, 221113, 221114, 221115, 221116, 221117, 221118, 22112, 221121, (issued March 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

⁶¹ U.S. Census Bureau, 2017 NAICS Definitions, “221210 Natural Gas Distribution,” https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

firms having 1,000 or fewer employees.⁶² According to Census Bureau data for 2012, there were 422 firms in this category that operated for the entire year.⁶³ Of this total, 399 firms had employment of fewer than 1,000 employees, 23 firms had employment of 1,000 employees or more, and 37 firms were not operational.⁶⁴ Thus, the majority of firms in this category can be considered small.

23. *Water Supply and Irrigation Systems.* This economic census category “comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems. The water supply system may include pumping stations, aqueducts, and/or distribution mains. The water may be used for drinking, irrigation, or other uses.”⁶⁵ The SBA has developed a small business size standard for this industry, which is all such firms having \$27.5 million or less in annual receipts.⁶⁶ According to Census Bureau data for 2012, there were 3,261 firms in this category that operated for the entire year.⁶⁷ Of this total, 3,035 firms had annual sales of less than \$25 million⁶⁸ Thus, the majority of firms in this category can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

24. The Notice proposes and/or seeks comment on a number of rule changes that will affect reporting, recordkeeping, and other compliance requirements. We expect the rule revisions proposed or suggested for potential change in the Notice to reduce reporting, recordkeeping, and other compliance requirements. The rule revisions taken as a whole should have a beneficial reporting, recordkeeping, or compliance impact on small entities because all carriers will be subject to fewer such burdens. Each of these changes is described below.

25. The Notice proposes the following changes to the current pole attachment timeline: (1) requiring utilities to make a decision on completed pole attachment applications within a timeframe shorter than the current 45 days of receipt; (2) requiring utilities to provide an estimate of make-ready costs to new attachers within a timeframe that is shorter than the current 14 days; and (3) establishing a time period for existing attachers to complete make-ready work to their attachments in the communications space of a pole that is shorter than the current 60 days. The *Notice* also proposes to limit a new attacher’s liability for make-ready costs to those costs actually caused by the new attachment, to require utilities to proportionately share in the cost of a new attachment for which they receive a direct benefit, and to require utilities that perform make-ready work to make available to new attachers a

⁶² U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

⁶³ U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS code 2212 (issued March 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

⁶⁴ *Id.*

⁶⁵ U.S. Census Bureau, 2017 NAICS Definitions, “221310 Water Supply and Irrigation Systems,” https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

⁶⁶ U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

⁶⁷ U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS code 221310 (issued March 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

⁶⁸ U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Revenue Size of Firms for the U.S.: 2012,” NAICS code 221310 (issued March 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

schedule of common make-ready charges. With regard to pole attachment rates, the Notice proposes to codify the elimination from the telecommunications and cable rate formulas those capital costs that already have been paid to the utility via make-ready charges, to establish a rebuttable presumption that incumbent LECs are similarly situated to other attachers on a pole, and to establish a rebuttable pole attachment formula for computing the maximum pole attachment rate to be charged to incumbent LECs. Further, the Notice proposes a 180-day shot clock for Commission resolution of pole access complaints, which would include a mandatory pre-complaint meeting between the parties in order to resolve procedural issues and deadlines. Finally, the Notice proposes to allow incumbent LECs to request nondiscriminatory pole access from other LECs that own or control utility poles. Should the Commission adopt any of these proposals, such actions could result in increased, reduced, or otherwise altered reporting, recordkeeping, or other compliance requirements for utilities and attaching entities. The Notice also seeks comment on eliminating some or all of the changes to the copper retirement process adopted by the Commission in the *2015 Technology Transitions Order*, including the rules that doubled the time period during which an incumbent LEC must wait to implement the planned copper retirement after the Commission's publication of public notice from 90 days to 180 days, required direct notice to retail customers, and expanded the types of information that must be disclosed. The Notice also proposes eliminating the rule preventing incumbent LECs from disclosing information about planned network changes with certain entities until public notice has been given of those planned changes, and also seeks comment on eliminating Section 68.110(b), which requires that a carrier notify its customers when changes to its facilities, equipment, operations, or procedures might render customers' terminal equipment incompatible with those facilities, equipment, operations, or procedures. In addition, the Notice proposes targeted measures and/or seeks comment on potential rule changes to shorten timeframes and eliminate unnecessary regulatory process encumbrances that carriers face to maintain legacy services they seek to discontinue.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

26. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁶⁹

27. The Commission proposes to adopt specific changes to its pole attachment timeline that would provide a predictable, timely process for parties to obtain pole attachments, while maintaining the interests of utilities and existing attachers in preserving safety, reliability, and sound engineering. In consideration of the new timeline, the Commission seeks comments on alternatives that might help smaller utilities and attachers: (1) whether it would be reasonable to cap at 45 days a utility's review of a large number of pole attachment applications; (2) whether it is reasonable to combine the survey, estimate, and acceptance stages of the current Commission pole attachment timeline into one step with a condensed timeframe; and (3) whether 30 days is long enough for existing attachers to complete routine make-ready work. The Commission also seeks alternatives to its current make-ready process in the areas of: (1) the expanded use of utility-approved contractors to perform make-ready work; (2) allowing existing attachers to observe the make-ready work being performed by new attachers and their contractors; (3) requiring utilities and attachers to agree on the specific contractors to perform make-ready work on their equipment; (4) allowing new attachers to perform routine make-ready work on all pole equipment without involving existing attachers; and (5) establishing pole attachment processes modeled after "one-touch, make-ready", "right-touch, make-ready", and other approaches. The Commission also

⁶⁹ See 5 U.S.C. § 603(c).

seeks alternatives to its current complaint process as the best way to keep make-ready costs just and reasonable, asks whether a bonus payment or multiplier could be used to incent existing attachers to meet their make-ready timelines, asks about ways to incent private negotiations between new and existing attachers to govern the make-ready process (e.g., allowing a new attacher to select a default contractor to perform make-ready, penalizing existing attachers that fail to meet make-ready deadlines), asks whether utilities should be required to make information available online regarding the cost, location, and availability of poles and conduits, asks whether a flat per-pole make-ready fee would be preferable to the current method of allocating make-ready costs, asks whether utilities should be required to reimburse attachers for the costs of new attachments that subsequently benefit utilities (which might benefit new entrants, especially small entities with limited resources), asks whether the Commission should eliminate all capital costs from its pole attachment rate formulas, asks about the appropriate pole attachment rate for attachers providing commingled cable and telecommunications services, and asks whether we should adopt a shot clock for all pole attachment complaints (not just those related to pole access).

28. The Notice also seeks comment on the need to revise the requirements of our network change disclosure rules applicable to copper retirements to reduce barriers to investment in next-generation technologies and promote broadband deployment. To that end, the Notice seeks comment on eliminating Section 51.332 in its entirety and returning to a more streamlined version of the pre-2015 *Technology Transitions Order* requirements for handling copper retirements subject to Section 251(c)(5) of the Act. Specifically, the Notice seeks comment on reinstating the less burdensome requirements under Section 51.333(c) of the Commission's rules applicable to copper retirements prior to adoption of the *2015 Technology Transitions Order*. In the alternative, the Notice seeks comment on eliminating all differences between copper retirement and other network change notice requirements, rendering copper retirement changes subject to the same long-term or, where applicable, short-term network change notice requirements as all other types of network changes subject to Section 251(c)(5). As a third alternative, the Notice seeks comment on retaining but amending Section 51.332 to streamline the process. Specifically, the Notice seeks comment on revising Section 51.332 to: (1) require an incumbent LECs to serve its notice only to telephone exchange service providers that directly interconnect with the incumbent LEC's network, rather than "each entity within the affected service area that directly interconnects with the incumbent LEC's network"; (2) reduce the waiting period to 90 days from 180 days after the Commission releases its public notice before the incumbent LEC may implement the planned copper retirement; (3) provide greater flexibility regarding the time in which an incumbent LEC must file the requisite certification; and (4) reduce the waiting period to 30 days where the copper facilities being retired are no longer being used to serve any customers in the affected service area; and to potentially reinstate the objection procedures applicable under the rules in place prior to the *2015 Technology Transitions Order* if Section 51.332 is eliminated. The Notice also proposes to eliminate the prohibition on incumbent LECs disclosing information about planned network changes prior to giving public notice of those planned changes. And the Notice seeks comment on eliminating or modifying Section 68.110(b), which requires that a carrier notify its customers when changes to its facilities, equipment, operations, or procedures might render customers' terminal equipment incompatible with those facilities, equipment, operations, or procedures.

29. The Notice seeks comment on proposals to streamline the Section 214(a) discontinuance process for applications that seek authorization to "grandfather" low-speed legacy services, such as TDM services at lower-than-DS1 speeds (below 1.544 Mbps), for existing customers. Specifically, the proposals seek to reduce the public comment period to 10 days for applications from both dominant and non-dominant carriers seeking to grandfather legacy low-speed services. The proposals also seek to revise the Commission's discontinuance rules to provide for automatic grant of applications by both dominant and non-dominant carriers to grandfather low-speed legacy services on the 25th day after the Commission has released a public notice seeking comment on an application, unless the Commission notifies the applicant that such a grant will not be automatically effective.

30. The Notice seeks comment on proposals to streamline the discontinuance process for any application seeking authorization to discontinue legacy data services that have been grandfathered for a

period of no less than 180 days prior to the filing of the application. The proposals seek to adopt a uniform public comment period of 10 days for all applications seeking to discontinue legacy data services that have previously been grandfathered, regardless of whether the carrier filing the application is a dominant or non-dominant carrier. Additionally, the proposals seek to provide for automatic grant of these applications on the 31st day after filing, unless the Commission notifies the applicant that such a grant will not be automatically effective.

31. The Notice seeks comment on revising the discontinuance rule pertaining to discontinuance applications filed in response to a copper retirement notice to reflect any subsequent changes to the copper retirement rules and any other streamlining measures that could be taken.

32. The Notice seeks comment on reversing the Commission's 2015 "clarification" of Section 214(a) that substantially expanded the scope of end users that a carrier must consider in determining whether it is required to obtain Section 214 discontinuance authority, and, going forward, interpret Section 214(a) to require a carrier to take into account only its own end users when evaluating whether the carrier will "discontinue, reduce, or impair service to a community, or part of a community."

33. The Commission believes that its proposals and potential rule changes upon which the Notice seeks comment will benefit all carriers, regardless of size. The proposals and potential rule changes would further the goal of reducing regulatory burdens, thus facilitating investment in next-generation networks and promoting broadband deployment. We anticipate that a more modernized regulatory scheme will encourage carriers to invest in and deploy even more advanced technologies as they evolve.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

34. None.

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84.

Building a fixed broadband network is hard and expensive. There's no better way to understand this than by seeing it for yourself. I've done that during my time at the FCC. I've visited Baldwin City, Kansas to learn how RG Fiber has connected small towns in the Sunflower State with high-speed broadband. I've sunk my shoes into the muck outside Hammond, Louisiana, where Southern Light was stringing fiber along the bayou. Just last month, I spent time with Rocket Fiber in Detroit, where I saw how a scrappy upstart is delivering badly-needed digital infrastructure to the Motor City.

From these competitive fiber providers and many others, I've heard a similar refrain: their work is difficult, sometimes prohibitively so. You need a lot of capital. You need capable work crews. And as important as either of these, you need a regulatory framework that enables you to build a business case for building a business. Without rules that keep costs low and encourage deployment, the RG Fibers and Southern Lights and Rocket Fibers won't get off the ground—and consumers will never benefit from the competition they're trying to bring to the broadband marketplace.

That brings us to today's rulemaking, which rests on a simple premise: When you make it easier and cheaper to build high-speed networks, companies are more likely to build those networks. Unreasonably high costs and excessive delays to access poles and costly and cumbersome permitting processes can make it extremely difficult to deploy infrastructure. With today's Notice, we seek comment on creative and common-sense solutions to solve these problems.

In addition, we focus on revising FCC rules that unnecessarily slow down the transition from old, fading 20th century networks to new, resilient 21st century networks. For example, some of these rules actually doubled the waiting period for retiring copper plant, some of which has been in the ground since the Roosevelt Administration. This directly harms consumers desperate for better Internet access and more competition. That's because every dollar that the FCC forces companies to spend maintaining obsolete, low-capacity copper lines is a dollar that cannot be spent deploying high-capacity fiber and other next-generation technologies. That's why, in today's Notice, we examine ways to modernize our rules and America's broadband infrastructure along with them.

Last but not least, thank you to the terrific staff across the agency who put in so much hard work on this item: Michele Berlove, Jim Carr, Adam Copeland, Madeleine Findley, Lisa Griffin, Dan Kahn, Chris Killion, Doug Klein, Dick Kwiatkowski, Paul Lafontaine, Rick Mallen, Rosemary McEnery, Bakari Middleton, Kris Monteith, Ramesh Nagarajan, Terri Natoli, Omar Nayeem, Claudia Pabo, Michael Ray, Bill Richardson, Zach Ross, Lisa Saks, Deborah Salons, Katja Seim, and John Visclosky. Consumers in places like Baldwin City and Detroit and Hammond might not know the details of what you have accomplished today, but they'll benefit substantially from your work in the future.

**CONCURRING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84.

Let me say up front: despite the fact that this item tees up some ideas I am uncomfortable with, I will respectfully concur. I want to thank the Chairman for working with me to address some of my substantial concerns, in particular, revisiting the test for streamlined voice discontinuance, and adding in less aggressive language regarding our interactions with localities.

Indeed, there is much on which we can agree. The time is ripe for opening up pole attachment reform, for taking a look at how we can work with local governments to remove barriers to deployment, and for generally evaluating how we can further streamline processes for rolling out new services. What concerns me, however, is the strong talk surrounding preemption, that takes place even before we lay out a clear path to work with communities through other processes such as the Broadband Deployment Advisory Committee's development of model codes. The importance of community engagement was reiterated during my visit earlier this week to the Digital Southwest summit in Mesa, Arizona, and it is with this backdrop that I look forward to reviewing the full record on all of these issues.

However, when it comes to the Commission's efforts to start a proceeding to roll back the carefully considered efforts of the past Administration to carve a path forward for technology transitions, I remain extremely concerned. This Commission seems to view paying customers who subscribe to legacy services as a barrier to infrastructure deployment, and that is problematic for me.

A RAND study from last year found that approximately 20 percent of Americans view landline telephone service as the most important communications service, beating out mobile voice, mobile broadband, and fixed broadband. And this group may, according to RAND, "include the more vulnerable members of society." Indeed, a majority of fixed voice customers, still choose legacy telephone service despite other options that may be available in the marketplace. And while they certainly may be out there, I have yet to come across a consumer who is clamoring for their landline service, to be converted to interconnected voice-over-IP service.

This item, at least as it was originally drafted, primarily ensured that large carriers, not consumers, got what they want. These carriers' balance sheets are heavily inked with operating expenditures associated with legacy services. It is no secret, that it would indeed be more efficient for carriers to migrate all of their customers off of legacy services as quickly as possible. But as regulators, we are charged with protecting the public interest, and the public interest standard goes beyond operating efficiencies.

Rather than properly wrestling with these difficult issues however, the Commission implies that efficient technology transitions override consumer desires and consumer protections. At the end of the day, these transitions are either about replacing electronics on either end of a wire, or replacing that wire with fiber or other technologies. But those infrastructure changes promise to fundamentally alter the very nature of the service offered to consumers. This is exactly why we must ensure that consumers' concerns and needs are given credence during this process of retiring copper or discontinuing legacy services. On the road from legacy to modern services, this item seeks comment on removing stop signs and traffic lights along the way. I only hope, that we do not crash and burn.

I thank the staff of the Wireline Competition Bureau for their hard work and professionalism. These are incredibly difficult issues, and I understand you pulled this item together very quickly, and you did so very well.

**STATEMENT OF
COMMISSIONER MICHAEL P. O'RIELLY**

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84.

As the staff outlined, this item seeks comment on several ways to streamline FCC regulations and processes, reduce unnecessary regulatory compliance costs, and promote broadband deployment.

The prior Commission frequently attempted to insert itself into technology transitions, often at the very end with little to no added value. These forays typically involved protecting obsolete or fading technologies that consumers have rapidly abandoned, applying old rules to new technologies, imposing additional hurdles and tests, and providing no assurances that applications that met requirements for supposed “streamlined” treatment would actually be granted in a reasonable timeframe. I frequently dissented from policies that impeded technology transitions and hamstrung providers without actually protecting consumers or promoting investment in new services and networks. So it should come as no surprise that I join to undo these harmful decisions now.

I am particularly encouraged to see the Commission seek comment on what amounts to disavowing the 2014 Declaratory Ruling and subsequent Order on Reconsideration, which appeared to require carriers to file section 214 discontinuance applications for services they don't even know they are offering. Instead of defining a service based on the terms of a carrier's tariff, the Commission said that it would take into account “the totality of the circumstances from the perspective of the relevant community or part of a community, when analyzing whether a service is discontinued, reduced, or impaired under section 214.”¹ In other words, a carrier has to guess how the service is being used, what the community thinks about such uses, and whether the FCC would require a filing in such instances. Such a nebulous standard appears nowhere in the Act and should be overturned posthaste.

I thank my colleagues for working with me to improve this item, and I hope we receive a robust record on these and other ideas to further reduce regulation in a manner that is consistent with our statutory authority. I vote to approve.

¹ See *Technology Transitions et al.*, GN Docket No. 13-5 et al., Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 15017-18, para. 117 (2014) (*2014 Technology Transitions NPRM and Declaratory Ruling*).

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

In the Matter of)
)
Accelerating Wireless Broadband Deployment) WT Docket No. 17-79
by Removing Barriers to Infrastructure)
Investment)
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June 15, 2017

interpretation runs contrary to the explicit language and purpose of these provisions,³² and their consistent interpretation by courts.³³

Likewise, the Commission should reject arguments that Section 224 of the Communications Act insulates municipal ROW management from Commission oversight. Section 224 gives the Commission authority to regulate rates, terms, and conditions for telecommunications attachments to poles owned by a utility, but not those owned by a state.³⁴ Nevertheless, state and municipal-owned poles are still subject to Section 253.³⁵ Section 253's requirement that state and local governments adopt competitively neutral and nondiscriminatory regulations does not carve out pole attachments or other portions of the Act.³⁶ Otherwise, municipal pole regulations and fees could discriminate without repercussion, frustrating the purpose of the Act. Accordingly, the Commission should assert its authority over these structures and preempt local regulations that conflict with the Communication Act's requirements.

IV. TO REDUCE STATE AND LOCAL BARRIERS TO SMALL CELL DEPLOYMENTS, THE COMMISSION SHOULD DECLARE THAT SECTIONS

³² See, e.g., 47 U.S.C. § 253(a) (“No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”). Section 253(c), which carves out “reasonable” rights of way management, would hardly be necessary if all ROW decisions were proprietary and shielded from the statute’s sweep.

³³ See, e.g., *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005) (“[Section 332] imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless] facilities.”); *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 721 (9th Cir. 2009) (“The [Telecommunications Act] seeks a balance by placing certain limitations on localities' control over the construction and modification of [wireless communications facilities].”).

³⁴ 47 U.S.C. §§ 224(a)(1), (4).

³⁵ See 47 U.S.C. § 253(a) (“No state or local regulation . . .”).

³⁶ 47 U.S.C. § 253(c).

253 AND 332 PROHIBIT CERTAIN ACTIONS AND PRACTICES.

While AT&T commends the Commission's work to date on streamlining federal, state, and local siting practices, progress with regard to siting small cell facilities has been uneven in practice. Local governments continue to impede small cell deployments, particularly in public ROWs, generating obstacles that threaten the promise of advanced wireless services. The Commission should clarify that state and local regulations, such as those discussed below, that materially inhibit or limit the ability to provide wireless service violate Sections 253 and/or 332 of the Communications Act.

A. Direct Prohibitions on Wireless Small Cell Placement Violate Sections 253 and 332.

Carriers must deploy small cell facilities to enhance 4G network capacity, throughput, and reliability and to set the foundation for 5G technology. Local ROWs are the best areas to deploy these facilities because of their inventory of existing densely-spaced, low-elevation vertical structures. But municipalities have enacted a plethora of barriers to prevent carriers from deploying these facilities in ROWs. These direct prohibitions materially inhibit or limit a service provider's ability to offer services that customers seek and have the effect of prohibiting their ability to provide wireless service under 253(a). The following are examples of these barriers.

ROW prohibitions. Prohibiting small cell deployment in a ROW and on municipally-owned poles reduces the number of available sites for infrastructure placement. Many state and local governments have restricted the placement of small cell facilities in the ROW and on structures they control within the ROW, such as light poles and traffic control poles. Examples of ROW prohibitions include:

- At least two states have refused requests to place small cell infrastructure in the ROWs under their control, impacting state highways, major roads, and some arterial roadways in suburban and urban areas. As a result, in one of these states, AT&T was forced to alter its plans to locate 16 nodes along a highway ROW.

- AT&T has faced similar local government barriers in Texas and Massachusetts targeted at small cell facilities in the ROW.
- AT&T has delayed a 10-node small cell deployment in a Georgia County that refuses to allow wireless only poles in the ROW.
- One city in New York proposes to restrict installation of small cells to existing poles, which may not be properly spaced for small cells.

Moratoria. A moratorium is an express prohibition on the ability to deploy broadband infrastructure in the ROW. Ostensibly passed to allow a municipality to manage the deployment process or formulate policy, moratoria are often extended long beyond the time needed for any articulated purpose. Moratoria also include situations where a municipality, without formal action, simply refuses to accept or rule on siting applications. Examples of burdensome moratoria include:

- A Florida city imposed a “six-month” moratorium on ROW wireless siting that was extended multiple times over two years. As a result, AT&T had to cancel plans to deploy over 120 nodes.
- Bryan, Texas issued a moratorium on all wireless facility permits in 2016 that remains in effect, putting at risk AT&T’s small cell deployment in the city.
- An Ohio municipality enacted a 145-day moratorium on permits for construction in the ROW.
- A New York town has adopted a 140-day moratorium on the placement of new wireless facilities, including small cells placed on utility poles.

Above-ground facility prohibitions. Usually intended to avoid the visual impact from electric, telephone, and cable lines and big wireless towers, prohibitions on above-ground facilities and requirements to place infrastructure underground have a disproportionate impact on the provision of wireless broadband service via small cells, blocking such service entirely. Wireless service simply cannot be provided in some areas, such as residential areas, without the ability to place facilities above ground in the ROW. Indeed, underground requirements impede, and in some instances, will prevent, the deployment of millimeter wave spectrum to support 5G technologies. As the Ninth Circuit has recognized, an ordinance imposing an undergrounding requirement on a carrier “would

effectively prohibit it from providing services,”³⁷ which would violate Sections 253 and 332. The following are examples of such prohibitions:

- Bryan, Texas issued its moratorium on above-ground wireless facility permits upon receipt of an application to place wireless facilities in the ROW, finding that the application was a “current and immediate threat to the public health, safety, and welfare,” an unsupportable finding in light of extensive above-ground utilities deployed in most areas of the city.
- Three municipalities in Kansas prohibit above-ground facilities in certain areas.
- One city in New York is considering whether to apply its undergrounding requirements to wireless facilities.
- A municipality in Massachusetts refuses to consider the attachment of small cells in the city. That municipality also has a rule requiring that all new cable attachments be undergrounded except in the case where an existing company already has above-ground attachments on the poles, effectively discriminating against new carriers without existing attachments on poles.
- An Alabama city prohibits overhead facilities in certain areas and requires entities having such facilities already in place to relocate them underground, at their cost.
- An Indiana municipality requires all utilities to be placed underground unless a waiver is obtained.

Location prohibitions. Even where municipalities permit placement of small cell facilities in ROWs, they often arbitrarily limit where such facilities may be located. Location prohibitions materially inhibit or limit the ability of a service provider to offer wireless service. The following are examples of location prohibitions:

- Local governments in the States of Texas and Kansas, among others, require a minimum distance (*e.g.*, 100, 300, 500, or 1000 feet) between each small cell facility in the ROW.
- A local government in Texas prohibits small cell facility placements on municipally-owned light poles in the ROW and in parks.
- New York City prohibits mid-block placement of small cell facilities, whereas several municipalities in California do the exact opposite by prohibiting small cell facility placements in the intersections. In one of those California communities, the inability to

³⁷ *Sprint Telephony PCS, L.P. v. City of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008).

place small cell facilities in the intersection combined with process burdens delayed AT&T's small cell placements for over two years.

These direct prohibitions are not saved by the safe harbors in Section 253(b) and (c) because they typically are not applied in a competitively neutral or nondiscriminatory manner. For instance, location prohibitions on small cell deployments in the ROW are inherently discriminatory because they disadvantage later ROW entrants. There is only one ROW, and arbitrary restrictions on the placement of small cells leave later entrants unable to place facilities in necessary locations. Similarly, ROW access restrictions selectively applied to wireless providers only are inherently discriminatory. Most ROWs support light poles, traffic control poles, utility poles, equipment cabinets, and devices installed on those poles or cabinets, such as electric transformers, sensors, traffic cameras, solar panels, and Wi-Fi antennas and other equipment placed by cable companies and local government entities. This equipment, often placed at regular intervals along the ROW, is no less, and typically substantially more, visually obtrusive than small cell antennas. And yet, municipalities often subject small cell facilities to more onerous restrictions. Such discriminatory regulations hinder the deployment of small cells in violation of Section 253.³⁸

B. Unreasonable Aesthetic Restrictions on Wireless Small Cell Facilities in the ROW Violate Sections 253 and 332.

Some local governments that have not enacted direct prohibitions on wireless small cell facilities have instead enacted unreasonable aesthetic restrictions that can have the same effect.

Examples of these ordinances include:

- Local governments in Texas and New York allow for a single size and configuration for small cell equipment, while requiring case-by-case approval of any non-conforming equipment, even if smaller and upgraded in design and performance. As a practical matter,

³⁸ In WT Docket 16-421, AT&T demonstrated, via contrasting illustrative deployments in a fictional downtown area, how prohibitions on the placement of small cell equipment can materially inhibit or limit the ability of a service provider to offer wireless service. AT&T incorporates those comments in this docket. *See* Comments of AT&T, WT Docket No. 16-421 at 11-12 (filed March 8, 2017).

service providers must incur the added expense of conforming their equipment designs to the approved size and configuration, even if newer equipment is smaller, to avoid the delays associated with the approval of an alternative equipment design and the risk of rejection of that design.

- Elsewhere in California, an AT&T project to install 90 small cell nodes on municipal light poles were delayed approximately one year waiting for design approval.
- Two local governments in Illinois require wireless equipment to be painted a “color that blends with the surroundings of the pole, structure, or infrastructure on which it is mounted.”
- An ordinance adopted by a local government in Pennsylvania requires a “stealth design” for wireless facilities that makes them “more visually appealing and virtually indistinguishable from the structure that it is mounted to.” Similar ordinances throughout the country require service providers to “camouflage” small cell equipment.
- Local governments in California and Pennsylvania prohibit the placement of wireless facilities in and around historic properties and districts, regardless of the size of the equipment or the presence of existing more visually intrusive construction near the property or district, and even if they are categorically excluded from Section 106 review under Commission rules.

These restrictions are particularly problematic because they are vague and often applied discriminatorily. Municipalities often apply these laws only to equipment of licensed wireless providers, but not to other utility equipment, including wireless equipment of cable providers, running afoul of Sections 253 and 332. Worse, these restrictions can materially inhibit or limit the ability to provide service, especially if they limit the configuration of equipment. Network equipment manufacturers are actively innovating with respect to small cell equipment form and function. Regulations that limit the configuration of equipment or define acceptable equipment in overly narrow terms, such as size or configuration requirements, are especially burdensome.

C. ROW and Municipal Pole Access Fees That Are Not Cost-Based Violate Section 253.

In addition to unreasonable regulations, state and local governments often subject providers to exorbitant fees for placing facilities in the ROW. Although Section 253 permits these fees, it requires that they be “fair and reasonable.” But municipalities frequently exceed this standard and

treat ROWs as a revenue generator at the expense of broadband deployment. Municipalities have become creative in the different types of fees they charge for ROW access and the utility of the ROW for small cell deployment leaves carriers like AT&T with few other options but to pay.

Examples of unreasonable fees AT&T has encountered are:

- *Application/Permit fee.* One-time permit application fees are common, depending on whether the support structure is municipally-owned, and some are excessive. Bloomington, Minnesota, in an attempt to recover purportedly lost revenue when recently passed statewide small cell legislation imposed standard ROW access rates, has proposed to raise its application fee from \$35 to \$1,500 per node. Four California municipalities require traffic-control plans that cost over \$10,000, with two requiring plans that exceed \$20,000. The City of St. Paul sought to charge a one-time administrative charge of \$5,000, and another Minnesota city recently assessed a one-time administrative charge of \$4,000 for an application for a wireless carrier to attach to a city structure, in addition to applicable permit fees.
- *Recurring charges.* Recurring charges take the form of flat fees, revenue-based fees, in-kind contributions, or some combination of the foregoing and appear to be set based on a perceived “market rate”—a faulty premise when there is no true “market” for access to the ROW. In practice, every municipality has a monopoly of the ROW and the discretion to dictate the terms of access.
 - *ROW usage fee.* These fees are charged for the placement of equipment in the ROW. For example: A Washington local government can charge an annual fee of up to \$10,000 per facility. Before the passage of small cell legislation, Arizona municipalities charged annual per-node fees in the range of \$3,000 to \$4,000 and a Texas municipality sought a \$3,000 annual fee for access.³⁹ A Pennsylvania municipality sought an annual fee of \$8,000 to access the ROWs, which has caused AT&T to abandon deployments. Another municipality has “Annual Registration Maintenance Fees” to occupy the ROW of \$10,000 for less than 1 mile, \$20,000 from 1 to 15 miles, \$30,000 from 16 to 50 miles and \$40,000 for over 50 miles. One Oregon City has published rates of \$5,500 for attachments to city-owned poles downtown and \$3,500 for city-owned poles outside the downtown core. These wide-ranging ROW usage fees extend nationwide and speak to the arbitrary nature in which the amounts are determined.
 - *Municipal structure attachment fee.* This fee is imposed as rent to attach to municipally-owned poles, and is often excessive, acting as an income generator for the local government. Whereas utility pole attachment rates subject to the Commission’s Section 224 regulations are below \$50 annually, municipalities may

³⁹ See Ariz. H.B. 2365 (2017); Tex. S.B. 1004 (2017) (limiting the fees that municipalities can charge for the use of the ROW).

charge thousands for a similar small cell attachment. Three cities in California assess fees of \$2,600, \$4,500, and \$8,000 annually per attachment. In Texas, one city charges \$2,000 annually per attachment with a 2% annual escalator while another city charges \$1,500 per attachment with an unfettered right to raise the fee every two years.⁴⁰ A Georgia municipality is considering an annual fee of \$6,000 per node. An Illinois city charges over \$2,500 annually for streetlight attachments and over \$5,000 for traffic light attachments and has a 5% annual escalator. The City of St. Paul, Minnesota, acting through a contractor that receives a portion of any increase in revenues generated, sought an annual fee of \$3,400 to attach to city structures and rejected AT&T's request to opt-in to the city's agreements with other wireless carriers, all of which carry an annual fee of less than \$1,000, inclusive of the cost of electricity. AT&T's refusal to agree to these exorbitant fees in Minnesota has delayed AT&T's small cell deployment, not an insignificant development in light of efforts needed to enhance service in anticipation of the Super Bowl in 2018.⁴¹ Another Minnesota city recently assessed a one-time administrative charge of \$4,000 to a wireless carrier for an application to attach to a city structure, in addition to applicable permit fees. These exorbitant fees are unsupportable except for the municipalities' monopoly on ROW access.

- *In-kind contributions.* In-kind contributions are negotiated and occur in addition to or instead of ROW usage fees and municipal attachment fees. A municipality in Massachusetts requires small cell operators to provide the city with free dark fiber as a condition of using city light poles, while another local municipality in Massachusetts requires the transfer of dark fiber to the city when the service provider's access to the ROW ends. Other municipalities saddle small cell service providers with maintenance of the pole and surrounding ROW area.
- *Gross-revenue fees.* Multiple municipalities around the country require 5% of a provider's gross revenue as part of providing access to the ROWs, while a local government in Georgia charges 3% of annual revenue.

These fees discourage providers from investing in or expanding their networks. As a result, providers forgo deploying small cells in certain municipalities or diminish the size of or even abandon a project. If, as S&P Global Market Intelligence estimates, small-cell deployments reach

⁴⁰ See *supra* n.16.

⁴¹ Minnesota's recently adopted small cell legislation eliminates cities' excessive charges for attachment to municipal structures and access to the ROW. See Minn. S.F. 1456, Article 9 (2017) (amending Minn. Statutes §§ 237.162-63).

nearly 800,000 by 2026,⁴² a ROW fee of \$1,000 per year (a modest sum relative to current ROW access and attachment fees) would result in nearly \$800 million *annually* in foregone investment. This lost investment would harm consumers and materially inhibit or limit a service provider's ability to provide wireless services.

To avoid this potential for lost investment, the Commission should clarify that a “fair and reasonable” fee to locate in a ROW and on municipally-owned ROW structures must be cost-based (*i.e.* allowing the local government to recover 100% of its real costs arising from the presence of the wireless attachment in the ROW or on its support structure). As an initial matter, the Commission should categorically prohibit revenue-based fees as, by definition, they are not related to management or use of the ROW.⁴³ Municipalities should be allowed to recover their costs to process an application (in the case of a ROW permit fee), manage the ROW (in the case of accessing the ROW to place a pole or attach to an investor-owned utility pole), and manage the pole in the ROW (in the case of attaching to a municipal pole). In the case of attaching to municipality-owned structures, fair and reasonable fees should be nominal and only compensate the local government for the additional costs of providing the attachment. Without a cost-based approach, service providers are locked into a cycle of ever higher fees to access the ROWs and poles in ROWs.

⁴² *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13364 n.23 (citing *SNL Kagan Wireless Investor*).

⁴³ *See, e.g., TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002) (invalidating fees based on percentage of revenue); *Qwest Corp. v. City of Santa Fe, New Mexico*, 224 F. Supp. 2d 1305, 1327 (D.N.M. 2002), *aff'd in part, remanded in part*, 380 F.3d 1258 (10th Cir. 2004) (“[I]n order to fall within the savings clause of Section 253(c), the compensation required by a local government must directly relate to actual use of local rights-of-way.”); *Peco Energy Co. v. Twp. of Haverford*, 1999 WL 1240941, at *8 (E.D. Pa. Dec. 20, 1999) (“Revenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of-way.”).

Further, both Sections 253 and 332 require nondiscriminatory and competitively neutral application of regulations. Yet, wireless service providers are often subject to higher fees than other ROW occupants, even though wireless service providers use considerably less of the ROW. The Commission should clarify that Sections 253 and 332 require that wireless providers only be assessed fees that are proportionate to their use of the ROW. Consistent and rational fees will allow all wireless providers to compete on an equal basis and expedite broadband deployment.

To alleviate some of the issues associated with excessive fees, the Commission could establish a presumptively reasonable safe harbor fee for use of the ROW and municipally-owned structures in the ROW. A reasonable safe harbor fee to locate in the ROW could be in the range of \$50 annually, based on the model adopted by the State of Arizona.⁴⁴ A reasonable safe harbor fee for placement of small cell equipment on municipal structures could also be about \$50 annually per structure, more than the pole attachment fees AT&T typically pays to utilities. Fees that fall within these safe harbors would be predictable and could be relied on by service providers and municipalities. To address the fact that, in many instances, multiple parties use the ROW and may reasonably be expected to share costs, the Commission should clarify that a fair and reasonable municipal pole-attachment fee is the lesser of (i) the Section 253(c) safe harbor fees above; or (ii) the ROW access fees charged to other ROW occupants for proportional use.

D. Burdensome Permitting Processes Violate Section 253 by Injecting Unnecessary Costs and Delays into the Wireless Siting Process.

Local governments also enact burdensome permitting and zoning processes that discourage the deployment of wireless broadband facilities. These requirements range from requiring the submission of detailed maps of all wireless facilities in a jurisdiction, to refusing to accept batched

⁴⁴ Ariz. Rev. Stat. §9-592, D.4, adopted in Ariz. H.B. 2365 (2017).

applications, to imposing the same burdensome processes on minor facility modifications as to new deployments, each of which can cause extensive delays. One of AT&T's early Distributed Antenna Systems ("DAS") projects in California took over 800 days to deploy because local government officials scrutinized the design and operational details of each node, including issues such as whether a macro site or DAS node would best cover an area, antenna designs, RF exposure, property values analyses, stealthing, equipment placement (above or below ground level), acoustic noise studies, screening, placement away from intersections, and network performance. The Commission should clarify that onerous processes, such as those described above, discourage wireless providers from deploying small cells in large numbers, as is needed for 5G technologies, and contravene Section 253. In order to streamline and expedite processing, the Commission should limit what local governments can review when considering applications and clarify that prohibiting "batched" applications has the effect of materially inhibiting the provision of wireless services.

E. The Commission Should Preempt Local Regulations That Would Inhibit Small Cell Deployments in Particular.

The Commission should clarify that local regulations that inhibit the deployment of small cells are preempted under Section 253. This includes local ordinances that, absent legitimate space, safety, or historic preservation considerations, materially inhibit or limit the placement of small cell equipment and supporting poles that meet the following criteria:

- Small cell antennas fitting, or that could fit, within an enclosure of six cubic feet in volume;
- Equipment associated with the small cell antennas, excluding electric meters, concealment elements, power transfer switches, telecommunications demarcation boxes, battery back-up power systems, cut-off switches, cable, conduit, and equipment concealed from public view or camouflaged and that are no more than 28 cubic feet in volume; and
- New or replacement poles in the ROW that are no taller than 50 feet above ground level or 10 feet higher than the highest pole or other structure within 500 feet of the ROW.

These size limitations are consistent with limitations codified in small cell legislation recently adopted by multiple states.⁴⁵ Those states are to be applauded for having the forethought to recognize that unreasonable regulation of small cells limits the deployment of wireless services and can and should be removed throughout their state, in favor of reasonable standards that allow for wireless use of the ROW while still protecting the character of their communities.

States have also implemented other small cell deployment process reforms. For example, the Texas legislature recently passed a bill that streamlines network providers' access to the public ROW and establishes both timeframes for expeditious processes and fair terms and conditions, including fees.⁴⁶ Virginia also recently enacted a law that allows providers to batch up to 35 nodes in a single application and gives applicants a deemed approved remedy for delayed review.⁴⁷ These common-sense reforms have streamlined the review process and will lead to significant benefits for providers, local governments, and consumers alike. Nevertheless, Commission action still is needed to ensure that wireless infrastructure can be deployed expeditiously in localities across the country.

⁴⁵ See, e.g. Ariz. H.B. 2365 (2017); Minn. S.F. 1456, Art. 9 (2017); Fla. S.B. 596 (2017); Iowa S.F. 431 (2017); Ind. S.B. 213 (2017); Ohio S.B. 331 (2017).

⁴⁶ Tex. S.B. 1004 (2017).

⁴⁷ Va. Code Ann § 15.2-2316.4 (2017).

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

In the Matter of)
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Accelerating Wireline Broadband Deployment) WC Docket No. 17-84
by Removing Barriers to Infrastructure)
Investment)
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**COMMENTS OF AT&T SERVICES, INC.
ON NOTICE OF PROPOSED RULEMAKING,
NOTICE OF INQUIRY, AND REQUEST FOR COMMENT**

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June 15, 2017

a result would also require local governments to evaluate the mix of services before regulating, which are determinations they do not have the expertise or authority to make.

C. The Commission Should Preempt State and Local Laws and Other Legal Requirements That Inhibit Broadband Deployment

The Commission seeks comment on which specific categories of state and local restrictions are inhibiting the provision of telecommunications service.²⁰⁵ Despite the Commission's work to date on streamlining federal, state, and local siting practices, state and local governments continue to impede broadband infrastructure deployments in a variety of ways. These barriers to broadband deployment violate § 253(a) and should be preempted.

1. Moratoria. The Commission should adopt rules that preempt blanket moratoria on the ability to deploy broadband infrastructure in rights-of-way. For example, an Ohio municipality enacted a 145-day moratorium on permits for construction in rights-of-way, and an Illinois city imposed a five-year moratorium on pavement cuts to roadways that have been resurfaced or reconstructed. These kinds of moratoria do not merely place reasonable limits on the time, place, and manner of access to rights-of-way. Rather, they are blunt instruments that force providers either to delay or cancel their planned deployments, which inhibits their ability to compete on a level playing field and artificially limits the choices of consumers. They therefore fall outside the § 253(c) savings clause that allows local governments "to manage the public rights of way": that authority must be limited to *reasonable* regulations to avoid permitting evasion of the basic purpose of the provision.

2. Above-Ground Facility Prohibitions. Some municipalities prohibit or restrict the deployment of above-ground facilities, usually to shield residents from having to look at electric,

²⁰⁵ See Notice ¶¶ 101-108.

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

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

**COMMENTS OF CONTERRA BROADBAND SERVICES, SOUTHERN LIGHT, LLC
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of open hostility of a local government to small cell wireless facilities in the public rights-of-way.

The Commission's goal should be to direct resources to supporting broadband deployment, not costly and time-consuming litigation. A deemed granted remedy for all applications – both wireline and wireless — and regardless of the authority under which the shot clock is adopted, will ease the burden of local government approvals, streamline deployment and promote investment in expanding broadband.

VI. The FCC Should Use its Authority Under Section 253(a) to Preempt Moratoria Imposed by State/Local Governments

CFPs have encountered moratoria in numerous forms and municipalities where they have sought authorization to deploy telecommunications infrastructure, both wireline and wireless, in the public rights-of-way. In one municipality, applicants were informed there was a moratorium on competitive deployments, allowing incumbent phone companies and cable operators to operate without fear of competitive deployment on the horizon. In at least one instance, an agency has granted right-of-way access privileges to a single entity through a bidding process, thereby creating a monopoly on access to the rights-of-way in that jurisdiction. In other areas, state highway officials have refused to issue permits for deploying fiber on bridges, even where spare conduit is available. In addition, municipally-owned utilities frequently delay issuance of pole attachment applications or claim they have issued a moratorium on new construction thereby impeding the deployment of service to the community. While such municipally-owned utilities are not subject to the Pole Attachment Act, the Commission should take all available steps, including the use of Section 253 and recommending legislative action to Congress, to remove this significant impediment to broadband deployment.

The *Wireline NPRM* asks whether the FCC should adopt “rules prohibiting state or local

moratoria on market entry or the deployment of telecommunications facilities.”⁵⁶ The Commission has already established that moratoria do not toll any of the infrastructure deployment shot clocks in the FCC’s rules.⁵⁷ There is no reason to adopt a different policy with respect to any of the shot clocks adopted as a result of these rulemaking proceedings.

The Commission, however, in the event that it does not adopt a more expansive regime of shot clocks, should explicitly state that moratoria by any municipal agency clearly violates Section 253(a) and cannot be saved by either Section 253(b) or (c). A moratorium clearly effectively bars the provision of service.

Moratoria can impose significant costs that impede the deployment of broadband infrastructure. For some CFPs denied the ability to deploy fiber across bridges and highways, the only alternative is to bore underneath the body of water instead of using the conduit on the bridge. While deploying through existing conduit would cost approximately \$20,000, the cost to bore under a significant body of water can easily exceed \$500,000. That difference cannot be overcome and usually means the community at the other end of the bridge does not receive the same broadband as its mainland neighbors. Where school systems are involved, companies serving those schools can only deliver broadband to the mainland schools, while the schools across the water remain isolated and without the tools necessary to promote digital literacy. Such policies clearly exacerbate the digital divide.

In other cases, local governments cite to pending state or federal legislation as grounds to halt or delay the filing or processing of right-of-way permits or franchise applications.

⁵⁶ *Wireline NPRM, NOI and RFC*, 32 FCC Rcd. at 3297, ¶ 102.

⁵⁷ *2014 Infrastructure Order*, 29 FCC Rcd. at 12971, ¶ 265; 47 C.F.R. 1.40001(c)(3) (“Tolling of the timeframe for review. The 60-day period begins to run when the application is filed, and may be tolled only by mutual agreement or in cases where the reviewing State or local government determines that the application is incomplete. The timeframe for review is not tolled by a moratorium on the review of applications.”).

Municipalities also can create a “moratorium” as a negotiating tactic to extract in-kind payments or fees from carriers, or simply to prevent carriers from installing facilities in the right-of-way because the local government does not want to issue a permit under any circumstance. Because carriers have strong incentives against seeking judicial redress or relief from the Commission in these situations, the Commission should prospectively preempt moratoria on deployment of facilities in the public right-of-way. Otherwise, carriers will refuse to deploy facilities in those areas, robbing citizens in that municipality of the benefits from increased and improved broadband services.

VII. The Commission Should Hold That Local Government Demands For Free Or Reduced Price Access To Facilities And Services, Including Free Provision Of Fiber Or Other In-Kind Payments, Violate Section 253(c).

Many local governments, either as a substitute for or in addition to monetary payments for right-of-way access, insist that CFPs provide excessive in-kind payments, including free strands of fiber or free conduit. In some instances, the local government requires CFPs to deed over all conduit and pay the local government a fee to lease access to that conduit.⁵⁸ There are numerous problems with such requirements. First, the costs of the free fiber or conduit greatly exceeds the actual burden access to rights-of-way imposes on the community. Further, turning over free fiber strands or conduit to the local government may deprive the CFP of an ability to obtain a return on its investment and pay the franchise fees; particularly if the local government elects to use the free infrastructure it has received to build its own network rather than using the networks of private sector telecommunications companies.

The burden of negotiating these provisions is a significant impediment to the deployment

⁵⁸ *Zayo Group LLC v Mayor and City of Baltimore et al.*, 2016 WL 3448261 (D. Md. 2016).

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

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

COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.

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and enhance participation with localities as they address their future broadband deployment needs.

In Section II of these comments, Crown Castle offers some examples of its experiences in wireless deployment, highlighting the many success stories while laying out some of the issues it has faced at the local level. In Sections III, IV, and V, Crown Castle explains how it believes the FCC can act to address these challenges—by clarifying existing law, and by revisiting conclusions from prior proceedings that have turned out to be less effective in practice.

II. LOCAL RIGHTS OF WAY AND LAND USE RESTRICTIONS ARE IMPEDING EFFORTS TO DEPLOY BROADBAND INFRASTRUCTURE IN SEVERAL JURISDICTIONS.

As network providers such as Crown Castle tackle the challenge of building and upgrading the networks that will power the expanding wireless economy, they will need to work in partnership with state and local governments to facilitate rapid deployment of next-generation systems. Crown Castle has already worked to deploy small cell and other advanced facilities in communities large and small that have embraced the economic promise of broadband connectivity, and has adopted collaborative approaches to the deployment of fiber optic and wireless services and infrastructure. Individuals and businesses in these communities enjoy access to some of the world's most advanced broadband networks, and these jurisdictions should serve as models for the public-private cooperation that will be necessary for next-generation broadband networks to flourish.

Unfortunately, these success stories are far from universal. Crown Castle frequently faces resistance from other state and local governments that hinder efforts to deploy facilities necessary to support next-generation broadband networks. This resistance is particularly heightened when it comes to locating telecommunications networks in the public ROW—an issue that is increasingly critical for 5G deployment. Many municipalities charge excessive and

unreasonable fees to access the ROW that are completely unrelated to their maintenance or management, and instead serve merely to increase government revenues. Still other municipalities discriminate by erecting barriers that make it difficult for independent network and telecommunications service providers to deploy next-generation broadband networks in public ROW (instead favoring incumbent and sometimes CMRS providers). The patchwork of inconsistent local regulation serves as a barrier to deployment of regional or national networks. The local regulatory obstacles faced by Crown Castle and other network providers are not limited to accessing the public ROW, however. Many jurisdictions improperly apply onerous local zoning regulations to siting applications, adding to the cost and time required to deploy facilities. Left unaddressed, these impediments challenge the United States' role as a leader in delivering broadband services.

A. **Crown Castle Works Diligently and Cooperatively with Municipalities That Adopt Reasonable Approaches to Siting Applications Consistent with Section 332, 253, and 6409.**

Crown Castle has a strong record of working collaboratively with willing municipalities to facilitate deployment of next-generation broadband networks. As described above, Crown Castle has installed small cell networks in New York's Central Park and in Central Philadelphia that provide reliable and expandable wireless broadband services. Both networks have ample capacity to handle the influx of tourists in summer months, and Philadelphia's network also has supported large events such as the 2016 Democratic National Convention, concerts, Fourth of July fireworks, and more. In another positive example, after being ravaged by Hurricane Sandy in 2012, the Borough of Sea Bright, New Jersey, has turned to small cells to boost resiliency and increase capacity, transforming the Borough into a leader in broadband infrastructure.¹⁶

¹⁶ See Matt Leonard, *NJ City Boosts Communications Resiliency*, GCN (Dec. 20, 2016), available at <https://gcn.com/articles/2016/12/20/sea-bright-resilient-city.aspx>.

Other municipalities that recognize the potential of next-generation wireless broadband and have worked with Crown Castle to bring these services to their residents include large jurisdictions like Chicago, Illinois, Pittsburgh, Pennsylvania, Minneapolis, Minnesota and the Louisville-Jefferson County Metro Government, Kentucky, along with smaller jurisdictions such as State College, Pennsylvania, Brookfield, Wisconsin, Little Elm, Texas, The Colony, Texas, and Texas City, Texas. The City of Cincinnati, Ohio offers a particularly illustrative example of how local governments and stakeholders can work together. After the City presented a draft ordinance that would have hindered small cell deployments, City officials engaged in a collaborative stakeholder process, held facilitated meetings, and listened to and addressed stakeholder concerns. The result was a compromise ordinance that balances municipal and provider concerns and positions Cincinnati to be at the forefront of the next broadband revolution. Little Rock, Arkansas, likewise, will benefit if the May 22, 2017, draft of its municipal ordinance is passed. The current draft under consideration presents a balanced approach to the placement of small cells that will expedite deployment.

B. Onerous Municipal Zoning and Planning and Restrictions and Arbitrary Fees Have Hindered Deployment of Next-Generation Wireless Services.

For each example of a community that has welcomed advanced broadband services, however, there are several contrasting examples of state and local governments that have obstructed barriers that hinder the deployment of next-generation broadband networks. As long as the regulatory environment remains uncertain and downright impossible in many jurisdictions, next-generation broadband networks will be unable to flourish. As Chairman Pai has properly recognized that “the more difficult government makes the business case for deployment, the less

likely it is that broadband providers big and small will invest the billions of dollars needed to connect consumers with digital opportunity.”¹⁷

Discrimination against network providers trying to build out new small cell systems is a major impediment to broadband deployment. In most jurisdictions, an existing utility, including an incumbent telephone carrier, can place poles in the public ROW without any zoning review. Once those poles are installed, an affiliated wireless provider can often attach small wireless facilities—such as small cell nodes—with minimal or no scrutiny, thereby avoiding both the delays and costs experienced by other infrastructure providers. For providers such as Crown Castle that do not provide incumbent, wireline services to end users, however, the experience can be much different. In one central Pennsylvania city, for example, officials recently required Crown Castle to follow the zoning process normally reserved for new macro towers, even though other telecommunications providers only needed to obtain engineering permits. Although Crown Castle was able to obtain a special exemption for half its nodes, the added procedural hurdle resulted in a 3-4 month delay that the incumbent could have avoided.

Crown Castle is aware of a number of instances where the imposition of unreasonable review procedures has precluded the deployment of infrastructure to support advanced wireless services. The Township of Upper St. Clair, Pennsylvania, for example, passed an ordinance in 2015 requiring a zoning application to place small cells in the public ROW, blocking small cell deployment in approximately 80% of the Township’s land area. Many nearby municipalities have adopted nearly identical versions of this regulation. In Abington Township, Pennsylvania, the Township subjected Crown Castle to discretionary zoning review not only for 21 proposed new nodes in the Township’s jurisdiction, but for two additional facilities on Pennsylvania

¹⁷ Pai MWC Keynote at 2.

Department of Transportation roads within the Township that are compliant with Section 6409. Before Crown Castle could even file its applications, the Township sought a preliminary injunction to prevent Crown Castle from construction. The Township’s request for preliminary injunction has recently been denied. And the Village of Lloyd Harbor, New York, is unapologetic about refusing to provide Crown Castle with authority to install facilities in one part of the Village unless it provides coverage for another portion of the Village—a classic instance of a municipality erecting an effective prohibition.¹⁸

In response to the Commission’s request for “information on the prevalence of barriers, costs thereof, and impacts on investments in and deployment of wireless services” and “the extent to which the Commission’s existing rules and policies have or have not been successful in addressing local siting review challenges,”¹⁹ Crown Castle offers the following (updated from its comments in response to the *Streamlining PN*).

1. Imposition of Unreasonable Fees and Conditions

Many jurisdictions impose onerous and discriminatory restrictions and fees that thwart deployment of small cell networks due to the mere presence of antennas in the network design. These restrictions and fees, which generally do not apply to wireline deployment (without antenna appurtenances) in the ROW, go beyond reasonable resource management, and appear designed to either deter small cell deployment or to merely generate revenue for cash-strapped local governments—all at the expense of broadband facility modernization and densification. Specifically, these jurisdictions fail to account either for the unobtrusive nature of small cells or the general nature of a small cell network design, which requires the installation of many relatively low-powered, fiber-connected nodes to provide maximum throughput and spectral

¹⁸ See Letter from Village of Lloyd Harbor, WT Docket No. 16-421 (Apr. 6, 2017) at 1-2.

¹⁹ *NPRM* ¶ 6.

efficiency. Moreover, some jurisdictions have challenged the ability of entities like Crown Castle, who have certificates from the state public utility commission, to provide backhaul service for wireless carriers. There is also a growing and unfortunate trend of municipalities challenging the validity of the certificates of public convenience and necessity (“CPCNs”) with the state public utilities commissions. Taken together, these actions (or inactions) disrupt the availability of next-generation broadband services. Below are just some of the examples that Crown Castle has observed across the country:

- ***California:*** A number of California municipalities have established such onerous requirements as to effectively prohibit small cell installations within their jurisdictions.
 - The City of Newport Beach has created an untenable situation by seeking excessive fees for use of the City’s poles and denying applications for new pole construction. Based on a CBRE, Inc. market rent survey commissioned by the City, Newport Beach has adopted a new wireless ordinance that recommends a baseline annual rent of \$10,800 per node site—more than 50 times the average FCC rate for wireless pole attachments. When Crown Castle determined that the most prudent approach would be to construct its own poles, Newport Beach denied Crown Castle’s applications, claiming that the proposal created aesthetic concerns. Thus, for Crown Castle to access the ROW, it must use the City’s poles and pay the monopolistic fees established by the City. As a result, Crown Castle has re-evaluated its planned deployment for Newport Beach.
 - In its comments to the *Streamlining PN*, Crown Castle cited issues related to deploying small cell networks within the City of Carlsbad, in particular, with respect to the imposition of substantial annual attachment fees. Since that time, Crown Castle has been encouraged by progress that has been made on agreements with the City and has been able to negotiate a reduction to the proposed market based rates.
- ***Maryland:***
 - Montgomery County has some of the highest and most burdensome application fees in the country. Montgomery County applies a two-step “special exception” process for any new small cell node pole installations in public ROW that are not collocations on existing structures. First, a party must apply to the Telecommunications Facility Coordinating Group (“TFCG”) and pay an application fee of \$1,000 per collocation or \$2,000 for each new or replacement pole. Upon recommendation by the TFCG, the party must then

pay a \$20,000 application fee per new or replacement pole, and the hearing examiner must review the application—a process that could take 3-6 months.²⁰

- The City of Gaithersburg is considering a master ROW use and franchise agreement that would impose a non-refundable application fee of \$500 for each new pole or collocation, an annual attachment fee of \$500 for each facility on which equipment has been installed (subject to an annual increase), and a use fee of five percent (5%) of gross revenues.
- **New York:** The level of support toward small cell deployments varies greatly by jurisdiction in New York. While some municipalities have encouraged the deployment of next-generation broadband infrastructure and services, others have imposed some of the most draconian restrictions in the country.
 - The Town of Hempstead requires an escrow fee of \$3,000 per new small cell node pole and \$1,000 per collocation to cover “consultant review.”²¹ At this rate, a typical network deployment results in escrow fees of \$150,000 or more. In addition, the Town charges an application fee of \$900 for each new pole and \$650 for each new node on an existing pole. Hempstead also imposes a \$450 fee to modify an existing site, which is in addition to the \$650 fee charged by the Highway Department for a new pole application. All of these fees are in addition to the annual “voluntary” 5% gross revenue share for the Town.²²
 - In the Village of Brookville, Crown Castle filed under protest and received Zoning Board approval for the deployment of a small cell system. Nevertheless, it took one-and-a-half years for the village attorney to draft the approval resolution and negotiate the right-of-way of use agreement (“RUA”). Crown Castle had to deposit \$8,500 per node into escrow for “consultant review” and had to pay an additional application fee of \$2,000 per carrier, per

²⁰ Applications for collocation on an existing third-party wood utility pole are considered as of right and may proceed directly to permit upon recommendation by the TFCG. However, the existing wooden pole often cannot accommodate the additional small cell equipment and therefore, new poles must be installed.

²¹ In its *Streamlining PN Reply Comments*, the Town claimed that “[t]he need for consultant review is clear from the factual record of widespread safety and code violations.” See Reply Comments of Town of Hempstead, WT Docket No. 16-421 (Apr. 7, 2017), at 2. Setting aside the merits of the Town’s allegations, the examples cited by the Town involve alleged construction violations, not issues with the applications, and in any event do not involve small cell facilities.

²² The Town of Hempstead also has a wireless ordinance that has been the subject of pending litigation in federal court for more than six years. As of the date of this filing, a motion for summary judgment, asserting that the ordinance constitutes a prohibition and violates a variety of provisions of the Communications Act, has been fully briefed and awaiting decision for more than two years. *New York SMSA P’ship v. Town of Hempstead*, 2:10-cv-4997 (E.D.N.Y.).

node. In other words, for a collocation requiring no change to equipment, the cost would be \$4,000 per node. Crown Castle also had to pay almost \$20,000 in legal fees for the Village attorney.

- The Village of Laurel Hollow requires a \$3,000 escrow fee per small cell node and an application fee of \$900 for new poles and \$650 for collocated facilities on existing poles.²³ Although the Village has claimed that Crown Castle consented to these fees,²⁴ such a claim is disingenuous given that the Village refused to process Crown Castle’s request until Crown Castle withdrew its express objection to the fees and reservation of rights. Moreover, the Village refused to negotiate a right of use agreement (including any applicable fees) until after the Village had issued special permits for the nodes, requiring Crown Castle to make certain assumptions about the fees it would command.
- In the Town of Oyster Bay, Crown Castle filed applications for 22 small cell nodes on November 15, 2016. On April 6, 2017, the Town issued the permits and Crown Castle began installing equipment. As a result of the outcry of citizens based on unfounded fears over health risks from radiofrequency radiation, on May 10, 2017, the Town issued a cease and desist order revoking the 22 permits. The Town Supervisor was quoted on video at a meeting the prior day stating “Going forward, we are to stop providing the right-of-way for cell companies to install repeaters.” Crown Castle recently filed a complaint against the Town in District Court.
- **Virginia:** At the state level, the Virginia Department of Transportation (“VDOT”) charges some of the most excessive and unreasonable annual fees in the country—\$24,000 for each new pole and \$12,000 per collocation on an existing pole, without regard for whether the pole is owned by the state or by a third party. At the county level, Fairfax County has established a Special Use Permit requirement for any new small cell node public installations in public ROW. In addition to the \$15,000 application fee per utility pole, applications must be reviewed and approved by the County Planning Commission, which could take up to six months. In response to these and other issues faced in Virginia with respect to the deployment of small cell systems, the Governor of Virginia recently signed into law legislation that potentially resolves many of these fee issues.²⁵ However, new poles are not specifically addressed in the new Virginia legislation and would continue to be subject to the County Special Exception review and will continue to carry excessive fees. Additionally, new poles in Fairfax County that fall within VDOT controlled ROWs will fall under the VDOT Land Use Regulations and are therefore subject to the \$24,000 annual recurring fee.

²³ See Reply Comments of Village of Laurel Hollow, WT Docket No. 16-421 (Apr. 7, 2017) at 2.

²⁴ See *id.*

²⁵ See Virginia SB 1282 (passed House and Senate on February 20, 2017, and the Governor signed the legislation into law on June 8, 2017).

2. Prohibition of Small Cell Deployment

A number of jurisdictions have gone farther, and either imposed an outright prohibition on the installation of small cell nodes in the ROW or applied explicit or implicit moratoria on processing of small cell applications, in violation of their shot clock obligations. Some of the examples encountered by Crown Castle are detailed below:

- **Alabama:** Officials from the Alabama Department of Transportation (“ALDOT”) recently advised Crown Castle that the agency will not permit installation of small cell sites for any entities, including those certified by the Alabama Public Service Commission, in accordance with a standing policy of prohibiting “distribution” equipment in state-controlled ROW. Under this unwritten, interpretive policy, equipment placed in state-controlled ROW must be only for “transmission” rather than “distribution,” resulting in an absolute prohibition of small cell deployment in state-controlled ROW.
- **California:** Several California jurisdictions have imposed absolute or effective prohibitions on the installation of small cell nodes in ROW.
 - Redwood City previously included a statement on its website that “the City of Redwood City does not permit the installation of any new wireless communications facilities on City-owned property or in the right-of-way.” Only after Crown Castle identified this statement in its comments did the City remove it.²⁶ Crown Castle looks forward to working with Redwood City if it is, in fact, “open to installation of new wireless communications facilities on both City-owned property and in the public right-of-way.”
 - San Francisco has imposed a discriminatory pre-deployment aesthetic review requirement for ROW deployments despite the fact that San Francisco does not require an equivalent review for other (often more conspicuous) ROW deployments. An appeals court recently upheld San Francisco’s ordinance, though the matter is now under review by the California Supreme Court. The judicial review of this ordinance is now in its sixth year.
 - San Francisco has also entered into an exclusive arrangement with one entity to provide wireless service within the City parks. To provide service for a competing entity at one of San Francisco’s largest parks, Crown Castle designed a network utilizing existing wooden utility poles around the outside park perimeter. Notwithstanding significant negotiations and proposed accommodations, the City denied the application based on aesthetics grounds,

²⁶ See Reply Comments of City of Redwood City, WT Docket No. 16-421 (Apr. 7, 2017) at 1-2.

even though similar (and larger) designs were approved by the City for Crown Castle installations at other locations.

- One of the biggest issues that Crown Castle faces in California, in particular, is the position that although the municipality is required to approve or disapprove applications within the shot clock time frames, it is not required to “issue permits” within the same timeframes, thereby delaying if not completely obstructing infrastructure deployment. For example, the City of Rancho Palos Verdes does not agree that the 90-day shot clock applies to collocations of small cell equipment in the right-of-way. In addition, the City takes the position that the shot clock does not apply to collateral permits, such as encroachment permits, necessary for deployment of small cell networks. Other cities in California that have taken similar positions include Palo Alto, Monterey, Pacific Grove, Santa Cruz, Santa Cruz (County), Ceres, Santa Barbara, Santa Barbara (County), Cupertino, Hillsborough, Oakland, Piedmont, San Luis Obispo, Stockton, Santa Clara County and South Lake Tahoe.
- **Colorado:** The City of Greenwood Village has a lengthy pre-application process for all installations, including attachments to an existing pole. Applicants must send notifications to all households within a 2,000-foot radius of the deployment, hold a neighborhood input meeting with staff-coordinated attendance, and prepare a report addressing all the issues raised in the meeting. These requirements add considerable time to the process and, because they occur “pre-application,” the City takes the position that they do not trigger the shot clock. Once submitted, the application must be reviewed for approval by both the Planning Commission and the City Council. Although reply comments filed on the City’s behalf attempted to explain these restrictions, they did not deny them or otherwise refute their dilatory effect.²⁷
- **Delaware:** The Delaware Department of Transportation (“DelDOT”) has recently taken the position that although an entity has a CPCN from the Delaware Public Service Commission, if the service provided includes a cellular technology, the entity is not eligible for a permit to occupy the state’s ROW. DelDOT added, without explanation, that “an initial review of small cell site installations by the Department has found that such installation may not be safe to travelers and may interfere with the primary transportation purpose of the public roads.” Legislation is now under consideration in Delaware that would resolve this issue.
- **Florida:** The City of Fort Lauderdale has extended its small cell moratorium eight times over the past two-and-a-half years, citing the need to better understand and

²⁷ See Reply Comments of Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County, Washington, the Jersey Access Group and the Colorado Municipal League, WT Docket No. 16-421 (Apr. 7, 2017) at 4-6.

document best practices on how to administer wireless facilities in the public ROW. Finally, through the work of a consortium of facilities-based providers, Fort Lauderdale enacted a new wireless ordinance in March 2017.

- **Illinois:** Crown Castle has encountered significant delay regarding its applications to install small cell networks in a number of Illinois jurisdictions.²⁸
 - In one Illinois municipality, which Crown Castle initially contacted in October 2015 regarding the deployment of fiber optic lines and small cell nodes, municipal officials confirmed that a license agreement would be required for use of the public ROW, and Crown Castle provided a draft of such an agreement in November 2015. Only after Crown Castle submitted applications in October 2016 accompanied by a letter advising the municipality of its obligations under the FCC's shot clock, however, has the municipality agreed to move forward with negotiations.
 - Another Illinois municipality, meanwhile, required Crown Castle to enter into a license agreement to install fiber optics in the ROW notwithstanding the fact that similarly situated telecommunications providers had previously installed fiber optics in the ROW without a license or franchise agreement. It took the municipality approximately eight months to negotiate the license agreement.
- **Indiana:** Although Crown Castle successfully deployed a dozen small cell nodes and a fiber optic backbone in Evansville in 2015, a competitor's proposal caused the City to revise its procedures and prohibit the installation of new poles in the ROW, significantly delaying a planned 2016 expansion of Crown Castle's network. Without addressing the merits of Evansville's allegations in reply to Crown Castle's initial comments, Crown Castle notes that they all relate to supervision of construction, not to the City's overly burdensome application and processing requirements, which it "admits . . . are evolving."²⁹
- **Hawaii:** Crown Castle has been working for more than two years to reach an agreement with the City and County of Honolulu to authorize small cell network deployment. The City and County have raised bid policy and anti-competition concerns about Crown Castle's proposal despite having entered into master license agreements with Hawaiian Electric Industries and Hawaiian Telecom. They also have refused or been unable to provide clear direction regarding the procedure for placing new poles in the ROW, resulting in significant delay. Crown Castle is now evaluating a design that utilizes newly-installed utility poles.
- **Louisiana:** In January 2016, Jefferson Parish denied Crown Castle's application for a franchise notwithstanding the fact that it had granted a franchise to a competitor and allowed it to construct small cells in the Parish's ROW. Although

²⁸ Crown Castle is unable to identify the jurisdictions because of ongoing negotiations.

²⁹ See Reply Comments of City of Evansville, WT Docket No. 16-421 (Apr. 7, 2017) at 3.

Crown Castle has made several efforts to obtain reconsideration of the Parish's unjustifiable decision, the Parish has refused.

- **Massachusetts:** The Massachusetts Port Authority has been unwilling to discuss either collocation on existing poles or the installation of new poles in the ROW, claiming that it “will issue an RFP in the future.” This inaction has had the effect of prohibiting service. The City of Cambridge, meanwhile, has refused to allow attachment to City-owned light poles or to approve the installation of new poles, thereby effectively prohibiting installations in certain parts of the city.
- **Maryland:**
 - As an alternative to the burdensome and costly “special exception” process described above, Montgomery County has introduced a zoning text amendment to specifically address small cell installations in the ROW. While this amendment would greatly improve the application and approval process for small cells, the amendment has stalled in response to public opposition.
 - In one Maryland municipality,³⁰ the city has attempted to rescind an RUA that it negotiated with Crown Castle, arguing that the document did not receive the required municipal approvals. The city is now drafting a new ordinance to manage ROW access. While this process is ongoing, the city has imposed a *de facto* moratorium on wireless deployment in the ROW that remains in place and seems unlikely to be lifted soon.
 - A number of jurisdictions in Maryland have discussed at a public meeting the idea of forming a coalition to challenge the state-issued certificates held by neutral-host network providers like Crown Castle, in an attempt to prevent such providers from building facilities in the ROW.³¹
- **South Carolina:**
 - The City of Charleston has failed to act on applications to install fiber in the ROW that were submitted in December 2015. Recently, the City informed Crown Castle, that a franchise agreement would be required before obtaining any fiber installation permits. To date, the City has been unable to provide a process for submitting small cell node applications.
- **Texas:**

³⁰ Crown Castle is unable to identify the jurisdiction because of ongoing negotiations.

³¹ As discussed in footnote 11, *supra*, a motion pending before the Pennsylvania Public Utility Commission would preclude operators of DAS networks from certification as public utilities. Such state-by-state classification of small cell facilities further complicates the regulatory environment for network deployment, frustrating the federal policy favoring deployment of high-speed broadband networks.

- The City of Austin adopted an “administrative program” prohibiting any entity that is not a CMRS provider from deploying wireless equipment in public ROW, flatly prohibiting network providers from placing their own facilities unless they partner with a CMRS provider.³²
- The City of Sugarland has flatly denied requests to deploy small cell networks in its municipal ROW, claiming that Section 253 gives the City the right to prohibit all facilities used to support wireless services from deployment in its ROW. Comments filed on behalf of the City admit as much, improperly claiming that these actions are in the City’s “proprietary capacity” and thus permissible.³³
- In 2015, the City of Dallas denied permits for a small network stating that it was reviewing its small cell policy and Crown Castle could reapply once it had adopted a new policy. More than two years later, Dallas has not formally adopted a policy. City Staff indicates that if Crown Castle would like to move forward with its proposed network, each node pole will be subject to a \$1,000 license fee and the network will be subject to a fiber fee of \$6.41 per linear foot. Staff indicates this fiber fee is the commercial rate for real estate in the central business district and that the rate will vary throughout the City (based on adjacent market real estate values). This small 20 node network would result in nearly \$300,000 in annual license fees paid to Dallas. Crown Castle filed a complaint against the City of Dallas at the Texas Public Utilities Commission, which is currently pending.
- **Virginia:** Both Virginia state government agencies and municipalities have imposed onerous restrictions on ROW installations.
 - In contradiction of its obligations under a franchise agreement with Crown Castle, the City of Newport News has purported to apply its wireless zoning ordinance to Crown Castle’s deployment of small cell facilities in the ROW. Although a trial court sided with Crown Castle, the matter currently is on appeal.
 - In the unincorporated community of Tysons Corner, one of the densest communities in the Washington metropolitan area, installation of new structures within the public ROW is prohibited—purportedly to comply with the area’s comprehensive master plan. Although Crown Castle has received

³² Comments filed on behalf of the City of Austin admit that the administrative program only permits use of the ROW by an “agent of a CMRS.” *See* Reply Comments Texas Municipal League, WT Docket No. 16-421 (Apr. 7, 2017) at 10-11. This program will likely be affected by a recently passed statewide bill that defines “network provider” as both wireless service providers and persons that build and install on behalf of a wireless service provider and authorizes “network providers” to access the public ROW. *See* Tex. S.B. 1004 § 284.101 (2017).

³³ *See id.* at 11.

approval and permits for collocation on existing poles, this does not provide sufficient coverage for a small cell network. If Crown Castle wanted to pursue approval of new structures, it would first need to apply to the Tysons Corner Land Use Task Force and then be subject to the Fairfax County special exception process (as detailed above), which carries excessive fees and a low probability of success under the current guidelines and processes.

- **Washington:**
 - The City of Mercer Island requires parties applying to install small cell nodes in residential ROW to obtain consent from adjoining property owners despite the absence of similar requirements for other utilities operating in the same ROW.
 - The City of Seattle has imposed an onerous zoning review process for utility-pole mounted equipment which results in a recommendation to the utility responsible for issuing the permit. The City review fee is \$4,000 per pole reviewed.
- **Wisconsin:** Small cell network providers have encountered delays and obstruction in a number of Wisconsin jurisdictions. In response to Crown Castle's applications for the installation of fiber optics and small cell nodes, one city required Crown Castle to participate in a "pilot program" under which it had to provide drawings for specific locations and construct a custom-designed pole in locations where Crown Castle would be using city-owned streetlights. This city has recently provided comments regarding applications first submitted by Crown Castle in September 2015. Crown Castle has submitted revised pole drawings for the City's consideration. Another city informed Crown Castle that it preferred the use of existing infrastructure to the installation of new poles, but then was slow to negotiate an agreement for the use of the city's streetlights and has taken more than nine months to approve Crown Castle's request for fiber permits.³⁴

These examples reflect just a sample of the patchwork of ever-changing local regulations faced by Crown Castle and other entities working to deploy the fiber optic backbones and small cell nodes required to support the next-generation of wireless services, including 5G. Crown Castle calls attention to these examples not to reflect poorly on these jurisdictions, but to highlight the diverse and often discriminatory treatment faced across the nation. In many cases, the jurisdictions were either unprepared or ill-equipped to address the influx of new technology. In other cases, the jurisdictions may still not be aware of the growing need and economic benefit

³⁴ Crown Castle is unable to identify these jurisdictions due to ongoing negotiations.

that will be derived from future 5G deployments and, therefore, have not taken the steps to facilitate such deployment. Although Crown Castle is working diligently to reach resolution of these and other issues with multiple jurisdictions, without substantial changes to the way municipalities process and permit small cell deployments, it may be impossible to develop the uniform, national footprint of high-speed data services necessary to fuel the continued growth of the innovation economy.

3. Restrictions on Deployments Outside the Public Rights-of-Way.

With respect to facility deployment outside of the ROW, the Commission has done well at keeping pace with technological changes to fulfill the purposes of Sections 332 and 253 of the Communications Act and Section 6409 of the Spectrum Act, and to respond to the challenges faced in many jurisdictions. Nevertheless, more work remains. A number of localities continue to apply improper conditions on eligible facilities requests (“EFRs”) under Section 6409, to seek information from EFR applicants unrelated to the determination of whether the application meets the EFR requirements, and/or to simply deny these applications without justification. For example, the California cities of Lafayette and Concord impose management agreements as a condition to EFR permits, which include landscaping requirements and other provisions unrelated to health and safety, contrary to the FCC requirements. Other municipalities impose undue delays on siting applications covered by Section 332, whether or not they are located in the right of way, or hold these applications to an impermissibly high standard. These onerous requirements continue to impede the rollout of next-generation wireless facilities.

Some municipalities have been creative in their efforts to evade the intent and plain meaning of Section 6409, which requires that state and local governments “shall approve” and “may not deny...” any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base

station.”³⁵ For example, Vista, California, enacted an ordinance (virtually identical to ordinances adopted in Irvine, Santa Monica, and San Diego) governing the review process for wireless facilities that include an “amortization” provision effectively prohibiting the grant of new EFR permits for an existing facility. Under these ordinances, all new permits, including EFR permits, must comply with an amortization schedule under which existing structures must meet the new ordinance’s concealment requirements. As a result, in most cases, no additional EFR permits will be granted for the structure because the addition of antennas will “defeat the existing concealment” and therefore not qualify as EFRs. Within 10 years, these ordinances will effectively evade and totally negate the requirements of Section 6409.

In addition, some jurisdictions have adopted limited or unreasonably narrow readings of the Commission’s *2009 Declaratory Ruling* and *2014 Infrastructure Order* that hinder small cell deployment.³⁶ Under the timeframes adopted in the *2009 Declaratory Ruling*, jurisdictions must review completed collocation applications within 90 days and applications for other facilities within 150 days.³⁷ Nevertheless, the industry continues to face enormous delays in attempting to construct small cell and other infrastructure necessary to deploy broadband communications services. For example, as noted above, some jurisdictions, such as Greenwood Village, Colorado, require lengthy and burdensome “pre-submission” procedures before they will even accept an application triggering the “shot clock” timeframes. A proposal under consideration in the City of Gaithersburg, Maryland, would require submission of, *inter alia*, a technical description of the

³⁵ See Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”), Pub. L. 112-96, 126 Stat. 156 § 6409(a) (2012) (codified in 47 U.S.C. § 1455(a)).

³⁶ See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd. 13994 (2009) (“*2009 Declaratory Ruling*”); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865 (2014) (“*2014 Infrastructure Order*”).

³⁷ *2009 Declaratory Ruling* ¶¶ 45-48.

proposed facilities, a study showing the need for the proposed facilities, and a certified analysis that the new facility in addition to any existing facilities meets the FCC's radiofrequency exposure guidelines—all prior to submitting a formal application.³⁸ During the pre-application review period, cities may request modifications to locations based on departmental or community feedback, evaluating each new proposal in a vacuum, resulting in a cycle of delay that may have no practical end. In other cases, jurisdictions such as Redwood City, California, have refused to accept applications while others have declared applications incomplete with no reasonable basis, thereby also attempting to evade the shot clock.

C. Applicants Are Rarely to Blame for Delays in Processing of Siting Applications.

In the *NPRM*, the Commission asks whether there are ways in which applicants contribute to unnecessary delays in the processing of siting applications.³⁹ While Crown Castle cannot speak for the industry as a whole, Crown Castle works collaboratively with willing jurisdictions to expeditiously complete the application process.

Where application requirements are clear and understandable, Crown Castle has no problem bringing the required information to the table and working with the local administration to receive a grant. It is, of course, in the interest of both Crown Castle and its wireless customers to receive approvals as quickly as possible and get facilities installed and on-air without delay. Indeed, the need to get facilities on-air quickly sometimes entails Crown Castle's acquiescence to procedures that may be contrary to federal law but, without which, Crown Castle cannot obtain the permits it needs to deploy next-generation broadband infrastructure. There is no

³⁸ See City of Gaithersburg, *Small Cell Facilities in the Public Right-of-Way*, Mayor and City Council Work Session 18-20 (May 22, 2017), <http://sirepub.gaithersburgmd.gov/sirepub/cache/2/bxabirplai1n3t4x3utxl3h2/7441406152017075146644.PDF>, attached hereto as Exhibit C.

³⁹ *NPRM* ¶ 7.

reason to think that Crown Castle or any other infrastructure provider would deliberately slow down the application process.

When delays do occur, they most often are due to: (1) unclear or changing procedures for accepting new applications; or (2) the discovery of unanticipated costs or processing times that alter the business case for proceeding with the application. In the case of the former, Crown Castle will work with the jurisdiction to provide information reasonably needed to process the application. In the latter instance, however, Crown Castle may need to abandon or defer once-desirable projects that are no longer financially viable to unanticipated costs or processing times.

III. THE COMMISSION SHOULD ADOPT THE PROPOSALS IN THE *NPRM* FOR STREAMLINING STATE AND LOCAL REVIEW.

In the *NPRM*, the Commission proposes three specific measures to expedite local review and ensure that municipalities act promptly on siting applications: adopting a deemed grant remedy for missing shot clock deadlines; defining the reasonable time to act on applications; and reiterating that moratoria on wireless siting applications are not permissible under any circumstances.⁴⁰ For the great many jurisdictions that work collaboratively with broadband service providers, these proposals reflect business as usual and will not have any impact. However, these measures will provide an important incentive for the remaining municipalities to expeditiously review wireless siting applications while still preserving discretion over those matters appropriately reserved for local review. Accordingly, the FCC should adopt all three proposals as described more fully below.

A. A Robust “Deemed Granted” Remedy Will Provide Proper Incentives for Expeditious Processing Without Unduly Burdening Municipalities

⁴⁰ See *id.* ¶¶ 7-22.

should require jurisdictions to publish their schedule of fees for ROW use for all utilities to ensure that small cell applications are not subject to discriminatory charges.

C. The Commission Should Reinforce That Moratoria Constitute Prohibited Barriers to Entry.

The Commission asks for specific information about the use of moratoria and the effect of such restrictions.⁶² In its comments in response to the *Streamlining PN*, Crown Castle identified a number of communities that implemented improper moratoria in violation of Sections 253, 332, and the *2014 Infrastructure Order*. While at least one community responded by seeking to clarify that its moratorium was in error and that it would continue to process applications, other communities continue to impose either *de jure* or *de facto* moratoria on the processing of siting applications for broadband networks. For example, just last week, the Town of Amherst, New York adopted a local law prohibiting the Town staff from “accept[ing]/process[ing] any applications, of any form, or issu[ing] any permits, of any form, relating to the placement or installation of telecommunication towers, facilities and antennae within the Town’s public rights-of-way until the moratorium is rescinded and/or a Local Law addressing this matter is adopted.”⁶³ In fact, in the time since publication of the *Streamlining PN*, moratoria have been instituted in the cities of Parkland, Florida, Vestal, New York, Orangetown, New Jersey, Tonawanda, New York, Amherst, New York, Cody, Wyoming, and Leon County, Florida, to name a few.

The Commission should reaffirm that a moratorium (whether spelled out in law or simply enacted in practice) on applications constitutes a *per se* violation of Section 253(a) and/or 332(c)(7)(B). Furthermore, the Commission should make abundantly clear that the shot clock

⁶² *See id.* ¶ 22.

⁶³ *See* Town of Amherst, New York, Resolution 2017-674 (adopted June 5, 2017).

begins to run with the good faith submission of an application, notwithstanding the existence of any moratorium. Should a municipality elect not to act on a properly submitted application, then the applications will be deemed granted once the maximum time for acting on the application has run.

IV. THE COMMISSION SHOULD STREAMLINE THE NHPA AND NEPA PROCESSES TO PROMOTE EFFICIENCY AND REDUCE DELAYS.

Crown Castle applauds the Commission for undertaking a “comprehensive fresh look” at its rules and procedures implementing the National Historic Preservation Act (“NHPA”) and National Environmental Policy Act (“NEPA”) to facilitate wireless infrastructure deployment.⁶⁴ Reform is needed to promote infrastructure deployment across the country which will support next-generation wireless broadband networks. As Chairman Pai recognized, “[t]o bring the benefits of the digital age to all Americans, the FCC needs to make it easier for companies to build and expand broadband networks. We need to reduce the costs of broadband deployment, and we need to eliminate unnecessary rules that slow down or deter deployment.”⁶⁵

Today, applicants wishing to construct or add wireless infrastructure often must undertake NHPA Section 106 review, which can involve Tribal consultation, NEPA review, and local government pre-construction review. In many cases, these processes must be completed sequentially and not simultaneously. In the course of these reviews, applicants often encounter delays and excessive fees, which impede and even sometimes halt infrastructure deployment. To address these issues, the Commission should: (1) adopt rules which would eliminate inefficiencies in the Tribal review process; (2) streamline the NHPA Section 106 review process; (3) grandfather so-called “Twilight Towers;” and (4) remove the requirement that applicants

⁶⁴ *NPRM* ¶ 23.

⁶⁵ Chairman Ajit Pai, FCC Blog, *Infrastructure Month at the FCC* (Mar. 30, 3017) <https://www.fcc.gov/news-events/blog/2017/03/30/infrastructure-month-fcc>.

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

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

COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.

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C. The Commission Should Define Actions that Effectively Prohibit the Provision of Telecommunications Services

The current situation under the Eighth Circuit's and Ninth Circuit's decisions would force providers to prove, on a city-by-city, location-by-location basis, that local requirements make it impossible to provide any telecommunications services under any circumstances, regardless of the cost, the burden, the delay, or the impact on the ability to design and build a network beyond that local area. The Eighth Circuit's and Ninth Circuit's interpretation has effectively neutered Section 253 and in so doing thwarted the pro-deployment, pro-competitive, deregulatory intent of the 1996 Act.

The deployment of new technologies and competitive services requires a significant capital investment—potentially millions of dollars for each community. Uncertainty resulting from wholly subjective, discretionary local requirements creates so much risk that companies may not even undertake the investment involved in planning for new services in communities that assume they are authorized to deny consent or impose significant burdens on consent. Moreover, the expense of complying with local application and information requirements may alone be prohibitive. Likewise, the cumulative effect of local requirements can create a prohibition of service, even if any one of the requirements, alone, may not completely prohibit service.¹¹⁴

1. Subjecting New Entrants To A Different Process Than Other Rights-Of-Way Pole Users Violates Section 253(a)

A significant impediment that Crown Castle encounters around the country is the imposition of new, more burdensome requirements on Crown Castle than was imposed on the ILEC or even prior competitive telecommunications providers. As discussed above, preventing

¹¹⁴ See *Puerto Rico Tel.*, 450 F.3d at 18-19 (holding that risk of other communities all adopting a fee violates Section 253).

discrimination against new entrants was a primary purpose of Section 253. At a minimum, the Commission should adopt a rule that local regulations that impose different, more burdensome requirements and conditions on new entrants than all other telecommunications providers in the public rights-of-way violate Section 253(a).¹¹⁵ Such a rule – although stating what should be a fundamental principle – would significantly assist Crown Castle in the deployment of new facilities and services.

2. Moratoria

The Commission seeks comment on whether it should adopt rules prohibiting state or local moratoria on market entry or facilities deployment.¹¹⁶ As the Commission and multiple courts have recognized, the 1996 Act was intended to promote competitive technologies and prevent local governments from influencing market entry and success.¹¹⁷ Moratoria are a

¹¹⁵ It is axiomatic that if the requirements are a Section 253(a) violation because they are discriminatory, by definition they are not “competitively neutral” or “nondiscriminatory” management of the public rights-of-way under Section 253(c). *E.g.*, *Zayo Grp., LLC v. Mayor & City Council of Balt.*, No. JFM-16-592, 2016 WL 3448261, at *7 (D. Md. June 14, 2016) (“[T]he purported disparity in treatment between Verizon and its competitors, shows that the City’s action may be neither competitively neutral nor nondiscriminatory.”); *City of White Plains*, 305 F.3d at 80.

¹¹⁶ *NPRM*, ¶ 102.

¹¹⁷ Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (describing the purpose of the 1996 Act as “[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999) (*Iowa Utilities Board*) (the 1996 Act “fundamentally restructures local telephone markets” to facilitate market entry); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997) (“The Telecommunications Act was an unusually important legislative enactment ... designed to promote competition”). *See also United States Telecom Association v. FCC*, 290 F.3d 415, 417 (D.C. Cir. 2002); *New York & Public Service Comm'n of New York v. FCC*, 267 F.3d 91, 96 (2nd Cir. 2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 865 (6th Cir.1999); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 944 (8th Cir.2000) (noting 1996 Act is intended to “jump-start” local competition); *2011 Pole Attachment Order*, ¶ 136.

fundamental barrier to deploying broadband infrastructure in the public rights of way, and the Commission should adopt a rule explicitly preventing such action. Indeed, such a declaration by the Commission would be consistent with the Commission's repeated prior holdings that Section 253 prohibits local governments from discriminating against new entrants or new technologies.

Crown Castle, has often encountered both *de facto* and explicit moratoria imposed by municipalities. For example, in the case of fiber deployment, Crown Castle has often been told that the municipality will not process any applications or permits related to the use of public rights of way until the municipality rewrites its ordinance. Additionally, on occasion, municipalities have enacted explicit moratoria on the deployment of fiber related to small cell networks.

No set of circumstances can justify a moratorium on deployment. It is an explicit prohibition on the ability of companies to provide telecommunications service, in violation of Section 253(a). In order to prevent the use of moratoria by municipalities, the Commission should adopt a rule outlawing moratoria and, at a minimum, codifying its interpretation of Section 253(a) in *California Payphone*: a local requirement prohibits the provision of telecommunications service in violation of Section 253(a) if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”¹¹⁸

3. Delays

The Commission also seeks comment on adopting rules to eliminate excessive delays in negotiations and approvals for right of way agreements and permitting.¹¹⁹ Indeed, the

¹¹⁸ *California Payphone*, 12 FCC Rcd at 14206, ¶ 31; *see also Texas PUC Order*, 13 FCC Rcd at 3470, ¶ 22.

¹¹⁹ *NPRM*, ¶ 103.

Commission asks “[f]or instance, would the Commission adopt a mandatory negotiation and/or approval time period. . . .”¹²⁰ As a threshold matter, the Commission should recognize that not all local governments require an “agreement” to access the public rights of way, and indeed, state laws sometimes prohibit local governments from requiring such an agreement.¹²¹ Thus, any rule adopted by the Commission must make clear that it does empower local governments to require an agreement; the rule would only apply if the local government has independent authority to require such an agreement and applies the requirement to all telecommunications providers.

Otherwise, Crown Castle supports the proposal to adopt a shot clock for the negotiation of agreements and/or approval of permits to prevent municipalities from effectively prohibiting the deployment of broadband infrastructure by creating unnecessary delays in violation of Section 253. Crown Castle has been forced to wait months and even years for municipal approval after submitting applications, which effectively prohibits Crown Castle from providing telecommunications services in violation of Section 253(a).¹²² Even if the local government eventually grants the application, the damage has already been done. During the delay, Crown Castle has been prevented from competing with ILECs and any other existing provider. In an industry where technology changes constantly and consumers demand immediate access to the most recent technologies and services, delays of a few months, much less years, are unacceptable and can fundamentally harm a company’s ability to compete and succeed in the long term and even beyond the particular local jurisdiction. Thus, municipal delay is fundamentally thwarting the purpose of the 1996 Act.

¹²⁰ *NPRM*, ¶ 103.

¹²¹ *See, e.g.*, Cal. Pub. Util. Code § 7901; Fla. Stat. § 337.401(3)(a); Ga. Code § 46-5-1(a)(2)(A).

¹²² *See AT&T Commc’ns of Southwest, Inc. v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997), *vacated on other grounds*, 235 F.3d 241 (5th Cir. 2000).

This concept is well established in case law. In *TCG New York, Inc. v. City of White Plains*, the Second Circuit affirmed the District Court’s ruling that the City’s unreasonable delay in negotiating a franchise agreement that the city demanded had the effect of prohibiting TCG from providing telecommunications services in violation of Section 253(a).¹²³ Likewise, in *City of Austin*, the court recognized that the telecommunications marketplace is highly competitive and constantly changing, and as a result, even the slightest delay can cause a provider to lose significant opportunities as compared to those already operating in the market.¹²⁴ In *Township of Haverford*, the court held that the challenged ordinance violated Section 253, among other reasons, because there was no guarantee that a franchise application “once submitted, will be processed *expeditiously*.”¹²⁵

The Commission likewise has recognized the potential adverse effects of local government delay. In the second *Classic Telephone* Order, addressing the defendant cities’ failure to act under the Commission’s first order, the Commission explained:

If a potential entrant is unable to secure the necessary regulatory approvals within a reasonable time, it may abandon its efforts to enter a particular market based solely on the inaction of the relevant government authority. . . . More specifically, in certain circumstances a failure by a local government to process a franchise application in due course may “have the effect of prohibiting” the ability of the applicant to provide telecommunications service, in contravention of section 253.¹²⁶

¹²³ *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002).

¹²⁴ *City of Austin*, 975 F. Supp. at 938.

¹²⁵ *Peco Energy Co. v. Township of Haverford*, 1999 WL 1240941, at *8 (emphasis added) (*Township of Haverford*).

¹²⁶ *Classic Telephone, Inc. Petition for Emergency relief, Sanctions and Investigation*, 12 FCC Rcd 15619, 15634, ¶ 28; see also *TCI Cablevision*, 12 FCC Rcd. at 21441, ¶ 105 (FCC concerned with “unnecessary delays” caused by local governments).

The Commission should be cautious about imposing a “shot clock” on the grant of right of way permits. In reality, the vast majority of standard right of way permits, particularly for fiber deployment are granted on a ministerial basis within a matter of a few days or perhaps a few weeks. The Commission does not want to inadvertently slow those processes by creating a “shot clock” that may lead local governments to simply fall into taking the entire time. Nonetheless, the Commission should define an outer limit for local government action.

For standard right of way access permits, Crown Castle supports a maximum time of 30 days. Local governments have already issued many such permits to other cable, telecom, and electric utilities over the course of decades. New installations, such as Crown Castle’s, do not raise issues that require significant additional time.

For local governments that require, and are permitted to require, a franchise/license/right of way agreement, the maximum reasonable time for local government negotiation of the agreement also should be 30 days. The shot clock should begin immediately upon submission of a written request for access to a right-of-way.

Local governments have no basis for taking any longer. First, if the local government requires an agreement, then it should have one already in place from every other telecommunications provider, including the ILEC. And those agreements are public documents that should be publically available. If the local government does have an agreement with existing providers, it cannot lawfully require one of the new entrant.¹²⁷

¹²⁷ *TCG NewYork, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir.2002) (finding that the city violated Section 253 of the Communications Act by requiring a CLEC to pay franchise fees and other forms of compensation as part of a telecommunications franchise while excusing the ILEC from any comparable requirements).

4. Excessive Fees

The Commission seeks comment on whether to adopt rules prohibiting excessive fees and other costs.¹²⁸ In many respects, the issue raised in the NPRM are identical to the questions asked in the “Mobilitie Petition” docket.¹²⁹ Accordingly, Crown Castle incorporates by reference its comments in that Docket.¹³⁰

A significant issue that the Commission does not appear to focus on is the problem of fees and costs being imposed on new entrants, such as Crown Castle, that are not imposed on the ILEC or other companies that previously deployed telecommunications networks in the rights of way. Crown Castle far too frequently encounters this situation. Some local governments appear motivated to try to profit from the current deployment of telecommunications networks by imposing on new entrants fees that are not imposed on the ILEC or perhaps even prior telecommunications providers.

Accordingly, the Commission should adopt a rule that reiterates its holding in the *Texas PUC Order* that Section 253(a) bars state or local requirements that restrict the means or facilities through which a party is able to provide service, and moreover, that it bars local requirements that impose financial burdens on one set of providers that are not imposed on others.¹³¹ Indeed, the Commission has previously concluded that costs imposed only on new

¹²⁸ *NPRM*, ¶¶ 104-105.

¹²⁹ *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421.

¹³⁰ *See* Comments of Crown Castle International Corp., WT Docket No. 16-421 (filed on Mar. 9, 2017); *See* Reply Comments of Crown Castle International Corp., WT Docket No. 16-421 (filed on Apr. 10, 2017).

¹³¹ *Texas PUC Order*, 13 FCC Rcd at 3466, ¶ 13; *see also Minnesota Order*, 14 FCC Rcd 21708-09, ¶ 21.

entrants are classic barriers to entry.¹³² In a 1994 order implementing the 1992 Cable Act, the Commission defined a barrier to entry as ““a cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry.””¹³³ And the Ninth Circuit has held that “[t]he disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier.”¹³⁴ In its *Amicus Curiae* brief in *White Plains*, the Commission asserted that “[d]iscriminatory entry conditions . . . make competitive entry more difficult and unlikely, thereby undermining the local competition Congress sought to foster.”¹³⁵

Such a declaration is also supported by multiple courts. For example, the Southern District of New York, in *Montgomery County v. Metromedia Fiber Network, Inc.*, held that

*subjecting new market entrants . . . to a lengthy and discretionary application process, while exempting the incumbent provider. . . from such process, has the effect of prohibiting the provision of telecommunications services, because it “materially inhibits or limits the ability” of the new entrant “to compete in a fair and balanced legal and regulatory environment.”*¹³⁶

Similarly, the First Circuit explained that

Congress apparently feared that some states and municipalities might prefer to maintain the monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service. Section 253(a) takes that choice away

¹³² See *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 7442, Appendix H at 7621-22, ¶ 29 (1994).

¹³³ *Id.* (quoting G. Stigler, *The Organization of Industry* 67 (1968)).

¹³⁴ *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1428 (9th Cir. 1993).

¹³⁵ Brief for Federal Communications Commission and the United States as Amici Curiae, *TCG N.Y., Inc. v. City of White Plains*, No. 01-7213, 2001 WL 34355501, at *8 (2d Cir. filed June 13, 2001) (“FCC Br. in *City of White Plains*”).

¹³⁶ *Montgomery County v. Metromedia Fiber Network, Inc.*, 326 B.R. 483, 494 (S.D.N.Y. 2005), *vacated and remanded pursuant to joint motion* (05-4123) (Aug. 31, 2006) (first emphasis added).

from them, thus preventing state and local governments from standing in the way of Congress's new free market vision.¹³⁷

Accordingly, there is ample support for a Commission declaration that local fees that are imposed only on new entrants in the right-of-way violate Section 253.¹³⁸

5. Other Unreasonable Conditions and Actions Imposed by Local Governments

Additionally, Crown Castle has encountered some cities that have used access to the right-of-way as a bargaining chip for other unreasonable demands, such as free telecommunications service or "charitable donations" even where charging fees for use of the right-of-way are specifically prohibited by law. One jurisdiction stated that if Crown Castle's network were to be approved it would have be required to install police video surveillance cameras for the City to utilize for law enforcement purposes. Other jurisdictions have required Crown Castle construct additional conduit for municipal utility projects while others simply seek free access to fiber strands. Recently one jurisdiction offered discounted permitting fees with a sizeable charitable donation to the municipality's charitable organization.

6. Other Prohibitive Local Requirements

The Commission also seeks comment on other issues where the Commission might adopt rules to preempt local requirements that have the effect of prohibiting the provision of telecommunications services.¹³⁹ One issue the Commission identifies is whether the

¹³⁷ *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999).

¹³⁸ As noted above, such discriminatory requirements would violate not only Section 253(a), but would not be competitively neutral and nondiscriminatory, as required by Section 253(c).

¹³⁹ *NPRM*, ¶ 108.

Commission should adopt rules addressing the transparency of local application processes.¹⁴⁰

Crown Castle supports such a rule.

Too often, a significant impediment to deployment is the lack of clarity in a local government's requirements. Crown Castle too frequently encounters situations where there is no clear articulation of what the local government requires. A related, but even more problematic problem is situations where the local government either refuses to follow its own requirements or arbitrarily changes them as applied to Crown Castle. A Commission rule clarifying that local governments must make their right of way access rules readily and publically available, on the local government's internet site, would help remedy these situations that impede the deployment of telecommunications, and it would help prevent local governments from discriminating against new entrants with unwritten, arbitrary requirements.

D. Broadband Deployment Advisory Committee

Crown Castle is supportive of the efforts taken by the Commission to increase collaboration among federal, state, and local governments and industry. Crown Castle is hopeful that the Commission's newly-formed Broadband Deployment Advisory Committee ("BDAC") will lead to collaborative broadband deployment policies that promote the efficient deployment of broadband infrastructure.¹⁴¹ Crown Castle looks forward to eventual reports and conclusions from BDAC on the state of broadband deployment.

IV. CONCLUSION

Crown Castle appreciates the Commission's attention to the important issues raised in the NPRM and urges the Commission to adopt the proposed amendments addressed in these

¹⁴⁰ *Id.*

¹⁴¹ *FCC Announces the Membership and First Meeting of the Broadband Deployment Advisory Committee*, GN Docket No. 17-83, Public Notice, DA 17-328, 32 FCC Rcd 2930 (Apr. 6, 2017).

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

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

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Dated: June 15, 2017

altogether.³⁶ The Commission should thus rule that the shot clocks govern applications to locate wireless facilities in ROWs and on municipal facilities along those ROWs.

D. The Commission Should Clarify that the Shot Clocks Apply to the Entire Local Review Process.

The Commission correctly notes that there have been disputes as to when the shot clocks begin to run.³⁷ Some localities impose multiple, sequential stages of review by, for example, requiring providers to enter into a license or franchise agreement to have ROW access, but then requiring the separate submission and approval of individual site applications. They assert that the shot clocks do not apply to the agreement negotiation process, but begin to run only after the provider files individual site applications.³⁸ The localities' position effectively nullifies the shot clocks because there is no time limit that applies to the upfront agreement process.

The Commission should declare that the shot clocks apply to the entire local review process. If a locality requires multiple steps, the shot clocks should apply to all steps together. This action is necessary to ensure that the shot clocks effectively achieve the Commission's goal of streamlining the siting process. Further, this ruling is appropriate under Section 332(c)(7)(B), because that provision broadly requires that a locality "shall act on any request for authorization to place, construct or modify personal wireless services facilities within a reasonable period of time."³⁹ If a locality requires a provider to request and enter into an agreement for authorization, that request should trigger the shot clock. Any other reading would enable localities to bypass the shot clock simply by imposing pre-application requirements.

³⁶ For this reason, a locality's denial of access to muni-owned poles and ROWs also violates Section 253(a), because that denial "effectively prohibits" the deployment of service. *See infra* Section V.B.

³⁷ *Wireless NPRM/NOI* ¶ 20.

³⁸ *Id.*

³⁹ 47 U.S.C. § 332(c)(7)(B).

would effectively deny needed service—an interpretation that is flatly at odds with the purpose of that provision. The Commission should put an end to local government and judicial evaluations of whether a wireless provider has adequately shown a site is needed. It should interpret Section 332 to prohibit those evaluations and declare that localities may neither consider the need for service in their siting decisions nor require providers to prove that need.

D. The Commission Should Build on the Above Interpretations to Prohibit Specific Actions or Practices That Impede Deployment or that Discriminate Against Wireless Providers.

The Commission recognizes that Sections 253 and 332 have been interpreted by the courts in a variety of ways, and asks whether it should supply additional guidance on how to apply these statutory mandates to specific types of laws, regulations, or other governmental restrictions.⁵³ Although it is important that the Commission announce interpretations of Sections 253 and 332 that will effectuate those provisions and resolve uncertainty resulting from disparate court decisions, it is equally important that it apply those interpretations now to address the legality of specific local siting practices.

Announcing “guideposts” as to practices that violate Sections 253 and/or 332 will provide needed certainty and clarity to the industry and localities, head off disputes, and provide practical guidance to courts that may be called on to adjudicate disputes over the application of these statutes. The Commission should declare that the following actions and requirements are unlawful:

Express and *de facto* moratoria. Some localities have imposed siting moratoria that block wireless deployment.⁵⁴ Although some claim they need time to develop regulations

⁵³ *Wireless NPRM/NOI* ¶¶ 88-91.

⁵⁴ CTIA PN Comments at 12 (providing five examples of express and *de facto* moratoria); CTIA PN Reply Comments at 14; Comments of Mobilitie, LLC, WT Docket No. 16-421, at 10-12 (filed Mar. 8,

governing small cell deployments, that justification does not warrant the indefinite, open-ended moratoria that CTIA’s members are encountering.⁵⁵ For example, the record in WT Docket No. 16-421 showed:

- Three localities in Florida enacted moratoria—two of the laws were enacted in 2014 and the other in September 2016.⁵⁶
- A locality in Iowa issued moratorium against small cells in August 2016.⁵⁷
- A locality in California passed a moratorium in August 2016.⁵⁸
- A locality in Minnesota passed a moratorium prohibiting wireless and small cell/DAS systems in August 2016.⁵⁹
- A locality in Washington passed a moratorium in September 2016 that is expected to remain in place until August 2017 or later.⁶⁰

The Commission previously held that moratoria do not toll the running of Section 332 shot clocks, but it did not ban all moratoria under Section 332.⁶¹ Moreover, the Commission did

2017) (“Mobilitie PN Comments”); Initial Comments of Lighttower Fiber Networks, WT Docket No. 16-421, at 10 (filed Mar. 8, 2017) (“Lighttower Fiber Networks PN Comments”); Comments of Mobile Future, WT Docket No. 16-421, at 3-4 (filed Mar. 8, 2017) (“Mobile Future PN Comments”); *see also* *Wireless NPRM/NOI* ¶ 22; *Wireline NPRM/NOI* ¶ 102.

⁵⁵ *E.g.*, Karsten Burgstahler, *Council confirms Cell Tower Moratorium*, JOURNAL GAZETTE & TIMES COURIER (Nov. 10, 2014) (describing a “newly passed” moratorium on “new cellphone towers” in Charlestown, Illinois that will last “for at least six months.”); Kimberly Jordan, *Commissioners Vote On Cell Tower Moratorium*, LEBANON DEMOCRAT (Dec. 7, 2015) (describing a “moratorium on new cell tower applications” in Lebanon, Tennessee for a period “up to 365 days”); BJ Bangs, *Eustis Cell Tower Public Hearing Heated, Moratorium Extended*, THE IRREGULAR (Oct. 31, 2012) (discussing a “moratorium on cell towers” within the city of Eustis, Maine that could be extended indefinitely “if needed”).

⁵⁶ *Mobilitie PN Comments* at 10-11.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Wireless NPRM/NOI* ¶ 22 (citing *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12971 ¶ 265 (2014)).

not there address the legality of moratoria under Section 253(a). It now asks whether it should “take any additional actions necessary, such as issuing an order or declaratory ruling providing more specific clarification of the moratorium ban or preempting specific State or local moratoria.”⁶² It should rule that any ordinance or regulation that expressly blocks processing of siting applications is unlawful under Sections 253(a) and 332(c)(7)(B)(i), both of which outlaw regulations that have the effect of prohibiting wireless service.

Although laws and regulations that expressly prohibit deployment clearly violate Section 253(a), *de facto* moratoria, where localities do not enact an ordinance but instead freeze or decline to act on applications for wireless facilities, have the same harmful impact.⁶³ CTIA’s members have experienced localities that refuse to process applications, or that tell applicants to wait until the locality develops siting policies, without making any commitment as to whether, if ever, they will do so. There is no reason why localities cannot act on applications for individual sites while they are also developing general siting policies. The Commission should thus also rule that *de facto* moratoria through failures to act are equally unlawful.

Undergrounding requirements. Some jurisdictions require facilities to be placed underground. Undergrounding ordinances are obviously not feasible for wireless networks, which require over-the-air transmission.⁶⁴ These ordinances operate as *de facto* prohibitions on wireless service and discriminate against wireless technologies, violating Sections 253(a) and

⁶² *Id.*

⁶³ CTIA PN Reply Comments at 8; Lighttower Fiber Networks PN Comments at 10; Mobile Future PN Comments at 3-4; Mobilitie PN Comments at 11-12.

⁶⁴ See *Wireless NPRM/NOI* ¶ 98 (“Obviously, it is impossible to operate wireless network facilities underground. Undergrounding of utility lines seems to place a premium on access to those facilities that remain above ground, such as municipally-owned street lights.”).

deploy sites anywhere subject to the locality's site separation rules, but subsequent providers will be constrained not only by those rules but by where incumbent providers built their sites, making its deployment far more difficult if not impractical. As long as the provider complies with safety-related and similar requirements for deployment, it should be able to deploy cells to meet its network needs, regardless of the proximity to other sites.

Discriminatory requirements. The clear command of both Sections 253 and 332 is to prohibit localities from imposing differing obligations on similarly situated providers, or on new entrants but not on incumbents. Some localities impose requirements on wireless providers for use of ROWs that they do not impose on others, for example, utilities that install wireless monitoring devices along ROWs. Some discriminate against wireless providers by requiring them to meet multiple, arbitrary requirements, such as a franchise agreement, zoning approvals (typically following the delay and expense of public hearings), and permits for individual sites. The record in WT Docket No. 16-421 contains numerous examples of such discriminatory regulations and practices. One provider reported that nearly 50 communities imposed different standards on it compared to other ROW users, even though those other users deployed similarly sized or even larger facilities.⁷⁸ The Commission correctly states that singling out providers for more processes or obligations than other ROW users can violate Sections 253 and 332.⁷⁹ It should prohibit such discrimination.

Unbounded subjective aesthetic restrictions. Some localities grant reviewing agencies discretion to deny a siting application based on vaguely worded or subjective visual or other

⁷⁸ See ExteNet PN Comments at 9; *see also, e.g.*, T-Mobile PN Reply Comments at 10 (listing examples of discriminatory practices in other localities).

⁷⁹ *Wireless NPRM/NOI* ¶¶ 97, 99.

aesthetic interests.⁸⁰ As the Commission notes, consideration of the aesthetic impact of a facility is not inherently improper.⁸¹ However, small cells and DAS systems are designed to blend in to the streetscape with minimal if any visual impact. In any event, a “we know it when we see it” standard is no standard at all, because it unlawfully fails to supply sufficient advance notice to providers as to the restrictions they must build to. Unbounded, subjective limits also cannot be justified as related to a locality’s interest in managing the use of the ROW to address traffic, safety, or related concerns. The Commission should deem such regulations unlawful and require localities that want to consider the visual impact of facilities to craft objective rules.

Procurement requirements. The Commission also asks whether it should address local requirements that compel providers to purchase or use muni-owned facilities, or to furnish services to the locality for free or at a discount.⁸² The Commission should deem that these requirements are unlawful barriers to service. They are irrelevant to a locality’s legitimate interest in managing the use of its ROWs. Rather, they improperly leverage localities’ monopoly control of ROW access to generate additional revenues.

VI. THE COMMISSION SHOULD PROHIBIT SITING FEES THAT ARE UNREASONABLE OR THAT DISCRIMINATE AMONG PROVIDERS.

In WT Docket No. 16-421, the Commission compiled an extensive record that demonstrates localities are imposing excessive fees on wireless providers seeking to construct needed facilities, and those fees are impeding deployment. Localities often request multiple separate payments, including up-front application fees, recurring site fees, charges based on a

⁸⁰ CTIA PN Reply Comments at 8-9; CTIA PN Comments at 12-14; AT&T PN Comments at 4, 15-16; Crown Castle PN Comments at 12-13; CCA PN Comments at 29-30.

⁸¹ *Wireless NPRM/NOI* ¶ 92.

⁸² *Wireline NPRM/NOI* ¶ 106.

Attachment

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

Streamlining Deployment of Small Cell	)	WT Docket No. 16-421
Infrastructure by Improving Wireless Facilities)	
Siting Policies)	
)	
Mobilitie, LLC Petition for Declaratory Ruling)	

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Dated: March 8, 2017

- **Commissioner Clyburn:** “Lack of affordability remains one of the larger barriers to connected communities in this country. . . . Streamlining deployment is central to this effort. We must ensure that all providers are able to deploy and upgrade their infrastructure at the lowest cost and quickest pace.”²²
- **Commissioner O’Rielly:** “Standing in the way of progress . . . are some localities, Tribal governments and states seeking to extract enormous fees from providers and operating siting review processes that are not conducive to a quick and successful deployment schedule. At some point, the Commission may need to exert authority provided by Congress to preempt the activities of those delaying 5G deployment without justifiable reasons.”²³

By clarifying and modernizing the federal, state, local, and tribal infrastructure deployment requirements, the Commission can enable wireless providers to invest resources more quickly, thereby expediting connectivity, providing jobs to more Americans, and advancing the United States’ wireless leadership.

III. BARRIERS AT THE LOCAL LEVEL THREATEN THE RAPID DEPLOYMENT OF BROADBAND AND 5G.

Congress and the Commission have both sought to promote investment in broadband services because that investment clearly serves the public interest. In 2009, Congress directed

(stating “our 5G future will require a lot of infrastructure, given the ‘densification’ of 5G networks” and that “the key to realizing our 5G future is to set rules that will maximize investment in broadband. For if we don’t, the price could be steep. After all, networks don’t have to be built. Risks don’t have to be taken. Capital doesn’t have to be spent in the communications sector. And the more difficult government makes the business case for deployment, the less likely it is that broadband providers big and small will invest the billions of dollars needed to connect consumers with digital opportunity.”).

²² FCC Commissioner Mignon L. Clyburn, Keynote Remarks at the #Solutions2020 Policy Forum, Georgetown University Law Center, at 4 (Oct. 19, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341824A1.pdf.

²³ FCC Commissioner Michael O’Rielly, Statement Before the Senate Committee on Commerce, Science, and Transportation, Oversight of the Federal Communications Commission, at 1-2 (Sept. 15, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341263A1.pdf.

the Commission to evaluate actions to foster expanded broadband.²⁴ The resulting 2010 National Broadband Plan identified many actions that federal, state, and local government agencies should take, and specifically warned that barriers to ROWs were a clear threat to expanded broadband.²⁵ Increasing broadband's availability through expanded wireless infrastructure is particularly important for connecting low-income and minority Americans, because data show that these groups are particularly dependent on wireless devices and services.²⁶

Despite the clear national interest in promoting wireless broadband and 5G, many localities are erecting multiple barriers to wireless deployment. These barriers are proliferating. They comprise restrictions that prevent both new and upgraded infrastructure, and mandates that providers pay excessive up-front and perpetual permit fees. These regulations frustrate and deter the investment in wireless networks necessary to support wireless broadband and 5G by imposing unjustified delays and severe financial burdens on broadband providers. They also suppress new competition and the benefits it brings by deterring new entrants from building new facilities and offering competitive service.

²⁴ American Recovery and Reinvestment Act of 2008, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115 (2009).

²⁵ FCC, *Connecting America: The National Broadband Plan*, at 109 (2010), <http://transition.fcc.gov/national-broadband-plan.pdf> (“Securing rights to [ROWs] is often a difficult and time-consuming process that discourages private investment. . . . [G]overnment should take steps to improve utilization of existing infrastructure to ensure that network providers have easier access to poles, conduits, ducts and rights-of-way. . . . The cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands.”).

²⁶ Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CENTER (Apr. 1, 2015), http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf.

These concerns are borne out by the facts on the ground: Local ordinances and regulations are blocking or delaying broadband deployment, driving up providers' costs, and deterring investment. Although a wide variety of local practices are impeding deployment, the following are the most prevalent and warrant prompt Commission action.

Moratoria. Some localities have adopted siting moratoria that expressly prohibit any new wireless deployment in ROWs. Others have imposed *de facto* moratoria by declining to process applications to locate new wireless facilities or modify existing facilities, informing providers that new regulations governing small cells must first be adopted. Although localities claim that they need time to enact those new regulations, that claim does not justify the long or open-ended moratoria that CTIA's members are encountering. Moratoria unquestionably violate Section 253(a) because they constitute a total bar to a provider's construction of new facilities needed to provide service. Examples of these absolute barriers to wireless service include the following:

- An Illinois city has denied all permits to locate small cells along ROWs. Another city in that state is refusing to process permit applications until it can enact a new ordinance on small cells.
- A Florida county has a moratorium blocking all ROW installations. At the time of filing, CTIA is aware of at least 17 other city or county moratoria in Florida, with seven others pending.
- Two cities in Massachusetts have refused to act on any multiple small cell permit applications that have been pending for many months.
- A Texas city is refusing to allow any wireless facilities in ROWs.
- A New Jersey city requires a public bidding process to attach facilities to utility poles but has failed to seek bids for more than six months.

Restrictions on Deployment. Some jurisdictions require all telecommunications facilities to be placed underground. While undergrounding is feasible for wireline, it is

obviously not for wireless networks, which require over-the-air transmission. These ordinances thus operate as *de facto* prohibitions on wireless technologies that also discriminate against them. Undergrounding mandates are particularly arbitrary because all cities have poles in their ROWs that hold streetlights, traffic signals, and signage. Small cells can be installed on these poles without impeding the flow of traffic or pedestrians. In effect, these localities have unilaterally determined that they do not want new wireless facilities in their ROWs at all, thereby deterring the entry of new competitors and the expansion of the networks of existing providers.

Other jurisdictions impose severe restrictions on the locations and dimensions of new equipment. Although not absolute prohibitions like moratoria, these regulations block the provision of new service and impair the quality of existing service. As the Public Notice acknowledges,²⁷ small cells require dense deployments to provide sufficient capacity and coverage. And localities are imposing restrictions on how many small cells may be deployed and where, effectively prohibiting wireless providers from designing their networks for reliable, robust service. Others are imposing severe height limits that as a practical matter preclude deployment because the small cells cannot sufficiently cover an area at those low heights. Upgrades to antennas and supporting equipment such as batteries and electrical connections are frequently necessary. For example, a wireless provider replaces or modifies existing antennas when it needs to add new bandwidth to accommodate increasing traffic, or to operate on new radio frequencies that it has secured a license from the Commission to use. Additionally, a provider may need to upgrade fiber connections to transport ever-increasing volumes of traffic to and from small cell antennas, its core network, and the Internet.

²⁷ Public Notice at 13360.

But localities either restrict these upgrades, or require providers to pay additional fees, apply for more permits, and wait long periods for approvals. These regulations and practices are not based on a locality's legitimate interest in managing ROWs, for example, the safety of pedestrians or vehicles. Instead they illustrate how localities micromanage wireless investment in ways that deter and distort that investment. Examples of these barriers to deployment include the following:

- A California city refuses to allow any small cell installations on municipal infrastructure.
- Several California cities require providers to demonstrate gaps in service coverage as a condition of ROW access.
- One Florida city flatly prohibits any small cell installations on municipal light poles.
- A Florida city limits the number of small cell installations (regardless of the number of providers) to 13 sites in one square mile.
- Several Illinois jurisdictions impose minimum distance requirements of up to 1,000 feet between small cell installations, even when the installations serve different wireless providers.
- Other Illinois jurisdictions impose rigid height limits for poles supporting small cells of as short as 40 feet.

Excessive and/or Discriminatory ROW Fees. Numerous localities and state highway administrations are demanding exorbitant fees as a condition to access ROWs.²⁸ Localities often request multiple separate payments, including up-front application fees, recurring fees, and charges based on a percentage of the wireless provider's revenues. Recurring fees are particularly onerous and harm investment because they are typically imposed on each small cell or other facility the provider seeks to construct and must be paid every year. And, they are

²⁸ See *Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, at 16-19 (filed Nov. 15, 2016) (providing numerous examples of excessive fees); *see also* Public Notice at 13371-72.

typically escalated automatically each year without being tied to inflation indices such as the consumer price index, driving providers' costs even higher. Given that wireless providers often need to install dozens or even hundreds of small cell sites to provide sufficient coverage and capacity across a city, a fee on the order of \$1,000 per pole, which some of CTIA's members are being asked to pay, can quickly add up to hundreds of thousands of dollars per year, and over time can cost millions. But localities are demanding fees that are even higher. For example:

- One California city is demanding up to \$20,000 in annual ROW fees. Two other California cities charge ROW fees per pole of over \$1,000 per month and \$2,300 per month respectively.
- A Massachusetts city requires a \$5,000 up-front fee before it will negotiate an ROW use agreement. Another city in that state is demanding a \$6,000 per pole annual fee.
- A Minnesota city is demanding a \$6,000 annual per pole fee.
- An Oklahoma city charges more than \$2,500 per year per small cell.
- A Virginia city charges a one-time fee of \$5,000 for ROW access.
- A county in Washington state charges \$10,000 for an antenna array and \$3,000 for a single antenna per year.
- A company that holds a contract with New York to manage wireless facilities is demanding fees of \$9,000 per year for small cells.
- The New Jersey Department of Transportation is requesting \$37,000 per year per for each new facility located in state highway ROWs.
- The Virginia Department of Transportation charges \$24,000 per year for each new structure in state highway ROWs.

High per-site fees are especially detrimental to small cell deployments because they make installation cost-prohibitive. Wireless providers facing these fees must add them to the substantial up-front costs of purchasing and installing the equipment. But given that such fees far exceed expected revenues that would ordinarily come from deploying larger macrocell sites

serving far more subscribers, a deployment the provider would otherwise make becomes no longer financially viable, frustrating investment and new or improved service.

Revenues-based fees are improper for a different reason: They have nothing to do with the provider's use of a locality's streets, because instead they tax the carrier based on its gross revenues, not on the extent of its buildout. Two providers with equivalent revenues will pay the same fee, even though one has two sites and one has 200. And two providers with similarly-sized buildouts will pay widely different fees if one has many customers and the other has few. These fees are thus clearly not related to the locality's costs of managing the permitting process or the use of its streets. Localities requesting these fees are instead seeking to profit from their monopoly control of ROWs by leveraging wireless providers' growing need to access ROWs. Again, however, these fees can preclude small cell deployment by making investment in new infrastructure cost-prohibitive.

Local charges for accessing ROWs are often much higher than the fees paid previously by other ROW users, even for locating facilities on the same streets. For example, the price a city charges a wireless provider to install a new pole to hold small cell equipment is often many times higher than the price it charges a landline provider (if the landline provider is charged anything at all). Some localities also charge competing wireless providers different fees for constructing similar poles or attaching equipment on poles. For example, a Minnesota city negotiated a \$600 per pole annual fee with one provider but is now demanding annual fees of \$7,500-\$8,500 per pole from another – more than ten times higher. Those charges vastly exceed annual attachment fees under the Commission's cost-based, pole attachment rate. They also discriminate against new entrants, deterring investment and impeding the competition that such investment can generate. Moreover, they discriminate among technologies by forcing wireless

providers to pay more for ROW access than landline carriers. For example, charges for laying fiber can be far higher for wireless providers than for local exchange carriers, even though the disturbance to streets is identical.

Inconsistent Collocation Reviews. Although Section 6409(a) of the Spectrum Act and the Commission’s rules require localities to act on eligible requests to collocate facilities on a tower or structure with an existing approved antenna within 60 days or it will be deemed granted,²⁹ they do not apply to collocations on non-tower structures (including many 5G deployments) that lack an existing antenna. Instead, they are processed under the Commission’s 90-day Section 332 shot clock. This artificial distinction discourages the use of existing buildings and other non-tower structures that lack an antenna – the very infrastructure that may have space to support new small cell facilities – despite the clear preference for collocation where possible because of its minimal impact on the environment.³⁰

Unnecessarily Long Review Periods. The Commission adopted the 150-day and 90-day shot clocks more than seven years ago when macrocells were the norm, prior to the enactment of Section 6409(a) and well before the anticipated significant use of small cell deployments to support 5G.³¹ Even at the time they were adopted, evidence before the Commission showed that

²⁹ See Spectrum Act, § 6409(a), 47 U.S.C. §1455; 47 C.F.R. § 1.40001(c)(2), (c)(4); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12875, ¶ 21 (2014) (“*Wireless Infrastructure Order*”).

³⁰ See 47 C.F.R. § 1.1306 n. 1 (“The use of existing buildings, towers or corridors is an environmentally desirable alternative to the construction of new facilities and is encouraged.”).

³¹ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (“*Shot Clock Order*”), *aff’d sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013) (“*City of Arlington*”).

many states and localities took far less time to complete their reviews.³² This is even more so today. Moreover, Section 6409(a)'s "shall approve" mandate has eliminated many reviews, and the increasing use of less impactful small cells means more deployments should be easier to review. Yet, the shot clocks have not reflected these developments: An application to install a small cell on a building without an antenna is allowed to take *three months*, while an application to site a new 5G support pole is allowed to take *five months*. These processing times are simply not necessary or workable given the hundreds of thousands of anticipated new small cells.

Lengthy and Costly Court Remedy for Shot Clock Violations. Although siting requests covered by Section 6409(a) are deemed granted if not approved within 60 days, siting requests covered by the Section 332 shot clocks include no such remedy. Applicants facing inaction on requests to site facilities on existing non-tower structures without an antenna (processed under the 90-day shot clock) and requests for new support structures (processed under the 150-day shot clock) must instead await an uncertain outcome, abandon their applications, or seek court review at the end of the shot clock periods. This results in costly and time-consuming litigation that discourages investment in new facilities. The costs and delays associated with litigation are onerous enough for macrocell deployments. But when providers seek to deploy small cells, those costs and delays make deployment cost-prohibitive. Because individual small cells provide more limited coverage and thus generate less traffic and revenues, incurring the time and expense of litigating with localities for the right to deploy them is not an effective remedy.

³² *Shot Clock Order* at 14010-11, ¶ 43 (“[T]he City of Saint Paul, Minnesota has processed personal wireless service facility siting applications within 13 days, on average, since 2000.”); *id.* (“[T]he City of LaGrande, Oregon, has processed applications on average in 45 days in the last ten years.”).

Blocked or Delayed Access to Municipal Poles and ROWs. The problems above are magnified when localities refuse to act on applications to install facilities on municipal poles or ROWs, which are typically optimal locations for small cells. Some jurisdictions claim that granting access is a proprietary function not subject to Sections 253 or 332, and thus they can deny access at will, or condition it on providers' concessions to whatever terms, conditions, and payments the jurisdictions demand. The resulting patchwork of local mandates and restrictions further deters deployment.

IV. THE COMMISSION SHOULD INVOKE ITS AUTHORITY TO INTERPRET SECTION 253 AND REMOVE BARRIERS TO BROADBAND DEPLOYMENT.

A. A Declaratory Ruling Will Provide All Parties With Needed Guidance That Will Speed New Broadband Facilities.

Section 253 implements Congress' directive to avoid government overreach by prohibiting state or local laws or regulations that "may prohibit or have the effect of prohibiting" wireless or wireline services. Section 253's legislative history indicates that Congress intended its scope to be sweeping and to limit localities to managing their ROWs in ways that did not impede the statute's goals. Senator Gorton, who offered the language that ultimately became Section 253, emphasized that "the reach of this provision is broad," and Senator Feinstein noted that it should preserve localities' authority to supervise excavation work and to coordinate construction activities to protect unimpaired use of ROWs.³³ But the local regulations CTIA's members face go far beyond these limited management functions.

³³ 141 Cong. Rec. S8212 (June 13, 1995) (statement of Sen. Gorton) (stating that Section 253 is a "very, very broad prohibition against state and local" regulation); 141 Cong. Rec. S8170-71 (June 12, 1995) (statement of Sen. Feinstein).

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC. 20554**

In the Matter of

Accelerating Wireless Broadband
Deployment by Removing Barriers to
Infrastructure Investment

WT Docket No. 17-79
WT Docket No. 17-38
WC Docket No. 17-84

WTB Seeks Comment On Revising The
Historic Preservation Review Process for
Small Facility Deployments

WT Docket No. 15-180

**JOINT COMMENTS OF EMF SAFETY NETWORK
AND ECOLOGICAL OPTIONS NETWORK**

EMF Safety Network (EMFSN)¹ and Ecological Options Network (EON)² appreciate this chance to participate in the above captioned Federal Communications Commission (FCC) proceedings, which seek comments on removing barriers and revising historic preservation protections for accelerating wireless radiation deployment across America.

¹ EMF Safety Network (EMFSN) was founded in 2009, and is a coalition of business and property owners, and utility customers. Our mission is to educate and empower people by providing science and solutions to reduce EMFs, achieve public policy change, and obtain environmental justice. We have participated in formal proceedings on utility smart meters at the California Public Utilities Commission since 2010. EMFSN website: www.emfsafetynetwork.org

² Ecological Options Network was founded in 2003, is a 501 (c) (3) organization that networks with utility customers and organizations to empower policy protecting health, environment and consumer rights. EON website: <http://www.eon3.net/>

munications profits.

Mobilitie writes, *“The Commission has found that all consumers require wireless broadband to have true and meaningful access to the Internet.”*(Petition pg.4) If the Commission found this to be true they are wrong, because wireless is not required in order to access the internet and there is a growing population of people who use wired internet and corded connections. True and meaningful access to the internet includes speed and security which is provided by fiber optic and/or wired connections.

8. For the above reasons, we ask the FCC to stop the acceleration of RFR until safer alternatives are established and proceedings 13-84 and 03-137 are finalized.

Respectfully submitted on June 9, 2017 by:

/s/_____

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

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

**INITIAL COMMENTS OF
LIGHTOWER FIBER NETWORKS**

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SUMMARY

As described herein, there are still many areas of law that need improvement in order to create a regulatory environment supportive of increased wireline infrastructure investment because, under today's legal framework, receiving all the necessary approvals for deployment takes too long and costs too much, which has a chilling effect on investment.

Lightower has experienced significant delays to deploying wired broadband infrastructure due to an inability to access utility poles and municipal public right-of-way ("ROW") in a timely manner. Utility pole owners and pre-existing attachers regularly fail to comply with the make-ready timeframes set out by the Commission. Similarly, many local jurisdictions fail to approve access to the ROW within reasonable periods of time. Lightower encourages the Commission to establish predictable timeframes with adequate remedies when those timeframes are exceeded.

Additionally, Lightower has experienced barriers due to a lack of cost transparency. Utility pole owners often send bulk make-ready invoices without any explanation. Without clear itemization, Lightower has no way to evaluate whether these charges are fair or accurate. Likewise, many jurisdictions demand arbitrary amounts of money or "donations" in exchange for access to the ROW with no clear relationship to ROW management costs. Lightower encourages the Commission to clarify that all fees be transparent, non-discriminatory and based on actual underlying costs borne by pole owners and local jurisdictions in relation to Lightower's network.

In order to have robust broadband access, regulatory reforms and new regulations are needed so that those who invest in broadband infrastructure will be able to predict how long it will take to obtain all necessary approvals and how much they can expect to spend on such. With better certainty, the Commission will be ensuring continued invest in broadband networks.

III. COMMENTS ON NOTICE OF INQUIRY PERTAINING TO PROHIBITING STATE AND LOCAL LAWS INHIBITING BROADBAND DEPLOYMENT

The Commission has requested comment on whether, consistent with its authority under 47 USC 253 (“Section 253”), it should adopt rules to promote the deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment. As an initial matter, Lightower posits that the Commission has the requisite authority to adopt such rules pursuant to the language of Section 253 and its authority under 47 USC 201(b) to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions” of the Telecommunications Act of 1934. Likewise, the adoption of general rules pertaining to Section 253(a) is not inconsistent with the provisions of Section 253(d) directing the Commission to preempt the enforcement of particular state or local statutes, regulations, or requirements “to the extent necessary to correct such violation or inconsistency,” in that rules implementing and interpreting Section 253(a) will provide clarification on what constitutes a state or local regulation or practice that may prohibit or have the effect of prohibiting the provision of telecommunications service.

Additionally, the notice and comment opportunities presented in a Commission proceeding to take enforcement action following a violation of Section 253(a), as detailed in rules implementing the same, would be sufficient to satisfy the requirements of Section 253(d). Thus, as explained in comments and reply comments submitted in other Commission dockets⁶ and herein, the Commission should adopt rules interpreting and implementing the pronouncement of Section 253(a) against state and local regulations that prohibit or have the

⁶ See *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, WT Docket No. 16-421, Initial and Reply Comments of Lightower Fiber Networks, submitted, respectively, March 8, 2017 and April 7, 2017; see also *Wireless NPRM/NOI*, WT Docket No. 17-79, Initial Comments of Lightower Fiber Networks, submitted June 15, 2017.

effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service in order to assist parties in identifying and eradicating these significant barriers to deployment.

As suggested in the Notice of Inquiry in this docket, there are a number of specific categories of actions/items for which Commission rules are needed to prevent states and localities from enforcing laws and/or engaging in practices that may prohibit or have the effect of prohibiting the ability of entities to provide telecommunications service. The need for rules in each of these categories is discussed in turn below.

A. The Commission Should Adopt Rules Prohibiting State and Local Deployment Moratoria, whether Actual or Effective.

The Commission should adopt rules under Section 253(a) to prohibit the imposition, by state and local governments, of deployment moratoria in circumstances where such moratoria are unrelated to safety. It is important that the Commission clearly states in any such rules that deployment moratoria, whether actual/pronounced, or effective, constitute regulations that may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.

Over the years, Lightower has encountered situations in which local governments have explicitly imposed moratoria on processing applications necessary for the deployment of broadband infrastructure; it has also been involved in a number of scenarios in which, in spite of no pronouncement by local government that a moratorium has been imposed, the governmental entity is simply not moving forward in such a way as to process applications related to the deployment of broadband infrastructure. The latter scenario may be characterized as an effective prohibition. In Lightower's experience, moratoria have most often not been tied to safety or driven by events requiring construction stoppages; rather, moratoria often appear to have been

put into place in order to arbitrarily exempt governmental entities from processing applications, etc. These types of moratoria, when imposed, amount to delay tactics without correlation to safety or specific events that would warrant delay.

The Commission should adopt rules prohibiting the imposition of both explicit and effective deployment moratoria in circumstances where safety concerns are not the operative consideration. It seems evident that periods of time, whether limited or otherwise, that permit state and local authorities to hold pending applications related to deployment in abeyance, represent real barriers to entry. Although the Commission has previously clarified that the shot clock timeframe for wireless siting applications runs regardless of any moratorium, the Commission has not made the same pronouncement in association with wireline deployment applications. Adopting a rule prohibiting state and local moratoria on the deployment of broadband infrastructure, with very narrow exceptions, would formalize the existing Commission holding for wireless siting applications, and would extend the same protections to wireline deployment applications, thereby eliminating an obvious barrier to broadband infrastructure deployment.

B. The Commission Should Adopt Rules to Eliminate Excessive Delays in Negotiations and Approvals for Rights-of-Way Agreements and Permitting for Telecommunications Services.

Often, the timelines applicants face when seeking state and/or local approval of the various applications necessary for deployment of broadband infrastructure are extremely prolonged and unpredictable. The adoption of rules by the Commission setting forth binding timeframes for consideration of the same would assist telecommunications providers in achieving deployment within a reasonable, predictable amount of time.

In Lighttower's experience, securing a local franchise for the deployment of telecommunications infrastructure often takes in excess of six months from the date of tendering an application for the same to the applicable governmental entity. Given that broadband infrastructure is extraordinarily important to the vitality of local governments in relation to public safety, consumers and the businesses located therein and the ability to attract and retain new customers, and that such customers expect connectivity within a finite (and sometimes quite a short) period of time, the delay associated with granting telecommunications providers franchise agreements and approving deployment applications represents a significant deployment barrier. In order to combat this issue, the Commission should adopt rules placing time limits on local consideration of applications for telecommunications franchises, much as those recently adopted in the context of cable franchises. Lighttower recommends a review period of 90 days for typical telecommunications deployment proposals.

Further, Lighttower often encounters unwillingness by localities to concurrently process franchise applications and other applications necessary for deployment. In order to facilitate the timely deployment of telecommunications infrastructure, the Commission should issue a rule directing that state and local governments must process an applicant's application to occupy the ROW and any other necessary applications during the same timeframe in which an applicant's franchise application is being considered.

For instance, Lighttower recently submitted franchise applications and applications to occupy public rights-of way in two municipalities of roughly the same size that are located geographically close to one another. One of the municipalities reviewed and considered Lighttower's franchise application at the same time it considered its right-of-way occupancy application; the other municipality indicated that it was unwilling to process the right-of-way

occupancy application until the franchise process was complete. The former municipality approved Lighttower's franchise and issued its permit to occupy rights-of-way within days of one another; in the latter municipality, however, several months elapsed from the time the franchise was approved until the ROW occupancy permit was issued. From this example, it is clear that concurrent consideration of all necessary permit applications will shorten resulting timeframes for deployment of telecommunications infrastructure. Lighttower respectfully requests that the Commission direct state and local governments to consider any applications submitted by the same applicant related to the deployment of telecommunications infrastructure on a concurrent basis.

C. The Commission Should Adopt Rules Prohibiting Excessive Fees and Costs, the Imposition of Unreasonable Permit Conditions, and Bad Faith Negotiation Conduct, as Each of these Practices by State and Local Jurisdictions May Prohibit or Have the Effect of Prohibiting the Provision of Telecommunications Service.

Lighttower has encountered a number of scenarios in which local jurisdictions have imposed unreasonable conditions for approval of deployment applications and, by means of those unreasonable conditions, have imposed excessive costs for deploying telecommunications infrastructure in their jurisdictions. In connection with these scenarios, in situations where Lighttower has contested the conditions or costs, jurisdictions have often refused to continue processing or grant pending deployment applications. The Commission should prohibit these practices.

1. Importance of cost transparency.

As Lighttower has previously noted in other dockets, many jurisdictions demand arbitrary fees for use of public rights-of-way for telecommunications infrastructure with no clear relationship to the jurisdiction's costs of management of the rights-of-way. Lighttower strongly

suggests that any forthcoming Commission rules interpreting Section 253(a) specify that all jurisdictional fees associated with telecommunications infrastructure in public rights-of-way be based on or otherwise verifiably connected to actual costs incurred by the jurisdiction to regulate telecommunications providers' use of the same. Additionally, there is often no available evidence that all telecommunications providers are being charged in an equitable manner, so it is important that any rules implementing Section 253(a) call for full cost transparency so that providers can ascertain that they are being treated fairly and in the same manner as other such providers.

2. Requirement for “donations” and other excessive costs.

Lightower has also encountered local jurisdictions that have requested significant “donations” before they will agree to approve a telecommunications franchise or equivalent agreement. Other times, such jurisdictions will simply refuse to process an application or grant a franchise until payment of some sort of arbitrary fee has been received. Regardless of the form these arbitrary fees or donations take, they significantly delay deployment of telecommunications facilities, and the Commission should adopt rules proscribing these practices.

D. The Commission Should Adopt a Residual Rule Preempting any State or Local Legal Requirement or Practice that May Prohibit or Have the Effect of Prohibiting the Provision of Telecommunications Service.

To the extent that the Commission determines that it should adopt rules interpreting and implementing Section 253(a), Lightower strongly recommends incorporation of a residual section that proscribes practices that, while not fitting squarely within any enumerated category of prohibited regulations, practices, or requirements, may prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications service. Clearly, the practices discussed above, which should be prohibited by the Commission, do not represent an exhaustive

list. New practices, regulations, and other procedures resulting in extensive deployment delays and prohibitions seem to be implemented every month. In order to ensure against a workaround, any rules interpreting and implementing Section 253(a) should include a residual section proscribing practices that may prohibit or have the effect of prohibiting the ability of entities to provide telecommunications service.

IV. CONCLUSION

As discussed *supra*, Lightower recommends adoption of the Commission's proposed pole attachment rule revisions, with minor changes to a number of the same. Lightower further recommends the assessment of penalties upon parties who have not complied with attachment timelines. Lightower additionally requests Commission clarification of a number of items, and recommends that the Commission adopt rules interpreting and implementing Section 253(a). Lightower thanks the Commission for the opportunity to submit comments in this important proceeding.

Respectfully submitted,

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

In the Matter of

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

COMMENTS OF MOBILITIE, LLC

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utilities to establish transparent, uniform procedures and standards for approving attachments; and (3) require that utilities disclose and place online basic pole management information, including authorized vendors, pole locations and specifications, structural design parameters, and all make-ready and any other charges attachers may incur.

II. THE FCC SHOULD OUTLAW EXCESSIVE AND DISCRIMINATORY FEES.

Many localities are imposing extremely high fees – as much as \$10,000 or more per site in up-front licensing and application charges, and equally excessive annual “rents.”⁵ These high fees are not based on localities’ costs to manage ROW access and oversee deployment.

Mobilite explained why those excessive fees – which had not been imposed on other ROW occupants – undermine Congress’ objective in Section 253(c) of the Act that fees imposed on providers must be fair, reasonable and nondiscriminatory. It asked the Commission to make three rulings to effectuate and enforce Section 253(c):

- “Fair and reasonable compensation” means charges for rights of way application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way. Additional charges or those not related to actual use of the right of way, such as fees based on carriers’ revenues, are unlawful.
- “Competitively neutral and nondiscriminatory” means charges imposed on a provider for access to rights of way that do not exceed the charges imposed on other providers for similar access. Higher charges are discriminatory and therefore unlawful.
- Localities must disclose to a provider seeking access to rights of way the charges that they previously assessed on others for access.⁶

Many providers in WT Docket No. 16-421 supported the Petition, demonstrating that the scope of the problem is nationwide. They documented their experiences with localities’

⁵ Petition at 12-19.

⁶ *Id.* at 36.

demands for substantial up-front and recurring fees that are costing thousands of dollars per site per year, providing dozens of examples of excessive upfront and recurring siting fees.⁷ They also explained why some jurisdictions' argument that they can impose "market" rents for ROW access is meritless: Section 253(c) does not authorize such rents, and in any event, there is no true "market" for ROW access, because jurisdictions hold monopoly control over that access.⁸ Allowing "market" rates would be tantamount to empowering localities to charge whatever fees they want, nullifying Congress' objective in Section 253 to permit localities to be compensated for their costs in issuing permits and managing ROW access. In short, the Commission has an ample record basis on which to grant the Petition. Because these excessive fees continue to impose barriers to deployment nationwide, the Commission should outlaw them now.

III. THE FCC SHOULD SHORTEN THE SHOT CLOCKS AND MAKE THEM MORE EFFECTIVE.

The Commission can significantly alleviate siting delays by shortening the "shot clocks" that currently apply to local review of wireless facilities and how they operate. The shot clocks were adopted to set reasonable time periods pursuant to Section 332(c)(7)(B)(ii) of the Act for localities to act on applications to construct new towers and to collocate macrocells on existing towers. They were not designed for reviewing far less visually intrusive small cells, microcells, and the short poles on which those facilities are located. Commenters in WT Docket No. 16-421 demonstrated that localities can act on small cell permits much faster, and that the Commission

⁷ See, e.g., AT&T Comments at 19-21; CCA Comments at 16; CTIA Comments at 15; Sprint Comments at i, 24-26, Tech Freedom Comments at 5; T-Mobile Comments at 10; Verizon Comments at 9 and Appendix; see also Mobilite Reply Comments at 8. (All comments cited herein were filed in WT Docket No. 16-421.)

⁸ See, e.g., CCA Comments at 26; T-Mobile Comments at 30; Verizon Comments at 15; Mobilite Reply Comments at 11-12.

has the authority to modify the shot clocks to reflect the realities of wireless deployment today.⁹ The compelling public interest in the rapid deployment of essential new infrastructure to support broadband networks supplies a strong public policy basis for shortening the shot clocks. The Commission should thus rule that 60 days is a reasonable time for localities to act on applications for new and collocated small cell facilities.

The record in WT Docket No. 16-421 also showed, however, that shortening the shot clocks will not alone be sufficient to speed broadband deployment. One major obstacle is that some localities require providers to endure lengthy zoning or franchising procedures before the localities will accept individual siting applications and before (they assert) the shot clocks begin to run. Those procedures undermine the effectiveness of the shot clocks in speeding deployment by tacking on many months of delay.¹⁰ In addition, some localities have asserted that the shot clocks do not apply to ROW facilities, which also undermines their utility, because deployment of small cell facilities along ROWs are increasingly essential to wireless broadband networks. The Commission should address both of these issues at the same time it shortens the shot clock periods by issuing a declaratory ruling that:

- Action on a small cell permit is presumptively unreasonable under Section 332(c)(7)(B)(ii) if it is not acted on within 60 days.
- If a locality determines a provider must secure a citywide license or franchise before it can access rights of way, the shot clocks apply to that entire process from licensing through permitting.

⁹ See, e.g., Mobilite Comments at 10-12; CTIA Comments at 12-14; AT&T Comments at 4, 15-16, Crown Castle Comments at 12-13.

¹⁰ See, e.g., Mobilite Comments at 16 (providing examples of long delays); AT&T Comments at 23; Extenet Systems Comments at 7-8; Verizon Comments at 18-19.

- The shot clocks apply to permits that seek access to rights of way and to municipal streetlight and traffic poles and other structures located in rights of way.¹¹

IV. THE FCC SHOULD OUTLAW SPECIFIC BARRIERS TO DEPLOYMENT.

The Commission asks in the *Wireless NPRM/NOI* whether it should take action to implement Section 253(a) of the Act by addressing types of laws, regulations or practices that “prohibit or have the effect of prohibiting” service. The record the Commission compiled in WT Docket No. 16-421 contains numerous examples of such barriers, and supplies a substantial factual basis on which to issue a declaratory ruling that those barriers violate Section 253(a).

Commenters demonstrated, for example, that localities have enacted moratoria that expressly prohibit deployment, or are following practices that are the equivalent of moratoria because they have the same impact: deployment is stonewalled.¹² Commenters also documented local regulations which prohibit new poles, impose minimum distances between small cell locations, and otherwise interfere with a provider’s design of its network. Another well-documented deployment obstacle is the anachronistic requirement that a provider prove that a geographic coverage gap exists as a condition to obtaining a permit.¹³ Today’s broadband network deployments are not about filling coverage holes. They are needed to expand network capacity to improve network speeds and reliability and provide the rapidly growing new services that customers demand. The Commission should eradicate these barriers by interpreting Section 253(a) as follows:

- Localities may not enforce moratoria, either in the form of ordinances that explicitly block reviews of siting permits, or *de facto* moratoria in which localities refuse to act

¹¹ Mobilite Comments at 4.

¹² See, e.g., Mobilite Comments at 10-12 (providing examples of local restrictions or conditions that impede deployment); AT&T Comments at 15-16; CCA Comments at 29-30.

¹³ Mobilite Comments at 13.

ATTACHMENT 1

STAMP & RETURN

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Promoting Broadband for All Americans by)
Prohibiting Excessive Charges for Access to)
Public Rights of Way)

WT Docket No. _____

Accepted / Filed

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**Federal Communications Commission
Office of the Secretary**

PETITION FOR DECLARATORY RULING

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RER 448

impede access to public rights of way is imperative. Just as rights of way have served the public by making available other essential services like water and electric power, they now can serve the public by making broadband, the newest essential service, available to all.

Courts have observed that local governments' *de facto* monopoly control over public rights of way creates the "danger that local governments will exact artificially high rates" for the use of public rights of way.⁷ That danger is precisely what is occurring today across the nation, as many localities are leveraging the growing demand for wireless broadband and the corresponding need for new infrastructure to impose excessive rights of way fees. While some communities are working cooperatively with providers and impose relatively low fees, often no more than \$100 for access to a streetlight or utility pole for attaching equipment, others are demanding thousands of dollars in up-front application fees, plus thousands of dollars for each pole as well as additional charges for deploying fiber or other backhaul. Given that small cells and new spectrum bands that will increasingly be used for wireless broadband require multiple sites, these fees when imposed city-wide can run into the hundreds of thousands of dollars, far exceeding any possible costs to localities for approving permits and managing their rights of way. Many require these high fees to be paid every year, often with mandatory annual escalations, which can result in rights of way charges of millions of dollars over time. These charges comprise a major component of deployment costs, undermining deployment incentives in these communities and the public interest.⁸

⁷ *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002); see also *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534, 544 (D.P.R. 2003), *aff'd* 450 F. 3d 9 (1st Cir. 2006).

⁸ Local governments may contend that they are serving their residents by collecting more revenues through high rights of way charges but, as the Commission has made clear, this position ignores the broader interests at the core of Section 253. *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*,

- mobile data traffic will grow six-fold from 2015 to 2020, a compound annual growth rate of 42%;
- mobile data traffic will grow two times faster than U.S. fixed IP traffic from 2015 to 2020;
- mobile data traffic in 2020 will be equivalent to six times the volume of the entire U.S. Internet in 2005; and
- the average mobile connection speed will double from 2015 to 2020, reaching 16 Mbps in 2020.¹⁹

The staggering growth in traffic will eventually outpace network capacity, absent the further densification of networks made possible by billions of dollars in investment to build new infrastructure in local communities across the country. Greatly increased backhaul and transport capacity, as well as “last-mile” capacity through additional cell sites, is critical. As Commissioner Rosenworcel noted in supporting the Commission’s allocation of new spectrum bands for 5G, “While these superhigh signals carry a significant amount of data, they don’t go far. But we can turn this limitation into a strength by combining these frequencies with small cells packed close together, densifying networks at lower cost. This all works – if we come up with policies and practices that facilitate small cell deployment.”²⁰

Rights of way are ideal – but also essential – for small cell and 5G technologies, as well as for the backhaul and transport facilities that connect them to all carriers’ networks, allowing customers to enjoy nationwide connectivity. Much like mobile devices, wireless infrastructure is evolving toward extremely small equipment that can easily be located on streetlights and utility poles that already occupy rights of way, as well as on structures supporting signage and traffic control equipment. The reduced size and weight of small cell equipment generally does not pose loading problems for most rights of way structures. Many types of small cell antennas extend no more than a few feet in any direction; some are now nearly as small as a laptop.

¹⁹ Cisco, *VNI Mobile Forecast Highlights, 2015-2020*, http://www.cisco.com/assets/sol/sp/vni/forecast_highlights_mobile/.

²⁰ *Spectrum Frontiers Order* (Separate Statement of Commissioner Jessica Rosenworcel at 2).

Access to rights of way is also more essential for small cells and the transmission facilities that connect them than it has been for 3G and 4G macrocells. The higher-frequency radio spectrum bands that carriers will increasingly depend on for small cells and 5G can supply needed network capacity. However, these bands' propagation limitations require more closely-spaced infrastructure. There is often no practical way to deploy this infrastructure without using public rights of way. And every small cell site must be connected to networks through backhaul and transport facilities so that customers can send and receive communications to or from anywhere. Given the enormous capacity demands being placed on networks, fiber may be the only cost-effective choice in urban areas. Fiber supplies the bandwidth needed to accommodate explosive data growth for many years, avoiding the need to repeatedly install new conduit. But installing fiber is not technically feasible or financially viable without access to rights of way. If carriers and infrastructure providers are charged exorbitant rents or fees for that access, fiber deployment will be deterred.

In short, robust and ubiquitously available wireless broadband depends on affordable access to rights of way. By granting this petition, the Commission will give force to the core purpose of Section 253. And it will prevent excessive fees that are impeding providers from building the infrastructure that will help make wireless broadband for all Americans a reality.

C. High and Discriminatory Fees Are Impeding Deployment of Infrastructure Needed to Support Wireless Broadband.

Mobilitie and other providers are spearheading the wireless industry's expansion of network capacity to accommodate ever-growing customer demands for advanced technologies. These companies pay enormous up-front costs to construct and expand their networks, long before they can generate revenues from those networks. The economics of deployment are, however, made far more difficult when localities impose excessive fees as a precondition for

deployment. As Commissioner O’Rielly stated at the Commission’s May 3, 2016 workshop, “I continue to hear legitimate complaints about localities placing hurdles in front of small cell deployments. Issues range from permitting problems and excessive fees to forced tolling agreements and *de facto* moratoria. Site approvals in rights-of-way, which are especially important for small cell systems, appear to be particularly problematic.”²¹ In recent testimony to Congress, he expanded on his concerns:

One area that the Commission, and perhaps Congress, can provide greater assistance is removing barriers to the wireless infrastructure necessary to deploy 5G. As I have previously outlined, experts estimate that the propagation capabilities (short distances) will require a ten-fold or greater siting of wireless towers and antennas. Some have argued that we may see a million new small cells and DAS antennas deployed in the next five years. All of this infrastructure can’t be sited without approval of decision makers, including private land owners and municipal managers.

Standing in the way of progress, however, are some localities, Tribal governments and states seeking to extract enormous fees from providers and operating siting review processes that are not conducive to a quick and successful deployment schedule. At some point, the Commission may need to exert authority provided by Congress to preempt the activities of those delaying 5G deployment without justifiable reasons.²²

Mobilitie’s experience validates these concerns. It holds authorizations from state public utility commissions nationwide to provide telecommunications services, and has filed thousands of applications for permits or franchises in nearly all 50 states. Those applications cover tens of thousands of individual sites to be located in rights of way that include antennas, fiber, electric power supply, and other equipment. Some localities recognize the public interest benefits in

²¹ FCC Commissioner Michael O’Rielly, Statement at DAS and Small Cell Solutions Workshop (May 3, 2016).

²² FCC Commissioner Michael O’Rielly, Statement Before the Senate Committee on Commerce, Science, and Transportation, “Oversight of the Federal Communications Commission,” at 1-2 (September 15, 2016).

granting Mobilitie affordable access to rights of way to bring advanced services to their residents. These communities have worked cooperatively with Mobilitie and charge reasonable fees. For example, Mobilitie has concluded rights of way agreements with small up-front or annual fees ranging from \$80 to \$750 with the cities of Los Angeles and Anaheim, California; Minneapolis, Minnesota; Overland Park and Olathe, Kansas; Independence, Missouri; Newark and Union City, New Jersey; Bismarck, North Dakota; Price, Utah; and Racine and Wauwatosa, Wisconsin.

Many other localities are, however, requesting multiple, exorbitant fees that unlawfully discriminate against wireless technology and impair new or improved service. In Mobilitie's experience, these fees are orders of magnitude higher than what other localities charge – even ten times as much – and also far exceed a locality's charges to defray its reasonable costs of processing permit applications and managing its rights of way. Mobilitie believes these fees are materially higher than what other rights of way users have been charged, although, as discussed below, information as to what other users are paying is difficult to obtain.²³

These high charges are particularly unjustified because equipment for new wireless technologies is often *less* intrusive than equipment for older wireline or wireless services. The regulatory approval process for these types of new wireless facilities should be faster and *less* burdensome, not slower and more expensive.

Commentators have noted the growing problem of high rights of way fees and have asked the Commission to address it:

²³ Some localities are requiring Mobilitie to pay a revenues-based “franchise fee.” But franchise fees are typically required when a locality awards a special privilege or exclusive right. In contrast, the agreements that Mobilitie is being asked to execute declare that Mobilitie is only being granted “non-exclusive” access, and that the locality may “franchise” an unlimited number of other providers – and collect revenues-based fees from each of them as well.

Many LGUs [local government units] have recognized that communications are a beneficial service and crucial for economic development and, thus, they have allowed carriers to occupy the PROW [public rights of way] in return for one time permit charges or similar fees that are limited to recovering the cost of PROW management and maintenance. Other LGUs have seen the opportunity for a large and continuous revenue source, and they have used their monopoly control over the PROW to extract large fees that are used to subsidize other LGU services.²⁴

Noting that broadband is “becoming an essential service” and that both “the Bush and Obama administrations have established accelerated broadband deployment as a national priority,” this analysis concluded that high rights of way charges interfere with that priority: “To upgrade and build out their networks, carriers naturally need increased access to the PROW. LGUs that seek to subsidize other government services by charging revenue generating PROW fees are a formidable obstacle to that goal.”²⁵

“Given the importance of ubiquitous expansion of 4G and the rollout of 5G to our economic future, it’s not reasonable for localities to view cell site deployment as a potential new revenue stream, which is something we’ve seen.”²⁶ The problem is not confined to a few outlier localities – it exists nationwide. Across the country, Mobilite is being confronted with multiple fees, often being asked to pay not only up-front fees but also annual recurring fees which escalate by mandatory amounts year after year. Worse, cities are requesting these fees not only for new poles or for attachments to city-owned light poles, but also where Mobilite would install its equipment on a private utility’s poles, even though there is no cost to the city from that installation and no new use of its rights of way. Types of fees include:

²⁴ Thomas W. Snyder and William Fitzsimmons, *Putting a Price on Dirt: The Need for Better-Defined Limits on Government Fees for Use of the Public Right-of-Way Under Section 253 of the Telecommunications Act of 1996*, 64 Fed. Comm. L. J. 137, 138-39 (2012) (“Snyder & Fitzsimmons”).

²⁵ *Id.* at 140.

²⁶ FCC Chairman Tom Wheeler, Remarks at the Competitive Carriers Association, at 5 (September 20, 2016 (“Wheeler CCA Remarks”).

Application fees. Localities seek up-front fees to process any permit applications while reserving discretion to deny any or all permits. These fees are typically in the \$1,000 - \$3,000 range but can be far higher. For example, a Minnesota locality demanded a \$10,000 up-front processing fee and a California city requested an \$8,000 “administration fee,” but neither locality explained how it calculated this amount or how it possibly reflected costs to process the application. These fees are problematic because they often are not *in lieu of* per-pole or per-site fees but are instead *in addition to* them, further driving up carriers’ up-front costs.

Annual per-pole fees. In addition, every locality is seeking a separate fee for each and every facility Mobilitie constructs. These fees do not serve to compensate the city for processing Mobilitie’s applications because those costs will already be recouped through the up-front application fees. Localities do not explain or justify annual per-pole fees as compensating them for the management of the rights of way, supervision of Mobilitie’s operation, or other ongoing costs. Instead, the fees appear to be set to recover what localities believe the “market” rate is for the use of their rights of way so that they can profit from it. This results in huge variations in what Mobilitie is being asked to pay from city to city. And, because cities typically demand that the first year’s fee be paid as a condition of granting a permit to construct a site, Mobilitie must pay the fee long before it can generate any revenues from its use. By adding to Mobilitie’s up-front costs, these fees make the financial case for expanding service even more difficult.

Examples of such high fees include:

- A Wisconsin city has requested annual fees of \$30,000 for each pole.
- Two Oregon cities have requested payments of \$6,083 and \$5,000 annually for each pole.
- One California city initially proposed annual fees of \$14,000 per pole. When Mobilitie objected the city reduced the fees to \$4,000, justifying that number because a nearby city had charged \$4,000. This pricing behavior signals that cities are setting fees not to

compensate them for managing the rights of way, but to collect as much as other cities are receiving or as much as the market can bear.

- Two other California cities are demanding annual fees of \$10,800 and \$7,210 per pole respectively.
- A Texas locality requested a \$20,000 annual per-pole fee for new poles. Mobilitie proposed a lower amount but the city refused to accept it, forcing Mobilitie to limit its planned deployment to attaching equipment to existing poles. Even for simple attachments the city is demanding \$2,000 annually for each pole, even where the attachment would require no disturbance of the underlying right of way.
- An Illinois jurisdiction is requesting a \$12,000 annual per-pole fee.
- A New York locality imposed a blanket fee of \$45,000 per year that is not tied to the number of poles Mobilitie constructs and thus bears no relationship to actual use of the rights of way.

It bears emphasis that these and other charges localities demand are “unit” fees, which must be paid for *each* small cell site. But small cell deployments may require dozens or even hundreds of sites to provide needed capacity and coverage, meaning that these fees skyrocket. A \$5,000 per-site fee for a 100-site deployment translates into \$500,000 in fees per year.

The magnitude of many rights of way fees materially impacts the economics of small cell and backhaul deployment, because those fees are so high in relation to other buildout costs and comprise a large percentage of those costs. The harmful impact of these fees is compounded because they are recurring fees that must be paid to the locality every year, meaning that over time they can far exceed all other deployment costs. Depending on the type of equipment used, the installation of a new pole can cost from \$15,000 to \$30,000. With some localities imposing per-site permit application fees of several thousand dollars, plus annual fees in that range as well, up-front fees can comprise 20-30 percent or more of total construction costs. But those up-front fees only are part of the payments Mobilitie must make. Because it typically also must pay the per-pole fee every year – and that fee is almost always subject to mandatory annual percentage

escalations – the financial burden that local fees impose is exacerbated. Thus, for example, an annual \$3,000 fee will cost well more than \$30,000 for *each* installation over ten years, which can far exceed the entire costs of deployment. Such fees can make deployment financially nonviable, effectively preventing deployment of new service.

Percentage-of-revenues fees. Other localities demand that Mobilitie pay a percentage of its annual gross revenues, with required fees as high as six and seven percent (requested by localities in Oregon and Washington). Jurisdictions in California, Massachusetts, and New York, as well as other jurisdictions in Oregon, are requesting that Mobilitie pay them five percent of its gross annual revenues. These fees, which can exceed what localities can charge cable providers under federal law, by definition bear no relationship to Mobilitie’s actual use of the rights of way. Such a substantial tax directly affects Mobilitie’s ability to finance projects in those communities.

Fiber fees. Where Mobilitie seeks to lay Ethernet or other fiber in rights of way to transport traffic from its pole-based equipment to carriers’ core networks, cities also request a per-foot fee. These fees vary tremendously. While some jurisdictions in states including Kansas, New York, Minnesota and Utah charge fees ranging from \$0.19 to \$1.08 per foot per year, other cities are requesting per-foot charges orders of magnitude higher. For example, several Texas cities have sought fiber fees based on the fair market value of adjacent private property – even though they would not be granting Mobilitie any title or other private property rights that property owners enjoy. Such “fair market value” fees drive up the costs of fiber to prohibitive levels, deterring the deployment of new fiber capacity needed to accommodate growing broadband traffic.

Third-party manager fees. Some localities are entering into exclusive contracts with private companies to manage their rights of way. Some of these firms compete with other companies deploying network infrastructure. Under these arrangements, the private manager is empowered to negotiate rent and other fees from carriers and keep a share of the profits. This practice results in fees that by definition do not only compensate the city but also pay a private party, without any relationship to Mobilitie's actual use of the rights of way. Chairman Wheeler has criticized this growing practice: "It's not reasonable for cities to 'franchise' their siting to a third party, who acts as a gatekeeper."²⁷

The plethora of different and often multiple fees demonstrates that many localities are using their authority to manage rights of way as a pretext for raising revenue, regardless of Section 253(c)'s mandate for "fair and reasonable compensation" that is "competitively neutral and nondiscriminatory." And, because these fees must be paid in advance, they are particularly burdensome for a new entrant such as Mobilitie, who must pay them in addition to fronting the costs of equipment and construction, long before it can expect to generate revenue. This often creates an untenable situation that leaves Mobilitie with the dilemma of acceding to a municipality's unreasonable demands or not deploying in that municipality at all. These profit-generating regimes also frustrate the Commission's efforts to accelerate broadband deployment and foster the entry and growth of new competitive services.

²⁷ Wheeler CCA Remarks at 5.

ATTACHMENT 2

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

Streamlining Deployment of Small Cell)	
Infrastructure by Improving Wireless Facilities)	
Siting Policies	)	WT Docket No. 16-421
)	
Mobilitie, LLC Petition for Declaratory Ruling)	

COMMENTS OF MOBILITIE, LLC

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Dated: March 8, 2017

Commission rightly finds that it is time for it to address those obstacles to fulfill its statutory mandate to promote ubiquitous telecommunications networks to serve the American public.

III. MANY LOCALITIES HAVE IMPOSED OBSTACLES THAT ARE SEVERELY IMPEDING INVESTMENT IN CRITICAL WIRELESS INFRASTRUCTURE.

Mobilitie is working cooperatively with many communities to deliver available and affordable broadband services to their residents and thereby promote the objectives of the Communications Act. Many cities recognize the tremendous benefits to their citizens of using rights of way to deliver broadband, and Mobilitie is successfully partnering with them.

However, many localities are frustrating deployment and thereby impeding ubiquitous, affordable wireless broadband. They are, among other practices, imposing unreasonable, excessive and discriminatory fees that deter Mobilitie from building new infrastructure. Mobilitie thus sought relief from the Commission in its Petition, which supplies numerous examples of unreasonable and discriminatory charges. These include requirements that Mobilitie pay a percentage of its gross revenues; annual fees in the thousands of dollars for each small cell that far exceed any possible costs to the locality; and fees that are imposed on Mobilitie but not imposed on competing providers, impeding the provision of competitive new services. Section 253(c) of the Act specifically requires that in order to fit within that provision, rights of way fees must constitute “fair and reasonable compensation,” be “competitively neutral and nondiscriminatory,” and be “publicly disclosed.” Mobilitie asked the Commission to interpret these statutory phrases consistent with their plain meaning and the goals of the Act.¹¹

The Public Notice seeks comment on Mobilitie’s Petition as well as on any other laws, regulations and practices that adversely affect wireless deployment. It correctly notes that while

¹¹ Mobilitie did not ask the Commission to preempt any specific state or local law or regulation. Rather, it only seeks a ruling that addresses what constitute reasonable and nondiscriminatory – and thus permissible – fees under federal law.

excessive and discriminatory fees are one type of barrier, there are others that can impede or block new investment, and asks for what types of such obstacles exist as well as illustrations as to how they have been imposed. Given that Mobilitie supplied numerous examples of excessive and discriminatory fees in its Petition, it will not repeat those examples here, but expects that other providers will supply many additional examples to illustrate the breadth of this problem.

Instead, Mobilitie submits these comments to respond to the Commission's request for information about additional deployment barriers. They unfortunately go well beyond exorbitant fees that impair broadband deployment, and impose barriers and extremely long procedures that delay new service or deny it altogether. Such barriers are equally unlawful, and the Commission should adopt a declaratory ruling to take them down.

A. Both Explicit and Effective Moratoria Unlawfully Block Deployment in Violation of Section 253(a).

Section 253(a) of the Communications Act is based on Congress' determination that state and local laws, regulations or practices that obstruct the deployment of telecommunications services disserve the public interest and must be curtailed. And the scope of this section is broad – it reaches not only laws or regulations that may expressly prohibit service, but also those that may “have the effect of prohibiting” services.

Moratoria on building facilities unquestionably violate Section 253(a) because they expressly prohibit new service. They have stopped Mobilitie from constructing the facilities needed for its networks. For example:

- A Florida locality enacted a moratorium prohibiting new wireless facilities in 2014, but it is still in effect three years later.
- Two other Florida jurisdictions enacted moratoria in September 2016 that remain in effect.

- An Iowa locality issued an indefinite moratorium in August 2016 on small cell permitting to develop a small cell ordinance.
- A California locality passed an indefinite moratorium in August 2016 prohibiting new wireless facilities.
- A Minnesota locality issued a moratorium in August 2016 prohibiting approval of or wireless and small cell/DAS systems without any end date.
- A Washington state locality passed a moratorium in September 2016 prohibiting the approval of any wireless facilities until at least August 2017.

Mobilitie has also confronted local practices which, while not taking the form of explicit moratoria, still have the same practical impact, because they stop it from securing the permits the locality requires and thus effectively stymie installation of new facilities. These practices take various forms, including refusals to process site permit applications, refusals to negotiate master rights of way agreements which the locality insists are a prerequisite to its willingness to process site permits, or simple inaction. Some cities say they cannot consider Mobilitie's applications until they develop an administrative review process, but then fail to create that process, leaving Mobilitie with no path forward. These failures to act have the same effect as express moratoria.

For example:

- Four Arizona jurisdictions have told Mobilitie that they will not process ROW siting applications until the state legislature determines whether to enact siting legislation.
- Two other Arizona jurisdictions have stated that they will not process applications because of this Commission proceeding.
- Approximately 30 California localities are refusing to negotiate ROW access agreements and permits, stating that they first want to acquire street lights owned by a privately-owned investor utility. Why the city's desire to acquire these facilities should block Mobilitie from securing permits has never been explained.
- Three Michigan jurisdictions will not allow deployment of facilities in their ROWs at all.

- A Minnesota locality told Mobilitie last year it will not accept small cell applications until it adopts a new ordinance for permitting small cells, but has recently stated that it will take at least another year to enact the ordinance.
- A New York city is denying ROW access for small cells because it has no permitting process in place but has not stated when that process will be completed.
- An Ohio city is denying ROW access without providing an explanation.
- An Oregon city requires a franchise agreement before it will consider small cell permit applications, but will not negotiate the franchise agreement.
- Three state departments of transportation are refusing to permit Mobilitie's facilities along highway ROWs.

Both express and *de facto* moratoria directly undercuts the purpose of Section 253(a), to ensure that localities do not block the deployment of new telecommunications services. They are accordingly unlawful.

B. Regulations or Practices that Restrict New Small Cell Facilities Also Violate Section 253(a).

Many other localities do not enforce express or *de facto* moratoria, but impose severe restrictions that effectively deter new infrastructure. The most common type of restriction prohibits Mobilitie from installing new poles in rights of way on which to attach its antennas, fiber and other necessary equipment, and allows it only to attach equipment to existing poles. Other restrictions require Mobilitie's equipment to be spaced minimal distances from other providers' facilities. Those limits preclude Mobilitie from deploying small cells at locations that are needed to provide reliable coverage. And others require Mobilitie to demonstrate a network "coverage gap," despite the fact that small cells are not intended to fill geographic gaps, but to fill "capacity gaps" where the available bandwidth is or will soon be inadequate to accommodate the exploding volume of traffic and the fast speeds customers expect. For example:

- A California locality requires all facilities to be underground, and thus will not allow Mobilitie to install new poles or even small cells attached to existing poles.

- Nearly 40 California localities require propagation maps that demonstrate the need for additional wireless infrastructure to fill a coverage gap.
- An Illinois city required Mobilitie to make a large cash deposit before it would even begin negotiations, but then refused to work with the company or even discuss an agreement.
- Another Illinois city is requiring Mobilitie to attach city-owned equipment at Mobilitie's own cost as a condition of being able to install new poles.
- Another Illinois city is conditioning ROW access on Mobilitie's waiver of its rights to seek judicial review of city permitting decisions.
- Two other Illinois cities require propagation maps in order to prove a need for new infrastructure.
- Two Michigan localities will not allow Mobility to deploy small cells because they require all telecommunications facilities to be installed underground.
- Five Minnesota jurisdictions require propagation maps that demonstrate the need for additional wireless infrastructure.
- Two Nevada counties have imposed minimum spacing requirements between small cell facilities that impair network coverage.
- Two Ohio jurisdictions require propagation maps that demonstrate the need for additional wireless infrastructure.
- Two Oregon localities require Mobilitie to provide an alternative site analysis showing why it cannot locate small cell facilities on private property.
- A number of Washington localities are requesting that applicants for new small cell facilities using ROWs demonstrate a significant gap in coverage, show why using ROWs is the least intrusive means to fill that gap, and/or produce an analysis of the feasibility of alternative sites that do not use ROWs.

These types of restriction are no more lawful than small cell siting moratoria. They effectively prohibit service in many locations, because existing poles are either insufficiently tall or have loading restrictions and cannot bear the weight of the new equipment. Alternatively, the poles are in the wrong locations to achieve reliable, robust network coverage. More

fundamentally, such restrictions impermissibly inject localities into the design of telecommunications networks. Section 253(a) grants them no such authority.

C. Many Localities Are Imposing Long Delays, First to Execute A Rights of Way Access Agreement, and Then to Process Individual Siting Permits

The Public Notice seeks information as to the length of time that localities take to process applications. It correctly notes that, given the far smaller visual and other impacts of small cells, processing times should be correspondingly faster. But in Mobilitie's experience, processing times are extremely slow – and often involve not one but two lengthy periods of delay, one following the other, and each lasting months and many well over a year. Many localities require Mobilitie to obtain a city-wide license or franchise merely to have the right to access their rights of way. However, that license or franchise is *in addition to* the city's *separate* requirement that Mobilitie secure permits for each individual site. The result is that Mobilitie must secure not only a city-wide license but also individual permits. This two-step process imposes extensive delays as well as costly and burdensome conditions that frustrate deployment.

The license or franchise agreement negotiation process is lengthy. While cities are requiring them for rights of way access, few have agreements that are designed for small cell deployments and thus must create them. These agreements are typically extensive contracts, often thirty pages or more, which impose detailed obligations and restrictions on Mobilitie, and address matters that go well beyond the locality's legitimate interest in managing its rights of way. For example, they require Mobilitie to pay a franchise fee based on a percentage of the company's gross revenues, require Mobilitie to demonstrate a business need for its service or a gap in wireless coverage, impose design requirements, or seek to regulate Mobilitie's dealings with its customers.

Over 340 jurisdictions have taken over six months to establish a process or agreement for access to the right of way – measured not from the time of first discussion but from the time a template process or draft agreement was first exchanged. Of these at least 75 localities have taken over twelve months to establish a process or agreement, and at least 11 have taken over a year and one half. At least two have taken more two years or more. And these localities do not include those that enacted moratoria that completely block new infrastructure. Examples of license agreement delays abound:

- In California, Mobilitie has been waiting for one city to move ahead with an agreement for two years, and for a second city for more than eighteen months. It has been seeking an agreement with a third city for more than one year.
- In Florida, one jurisdiction has stalled the agreement process for over two years.
- In Georgia, discussions began in one locality a year ago; no agreement is yet in place.
- In Illinois, Mobilitie began negotiations with a locality eleven months ago but was unable to get responses for months and still has no agreement.
- In Iowa, one locality notified Mobilitie ten months ago that an agreement would be required but no agreement has yet been reached.
- Similarly, a Maryland locality informed Mobilitie eleven months ago that an agreement would be required but put the agreement on hold.
- In Massachusetts, discussions with one city have been ongoing for eighteen months.

The “benefit” of the rights of way license or franchise is no more, though, than the opportunity to file permits one by one – in a work stream that can require dozens of sites for each build. In many of these jurisdictions, after Mobilitie has started to file applications for the individual permits that will finally allow it to build, it must again wait – and generally for not months but quarters – before the applications it files are granted or denied. For well over half of these facilities, the process has taken over six months, and many have been awaiting approval for over a year. This glacial pace is the result both of time working with jurisdictions as they change

or create application requirements and processes, and of delay after applications are complete. Every one of these delays frustrates deployment of needed new infrastructure to serve these communities. Examples of standard delays for eight months or more are common, and one city has a year-long permitting process:

- One jurisdiction in southern California has a permit review period of one year even following an executed ROW Access agreement.
- A northeastern jurisdiction is still reviewing applications that have been submitted without response for over eight months.
- Mobilitie submitted applications to one mid-Atlantic locality last June but is still waiting for it to act – nine months later.
- One midwest jurisdiction has been willing to work with Mobilitie on the proposed deployment, but the pace has been extremely slow pace allowing eight months to pass without any successful permitting.
- One jurisdiction in the south is working with us, but has a very restrictive and slow process requiring Mobilitie to jump through several hoops that has lasted eight months to date.
- A city in the west is requiring a very lengthy process involving environmental reviews, design commission approval, and numerous other deliverables to be first approved by the city's Department of Transportation and ultimately, the City Council; which add up to more than six months.

IV. THE COMMISSION SHOULD INVOKE ITS AUTHORITY TO REMOVE THESE BARRIERS TO BROADBAND DEPLOYMENT.

Chairman Pai has declared:

[T]he FCC must aggressively use its statutory authority to ensure that local governments don't stand in the way of broadband deployment. In section 253 of the Communications Act, for example, Congress gave the Commission the express authority to preempt any state or local regulation that prohibits or has the effect of prohibiting the ability of any entity to provide wired or wireless service. So where states or localities are imposing fees that are not "fair and reasonable" for access to local ROWs, the FCC should preempt them. Where local ordinances erect barriers to broadband deployment (especially as applied to new entrants), the FCC should eliminate them. And where local governments are not transparent

ATTACHMENT 3

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

Streamlining Deployment of Small Cell)	
Infrastructure by Improving Wireless Facilities)	
Siting Policies)	WT Docket No. 16-421
)	
Mobilitie, LLC Petition for Declaratory Ruling)	

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Dated: April 7, 2017

The record supplies compelling factual and legal grounds for the Commission to remove the obstacles impeding the deployment of advanced wireless broadband networks. Mobilitie's November 15, 2016 Petition for Declaratory Ruling ("Petition") sought Commission action against one obstacle: the excessive and discriminatory fees localities are imposing on wireless infrastructure along rights of way ("ROWs"). All wireless providers and associations filing comments support Mobilitie's Petition, documenting numerous examples of exorbitant and discriminatory fees that they or their members have confronted. The data illustrate that many localities are leveraging the growing demand for ROW access and their monopoly control over that access to extract monopoly rents. Commenters also support Mobilitie's showing as to why Section 253 of the Communications Act of 1934, as amended ("Act"), supplies legal authority for the Commission to grant the Petition. And they endorse Mobilitie's three specific requests for the Commission to interpret Section 253 to ensure that ROW fees meet the Act's requirement that fees are "fair and reasonable," are "nondiscriminatory and competitively neutral," and are "publicly disclosed" so that they are transparent to all.

In contrast, parties opposing the Petition fail to contravene this substantial record. Many localities are good stewards of their citizens, recognize the economic and other benefits of new infrastructure, and exercise that responsibility appropriately by charging reasonable fees. But that does not change the fact that many others impose fees that are excessive or discriminatory, or both. Others make the incorrect claim that the Petition asks the Commission to set rates for ROW fees. To the contrary, it asks the Commission to declare that fees should be based on localities' costs so as to make them whole, not to specify fees. Some localities assert they are simply setting fees at "market," but there is no free market for ROW access. The record information as to fees confirms that localities exercise monopoly control over ROWs and setting

fees. Others assert that the Commission has no authority at all to address their control over ROW access, but that assertion is belied by Congress' decision in Section 253 to limit localities' discretion to impose requirements or restrictions on services.

Given the strong factual and legal record supporting a declaratory ruling, the Commission can – and should – act quickly. The industry has been working with cities for years, and while some cities are on the vanguard of fast deployment, far too many leverage the growing demand for new facilities to extract high fees. Since filing its Petition nearly five months ago, Mobilite has strived to work with localities to obtain reasonable fees and secure the many required licenses and permits, but still faces the same obstacles that its Petition and all industry commenters document. Localities continue to require both up-front application and permit fees, as well as recurring, annual “rental” fees – even though they only incur one-time costs to review and process applications and to supervise installation of facilities in ROWs. Worse, some localities are sharply hiking fees to thousands of dollars to capitalize on the demand for additional infrastructure. For a deployment that requires a vast number of small cell facilities across a metropolitan area, these fees quickly mount up to hundreds of thousands of dollars, often making deployment economically infeasible. They far exceed any costs the locality incurs by orders of magnitude, while taking capital that would otherwise go to investment in new infrastructure. Yet as the race to 5G intensifies, the need for that investment to ensure the speed and optimal performance of wireless networks intensifies.

The Commission should thus promptly issue a declaratory ruling granting the Petition. That action will curb the excessive fees that are deterring investment in expanding the nation's wireless infrastructure and blocking creation of the many jobs that investment will generate. Moreover, it will speed provision of advanced services to the public, which increasingly depends

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

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

**COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION**

The American Public Power Association (“APPA”), on behalf of the Nation’s publicly-owned electric utilities, submits these consolidated comments in response to the *Wireline Notice of Proposed Rulemaking and Notice of Inquiry* (“*Wireline NPRM/NOI*”)¹, and the associated *Wireless Notice of Proposed Rulemaking and Notice of Inquiry* (“*Wireless NPRM/NOI*”)², issued by the Federal Communications Commission (“Commission”). In these two interrelated

¹ *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking (“Wireline NPRM”), Notice of Inquiry (“Wireline NOI”), and Request for Comment*, WT Docket 17-84, released April 21, 2017. Notably, as published by the Federal Register in the Code of Federal Regulations, the abovementioned issuance did not include the “Request for Comment,” so these comments do not directly address inquires in that portion of the document.

² *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking (“Wireless NPRM”), and Notice of Inquiry (“Wireless NOI”),* WT Docket 17-79, released April 21, 2017.

proceedings, the Commission seeks comment on numerous far-reaching proposals that are intended to “reduce pole attachment costs and speed access to utility poles” for broadband service providers,³ and to “remove or reduce” existing “regulatory impediments to wireless network infrastructure investment and deployment.”⁴ The Commission suggests that these proposals will remove barriers to wireline and wireless broadband deployment, and will thereby encourage broadband service providers to accelerate deployment of facilities and introduce more advanced services, such as 5G wireless broadband services.

APPA shares the Commission’s desire to expand broadband deployment, adoption, and use throughout the United States. In fact, as the Commission is aware, some members of APPA have been at the forefront of spurring broadband deployment, adoption, and use in their communities, particularly in rural and underserved areas. APPA submits, however, that several of the Commission’s proposals and lines of inquiry in the *Wireline NPRM/NOI* and *Wireless NPRM/NOI* may exceed the Commission’s statutory authority and would have significant detrimental operational and financial impacts on utility operations.

Access to utility poles involves a balancing of myriad competing interests and considerations. With respect to municipal utility poles,⁵ Congress has repeatedly concluded that

³ *Wireline NPRM/NOI*, at ¶ 3.

⁴ *Wireless NPRM/NOI*, at ¶ 2.

⁵ Many public power utilities are municipal utilities (a utility owned by a municipality). The ones that are not owned by a municipality are still governmentally owned. Examples include public utility districts, irrigation districts, and state-created entities that serve areas larger than a municipality. Given that the *Wireline NPRM/NOI* and *Wireless NPRM/NOI* utilize the phrase “municipal” or “municipally-owned” generally with respect to all government-owned utilities we use it throughout the document, but our comments are applicable to all public power utilities.

In the *Wireless NPRM/NOI*, however, the Commission asks whether management of access to municipally-owned structures should at times be considered regulatory rather than proprietary in nature.

We seek comment on whether we should reaffirm or modify the *2014 Infrastructure Order*'s characterization of the distinction between State and local governments' regulatory roles versus their proprietary roles as "owners" of public resources. How should the line be drawn in the context of properties such as public rights of way (e.g., highways and city streets), municipally-owned lampposts or water towers, or utility conduits? Should a distinction between regulatory and proprietary be drawn on the basis of whether State or local actions advance those government entities' interests as participants in a particular sphere of economic activity (proprietary), by contrast with their interests in overseeing the use of public resources (regulatory)?²⁴

APPA submits that the Commission was correct in its prior determinations that management of access to municipal facilities, namely electric utility poles, is proprietary in nature and is outside the scope of Section 253. There can be no real suggestion that the provision of electric service by a municipal electric utility is not a proprietary activity. Indeed, public power utilities do not have regulatory authority over public ROW to be used by private communications providers. Further, in many instances, public power utilities are separate corporate entities from the local governments that may own the public ROWs. For example, the electric service territory of many municipal electric utilities extends well beyond the corporate territorial boundaries of the municipality that created them. In such cases, the municipal utility typically must obtain access to the public ROWs from the local jurisdiction in a similar manner as other users of the ROWs. Similarly, many public power utilities were created as independent agencies or districts, are not part of any particular local governmental entity, and do not exercise any control over the use of the public ROWs.

²⁴ *Wireless NPRM/NOI*, at ¶ 96.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of

ACCELERATING WIRELESS)
BROADBAND DEPLOYMENT BY)
REMOVING BARRIERS TO) WT Docket No. 17-79
INFRASTRUCTURE INVESTMENT)

COMMENTS OF SMART COMMUNITIES AND SPECIAL DISTRICTS COALITION

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June 15, 2017

**SUMMARY OF COMMENTS OF THE SMART
COMMUNITIES AND SPECIAL DISTRICTS COALITION**

The Smart Communities and Special Districts Coalition (“Smart Communities”) is comprised of individual localities, special districts, and local government associations that collectively represent over 31 million residents in 11 states and the District of Columbia. Collectively, Smart Communities have significant experience in addressing the placement of wireline and wireless facilities, including wireless deployments from very large structures and monopoles to relatively small wireless structures.¹ Smart Communities have devoted significant community resources to undergrounding utilities and other economic development projects, whose job-creating success depends on balancing the needs of local businesses, utilities, residents, consumers and tourists – all while maintaining the safety and integrity of private and public infrastructure located within their communities.

Moreover, Smart Communities interact on a daily basis with wireless industry participants in their role as owners of public rights-of-way, parks, street lights, water towers and tanks as well as other proprietary infrastructure routinely used to support commercial wireless facilities. Smart Communities thus bring to this proceeding a unique understanding of the challenges and rewards of siting wireless facilities and leasing space for their deployment, including the next generation of wireless services and infrastructure. Based on our experience, Smart Communities believe that no additional federal regulations are required at this time, and the Commission need not, should not and cannot pursue the proposals in the NOI.

Local governments want and support wireless infrastructure, including small cells that will one day support 5G in order to meet the connectivity needs of their residents and businesses.

¹ Smart Communities is also filing comments in the Commission’s companion wireline proceeding (WC Docket No. 17-84).

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of

ACCELERATING WIRELESS)
BROADBAND DEPLOYMENT BY)
REMOVING BARRIERS TO) WT Docket No. 17-79
INFRASTRUCTURE INVESTMENT)

COMMENTS OF SMART COMMUNITIES AND SPECIAL DISTRICTS COALITION

I. INTRODUCTION

The Smart Communities and Special Districts Coalition (“Smart Communities”)² is comprised of individual localities, special districts, and local government associations that collectively represent over 31 million residents in 11 states and the District of Columbia.³

² The Smart Communities and Special Districts Coalition is comprised of members of the Smart Communities Siting Coalition which was originally formed to participate in the Mobilitee Petition docket (WT Docket No. 16-421), plus additional communities and special districts who have joined to participate in this proceeding and the Commission’s companion wireline proceeding (WC Docket No. 17-84). The full membership of the Smart Communities and Special Districts Coalition is listed in FN 2 below.

³ Individual members: Ann Arbor, MI; Atlanta, GA; Berlin, MD; Berwyn Heights, MD; Boston, MA; Capitol Heights, MD; Cary, NC; Chesapeake Beach, MD; College Park, MD; Corona, CA; Dallas, TX; District of Columbia; Elsinore Valley Municipal Water District (CA); Frederick, MD; Gaithersburg, MD; Greenbelt, MD; LaPlata, MD; Laurel, MD; City of Los Angeles, CA; Marin Municipal Water District (CA); McAllen, TX; Montgomery County, MD; Myrtle Beach, SC; New Carrollton, MD; North County Fire Protection District (CA); Ontario, CA; Padre Dam Municipal Water District (CA); Perryville, MD; Pocomoke City, MD; Poolesville, MD; Portland, OR; Rockville, MD; Rye, NY; Santa Clara, CA; Santa Margarita Water District (CA); Sweetwater Authority (CA); Takoma Park, MD; University Park, MD; Valley Center Municipal Water District (CA); Westminster, MD and Yuma, AZ.

Organizations Representing Local Governments: Texas Coalition of Cities for Utility Issues (TCCFUI) is a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages. The Michigan Coalition to Protect Public Rights-of-Way (“PROTEC”) is an organization of Michigan cities that focuses on protection of their citizens’ governance and control over public rights-of-way. The Michigan Townships Association (“MTA”) promotes the interests of 1,242 townships by fostering strong, vibrant communities; advocating legislation to meet 21st century challenges; developing knowledgeable township officials and enthusiastic supporters of township government; and encouraging ethical practices of elected officials. The Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. The Public Corporation Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The position expressed in this Brief is that of the Public Corporation Law Section only. The State Bar of Michigan takes no position. The Michigan Municipal League (“MML”) is a non-profit Michigan corporation whose purpose is the improvement of municipal government. Its membership includes 524 Michigan

requested (because no cost-benefit analysis has been provided by the industry, and no cost-benefit analysis is even requested by the Commission in this docket).

2. *The Mobilitie Docket Record Shows Deployment Has Proceeded Apace.*

Industry's comments in response to the *Mobilitie* Petition demonstrate there have been very few cases that turn on a failure of a community to act in a timely way. Industry did not show that a shorter time frame is required, or would significantly cut deployment times, given, for example the time required prior to beginning construction for things such as make-ready engineering work.

One community accused of delays by name in industry comments in the *Mobilitie* docket was Montgomery County, Maryland.²⁶ Montgomery County is a member of this coalition, but also filed Supplemental Comments in the *Mobilitie* docket²⁷ in which the County documented that any claims of delay or excessive fees made against the County are dwarfed by its record of success, including:

- The County has reviewed 2,900 applications in 20 years, and currently has 1,121 wireless facilities deployed at 534 unique locations throughout the County.
- ...The County Department of Permitting Services processes over 60,000 permits and conducts more than 157,000 inspections annually.²⁸

The record in the *Mobilitie* docket also suggests that in cases where the time between initial application and grant of the request has been longer than one might expect under the Commission's shot clock rules, the fault lies with the operator, *Mobilitie* being a particular complainant and culprit in this regard. The *Mobilitie* Docket Montgomery County Comments

²⁶ See e.g., *Mobilitie* Docket Crown Castle Comments at pp. 12-13 (burdensome application fees) and perhaps is the "Maryland locality" complained of at p. 15 of the Comments of *Mobilitie* in the *Mobilitie* docket ("*Mobilitie* Docket *Mobilitie* Comments") as being "on hold" for eleven months.

²⁷ Supplemental Comments of Montgomery County, MD in the *Mobilitie* Docket (filed Mar. 8, 2017) ("*Mobilitie* Docket Montgomery County Comments").

²⁸ *Mobilitie* Docket Montgomery County Comments at p. i.

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

In the Matters of

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

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June 15, 2017

1) access to public rights of way to place new poles and attach to existing structures; 2) reasonable fees for both applications and usage of the rights of way from both local governments and tribes that demand payment for historic review; and 3) timely action on access agreements and individual site permits, as well as prompt action by tribes that require historic review.

Without removal of all three barriers, rapid, economical infrastructure deployment is threatened.

Many of these regulations and fees were created when carriers were deploying voice-centric networks that entailed establishing large macro cells that cost hundreds of thousands of dollars, and carriers could more readily justify waiting through the process, litigating adverse decisions, and, if required, paying fees that were a much smaller share of the total cost of each site. The new infrastructure is radically different, however, and the old siting paradigm no longer applies. The cost per cell has dropped to the low tens of thousands of dollars and the number of sites needed has multiplied. Most importantly, the physical size and visual effect of deploying a small cell is dramatically less than traditional towers. In this environment, carriers cannot engage in a protracted regulatory struggle for each individual site. Given that all carriers face limited capital budgets, they are forced to limit the number and pace of their deployment investments to areas where the delays and impediments are the least onerous, to the detriment of their customers and, ultimately and ironically, to the very jurisdictions that imposed obstacles in the first place.

D. Small Cell Technology Primer

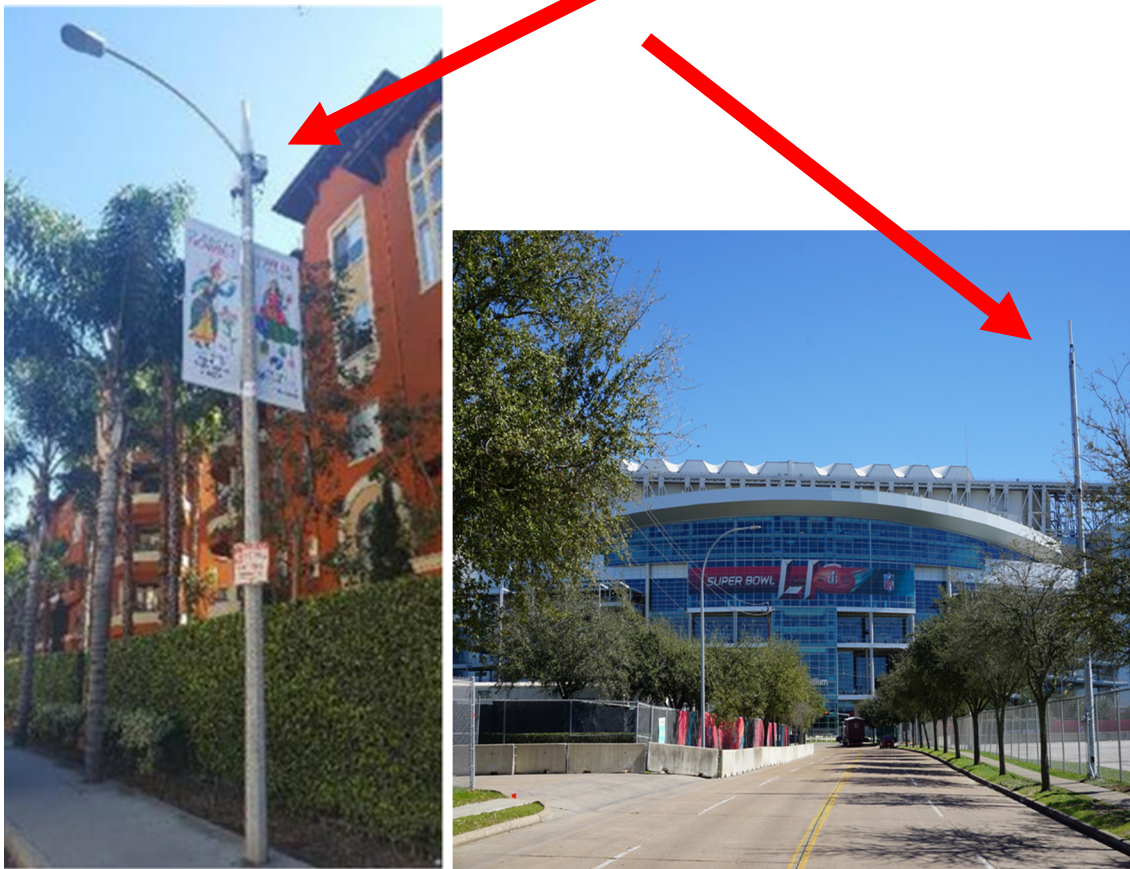
Small cells are wireless base stations that have the same basic functionality as the familiar macro cells, but are much smaller physically and cover smaller geographic areas. They cover a radius of approximately ¼ mile or less, compared to the multi-mile radius of traditional macro cells. A traditional macro site consists of a tall support tower with numerous separate antennas mounted on top. The ground area is often fenced and contains one or more equipment

cabinets.

In contrast, Sprint's small cells are small, prepackaged units approximately the size of a shoe box to a fire extinguisher that mount on a traditional utility pole, streetlight, traffic signal, or building with no additional equipment installed on the ground. Although FCC rules define a small cell as a pole-mounted antenna of no more than six cubic feet and other equipment no more than 21 cubic feet for a single installation,¹¹ in practice, Sprint's small cells are much smaller. A typical small cell radio unit used by Sprint is approximately 20"x10"x10", or in other words smaller than the ubiquitous power transformers mounted on electric poles nationwide and similar in size to pole-mounted junction boxes for telecommunications. There is an omnidirectional antenna and one or two additional smaller pieces of equipment mounted on the pole to provide backhaul, as well as an electric meter.

Pictured below are two typical small cells, one mounted on a streetlight and the other on a new steel utility pole outside NRG Stadium in Houston, Texas (indicated by the red arrow):

¹¹ 47 C.F.R. § 1.1307(a)(4). Amended Collocation Agreement § VI.5.b.ii.



III. The Current Burdensome and Ineffective Tribal Historic Review Process Can and Must Be Rationalized

A. Overview

While there are many costs facing carriers during deployment, the costs imposed on carriers from fee demands in the Section 106 Process for tribal historic review under the National Historic Preservation Act have risen precipitously over the last few years. Sprint supports the efforts of the federal government and the FCC to preserve sites of religious, historic, and cultural significance to Indian tribes. Unfortunately, good intentions to protect important sites have given way to a spiraling imposition of fees at sites with essentially no chance of having an adverse impact on a site that meets the criteria under the FCC's Nationwide Programmatic Agreement of eligibility for inclusion on the National Register of Historic Places.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

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Moratoria (both actual and de facto). Although moratoria do not toll the shot clocks, localities continue to adopt them. Evidence demonstrates that “moratoria are a frequent, frustrating obstacle for competitive carriers seeking to deploy consumer demanded next-generation services.”³³ Localities also simply fail to act on applications (in some cases while they develop small cell policies) or impose restrictions that result in *de facto* moratoria.³⁴ For example, in T-Mobile’s experience, at least 15 municipalities have no clear application process at all, and some (five jurisdictions and growing) refuse to process small cell requests under ROW permitting processes.³⁵

Discriminatory treatment. Evidence confirms that localities engage in discriminatory conduct, contrary to Sections 253 and 332.³⁶ Such conduct impedes new entry into the market and the competition that comes with it, and deters the use of beneficial wireless technologies by forcing wireless providers to pay more than landline providers and utility companies and subjecting them to additional requirements in order to secure ROW access.³⁷ For example, eighty percent of jurisdictions in T-Mobile’s experience treat DAS and small cell deployments on poles in ROWs differently than they treat similar installations by landline, cable, or electric utilities.³⁸

³³ CCA at 31-32; *see also, e.g.*, AT&T at 7-8; Crown at 15-16; Mobilitie at 10-11.

³⁴ *See, e.g.*, Lighttower at 11; *see also, e.g.*, Mobilitie at 10 (noting that nearly 30 localities in California have refused to negotiate ROW access agreements pending the acquisition of street lights from a privately-owned investor utility).

³⁵ T-Mobile at 7.

³⁶ 47 U.S.C. §§ 253, 332(c)(7); *see, e.g.*, Crown at 15, 19; ExteNet at 9; Sprint at 20; T-Mobile at 7.

³⁷ CTIA Comments, WT Dkt. No. 16-421, at 16-17 (Mar. 8, 2017) (“CTIA”).

³⁸ T-Mobile at 7.

For example, in *NextG v. New York*, NextG demonstrated that light poles and public ROWs are “held by the City in trust for the public,” and that requests to access those public resources is something “substantially different from seeking to lease space in a City-owned building.”²⁰⁷ At issue in that case was whether a two-year delay and refusal by the city to grant access to poles in public ROWs absent a costly franchise violated Section 253, which like Section 332, bars state or local regulatory action which has the effect of prohibiting communications.²⁰⁸ The court agreed with NextG that the city’s actions “are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy.”²⁰⁹ The Commission should adopt the same rationale here, and clarify that municipal ROWs and associated poles are property held in trust for the public, and intended to serve as the locations for public services.²¹⁰

²⁰⁷ *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063 (S.D.N.Y. Dec. 10, 2004) (“*NextG Networks*”); see also *New Jersey Payphone Ass’n v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001) (“[T]he control the municipality exerts over the easement is a function of its powers as trustee, conventionally expressed as the police power to manage the public right-of-way. *Distinct from public parks or government buildings, the municipality does not possess ownership rights as a proprietor of the streets and sidewalks.* Consequently, the Town’s analogies and hypotheticals likening the effect of the Ordinance to the Town’s management of public parks and buildings are inapt.”) (emphasis added) (citations omitted).

²⁰⁸ *NextG Networks* at *16.

²⁰⁹ *Id.* at *16-18. The court ultimately found irreparable harm had not been established, and therefore declined to grant injunctive relief. *Id.* at *28-30.

²¹⁰ See also, e.g., *City and County of Denver v. Qwest Corp.*, 18 P.3d 748, 761 (Colo. 2001) (“It is well established that municipalities hold public rights-of-way in a governmental capacity.”); *AT&T v. Village of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. S.Ct. 1993) (“Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public.”); *Village of Kalkaska v. Shell Oil Co.*, 446 N.W.2d 91, 95 n.18 (Mich. 1989) (“[T]he cities have no proprietary interest in city streets as their private property.”) (internal quotation omitted); *City of Albany v. State*, 21 A.D.2d 224, 225 (N.Y. App. Div. 1964), *aff’d* 207 N.E.2d 864 (N.Y. 1965) (“We have no difficulty in

Specifically, the Commission should clarify that requests to access municipal poles and ROWs, and the terms and conditions of such access, implicate regulatory rather than proprietary functions and therefore the protections of Section 253 (including the requirement that ROW and pole use charges be “fair and reasonable”) and Section 332 (including the shot clocks implementing the “reasonable period of time” to act), as well as Section 6409(a) (including collocation-by-right with respect to municipal poles with existing approved antennas), apply. Indeed, Section 253(c)’s provisions requiring “fair and reasonable compensation” for use of ROW on a “nondiscriminatory basis” apply explicitly to state and local management of “the public rights-of-way,” and make no mention of any proprietary carve-outs or exceptions.²¹¹ Likewise, Section 332’s obligation to act within a “reasonable period of time” applies to “*any* request for authorization” to place, construct or modify a wireless facility,²¹² again without any indication of a carve-out or exception for a request to construct such a facility on a municipal pole or ROW. If Congress meant to exclude municipal-owned poles or ROW from the statutes, it would have done so explicitly.

By taking these steps, the FCC will help ensure access pursuant to Sections 253 and 332(c)(7) to state and municipal poles and ROWs, which are not currently subject to Section 224 of the Act.²¹³ At a minimum, the FCC must ensure that wireless providers are afforded the right to build their own facilities in the public ROWs on the same terms that apply to other telecommunications and ROW users.

finding that ... the land held for street purposes ... [was] held in a governmental rather than a proprietary capacity.”) (citations omitted).

²¹¹ See 47 U.S.C. § 253(c).

²¹² See *id.* § 332(c)(7)(B)(ii).

²¹³ See *Wireline NPRM/NOI*, 32 FCC Rcd at 3276 ¶ 30, 3299-3300 ¶ 108.

ATTACHMENT B

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Streamlining Deployment of Small Cell	)	WT Docket No. 16-421
Infrastructure By Improving Wireless Facilities)	
Siting Policies)	
)	
Mobilitie, LLC Petition for Declaratory Ruling)	

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April 7, 2017

As a consequence, arguments by localities that FCC action here is contrary to precedent or the Constitution, or is otherwise unlawful, lack merit. To the contrary, affording localities the unfettered discretion they seek to set fees and charges would thwart the procompetitive mandate in Sections 253 and 332 and undermine the goals of both statutes. And the requested guardrails will not compromise the ability of localities to review applications and address legitimate safety and welfare concerns, as long as they do so pursuant to clear, objective standards that are applied on a nondiscriminatory basis and do not have the effect of prohibiting service.

DISCUSSION

I. THE RECORD DEMONSTRATES THAT SYSTEMIC BARRIERS TO DEPLOYMENT EXIST.

The record is replete with evidence documenting the different types of deployment barriers faced by T-Mobile and other wireless and infrastructure providers as they seek to upgrade networks and meet consumer demand for new advanced services, like 5G. These barriers include excessive fees, needless delays, preferences for or against city-owned property, moratoria (both actual and *de facto*), discriminatory treatment of wireless carriers compared to wireline or other utilities, and discretionary denials and other barriers.

Excessive fees. Many local governments impose exorbitant one-time application fees, consultant fees, annual recurring fees, franchise or use fees, and/or gross revenue fees which are unreasonable and unrelated to actual cost recovery. One-time fees can range up to many tens-of-thousands of dollars per application, while annual use fees can range up to tens-of-thousands of dollars per site.⁴ As the Competitive Carriers Association (“CCA”) notes, these excessive and

⁴ Sprint Corporation Comments, WT Dkt. No. 16-421, at 24 (Mar. 8, 2017) (“Sprint”).

unfair fees are “a nationwide issue” that are “stalling broadband deployment.”⁵ Examples include:

- A western city imposes a \$9,500 per site application fee, while a nearby community charges only \$350 per application and \$742 per year. As a result, “residents of the jurisdiction with lower fees and a streamlined process are now enjoying the increased coverage and speed benefits of more than 100 small cells with hundreds more already approved, while mobile users in the high-fee areas of the jurisdiction next door continue to wait.”⁶
- A northeastern city charges a one-time administration fee of \$50,000 for the right to locate cells in the ROW, in addition to per-cell fees.⁷
- Montgomery County, MD includes some of the highest application fees in the country—more than \$20,000 for each new small cell node pole installed in a public ROW.⁸
- A large southern city assesses a \$5,000 one-time application fee *and* 5% of gross revenues *and* an annual fee of \$1,300 per pole or \$700 per attachment.⁹
- Three cities in California assess annual fees ranging from \$2,600 to \$8,000 for each attachment on a municipal-owned pole, while a city in Missouri and a city in Texas assess an annual fee of \$2,000 per attachment. By comparison, utility pole attachment rates subject to the FCC’s Section 224 regulations are less than \$50 a year.¹⁰
- A wireless ordinance in Newport Beach, CA recommends a \$10,800 per node baseline annual rent, which is more than 50 times the average FCC wireless pole attachment rate.¹¹
- Several Massachusetts state agencies charge per pole attachment fees ranging between \$1,500 per pole to \$3,500 per pole. These fees appear to have no purpose other than to generate revenue.¹²
- A locality in Washington charges an annual ROW usage fee of \$10,000 per facility, while Arizona municipalities typically charge annual fees ranging between \$3,000 to \$4,000 per-node.¹³

⁵ Competitive Carriers Association Comments, WT Dkt. No. 16-421, at 15 (Mar. 8, 2017) (“CCA”).

⁶ Sprint at ii-iii.

⁷ *Id.* at 25.

⁸ Crown at 12-13.

⁹ Sprint at 25.

¹⁰ AT&T Comments, WT Dkt. No. 16-421, at 18-19 (Mar. 8, 2017) (“AT&T”).

¹¹ Crown at 11.

¹² *Id.* at 12.

¹³ AT&T at 18.

- Several New York municipalities require excessive escrow fees in addition to other charges. Hempstead, NY, for example, requires an escrow fee of \$3,000 per new small cell node pole and \$1,000 per collocation for consultant review, resulting in escrow fees of \$150,000 or more for a typical network deployment. This in addition to an annual “voluntary” 5% gross revenue share for the Town.¹⁴
- Many other northeast suburban towns also assess franchise fees of 5% of revenues for access to ROW,¹⁵ while numerous western localities demand gross revenue or franchise fees ranging from 3.5% to 7%.¹⁶
- A city in New York requires a \$30,000 per year flat “administrative fee,” plus a payment of \$708 per node per year.¹⁷
- One southern state Department of Transportation (“DOT”) is demanding \$24,000 per year for a single new ROW pole, which is more than the revenue the pole would generate from the provider’s customers.¹⁸ The same DOT charges the electric utility \$0 for each of its poles in the ROW.¹⁹ A western DOT charges \$40,000 per year for macro cells in urban environments, and \$10,000 per year for small cells in urban environments.²⁰ And two northeastern state DOTs assess annual fees for wireless attachments in the ROW of \$9,000 and \$37,000, respectively, which do not apply to attachments by non-wireless utilities.²¹

Unnecessary delays. Providers continue to encounter significant delays despite the FCC’s shot clocks, and the record confirms that litigation is rarely a viable option.²² As AT&T explains, “such suits are sparingly used because they damage the relationship between providers

¹⁴ Crown at 13.

¹⁵ Verizon Comments, WT Dkt. No. 16-421, App. A at 2 (Mar. 8, 2017) (“Verizon”).

¹⁶ Sprint at 27.

¹⁷ ExteNet Systems, Inc. Comments, WT Dkt. No. 16-421, at 10 (Mar. 8, 2017) (“ExteNet”).

¹⁸ ExteNet at 10; Crown at 13.

¹⁹ ExteNet at 10 n.10.

²⁰ Sprint at 26.

²¹ Verizon at 9.

²² *See, e.g.*, Lighttower Fiber Networks Comments, WT Dkt. 16-421, at 5 (Mar. 8, 2017) (“Lighttower”) (“Given the significant amount of time, resources and expense associated with litigating even one federal lawsuit, it is neither practical nor an efficient use of time for Lighttower to litigate against each and every jurisdiction Having to bring suit in every such case would ... effectively prohibit Lighttower from providing telecommunications service.”); Sprint at 18 (“Litigation in federal court ... directly undermines the ability of carriers to engage in negotiation of a reasonable implementing policy.”).

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

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shorter distances and with direct lines-of-sight.¹⁷ Thus carriers using millimeter wave bands will need to deploy small facilities in many more locations that are both closer to the ground (30-50 feet in height) and closer to the customer than traditional wireless cell sites. Existing poles (including utility poles, light poles, traffic control poles, and street signs) in rights-of-way are ideal locations for 5G antennas. These facilities are significantly smaller than traditional “macro” antennas and blend more easily into the environment. Yet, as discussed below, many local ordinances and officials (or their consultants) do not take into account these significant differences, and instead burden the small cell siting process with requirements at least if not more cumbersome than those that apply to much larger facilities.

III. THE COMMISSION SHOULD CLARIFY THAT THE COMMUNICATIONS ACT BARS STATE AND LOCAL ACTION THAT ERECT SUBSTANTIAL BARRIERS TO WIRELESS FACILITIES DEPLOYMENT.

A. State and Local Requirements and Fees Effectively Prohibit Providing Advanced Broadband Service to Customers.

Even in the early stages of small cell deployment, Verizon has encountered a variety of practices that have the effect of delaying or preventing small cell deployment. These include barriers in gaining access to state and local rights-of-way, and municipally owned poles within them, and outdated local zoning requirements. These practices are already slowing the deployment of 4G small cells, and costs and delays will only grow as providers transition to more advanced 5G networks. Federal law, most notably Sections 253 and 332 of the Act, exists to block local actions and requirements that threaten important federal interests such as broadband and 5G deployment.¹⁸ The Commission has authority to address these local obstacles to deployment, and it should do so expeditiously.

¹⁷ *Id.* at 8020, ¶ 6.

¹⁸ 47 U.S.C. §§ 253, 332(c)(7).

One of the most significant challenges carriers face in deploying small cells is gaining access to state or local rights-of-way and municipally owned poles within them.¹⁹ Barriers to right-of-way and municipal pole access include refusal to negotiate right-of-way access agreements, substantial delays in negotiating such agreements, excessive and often discriminatory fees for access to rights-of-way and municipal poles, and unreasonable conditions for such access.²⁰

Verizon continues to face substantial barriers to deploying small cells. For example, the towns of Tonawanda, New York, and Amherst, New York, recently adopted moratoria on processing and approving small cell applications. A Minnesota town has proposed barring construction of new poles in rights-of-way. A large Southwestern city requires applicants to obtain separate and sequential approvals from three different governmental bodies before it will consider issuing a temporary license agreement to access city rights-of-way. Other jurisdictions, like a Midwestern suburb, where Verizon has been trying unsuccessfully to get approval for small cells since 2014, have no established procedures for small cell approvals and are extremely slow to respond.

Excessive fees are another substantial barrier to small cell deployment. Carriers encounter fees at multiple steps of the application and approval process. Fees are assessed for permission to access rights-of-way, for renting space on municipal poles, for application processing, for consultants hired by localities to review wireless applications, and to renew existing facility permits. In many cases, the fees assessed are not related to costs incurred. For example, a Midwestern city which requires, with few exceptions, small cells in the rights-of-way

¹⁹ See Verizon Small Facility Comments at 6-10 & App'x A (Mar. 8, 2017).

²⁰ *Id.*

to be placed on city owned structures, is currently demanding \$6,000 per pole per year to attach small cells to city owned light poles. This city also requires applicants to obtain a special use permit for each proposed small cell facility and charges \$11,000 per application – a charge that includes an escrow fee to cover the expected cost of the city’s consultant to review wireless applications. Many other localities, like East Greenbush, New York, and Santa Clara, Utah, require \$8,500 escrow fees for consultant reviews.²¹ And many jurisdictions, like Rochester and Buffalo, New York, have proposed or require a five percent gross revenue fee, again unrelated to the cost of wireless attachments, for accessing local rights-of-way. The New York State Department of Transportation (“NYDOT”) and Onondaga County (New York) require carriers to obtain rights-of-way permits for small cells on utility poles through their agent. The agent requires wireless providers to enter into an agreement that includes a \$750/month pole rental fee.²²

Even where carriers can gain approval to access rights-of-way and agree on fees, many localities place unreasonable conditions on right-of-way or pole access that make it extremely difficult, if not impossible, to deploy small cells. For example, Washington, D.C., recently released a supplemental agreement for installing wireless facilities in the right-of-way. That agreement would give the city the ability to require applicants to install, for free, WiFi access points (provided by the city) on the poles used by the applicant and to run fiber to each access point. Many localities require all utilities to be located underground – thus dramatically increasing the costs of deployment – and one Midwestern town compounds the problem by

²¹ Many jurisdictions have adopted wireless ordinances proposed and written by wireless engineering consultants. These ordinances impose charges from \$5,000 to over \$10,000 for those consultants to review applications to determine, among other things, if the facility is needed.

²² NYDOT’s agent assesses the rental fee even for utility poles not owned by NYDOT.

proposing to prohibit small cells on existing above-ground infrastructure. Many jurisdictions also impose unreasonable set-back requirements, minimum separation distances, and height and equipment size limitations for small facilities in the rights-of-way. For example, Buffalo Grove, Illinois, requires small cells to be at least 100 feet away from any residential building and no closer than 1,000 feet to any other small cell (even if owned by another provider); it also requires equipment to be mounted at least eight feet above ground, and limits antenna height to 35 feet above ground level.

The Commission should exercise its authority under Sections 253 and 332(c)(7) of the Act to remove these barriers to small cell deployment by clarifying the applicable legal standards and adopting rules prohibiting actions that impose substantial barriers to providing service or deploying small cells.

B. The Commission Should Find that “Prohibit or Have the Effect of Prohibiting” Has the Same Meaning in Sections 253 and 332.

As the Commission noted in the *Wireless Infrastructure Notice*, Section 253 and Section 332(c)(7) contain nearly identical operative language limiting the ability of state and local governments to prevent the provision of personal wireless telecommunications service.²³ While both statutes preserve limited state and local government authority,²⁴ both also bar state or local governments from passing laws or taking actions that “prohibit or have the effect of prohibiting”

²³ *Wireless Infrastructure Notice* at ¶ 88.

²⁴ See 47 U.S.C. §253(b) (permitting states to impose “requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers”) and § 253(c) (permitting state and local governments to “require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis”); *id.* § 332(c)(7)(A) (preserving state and local “authority . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities”).

D. State and Local Actions Pertaining to Access to Rights-of-Way, Other Public Lands, and Structures Within Them Are Subject to Sections 253 and 332.

Contrary to claims of some localities, Sections 253 and 332 apply to state and local actions that deny wireless providers access to state or municipally owned or managed rights-of-way and poles in those rights-of-way. Sections 253 and 332, as well as Section 6409 of the Spectrum Act,⁸⁰ make no distinction between states and localities acting in their proprietary⁸¹ versus regulatory capacities. Congress was well aware that state and local governments act in both capacities but did not create any exception in the statutes for governments acting in their proprietary capacities. This implies that Congress intended for the Act to apply to actions taken by state and local governments, even where they operate in a proprietary capacity.⁸² At minimum, Congress did not unambiguously indicate that the Communications Act applies only to state and local governments acting in their regulatory capacity, and the Commission could reasonably interpret Sections 253 and 332 as applying to state and local governments regardless of whether they act in a proprietary or regulatory capacity.

Should the Commission determine, however, that Sections 253 and 332 do not apply to state and local governments when they act in their proprietary roles, the Commission should make clear that public rights-of-way and other property held by governments for public purposes are subject to the Communications Act. Under this interpretation, Sections 253 and 332 would

⁸⁰ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)) (“Section 6409”).

⁸¹ For example, a proprietary action might be when a local government is a property owner and acts in the same way as would a private actor that owned the same property.

⁸² See *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 231-32 (1993) (where Congress provides an “implied indication ... that a State may not manage its own property when it pursues its purely proprietary interests,” such a restriction is proper).

not apply only where a local government acts in the same way as would a private actor that owned the same property. Courts have applied this stringent test to determine whether an action is proprietary under the Communications Act. They have looked to whether the municipality’s “interactions with the market [are] so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.”⁸³ In making this determination, courts consider “(1) whether ‘the challenged action essentially reflect[s] the entity’s own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances,’ and (2) whether ‘the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.’”⁸⁴ Consequently, the burden rests on state and local governments to show that their interactions are “so narrowly focused” on the “efficient procurement of needed goods and services” – and not instead to “encourage a general policy” – that their interest is “purely proprietary” in nature.

Under this framework, states and localities manage public rights-of-way in their regulatory capacities. As the Commission has noted, “[c]ourts have held that municipalities generally do not have compensable ‘ownership’ interests in public rights-of-way, but rather hold the public streets and sidewalks in trust for the public.”⁸⁵ “It is a widely accepted principle of

⁸³ *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002) (quoting *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)) (internal quotation marks omitted).

⁸⁴ *Id.* (alteration in original) (quoting *Cardinal Towing*, 180 F.3d at 693).

⁸⁵ *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5160 at ¶ 134 (2007) (“*Cable Franchising Report and Order*”), petition for review denied, *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

long standing that “[t]he interest [of a city in its streets] is exclusively publici juris, and is, in any aspect, totally unlike property of a private corporation, which is held for its own benefit and used for its private gain or advantage.”⁸⁶ Because they manage public rights-of-way for the public good, and not solely their own interest, state and local governments do not possess a proprietary interest in rights-of-way. For this reason, many courts “have recognized that the ownership interest municipalities hold in their streets is ‘governmental,’ and not ‘proprietary.’”⁸⁷ Thus, even though a state or municipality can “own” the land beneath a public street, it holds that land in trust for public use, making its decisions regarding that land governmental or regulatory, as opposed to proprietary, in nature. No such analogous responsibility applies to private actors in most circumstances.

This framework makes clear that state and local governments act in a regulatory or governmental capacity when they take actions that deny wireless providers access to state or municipally owned or managed rights-of-way and poles in those rights-of-way, thus bringing these actions within the ambit of Sections 253 and 332(c)(7). When a state or locality imposes requirements that a wireless carrier must follow in order to site its equipment or renders an adverse siting decision, its actions do not resemble those of a private party acting in its own narrow interest, but those of a regulatory body that manages land use decisions on land held in public trust. Consequently, where a city’s franchising and permitting decisions denied a

⁸⁶ Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 Dick. L. Rev. 209, 213 (2002) (alterations in original) (quoting *People v. Kerr*, 27 N.Y. 188, 200 (1863)).

⁸⁷ *Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 221-22 (1st Cir. 2005) (citing *City of Denver v. Qwest Corp.*, 18 P.3d 748, 761 (Colo. 2001) (en banc)); *Am. Tel. & Tel. Co. v. Vill. of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993); *City of N.Y. v. Bee Line, Inc.*, 284 N.Y.S. 452, 457 (App. Div. 1935), *aff’d*, 3 N.E.2d 202 (N.Y. 1936)); *see also City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 781, 785 (Ohio 1901); *Hodges v. W. Union Tel. Co.*, 18 So. 84, 85 (Miss. 1895).

payphone company access to the city's rights-of-way, that decision was regulatory in nature and subject to preemption under Section 253.⁸⁸ The same is true of the placement of wireless facilities. Moreover, states and localities negotiating with wireless providers generally act not on a case-by-case basis, but instead pursuant to master lease or license agreements and local zoning ordinances.⁸⁹ These requirements put in place for all wireless providers indicate that the "primary goal [i]s to encourage a general policy rather than address a specific proprietary problem."⁹⁰ Because state or local government rules or actions regarding rights-of-way or poles within those rights-of-way are regulatory in nature, preemption is proper under Sections 253 and 332(c)(7).

Applying the same standard, states and localities also own and manage lampposts, water towers, and utility conduits in their regulatory capacities. States and municipalities do not own and operate such structures purely for their own benefit. As with rights-of-way, they oversee these structures as a way of managing public resources – whether it be the water held in city owned towers or the fiber optic cable threaded through city utility conduits. And states and localities own and operate lampposts in order to manage rights-of-way and enhance public safety – a classic regulatory role. States and localities do not construct and operate these lampposts to advance their economic agendas. They therefore do not act solely in their own economic

⁸⁸ *Coastal Commc'ns Serv., Inc. v. City of N.Y.*, 658 F. Supp. 2d 425, 443 (E.D.N.Y. 2009).

⁸⁹ See Verizon Small Facility Comments at 7-8, 18-19 (noting Verizon's experience that negotiating with local governments generally involves master lease agreements and zoning ordinances).

⁹⁰ *Sprint Spectrum L.P.*, 283 F.3d at 420 (quoting *Cardinal Towing*, 180 F.3d at 693) (internal quotation marks omitted).

interest, as would a private party, in operating these structures.⁹¹ Instead, they act primarily “to encourage a general policy rather than address a specific proprietary problem.”⁹² Thus, for these structures, which states and localities operate not as market participants in their own spheres of economic activity, but instead as managers of public goods, the governmental interests are regulatory and the restrictions of Sections 253 and 332 apply in full.

IV. THE COMMISSION SHOULD ADOPT RULES BARRING STATE AND LOCAL ACTIONS THAT PROHIBIT THE PROVISION OF TELECOMMUNICATIONS SERVICES.

A. The Commission Has Authority to Adopt Rules Under Section 253.

Text and precedent make clear that the Commission has authority to adopt rules that preempt local laws that violate Section 253. Earlier in the same chapter of the statute, the Communications Act provides: “The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”⁹³ The

⁹¹ See *Minnesota Preemption Order*, 14 FCC Rcd at 21707-08 at ¶ 19 (noting that preemption under Section 253 was appropriate because “Minnesota is not merely acquiring fiber optic capacity for its own use”). Where a governmental entity could show that the water in its tower or the light from its light pole was being used solely for government purposes, and not for the public at large, then a governmental entity would be able to argue that it was operating the water tower or lamppost in its proprietary capacity. But so long as it is engaging in the provision of public services, the state’s or locality’s interest would fall squarely on the regulatory side of the divide. This analysis is consistent with the approach taken by the Commission in 2014 with regard to the Spectrum Act. There, the Commission distinguished between a local government acting similarly to a private property owner and pursuing its “purely proprietary interests,” and its actions as a regulator of public lands or other resources. *2014 Infrastructure Order*, 29 FCC Rcd at 12964 at ¶ 239.

⁹² *Sprint Spectrum L.P.*, 283 F.3d at 420 (quoting *Cardinal Towing*, 180 F.3d at 693) (internal quotation marks omitted).

⁹³ 47 U.S.C. § 201(b).

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

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

COMMENTS OF THE WIRELESS INFRASTRUCTURE ASSOCIATION

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June 15, 2017

California city, staff insisted on “scrutiniz[ing] the design and operational details of each node, including issues such as whether a macro site or DAS node would best cover an area, antenna designs, RF exposure, property values analyses, stealthing, equipment placement (above or below ground level), acoustic noise studies, screening, placement away from intersections, and network performance.”³¹ Members report that similar experiences are commonplace throughout California and other jurisdictions across the country.

B. Localities Continue to Impose Moratoria.

Many localities continue to adopt moratoria and rely on them as a basis for refusing to act on wireless siting applications. The record in response to the *2016 Streamlining Public Notice* demonstrates that moratoria on the deployment of small wireless facilities are rampant and only becoming more prevalent, as indicated by the selected examples below:

- Many localities and State DOTs have implemented moratoria governing ROW access.³²
- Localities in California, Iowa, and Minnesota issued indefinite moratoria in August 2016 prohibiting new wireless and/or small cell facilities.³³

³¹ AT&T Comments at 23.

³² Comments of WIA, at 16-17 (filed Mar. 8, 2017) (“WIA Comments”); AT&T Comments at 7-8; Crown Castle Comments at 15-16; Comments of Mobilitie, LLC, at 10-11 (filed Mar. 8, 2017) (“Mobilitie Comments”); *see, e.g.*, Marc Benjamin, *Fresno County to cellphone tower companies: Stay off our land, at least for now*, THE FRESNO BEE (Nov. 20, 2016), <http://www.fresnobee.com/news/local/article116012318.html>; Noel Brinkerhoff, *American Canyon halts effort to add wireless antennas to streetlights*, THE AMERICAN CANYON EAGLE (Aug. 31, 2016), http://napavalleyregister.com/eagle/news/local/american-canyon-halts-effort-to-add-wireless-antennas-to-streetlights/article_1258e1e4-a625-5b48-b6b8-a848b57e5b11.html; Alexandra Seltzer, *City issues moratorium on new cell towers*, MyPALMBEACHPOST, (Nov. 21, 2016), <http://www.mypalmbeachpost.com/news/local/city-issues-moratorium-new-cell-towers/bQCOw0PXcaPQrUo2SlxvUN>.

³³ Mobilitie Comments at 11.

- Multiple jurisdictions in New York, Ohio, and Texas also have imposed wireless siting moratoria.³⁴ These include the towns of Tonawanda, NY and Amherst, NY, which recently adopted moratoria applicable to processing and approving small cell applications.

De facto moratoria have also been imposed across multiple jurisdictions in Massachusetts and Illinois. These jurisdictions have not specifically passed ordinances putting moratoria in place, but have informally suspended applications or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered.³⁵ These *de facto* moratoria have resulted in delays ranging from 2.5 to 10 months or, in some cases, indefinite delays. In Myrtle Beach, South Carolina, the City has refused to process requests to deploy small cell facilities in ROWs. DeKalb County, Georgia similarly has refused to issue permits for small cells for the past year. One WIA member is currently prohibited from deploying approximately eighty-five small wireless facilities in nine jurisdictions that have either enacted a moratorium or entered an indefinite holding pattern constituting a *de facto* moratorium. These types of obstacles have also added between one to three years of delay to the member's deployment efforts.

Moratoria often are targeted responses, put in place after applications are submitted, to indefinitely defer consideration of new wireless siting proposals. Even in jurisdictions where

³⁴ See Comments of Competitive Carriers Association, at 31-33 (filed Mar. 8, 2017) (“CCA Comments”); Nancy A. Fisher, *Tonawanda puts a moratorium on cell towers*, THE BUFFALO NEWS (Mar. 28, 2017), <http://buffalonews.com/2017/03/28/tonawanda-puts-moratorium-cell-towers/>; Town of Amherst Erie County, New York, Town Board Resolution 2017-511, *Wireless Communications Moratorium* (May 8, 2017), http://amherstny.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=2824&MediaPosition=&ID=16925&CssClass.

³⁵ The WIA member seeking to deploy in these jurisdictions has been working cooperatively with the local government officials (and, in some cases, the consultants they have hired) as they formulate their small wireless facility permitting policies.

state legislation has been enacted to streamline the process and limit local government authority over small wireless facilities, some local governments have responded by enacting moratoria while they “study the effect” of such legislation on their authority.³⁶

C. Requirements Imposed on Small Wireless ROW Deployments Are Discriminatory.

Local governments also discriminate against wireless carriers seeking to deploy small wireless facilities in ROWs, by applying different permitting requirements than those imposed on other telecommunications carriers and utilities seeking to deploy similarly-sized equipment. Cities around the country generally have regulations establishing permitting processes pursuant to which telecommunications and utility facilities are installed on poles. Those processes typically involve a ministerial review process pursuant to which applications are reviewed and permits issued in a matter of days, or at most a few weeks. In some communities, non-CMRS telecommunications carriers and utility companies are not required to obtain *any* site-specific permits before installing equipment on existing utility poles. Yet, for small wireless facility installations on such poles, many cities are refusing to process the deployments under the traditional ROW permit process. Or the cities impose additional requirements or restrictions on small wireless facilities that are not imposed on other ROW users.

For example, San Francisco requires numerous additional steps of proposed small wireless facility applicants in ROWs even though other ROW deployments are not subject to a

³⁶ See, e.g., Jaime Anton, *City extends antenna moratorium*, THE ROYALTON POST (Feb. 11, 2017), http://www.thepostnewspapers.com/north_royalton/local_news/city-extends-antenna-moratorium/article_838b18bd-1cbb-5ddc-9620-9a37cc81ebc3.html.

**Before the
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In the Matter of)
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Streamlining Deployment of Small Cell)
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“Department of Streets” (or some similar department) reviews the applications and issue permits, typically in a matter of days or at most a few weeks. In some communities, those companies are not required to obtain *any* site-specific permit before installing equipment on existing utility poles. Yet, for small wireless facility installations on such poles, many cities are refusing to process the deployments under the standard right-of-way permit process. Or the cities impose additional requirements or restrictions on small wireless facilities that are not imposed on other right-of-way users.

In extreme examples, cities are requiring small wireless facility installations to comply with requirements that are not even consistent with the city’s code. For example, one jurisdiction in a western suburb of Chicago requires that a full special use permit package be submitted with each application, even if the location of the proposed deployment is not in a zone or district that requires a special use permit under the local code.

3. Lack of Clarity in Local Processes Is a Significant Problem

Even where a local zoning code is silent on wireless installations in the public right-of-way, this does not translate into a green light for installation. A local government may change course and ultimately require zoning approval or may leave applications in limbo due to the absence of any clear process. For example, one Chicago suburb attempted to revoke a WIA member’s already-granted right-of-way permit because it did not have a policy or procedure in place for small wireless facilities in particular. Likewise, Crown Castle needed court vindication when Newport News, Virginia, sought to stop Crown Castle’s deployment despite granting it

right-of-way permits and a franchise.¹⁷ Several members have experienced multi-year ordeals where local governments have repeatedly changed the rules mid-stream.

In addition, despite having well-established processes for deployment of telecommunications equipment in the public rights-of-way, many local governments are delaying deployment while they consider or impose regulations that single out small wireless facilities. Various jurisdictions are in the process of drafting ordinances to address small wireless facility deployment in the public rights-of-way. In many cases, WIA and its members are working cooperatively with those jurisdictions to achieve reasonable regulations that do not thwart the deployment of telecommunication services. Unfortunately, despite the industry's best efforts to educate local governments on the benefits of small wireless facilities and the federal mandate of nondiscriminatory regulation, many of the proposed ordinances will impose discretionary, burdensome requirements that do not apply to non-wireless right-of-way occupants and act as a barrier to deployment.

4. Local Governments Continue to Impose Moratoria

Many jurisdictions across the country have imposed moratoria (or *de facto* moratoria) on the filing, acceptance and/or processing of permits for wireless facilities in the public right-of-way, completely halting deployment of small wireless facilities and the provision of telecommunications services.¹⁸

¹⁷ *Crown Castle NG Atl. LCC v. City of Newport News*, No. 4:15CV93, 2016 WL 4205355 (E.D. Va. Aug. 8, 2016), *appeal filed*, No. 16-2025 (4th Cir. Sept. 7, 2016).

¹⁸ *See, e.g.*, Mark Benjamin, Fresno Bee, "Fresno County to cellphone tower companies: Stay off our land, at least for now" (Nov. 20, 2016), <http://www.fresnobee.com/news/local/article116012318.html>; Noel Brinkerhoff, American Canyon Eagle, "American Canyon halts effort to add wireless antennas to streetlights" (Aug. 31, 2016), <http://napavalleyregister.com/eagle/news/local/>

5. Local Governments Seek to Profit from Small Wireless Facilities by Imposing Unreasonable and Discriminatory Fees

The imposition of unreasonable and discriminatory fees for access to the public right-of-way is both widespread and unpredictable. WIA members have reported municipal fee demands ranging anywhere from exorbitant “one time” fees, to monthly or annual recurring fees with steep escalation percentages. The fees charged are unpredictable, not only from jurisdiction to jurisdiction, but also within particular jurisdictions themselves—*i.e.*, one right-of-way user cannot always expect to be charged the same fee as other right-of-way users. Indeed, in some cases, one company deploying small wireless facilities on poles may be charged different fees than prior companies deploying small wireless facilities on poles. This unpredictability makes it difficult for companies to make meaningful evaluations and ultimately stymie investment.

a. Imposition Of High Initial Fees And Excessive Recurring Charges

Some local governments impose high initial fees for access to the right-of-way. One city in the suburbs of Seattle requires a \$5,000 fee before it will begin review of the right-of-way use agreement that it requires. Similarly, a Virginia city seeks to charge a one-time fee of \$5,000 to evaluate right-of-way permits for small wireless facility attachments to existing structures.

Excessive recurring charges on small wireless facility installations are also common. For example, one Massachusetts city seeks to charge \$6,000 per pole occupied (the poles are not owned by the City), per year, for the right to use the public right-of-way. For one member that seeks to deploy 50 small wireless facilities in the right-of-way in that jurisdiction, that amounts to a \$300,000 annual fee for installations that simply occupy the right-of-way on existing utility-owned poles. A northeast state Department of Transportation imposes a \$37,000 per year fee *per node*, which fee is applied in a discriminatory fashion because “public utilities,” which includes wireline telecommunications providers, are exempt from the fee. Another east coast Department

of Transportation seeks to charge small wireless facility attachments to existing utility poles in the right-of-way the same amount that the DOT charges to install a new tower—\$24,000 per year. Yet, the DOT charges no such fee to the electric company for installation of its utility poles. In other words, the DOT is claiming that addition of an antenna converts a pole on which no fee is paid into a “tower” that requires a \$24,000 per year fee.

In most cases, the high fees charged by cities bear no rational relation to the cities’ management of the public right-of-way. For example, in Texas, one WIA member was required to pay the equivalent of \$1,000 per antenna annually to maintain its small wireless facilities in the public right-of-way—an arbitrary amount that bears no relation to the city’s management of the public right-of-way. Indeed, the member must separately pay the fees related to obtaining a standard right-of-way permit, which presumably reflect the city’s regulatory costs.

WIA members have reported other wide ranging municipal fee demands for use of the public right-of-way—anywhere from percentages of gross revenues as high as 5.4%, to linear foot charges of several dollars per foot, to \$10,000 in up-front “deposits” for application review. Those fees have no relation to the costs imposed by the facilities deployed.

Incredibly, some cities seek to charge fees based on the false notion of a “fair market value” of the public rights-of-way. For example, cities in Texas have asserted that they can charge fees for occupation of the public rights-of-way by wireless facilities (but not telecommunications facilities unrelated to wireless equipment) based on their assessment of the value of the private property adjoining the right-of-way. So, under their theory, the right-of-way in front of a commercial high rise requires more payment to the city than a pole in the right-of-way in front of a home, or even, a pole in front of a high value home requires a higher fee to the city than one in front of a less valuable house.

These are examples of naked attempts to profit from the deployment of wireless facilities.

b. Excessive Fee Demands for Access to Municipal Poles

Another growing problem is access to municipal infrastructure. In many areas, cities have prohibited the installation of utility poles. In those areas, the only above ground poles are street lights or traffic signal poles owned by the city. Because the city prohibits installation of privately-owned poles, the only way that small wireless facilities can be deployed is through use of the city-owned poles. This situation has led to problems with cities either refusing access altogether or leveraging the situation to seek monopoly rents.

The issue is often compounded by the use of consultants. For example, some cities have entered into consulting agreements granting third party firms or individuals the exclusive right to negotiate leases, licenses, or other agreements for the rental of space on municipal poles for deployment of small wireless facilities. These types of agreements are troublesome on many levels. First, they specifically target entities deploying wireless infrastructure, but not any other user of municipal property.

Second, such agreements are structured so that both the municipality and the consultant can maximize their profit. One consultant has entered into virtually identical “Representation Agreements” with cities in Minnesota, pursuant to which this consultant is compensated on a “success fee structure” – *i.e.*, the higher the rent charged to the wireless infrastructure lessee, the higher the compensation to the consultant.²³ The success fee is based on the percentage increase in rent resulting from an entity’s renewed lease agreement with the city as compared to its initial lease agreement. Even more egregious, these “Representation Agreements” promote the imposition of exorbitant rents on new entrants—*i.e.*, where the lease agreement is not a renewal

²³ One WIA member reports that a city demanded \$6,000 per year/per pole.

agreement, the baseline rent for comparison and calculation of the success fee is determined by the average rent of all pre-existing lease agreements for the previous calendar year. Accordingly, the consultant is motivated to negotiate lease agreements with new entrants that extract the highest percentage increase in rent possible as compared to lease agreements with existing (competitor) lessees.

As a result, one city in Minnesota demanded that one company seeking to deploy facilities in the right-of-way pay more than fourteen times the amount the city had negotiated with another entity three years prior. These agreements with the consultant are a prime example of cities (and their consultants) that apparently view wireless infrastructure in the public right-of-way as a profit making opportunity, rather than a corridor held in the public trust for common use that the city must manage in a competitively neutral and nondiscriminatory manner to foster enhanced competition, as was the purpose of the 1996 Act.²⁴

c. Other Unreasonable Conditions And Actions Imposed By Local Governments

Additionally, WIA members report that some cities have used access to the right-of-way as a bargaining chip for other unreasonable demands, such as free telecommunications service or “charitable donations” (where charging fees for use of the right-of-way are specifically prohibited by law), or to gain leverage in unrelated matters. For example, one Massachusetts jurisdiction has refused to take action on one WIA member’s six permit applications pending for nearly a year unless and until an affiliate of the member cooperates with other municipal initiatives.

²⁴ A similar consultant called “5 Bars” advertises its abilities to “optimize new City revenue sources from wireless infrastructure.” See <http://5bars.com/communities>.

A city in Maryland has refused to allow one WIA member access to its pole infrastructure in the right-of-way unless the member agrees to two separate agreements, each with its own fees, conditions, and demands (such as placing additional conduit for the city's exclusive use, special permitting fees, the requirement for public hearings, and monthly recurring charges escalating at 4% per year). Other unreasonable demands and limitations reported by WIA members include examples such as a cash escrow for the life of an installation, and annual landscaping fees.

III. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING INTERPRETING SECTION 253

In the *Public Notice*, the Commission summarizes some of the cases addressing Section 253, and asks whether it should, “as the expert agency, attempt to reconcile or otherwise resolve these or other difference of interpretation among the courts.”²⁵ As demonstrated below, the Commission should issue a declaratory ruling holding that the Ninth Circuit's decision in *City of Auburn v. Qwest Corp.*,²⁶ and other similar cases that adopted and enforced the Commission's *California Payphone* standard under Section 253, were correct. The Commission should also declare that the restrictive interpretations subsequently adopted by the Eighth Circuit in *Level 3 Communications, L.L.C. v. City of St. Louis*²⁷ and the Ninth Circuit in *Sprint Telephony PCS, L.P. v. County of San Diego*²⁸ were incorrect.

Specifically, the Commission should declare, as a result, that Section 253(a) is not limited to outright or explicit prohibitions on service, but is violated by any state or local requirements

²⁵ *Public Notice*, 31 FCC Rcd at 13370.

²⁶ 260 F.3d 1160, 1175-76 (9th Cir. 2001), *overruled by Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571 (9th Cir. 2008).

²⁷ 477 F.3d 528, 532 (8th Cir. 2007).

²⁸ 543 F.3d 571 (9th Cir. 2008).

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**REPLY COMMENTS OF
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others emphasized, the patchwork quilt of local requirements alone is a significant barrier to deployment.²⁸ Neighboring towns can impose radically different application requirements. As a result, companies seeking to deploy regional or statewide networks are unable to even rely on consistent application requirements.

And as many commenters' experiences reveal, lack of clarity creates significant delay. Reflecting a general opposition to new technology or wireless facilities in general, local governments refuse to follow their own standard right-of-way process and will essentially make up the process on an *ad hoc* basis, changing the demands during the process.²⁹ Similarly, some municipal commenters argue that the shot clock should not run until a "complete" application is submitted.³⁰ Yet providers have repeatedly experienced how local governments will refuse to agree that an application is complete. Again, *Crown Castle v. Greenburgh* is a classic example of how cities will constantly ask for new information and demand changes, even if not required by the local code.³¹ In another example, a WIA member reports that it has been seeking approval to deploy nineteen small cells from Cary, North Carolina (a local government that views itself as reasonable)³² since January 2015, and the town has changed its process three times while that application has been pending—from a right-of-way process, to a zoning-type process, and then a formal zoning process. Contrary to their comments, the Town of Hempstead, New York recently objected to multiple applications submitted by a WIA member to collocate nodes on existing

²⁸ See, e.g., Crown Castle Comments at 15-19; ExteNet Comments at 6-17; Lightower Comments at 5-12; T-Mobile Comments at 7; Verizon Comments at 6-10.

²⁹ See, e.g., WIA Comments at 14-15; ExteNet Comments at 5; Lightower Comments at 5.

³⁰ League of Arizona Cities and Towns, *et al.* (Arizona Coalition) Comments at 21-22.

³¹ *Town of Greenburgh*, 2013 WL 3357169, at *16-17.

³² See Comments of Cary, North Carolina at 3.

utility poles in the right-of-way.³³ Notwithstanding the fact that the member has approximately 150 nodes in operation in the Town of Hempstead and that the proposed deployment is not substantially different than the prior 150 nodes, the town consultant has now taken the position that the use of concealment technology is required to minimize the adverse aesthetic and visual impacts. The town is now requiring the member to present new designs for the nodes and to obtain special use permits pursuant to the town zoning code. Similarly, the planning department of a city in California just declined to support approval of a proposed small wireless installation, claiming that the installations do not meet “Planning and Zoning Protected Location Compatibility Standards”—even though the same equipment has been deployed elsewhere in the city dozens of times, and even though the “Protected Location” standards should not apply because the proposals are not on “protected view” streets. It is an example of a purely subjective review, where the city claims that equipment that has been approved dozens of times elsewhere in the same city is now not compatible.

In another example, a WIA member spent over a year working with a different city in California on facility designs before it could even apply. After this yearlong collaborative process, the applicant submitted the permit applications required by the city and the city changed its mind, demanding changes to the equipment installation design. Similarly, a WIA member this week received an incomplete letter from a city in Washington, despite the fact that the member had worked through a lengthy franchise negotiation with the city that was supposed to resolve these issues. It appears the city is raising new issues very late in the game—even though the city had over a year to review and work with the provider.

³³ *See generally* Town of Hempstead Comments.

These photographs confirm that small wireless facilities, as defined by WIA and others, including the Commission, are similar to other ubiquitous facilities installed in the public rights-of-way—a fact confirmed by at least two courts.⁷⁶ The small wireless facilities are the same size and type as all the other right-of-way equipment and raise no unusual or unique concerns.

Below are additional examples of small wireless facility installations that blend seamlessly with the existing infrastructure.

⁷⁶ *Crown Castle NG Atlantic, LLC v. City of Newport News*, No. 4:15CV93, 2016 WL 4205355, at *13 (E.D. Va. Aug. 8, 2016) (“Although the equipment differs in function, the equipment installed by Verizon, Dominion, and Cox is often similar in size and sometimes larger than the equipment attached at each of Crown Castle’s four Node locations.”); *T-Mobile W. Corp. v. City & Cty. of San Francisco*, No. CGC-11-510703, at 8 (Super. Ct. S.F. Cty. Nov. 26, 2014) (“The pieces of equipment, including antennas, installed on utility poles in the public right-of-way by Plaintiffs are generally similar in size and appearance to the pieces of equipment installed on utility poles in the public rights-of-way by other right-of-way occupants, including but not limited to PG&E, Comcast, and AT&T.”).



(AT&T installation on existing utility pole in Los Angeles with electric distribution and other telecommunication installations)



(AT&T installation in Hunter Mill, VA)



(AT&T node on municipal light pole in Manhattan)





(The previous two photos show AT&T nodes on San Francisco light poles)

Clearly, the local government desire to impose zoning regulations on small wireless facilities in the public rights-of-way is not nondiscriminatory management of the public rights-of-way. It is essentially unheard of for local governments to require non-wireless telecommunications providers, electric companies, or cable operators to go through a zoning

process to obtain approval for their installation of equipment in the public rights-of-way.⁷⁷ Even the utility poles themselves are generally not subject to zoning review.⁷⁸ A classic example of the treatment of all other right-of-way users compared to small wireless facilities was found by the court in *Crown Castle NG Atlantic LLC v. City of Newport News*, where the court held that “the City has not required Verizon, Cox, or Dominion to obtain zoning approval or conditional use permits in order to place their equipment on utility poles located in the City's public rights of way or replace the utility poles they already own.”⁷⁹ This despite the fact that “[a]lthough the equipment differs in function, the equipment installed by Verizon, Dominion, and Cox is often similar in size and sometimes larger than the equipment attached at each of Crown Castle’s four Node locations.”⁸⁰

Rather, as discussed more below, local governments seek to regulate based on a reflexive response to the inclusion of “wireless” equipment. Indeed, several municipal commenters are candid in admitting that fears of RF emissions, albeit unfounded and preempted from consideration by the 1996 Act, are a significant driver of local scrutiny and opposition to small wireless facilities.⁸¹

The Siting Coalition asserts that cities regulate based on “characteristics” not “technology,”⁸² but that is demonstrably false. Similarly, the Siting Coalition’s assertion that

⁷⁷ WIA Comments at 45; *see also* Crown Castle Comments at 14, 23; ExteNet Comments at 9; Lighttower Comments at 8.

⁷⁸ *See, e.g., City of Newport News*, 2016 WL 4205355, at *7 (noting that utility pole owners not required to obtain zoning approval to install or replace poles in right-of-way).

⁷⁹ *Id.* at *8.

⁸⁰ *Id.* at *52.

⁸¹ *See, e.g., Montgomery County Maryland Comments* at 28-33; Siting Coalition Comments at 48.

⁸² Siting Coalition Comments at 14-15.

zoning codes provide sufficient “flexibility” to distinguish among facilities is simply wrong. Local governments are rigidly applying zoning laws written for tall towers to effectively prohibit deployment of small wireless facilities. As chronicled in WIA’s opening comments, WIA’s members regularly encounter zoning provisions that apply solely because of the existence of an antenna or the provision of personal wireless service. The “characteristics” of the equipment are irrelevant. As a result, companies are stuck in untenable situations where the local government will deny installation of a small wireless facility unless the company can satisfy the criteria for a variance from a patently absurd requirement, for example, to install an eight-foot-tall fence around the utility pole (that the city now deems a “tower”) or to maintain a certain setback from the public rights-of-way itself.⁸³

3. Small Wireless Facilities Are as Safe as Any Other Rights-of-Way Installation

Local government commenters also allege that there are significant safety concerns raised uniquely by small wireless facilities in the public rights-of-way.⁸⁴ However, again, the basis for those claims is a few specific instances involving installation of new 75 to 120-foot-tall poles. For example, the Siting Coalition includes a report from a Michigan county roadway engineer, Mr. Steven Puuri, who asserts that installation of new small wireless facilities in the public rights-of-way leads to “unnecessary hazards” and significant safety concerns.⁸⁵ But Mr. Puuri’s examples all concern installation of new 75 to 120-foot-tall poles.⁸⁶ Mr. Puuri does not explain or discuss why small wireless facilities on poles are any more dangerous than the millions of

⁸³ WIA Comments at 9-10; *see also* Lighttower Comments at 8.

⁸⁴ *See, e.g.*, Community Wireless Consultants Comments at 3; Siting Coalition Comments at 29; Town of Hempstead Comments at 3, 5, 8.

⁸⁵ Siting Coalition Comments Exhibit 4, Report of Steven Puuri.

⁸⁶ *Id.* (listing documents reviewed).

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

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

**REPLY COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION**

The American Public Power Association (“APPA”), on behalf of the Nation’s publicly-owned electric utilities, submits these consolidated reply comments in response to certain comments filed on the *Wireline Notice of Proposed Rulemaking and Notice of Inquiry* (“*Wireline NPRM/NOI*”)¹, and the associated *Wireless Notice of Proposed Rulemaking and Notice of Inquiry* (“*Wireless NPRM/NOI*”)², issued by the Federal Communications Commission (“Commission”). Specifically, APPA files these reply comments to respond to commenters who suggest that the Commission should improperly attempt to expand the scope of its regulatory authority under

¹ *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking* (“*Wireline NPRM*”), *Notice of Inquiry* (“*Wireline NOI*”), and *Request for Comment*, WC Docket 17-84, released April 21, 2017.

² *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking* (“*Wireless NPRM*”), and *Notice of Inquiry* (“*Wireless NOI*”), WT Docket 17-79, released April 21, 2017.

services,” while also protecting the “public interest in a streetscape that is safe, not excessively cluttered in appearance, and otherwise consistent with City use of the relevant facilities and their surroundings,” and that city council had “determined that the granting of such franchises will promote the public interest, enhance the health, welfare and safety of the public and stimulate commerce by assuring the widespread availability of reliable mobile telecommunications services.”³⁸

Thus, it was the city’s own reliance upon its governmental objectives in regulating the public ROW, and its governmental responsibility to manage the health, safety, and public welfare through the franchise process, that took NextG’s streetlight pole attachment requests outside of the realm of a proprietary activity. That is not typically the case with access to public power utility poles, where access to the poles is controlled and administered by the electric utility and is independent of any underlying authority to occupy the public ROWs, which may be authorized by a local government. In this sense, many public power utilities are no different than a cable or wireline telecommunications provider that must obtain a cable franchise or a ROW use agreement with the state or local government, and they must separately enter into a pole attachment agreement with the private or public utility pole owners.

The fact-specific nature of the *NextG* case also underscores the need for the Commission to avoid attempting to utilize Section 253 to adopt uniform, prescriptive rules and to allow such issues to be addressed on a case-by-case basis through the courts. Furthermore, nothing in the legislative history of Section 253 indicates that Congress intended for this section to impose a one-size-fits-all approach to the management of ROW. If it had, Congress would have preempted state and local authority over ROW altogether. Instead, Congress specifically carved out state and local

³⁸ *Id.*, at *5.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of

ACCELERATING WIRELESS)
BROADBAND DEPLOYMENT BY)
REMOVING BARRIERS TO) WT Docket No. 17-79
INFRASTRUCTURE INVESTMENT)

ACCELERATING WIRELINE)
BROADBAND DEPLOYMENT BY)
REMOVING BARRIERS TO) WC Docket No. 17-84
INFRASTRUCTURE INVESTMENT)

**REPLY COMMENTS OF SMART COMMUNITIES
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July 17, 2017

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of

ACCELERATING WIRELESS)	
BROADBAND DEPLOYMENT BY)	
REMOVING BARRIERS TO	)	WT Docket No. 17-79
INFRASTRUCTURE INVESTMENT)	
)	
ACCELERATING WIRELINE)	
BROADBAND DEPLOYMENT BY)	
REMOVING BARRIERS TO	)	WC Docket No. 17-84
INFRASTRUCTURE INVESTMENT)	

**REPLY COMMENTS OF SMART COMMUNITIES
AND SPECIAL DISTRICTS COALITION**

I. INTRODUCTION

The Smart Communities and Special Districts Coalition (“Smart Communities”) is comprised of individual localities, special districts, and local government associations that collectively represent over 31 million residents in 11 states and the District of Columbia.¹

¹ The Smart Communities and Special Districts Coalition is comprised of the following members:

Individual members: Ann Arbor, MI; Atlanta, GA; Boston, MA; Cary, NC; Corona, CA; Dallas, TX; District of Columbia; Elsinore Valley Municipal Water District (CA); Frederick, MD; Gaithersburg, MD; Greenbelt, MD; LaPlata, MD; Laurel, MD; City of Los Angeles, CA; Marin Municipal Water District (CA); McAllen, TX; Montgomery County, MD; Myrtle Beach, SC; North County Fire Protection District (CA); Ontario, CA; Padre Dam Municipal Water District (CA); Portland, OR; Rye, NY; Santa Clara, CA; Santa Margarita Water District (CA); Sweetwater Authority (CA); Valley Center Municipal Water District (CA); and Yuma, AZ.

Organizations Representing Local Governments: Texas Coalition of Cities for Utility Issues (TCCFUI) is a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages. The Michigan Coalition to Protect Public Rights-of-Way (“PROTEC”) is an organization of Michigan cities that focuses on protection of their citizens’ governance and control over public rights-of-way. The Michigan Townships Association (“MTA”) promotes the interests of 1,242 townships by fostering strong, vibrant communities; advocating legislation to meet 21st century challenges; developing knowledgeable township officials and enthusiastic supporters of township government; and encouraging ethical practices of elected officials. The Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. The Public Corporation Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The position expressed in this Brief is that of the Public Corporation Law Section only. The State Bar of Michigan takes no position. The Michigan Municipal League (“MML”) is a non-profit Michigan