

**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	)	

**COMMENTS OF CTIA**

Thomas C. Power  
Senior Vice President, General Counsel

Scott K. Bergmann  
Vice President, Regulatory Affairs

Brian M. Josef  
Assistant Vice President, Regulatory Affairs

Kara D. Romagnino  
Director, Regulatory Affairs

**CTIA**  
1400 Sixteenth Street, NW, Suite 600  
Washington, DC 20036  
(202) 785-0081

Dated: March 8, 2017

**TABLE OF CONTENTS**

I. INTRODUCTION AND SUMMARY..... 2

II. WIRELESS BROADBAND HAS A SIGNIFICANT IMPACT ON OUR ECONOMY AND COMMUNITIES TODAY, AND 5G WILL UNLEASH FURTHER INNOVATION AND GROWTH..... 6

III. BARRIERS AT THE LOCAL LEVEL THREATEN THE RAPID DEPLOYMENT OF BROADBAND AND 5G..... 10

IV. THE COMMISSION SHOULD INVOKE ITS AUTHORITY TO INTERPRET SECTION 253 AND REMOVE BARRIERS TO BROADBAND DEPLOYMENT..... 19

    A. A Declaratory Ruling Will Provide All Parties With Needed Guidance That Will Speed New Broadband Facilities.....19

    B. Laws Effectively Prohibit Service if They Limit Providers From Competing in a Fair and Balanced Regulatory Environment.....22

    C. Moratoria Unlawfully Prohibit Deployment.....25

    D. Undergrounding Ordinances and Laws That Restrict Upgrades Also Unlawfully Prohibit Deployment.....26

    E. Section 253(c) Does Not Permit Rights-of-Way Charges That Exceed a Locality’s Incremental Costs to Issue Permits and Manage Rights-of-Way and/or That Discriminate Among Providers.....28

V. THE COMMISSION SHOULD FURTHER INTERPRET SECTION 332 TO ADDRESS UNREASONABLE SITING DELAYS AND MORE EFFECTIVELY STREAMLINE SITING..... 33

    A. The Commission Should Interpret Section 332 to Include a 60-Day Shot Clock for Collocations Not Covered by Section 6409(a).....34

    B. The Commission Should Tighten and True Up the Shot Clocks Between Section 332(c)(7) and Section 6409(a).....36

    C. The Commission Should Adopt a “Deemed Granted” Remedy for its 332(c)(7) Shot Clocks.....39

    D. The Commission Should Clarify That Its Shot Clocks Apply to Municipal Poles and Rights-of-Way.....43

VI. THE COMMISSION SHOULD DECLARE THAT THE DEPLOYMENT OF SMALL CELLS DOES NOT CONSTITUTE A MAJOR FEDERAL ACTION OR AN UNDERTAKING..... 47

VII. CONCLUSION..... 49

**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	)	

**COMMENTS OF CTIA**

CTIA<sup>1</sup> respectfully submits these comments on the Public Notice<sup>2</sup> released by the Wireless Telecommunications Bureau of the Federal Communications Commission (“Commission”) seeking input on what actions the Commission should take to promote and modernize wireless broadband deployment. The Public Notice correctly recognizes that removing barriers to wireless deployment will bring substantial benefits to American consumers and the U.S. economy. CTIA strongly supports prompt and comprehensive Commission actions to remove those barriers – actions that can be taken while fully protecting localities’ interests in overseeing the installation of wireless facilities and managing rights-of-way (“ROWs”).

---

<sup>1</sup> CTIA- the Wireless Association<sup>®</sup> ([www.ctia.org](http://www.ctia.org)) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21<sup>st</sup>- century connected life. The association’s members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry, and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

<sup>2</sup> *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360 (2016) (“Public Notice”).

## **I. INTRODUCTION AND SUMMARY.**

Wireless broadband services are creating unprecedented opportunities for American consumers and businesses. They enable people to identify and pursue job opportunities, obtain education and training, secure government services, and stay connected with family and friends through video as well as voice, messaging, and email. And the next generation of wireless – 5G – promises even more advanced capabilities that will enable the Internet of Things, connected vehicles, and other new services to deliver additional benefits to American consumers, create jobs, and add billions of dollars to the U.S. economy. Speeding the rapid deployment to broadband and 5G is appropriately a Commission priority. Indeed, Chairman Pai recently announced the establishment of a Broadband Deployment Advisory Committee to recommend reforms to encourage and expedite broadband deployment across the country. CTIA urges the Commission to take steps to facilitate the build out of networks that support this connectivity.

5G will require dense wireless networks, deployment of hundreds of thousands of new small cells, and expanded backhaul and transport facilities to provide needed capacity and coverage. Rapid, affordable access to state and local ROWs and other locations is critical to the successful deployment of these services. This access is particularly important because of the signal propagation limits of the high-band radio spectrum that are viewed as an initial platform for 5G. High-band signals offer tremendous capacity but also travel short distances. Moreover, the backhaul and transport facilities required to connect small cells with core networks and provide customers with reliable Internet connectivity need to be located in ROWs.

The tremendous promise of 5G is, however, threatened by a growing web of local siting restrictions and requirements that delay, discourage, or outright block the new infrastructure needed to accommodate the public's growing demand. Many local requirements were adopted to regulate large macrocell towers and are not appropriately applied to small cell deployments,

given the fact that small cells are far less visually intrusive and that most can be installed on existing structures with no ground disturbance. Rather than remove or at least minimize these requirements, some localities are imposing *higher* barriers, *more* burdensome regulations, and *higher* charges. They are stalling deployment, declining to process permit applications, imposing long waiting periods, or telling wireless providers that they must wait indefinitely for the locality to develop a long-term plan for ROWs use (without committing that such use will ever be allowed). Some are effectively prohibiting the installation of facilities through moratoria, bans on upgrading existing facilities, or ordinances that require all telecommunications infrastructure to be placed underground. Some of those that do allow access are charging very high up-front access fees as well as recurring rents and other charges, deterring broadband investment and deployment. Of course, some localities are modifying their siting policies to embrace new wireless deployments, which CTIA commends. The Commission should take action, however, to ensure that reasonable policies are implemented in all localities.

CTIA agrees with the Public Notice that “the Commission has a statutory mandate to facilitate the deployment of network facilities needed to deliver more robust wireless services to consumers throughout the United States,” and that it has the “responsibility to ensure that this deployment of network facilities does not become subject to delay caused by unnecessarily time-consuming and costly siting review processes that may be in conflict with the Communications Act.”<sup>3</sup>

The Public Notice correctly states that Sections 253 and 332 of the Communications Act and Section 6409 of the Spectrum Act “are designed, among other purposes, to remove barriers to deployment of wireless network facilities by hastening the review and approval of siting

---

<sup>3</sup> Public Notice at 13361.

applications by local land-use authorities.”<sup>4</sup> These provisions reflect Congress’s recognition that expanding the reach and capacity of networks directly benefits the public and the economy. The Commission has both the authority and the responsibility to apply these provisions to foster the national policy goal of promoting ubiquitous, advanced, and affordable wireless services.

Consistent with this goal, CTIA urges the Commission to:

- **Declare that Section 253(a) prohibits regulations that inhibit or limit the ability of a wireless provider to compete.** The Commission held twenty years ago that a regulation “may prohibit or have the effect of prohibiting” service, and is thus unlawful under Section 253, 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.” But some courts have interpreted Section 253 more narrowly, finding that to be unlawful the regulation must actually prohibit service. The Commission should remove the uncertainty resulting from these rulings and reaffirm its interpretation of Section 253 to prohibit laws that physically block wireless deployment as well as those that indirectly deter deployment by imposing requirements or charges that make it cost-prohibitive or economically difficult to offer service.
- **Declare that Section 253(a) prohibits moratoria.** Whether localities adopt an express moratorium, or refuse to act on siting applications through a *de facto* moratorium, Section 253 prohibits these barriers to service.
- **Declare that Section 253(a) prohibits a locality from requiring facilities to be placed underground or from preventing technology upgrades.** Such regulations in effect prohibit wireless broadband services.
- **Declare that Section 253(c) does not permit localities to impose charges for ROW access that exceed their incremental costs to manage the siting process and supervise use of ROWs, and/or discriminate among providers.** That section allows localities to obtain “fair and reasonable compensation” that is “competitively neutral and nondiscriminatory.” The Commission should declare these provisions to mean that fees must be no more than necessary to cover a locality’s actual costs to manage its ROWs and that localities must not impose different charges on different providers seeking similar ROW access.
- **Interpret Section 332(c)(7) to include a new 60-day shot clock for collocations not covered by Section 6409(a).** Collocations on non-tower structures that would otherwise be covered by Section 6409(a) but for the absence of an existing approved

---

<sup>4</sup> *Id.*

antenna should be subject to the same 60-day period that applies to Section 6409(a) collocations.

- **Tighten and true up shot clocks between Section 332(c)(7) and Section 6409(a).** The existing shot clocks for localities to act on all new site and collocation permit applications should be reduced to 90 days and 60 days, respectively. Given the trend toward installing small cells and their far smaller impact, what is a reasonable time to act should be commensurately shortened.
- **Adopt a “deemed granted” remedy for the Section 332(c)(7) shot clocks.** The statute supports adoption of this remedy, which will speed small cell deployments while fully protecting the interests of localities in managing those deployments.
- **Apply shot clocks to requests to place facilities in ROWs and on municipal-owned poles.** The Commission should declare that Section 332 applies to siting applications that seek to use ROWs and municipal-owned poles in those ROWs, because localities act in their regulatory capacity when managing ROWs.
- **Declare that small cell deployments are not federal undertakings or major federal actions.** Given that small cells have no adverse impact on the environment or historic properties, the Commission should exempt them from its procedures to assess those impacts.

In addition to the barriers to broadband deployment that CTIA’s Comments address, the current process for tribal reviews of wireless facilities also imposes significant obstacles, frustrates deployment, and adds substantial costs.<sup>5</sup> Given that wireless facilities deployment in many cases – particularly with regard to small cells – poses no risk to tribal interests, the current breadth of tribal reviews, the delays that are endemic to those reviews, and the substantial fees that providers find they must pay to secure approvals, all pose unnecessary barriers to network deployment nationwide. The goals of this proceeding cannot be fully achieved without also modernizing these review processes. CTIA urges the Commission to take up those issues as soon as possible.

---

<sup>5</sup> Discussions herein to tribal siting review speak to reviews on non-tribal lands. CTIA is not suggesting in these Comments any changes to the review processes applicable to wireless infrastructure deployment on tribal lands.

## **II. WIRELESS BROADBAND HAS A SIGNIFICANT IMPACT ON OUR ECONOMY AND COMMUNITIES TODAY, AND 5G WILL UNLEASH FURTHER INNOVATION AND GROWTH.**

In communities across the country and in nearly every sector of the economy, wireless broadband is transforming how we live, work, and communicate. In just seven years, wireless providers spent \$200 billion in network improvements to deliver 4G LTE mobile broadband nationwide.<sup>6</sup> Today, 99.7 percent of Americans have access to 4G LTE service, and 95.9 percent can choose from three or more 4G LTE providers.<sup>7</sup>

This nationwide mobile broadband deployment has unlocked opportunities for all Americans, including low-income individuals, people with disabilities, and those living in rural areas. Communities across the country, and industries including agriculture, automobiles, healthcare, appliance manufacturing, and energy, are harnessing the power of wireless connectivity. For example, through wireless technology, farmers can prevent the over- and under-watering of crops and preserve resources during droughts.<sup>8</sup> Wireless technologies are also helping break down barriers for consumers with disabilities, enabling people with vision-, hearing-, dexterity- and cognition-related conditions to participate meaningfully in our fast-paced

---

<sup>6</sup> See CTIA Press Release, Americans' Data Usage More than Doubled in 2015 (May 23, 2016), <http://www.ctia.org/industry-data/press-releases-details/press-releases/americans-data-usage-more-than-doubled-in-2015> (“CTIA May 23 Press Release”).

<sup>7</sup> *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993*, Nineteenth Report, 31 FCC Rcd 10534, ¶ 39, Chart III.A.2 (2016).

<sup>8</sup> David L. Sunding, Martha Rogers & Coleman D. Bazelon, *The Farmer And The Data: How Wireless Technology Is Transforming Water Use In Agriculture* (Apr. 27, 2016), <http://www.mondaq.com/unitedstates/x/487024/Telecommunications+Mobile+Cable+Communications/The+Farmer+And+The+Data+How+Wireless+Technology+Is+Transforming+Water+Use+In+Agriculture>.



society.<sup>9</sup> And medical researchers are using wireless technologies to make substantial advancements in how we monitor and treat a variety of medical conditions, including by using wearables and movement sensors to monitor and improve the progression of diseases such as Parkinson's.<sup>10</sup>

Mobile broadband also contributes substantially to the U.S. economy. Today, more than 4.6 million Americans have jobs that depend directly or indirectly on the wireless industry,<sup>11</sup> and employing one person in the wireless industry results in 6.5 more people finding employment.<sup>12</sup> All told, the wireless industry as a whole generates more than \$400 billion in total U.S. spending.<sup>13</sup>

With the introduction of 5G networks and technologies, these benefits will only continue to grow. Next-generation 5G networks will be ten times faster and five times more responsive than today's networks, and they will be able to support 100 times more devices. One recent study estimates that wireless operators will invest \$275 billion dollars over the next decade to deploy 5G to consumers. As a result of that investment, 5G is expected to create three million

---

<sup>9</sup> See, e.g., PN Comments of CTIA – Accessibility of Communications Technologies, CG Docket No. 10-213 (filed June 22, 2016) (describing the various service plans, devices, and applications that benefit the accessibility community).

<sup>10</sup> See Intel, *Using Wearable Technology to Advance Parkinson's Research* (2015), <http://www.intel.com/content/dam/www/public/us/en/documents/white-papers/using-wearable-technology-mjff.pdf>.

<sup>11</sup> See Roger Entner, *The Wireless Industry: Revisiting Spectrum, the Essential Engine of US Economic Growth*, RECON ANALYTICS, at 18 (Apr. 2016), <http://www.ctia.org/docs/default-source/default-document-library/entner-revisiting-spectrum-final.pdf>.

<sup>12</sup> Coleman Bazelon & Giulia McHenry, *Mobile Broadband Spectrum: A Vital Resource for the American Economy*, THE BRATTLE GROUP, at 2, 20 (May 11, 2015), [http://www.ctia.org/docs/default-source/default-document-library/brattle\\_spectrum\\_051115.pdf](http://www.ctia.org/docs/default-source/default-document-library/brattle_spectrum_051115.pdf).

<sup>13</sup> *Id.* at 10.

new jobs in communities of all sizes across the country and boost the U.S. GDP by half a trillion dollars.<sup>14</sup>

5G will unlock the Internet of Things, enable a new generation of smart communities, and unleash innovation for industries across the country. With 5G, integrated technologies that assist in the management of vehicle traffic and electrical grids will produce \$160 billion in benefits and savings through reductions in energy usage, traffic congestion, and fuel costs.<sup>15</sup> And wireless-enabled smart grids could create \$1.8 trillion for the U.S. economy, saving consumers hundreds of dollars per year.<sup>16</sup> Improvements made by advanced wireless connectivity could also save lives. One recent study showed that a one-minute improvement in emergency response time as a result of wireless connectivity translates to a reduction of eight percent in mortality, and wireless-powered self-driving cars could translate to 21,700 lives saved.<sup>17</sup>

Construction of the network infrastructure needed to support wireless broadband cannot wait, because the public's use of mobile broadband is not waiting; in fact it is growing exponentially. The amount of data flowing over U.S. wireless networks more than doubled in

---

<sup>14</sup> See *How 5G Can Help Municipalities Become Vibrant Smart Cities*, ACCENTURE STRATEGY, at 1 (Jan. 12, 2017), <http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf>.

<sup>15</sup> See *id.* at 1.

<sup>16</sup> See *Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation*, DELOITTE, (Jan. 2017), [http://www.ctia.org/docs/default-source/default-document-library/deloitte\\_20170119.pdf](http://www.ctia.org/docs/default-source/default-document-library/deloitte_20170119.pdf).

<sup>17</sup> *Id.*

2015<sup>18</sup> to a level 25 times greater than in 2010.<sup>19</sup> And there is no end in sight when it comes to growth in mobile demand. The most recent Cisco study of mobile data, for example, predicted that mobile data traffic worldwide will grow seven-fold from 2016 to 2021, and will in 2021 be 122 times the level of traffic just ten years before that, in 2011. Mobile video, which requires fast speeds and substantial network capacity, is expected to increase nearly nine times from 2016 to 2021 and will represent 78 percent of all mobile traffic by 2021.<sup>20</sup>

Wireless providers are ready to make the major investments required to expand broadband networks because they know those investments are vital for them to compete and to ensure their customers continue to receive high-quality, reliable service. And the benefits of infrastructure investment in creating jobs and strengthening the U.S. economy are unquestionable.

Indeed, Chairman Pai, Commissioner Clyburn, and Commissioner O’Rielly have all recognized the urgent need to build densified broadband networks and the critical importance of removing regulatory barriers obstructing that deployment:

- **Chairman Pai:** “Future 5G technologies will require ‘densification’ of wireless networks. That means providers are going to deploy hundreds of thousands of new antennas and cell sites, and they are going to deploy many more miles of fiber to carry all of this traffic. Without a paradigm shift in our nation’s approach to wireless siting and broadband deployment, our creaky regulatory approach is going to be the bottleneck that holds American consumers and businesses back.”<sup>21</sup>

---

<sup>18</sup> CTIA May 23 Press Release.

<sup>19</sup> *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021 White Paper*, CISCO (Feb. 9, 2017), <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/mobile-white-paper-c11-520862.html>.

<sup>20</sup> *Id.*

<sup>21</sup> Remarks of FCC Commissioner Ajit Pai, Remarks at the Brandery: A Digital Empowerment Agenda Cincinnati, OH, at 2 (Sept. 13, 2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-341210A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf); see also Remarks of FCC Chairman Ajit Pai at the Mobile World Congress, Barcelona, Spain, at 2 (Feb. 28, 2017), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0228/DOC-343646A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0228/DOC-343646A1.pdf)

- **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.”<sup>22</sup>
- **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.”<sup>23</sup>

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.”).

<sup>22</sup> 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](https://apps.fcc.gov/edocs_public/attachmatch/DOC-341824A1.pdf).

<sup>23</sup> 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](https://apps.fcc.gov/edocs_public/attachmatch/DOC-341263A1.pdf).

the Commission to evaluate actions to foster expanded broadband.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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.

---

<sup>24</sup> American Recovery and Reinvestment Act of 2008, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115 (2009).

<sup>25</sup> 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.”).

<sup>26</sup> 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](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,<sup>27</sup> 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.

---

<sup>27</sup> 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.<sup>28</sup> 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

---

<sup>28</sup> 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,<sup>29</sup> 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.<sup>30</sup>

**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.<sup>31</sup> Even at the time they were adopted, evidence before the Commission showed that

---

<sup>29</sup> 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*”).

<sup>30</sup> 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.”).

<sup>31</sup> *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.<sup>32</sup> 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.

---

<sup>32</sup> *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.<sup>33</sup> But the local regulations CTIA's members face go far beyond these limited management functions.

---

<sup>33</sup> 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).

Chairman Pai has noted correctly that Section 253 was intended to stop regulatory actions that stand in the way of new services, and that the Commission should use that provision to clear the path for investment in those services:

[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 about their application processes, the FCC should require some sunlight. These processes need to be public and streamlined.<sup>34</sup>

Now is the time for the Commission to act. The proliferating regulatory barriers localities are erecting are directly impeding achievement of national policy goals. In the past, the Commission has addressed and on occasion struck down individual laws through its Section 253(d) preemption authority. But those decisions have been necessarily confined to the facts in a particular jurisdiction, such as the language of the law or its impact on particular wireless providers. The best way for the Commission to achieve the purpose of Section 253 and stop regulatory barriers threatening ubiquitous availability of wireless connectivity and 5G is to issue a declaratory ruling pursuant to Section 253 and applying it to remove those barriers.

The Commission has repeatedly interpreted the Communications Act through declaratory rulings because it has recognized the benefits in doing so.<sup>35</sup> It has well-settled authority, granted

---

<sup>34</sup> Remarks of FCC Commissioner Ajit Pai, Remarks at the Brandery: A Digital Empowerment Agenda, Cincinnati, OH, at 7 (Sept. 13, 2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-341210A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf).

<sup>35</sup> See, e.g., *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act*, Declaratory Ruling, 26 FCC

by Congress under Section 5(d) of the Administrative Procedure Act, to issue declaratory rulings.<sup>36</sup> Courts have widely and frequently upheld this authority,<sup>37</sup> and also have acknowledged the Commission’s lead role in applying the Communications Act.<sup>38</sup> And, the Commission has adopted declaratory rulings specifically to promote broadband wireless deployment. For example, in 2009 the Commission issued a declaratory ruling interpreting Section 332(c)(7) of the Communications Act to impose “shot clocks” for local zoning action on wireless siting applications. That ruling was designed to “promote[ ] the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks.”<sup>39</sup>

A Commission interpretation of the Communications Act will have nationwide application and thus will provide clarity and certainty to all providers and localities. It will

---

Rcd 8259, ¶ 1 (2011) (“*CRC Communications of Maine*”) (“[O]ur decision will provide clarity and guidance to incumbent local exchange carriers (LECs), competitive providers and state commissions about the rights and obligations regarding negotiation and arbitration under Section 251.”).

<sup>36</sup> 5 U.S.C. § 554(e) (stating that an “agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty”); 47 C.F.R. § 1.2(a) (“The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

<sup>37</sup> *Central Texas Cooperative, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) (“47 C.F.R § 1.2 [is] a provision giving the Commission the authority to issue declaratory orders. Section 1.2 refers to § 554(e) of the APA, which . . . is a subsection of the provision governing formal adjudication. . . . [T]here is some authority to the effect that the declaratory ruling provision in § 554(e) may be used in informal adjudication.”); *City of Arlington* at 241 (“Section 1.2 grants the FCC the power to issue declaratory orders and is derivative of § 554(e) of the APA”), *aff’d*, 133 S. Ct. 1863 (2013).

<sup>38</sup> *See, e.g., BellSouth v. Town of Palm Beach*, 252 F.3d 1169, 1188 n.1 (6<sup>th</sup> Cir. 2001) (“As the federal agency charged with implementing the Act, the FCC’s views on the interpretation of Section 253 warrant respect.”); *TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 152 (D.C. Cir. 1989).

<sup>39</sup> *Shot Clock Order* at 13994, ¶ 1.

prevent or resolve disputes that have delayed deployment and consumed the resources of all parties. And it will provide expert agency guidance to the federal courts when they adjudicate complaints brought under Section 253. CTIA urges the Commission to act as soon as possible. The sooner it acts, the sooner the benefits of its ruling in promoting the nation’s wireless policy objectives will flow. Specifically, it should adopt a declaratory ruling that interprets Section 253 in four respects, as detailed below.

**B. Laws Effectively Prohibit Service if They Limit Providers From Competing in a Fair and Balanced Regulatory Environment.**

In one of its first rulings interpreting Section 253(a), the 1997 *California Payphone* decision, the Commission declared that a law “may prohibit or have the effect of prohibiting” service 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.”<sup>40</sup> That ruling correctly implemented Congress’ objective in Section 253 and its overall goals in the 1996 Telecommunications Act to “promote competition and reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies.”<sup>41</sup> The Commission relied on *California Payphone* in several other decisions.<sup>42</sup> However, it has not reaffirmed that seminal decision recently, and several courts have adopted a conflicting, incorrectly narrow reading of

---

<sup>40</sup> *California Payphone Association Petition for Preemption of Ordinance No. 576NS of the City of Huntington Park, California*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14195, 14206 (1997) (“*California Payphone*”).

<sup>41</sup> Telecommunications Act of 1996, Preamble, Pub. L. 104-104, 110 Stat. 56 (1996); *see also* 47 U.S.C. § 1302 (noting that the Commission should take actions to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”).

<sup>42</sup> *Public Utilities Comm’n of Texas Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utilities Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997); *TCI Cablevision of Oakland City*, Memorandum Opinion and Order, 12 FCC Rcd 21396 (1997).



Section 253(a), creating uncertainty as to providers' and localities' respective rights and obligations. Given the harmful impact of that uncertainty on the national policy goals of expediting wireless broadband deployment, the Commission should explicitly reaffirm *California Payphone*.

While some laws such as moratoria or undergrounding ordinances physically block wireless broadband deployment and thus expressly violate Section 253(a), others more indirectly deter deployment by imposing requirements or charges that make it cost-prohibitive or at least more economically difficult for new or existing providers to offer service.<sup>43</sup> That harmful impact is particularly acute because wireless broadband will require massive investment in hundreds of thousands of small cells, plus innumerable miles of fiber or other network connections using ROWs to support small cells and connect them to core networks. Local regulations and fees that increase the already substantial burden of this investment inevitably discourage it. And, where regulatory burdens and costs are high, investment will simply not happen. This is why both express prohibitions on deployment, as well as regulations and fees that deter deployment, undermine the 1996 Telecommunications Act's purposes. And this is why *California Payphone* held that Section 253(a) prohibited both.

The First, Second, and Tenth Circuits have followed *California Payphone* in adjudicating complaints of violations of Section 253(a).<sup>44</sup> The Tenth Circuit, for example, struck down a local ordinance that resulted in high rental fees for ROWs use, finding that a regulation "need not

---

<sup>43</sup> In particular, and as discussed in Section III.E, *infra*, ROW charges that exceed a locality's incremental costs to issue permits and manage the ROW prohibit service in violation of Section 253(a) by limiting providers' ability to compete in a fair and balanced regulatory environment.

<sup>44</sup> See, e.g., *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1<sup>st</sup> Cir. 2006) (invalidating revenues-based fee for use of ROWs because of the "strain" the fee would have on the provider's provision of service).

erect an absolute barrier to entry in order to be found prohibitive.”<sup>45</sup> The Eighth and Ninth Circuits, however, deviated from the Commission’s interpretation, finding that regulations (such as high franchise fees) that did not specifically prohibit construction of new facilities complied with Section 253(a).<sup>46</sup> In response to providers’ petitions for certiorari of the Eighth and Ninth Circuit decisions, the Commission and the Solicitor General filed a joint brief that criticized the narrow approach those courts took:

Portions of the Ninth Circuit’s decision . . . could be read to suggest that a Section 253 plaintiff must show effective preclusion – rather than simply material interference – in order to prevail. . . . Limiting the preemptive reach of Section 253(a) to legal requirements that completely preclude entry would frustrate the policy of open competition Section 253 was intended to promote.<sup>47</sup>

They nonetheless urged the Supreme Court to decline certiorari because the two courts had approvingly cited *California Payphone* and because the Commission could address any lack of uniformity through declaratory rulings. The Supreme Court denied certiorari, but the Commission has not issued a ruling to address the uncertainty that several court decisions have created as to the proper scope of Section 253(a).

The Commission has adopted declaratory rulings in other contexts precisely to resolve that type of confusion and “provide clarity and guidance” to affected parties and the courts.<sup>48</sup> It should adopt such a ruling on Section 253(a) that reaffirms *California Payphone* and reiterates

---

<sup>45</sup> *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10<sup>th</sup> Cir. 2004) (approving *California Payphone*’s standard for applying Section 253(a) and invalidating city’s ROWs fee); *see also RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268-69 (10<sup>th</sup> Cir. 2000) (stating that a regulation need not be “insurmountable” in order to conflict with Section 253(a)).

<sup>46</sup> *See, e.g., Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8<sup>th</sup> Cir. 2007); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9<sup>th</sup> Cir. 2008).

<sup>47</sup> Brief of the United States as *Amicus Curiae*, *Level 3 Communications, L.L.C. v. City of St. Louis et al.*, 557 U.S. 935 (2009) (No. 08-626).

<sup>48</sup> *CRC Communications of Maine* at 8259, ¶ 1.

that a law is prohibited 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.”<sup>49</sup> It should expressly reject the interpretations by some courts that have much more narrowly construed Section 253(a) to apply only to an absolute prohibition on service. The Commission clearly has the authority to take this action, which will merely reaffirm its prior ruling,<sup>50</sup> and it should do so promptly to fulfill the language and achieve the purpose of Section 253(a).<sup>51</sup>

### **C. Moratoria Unlawfully Prohibit Deployment.**

There can be no more absolute prohibition than moratoria because they block deployment altogether and thus unquestionably violate Section 253(a). *De facto* moratoria, where localities simply fail to act to grant permits for wireless facilities, are equally pernicious because they have the same practical impact. Although localities often argue that they need time to develop comprehensive regulations governing deployment, that argument does not justify moratoria. Section 253(a) does not allow prohibitions that may end at some future date; it does not countenance *any* prohibition. There is also no reason why localities cannot process and grant applications for individual sites at the same time they seek to develop a broader policy.

---

<sup>49</sup> *California Payphone* at 14191, 14206.

<sup>50</sup> The Supreme Court has held that courts must defer to an agency’s interpretation under the *Chevron* framework even when the agency’s construction contradicts pre-existing case law. “[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute ... would allow a court's interpretation to override an agency's.” *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005), *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

<sup>51</sup> Commentators have also urged the Commission to reaffirm the *California Payphone* test for when a regulation violates Section 253(a), noting that this action is needed to resolve the uncertainty resulting from disparate court rulings and to promote new services and competition. *See, e.g.,* Thomas W. Snyder & 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 (2011).

The Commission briefly addressed moratoria in its 2014 *Wireless Infrastructure Order*, finding that they undermine Section 332(c)(7)'s objective to foster the rapid deployment of wireless facilities. It thus held that moratoria do not toll the running of the shot clocks and that “any moratorium that results in a delay of more than 90 days for a collocation application or 150 days for any other application will be presumptively unreasonable.”<sup>52</sup> It declined to rule that moratoria extending longer than the shot clock periods were *per se* unlawful because of its prior determination that Section 332(c)(7) granted courts the authority to rule on whether a locality had unreasonably delayed action. However, this case-by-case approach has created uncertainty as to the legality of moratoria. In any event, the *Wireless Infrastructure Order* did not address the legality of moratoria under Section 253(a). That provision is broader than Section 332 because it flatly outlaws any regulations that may prohibit or have the effect of prohibiting service. That is precisely what moratoria do. The Commission should thus declare that express moratoria and *de facto* moratoria that effectively preclude a locality from approving permits to place new or wireless facilities or modifications to existing facilities in ROWs violate Section 253(a).

**D. Undergrounding Ordinances and Laws That Restrict Upgrades Also Unlawfully Prohibit Deployment.**

Requirements that all communications facilities be placed underground violate Section 253(a) because wireless facilities of course must be located above ground. Neither the language nor the legislative history of Section 253 authorizes localities to restrict deployment in this way. Congress intended to preserve localities' authority to impose “time, place and manner” regulation to “manage” deployment – not bar it entirely. At least one federal circuit court of

---

<sup>52</sup> *Wireless Infrastructure Order* at 12972, ¶ 267.

appeals has agreed that undergrounding ordinances “effectively prohibit” deployment.<sup>53</sup>

Undergrounding ordinances also unlawfully discriminate among telecommunications technologies because, while wireline services can still be provided even if they must be buried in conduits, wireless cannot. For this reason they also do not fit within Section 253(c), which provides that, while localities can adopt ROWs regulations, those regulations must be “competitively neutral and nondiscriminatory.”

There is also no valid policy rationale for localities to prohibit wireless infrastructure as part of their undergrounding policies. Even in areas where utility lines must be undergrounded, streetlights and traffic light or signal control poles remain in place. Small cells can be attached to those existing poles and connected to networks through either microwave transmitters or underground fiber without adding any overhead wires. In short, small cells impose no additional disturbance of the ROWs.

Some localities also prevent or restrict providers from upgrading their infrastructure in ROWs by modifying or replacing wireless facilities and associated equipment. These regulations also conflict with Section 253(a) and undermine its purpose. Telecommunications networks are not static but instead must continuously evolve to accommodate changes in wireless technologies. For example, upgrades to wireless facilities are often necessary to utilize new spectrum resources that the provider has obtained and to provide enhanced capacity to handle growing traffic. A wireless provider may also need to replace or supplement existing backhaul infrastructure to, for example, add fiber to augment existing microwave-based

---

<sup>53</sup> In *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580 (9<sup>th</sup> Cir. 2008), which concerned the legality of a franchise fee, the court identified undergrounding as problematic under Section 253(a): “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.”

backhaul. Local laws and regulations that impede providers from making these upgrades effectively block their deployment of upgraded services. CTIA does not ask the Commission to prohibit localities from adopting reasonable regulations for review and approval of upgrades, just as they may have regulations for new facilities. But the Commission should declare that Section 253(a) makes it unlawful for localities to prevent or impede upgrades altogether.

**E. Section 253(c) Does Not Permit Rights-of-Way Charges That Exceed a Locality's Incremental Costs to Issue Permits and Manage Rights-of-Way and/or That Discriminate Among Providers.**

Section 253(c) allows localities to impose charges that constitute “fair and reasonable compensation.” Localities can, for example, recoup their costs to review and issue siting permits, to supervise the installation of small cells, fiber and other facilities that impact the ROWs, and to ensure those facilities are properly maintained. The Commission should, however, declare that (1) Section 253(c) does not allow cities to profit from providers’ need for ROW access and raise revenues to spend for other purposes, and (2) ROW permit and other fees that exceed a municipality’s actual costs constitute an economic barrier under Section 253(a).<sup>54</sup> This ruling is particularly important now because, although localities control the supply of access to ROWs, demand will grow as wireless providers confront the need to build many more facilities to accommodate exponentially-growing traffic, incenting some localities to demand even higher prices for access. By ruling that a locality’s charges for access to ROWs that exceed its incremental costs to issue permits and manage its ROWs do not fit within Section 253(c) or 253(a), the Commission will ensure that localities can be fully compensated for their costs

---

<sup>54</sup> See, *supra*, Section IV.B.

related to issuing permits and managing their ROWs, while also ensuring that providers do not face exorbitant fees that would suppress broadband deployment.<sup>55</sup>

The language and legislative history of Section 253(c) both support this interpretation. Congress' choice of the term "compensation" is significant because "compensation" denotes a payment that makes a party whole by recouping its expenses.<sup>56</sup> The legislative history also indicates that localities' right to recover "fair and reasonable compensation" was intended to mean fees that are related to a locality's costs. Senator Feinstein discussed the need to ensure that localities could assess fees "to cover the costs of reviewing plans and inspecting excavation work" and "to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation."<sup>57</sup> Nowhere does the legislative history indicate that Congress was giving a blank check to localities to use their control over ROWs to generate as much money as the "market" would bear.<sup>58</sup>

A number of courts have concluded that "fair and reasonable compensation" limits fees qualifying under Section 253(c) to those that are based on the locality's costs, and have

---

<sup>55</sup> Indeed, although localities may assess revenues-based franchise fees on cable operators, wireless attachments do not occupy rights-of-way on the same scale that cable operators necessitate to serve the same communities. An individual wireless provider's revenues are not a measure of a locality's costs.

<sup>56</sup> "Compensation" connotes payment that recoups an expense or outlay, not an ability to profit by collecting as much revenue as possible. *See* Black's Online Dictionary (2d ed.) (defining "compensation" as "indemnification; payment of damages; making amends; that which is necessary to restore an injured party to his former position. An act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person indemnified may receive equal value for his loss, or be made whole in respect of his Injury.").

<sup>57</sup> 141 Cong. Rec. S8170 (June 12, 1995) (statement of Sen. Feinstein); *see also* 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).

<sup>58</sup> Indeed, CTIA submits that no "market" exists for access to municipal rights-of-way.

invalidated revenues-based fees.<sup>59</sup> Several have pointed out that any other reading would remove any meaningful limits on what cities could charge. For example, in *Bell Atlantic-Maryland, Inc. v. Prince George's County*, a district court rejected the county's requirement that a provider pay a charge set at three percent of its gross revenues. The court explained its reasoning as follows:

The crucial point . . . is that any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use of the local rights-of-way, otherwise the fees constitute an unlawful economic barrier under Section 253(a). . . For the same reason, the court also believes that local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way. *Franchise fees thus may not serve as general revenue-raising measures.*

. . . If local governments were permitted under Section 253(c) to charge franchise fees that were unrelated either to a telecommunications company's use of the public rights-of-way or to a local government's costs of maintaining and improving its rights-of-way, then local governments could effectively thwart the [1996 Telecom Act's] pro-competition mandate and make a nullity

---

<sup>59</sup> See, e.g., *PECO Energy Company v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409, \*24 (E.D. Pa. 1999) ("Revenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of-way."); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1100 (N.D. Ca. 2001) ("Fees charged against telecommunications carriers must be directly related to the carrier's actual use of the local ROWs."); *N.J. Payphone Ass'n Inc. v. Town of West York*, 130 F. Supp. 2d 631, 637-8 (D.N.J. 2001) ("*N.J. Payphone*"), *aff'd*, 299 F.3d 235 (3d Cir. 2002) (stating that "fair and reasonable compensation" is limited to "recoupment of costs directly incurred through the use of the public rights-of-way. . . . A fee that does more than make a municipality whole is not compensatory in the literal sense."); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 113-14 (D.P.R. 2005) (locality failed to prove that right-of-way fee complied with Section 253(c); "Absent evidence of costs the Court cannot determine whether the Ordinance results in fair and reasonable compensation as opposed to monopolistic pricing."), *aff'd*, 450 F.3d 9 (1<sup>st</sup> Cir. 2006).



out of Section 253(a). Congress could not have intended such a result.<sup>60</sup>

Similarly, in *XO Missouri, Inc. v. City of Maryland Heights*, the Eastern District of Missouri held that fees based on providers' revenues are not permitted by Section 253(c):

The Court adopts the reasoning supporting other courts' decisions that revenue-based fees are impermissible under the [1996 Telecom Act]. *Thus, to meet the definition of "fair and reasonable compensation" a fee charged by a municipality must be directly related to the actual costs incurred by the municipality when a telecommunications provider makes use of the rights-of-way. . . [P]lainly a fee that does more than make a municipality whole is not compensatory in the literal sense, and instead risks becoming an economic barrier to entry.*<sup>61</sup>

A few courts, however, have adopted a broader interpretation of Section 253(c) by allowing other factors in addition to the locality's costs to manage ROWs access. In *TCG Detroit v. City of Dearborn*, for example, the Sixth Circuit approved a gross revenue fee after examining the extent of the use contemplated, the amount other telecommunications providers would be willing to pay, and the impact on the profitability of the business to determine whether a fee scheme is fair and reasonable."<sup>62</sup> Another court has noted the varying approaches to determining when a right-of-way fee is fair and reasonable:

Some courts have found that the fairness and reasonableness of a franchise fee under section 253(c) depends upon a rough proportion between the fee and the extent of the use of the public right-of-way, fees other providers have been willing to pay, and the negotiating history of the parties. . . . Others, more persuasively in this Court's view, read 'fair and reasonable compensation' to limit

---

<sup>60</sup> *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 817 (D. Md. 1999), *vacated on other grounds*, *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 212 F. 3d 863 (4<sup>th</sup> Cir. 2000) (emphasis added).

<sup>61</sup> *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 994 (E.D. Mo. 2003) (emphasis added).

<sup>62</sup> *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (2000); *see also City of Portland, Oregon v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1074-75 (D. Or. 2005).

municipalities to recoupment of costs directly incurred through the use of the public right-of-way.<sup>63</sup>

The courts' different approaches, coupled with wireless providers' growing need to locate facilities along ROWs, make Commission guidance essential. It should declare that to fit within Section 253(c), ROW access and use charges must be based on localities' incremental costs to review and approve siting permits and to manage the ROWs. Put another way, localities can recoup the costs they incurred due solely to the wireless facilities. This ruling will provide more certainty to localities and wireless providers nationwide as to what fees are permissible, and thereby head off disputes that might otherwise land in court. It also will ensure that localities can fully recoup their costs to review and process permit applications and to oversee the installation and maintenance of wireless facilities, while stopping the practice of profiting through high fees – a practice that Section 253(c) does not authorize. And most importantly, it will remove a major obstacle to new entrants and existing providers that are ready to invest in new infrastructure to meet Americans' rapidly growing dependence on wireless connectivity.

For these same reasons, the Commission should declare that fees that charge a provider a certain percentage of its revenues, or that are based on the market value of adjacent property, are clearly not based on the locality's costs of managing its rights -of -way; they do not even relate to those costs. These fees are not “fair and reasonable compensation” – they are transparent efforts to generate as much revenue as possible from the public's growing demand for wireless broadband.

---

<sup>63</sup> *N.J. Payphone* at 637-38; *see also Qwest Corporation v. City of Santa Fe*, 380 F.3d 1258, 1272-73 (10<sup>th</sup> Cir. 2004) (striking down local ROWs access fee, but noting that courts were split on whether fees must be cost-based or could include other factors).

Section 253(c) also provides that ROW charges must be “competitively neutral and nondiscriminatory.” Fees that vary depending on the provider are by definition neither neutral nor nondiscriminatory. Thus, for example, if a locality charges a particular up-front permit fee and/or a recurring rental fee on a wireline company to install and maintain a pole, higher fees on a wireless company to deploy a pole to support its own service would not qualify under Section 253(c). By declaring that Section 253(c) does not authorize such discriminatory pricing, the Commission will promote technological neutrality and foster essential broadband deployment.

**V. THE COMMISSION SHOULD FURTHER INTERPRET SECTION 332 TO ADDRESS UNREASONABLE SITING DELAYS AND MORE EFFECTIVELY STREAMLINE SITING.**

The Public Notice recognizes that “the successful deployment of wireless networks depends in large part on how quickly providers are able to obtain the necessary regulatory approvals.”<sup>64</sup> The Commission’s adoption of the Section 332(c)(7) shot clocks in 2009 helped to expedite wireless deployment. But the shot clocks do not reflect the evolution of the industry toward small cells and the evidence that localities can complete reviews more quickly, which warrant modifying the time lines that are now more than seven years old. In addition, the wireless industry’s experience with seeking to enforce the shot clocks has demonstrated that they should be modified to enhance their effectiveness.

The Public Notice asks whether the Commission should modify the shot clocks and/or take other actions to speed deployment. It correctly observes that the shot clocks “may be longer than necessary and reasonable to review a small cell siting request,” because “small cells may have less potential for aesthetic and other impacts than macrocells.”<sup>65</sup> CTIA agrees and urges

---

<sup>64</sup> Public Notice at 13364.

<sup>65</sup> *Id.* at 13371.

the Commission to shorten the shot clock periods. Issues with the current shot clocks, however, go beyond the fact that they do not reflect the trend toward small cells. The Commission should take further action. As detailed below, it should also (1) remove the disparate time periods that apply to similar facilities; (2) expand the deemed granted remedy; and (3) clarify that the shot clocks apply to wireless facilities placed in the ROWs or on municipally-owned poles and other structures in those ROWs.

**A. The Commission Should Interpret Section 332 to Include a 60-Day Shot Clock for Collocations Not Covered by Section 6409(a).**

The Commission should interpret Section 332(c)(7) to adopt a 60-day shot clock for collocations on non-tower structures that would otherwise be covered by Section 6409(a) but for the absence of an existing approved antenna. This will resolve the problem that the current shot clocks discourage the use of an entire class of otherwise 5G-eligible structures.

The Commission currently applies a 60-day shot clock to collocations covered by Section 6409(a), *i.e.*, collocations on towers or structures with existing approved antennas that do not result in a substantial change to the underlying structure.<sup>66</sup> But left out are similar requests to collocate on structures without an existing approved antenna, which are processed instead under the longer 90-day Section 332(c)(7) shot clock. This discrepancy needlessly subjects requests to site new 5G-enabling small cells on existing poles and other non-tower structures without antennas to processing times one-third longer than other similarly-situated small cell installation

---

<sup>66</sup> Section 6409(a) provides, in part, that states and localities “shall approve” a collocation request on “an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” The Commission adopted a 60-day shot clock to implement the “shall approve” mandate, and interpreted “base station” as “a structure that currently supports or houses an antenna, transceiver, or other associated equipment” that “ha[s] been reviewed and approved under the applicable local zoning or siting process.” *See Wireless Infrastructure Order* ¶¶ 172-74, 216; 47 C.F.R. § 1.40001.

requests. The net result is to discourage use of some of the very structures that are ideal for new 5G deployments precisely because they do not already have an existing approved antenna.

The Commission should eliminate this discordant treatment by adopting a new 60-day shot clock for non-substantial collocations not covered by Section 6409(a).<sup>67</sup> By definition, Section 6409(a) collocation requests are non-substantial,<sup>68</sup> and the proposed rule would merely apply the same 60-day processing period to similar collocations on non-tower structures that lack an existing approved antenna. These small collocations do not require 90 days to review; indeed, states already process similar collocation requests in even less time. For example, both New Hampshire and Wisconsin have adopted 45-day review periods for non-substantial collocations on existing towers, buildings, or other structures, regardless of whether the structure already supports an existing antenna.<sup>69</sup> This change will subject all similar collocation requests to the same processing times. And, it will encourage use of existing infrastructure which, because it lacks an existing antenna, may be more likely to have space to support a new deployment.

---

<sup>67</sup> Likewise, as discussed below, the Commission should add a deemed granted rule to its Section 332 shot clocks to further align the Section 6409(a) and Section 332 shot clocks.

<sup>68</sup> See 47 C.F.R. § 1.40001(a).

<sup>69</sup> See N.H. REV. STAT. ANN. § 12-K:10(II) (“The [reviewing] authority, within 45 calendar days of receiving a collocation application or modification application, shall .... [m]ake its final decision to approve or disapprove the collocation application or modification application ....”); *id.* § 12-K:2(X) (“‘Collocation’ means the placement or installation of new [personal wireless service facilities, or PWSFs] on existing towers or mounts, including electrical transmission towers and water towers, as well as existing buildings and other structures capable of structurally supporting the attachment of PWSFs in compliance with applicable codes. ‘Collocation’ does not include a ‘substantial modification.’”); WIS. STAT. § 66.0404(3)(c) (“Within 45 days of its receipt of a complete [Class 2 collocation] application, a political subdivision shall .... [m]ake a final decision whether to approve or disapprove the application.”); *id.* § 66.0404(1)(e) (a “Class 2 collocation” is “the placement of a new mobile service facility on an existing support structure such that the owner of the facility does not need to ... engage in substantial modification”); *id.* § 66.0404(1)(t) (a “support structure” is “an existing or new structure that supports or can support a mobile service facility, including a mobile service support structure, utility pole, water tower, building, or other structure”).

The Commission has ample authority to interpret Section 332(c)(7) to add a new 60-day shot clock for collocations on non-tower structures that would otherwise be covered by Section 6409(a) but for the absence of an existing approved antenna. Section 332(c)(7) directs states and localities to act on any request to place, construct, or modify personal wireless service facilities “within a reasonable period of time,”<sup>70</sup> and both the Fifth Circuit and the Supreme Court have upheld the Commission’s authority to adopt shot clocks specifying what is a reasonable period of time to act under 332(c)(7).<sup>71</sup> As the Supreme Court explained, “Congress has unambiguously vested the Commission with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation [of what is a presumptively ‘reasonable period of time’ under Section 332(c)(7)(B)(ii)] was promulgated in the exercise of that authority.”<sup>72</sup> The Commission should exercise that authority here.

**B. The Commission Should Tighten and True Up the Shot Clocks Between Section 332(c)(7) and Section 6409(a).**

The Commission should also exercise its authority to determine what is a presumptively reasonable period of time to act under Section 332(c)(7) by adjusting the existing shot clocks to account for current market realities. Specifically, the existing 150-day review period for new wireless sites or substantial modifications should be shortened to **90 days**, and the existing 90-day review period for collocations should be shortened to **60 days**.<sup>73</sup> Section 332(c)(7) gives the Commission discretion to determine what is a “reasonable period of time” for a locality to act on

---

<sup>70</sup> 47 U.S.C. § 332(c)(7)(B)(ii).

<sup>71</sup> *See City of Arlington*.

<sup>72</sup> *City of Arlington* at 1874; *see Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

<sup>73</sup> If the Commission revises its Section 332(c)(7) shot clock to provide for 60-day review for all non-substantial collocations, then the relief described in Part IV(A) of these comments would be unnecessary.

a siting application,<sup>74</sup> and the Commission can modify its interpretation of a term in the Communications Act based on changed facts as long as it provides a reasoned explanation.<sup>75</sup> Here, 90-day and 60-day review periods are warranted.

First, state and local processes support tightened shot clocks. The Commission has already recognized that jurisdictions can take less time to review wireless siting applications than the current shot clocks prescribe – with some taking as little as 75 days or less to review new facilities or major modifications, and as little as 14 days or less to complete the review of collocation applications.<sup>76</sup> A number of state statutes already require the processing of complete non-collocation/substantial modification applications in 90 days or less, and collocation applications in 60 days or less. For example, Michigan requires non-collocation applications to be reviewed within 90 days,<sup>77</sup> as does Virginia,<sup>78</sup> while Minnesota and Kentucky impose 60-day deadlines to process non-collocation or new tower applications.<sup>79</sup> Likewise Minnesota requires collocation applications to be processed within 60 days,<sup>80</sup> and in Michigan certain collocations

---

<sup>74</sup> See *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013).

<sup>75</sup> See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>76</sup> See *Shot Clock Order* at 14010-11, ¶ 43; see also *id.* (“[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.”).

<sup>77</sup> MICH. COMP. LAWS SERV. § 125.3514(8).

<sup>78</sup> See VA. CODE ANN. § 15.2-2232(F). Virginia requires any application for a telecommunications facility to be processed in 90 days.

<sup>79</sup> See MINN. STAT. § 15.99, Subd. 2(a) (requiring non-collocation applications to be processed within 60 days); KY. REV. STAT. § 100.987(4)(c) (requiring new tower applications to be processed in 60 days).

<sup>80</sup> MINN. STAT. § 15.99, Subd. 2(a). Minnesota requires any zoning application, including both collocation and non-collocation applications, to be processed in 60 days. See *id.*; *Shot Clock Order* at 14012, ¶ 47 (citing MINN. STAT. § 15.99).

are also subject to a 60-day review period while others are exempt from approval altogether.<sup>81</sup> And Florida requires completed collocation applications to be processed in 45 business days,<sup>82</sup> while New Hampshire and Wisconsin require processing in only 45 calendar days.<sup>83</sup> These examples show that processing siting applications within the tighter time frames proposed herein is reasonable.

In addition, given localities' extensive experience and the increasing shift toward smaller facilities, siting reviews can be completed more quickly than when the Commission determined seven years ago that 150 and 90 days were presumptively reasonable. Unlike in 2009 when the current shot clocks were established for macrocells, many new sites today are for small cells that have far less visual and other impact and take less time to review. And although larger macrocells and towers remain important parts of today's networks, the increasing shift toward smaller deployments – coupled with the fact that Section 6409(a)'s “shall approve” mandate eliminates the need for localities to evaluate many collocation requests – frees up resources that can reduce processing times overall. For example, many small cells will need to be housed on new poles because existing poles are not sufficiently tall, do not provide needed coverage, or cannot support the extra load. The current 150-day (five-month) shot clock is an unreasonably long period of time given the minimal visual impact of these small cells and associated poles.

---

<sup>81</sup> MICH. COMP. LAWS SERV. § 125.3514(1)-(6).

<sup>82</sup> FLA. STAT. ANN. § 365.172(13)(d)(1)-(2).

<sup>83</sup> See N.H. REV. STAT. ANN. § 12-K:10; *id.* § 12-K:2; WIS. STAT. §§ 66.0404(3)(c); 66.0404(1)(e); 66.0404(1)(t).



**C. The Commission Should Adopt a “Deemed Granted” Remedy for its 332(c)(7) Shot Clocks.**

The Commission should revise its Section 332(c)(7) shot clocks to adopt a “deemed granted” remedy for those applications not covered by Section 6409(a). Although applications covered by Section 6409(a) are deemed granted if not approved within 60 days,<sup>84</sup> the Section 332(c)(7) shot clocks currently require only that applications be acted on within the established presumptively reasonable time frames or the applicant may go to court.<sup>85</sup> The Commission should revise its rules to eliminate this discrepancy going forward. As Chairman Pai has explained:

[T]he FCC has already established a shot clock within which local governments are supposed to review wireless infrastructure applications. But if a city doesn’t process the application in that timeframe, a company’s only remedy is to file a lawsuit. We should give our shot clock some teeth by adopting a “deemed-grant” remedy, so that a city’s inaction lets that company proceed.<sup>86</sup>

In the absence of a deemed granted rule, localities can and do run the Section 332(c)(7) shot clocks out and fail to act. This forces applicants to decide whether to litigate, involving considerable time and expense,<sup>87</sup> or continue to pursue the application with an uncertain time frame for action. Even if an applicant decides to expend the funds and litigate, it risks future ill will by taking the jurisdiction to court. The net results are potentially long, multi-year delays and

---

<sup>84</sup> 47 C.F.R. § 1.40001(c)(2), (c)(4).

<sup>85</sup> *Shot Clock Order* ¶¶ 39, 45; *see also Wireless Infrastructure Order* at 12978, ¶ 284.

<sup>86</sup> Remarks of FCC Commissioner Ajit Pai at CCA’s 2016 Annual Convention, Seattle, WA, at 2 (Sept. 21, 2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-341365A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-341365A1.pdf).

<sup>87</sup> Indeed, courts have ignored Section 332(c)(7)(B)(v)’s direction that they “hear and decide” actions “on an expedited basis.” As the Supreme Court has noted, for example, the district court in one case did not act on respondent’s complaint until 16 months after filing, notwithstanding Section 332(c)(7)(B)(v). *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 118 (2005) (“*Abrams*”).

substantially increased costs, which frustrate building the densified networks needed for broadband and, soon, 5G.

*Crown Castle v. Greenburgh* is a prime example.<sup>88</sup> There, Crown Castle first sought authority to install a distributed antenna system (“DAS”) in 2009 and requested processing within the Section 332(c)(7) shot clock timeframes. But it was not until nearly three years later, after multiple applications, questions and responses, revisions, town board proceedings, and a public hearing – what the court called a “ping-pong match” – that the town ultimately acted and denied the applications. Only after Crown Castle brought suit to challenge the denial did a district court direct issuance of the permits – nearly four years after authority was first requested – and the Second Circuit later affirmed.<sup>89</sup> This costly four-year effort to improve service and enhance competition would have been avoided under a deemed granted rule. Thus, adding a deemed granted rule is critical to ensuring that states and localities act within the prescribed timelines for *all* siting applications, regardless of whether they are covered by Section 332 or Section 6409(a). Doing so will also reduce costly and time-consuming litigation, allowing resources to be used to invest in, rather than litigate, the expansion of broadband deployment.

The Commission has ample authority to apply a deemed granted rule to applications not covered by Section 6409(a) when jurisdictions fail to act. The Commission may adopt a deemed granted rule using its broad authority to adopt rules to carry out the objectives of the Communications Act,<sup>90</sup> and to facilitate broadband deployment under the Telecommunications

---

<sup>88</sup> See *Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 U.S. Dist. LEXIS 93699 (S.D.N.Y. 2013) (“*Greenburgh*”), *aff’d*, 552 Fed. Appx. 47 (2d Cir. 2014).

<sup>89</sup> 552 Fed. Appx. 47 (2d Cir. 2014).

<sup>90</sup> See 47 U.S.C. §§ 154(i), 201(b), 303(r); see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (“[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act.’”).

Act.<sup>91</sup> In particular, the Commission may use its authority to implement Section 332(c)(7), which provides that states and localities must act on siting requests “within reasonable period of time” and that applicants are aggrieved when there has been a “failure to act.”

The Commission’s authority to adopt a rule implementing Section 332(c)(7) that may have the effect of overriding local or state law was squarely confirmed by the Supreme Court in *City of Arlington*. There, the Supreme Court rejected the claim that the statute, by preserving local authority over zoning, denied the Commission authority to implement Section 332(c)(7) through establishment of the presumptively reasonable time for action by local zoning authorities. The fact that the Commission’s ruling appeared to impinge on a matter of traditional local concern was found to be “faux-federalism,” because Section 332(c)(7) “explicitly supplants state authority” by requiring decisions under local law to be made within a reasonable period of time.<sup>92</sup> Consistent with that ruling, adopting a deemed granted approach to address “failure[s] to act” on siting applications within “a reasonable period of time” falls well within the Commission’s interpretive authority under Section 332(c)(7).<sup>93</sup>

Accordingly, the Commission should revisit its prior decisions not to apply a deemed granted rule to applications when jurisdictions fail to act.<sup>94</sup> Much has changed since 2009 when the Commission initially declined to adopt a deemed granted rule, and even since 2014 when the

---

<sup>91</sup> 47 U.S.C. § 1302(a); *Verizon v. FCC*, 740 F.3d 623, 641 (D.C. Cir. 2014) (agreeing that the Commission has the authority under Section 706(b) of the Telecommunications Act “to take steps to accelerate broadband deployment if and when it determines that such deployment is not ‘reasonable and timely’”).

<sup>92</sup> *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1873 (2013).

<sup>93</sup> *Id.* at 1874-75 (courts must defer to a reasonable interpretation by the agency as long as the agency does not overstep the lines drawn by Congress and “the agency’s answer is based on a permissible construction of the statute”).

<sup>94</sup> *See Shot Clock Order* at 14009, ¶ 39; *Wireless Infrastructure Order* at 12978, ¶ 284.

Commission last examined the issue. It is now clear following the *City of Arlington* case that the Commission is authorized to adopt rulings to enforce Section 332(c)(7). And the need for hundreds of thousands of small cells mean that case-by-case court review in cases where localities fail to act is no longer a viable option.

The text of Section 332 supports a ruling that the remedy that section provides is not exclusive.<sup>95</sup> Section 332(c)(7)(B)(v) provides only that a party aggrieved “may” commence action in court, not that it “must” do so. Indeed, the Commission has adopted a “deemed granted” remedy in analogous circumstances when it implemented Section 621(a)(1) of the Communications Act, which prohibits franchising authorities from unreasonably refusing to award competitive cable franchises.<sup>96</sup> That section provides that an applicant whose application for a competitive franchise is denied “may” appeal, but the Commission still adopted a deemed granted rule: If a local cable franchising authority has not made a final decision on a franchise application within a specified period, the authority will be deemed to have granted the applicant an interim franchise until it delivers a final decision.<sup>97</sup> As the Commission there explained, “[i]n

---

<sup>95</sup> See *Abrams* at 122. Although the Supreme Court has held that the expedited court remedy in Section 332(c)(7)(b)(v) precludes other inconsistent judicial remedies (like requests for damages and attorney’s fees under 42 U.S.C. § 1983), *see id.*, neither the Court nor the statute itself precludes other forms of relief. Moreover, there is a savings clause included in Communications Act providing that “[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.” 47 U.S.C. § 414; *see also Jones v. RCC Atl., Inc.*, 2009 U.S. Dist. LEXIS 1858, at \*9 (D. Vt. 2009) (“[T]his Court finds Congress did not ... intend that § 332 provide an exclusive remedy.”).

<sup>96</sup> 47 U.S.C. § 541(a)(1).

<sup>97</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶¶ 4, 54, 62, 68-73, 77-78 (2007), *pet. for rev. denied sub nom. Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009); *see also id.* at 5140, ¶ 80 (noting that “the deemed grant approach is consistent with other federal regulations designed to address inaction on the part of a State decision maker”) (citing examples).

selecting this [deemed granted] remedy, we seek to provide a meaningful incentive for local franchising authorities to abide by the deadlines contained in this Order while at the same time maintaining [local] authority to manage rights-of-way.”<sup>98</sup>

**D. The Commission Should Clarify That Its Shot Clocks Apply to Municipal Poles and Rights-of-Way.**

Finally, the Commission should declare that its shot clocks apply to requests to install wireless facilities on municipal poles or in municipal ROWs. As discussed above, some municipalities take the position that they are acting in a “proprietary” rather than a regulatory capacity in processing such requests, and therefore the shot clocks do not apply. The Commission should declare that these periods *do* apply to these facilities requests. This is a significant issue because many localities are failing to act on these requests and have no legal incentive to do so in the absence of clarity about whether granting access to public poles and ROWs is a regulatory function. A Commission ruling that the shot clocks apply will provide that incentive.<sup>99</sup>

Section 332(c)(7) proscribes certain state and local “regulation” that can impede the timely siting of personal wireless facilities, but some courts have held that Section 332(c)(7) does not apply when localities act in their “proprietary” capacity.<sup>100</sup> The Commission cited this

---

<sup>98</sup> *Id.* at 5138, ¶ 76.

<sup>99</sup> Although Section 224 does not extend protections designed to ensure reasonable and timely access to utility-owned infrastructure to municipal poles and ROWs, *see* 47 U.S.C. § 224(a)(1); *Implementation of Section 224*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5243 n.14 (2011) (explaining that Section 224 “exempts poles owned by municipalities, cooperatives, and non-utilities”), Section 332(c)(7) includes no such exclusion for municipal poles and ROWs. *See* 47 U.S.C. § 332(c)(7). This indicates Congress intended two distinct approaches as between the separate sections.

<sup>100</sup> *See Omnipoint Commc’ns., Inc. v. City of Huntington Beach*, 738 F.3d 192, 200-01 (9th Cir. 2013) (“*Huntington*”).

principle in 2014 but declined to elaborate on how it would apply to particular circumstances.<sup>101</sup> Courts have not squarely addressed whether local management of ROWs access is a proprietary or regulatory function. Commission action is needed to make clear that action on a request to site wireless facilities on municipal or other public poles or ROWs is a *regulatory*, rather than a proprietary, function and is subject to the shot clocks.

At least two courts have indicated that access to public poles and ROWs implicates *regulatory* functions. In *NextG v. New York*,<sup>102</sup> the Southern District of New York considered whether the city's two-year delay and refusal to grant access to poles in public ROWs absent a costly franchise violated Section 253 of the Communications Act which, similar to Section 332, bars state and local regulatory action which has the effect of prohibiting communications.<sup>103</sup> NextG argued 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." The court agreed and held that the city's actions "are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy."<sup>104</sup>

*Crown Castle v. Greenburgh*, discussed above, also highlights the need for regulatory relief to curb unreasonable delays in access to poles and ROWs. In that case, the town ignored

---

<sup>101</sup> See *Wireless Infrastructure Order* at 12964-65, ¶¶ 239-40.

<sup>102</sup> *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063 (S.D.N.Y. 2004) ("*NextG*").

<sup>103</sup> Section 332, *inter alia*, proscribes state or local regulation that prohibits (or has the effect or prohibiting) personal wireless services, whereas Section 253, *inter alia*, proscribes any regulation that prohibits (or has the effect of prohibiting) telecommunications services. Compare 47 U.S.C. § 253 with *id.* § 332(c)(7).

<sup>104</sup> *NextG*, 2004 U.S. Dist. LEXIS 25063 at \*16-\*18. The court ultimately declined to grant injunctive relief, however, finding irreparable harm had not been established. See *id.* at \*28-\*30.

the shot clocks and took nearly three years to finally act and deny a request to deploy a DAS system.<sup>105</sup> Crown Castle challenged the denial in court, contending that it violated Section 322(c)(7)'s obligations to process the application "within a reasonable period" and be supported "by substantial evidence." The court ultimately found the timing issue was moot because a decision had issued, but the delay influenced its finding that the decision was not supported by substantial evidence. The court thus found that Section 322(c)(7) *does* apply to requests to install facilities on public poles and ROWs, even though the shot clock issue itself was rendered moot.

In other instances, however, courts have found actions to be proprietary, rather than regulatory. In *Omnipoint v. Huntington*, for example, the Ninth Circuit held that a city's decision to require a company to obtain voter approval before licensing an antenna in a city-owned park was proprietary, and therefore was not preempted by Section 332.<sup>106</sup> Conversely, a New Hampshire district court held in *Sprint Spectrum v. Durham* that a request for permission to locate a wireless facility at a town landfill *is* subject to Section 332.<sup>107</sup> There, the court found that Section 332 "does not allow local governments to shield themselves from acts which violate the [statute] by characterizing those actions as taken pursuant to a town's proprietary functions."<sup>108</sup>

The Commission should resolve this issue by specifying by rule that both the Section 332(c)(7) shot clocks, as well as the Section 6409(a) shot clock, *do* apply to requests to site

---

<sup>105</sup> *Greenburgh*, 2013 U.S. Dist. LEXIS 93699 at \*6-\*8.

<sup>106</sup> *Huntington*, 738 F.3d at 200-01.

<sup>107</sup> *Sprint Spectrum L.P. v. Town of Durham*, 1998 U.S. Dist. LEXIS 23941, \*1, \*18-\*20 (D.N.H. 1998) ("*Durham*").

<sup>108</sup> *Id.* at \*19-\*20.

wireless facilities on municipal poles and in municipal ROWs. Municipal poles and ROWs are public property intended to serve as the locations for public services. In such circumstances, municipal oversight serves a regulatory, rather than a proprietary, function as indicated in *NextG*, and therefore Sections 332(c)(7) and 6409(a) – and the shot clocks that implement them – apply. In fact, localities have detailed laws, ordinances, and rules dealing with ROW access, confirming that localities managing ROWs are not acting as private landowners. Moreover, nothing in either statute exempts applications to site wireless facilities on municipal pole or ROWs sites.<sup>109</sup> Failure to adopt the requested rule will allow potentially multi-year delays like those suffered in *NextG* and *Greenburgh* to continue in the absence of clear and consistent guidance from the Commission.

As discussed above, the Commission has ample authority to interpret Section 332(c)(7)<sup>110</sup> as well as Section 6409(a).<sup>111</sup> As Chairman Pai has noted, “Congress clearly and specifically granted the Commission the power to remove barriers to infrastructure deployment.”<sup>112</sup> The Commission should exercise this authority to declare that its shot clocks apply to requests to site facilities on municipal poles and ROWs.

---

<sup>109</sup> *Cf. Durham*, 1998 U.S. Dist. LEXIS 23941 at \*19-\*20.

<sup>110</sup> *See City of Arlington*, 133 S. Ct. at 1866-75 (affirming FCC authority to interpret what is a “reasonable period of time” for a state or local government to “act on any request for authorization to place, construct, or modify personal wireless service facilities” for purposes of Section 332(c)(7)).

<sup>111</sup> *See Montgomery County v. FCC*, 811 F.3d 121, 126-33 (4<sup>th</sup> Cir. 2015) (affirming FCC authority to interpret requirement that a state or local government “may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station” that does involve a substantial change).

<sup>112</sup> Remarks of FCC Commissioner Ajit Pai at the CTIA Wireless Foundation Smart Cities Expo, Washington, D.C., at 2 (Nov. 2, 2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-342032A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-342032A1.pdf).



**VI. THE COMMISSION SHOULD DECLARE THAT THE DEPLOYMENT OF SMALL CELLS DOES NOT CONSTITUTE A MAJOR FEDERAL ACTION OR AN UNDERTAKING.**

Finally, the Commission should determine that the deployment of small cells is neither a “major federal action” under the National Environmental Policy Act (“NEPA”) nor a “federal undertaking” under the National Historic Preservation Act (“NHPA”). This ruling will directly promote the objectives of this proceeding – to speed the deployment of broadband and reduce deployment costs – because it will obviate the need for the Commission and wireless providers to follow the complex procedures that apply to major federal actions and undertakings. It will also conserve the resources of the Commission, state and tribal preservation offices, and wireless providers.

This determination is also supported by the applicable statutes. “Major federal actions” and “undertakings” are defined to occur when the government finances, authorizes, or licenses the construction of facilities or other projects.<sup>113</sup> But the government does not assist in the funding of small cell deployments. And, because wireless providers hold geographic licenses that do not require Commission approval and licensing of individual small cell sites, there is no licensing process for particular facilities. Nor is the government involved in the applicants’ determination of where to affix small cells, which often do not involve construction of new towers and, instead, utilize existing structures. In short, there is no “action” that the Commission undertakes for a small cell outside of the current NEPA and/or NHPA process, and this is the case whether the small cell is installed on an existing or a new structure. Funding, licensing, or approvals are the triggers for agency actions to potentially constitute a major federal action or a

---

<sup>113</sup> See 40 C.F.R. § 1508.8; 16 U.S.C. § 470w(7) (defining undertaking to include a project or activity under the jurisdiction of a Federal agency “requiring a federal permit, license, or approval.”).

federal undertaking, but those triggers do not occur specifically to the placement of small cells. Accordingly, given the lack of federal involvement in small cell deployments, the Commission can properly find they are not major federal actions or undertakings and thus fall outside the scope of NEPA and NHPA.

In considering how to approach small cells and DAS, the Commission wisely categorically excluded them from certain reviews, but declined to find that such deployments are not “undertakings.”<sup>114</sup> This conclusion was based on a flawed reading of the statute and should be reexamined. The agency noted that “while the Commission has generally waived the requirement of preconstruction approval for geographic-area licensees, as permitted by Section 319(d), the Commission has also retained authority under Section 1.1312 of the Commission’s rules to review the environmental effect of all ‘facilities,’ including their effects on historic properties.”<sup>115</sup> The statutory language, however, does not reach general claims of “retained authority”; it specifically applies to those actions that “require a federal permit, license, or approval.” The agency properly determined as a general matter that there is no public interest benefit in conducting site-by-site review of each facility subject to a geographic license. One result of this determination is that no “federal permit, license, or approval” is required to construct a small cell site. The agency should stick to the plain language of the statute and find that small cell deployments are not “undertakings” under federal law. Such an approach is most faithful to the goals of Congress and will expedite the deployment of unobtrusive small cells that are critical to next-generation communications services.

---

<sup>114</sup> *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd 14238, ¶ 25 (2013).

<sup>115</sup> *Wireless Infrastructure Order*, 29 FCC Rcd 12865, 12915, ¶ 84.

Should the Commission decline to determine that small cell deployments are not federal “undertakings,” it should, at a minimum, conclude that small cells and DAS have no potential to affect tribal or historic preservation or have a significant environmental impact and should thus be excluded from those reviews. Such a finding would be consistent with prior, related Commission findings, reflect the lack of impact or *de minimus* impact of DAS and small cell facilities, preserve tribal, historic preservation, and environmental resources for reviewing those deployments that may be more likely to have an impact, and speed buildout of wireless networks.

## **VII. CONCLUSION.**

CTIA urges the Commission to act quickly to remove regulatory barriers to wireless infrastructure deployment that have the effect of slowing, or outright prohibiting, the delivery of mobile wireless services to consumers. Adopting the recommendations discussed herein will fully respect the prerogatives of localities to oversee the deployment of small cells and other wireless facilities and to manage their ROWs while expediting and modernizing the infrastructure siting requirements and promoting the massive broadband investment that is

needed to provide all Americans with advanced, ubiquitous, and high-quality wireless networks and services.

Respectfully submitted,

/s/ Brian M. Josef

Brian M. Josef  
Assistant Vice President, Regulatory Affairs

Thomas C. Power  
Senior Vice President, General Counsel

Scott K. Bergmann  
Vice President, Regulatory Affairs

Kara D. Romagnino  
Director, Regulatory Affairs

**CTIA**  
1400 Sixteenth Street, NW, Suite 600  
Washington, DC 20036  
(202) 785-0081

Dated: March 8, 2017