June 20, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: **Ex Parte Presentation,** *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-84; *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Siting Policies*, WT Docket No. 16-421

Dear Ms. Dortch:

CTIA applauds the Commission's continuing efforts to remove barriers to the deployment of next-generation wireless facilities, including recent steps to streamline or eliminate unnecessary environmental and historic preservation reviews.[1] As the Commission pivots to addressing the local siting issues raised in these proceedings, CTIA submits this *ex parte* to outline why a deemed granted remedy is critical and appropriate to address continuing local failure to act on wireless siting requests "within a reasonable period of time," as required by Section 332(c)(7) of the Communications Act (the "Act"). While CTIA is encouraged by the many state and local officials

[1] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Report and Order, 32 FCC Rcd 9760 (2017) (eliminating historic preservation review for certain replacement utility poles); *Comment Sought on Draft Program Comment for the FCC's Review of Collocations on Certain Towers Constructed without Documentation of Section 106 Review*, Public Notice, 32 FCC Rcd 10715 (2017) (proposing a draft Program Comment to facilitate collocations on "Twilight Towers"); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, 83 Fed. Reg. 19440 (May 3, 2018) (revising the rules and procedures for deployments subject to National Historic Preservation Act and National Environmental Policy Act review).

who are seeking to expedite broadband deployment, it is still too often the case that untimely local action on wireless siting requests is creating a barrier to broadband deployment; the Commission has ample authority to address this barrier by adopting a deemed granted remedy.

The record demonstrates the urgent need for a deemed granted remedy. Unlike the Section 6409(a) shot clock, the Section 332 shot clocks (90 days for collocations, and 150 days for new facilities) lack a sufficient remedy and require applicants to pursue time-consuming and costly judicial review.[2] This introduces substantial delay into the process, and often results in a ruling that sends the matter back to the locality – which can still then act to deny the application, dragging the process out for years. In one recent case, for example, the applicant sought an injunction in district court after the town failed to act within the shot clock.[3] Almost a year after the shot clock expired, the court found that the only remedy was to require a written decision.[4] Notably, the court made this finding notwithstanding the Commission's 2014 pronouncement that it is appropriate for courts to treat non-compliance with the shot clock as a significant factor weighing in favor of injunctive relief.[5] Ultimately, the Second Circuit affirmed the denial of injunctive relief – after yet another year had passed – citing the Commission's 2014 decision

---

[2] The Section 6409(a) shot clock implements Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"), Pub. L. No. 112–96, 126 Stat. 156 (2012), and requires localities to act on eligible facility requests – including non-substantial collocations on towers or non-tower structures with an existing approved antenna – within 60 days or they are deemed granted. *See* 47 C.F.R. § 1.40001(c). In contrast, other wireless siting requests are subject to the Section 332(c)(7) shot clocks which, if violated today, include only an option to seek judicial relief. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3333-34 ¶ 8 (2017) ("*Wireless NPRM/NOI*").

[3] *See Up State Tower Co., LLC v. Town of Kiantone*, 2016 U.S. Dist. LEXIS 170827 (W.D.N.Y. 2016), *aff'd*, 718 Fed. Appx. 29 (2d Cir. 2017).

[4] *Kiantone*, 2016 U.S. Dist. LEXIS 170827, *15.

[5] *See Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12978 ¶ 284 (2014) ("*2014 Wireless Infrastructure Order*") (stating that in the case of a failure to act within the Section 332 shot clocks, and absent some compelling need, "we believe that it would also be appropriate for the courts to treat such circumstances as significant factors weighing in favor of [injunctive] relief"), *aff'd, Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

declining to adopt a deemed granted remedy.[6]

Indeed, experience since the 2009 *Shot Clock Order*[7] has shown that requiring providers to rely primarily on litigation to enforce their federal rights is neither a meaningful deterrent nor an effective solution. Even though the Supreme Court has affirmed the Commission's authority to adopt the shot clocks, that authority is undermined if the shot clocks are not enforced. Without deemed granted, localities can block siting for months or years while providers are forced to litigate. The result is to effectively nullify the shot clocks and their underlying purpose to streamline deployment.

This is not a theoretical harm. For example, data submitted in the record by a nationwide wireless carrier shows that nearly one-third *of all of its recently proposed sites*, including broadband-enabling small cells, involve cases where the locality failed to act, in violation of the shot clocks.[8] Likewise, a deployer of distributed network systems ("DNS") reported that nearly half of 100 communities in which it deployed DNS facilities between 2015 and 2016 failed to act within the longest (150-day) shot clock.[9] Still another infrastructure provider documented that approximately 46 jurisdictions it works with have exceeded the longer, 150-day shot clock.[10] The record also shows that jurisdictions continue to impose moratoria (both official and *de facto*),[11]

---

[6] *See Kiantone,* 718 Fed. Appx. at 31-32 (citing *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978 ¶ 284).

[7] *Petition 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, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013) ("*City of Arlington*").

[8] Comments of T-Mobile USA, Inc., WT Docket No. 17-79, WC Docket No. 17-84, at 8 (June 15, 2017) ("T-Mobile Comments").

[9] Comments of Extenet Systems, Inc., WT Docket No. 17-79, WC Docket No. 17-84, at 5-6 (June 15, 2017) ("ExteNet Comments").

[10] Initial Comments of Lightower Fiber Networks, WT Docket No. 17-79, at 5-6 (June 15, 2017) ("Lightower Comments").

[11] *See, e.g.*, Comments of CTIA, WT Docket No. 17-79, WC Docket No. 17-84, at 9 (June 15, 2017) ("CTIA Comments") (citing record evidence); *see also* Comments of Sprint Corp., WT Docket No. 17-79, WC Docket No. 17-84, at 41-43 (June 15, 2017) ("Sprint Comments"); Michael O'Rielly, Comm'r, FCC, Remarks at the 2017 Wireless Infrastructure Show, Orlando, FL, at 4 (May 23, 2017) ("[I]ndustry is still experiencing excessive delays

which evade the shot clocks altogether. These and other continuing and pervasive shot clock violations and delays are frustrating the deployment of broadband services and technologies, including 5G and small cells, and are a significant barrier to infrastructure investment.[12]

Given this record evidence, the Commission should act now to make deemed granted relief available nationwide. As with the Commission's deemed granted rule implementing Section 6409(a), to avail itself of this remedy an applicant would inform the reviewing authority in writing that the shot clock has passed and the application is deemed granted.[13]

The deemed granted remedy has proven very effective in speeding the deployment of facilities covered by Section 6409(a) (*e.g.*, non-substantial collocations on towers or non-tower structures with an existing approved antenna), supporting its application to all wireless facility siting requests. CTIA members have found that the Section 6409(a) deemed granted remedy has deterred shot clock violations and, where they do occur, incented localities to swiftly act after receipt of the deemed grant letter – settling cases that would have otherwise required the time and expense of litigation. By similarly adopting a deemed granted remedy for Section 332(c)(7) shot clock violations, the Commission will "add greater consequence to violations of the shot clock," and help "relieve applicants of the uncertainty, delay, and expense of bringing litigation against a municipality to enforce their rights."[14]

---

and moratoria when filing siting applications for access to locality rights of way. The record is replete with reports of long pre-application processes before an application can be filed or is deemed complete and applications going through two years or more of review before a decision is actually made. These long, intentional delays are also turning into *de facto* moratoria.").

[12] *See, e.g.*, Comments of AT&T, WT Docket No. 17-79, at 1-3 (June 15, 2017) ("AT&T Comments"); Comments of Competitive Carrier Ass'n, WT Docket Nos. 17-79 &15-180, WC Docket No. 17-84, at i, 6-7 (June 15, 2017) ("CCA Comments"); CTIA Comments at 1-3, 6-7, 9-10; ExteNet Comments at 11; Comments of Globalstar, Inc., WT Docket No. 16-421, at 1-2, 8-9, 12 (Mar. 8, 2017); Lightower Comments at i, 1, 5-6; Sprint Comments at ii, 46-47; T-Mobile Comments at 3, 6-9; Comments of Verizon, WT Docket No. 17-79, WC Docket No. 17-84, at 2, 35-36 (June 15, 2017) ("Verizon Comments"); Comments of the Wireless Infrastructure Ass'n, WT Docket No. 17-79, WC Docket No. 17-84, at 7-10 (June 15, 2017) ("WIA Comments").

[13] *See* 47 C.F.R. § 1.40001(c)(4).

[14] AT&T Comments at 26.

The Commission has ample authority to adopt a deemed granted remedy. Ample legal authority exists for the Commission to adopt a deemed granted remedy under any or all of the Commission's proposed approaches to strengthen the Section 332(c)(7) shot clocks. These approaches involve interpreting various statutory provisions and adopting rules to carry out those provisions. As the Supreme Court has recognized, "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication," and this includes Section 332(c)(7) of the Act.[15]

First, the Commission has broad authority to reinterpret the requirement in Section 332(c)(7)(B)(ii) that states and localities shall act on siting applications within a "reasonable period of time."[16] As the Fifth Circuit recognized, and the Supreme Court confirmed, this phrase is ambiguous, and its meaning "is undoubtedly a question of federal law" that falls within the Commission's general authority to interpret and administer.[17] This general authority is found in Sections 4(i), 201(b), and 303(r) of the Act, which authorize the Commission to take such acts or issue such orders, restrictions, or rules as may be necessary to carry of the substantive provisions of the Act – including Section 332(c)(7).[18] This general authority includes ample room for the Commission to convert the current rebuttable presumption that the shot clocks set reasonable time periods for jurisdictions to act into an irrebuttable presumption, pursuant to which an application would be deemed granted if a decision is not made within those periods.[19]

---

[15] *City of Arlington*, 569 U.S. at 307.

[16] 47 U.S.C. § 332(c)(7)(B)(ii). As discussed below, the Commission can revisit and alter prior statutory interpretations, as long as it adequately explains its reasons for doing so.

[17] *City of Arlington*, 668 F.3d at 249-55; 569 U.S. at 305-07.

[18] *See* 47 U.S.C. §§ 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."), 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."), 303(r) (directing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act").

[19] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3334-36 ¶¶ 11-13.

Second, the Commission has broad authority to interpret a different ambiguous phrase in Section 332(c)(7) – the statement that state and local authority over the placement of wireless facilities is preserved "except as provided" in 332(c)(7).[20] That is, if a locality fails to act within a reasonable period of time under Section 332(c)(7)(B)(ii), then its preserved authority over decisions concerning that request lapses, leaving the Commission to fill the void.[21] Under this interpretation, "by failing to act on an application within a reasonable period of time, the [local authority] would have defaulted its authority over such applications (*i.e.*, lost the protection of Section 332(c)(7)(A), which otherwise would have preserved such authority), and at that point no local land-use regulator would have authority to approve or deny an application."[22] Because this approach again calls for the Commission to interpret ambiguous language in the Act,[23] the same legal support cited above for the first approach is applicable.[24]

Third, the Commission may use its statutory authority to promulgate a deemed granted rule. As the Commission has explained, it can adopt a deemed granted rule to implement Section 332(c)(7) using its general authority under Sections 201(b) and 303(r) of the Act.[25] Indeed, the Fifth Circuit affirmed the Commission's determination in the *Shot Clock Order* that the Commission's "general authority to make rules and regulations to carry out the Communications Act *includes the power to implement § 332(c)(7)(B)(ii)*."[26] This general authority is buttressed by Section 253 of the Act, which prohibits state and local requirements that effectively prohibit telecommunications.[27]

---

[20] *See* 47 U.S.C. § 332(c)(7)(A).

[21] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3336 ¶ 14.

[22] *Id*.

[23] *See id*.

[24] *See*, *supra*, notes 17- 18 and accompanying text.

[25] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3336 ¶ 15 (citing 47 U.S.C. §§ 201(b), 303(r)).

[26] *City of Arlington*, 668 F.3d at 249 (emphasis added).

[27] The Commission could find, consistent with the record, that state or local government failures to act within the reasonable shot clock time frames has the "effect of prohibiting" wireless carriers' provision of service, thus justifying the adoption of a deemed granted rule to implement the policies of Section 253(a). *See Wireless NPRM/NOI*, 32 FCC Rcd at 3336 ¶ 15, 3336-37 n.30.

Authority to adopt a deemed granted rule is further supported by Section 706 of the Telecommunications Act of 1996, which directs the Commission to encourage broadband deployment by utilizing "regulating methods that remove barriers to infrastructure investment."[28] As the D.C. Circuit has recognized, Section 706 "vests [the FCC] with affirmative authority to enact measures encouraging the deployment of broadband infrastructure."[29] A deemed granted remedy fits squarely within this authority.[30]

A deemed granted remedy is consistent with the statutory text. A deemed granted approach is consistent with the judicial review provision in Section 332(c)(7)(B)(v), which provides only that a party aggrieved "may" commence action in court – not that it "must" do so.[31] The fact that the statute permits aggrieved parties in a specific dispute to seek judicial review does not affect the Commission's authority to adopt other remedies in order to implement Section 332(c)(7)(B)(ii) and remove barriers to deployment, as the Fifth Circuit found.[32] Nor does a deemed

---

[28] 47 U.S.C. § 1302(a).

[29] *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014). *Cf. Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33 ¶¶ 62-64 (2007) ("*Cable Franchise Order*"), *pet. for rev. denied sub nom. Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) ("*Alliance for Cmty. Media*"), *cert. denied*, 557 U.S. 904 (2009).

[30] *See, e.g.*, CTIA Comments at 40-41, 43; Sprint Comments at 36.

[31] 47 U.S.C. § 332(c)(7)(B)(v) ("Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph *may*, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.") (emphasis added).

[32] The Fifth Circuit recognized that "[a]lthough Section 332(c)(7)(B)(v) does clearly establish jurisdiction in the courts over disputes arising under Section 332(c)(7)(B)(ii), "*the provision does not address the FCC's power to administer § 332(c)(7)(B)(ii) in contexts other than those involving a specific dispute*." *City of Arlington*, 668 F.3d at 251 (emphasis added). Here, providers are asking the Commission to adopt a generally applicable deemed granted remedy under its power to administer Section 332(c)(7)(B)(ii), *see supra* notes 16-17, and not to resolve a specific dispute. Parties aggrieved by the failure to observe the deemed grant could still go to court to enforce the deemed grant in specific cases. *See infra* text accompanying note 33; *see also City of Arlington*, 668 F.3d at 251 ("[T]here is nothing inherently unreasonable about reading § 332(c)(7) as preserving the FCC's ability to implement § 332(c)(7)(B)(ii) while providing for judicial review of disputes."). Moreover, the Fifth Circuit cited approvingly a decision by the Sixth Circuit upholding a Commission order addressing a similar statutory scheme in the cable franchise context. *See id*. (citing *Alliance for Cmty. Media*). As discussed below, the cable statute at

granted remedy render the judicial relief provision superfluous. Rather, providers may still need to seek relief when a physical permit is needed and the locality refuses to issue one despite the deemed grant, or localities may challenge a deemed grant when they believe an applicant was not eligible for that relief in the first instance.[33]

A deemed granted remedy is not precluded by the legislative history of Section 332(c)(7). Although language in a conference report states that courts shall have "exclusive jurisdiction" over disputes arising under that section,[34] the implementation of a deemed granted remedy does not amount to dispute resolution by the Commission, as the locality retains full discretion to rule on individual siting requests to the extent of its authority. As such, a "deemed granted" remedy does not diminish the federal courts' jurisdiction to resolve specific disputes that do arise under the statute. The "deemed granted" remedy is thus fully consistent with the conference report language, inasmuch as it deters delays on siting applications and allows applicants, if needed, to avail themselves in a timely manner of the judicial remedies referenced in the conference report.[35]

In fact, the Commission has adopted a "deemed granted" remedy in analogous

---

issue there also included a permissive judicial review provision (providing that an aggrieved applicant "may" appeal"), and the Commission adopted a deemed granted remedy in that case. *See*, *infra*, notes 36-39 and accompanying text; *see also City of Arlington*, 668 F.3d at 250-51 ("Had Congress intended to insulate § 332(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly[.] . . . Here, however, Congress did not clearly remove the FCC's ability to implement the limitations set forth in § 332(c)(7)(B).").

[33] *See, e.g.*, Reply Comments of CTIA, WT Docket No. 16-421, at 24 (Apr. 7, 2017).

[34] S. Rep. No. 104-230, at 207-08 (1996) (Conf. Rep.) ("It is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) … the courts shall have exclusive jurisdiction over all … disputes arising under this section.").

[35] *See* AT&T Comments at 27. In any case, the D.C. Circuit has affirmed that "a plain reading of an unambiguous statute cannot be eschewed in favor of a contrary reading, suggested only by the legislative history and not by the text itself," and that "[w]e will not permit a committee report to trump clear and unambiguous statutory language." *ACLU v. FCC*, 823 F.2d 1554, 1568-69 (D.C. Cir. 1987) (quoting *Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F. Supp. 1305, 1310 (S.D.N.Y. 1982)). Here, Section 332(c)(7)(B)(v)'s clear permissive language – providing that an aggrieved party "may appeal" – plainly does not vest exclusive jurisdiction in the courts. *See* AT&T Comments at 27.

circumstances when it implemented Section 621(a)(1) of the Communications Act, which prohibits franchising authorities from unreasonably refusing to award competitive cable franchises.[36] 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.[37] In upholding the deemed granted remedy in that case, the Sixth Circuit rejected the argument that the cable statute's identification of courts as the forum for aggrieved cable operators to obtain relief deprived the Commission of statutory authority to exercise its rulemaking power to adopt a deemed granted remedy.[38] The same principle applies here.[39]

Establishing a deemed granted remedy is also consistent with the requirement in Section 332(c)(7)(B)(ii) that a locality act on each application within a reasonable period of time, taking into account "the nature and scope of such request."[40] The Commission's shot clocks already vary depending upon the nature of a siting request (*e.g.*, less time for collocations, more time for new facilities). Put differently, the time period that must lapse before a wireless siting request would be deemed granted already varies with, and accounts for, the nature and scope of the request. It is therefore fully consistent with the text of Section 332(c)(7) for the Commission to provide guidance regarding the maximum amount of time that may be "reasonable" for localities to review different categories of applications before they are deemed granted.[41]

---

[36] 47 U.S.C. § 541(a)(1).

[37] *Cable Franchise Order*, 22 FCC Rcd at 5103 ¶ 4, 5128-29 ¶ 54, 5132-33 ¶ 62, 5134-37 ¶¶ 68-73, 5138-39 ¶¶ 77-78.

[38] *See Alliance for Cmty. Media*, 529 F.3d at 775 (holding that "the availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the [Commission's] rulemaking authority over section 621(a)(1)"); *see also id*. at 768.

[39] *See City of Arlington*, 668 F.3d at 251.

[40] 47 U.S.C. § 332(c)(7)(B)(ii).

[41] *See* Verizon Comments at 38-39; Reply Comments of WIA, WT Docket No. 17-79, WC Docket No. 17-84, at 10-11 (July 17, 2017).

A deemed granted approach is reasonable and must be given deference. The well-established *Chevron* framework applies to the Commission's interpretation of the Communications Act.[42] At *Chevron* step one, the question is "whether Congress has directly spoken to the precise question at issue" in clear, unambiguous terms.[43] But if "the statute is silent or ambiguous with respect to the specific issue," *Chevron* step two asks "whether the agency's answer is based on a permissible construction of the statute."[44] "[I]f the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."[45] Here, a deemed granted approach would implement ambiguous terms in Section 332(c)(7), and that approach is reasonable and entitled to "substantial deference."[46]

At the outset, there is no question under *Chevron* step one that the Section 332(c)(7) terms at issue – "reasonable period of time" and "except as provided" – are ambiguous. In *City of Arlington*, the Fifth Circuit specifically found that "the phrase 'a reasonable period of time,' as it is used in § 332(c)(7)(B)(ii), is inherently ambiguous."[47] Likewise, the Commission correctly found in the *Wireless NPRM/NOI* that the phrase "except as provided" is an "ambiguous provision[] in the statute."[48]

Next, under *Chevron* step two, Commission's interpretation of these ambiguous terms to

---

[42] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005) ("*Brand X*") ("[W]e apply the *Chevron* framework to the Commission's interpretation of the Communications Act.").

[43] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984) ("*Chevron*"); *see id*. at 842-43 ("[Where] the intent of Congress is clear, that is the end of the matter; for the court[s], as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[44] *Id*. at 843.

[45] *Brand X*, 545 U.S. at 980; *see also id*. at 983 (finding that "the agency remains the authoritative interpreter (within the limits of reason) of [ambiguous] statutes").

[46] *City of Arlington*, 668 F.3d 255; *U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 457-58 (D.C. Cir. 2000).

[47] *City of Arlington*, 668 F.3d 255; *see also Alliance for Cmty. Media*, 529 F.3d at 777 (acknowledging the ambiguity of descriptors such as "reasonable").

[48] *Wireless NPRM/NOI*, 32 FCC Rcd at 3336 ¶ 14.

adopt a deemed granted remedy is "a reasonable policy choice for the agency to make"[49] – and therefore is not arbitrary and capricious.[50] This is true for a number of reasons.

First, adoption of a deemed granted remedy is consistent with, and helps to effectuate, the basis and purpose of Section 332(c)(7). Congress enacted Section 332(c)(7) to "reduce the impediments that local governments could impose to defeat or delay the installation of wireless communications facilities."[51] As the record highlighted above demonstrates, continued untimely local action on wireless siting requests well in excess of even the longest current shot clock, coupled with actual and *de facto* moratoria where localities simply fail to act, are delaying or deterring the deployment of wireless broadband infrastructure.[52] Specifying a deemed granted remedy for shot clock violations simply gives effect to the statute's purpose, and is therefore a reasonable interpretation of the statutory language.[53]

---

[49] *Brand X*, 545 U.S. at 986.

[50] *See Verizon*, 740 F.3d at 635 (noting that "[t]he *Chevron* inquiry overlaps substantially with that required by the Administrative Procedure Act (APA), pursuant to which we must also determine whether the Commission's actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'") (quoting 5 U.S.C. § 706(2)(A)).

[51] *Abrams*, 544 U.S. at 115; *see also City of Arlington*, 668 F.3d at 234 ("Section 332(c)(7) seeks to reconcile two competing interests – Congress's desire to preserve the traditional role of state and local governments in regulating land use and zoning and Congress's interest in encouraging the rapid development of new telecommunications technologies by removing the ability of state and local governments to impede the construction and modification of wireless communications facilities through delay or irrational decisionmaking.").

[52] In examining the record evidence, the Commission need only articulate a rationale connection between the facts found – here, pervasive continuing delays and/or inaction notwithstanding the shot clocks – and the choice made – in this case, adoption of a deemed granted remedy to better effectuate Section 332(c)(7). *See Motor Vehicle Mfs. Ass'n v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 43 (1983); *see also City of Arlington*, 668 F.3d at 261 (finding that it is not the role of the courts to "independently weigh the evidence before the agency").

[53] *See, e.g.*, *Arrington v. Wong*, 237 F.3d 1066, 1074 (9th Cir. 2001) ("Because the agency's regulation is consistent with the purposes and language of the statute, we find that interpretation reasonable (and certainly not arbitrary or capricious)."); *see also Chemical Mfrs. Ass'n v. EPA*, 919 F.2d 158, 162-63 (D.C. Cir. 1990); *Berkshire Hathaway, Inc. v. Textile Workers Pension Fund*, 874 F.2d 53, 56 (1st Cir. 1989).

Second, both the Commission and the courts have recognized that a deemed granted remedy is a reasonable enforcement tool to use to incent local action when required by statute. For example, in order to enhance competition in the cable marketplace, Congress enacted Section 621(a)(1) of the Act, which states that local franchise authorities "may not unreasonably refuse to award an additional [cable] franchise."[54] In interpreting this language, the Commission imposed deadlines for action but also recognized that a remedy was needed for local failure to act by those deadlines. It therefore adopted an interim deemed granted remedy, upheld by the Sixth Circuit, explaining: "In selecting this remedy, we seek to provide *a meaningful incentive* for local franchising authorities to abide by the deadlines. . . . In order to encourage franchising authorities to reach a final decision on a competitive application within the applicable time frame set . . ., a failure to abide by the Commission's deadline must bring with it meaningful consequences."[55]

Likewise, in order to speed new wireless deployments on towers and structures with existing antennas, Congress enacted Section 6409(a) of the Spectrum Act, which provides that jurisdictions "may not deny, and shall approve" requests to install certain eligible facilities on such structures.[56] In interpreting this language, the Commission once again imposed a deadline for action and, as in the Section 621(a) context, recognized that a remedy was needed for local failure to act by that deadline. It therefore adopted a deemed granted remedy, upheld by the Fourth Circuit, explaining: "We anticipate . . . that the prospect of a deemed grant will create *significant incentives* for States and municipalities to act in a timely fashion."[57] These same considerations – incentivizing localities to act in a timely manner through adoption of an enforcement mechanism – are equally at play here and further demonstrate the reasonableness of a deemed granted remedy in the Section 332(c)(7) context.[58]

---

[54] 47 U.S.C. § 541(a)(1).

[55] *Cable Franchise Order*, 22 FCC Rcd at 5138-39 ¶¶ 76-77 (emphasis added); *see Alliance for Cmty. Media*, 529 F.3d at 771, 778-80.

[56] 47 U.S.C § 1455(a)(1).

[57] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12962 ¶ 233 (emphasis added); *see Montgomery County*, 811 F.3d at 128-29.

[58] *See Wireless NPRM/NOI*, 32 FCC Rcd at 3335-36 ¶ 13.

Finally, it bears noting that an increasing number of states have adopted deemed granted remedies to expedite local action on wireless siting.[59] CTIA commends these state efforts, which further show that a deemed granted approach is reasonable and not unduly burdensome.

The FCC is not limited by prior decisions not to adopt a deemed granted remedy. While the Commission chose to take a "cautious approach" in 2009 when it put the Section 332 shot clocks in place and initially declined to include a deemed granted remedy,[60] circumstances have changed significantly since then. Now, with the benefit of lessons learned since 2009, and even since 2014 when the Commission last examined the issue,[61] the Commission can and should revisit its approach.

Under well-established precedent, the Commission is free to update its interpretation of Section 332(c)(7), and doing so is not arbitrary and capricious, as long as it provides a "reasoned explanation" for doing so.[62] "For if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'"[63] Indeed, "[a]n initial agency interpretation is not instantly carved in stone."[64] Rather, the agency "must consider

---

[59] *See* A.R.S. § 9-593(F); 17 Del. C. § 1609(b)(4); Fla. Stat. § 337.401(7)(d)(8); 50 ILCS 835/15(d)(8); Iowa Code § 8C.7A(3)(c)(2); K.S.A. § 66-2019(h); Minn. Stat. § 237.163, subd. 3c; R.S. Mo. § 67.5113.8; N.M. Stat. Ann. § 63-9I-4(E)(2)-(3); N.C. Gen. Stat. § 160A-400.54(d)(3)-(4); ORC Ann. § 4939.031(C); 11 Okl. St. § 36-504(D)(7); R.I. Gen. Laws § 39-32-4(b); Tenn. Code Ann. § 13-24-409(b)(6); Tex. Local Gov. Code § 284.154(d); Utah Code Ann. § 54-21-302(6)(b); Va. Code Ann. §§ 15.2-2316.4:1, 56-484.28, 56-484.29(A). *See also, e.g.*, Cal. Gov't Code § 65964.1(a)(1); N.H. Rev. Stat. Ann. § 12-K:10.III; Mich. Comp. Laws § 125.3514(6); Wis. Stat. § 66.0404(2)(d), (3)(c) (deeming collocation applications to be approved if they are not reviewed within a specified or "reasonable" period of time).

[60] *Wireless NPRM/NOI*, 32 FCC Rcd at 3334-35 ¶ 11.

[61] *See Shot Clock Order*, 24 FCC Rcd at 14009 ¶ 39; *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978 ¶ 284.

[62] *Brand X*, 545 U.S. at 1000-02.

[63] *Id*. at 981 (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)).

[64] *Chevron*, 467 U.S. at 863.

varying interpretations and the wisdom of its policy on a continuing basis,"[65] including, for example, "in response to changed factual circumstances, or a change in administrations."[66]

This is precisely the case here. It is clear following the Supreme Court decision in *City of Arlington* that the Commission is authorized to adopt and interpret shot clocks to enforce Section 332(c)(7), even though the statute preserves local zoning authority.[67] Moreover, the record demonstrates that the absence of a deemed granted remedy for Section 332 shot clock violations has forced applicants to choose among three equally unappealing options: await an uncertain outcome, abandon their applications, or pursue costly and time-consuming litigation.[68] None is an effective remedy, as each discourages investment in new facilities. Finally, the costs and delays associated with litigation – while already onerous for macrocell deployments – risk making the deployment of small cells cost-prohibitive. Indeed, projections of up to 150,000 small cells by the end of 2018,[69] and nearly 800,000 by 2026,[70] demonstrate that case-by-case court review where localities fail to act is simply not a workable solution going forward.[71]

---

[65] *Id.* at 863-64.

[66] *Brand X*, 545 U.S. at 981.

[67] *See* 569 U.S. at 305-07; *see also Wireless NPRM/NOI*, 32 FCC Rcd at 3333-34 ¶ 11.

[68] *See, e.g.*, AT&T Comments at 25-26; CCA Comments at 7; Comments of Crown Castle Int'l Corp., WT Docket No. 17-79, at 24-26 (June 15, 2017); CTIA Comments at 9, 18; ExteNet Comments at 11; Lightower Comments at 5-6; Comments of Samsung Electronics America, Inc., WT Docket No. 17-79, at 6-7 (June 15, 2017); Sprint Comments at 42, 47; T-Mobile Comments at 8; Verizon Comments at 16; WIA Comments at 16-17.

[69] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Public Notice, 31 FCC Rcd 13360, 13363-64 (WTB 2016) (citing S&P Global Market Intelligence, John Fletcher, Small Cell and Tower Projections through 2026, SNL Kagan Wireless Investor (Sept. 27, 2016)).

[70] *Id*. at 13364.

[71] *See, e.g.*, Comments of AT&T, WT Docket No. 16-421, at 15 n.25 (Mar. 8, 2017) (explaining that "[w]hile service providers can file suit against a municipality for violating the Section 332 shot clock with respect to facilities not covered by Section 6409, such suits are sparingly used because they damage the relationship between providers and municipalities, are expensive, lead to unpredictable delays, and are not practically scalable for deployments with more than a few nodes").

A deemed granted remedy is consistent with the Tenth Amendment. While the Tenth Amendment reserves to the states "those powers not delegated to the United States"[72] – meaning the federal government "may not compel the States to implement . . . federal regulatory programs"[73] – no such federally mandated state action is at issue here. A deemed granted remedy would not require states or localities to implement a government program; instead, it would provide an incentive for jurisdictions to act within the Section 332(c)(7) shot clocks and, if they do not, deem an application granted by operation of law.

In fact, as noted, the Fourth Circuit upheld the Commission's adoption of a deemed granted remedy to implement Section 6409(a) of the Spectrum Act.[74] The court held that the Commission did not violate the Tenth Amendment "because it [did] not require states to take any action at all," but rather "provide[d] a remedy to ensure that states did not circumvent statutory requirements."[75] The same is true here: The requested deemed granted remedy would "do[] no more than implement the statute."[76]

---

[72] U.S. Const. amend. X.

[73] *Printz v. United States*, 521 U.S. 898, 925 (1997).

[74] *Montgomery County*, 811 F.3d 121, *affirming Wireless Infrastructure Order*, 29 FCC Rcd at 12955-57 ¶¶ 211-16 and n.593; *see also*, *supra*, note 2 (citing 47 C.F.R. § 1.40001(c)).

[75] 811 F.3d at 128-29.

[76] *Id*. at 128. A recent *ex parte* erroneously asserts that a deemed granted remedy and other actions the Commission is considering to streamline deployment are foreclosed by the Supreme Court's decision that a federal law prohibiting state authorization of sports gambling violated the Tenth Amendment because the federal government may not "compel state and local government action." Letter to Hon. Ajit Pai, Chairman, FCC, from Joseph Van Eaton, Best Best & Krieger, LLP, WT Docket No. 17-79 (June 4, 2018) (citing *Murphy v. National Collegiate Athletic Ass'n,* 200 L. Ed. 2d 854 (2018) ("*Murphy*")). However, this argument fundamentally mischaracterizes the Commission's proposed actions in this proceeding. Rather than imposing mandates, the Commission would be interpreting provisions in the Communications Act – the Federal law that the Commission is tasked with interpreting and applying. The two provisions most at issue – Sections 253 and 332 – include limitations on state and local authority. The mere fact that Commission interpretation of those provisions will have an impact on states and localities does not convert the Commission's actions into mandates. Indeed, the courts already have acknowledged as much and rejected Tenth Amendment claims in the context of a deemed granted remedy. As the Fourth Circuit held, *see supra* note 74, the deemed granted remedy does not violate the

* * *

CTIA strongly agrees with Chairman Pai that the Commission "should give our shot clock some teeth by adopting a 'deemed-grant' remedy, so that a city's inaction lets that company proceed."[77] By acting expeditiously to adopt such a remedy, the Commission will help to carry out its mandate to ensure timely action on siting applications and remove another barrier to infrastructure investment.

Pursuant to Section 1.1206(a) of the Commission's rules, a copy of this letter is being electronically submitted into the record of these proceedings. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Scott K. Bergmann

Scott K. Bergmann
Senior Vice President, Regulatory Affairs

Tenth Amendment's limit on federal action, because it compels no such state action. Nothing in *Murphy* casts doubt on the Fourth Circuit's holding.

[77] *See* Ajit Pai, Comm'r, FCC, *Remarks at the CCA 2016 Annual Convention*, Seattle, WA, at 2 (Sept. 21, 2016).