Nos. 19-70213, 19-70124, 19-70125, 19-70136, 19-70144, 19-70145, 19-70146, 19-70147, 19-70326, 19-70339, 19-70341, and 19-70344

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SPRINT CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petitions for Review of Orders of the Federal Communications Commission

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

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

THIRD REPORT AND ORDER AND DECLARATORY RULING

Adopted: August 2, 2018 **Released: August 3, 2018**

By the Commission: Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioner Rosenworcel approving in part, dissenting in part and issuing a statement.

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I. INTRODUCTION

1. Today, we continue our efforts to promote broadband deployment by speeding the process and reducing the costs of attaching new facilities to utility poles.[1] Now, more than ever, access to this vital infrastructure must be swift, predictable, safe, and affordable, so that broadband providers can continue to enter new markets and deploy facilities that support high-speed broadband. Pole access also is essential to the race for 5G because mobile and fixed wireless providers are increasingly deploying innovative small cells on poles and because these wireless services depend on wireline backhaul.[2] Indeed, an estimated 100,000 to 150,000 small cells will be constructed by the end of 2018, and these numbers are projected to reach 455,000 by 2020 and 800,000 by 2026.[3]

2. In today's order, we take one large step and several smaller steps to improve and speed the process of preparing poles for new attachments, or "make ready."[4] Make-ready generally refers to the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the pole. Consistent with the recommendations of the Broadband Deployment Advisory Committee (BDAC),[5] we fundamentally shift the framework for the vast majority of attachments governed by federal law by adopting a new pole attachment process that includes "one-touch make-ready" (OTMR), in which the new attacher performs all make-ready work. OTMR speeds and reduces the cost of broadband deployment by allowing the party with the strongest incentive—the new attacher—to prepare the pole quickly by performing all of the work itself, rather than spreading the work across multiple parties. By some estimates, OTMR alone could result in approximately 8.3 million incremental premises passed with fiber and about $12.6 billion in incremental fiber capital expenditures.[6] We exclude from OTMR new attachments that are more complicated or above the "communications space" of a pole, where safety and reliability risks can be greater, but we make significant incremental improvements to our rules governing such attachments to speed the existing process, promote accurate billing, and reduce the likelihood of coordination failures that cause unwarranted delay.

3. We also adopt other improvements to our pole attachment rules. To provide certainty to all parties and reduce the costs of deciphering our old decisions, we codify and refine our existing precedent that requires utilities to allow "overlashing," which helps maximize the usable space on the

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[1] Consistent with section 224 of the Communications Act of 1934, as amended (the Act), we use the term "pole attachment" to encompass "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility," unless otherwise dictated by context. *See* 47 U.S.C. § 224(a)(4). In the specific context of pole attachment timelines, we use the term "pole attachment" to refer only to utility poles (and not to attachments to ducts, conduits, or rights of way). *See* 47 CFR § 1.1411(a).

[2] *See* Crown Castle Wireline NPRM Comments at 1-2; Mobilitie Wireline NPRM Comments at 7-8; Sprint Wireline NPRM Comments at 10, 39-40.

[3] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, 31 FCC Rcd 13360, 13363-64 (WTB 2016).

[4] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18056 n.50 (1999).

[5] *See* Letter from Paul D'Ari, Designated Federal Officer, Broadband Deployment Advisory Committee, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed July 3, 2018), at Attach. Broadband Deployment Advisory Committee, FCC, *Report of the Competitive Access to Broadband Infrastructure Working Group* at 18-31 (2018), https://ecfsapi.fcc.gov/file/107030255502405/Competitive%20Access%20to%20Broadband%20Infrastructure%20Report.pdf (BDAC January 2018 Recommendations).

[6] *See* Letter from Thomas J. Navin, Counsel to Corning, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-84, at Attach. A; Ed Naef and Alex King, CMA Strategy Consulting, *Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 1, Model Sensitivities* at 5-6 (filed Feb. 26, 2018) (Corning Economic Study).

pole. We clarify that new attachers are not responsible for the costs of repairing preexisting violations of safety or other codes or utility construction standards discovered during the pole attachment process. And we eliminate outdated disparities between the pole attachment rates incumbent local exchange carriers (LECs) must pay compared to other similarly-situated telecommunications attachers.

4. Finally, we address two forms of state and local regulatory barriers to the deployment of wireline and wireless facilities. In the Report and Order, we make clear that we will preempt, on a case-by-case basis, state and local laws that inhibit the rebuilding or restoration of broadband infrastructure after a disaster. In today's Declaratory Ruling, we conclude that state and local moratoria on telecommunications services and facilities deployment are barred by section 253(a) of the Act because they "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[7] Barring deployment deprives the public of better services and more broadband options, yet a small but growing number of localities have adopted moratoria in various forms. We put an end to such regulatory barriers.

II. BACKGROUND

5. Section 224 of the Act grants us broad authority to regulate attachments to utility-owned and -controlled poles, ducts, conduits, and rights-of-way.[8] The Act authorizes us to prescribe rules to: ensure that the rates, terms, and conditions of pole attachments are just and reasonable;[9] require utilities[10] to provide nondiscriminatory access to their poles, ducts, conduits, and rights-of-way to telecommunications carriers and cable television systems (collectively, attachers);[11] provide procedures for resolving pole attachment complaints;[12] govern pole attachment rates for attachers;[13] and allocate make-ready costs among attachers and utilities.[14] The Act exempts from our jurisdiction those pole attachments in states that have elected to regulate pole attachments themselves.[15] Pole attachments in thirty states are currently governed by our rules.

6. Our rules take into account the many purposes of utility poles and how an individual pole is divided into various "spaces" for specific uses.[16] Utility poles often accommodate equipment used to

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[7] 47 U.S.C. § 253(a).

[8] *See* 47 U.S.C. § 224(b)(1). The placement and use of utility infrastructure also are governed by local, state, and federal safety rules, as well as by industry standards such as those set forth in the National Electric Safety Code (NESC). The NESC is a set of standards published by the Institute of Electrical and Electronics Engineers (IEEE) for the safe installation, operation, and maintenance of electric power and communications systems. *2017 National Electrical Safety Code (C2-2017)*, IEEE (2017).

[9] 47 U.S.C. §§ 224(b)(1)-(2).

[10] The Act defines a utility as a "local exchange carrier or an electric, gas, water, steam, or other public utility, . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1). However, for purposes of pole attachments, a utility does not include any railroad, any cooperatively-organized entity, or any entity owned by a federal or state government. *Id.*

[11] 47 U.S.C. § 224(f). The Act allows utilities that provide electric service to deny access to their poles, ducts, conduits, or rights-of-way because of "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." *Id.* at § 224(f)(2).

[12] 47 U.S.C. § 224(b)(1).

[13] 47 U.S.C. §§ 224(d)-(e).

[14] 47 U.S.C. §§ 224(b), (h)-(i).

[15] *See* 47 U.S.C. § 224(c). To date, twenty states and the District of Columbia have opted out of Commission regulation of pole attachments in their jurisdictions. *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541, 5541-42 (WCB 2010).

[16] 47 CFR §§ 1.1411(e), (i); 1.1412(a). The citations to the rules throughout this Order and Appendix A reflect the renumbering of Part 1, subpart J of Title 47 of the Code of Federal Regulations as adopted by the Commission in

provide a variety of services, including electric power, telephone, cable, wireline broadband, and wireless.[17] Accommodating a variety of services on the same pole benefits the public by minimizing "unnecessary and costly duplication of plant for all pole users."[18] Different vertical portions of the pole serve different functions.[19] The bottom of the pole generally is unusable for most types of attachments, although providers of wireless services and facilities sometimes attach equipment associated with distributed antenna systems (DAS) and other small wireless facilities to the portion of the pole near the ground.[20] Above that, the lower usable space on a pole—the "communications space"—houses low-voltage communications equipment, including fiber, coaxial cable, and copper wiring.[21] The topmost portion of the pole, the "electric space," houses high-voltage electrical equipment.[22] Work in the electric space generally is considered more dangerous than work in the communications space.[23] Historically, communications equipment attachers used only the communications space; however, mobile wireless providers increasingly are seeking access to areas above the communications space, including the electric space, to attach pole-top small wireless facilities.[24]

7. When a new attacher seeks access to a pole, it is necessary to evaluate whether adding the attachment will be safe and whether there is room for it.[25] In many cases, existing attachments must be moved to make room for the new attachment. In some cases, it is necessary to install a larger pole to accommodate a new attachment.[26] Our current rules, adopted in 2011, prescribe a multi-stage process for placing new attachments on utility poles:

- Application Review and Survey. The new attacher applies to the utility for pole access. Once the application is complete, the utility has 45 days in which to make a decision on the application and complete any surveys to determine whether and where attachment is feasible

(Continued from previous page)
July 2018. *See Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, EB Docket No. 17-245, Report and Order, FCC 18-96, Appx. A (July 18, 2018).

[17] *See* Letter from H. Russell Frisby, Jr., Counsel to Edison Electric Institute (EEI), to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. Duke Energy, *What's on an electric utility pole?* (filed Oct. 3, 2017) (EEI Oct. 3, 2017 Wireline *Ex Parte* Letter).

[18] S. REP. NO. 95-580, at 13 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 109, 121.

[19] *See* Florida Public Service Commission, *What's on a Utility Pole?* (2018), http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole (last visited June 27, 2018); *see also* EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. *Pole Attachments: Safety and Reliability*, at 4.

[20] *See* EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. *Pole Attachments: Safety and Reliability*; Crown Castle Wireline NPRM Comments at 5.

[21] *See* Florida Public Service Commission, *What's on a Utility Pole?* (2018), http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole (last visited June 27, 2018); *see also* EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. Duke Energy, *What's on an electric utility pole?*

[22] *See* Florida Public Service Commission, *What's on a Utility Pole?* (2018), http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole (last visited June 27, 2018); *see also* EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. Duke Energy, *What's on an electric utility pole?*

[23] *See* Coalition of Concerned Utilities (CCU) Wireline NPRM Comments at 28-29; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; EEI Wireline NPRM Reply at 23; Alliant Energy Corp. et al. (Midwest Electric Utilities) Wireline NPRM Reply at 25-28.

[24] *See* Crown Castle Wireline NPRM Comments at 18.

[25] *See* American Cable Association (ACA) Wireline NPRM Reply at 18; Ameren et al. (Electric Utilities) Wireline NPRM Reply at 17.

[26] *See* Google Fiber Wireline NPRM Comments at 7.

and what make-ready is required.[27] The utility may take an additional 15 days for large orders.[28] Our current rules allow new attachers in the communications space to perform surveys when the utility does not meet its deadline.[29]

- Estimate. The utility must provide an estimate of all make-ready charges within 14 days of receiving the results of the survey.[30]

- Attacher Acceptance. The new attacher has 14 days or until withdrawal of the estimate by the utility, whichever is later, to approve the estimate and provide payment.[31]

- Make-Ready. The existing attachers are required to prepare the pole within 60 days of receiving notice from the utility for attachments in the communications space (105 days in the case of larger orders) or 90 days for attachments above the communications space (135 days in the case of larger orders).[32] A utility may take 15 additional days after the make-ready period ends to complete make-ready itself.[33] Our current rules allow new attachers in the communications space to perform make-ready work themselves using a utility-approved contractor when the utility or existing attachers do not meet their deadlines.[34]

8. A number of commenters allege that pole attachment delays and the high costs of attaching to poles have deterred them from deploying broadband.[35] For example, Nittany Media's CTO explains that "[o]ver the past 4 years I have seen a tremendous increase in the costs of fiber construction. Although material and labor costs have remained stable and even in some cases become more efficient, pole attachment costs have increased exponentially."[36] Commenters in particular point to the make-ready stage of our current timeline as the largest source of high costs and delays in the pole attachment process.[37] In response to these types of concerns and to promote broadband deployment, two localities and one

[27] 47 CFR § 1.1411(c).

[28] 47 CFR §§ 1.1411(c), (g).

[29] 47 CFR § 1.1411(i).

[30] 47 CFR § 1.1411(d).

[31] 47 CFR §§ 1.1411(d)(1)-(2).

[32] 47 CFR §§ 1.1411(e)(1)(ii), (e)(2)(ii). A "larger order" is "the lesser of 3000 poles or 5 percent of the utility's poles in a state." 47 CFR § 1.1411(g)(3).

[33] 47 CFR §§ 1.1411(e)(1)(iv), (e)(2)(iv).

[34] 47 CFR § 1.1411(e)(1)(v).

[35] *See, e.g.*, Crown Castle Wireline NPRM Comments at 4-10; Google Fiber Wireline NPRM Comments at 2; Lightower Wireline NPRM Comments at I, 2; Mobilitie Wireline NPRM Comments at 8-11; *see also* INCOMPAS Wireline NPRM Comments at 6 ("The existing rules, while adopted with the right objectives, are insufficient for modern infrastructure."); Fiber Broadband Association (FBA) Wireline NPRM Comments at 4 ("Yet, six years after the *2011 Pole Attachment Order*, the FBA's service provider members still find that substantial problems persist in seeking access to poles. In too many instances, pole owners simply ignore the Commission's mandated timelines.").

[36] Letter from Michael H. Hain, CTO, Nittany Media, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed June 15, 2017). *See also* FBA Wireline NPRM Comments at 3 (stating that FBA "encourages the Commission to adopt reforms that will improve efficiency by addressing practices of many pole owners and existing attachers that delay and increase the cost of pole access"); Google Fiber Wireline NPRM Comments at 2 ("[S]taging make-ready in sequential 60-day notice periods . . . results in delay and increased costs . . . These problems, in turn, hinder—and may even foreclose entirely—the deployment of new networks and expansion of broadband service."); Lightower Wireline NPRM Comments at i ("Lightower has experienced barriers [to deploying wired broadband infrastructure] due to a lack of cost transparency.").

[37] *See* Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Nov. 13, 2017) (Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter), at

state—Louisville, Kentucky;[38] Nashville, Tennessee;[39] and the State of West Virginia[40]—adopted their own versions of OTMR where the new attacher performs all the required make-ready work.

9. As part of its commitment to speeding broadband deployment, the Commission established the BDAC in January 2017 to advise on how best to remove barriers to broadband deployment, such as delays in new pole attachments.[41] Earlier this year, the BDAC recommended that the Commission take a series of actions to promote competitive access to broadband infrastructure, including adopting OTMR for simple attachments in the communications space and making incremental improvements to the Commission's pole attachment process for complex and non-communications space attachments.[42]

10. We are also committed to using all the tools at our disposal to speed the restoration of infrastructure after disasters. Disasters such as the 2017 hurricanes can have debilitating effects on communications networks,[43] and one of our top priorities is assisting in the rebuilding of network infrastructure in the wake of such events.[44] We have also made clear our commitment to ensuring that our own federal regulations do not impede restoration efforts.[45]

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Attach. Nicholas Vantzelfde, Managing Partner, Communications Media Advisors, LLC, *Perspectives on the Current State of Make Ready and the Potential Impact of a One-Touch Make-Ready Policy*, at 4 (2017) (CMA Report) ("Expediting the make-ready process can reduce payback periods and thus spur increased investment for next-generation networks. The current process is inefficient; impeding broadband deployment and creating additional burdens for pole owners."); Letter from Karen Reidy, Vice President, Regulatory Affairs, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Dec. 20, 2017) ("[T]he current [make-ready] approach—with its sequential make-ready performed by different parties—results in substantial delays, lack of predictability, higher costs, and reduced fiber network expansion."); CCU Wireline NPRM Comments at 11; Google Fiber Wireline NPRM Comments at 9; BDAC January 2018 Recommendations at 19-20.

[38] *See* Louisville Ordinance No. O-427-15, § 116.72(D)(2). In March 2017, the United States District Court for the Western District of Kentucky allowed several challenges to the Louisville OTMR ordinance to proceed. *See Insight Kentucky Partners II, L.P. v. Louisville/Jefferson Cty. Metro Gov't*, 2017 WL 1193065 (W.D. Ky. Aug. 16, 2017).

[39] *See* Nashville Ordinance No. BL2016-343, § 13.18.020 (A). In November 2017, the United States District Court for the Middle District of Tennessee found that the Nashville OTMR ordinance was preempted by federal law and permanently enjoined the City of Nashville and Davidson County, TN from applying the ordinance to private parties. *See BellSouth Telecomm., LLC. v. Metro. Gov't of Nashville and Davidson Cty., Tenn.*, 2017 WL 5641145 (M.D. Tenn. Nov. 21, 2017).

[40] *See* W. VA. Code § 31G (2017). In June 2018, after both West Virginia and Frontier, which challenged the West Virginia OTMR statute, agreed that the Commission's pole attachment rules preempt West Virginia OTMR statute, the United States District Court for the Southern District of West Virginia granted Frontier's motion for summary judgment and permanently enjoined the West Virginia OTMR statute. *See Frontier West Virginia Inc., et al. v. Gov. Jim Justice II, et al., West Virginia Cable Telecomm. Ass'n, Inc. v. James C. Justice, Jr., et al.*, Civil Action Nos. 2:17-cw-03560, 2:17-cv-03609, Memorandum Opinion and Order (S.D.W. Va. June 14, 2018).

[41] *See* FCC, Broadband Deployment Advisory Committee, Organization, Charter, https://www.fcc.gov/sites/default/files/bdac-charter.pdf (last visited June 28, 2018).

[42] *See* BDAC January 2018 Recommendations at 19, 21.

[43] *See* Letter from Sandra E. Torres López, Chairwoman, Puerto Rico Telecommunications Regulatory Board, to Ajit Pai, Chairman, FCC, WC Docket No. 10-90, at 1 (filed Dec. 13, 2017) (estimating that Hurricanes Irma and Maria caused approximately $1.5 billion of damage to Puerto Rico's communications network).

[44] *See, e.g.*, *Uniendo a Puerto Rico Fund and the Connect USVI Fund*, WC Docket No. 18-143, et al., Order and Notice of Proposed Rulemaking, FCC 18-57 (May 29, 2018) (establishing the Uniendo a Puerto Rico Fund and the Connect USVI Fund to rebuild, improve and expand voice and broadband networks in Puerto Rico and the U.S. Virgin Islands).

[45] *See, e.g.*, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128, 11157-59, paras. 71-78 (2017) (*Wireline Infrastructure Order*); *Accelerating Wireline Broadband*

11. The Commission initiated this proceeding on April 20, 2017 by adopting a *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment* seeking comment on a number of potential regulatory reforms to our rules and procedures to accelerate deployment of next-generation networks and services.[46] The Commission sought comment on, among other things, speeding the pole attachment timeline;[47] alternative pole attachment processes, including OTMR;[48] and creating a presumption that the incumbent LEC attachers pay the same pole attachment rate as other telecommunications attachers.[49] The Commission also sought comment on whether moratoria on the deployment of telecommunications facilities are inconsistent with section 253(a) of the Act.[50]

12. On November 16, 2017, the Commission adopted a *Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking* enacting reforms to better enable providers to invest in next generation networks.[51] Among other proposals, the *Further Notice of Proposed Rulemaking* sought comment on the treatment of overlashing by utilities[52] and what actions the Commission can take to facilitate the rebuilding and repairing of broadband infrastructure after natural disasters.[53]

III. REPORT AND ORDER

13. Based on the record in this proceeding, we amend our pole attachment rules to facilitate faster, more efficient broadband deployment. Further, we address state and local legal barriers to rebuilding networks after disasters. But, at the outset, we emphasize that parties are welcome to reach bargained solutions that differ from our rules.[54] Our rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and encourage parties to seek superior solutions for themselves through voluntary privately-negotiated solutions.[55] In addition, we recognize that some states will seek to build on the rules that we adopt herein in order to serve the particular needs of their communities. As such, nothing here should be construed as

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Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Second Report and Order, FCC 18-74, paras. 58-59 (June 8, 2018) (*Second Wireline Infrastructure Order*) (streamlining network change procedures where *force majeure* event necessitates a network change).

[46] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (*Wireline Infrastructure Notice*).

[47] *Id.* at 3268-70, paras. 7-12.

[48] *Id.* at 3270-76, paras. 13-31.

[49] *Id.* at 3279-80, paras. 44-46.

[50] *Id.* at 3297, para. 102.

[51] *See generally Wireline Infrastructure Order*.

[52] *See id.* at 11188-89, paras. 160-62.

[53] *See id.* at 11194, paras. 178-79.

[54] *See* CCU Wireline NPRM Comments at 18 (encouraging that "utilities and attachers be free to agree on their own one-touch make-ready process").

[55] We therefore reject a clarification requested by Crown Castle that would limit the scope of mutually bargained-for attachment solutions. *See* Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at 4 (filed July 25, 2018) (Crown Castle July 25, 2018 Wireline *Ex Parte* Letter) (requesting that the "Commission should clarify that its rules serve as a floor, and that just as state requirements must not conflict with the new rules, negotiated agreements must incorporate the new rules as a baseline and build upon, rather than replace, them"); *cf.* Letter from Mindy E. Hartstein, Director, Hawaiian Electric Co., Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed July 25, 2018) (Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter) ("[W]here parties have reached bargained solutions that differ from the Draft Order . . . the terms of a collaborative, negotiated agreement control.").

altering the ability of a state to exercise reverse preemption of our pole attachment rules.[56]

A. Speeding Access to Poles

14. Most fundamentally, we amend our rules to allow new attachers[57] with simple wireline attachments in the communications space to elect an OTMR-based pole attachment process that places them in control of the work necessary to attach their equipment, and we improve our existing attachment process for other, more complex attachments. We summarize these changes, as well as our prior rules, in the table below:[58]

[56] *See* 47 U.S.C. § 224(c).

[57] We define a new attacher as a cable television system or telecommunications carrier requesting to attach new or upgraded facilities (e.g., equipment or lines) to a pole owned or controlled by a utility. *See infra* Appx. A, 47 CFR § 1.1411(a)(2). Therefore, new attachers include existing attachers that need to upgrade their facilities with new attachments.

[58] This table is a summary for informational purposes only, and it sacrifices nuance for brevity. The text of this *Report and Order* (excluding the table) and the rules in Appendix A set forth our binding determinations.

Phase	Prior Rules	OTMR-Based Regime	Enhanced Non-OTMR Regime
Review of Application for Completeness	Vague definition of complete application can lead to delays. No timeline for utility to determine whether application is complete. *47 CFR § 1.1411(c)*	Revised definition of complete application makes it clear what must be included in application. A utility has 10 business days to determine whether an application is complete; the utility must specify any deficiencies and has limited time to review resubmitted applications. *Appx. A §§ 1.1411(c)(1), (j)(1)(ii)*	
Review of Whether to Grant Complete Application; Survey	The utility has 45 days to decide whether to grant a complete application and to complete any surveys. The utility has an additional 15 days for large orders. *47 CFR § 1.1411(c)*	The utility has 15 days to decide whether to grant a complete application. The new attacher conducts the survey and determines its timing. *Appx. A § 1.1411(j)(2), (j)(3)*	Largely same as prior rules, except that the utility must take certain steps to facilitate survey participation by new and existing attachers. *Appx. A § 1.1411(c)(3)*
Estimate	The utility must provide an estimate of the make-ready charges within 14 days of receiving the survey results. *47 CFR § 1.1411(d)*	N/A – no estimate stage	Same as prior rules, except the estimate must detail basis for charges. *Appx. A § 1.1411(d)*
Attacher Acceptance	The attacher has 14 days or until withdrawal of the estimate by the utility, whichever is later, to approve the estimate and provide payment. *47 CFR § 1.1411(d)(i)-(ii)*	N/A – no acceptance stage	Same as prior rules. *Appx. A § 1.1411(d)(2)*
Make-Ready	The existing attachers must prepare the pole within 60 days of receiving notice from the utility in the communications space (105 days for larger orders) or 90 days in the above the communications space (135 days for larger orders). A utility may take 15 additional days after the make-ready period to complete make-ready itself. *47 CFR § 1.1411(e)(1)(ii), (e)(1)(iv), (e)(2)(ii), (e)(2)(iv)*	The new attacher performs all work in as little as one trip. The new attacher must provide 15 days' notice to existing attachers before commencing work, and this notice period may run concurrently with the utility's review of whether to grant the application. The new attacher must notify existing attachers within 15 days after completion of work on a pole so that existing attachers can inspect the work. *Appx. A § 1.1411(j)(4)*	The existing attachers prepare the pole within 30 days in the communications space (75 days for larger orders) or 90 days above the communications space (135 days for larger orders). A utility may take 15 additional days after the make-ready period to complete make-ready itself for work outside the communications space. *Appx. A § 1.1411(e)(1)(ii), (e)(2)(ii), (e)(2)(iv)*
Self-Help Remedy	New attachers in the communications space may perform work themselves when the deadlines are not met. *47 CFR § 1.1411(i)*	N/A	New attachers in any part of the pole may perform work themselves when the deadlines are not met. We take steps to strengthen the self-help remedy. *Appx. A § 1.1411(i)(2)*

15. No matter the attachment process, we encourage all parties to work cooperatively to meet deadlines, perform work safely, and address any problems expeditiously. Utilities, new attachers, and

existing attachers agree that cooperation among the parties works best to make the pole attachment process proceed smoothly and safely.[59]

1. New OTMR-Based Pole Attachment Process

16. We adopt a new pole attachment process that new attachers can elect that places them in control of the surveys, notices, and make-ready work necessary to attach their equipment to utility poles. With OTMR as the centerpiece of this new pole attachment regime, new attachers will save considerable time in gaining access to poles (with accelerated deadlines for application review, surveys, and make-ready work) and will save substantial costs with one party (rather than multiple parties) doing the work to prepare poles for new attachments. A better aligning of incentives for quicker and less expensive attachments will serve the public interest through greater broadband deployment and competitive entry.

a. Applicability and Merits of OTMR Regime

17. We adopt the BDAC's recommendation and amend our rules to allow new attachers to elect OTMR for simple make-ready for wireline attachments in the communications space on a pole.[60] We define simple make-ready as the BDAC does, i.e., make-ready where "existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment."[61] Commenters state that simple make-ready work does not raise the same level of safety concerns as complex make-ready or work above the communications space on a pole.[62] There is substantial support in the record, both from utilities and attachers, for allowing OTMR for simple make-ready;[63] and because this option will apply to the substantial majority of pole

[59] *See, e.g.*, CCU Wireline NPRM Comments at 3-4; Midwest Electric Utilities Wireline NPRM Comments at 18; CenterPoint Energy Houston Electric, LLC et al. (POWER Coalition) Wireline NPRM Comments at 9-10; AT&T Wireline NPRM Reply at 4 n.4.

[60] *See* BDAC January 2018 Recommendations at 21.

[61] *Id.* at 20.

[62] *See, e.g.*, ExteNet Systems, Inc. (ExteNet) Wireline & Wireless NPRM Comments at 54-55; FBA Wireline NPRM Comments at 5 n.12, 8; AT&T Wireline NPRM Reply at 8-9; Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed June 4, 2018) (Google Fiber June 4, 2018 Wireline *Ex Parte* Letter); Letter from Charles A. Zdebski and Brett H. Freedson, Counsel to CenterPoint Energy Houston Electric, LLC and Florida Power & Light Co., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Feb. 13, 2018) (CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter); Letter from Eben M. Wyman, Principal, Power & Communication Contractors Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at [2] (filed Nov. 30, 2017) (PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter).

[63] *See* CCU Wireline NPRM Comments at 17-18; Computing Technology Industry Association (COMPTIA) Wireline NPRM Comments at 2-3; EEI Wireline NPRM Comments at 32; Electric Utilities Wireline NPRM Comments at 7; FBA Wireline NPRM Comments at 5; Level 3 Wireline NPRM Comments at 2-3; POWER Coalition Wireline NPRM Comments at 10; Utilities Technology Council (UTC) Wireline NPRM Reply at 17-21; AT&T Wireline NPRM Reply at 7-8; CPS Energy Wireline NPRM Reply at 8-9; Google Fiber Wireline NPRM Reply at 1-2; Verizon Wireline NPRM Reply at 4-9; Letter from Angie Kronenberg, Chief Advocate & General Counsel, INCOMPAS, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84 et al., at Attach. 3 (filed Feb. 13, 2018) (INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter); Letter from Brett Heather Freedson, Counsel to CenterPoint Energy Houston Electric, LLC et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, Attach. 1 (filed May 25, 2018) (CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter); Letter from Debbie Goldman, Telecommunications Policy Director, Communications Workers of America, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Feb. 6, 2018) (CWA Feb. 6, 2018 Wireline *Ex Parte* Letter); Letter from Lonnie R. Stephenson, International President, IBEW, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Jan. 30, 2018) (IBEW Jan. 30, 2018 Wireline *Ex Parte* Letter); Letter from Lisa R.

attachment projects,[64] it will speed broadband deployment. We also follow the BDAC's recommendation and do not provide an OTMR option for more complex projects in the communications space or for any projects above the communications space at this time.[65]

18. Our new rules define "complex" make-ready, as the BDAC does, as "[t]ransfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments."[66] We consider "[a]ny and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers[] . . . to be . . . complex."[67] We agree with Verizon that the term "wireless activities" does not include a wireless attacher's work on its wireline backhaul facilities, which is no different than wireline work done by other attachers.[68] While the BDAC recommendation did not explicitly address the treatment of pole replacements, we interpret the definition of complex make-ready to include all pole replacements as well. We agree with commenters that pole replacements are usually not simple or routine and are more likely to cause service outages or facilities damage,[69] and thus we conclude that they should fall into the complex category of work.

19. There is substantial support from commenters in the record for not using OTMR for complex make-ready work at this time.[70] We agree that we should exclude these more challenging

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Youngers, Executive Director, Fiber Broadband Association (FBA), to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 20, 2018) (FBA July 20, 2018 Wireline *Ex Parte* Letter).

[64] According to AT&T, approximately 80 percent of current make-ready work is "simple." *See* Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. *Accelerating Wireline Broadband Deployment: Presentation – Pole Attachment Process with OTMR* at 2 (filed Jan. 22, 2018). *See also* Letter from Eric B. Langley, Counsel to Electric Utilities, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Mar. 19, 2018) (Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter) (stating that "more than 80[] [percent] of make-ready poles require communications space make-ready only"). We recognize that in the future, it is likely that less than 80 percent of make-ready work will be eligible for OTMR as wireless carriers ramp up non-simple 5G deployments. *See, e.g.*, AT&T Wireline NPRM Comments at 8 (stating that "[i]ndustry-wide 5G network deployment is expected to involve 10 to 100 times more antenna locations than 4G or 3G."); EEI Wireline NPRM Comments at 29 (asserting that "[i]t can be expected that an increase in the volume of wireless attachment requests due to 5G deployments will exacerbate pole attachment delays due to the complex nature of the installations and the number of poles involved.").

[65] *See* BDAC January 2018 Recommendations at 21-22, 27.

[66] *Id.* at 20.

[67] *Id.* We deny Crown Castle's request to exclude wireless activity in the communications space from the definition of complex make-ready. *See* Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 4-5. We find that the BDAC carefully analyzed the impact of wireless pole attachment work and correctly concluded that such work is complex. *See* BDAC January 2018 Recommendations at 19-23, 27, 29-31.

[68] Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 6-7 (filed July 26, 2018) (Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter). Consistent with the definition of "complex," a wireless attacher's work on its wireline facilities is complex if is the work reasonably likely to cause a service outage or facility damage.

[69] *See* Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Apr. 12, 2018) (Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter); Midwest Electric Utilities Wireline NPRM Reply at 25-26; Puget Sound Energy Wireline NPRM Comments at 7-8.

[70] *See, e.g.*, Charter Communications, Inc. (Charter) Wireline & Wireless NPRM Comments at 55; FBA Wireline NPRM Comments at 5 n.12; Google Fiber Wireline NPRM Comments at 5-6; Level 3 Wireline NPRM Comments at 3; POWER Coalition Wireline NPRM Comments at 11; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; Letter from Frank S. Simone, Vice President-Federal Regulatory, AT&T, and Debbie Goldman, Telecommunications Policy Director, Communications Workers of America, to Marlene H. Dortch, Secretary, FCC,

attachments from OTMR at this time to minimize the likelihood and impact of service disruption. In particular, cutting or splicing of existing wires on a pole has the heightened potential to result in a network outage.[71] We also recognize that wireless attachments involve unique physical and safety complications that existing attachers must consider (e.g., wireless configurations cover multiple areas on a pole, considerably more equipment is involved, RF impacts must be analyzed), thus increasing the challenges of using an accelerated, single-party process at this time.[72]

20. The new OTMR process also will not be available for work above the communications space, including the electric space.[73] Many utility commenters argue that work above the communications space, which mainly involves wireless attachments, frequently impacts electrical facilities and that such work should fall to the utilities to manage and complete.[74] We recognize that work above the communications space may be more dangerous for workers and the public and that impacts of electric outages are especially severe.[75] Therefore, we find at this time that the value of control by existing attachers and utilities over infrastructure above the communications space outweighs the benefits of allowing OTMR for these attachments. Based on the foregoing analysis, we decline Verizon's request to allow OTMR for complex make-ready and work above the communications space.[76] We recognize that by not providing an OTMR option above the communications space for the time being, we are not permitting OTMR as an option for small cell pole-top attachments necessary for 5G deployment. We take this approach because there is broad agreement that more complex projects and all projects above the communications space may raise substantial safety and continuity of service concerns.[77] At the same time, we adopt rules aimed at mitigating the safety and reliability concerns about the OTMR process we adopt today, and we are optimistic that once parties have more experience with OTMR, either they will by contract or we will by rule expand the reach of OTMR.[78] In the meantime, we find that the benefits of moving incrementally by providing a right to elect OTMR only in the communications space and only for simple wireline projects outweigh the costs.

21. We agree with commenters that argue that OTMR is substantially more efficient for new attachers, current attachers, utilities, and the public than the current sequential make-ready approach set

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WC Docket No. 17-84, GN Docket No. 17-83, at 1 (filed Jan. 16, 2018) (AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter); CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 1.

[71] *See* Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 2.

[72] *See* CCU Wireline NPRM Comments at 27-28; EEI Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28-29; American Public Power Association (APPA) Wireline NPRM Reply at 28.

[73] This accords with the BDAC's recommendations. *See* BDAC January 2018 Recommendations at 21-22.

[74] *See* CCU Wireline NPRM Comments at 28; EEI Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 6; Midwest Electric Utilities Wireline NPRM Comments at 30; POWER Coalition Wireline NPRM Comments at 11; Puget Sound Energy Wireline NPRM Comments at 5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; UTC Wireline NPRM Comments at 13.

[75] *See, e.g.*, CCU Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 8-9; Puget Sound Energy Wireline NPRM Comments at 4; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; EEI Wireline NPRM Reply at 20; Midwest Electric Utilities Wireline NPRM Reply at 24-26.

[76] *See* Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 4 (filed Mar. 8, 2018) (Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter).

[77] *See, e.g.*, CCU Wireline NPRM Comments at 28-29; EEI Wireline NPRM Comments at 28; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; Midwest Electric Utilities Wireline NPRM Reply at 25-26; APPA Wireline NPRM Reply at 28; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

[78] *See* FBA July 20, 2018 Wireline *Ex Parte* Letter at 3.

forth in our rules.[79] We agree with Next Centuries Cities that "OTMR facilitates deployment and reduces barriers to access, which leads to increased broadband deployment, decreased costs for consumers, and increased service speeds."[80] Indeed, Corning estimates that OTMR for wireline deployments could result in over eight million additional premises passed with fiber and about $12.6 billion in incremental fiber capital expenditures.[81] Although we do not at this time provide for an OTMR option for pole-top small cell deployment, OTMR will facilitate the rollout of 5G services because mobile services depend on wireline backhaul, and OTMR will expedite the buildout of wireline backhaul capacity.[82] Utilities such as Ameren and Oncor Electric agree that "[OTMR] in the communications space is the most effective vehicle for the Commission to make large strides in speeding the deployment of broadband."[83]

22. OTMR speeds broadband deployment by better aligning incentives than the current multi-party process.[84] It puts the parties most interested in efficient broadband deployment—new attachers—in a position to control the survey and make-ready processes.[85] The misaligned incentives in

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[79] *See* Computer & Communications Industry Association (CCIA) Wireline & Wireless NPRM Comments at 17; Letter from Christopher Shipley, Attorney and Policy Advisor, INCOMPAS, to Marlene Dortch, Secretary, FCC, Docket Nos. 17-84 et al., at 2 (filed Apr. 20, 2018) (INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter); Letter from Karen Reidy, Vice President, Regulatory, INCOMPAS, to Marlene Dortch, Secretary, FCC, Docket Nos. 17-84, at 1 (filed July 22, 2018) (INCOMPAS July 22, 2018 Wireline *Ex Parte* Letter); Letter from Kristine Laudadio Devine, Counsel to Google Fiber Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1-2 (filed Feb. 1, 2018) (Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter); Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2.

[80] Next Century Cities Wireline NPRM Comments at 7; *see also* Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1 ("OTMR will allow new attachers to pay for one trip to the pole instead of several, facilitate streamlined engagement of contractors, reduce duplication of effort, and eliminate the need to pay pass-through administrative costs of existing attachers—all factors that make deployment of new networks expensive and slow."); BDAC January 2018 Recommendations at 19, 31 ("The rules should provide pole attachers with a single-contractor, single-trip solution for simple make-ready work [in the communications space] which expedites make-ready work . . . ."); Corning Economic Study at 28-29 (asserting that under sequential make-ready, a pole with four attachers means four different parties are completing make-ready at four different times, "a wasteful process as each touch can add up to $450 in costs[]" for the new attacher); CCIA Wireline & Wireless NPRM Comments at 17 ("OTMR reduces the cost and [increases the] speed of deployment of new networks by maximizing efficiency"); CPS Energy Wireline NPRM Reply at 14 ("CPS Energy has worked with industry stakeholders to develop an innovative OTMR process that effectively and efficiently facilitates access to poles in a manner that protects the legitimate interests of CPS Energy, new entrants, and existing attaching entities."); INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2; Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 1 (OTMR "in the communications space is the most effective vehicle for the Commission to make large strides in speeding the deployment of broadband.").

[81] *See* Corning Economic Study at 5.

[82] *See* Google Fiber Wireline NPRM Comments at 4; Verizon Wireline NPRM Comments at 2.

[83] Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 1.

[84] *See* CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2 ("From the perspective of the IOUs, this common sense approach also appropriately places the burden of coordinating make-ready work on the communications entity that ultimately will benefit from use of the pole."); Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 2-3 (filed June 21, 2018) (Verizon June 21, 2018 Wireline *Ex Parte* Letter) (describing the buildout in West Virginia of wireline backhaul for Verizon's wireless network where it "faced multiple and extensive delays at every step of the make-ready process as existing attachers repeatedly missed deadlines. This meant that there were often teams of workers ready to complete the build who were sidelined as they waited for existing attachers to finish their respective moves. This not only delayed deployment significantly but also drove up our costs as we waited for the ability to build.").

[85] *See* CMA Report at 10, 12; COMPTIA Wireline NPRM Comments at 3; Electric Utilities Wireline NPRM Comments at 5; ExteNet Wireline & Wireless NPRM Comments at 54-55; Google Fiber Wireline NPRM

the current process often result in delay by current incumbents and utilities and high costs for new attachers as a result of the coordination of sequential make-ready work performed by different parties.[86] As Google Fiber points out, under the current process, if the lowest attacher on the pole (usually the incumbent LEC) moves its wires and equipment to accommodate a new attachment at the end of the existing 60-day make-ready period, then the entire pole attachment process is derailed because multiple existing attachers still have to perform make-ready on their equipment, despite the fact that the make-ready deadline contemplated in our rules has lapsed.[87] Because existing attachers lack an incentive to accommodate new attachers quickly, these delays in sequential attachment are all too common.[88] OTMR eliminates this problem.

23. We also agree with commenters that OTMR will benefit municipalities and their residents by reducing closures and disruptions of streets and sidewalks.[89] Unlike sequential make-ready work, which results in a series of trips to the affected poles by each of the attachers and repeated disruptions to vehicular traffic, OTMR's single trip to each affected pole will reduce the number of such disruptions.[90]

24. We also agree with those commenters that argue that an OTMR-based regime will benefit utilities.[91] The record indicates that many utilities that own poles are not comfortable with their current responsibilities for facilitating attachments in the communications space.[92] By shifting responsibilities from the utility to the new attacher to survey the affected poles, determine the make-ready work to be done, notify affected parties of the required make-ready work, and perform the make-ready work, our new

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Comments at 11; INCOMPAS Wireline NPRM Comments at 9-10; Next Century Cities Wireline NPRM Comments at 6; FBA July 20, 2018 Wireline *Ex Parte* Letter at 2; INCOMPAS July 22, 2018 Wireline *Ex Parte* Letter at 1.

[86] *See* CMA Report at 1-2, 6-8, 12; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter Attach. 2-3; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; *see also* CCU Wireline NPRM Comments at 11-12; Google Fiber Wireline NPRM Comments at 11-12; BDAC January 2018 Recommendations at 19-20.

[87] *See* Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3; *see also* Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at 3 (filed July 2, 2018) (Verizon July 2, 2018 Wireline *Ex Parte* Letter) (stating that "if make-ready is necessary to accommodate a new attachment that will be placed at the top of the communications space, then existing attachers will move their facilities downward proceeding sequentially from the lowest attacher in the communications space to the highest attacher in the communications space").

[88] *See* CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2 (stating that "a formidable disincentive exists for an incumbent communications attacher to cooperate in a process that ultimately will bring direct competition within its service footprint"); CCU Wireline NPRM Comments at 11; CMA Report at 1-2; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; BDAC January 2018 Recommendations at 19-20.

[89] *See* Electric Utilities Wireline NPRM Comments at 8; ExteNet Wireline & Wireless NPRM Comments at 54-55; FBA Wireline NPRM Comments at 6-8; INCOMPAS Wireline NPRM Comments at 9; Next Century Cities Wireline NPRM Comments at 6; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2; Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1-2.

[90] *See, e.g.*, ExteNet Wireline & Wireless NPRM Comments at 54-55; INCOMPAS Wireline NPRM Comments at 9; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

[91] *See, e.g.*, EEI Wireline NPRM Comments at 32; FBA Wireline NPRM Comments at 7; CPS Energy Wireline NPRM Reply at 6-7; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2.

[92] *See, e.g.*, EEI Wireline NPRM Comments at 21-22; Electric Utilities Wireline NPRM Comments at 5-6; POWER Coalition Wireline NPRM Comments at 11-12; UTC Wireline NPRM Reply at 18; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

OTMR regime will alleviate utilities of the burden of overseeing the process for most new attachments and of some of the costs of pole ownership.[93]

25. While giving the new attacher control drives the substantial benefits of an OTMR regime, it also raises concerns among some utilities and existing attachers. But we are not convinced by the arguments made by some commenters that OTMR will allow make-ready work to be performed by new attachers that lack adequate incentives to perform quality work, and therefore will increase the likelihood of harm to equipment integrity and public safety.[94] As other commenters explain, the new attacher and its chosen contractor have an incentive to perform quality work in order to limit risk, keep workers safe, and avoid tort liability for damages caused by substandard work.[95] We also adopt several safeguards herein that incentivize the new attacher and its contractor to perform work correctly.[96]

26. In addition, some commenters raise concerns that OTMR may not protect public safety "given the real prospects for serious injuries to [lineworkers] and the public[;]"[97] ensure "the reliability and security of the electric grid[;]"[98] and maintain the safety and reliability of existing attachers' facilities in order to prevent service outages.[99] We are not persuaded, however, by the anecdotal evidence offered in support of these commenters' concerns.[100] For example, Charter cites problems with third-party

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[93] *See* FBA Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 6-7; UTC Wireline NPRM Reply at 18; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2.

[94] *See* AT&T Wireline NPRM Comments at 16; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 20; EEI Wireline NPRM Comments at 31 ; Frontier Wireline NPRM Comments at 18; NCTA Wireline & Wireless NPRM Comments at 16; POWER Coalition Wireline NPRM Comments at 12; CCU Wireline NPRM Reply at 2-6; CenturyLink Wireline NPRM Reply at 15-16; Communications Workers of America (CWA) Wireline NPRM Reply at 1; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 2; Letter from Elizabeth Andrion, Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, GN Docket No. 17-83, at 1 (filed Feb. 5, 2018) (Charter Feb. 5, 2018 Wireline *Ex Parte* Letter); Letter from Brian Thorn, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 26, 2018).

[95] *See* CMA Report at 10-13; CPS Energy Wireline NPRM Reply at 10-11, 20, 23; Google Fiber Wireline NPRM Reply at 8; PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2.

[96] *See infra* sections III.A.1.b., III.A.1.c.

[97] EEI Wireline NPRM Comments at 12; *see also, e.g.*, BDAC January 2018 Recommendations at 19 ("The rules also should balance every community's interest in safety and continuous service."); AT&T Wireline NPRM Comments at 15 (stating that OTMR should preserve the safety of the public and workers).

[98] EEI Wireline NPRM Comments at 12; *see also, e.g.*, POWER Coalition Wireline NPRM Comments at 11 (stating that OTMR "must be limited to ensure that workers on the pole are not exposed to, and do not create unsafe conditions, or act in a manner that threatens the reliability of electric infrastructure"); CCU Wireline NPRM Reply at 2-3 ("Contractors in the electric space working under the direction of communications companies could injure themselves, create hazards to subsequent pole workers or the public at large, cause electrical outages or reliability concerns, or damage electric service facilities on the poles.").

[99] *See* CenturyLink Wireline NPRM Comments at 15; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 20; Frontier Wireline NPRM Comments at 18; NCTA Wireline & Wireless NPRM Comments at 15-16.

[100] *See e.g.*, AT&T Wireline NPRM Comments at 16 ("[U]napproved contractors have caused outages to AT&T wireline facilities in Tennessee, Kentucky, Florida, Georgia, and North Carolina. In 2016, AT&T suffered four outages in the Nashville area that were caused by an attacher's unapproved contractors' underground boring operations, one of which resulted in a major 911 outage."); Comcast Wireline & Wireless NPRM Comments at 21-22 ("Comcast has experienced this dynamic firsthand in Nashville, where, at last count, roughly 40 percent of the instances of make-ready work performed by Google Fiber contractors on Comcast's equipment violated requirements set forth in the National Electrical Safety Code[.]") (emphasis removed). NCTA's contention that we must rely on the anecdotal evidence in the record is misplaced. *See* NCTA July 18, 2018 Wireline Ex Parte Letter at 2 n.5. While the anecdotes raised in the record are important reminders of the need for new attachers to take great

contractor work on its equipment in San Antonio and in Kansas City.[101] CPS Energy contends, however that rather than being an indictment of OTMR, Charter's anecdotes instead show that an OTMR process can work as intended to speed broadband deployment without sacrificing safety or network integrity.[102] We agree. As CPS Energy points out, its OTMR process ensured that Charter received notice of the completion of make-ready and received adequate opportunity to perform a post-make-ready inspection.[103] It was during the inspection that Charter discovered problems with the make-ready work performed by the new attacher, at which point it had the opportunity to report any make-ready problems discovered during the inspection to the new attacher for remediation.[104] As CPS Energy notes, its OTMR process "worked as designed: Charter experienced no outages."[105] The process we adopt today assures these same safeguards.[106]

27. We are committed to ensuring that our approach to pole attachments preserves the safety of workers and the public and protects the integrity of existing electric and communications infrastructure. As an initial matter, we follow the BDAC's recommendation that all complex work and work above the communications space, where reliability and safety risks can be greater, will not be eligible for the new OTMR process.[107] In addition, we take several steps to promote coordination among the parties and ensure that new attachers perform work safely and reliably, thereby significantly mitigating the potential drawbacks of OTMR. First, we require new attachers to use a utility-approved contractor to perform OTMR work, except when the utility does not provide a list of approved contractors, in which case new attachers must use qualified contractors.[108] This requirement addresses existing attachers' apprehension about unfamiliar contractors working on their facilities[109] and also guards against delays that result when utilities fail to maintain approved contractor lists.[110] Second, we require new attachers to provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed[111] in order to

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care in protecting poles and the existing equipment on those poles while carrying out OTMR, these examples fail to demonstrate a pattern of new attacher carelessness with regard to third-party equipment, and contrary to NCTA's assertion, they do not constitute "ample evidence" of a "substantial number of incidents, including 911 outages." *Id*.

[101] *See* Charter Wireline & Wireless NPRM Comments at 39-44 (noting NESC violations discovered after OTMR performed on its equipment and after make-ready).

[102] *See* CPS Energy Wireline NPRM Reply at 23; *see also* Google Fiber June 4, 2018 Wireline *Ex Parte* Letter at 1 ("The mere fact that, at some point, errors were made by someone in performing make-ready work does not implicate the safety and efficiency of a well-structured OTMR regime.").

[103] CPS Energy Wireline NPRM Reply at 23.

[104] *See id.*; *see also* Google Fiber Wireline NPRM Reply at 12 n.24 (noting that in Nashville, "Comcast inspected the work before it was completed, and upon receiving notice of the violations, Google Fiber made corrections as required."); PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2 ("[W]e believe OTMR can be, and already is[,] performed in the field safely and efficiently.").

[105] CPS Energy Wireline NPRM Reply at 23.

[106] *See infra* section III.A.1.c.

[107] *See* BDAC January 2018 Recommendations at 21-22, 27.

[108] *See infra* section III.A.1.b. (describing the required contractor qualifications).

[109] *See, e.g.*, AT&T Wireline NPRM Comments at 16; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 21.

[110] *See* ACA Wireline NPRM Reply at 24-25.

[111] We decline to adopt NCTA and CWA's request that we find that new attachers should be responsible for any expenses associated with the costs incurred by existing attachers if they decide to double-check the work performed by the new attacher's contractors, including any post-make-ready inspections. *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2, 4; CWA July 26, 2018 Wireline *Ex Parte* Letter at 4. One of the core benefits of OTMR—cost savings—would be jeopardized if new attachers were responsible for the costs of doing the work itself and

encourage new attachers to perform quality work and to provide the utility and existing attachers an opportunity for oversight to protect safety and prevent equipment damage.[112] Third, we require new attachers to allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work to address existing attachers' and utilities' concerns that the new attacher's contractor may damage equipment or cause an outage without their knowledge and with no opportunity for prompt recourse.[113]

28. Finally, as an additional safeguard to prevent substantial service interruptions or danger to the public or workers, we allow existing attachers and utilities to file a petition with the Commission, to be considered on an expedited, adjudicatory case-by-case basis, requesting the suspension of a new attacher's OTMR privileges due to a pattern or practice of substandard, careless, or bad faith conduct when performing attachment work.[114] Such petition shall be placed on public notice, and the new attacher will have an opportunity to address the allegations of substandard, careless, or bad faith conduct and to explain how it plans to eliminate any such conduct in the future. In those instances where the Commission finds that suspension is warranted, the Commission will suspend the privileges for a length of time appropriate based on the conduct at issue, up to and including permanent suspension.[115]

29. We disagree with NCTA's contention that these safeguards do not adequately protect

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reimbursing the monitoring and inspection expenses of potentially multiple existing attachers. As other commenters explain, new attachers should not be responsible for "existing attachers' 'elective' costs – that is, their costs to attend the joint survey or be present when make-ready is performed." Letter from Kristine Laudadio Devine, Counsel to Google Fiber Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed July 23, 2018) (Google Fiber July 23, 2018 Wireline *Ex Parte* Letter); *see also* Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 7.

[112] *See* ACA Wireline NPRM Comments at 16-17; *see also, e.g.*, Charter Wireline & Wireless NPRM Comments at 39-44 ("Charter's experience has been that the work done under [a] one-touch policy is only as effective as the contractor performing the work and the quality and timeliness of the initial notice that Charter receives."); Comcast Wireline & Wireless NPRM Comments at 20-22; NCTA Wireline NPRM Comments at 15-16 ("[T]hese ordinances generally provide little or no advance notice to an existing provider that its facilities will be moved, little or no opportunity to perform the work even when notice is provided, no ability to select the contractor that performs the work on behalf of the new entrant, and limited ability to inspect and remediate (and no indemnification requirement) if the work is done poorly. The effect of these provisions is to jeopardize the safety and quality of service of existing providers."); AT&T Wireline NPRM Reply at 9 ("Under AT&T's OTMR proposal, existing attachers are provided 30 days after notice to make these determinations and to invoke their right to the existing 60-day make-ready period if complex make-ready is required."). We disagree with CenturyLink's assertion that giving an existing attacher the right to be present when make-ready is performed "does not meaningfully protect the interests of a pole owner or existing attacher" because "such uncompensated activities are unlikely to be a prudent use of a pole owner's or existing attacher's resources." Letter from Nicholas G. Alexander, Associate General Counsel, CenturyLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket 17-84, at 4-5 (filed July 23, 2018) (CenturyLink July 23, 2018 Wireline *Ex Parte* Letter). We find that if utilities and existing attachers have significant safety or network reliability concerns with an OTMR project, they will have an adequate incentive to exercise the right to be present.

[113] *See, e.g.*, Charter Wireline & Wireless NPRM Comments at 56-57; Comcast Wireline & Wireless NPRM Comments at 21-23; NCTA Wireline & Wireless NPRM Reply at 16-17.

[114] Such a petition right should address the concerns of existing attachers that claim they have no recourse if new attachers abuse the OTMR process. *See, e.g.*, NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2; CWA July 26, 2018 Wireline *Ex Parte* Letter at 4.

[115] We decline proposals to codify a complaint right under the pole attachment rules for existing attachers for violations of the OTMR rules. *See* Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2, 4 (filed July 18, 2018) (NCTA July 18, 2018 Wireline *Ex Parte* Letter); Letter from Debbie Goldman, Telecommunications Policy Director, Communications Workers of America, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed July 26, 2018) (CWA July 26, 2018 *Ex Parte* Letter). In addition to being able to file petitions as described above, existing attachers may file informal complaints regarding alleged OTMR rules violations.

existing attachers from substandard work performed on their equipment by third-party contractors.[116] At every step in the OTMR process, the safeguards we adopt give existing attachers an opportunity to monitor third-party work and raise any concerns they might have—either to the new attacher or to the utility. Far from being voiceless in their concerns about third-party work, as NCTA contends,[117] existing attachers can take their reservations about new attacher workmanship and contractor qualifications to the utility, which, as the pole owner and an attacher on the pole, has the incentive to act on such concerns.

30. We recognize that we cannot fully align the incentives of new attachers with those of existing attachers and utilities, but we find that the significant benefits of faster, cheaper, more efficient broadband deployment from this new OTMR process outweigh any costs that remain for most pole attachments. We expect the OTMR regime we adopt today to speed broadband deployment without substantial service interruptions or danger to the public or workers. To the extent that it exceeds our expectations, we may consider expanding the availability of our OTMR process where it is safe to do so.[118] Conversely, if new attachers fail to prevent physical harm or outages, we will not hesitate to revisit whether to maintain an OTMR option.

31. We note that even where an attachment qualifies for our new OTMR process, there may be instances where a new attacher prefers to use our existing pole attachment timeline because, for instance, the new attacher prefers a process where existing attachers are responsible for moving their own equipment rather than the new attacher.[119] Therefore, we permit new attachers to elect our existing pole attachment regime (as modified herein) rather than the new OTMR process.[120]

32. *Rejecting Non-OTMR Solutions.* We reject proposals advanced in the record to reform the pole attachment timeline—specifically, "right-touch, make-ready"[121] and NCTA's "Accelerated and Safe Access to Poles" ("ASAP") proposal—which merely modify the current framework rather than using OTMR.[122] We find that compared to our OTMR approach, these approaches have much more limited benefits because they rely on diffuse responsibility among parties that lack the new attacher's incentive to ensure that the work is done quickly, cost-effectively, and properly.[123] Moreover, they would

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[116] *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2-3.

[117] *Id*.

[118] Corning estimates that applying OTMR to 5G attachments would result in an additional 5.9 million incremental premises passed and about $8.8 billion in associated capital expenditures. Corning Economic Study at 5-6.

[119] *See* Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2 ("Attachers who do not elect to use OTMR would be able to continue to use the existing pole attachment timeframes and processes.").

[120] We reject requests that OTMR should be made a part of our existing pole attachment process. *See* Letter from Phillip Moeller, Executive Vice President, EEI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 26, 2018) (EEI July 26, 2018 Wireline *Ex Parte* Letter) ("By creating a separate OTMR process, the Commission would make the pole attachment process administratively burdensome and overly complicated which may eliminate some of the intended benefits of this policy."); Letter of David D. Rines, Counsel to Xcel Energy Services Inc. and Alliant Energy Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 26, 2018) (Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter). Because OTMR is an elective new process with its own requirements and obligations, we find that it requires distinct procedures and rules from our existing pole attachment procedures.

[121] *See* Comcast Wireline & Wireless NPRM Reply at 10-11 (proposing right-touch, make-ready, which allows existing attachers to perform make-ready sequentially within a designated time period and relies on fines and other penalties to encourage existing attachers to meet their deadlines).

[122] *See* Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Mar. 5, 2018) (NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter) (setting forth "ASAP" proposal, which shortens existing pole attachment timeline, particularly for utilities).

[123] *See* CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 3; Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed Mar. 14, 2018)

"do nothing to solve the numerous separate climbs and construction stoppages in the public-rights-of-way" resulting from sequential make-ready.[124] We also agree with AT&T that adopting a penalties-based approach is more likely to promote conflict than speedier deployment.[125]

33. We also agree with commenters that the ASAP proposal would put unrealistic time pressure on existing attachers and utilities.[126] For example, NCTA recommends: (1) an expedited 15-day period for utilities to both complete their review of pole attachment applications and conduct the appropriate pole surveys; and (2) a seven-day period for presenting the new attacher with an estimate of make-ready charges.[127] As the Electric Utilities explain, "NCTA's recent 'ASAP' proposal seeks to cut critical engineering review and addresses steps in the access process that are not part of the problem."[128] While a more compressed pole attachment timeline is appropriate for our OTMR regime because a single party controls the work, such timelines are not appropriate for a utility that has to coordinate work separately for both the new attacher and multiple existing attachers.[129]

34. *Legal Considerations.* We reject the contentions of certain cable commenters that OTMR "deprives an existing attacher of its statutory right to notice and an opportunity to add to or modify its own existing attachment before a pole is modified or altered and thus violates Section 224(h)."[130] Section 224(h) of the Act provides, in relevant part, that "[w]henever the owner of a pole . . . intends to modify or alter such pole . . . the owner shall provide written notification of such action to any entity that has obtained an attachment . . . so that such entity may have a reasonable opportunity to add to or modify its existing attachment."[131] We agree with Verizon that there is no statutory right under section 224(h) for an existing attacher to add to or modify its existing attachment when a new attacher is

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(Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter) ("By reducing inefficiency and waste in make-ready, adoption of OTMR will shift the core economic assumptions that inform deployment planning.").

[124] INCOMPAS Wireline NPRM Comments at 10; *see* CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2-3 ("[T]he ASAP Proposal would maintain the current sequence of duplicative visits to the pole[.]"); INCOMPAS July 22, 2018 Wireline *Ex Parte* Letter at 1.

[125] *See* AT&T Wireline NPRM Comments at 28 ("Adopting a penalties-based approach would only foment conflict, in litigation or otherwise, between new and existing attachers about who is to blame for the make-ready delay."); *see also* Crown Castle Wireline NPRM Comments at 25 (stating that "the administration, tracking, and enforcement of such fines would simply complicate matters"); Frontier Wireline NPRM Comments at 19 (stating that any significant penalties for failing to act in a certain timeframe would unfairly shift significant costs and risks to existing attachers and utilities); Verizon Wireline NPRM Reply at 9.

[126] *See* Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 3-4 (stating that "rather than enabling new attachers to help drive the application review, survey, and make-ready estimate process, the NCTA proposal would place increased burdens on pole owners and existing attachers to process applications and complete make-ready"); Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter at 4-5; Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

[127] NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter Attach. 1-2.

[128] Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2.

[129] *See* Verizon Wireline NPRM Comments at 9 ("With the one-touch make-ready alternative available to those who want to move more quickly, the Commission should leave intact the current process and timelines for those attachers who do not wish to take on the responsibility for conducting an engineering survey, estimating the necessary make-ready work, and doing one-touch make-ready through an approved contractor.")

[130] NCTA Wireline NPRM Reply at 20; *see also* Charter Wireline NPRM Comments at 45-46; Comcast Wireline NPRM Comments at 19; NCTA Wireline NPRM Comments at 19; Letter from Steve Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 12, 2018) (NCTA July 12, 2018 Wireline *Ex Parte* Letter).

[131] 47 U.S.C. § 224(h).

performing the make-ready.[132] On its face section 224(h) only applies to situations where the pole owner modifies or alters the pole, and thus is not implicated under the OTMR approach we adopt today: under our approach new attachers, not pole owners, perform OTMR work.[133]

35. We also find that OTMR does not constitute a government taking of existing attachers' property that requires just compensation under the Fifth Amendment, and we reject arguments to the contrary.[134] As an initial matter, OTMR is not a "permanent physical occupation" of an existing attacher's property;[135] at most it gives contractors of the new attacher a temporary right to move and rearrange attachments.[136] In such situations, where a regulation falls short of eliminating all economically beneficial use of the property at issue, courts apply the balancing test of *Penn Central Transportation Co.* [137] and evaluate the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with "distinct investment-backed expectations," and "the character of the government action."[138] Applying that test here makes clear that OTMR effects no taking. We are limiting the application of OTMR to simple work (i.e., where outages are not expected to occur) on wireline attachments in the communications space performed by qualified contractors, and we have taken steps to ensure that the OTMR process limits adverse effects on existing attachers' networks,[139] which means any economic impact on existing attachers and any interference with investment expectations will be limited. Furthermore, OTMR represents at most an incidental movement of existing attachers' property.[140] To the

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[132] Verizon Wireline NPRM Reply at 10.

[133] *See* 47 U.S.C. § 224(h). We reject NCTA's contention that our analysis here of section 224(h) somehow suggests that section 224 of the Act "provides new attachers a greater right to move existing facilities than the company that owns those facilities." NCTA July 18, 2018 Wireline *Ex Parte* Letter at 1-2. Rather, section 224 of the Act gives us broad authority to adopt appropriate pole attachment rules, including the OTMR regime set forth herein. *See infra* section III.E.

[134] *See* Charter Wireline & Wireless NPRM Comments at 49-50; Comcast Wireline & Wireless NPRM Comments at 22.

[135] *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1073 (1992). With respect to utilities' property interests, we recognize that our new OTMR regime grants access to utilities' poles, as our current regime does, via section 224(f)(1), which requires utilities to provide cable systems and telecommunications carriers with nondiscriminatory access to utilities' poles, ducts, and rights-of-way, and that Congress' grant of such mandatory access likely constitutes a government taking. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999). However, we agree with the Eleventh Circuit that by mandating that utilities receive just and reasonable rates for such access, the Act "is not facially unconstitutional under the Fifth Amendment, because, at least in most cases, it provides a constitutionally adequate process which ensures a utility does not suffer that taking without obtaining just compensation," *Id.* at 1338. Our OTMR regime changes the manner by which new attachers may invoke their mandatory access right under section 224(f)(1), but does not change the process by which new attachers must compensate utilities for such access.

[136] *See* Google Fiber Wireline NPRM Comments at 13-14.

[137] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

[138] *Penn Central Transp. Co.*, 438 U.S. at 124.

[139] *See infra* section III.A.1.c.(i), (v) (specifying that new attachers must provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed); section III.A.1.c.(vi) (mandating that new attachers allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work).

[140] *Penn Central Transp. Co.*, 438 U.S. at 124 (noting that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.") (citation omitted).

extent that movement affects existing attachers' or utilities' property, such impact is incidental and not our purpose, which is to promote broadband deployment and further the public interest.[141]

b. Contractor Selection Under the OTMR Process

36. We adopt rules requiring attachers using the OTMR process to use a utility-approved contractor if the utility makes available a list of qualified contractors authorized to perform surveys and simple make-ready work in the communications space. If there is no utility-approved list of contractors, we adopt rules that require OTMR attachers to use a contractor that meets key safety and reliability criteria, as recommended by the BDAC.[142] The record suggests that inconsistent updating of approved contractor lists by utilities, as well as a lack of uniform contractor qualification and selection standards, leads to delays when new attachers seek to exercise their self-help remedy and perform make-ready work on a pole.[143] At the same time, existing attachers are understandably apprehensive about having unfamiliar contractors work on and potentially damage their facilities.[144] The process we adopt addresses both of these problems by preventing delays in the engagement of contractors and by establishing clear minimum qualifications.[145]

37. *Utility-Approved Contractors.* We strongly encourage utilities to publicly maintain a list of approved contractors qualified to perform surveys and simple make-ready work as part of the OTMR process.[146] However we do not *require* utilities to do so. Utilities have a strong interest in protecting their equipment and many have indicated their interest in deciding which contractors can perform work on their poles.[147] At the same time, many utilities have indicated that they do not have the expertise to select contractors qualified to work in the communications space and would prefer to defer to the new attachers' choice of contractors.[148] Therefore, we give the utilities the option of maintaining a list of approved contractors for OTMR work but do not impose a mandate.

38. If the utility maintains a list, new and existing attachers may request that contractors meeting the qualifications set forth below be added to the utility's list and utilities may not unreasonably withhold consent to add a new contractor to the list. We adopt this requirement so that a utility that maintains a list does not have the ability to prevent deployment progress, which would be contrary to our goal in adopting OTMR. To be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability.[149]

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[141] *See id.*

[142] *See* BDAC January 2018 Recommendations at 26.

[143] *See* ACA Wireline NPRM Reply at 24-25; *see also* BDAC January 2018 Recommendations at 20.

[144] *See* AT&T Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 39; Comcast Wireline NPRM Comments at 21; *see also* BDAC January 2018 Recommendations at 27.

[145] *See* BDAC January 2018 Recommendations at 29-30.

[146] *See id.* at 28; CCU Wireline NPRM Comments at 17; CPS Energy Wireline NPRM Reply at 11; Verizon Wireline NPRM Reply at 7; Letter from Heather Burnett Gold, President & CEO, Fiber Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed Apr. 10, 2018) (FBA Apr. 10, 2018 Wireline *Ex Parte* Letter).

[147] *See*, *e.g.*, CCU Wireline NPRM Comments at 17; AT&T Wireline NPRM Reply at 10; Google Fiber Wireline NPRM Reply at 9; Verizon Wireline NPRM Reply at 7.

[148] *See* BDAC January 2018 Recommendations at 20, 26, 28; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 13; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

[149] *See* BDAC January 2018 Recommendations at 30 ("Either a pole owner or an existing attacher could reject a contractor proposed by an attacher before the twenty-five calendar day notice period expires, but only on established, declared transparent grounds uniformly applied on the basis of safety or reliability qualification failure."); CenterPoint Energy et al. May 25, 2018 Wireline Ex Parte Letter at 2 ("An IOU pole owner . . . may

39. To help ensure public and worker safety and the integrity of all parties' equipment, we conclude that any contractors that perform OTMR must meet certain minimum safety and reliability standards. We require utilities to ensure that contractors on the approved list meet the following minimum requirements, enumerated by the BDAC, for performing OTMR work: (1) follow published safety and operational guidelines of the utility, if available, but if unavailable, follow the National Electrical Safety Code (NESC) guidelines; (2) read and follow licensed-engineered pole designs for make-ready work, if required by the utility; (3) follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational Safety and Health Administration (OSHA) rules; (4) meet or exceed any uniformly applied and reasonable safety and reliability thresholds set and made available by the utility, e.g., the contractor cannot have a record of significant safety violations or worksite accidents;[150] and (5) be adequately insured or be able to establish an adequate performance bond for the make-ready work it will perform, including work it will perform on facilities owned by existing attachers.[151] These requirements collectively will materially reduce safety and reliability risks, as well as delays in the completion of pole attachments, by allowing one qualified contractor to perform all necessary make-ready work instead of having multiple contractors make multiple trips to the pole to perform this work.[152]

40. *New Attacher Selection of Contractors.* Where there is no utility-approved list of qualified contractors or no approved contractors available within a reasonable time period, then, consistent with the BDAC recommendation, new attachers proceeding with OTMR may use qualified contractors of their choosing.[153] The new attacher must certify to the utility[154] (either in the three-

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object to any proposed Communications Contractor . . . (i) if it is determined that such contractor does not satisfy the minimum qualification requirements proposed by the BDAC; or (ii) if it is determined that such contractor does not meet any minimum qualification requirement of the IOU pole owner related to safety or reliability, that is disclosed to the public, and that is evenhandedly applied; or (iii) if it determined, based on past record, that such contractor is not qualified to perform the work for which it seeks to be pre-approved.").

[150] We decline to adopt ACA's proposal that we combine prongs (1) and (4) by incorporating the relevant elements of (4) into (1) and deleting (4). *See* Letter from Thomas Cohen, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4, Attach. at 10 (filed July 23, 2018) (ACA July 23, 2018 Wireline *Ex Parte* Letter). The contractor qualification requirements we adopt conform to the BDAC's recommendations, which we find superior to ACA's proposal. ACA's proposal would limit the utility to imposing "commercially reasonable" published safety and operational guidelines, *see id.*, but we find it best promotes safety and reliability to preserve the utility's discretion to publish binding safety and operational guidelines of its choosing, consistent with the BDAC's recommendation. Additionally, while we recognize that prongs (1) and (4) overlap, we find any such overlap is warranted as extra protection to help ensure contractors do safe, reliable work.

[151] *See* BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2. We adopt NCTA's proposed clarification that the make-ready for which the contractor must be adequately insured or establish an adequate performance bond includes any work it will perform on facilities owned by existing attachers. *See* Letter from Jennifer McKee, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, Attach. at 9 (filed July 25, 2018) (NCTA July 25, 2018 Wireline *Ex Parte* Letter). Through this change, we intend to clarify that the bond or insurance must be adequate for the entire scope of the make-ready work; we do not through this change address the new attacher's responsibility for damage, which we discuss below. *See infra* section III.A.1.d.

[152] *See* BDAC January 2018 Recommendations at 19; Lumos Wireline NPRM Reply at 4-5.

[153] *See* BDAC January 2018 Recommendations at 28 ("In addition to those contractors placed on an approved list by the pole owner, attachers may propose contractors to the pole owner for approval for any category of make-ready work."). To maximize options for new attachers, we allow a new attacher entitled to select a contractor that does not appear on a utility's list to use its own employees to perform pole attachment work, so long as those employees meet all qualifications for contractors set forth herein. Thus, we use the term "contractor" as a term of art that encompasses the new attacher's employees.

business-day advance notice for surveys or in the 15-day make-ready notice)[155] that the named contractor meets the same five minimum requirements for safety and reliability discussed above.[156]

41. The utility may mandate additional commercially reasonable requirements for contractors relating to issues of safety and reliability, but such requirements must clearly communicate the safety or reliability issue, be non-discriminatory, in writing, and publicly available (e.g., on the utility's website).[157] This condition will guard against pole damage and resulting outages and safety hazards due to particular local conditions,[158] while ensuring that utilities do not use these additional requirements as a roadblock to deployment.[159] We also grant utilities the flexibility to mandate such additional commercially reasonable requirements for contractors because utilities are best positioned to ensure that any additional state or local legal requirements are complied with and any additional environmental or pole-specific factors are accounted for.[160]

42. Where there is no utility-approved list of contractors, we adopt rules, consistent with the BDAC's recommendation, allowing the utility to veto any contractor chosen by the new attacher.[161] Utilities must base any veto on reasonable safety or reliability concerns related to the contractor's ability to meet one or more of the minimum qualifications described earlier in this subsection or on the utility's previously posted safety standards.[162] The utility also must make its veto within either the three-business-day notice period for surveys or the 15-day notice period for make-ready.[163] In reaching this determination, we agree with the Coalition of Concerned Utilities that the safety and reliability of the pole

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[154] The new attacher may choose to require the contractor to certify to the new attacher that the contractor meets the five BDAC-enumerated minimum safety and reliability requirements and provide a copy of this contractor certification to the utility.

[155] *See infra* section III.A.1.c.(i), (v).

[156] *See* BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

[157] *See* BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2. Ideally, such requirements for contractors would also be found in the pole attachment agreement between the utility and the new attacher.

[158] *See* Frontier Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 38.

[159] *See* Verizon Wireline NPRM Reply at 8 n.29.

[160] *Cf.* CCU Wireline NPRM Comments at 10, 24 (stating that the Coalition currently "complies with federal, state, and, when applicable, local code and operating requirements for safe work and construction practices[,]" and that "[i]t takes careful effort to maintain and operate critical electric infrastructure[]" to ensure attachments are not installed out of compliance with applicable codes or in a manner that cannot withstand weather emergencies); Midwest Electric Utilities Wireline NPRM Comments at 38 (describing a utility response to an inclement weather emergency or power outage); POWER Coalition Wireline Comments at 6 (describing its members' experience complying with local requirements).

[161] *See* BDAC January 2018 Recommendations at 30; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

[162] *See* BDAC January 2018 Recommendations at 30 (stating that a utility cannot be unreasonably restrictive if a contractor meets the minimum qualification requirements; a rejection of a contractor must be on "established, declared transparent grounds uniformly applied on the basis of safety or reliability qualification failure"); CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2. We agree with ACA that we should prevent unwarranted vetoes by requiring the utility to have a "reasonable" basis for vetoing the new attacher's contractor. *See* ACA July 23, 2018 Wireline *Ex Parte* Letter at 4. We decline to adopt ACA's precise proposed wording, *see id.*, Attach. at 10, which we view as unduly restricting the utility's discretion.

[163] If a contractor conducts a survey and the utility vetoes that contractor during the 15-day notice period for make-ready, then the survey is not invalidated because the utility already had the opportunity to: (1) be present for the survey; and (2) object to the contractor during the three-business-day notice period for surveys.

is extremely important and, as a result, utilities should be able to disqualify contractors that raise concrete workmanship dangers.[164] To avoid an ongoing dispute between the utility and the new attacher that results in the substantial delay of the pole attachment, any veto by the utility that conforms with the requirements we set forth is determinative and final.[165] When vetoing an attacher's chosen contractor, however, the utility must identify at least one qualified contractor available to do the work.

43. *Existing Attachers.* We decline to grant existing attachers the right to veto or object to the inclusion of a contractor on the utility-approved list or a new attacher's contractor selection.[166] Several commenters explain that existing attachers lack the incentive to act quickly to accommodate a new attacher on a pole given that a new attacher may be a competitor to an existing attacher.[167] By contrast, the utility in most cases is not a competitor to the new attacher.[168] Further, while there will only be one utility with an objection right for any given pole, there could be several existing attachers for that same pole, thereby materially increasing the chances that an objection may be lodged for the purposes of competitive gamesmanship were we to allow existing attachers to challenge a new attacher's contractor selection. Therefore, we are not convinced that an objection process for existing attachers could be designed in a manner sufficient to prevent significant delays in deployment. Imposition of a time limit for objections could force existing attachers to make objections more promptly, but would not prevent gamesmanship, and imposition of a good faith objection requirement would not prevent deployment delays as new attachers would need to resort to the Commission's complaint process to enforce such a requirement.

44. We also decline suggestions that we grant existing attachers the right to disqualify a contractor if the contractor does not meet the minimum qualifications for contractors we establish or if the existing attacher previously terminated the contractor for poor performance or violations of federal, state, or local law.[169] Adopting this proposal is unnecessary because the minimum requirements for contractors we adopt, and the duties we place on utilities and new attachers to ensure compliance with those requirements, will protect against unsafe and unqualified contractors.[170] Additionally, giving existing attachers this form of a veto right could delay and deter broadband deployment.[171] For example, adopting

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[164] *See* CCU Wireline NPRM Reply at 2-3; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

[165] *See* AT&T Wireline NPRM Reply at 10.

[166] The BDAC recommended giving existing attachers the right to object to a new attacher's proposed contractor. *See* BDAC January 2018 Recommendations at 30. Several commenters support granting existing attachers a right to object to either or both of (1) contractors on the utility list and (2) the new attacher's contractor selection. *See, e.g.*, AT&T Wireline NPRM Comments at 16; CenturyLink Wireline NPRM Comments at 15; Charter Wireline NPRM Comments at 50, 56; NCTA Wireline NPRM Comments at 16.

[167] *See, e.g.*, CMA Report at 6; CCU Wireline NPRM Comments at 11; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 2; Letter from Karen Reidy, VP of Regulatory Affairs, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Apr. 4, 2018) (INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter); Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1-2.

[168] *See infra* section III.C (describing declining incumbent LEC pole ownership rates).

[169] *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 3; NCTA July 25, 2018 Wireline *Ex Parte* Letter at 2, Attach. at 9; CWA July 26, 2018 Wireline *Ex Parte* Letter at 4.

[170] *See supra* paras. 39-40. The utility and the new attacher both have an incentive to ensure quality work and comply with our rules. We therefore find that giving the existing attacher a parallel right to ensure compliance with the minimum qualifications is unnecessary.

[171] *See* Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed July 26, 2018) (Google Fiber July 26, 2018 Wireline *Ex Parte* Letter); Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 4.

this proposal could create an incentive for existing attachers to terminate contractors in the interest of making contractor selection more difficult for potential competitors.

45. We also reject NCTA's proposal to permit new attachers to use only contractors pre-approved by existing attachers when moving existing attachers' equipment.[172] Such a proposal undermines the goals we seek to promote in adopting OTMR—speeding and lowering the costs of new deployment. In cases where there are multiple existing attachers, new attachers may need to hire multiple contractors to move existing attachments before the new attachment can be completed thereby necessitating multiple trips to the pole.[173] Even in situations where there is only one existing attacher, a new attacher could be faced with the unenviable choice of paying higher costs to use the existing attacher's preferred contractor to complete all make-ready or using two different contractors—one to move the existing attacher and one to complete the new attachment—which would slow deployment and be more costly than using one contractor.[174]

46. The rules we adopt should alleviate some commenters' concern that depriving existing attachers of a right to input in the contractor selection process could result in serious harm to existing facilities on the pole.[175] First, only simple make-ready work is subject to the OTMR process; existing attachers can perform their own make-ready work in more challenging and dangerous situations. Further, the authority we grant utilities to develop a mandatory list and veto a new attacher's contractor selection for OTMR work should help mitigate the risk to the safety and reliability of the attachments subject to make-ready work by the new attacher's contractor.[176] As several commenters point out, in many markets, contractors approved by the utilities may already be the same as those approved by existing attachers.[177] Additionally, regardless of whether the utility intervenes, contractors must meet the five criteria recommended by the BDAC, which help to ensure safe, reliable, and quality work. Finally, we conclude that we have put in place adequate protections elsewhere in the new OTMR process, in addition to the protections we identify here, to protect the network reliability and safety concerns of existing attachers.[178]

47. *Use of Union Workers to Perform Make-Ready Work.* We decline to adopt a requirement that OTMR must be performed by union contractors where an existing attacher has entered into a collective bargaining agreement (CBA) that requires the existing attacher to use union workers for pole

[172] NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter Attach. 4-5; NCTA July 12, 2018 Wireline *Ex Parte* at 2.

[173] *Cf.* Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 3 (stating that if a new attacher is required to use contractors approved by existing attachers "[n]ew attachers would still be forced to pay for multiple trips to the pole by multiple contractors").

[174] *Cf. id.* at 3 (allowing the existing attacher to "mandate, at the time a new deployment is commencing, that a new entrant use only its approved contractors would not only introduce additional delay in the make-ready timeframe, but would also perpetuate the existing inefficient and costly sequential process"); *see also* Verizon Wireline NPRM Comments at 5 (allowing a new attacher to hire one approved contractor to move all the facilities on a pole reduces "'the disruption, inconvenience, and delay that come from work by multiple crews,' lowering make-ready costs, and 'improv[ing] safety and pole integrity'").

[175] *See* AT&T Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 52, 56; Comcast Wireline NPRM Comments at 21 n.51; NCTA Wireline NPRM Comments at 16; NCTA July 12, 2018 Wireline *Ex Parte* at 2.

[176] *See* CCU Wireline NPRM Comments at 26; Google Fiber Wireline NPRM Reply at 9.

[177] *See* Google Fiber Wireline NPRM Reply at 9 n.17; Verizon Wireline NPRM Reply at 6.

[178] *See infra* section III.A.1.c.(i), (v) (specifying that new attachers must provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed); section III.A.1.c.(vi) (mandating that new attachers allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work).

attachment work.[179] The BDAC's OTMR recommendation did not create a different OTMR regime for existing attachers subject to CBAs,[180] and we find no reason to do so here. New attachers that are not parties to a CBA have no obligations under such a CBA. It is the new attacher's contractor that will be performing the make-ready work, so the CBA is not implicated.

48. Further, the record indicates that requiring a new attacher to hire a union contractor only because one of the existing attachers' CBA mandates the use of union workers to perform its pole attachment work would frustrate the efficiency and utility of OTMR. The record suggests that in some areas, it may not be possible for a new attacher to find union contractors covered by an existing attacher's CBA.[181] In addition, tailoring our OTMR rules to an existing attacher's CBA "would result in a patchwork of rules that might be subject to change every few years and would be administratively unmanageable for new attachers."[182]

49. The Communications Workers of America (CWA) has expressed concern that an OTMR regime that fails to honor CBAs has the potential to cause facility damage, service interruption, and danger to the public and workers.[183] Specifically, CWA argues that its CBAs ensure that make-ready work is performed by "well-trained employees who are directly accountable for their work," and as a result, "perform the job properly and safely."[184] We agree that experienced union contractors can evaluate the condition of poles, are familiar with the rules regulating attachments, and have experience preparing surveys and cost estimates and completing inspections of pole attachment work.[185] At the same time, we find that CWA's quality and safety concerns are already addressed in the proposed OTMR regime through the opportunity for existing attachers to be present for surveys and make-ready work[186] and to conduct post-make-ready inspections on the work performed.[187] Both opportunities provide existing attachers with a safeguard against facility damage and harms that could result from contractor mistakes[188]— and nothing in our adoption of an OTMR regime should be construed as preventing an existing attacher from using union employees and/or contractors pursuant to an applicable CBA on pole-related work not

[179] Several commenters advocate such a requirement. *See* Frontier Wireline NPRM Comments at 17-18; AT&T Wireline NPRM Reply at 9-10; CenturyLink Wireline NPRM Reply at 14; CWA Feb. 6, 2018 Wireline *Ex Parte* Letter at 2; IBEW Jan. 30, 2018 Wireline *Ex Parte* Letter at 2.

[180] *See* BDAC January 2018 Recommendations at 19-25.

[181] *See* Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 4 (stating that, in many areas, the only union members covered by AT&T's collective bargaining agreements are AT&T employees).

[182] Verizon Wireline NPRM Reply at 8.

[183] Letter from Debbie Goldman, Telecommunications Policy Director, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1-3 (filed May 23, 2018) (CWA May 23, 2018 Wireline *Ex Parte* Letter). Several dozen individual commenters similarly allege that "[t]his proposal puts both the lives of workers and the public at risk." *See, e.g.*, John Bordreau Wireline NPRM Comments; Lee Cochran Wireline NPRM Comments; Maivys Cuevillas Wireline NPRM Comments; Kreissa Reed Wireline NPRM Comments. We reject these generalized allegations as speculative.

[184] CWA May 23, 2018 Wireline *Ex Parte* Letter at 3.

[185] CWA Wireline NPRM Comments at 3-4.

[186] *See* ACA Wireline NPRM Comments at 16-17.

[187] *See* AT&T Wireline NPRM Comments at 3, 18; Charter Wireline NPRM Comments at 56; COMPTIA Wireline NPRM Comments at 2; Electric Utilities Wireline NPRM Comments at 6; Google Fiber Wireline NPRM Comments at 6; Portland General Electric Company et al. (Oregon Electric Utilities) Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 11.

[188] *See* ACA Wireline NPRM Comments at 16-17; Electric Utilities Wireline NPRM Comments at 6; CPS Energy Wireline NPRM Reply at 11.

subject to OTMR that the existing attacher is entitled to perform.[189]

50. Finally, allowing private contracts to dictate our policy choice would "subvert[] the supremacy of federal law over contracts."[190] As the Supreme Court has made clear, "[i]f the regulatory statute is otherwise within the powers of Congress . . . its application may not be defeated by private contractual provisions."[191]

51. *Section 1.1412(d).* We disagree with ACA's contention that section 1.1412(d)—an existing rule provision that gives an electric utility's "consulting representative" authority to "make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes"[192]—is moot as a result of our changes to the contractor process.[193] We provide opportunities for electric utilities to send a representative on surveys and make-ready work performed by a new attacher,[194] and this rule provision empowers that representative to make final decisions in specified cases. While we recognize that this may entail delay in certain limited circumstances in which the electric utility chooses to send a representative and a problem arises, ACA overstates its case in suggesting that this limited right "render[s] the improvements to the self-help process meaningless."[195] We find the costs of retaining this narrow rule justified given its important role in promoting safe and reliable work and in establishing clear lines of authority for fieldwork at which multiple parties are present.

c. OTMR Pole Attachment Timeline

52. One substantial benefit of the OTMR process is that it allows for a substantially shortened timeline for application review and make-ready work.[196] We estimate that new attachers using the new OTMR process will save more than three months from application to completion as compared to the process provided for under our existing rules.[197]

(i) Conducting a Survey

53. Our OTMR regime saves significant time by placing the responsibility on the new attacher (rather than the utility) to conduct a survey of the affected poles to determine the make-ready

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[189] We decline to adopt CWA's suggested language, which would provide for an existing attacher to use union employees pursuant to an applicable CBA on work subject to OTMR. *See* CWA July 26, 2018 Wireline *Ex Parte* Letter at 4. We recognize the value of union contractors, and attachers may choose to use union contractors; CWA's proposal, however, could inhibit deployment by granting existing attachers control over the performance of OTMR work.

[190] Google Fiber Wireline NPRM Reply at 7.

[191] *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986).

[192] *Infra* Appx. A, 47 CFR § 1.1412(d).

[193] ACA July 23, 2018 Wireline *Ex Parte* Letter at 5, Attach. at 10.

[194] *See infra* Appx. A, 47 CFR §§ 1.1411(i)(1)(i), (i)(2)(i), (j)(3)(i), (j)(4)(i); *infra* sections III.A.1.c.i, III.A.1.c.v.

[195] ACA July 23, 2018 Wireline *Ex Parte* Letter at 5.

[196] We reject Hawaiian Electric's request to make special accommodations for OTMR implementation in the Hawaiian Islands because of what it describes as the unique circumstances for pole attachments in Hawaii (e.g., longer pole ordering lead times, Public Utility Commission constraints, database updates). Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 2-4. Hawaiian Electric has reasonable alternatives to address these challenges, including negotiating for timeline adjustments with new attachers, that themselves may be facing similar challenges, or seeking a waiver from the Commission.

[197] This calculation includes a 30-day reduction in the application review/survey stage, the elimination of the 28-day estimate and acceptance stages, and up to 45 days saved to complete make-ready.

work to be performed.[198] Under an OTMR regime, the survey will come near the beginning of the process (after the new attacher negotiates with the utility for pole access and chooses a contractor to perform the work required for attachment) to enable the new attacher to determine whether any make-ready is required and, if so, what type of make-ready (simple or complex) is involved. The results of the survey typically will be included in the new attacher's pole attachment application.[199]

54. To help ensure that the new attacher handles third-party equipment with sufficient care and makes an accurate determination of the work to be done to prepare the poles for its new attachments, our new rules require new attachers to permit representatives of the utility and any existing attachers potentially affected by the proposed work to be present for the survey. We also require new attachers to use commercially reasonable efforts to provide the utility and existing attachers at least three business days of advance notice of the date, time, and location of the survey and the name of the contractor performing the survey.[200] Despite claims to the contrary,[201] we agree with the BDAC that advance notice of three business days from the new attacher strikes the right balance between providing sufficient time to accommodate coordination with the utility and existing attachers and the need to keep the pole attachment process moving forward in a timely manner.[202] Also, as the BDAC found in the context of utility surveys, joint surveys help address the potential safety and equipment damage risks raised by existing attachers.[203] To prevent coordination problems that may invite delay, we do not require a new attacher to set a date for the survey that is convenient for the utility and existing attachers.[204] In the case of reasonable scheduling conflicts, however, we encourage the parties to work together to find a mutually-agreeable time for the

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[198] *See* Verizon Wireline NPRM Reply at 5; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

[199] CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

[200] *See, e.g.*, BDAC January 2018 Recommendations at 37; ACA Wireline NPRM Reply Comments at 16-17; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4. Contrary to EEI's claim, our OTMR regime does not require the utility to serve in a clearinghouse role for surveys; the new attacher performs this function. *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 3-4. We also reject AT&T's request to eliminate the advance notice requirement for surveys, which AT&T claims is "impractical to fulfill because neither pole owners nor new attachers know the identity of existing attachers on a particular pole." Letter from Frank S. Simone, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 5 (filed July 23, 2018) (AT&T July 23, 2018 Wireline *Ex Parte* Letter). We recognize that new attachers may need to rely upon utilities for existing attacher contact information to make the notifications, and utilities presumably have access to such information through pole attachment agreements and/or previous make-ready notifications. Therefore, if a new attacher requests contact information for existing attachers from the utility for use in this notification process, the utility must provide any such contact information it possesses. We adopt this requirement so that a new attacher can fulfill its notification obligation when it does not have a direct relationship with existing attachers. We find a utility's failure to keep adequate documentation on existing attachments is insufficient justification for eliminating the advance notice requirement for surveys.

[201] *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 3 ("In practice, three business days of notice will rarely allow utilities or existing attachers the ability to schedule survey ride-outs."); Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 3 n.5.

[202] *See, e.g.*, BDAC January 2018 Recommendations at 37, 39 ("Members of the Committee agreed that a joint survey would be a useful option for the attacher and could benefit the utility as well. They also agreed that the pole owner should be able to establish the timing of the joint survey and then give the attacher reasonable notice (of not less than three days) to participate."); ACA Wireline NPRM Comments at 16-17; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4; FBA July 20, 2018 Wireline *Ex Parte* Letter at 4.

[203] *See* BDAC January 2018 Recommendations at 37. NCTA's contention that the existing attacher has no recourse if it disagrees with the results of the new attacher's survey is incorrect. *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2-3. Existing attachers can raise any objections about the survey findings either with the new attacher or with the utility, which can make final determinations on survey results for reasons of capacity, safety, reliability, and generally applicable engineering purposes. *See* 47 CFR § 1.1412(d).

[204] *See* BDAC January 2018 Recommendations at 40.

survey. We also encourage all attachers to provide a point of contact publicly (e.g., on their websites) so that new attachers know whom to contact when providing notices required under the OTMR regime.

(ii) Notifying the Utility of the Intent to Use OTMR

55. Consistent with the BDAC's recommendation, we require the new attacher to ensure that its contractor determines whether make-ready work identified in the survey is simple or complex, subject to a utility's right to reasonably object to the determination.[205] For purposes of clarity and certainty, we require a new attacher—if it wants to use the OTMR process and is eligible to do so based on the survey—to elect OTMR in its pole attachment application and to identify in its application the simple make-ready work to be performed.[206] Some commenters oppose letting the new attacher's contractor make the simple versus complex determination.[207] AT&T, for example, advocates for allowing the existing attacher to make the determination.[208] However, we agree with those commenters that argue that the new attacher's contractor has the incentive to make the correct determination in order to (1) avoid liability for damages caused by an incorrect choice; (2) limit risk; and (3) in the case of third-party contractors, preserve relationships with all attachers, as well as with the utility, to obtain future work.[209] As a result, we find it is "more likely that approved contractors will be conservative in their determination of whether work is simple or complex."[210] In addition, we agree with Google Fiber that having a contractor chosen from a neutral utility-approved list, where such a list is available, "determine whether make-ready is simple or complex means neither the incumbent nor the new attacher has an opportunity to inject anti-competitive bias into the process."[211]

56. We require a utility that wishes to object to a simple make-ready determination to raise such an objection during the 15-day application review period (or within 30 days in the case of larger orders).[212] We decline suggestions that we extend the objection right to existing attachers[213] because we

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[205] *See id.* at 24; *see also* CPS Energy Wireline NPRM Reply at 7; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 1; Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5; INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter at 2. Because all utilities have strong incentives to promote safety and the structural integrity of their poles, we agree with AT&T and Windstream that all utilities, including incumbent LEC pole owners, should have the ability to object to the simple/complex determination on poles that the utility owns. *See* AT&T July 23, 2018 Wireline *Ex Parte* Letter at 2-3; Windstream July 25, 2018 Wireline *Ex Parte* Letter at 2-3. At this time, we find it unnecessary to establish specific procedures around determining whether work will be in the communications space (and thus eligible for OTMR) because we expect that determination to be self-evident.

[206] CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

[207] *See* AT&T Wireline NPRM Reply at 9; NCTA Wireline NPRM Reply at 17; CWA Feb. 6, 2018 Wireline *Ex Parte* Letter at 3.

[208] *See* AT&T Wireline NPRM Reply at 9; Charter Wireline & Wireless NPRM Comments at 55.

[209] *See* Google Fiber Wireline NPRM Reply at 6; Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5; *see also* INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter at 2 (explaining that letting existing attachers, which are often competitors of new attachers, select the contractor for OTMR could lead to anti-competitive behavior). In cases where the new attacher uses its own employees, we find that it will be sufficiently incentivized to make the correct choice in order to limit liability for damages and risk.

[210] Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3.

[211] *Id.*; *see also* Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5.

[212] We are not, contrary to some assertions, making the utility the arbiter of what constitutes complex make-ready within the communications space. *See* Letter from Robin F. Bromberg, Counsel to American Electric Power Service Corp. and Georgia Power, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 23, 2018) (AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter); Letter from Robin F. Bromberg, Counsel to Georgia Power et al., to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 6 (filed July 26, 2018) (Southern Company July 26, 2018 Wireline *Ex Parte* Letter). We are merely giving the utility the ability, *if it elects*, to evaluate and object to the simple/complex determination made by the new attacher's contractor. We do so because we find that the utility is in a good position to make an unbiased and informed decision on this issue. Utilities are

agree that doing so could provide existing attachers the opportunity "to slow a new attacher's deployment by over-designating make-ready work as complex."[214] Also, while the BDAC did not address the timing of an objection to the simple/complex determination in its OTMR recommendation, we find that setting a time limit for the objection will reduce confusion and foster quicker deployment. We find 15 days to be sufficient because the utility will have the right to accompany the new attacher's contractor on the survey when the contractor makes the simple/complex determination,[215] so the utility will have ample opportunity to have the information it needs to determine whether to object before the deadline.

57. If the utility objects to the new contractor's determination that work is simple, then the work is deemed complex—the utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, and provides a good faith explanation of how such evidence and information relate to a determination that the make-ready is not simple. This approach is consistent with other decisions left to a utility during our pole attachment process.[216] We find that making the utility's determination final is appropriate because it avoids protracted disputes that could slow deployment. However, we caution utilities that if they make such a decision in a manner inconsistent with the requirements we set forth, for instance without adequate support or in bad faith, then new attachers can avail themselves of our complaint process to address such behavior.

58. If the new attacher determines that the make-ready involves a mix of simple and complex work (or involves work above the communications space), then we allow the new attacher discretion to determine whether to bifurcate the work. If the new attacher prefers to complete the simple make-ready work under the OTMR process while it waits for complex work/work above the communications space to run its course through the longer existing process, then it may do so. A new attacher electing to bifurcate the work must submit separate applications for the simple and complex work and work above the communications space.[217] If the new attacher prefers that its entire project (both simple and complex work and work above the communications space) follow the existing process, or if the new attacher does not view bifurcation as feasible, then it may employ the existing process for the entire project.

59. In response to a request from Xcel/Alliant, we clarify "what procedures should be followed when it is discovered in the field while make-ready is being performed that the work on a particular pole is in fact complex, or if it is found that conditions in the field will prevent the OTMR

(Continued from previous page)
free to consult with existing attachers in making such an evaluation to the extent such consultation would be useful. *See* Letter from Brett Kilbourne, Vice President, Policy and General Counsel, UTC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed July 26, 2018) (UTC July 26, 2018 Wireline *Ex Parte* Letter at 2).

[213] *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2-3; CWA July 26, 2018 Wireline *Ex Parte* Letter at 4.

[214] Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 4; *see also* Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 2. We also disagree with NCTA's contention that the existing attacher has no recourse if it does not agree with the determination of the new attacher's contractor that certain make-ready work is simple. *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2-3. The existing attacher always may voice its concerns to the new attacher and to the utility, which can veto the determination of a new attacher's contractor and which has an incentive as the pole owner and as an attacher to ensure that work is classified correctly.

[215] *See infra* section III.A.1.c.(i).

[216] *See* 47 U.S.C. § 224(f)(2); *see infra* Appx. A, 47 CFR § 1.1412(d).

[217] *See, e.g.*, AEP/Georgia Power July 23, 2018 Wireline Ex Parte Letter at 1-2 ("It is unclear how the Commission intends the OTMR process to unfold where a single application involves various categories of make-ready, including simple communications space make-ready, complex communications space make-ready, and power supply space make-ready."); *see* UTC July 26, 2018 Wireline Ex Parte Letter at 2 (requesting clarification as to what extent a utility may deny an application that includes multiple types of make-ready). In response to these requests for clarification, we have clarified herein that new attachers that wish to perform both OTMR and complex work must submit separate applications.

contractor from performing the make-ready work in a 'simple' manner, if at all."[218] In such situations, we find that if the new attacher or the utility discovers that work initially classified by the new attacher and approved by the utility as simple actually turns out to be complex, then that specific work must be stopped.[219] The determining party must notify the other party of its determination and the affected poles; the attachments at issue will then be governed by the non-OTMR timeline, and the utility should provide notice to existing attachers of make-ready work as soon as reasonably practicable.[220]

(iii) Review of Application for Completeness

60. In the interest of speeding application review, we adopt a rule to specify that under the OTMR regime, a pole attachment application is complete if it provides the utility with the information necessary under the utility's procedures, as specified in a master service agreement or in publicly-available requirements at the time of submission of the application, to make an informed decision on the application.[221] We also establish a timeline for the utility's review of the application for completeness. We adopt these requirements to address attachers' complaints—made in response to the Commission's request in the *Wireline Infrastructure Notice* for comments on ways to streamline and accelerate the pole attachment timeline[222]—that "pole owners are not transparent about telling applicants all information that is required to be included on applications at the time of their submission," often resulting in delays to the pole attachment process while the pole owner requests additional information over a series of weeks or months.[223]

61. While the current definition of a complete application only requires "information necessary under [the utility's] procedures,"[224] our revised definition provides more transparency about what an attacher must include in its application, because the master service agreement or publicly-available requirements must be available to new attachers as they prepare their application.[225] We reject NCTA's proposal that we define an application as complete if it provides "only the information reasonably necessary to commence the application process and does not impose unreasonable or unnecessary additional requirements"[226] because that definition fails to provide new attachers sufficient prior notice of the application requirements and invites disputes between the new attacher and utility over what information is "reasonably necessary to commence the application process" or what constitutes "unreasonable or unnecessary additional requirements."[227]

62. To prevent unnecessary delays in starting the pole attachment process, we adopt rules consistent with the BDAC-recommended timeline for a utility to determine whether a pole attachment

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[218] Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 4.

[219] *See infra* Appx. A, 47 CFR § 1.1411(j)(4)(iii). The new attacher may choose to continue OTMR work on other poles to the extent that such work is simple.

[220] *See infra* section III.A.2.a.(iii); Appx. A, 47 CFR § 1.1411(e).

[221] *See* Letter from Thomas Cohen, Counsel to ACA, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 5 (filed Sep. 14, 2017) (ACA Sep. 14, 2017 Wireline *Ex Parte* Letter). The BDAC recommended a definition of a complete pole attachment application that we adopt for our existing pole attachment timeline. *See* BDAC January 2018 Recommendations at 32; *see also infra* section III.A.1.c.(iii). We slightly revise that definition for purposes of our OTMR timeline to account for the new attacher, rather than the utility, conducting the pole surveys.

[222] *See Wireline Infrastructure Notice*, 32 FCC Rcd at 3268-69, 3273, paras. 7-8, 21.

[223] *See* Lightower Wireline NPRM Comments at 4-5; ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 3; FBA July 20, 2018 Wireline *Ex Parte* Letter at 3-4.

[224] 47 CFR § 1.1411(c).

[225] *See infra* Appx. A, 47 CFR § 1.1411(c)(1).

[226] NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1.

[227] *Id.*

application is complete:[228]

- A utility has 10 business days after receipt of a pole attachment application in which to determine whether the application is complete and notify the attacher of that decision.
- If the utility notifies the attacher that the attacher's application is not complete within the 10 business-day review period, then the utility must specify where and how the application is deficient.
- If there is no response by the utility within 10 business days, or if the utility rejects the application as incomplete but fails to specify any deficiencies in the application, then the application is deemed complete.
- If the utility timely notifies the new attacher that the application is incomplete and specifies deficiencies, a resubmitted application need only supplement the previous application by addressing the issues identified by the utility, and the application shall be deemed complete within five business days after its resubmission, unless the utility specifies which deficiencies were not addressed and how the resubmitted application did not sufficiently address the utility's reasons.[229]
- The new attacher may follow this resubmission procedure as many times as it chooses, so long as in each case it makes a bona fide attempt to correct the issues identified by the utility, and in each case the deadlines set forth herein apply to the utility's review.

63. We find that incorporating a specific timeline into our rules provides all parties with some predictability about the start of the OTMR process and avoids unnecessary delays that arise when utilities do not formally accept an application in a timely manner.[230] We find that the timeline we adopt balances the interests of new attachers in the speedy processing of applications and of utilities in needing sufficient time to review the applications. We require utilities to specify the deficiencies in pole attachment applications within 10 business days of receipt so that the new attachers have the information necessary to address those deficiencies in a timely fashion. We also believe this gives incentives for utilities generally to communicate to prospective applicants concerning what is needed for an application because doing so will aid in the utility's formal review process. We adopt a "deemed grant" remedy to prevent delays, and we adopt a shorter timeline for second and further reviews because we expect utilities' review to be cabined to a more limited number of issues that it previously identified. We also encourage utilities that receive complete applications to respond promptly and affirmatively confirm that applications are complete, rather than wait for the 10 business-day review period to lapse. In response to a concern raised by Crown Castle, we clarify that the utility cannot delay its determination of whether an application is complete by seeking to negotiate rates, terms, and conditions in the pole attachment agreement that "unreasonably deviate from those assured by the rules."[231] Such bad faith practices intended to delay the start of the pole attachment timeline are prohibited as contrary to our goal of speedy broadband deployment.

(iv) Application Review

64. For OTMR attachments, we shorten the time period within which a utility must decide

[228] BDAC January 2018 Recommendations at 32; *see also* ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5. *See infra* Appx. A, 47 CFR § 1.1411(j)(1)(ii).

[229] Because the utility already must specify the reasons for deeming an application incomplete, and thus condense the outstanding issues with regard to the application, we disagree with EEI that utilities should have 10 days to review a resubmitted application to determine whether the new attacher adequately has addressed the reasons for the application's return. *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 4.

[230] *See* ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4-5 (explaining the delays and lack of transparency in the application process).

[231] Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 4.

whether to grant a complete application from 45 days to 15 days for standard requests and from 60 days to 30 days for larger requests.[232] While the BDAC did not address this issue, we find that because the new attacher (rather than the utility) will be doing most of the pre-make-ready work under OTMR (e.g., surveys, notices), it is appropriate to adopt a shorter timeline for the utility to review the application.[233] Furthermore, because the utility has the right to specify the information it requires the new attacher to put in the application and has the ability to reject the application (multiple times if necessary) before accepting it for review, we find 15 days should be sufficient for the utility to conduct its review.[234] We reject Xcel/Alliant's contention that providing a shorter timeframe for OTMR application review will cause utilities to unfairly prioritize OTMR applications over previously-filed non-OTMR applications or cause new attachers to game the process by submitting OTMR applications to get them processed and approved ahead of other attachers.[235] There is no incentive for new attachers to submit bad faith OTMR applications because it does not bring the applicant any advantage—as discussed above, once the new attacher or utility discovers that simple work actually is complex, then the work must follow our non-OTMR timeline, resulting in no time savings and wasted money and effort that the applicant could have saved had it originally classified the work correctly in its application.[236]

(v) Make-Ready

65. The new attacher may proceed with OTMR by giving 15 days' prior written notice to the utility and all affected existing attachers.[237] To avoid unnecessary delays, we conclude that the new attacher may provide the required 15-day notice any time after the utility deems its pole attachment application complete. Thus, the 15-day notice period may run concurrently with the utility's evaluation of whether to grant the application.[238] If, however, the new attacher cannot start make-ready work on the date specified in its 15-day notice (e.g., because its application has been denied or it is otherwise not ready to commence make-ready), then the new attacher must provide 15 days' advance notice of its revised make-ready date.

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[232] *See infra* Appx. A, 47 CFR § 1.1411(j)(2) (providing that the deadline is extended to 60 days for larger pole attachment requests as described in 47 CFR § 1.1411(g)). Larger requests are when an order is greater than 3000 poles or 5 percent of the utility's poles in a state. *See infra* Appx. A, 47 CFR § 1.1411(g).

[233] *See* CPS Energy Wireline NPRM Reply at 7 (explaining that transferring the make-ready design and planning to the new attachers allows CPS Energy to slash its pole attachment application review time by over fifty percent); *see also* EEI July 26, 2018 Wireline *Ex Parte* Letter at 5; Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 2-4; UTC July 26, 2018 Wireline *Ex Parte* Letter at 2.

[234] We reject the contentions that 15 days "does not provide a mechanism by which a new attacher may be made aware if the poles it selected are already subject to a pre-existing pole attachment application" and that it does not "account for how to address multiple or overlapping pole orders." EEI July 26, 2018 Wireline *Ex Parte* Letter at 5; *see also* Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 2; UTC July 26, 2018 Wireline *Ex Parte* Letter at 2. In the time we give to a utility to review a pole attachment application and also to determine its completeness, we expect that the utility should be able to resolve these processing issues. But, if the utility needs additional time, then it may work with the new attacher to negotiate a new schedule that timely resolves these issues. We retain in the OTMR context our preexisting requirement that if a utility denies an application, the utility's denial must be specific and include all relevant evidence and information supporting its denial and must explain how such evidence and information relate to a denial of access for reasons of safety, reliability, lack of capacity, or engineering standards. *See* 47 CFR § 1.1403(b).

[235] Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 3.

[236] *See supra* section III.A.1.a.

[237] *See* COMPTIA Wireline NPRM Comments at 2; Google Fiber Wireline NPRM Reply at 9; *cf.* BDAC January 2018 Recommendations at 23.

[238] We disagree with CWA's contention that the utility's application review period and the new attacher's pre-make-ready notice period should not run concurrently. CWA July 26, 2018 Wireline *Ex Parte* Letter at 3. As part of our goal of speeding the OTMR pole attachment process, we find that allowing the two time periods to run concurrently will eliminate unnecessary delays in the process.

66. Although the BDAC recommendation provides for 25 days prior written notice for OTMR,[239] we find that 15 days strikes a reasonable balance between promoting fast access to utility poles (one of the core goals of OTMR) and providing sufficient time for existing attachers and the utility to work with the new attacher to arrange to be present when OTMR is being performed on their equipment.[240] Furthermore, the 25-day notice period recommended by the BDAC for OTMR is only five days shorter than the 30-day period recommended by the BDAC for existing attachers to complete complex make-ready work,[241] which is not much time savings for an OTMR process that we adopt for simple work that is unlikely to cause safety issues.[242] We also disagree with NCTA's request for a longer notice period for larger projects;[243] because this is merely a notice requirement and does not require action on the part of the existing attacher or utility, there is no need for a longer notice period for larger projects.

67. To keep all affected parties informed about the new attacher's progress, and consistent with the BDAC's recommendation, we require the new attacher to provide representatives of the utility and existing attachers with the following information in the 15-day advance notice: (1) the date and time of the make-ready work; (2) a description of the make-ready work involved; (3) a reasonable opportunity to be present when the make-ready work is being performed; and (4) the name of the contractor chosen by the new attacher to perform the make-ready work.[244] Allowing existing attachers and the utility a reasonable opportunity to be present when OTMR work is being done addresses the concerns of existing attachers that third-party contractors may not take proper care when performing simple make-ready work on their equipment.[245] We also adopt the advance notice requirements to allow the utility and existing attachers, if they so choose, to alert their customers that work on their equipment is forthcoming; as Liberty Cablevision of Puerto Rico explains, "[t]his is a reasonable way to address concerns that service-affecting problems arising from the make-ready work would be improperly attributed to an existing attacher."[246] In addition, providing the name of the new attacher's OTMR contractor allows existing

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[239] *See* BDAC January 2018 Recommendations at 23; *see also* AT&T Wireline NPRM Comments at 17 (requesting that new attachers notify existing attachers at least 30 days prior to the OTMR make-ready); CPS Energy Wireline NPRM Reply at 9, 16-17 (requesting 21 days' advance notice to existing attachers of impending OTMR work); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 1 (requesting 30 days' advance notice to give existing attachers a chance to move their equipment); CenturyLink July 23, 2018 Wireline *Ex Parte* Letter at 4-5 (requesting 25 days advance notice); NCTA July 25, 2018 Wireline *Ex Parte* Letter at 2 (requesting 25 days advance notice); CWA July 26, 2018 Wireline *Ex Parte* Letter at 3 (requesting 25 days advance notice).

[240] *See* Level 3 Wireline NPRM Comments at 3; Verizon Wireline NPRM Comments at 7 (recommending only five days' notice before OTMR work begins); Google Fiber Wireline NPRM Reply at 9.

[241] *See* BDAC January 2018 Recommendations at 21, 23.

[242] *See* Google Fiber Wireline NPRM Reply at 9 (stating that "a 15-day notice period should be sufficient for utility-approved contractors to ensure that these services will be adequately protected during make-ready").

[243] *See* NCTA July 25, 2018 Wireline *Ex Parte* Letter at 2.

[244] *See* BDAC January 2018 Recommendations at 23; *infra* Appx. A, 47 CFR § 1.1411(j)(4)(i); Charter Wireline & Wireless NPRM Comments at 56; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 5. As is the case for survey notifications, if a new attacher requests contact information for existing attachers from the utility for use in this notification process, the utility must provide any such contact information it possesses. *See supra* section III.A.1.c.(i). We adopt this requirement so that a new attacher can fulfill its notification obligation when it does not have a direct relationship with existing attachers.

[245] *See* BDAC January 2018 Recommendations at 27 ("Existing attachers worry that one-touch make-ready endangers their attachments and provision of service because they are in control of neither the contractor nor the quality of work performed."); Comcast Wireline & Wireless NPRM Comments at 21; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at 2 (stating that cable operators have experienced problems with OTMR "where there is a complete lack of privity between the existing attacher and the contractor.").

[246] Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 8 n.7.

attachers to notify the utility and the utility to object if the contractor is not properly qualified.[247]

68. We emphasize that the 15 days is only a notice period before the new attacher begins make-ready work; it is not an opportunity for existing attachers or the utility to complete make-ready work on their equipment and then bill the new attacher for that work.[248] However, we clarify that we are not precluding existing attachers and the utility from doing non-reimbursable work on their equipment during the 15-day notice period. We find that, contrary to the requests of certain attachers,[249] providing an existing attacher an affirmative right to perform make-ready and bill the new attacher for such work during the notice period would undermine one of the main benefits of OTMR: decreasing make-ready costs for new attachers.[250]

69. We also adopt the BDAC recommendation that we require the new attacher to notify an affected entity immediately if the new attacher's contractor damages another company's equipment or causes an outage that is reasonably likely to interrupt the provision of service.[251] We extend this requirement to damage to the utility's equipment as well. Upon receiving notice of damaged equipment or a service outage, the utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or outage or require the new attacher to fix the damage or outage at its expense immediately following notice from the utility or existing attacher.[252] Upon notice from the existing attacher or the utility to fix damages or an outage caused by the new attacher, the new attacher must complete the repair work before it can resume its make-ready work.[253] Where the utility or the existing attacher elects to fix the damage or outage, the new attacher can only continue with make-ready work if it does not interfere with the repair work being

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[247] *See* BDAC January 2018 Recommendations at 27 ("Opponents of one-touch make-ready often cite unknown contractor qualifications as a principal reason why one-touch make-ready should not be adopted."); *see also* Charter Wireline & Wireless NPRM Comments at 42 (stating that OTMR is only as effective as the contractor performing the work).

[248] *See* Verizon July 2, 2018 Wireline Ex Parte Letter at 3 ("If a new attacher elects OTMR, existing attachers would not have the right to perform their own make-ready."); Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 2.

[249] *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 3-4; CenturyLink July 23, 2018 Wireline *Ex Parte* Letter at 4; Letter from Christianna Barnhart, Vice President, Regulatory Affairs, Charter, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 25, 2018) (Charter July 25, 2018 Wireline *Ex Parte* Letter); Letter from David Don, Vice President, Regulatory Policy, Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 26, 2018) (Comcast July 26, 2018 Wireline *Ex Parte* Letter); CWA July 26, 2018 Wireline *Ex Parte* Letter at 3.

[250] *See* Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter at 1; Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 3-4. We decline CenturyLink's request that we clarify that when performing OTMR, a new attacher should preserve the relative position of existing attachers on a pole. *See* CenturyLink July 23, 2018 Wireline Ex Parte Letter at 5. While we agree that new attachers should strive to complete their attachments in the least disruptive manner possible, the Commission has not historically regulated the positioning of attachments on the pole, and attachers remain free to bargain for such positioning rights in their respective pole attachment agreements with the utility.

[251] BDAC January 2018 Recommendations at 22; Charter Wireline & Wireless NPRM Comments at 57; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 5; Comcast July 26, 2018 Wireline *Ex Parte* Letter at 1; Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 1-2. This obligation also applies when the new attacher or its contractors are performing self-help make-ready work. *See infra* section III.A.2.b.

[252] *See, e.g.*, CenturyLink Wireline NPRM Comments at 12-13; Charter Wireline & Wireless NPRM Comments at 56-57; CPS Energy Wireline NPRM Reply at 11-12; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 19; Level 3 Wireline NPRM Comments at 3; Midwest Electric Utilities Wireline NPRM Comments at 8; POWER Coalition Wireline NPRM Comments at 12; UTC Wireline NPRM Comments at 14; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 1; NCTA July 18, 2018 Wireline *Ex Parte* Letter at 3; Comcast July 26, 2018 Wireline *Ex Parte* Letter at 1-2; Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 1-2.

[253] *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 3; Comcast July 26, 2018 Wireline *Ex Parte* Letter at 1; Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 2.

conducted by the utility or existing attacher. This requirement for immediate notification and repair of damages or outages caused by a new attacher's contractor addresses the concern of existing attachers and utilities that the new attacher's contractor may damage equipment or cause an outage that would harm consumers or threaten safety without the existing attacher's or utility's knowledge or an opportunity for prompt recourse.[254]

(vi) Post Make-Ready

70. We agree with commenters that suggest that the OTMR process should include time for post-make-ready inspections and the quick repair of any defective make-ready work.[255] To give existing attachers and the utility an opportunity to correct any errors and to further encourage quality work by the new attacher, we adopt the BDAC's recommendation that the new attacher must provide notice to the utility and affected existing attachers within 15 days after the new attacher has completed OTMR work on a particular pole.[256] In its post-make ready notice, the new attacher must provide the utility and existing attachers at least a 90-day period for the inspection of make-ready work performed by the new attacher's contractors.[257] This post-make-ready inspection and remedy requirement gives the utility and existing attachers their own opportunity to ensure that work has been done correctly.

71. To allow new attachers to timely address allegations of needed repair work, we adopt rules requiring that within 14 days after any post-make ready inspection, the utility and the existing attachers notify the new attacher of any damage or any code (e.g., safety, electrical, engineering, construction) violations caused to their equipment by the new attacher's make-ready work and provide adequate documentation of the damage or the violations.[258] The utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or violations, or require the new attacher to fix the damage or violations at its expense within 14 days following notice from the utility or existing attacher.[259] We provide the utility or existing attacher options regarding repair to maximize their flexibility in addressing issues for which they are not at fault. The safeguards we establish in the OTMR process collectively give the new attacher the

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[254] *See* BDAC January 2018 Recommendations at 27; Charter Wireline & Wireless NPRM Comments at 39-43; Comcast Wireline NPRM Comments at 21-22; NCTA Wireline NPRM Reply at 16-17.

[255] *See* AT&T Wireline NPRM Comments at 18; CenturyLink Wireline NPRM Comments at 15; Charter Wireline & Wireless NPRM Comments at 56-57; COMPTIA Wireline NPRM Comments at 2; Electric Utilities Wireline NPRM Comments at 6; Google Fiber Wireline NPRM Comments at 6; Oregon Electric Utilities Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 11; UTC Wireline NPRM Reply at 19; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

[256] BDAC January 2018 Recommendations at 22; *see also* Electric Utilities Wireline NPRM Comments at 6; CPS Energy Wireline NPRM Reply at 11. To minimize paperwork burdens, the new attacher may batch in one post-make-ready notice all poles completed in a particular 15-day span. For example, if a pole attachment project took 30 days to complete, the new attacher could provide one notice to the existing attacher with the first 15 days' worth of work and a second notice on day 30 with the remainder of the work.

[257] *See, e.g.*, CPS Energy Wireline NPRM Reply at 11; Electric Utilities Wireline NPRM Comments at 6; NCTA July 18, 2018 Wireline *Ex Parte* Letter at 4; Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 2.

[258] *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 6; Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 4-5.

[259] *See, e.g.*, Charter Wireline & Wireless NPRM Comments at 56-57; CPS Energy Wireline NPRM Reply at 11; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 19-20; Midwest Electric Utilities Wireline NPRM Comments at 8; POWER Coalition Wireline NPRM Comments at 12; UTC Wireline NPRM Comments at 14; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 1; *see also* Level 3 Wireline NPRM Comments at 3 (submitting that remediation should take place within 30 days). We decline the request of EEI and Xcel/Alliant that we adopt a re-inspection timeframe after repairs have been made by the new attacher. *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 6; Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 4-5. While the utility or an existing attacher is free to conduct an inspection of the new attacher's repairs, formalizing the process is not needed as we require the parties to work together to ensure that repairs are completed.

incentive to ensure its contractor performs work correctly; we therefore expect the invocation of this remediation procedure to be infrequent.

72. We disagree with Verizon's argument that we should refrain from establishing a timeframe for the utility and existing attachers to inspect completed make-ready work because deadlines for raising claims about property damage are "typically governed by state contract or property law."[260] We find it appropriate to establish a post-inspection timeline at the federal level so that parties can identify any defective make-ready work that has the potential to cause harm or injury to persons or equipment and remedy it as soon as possible. We also find that the deadlines we establish for the post-make-ready timeline give the existing attachers and the utility time that is sufficient but not unnecessarily long to inspect the work and give the new attacher reasonable time to fix any equipment damage and to rectify any potentially unsafe conditions.

d. Indemnification

73. We conclude that new attachers should be responsible and liable for any damage or non-compliance resulting from work completed by the new attacher during OTMR. The OTMR rules we adopt provide a process for existing attachers to timely identify damage to their equipment that occurs during the OTMR process and to arrange for its repair.[261] To the extent that process proves insufficient, injured parties may seek judicial relief based on state law claims.

74. We find, consistent with the BDAC's recommendation,[262] that federally-imposed indemnification is not necessary.[263] The record indicates that the existing legal regime, including contract [264] and tort law,[265] provides sufficient protection for existing attachers without broad federal regulatory

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[260] Verizon Wireline NPRM Reply at 9.

[261] *See supra* section III.A.1.c.(vi). OTMR contractors will be required to carry adequate insurance or establish a performance bond, which should ensure there is compensation available should the contractor's work be faulty. *See supra* section III.A.1.b. To reduce disputes over the cause of damages, NCTA proposes that we require new attachers' contractors to "document, via photograph or video, the condition of the existing attachers' facilities both before performing any make-ready work and after make-ready work is complete." NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter Attach. 6; NCTA July 12, 2018 Wireline *Ex Parte* at 3. While we agree with NCTA that such documentation could potentially help to resolve disputes surrounding the cause of damage, there is no record evidence as to how effective or burdensome such a requirement would be, and NCTA does not indicate how widespread this practice currently is. Therefore, we decline to mandate it at this time.

[262] *See* January 2018 BDAC Recommendations at 47.

[263] Several commenters propose such a requirement. *See* AT&T Wireline NPRM Comments at 18; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 18; UTC Wireline NPRM Comments at 14; Comcast Wireline NPRM Reply at 11; NCTA Wireline NPRM Reply at 20; NCTA July 12, 2018 Wireline *Ex Parte* Letter at 2-3; NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2, 4; CenturyLink July 23, 2018 Wireline *Ex Parte* Letter at 4; Charter July 25, 2018 Wireline *Ex Parte* Letter at 1-2; CWA July 26, 2018 Wireline *Ex Parte* Letter at 4.

[264] *See* Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 3 (contending that contractual negotiations are sufficient to address new attacher liability to existing attachers beyond liability for damage the new attacher or the new attacher's contractor causes to the existing attacher's facilities); Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 6 (arguing that "'[a]ny third party or indirect damages should be addressed in the attachment agreement(s) between the parties already in place'"). Google Fiber observes that it is common practice today for liability concerns to be addressed in pole attachment agreements, "under which attachers routinely agree to indemnify pole owners for property damage, bodily injury, and death arising from their work on, and attachments to utility poles." Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 3 n. 8 (filed Nov. 30, 2017) (Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter).

[265] *See* Charter Wireline & Wireless NPRM Comments at 51 (contending that without contractual privity between the existing and new attachers, the only method of resolving disputes over deficient make-ready work is through tort litigation); CenturyLink Wireline NPRM Reply at 14 (stating that the only likely remedy for an attaching entity, like Century Link, with no contract with another communications company "would be litigation against the IOU for breach or the attacher or its contractor in tort"). Google and CPS Energy also argue that indemnification is not

intrusion. The repair process we adopt in our OTMR rules adds an additional layer of protection.[266] With these other remedies already available, we disagree with NCTA that a Commission-mandated indemnification requirement is the "only practical mechanism by which an existing attacher can hold a new attacher or its contractor accountable for the consequences of performing shoddy work" in situations where there is no privity of contract between the parties or a statutory requirement to hold harmless existing attachers.[267] Rather, we find that adding a federal layer of indemnification would not be efficient or assist in speeding broadband deployment.[268] Further, we agree with Google Fiber that indemnification obligations are typically not one-size-fits-all provisions,[269] such that it would be difficult to craft a regulatory solution that is workable in all situations.

75. We disagree with NCTA's assertion that section 224(i) of the Act requires federally mandated "[b]road indemnification of existing attachers," including indemnification for consequential damages.[270] Section 224(i) provides that existing attachers "shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way)."[271] NCTA claims that this language requires new attachers to pay for "any damages – such as damages caused by service downtime – resulting from such work."[272]

76. We find NCTA's reading of section 224(i) to be overly broad. In our view, the statute is best read to allow the existing attacher to recover only those costs directly connected to "rearranging or replacing the attachment," i.e., the direct costs of moving or replacing the attachment.[273] These costs do not include consequential damages. While NCTA relies on the modifier "any of" for its broad reading, contending that the phrase "any of" means the statute requires compensation for consequential damages,[274] the more natural reading of "any of" is that the statute prohibits holding existing attachers responsible for any *portion* of "the costs of rearranging or replacing its attachment."[275] NCTA cites no precedent that supports its broad reading, and the Commission's bonding and insurance requirements that NCTA does

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appropriate in situations where there is not privity of contract between new and existing attachers. *See* CPS Energy Wireline NPRM Reply at 19-21; Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter at 2-3. State tort law remains available regardless of whether there is contractual privity.

[266] *See* FBA July 20, 2018 Wireline *Ex Parte* Letter at 3.

[267] Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 6 (filed Apr. 4, 2018) (NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter); *see also* CenturyLink July 23, 2018 Wireline *Ex Parte* Letter at 4.

[268] *See* FBA July 20, 2018 Wireline *Ex Parte* Letter at 3. Although CenturyLink claims that without Commission-imposed indemnification, disputes over damages "will have to be" be resolved via litigation, CenturyLink fails to demonstrate how a federal indemnification remedy would change the risk of litigation. CenturyLink July 23, 2018 Wireline *Ex Parte* Letter at 4. Parties frequently resolve contractual and tort issues out of court, and conversely a federal indemnification remedy does not foreclose litigation. We also disagree with CenturyLink's assertion that the approach we adopt "unfairly shift[s] the burden from [new] attachers to existing attachers for legal and regulatory obligations"—rather, we preserve the regulatory status quo under existing law. *Id.*

[269] Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter at 2-3.

[270] *See* NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 5.

[271] 47 U.S.C. § 224(i).

[272] NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 5 n.19.

[273] 47 U.S.C. § 224(i).

[274] *See* NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 5 n.19.

[275] Contrary to NCTA's assertion, in reaching this conclusion, we are not "add[ing] qualifying language" but rather construing the statute. NCTA July 18, 2018 Wireline *Ex Parte* Letter at 4.

cite[276] are far more narrow than the broad indemnification it argues for in this instance.[277] In fact, we have previously declined to adopt rules requiring broad indemnification for consequential damages, instead finding that indemnification obligations should be left for commercial negotiations.[278]

2. Targeted Changes to the Commission's Existing Pole Attachment Process

77. To speed broadband deployment for new attachments that are not eligible for our OTMR process and for new attachers that prefer not to use the OTMR process, we make targeted changes to the rules governing the existing pole attachment timeline. Our targeted changes include:

- Revising the definition of a complete pole attachment application and establishing a timeline for a utility's determination whether an application is complete;
- Requiring utilities to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher;
- Establishing a 30-day deadline for completion of all make-ready work in the communications space;
- Eliminating the 15-day utility make-ready period for communications space attachments;
- Streamlining the utility's notice requirements;
- Enhancing the new attacher's self-help remedy by making the remedy available for surveys and make-ready work for all attachments anywhere on the pole in the event that the utility or the existing attachers fail to meet the required deadlines;
- Revising the contractor selection process for a new attacher's self-help work; and
- Requiring utilities to provide detailed estimates and final invoices to new attachers regarding make-ready costs.

78. We agree with numerous commenters that with respect to the Commission's current pole attachment timeline, we should refrain from adopting wholesale changes at this time.[279] We agree with

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[276] *Id.* at 5; *2011 Pole Attachment Order*, 26 FCC Rcd. at 5266-69, para. 56 ("If a requirement is customary and prudent whenever a [utility-approved] contractor [for self-help] is hired, such as requiring a service bond . . . it is likely reasonable."); *In the Matter of Leased Commercial Access*, MB Docket No. 07-42, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 2909, 2922-23, para. 27-28 (2008) (*2008 Leased Access Order*) (finding it reasonable for a cable system operator to require a leased access programmer "to obtain reasonable liability insurance coverage[,]" but confirming that the Commission would "continue to address complaints about specific contract terms and conditions on a case-by-case basis"). The *2008 Leased Access Order*'s rules never went into effect due to a stay by the Sixth Circuit. *See* Order, United Church of Christ Office of Communications, Inc. *et al.* v. FCC, No. 08-3245 (and consolidated cases) (6th Cir., May 22, 2008). In June of this year, the Commission tentatively concluded that it should vacate the *2008 Leased Access Order*. *Leased Commercial Access Modernization of Media Regulation Initiative,* MB Docket Nos. 07-42, 17-105, Further Notice of Proposed Rulemaking, FCC 18-80, para. 2 (June 8, 2018). Consistent with the Commission's approach in the *2011 Pole Attachment Order*, our Order today requires analogous bonding or insurance requirements for new attachers' third-party OTMR contractors. *See supra* section III.A.1.b.

[277] *Cf.* Verizon July 2, 2018 Wireline *Ex Parte* Letter at 5 (submitting that "[t]he fact that the Commission has stated that, as a general matter, a utility can impose reasonable service bond requirements on contractors and that a cable system operator can impose reasonable insurance requirements in leased access contracts does not answer whether broad indemnification is reasonable for OTMR.").

[278] *See 2011 Pole Attachment Order*, 26 FCC Rcd. at 5261, para. 39 (concluding in response to commenters seeking broad indemnification for self-help make-ready work that "we presume that utilities could structure attachment agreements to . . . address liability or other concerns they might have in cases where they elect to perform make-ready themselves.").

[279] *See* CCU Wireline NPRM Comments at 24-25; CenturyLink Wireline NPRM Comments at 3; Comcast Wireline NPRM Comments at 18; Charter Wireline NPRM Comments at 37-38; EEI Wireline NPRM Comments at 3, 22;

Verizon that "any timeline change should be very cautious and include only targeted, incremental reforms" and with AT&T that "[e]xisting timelines are already challenging for some utilities to meet, and shortening those deadlines even further could compromise safety by encouraging workforces to rush or to take shortcuts to meet deadlines."[280] As a result, while we make changes aimed at speeding broadband deployment where the record indicates such changes would be workable and beneficial, we leave unchanged the pole attachment deadlines for the existing application review/survey, estimate, and acceptance stages.

a. Creating a More Efficient Pole Attachment Timeline

(i) Review of application for completeness

79. For the reasons discussed above, we adopt rules reflecting the same improvements to our definition of a complete pole attachment application and the same completeness review process as we do for the OTMR timeline, subject to one change to adjust for the fact that the utility conducts the survey under the non-OTMR process.[281] We adopt the BDAC's recommendation and revise our existing pole attachment rules to define an application as complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-available requirements at the time of submission of the application, to begin to survey the affected poles.[282] While the current definition of a complete application only requires "information necessary under [the utility's] procedures,"[283] this revised definition requires more transparency on behalf of the utility as the master service agreement and public requirements will be available to new attachers as they prepare their applications. In addition, to prevent unnecessary delays in starting the pole attachment process, we adopt the same BDAC-recommended timeline as in our OTMR process for a utility to determine whether a pole attachment application is complete.[284] We agree with ACA that providing a specific timeline for determining completeness offers all parties predictability about the start of the OTMR process and avoids unnecessary delays.[285]

80. We decline to make further changes at this time to our rules governing the process prior to the utility's substantive review of a pole attachment application. Some new attachers ask that we curtail or eliminate what they describe as "burdensome" pre-application requirements imposed by some

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Electric Utilities Wireline NPRM Comments at 11-13; Frontier Wireline NPRM Comments at 15; POWER Coalition Wireline NPRM Comments at 5; Puget Sound Energy Wireline NPRM Comments at 3-5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 2; APPA Wireline & Wireless NPRM Reply at 30; AT&T Wireline NPRM Reply at 1, 4-5; CWA Wireline NPRM Reply at 1; Midwest Electric Utilities Wireline NPRM Reply at 4-5; Verizon Wireline NPRM Reply at 10.

[280] *See* AT&T Wireline NPRM Reply at 4-5; Verizon Wireline NPRM Reply at 10.

[281] *See supra* section III.A.1.c.(iii). Except for the distinction we identify, nothing about the complete application definition and completeness review process we adopt is dependent on or justified by which party performs the make-ready work.

[282] BDAC January 2018 Recommendations at 32; ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5; CenterPoint Energy et al. May 25, 2018 *Ex Parte* Letter at 3 n.19.

[283] 47 CFR § 1.1411(c).

[284] *See supra* section III.A.1.c.(iii); BDAC January 2018 Recommendations at 32; *see also* ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5.

[285] ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4-5; *see also* FBA July 20, 2018 Wireline *Ex Parte* at 3-4 ("The FBA believes these [application completeness and timing] rules will help reduce uncertainty and expedite the processing of applications."). We decline to adopt ACA's request that we tie review deadlines to an application's submission date, rather than the date it is received. *See* ACA July 23, 2018 Wireline *Ex Parte* Letter at 5. Instead, we follow the BDAC OTMR recommendation that ties deadlines to receipt of the application by the utility, because the utility cannot begin to review the application until it has been received. *See* BDAC January 2018 Recommendations at 32.

utilities,[286] such as "unnecessary" pole design and engineering analyses, the submission of a "pre-application" to allow utilities to determine make-ready costs, and the pre-payment of pole surveys and other fees.[287] Because it is unclear from the record whether any pre-application requirements have the systematic effect of delaying broadband deployment, we find it premature to adopt rules governing these requirements and instead will address any onerous pre-application requirements on a case-by-case basis via our complaint procedures. We recognize that utility-imposed pre-application procedures can have value[288] and can help to avoid incomplete or erroneous pole attachment applications, thus saving time in the process.[289] Certain pre-application requests for information (e.g., the submission of pole loading analyses) can be important tools to address safety, reliability, and engineering concerns.[290] We caution utilities, however, that any such requirements must be reasonable, nondiscriminatory, and applied fairly and efficiently.[291]

(ii) Review of whether to grant complete application and survey

81. We decline to shorten the 45-day period in our existing rules during which the utility must review a complete pole attachment application and survey the affected poles for non-OTMR projects.[292] In so doing, we reject proposals by some attachers that we shorten the application review and survey stage[293] because we agree with utility commenters that the existing 45-day timeframe accounts for demands on existing workforce, safety concerns, volume of pole attachment applications, and timing constraints.[294] We also decline to adopt ACA's proposal that a pole attachment application be deemed granted if the utility fails to act on an application within the 45-day timeframe.[295] Failure by the utility to

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[286] *See, e.g.*, Charter Wireline NPRM Comments at 36-37; ExteNet Wireline & Wireless NPRM Comments at 51; Lightower Wireline NPRM Comments at 4-5; NCTA Wireline NPRM Comments at 6-7; ACA Wireline NPRM Reply at 19; Comcast Wireline & Wireless NPRM Reply at 10; Crown Castle Wireline NPRM Reply at 3-4.

[287] *See* Charter Wireline NPRM Comments at 36-37; Lightower Wireline NPRM Comments at 4-5; ACA Wireline NPRM Reply at 19; Crown Castle Wireline NPRM Reply at 3-5.

[288] *See* CCU Wireline NPRM Reply at 18 ("Each pole must be analyzed to ensure that it has sufficient strength and space to accommodate the new pole attachment, and that applicable safety codes and standards can be achieved.").

[289] *See* Midwest Electric Utilities Wireline NPRM Comments at 17-18; CCU Wireline NPRM Reply at 12-13.

[290] CCU Wireline NPRM Reply at 12-13, 16; Electric Utilities Wireline NPRM Reply at 17-19; POWER Coalition Wireline NPRM Reply at 11.

[291] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5274, para. 73; *see also* POWER Coalition Wireline NPRM Reply at 11 (explaining that pre-application requirements "are designed precisely to facilitate the pole owner's determination of whether any requested attachment would raise concerns of safety, reliability, and engineering").

[292] We also clarify that nothing in our rules precludes a utility from using a new attacher to conduct a survey of the affected poles, at the utility's expense, consistent with the requirements in section 1.1411(i)(1). *See* ACA July 23, 3018 Wireline *Ex Parte* Letter at 3, Attach. at 3.

[293] *See, e.g.*, NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1 (proposing 15-day application review and survey period); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1 (proposing 30-day application review and survey period); ExteNet Wireline & Wireless NPRM Comments at 51-52 (same proposal as Charter); Lightower Wireline NPRM Comments at 4.

[294] *See, e.g.*, AT&T Wireline NPRM Comments at 7-8; CCU Wireline NPRM Comments at 23; CenturyLink Wireline NPRM Comments at 8; CWA Wireline NPRM Comments at 7-8 ; EEI Wireline NPRM Comments at 20-21; Electric Utilities Wireline NPRM Comments at 11; Frontier Wireline NPRM Comments at 16; POWER Coalition Wireline NPRM Comments at i; Puget Sound Energy Wireline NPRM Comments at 3; Verizon Wireline NPRM Comments at 9; APPA Wireline NPRM Reply at 3, 30; Midwest Electric Utilities Wireline NPRM Reply at 5-6, 16; UTC Wireline NPRM Reply at 1.

[295] *See* ACA July 23, 3018 Wireline *Ex Parte* Letter at 2, Attach. at 3; Letter from Thomas Cohen, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 25, 2018) (ACA July 25, 2018 Wireline *Ex Parte* Letter).

act on an application within the prescribed time period is a violation of our rules and, accordingly, use of our recently-adopted expedited pole access complaint procedure is available as a remedy.[296]

82. To make the survey and application review process more efficient and transparent, however, we adopt a change recommended by the BDAC and several commenters to require utilities to facilitate survey participation by new and existing attachers.[297] Specifically, in performing a field inspection as part of any pre-construction survey, we modify our rules to require a utility to permit the new attacher and any existing attachers potentially affected by the new attachment to be present for any pole surveys.[298] We require the utility to use commercially reasonable efforts to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher, such notice to include the date, time, and location of the survey, and the name of the contractor performing the survey.[299] We find that advance notice of three business days strikes the right balance between providing sufficient time to accommodate coordination with the attachers and the need to keep the pole attachment process moving forward in a timely manner.[300] We agree with ACA that by encouraging collaboration between all interested parties at an early stage in the pole attachment process, this requirement will facilitate "the expeditious development of solutions in advance of attachments, as well as reduce the potential for future disputes" and that it "reduce[s] the possibility of improper attachments, a concern raised by virtually all utility commenters."[301]

83. In addition, to prevent unnecessary and wasteful duplication of surveys, we adopt a change to our rules that allows utilities to meet the survey requirement of our existing timeline by electing to use surveys previously prepared on the poles in question by new attachers. In the OTMR context, new attachers will perform the necessary surveys to determine whether make-ready work is simple or complex prior to the submission of an application.[302] To the extent such work is complex, it will be governed by our existing pole attachment timeline where the utility performs the survey and must give advance notice

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[296] *See Wireline Infrastructure Order*, 32 FCC Rcd at 11132-34, paras. 9-14.

[297] *See* BDAC January 2018 Recommendations at 37; ACA Wireline NPRM Reply at 18-19; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4; FBA July 20, 2018 Wireline *Ex Parte* Letter at 4.

[298] *See, e.g.*, BDAC January 2018 Recommendations at 37 (stating that a joint survey requirement "would speed up the application process and lower the cost of attachments"); ACA Wireline NPRM Comments at 16-17.

[299] *See* BDAC January 2018 Recommendations at 37. To prevent coordination problems that may invite delay, we do not require a utility to set a date for the survey that is convenient for the affected attachers. *Id.* at 40. However, in the case of reasonable scheduling conflicts, we encourage the parties to work together to find a mutually-agreeable time for the survey. As we did in the OTMR context, we reject AT&T's request to eliminate the notification requirement for surveys. *See supra* section III.A.1.c.(i); AT&T July 23, 2018 Wireline *Ex Parte* Letter at 5. Giving existing attachers the ability to attend the survey by providing advance notification increases collaboration between the parties and assists in identifying potential issues to ensure safety and network reliability. The failure of a utility to maintain adequate records to enable the utility to identify the attachers on its poles, which AT&T claims is typical, is not a sufficient reason for us to eliminate the notification requirement. *See id.*

[300] In light of the BDAC's recommendation, reached after much deliberation by a wide variety of stakeholders,, we deny ACA's request that we use calendar days rather than business days. *See* ACA July 23, 2018 Wireline *Ex Parte* Letter at Attach. at 2.

[301] ACA Wireline NPRM Reply at 18-19 (footnotes omitted); *see also* ACA Wireline NPRM Comments at 39 (noting that Central Hudson Gas & Electric Corp. gives attachers five days' notice of the survey and permits attachers to be present); FBA July 20, 2018 Wireline *Ex Parte* Letter at 4. *But see* Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 7 (claiming that the advance notification requirement would provide "no practical benefit to attachers because survey schedules "are often unpredictable."). To provide utilities some measure of flexibility in complying with this requirement while still encouraging joint surveys to occur, we hold utilities to a "commercially reasonably efforts standard" to make the notifications.

[302] *See supra* section III.A.1.c.(i).

of the survey to affected attachers.[303] However, we will allow the utility to elect to use the new attacher's previously performed survey (performed as part of the OTMR pole attachment process) to fulfill its survey requirements, rather than require the utility to perform a potentially duplicative survey. The utility still must notify affected attachers of its intent to use the new attacher's survey and provide a copy of the new attacher's survey in its notice. If the utility is relying solely on the new attacher's survey to fulfill the survey requirements, we agree with Crown Castle that it is appropriate to shorten the survey period from 45 days to 15 days to speed deployment.[304]

(iii) Make-ready stage

84. To speed broadband deployment, we amend our rules to reduce the deadlines for both simple and complex make-ready from 60 to 30 days (and from 105 to 75 days for large requests in the communications space). To account for the unique circumstances involved with attachments above the communications space,[305] we maintain the current make-ready deadline of 90 days (and 135 days for large requests) for these attachments. We also adopt modified notice requirements to apportion more of the responsibility for promoting make-ready timeline compliance from utilities to new attachers, because new attachers have the greater incentive to drive adherence to the make-ready deadline.

85. *Make-ready deadlines.* Based on the current record and the BDAC's recommendation, we adopt a change to our rules that shortens the make-ready deadline for new pole attachments in the communications space to promote broadband deployment without imposing undue risk to safety or reliability.[306] We agree with Crown Castle that adoption of a shorter make-ready period in the communications space will promote the efficient completion of make-ready by encouraging utilities and existing attachers to prioritize attachment work.[307] We also agree with Google Fiber that a 30-day period for communications space make-ready (and 75 days for larger requests) "will ensure that existing attachers have the opportunity to control make-ready that is expected to affect their services, while reducing delays and increasing efficiency for new attachers."[308] The make-ready timelines we adopt for work in the communication space should be sufficient for both simple and complex work.

86. While the BDAC recommended that we impose a 30-day deadline for complex make-ready work in the communications space,[309] it did not make a recommendation on the deadline for simple make-ready work that is not subject to OTMR. We find that there is value to maintaining consistency of deadlines in the communications space; thus, we adopt the 30-day deadline for all communications space make-ready work.

87. To account for the safety concerns of working above the communications space, we maintain our current make-ready deadlines of 90 days (and 135 days for large requests).[310] In establishing the existing deadlines for make-ready above the communications space, which are 30 days longer than the existing deadlines for make-ready work in the communications space, the Commission pointed to the

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[303] *See infra* Appx. A, 47 CFR § 1.1411(c)(3).

[304] Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 5.

[305] *See, e.g.*, Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 7-8.

[306] *See* BDAC January 2018 Recommendations at 21, 24; ExteNet Wireline NPRM Comments at 52; Lightower Wireline NPRM Comments at 7; Crown Castle Wireline NPRM Reply at 11-12; Google Fiber Wireline NPRM Reply at 6.

[307] Crown Castle Wireline NPRM Comments at 17.

[308] Google Fiber Wireline NPRM Reply at 6.

[309] BDAC January 2018 Recommendations at 21, 24; *see also* Google Fiber Wireline NPRM Comments at 7-8.

[310] *See* CCU Wireline NPRM Comments at 26-28; EEI Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28-29; APPA Wireline NPRM Reply at 30; UTC July 26, 2018 Wireline *Ex Parte* Letter at 1; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 2.

safety risks associated with working on attachments in, near, or above the electric space and the recognized lack of real-world experience at the time with pole-top attachments.[311] We recognize that both utilities and attachers have more experience with these types of attachments than when the Commission adopted these deadlines in 2011,[312] but the same safety risks identified by the Commission in 2011 are still relevant today,[313] and therefore we continue to allow for more time to complete make-ready above the communications space because such attachments involve work near electrical wires that require more careful work and more experienced contractors. However, we recognize the important role that attachments above the communications space can have in facilitating faster and more efficient wireless deployment (particularly the small cell deployments necessary for advanced 5G networks),[314] and therefore, as described below, we make the self-help remedy applicable to these attachments for the first time, which we anticipate will speed deployment by providing a strong incentive for utilities and existing attachers to meet their make-ready deadlines and give new attachers the tools to deploy quickly when deadlines are not met.[315]

88. For all attachments, we retain as a safeguard our existing rule allowing utilities to deviate from the make-ready timelines for good and sufficient cause when it is infeasible for the utility to complete make-ready work within the prescribed time frame.[316] This safeguard will mitigate the effects of our decrease in the make-ready time periods by carving out edge cases where timely completion is truly infeasible and the utility wishes to retain control of the make-ready process. It aids us in balancing the interests of utilities to control make-ready in non-OTMR circumstances and the needs of new attachers to obtain timely completion of OTMR or the ability to employ self-help.

89. Recognizing that our new timeline will put pressure on existing attachers, particularly with respect to poles that have multiple attachers that must conduct complex make-ready work within a shorter timeframe, we adopt a new safeguard for existing attachers. Specifically, we adopt the BDAC recommendation that an existing attacher may deviate from the 30-day deadline for complex make-ready in the communications space (or the 75-day deadline in the case of larger orders) for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready by the deadline.[317] An existing attacher that so deviates must immediately notify, in writing, the new attacher

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[311] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5258-59, para. 33.

[312] *See* AT&T Wireline NPRM Comments at 14; Verizon Wireline NPRM Reply at 11; Crown Castle Wireline NPRM Comments at 18; *see also* AT&T Wireline NPRM Reply at 6 (commenting that since 2011, "pole owners, wireless providers, and contractors have become more, not less, knowledgeable about and proficient at safely deploying antennas and other equipment on utility poles").

[313] *See* CCU Wireline NPRM Comments at 26-28; EEI Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28-29; APPA Wireline NPRM Reply at 30; UTC July 26, 2018 Wireline *Ex Parte* Letter at 1; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 2.

[314] *See* ExteNet Wireline NPRM Comments at 52; AT&T Wireline NPRM Reply at 6-7; Crown Castle Wireline NPRM Reply at 12-13; Verizon Wireline NPRM Reply at 11.

[315] *See infra* section III.A.2.b.

[316] *2011 Pole Attachment Order*, 26 FCC Rcd at 5272-73, para. 68. We agree with ACA that a utility that so deviates may do so for a period no longer than necessary to complete make-ready on the affected poles and must immediately notify, in writing, the new attacher and affected existing attachers, identify the affected poles, and include a detailed explanation of the basis for the deviation and a new completion date. *See* ACA July 23, 2018 Wireline Ex Parte Letter at Attach. at 6; *see also infra*, Appx. A, 47 CFR § 1.1411(h)(2). A new attacher may challenge the utility's determination for deviating from the make-ready timeline if the utility's rationale is not justified by good and sufficient cause. *2011 Pole Attachment Order*, 26 FCC Rcd at 5273, para. 68.

[317] BDAC January 2018 Recommendations at 21; *see also* Level 3 Wireline NPRM Comments at 3 ("New attachers must provide 30 days' written notice for complex make ready to allow a field meeting to be scheduled within that 30 days . . . The existing attacher will have 60 days from the date of notice to perform Complex Make Ready if the technicians mutually agree to such extension in the field meeting."); Oregon Electric Utilities Wireline NPRM

and other affected existing attachers, identify the affected poles, and include a detailed explanation of the basis for the deviation and a new completion date, which cannot extend beyond 60 days from the date of the utility make-ready notice to existing attachers (or 105 days in the case of larger orders). The existing attacher shall deviate from the complex make-ready time limits for a period no longer than necessary to complete make-ready on the affected poles. If the complex make-ready work is not complete within 60 days from the date that the existing attacher sends the notice to the new attacher, then the new attacher can complete the work using a utility-approved contractor.[318] We require existing attachers to act in good faith in obtaining an extension, and we caution that obtaining an extension as a routine matter or for the purpose of delaying the new attachment is inconsistent with acting in good faith. If a new attacher believes the existing attacher is not using the extension period in good faith, it may file a complaint with the Commission.

90. We reject AT&T's request for a uniform 60-day time period for complex make-ready.[319] Although AT&T's proposal might provide more predictability, we find that the BDAC recommendation better speeds deployment by setting a shorter 30-day period for complex make-ready in the communications space and allowing for additional time in that context only on a case-by-case basis.

91. We further accelerate communications space attachments by eliminating the optional 15-day extension period for the utility to complete the make-ready work.[320] Many commenters and the BDAC support elimination of the extra 15 days at the end of the make-ready stage because few, if any, utilities actually invoke the extension.[321] However, with respect to work above the communications space, we retain the optional 15-day extension period for utility make-ready.[322] Because we are extending a new attacher's self-help remedy to attachments above the communications space, more utilities may need to use the additional 15 days to perform such make-ready work themselves.[323] Further, retaining this extra period promotes safety and reliability of the electric grid by granting the utility extra time to undertake the work itself. To the extent utilities do not intend to avail themselves of the additional 15 days before a new attacher resorts to self-help above the communications space, we strongly encourage utilities to communicate that intent as soon as possible to new attachers so that the new attacher can promptly begin make-ready work.

92. We decline to reduce the timeline for large attachments beyond the 30-day decrease for communications space attachments set forth above. While Crown Castle advocates for eliminating the additional time afforded to large pole attachment requests because of the resulting extra delay to the pole

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Comments at 5 (when make-ready requires more than 45 days to complete, the parties must negotiate "a mutually satisfactory longer period to complete the make ready work.").

[318] BDAC January 2018 Recommendations at 21; *see also* AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 3. If no utility-approved contractor is available, then the new attacher must follow the procedures outlined *infra* in section III.A.2.c. for choosing an appropriate contractor.

[319] Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Mar. 23, 2018).

[320] *See* 47 CFR § 1.1411(e)(1)(iv).

[321] *See* BDAC January 2018 Recommendations at 46 ("[B]ased on information that utilities rarely, if ever, assert their right to complete make-ready work that is uncompleted by existing attachers within 15 days, Committee members agreed to remove this obligation on utilities, which would facilitate a requesting attacher completing make-ready work as quickly as possible."); AT&T Wireline NPRM Comments at 13; Frontier Wireline NPRM Comments at 15; USTelecom Wireline NPRM Comments at 17; Lumos Wireline NPRM Reply at 6-7.

[322] *See* 47 CFR § 1.1411(e)(2)(iv).

[323] *Cf.* CenturyLink Wireline NPRM Comments at 10.

attachment process,[324] we agree with commenters that argue that the additional time is often needed for utilities to carefully process larger requests.[325] As AT&T explains "more attachments on more poles require more surveys, more coordination with attachers, and more make-ready work. That additional work, much of which involves site visits, requires additional time."[326]

93. We also decline the request of some commenters to adopt a shorter timeline for routine pole attachment requests involving a small number of poles.[327] We agree with the Coalition of Concerned Utilities that mandating shorter deadlines for smaller requests could cause the utilities to give undue priority to those requests merely because they are smaller in order to meet the compressed deadlines.[328] In addition, the Coalition of Concerned Utilities claims that new attachers have been shown to abuse the process in states where utilities are required to process smaller applications more quickly by submitting a series of smaller applications (as opposed to one large application) to ensure that utilities focus on their applications first.[329] We do not want to incentivize possible gamesmanship by instituting a federal requirement of shorter deadlines for smaller requests.

94. *Notice and New Attacher Role.* We adopt the BDAC recommendation that when a utility provides the required make-ready notice to existing attachers, then it must provide the new attacher with a copy of the notice, plus the contact information of existing attachers to which the notices were sent, and thereafter the new attacher (rather than the utility) must take responsibility for encouraging and coordinating with existing attachers to ensure completion of make-ready work on a timely basis.[330] We adopt this additional notice requirement to empower the new attacher to promote the timely completion of make-ready.[331] As explained by the POWER Coalition, "the new attacher is in the better position to manage the work of existing attachers, to impose reasonable deadlines, and to negotiate compensation for

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[324] *See* Crown Castle Wireline NPRM Comments at 17-18.

[325] *See e.g.,* AT&T Wireline NPRM Comments at 10; CenturyLink Wireline NPRM Comments at 10; EEI Wireline NPRM Comments at 22; Midwest Electric Utilities Wireline NPRM Comments at 20; UTC Wireline NPRM Reply at 10-11.

[326] AT&T Wireline NPRM Comments at 10.

[327] *See* NTCA Wireline NPRM Comments at 6-7 (would apply to requests by smaller providers for routine attachments involving 100 or fewer poles in a six-month period); WTA Wireline NPRM Comments at 18 (would apply to pole attachment requests involving 50 or fewer poles); ACA Wireline NPRM Reply at 20-22 (would apply to routine pole attachment requests involving 20 or fewer poles); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 3 (would apply to applications of 30 or fewer poles).

[328] *See* CCU Wireline NPRM Reply at 23.

[329] *Id*. (noting that "[i]n order to treat attaching entities in a nondiscriminatory manner, utilities typically process applications in the order they are received, no matter the size if [*sic*] the application").

[330] *See* BDAC January 2018 Recommendations at 46; Electric Utilities Wireline NPRM Comments at 20; POWER Coalition Wireline NPRM Comments at 11-12; Letter from Thomas Cohen and J. Bradford Currier, Counsel to ACA, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 6 (filed Mar. 26, 2018) (ACA Mar. 26, 2018 Wireline *Ex Parte* Letter); FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 3. We decline ACA's request that we require utilities to provide new attachers with specific contact information, such as e-mail addresses and telephone numbers. *See* ACA 2018 July 23, 2018 Wireline *Ex Parte* Letter at Attach. at 5. While we encourage utilities to provide as much existing attacher contact information to new attachers as possible, we recognize that utilities may not always have every form of contact information we may specify.

[331] At the same time, we expect existing attachers to respond in a timely manner to requests from new attachers for information, including estimated completion dates and work status updates, and to cooperate with new attachers and other existing attachers to complete make-ready prior to the date set in the notice. *See* ACA July 23, 2018 Wireline *Ex Parte* Letter at 2-3, Attach. at 5.

the work performed."[332]

95. *Delivery of Power.* We decline to amend our rules to require that the make-ready process include the delivery of electric power to a new attachment.[333] As pointed out by utility commenters, the provision of electric service is outside of our jurisdiction, as it is governed by the Federal Energy Regulatory Commission and state law.[334] We recognize, however, that electricity is critical to powering wireline and wireless equipment and that any delay in supplying power to a new attachment is an impediment to broadband deployment.[335] We therefore strongly encourage utilities and new attachers to work together to avoid delays in delivering power to new attachments.

b. Enhancing the Self-Help Remedy

96. In the interest of speeding broadband deployment, we modify our rules to provide a self-help remedy to new attachers for work above the communications space, including the installation of wireless 5G small cells, when the utility or existing attachers have failed to complete make-ready work within the required time frames. We recognize that despite widespread agreement that make-ready work often extends past Commission-prescribed timelines,[336] and new attachers' frustration with delays caused by missed deadlines for make-ready work,[337] the record shows that, at present, new attachers rarely invoke the existing self-help remedy in the communications space.[338] In the interest of ensuring that new attachers are able to exercise the self-help remedy, we take this opportunity to reiterate its availability and modify our rules to provide a process for new attachers to communicate their intent to engage in self-help to the utility and existing attachers. These steps, together with the changes we make to the process for new attachers to hire contractors to conduct self-help work, should encourage the use of self-help where necessary and strengthen the incentive for utilities and existing attachers to complete work on time.

97. *Self-Help Above the Communications Space.* In the *2011 Pole Attachment Order*, the Commission declined to apply a self-help remedy for survey and make-ready work for pole attachments "located in, near, or above the electric space."[339] After further consideration and in light of the national importance of a speedy rollout of 5G services, we amend our rules to allow new attachers to invoke the self-help remedy for work above the communications space, including the installation of wireless 5G

[332] POWER Coalition Wireline NPRM Comments at 11-12; *see also* Electric Utilities Wireline NPRM Comments at 20 (requesting we make clear that "beyond an initial notification regarding the need for and nature of make-ready, the pole owner has no further notification or coordination obligations."); ACA Mar. 26, 2018 Wireline *Ex Parte* Letter at 6 (asking that we require "the utility to notify existing attachers about the need for and nature of make-ready work and to provide that information to the new attacher, who then will be responsible for following-up with existing attachers on that work."); Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T to Marlene H. Dortch, Secretary, FCC, WC Docket 17-84, at 1-2 (filed April 19, 2018) (advocating for the new attacher to serve as "project manager" for the make-ready process).

[333] *See* Crown Castle Wireline NPRM Comments at 21-22; Lightower Wireline NPRM Comments at 7-8.

[334] *See* CCU Wireline NPRM Reply at 24-25; EEI Wireline NPRM Reply at 9; Electric Utilities Wireline NPRM Reply at 9-12; Midwest Electric Utilities Wireline NPRM Reply at 28; POWER Coalition Wireline NPRM Reply at 10.

[335] *See* Crown Castle Wireline NPRM Comments at 21-22; Lightower Wireline NPRM Comments at 7-8.

[336] *See* CCU Wireline NPRM Comments at 11-12; FBA Wireline NPRM Comments at 4; Google Fiber Wireline NPRM Comments at 11-12; CMA Report at 1-2, 6; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 2; *see also* BDAC January 2018 Recommendations at 19-20.

[337] *See* ACA Wireline NPRM Comments at 20; CCU Wireline NPRM Comments at 11; FBA Wireline NPRM Comments at 4; Google Fiber Wireline NPRM Comments at 11-12; CMA Report at 1-2, 6-7; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 2.

[338] *See* BDAC January 2018 Recommendations at 43-46; ACA Wireline NPRM Comments at 44; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

[339] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5262, para. 42.

small cells, when utilities and existing attachers have not met make-ready work deadlines.[340] Accenture estimates that wireless providers will invest $275 billion dollars over the next decade to deploy 5G, which is expected to create three million new jobs across the country and boost the U.S. gross domestic product by half a trillion dollars.[341] As CTIA explains, the network infrastructure needed to support 5G cannot wait, and it is incumbent on the Commission to quickly eliminate barriers to, and encourage investment in, 5G deployment.[342] Although we do not allow wireless attachers to perform their own work in the first instance for safety and equipment integrity reasons, we nonetheless give them the ability to use self-help to complete make-ready when utilities miss their deadline.

98. Until now, the only remedy for missed deadlines for work above the communications space has been filing a complaint with the Commission's Enforcement Bureau.[343] We agree with commenters that argue that complaints are an important but insufficient tool for encouraging compliance with our deadlines and speeding broadband deployment.[344] We expect the availability of self-help above the communications space will strongly encourage utilities and existing attachers to meet their make-ready deadlines and give new attachers the tools to deploy quickly when they do not.[345] As described by Crown Castle, the extension of the self-help remedy to attachments above the communications space closes "a significant gap in the Commission's rules that leaves Crown Castle without a meaningful remedy when the electric utility fails to perform make-ready work in a timely fashion."[346]

99. We recognize the valid concerns of utilities regarding the importance of safety and equipment integrity, particularly in the electric space,[347] and we take several steps to address these

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[340] We reject the request of AEP/Georgia Power that we "issue a Further Notice of Proposed Rulemaking on this issue." AEP/Georgia Power July 23, 2018 *Ex Parte* Letter at 3; *see also* EEI July 26, 2018 Wireline *Ex Parte* Letter at 9 (requesting a further notice regarding self-help above the communications space); Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 3 (positing that the electric utilities assist in developing "an alternative proposal for rules that incentivize timely performance, rather than penalizing untimely performance"). In response to our request for comments on potential reforms to our current pole attachment timeline to facilitate timely access to poles, we assembled a record on the issue of self-help above the communications space and received comments and additional filings from both those in favor and opposed to the idea. *See Wireline Infrastructure Notice*, 32 FCC Rcd at 3268, paras. 6-7. We also reject Georgia Power's request to limit self-help above the communications space to only wireless attachments. *See* Letter from Allen Bell, Distribution Manager, Georgia Power Company, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 27, 2018). Although Georgia Power asserts that such a distinction would "reduce the safety and reliability threat," it offers no evidence in support of this claim. *Id.*

[341] *See* CTIA Wireline NPRM Comments at 4 (quoting Accenture Strategy, Smart Cities – How 5G Can Help Municipalities Become Vibrant Smart Cities at 1 (Jan. 12, 2017), https://newsroom.accenture.com/content/1101/files/Accenture_5G-Municipalities-Become-Smart-Cities.pdf).

[342] *See* CTIA Wireline NPRM Comments at 5.

[343] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5262, paras. 42-43. We are not aware of any such complaints being filed since 2011.

[344] *See* ACA Wireline NPRM Comments at 32; *see also* Crown Castle Wireline NPRM Comments at 19.

[345] *See* ACA Wireline NPRM Comments at 46 ("The [self-help] process also would provide an incentive for utilities and existing attachers to conduct necessary make-ready works in a timely fashion to prevent other companies from moving their equipment."); FBA July 20, 2018 Wireline *Ex Parte* Letter at 4.

[346] Crown Castle Wireline NPRM Comments at 19.

[347] *See* CCU Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 8-11; POWER Coalition Wireline NPRM Comments at 11; Puget Sound Energy Wireline NPRM Comments at 5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 3-4; EEI Wireline NPRM Reply at 20-21; Midwest Electric Utilities Wireline NPRM Reply at 24; Letter from Thomas R. Pryatel, Director, Energy Delivery-Operations Services, FirstEnergy Service Company, to Ajit Pai, Chairman, FCC, WC Docket No. 17-84, at 1-3 (filed July 23, 2018) (FirstEnergy July 23, 2018 Wireline *Ex Parte* Letter); Letter from Thomas B. Magee, Counsel to CCU, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 25, 2018) (CCU July 25, 2018 *Ex Parte* Letter); Letter from Ken Johnson, VP Reg. & Gov. Affairs, Puget Sound Energy, to Marlene H. Dortch,

important issues. As an initial matter, in response to concerns expressed by utilities,[348] we maintain the 90-day period (135 for larger requests) for the utility to complete make-ready. In the event that new attachers must resort to self-help above the communications space, the new attacher must use a qualified contractor, that is pre-approved by the utility, to do the work.[349] While some utilities argue that contractors working for third parties will not adhere to the utility's procedures for ensuring the integrity of electric distribution facilities,[350] the utility will have full control over the contractor pre-approval process and therefore will be able to require that contractors who wish to be placed on the utility-approved list adhere to utility protocols for working in the electric space, even when the contractor is retained by a third-party communications attacher. In addition, we reiterate that utilities will have the opportunity to identify and address any safety and equipment concerns when they receive advance self-help notice and post-completion notice from the new attacher.[351] Our rules also contain additional pre-existing protections for utilities that empower them to promote safety and reliability.[352] Finally, utilities may prevent self-help from being invoked by completing make-ready on time. Because electric utilities always will have the opportunity to complete make-ready work before self-help is triggered, have control over which contractors will be allowed to perform self-help, and will have the opportunity to be present when the self-help make-ready work is performed, we disagree with FirstEnergy that our new rules "risk loss of control for every expansion of capacity to accommodate new attachments."[353]

100. We also disagree with FirstEnergy's suggestion that we lack jurisdiction to allow for self-help above the communications space because Congress granted jurisdiction to the Commission only over poles and not "electrical equipment attached to the poles."[354] Our rules are designed to facilitate timely and non-discriminatory access to poles for attachments, and the action we take herein falls well within the Commission's jurisdiction.[355] While Section 224(f)(2) of the Act gives utilities the ability to deny

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Secretary, FCC at 1-2 (filed July 25, 2018) (Puget Sound Energy July 25, 2018 Wireline *Ex Parte* Letter); Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 5; EEI July 26, 2018 Wireline *Ex Parte* Letter at 8; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 2; UTC July 26, 2018 Wireline *Ex Parte* Letter at 3. *But see* Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 5 (arguing that the "Commission should reject requests to eliminate the . . . self-help remedy for make-ready work above the communications space).

[348] *See, e.g.*, Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 7-8.

[349] *See* ACA Wireline NPRM Comments at 45; Crown Castle Wireline NPRM Comments at 19; Lightower Wireline NPRM Comments at 13-14.

[350] *See* FirstEnergy July 23, 2018 Wireline *Ex Parte* Letter at 2; AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 3; CCU July 25, 2018 Wireline *Ex Parte* Letter at 3; Pugent Sound Energy July 25, 2018 Wireline *Ex Parte* Letter at 1-2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 9; UTC July 26, 2018 Wireline *Ex Parte* Letter at 3-4.

[351] *See* CenturyLink Wireline NPRM Comments at 11; Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 8-9; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 12; ACA Wireline NPRM Reply at 27-28; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 6; BDAC January 2018 Recommendations at 42.

[352] *See infra* Appx. A, 47 CFR § 1.1412(d) (stating that when self-help surveys and make-ready work result in disputes between attachers and an electric utility, the consulting electric utilities are entitled to make final determinations "on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes"); 47 CFR § 1.1411(e)(2)(iv) (providing the utility 15 days to complete work beyond other attachers).

[353] FirstEnergy July 23, 2018 Wireline *Ex Parte* Letter at 3.

[354] *Id.*

[355] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5282, para 91 (stating "the broad language of section 224(b)(1) and (b)(2) indicate a delegation of comprehensive rulemaking authority over all attachment issues, including access" and that Section 224(f) is a further broad mandate of "nondiscriminatory" access with a specific carve-out for certain

applications for new attachments due to lack of capacity, as stated by First Energy, and for "safety, reliability, and generally applicable engineering purposes," their discretion under Section 224(f)(2) is not "unfettered."[356] And in any event, the actions we take here do not abridge a utility's ability to deny access on a non-discriminatory basis as provided for by Section 224(f)(2).[357]

101. *Pole Replacements*. We agree with parties that argue that the self-help remedy should not be available when pole replacements are required as part of make-ready.[358] The record shows that pole replacements can be complicated to execute and are more likely to cause service outages or facilities damage.[359] Given the particularly disruptive nature of this type of work, we make clear that pole replacements are not eligible for self-help.

102. *Self-Help Notices*. Similar to the pre- and post-work notice requirements we adopt in the new OTMR process, and consistent with the BDAC's recommendation, we require new attachers to give affected utilities and existing attachers (1) no less than three business days advance notice for self-help surveys and five days' advance notice of when self-help make-ready work will be performed and a reasonable opportunity to be present,[360] and (2) notice no later than 15 days after make-ready is complete on a particular pole so that they have an opportunity to inspect the make-ready work.[361] Just as in the

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conditions where electric utilities may deny access to their "poles, ducts, conduits, or rights-of-way"); *see also Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for our Future*, GN Docket No. 09-51, Order and Further Notice Proposed Rulemaking, 25 FCC Rcd 11864, 11873, para. 17 (2010) ("We hold that access to poles, including the preparation of poles for attachment, commonly termed 'make-ready,' must be timely in order to constitute just and reasonable access.").

[356] *See* 47 U.S.C. § 224(f)(2); First Energy July 23, 2018 Wireline *Ex Parte* Letter at 3; *Southern Co. v. FCC*, 293 F.3d 1338, 1348 (11th Cir. 2002). For example, the D.C. Circuit has upheld the Commission's interpretation that capacity is not insufficient where facility rearrangement in the existing space using traditional methods of attachment can accommodate the request. *See Gulf Power Co. v. FCC*, 669 F.3d 320, 325 (D.C. Cir. 2012). In the *2011 Pole Attachment Order*, the Commission further clarified that "where rearrangement of a pole's facilities--whether in the communications space or the electric space--can accommodate an attachment, there is not "insufficient capacity" under section 224(f)(2). . . . We do not equate capacity expansion with facility rearrangement in existing space." 26 FCC Rcd 5240, paras. 231-32 (2011).

[357] The retained and modified rules include opportunities and safeguards for utilities to exercise their right under Section 224(f)(2), including instances where there are valid concerns about "safe and reliable operation of the electric *system*" or "*electrical equipment* attached to the poles." *See* First Energy July 23, 2018 Wireline *Ex Parte* Letter at 2, 3 (emphasis in original); 47 CFR § 1.1413(d); Appx. A, 47 CFR §§ 1.1412(c), 1.1412(h)(2), 1.1412(i)(2)(i).

[358] *See* AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 3; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 3; UTC July 26, 2018 Wireline *Ex Parte* Letter at 1, 3.

[359] *See* Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 2; Midwest Electric Utilities Wireline NPRM Reply at 25-26; Puget Sound Energy Wireline NPRM Comments at 7-8.

[360] In our new OTMR-based pole attachment process, we require that new attachers provide no less than three business days' advance notice for surveys and 15 days advance notice for make-ready. *See supra* sections III.A.1.c.(i), (v). The notice period to commence self-help make-ready is 10 days shorter than in the OTMR process because the utility and existing attachers have at least 30 days to perform make-ready prior to the new attacher electing self-help. *See* ACA Wireline NPRM Comments at 46 (proposing 7-day self-help make-ready notice period).

[361] Just as in the OTMR context, the new attacher's post-make-ready notice must provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready work done on a particular pole. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage to their equipment or any code (e.g., safety, electrical, engineering, construction) violations caused by make-ready conducted by the new attacher. If the utility or existing attachers discover damage or any code violations caused by make-ready conducted by the new attacher on equipment belonging to the utility or an existing attacher, then the utility or existing attacher shall inform the new attacher and provide adequate documentation of the damage or code violations. The utility or existing attacher may either (A) complete any

OTMR context, the advance notice must include the date and time of the work, the nature of the work, and the name of the contractor being used by the new attacher.[362] As in the OTMR context, we also require new attachers to provide immediate notice to the affected utility and existing attachers if the new attacher's contractor damages equipment or causes an outage that is reasonably likely to interrupt the provision of service.[363] We find that these self-help notices will promote safe, reliable work and provide the opportunity for corrections where needed, as well as allow utilities and existing attachers to alert their customers of the work.[364] In this context, we also find that the notices will help to address complaints that utilities are not receiving consistent notices from attachers regarding critical steps in the pole attachment process.[365]

103. At the request of numerous commenters,[366] we also take this opportunity to reiterate that under our existing rules, the make-ready clock runs simultaneously and not sequentially for all existing attachers, and the utility must immediately notify at the same time all entities with existing attachments

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necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations, or (B) require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher. *See supra* section III.A.1.c.(vi); CenturyLink Wireline NPRM Comments at 11; Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 9; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 11-12; ACA Wireline NPRM Reply at 28; Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 1; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 6; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 4. To maintain consistency with the OTMR rules, we decline to adopt ACA's suggestion to eliminate the 14-day notice period. *See* ACA July 23, 3018 Wireline *Ex Parte* Letter at Attach. at 7. Similarly, we decline EEI and UTC's proposal to enact an additional period for re-inspection of the new attacher's repair. *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 6; UTC July 26, 2018 Wireline *Ex Parte* Letter at 3. The utility is free to inspect the new attacher's repair at any time without us having to mandate further processes.

[362] *See supra* sections III.A.1.c.(i), (v). Similar to our finding with regard to the OTMR process, we find that the utility and existing attachers should be responsible for any expenses associated with double-checking the self-help work performed by the new attacher's contractors, including any post-make-ready inspections. *See supra* section III.A.1.a; *see also* Google Fiber July 23, 2018 Wireline *Ex Parte* Letter at 2; Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 7. *But see* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2, 4 (arguing that existing attachers should be reimbursed by the new attacher for expenses associated with monitoring the new attacher's self-help survey and make-ready work); CWA July 26, 2018 Wireline *Ex Parte* Letter at 4 (arguing same). We find that the new attacher should not be penalized when existing attachers and the utility miss their deadlines by holding a new attacher responsible for both the costs of doing the work itself and reimbursing the expenses of the utility and existing attachers to monitor and inspect that work.

[363] *See supra* section III.A.1.c.(v); *see also infra* Appx. A, 47 CFR § 1.1411(j)(4)(ii). As in the OTMR context, upon receiving notice of damaged equipment or a service outage, the utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or outage or require the new attacher to fix the damage or outage at its expense immediately following notice from the utility or existing attacher. Upon notice from the existing attacher or the utility to fix damages or outages caused by a contractor, the new attacher must complete the repair work before it can resume its make-ready work. Where the utility or the existing attacher elects to fix the damage or outage, the new attacher can only continue with make-ready work if it does not interfere with the repair work being conducted by the utility or existing attacher. *See infra* Appx. A 47 CFR § 1.1411(i)(2)(ii).

[364] For the same reasons as in the OTMR context, we decline NCTA's proposal to codify a complaint right under the pole attachment rules for existing attachers for violations of the self-help rules. *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2, 4; *supra* section III.A.1.

[365] *See* Midwest Electric Utilities Wireline NPRM Comments at 27.

[366] *See* Google Fiber Wireline NPRM Comments at 11-12; AT&T Wireline NPRM Reply at 11 (asserting that concerns with sequential make-ready can be resolved by clarifying that there is only one make-ready period applicable to all existing attachers); Lumos Wireline NPRM Reply at 5; CMA Report at 1-2, 6; *see also* ACA Wireline NPRM Comments at 20; CCU Wireline NPRM Comments at 11; Charter Wireline NPRM Comments at 34-35; BDAC January 2018 Recommendations at 19.

that are affected by the proposed make-ready work.[367] We recognize that coordinating work among existing attachers may be difficult, particularly for poles with many attachments, and existing attachers that are not the first to move may in some circumstances receive limited or even no time for work during the make-ready stage.[368] Despite these challenges, we expect utilities, new attachers, and existing attachers to work cooperatively to ensure that pole attachment deadlines are met. If others do not meet their deadlines, new attachers then may invoke the self-help remedy.[369]

c. Contractor Selection for Self-Help

104. We adopt different approaches to new attacher contractor selection for simple and non-simple self-help make-ready. Given that simple self-help and OTMR are substantially similar, we adopt the same approach to contractor selection for simple self-help in the communications space as for OTMR, and we do so for the same reasons set forth above.[370] Thus, consistent with the OTMR regime:

- A new attacher electing self-help for simple work in the communications space must select a contractor from a utility-maintained list of qualified contractors, where such a list is available. The contractor must meet the same safety and reliability criteria as contractors authorized to perform OTMR work. New and existing attachers may request that qualified contractors be added to the utility's list and the utility may not unreasonably withhold its consent for such additions.
- Where no utility-maintained list is available, or no utility-approved contractor is available within a reasonable time period, the new attacher must select a contractor that meets the same safety and reliability criteria as contractors authorized to perform OTMR work and any additional non-discriminatory, written, and publicly-available criteria relating to safety and reliability that the utility specifies. The utility may veto the new attacher's contractor selection so long as it offers another available, qualified contractor.

105. For complex work and work above the communications space, we take a different approach and require new attachers to select a contractor from the utility's list. We also require utilities to make available and keep up-to-date a reasonably sufficient list of contractors they authorize to perform complex and non-communications space self-help surveys and make-ready work.[371] We thus maintain our existing contractor selection requirements as to complex self-help in the communications space and extend those requirements to self-help above the communications space.[372]

106. We treat the utility list as mandatory for complex and above the communications space work for several reasons. These types of make-ready can involve greater risks than simple make-ready, and we agree with numerous commenters that utility selection of eligible contractors promotes safe and

[367] *See* 47 CFR § 1.1411(e); *see also* AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 3 ("Sequential timelines are not and have never been contemplated or required by existing Commission rules.").

[368] *See* Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3; *see also supra* section III.A.1.a. We encourage coordination to ensure that each existing attacher receives the time it needs to complete make-ready.

[369] *See* 47 CFR § 1.1411(e)(1)(v); *2011 Pole Attachment Order*, 26 FCC Rcd at 5265, para. 49.

[370] *See supra* section III.A.1.b.

[371] We decline AT&T's request to exempt LEC pole owners from the requirement to maintain a list of approved contractors for work above the communications space. *See* AT&T July 23, 2018 Wireline *Ex Parte* Letter at 4-6. While we agree with AT&T that LEC pole owners may not have direct knowledge of contractors qualified to do such work, their pre-existing relationship with the electric utility places LEC pole owners in a better position to obtain such information than the new attacher, which may not have such a relationship.

[372] 47 CFR §§ 1.1412(a)-(b).

reliable work in more challenging circumstances.[373] Although the current selection process sometimes entails delays where utilities fail to provide a list of approved contractors,[374] we find that as to complex work and work above the communications space—which poses heightened safety and reliability risks—the benefits of the current approach outweigh its costs.[375] We recognize that self-help above the communications space is novel and poses particularly heightened safety and reliability risks.[376] We therefore find it especially important to give the utility control over who performs such work.[377] In reaching this conclusion, we decline to adopt the BDAC's recommendation that utilities need no longer provide, and requesting attachers need not use, utility-approved contractors to complete complex make-ready work in the communications space under the self-help remedy.[378]

107. Although we treat the utility list as mandatory for complex and above the communications space make-ready, we adopt a protective measure to prevent the utility list from being a choke-point that prevents deployment. The record indicates that some new attachers have been unable to exercise their self-help remedy because a list of utility-approved contractors was not available.[379] To alleviate this problem for complex and above the communications space work, we set forth in our rules—as we do in the context of OTMR and simple-self-help—that new and existing attachers may request that qualified contractors be added to the utility's list and that the utility may not unreasonably withhold its consent for such additions.[380] As in the context of OTMR and simple self-help, to be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability.[381]

108. Because we adopt this safeguard for non-simple make-ready, we decline to adopt the BDAC's recommended multi-step objection and appeal process for adding and removing contractors from the utility-approved contractor list.[382] Among other things, the BDAC proposes giving existing attachers

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[373] *See* CCU Wireline NPRM Comments at 28; Verizon Wireline NPRM Reply at 7; Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 4.

[374] *See* ACA Wireline NPRM Comments at 44-45.

[375] AT&T Wireline NPRM Reply at 7-8; *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5267, para. 55 (concluding that the use of a utility-approved contractor by the new attacher "ensures that only qualified contractors work on utility poles").

[376] *See* CCU Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28; EEI Wireline NPRM Comments at 19 n.18; UTC Wireline NPRM Reply at 16.

[377] *See* Midwest Electric Utilities Wireline NPRM Comments at 28-29; CCU Wireline NPRM Comments at 28-29; UTC Wireline NPRM Reply at 16; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 1.

[378] BDAC January 2018 Recommendations at 46. The BDAC's recommendation also extends to simple work in the communications space, *see id.*, and we adopt that aspect of the recommendation as set forth above.

[379] *See* ACA Wireline NPRM Reply at 24.

[380] ACA expresses concern that, unlike with OTMR contractor selection, self-help new attachers are not permitted to select a qualified contractor to perform complex and electric space make-ready work where utilities do not provide a list. *See* ACA July 25, 2018 Wireline *Ex Parte* Letter at 4. While requiring new attachers to request the addition of a qualified contractor to the list may be a more time-consuming process than simply allowing new attachers to select a contractor and proceed with the self-help work, we find that this approach still provides new attachers with input while better accounting for the heightened safety and reliability risks that may arise in non-simple work.

[381] *See supra* section III.A.1.b.

[382] *See* FCC, Broadband Deployment Advisory Committee, Approved Recommendations, Addendum to the Report of the Competitive Access to Broadband Infrastructure Working Group at 2-4 (Apr. 25, 2018) https://www.fcc.gov/sites/default/files/bdac-cabi-report-04252018.pdf (BDAC April 2018 Recommendations).

the right to request the removal of a contractor from the list,[383] and it proposes allowing appeals to the Commission for an expedited letter ruling by the Commission staff.[384] We find the BDAC's process unduly complex and cumbersome, and we believe it provides counterproductive opportunities for delay to competitors to new attachers.[385] We agree with Verizon that while utilities should consider feedback on contractors from existing attachers, if existing attachers had rights to object to utility-approved contractors, "the list of approved contractors could vary from pole to pole based on the particular attachers on the poles," creating an administrative burden for new attachers and thereby slowing deployment.[386] Further, given that we do not directly regulate and generally have little information about communications pole attachment contractors operating throughout the country, we are not well-positioned at this juncture to adjudicate disputes over specific contractors' qualifications, especially on an expedited basis.

d. Detailed Make-Ready Costs

109. To facilitate the planning of more aggressive deployments, we adopt additional requirements to improve the transparency and usefulness of the make-ready cost estimates currently required under our rules.[387] We require estimates of all make-ready charges to be detailed and include documentation that is sufficient to determine the basis for all charges,[388] as well as similarly detailed post-make-ready invoices.

110. The record reflects frustration over the lack of transparency of current estimates of make-ready work charges.[389] ACA, Lumos, Crown Castle, and other commenters express support for a requirement that utilities provide detailed, itemized estimates and final invoices of all necessary make-ready costs.[390] They, along with other commenters, argue that, in many cases, utilities currently do not provide detailed estimates or detailed final invoices.[391] They claim that where utilities do not detail the basis of potential or actual charges, new attachers may reasonably fear that utilities can "potentially include costs that are unnecessary, inappropriately inflated, or that attaching entities could easily avoid."

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[383] *See id.* at 2-3.

[384] *See id.* at 4.

[385] *See supra* section III.A.1.b. (finding giving existing attachers an objection right to contractors likely to slow broadband deployment).

[386] Verizon Wireline NPRM Reply at 7.

[387] Under our current rules, a utility must present a new attacher with "an estimate of charges to perform all necessary make-ready work" within 14 days of conducting the survey of the pole or receiving from the new attacher its own conducted survey. 47 CFR § 1.1411(d); *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5255-56, paras. 26-28.

[388] *See* Lumos Wireline NPRM Reply at 13.

[389] *See* ACA Wireline & Wireless NPRM Comments at 24-26, 48; Crown Castle Wireline NPRM Comments at 15; Google Fiber Wireline NPRM Comments at 11; NCTA Wireline & Wireless NPRM Comments at 11-12; Lumos Wireline NPRM Reply at 13.

[390] *See* ACA Wireline & Wireless NPRM Comments at 24-26; Lightower Wireline NPRM Comments at 6; Crown Castle Wireline NPRM Reply at 7-8; Lumos Wireline NPRM Reply at 13.

[391] *See, e.g.*, ACA Wireline & Wireless NPRM Comments at 25, 49; Crown Castle Wireline NPRM Comments at 14; Lightower Wireline NPRM Comments at 6; Lumos Wireline NPRM Comments at 12-13; ACA Wireline & Wireless NPRM Reply at ii; Charter Feb. 5, 2018 Wireline *Ex Parte* Letter Attach. at 3; ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 7. Oregon and New York currently require detailed make-ready estimates. *See* Or. Admin. R. 860-028-0100; N.Y. Pub. Serv. Comm'n, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, Case 03-M0432, Appendix A (Aug. 6, 2004), *available at* http://www.utilityregulation.com/content/orders/04NY0432E.pdf; *see also* ACA Wireline & Wireless NPRM Comments at 49.

[392] Numerous commenters describe experiencing "'bill shock,' where a utility's make-ready invoices far exceed[] the utility's initial estimates[,]"[393] and add that the lack of transparency of make-ready costs inhibits their ability to plan network expansions.[394] Given the frustration reflected in the record, we find that requiring detailed make-ready cost estimates and post-make-ready invoices will improve transparency in the make-ready process and better enable providers to plan broadband buildouts.[395]

111. We further clarify that our current rules require the utility to provide estimates for all make-ready work to be completed, regardless of what party completes the work.[396] Although some utilities claim they are poorly positioned to provide estimates for make-ready work other than their own, [397] we continue to find that utilities are best positioned to compile and submit these make-ready estimates to new attachers due to their pre-existing and ongoing relationships with the existing attachers on their poles.[398] We recognize that in many circumstances the utility will not be able to prepare on its own an estimate for other existing attachers' make-ready work;[399] therefore, we clarify that utilities may comply

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[392] Crown Castle Wireline NPRM Comments at 15; *see also* ACA Wireline & Wireless NPRM Comments at 48 ("Utilities . . . have exploited these gaps by providing attachers with vague and un-itemized pre-job estimates and post-job bills for make-ready work and attempting to charge attachers for fixing existing safety code violations and subsidizing the utilities' own deferred maintenance.").

[393] ACA Mar. 26, 2018 Wireline *Ex Parte* Letter at 3.

[394] *See* Google Fiber Wireline NPRM Comments at 11 (noting that improved cost certainty across markets can allow attachers to plan network expansions with greater confidence); Lumos Wireline NPRM Comments at 14 (noting that requiring utilities to make their charges more transparent "would expedite the performance of necessary make-ready while maintaining cost certainty and ensuring non-discriminatory treatment of attachers"); ACA Wireline & Wireless NPRM Comments at 25-26 (stating that "post-make-ready financial surprises can damage the viability of projects" and providing examples of significant back-billing); NCTA Wireline & Wireless NPRM Comments at 11-12 (recognizing that cost transparency allows attachers to plan upgrades and extensions more effectively).

[395] *See* Lumos Wireline NPRM Reply at 13.

[396] Our current rule requires that "a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work . . . ." 47 CFR § 1.1411(d).

[397] *See* Electric Utilities Wireline NPRM Comments at 15 (contending that utilities are ill-equipped both to estimate the make-ready costs of a third-party attacher on the utilities' poles and to enforce any requirement that these third parties provide make-ready cost estimates to new attachers); Midwest Electric Utilities Wireline NPRM Reply at 17 (arguing that a utility should be required to provide "an estimate of the costs to perform make-ready work only on the utilities own facilities" and "not . . . an estimate of the costs to perform make-ready work on other attachers' facilities"); AT&T July 23, 2018 Wireline *Ex Parte* Letter at 2; CCU July 25, 2018 Wireline *Ex Parte* Letter at 2; *see also* CenterPoint Energy et al. May 25, 2018 *Ex Parte* Letter Attach. at 4 ("[M]ake-ready transactions [should] be made directly between the new attacher and the contractor who ultimately performs the make-ready prescribed by the pole owner.").

[398] *See* ACA July 25, 2018 Wireline *Ex Parte* Letter at 5. We also remind utilities of the 14-day deadline in our rules to provide the estimate of make-ready charges to the new attacher. *See* 47 CFR § 1.1411(d). We decline to extend this time period as such an extension would unduly slow down the make-ready process. *See* UTC July 26, 2018 Wireline *Ex Parte* Letter at 4-5; *see also* Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 5-6 (proposing that estimates should be provided within a reasonable period of time).

[399] *See* AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 4; AT&T July 23, 2018 Wireline *Ex Parte* Letter at 2; CCU July 25, 2018 Wireline *Ex Parte* Letter at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 10-11; Puget Sound Energy July 25, 2018 Wireline *Ex Parte* Letter at 2; Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 5; Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 6; UTC July 26, 2018 Wireline *Ex Parte* Letter at 5. While Southern Company argues that requiring electric utilities to compile estimates contradicts our decision in this Order to shift the burden to new attachers to coordinate make-ready, we find that this requirement merely clarifies our existing rule requirement and represents a limited and warranted ongoing obligation for utilities. *See* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 4; *see also* § 1.1411(d).

with this requirement by compiling estimates from third-parties for submission to the new attacher.[400] We do not require utilities to compile and submit final invoices of make-ready work performed by third-party existing attachers.[401] We anticipate that existing attachers will have sufficient incentives to ensure that their final invoice reaches the new attacher so that they receive compensation for performed work.

112. We require the utility to detail all make-ready cost estimates and final invoices on a per-pole basis when requested by the new attacher.[402] While we recognize that requiring utilities to provide costs on a per-pole basis may be more burdensome than providing a less granular estimate,[403] we find that a pole-by-pole estimate may be necessary to enable new attachers to understand the costs of deployment and to make informed decisions about altering their deployment plans if make-ready costs on specific poles could prove to be cost-prohibitive.[404] Requiring per-pole estimates and invoices upon request will also enable new attachers to better determine whether invoices are accurate, saving new attachers the unnecessary time and cost they currently devote to such a task.[405] The record shows that certain fixed costs are not necessarily charged on a per-pole basis (e.g., traffic control, lock-out/tag-out, truck rolls),[406] and therefore the rules we adopt today allow for such fixed costs to be estimated and submitted on a per-job basis, rather than a pole-by-pole basis, even where a pole-by-pole estimate or invoice is requested.[407]

113. As part of the detailed estimate, the utility must disclose to the new attacher its projected material, labor, and other related costs that form the basis of its estimate, including specifications of what costs, if any, the utility is passing through to the new attacher from the utility's use of a third-party contractor. The utility must also provide documentation that is sufficient to determine the basis of all charges in the final invoice, including any material, labor and other related costs.[408] While we understand

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[400] *See* ACA July 25, 2018 Wireline *Ex Parte* Letter at 5. We further clarify that where the utility compiles third-party estimates, it is responsible only for compilation and transmission—it is not responsible for the accuracy or content of the estimates.

[401] *See* Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 6-7. To the extent that the utility is an existing attacher, it is still responsible, where applicable, for providing a final invoice.

[402] *See* ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8; *see also* Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 5-6 (suggesting that the Commission allow utilities to make available upon request the cost information on which their estimates and invoices are based). We decline Southern Company's proposal to only require utilities to provide estimates and final invoices on a per-pole basis "where reasonably possible." *See* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 3-4. This suggested language could excuse electric utilities from ever providing estimates on a per-pole basis as some utilities currently claim that they do not have the billing system to accommodate pole-by-pole estimates and invoices. *See id*.

[403] *See* CCU Wireline NPRM Reply at 19 (arguing that detailing charges on a per-pole basis would be overly time consuming and cost prohibitive); Electric Utilities Wireline NPRM Reply at 26; AT&T July 23, 2018 Wireline *Ex Parte* Letter at 2; AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 3; CCU July 25, 2018 Wireline *Ex Parte* Letter at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 12; UTC July 26, 2018 Wireline *Ex Parte* Letter at 4; Puget Sound Energy July 25, 2018 Wireline *Ex Parte* Letter at 2; Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 5.

[404] *See* ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8.

[405] *See* ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8.

[406] *See* AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 3; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 4.

[407] *See infra* Appx. A, 47 CFR § 1.1411(d).

[408] *See* ACA July 23, 2018 Wireline *Ex Parte* at 2, Attach. at 4.

that this requirement places a burden on utilities,[409] we agree with ACA that this requirement will allow new attachers to understand the basis for each individual make-ready charge and prevent disputes over "unreasonable or simply unnecessary make-ready charges in aggregate cost estimates."[410] However, if a utility completes make-ready and the final cost of the work does not differ from the estimate, it is not required to provide the new attacher with a final invoice.[411]

114. We decline to adopt the request of some commenters that we require utilities to provide new attachers with a publicly-available schedule of common make-ready charges. These commenters argue that easy access to make-ready rates could promote fair and predictable rates, a more efficient process, and a level playing field between attachers and utilities during attachment rate negotiations, as well as averting disputes over rates and the process used.[412] The record indicates that make-ready costs vary considerably, however, based on a wide variety of factors, including geographic area, soil, vegetation conditions, the accessibility of the pole, and the availability of contractors in the area.[413] Contractors charge varying rates for their work based on the "labor requirements, equipment used[,] and travel time to the jobsite" of the particular make-ready job.[414] Other issues, such as the complexity of the job, rights-of-way, age of the pole, what is on the pole, and size of the pole, also contribute to the determination of a make-ready rate.[415] The variety and complexity of these variables suggest that requiring utilities nationwide to produce a schedule of make-ready rates would be unreasonably burdensome unless the schedule were at such a level of generality that it would be of little use to attachers in predicting the actual costs of their planned pole attachments.[416] At the same time, we encourage utilities to voluntarily make publicly available schedules of make-ready charges in circumstances in which it is feasible to do so, such as where the utility operates in an area of the country with homogenous terrain.[417]

3. Treatment of Overlashing

115. We codify our longstanding policy that utilities may not require an attacher to obtain its approval for overlashing.[418] Consistent with Commission precedent, the utility also may not require pre-

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[409] *See* Puget Sound Energy July 25, 2018 Wireline *Ex Parte* Letter at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 12; UTC July 26, 2018 Wireline *Ex Parte* Letter at 4-5.

[410] *See* ACA Wireline & Wireless NPRM Comments at 49-50.

[411] *See* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 4. To this end, and in order to ensure a transparent make-ready process, we decline Hawaiian Electric's proposal that utilities should not be required to provide a new attacher with a final invoice when the final make-ready charges differ from those in the estimate. *See* Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 5.

[412] *See, e.g.*, ACA Wireline & Wireless NPRM Comments at 47-48; AT&T Wireline NPRM Comments at 24; Comcast Wireline & Wireless NPRM Comments at 28; Lumos Wireline NPRM Comments at 14; NCTA Wireline & Wireless NPRM Comments at 12; Comcast Wireline & Wireless NPRM Reply at 11; Crown Castle Wireline NPRM Reply at 7-8.

[413] *See, e.g.*, EEI Wireline NPRM Comments at 38; Frontier Wireline NPRM Comments at 21-22; USTelecom Wireline NPRM Comments at 18-19; UTC Wireline NPRM Comments at 15.

[414] UTC Wireline NPRM Comments at 15; *see also* Electric Utilities Wireline NPRM Comments at 40 (quoting *2011 Pole Attachment Order*, 26 FCC Rcd at 5279, para. 86) ("Actual charges vary depending on numerous unique factors, including material and labor costs which fluctuate. As such, the price of make-ready does not lend itself well to fixed schedule of charges.").

[415] *See* CCU Wireline NPRM Comments at 30-31.

[416] *See* EEI Wireline NPRM Comments at 40.

[417] EEI asserts that utilities that currently provide a schedule of common make-ready charges typically operate in areas of the country with homogenous terrain. EEI Wireline NPRM Comments at 40.

[418] *Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98 and 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, para. 75 (2001) (*2001 Pole*

approval for third party overlashing of an existing attachment, when such overlashing is conducted with the permission of an existing attacher.[419] In addition, we adopt a rule that allows utilities to establish reasonable advance notice requirements. As the Commission has previously found, the ability to overlash often "marks the difference between being able to serve a customer's broadband needs within weeks versus six or more months when delivery of service is dependent on a new attachment."[420] In codifying the existing overlashing precedent while adopting a pre-notification option, we seek to promote faster, less expensive broadband deployment while addressing important safety concerns relating to overlashing.[421] We find that our codification will hasten deployment by resolving disagreements over whether utilities may impose procedural requirements on overlashing by existing attachers.[422]

116. While we make clear that pre-approval for overlashing is not permissible, we adopt a rule that utilities may, but are not required to, establish reasonable pre-notification requirements including a requirement that attachers provide 15 days (or fewer) advance notice of overlashing work.[423] Commenters express the concern that poles may not always be able to reliably support additional weight due to age and environmental factors, such as ice and wind, and as a result, overlashing even one additional cable on a pole may cause an overloading.[424] Such pole overloading could "hamper the

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Attachment Order) ("We affirm our policy that neither the host attaching entity nor the third-party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment."), *aff'd Southern Co. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

[419] *2001 Pole Attachment Order*, 16 FCC Rcd at 12141, para. 75; *see also* AT&T July 23, 2018 Wireline *Ex Parte* Letter at 3 (requesting codification that pre-approval not be required for pre-approved third-party overlashing); ACA July 25, 2018 Wireline *Ex Parte* Letter at 3 (requesting same); Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 7 (requesting same).

[420] Crown Castle Wireline FNPRM Comments at 2; *see also* ACA Wireline and Wireless NPRM Comments at 11.

[421] *See Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order 13 FCC Rcd 6777, 6807, para. 62 (1998); *see also* CTIA Wireline FNPRM Reply at 3-4 ; FBA Wireline FNPRM Reply at 1; FBA July 20, 2018 Wireline *Ex Parte* Letter at 3.

[422] *See* ACA Wireline & Wireless NPRM Comments at 10-11; Crown Castle Wireline FNPRM Comments at 4-5; Verizon Wireline FNPRM Comments at 19; FBA July 20, 2018 Wireline *Ex Parte* Letter at 3.

[423] *See* AT&T Wireline FNPRM Comments 15; CPS Energy Wireline FNPRM Comments at 2; EEI Wireline FNPRM Comments at 12; Electric Utilities Wireline FNPRM Comments at 25; NTCA Wireline FNPRM Comments at 5; POWER Coalition Wireline FNPRM Comments at 6; Utility Coalition on Overlashing Wireline FNPRM Comments at 10; UTC Wireline FNPRM Comments at 4; Xcel Energy Wireline FNPRM Comments at 1-2; ACA Wireline FNPRM Reply at 10; CPS Energy Wireline FNPRM Reply at 3; Electric Utilities Wireline FNPRM Reply at ii-iii, 4; NASUCA Wireline FNPRM Reply at 2-3; NRECA Wireline FNPRM Reply at 2; POWER Coalition Wireline FNPRM Reply at 8);UTC Wireline FNPRM Reply at 1-2). Further, a handful of states also require advance notice of overlashing; *see* UTC Wireline FNPRM Comments at 5 (noting that Arkansas, Ohio, Louisiana, Iowa, and Utah provide "for advance notice of overlashing."); Electric Utilities Wireline FNPRM Comments at 12-18 (stating that the public utility commissions of Arkansas, Ohio, Washington, Louisiana, Iowa, Utah, Connecticut have ratified or adopted an advance notice requirement to some degree); Utility Coalition on Overlashing Wireline FNPRM Comments at ii, 23-24 (noting that states such as Louisiana, California, Ohio, and Michigan recognize the impact of overlashing "must be analyzed in advance of the overlashing"); ACA Wireline FNPRM Reply at 11, n. 47 ("Washington and Louisiana require 15 days' notice, while Utah requires 10 days' notice for most overlashing projects and Iowa requires 7 days' notice"). We decline Southern Company's proposal to impose a "reasonable penalty" where an overlasher fails to comply with an electric utility's advance notice requirement. *See* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 9. The informal complaint process is available to utilities that wish to allege a violation of the notice rule.

[424] *See, e.g.*, AT&T Wireline FNPRM Comments at 15; EEI Wireline FNPRM Comments at 5; Electric Utilities Wireline FNPRM Comments at 18-19; UTC Wireline FNPRM Comments at 3; CCU Wireline NPRM Reply at 30; Utility Coalition on Overlashing Wireline FNPRM Reply at 4, 6-7; Letter from Robin F. Bromberg, Counsel, Electric Utilities, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed Nov. 13, 2017)

installation or maintenance of electric facilities, or other on-going wireline or wireless facility installations."[425] We find these concerns to be valid and supported by the record.[426] Thus, we agree with commenters that allowing utilities to require advance notice will promote safety and reliability and allow the utility to protect its interests without imposing unnecessary burdens on attachers.[427] If after receiving this advance notice, a utility determines, through its own engineering analysis, that there is insufficient capacity on the pole for a noticed overlash, the noticed overlash would be inconsistent with generally applicable engineering practices, or the noticed overlash would compromise the pole's safety or reliability,[428] the utility must provide specific documentation demonstrating that the overlash creates a capacity, safety, reliability, or engineering issue within the 15 day advance notice period and the overlasher must address any identified issues—either by modifying its proposal or by explaining why, in the overlasher's view, a modification is unnecessary—before continuing with the overlash.[429] Consistent with our approach to OTMR and self-help,[430] we adopt ACA's position that a utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash, as such fees will increase the costs of deployment.[431]

117. We find that an approach to overlashing that allows for pre-notification without requiring

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(Electric Utilities Nov. 13, 2017 Wireline *Ex Parte* Letter); CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter at 2.

[425] CPS Energy Wireline FNPRM Comments at 8.

[426] For instance, the Coalition of Concerned Utilities argues that overlashing may cause the pole line "to sag to such an extent that it violates required vertical safety clearance requirements over streets and highways." CCU Wireline NPRM Reply at 30. EEI suggests that overlashing may cause pole failure, interrupt electrical service, and endanger the public. EEI Wireline FNPRM Comments at 5. Similarly, the Electric Utilities contend that the combination of overlashing and environmental factors, such as wind and ice, could cause pole line overload and that a utility-performed engineering analysis may prevent such an overload. Electric Utilities Wireline FNPRM Comments at 18-19.

[427] *See* AT&T Wireline FNPRM Comments at 15; CPS Energy Wireline FNPRM Comments at 2; NTCA Wireline FNPRM Comments at 5; POWER Coalition Wireline FNPRM Comments at 6; Utility Coalition on Overlashing Wireline FNPRM Comments at 10; UTC Wireline FNPRM Comments at 4; Xcel Energy Wireline FNPRM Comments at 1-2; ACA Wireline FNPRM Reply at 10-11; CPS Energy Wireline FNPRM Reply at 3-4; Electric Utilities Wireline FNPRM Reply at ii-iii, 4; NASUCA Wireline FNPRM Reply at 2-3; NRECA Wireline FNPRM Reply at 2; POWER Coalition Wireline FNPRM Reply at 8; UTC Wireline FNPRM Reply at 1-2. The record indicates that several states already require advance notice of overlashing. *See* UTC Wireline FNPRM Comments at 5; Electric Utilities Wireline FNPRM Comments at 12-18; Utility Coalition on Overlashing Wireline FNPRM Comments at ii, 23-24; ACA Wireline FNPRM Reply at 11, n. 47. This 15-day notice period is consistent with the OTMR notice period that we adopt for simple make-ready work in the communications space. *See supra* section III.A.1.c.(v).

[428] 47 U.S.C. § 224(f)(2).

[429] *See* Comcast July 26, 2018 Wireline *Ex Parte* Letter at 2. To the extent a utility can document that an overlash would require modifications to the pole or replacement of the pole, the overlasher will be held responsible for the costs associated with ensuring that the pole can safely accommodate the overlash. *See Southern Co. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002). A utility may not deny access to overlash due to a pre-existing violation on the pole. *But see* UTC July 26, 2018 Wireline *Ex Parte* Letter at 5. However, a party that chooses to overlash on a pole with a safety violation and causes damage to the pole or other equipment will be held responsible for any necessary repairs.

[430] *See supra* sections III.A.1.a. (requiring that utilities pay their own costs to double-check new attachers' OTMR work); III.A.2.b. (requiring that utilities pay their own costs to double-check new attachers' self-help work).

[431] *See* ACA July 23, 2018 Wireline *Ex Parte* Letter at 6, Attach. at 11. To this end, we reject Southern Company's assertion that the costs of performing a pre-overlash engineering analysis are incremental costs caused by the new attacher and, as a result, electric utilities are entitled to recover them. *See* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 9-10.

pre-approval is superior to more extreme solutions advocated by some commenters.[432] We are unpersuaded, for example, by arguments that utility pre-approval for overlashing is necessary to ensure safety.[433] Pre-approval is not currently required, and the record does not demonstrate that significant safety or reliability issues have arisen from the application of the current policy. Rather, the record reflects that an advance notice requirement has been sufficient to address safety and reliability concerns, as it provides utilities with the opportunity to conduct any engineering studies or inspections either prior to the overlash being completed or after completion.[434] For instance, after an Edison Electric Institute member received advance notice of overlashing on 5,186 poles, its inspection found that 716 of those poles "'had preexisting violations for failure to meet NESC requirements for clearance between communications attachments and power facilities.'"[435] Similarly, in 2016, Oncor Electric Delivery in Texas received advance notice of overlashing and discovered 13.8% of the poles had existing clearance violations between existing attachments and power facilities.[436] Further, requiring that attachers receive prior approval for overlashing would unnecessarily increase costs for attachers and delay deployment.[437]

118. On the other hand, we also reject commenters' arguments for notice only after overlashing (i.e., "attach-and-notify").[438] While attach-and-notify advocates assert that advance notice is time-consuming, cumbersome, and inefficient,[439] we find the burden of advance notice minimal compared to the importance of ensuring that any new overlashed facilities will not "compromise the safety or integrity of existing electric distribution and communications infrastructure."[440] Providing the utility with advance notice of overlashing will allow it to better monitor and ensure the safety, integrity, and reliability of its poles both before and after the overlash is completed[441] without overburdening

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[432] We reject EEI's proposal to subject the overlashing process to the same OTMR or non-OTMR timeline and processes as this would be tantamount to requiring pre-approval for overlashing and would dramatically slow deployment via overlashing. *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 13.

[433] *See, e.g.*, CCU Wireline NPRM Reply at 29-30; EEI Wireline FNPRM Comments at 13.

[434] *See, e.g.*, UTC Wireline FNPRM Comments at 4; Utility Coalition on Overlashing Wireline FNPRM Comments at 10. Conversely, the record indicates that in at least one case, a utility was not able to detect and prevent a problem because it did not receive advance notice. Specifically, Ameren Missouri identifies a situation in which a truck hit improperly low-hanging wires; it asserts that the problem was exacerbated by overlashing and claims that if it had received advance notice of the overlashing, it would have been able to perform an inspection, discover the existing violation, and prevent a company from overlashing when there was a public safety threat of a low hanging wire over a public road. *See* Electric Utilities Wireline FNPRM Comments at 21-22.

[435] EEI Wireline FNPRM Comments at 6.

[436] *See* Electric Utilities Wireline FNPRM Comments at 21.

[437] *See, e.g.*, ACA Wireline FNPRM Comments at 9; NCTA Wireline FNPRM Comments at 2.

[438] *See* FBA Wireline FNPRM Reply at 1, 9; Verizon Wireline FNPRM Reply at 16.

[439] *See, e.g.*, Comcast Wireline FNPRM Comments at 3; Verizon Wireline FNPRM Comments at 19; Comcast Wireline FNPRM Reply at 10; FBA Wireline FNPRM Reply at 8; NCTA Wireline FNPRM Reply at 2-3.

[440] Xcel Energy Wireline FNPRM Comments at 4; *see also* AT&T Wireline FNPRM Comments at 15 ("[A]dvance notice to the pole owner and any host attaching entity . . . promotes safety and the integrity and reliability of the wireline network by affording an opportunity to validate that the attacher has considered the impact overlashing will have on the pole and the host cables."); Electric Utilities Wireline FNPRM Comments at 1 ("[T]he Commission should clarify that pole owners may require advanced notice of overlashing in order to ensure that overlashing complies with applicable standards for safety, reliability, and engineering."); AT&T Wireline FNPRM Reply at 1 ("Prior notice of overlashing promotes safety and the integrity and reliability of poles.").

[441] Xcel Energy Wireline FNPRM Comments at 6; *see also* Electric Utilities Wireline FNPRM Comments at ii ("Without advance notice of overlashing, electric utilities cannot evaluate the impact of the proposed overlashing (loading/clearance) or determine whether there are existing violations (loading/clearance) that must be corrected prior to overlashing."); UTC Wireline FNPRM Comments at 4 ("[U]tilities need *advance* notice of overlashing in order to conduct an engineering study and inspect the poles to assess additional loading and ensure there are no existing violations of the electric utilities' standards or applicable codes on the pole that must be remedied prior to

overlashers or requiring multiple trips to the pole.[442]

119. We also take this opportunity to clarify several points related to overlashing. First, if the utility elects to establish an advance notice requirement, the utility must provide advanced written notice to attachers or include the requirement in its pole attachment agreements. We find that providing this guidance will give clarity to all parties as to when the utility must receive advance notice, thereby reducing the likelihood of disputes. Utilities may require pre-notification of up to 15 days, the same notice period that we adopt for OTMR attachments.[443] We also emphasize that utilities may not use advanced notice requirements to impose quasi-application or quasi-pre-approval requirements, such as requiring engineering studies.[444] Finally, just as new attachers electing OTMR are responsible for any corrective measures needed because of their work,[445] in the event that damage to the pole or other existing attachment or safety or engineering standard violations result from overlashing, the overlasher will be responsible for any necessary repairs arising from such overlashing.[446] Poorly performed overlashing can create safety and reliability risks,[447] and the Commission has consistently found that overlashers must

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the proposed overlashing."); Utility Coalition on Overlashing Wireline FNPRM Comments at 10 ("[A]dequate advance notice containing adequate information about the overlashing is necessary to enable utilities to analyze the capacity, safety, reliability and generally applicable engineering concerns of the utility pole owner.").

[442] *See, e.g.*, Xcel Energy Wireline FNPRM Comments at 6; CPS Energy Wireline FNPRM Comments at 6-7.

[443] *See supra* section III.A.1.c.(v). We therefore reject requests that utilities be allowed to require up to 45 days prior notice of overlashing. *See* AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 2; Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 3; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 8; UTC July 26, 2018 Wireline *Ex Parte* Letter at 5. Given that pre-approval for overlashing is not required, such a lengthy notice period should not be necessary.

[444] *See* ACA Wireline FNPRM Reply at 12; FBA July 20, 2018 Wireline *Ex Parte* Letter at 3. We reject AT&T's proposal to require that overlashers confirm to the pole owner in the advance notice "that they have fulfilled their responsibility" to comply with reasonable safety, reliability, and engineering practices. AT&T July 23, 2018 Wireline *Ex Parte* Letter at 3; *see also* ACA July 25, 2018 Wireline *Ex Parte* Letter at 4. *But see* Letter from Steven F. Morris, VP and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 at 1-2 (arguing that "AT&T provide[s] no justification for the Commission to depart from its longstanding policy and its thorough consideration of the safety of overlashing"). Requiring engineering studies, pre-certifications, or any other similar requirement is unnecessary because the overlasher is ultimately responsible for any necessary repairs subsequently discovered by the pole owner. To the extent that the pole owner wishes to perform an engineering analysis of its own either within the 15-day advance notice period or after completion of the overlash, the pole owner bears the cost of such an analysis. *But see* AT&T July 23, 2018 Wireline *Ex Parte* Letter at 3 (proposing that engineering studies conducted by the pole owner after an overlash is completed be paid for by the overlasher in the event that the overlasher did not provide advanced confirmation of the safety, reliability, and engineering suitability of the overlash); Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 3 (proposing that new attachers be required to provide an engineering analysis of the overlash with its advance notice); Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 9 (proposing that the Order should allow utilities to use advance notice requirements to require an engineering study, otherwise smaller electric utilities will not be able to pre-engineer overlashing, and safety and reliability will suffer); EEI July 26, 2018 Wireline *Ex Parte* Letter at 12-13. We also reject Southern Company's proposal to permit utilities to require an overlasher to submit specifications of the materials to be overlashed with the notice of overlashing. *See* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 8. Such a requirement could unduly slow deployment with little offsetting benefit.

[445] *See supra* section III.A.1.c.(vi).

[446] *See* Crown Castle Wireline FNPRM Reply at 10; Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 7.

[447] *See* NRECA Wireline FNPRM Reply at 1-2 (describing "poorly constructed overlashing, overlashing that results in excessive wind and ice loads, overlashing with insufficient guying to maintain pole integrity, [and] vehicles snagging overlashed wires that hang too low to the ground"); AT&T Wireline FNPRM Reply at 3-4 ("AT&T has experienced a number of incidences where sagging cables from overlashing without proper engineering caused

ensure that they are complying with reasonable safety, reliability, and engineering practices.[448]

120. We agree with ACA that we should adopt a post-overlashing notification procedure comparable to the post-make ready notification procedure we adopt for OTMR.[449] Therefore, we require that an overlashing party shall notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or any code (e.g., safety, electrical, engineering, construction) violations to its equipment caused by the overlash. If the utility discovers damage or code violations caused by the overlash on equipment belonging to the utility, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

B. New Attachers are Not Responsible for Preexisting Violations

121. Consistent with the BDAC's recommendation, we clarify that new attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent such poles or third-party equipment were out of compliance prior to the new attachment.[450] Although utilities have sometimes held new attachers responsible for the costs of correcting preexisting violations,[451] this practice is inconsistent with our long-standing principle that a new attacher is responsible only for actual costs incurred to accommodate its attachment.[452] The new attachment may precipitate correction of the preexisting violation, but it is the violation itself that causes the costs, not the new attacher. Holding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment, and provides incentives for attachers to complete make-ready work irresponsibly and count on later attachers to fix the problem.[453] This is true whether the make-ready work that corrects these preexisting violations is simple or complex.[454]

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trucks to unknowingly snag cables, felling poles on roads and sidewalks, endangering the public from pole impact and energized electric lines, and creating avoidable service outages.").

[448] *See 2001 Pole Attachment Order*, 16 FCC Rcd at 12141, para. 73. We reach this conclusion under our authority pursuant to 47 U.S.C. § 224(b)(1).

[449] *See* ACA July 23, 2018 Wireline *Ex Parte* Letter at 6, Attach. at 11; ACA July 25, 2018 Wireline *Ex Parte* Letter at 3; *see also supra* section III.A.c.(vi).

[450] BDAC January 2018 Recommendations at 24; *see also* Lumos Wireline NPRM Comments at 15; Electric Utilities Wireline NPRM Comments at 44; CCU Wireline NPRM Comments at 19-20; Lightower Wireline NPRM Comments at 12; ACA Wireline NPRM Reply Comments at 28-31; FBA July 20, 2018 Wireline *Ex Parte* Letter at 4; Letter of Lawrence Lackey, Director of Regulatory, FirstLight, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 26, 2018) (FirstLight July 26, 2018 Wireline *Ex Parte* Letter). This includes situations where a pole has been "red tagged"—that is, found to be non-complaint with safety standards and placed on a replacement schedule. *See* Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 3. When a pole has been red tagged, new attachers are not responsible for the cost of pole replacement.

[451] *See, e.g.*, ACA Wireline NPRM Comments at 22, 48-49; Lumos Wireline NPRM Comments at 15.

[452] *See, e.g.*, *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24625, para. 26 (2003); *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, File Nos. PA 99-001, PA 99-002, Consolidated Order, 14 FCC Rcd 11599, 11606-07, para. 19 (CSB 1999).

[453] *See* ExteNet Wireline NPRM Comments at 56; Lightower Wireline NPRM Comments at 12; Lumos Wireline NPRM Comments at 15; ACA Wireline NPRM Reply at 28-31. We therefore reject CPS Energy's approach in which "the applicant is required to remedy existing technical violations of third-party attachments at its expense as part of the one-touch make-ready process." CPS Energy Wireline NPRM Reply at 10. Similarly, we reject the

122. We also clarify that utilities may not deny new attachers access to the pole solely based on safety concerns arising from a pre-existing violation, as Lightower alleges sometimes occurs.[455] Simply denying new attachers access prevents broadband deployment and does nothing to correct the safety issue.[456] We also clarify that a utility cannot delay completion of make-ready while the utility attempts to identify or collect from the party who should pay for correction of the preexisting violation.[457]

C. Addressing Outdated Rate Disparities

123. In the interest of promoting infrastructure deployment, the Commission adopted a policy in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access.[458] Incumbent LECs allege, however, that electric "utilities continue to charge pole attachment rates significantly higher" than the rates charged to similarly situated telecommunications attachers,[459] and that these higher rates inhibit broadband deployment.[460] To address this problem, we revise our rules to

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proposals from utilities that new attachers should be forced to either "wait for the corrective process to run its course" or "cover[] the cost of correcting the violation, without recourse." AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 2-3; *see also* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 5-6. This approach is tantamount to forcing the new attacher to pay to correct the preexisting violation as the alternative would require the new attacher to postpone make-ready indefinitely. *See* Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 6 (explaining how this approach would force new attachers "to choose between paying to remediate preexisting violations versus risking unpredictable and potentially significant deployment delays").

[454] EEI requests clarification that if a new attacher fixes existing violations while performing simple make-ready, it may not charge the utility for such repairs. *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 6-7. If the new attacher chooses to repair a pre-existing violation it may seek reimbursement from the party responsible for the violation, including, if applicable, the utility.

[455] Lightower Wireline NPRM Comments at 12; *see also* FirstLight July 26, 2018 Wireline *Ex Parte* Letter at 2-3. This includes situations where a pole has been red-tagged, and new attachers are prevented from accessing a pole until it is replaced. *See* Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 3-4.

[456] For this reason, we reject Xcel Energy and Alliant Energy's suggestion that we provide utilities, where there is a preexisting violation, "the right to stop all work on that pole and prohibit physical access to that pole until the pre-existing safety issue is resolved and the pole is brought into compliance." Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 7; *see also* EEI July 26, 2018 Wireline *Ex Parte* Letter at 10.

[457] *See* FBA July 20, 2018 Wireline *Ex Parte* Letter at 5. We disagree with American Electric Power Service Corporation and Georgia Power that the approach we adopt today denies existing attachers of any contractual right to receive notice of a violation. AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 2. Such notice could be provided, for instance, after the survey has been completed, identifying any preexisting violations, and before make-ready work is performed. We further reject the proposal that we establish a formal notice process in which existing attachers are given a timeline to correct preexisting violations. *See* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 5-6; *see also* Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 3-4 (proposing a timeline for utilities to replace poles when new attachments are prohibited due to the need for a pole replacement). Such a process largely leaves new attachers in the same unacceptable position they confront today—delaying their deployment until the existing attacher makes a repair or being forced to make the repair and attempt to recover their costs from the existing attacher.

[458] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5328, 5333-5337, paras. 203, 214-219 (establishing process by which incumbent LECs can show they are similarly situated to telecommunications attachers in order to receive comparable rates to those attachers).

[459] Verizon Wireline NPRM Comments at 11; *see also* AT&T Wireline NPRM Comments at 23 (describing the "higher attachment rates paid by AT&T's ILECs to electric utilities relative to competitors that benefit from the telecommunications rate"); Frontier Wireline NPRM Comments at 4 ("ILEC attachers currently pay disproportionately higher rates compared to other broadband attachers."); USTelecom Wireline NPRM Comments at 7 ("ILEC attachers do not currently benefit from . . . rate parity.").

[460] *See* USTelecom Wireline NPRM Comments at 7 ("The lack of regulatory parity between ILECs and their cable and CLEC counterparts in the provision of broadband services complicates investment decisions for ILECs and has undoubtedly inhibited broadband deployment in the United States."); *see also* Letter from Kevin G. Rupy, Vice

establish a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system (telecommunications attachers).[461] The utility can rebut the presumption with clear and convincing evidence that the incumbent LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers.

124. As the Commission has recognized, historically, incumbent LECs owned approximately the same number of poles as electric utilities and were able to ensure just and reasonable rates, terms, and conditions for their attachments by negotiating long-term joint use agreements with utilities.[462] These joint use agreements may provide benefits to the incumbent LECs that are not typically found in pole attachment agreements between utilities and other telecommunications attachers, such as lower make-ready costs, the right to attach without advance utility approval, and use of the rights-of-way obtained by the utility, among other benefits.[463] By 2011, however, incumbent LECs owned fewer poles than utilities, and the Commission found that incumbent LECs "may not be in equivalent bargaining position with electric utilities in pole attachment negotiations in some cases."[464] In 2011, the Commission determined that it had the authority "to ensure that incumbent LECs' attachments to other utilities' poles are pursuant to rates, terms and conditions that are just and reasonable,"[465] and placed the burden on incumbent LECs to rebut the presumption that they are not similarly situated to an existing telecommunications attacher in order to obtain access on rates, terms, and conditions that are comparable to the existing telecommunications attacher.[466]

125. The record clearly demonstrates that incumbent LEC pole ownership continues to decline.[467] Incumbent LECs argue that a reversal of the current presumption is warranted because incumbent LECs' bargaining power vis-à-vis utilities has eroded since 2011 as their percentage of pole ownership relative to utilities has dropped, thus resulting in increased attachment rates relative to their

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President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed June 6, 2018) (USTelecom June 6, 2018 Wireline *Ex Parte* Letter) (arguing that "rationalizing antiquated monopoly-era cost structures for pole inputs is necessary for efficient investment to bring more and better broadband infrastructure to a larger share of Americans, particularly in rural areas.").

[461] *See* USTelecom Wireline NPRM Comments at 9; Verizon Wireline NPRM Comments at 10.

[462] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5244, para. 8. As the Commission explained at the time, "joint use agreements are structured as cost-sharing arrangements, with each party agreeing to own a certain percentage of the joint use poles. This percentage typically is 40–50% for the incumbent LEC and 50–60% for the electric utility, and generally reflects the relative ratio of pole ownership that existed at the time these agreements originally were negotiated. No money changes hands under these agreements if each party owns its specified percentage of joint use poles. . . . When pole ownership deviates from the agreement, the party that owns less than the specified percentage typically pays the other party an amount based on a per pole rate." *Id.* at 5334-35, n.651 (internal citations omitted).

[463] *See* EEI Wireline NPRM Reply at 14; UTC Wireline NPRM Reply at 27-28.

[464] *2011 Pole Attachment Order*, 26 FCC Rcd at 5329, para. 206.

[465] *Id.* at 5330, para. 208.

[466] *See* 47 CFR § 1.1413; *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5336, para. 217 (stating that, "to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as [a] 'just and reasonable' rate").

[467] *See* AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 6; Letter from Kevin G. Rupy, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. at 7 (USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter) ("In the 46 states surveyed, USTelecom's data show that for every ILEC pole to which IOUs attach, ILECs attach to three IOU poles. Specifically, ILECs attach to approximately 13.9 million IOU poles, whereas IOUs attach to only 4.6 million ILEC poles.").

fellow telecommunications attachers.[468] To bolster this claim, USTelecom provides the results of a recent member survey showing that its incumbent LEC members "pay an average of $26.12 [per year] to [investor-owned utilities] today in Commission-regulated states (an *increase* from $26.00 in 2008), compared to cable and CLEC provider payments to ILECs, which average $3.00 and $3.75 [per year], respectively (a *decrease* from $3.26 and $4.45, respectively, in 2008)."[469]

126. We are convinced by the record evidence showing that, since 2008, incumbent LEC pole ownership has declined and incumbent LEC pole attachment rates have increased (while pole attachment rates for cable and telecommunications attachers have decreased).[470] We therefore conclude that incumbent LEC bargaining power vis-à-vis utilities has continued to decline. Therefore, based on these changed circumstances, we agree with incumbent LEC commenters' arguments that, for new and newly-renewed pole attachment agreements between utilities and incumbent LECs, we should presume that incumbent LECs are similarly situated to other telecommunications attachers and entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers.[471] We conclude that, for determining a comparable pole attachment rate for new and newly-renewed pole attachment agreements, the presumption is that the incumbent LEC should be charged no higher than the pole attachment rate for telecommunications attachers calculated in accordance with section 1.1406(e)(2) of the Commission's rules.[472] We find that applying the presumption in these circumstances will promote broadband deployment and serve the public interest; we agree with USTelecom that greater rate parity between incumbent LECs and their telecommunications competitors "can energize and further accelerate broadband deployment."[473] However, we recognize there may be some cases in which incumbent LECs may continue to possess greater bargaining power than other attachers, for example in geographic areas where the incumbent LEC continues to own a large number of poles. Therefore, we establish a presumption that may be rebutted, rather than a more rigid rule.[474]

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[468] *See* AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 4-7; USTelecom Wireline NPRM Comments at 3-4; Verizon Wireline NPRM Comments at 11. According to a recent USTelecom survey, its members in 2017 paid investor owned utilities nearly nine times what incumbent LECs charge cable provider attachers on incumbent LEC-owned poles, and almost seven times the rates incumbent LECs charge competitive LEC attachers on incumbent LEC-owned poles. *See* USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter Attach. at 3. According to USTelecom, this disparity has risen from 2008 when its members paid eight times more than cable providers and six times more than competitive LECs. *See id*. at Attach. at 4.

[469] USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter Attach. at i (italics in original).

[470] *See* AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 4-7; USTelecom Wireline NPRM Comments at 3-4; Verizon Wireline NPRM Comments at 11; USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter at Attach. at 2-11.

[471] *See* Letter from Kevin Rupy, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed July 27, 2018) (USTelecom July 27, 2018 Wireline *Ex Parte* Letter) (proposing we extend the presumption to newly-renewed agreements); Letter from Thomas W. Whitehead, Vice President, Federal Government Affairs, Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-89, WC Docket No. 17-84, at 2 (filed July 25, 2018) (Windstream July 25, 2018 Wireline and Wireless *Ex Parte* Letter) (proposing that we extend the presumption to newly-renewed agreements); *see also* USTelecom Wireline NPRM Comments at 6-8; AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 5-7; Verizon Wireline NPRM Comments at 11-12; *cf.* Windstream July 25, 2018 Wireline *Ex Parte* Letter at 2 (proposing that we also extend the presumption to all agreements starting two years after the effective date of this Order).

[472] *See* 47 CFR § 1.1406(e)(2).

[473] USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter Attach. at 1.

[474] We find Utilities Technology Council's claim that the presumption we adopt today will lead to the "wholesale abandonment of joint use agreements" which will, in turn, "undermine investment in the very infrastructure upon

127. We extend this rebuttable presumption to newly-negotiated and newly-renewed joint use agreements.[475] We conclude that, by applying the presumption to new and newly-renewed agreements, we will give incumbent LECs parity with similarly-situated telecommunications attachers, and encourage infrastructure deployment by addressing incumbent LECs' bargaining power disadvantage.[476] We recognize that this divergence from past practice will impact privately-negotiated agreements[477] and so the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements.[478] We disagree with utilities that argue that we should not apply the presumption to any existing agreements because existing joint use agreements were negotiated at a time of more equal bargaining power between the parties and because incumbent LECs receive unique benefits under joint use agreements.[479] To the extent incumbent LECs receive net benefits distinct from those given to other telecommunications attachers, a utility may rebut the presumption.

128. Utilities can rebut the presumption we adopt today in a complaint proceeding by

(Continued from previous page)
which all attaching entities depend to provide their services safely and reliably," speculative and unsupported by evidence. UTC July 26, 2018 Wireline *Ex Parte* Letter at 6-7.

[475] *See* Electric Utilities Wireline NPRM Comments at 24-25 (suggesting that we apply the presumption to newly-negotiated agreements); Windstream July 25, 2018 Wireline *Ex Parte* Letter at 2 (suggesting that we apply the presumption to newly-renewed agreements). A new or newly-renewed pole attachment agreement is one entered into, renewed, or in evergreen status after the effective date of this Order, and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status. Consistent with the Commission's conclusion in 2011, the pre-2011 pole attachment rate for telecommunications carriers will continue to serve as a reference point in complaint proceedings regarding agreements that materially advantage an incumbent LEC and which were entered into after the 2011 Order and before the effective date of the Order we release today. *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218. This includes circumstances where an agreement has been terminated and the parties continue to operate under an "evergreen" clause. *See* Verizon Florida LLC v. Florida Power and Light Company, Pole Attachment Complaint, Docket No. 15-73, File No. EB-15-MD-002, at 6 (filed Mar. 13, 2015) (describing how the parties had terminated a joint use agreement but continued to operate under rates established by the joint use agreement for existing attachments pursuant to the agreement's evergreen clause); *cf.* Electric Utilities Apr. 24, 2018 Wireline *Ex Parte* Letter at 5-6 ("[I]n almost all joint use agreements, investor-owned electric utilities have no right to demand removal of attachments upon termination.") (emphasis omitted).

[476] *See* USTelecom July 27, 2018 Wireline *Ex Parte* Letter at 1-3 (explaining that lower rates will encourage infrastructure deployment, and that incumbent LECs lack the bargaining power to renegotiate existing joint use agreements); *see also* AT&T July 23, 2018 Wireline *Ex Parte* Letter at 3-5 (explaining same); Letter from Katharine R. Saunders, Managing Associate General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1-4 (filed July 26, 2018) (explaining how our current scheme has "negatively impacted broadband deployment," and arguing that we adopt the presumption for existing joint use agreements).

[477] *See* UTC Wireline NPRM Comments at 20; Midwest Electric Utilities Wireline NPRM Reply at 32; POWER Coalition Wireline NPRM Reply at 24-25; *see also* CCU Wireline NPRM Comments at 53; Electric Utilities Wireline NPRM Reply at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 14-15.

[478] Until that time, for existing agreements, the *2011 Pole Attachment Order*'s guidance regarding review of incumbent LEC pole attachment complaints will continue to apply. *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5333-38, paras. 214-19; *see also* USTelecom July 27, 2018 Wireline *Ex Parte* Letter Appx. A at i; Verizon July 25, 2018 Wireline *Ex Parte* Letter at 2-3. Because our intention is to encourage broadband deployment going forward, we decline to adopt USTelecom's proposal that we give incumbent LECs "the right to refunds for overpayments as far back as the statute of limitations allows." USTelecom July 25, 2018 Wireline *Ex Parte* Letter at 2-3.

[479] *See* CCU Wireline NPRM Comments at 41-49; Electric Utilities Wireline NPRM Reply at 3-5; Midwest Electric Utilities Wireline NPRM Reply at 34; Electric Utilities Apr. 24, 2018 Wireline *Ex Parte* Letter at 7-8; *see also* UTC Wireline NPRM Comments at 20-21; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 6-8 (arguing that we should not apply the presumption to existing agreements, and suggesting that we limit the presumption for new agreements regarding new attachments).

demonstrating that the incumbent LEC receives net benefits that materially advantage the incumbent LEC over other telecommunications attachers.[480] Such material benefits may include "[p]aying significantly lower make-ready costs; [n]o advance approval to make attachments; [n]o post-attachment inspection costs; [r]ights-of-way often obtained by electric company; [g]uaranteed space on the pole; [p]referential location on pole; [n]o relocation and rearrangement costs; and [n]umerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed."[481] If the utility can demonstrate that the incumbent LEC receives significant material benefits beyond basic pole attachment or other rights given to another telecommunications attacher, then we leave it to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits.

129. If the presumption we adopt today is rebutted, the pre-*2011 Pole Attachment Order* telecommunications carrier rate is the maximum rate that the utility and incumbent LEC may negotiate. This conclusion builds on and clarifies the Commission's determination in the *2011 Pole Attachment Order* that the pre-2011 telecommunications carrier rate should serve "as a reference point in complaint proceedings" where a joint use agreement was found to give net advantages to an incumbent LEC as compared to other attachers.[482] The Commission "[found] it prudent to identify a specific rate to be used as a reference point in these circumstances because it [would] enable better informed pole attachment negotiations . . . [and] reduce the number of disputes" regarding pole attachment rates.[483] We reaffirm the conclusion that reference to this rate is appropriate where incumbent LECs receive net material advantages in a pole attachment agreement. And because we agree with commenters that "establishment of . . . an upper bound will provide further certainty within the pole attachment marketplace, and help to further limit pole attachment litigation,"[484] we make this rate a hard cap.[485] In so doing, we remove the potential for uncertainty caused by considering the rate merely as a "reference point."

D. Other Pole Attachment Issues

130. Below, we respond to several pole attachment related proposals raised in the record in the *Wireline Infrastructure* proceeding. We do not at this time address all outstanding issues raised in the notices or record in this proceeding, and we will take further action as warranted in this proceeding to

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[480] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5336-37, para. 218; *see also* Verizon Wireline NPRM Comments at 12.

[481] *2011 Pole Attachment Order*, 26 FCC Rcd at 5335, n.654 (quoting Comcast Reply, WC Docket No. 07-245, GN Docket No. 09-51, at 25 (Oct. 4, 2010)); *see also* CCU Wireline NPRM Comments at 45-49 (stating that "ILECs receive a host of advantages that third party attachers like cable companies and CLECs do not enjoy," before enumerating many of those specific advantages); Electric Utilities Wireline NPRM Comments at 26-30 (stating the benefits to ILECs of joint use agreements and claiming that "it is highly unlikely that ILECs made their existing attachments on 'comparable terms' to other attachers because the ILECs made them with the immense capital cost savings and operational advantages of joint use agreements"); Midwest Electric Utilities Wireline NPRM Comments at 45-46 (asserting that "ILECs generally obtain numerous benefits under their existing joint use agreements that offset any increased rates they might pay for pole access in certain circumstances"); EEI July 26, 2018 Wireline *Ex Parte* Letter at 15 ("joint use agreements confer upon ILECs, as joint pole owners, a myriad of other benefits that save time and expense").

[482] *2011 Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218.

[483] *Id.* The Commission further concluded that this rate, "which historically has been used in the marketplace," accounted for "particular arrangements that provide net advantages to incumbent LECs" because it was higher than the rate available to telecommunications attachers. *Id.*

[484] USTelecom Wireline NPRM Comments at 11; *see also* Verizon Wireline NPRM Comments at 14 ("If the pre-existing telecom rate is . . . an upper bound, it will focus the parties' negotiations by cabining the range of rates at issue.").

[485] *See* USTelecom Wireline NPRM Comments at 11; POWER Coalition Wireline NPRM Reply at 25 (submitting that if the utility overcomes the presumption, then "the old telecom rate should apply" if the incumbent LEC receives joint use benefits not enjoyed by other telecommunications carriers).

address outstanding issues.

131. *Uniform Pole Attachment Application.* We decline to adopt rules requiring utilities to use a uniform pole application form as requested by certain commenters.[486] We agree with a previous Commission decision that it is best to "leave the details of specific application criteria and processes to individual utilities,"[487] and we do not find a compelling case in the record to change course, so long as the criteria and processes a utility uses are reasonable. We also agree with the Coalition of Concerned Utilities that implementation and use of a standard pole application would likely prove difficult because "[e]ach utility has its own operational, design, construction, geographical and state regulatory requirements that call for different pole attachment application information."[488]

132. *Automated Tracking of Pole Attachment Progress.* We decline to adopt ACA's proposal that we require utilities to adopt a web-based pole attachment ticket management system.[489] Attachers and utilities are in the best position to develop systems, and we are reluctant to interfere in the market absent greater evidence of need. Rather, the market appears to be working in this regard. As ACA points out, "the great majority of utilities use NJUNS, NOTIFY, or some other management system."[490] Similarly, Alliant Energy developed and implemented its own online portal for processing and tracking pole attachment applications.[491]

133. *Utility Construction Standards and Requirements.* We decline the requests of certain commenters to establish limits on the construction standards and requirements that utilities adopt for their poles.[492] We agree with those utility commenters who argue that one-size-fits-all national pole construction standards (even if they were based on the NESC or similar codes) are not a good idea, and the better policy is to defer to reasonable and targeted construction standards established by states, localities, and the utilities themselves where appropriate.[493]

134. At this time, we decline to adopt Crown Castle's request that we prohibit blanket bans by utilities on the attachment of equipment in the unusable space on a pole because we have an insufficient record on which to reach a clear determination.[494] Crown Castle argues that it "has encountered a growing number of pole owners, whose territories cover many states, who have adopted blanket bans on attaching any equipment in the [unusable] space – despite the fact that this is a well-established and long-standing practice."[495] Two utility commenters argue that where utilities prohibit such attachments, they do so based on legitimate safety and engineering considerations, such as fall hazards, climbing obstructions, and the difficulty of moving equipment in the common space when poles have to be

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[486] *See, e.g.*, Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 3 ("Utilize a pole attachment application that requires applicants to submit only the information reasonably necessary for the application process."); FBA Wireline NPRM Comments at 8-9; Mobilitie Wireline & Wireless NPRM Comments at 10; ACA Wireline NPRM Reply at 14-17.

[487] *2011 Pole Attachment Order*, 26 FCC Rcd at 5274, para. 73.

[488] CCU Wireline NPRM Reply at 14; *see also* Electric Utilities Wireline NPRM Reply at 28-29 (claiming that "[d]ifferences in application forms reflect differences in electric utilities' internal construction standards, pole attachment policies, and even the specific geography and weather conditions of the utilities' service area").

[489] *See* ACA Wireline NPRM Reply at 17; Charter Wireline & Wireless NPRM Comments at 56; Crown Castle Wireline NPRM Reply at 9; NCTA Wireline & Wireless NPRM Reply at 22-23; UTC Wireline NPRM Reply at 7.

[490] ACA Wireline NPRM Reply at 17.

[491] Midwest Electric Utilities Wireline NPRM Reply at 12, 29-30.

[492] *See* Crown Castle Wireline NPRM Comments at 4-5; ExteNet Wireline & Wireless NPRM Comments at 55.

[493] *See* CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter at 4.

[494] Crown Castle Wireline NPRM Comments at 5-6.

[495] *Id.* at 5.

replaced.[496] No other commenter addressed this issue. We recognize that there are likely to be circumstances in which using the lower portion of poles to install equipment associated with DAS and other small wireless facilities will be safe and efficient.[497] However, given the paucity of the record, we are not in a position to be certain whether we should mandate that utilities permit certain uses. We would be open to revisiting this issue in the future.[498]

E. Legal Authority

135. We conclude that we have ample authority under section 224 to take the actions above to adopt a new pole attachment process, amend our current pole attachment process, clarify responsibility for pre-existing violations, and address outdated rate disparities. Section 224 authorizes us to prescribe rules ensuring that the rates, terms, and conditions of pole attachments are just and reasonable.[499] We find that the actions we take today to speed broadband deployment further these statutory goals. [500]

F. Effective Date of the Commission's Modified Pole Attachment Rules

136. Several parties have requested that the Commission provide a transition period in which to implement its revised rules governing pole attachments.[501] As AT&T notes, this Report and Order would modify "the Commission's existing timelines for application review, make-ready, and self-help and adopt new timelines for pre-application surveys, OTMR, and post-OTMR and self-help inspection and repair."[502] The record indicates that in some cases, these changes will require carriers and industry members to modify the automated electronic systems they use to track and coordinate pole attachment workflow and activities.[503] Therefore, we find it appropriate to provide a transitional period. To avoid confusion and facilitate efficient compliance preparation, we also wish to make the transitional period uniform for all pole attachment-related rules. Thus, the pole attachment-related portions of this Report

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[496] CCU Wireline NPRM Reply at 28; Electric Utilities Wireline NPRM Reply at 24-25.

[497] *Cf. 2011 Pole Attachment Order*, 26 FCC Rcd at 5276, para. 77 (prohibiting blanket bans on wireless pole-top attachments).

[498] While we do not today prohibit utilities from adopting blanket bans on the attachment of equipment in the unusable space on a pole, we take this opportunity to reaffirm our comments in the *2011 Pole Attachment Order* that: (1) a utility must explain in writing its precise concerns—and how they relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue; and (2) such concerns must be reasonable in nature in order to be considered nondiscriminatory. We expect attachers and utilities to work together to find code-compliant solutions that address any concerns raised by a utility. *See* Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 1-3.

[499] 47 U.S.C. §§ 224(b)(1), (2). As we have stated previously, "the broad language of section 224(b)(1) and (b)(2) indicate a delegation of comprehensive rulemaking authority over all attachment issues, including access." *2011 Pole Attachment Order*, 26 FCC Rcd at 5282, para. 91. Our comprehensive authority covers the various rules we adopt today, including new requirements on attachers. We note that other provisions of the Act also confer broad authority to regulate providers of telecommunications service or cable television systems. *See, e.g.*, 47 U.S.C. §§ 154(i), 201, 202, 536.

[500] While we rely solely on section 224 for legal authority, our prioritization of broadband deployment throughout today's *Report and Order* finds support in section 706(a) of the Telecommunications Act of 1996, which exhorts us to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "remov[ing] barriers to infrastructure investment." 47 U.S.C. § 1302(a). While section 706(a) does not provide a grant of regulatory authority, we look to it as guidance from Congress on how to implement our statutorily-assigned duties. *See Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 471-480, paras. 268-83 (2018).

[501] *See* AT&T July 23, 2018 Wireline *Ex Parte* Letter at 1; EEI July 26, 2018 Wireline *Ex Parte* Letter at 3, 7; Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 5.

[502] AT&T July 23, 2018 Wireline *Ex Parte* Letter at 1.

[503] *See id*.

and Order (i.e., sections III.A-E) and the rule amendments adopted therein shall become effective on the latter of (1) six months after the release of this item or (2) 30 days after the Commission publishes a notice in the Federal Register announcing approval by the Office of Management and Budget of the rules adopted herein containing modified information collection requirements.[504] We believe that this period will be sufficient, but no more than necessary, to allow affected industry members to modify their systems to account for the rule amendments adopted in this Report and Order.

G. Rebuilding and Repairing Broadband Infrastructure After Disasters

137. We will not allow state and local laws to stand in the way of post-disaster restoration of essential communciations networks. In the November 2017 *Further Notice of Proposed Rulemaking* in this proceeding, we sought comment on whether there are targeted circumstances related to disasters in which the Commission should use its preemption authority.[505] We find that sections 253 and 332(c)(7) of the Act[506] provide authority to preempt state or local laws that prohibit or have the effect of prohibiting the rebuilding or restoration of facilities used to provide telecommunications services, and we commit to the exercise of that authority on a case-by-case basis where needed.[507] Sections 253 and 332(c)(7) both provide for preemption of state and local laws that "prohibit or have the effect of prohibiting" the deployment of telecommunications services, and we conclude that these provisions provide authority to preempt state or local legal action that effectively prohibit the deployment of telecommunications services in the wake of a disaster.[508] As the Commission has previously recognized, certain federal regulations may impede restoration efforts, and we are working to address those too[509]—where it is within our authority, we are committed to addressing all legal requirements that stand in the way of prompt restoration of communications infrastructure.

138. We prefer to exercise our authority to address the application of section 253 to preempt state and local requirements that inhibit network restoration on an expedited adjudicatory case-by-case basis, in which we can take into account the particularized circumstances of the state or local law in question and the impact of the disaster, and other relevant factors, rather than through adoption of a rule.

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[504] The remainder of this *Report and Order* will be effective 30 days after publication in the Federal Register, and the *Declaratory Ruling* will be effective upon release. *See infra* section VI.

[505] *See Wireline Infrastructure Order*, 32 FCC Rcd at 11194, paras. 178-79.

[506] 47 U.S.C. §§ 253, 332(c)(7).

[507] Our finding that the Commission has such authority should not be construed to mean that the Commission's preemption authority under Section 253 is limited only to times of natural disasters. *See* Illinois Electric Cooperative Wireline FNRPM Comments at 4.

[508] 47 U.S.C. §§ 253(a), 332(c)(7). We find that our authority to interpret or act pursuant to sections 253 and 332 is not limited to natural disasters,and also extends to *force majeure* events generally, including man-made disasters. *Cf., e.g.*, *Wireline Infrastructure Order*, 32 FCC Rcd at 11157-59, paras. 71-78 (adopting streamlined copper retirement notice procedures for *force majeure* events).

[509] *See Wireline Infrastructure Order*, 32 FCC Rcd at 11157-59, paras. 71-78 (exempting incumbent LECs from certain requirements for copper retirements that are a direct result of damage to network infrastructure caused by a *force majeure* event); *Second Wireline Infrastructure Order* at paras. 58-59 (extending streamlined notice procedures for *force majeure* events to all types of network changes); *Telephone Number Portability; Numbering Resource Optimization*, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 6723 (2017) (granting a temporary waiver of the Commission's numbering rules for providers affected by Hurricane Harvey); *Telephone Number Portability; Numbering Resource Optimization*, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 6831 (2017) (granting a temporary waiver of the Commission's number assignment rules for providers affected by Hurricane Irma); *Telephone Number Portability; Numbering Resource Optimization*, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 7005 (2017) (granting a temporary waiver of section 52.15(f)(ii) of the Commission's rules for providers affected by Hurricanes Maria and Jose).

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139. As the City of New York suggests, state and local officials may be well positioned to respond to disasters and implement disaster response protocol and we will be cognizant not to exercise our preemption authority in a manner that could disrupt these efforts.[511] In the wake of Hurricanes Harvey, Irma, and Maria, the Commission worked closely with state and local partners to support restoration of communications networks in affected areas,[512] and going forward, we reiterate the need for ongoing coordination and cooperation between the Commission and state and local governments to rebuild damaged telecommunications infrastructure as quickly as possible.[513] As the Public Safety and Homeland Security Bureau is responsible for coordinating the Commission's disaster response and recovery activities[514] and is most closely in contact with state, local, and Federal public safety, disaster relief and restoration agencies in such instances, it should work with the Wireline Competition Bureau and Wireless Telecommunications Bureau to report, and provide assistance to, the Commission in its adjudication of such matters.

IV. DECLARATORY RULING

140. Section 253(a) of the Act specifies that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[515] Notwithstanding that clear admonition, some states and localities have adopted moratoria on the deployment of telecommunications services or telecommunications facilities, including explicit refusals to authorize deployment and dilatory tactics that amount to *de facto* refusals to allow deployment. To provide regulatory certainty and further deployment, we issue this Declaratory Ruling making clear that such state and local moratoria violate section 253(a) and strike at the heart of the ban on barriers to entry that Congress enacted in that provision.

A. Background

141. As the Eighth Circuit has explained, section 253(a) of the Act provides "a rule of preemption[]" that "articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers."[516] Section 253(b) provides an exception for state requirements that are competitively neutral, consistent with section 254 of the Act, and "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of

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[510] *See* Verizon Wireline FNPRM Comments at 20-22.

[511] *See* City of New York Wireline FNPRM Comments at 3.

[512] *See* Statement of Chairman Ajit Pai, *FCC Response to Hurricanes Harvey, Irma, and Maria* (Sept. 26, 2017), https://www.fcc.gov/document/presentation-fcc-response-hurricanes-harvey-irma-and-maria. As of December 7, 2017, in response to all three hurricanes, the FCC issued over 30 public notices and orders, permitting the flexible use of spectrum or other non-standard actions to support incident response; granted over 200 requests for Special Temporary Authorizations; granted temporary waivers of Lifeline requirements; and waived number portability rules to facilitate restoration of telephone services. *See Public Safety and Homeland Security Bureau Seeks Comment on Response Efforts Undertaken During 2017 Hurricane Season*, PS Docket No. 17-344, Public Notice, DA 17-1180, at 2-3 (PSHSB Dec. 7, 2017); *see also Uniendo a Puerto Rico Fund and the Connect USVI Fund* at paras. 13-27 (establishing the Uniendo a Puerto Rico Fund and the Connect USVI Fund to rebuild, improve and expand voice and broadband networks in Puerto Rico and the U.S. Virgin Islands).

[513] *See* CWA Wireline FNPRM Comments at 7; Uniti Fiber Wireline FNPRM Comments at 5.

[514] *See* 47 CFR § 0.191.

[515] 47 U.S.C. § 253(a).

[516] *Level 3 Commc'ns, LLC. v. City of St. Louis, Mo.*, 477 F.3d 528, 531–32 (8th Cir. 2007) (*Level 3*).

telecommunications services, and safeguard the rights of consumers."[517] Section 253(c) provides another set of exceptions to the limits on state and local authority by specifying that nothing in section 253 "affects the authority of a State or local government to manage their public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[518] Section 253(d) requires the Commission, after notice and comment, to preempt the enforcement of specific state or local requirements that are contrary to section 253(a) or (b) "to the extent necessary to correct such violation or inconsistency."[519] Pursuant to section 253(d), the Commission has preempted both state and local actions that prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services, such as a locality's denial of franchise applications from a new competitor,[520] provisions in state codes that protect rural incumbents,[521] and a state grant of an exclusive license to provide telecommunications services.[522]

142. Section 253 applies to wireless and wireline telecommunications services.[523] In the *Wireline Infrastructure Notice of Inquiry*, the Commission asked whether "moratoria on market entry or the deployment of telecommunications facilities[]" are inconsistent with section 253(a).[524] The Commission also sought comment on whether to provide an exception if moratoria were imposed with

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[517] 47 U.S.C. § 253(b); *see also Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, File No. CWD 98-90, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16231–32, para. 9 (2000).

[518] 47 U.S.C. § 253(c).

[519] 47 U.S.C. § 253(d). In the discussion below, we discuss the relation between subsections (d) and (a) and find that the former does not preclude us from issuing this *Declaratory Ruling* under subsection (a). *See infra* section IV.B.3.

[520] *See Classic Telephone, Inc.; Petition for Preemption, Declaratory Ruling and Injunctive Relief*, CCBPol 96-10, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13101, para. 36 (1996) (*Classic Telephone*).

[521] *See Public Utility Commission of Texas et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-14 et al., Memorandum Opinion and Order, 13 FCC Rcd 3460, 3466, para. 13 (1997) (*Public Utility Comm'n of Texas*); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, CCB Pol 97-1, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15658, para. 42 (1997), *aff'd sub nom. RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000) (*RT Commc'ns*).

[522] *See Connect America Fund (Sandwich Isles Communications, Inc.) Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611 and 69.2(hh) of the Commission's Rules*, WC Docket No. 10-90, CC Docket No. 96-45, Memorandum Opinion and Order, 32 FCC Rcd 5878, 5888, para. 26 (2017).

[523] Section 253(a) on its face applies to "any interstate or intrastate telecommunications service[,]" and the Supreme Court has held that wireless telecommunications services are included in that term. 47 U.S.C. § 253(a); *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co*., 534 U.S. 327, 340 (2002) ("[a] provider of wireless telecommunications service is a 'provider of telecommunications service'"). The Commission has previously recognized that section 253 applies to Commercial Mobile Radio Services (CMRS). *See Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45 et al., Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5486, para. 302 (1997) ("To demonstrate that state universal service contribution requirements for CMRS providers violate section 253, there must be a showing that the state universal service programs act as a barrier to entry for CMRS providers and are not competitively neutral."). We therefore disagree with Smart Communities that section 253 does not apply to wireless facilities. *See* Smart Communities Wireless NPRM Comments at 56-57.

[524] *Wireline Infrastructure Notice*, 32 FCC Rcd at 3297, para. 102.

"sharply restricted time limits[]" or under "exigent circumstances[.]"[525] In the *Wireless Infrastructure NPRM*, the Commission sought comment on promulgating a preemption rule to address state or local zoning authorities' unreasonable delays in acting on applications.[526] That item also initiated a Notice of Inquiry, which sought comment, among other things, on whether state or local governments have imposed restrictions on deployment comparable to moratoria.[527]

143. In response to the *Wireline Infrastructure Notice of Inquiry* and the *Wireless Infrastructure NPRM*, we received numerous comments about states and localities imposing moratoria on the deployment of telecommunications infrastructure. The record includes comments from a broad array of large and small wireline and wireless providers operating throughout the country. For example, AT&T describes an Ohio municipality that "enacted a 145-day moratorium on permits for construction in rights-of-way" and an Illinois city that "imposed a five-year moratorium on pavement cuts to roadways that have been resurfaced or reconstructed."[528] Uniti Fiber identifies 44 jurisdictions in Florida that have implemented wireless moratoria.[529] Frontier offers examples of several states that have issued moratoria, including Indiana, which "issued a complete moratorium" on broadband deployment in March 2017; Illinois, where localities "often refuse to issue work permits unless a carrier pays"; Michigan, which "has frost and freeze laws that prevent construction of facilities for extended periods of time during the winter"; and Washington, which "issued a moratorium banning Frontier from building new infrastructure" between August 2016 and January 2017.[530] The record demonstrates that moratoria are numerous, geographically diverse, and occur at both the state and local level, showing that this issue affects the deployment of telecommunications services in many cases across the nation.

B. Discussion

144. The records in both the wireline and wireless infrastructure proceedings reflect the existence of two types of moratoria, express and *de facto*. We find that both types of moratoria violate section 253(a) and generally do not fall within the section 253(b) and (c) exceptions.

1. Moratoria Violate Section 253(a)

145. *Express Moratoria.* For purposes of this Declaratory Ruling, we define express moratoria as state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities.[531] Commenters identify numerous

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[525] *Id.*

[526] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Second Report and Order, 32 FCC Rcd 3330, 3336-37, paras. 15-16 & n.30 (*Wireless NPRM*).

[527] *Id.* at 3364-65, paras. 95-96.

[528] AT&T Wireline NPRM Comments at 74.

[529] *See* Letter from Ronald W. Del Sesto, Jr., Counsel for Uniti Fiber, to Marleen H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at Exh. A (filed Oct. 30, 2017) (Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter); *see also* Conterra Broadband Services et al. (Conterra) Wireline NPRM Comments at 28 (describing one instance where a municipality placed a moratorium on competitive deployments, and others where state highway officials "refused to issue permits for deploying fiber on bridges, even where spare conduit is available"); T-Mobile Wireline & Wireless NPRM Comments at 37 (describing a *de facto* moratorium outside Indianapolis); Wireless Infrastructure Association (WIA) Wireline & Wireless NPRM Comments at 11-12 (describing *de facto* moratoria in jurisdictions in Massachusetts and Illinois).

[530] Frontier Wireline NPRM Comments at 32-33; *see also* Mobilitie Wireline & Wireless NPRM Comments at Attach. 2, 11-12 (describing *de facto* moratoria in jurisdictions in Arizona, California, Michigan, Minnesota, New York, Ohio, and Oregon); Sprint Wireline & Wireless NPRM Comments at 41-42 (describing instances of *de facto* moratoria in the south and with a state DOT).

[531] We specifically include facilities where such facilities are necessary for the provision of covered services within the scope of section 253. *See Public Utility Comm'n of Texas*, 13 FCC Rcd at 3496, para. 74 (finding that "section

instances of express moratoria that harm the public by prohibiting or having the effect of prohibiting the provision and deployment of telecommunications services and/or facilities. For example, despite the Commission's direction in 2009 and 2014 that states and localities must complete their review of wireless siting applications for collocation deployments within 90 days and for deployments other than collocation within 150 days,[532] the record in response to the *Wireless Infrastructure NPRM* shows that express moratoria on wireless deployments are all too common. Uniti Fiber, for example, identifies dozens of local jurisdictions that have implemented moratoria on wireless deployment.[533] Commenters also provide specific examples of moratoria related to the processing of siting applications involving deployment of small cells.[534] For instance, Crown Castle describes an Amherst, New York resolution prohibiting town staff from accepting or processing any applications or issuing any permits "relating to the placement or installation of telecommunication towers, facilities and antennae within the Town's public rights-of-way until the moratorium is rescinded and/or a Local Law addressing this matter is adopted.'"[535] Similarly, Uniti Fiber identifies a Jacksonville, Florida ordinance which was passed on an 'emergency' basis,[536] and which imposed a "temporary moratorium on the acceptance, processing or approval of rights-of-way permit applications for personal wireless communication systems in the City's rights-of-way."[537]

146. Likewise, in response to the *Wireline Infrastructure Notice of Inquiry*, several commenters provide examples of state and local moratoria that have prohibited or had the effect of prohibiting the deployment of telecommunications services.[538] For example, Crown Castle highlights

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253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service"); *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, CC Docket No. 98-1, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21705, para. 14 (1999) (*Minnesota Preemption Order*) (concluding that Section 253(a) preempts a state's agreement with an infrastructure developer—even though the developer deployed facilities rather than provided telecommunications services—because the operative inquiry is whether the state's action has an effect on the provision of telecommunications services); *cf. Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5922-23, paras. 60-62 (2007) (concluding that where the same infrastructure would provide "both telecommunications and wireless broadband Internet access service," the provisions of section 224 governing pole attachments would continue to apply to such infrastructure used to provide both types of service).

[532] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994, 14016-19, paras. 56-65 (2009) (*2009 Wireless Siting Declaratory Ruling*), *aff'd sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket Nos. 13-238, 13-32, WC Docket No. 11-59, Report and Order, 29 FCC Rcd 12865,12971, para. 265 (2014) (*Wireless Facilities Siting Order*).

[533] *See* Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter at Exh. A (providing a list of 44 jurisdictions in Florida that have implemented wireless moratoria).

[534] *See, e.g.*, Crown Castle Wireless NPRM Comments at 14-19; CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 12; Verizon Wireline & Wireless NPRM Comments at 6; AT&T Wireless NPRM Comments at 14.

[535] Crown Castle Wireless NPRM Comments at 32 (quoting Town of Amherst, New York, Resolution 2017-674, adopted June 5, 2017).

[536] Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter at Exh. B.

[537] *Id*.

[538] *See e.g.*, Frontier Wireline NPRM Comments at 32-33; Conterra Wireline & Wireless NPRM Comments at 28; AT&T Wireline NPRM Comments at 74; Letter from T. Scott Thompson, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 3-4 (filed Aug. 29, 2017) (Crown Castle Aug. 29, 2017 Wireline *Ex Parte* Letter); Letter from T. Scott Thompson, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC,

persistent problems of moratoria imposed by local governments on the processing and acceptance of applications for new sites.[539] As another example, AT&T states that a community in Ohio enacted a 145-day moratorium on permits for construction in rights-of-ways.[540]

147. Express moratoria are facially inconsistent with section 253(a). By their terms, express moratoria prohibit the provision of telecommunications services by halting the acceptance, processing, or approval of applications or permits for such services or the facilities used to provide such services.[541] Express moratoria also "have the effect of prohibiting" the provision of telecommunications service. As the record demonstrates, express moratoria limit the provision of service, harm competition, and impose significant costs that impede the deployment of telecommunications infrastructure and thereby exacerbate the digital divide.[542] And the impact of moratoria extend beyond the telecommunications services market. As the Wireless Internet Service Providers Association states, "a blanket moratorium that freezes all applications across the board will by definition impede the deployment of broadband services and effectively serve as a complete ban on market entry by small broadband providers that cannot afford to endure excessive delays."[543]

148. We reject the argument that all "temporary" moratoria are permissible simply because they are of a limited, defined duration.[544] As an initial matter, the record indicates that some states and localities impose so-called "temporary" moratoria without setting an end date, or continually extend temporary moratoria to create *de facto* indefinite moratoria on deployment.[545] We agree with commenters

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WC Docket No. 17-84, GN Docket No. 17-83, at 4 (filed Nov. 13, 2017) (Crown Castle Nov. 13, 2017 Wireline *Ex Parte* Letter).

[539] *See* Crown Castle Aug. 29, 2017 Wireline *Ex Parte* Letter at 3-4; Crown Castle Nov. 13, 2017 Wireline *Ex Parte* Letter at 4.

[540] *See* AT&T Wireline NPRM Comments at 74.

[541] *See* Letter from Scott K. Bergmann, SVP Regulatory Aff., CTIA, to Marlene H, Dortch, Secretary, FCC, WC Docket No. 17-84 and WTB Docket Nos. 17-79 and 16-421, at 3 (filed July 19, 2018) (stating that "there is no more absolute prohibition on deployment than refusing to accept or act on applications" and that "[a] local law that bars acceptance of applications and a local agency's refusal to act on them have precisely the same impact—no deployment is permitted—and they are thus per se unlawful"); *see also* CTIA June 27, 2018 Wireline *Ex Parte* Letter at 4.

[542] *See* Conterra Wireline NPRM Comments at 29; Frontier Wireline NPRM Comments at 32; CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 25; Mobile Future Wireless NPRM Comments at 9; Mobilitie Wireline & Wireless NPRM Comments at 7; R Street Institute Wireline NPRM Comments at 13-14; Samsung Wireless NPRM Comments at 7-8; *see also* Conterra Wireline & Wireless NPRM Comments at 29 (describing situations where deployment on bridges and highways was prohibited, creating situations where the only alternative was to "bore under a significant body of water" at a cost-prohibitive price of $500,000). *Cf.* Conterra Wireline & Wireless NPRM Comments at 28 ("In one municipality, applicants were informed there was a moratorium on competitive deployments, allowing incumbent phone companies and cable operators to operate without fear of competitive deployment on the horizon."); *see also California Payphone*, 12 FCC Rcd at 14206, para. 31 (state or local action effectively prohibits provision of service when it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment").

[543] Wireless Internet Service Providers Ass'n (WISPA) Wireline NPRM Comments at 5.

[544] *See* City of Norfolk Wireline NPRM Comments at 16; Minnesota Cities Coalition (MCC) Wireline NPRM Comments at 18-19; Washington State City Coalition (WSCC) Wireline NPRM Comments at 17-18; Illinois Municipal League (IML) Wireless NPRM Comments at 2; League of Minnesota Cities (LMC) Wireline NPRM Comments at 10-11; City of New York Wireline NPRM Comments at 4; League of Arizona Cities and Towns et al. (LACT) Wireless NPRM Comments at 12.

[545] *See, e.g.*, AT&T Wireless NPRM Comments at 14 ("A Florida city imposed a 'six-month' moratorium on [right-of-way] wireless siting that was extended multiple times over two years."); Sprint Wireless NPRM Comments at 41–42 ("One Southern city . . . imposed a moratorium on new builds in the downtown area until it revises its standards for fees, designs, and deployment in underserved areas. This moratorium has continued for 18 months.");

that even moratoria that are actually time limited "force providers either to delay or cancel their planned deployments."[546] Moreover, assertions that "temporary" moratoria are necessary for planning purposes or government study[547] provide insufficient justification for imposing such moratoria in light of clear congressional intent to severely limit state and local authorities' ability to take actions that prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.[548] We recognize, and discuss further below, that there may be limited instances where temporary moratorium could fall within the exception of 253(b)[549] and that 253(c) provides an exception for certain conduct that involves legitimate "rights-of-way" management.[550] But Congress did not countenance generalized government study and planning that stands in the way of additional competition and service upgrades, and we decline to create additional exceptions beyond those expressed by Congress.

149. *De Facto Moratoria.* We find that section 253(a) also prohibits *de facto* moratoria, which we define for the purpose of this Declaratory Ruling as state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium.[551] *De facto* moratoria are not formally codified by state or local governments as outright prohibitions but have the same effect as express moratoria since they, by their operation, prohibit or have the effect of prohibiting deployment of telecommunications services and/or telecommunications facilities. Examples of *de facto* moratoria in the record include, but are not limited to, blanket refusals to process applications,[552] refusals to issue permits for a category of structures,[553] frequent and lengthy delays of

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CTIA June 27, 2018 Wireline *Ex Parte* Letter at 5 (stating that "localities can and do extend such 'temporary' moratoria").

[546] *See* AT&T Wireline NPRM Comments at 74; *see also* AT&T Wireless NPRM Comments at 13-14 (explaining how AT&T had to cancel deployment plans after being faced with a supposedly temporary six-month moratorium that was repeatedly extended by a Florida city); CTIA June 27, 2018 Wireline *Ex Parte* Letter at 5 (arguing that section 253 does not exempt temporary bans "because they have the same impact [as permanent moratoria]—no deployment can occur").

[547] *See* City of Norfolk Wireline NPRM Comments at 16; MCC Wireline NPRM Comments at 18–19; WSCC Wireline NPRM Comments at 17; IML Wireless NPRM Comments at 2.

[548] We observe that if describing a law or regulation as "temporary" was sufficient to insulate that law against section 253(a), every express moratorium would be adopted as "temporary" in order to evade the statute.

[549] *See infra* at Section IV.B.2.

[550] 47 U.S.C. § 253(c). We find below that express and *de facto* moratoria do not fall within the section 253(c) exception. *See infra* at Section IV.B.2.

[551] For purposes of this Declaratory Ruling we exclude fees—even highly excessive fees—from the definition of *de facto* moratoria. In doing so, we do not consider what fees may be consistent with section 253(a). Rather, we choose to proceed incrementally and limit our discussion to moratoria as defined herein.

[552] *See* WIA Wireless NPRM Comments at 11 (noting multiple jurisdictions in Massachusetts and Illinois that "have not specifically passed ordinances putting moratoria in place, but have informally suspended applications or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered"); Mobilitie Wireless NPRM Comments at Attach. 2, 11–12 (citing local practices, including refusals to process site permit applications or negotiate master rights-of-way agreements, which, while not explicit moratoria, still have the same practical effect).

[553] *See* Conterra Wireline & Wireless NPRM Comment at 28 (citing instances where "state highway officials have refused to issue permits for deploying fiber on bridges, even where spare conduit is available"); Sprint Wireless NPRM Comments at 41 (stating that "[s]ome municipalities have dragged their feet for such a long time in establishing a process [to act on permitting applications for small cell deployment] that their actions have imposed a de facto moratorium on the use of the rights of way"); WIA Wireless NPRM Comments at 11 (stating that while some jurisdictions "have not specifically passed ordinances putting moratoria in place," they have refused to process requests to deploy small cell facilities or issue permits for small cells); CTIA Wireline & Wireless NPRM

months or even years in issuing permits and processing applications,[554] and claims that applications cannot be granted until pending local, state, or federal legislation is adopted.[555]

150. We distinguish *de facto* moratoria, which inherently violate section 253(a), from state and local actions that simply entail some delay in deployment.[556] Situations cross the line into *de facto* moratoria where the delay continues for an unreasonably long or indefinite amount of time such that providers are discouraged from filing applications, or the action or inaction has the effect of preventing carriers from deploying certain types of facilities or technologies. For example, T-Mobile describes one jurisdiction outside Indianapolis, in which small cell right-of-way applications "have been pending for nearly three years, but the jurisdiction will neither approve nor deny the applications."[557] WIA states that its members have encountered refusals to process small cell applications in Myrtle Beach, South Carolina, and DeKalb County, Georgia.[558] CTIA describes situations where localities refuse to process applications to locate or modify wireless facilities until and unless the locality adopts regulations governing small cell deployment.[559] Other localities allegedly place onerous conditions on accepting or reviewing applications

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Comments, Attach. 1 at 12 (describing several localities that have imposed *de facto* moratoria by declining to process applications to locate new wireless facilities or modify existing facilities).

[554] *See* Conterra Wireline & Wireless NPRM Comments at 28 (claiming that "municipally-owned utilities frequently delay issuance of pole attachment applications"); Lightower Wireline NPRM Comments at 18 (claiming that it has been "involved in a number of scenarios in which, in spite of no pronunciation by local government that a moratorium has been imposed, the governmental entity is simply not moving forward in such a way as to process applications" related to deployment"); T-Mobile Wireline & Wireless NPRM Comments at 37 (complaining of *de facto* moratoria where localities simply fail to act on applications, and citing the example of one jurisdiction outside Indianapolis where small cell rights-of-way applications have been pending for nearly three years without being either approved or denied). *Cf. Sprint Telephony*, 543 F.3d at 580 (municipal ordinance that "impose[s] an excessively long waiting period [could] amount to an effective prohibition").

[555] *See* Conterra Wireline & Wireless NPRM Comments at 29 (citing some instances where local governments cite to pending state or federal legislation as grounds to halt or delay the filing or processing of right-of-way permits or franchise applications); CTIA Wireline & Wireless NPRM Comments at 24 (citing the example of localities that "refuse to process applications, or that tell applicants to wait until the locality develops siting policies, without making any commitment" as to whether or when they will do so).

[556] This Declaratory Ruling is limited to express and *de facto* moratoria. We do not reach the limits of what actions violate section 253(a) or other provisions of the Act. *See* Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 5-6. We view express and *de facto* moratoria as some of the most extreme examples of state or local statutes, regulations, or legal requirements that violate 253(a). We note that Congress used the broad language of 253(a) to invalidate all state or local requirements that "may prohibit or have the effect of prohibiting" service regardless of what the requirements are called, and not all such invalidated requirements will rise to the level of an express or *de facto* moratorium.

[557] T-Mobile Wireline & Wireless NPRM Comments at 37; *see also* Verizon Wireline & Wireless NPRM Comments at 6 (describing "jurisdictions, like a Midwestern suburb, where Verizon has been trying unsuccessfully to get approval for small cells since 2014, [that] have no established procedures for small cell approvals and are extremely slow to respond"); Mobilitie Wireline & Wireless NPRM Comments, Attach. 2 at 11-12 (describing jurisdictions in Arizona, Minnesota, and New York which are not processing or accepting applications).

[558] *See* WIA Wireline & Wireless NPRM Comments at 11. While Myrtle Beach disputes these allegations, we do not decide their validity here. *See* Letter from Gerard Lavery Lederer, Best Best & Krieger LLP, Counsel to the City of Myrtle Beach, South Carolina, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 17-79, 16-421, WC Docket No. 17-84, ET Docket No. 13-84, GN Docket No. 17-83, 1-2 (filed Aug. 1, 2018) (asserting that telecommunications deployment can continue in Myrtle Beach City through the use of excess conduit in major thoroughfares even during periods where access to major thoroughfares is limited by the South Carolina Department of Transportation for traffic management and during hurricane season).

[559] CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 12; *see also* WIA Wireless NPRM Comments at 11 (stating that jurisdictions in Massachusetts and Illinois "have not specifically passed ordinances putting moratoria in

that would constitute *de facto* moratoria. For instance, Lightower describes situations where jurisdictions use *de facto* moratoria as punitive measures, stating that where Lightower "has contested the conditions or costs[] [of deploying telecommunications infrastructure], jurisdictions have often refused to continue processing or grant pending deployment applications."[560] Although we do not reach specific determinations on the numerous examples discussed by parties in our record, we find that these types of conduct are prohibited by section 253(a).

151. Like express moratoria, *de facto* moratoria prohibit or have the effect of prohibiting the provision of service, and are thus prohibited by section 253(a). As the examples above show, the presence of a formal, express moratorium is not necessary for a state or locality to take action that violates 253(a). A *de facto* moratorium can prohibit or effectively prohibit an entity from providing telecommunications service if the provider cannot obtain approval or authorization to deploy from the state or local government due to inaction or refusal, even if there is no statute, regulation, or other express legal requirement restricting the acceptance, processing, or grant of applications or authorizations.[561] This is true even though some *de facto* moratoria may leave the hypothetical possibility of a locality taking action on an application; if applicants cannot reasonably foresee when approval will be granted because of indefinite or unreasonable delay, then an impermissible *de facto* moratorium is in place.[562]

152. There may be situations in which states or localities impose limitations on deployment, but allow for alternative means of deployment in a manner that is reasonably comparable in cost and ease. Providers sometimes inaccurately characterize these limitations as moratoria, but we find that characterization to be inapt where the limitations do not foreclose deployments and carriers' ability to build the facilities they need to provide service. For example, some "street-cut" requirements, which providers sometimes refer to as moratoria, are not designed to thwart construction, but to promote "dig once" policies "in order to preserve the roadway and incentivize interested providers to deploy telecommunications conduit," and would not qualify as unlawful moratoria if the state or locality imposing such street-cut requirements does not bar alternative means of deployment such as aerial lines or sublicensing existing underground conduits.[563]

2. Moratoria Are Generally Not Protected Under the Section 253(b) and (c) Exceptions

153. With rare exception, neither express nor *de facto* moratoria are protected by the exceptions found in either section 253(b) or section 253(c).[564]

154. Section 253(b) allows certain "State" requirements, even if such requirements otherwise violate section 253(a), that are (i) "competitively neutral"; (ii) "consistent with section 254" of the Act;

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place, but have informally suspended applications or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered").

[560] Lightower Wireline NPRM Comments at 21.

[561] *See, e.g.*, T-Mobile Wireline & Wireless NPRM Comments at 37; CTIA Wireline & Wireless NPRM Comments at 24, Attach. 1 at 12; Mobilitie Wireline & Wireless NPRM Comments, Attach. 2 at 11; Verizon Wireline & Wireless NPRM Comments at 6; WIA Wireline & Wireless NPRM Comments at 11.

[562] Section 253(a) does not require that a bar to entry be "insurmountable before the FCC must preempt it." *RT Commc'ns*, 201 F.3d at 1268.

[563] *See* LACT Wireline NPRM Comments at 13-14; *but see* Tekify Fiber Wireline NPRM Comments at 2 (arguing against moratoria that require a utility to grind and re-pave entire street lengths). To promote deployment, we encourage state and local governments that enact a street-cut requirement that allows for alternative means of deployment to still provide advance notice to enable providers to deploy in the right-of-way in the least disruptive manner possible. *See* Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 17 (arguing for six months' notice in advance of a right-of-way related moratorium for repaving or other work).

[564] *See* 47 U.S.C. § 253(b), (c).

and (iii) "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[565] As an initial matter, we find that no local or municipal moratoria can fall within the section 253(b) exception absent a specific delegation of regulatory authority by a state to the locality or municipality in question.[566] Given that section 253(c) discusses the authority of "a State or local government," but section 253(b) only discusses the authority of "a State," we find Congress's omission of the phrase "local government" from the latter to be persuasive evidence that the section 253(b) exception does not generally apply to the conduct of local governments.[567] Indeed, some courts have held that the plain text of section 253(b) requires a finding that the provision protects only certain state activities "and does not speak to local regulation."[568] However, consistent with past Commission precedent, we need not go so far and make clear that section 253(b) does not apply to local or municipal legal requirements absent a specific delegation of authority from the state.[569]

155. Further, we find that most moratoria are not competitively neutral—they almost certainly will favor incumbents over new entrants and existing modalities over new technologies. We also find they are unlikely to fall within the ambit of any of the four public interest exceptions contained in section 253(b).[570] Neither the Commission nor a court has upheld a state requirement that violated section 253(a) on the grounds that it was necessary to "preserve and advance universal service."[571] Moreover, as a

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[565] 47 U.S.C. § 253(b).

[566] *See Classic Telephone*, 11 FCC Rcd at 13100-101, para. 34.

[567] *See* 47 U.S.C. § 253(b), (c).

[568] *TCG N.Y., Inc. v. City of White Plains, N.Y.*, 125 F. Supp. 2d 81, 87 (S.D.N.Y. 2000), *aff'd in part, rev'd in part on other grounds TCG N.Y.*, 305 F.3d 67; *see also Southwestern Bell Wireless Inc. v. Johnson Cty. Bd. of Cty. Comm'rs*, 199 F.3d 1185, 1192 (10th Cir. 1999) ("[S]ection 253(b) applies only to state, not local, regulation, since, in the remainder of section 253, Congress clearly says "State or local" when it so intends."); *City of Dallas v. Metropolitan Fiber Systems of Dallas, Inc.*, 98 civ. 2128, 2000 WL 198104, at *4 (N.D.Tex. Feb.17, 2000) (holding that section 253(b) was not applicable to municipalities).

[569] *See Classic Telephone*, 11 FCC Rcd at 13100-101, para. 34; *see also N.J. Payphone Ass'n, Inc. v. Town of W. N.Y.*, 130 F. Supp. 2d 631, 639 (D.N.J. 2001), *aff'd N.J. Payphone Ass'n*, 299 F.3d 235 (3rd Cir. 2001); *Bd. of Cty. Comm'rs of Grant Cty., N.M.*, 169 F. Supp. 2d 1243, 1247 (D.N.M. 2001) ("Local governments may only manage the rights of way, unless specifically delegated authority to impose requirements under § 253(b)."); *AT&T Comm. of the Southwest, Inc. v. City of Dallas,* 8 F. Supp.2d 582, 591 (N.D.Tex.1998), dismissed as moot on other grounds, 243 F.3d 928 (5th Cir. 2001) ("The language of § 253 is straightforward. Absent explicit delegation by the state legislature, cities do not have the more general authority to regulate to protect public safety and welfare, advance universal service and ensure quality—this is a function reserved to states by § 253(b), not to local governments."); Cox Comm. PCS, LP v. City of San Marcos, 204 F. Supp. 2d 1260, 1264 (S.D. Cal. 2002) (section 253(b) only applies to states, and not municipalities, unless a state specifically delegates authority to its local governments); *BellSouth Telecomm., Inc. v. City of Coral Springs,* 42 F. Supp.2d 1304, 1307 (S.D. Fla.1999), aff'd in part, rev'd in part on other grounds, 252 F.3d 1169 (11th Cir. 2001) ("While states may regulate universal service, protect consumers, ensure quality and protect the public safety and welfare, local governments can only manage the public rights-of-way, unless of course a state specifically delegated the state authority to its local governments."); BellSouth Telecomm., Inc. v. Town of Palm Beach, 127 F. Supp. 2d 1348, 1356 (S.D. Fla. 1999) (quoting BellSouth Telecomm. Inc v. City of Coral Springs, 42 F. Supp. 2d 1304 (S.D. Fla. 1999)), aff'd in part, rev'd in part on other grounds, 252 F.3d 1169 (11th Cir. 2001). To the extent that previous Commission decisions discussed section 253(b) as applying to either state or local requirements, we find that such decisions should be understood to be referring to only those local legal requirements that were enacted pursuant to specific delegated authority from a state. See, e.g., Public Utility Commission of Texas, 13 FCC Rcd at 3480, 3501, paras. 41, 83; Silver Star Telephone, 12 FCC Rcd at 15647, 15658, paras. 17, 42 (1997), aff'd sub nom. RT Communications, Inc., 201 F.3d 1264; Sandwich Isles Communications, Inc., 32 FCC Rcd at 5885, para. 19 (2017).

[570] *See* 47 U.S.C. § 253(b).

[571] 47 U.S.C. § 253(b). While the Commission has never upheld a state requirement on such a basis, it has preempted state requirements on the grounds that they are not necessary to preserve and advance universal service.

practical matter, moratoria run counter to the goal of preserving and advancing universal service as moratoria prevent or materially limit deployments that could assist in achieving universal service. Neither the Commission nor a court has ever evaluated whether a state requirement that violated section 253(a) was permissible on the grounds that it was nevertheless necessary to "ensure the continued quality of telecommunications services,"[572] and it is difficult to envision how a ban on deployment could conceivably improve the quality of such services. If anything, a moratorium is likely to decrease the quality of telecommunications services by barring competitive entry into the market, reducing the quality and quantity of services available to consumers, and inhibiting providers' ability to deploy the facilities needed to broaden the geographic areas they can serve, fill coverage gaps, expand capacity, and/or upgrade the technology used in their networks.[573]

156. With limited exception, moratoria are also unlikely to be necessary to "protect the public safety and welfare" or "safeguard the rights of consumers."[574] Both the Eighth and Ninth Circuits have noted that these exceptions can be applicable to legal requirements intended to protect the public from deceptive business practices.[575] On its own, the public safety and welfare exception has been understood to apply, at a minimum, to legal requirements that ensure emergency services such as 911 are made readily available.[576] Rather than preserving these vital interests, moratoria on deployment that violate section 253(a) decrease competition—thereby dampening the ability of a free and open market to act as a check against unfair or deceptive practices—and prevent the deployment of facilities that may be used in the provision of emergency services.

157. We recognize that there may be limited situations in the case of a natural disaster or other comparable emergency where an express or *de facto* moratoria that violates section 253(a) may nonetheless be "necessary" to "protect the public safety and welfare" or to "ensure the continued quality

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See, e.g., *Federal-State Joint Board on Universal Service Western Wireless Corporation Petition for Preemption of an Order of The South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, 15 FCC Rcd 15168, 15168-69, paras. 1-2 (2000) (*Western Wireless Preemption Declaratory Ruling*) (finding that the regulation at issue—which required common carriers to provide supported services throughout a service area prior to being designated as eligible telecommunications carriers who may receive federal universal service support—was not competitively neutral, consistent with section 254, or necessary to preserve and advance universal service, and thus did "not fall within the authority reserved to the states in section 253(b)").

[572] 47 U.S.C. § 253(b).

[573] *See, e.g.*, R Street Wireline NPRM Comments at 13-14; Mobile Future Wireless NPRM June 15, 2017 Comments at 9.

[574] 47 U.S.C. § 253(b).

[575] *See Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002) ("[T]he Supreme Court has recognized that states have an important interest in protecting the public from deceptive business practices. . . .Federal telecommunications law implicitly acknowledges the importance of this interest by leaving states some latitude to 'protect the public safety and welfare' and 'safeguard the rights of consumers.'"); *Comm'cns Telesystems Int'l v. Cal. Pub. Util. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999) (noting that the California Public Utility Commission has the power under section 253(b) to "implement regulations that are 'necessary' to 'protect the public' against slamming," or the unauthorized switching of consumers' long-distance carriers); *see also Classic Telephone*, 11 FCC Rcd at 13101, para. 35 ("Section 253(b) . . . ensures that States continue to have authority to require telecommunications service providers to make emergency services available to the public and comply with local consumer protection laws.").

[576] *See Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 324 (2d Cir. 2000) ("[T]he legislative history indicates that '[b]y "public safety and welfare,'" the Committee means, among other things, making certain that emergency services, such as 911, are available to the public."); *see also Classic Telephone*, 11 FCC Rcd at 13101, para. 35 ("Section 253(b) . . . ensures that States continue to have authority to require telecommunications service providers to make emergency services available to the public and comply with local consumer protection laws.").

of telecommunications services."[577] For example, in the event of a widespread power or telecommunications outage, a state might need to limit access to poles in a specific, affected area until existing power and telecommunications facilities can be restored. We interpret section 253(b) to allow for these state-imposed "emergency" express moratoria only if they are (1) "competitively neutral," as expressly required by section 253(b),[578] (2) necessary to address the emergency or disaster or related public safety needs, and (3) targeted only to those geographic areas that are affected by the disaster or emergency. Given that the emergency giving rise to such an express moratorium will be finite in time, a moratorium that extends beyond the duration of the emergency and associated repair efforts would not be permissible under section 253(b) because it would not be "necessary" to protect the safety and welfare of the public as section 253(b) requires.[579] Similarly, an express, statewide deployment moratorium that is not targeted to the geographic areas affected by the natural disaster or emergency would not be permissible as it would not be "necessary" in the unaffected areas and would thus be impermissibly overbroad.[580] We caution that mere assertions that express or *de facto* moratoria are necessary to achieve these goals do not suffice to invoke section 253(b).[581] Emergency moratoria must be identified as such and clearly communicated to applicants; states and localities may not use a natural disaster or similar emergency as a guise for implementing *de facto* moratoria. While narrowly tailored emergency moratoria may be legally permissible under section 253, we encourage states to work collaboratively with providers before resorting to express moratoria in the wake of natural disasters or emergencies. The burden is on states to justify the imposition of a moratorium by specifically demonstrating that a moratorium serves, and is narrowly-tailored in a manner that makes it necessary to achieve, one of the goals articulated in section 253(b).

158. We also take this opportunity to remind states that section 253(b) only permits them to impose requirements that are "necessary" to preserve or advance the interests identified in section 253(b).[582] Moratoria are "blunt instruments."[583] There may well be instances where a more limited legal requirement could reasonably be said to be "necessary" to advance universal service, protect the public safety, ensure the continued quality of telecommunications services, or safeguard the rights of consumers, but most moratoria are, by their very nature, too broad and far-ranging to satisfy such a strict standard. Such bans cannot be considered "necessary" to further a specific interest if that interest could be advanced by the imposition of some other, more targeted measure.[584]

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[577] 47 U.S.C. § 253(b).

[578] As the Commission has previously held, to be considered "competitively neutral" for purposes of section 253(b), a legal requirement must have a like effect on all types of providers and technologies, and must not unfairly advantage or hamper one type of provider or technology over another. *See Western Wireless Preemption Declaratory Ruling*, 15 FCC Rcd at 15176-177, paras. 21-22 (citing *Federal-State Joint Board on Universal Service*, 12 FCC Rcd at 8801, para. 47); *see also Nixon v. Mo. Mun. League*, 541 U.S. 125, 137 (2004) (citing the Commission's holding in *Western Wireless Preemption Declaratory Ruling* and reaffirming that the Commission has "understood § 253(b) neutrality to require a statute or regulation affecting all types of utilities in like fashion").

[579] 47 U.S.C. § 253(b); *see also New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCBPol 96-11, Memorandum Opinion and Order, 11 FCC Rcd 19713,19722, para. 21 (1996) (*New England Payphone Order*) (stating that "[a]n interpretation of section 253(b) that a state's action merely be reasonable ignores the specific language of the statute requiring such state action to be 'necessary'").

[580] 47 U.S.C. § 253(b).

[581] *See, e.g.*, City of Norfolk Wireline NPRM Comments at 16-17 (claiming generally that "[m]oratoria also allow local officials to consider the legitimate concerns of members of the public, such as health, public safety and environmental issues, and how best to responsibly address them"); MCC Wireline NPRM Comments at 18; WSCC Wireline NPRM Comments at 17.

[582] 47 U.S.C. § 253(b).

[583] AT&T Wireline NPRM Comments at 74.

[584] *See New England Payphone Order*, 11 FCC Rcd at 19722, para. 22 (rejecting a measure prohibiting incumbent LECs from providing in-state payphone services as "the most restrictive means available" and concluding that the

159. It is even less likely that the section 253(c) exceptions could shield moratoria that violate section 253(a) from preemption. Section 253(c) specifies that "[n]othing in this section affects the authority of the State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[585] For purposes of this Declaratory Ruling, we exclude the imposition of fees from the definition of *de facto* moratoria.[586] Thus, the applicability of 253(c) depends on whether moratoria may constitute management of the public rights-of-way.[587]

160. While the Act does not define "manage[ment of] rights-of-way," the Commission has recognized in the context of section 253(c) that "[l]ocal governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage gas, water, cable . . . and telephone facilities that crisscross the streets and public rights-of-way."[588] The Commission has described the "types of activities that fall within the sphere of appropriate rights-of-way management" as including "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."[589] Thus, section 253(c) protects certain activities

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record "does not support a finding that such an extreme approach is 'necessary'" under section 253(b)); *id.*, 11 FCC Rcd at 19722, para. 21 ("An interpretation of section 253(b) that a state's action merely be reasonable ignores the specific language of the statute requiring such state action to be 'necessary.'"); *Classic Telephone*, 11 FCC Rcd at 13102, para. 38 ("Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry.") (citing S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1, at 126 (1996)). We recognize that outside the context of section 253(b), the Commission has sometimes interpreted the term "necessary" as simply meaning "used" or "useful." *See New England Payphone Order*, 11 FCC Rcd at 19723-25, paras. 24-25 (distinguishing the use of the term "necessary" as used in section 253(b) from the duty imposed on ILECs by section 251(c)(6) to provide collocation of equipment that is "necessary" for interconnection or access to unbundled network elements at the ILEC's premises, and noting that the term "necessary" is interpreted to mean "used" or "useful" in the context of 251(c)(6)). Several courts have also recognized that the word "necessary" may not automatically mean absolutely essential or required. *See U.S. v. Comstock*, 560 U.S. 126, 134 (2010) (interpreting the term as used in the necessary and proper clause of the Constitution) (citing *McCulloch v. Maryland*, 17 U.S. 316, 413-15 (1819)); *Fish v. Kobach*, 840 F.3d 710, 734 (10th Cir. 2016) (interpreting the term as used in the National Voter Registration Act); *Nat. Res. Def. Council v. Thomas*, 838 F.2d 1224, 1236 (D.C. Cir. 1988) (interpreting the term as used in the Clean Air Act); *FTC v. Rockefeller*, 591 F.2d 182, 188 (2d Cir. 1979) (interpreting the term as used in the Federal Trade Commission Act). However, the Commission in the *New England Payphone Order* and *Classic Telephone*, relying in part on congressional guidance, established that it construes "necessary" in section 253(b) as meaning essential.

[585] 47 U.S.C. § 253(c).

[586] We do not take up in this Declaratory Ruling the question of the circumstances in which the imposition of fees may violate section 253(a).

[587] LMC Wireline NPRM Comments at 8–9; WSCC Wireline NPRM Comments at 20; City of NorfolkWireline NPRM Comments at 2; LACT Wireline & Wireless NPRM Reply at 51. *Cf.* IML Wireless NPRM Comments at 3-4 (arguing that municipalities have a public duty to regulate the right-of-way).

[588] *TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C.* §§ 541, 544(e), and 253, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21441, para. 103 (1997) (*TCI Cablevision of Oakland County*).

[589] *TCI Cablevision of Oakland County*, 12 FCC Rcd at 21441, para. 103. The Ninth Circuit determined that the following activities were beyond the management of rights-of-way under section 253(c): regulations requiring applicants to submit proof of financial, technical, and legal qualifications; ordinances imposing requirements or other controls over matters not directly related to management of rights-of-way; franchise agreements that contain conditions unrelated to the management of rights-of-way; ordinance requirements that companies provide free and excess capacity for the use of the locality; and ordinances that grant the locality unfettered discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed factors. *See City of Auburn*

that involve the actual use of the right-of-way. In contrast, to the extent they implicate rights-of-way issues at all, moratoria bar providers from obtaining approval to access the right-of-way.[590] Hence, we fail to see how section 253(c) could save a moratorium from preemption.

3. Authority to Act

161. We issue this authoritative interpretation of section 253 pursuant to our authority to interpret key provisions of the Communications Act.[591] We also have authority under the Administrative Procedure Act (APA) and our rules to issue a declaratory ruling to terminate a controversy or remove uncertainty on our own motion.[592] In this instance, we find issuing a declaratory ruling on our own motion is necessary to remove what the wireline and wireless infrastructure records reveal are substantial uncertainty and significant legal controversies caused by the state and local imposition of moratoria.[593]

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v. Qwest Corp., 260 F.3d 1160, 1178-79 (9th Cir. 2001), *vacated on other grounds Sprint Telephony*, 543 F.3d at 571.

[590] *See Minnesota Preemption Order*, 14 FCC Rcd at 12728-29 (while section 253(c) protects state and local governments' authority to issue construction permits regulating how and when road construction may be conducted does not mean that it protects a state or local government's refusal to issue construction permits to most entities); *see also* AT&T Wireline NPRM Comments at 74 (arguing that moratoria "fall outside the § 253(c) savings clause that allows local governments 'to manage the public rights of way': that authority must be limited to *reasonable* regulations to avoid permitting evasion of the basic purpose of the provision").

[591] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (holding that courts must grant considerable weight to an agency's reasonable interpretation of a statute it is charged with administering where the statute is ambiguous); *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (stating that statutory ambiguities will be resolved, within the bounds of reasonable interpretation, by the agency that administers the statute); *id.* at 307 (holding that "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication"); *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-84 (2005) (*NCTA v. Brand X*) (holding that the agency's interpretation of the terms "telecommunications service" and "offer" is entitled to *Chevron* deference and is a reasonable construction of the Act); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999) (holding that the Commission's interpretation of the interconnection requirement in 47 U.S.C. § 252(i) was reasonable); Letter from Rebecca Murphy Thompson, Executive Vice President and General Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket Nos. 17-79, 15-180, at 1 (filed June 25, 2018) (CCA June 25, 2018 Wireline *Ex Parte* Letter) ("The Commission has broad authority to interpret Section[] 253 . . . and to adopt rules and regulations in furtherance of [that section.]").

[592] 5 U.S.C. § 554(e); 47 CFR § 1.2; *see also City of Arlington, Tex. v. FCC*, 668 F.3d 229, 243 (5th Cir. 2012) (stating that an "agency need not be presented with a specific dispute between two parties in order to use section 554(e)'s declaratory ruling mechanism" and that section 554 "empowers agencies to use declaratory rulings to 'remove uncertainty'" by issuing statutory interpretations in cases involving "concrete and narrow questions of law the resolutions of which would have an immediate and determinable impact on specific factual scenarios"), *aff'd on other grounds*, 569 U.S. 290 (2013); *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976) (reiterating that "the choice whether to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application") (citing *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 291-95 (1974)); *N.C. Utilities Comm'n v. FCC*, 537 F.2d 787, 790 n.2 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 ("[F]ederal administrative agencies are not restricted to adjudication of matters that are 'cases and controversies' within the meaning of Article III of the Constitution."); *N.Y. State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) (holding that the Commission, in preempting state and local entry regulation of satellite master antenna television, did not abuse its discretion in labeling its action a declaratory ruling and a consolidation of precedent, rather than engaging in a rule-making procedure).

[593] *See* Verizon Wireline NPRM Comments at 33; Conterra Wireline Comments at 30; Frontier Wireline NPRM Comments at 3; Competitive Carriers Association (CCA) Wireline & Wireless NPRM Comments, WC Docket Nos. 17-84 & 17-79, at executive summary (2017); ITTA Wireline NPRM Comments, WC Docket No. 17-84, at 35 (2017); CTIA Wireline & Wireless NPRM Comments at 3; WIA Wireline & Wireless NPRM Reply Comments at executive summary, 17; WISPA Wireline NPRM Comments at 5; Crown Castle Wireline NPRM Reply Comments at iii-iv; Letter from Joshua S. Turner, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket

162. We exercise that authority in this *Declaratory Ruling* to make clear that express and *de facto* moratoria violate section 253(a) as legal requirements that "prohibit or have the effect of prohibiting" the provision of telecommunications service.[594] We further find the exceptions set forth in sections 253(b) and (c) to be generally inapplicable to express and *de facto* moratoria.

163. We disagree with those commenters that argue that section 253(d) precludes the Commission from interpreting the applicability of section 253(a) to certain kinds of state and local laws or policies.[595] Nothing in section 253 purports to limit the exercise of our general interpretive authority. There is no dispute that section 253(d) provides an express mechanism for the Commission to preempt specific state or local legal requirements.[596] However, Congress' inclusion of this express mechanism to consider whether specific state and local requirements are preempted, does not limit our ability, pursuant to sections 303, 201(b), and other sections of the Act,[597] to define and provide an authoritative interpretation as to what constitutes a violation of section 253(a) and what qualifies for the section 253(b) or (c) exceptions.

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No. 17-84, at 4 (filed Nov. 10, 2017); Quintillion Networks Wireline & Wireless NPRM Reply, WC Docket Nos. 17-84 & 17-79, at 7; P.R. Telephone Company, Inc. Wireline NPRM Reply, WC Docket No. 17-84, at 16; Lightower Wireline NPRM Comments at 18; Letter from Scott K. Bergmann, VP, Regulatory Aff., CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 12 (filed Sept. 8, 2017); *see also* AT&T Wireless NPRM Comments, WC Docket No. 17-79, at 13-14 (2017); Conterra Wireless NPRM Comments at 28; CTIA Wireline & Wireless NPRM Comments at 23-24; Crown Castle Wireless NPRM Comments at 32; Mobile Future Wireless NPRM Comments at 9; Mobilitie Wireless NPRM Comments at 12; NCTA Wireless NPRM Comments, WC Docket No. 17-79, at 29 (2017); R Street Wireless NPRM Comments, WC Docket No. 17-79, at 5 (2017); Samsung Wireless NPRM Comments at 7; T-Mobile Wireless NPRM Comments, WC Docket No. 17-79, at 36-37 (2017); Verizon Wireless NPRM Comments, WC Docket No. 17-79, at 33 (2017); WIA Wireless NPRM Comments at 55; Letter from Kara Romagnino Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket Nos. 17-79, 16-421, at 2 (filed June 27, 2018) (CTIA June 27, 2018 Wireline *Ex Parte* Letter).

[594] 47 U.S.C. § 253(a); *see also* CCA June 25, 2018 Wireline *Ex Parte* Letter at 1 (stating that section 253 provides the "Commission with the necessary authority to take action regarding state and local siting processes that are effectively prohibiting carriers from providing telecommunications services"). Section 253(a) requires that we examine the effect of a state or local action on "*any* entity" and the effect with respect to "*any* interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). We interpret "service" to mean any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ, including to provide existing services more robustly, or at a higher level of quality—such as through filling a coverage gap, densification, or otherwise improving service capabilities. Thus, a prohibition or effective prohibition could occur not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider, but also by prohibiting or effectively prohibiting the introduction of new services or significant improvements to existing services by an incumbent provider. In this regard, we believe it is appropriate to construe section 253(a) in light of the broader goals outlined by Congress: "to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151.

[595] *See, e.g.*, Public Knowledge Wireline NPRM Comments at 17-18; City of N.Y. Wireline NPRM Comments, WC Docket No. 17-84, at 1-2 (2017); Smart Communities Wireline NPRM Comments, WC Docket No. 17-84, at 10-11 (2017) (Smart Communities Wireline NPRM Comments); City of Alexandria et al. (Virginia Joint Commenters) Wireline NPRM Comments, WC Docket No. 17-84, at 42-43 (2017). *But see* Conterra Wireline & Wireless NPRM Comments at 15-16 ("Section 253(d) is drafted broadly and provides the Commission ample latitude to elect the best procedure for utilizing its preemption power. . . . At a minimum, reviewing courts must afford the Commission broad deference in construing the ambiguous provisions in Section 253.").

[596] *See* 47 U.S.C. § 253(d). Section 253(d) expressly grants the Commission preemption authority. As such, we disagree with EEI's view that the Commission lacks the authority to preempt state and local laws such as moratoria because Congress left such decisions to the states. EEI Wireline NPRM Comments at 4.

[597] *See Wireless Infrastructure NPRM*, 32 FCC Rcd at 3336, para. 15 & nn. 28-30.

164. Because we interpret section 253(a) and do not specifically preempt any state or local law, the Supreme Court's holding in *City of Rancho Palos Verdes v. Abrams* that "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others,"[598] is not applicable here. In issuing this Declaratory Ruling we are not exercising our authority to enforce a substantive rule; rather, we are interpreting the scope of the substantive prohibition set forth in section 253(a).

165. Moreover, most courts that have considered the matter have *not* read section 253(d) as the exclusive enforcement mechanism for pursuing a claim that a state or local legal requirement violates section 253(a).[599] Some Circuit courts have held that section 253 includes an implied private cause of action to seek relief.[600] Other Circuit courts have entertained preemption claims under the Supremacy Clause of the United States Constitution, which is a legal avenue for preemption regardless of whether a statute authorizes a private cause of action.[601] As the First Circuit has explained, "under the Supremacy Clause, any state or local law that is inconsistent with the requirements of §253(a) will be null and void, unless it falls under one of the safe harbor provisions in §253."[602] Accordingly, courts have concluded that parties may bring section 253(a) preemption challenges directly in federal court, regardless of the availability of the Commission as a forum to resolve preemption disputes pursuant to section 253(d).[603] But whatever enforcement mechanisms may be available to preempt specific state and local requirements, nothing in section 253 prevents us from declaring that a category of state or local laws is inconsistent with section 253(a) because it prohibits or has the effect of prohibiting service.

166. Indeed, in issuing our interpretation of section 253(a) and the scope of the section 253(b) and (c) exceptions, we further the notice objectives that underlie section 253(d), which requires that the Commission provide "notice and an opportunity for public comment" prior to taking any preemptive action.[604] Adopting a general interpretation enhances certainty around frequently arising, factually similar issues. By issuing this Declaratory Ruling, we place states and localities on notice that express and *de facto* moratoria are inconsistent with section 253(a).[605] In so doing, we provide states and localities the

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[598] *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).

[599] *See, e.g.*, *P.R. Tel. Co*., 450 F.3d at 16; *N.J. Payphone Ass'n*, 299 F.3d at 241-42; *Qwest Corp. v. City of Santa Fe, N.M.*, 380 F.3d 1258, 1266 (10th Cir. 2004) (*Qwest Corp. v. City of Santa Fe*); *BellSouth Telecomm., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1191 (11th Cir. 2001); *TCG Detroit v. City of Dearborn,* 206 F.3d 618, 624 (6th Cir. 2000).

[600] *See BellSouth Telecomm., Inc.,* 252 F.3d at 1191; *TCG Detroit v. City of Dearborn,* 206 F.3d at 624. *But see Spectra Comm. Group., LLC v. City of Cameron*, 806 F.3d 1113, 1119-20 (8th Cir. 2015); *NextG Networks of N.Y., Inc. v. City of N.Y.*, 513 F.3d 49, 53 (2d Cir. 2008); *Sprint Telephony*, 543 F.3d at 580-81; *Sw. Bell Tel., L.P. v. City of Houston*, 529 F.3d 257, 261 (5th Cir. 2008); *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1266-67.

[601] *See P.R. Tel. Co*., 450 F.3d at 16; *N.J. Payphone Ass'n*, 299 F.3d at 242-43; *Qwest Corp. v. City of Santa Fe,* 380 F.3d at 1266. The Supremacy Clause invalidates state or local laws that "interfere with or are contrary to" federal law. U.S. Const. art. VI, Cl. 2.

[602] *P.R. Tel. Co*., 450 F.3d at 16 (citing U.S. Const. art. VI, Cl. 2. and *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1269).

[603] *See P.R. Tel. Co.*, 450 F.3d at 16; *N.J. Payphone Ass'n*, 299 F.3d at 242-43; *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1266.

[604] *See* 47 U.S.C. § 253(d).

[605] The League of Minnesota Cities claims that "[c]ourts continue to uphold moratoria used in limited circumstance as 'interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either "freezing" existing land uses or by allowing the issuance of . . . permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change.'" LMC Wireline NPRM Comments at 10 (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Plan. Agency*, 535 U.S. 302 (2002)). While the *Tahoe* case stands for the proposition that moratoria may be permitted under the Fifth Amendment to the U.S. Constitution, the fact that moratoria may be permissible under the Fifth Amendment does not limit our authority to

opportunity to ensure that their requirements comply with federal law. Therefore, construing section 253(d) as not limiting the Commission's authority to interpret the remainder of section 253 furthers important policy goals as well. Otherwise, the Commission would only have authority to act retrospectively to target individual laws, which would be inefficient, increase uncertainty, and impose additional costs on states and localities both from the sunk costs of enacting subsequently preempted legal requirements and the costs of litigating more section 253(d) preemption proceedings and judicial actions.[606]

167. We also disagree with assertions that the change in regulatory classification of broadband Internet access service in the *Restoring Internet Freedom Order* affects the validity of this Declaratory Ruling.[607] Consistent with prior Commission decisions, we have authority over infrastructure that can be used for the provision of both telecommunications and other services on a commingled basis.[608] Infrastructure for wireline and wireless telecommunication services frequently is the same infrastructure used for the provision of broadband Internet access service,[609] and our ruling today will promote broadband deployment,[610] in concert with our actions in the *Restoring Internet Freedom Order*.

168. We expect that this Declaratory Ruling, which provides our authoritative interpretation of the scope of section 253(a) as it pertains to state and local moratoria, will have several consequences that will benefit the public. First, we expect states and localities to comply with federal law by repealing existing moratoria, refusing to enforce moratoria that remain on the books, and declining to adopt new moratoria. Second, the interpretation of section 253 in this Declaratory Ruling will apply when conducting subsequent proceedings under section 253(d) to preempt specific legal rules permitted or

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interpret section 253 as prohibiting moratoria that prohibit or have the effect of prohibiting the ability of an entity to provide telecommunication services.

[606] Our decision today is consistent with the Commission's earlier decisions that state and local moratoria do not toll the "shot clocks" for state or municipal review of wireless siting applications pursuant to section 332(c)(7)(B)(ii) of the Act; that these "shot clocks continue to run" regardless of whether state or local governments purport to impose moratoria that suspend the acceptance or processing of siting applications for some period of time; and that "applicants can challenge moratoria in court when the shot clock expires without State or local government action." *See Wireless Facilities Siting Order*, 29 FCC Rcd at 12971, paras. 265-67; *see also 2009 Wireless Siting Declaratory Ruling*, 24 FCC Rcd at 14016-19, paras. 56-65 (stating that a state or local agency's failure to render a decision within "shot clock" deadlines – *i.e.*, 90 days for an application to deploy collocated antennas or within 150 days for an application to deploy facilities other than collocations – would presumptively constitute a "failure to act" that may be challenged under section 332(c)(7)(B)(v) of the Act).

[607] *See, e.g.*, Public Knowledge Wireline NPRM Comments at 13; Smart Communities Wireline NPRM Comments at 5-6; Smart Communities Wireline & Wireless NPRM Reply Comments at 37-39; Cities of San Antonio, Tex. et al. Wireline & Wireless NPRM Reply Comments at 17.

[608] *See Restoring Internet Freedom*, 33 FCC Rcd at 424-425, para. 188-190 (reaffirming that the Commission retains statutory authority to regulate facilities that provide commingled services where the Commission has statutory authority over one of the services); *Wireless Facilities Siting Order*, 29 FCC Rcd at 12973, para. 270-272 ("[T]o the extent [distributed antenna system] or small-cell facilities, including third-party facilities such as neutral host [distributed antenna system] deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to [section 332(c)(7)]."); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5924, para. 65 (2007) (applying section 224 to facilities that provide both telecommunications and wireless broadband Internet access service, and applying section 332(c)(7)(B) to facilities providing personal wireless service and wireless broadband Internet access service).

[609] *Restoring Internet Freedom*, 33 FCC Rcd at 423, 425, paras. 185, 190 (citing Cisco Systems, Inc. Comments, WC Docket No. 17-108, at 2-3 (July 17, 2017)); Mobilitie, LLC Comments, WC Docket No. 17-108, at 4 (July 17, 2017).

[610] *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 1 (asserting that this Declaratory Ruling "would be helpful in promoting continued broadband deployment by cable operators").

imposed by specific states or localities. To further effectuate the benefits of issuing this Declaratory Ruling, we direct the Wireline Competition Bureau and/or the Wireless Telecommunications Bureau to act expeditiously on section 253(d) petitions challenging alleged state or local moratoria.[611] Finally, this Declaratory Ruling sets forth the Commission's reasoned interpretation of section 253(a), which will inform judicial resolution of preemption claims brought by providers, states, or localities under the Supremacy Clause of the United States Constitution.

V. PROCEDURAL MATTERS

169. *Congressional Review Act.* The Commission will send a copy of this Third Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, including a copy of the Final Regulatory Flexibility Certification, in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[612] In addition, the Report and Order and this final certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration (SBA) and will be published in the Federal Register.[613]

170. *Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act of 1980 (RFA),[614] the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this Report and Order. The FRFA is contained in Appendix B.

171. *Paperwork Reduction Act of 1995 Analysis.* The Report and Order contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.[615]

172. In this document, we have assessed the effects of reforming our pole attachment regulations and find that doing so will serve the public interest and is unlikely to directly affect businesses with fewer than 25 employees.

VI. ORDERING CLAUSES

173. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201, 224, 253, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 224, 253, 303(r), and 332, and section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), this *Third Report and Order and Declaratory Ruling* IS ADOPTED.

174. IT IS FURTHER ORDERED that Part 1 of the Commission's rules IS AMENDED as set

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[611] Petitioners must follow the Commission's previously adopted procedural guidelines for section 253(d) petitions. *See* 47 CFR §§ 1.1204(b) Note 4; 1.1206(a) Note 1; and 1.1206(a)(13) Note 2; *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, Public Notice, 13 FCC Rcd 22970 (1998); *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, Memorandum Opinion and Order, 14 FCC Rcd 18831 (1999). The Commission has adopted similar requirements for certain types of petitions pursuant to section 332(c)(7)(B). *See Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, WT Docket No. 97-192, Report and Order, 15 FCC Rcd 22821 (2000).

[612] *See* 5 U.S.C. § 801(a)(1)(A).

[613] *See* 5 U.S.C. § 605(b).

[614] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

[615] *See Wireline Infrastructure Notice*, 32 FCC Rcd at 3306, para. 127.

forth in Appendix A.

175. IT IS FURTHER ORDERED that this *Report and Order* SHALL BE effective 30 days after publication in the Federal Register, except for sections III.A-E of this *Report and Order*, which will be effective on the latter of six months after release of this *Report and Order* or 30 days after the announcement in the Federal Register of Office of Management and Budget (OMB) approval of information collection requirements modified in this *Report and Order*. OMB approval is necessary for the information collection requirements in 47 CFR §§ 1.1411(c)(1), 1.1411(c)(3), 1.1411(d), 1.1411(d)(3), 1.1411(e)(3), 1.1411(h)(2)-(3), 1.1411(i)(1)-(2), 1.1411(j)(1)-(5), 1.1412(a)-(b), 1.1413(b), and 1.1415(b).

176. IT IS FURTHER ORDERED that the *Declaratory Ruling* and the obligations set forth therein ARE EFFECTIVE upon release of this Order.

177. IT IS FURTHER ORDERED, pursuant to section 253(d) of the Communications Act of 1934, as amended, that the Wireline Competition Bureau and the Wireless Telecommunications Bureau ARE DIRECTED to review specific petitions and, as necessary, preempt state or local statutes, regulations, or other legal requirements that constitute express moratoria or *de facto* moratoria.

178. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

179. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis and this *Declaratory Ruling*, to the Chief Counsel for Advocacy of the SBA.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

For the reasons set forth above, Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority for part 1 is amended to read as follows:

AUTHORITY: 47 U.S.C. 151, 154(i) and (j), 155, 157, 160, 201, 224, 225, 227, 303, 309, 310, 332, 1403, 1404, 1451, 1452, and 1455.

SUBPART J – POLE ATTACHMENT COMPLAINT PROCEDURES

Amend section 1.1402 by adding paragraphs (o), (p), (q), and (r) to read as follows:

§ 1.1402 Definitions.

* * *

(o) The term *make-ready* means the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole.

(p) The term *complex make-ready* means transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are to be considered complex.

(q) The term *simple make-ready* means make-ready where existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.

(r) The term *communications space* means the lower usable space on a utility pole, which typically is reserved for low-voltage communications equipment.

2. Amend section 1.1403 by revising paragraph (c) to read as follows:

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

* * *

(c) A utility shall provide a cable television system or telecommunications carrier no less than 60 days written notice prior to:

* * *

(3) Any modification of facilities by the utility other than make-ready noticed pursuant to section 1.1411(e), routine maintenance, or modification in response to emergencies.

* * * * *

3. Amend section 1.1411 by revising paragraphs (a), (c), (d), (e), (f), (g), (h), and (i) and adding paragraph (j) to read as follows:

§ 1.1411 Timeline for access to utility poles.

(a) *Definitions*.

(1) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(2) The term "new attacher" means a cable television system or telecommunications carrier requesting to attach new or upgraded facilities to a pole owned or controlled by a utility.

(3) The term "existing attacher" means any entity with equipment on a utility pole.

* * *

(c) *Application Review and Survey*.

(1) *Application Completeness*. A utility shall review a new attacher's attachment application for completeness before reviewing the application on its merits. A new attacher's attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in requirements that are available in writing publicly at the time of submission of the application, to begin to survey the affected poles.

(i) A utility shall determine within 10 business days after receipt of a new attacher's attachment application whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in its response, then the application is deemed complete. If the utility timely notifies the new attacher that its attachment application is not complete, then it must specify all reasons for finding it incomplete.

(ii) Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The new attacher may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) *Application Review on the Merits*. A utility shall respond to the new attacher either by granting access or, consistent with § 1.1403(b), denying access within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section). A utility may not deny the new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher.

(3) *Survey*.

(i) A utility shall complete a survey of poles for which access has been requested within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section).

(ii) A utility shall permit the new attacher and any existing attachers on the affected poles to be present for any field inspection conducted as part of the utility's survey. A utility shall use commercially

reasonable efforts to provide the affected attachers with advance notice of not less than 3 business days of any field inspection as part of the survey and shall provide the date, time, and location of the survey, and name of the contractor performing the survey.

(iii) Where a new attacher has conducted a survey pursuant to § 1.1411(j)(3), a utility can elect to satisfy its survey obligations in this paragraph by notifying affected attachers of its intent to use the survey conducted by the new attacher pursuant to § 1.1411(j)(3) and by providing a copy of the survey to the affected attachers within the time period set forth in paragraph (c)(3)(i) of this section. A utility relying on a survey conducted pursuant to § 1.1411(j)(3) to satisfy all of its obligations under § 1.1411(c)(3)(i) shall have 15 days to make such a notification to affected attachers rather than a 45 day survey period.

(d) *Estimate*. Where a new attacher's request for access is not denied, a utility shall present to a new attacher a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready within 14 days of providing the response required by §1.1411(c)(2), or in the case where a new attacher has performed a survey, within 14 days of receipt by the utility of such survey. Where a pole-by-pole estimate is requested and the utility expects to incur fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility may present charges on a per-job basis rather than present a pole-by-pole estimate for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

* * *

(2) A new attacher may accept a valid estimate and make payment any time after receipt of an estimate, except it may not accept after the estimate is withdrawn.

(3) *Final invoice.* After the utility completes make-ready, if the final cost of the work differs from the estimate, it shall provide the new attacher with a detailed, itemized final invoice of the actual make-ready charges incurred, on a pole-by-pole basis where requested, to accommodate the new attacher's attachment. Where a pole-by-pole invoice is requested and the utility incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility may present charges on a per-job basis rather than present a pole-by-pole invoice for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all invoiced charges, including any projected material, labor, and other related costs that form the basis of itsinvoice.

(4) A utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards and guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment.

(e) * * *

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

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

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that if make-ready is not completed by the completion date set by the utility in paragraph

(e)(1)(ii) in this section, the new attacher may complete the make-ready specified pursuant to paragraph (e)(1)(i) in this section.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(2)(ii) in this section (or, if the utility has asserted its 15-day right of control, 15 days later), the new attacher may complete the make-ready specified pursuant to paragraph (e)(2)(i) in this section.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(3) Once a utility provides the notices described in this section, it then must provide the new attacher with a copy of the notices and the existing attachers' contact information and address where the utility sent the notices. The new attacher shall be responsible for coordinating with existing attachers to encourage their completion of make-ready by the dates set forth by the utility in paragraph (e)(1)(ii) for communications space attachments or paragraph (e)(2)(ii) for attachments above the communications space.

(f) A utility shall complete its make-ready in the communications space by the same dates set for existing attachers in paragraph (e)(1)(ii) or its make-ready above the communications space by the same dates for existing attachers in paragraph (e)(2)(ii) of this section (or if the utility has asserted its 15-day right of control, 15 days later).

(g) * * *

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

* * *

(4) A utility shall negotiate in good faith the timing of all requests for attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single new attacher as one request when the requests are filed within 30 days of one another.

(h) *Deviation from the time limits specified in this section:*

(1) A utility may deviate from the time limits specified in this section before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) A utility may deviate from the time limits specified in this section during performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits specified in this section. A utility that so deviates shall immediately notify, in writing, the new attacher and affected existing attachers and shall identify the affected poles and include a detailed explanation of the reason for the deviation and a new completion date. The utility shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles and shall resume make-ready without discrimination when it returns to routine operations. A utility cannot delay completion of make-ready because of a preexisting violation on an affected pole not caused by the new attacher.

(3) An existing attacher may deviate from the time limits specified in this section during performance of complex make-ready for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready within the time limits specified in this section. An existing attacher that so deviates shall immediately notify, in writing, the new attacher and other affected existing attachers and shall identify the affected poles and include a detailed explanation of the basis for the deviation and a new completion date, which in no event shall extend beyond 60 days from the date the notice described in paragraph (e)(1) of this section is sent by the utility (or up to 105 days in the case of larger orders described in paragraph (g) of this section). The existing attacher shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles.

(i) *Self-help remedy*.

(1) *Surveys*. If a utility fails to complete a survey as specified in paragraph (c)(3)(i) of this section, then a new attacher may conduct the survey in place of the utility and, as specified in §1.1412, hire a contractor to complete a survey.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any field inspection conducted as part of the new attacher's survey.

(ii) A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey it conducts. The notice shall include the date and time of the survey, a description of the work involved, and the name of the contractor being used by the new attacher.

(2) *Make-ready*. If make-ready is not complete by the date specified in paragraph (e) of this section, then a new attacher may conduct the make-ready in place of the utility and existing attachers, and, as specified in §1.1412, hire a contractor to complete the make-ready.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any make-ready. A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 5 days of the impending make-ready. The notice shall include the date and time of the make-ready, a description of the work involved, and the name of the contractor being used by the new attacher.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either (A) complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or outage, or (B) require the new attacher to fix the damage or outage at its expense immediately following notice from the utility or existing attacher.

(iii) A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

(3) Self-help shall not be available for pole replacements.

(j) One-*touch make-ready option*. For attachments involving simple make-ready, new attachers may elect to proceed with the process described in this paragraph in lieu of the attachment process described in paragraphs (c)-(f) and (i) of this section.

(1) Attachment Application.

(i) A new attacher electing the one-touch make-ready process must elect the one-touch make-ready process in writing in its attachment application and must identify the simple make-ready that it will perform. It is the responsibility of the new attacher to ensure that its contractor determines whether the make-ready requested in an attachment application is simple.

(ii) The utility shall review the new attacher's attachment application for completeness before reviewing the application on its merits. An attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to make an informed decision on the application.

(A) A utility has 10 business days after receipt of a new attacher's attachment application in which to determine whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in the application, then the application is deemed complete.

(B) If the utility timely notifies the new attacher that its attachment application is not complete, then the utility must specify all reasons for finding it incomplete. Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The applicant may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) *Application Review on the Merits*. The utility shall review on the merits a complete application requesting one-touch make-ready and respond to the new attacher either granting or denying an application within 15 days of the utility's receipt of a complete application (or within 30 days in the case of larger orders as described in paragraph (g) of this section).

(i) If the utility denies the application on its merits, then its decision shall be specific, shall include all relevant evidence and information supporting its decision, and shall explain how such evidence and

information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.

(ii) Within the 15-day application review period (or within 30 days in the case of larger orders as described in paragraph (g) of this section), a utility may object to the designation by the new attacher's contractor that certain make-ready is simple. If the utility objects to the contractor's determination that make-ready is simple, then it is deemed complex. The utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, made in good faith, and explains how such evidence and information relate to a determination that the make-ready is not simple.

(3) *Surveys*. The new attacher is responsible for all surveys required as part of the one-touch make-ready process and shall use a contractor as specified in §1.1412(b).

(i) The new attacher shall permit the utility and any existing attachers on the affected poles to be present for any field inspection conducted as part of the new attacher's surveys. The new attacher shall use commercially reasonable efforts to provide the utility and affected existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey and shall provide the date, time, and location of the surveys, and name of the contractor performing the surveys.

(4) *Make-ready*. If the new attacher's attachment application is approved and if it has provided 15 days prior written notice of the make-ready to the affected utility and existing attachers, the new attacher may proceed with make-ready using a contractor in the manner specified for simple make-ready in §1.1412(b).

(i) The prior written notice shall include the date and time of the make-ready, a description of the work involved, the name of the contractor being used by the new attacher, and provide the affected utility and existing attachers a reasonable opportunity to be present for any make-ready.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either (A) complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or outage, or (B) require the new attacher to fix the damage or outage at its expense immediately following notice from the utility or existing attacher.

(iii) In performing make-ready, if the new attacher or the utility determines that make-ready classified as simple is complex, then that specific make-ready must be halted and the determining party must provide immediate notice to the other party of its determination and the impacted poles. The affected make-ready shall then be governed by parts (d)-(i) of this section and the utility shall provide the notice required by part (e) of this section as soon as reasonably practicable.

(5) *Post-make-ready timeline*. A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the

new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

4. Amend section 1.1412 by revising paragraphs (a), (b), and (c) to read as follows:

§ 1.1412 Contractors for surveys and make-ready.

(a) *Contractors for self-help complex and above the communications space make-ready.* A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform self-help surveys and make-ready that is complex and self-help surveys and make-ready that is above the communications space on its poles. The new attacher must use a contractor from this list to perform self-help work that is complex or above the communications space. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in §§1.1412(c)(1)-(5) and the utility may not unreasonably withhold its consent.

(b) *Contractors for simple work.* A utility may, but is not required to, keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and simple make-ready. If a utility provides such a list, then the new attacher must choose a contractor from the list to perform the work. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in §§1.1412(c)(1)-(5) and the utility may not unreasonably withhold its consent.

(i) If the utility does not provide a list of approved contractors for surveys or simple make-ready or no utility-approved contractor is available within a reasonable time period, then the new attacher may choose its own qualified contractor that meets the requirements in paragraph (c) of this section. When choosing a contractor that is not on a utility-provided list, the new attacher must certify to the utility that its contractor meets the minimum qualifications described in paragraph (c) of this section when providing notices required by §§1.1411(i)(1)(ii), 1.1411(i)(2)(i), 1.1411(j)(3)(i), and 1.1411(j)(4).

(ii) The utility may disqualify any contractor chosen by the new attacher that is not on a utility-provided list, but such disqualification must be based on reasonable safety or reliability concerns related to the contractor's failure to meet any of the minimum qualifications described in paragraph (c) of this section or to meet the utility's publicly available and commercially reasonable safety or reliability standards. The utility must provide notice of its contractor objection within the notice periods provided by the new attacher in §§1.1411(i)(1)(ii), 1.1411(i)(2)(i), 1.1411(j)(3)(i), and 1.1411(j)(4) and in its objection must identify at least one available qualified contractor.

(c) *Contractor minimum qualification requirements*. Utilities must ensure that contractors on a utility-provided list, and new attachers must ensure that contractors they select pursuant to paragraph (b)(i) of this section, meet the following minimum requirements:

(1) The contractor has agreed to follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor shall agree to follow National Electrical Safety Code (NESC) guidelines;

(2) The contractor has acknowledged that it knows how to read and follow licensed-engineered pole designs for make-ready, if required by the utility;

(3) The contractor has agreed to follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules;

(4) The contractor has agreed to meet or exceed any uniformly applied and reasonable safety and reliability thresholds set by the utility, if made available; and

(5) The contractor is adequately insured or will establish an adequate performance bond for the make-ready it will perform, including work it will perform on facilities owned by existing attachers.

* * * * *

5. Amend section 1.1413 by revising to read as follows:

§ 1.1413 Complaints by incumbent local exchange carriers.

(a) A complaint by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a local exchange carrier or that a utility's rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part.

(b) In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into or renewed after the effective date of this section, there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with § 1.1406(e)(2). A utility can rebut either or both of the two presumptions in this paragraph (b) with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.

6. Add section 1.1415 to read as follows:

§ 1.1415 Overlashing.

(a) *Prior approval.* A utility shall not require prior approval for: (i) an existing attacher that overlashes its existing wires on a pole; or (ii) for third party overlashing of an existing attachment that is conducted with the permission of an existing attacher.

(b) *Preexisting violations*. A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation. A utility may not require an existing attacher that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attacher.

(c) *Advance notice.* A utility may require no more than 15 days' advance notice of planned overlashing. If a utility requires advance notice for overlashing, then the utility must provide existing attachers with advance written notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attacher. If after receiving advance notice, the utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the 15 day advance notice period and the party seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary. A utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash.

(d) *Overlashers' Responsibility.* A party that engages in overlashing is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing or overlashing work causes safety or engineering standard violations, then the overlashing party is responsible at its expense for any necessary repairs.

(e) *Post-Overlashing Review*. An overlashing party shall notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or code violations to its equipment caused by the overlash. If the utility discovers damage or code violations caused by the overlash on equipment belonging to the utility, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment (*Wireline Infrastructure Notice*) and into the Report and Order and Declaratory Ruling, and Further Notice of Proposed Rulemaking (*Wireline Infrastructure Order*) for the wireline infrastructure proceeding.[2] The Commission sought written public comment on the proposals in the *Wireline Infrastructure Notice* and in the *Wireline Infrastructure Order*, including comment on the IRFA. The Commission received no comments on the IRFA. Because the Commission amends its rules in this Order, the Commission has included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.[3]

A. Need for, and Objectives of, the Rules

2. In the *Wireline Infrastructure Notice*, the Commission continued its efforts to close the digital divide by removing barriers to broadband infrastructure investment. To this end, the Commission proposed numerous regulatory reforms to existing rules and procedures regarding pole attachments.[4]

3. On November 16, 2017, the Commission adopted the *Wireline Infrastructure Order*, which enacted reforms to pole attachment rules that: (1) bar utility pole owners from charging for certain capital costs that already have been recovered from make-ready fees;[5] (2) set a 180-day shot clock for resolution of pole access complaints;[6] and (3) grant incumbent local exchange carriers (LECs) reciprocal access to infrastructure controlled by other LECs.[7] In addition, the Commission adopted reforms to speed the replacement of copper with fiber and Internet Protocol (OP) technologies.[8] In the *Further Notice of Proposed Rulemaking*, the Commission sought comment on (1) additional steps to streamline the process for retiring legacy services and network change disclosure and discontinuance processes;[9] (2) the treatment of overlashing by utilities;[10] and (3) what actions the Commission can take to facilitate the rebuilding and repairing of broadband infrastructure after natural disasters.[11]

4. Concurrently, the Commission's Broadband Deployment Advisory Committee (BDAC), a federal advisory committee chartered in 2017, formed five active working groups, as well as an ad hoc

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

[2] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (*Wireline Infrastructure Notice*).

[3] *See* 5 U.S.C. § 604.

[4] *See Wireline Infrastructure Notice*, 32 FCC Rcd at 3266.

[5] *See Wireline Infrastructure* Order, 32 FCC Rcd at 11131-32, paras. 7-8.

[6] *See id*. at 11132-34, paras. 9-14.

[7] *See id*. at 11134-37, paras. 51-21.

[8] *See id*. at 11137-87, paras. 22-155.

[9] *See id*. at 11187-94, paras. 156-159, 163-177.

[10] *See id*. at 11188-89, paras. 160-62.

[11] *See id*. at 11194, paras. 178-79.

committee on rates and fees, to address the issues raised in the *Wireline Infrastructure Notice*.[12] During five public meetings, BDAC adopted recommendations related to competitive access to broadband infrastructure.[13] These recommendations informed the Commission's policy decisions on pole attachment reform.

5. Pursuant to the objectives set forth in the *Wireline Infrastructure Notice*, this *Report and Order* and *Declaratory Ruling* (*Order*) adopts changes to Commission rules regarding pole attachments. The Order adopts changes to the current pole attachment rules that: (1) allow new attachers to perform all work, not reasonably likely to cause a service outage or facility damage, to prepare poles for new wireline attachments (make-ready work) in the communications space of a pole;[14] (2) adopt a substantially shortened timeline for such application review and make-ready work (OTMR pole attachment timeline);[15] (3) require new attachers to use a utility-approved contractor if a utility makes available a list of qualified contractors authorized to perform simple make ready work in the communications space;[16] (4) create a more efficient pole attachment timeline;[17] (5) enhance the new attacher's existing self-help remedy for surveys and make-ready work by extending it to all attachments (both wireless and wireline) above the communications space of a pole;[18] (6) require new attachers to use utility-approved contractors when utilities and existing attachers miss their deadlines and the new attacher elects self-help to complete surveys and make-ready work that is complex or that involves work above the communications space on a pole;[19] (7) require utilities to provide new attachers with detailed, itemized estimates and final invoices for all required make-ready work;[20] (8) codify the Commission's existing precedent that prohibits a pre-approval requirement for overlashing, and adopt a rule that allows utilities to establish reasonable advance notice requirements of up to 15 days for overlashing and holds overlashers responsible for ensuring that their practices and equipment do not cause safety or engineering issues;[21] (9) establish a rebuttable presumption that, for newly-negotiated, newly-renewed, and evergreen pole attachment agreements between LECs and utilities, incumbent LECs will receive comparable pole attachment rates, terms, and conditions as similarly-situated telecommunications carriers or cable television system providing telecommunications services;[22] and (10) establish that new attachers are not responsible for costs associated with brining poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent that such poles or third-party equipment were out of compliance prior to the new attachment.[23] The modifications to our pole attachment rules will facilitate deployment to and reduce barriers to access infrastructure by reducing costs and delays typically associated with the pole attachment process. Ultimately, these pole attachment reforms will contribute to increased broadband deployment, decreased costs for consumers, and increased service speeds.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. The Commission did not receive comments addressing the rules and policies proposed in

[12] *See supra* section I.

[13] *See supra* section I.

[14] *See supra* section III.A.1.a.

[15] *See supra* section III.A.1.c.

[16] *See supra* section III.A.1.b.

[17] *See supra* section III.A.2.a.

[18] *See supra* section III.A.2.b.

[19] *See supra* section III.A.2.c.

[20] *See supra* section III.A.2.d.

[21] *See supra* section III.A.3.

[22] *See supra* section III.C.

[23] *See supra* section III.B.

the IRFAs in either the *Wireline Infrastructure Notice* or the *Wireline Infrastructure Order*.

C. Response to Comments by the Chief Counsel for Advocacy of the SBA

7. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.[24]

8. The Chief Counsel did not file any comments in response to this proceeding.

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

9. The RFA directs agencies to provide a description and, where feasible, an estimate of the number of small entities that may be affected by the final rules adopted pursuant to the *Order*.[25] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[26] In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.[27] A "small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[28]

10. The changes to our pole attachment rules affect obligations on utilities that own poles, telecommunications carriers and cable television systems that seek to attach equipment to utility poles, and other LECs that own poles.[29]

11. *Small Businesses, Small Organizations, Small Governmental Jurisdictions*. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive small entity size standards that could be directly affected herein.[30] First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.[31] These types of small businesses represent 99.9% of all businesses in the United States which translates to 29.6 million businesses.[32]

12. Next, the type of small entity described as a "small organization" is generally "any not-

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[24] 5 U.S.C. § 604 (a)(3)

[25] *See* 5 U.S.C. § 604(a)(4).

[26] *See* 5 U.S.C. § 601(6).

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

[28] *See* 15 U.S.C. § 632.

[29] The definitions of utility and telecommunications carrier for purposes of our pole attachment rules are found in 47 U.S.C. § 224(a)(1) and (a)(5), respectively.

[30] *See* 5 U.S.C. § 601(3)-(6).

[31] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 1 – What is a small business?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf (Aug. 2017)

[32] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 2- How many small business are there in the U.S.?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf (Aug. 2017).

for-profit enterprise which is independently owned and operated and is not dominant in its field."[33] Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).[34]

13. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[35] U.S. Census Bureau data from the 2012 Census of Governments[36] indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.[37] Of this number there were 37,132 general purpose governments (county[38], municipal and town or township[39]) with populations of less than 50,000 and 12,184 special purpose governments (independent school districts[40] and special districts[41]) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000.[42] Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of "small governmental jurisdictions."[43]

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[33] 5 U.S.C. § 601(4).

[34] Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than $100,000. Of this number, 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of $50,000 or less on the IRS Form 990-N for Small Exempt Organizations and 261,784 nonprofits reporting total revenues of $100,000 or less on some other version of the IRS Form 990 within 24 months of the August 2016 data release date. *See* http://nccsweb.urban.org/tablewiz/bmf.php where the report showing this data can be generated by selecting the following data fields: Show: "Registered Nonprofit Organizations"; By: "Total Revenue Level (years 1995, Aug to 2016, Aug)"; and For: "2016, Aug" then selecting "Show Results".

[35] 5 U.S.C. § 601(5).

[36] *See* 13 U.S.C. § 161. The Census of Government is conducted every five years compiling data for years ending with "2" and "7." *See also* Program Description Census of Government, https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG#.

[37] *See* U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012 - United States-State, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG02.US01. Local governmental jurisdictions are classified in two categories - General purpose governments (county, municipal and town or township) and Special purpose governments (special districts and independent school districts).

[38] *See* U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01. There were 2,114 county governments with populations less than 50,000.

[39] *See* U.S. Census Bureau, 2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States – States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.

[40] *See* U.S. Census Bureau, 2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. There were 12,184 independent school districts with enrollment populations less than 50,000.

[41] *See* U.S. Census Bureau, 2012 Census of Governments, Special District Governments by Function and State: 2012 - United States-States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG09.US01. The U.S. Census Bureau data did not provide a population breakout for special district governments.

[42] *See* U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States–States,

14. *Wired Telecommunications Carriers*. The U.S. Census Bureau defines this industry as "establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[44] The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[45] Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.[46] Thus, under this size standard, the majority of firms in this industry can be considered small.

15. *Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses applicable to local exchange services. The closest applicable NAICS Code category is for Wired Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.[47] Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.[48] The Commission therefore estimates that most providers of local exchange carrier service are small entities that may be affected by the rules adopted.

16. *Incumbent Local Exchange Carriers (incumbent LECs)*. Neither the Commission nor the SBA has developed a small business size standard for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.[49] According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees.[50] Consequently, the Commission estimates that most providers of incumbent local

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https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments the majority of the 38, 266 special district governments have populations of less than 50,000.

[43] *Id.*

[44] U.S. Census Bureau, 2012 NAICS Definitions, "517311 Wired Telecommunications Categories," http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[45] *See* 13 C.F.R. § 120.201, NAICS Code 517311.

[46] 2012 U.S. Economic Census, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[47] *See* 13 C.F.R. § 120.201, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[48] 2012 U.S. Economic Census, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[49] *See* 13 C.F.R. § 120.201, NAICS Code 517311.

[50] 2012 U.S. Economic Census, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodT

exchange service are small businesses that may be affected by the rules and policies adopted. One thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.[51] Of this total, an estimated 1,006 have 1,500 or fewer employees.[52]

17. *Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers*. Neither the Commission nor the SBA has developed a small business size standard for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees.[53] Based on this data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[54] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[55] In addition, 72 carriers have reported that they are Other Local Service Providers.[56] Of this total, 70 have 1,500 or fewer employees.[57] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by the adopted rules.

18. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 14 of this FRFA. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[58] According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[59] Of this total, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.[60] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the adopted rules.

19. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a size standard for small businesses applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired

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ype=table.

[51] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at 5-5, Tbl. 5.3 (2010), (*Trends in Telephone Service*).

[52] *Id*.

[53] Employment Size of Firms for the U.S., 2012 Economic Census, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

[54] *See* Trends in Telephone Service at 5-5, Tbl. 5.3.

[55] *Id*.

[56] *Id*.

[57] *Id*.

[58] 13 C.F.R. § 121.201, NAICS Code 517311.

[59] *See* Trends in Telephone Service at 5-5, Tbl. 5.3.

[60] *Id*.

Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.[61] Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.[62] Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.[63] Of these, an estimated 279 have 1,500 or fewer employees.[64] Consequently, the Commission estimates that most Other Toll Carriers that may be affected by our rules are small.

20. *Wireless Telecommunications Carriers (Except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves, such as cellular services, paging services, wireless internet access, and wireless video services.[65] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had fewer than 1,000 employees.[66] Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services.[67] Of this total, an estimated 261 have 1,500 or fewer employees.[68] Consequently, the Commission estimates that approximately half of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

21. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[69] Industry data indicate that there are currently 4,600 active cable systems in the United States.[70] Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard.[71] In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer

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[61] 13 C.F.R. § 121.201, NAICS Code 517311.

[62] Employment Size of Firms for the U.S., 2012 Economic Census, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

[63] *See* Trends in Telephone Service at 5-5, Tbl. 5.3.

[64] *Id*.

[65] NAICS Code 517210 (2012), https://www.census.gov/econ/isp/sampler.php?naicscode=517210&naicslevel=6#.

[66] Employment Size of Firms for the U.S., 2012 Economic Census, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

[67] *See* Trends in Telephone Service at 5-5, Tbl. 5.3.

[68] *Id*.

[69] 47 C.F.R. § 76.901(e)

[70] Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing Aug. 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS)). *See* www.fcc.gov/coals.

[71] *See* SNL KAGAN, https://www.snl.com/interactiveX/MyInteractive.aspx?mode=4&CDID=A-821-38606&KLPT=8 (subscription required).

subscribers.[72] Current Commission records show 4,600 cable systems nationwide.[73] Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.[74] Thus, under this standard as well, we estimate that most cable systems are small entities.

22. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000 are approximately 52,403,705 cable video subscribers in the United States today.[75] Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[76] Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.[77] We clarify that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[78] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under *the* definition in the Communications Act.

23. *All Other Telecommunications.* "All Other Telecommunications" is defined as follows: "This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client supplied telecommunications connections are also included in this industry."[79] The SBA has developed a small business size standard for "All Other Telecommunications," which consists of all such firms with gross annual receipts of $32.5 million or less.[80] For this category, Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual

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[72] 47 C.F.R. § 76.901(c).

[73] Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing August 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS). *See* www.fcc.gov/coals.

[74] *Id*.

[75] *Assessment and Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appendix E para. 23 (2016) (citing Office of Management and Budget (OMB) Memorandum M-10-06, Open Government Directive, Dec. 8, 2009).

[76] 47 C.F.R. § 76.901(f).

[77] *Assessment & Collection of Regulatory Fees for Fiscal Year 2016,* Notice of Proposed Rulemaking, 31 FCC Rcd 5757, Appx. E para. 23 (2016).

[78] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.901(f).

[79] NAICS Code 517919 (2012), https://www.census.gov/econ/isp/sampler.php?naicscode=517919&naicslevel=6.

[80] 13 C.F.R. § 121.201; NAICS Code 517919, https://www.census.gov/econ/isp/sampler.php?naicscode=517919&naicslevel=6.

receipts less than $25 million.[81] Consequently, we conclude that the majority of All Other Telecommunications firms can be considered small.

24. *Electric Power Generation, Transmission and Distribution*. The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."[82] This category includes electric power distribution, hydroelectric power generation, fossil fuel power generation, nuclear electric power generation, solar power generation, and wind power generation. The SBA has developed a small business size standard for firms in this category based on the number of employees working in a given business.[83] According to Census Bureau data for 2012, there were 1,742 firms in this category that operated for the entire year.[84]

25. *Natural Gas Distribution.* This economic census category comprises: "(1) establishments primarily engaged in operating gas distribution systems (e.g., mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers."[85] The SBA has developed a small business size standard for this industry, which is all such firms having 1,000 or fewer employees.[86] According to Census Bureau data for 2012, there were 422 firms in this category that operated for the entire year.[87] Of this total, 399 firms had employment of fewer than 1,000 employees, 23 firms had employment of 1,000 employees or more, and 37 firms were not operational.[88] Thus, the majority of firms in this category can be considered small.

26. *Water Supply and Irrigation Systems*. This economic census category "comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems. The water supply system may include pumping stations, aqueducts, and/or distribution mains.

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[81] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC0751SSSZ1, Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 NAICS Code 517919, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ1&prodType=table.

[82] U.S. Census Bureau, 2017 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution," https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

[83] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, "Sector 22 - Utilities" at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

[84] U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, "Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012," NAICS codes 221111, 221112, 221113, 221114, 221115, 221116, 221117, 221118, 22112,221121, (issued Mar. 2016), https://www.census.gov/data/tables/2012/econ/census/utilities.html.

[85] U.S. Census Bureau, 2017 NAICS Definitions, "221210 Natural Gas Distribution," https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf .

[86] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, "Sector 22 - Utilities" at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

[87] U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, "Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012," NAICS code 2212 (issued Mar. 2016), https://www.census.gov/data/tables/2012/econ/census/utilities.html.

[88] *Id*.

The water may be used for drinking, irrigation, or other uses."[89] The SBA has developed a small business size standard for this industry, which is all such firms having $27.5 million or less in annual receipts.[90] According to Census Bureau data for 2012, there were 3,261 firms in this category that operated for the entire year.[91] Of this total, 3,035 firms had annual sales of less than $25 million[92] Thus, the majority of firms in this category can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

27. *One-Touch Make Ready (OTMR) Alternative Pole Attachment Process.* The Order adopts an OTMR pole attachment alternative to the Commission's existing pole attachment timeline. New attachers may perform all simple make-ready work required to accommodate new wireline attachments in the communications space on a pole. First, any OTMR work will be performed by a utility-approved contractor, although a new attacher can use its own qualified contractor to perform OTMR work when the utility does not provide a list of approved contractors. Second, new attachers must provide advanced notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when OTMR surveys and make-ready work are performed. Third, new attachers must allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work.

28. The Order sets forth that the OTMR process begins upon utility receipt of a complete application by a new attacher to attach to its facilities. A complete application is defined as one that provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to begin to survey the affected poles. The Order further establishes that a utility has ten business days after receipt of a pole attachment application to determine if the application is complete and notify the attacher of that decision. If the utility notifies the attacher that its application is not complete within the ten business-day review period, then the utility must specify where and how the application is deficient. If the utility provides no response within ten business days, or if the utility rejects the application as incomplete but fails to specify any deficiencies in the application, then the application is deemed complete. If the utility timely notifies the attacher that its application is incomplete and specifies the deficiencies, then a resubmitted application need only supplement the previous application by addressing the issues identified by the utility, and the application will be deemed complete within five business days after its resubmission, unless the utility specifies which deficiencies were not addressed. A new attacher may follow the resubmission procedure as many times as it chooses, so long as in each case it makes a bona fide attempt to correct the issues identified by the utility. A utility must respond to new attachers within 15 days of receiving complete pole attachment, or within 30 days for larger requests.

29. The Order provides that under the OTMR process, it is the responsibility of the new attacher to conduct a survey of the affected poles to determine the make-ready work to be performed. In performing a field inspection as part of any pre-construction survey, the new attacher must permit representatives of the utility and any existing attachers potentially affected by the proposed make-ready

[89] U.S. Census Bureau, 2017 NAICS Definitions, "221310 Water Supply and Irrigation Systems," https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

[90] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, "Sector 22 - Utilities" at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

[91] U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, "Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012," NAICS code 221310 (issued Mar. 2016), https://www.census.gov/data/tables/2012/econ/census/utilities.html.

[92] U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, "Establishment and Firm Size: Summary Statistics by Revenue Size of Firms for the U.S.: 2012," NAICS code 221310 (issued Mar. 2016), https://www.census.gov/data/tables/2012/econ/census/utilities.html.

work to be present for the survey, using commercially reasonable efforts to provide advance notice of the date, time, and location of the survey of not less than three (3) business days.

30. The Order requires that the new attacher ensures that its contractor determines whether the make-ready work identified in the survey is simple or complex, subject to an electric utility's right to reasonably object to the determination. The new attacher – if it wants to use the OTMR process and is eligible to do so based on the survey – must elect OTMR in its pole attachment application and identify in its application the simple make-ready work to be performed. The Order requires an electric utility that wishes to object to a simple make-ready determination to raise such an objection during the 15-day application review period (or within 30 days in the case of larger orders). Any such objection by the electric utility is final and determinative, so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, provides a good faith explanation of how such evidence and information relate to a determination that the make-ready is not simple. In this case, the work is deemed complex and must follow the existing pole attachment timeline that is modified in this Order. If the make-ready work involves a mix of simple and complex work, then the new attacher may elect to bifurcate the work and must submit separate applications for simple and complex work.

31. The Order provides that the new attacher can elect to proceed with the necessary simple make-ready work by giving 15 days' prior written notice to the utility and all affected existing attachers. The new attacher may provide the required 15-day notice any time after the utility deems its pole attachment application complete. If the new attacher cannot start make-ready work on the date specified in its 15-day notice, then the new attacher must provide 15 days' advance notice of its revised make-ready date. The new attacher's notice must provide representatives of the utility and existing attachers: (1) the date and time of the make-ready work, (2) a description of the make-ready work involved, (3) a reasonable opportunity to be present when the make-ready work is being performed, and (4) the name of the contractor chosen by the new attacher to perform the make-ready work. Further, the new attacher must notify the existing attacher immediately if the new attacher's contractor damages another company's or the utility's equipment or causes an outage that is reasonably likely to interrupt the provision of service.

32. Finally, the Order requires the new attacher to provide notice to the utility and affected existing attachers within 15 days after OTMR make-ready work is completed on a particular pole. In its post-make-ready notice, the new attacher must provide the utility and existing attachers at least a 90-day period for the inspection of make-ready work performed by the new attacher's contractors. The Order requires the utility and the existing attachers to notify the new attacher of any damage or any code violations caused to their equipment by the new attacher's make-ready work and provide adequate documentation of the damage or violations within 14 days after any post-make ready inspection. The utility or existing attacher can either complete any necessary remedial work and bill the new attacher for reasonable costs to fix the damage or violations, or require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.

33. The Order also establishes that new attachers must use a utility-approved contractor to perform OTMR if a utility makes available a list of qualified contractors authorized to perform simple make-ready work in the communications space of its poles. New and existing attachers may request that contractors meeting the minimum qualification requirements be added to the utility's list and utilities may not unreasonably withhold consent to add a new contractor to the list. To be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability. If the use of an approved contractor is not required by the utility or no approved contractor is available within a reasonable time period, then the Order allows new attachers to use qualified contractors of their choosing to perform simple make-ready work in the communications space of poles. The utility may mandate additional commercially reasonable requirements for contractors relating to issues of safety and reliability, but such requirements must clearly communicate the safety or reliability issue, be non-discriminatory, in writing, and publicly available. New attachers must provide the name of their chosen contractor in the three-business-day advance notice

for surveys or the 15-day notices sent to utilities and existing attachers in advance of commencing OTMR work. The utility may veto any contractor chosen by the new attacher as long as the veto is based on reasonable safety or reliability concerns related to the contractor's ability to meet one or more of the minimum qualifications or the utility's previously posted safety standards, and the utility identifies at least one qualified contractor available to do the work. When vetoing an attacher's chosen contractor, the utility must identify at least one qualified contractor available to do the work. The utility must exercise its veto within either the three-business-day notice period for surveys or the 15-day notice period for make-ready. The objection by the utility is determinative and final.

34. The utility or new attacher must certify to the utility, within either the three-business-day notice period for surveys or the 15-day notice period for make-ready, that any contractors perform OTMR meet the following minimum requirements: (1) follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor agrees to follow NESC guidelines; (2) read and follow licensed-engineered pole designs for make-ready work, if required by the utility; (3) follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules; (4) meet or exceed any uniformly applied and reasonable safety record thresholds set by the utility, if made available, *i.e.,* the contractor does not have an unsafe record of significant safety violations or worksite accidents; and (5) be adequately insured or be able to establish an adequate performance bond for the make-ready work it will perform, including work it will perform on facilities owned by existing attachers. The utility may mandate additional commercially reasonable requirements for contractors relating to issues of safety and reliability, but such requirements must be non-discriminatory, in writing, and publicly-available (i.e., on the utility's website).

35. *Existing Pole Attachment Process Reforms.* The Order makes targeted changes to the Commission's existing pole attachment timeline for attachments that are not eligible for the OTMR process and attachers that prefer the existing process. These reforms include revising the definition of a complete pole attachment application and establishing a timeline for a utility's determination whether application is complete; requiring utilities to provide at least three business days' advance notice of any surveys to the new attacher; establishing a 30-day deadline for all make-ready work in the communications space; streamlining the utility's notice requirements; eliminating the 15-day utility make-ready period for communications space attachments; streamlining the utility's notice requirements; requiring utilities to provide detailed estimates and final invoices to new attachers regarding make-ready costs; enhancing the new attacher's self-help remedy by making the remedy available for surveys and make-ready work for all attachments anywhere on the pole in the event that the utility or the existing attachers fail to meet the required deadlines; and revising the contractor selection process for a new attacher's self-help work.

36. The Order retains the existing requirement that the pole attachment timeline begins upon utility receipt of a complete application to attach facilities to its poles, but revises the definition of a complete application to an application that provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission, to begin to survey the affected poles. The Order then adopts the same timeline as set out in the OTMR-process for a utility to determine whether a pole attachment application is complete.

37. The Order also requires a utility to permit the new attacher and any existing attachers potentially affected by the new attachment to be present for any pole surveys. The utility must use commercially reasonable efforts to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher, including the date, time, location of the survey, and the name of the contractor performing the survey. The Order provides that the utility may meet the survey requirement of our existing timeline by electing to use surveys previously prepared on the poles in question by new attachers.

38. The Order amends the existing make-ready timeline by (1) reducing the deadlines for both simple and complex make-ready work from 60 to 30 days (and from 105 to 75 for large requests in

the communications space); and (2) eliminating the optional 15-day extension for the utility to complete communications space make-ready work. The Order maintains the current make-ready deadline of 90 days (and 135 days for large requests) for make-ready above the communications space. However, for all attachments, the Order retains as a safeguard our existing rule allowing utilities to deviate from the make-ready timelines for good and sufficient cause when it is infeasible for the utility to complete make-ready work within the prescribed timeframe. Further, an existing attacher may deviate from the 30-day deadline for complex make-ready in the communications space (or the 75-day deadline in the case of larger orders) for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready by the deadline. An existing attacher that so deviates must immediately notify, in writing, the new attacher and other affected existing attachers, identify the affected poles, and include a detailed explanation of the basis for the deviation and a new completion date, which cannot extend beyond 60 days from the date of the utility make-ready notice to existing attachers (or 105 days in the case of larger orders). The existing attacher cannot deviate from the complex make-ready time limits for a period longer than necessary to complete make-ready on the affected poles. If complex make-ready is not complete within 60 days from the date that the existing attacher sends notice to the new attacher, the new attacher can complete the work using a utility-approved contractor. Existing attachers must act in good faith in obtaining an extension. The Order also provides that when a utility provides the required make-ready notice to existing attachers, then it must provide the new attacher with a copy of the notice, plus the contact information of existing attachers to which the notices were sent, and thereafter the new attacher (rather than the utility) must take responsibility for encouraging and coordinating with existing attachers to ensure completion of make-ready work on a timely basis.

39. Expanding upon the Commission's existing make-ready cost estimate requirement for utilities, the Order requires a utility to detail all make-ready cost estimates and final invoices on a per-pole basis where requested by the new attacher. Fixed costs that are not necessarily charged on a per-pole basis may be submitted on a per-job basis, rather than a pole-by-pole basis, even where a pole-by-pole estimate or invoice is requested. As part of the detailed estimate, the utility is required to disclose to the new attacher its projected material, labor, and other related costs that form the basis of its estimate, including specifying what, if any costs, the utility is passing through to the new attacher from the utility's use of a third-party contractor. The utility must also provide documentation that is sufficient to determine the basis of all charges in the final invoice, including any material, labor and other related costs. If a utility completes make-ready and the final cost of the work does not differ from the estimate, it is not required to provide the new attacher with the invoice.

40. To increase broadband deployment, the Order modifies our existing pole attachment rules by extending a new attacher's self-help remedy for surveys and make-ready work to all attachments above the communications space, including the installation of wireless 5G small cells, when the utility or existing attachers have not met make-ready work deadlines. To address the safety concerns of utilities with regard to self-help work, the Order requires that new attachers, when invoking the self-help remedy, (1) use a utility-approved contractor to do the make-ready work; (2) provide no less than three business days advance notice for self-help surveys and five business days advance notice of when self-help make-ready work will be performed and a reasonable opportunity to be present; (3) provide notice to the utility and existing attachers no later than 15 days after make-ready is complete on a particular pole so that they have an opportunity to inspect the make-ready work. The advance notice must include the date and time of the work, nature of the work, and the name of the contractor being used by the new attacher. The new attacher is required to provide immediate notice to the affected utility and existing attachers if the new attacher's contractor damages equipment or causes an outage that is reasonably likely to interrupt the provision of service.

41. The Order adopts a contractor selection process for self-help that requires a new attacher electing self-help for simple work in the communications space to select a contractor from a utility-maintained list of qualified contractors that meet the same safety and reliability criteria as contractors authorized to perform OTMR work, where such a list is available. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualification requirements and

the utility may not unreasonably withhold consent. If no list is available or no approved contractor is available within a reasonable time period, the new attacher must select a contractor that meets the same safety and reliability criteria as contractors authorized to perform OTMR work and any additional non-discriminatory, written, and publicly-available criteria relating to safety and reliability that the utility specifies. The utility may veto the new attacher's contractor selection so long as such veto is prompt, set forth in writing that describes the reasonable basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety and reliability. Additionally, the utility must offer another available, qualified contractor. For complex work and work above the communications space, the Order requires (1) the utility to make available and keep up-to-date reasonably sufficient list of contractors it authorizes to perform complex and non-communications space self-help surveys and make-ready work; and (2) the new attacher to choose a contractor from the utility's list. New and existing attachers may request that qualified contractors be added to the utility's list and that the utility may not unreasonably withhold its consent for such additions. A utility's decision to withhold consent must be prompt, set forth in writing that describes the reasonable basis for the rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety.

42. *Additional Pole Attachment Reforms.* The Order codifies the Commission's existing precedent that prohibits a pre-approval requirement for overlashing. In addition, the Order adopts a rule on overlashing that allows utilities to establish a reasonable 15-day advance notice requirement, and holds overlashers responsible for ensuring that their practices and equipment do not cause safety or engineering issues. If after receiving advance notice, a utility determines that an overlash create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the 15 day advance notice period and the party seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary. The Order also provides that a utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash. The Order also includes a post-overlashing review process where an overlashing party is required to notify the affected utility within 15 days of completion of the overlsah on a particular pole. The notice must provide the affected utility 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage to its equipment caused by the overlash. It the utility discovers damage caused by the overlash on equipment belonging to the utility, then the utility must inform the overlashing party and provide adequate documentation of the damage. The Order sets forth that the utility may either (A) complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage, or (B) require the overlashing party to fix the damage at its expense within 14 days following notice from the utility.

43. The Order provides that a utility may not prevent an attacher from overlashing because another attacher has not fixed a preexisting violation or require an existing attacher that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attacher. The Order sets forth that new attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent such poles or third-party equipment were out of compliance prior to the new attachment. Further, utilities may not deny new attachers access to the pole solely based on safety concerns arising from a pre-existing violation. They also cannot delay completion of make-ready while the utility attempts to identify or collect from the party who should pay for correction of the preexisting violation. The Order also establishes a presumption that, for newly-negotiated, newly renewed, and evergreen pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or telecommunications attacher, unless the utility can rebut the presumption with clear and convincing evidence that the incumbent LEC receives net benefits under its pole attachment agreement with the utility, that materially advantage the incumbent LEC over other telecommunications attachers. If the presumption is rebutted, the pre-*2011 Pole Attachment Order* telecommunications carrier rate is the maximum rate that the utility and incumbent LEC may negotiate.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

44. In this Order, the Commission modifies its pole attachment rules to improve the efficiency and transparency of the pole attachment process, as well as to increase access to infrastructure for certain types of broadband providers. Overall, we believe the actions in this document will reduce burdens on the affected carriers, including any small entities.

45. The Order also finds that adopting the OTMR process will reduce delays and costs for new attachers, enhance competition, improve public safety and reliability of networks, and accelerate broadband buildout. As detailed in the Order, the Commission rejects alternative proposals, such as "right-touch, make-ready" and NCTA's "ASAP" proposal – which merely modify the current framework. These approaches diffuse responsibility among parties that lack the new attacher's incentive to ensure that the work is done quickly, cost effectively, and properly. Further, these proposals fail to address the existing problems created by sequential make-ready, such as numerous separate climbs and construction stoppages in the public-rights-of-way.

46. As described in the Order, applying targeted changes to the existing pole attachment process, such as a more efficient pole attachment timeline, detailed and itemized estimates and final invoices on a per-pole basis, and an enhanced self-help remedy, will increase broadband deployment by reducing the number of unreasonable delays, and encouraging transparency and collaboration between all interested parties at an early stage in the pole attachment process. The Order also concluded that codifying the Commission's existing precedent prohibiting a pre-approval requirement for overlashing, and adopting a rule allowing utilities to require advance notice of overlashing will eliminate the industry uncertainty that currently exists regarding overlashing, a practice that is essential to broadband deployment. In addition, by eliminating outdated disparities between the pole attachment rates that incumbent carriers must pay compared to other similarly-situated cable and telecommunications attachers, the Order sought to increase incumbent LEC access to infrastructure by addressing the bargaining disparity between utilities and incumbent LECs.

G. Report to Congress

47. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[93] In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.[94]

[93] *See* 5 U.S.C. § 801(a)(1)(A).

[94] *See* 5 U.S.C. § 604(b).

STATEMENT OF
CHAIRMAN AJIT PAI

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79.

Last year, I visited Detroit. Some long ago wrote off the Motor City, but as I saw for myself, there's an unmistakable energy and optimism to the place. Part of the reason why is Rocket Fiber. This small startup is aiming to provide high-speed, high-quality Internet access to residents and increase competition along the way. From a boxing ring to a mobile van that they use to sign up customers, I could feel the enthusiasm for the company's work, and by extension, the city's future.

But Rocket Fiber faces some big hurdles—among them the difficulty of attaching its broadband equipment to utility poles. For a competitive entrant, especially a small company, breaking into the market can be hard, if not impossible, if your business plan relies on other entities to make room for you on those poles. Today, a broadband provider that wants to attach fiber or other equipment to a pole first must wait for, and pay for, each existing attacher to sequentially move existing equipment and wires. This can take months. And the bill for multiple truck rolls adds up. For companies of any size, pole attachment problems represent one of the biggest barriers to broadband deployment.

All of this got me thinking about a policy that would allow a single entity to do the requisite work on the utility pole—a policy commonly known as "one-touch make-ready." Today, we adopt one-touch make-ready (OTMR) in order to help accelerate broadband deployment and competition across the country.

OTMR promises to substantially lower the cost and shorten the time to deploy broadband on utility poles. It allows a new provider who wants to attach to a pole to move all the wires and equipment in just one "touch." It's a bit like having to go to the grocery, the dry cleaner, and the bank. The slow way to do this would be to visit each business but return home each time. The rational thing we all do is to do each errand, one after the other, all on one trip. That's essentially what OTMR is.

Also, we make clear today that it is a violation of federal law for states or localities to impose moratoria on broadband deployment. There may be many reasonable ways local governments can regulate network deployments in their jurisdiction, but blocking competition and better services for American consumers is not one of them.

Let me address several claims about the OTMR process which have been raised. Some have said that state law will not provide sufficient protection for existing attachers and that we need new attachers to broadly indemnify existing attachers. I certainly believe new attachers should be responsible for damage they cause, which is why we've put in place protections. But Google Fiber has explained that blanket indemnification "would tilt the playing field even further toward existing attachers" and "would expose new attachers to potentially unbounded liability—and without any corresponding benefit."

It's also been suggested that OTMR undercuts collective bargaining agreements. Again, Google Fiber points out that "no other proposal is more self-serving than . . . insistence that new attachers be obligated to honor existing attachers' collective bargaining agreements . . . . Google Fiber has no problem using union contractors that have been approved by the pole owner. But the reality is that, in many areas, no such contractors exist; instead, in some of these places, the only [union] members covered by . . . collective bargaining agreements are [the] employees [of existing attachers]."

And we've heard that an existing attacher should have veto rights on determinations that make-ready work is simple. Google Fiber lays out how this "would gut OTMR by giving existing attachers the power to decide when OTMR can be used. This would perpetuate the existing power imbalance, in which incumbent attachers have the ability to delay and even prevent deployment of new networks by

competitors." "By allowing existing attachers to both unilaterally determine whether make-ready is simple or complex . . . , [this proposal] would obliterate those few remedies available to new attachers under the current system and would destroy new attachers' ability to have any control over the timing of their own deployment."

This Commission is heading forward, not backward. We're favoring competition, not status quo. We're embracing the promise of new entrants that want nothing more than a chance to compete, not the fears of those who always find a way to say no.

Finally, we would not have arrived on this pro-competitive path without the tireless work of the Broadband Deployment Advisory Committee, or BDAC. One of the major recommendations from the BDAC's work was that the Commission should adopt an OTMR regime. And I'm pleased that today's *Order* largely follows the path prescribed by the BDAC. I know there were many long hours of debate, and plenty of genuine disagreements, but at the end of the day the BDAC was able to coalesce around a solid, balanced policy. I promised the members of the BDAC early on that they wouldn't just be marking time. And I stood by my word. Make-ready is not make-work—it is a major step toward better, faster, and cheaper Internet access for all Americans.

Lastly, I want to thank the staff who have worked so hard on this item. From the Wireline Competition Bureau: Annick Banoun, Matthew Collins, Adam Copeland, Dan Kahn, Billy Hupp, Lisa Hone, Dick Kwiatkowski, Kris Monteith, Terri Natoli, Eric Ralph, Mike Ray, Jaclyn Rosen, Marvin Sacks, Deborah Salons, Mason Shefa, Anthony Patrone, and John Visclosky; from the Wireless Telecommunications Bureau: Garnet Hanly, Betsy McIntyre, Jiaming Shang, David Sieradzki, Don Stockdale, and Suzanne Tetreault; from the Enforcement Bureau: Michael Engel, Lisa Griffin, Rosemary McEnery, and Lisa Saks; from the Office of General Counsel: Malena Barzilai, Ashley Boizelle, Tom Johnson, Billy Layton, and Rick Mallen; and from the Office of Strategic Planning & Policy Analysis, Paul LaFontaine.

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79.

I believe there is near universal agreement, certainly among my colleagues here at the FCC, that broadband services of sufficient functionality should be available to all Americans that seek access. If used properly, broadband can bring enormous benefits to individuals and society as a whole. From critical news and information to educational materials and entertainment, broadband can improve the lives of our citizens in ways not imagined just a few decades ago. It is also completely interwoven into almost every aspect of the business and commercial world. And, the technologies in the works and on drawing boards suggest it will be an astronomically more connected universe.

Persistent and known obstacles, however, are preventing many Americans from accessing private sector broadband services. In many cases, the economics make it incredibly challenging to extend network build-outs to the farthest corners of our nation. It's why I have spent so much time working to modernize and strengthen the Commission's Connect America Fund and have pushed hard for the initiation of the Remote Areas Fund. Similarly, a large percentage of State and local governments are due kudos for stepping forward to make the process for obtaining broadband deployment approvals, to the extent it is necessary, more efficient.

At the same time, a select group of State and local governments have defied reason and actually slowed down or stifled deployment work to feed their own egos, power, or push for shakedown bounties. This is unacceptable. Today, the Commission takes its second step in our larger effort to confront the practices of these bad actors. This has been over a 30-year fight with some of these communities and the associations representing them, so you will excuse me if I don't buy the arguments that all it takes is more cooperation and time working together.

While I support the one-touch make-ready (OTMR) provisions, I want to start my comments on the second portion of today's item, the moratorium section. Anyone who has worked in this space for quite a while knows that State and local governments have been on notice for decades that Congress wanted to end: 1) moratoriums on wireless towers and antennas, and 2) tower siting decisions based on aesthetics. Let me make this clear for those local officials who may not have been listening in the past: NO MORATORIUMS; NO MORATORIUMS; ABSOLUTELY NO MORATORIUMS.

It is beyond me that we are still having to deal with this outrageous practice after so many years, especially given how important broadband can be to the very citizens residing in these areas. In addition to the existing provisions of section 332, today's item declares section 253 as a statutory authority for prohibiting applicable moratoriums. While I know it will be challenged in court, my simple reaction is hallelujah. Every ounce of Congressional authority provided to the Commission must be used as a counterforce against moratoriums, which is just another word for "mindless delay" or "extortion attempts to generate some local officials' wish list." And, the record is replete with examples of such out-of-bound practices, such as digital inclusion funds, that unnecessarily create political slush funds and raise the cost of service for consumers.

During to the first portion of the item, I want to thank the Chairman and his team for making a few key edits to the one touch make ready provisions. My revisions will not fundamentally alter the direction of the item or undermine its necessary efforts. Instead, it will smooth some rougher parts of the OTMR by bolstering the recourse for damages or non-compliance resulting from OTMR work, ensuring that make-ready work damage to existing attachers' facilities are rectified immediately, increasing post-OTMR inspection periods, allowing existing attachers to continue work on their networks during the advance notice period, reducing the burdens of per-pole estimates and invoices, permitting overlashing of

facilities upon permission of the host without the pole owners advance approval, amongst others.

In the end, the item will greatly aid the private sector expansion of broadband services throughout America, producing a more competitive and capable nation. I look forward to further actions later this year by Commissioner Carr to further extend wireless buildout relief, including other preemptive measures, to complement our work here today. I approve.

STATEMENT OF
COMMISSIONER BRENDAN CARR

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79.

The first utility poles in the country went up not far from here back in 1844. They formed a 38-mile line between the U.S. Capitol and the Mount Clare railroad station in Baltimore, Maryland. The poles went up along the right-of-way used by the Baltimore and Ohio Railroad. The idea came from an engineer, Ezra Cornell, who had been working with Samuel Morse on a way to quickly and efficiently string a telegraph line between the two points. With the poles and wire line in place, Morse and his partner Alfred Vail were able to send the world's first long-distance telegram on May 24, 1844.

So the humble utility pole is one of the oldest forms of infrastructure used for communications. And it is that same utility pole that will support the next-gen networks of tomorrow. Take 5G – we need thousands of new small cell deployments over the next few years. And the lion's share of these are expected to go up on utility poles in rights-of-ways. You can already see the leading edge of these deployments in communities across the country. I have seen it in Sioux Falls, South Dakota, where city officials showed me some of the small cells that have gone up across their downtown. I have seen it on top of a wooden pole outside a high school in rural Woodstock, Virginia, where a small cell is adding the capacity needed to power students' coding classes and cloud-based learning.

At the FCC, we have been working to streamline and reduce barriers to these small cell deployments. And today's decision is another good step in that direction. By making it easier for providers to safely and efficiently attach broadband-capable fiber and cable lines to utility poles, we can bring down the cost of the backhaul needed to connect all these small cell deployments.

In this decision, we also take the commonsense step of repeating our long-standing view that moratoria on telecom deployments violate federal law. This decision will provide even greater certainty as we look to promote next-gen deployments in communities across the country.

I want to thank the Wireline Competition Bureau and the Wireless Telecommunications Bureau in particular for their work on this item. It has my support.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
APPROVING IN PART, DISSENTING IN PART

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79.

In this country we build. We are a nation of doers. Clearing the obstacles in our way is deep in our DNA. I believe this instinct has served us well and over time there has been a lot of evidence this is true before the Federal Communications Commission. You see it in the way as a country we connected all through the public switched telephone network. You see it in the way we led the world in the deployment of 4G wireless services. You see it, too, in the cities and towns that are clamoring for better broadband service, because they know that without it their communities will not have a fair shot in the digital age.

You also see the influence of this spirit in this decision. It is designed to expedite access to utility poles. That may not seem grand at first blush, but clearing the way to access these lowly facilities is a big deal. It means building more broadband in more places, more competitive broadband, and enhanced access to the next generation of wireless services.

For this reason, I support one-touch make-ready pole attachment. By allowing for the modification or replacement of the lines or equipment on a utility pole to accommodate additional facilities, I believe we can speed the way to a future with more digital age infrastructure deployment across the country.

But as with all things, the devil is in the details. We are dealing with a complex and heady mix of federal authority, state preemption, local realities, and the possibility of job losses for workers and service outages for consumers. Getting it right is essential. I believe that in some ways, this decision runs roughshod over the details when clearer and more specific direction is required.

First, in our rush to put out rules, this agency accepts too much ambiguity in the one-touch make-ready regime we adopt today. Ideally these policies would be crystal clear so that there are no disputes about just what deployments qualify for one-touch make-ready procedures. But I am concerned that is not the case here. And I believe this is going to slow down deployment—not speed it up. Indeed, even determining what counts as simple make-ready work is not so simple. That's because our definitions of simple and complex processes do not provide enough real-world guidance to attachers and utilities, setting the stage for disputes and delays. Worse, we decide not to give any voice in this process to the parties that are well-positioned to make these tricky determinations—the existing attachers. This is hard to justify.

Second, we could do more to protect jobs and safety. By giving short shrift to employees covered by collective bargaining agreements, this decision threatens to invalidate private contracts negotiated between existing attachers and union workers. But going forward, this agency could put those employees out of work. This is not right. Moreover, it is not an outcome we can simply ignore.

Third, we should give more thought to what happens to existing attachers on poles. With only superficial analysis, we conclude that existing contract and tort law will protect their interests. This is not so simple because in many cases there is no privity of contract between these parties. Our one-touch make-ready regime—and the public at large—would be better served by mechanisms that would allow existing attachers to hold a new attacher or contractor accountable for the consequences of performing shoddy work, especially when they lead to consumer outages.

Finally, I fear that for all our desire to expedite deployment all this decision will do is speed the way for litigation. Nowhere is this clearer than in the declaratory ruling. This agency determines that state or local requirements that prevent or have the effect of suspending the processing of siting

applications for new communications infrastructure violate Section 253(a) of the Communications Act and are preempted. The legal analysis here is seriously lacking. A basic cannon of statutory interpretation requires that this agency give meaning to all relevant portions of the law. Interpretations that support statutory consistency are valued over those that do not. And yet, there is no way to square this declaratory ruling regarding Section 253(a) with Section 253(d). That's because Section 253(d) provides the express mechanism for this agency to preempt state and local requirements on a case-by-case basis after notice and opportunity for public comment. Moreover, our interpretation of Section 253(a) preemption all but reads Section 332(c) out of the law, which provides a specific due process remedy for the failure to act on wireless facilities siting.

So what does that mean in the real world? Take Myrtle Beach, South Carolina, just for example. It's a coastal community. There are laws that limit the ability of private entities to dig up roads during certain times of the year, namely during the height of hurricane season and during peak tourist times. These rules are limited in time and scope. They are informed by local traffic and public safety authorities. They are reasonably related to the police powers of municipalities. And yet, going forward, three unelected officials sitting here today preempt these local policies because they believe Washington knows better.

This is unfortunate. Because I believe we need smart one-touch make-ready policies—and others like it—to expedite the deployment of more broadband and wireless services in more places. We need to find a modern way to balance the needs for national deployment policies with local realities so that across the board government authorities support what we need everywhere—digital age infrastructure. I believe there is a thoughtful way to do this, but the reasoning in today's decision falls short.

While I approve our adoption of one-touch make-ready policies in concept, the deficiencies in our analysis are too significant for me to offer my full support. As a result, I approve in part and dissent in part.

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

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

DECLARATORY RULING AND THIRD REPORT AND ORDER

Adopted: September 26, 2018 **Released: September 27, 2018**

By the Commission: Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioner Rosenworcel approving in part, dissenting in part and issuing a statement.

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I. INTRODUCTION

1. America is in the midst of a transition to the next generation of wireless services, known as 5G. These new services can unleash a new wave of entrepreneurship, innovation, and economic opportunity for communities across the country. The FCC is committed to doing our part to help ensure the United States wins the global race to 5G to the benefit of all Americans. Today's action is the next step in the FCC's ongoing efforts to remove regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support these new services. We proceed by drawing on the balanced and commonsense ideas generated by many of our state and local partners in their own small cell bills.

2. Supporting the deployment of 5G and other next-generation wireless services through smart infrastructure policy is critical. Indeed, upgrading to these new services will, in many ways, represent a more fundamental change than the transition to prior generations of wireless service. 5G can enable increased competition for a range of services—including broadband—support new healthcare and Internet of Things applications, speed the transition to life-saving connected car technologies, and create jobs. It is estimated that wireless providers will invest $275 billion[1] over the next decade in next-generation wireless infrastructure deployments, which should generate an expected three million new jobs and boost our nation's GDP by half a trillion dollars.[2] Moving quickly to enable this transition is important, as a new report forecasts that speeding 5G infrastructure deployment by even one year would unleash an additional $100 billion to the U.S. economy.[3] Removing barriers can also ensure that every community gets a fair shot at these deployments and the opportunities they enable.

3. The challenge for policymakers is that the deployment of these new networks will look different than the 3G and 4G deployments of the past. Over the last few years, providers have been increasingly looking to densify their networks with new small cell deployments that have antennas often no larger than a small backpack. From a regulatory perspective, these raise different issues than the construction of large, 200-foot towers that marked the 3G and 4G deployments of the past. Indeed, estimates predict that upwards of 80 percent of all new deployments will be small cells going forward.[4] To support advanced 4G or 5G offerings, providers must build out small cells at a faster pace and at a far greater density of deployment than before.

4. To date, regulatory obstacles have threatened the widespread deployment of these new services and, in turn, U.S. leadership in 5G. The FCC has lifted some of those barriers, including our decision in March 2018, which excluded small cells from some of the federal review procedures designed for those larger, 200-foot towers. But as the record here shows, the FCC must continue to act in partnership with our state and local leaders that are adopting forward leaning policies.

5. Many states and localities have acted to update and modernize their approaches to small cell deployments. They are working to promote deployment and balance the needs of their communities. At the same time, the record shows that problems remain. In fact, many state and local officials have urged the FCC to continue our efforts in this proceeding and adopt additional reforms. Indeed, we have

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[1] *See* Accenture Strategy, Accelerating Future Economic Value from the Wireless Industry at 2 (2018) (Accelerating Future Economic Value Report), https://www.ctia.org/news/accelerating-future-economic-value-from-the-wireless-industry, attached to Letter from Scott K. Bergmann, Senior Vice Pres., Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed July 19, 2018).

[2] *See* Accenture Strategy, Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities, (2017) http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrantsmart-cities-accenture.pdf; attached to Letter from Scott Bergmann, Vice Pres. Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-421, (filed Jan. 13, 2017).

[3] Accelerating Future Economic Value Report at 2.

[4] Letter from John T. Scott, Counsel for Mobilitie, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2-3 (filed Sept. 12, 2018).

heard from a number of local officials that the excessive fees or other costs associated with deploying small scale wireless infrastructure in large or otherwise "must serve" cities are materially inhibiting the buildout of wireless services in their own communities.

6. We thus find that now is the appropriate time to move forward with an approach geared at the conduct that threatens to limit the deployment of 5G services. In reaching our decision today, we have benefited from the input provided by a range of stakeholders, including state and local elected officials.[5] FCC leadership spent substantial time over the course of this proceeding meeting directly with local elected officials in their jurisdictions. In light of those discussions and our consideration of the record here, we reach a decision today that does not preempt nearly any of the provisions passed in recent state-level small cell bills. We have reached a balanced, commonsense approach, rather than adopting a one-size-fits-all regime. This ensures that state and local elected officials will continue to play a key role in reviewing and promoting the deployment of wireless infrastructure in their communities.

7. Although many states and localities support our efforts, we acknowledge that there are others who advocated for different approaches.[6] We have carefully considered these views, but nevertheless find our actions here necessary and fully supported. By building on state and local ideas, today's action boosts the United States' standing in the race to 5G. According to a study submitted by Corning, our action would eliminate around $2 billion in unnecessary costs, which would stimulate around $2.4 billion of additional buildouts.[7] And that study shows that such new service would be

[5] *See, e.g.*, Letter from Brian D. Hill, Ohio State Representative, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Aug. 31, 2018) ("While the FCC and the Ohio Legislature have worked to reduce the timeline for 5G deployment, the same cannot be said for all local and state governments. Regulations written in a different era continue to dictate the regulatory process for 5G infrastructure"); Letter from Maureen Davey, Commissioner, Stillwater County, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 18, 2018) ("[T]he Commission's actions to lower regulatory barriers can enable more capital spending to flow to areas like ours. Reducing fees and shortening review times in urban areas, thereby lowering the cost of deployment in such areas, can promote speedier deployment across all of America."); Letter from Board of County Commissioners, Yellowstone County, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 21, 2018) ("Reducing these regulatory barriers by setting guidelines on fees, siting requirements and review timeframes, will promote investment including rural areas like ours."); Letter from Board of Commissioners, Harney County, Oregon, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 5, 2018) ("By taking action to speed and reduce the costs of deployment across the country, and create a more uniform regulatory framework, the Commission will lower the cost of deployment, enabling more investment in both urban and rural communities."); Letter from Niraj J. Antani, Ohio State Representative, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 4, 2018) ("[T]o truly expedite the small cell deployment process, broader government action is needed on more than just the state level."); Letter from Michael C. Taylor, Mayor, City of Sterling Heights, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Aug. 30, 2018) ("[T]here are significant, tangible benefits to having a nation-wide rule that promotes the deployment of next-generation wireless access without concern that excessive regulation or small cell siting fees slows down the process.").

[6] *See, e.g.*, Letter from Linda Morse, Mayor, City of Manhattan, KS to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 13, 2018) (City of Manhattan, KS Sept. 13, 2018 *Ex Parte* Letter); Letter from Ronny Berdugo, Legislative Representative, League of California Cities to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 18, 2018) (Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter); Letter from Damon Connolly, Marin County Board of Supervisors to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 17, 2018) (Damon Connolly Sept. 17, 2018 *Ex Parte* Letter).

[7] *See* Letter from Thomas J. Navin, Counsel to Corning, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1, Attach. A at 2-3 (filed Sept. 5, 2018) (Corning Sept. 5, 2018 *Ex Parte* Letter).

deployed where it is needed most: 97 percent of new deployments would be in rural and suburban communities that otherwise would be on the wrong side of the digital divide.[8]

8. The FCC will keep pressing ahead to ensure that every community in the country gets a fair shot at the opportunity that next-generation wireless services can enable. As detailed in the sections that follow, we do so by taking the following steps.

9. In the Declaratory Ruling, we note that a number of appellate courts have articulated different and often conflicting views regarding the scope and nature of the limits Congress imposed on state and local governments through Sections 253 and 332. We thus address and reconcile this split in authorities by taking three main actions.

10. First, we express our agreement with the U.S. Courts of Appeals for the First, Second, and Tenth Circuits that the "materially inhibit" standard articulated in 1997 by the Clinton-era FCC's *California Payphone* decision is the appropriate standard for determining whether a state or local law operates as a prohibition or effective prohibition within the meaning of Sections 253 and 332.

11. Second, we note, as numerous courts and prior FCC cases have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can unlawfully prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress's limits in Sections 253 and 332. We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision.[9] Namely, fees are only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality's reasonable costs. In this section, we also identify specific fee levels for the deployment of Small Wireless Facilities that presumptively comply with this standard. We do so to help avoid unnecessary litigation over fees.

12. Third, we focus on a subset of other, non-fee provisions of local law that could also operate as prohibitions on service. We do so in particular by addressing state and local consideration of aesthetic concerns in the deployment of Small Wireless Facilities, recognizing that certain reasonable aesthetic considerations do not run afoul of Sections 253 and 332. This responds in particular to many concerns we heard from state and local governments about deployments in historic districts.

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[8] *Id.*

[9] "Small Wireless Facilities," as used herein and consistent with section 1.1312(e)(2), encompasses facilities that meet the following conditions:

(1) The facilities—

(i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or

(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or

(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under part 17 of this chapter;

(5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).

13. Next, we issue a Report and Order that addresses the "shot clocks" governing the review of wireless infrastructure deployments. We take three main steps in this regard. First, we create a new set of shot clocks tailored to support the deployment of Small Wireless Facilities. In particular, we read Sections 253 and 332 as allowing 60 days for reviewing the application for attachment of a Small Wireless Facility using an existing structure and 90 days for the review of an application for attachment of a small wireless facility using a new structure. Second, while we do not adopt a "deemed granted" remedy for violations of our new shot clocks, we clarify that failing to issue a decision up or down during this time period is not simply a "failure to act" within the meaning of applicable law. Rather, missing the deadline also constitutes a presumptive prohibition. We would thus expect any locality that misses the deadline to issue any necessary permits or authorizations without further delay. We also anticipate that a provider would have a strong case for quickly obtaining an injunction from a court that compels the issuance of all permits in these types of cases. Third, we clarify a number of issues that are relevant to all of the FCC's shot clocks, including the types of authorizations subject to these time periods.

II. BACKGROUND

A. Legal Background

14. In the Telecommunications Act of 1996 (the 1996 Act), Congress enacted sweeping new provisions intended to facilitate the deployment of telecommunications infrastructure. As U.S. Courts of Appeals have stated, "[t]he [1996] Act 'represents a dramatic shift in the nature of telecommunications regulation.'"[10] The Senate floor manager, Senator Larry Pressler, stated that "[t]his is the most comprehensive deregulation of the telecommunications industry in history."[11] Indeed, the purpose of the 1996 Act is to "provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition."[12] The conference report on the 1996 Act similarly indicates that Congress "intended to remove all barriers to entry in the provision of telecommunications services."[13] The 1996 Act thus makes clear Congress's commitment to a competitive telecommunications marketplace unhindered by unnecessary regulations, explicitly directing the FCC to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[14]

15. Several provisions of the 1996 Act speak directly to Congress's determination that certain state and local regulations are unlawful. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[15] Courts have observed that Section 253 represents a "broad preemption of laws that inhibit competition."[16]

16. The Commission has issued several rulings interpreting and providing guidance regarding the language Congress used in Section 253. For instance, in the 1997 *California Payphone* decision, the Commission, under the leadership of then Chairman William Kennard, stated that, in determining whether a state or local law has the effect of prohibiting the provision of telecommunications services, it

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[10] *Sprint Telephony PCS LP v. County of San Diego*, 543 F.3d 571, 575 (9th Cir. 2008) (en banc) (*County of San Diego*) (quoting *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999)).

[11] 141 Cong. Rec. S8197 (daily ed. June 12, 1995).

[12] H.R. Conf. Rep. No. 104–458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. (100 Stat. 5) 124.

[13] S. Rep. No. 104-230, at 126 (1996) (Conf. Rep.).

[14] Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (noting that the 1996 Act "fundamentally restructures local telephone markets" to facilitate market entry); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997) ("The Telecommunications Act was an unusually important legislative enactment . . . designed to promote competition.").

[15] 47 U.S.C. § 253(a).

[16] *Puerto Rico Tel. Co. v. Telecomm. Reg. Bd. of Puerto Rico*, 189 F.3d 1, 11 n.7 (1st Cir. 1999).

"consider[s] whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[17]

17. Similar to Section 253, Congress specified in Section 332(c)(7) that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[18] Clause (B)(ii) of that section further provides that "[a] State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request."[19] Section 332(c)(7) generally preserves state and local authority over the "placement, construction, and modification of personal wireless service facilities" but with the important limitations described above.[20] Section 332(c)(7) also sets forth a judicial remedy, stating that "[a]ny person adversely affected by any final action or failure to act by a State or local government" that is inconsistent with the requirements of Section 332(c)(7) "may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."[21] The provision further directs the court to "decide such action on an expedited basis."[22]

18. The Commission has previously interpreted the language Congress used and the limits it imposed on state and local authority in Section 332. For instance, in interpreting Section 332(c)(7)(B)(i)(II), the Commission has found that "a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services,' within the meaning of Section 332(c)(7)(B)(i)(II)."[23] In adopting this interpretation, the Commission explained that its "construction of the provision achieves a balance that is most consistent with the relevant goals of the Communications Act" and its understanding that "[i]n promoting the construction of nationwide wireless networks by multiple carriers, Congress sought ultimately to improve service quality and lower prices for consumers."[24] The Commission also noted that an alternative interpretation would "diminish the service provided to [a wireless provider's] customers."[25]

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[17] *California Payphone Ass'n*, 12 FCC Rcd 14191, 14206, para. 31 (1997) (*California Payphone*).

[18] 47 U.S.C. § 332(c)(7)(B)(i).

[19] 47 U.S.C § 332(c)(7)(B)(ii).

[20] 47 U.S.C. § 332(c)(7)(A) (stating that, "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless services facilities"). The statute defines "personal wireless services" to include CMRS, unlicensed wireless services, and common carrier wireless exchange access services. 47 U.S.C. § 332(c)(7)(C). In 2012, Congress expressly modified this preservation of local authority by enacting Section 6409(a), which requires local governments to approve certain types of facilities siting applications "[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified in substantial part as Section 332(c)(7)] . . . or any other provision of law." Spectrum Act, 47 U.S.C. § 6409(a)(1).

[21] 47 U.S.C. § 332(c)(7)(B)(v).

[22] 47 U.S.C. § 332(c)(7)(B)(v).

[23] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14016, para. 56 (2009) (*2009 Declaratory Ruling*), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012) (*City of Arlington*), *aff'd*, 569 U.S. 290 (2013).

[24] *2009 Declaratory Ruling*, 24 RCC Rcd at 14017-18, para. 61.

[25] *Id*.

19. In the *2009 Declaratory Ruling*, the Commission acted to speed the deployment of then-new 4G services and concluded that, "[g]iven the evidence of unreasonable delays [in siting decisions] and the public interest in avoiding such delays," it should offer guidance regarding the meaning of the statutory phrases "reasonable period of time" and "failure to act" "in order to clarify when an adversely affected service provider may take a dilatory State or local government to court."[26] The Commission interpreted "reasonable period of time" under Section 332(c)(7)(B)(ii) to be 90 days for processing collocation applications and 150 days for processing applications other than collocations.[27] The Commission further determined that failure to meet the applicable time frame enables an applicant to pursue judicial relief within the next 30 days.[28] In litigation involving the 90-day and 150-day time frames, the locality may attempt to "rebut the presumption that the established timeframes are reasonable."[29] If the agency fails to make such a showing, it may face "issuance of an injunction granting the application."[30] In its *2014 Wireless Infrastructure Order*,[31] the Commission clarified that the time frames under Section 332(c)(7) are presumptively reasonable and begin to run when the application is submitted, not when it is found to be complete by a siting authority.[32]

20. In 2012, Congress adopted Section 6409 of the Middle Class Tax Relief and Job Creation Act (the Spectrum Act), which provides further evidence of Congressional intent to limit state and local laws that operate as barriers to infrastructure deployment. It states that, "[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified as 47 U.S.C. § 332(c)(7)] or any other provision of law, 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 not substantially change the physical dimensions of such tower or base station."[33] Subsection (a)(2) defines the term "eligible facilities request" as any request for modification of an existing wireless tower or base station that involves (a) collocation of new transmission equipment; (b) removal of transmission equipment; or (c) replacement of transmission equipment.[34] In implementing Section 6409 and in an effort to "advance[e] Congress's goal

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[26] *Id.* at 14008, para. 37; *see also id.* at 14029 (Statement of Chairman Julius Genachowski) ("[T]he rules we adopt today . . . will have an important effect in speeding up wireless carriers' ability to build new 4G networks--which will in turn expand and improve the range of wireless choices available to American consumers.").

[27] *Id.* at 14012, para. 45.

[28] *Id.* at 14005, 14012, paras. 32, 45.

[29] *Id.* at 14008-10, 14013-14, paras. 37-42, 49-50.

[30] *Id.* at 14009, para. 38; *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (proper remedies for Section 332(c)(7) violations include injunctions but not constitutional tort damages).

[31] Specifically, the Commission determined that once a siting application is considered complete for purposes of triggering the Section 332(c)(7) shot clocks, those shot clocks run regardless of any moratoria imposed by state or local governments, and the shot clocks apply to DAS and small-cell deployments so long as they are or will be used to provide "personal wireless services." *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, 12966, 12973, paras. 243, 270, (2014) (*2014 Wireless Infrastructure Order*), *aff'd*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015) (*Montgomery County*); *see also Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3339, para. 22 (2017) (*Wireless Infrastructure NPRM/NOI*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84 and WT Docket No. 17-79, FCC 18-111, paras. 140-68 (rel. Aug. 3, 2018) (*Moratoria Declaratory Ruling*).

[32] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, para. 258. ("Accordingly, to the extent municipalities have interpreted the clock to begin running only after a determination of completeness, that interpretation is incorrect.").

[33] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 § 6409(a)(2), 126 Stat. 156 (2012).

[34] *Id*.

of facilitating rapid deployment,"[35] the Commission adopted rules to expedite the processing of eligible facilities requests, including documentation requirements and a 60-day period for states and localities to review such requests.[36] The Commission further determined that a "deemed granted" remedy was necessary for cases in which the reviewing authority fails to issue a decision within the 60-day period in order to "ensur[e] rapid deployment of commercial and public safety wireless broadband services."[37] The Fourth Circuit, affirming that remedy, explained that "[f]unctionally, what has occurred here is that the FCC—pursuant to properly delegated Congressional authority—has preempted state regulation of wireless towers."[38]

21. Consistent with these broad federal mandates, courts have recognized that the Commission has authority to interpret Sections 253 and 332 of the Act to further elucidate what types of state and local legal requirements run afoul of the statutory parameters Congress established.[39] For instance, the Fifth Circuit affirmed the *2009 Declaratory Ruling* in *City of Arlington*. The court concluded that the Commission possessed the "authority to establish the 90– and 150–day time frames" and that its decision was not arbitrary and capricious.[40] More generally, as the agency charged with administering the Communications Act, the Commission has the authority, responsibility, and expert judgement to issue interpretations of the statutory language and to adopt implementing regulations that clarify and specify the scope and effect of the Act. Such interpretations are particularly appropriate where the statutory language is ambiguous, or the subject matter is "technical, complex, and dynamic," as it is in the Communications Act, as recognized by the Supreme Court.[41] Here, the Commission has ample experience monitoring and regulating the telecommunications sector. It is well-positioned, in light of this experience and the record in this proceeding, to issue a clarifying interpretation of Sections 253 and 332(c)(7) that accounts both for the changing needs of a dynamic wireless sector that is increasingly reliant on Small Wireless Facilities and for state and local oversight that does not materially inhibit wireless deployment.

22. The congressional and FCC decisions described above point to consistent federal action, particularly when faced with changes in technology, to ensure that our country's approach to wireless infrastructure deployment promotes buildout of the facilities needed to provide Americans with next-generation services. Consistent with that long-standing approach, in the 2017 *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on whether the FCC should again update its approach to infrastructure deployment to ensure that regulations are not operating as prohibitions in violation of Congress's decisions and federal policy.[42] In August 2018, the Commission concluded that state and local moratoria on telecommunications services and facilities deployment are barred by Section 253(a).[43]

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[35] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12872, para. 15.

[36] *Id.* at 12922, 12956-57, paras. 135, 214-15.

[37] *Id*. at 12961-62, paras. 226, 228.

[38] *Montgomery County*, 811 F.3d at 129.

[39] *See, e.g.*, *City of Arlington*, 668 F.3d at 253-54; *County of San Diego*, 543 F.3d at 578; *RT Commc'ns., Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000).

[40] *City of Arlington*, 668 F.3d at 254, 260-61.

[41] *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 328 (2002); *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000) (recognizing "agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated"); s*ee also, e.g.*, *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983-986 (2005) (Commission's interpretation of an ambiguous statutory provision overrides earlier court decisions interpreting the same provision).

[42] *See generally Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332-39, paras. 4-22.

[43] *See generally Moratoria Declaratory Ruling*, FCC 18-111, paras. 140-68.

B. The Need for Commission Action

23. In response to the opportunities presented by offering new wireless services, and the problems facing providers that seek to deploy networks to do so, we find it necessary and appropriate to exercise our authority to interpret the Act and clarify the preemptive scope that Congress intended. The introduction of advanced wireless services has already revolutionized the way Americans communicate and transformed the U.S. economy. Indeed, the FCC's most recent wireless competition report indicates that American demand for wireless services continues to grow exponentially. It has been reported that monthly data usage per smartphone subscriber rose to an average of 3.9 gigabytes per subscriber per month, an increase of approximately 39 percent from year-end 2015 to year-end 2016.[44] As more Americans use more wireless services, demand for new technologies, coverage and capacity will necessarily increase, making it critical that the deployment of wireless infrastructure, particularly Small Wireless Facilities, not be stymied by unreasonable state and local requirements.

24. 5G wireless services, in particular, will transform the U.S. economy through increased use of high-bandwidth and low-latency applications and through the growth of the Internet of Things.[45] While the existing wireless infrastructure in the U.S. was erected primarily using macro cells with relatively large antennas and towers, wireless networks increasingly have required the deployment of small cell systems to support increased usage and capacity. We expect this trend to increase with next-generation networks, as demand continues to grow, and providers deploy 5G service across the nation.[46] It is precisely "[b]ecause providers will need to deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next-generation technologies" that the Commission has acknowledged "an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise."[47] As explained below, the need to site so many more 5G-capable nodes leaves providers' deployment plans and the underlying economics of those plans vulnerable to increased per site delays and costs.

25. Some states and local governments have acted to facilitate the deployment of 5G and other next-gen infrastructure, looking to bring greater connectivity to their communities through forward-looking policies. Leaders in these states are working hard to meet the needs of their communities and balance often competing interests. At the same time, outlier conduct persists. The record here suggests that the legal requirements in place in other state and local jurisdictions are materially impeding that deployment in various ways.[48] Crown Castle, for example, describes "excessive and unreasonable" "fees

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[44] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Twentieth Report, 32 FCC Rcd 8968, 8972, para. 20 (2017) (*Twentieth Wireless Competition Report*).

[45] *See Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3331, para. 1.

[46] *See, e.g.*, Letter from Brett Haan, Principal, Deloitte Consulting, U.S., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Sept. 17, 2018) ("Significant investment in new network infrastructure is needed to deploy 5G networks at-scale in the United States. 5G's speed and coverage capabilities rely on network densification, which requires the addition of towers and small cells to the network. . . . This requires carriers to add 3 to 10 times the number of existing sites to their networks. Most of this additional infrastructure will likely be built with small cells that use lampposts, utility phones, or other structures of similar size able to host smaller, less obtrusive radios required to build a densified network." (citation omitted)); *see also* Deloitte LLP, 5G: The Chance to Lead for a Decade (2018) (Deloitte 5G Paper), *available at* https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-5gdeployment-imperative.pdf.

[47] *See Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3331, para. 2.

[48] *See, e.g.,* Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 10, 2018) ("Unfortunately, many municipalities are unable, unwilling, or do not make it a priority to act on applications within the shot clock period."); Letter from Keith Buell, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Aug. 13, 2018) (Sprint Aug. 13, 2018 *Ex Parte* Letter); Letter from Katherine R. Saunders, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21,

to access the [rights-of-way] that are completely unrelated to their maintenance or management." It also points to barriers to market entry "for independent network and telecommunications service providers," including municipalities that "restric[t] access to the [right-of-way] only to providers of commercial mobile services" or that impose "onerous zoning requirements on small cell installations when other similar [right of way] utility installations are erected with simple building permits."[49] Crown Castle is not alone in describing local regulations that slow deployment. AT&T states that localities in Maryland, California, and Massachusetts have imposed fees so high that it has had to pause or decrease deployments.[50] Likewise, AT&T states that a Texas city has refused to allow small cell placement on any structures in a right-of-way (ROW).[51] T-Mobile states that the Town of Hempstead, New York requires service providers who seek to collocate or upgrade equipment on existing towers that have been properly constructed pursuant to Class II standards to upgrade and certify these facilities under Class III standards that apply to civil and national defense and military facilities.[52] Verizon states that a Minnesota town has proposed barring construction of new poles in rights-of-way and that a Midwestern suburb where it has been trying to get approval for small cells since 2014 has no established procedures for small cell approvals.[53] Verizon states that localities in New York and Washington have required special use permits involving multiple layers of approval to locate small cells in some or all zoning districts.[54] While some localities dispute some of these characterizations, their submissions do not persuade us that there is no basis or need for the actions we take here.

26. Further, the record in this proceeding demonstrates that many local siting authorities are not complying with our existing Section 332 shot clock rules.[55] WIA states that its members routinely face lengthy delays and specifically cite localities in New Jersey, New Hampshire, and Maine as being

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2018) ("[L]ocal permitting delays continue to stymie deployments."); Letter from Kenneth J. Simon, Crown Castle, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Aug. 10, 2018); Letter from Scott K. Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 30, 2018) (CTIA Aug. 30, 2018 *Ex Parte* Letter).

[49] Crown Castle Comments at 7; *see also* Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 19, 2018) ("In Hillsborough, California, Crown Castle submitted applications covering 16 nodes, and was assessed $60,000 in application fees. Not only did Hillsborough go on to deny these applications, following that denial it also then sent Crown Castle an invoice for an additional $351,773 (attached as Exhibit A), most of which appears to be related to outside counsel fees—all for equipment that was not approved and has not yet been constructed.").

[50] Letter from Henry Hultquist, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Aug. 6, 2018) (AT&T Aug. 6, 2018 *Ex Parte* Letter).

[51] AT&T Comments at 6-7.

[52] T-Mobile Reply Comments at 7-9; *see also* CCA Reply Comments at 12; CTIA Reply Comments at 18; WIA Reply Comments at 22-23.

[53] *See* Verizon Comments at 7.

[54] *See* Verizon Comments at 35.

[55] *See, e.g.*, T-Mobile Comments at 8 (stating that "roughly 30% of all of its recently proposed sites (including small cells) involve cases where the locality failed to act in violation of the shot clocks."). According to WIA, one of its members "reports that 70% of its applications to deploy Small Wireless Facilities in the public ROWs during a two-year period exceeded the 90-day shot clock for installation of Small Wireless Facilities on an existing utility pole, and 47% exceeded the 150-day shot clock for the construction of new towers." WIA Comments at 7. A New Jersey locality took almost five years to deny a Sprint application. *See Sprint Spectrum L.P. v. Zoning Bd. of Adjustment of the Borough of Paramus, N.J.*, 21 F. Supp. 3d 381, 383, 387 (D.N.J. 2014), *aff'd*, 606 Fed. Appx. 669 (3d Cir. 2015). Another locality took almost three years to deny a Crown Castle application to install a DAS system. *See Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 WL 3357169, *6-8 (S.D.N.Y. 2013), *aff'd*, 552 Fed. Appx. 47 (2d Cir. 2014).

problematic.[56] Similarly, AT&T identified an instance in which it took a locality in California 800 days to process an application.[57] GCI provides an example in which it took an Alaska locality nine months to decide an application.[58] T-Mobile states that a community in Colorado and one in California have lengthy pre-application processes for all small cell installations that include notification to all nearby households, a public meeting, and the preparation of a report, none of which these jurisdictions view as triggering a shot clock.[59] Similarly, Lightower provides examples of long delays in processing siting applications.[60] Finally, Crown Castle describes a case in which a "town took approximately two years and nearly twenty meetings, with constantly shifting demands, before it would even 'deem complete' Crown Castle's application."[61]

27. Our Declaratory Ruling and Third Report and Order are intended to address these issues and outlier conduct. Our conclusions are also informed by findings, reports, and recommendations from the FCC Broadband Deployment Advisory Committee (BDAC), including the Model Code for Municipalities, the Removal of State and Local Regulatory Barriers Working Group report, and the Rates and Fees Ad Hoc Working Group report, which the Commission created in 2017 to identify barriers to deployment of broadband infrastructure, many of which are addressed here.[62] We also considered input from numerous state and local officials about their concerns, and how they have approached wireless deployment, much of which we took into account here. Our action is also consistent with congressional efforts to hasten deployment, including bi-partisan legislation pending in Congress like the STREAMLINE Small Cell Deployment Act and SPEED Act. The STREAMLINE Small Cell Deployment Act proposes to streamline wireless infrastructure deployments by requiring siting agencies to act on deployment requests within specified time frames and by limiting the imposition of onerous

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[56] WIA Comments at 8. WIA states that one of its "member reports that the wireless siting approval process exceeds 90 days in more than 33% of jurisdictions it surveyed and exceeds 150 days in 25% of surveyed jurisdictions." WIA Comments at 8. In some cases, WIA members have experienced delays ranging from one to three years in multiple jurisdictions—significantly longer than the 90- and 150-day time frames that the Commission established in 2009.

[57] *See* WIA Comments at 9 (citing and discussing AT&T's Comments in the 2016 Streamlining Public Notice, WT Docket No. 16-421).

[58] GCI Comments at 5-6.

[59] T-Mobile Comments at 21.

[60] Lightower submits that average processing timeframes have increased from 300 days in 2016 to approximately 570 days in 2017, much longer than the Commission's shot clocks. Lightower states that "forty-six separate jurisdictions in the last two years had taken longer than 150 days to consider applications, with twelve of those jurisdictions—representing 101 small wireless facilities—taking more than a year." Lightower Comments at 5-6. *See also* WIA Comments at 9 (citing and discussing Lightower's Comments in the 2016 Streamlining Public Notice, WT Docket No. 16-421).

[61] WIA Comments at 8 (citing and discussing Crown Castle's Comments in 2016 Streamlining Public Notice, WT Docket No. 16-421).

[62] BDAC Report of the Removal of State and Local Regulatory Barriers Working Group, https://www.fcc.gov/sites/default/files/bdac-regulatorybarriers-01232018.pdf (approved by the BDAC on January 23, 2018) (BDAC Regulatory Barriers Report); Draft Final Report of the Ad Hoc Committee on Rates and Fees to the BDAC, https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-rates-fees-wg-report-07242018.pdf (July 26, 2018) (Draft BDAC Rates and Fees Report); BDAC Model Municipal Code (Harmonized), https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-harmonization-wg-model-code-muni.pdf (approved July 26, 2018) (BDAC Model Municipal Code). The Draft Final Report of the Ad Hoc Committee on Rates and Fees to the BDAC was presented to the BDAC on July 26, 2018 but has not been voted by the BDAC as of the adoption of this Declaratory Ruling. Certain members of the Removal of State and Local Barriers Working Group also submitted a minority report disagreeing with certain findings in the BDAC Regulatory Barriers Report. *See* Minority Report Submitted by McAllen, TX, San Jose, CA, and New York, NY, GN Docket No. 17-83 (Jan 23, 2018); Letter from Kevin Pagan, City Attorney of McAllen to Marlene Dortch, Secretary, FCC (filed September 14, 2018).

conditions and fees.[63] The SPEED Act would similarly streamline federal permitting processes.[64] In the same vein, the Model Code for Municipalities adopts streamlined infrastructure siting requirements while other BDAC reports and recommendations emphasize the negative impact of high fees on infrastructure deployments.[65]

28. As do members of both parties of Congress and experts on the BDAC, we recognize the urgent need to streamline regulatory requirements to accelerate the deployment of wireless infrastructure for current needs and for the next generation of wireless service in 5G.[66] State government officials also have urged us to act to expedite the deployment of 5G technology, in particular, by streamlining overly burdensome regulatory processes to ensure that 5G technology will expand beyond just urban centers. These officials have expressed their belief that reducing high regulatory costs and delays in urban areas would leave more money and encourage development in rural areas.[67] "[G]etting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources. The solution is to streamline relevant policies—allowing more modern rules for modern infrastructure."[68] State officials have acknowledged that current regulations are "outdated" and "could hinder the timely arrival of 5G throughout the country," and urged the FCC "to push for more reforms that will streamline infrastructure rules from coast to coast."[69] Although many states and localities support our efforts, we acknowledge that there are others who advocated for different approaches, arguing, among other points,

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[63] *See, e.g.*, STREAMLINE Small Cell Deployment Act, S.3157, 115th Congress (2017-2018).

[64] *See, e.g.*, Streamlining Permitting to Enable Efficient Deployment of Broadband Infrastructure Act of 2017 (SPEED Act), S. 1988, 115th Cong. (2017).

[65] *See* BDAC Model Municipal Code; Draft BDAC Rates and Fees Report; BDAC Regulatory Barriers Report.

[66] *See, e.g.*, Letter from Patricia Paoletta, Counsel to Deloitte Consulting LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Sept. 20, 2018) ("Deloitte noted that, as with many technology standard evolutions, the value of being a first-mover in 5G will be significant. Being first to LTE afforded the United States macroeconomic benefits, as it became a test bed for innovative mobile, social, and streaming applications. Being first to 5G can have even greater and more sustained benefits to our national economy given the network effects associated with adding billions of devices to the 5G network, enabling machine-to-machine interactions that generates data for further utilization by vertical industries").

[67] Letter from Montana State Senator Duane Ankney to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (Duane Ankney July 31, 2018 *Ex Parte* Letter); Letter from Fred A. Lamphere, Butte County Sheriff, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1 (filed Sept. 11, 2018) (Fred A. Lamphere Sept. 11, 2018 *Ex Parte* Letter); Letter from Todd Nash, Susan Roberts, Paul Catstilleja, Wallowa County Board of Commissioners, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Aug. 20, 2018); Letter from Lonnie Gilbert, First Responder, National Black Growers Council Member, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1 (filed Sept. 12, 2018); Letter from Jason R. Saine, North Caroline House of Representatives, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1(filed Sept. 14, 2018) (Jason R. Saine Sept. 14, 2018 *Ex Parte* Letter) (minimal regulatory standard across the United States is critical to ensure that the United States wins the race to the 5G economy).

[68] Letter from LaWana Mayfield, City Council Member, Charlotte, NC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (LaWana Mayfield July 31, 2018 *Ex Parte* Letter); *see also* Letter from South Carolina State Representative Terry Alexander to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed August 7, 2018) ("[P]olicymakers at all levels of government must streamline complex siting stipulations that will otherwise slow down 5G buildout for small cells in particular."); Letter from Sal Pace, Pueblo County Commissioner, District 3, CO, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 30, 2018) (Sal Pace July 30, 2018 *Ex Parte* Letter) ("[T]he FCC should ensure that localities are fully compensated for their costs . . . Such fees should be reasonable and non-discriminatory, and should ensure that localities are made whole. Lastly, the FCC should set reasonable and enforceable deadlines for localities to act on wireless permit applications. . . . The distinction between siting large macro-towers and small cells should be reflected in any rulemaking.")

[69] Letter from Dr. Carolyn A. Prince, Chairwoman, Marlboro County Council, SC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (Dr. Carolyn Prince July 31, 2018 *Ex Parte* Letter)

that the FCC lacks authority to take certain actions.[70] We have carefully considered these views, but nevertheless find our actions here necessary and fully supported.

29. Accordingly, in this Declaratory Ruling and Third Report and Order, we act to reduce regulatory barriers to the deployment of wireless infrastructure and to ensure that our nation remains the leader in advanced wireless services and wireless technology.

III. DECLARATORY RULING

30. In this Declaratory Ruling, we note that a number of appellate courts have articulated different and often conflicting views regarding the scope and nature of the limits Congress imposed on state and local governments through Sections 253 and 332. In light of these diverging views, Congress's vision for a consistent, national policy framework, and the need to ensure that our approach continues to make sense in light of the relatively new trend towards the large-scale deployment of Small Wireless Facilities, we take this opportunity to clarify and update the FCC's reading of the limits Congress imposed. We do so in three main respects.

31. First, in Part III.A, we express our agreement with the views already stated by the First, Second, and Tenth Circuits that the "materially inhibit" standard articulated in 1997 by the Clinton-era FCC's *California Payphone* decision is the appropriate standard for determining whether a state or local law operates as a prohibition or effective prohibition within the meaning of Sections 253 and 332.

32. Second, in Part III.B, we note, as numerous courts have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can effectively prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress's limits in Sections 253 and 332. We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision. Namely, fees are only permitted to the extent that they represent a reasonable approximation of the local government's objectively reasonable costs, and are non-discriminatory.[71] In this section, we also identify specific fee levels for the deployment of Small Wireless Facilities that presumptively comply with this standard. We do so to help avoid unnecessary litigation, while recognizing that it is the standard itself, not the particular, presumptive fee levels we articulate, that ultimately will govern whether a particular fee is allowed under Sections 253 and 332. So fees above

[70] *See, e.g.*, City of Manhattan, KS Sept. 13, 2018 *Ex Parte* Letter at 1-2; Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter at 1-2; Damon Connolly Sept. 17, 2018 *Ex Parte* Letter at 1-2.

[71] Fees charged by states or localities in connection with Small Wireless Facilities would be "compensation" for purposes of Section 253(c). This Declaratory Ruling interprets Section 253 and 332(c)(7) in the context of three categories of fees, one of which applies to all deployments of Small Wireless Facilities while the other two are specific to Small Wireless Facilities deployments inside the ROW. (1) "Event" or "one-time" fees are charges that providers pay on a non-recurring basis in connection with a one-time event, or series of events occurring within a finite period. The one-time fees addressed in this Declaratory Ruling are not specific to the ROW. For example, a provider may be required to pay fees during the application process to cover the costs related to processing an application building or construction permits, street closures, or a permitting fee, whether or not the deployment is in the ROW. (2) Recurring charges for a Small Wireless Facility's use of or attachment to property inside the ROW owned or controlled by a state or local government, such as a light pole or traffic light, is the second category of fees addressed here, and is typically paid on a per structure/per year basis. (3) Finally, ROW access fees are recurring charges that are assessed, in some instances, to compensate a state or locality for a Small Wireless Facility's access to the ROW, which includes the area on, below, or above a public roadway, highway, street, sidewalk, alley, utility easement, or similar property (including when such property is government-owned). A ROW access fee may be charged even if the Small Wireless Facility is not using government owned property within the ROW. AT&T Comments at 18 (describing three categories of fees); Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 11 (filed Aug. 10, 2018) (Verizon Aug. 10, 2018 *Ex Parte* Letter) (characterizing fees as recurring or non-recurring); *see also* Draft BDAC Rates and Fees Report at p. 15-16. Unless otherwise specified, a reference to "fee" or "fees" herein refers to any one of, or any combination of, these three categories of charges.

those levels would be permissible under Sections 253 and 332 to the extent a locality's actual, reasonable costs (as measured by the standard above) are higher.

33. Finally, in Part III.C, we focus on a subset of other, non-fee provisions of state and local law that could also operate as prohibitions on service. We do so in particular by addressing state and local consideration of aesthetic concerns in the deployment of Small Wireless Facilities. We note that the Small Wireless Facilities that are the subject of this Declaratory Ruling remain subject to the Commission's rules governing Radio Frequency (RF) emissions exposure.[72]

A. Overview of the Section 253 and Section 332(c)(7) Framework Relevant to Small Wireless Facilities Deployment

34. In Sections 253(a) and 332(c)(7)(B) of the Act, Congress determined that state or local requirements that prohibit or have the effect of prohibiting the provision of service are unlawful and thus preempted.[73] Section 253(a) addresses "any interstate or intrastate telecommunications service," while Section 332(c)(7)(B)(i)(II) addresses "personal wireless services."[74] Although the provisions contain identical "effect of prohibiting" language, the Commission and different courts over the years have each employed inconsistent approaches to deciding what it means for a state or local legal requirement to have the "effect of prohibiting" services under these two sections of the Act. This has caused confusion among both providers and local governments about what legal requirements are permitted under Sections 253 and 332(c)(7). For example, despite Commission decisions to the contrary construing such language under Section 253, some courts have held that a denial of a wireless siting application will "prohibit or have the effect of prohibiting" the provision of a personal wireless service under Section 332(c)(7)(B)(i)(II) only if the provider can establish that it has a significant gap in service coverage in the

[72] *See* 47 CFR §§ 1.1307, 1.1310. We disagree with commenters who oppose the Declaratory Ruling on the basis of concerns regarding RF emissions. *See, e.g.*, Comments from Judy Aizuss, Comments from Jeffrey Arndt, Comments from Jeanice Barcelo, Comments from Kristin Beatty, Comments from James M. Benster, Comments from Terrie Burns, Comments from EMF Safety Network, Comments from Kate Reese Hurd, Comments from Marilynne Martin, Comments from Lisa Mayock, Comments from Kristen Moriarty Termunde, Comments from Sage Associates, Comments from Elizabeth Shapiro, Comments from Paul Silver, Comments from Natalie Ventrice. The Commission has authority to adopt and enforce RF exposure limits, and nothing in this Declaratory Ruling changes the applicability of the Commission's existing RF emissions exposure rules. *See, e.g.,* Section 704(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104 (directing Commission to "prescribe and make effective rules regarding the environmental effects of radio frequency emissions" upon completing action in then-pending rulemaking proceeding that included proposals for, *inter alia*, maximum exposure limits); 47 U.S.C. § 332(c)(7)(B)(iv) (recognizing legitimacy of FCC's existing regulations on environmental effects of RF emissions of personal wireless service facilities, by proscribing state and local regulation of such facilities on the basis of such effects, to the extent such facilities comply with Commission regulations concerning such RF emissions); 47 U.S.C. § 151 (creating the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service, . . . for the purpose of [*inter alia*] promoting safety of life and property through the use of wire and radio communications"). *See also* H.R. Rep. No. 204(I), 104th Cong., 1st Sess. 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61 (1996) (in legislative history of Section 704 of 1996 Telecommunications Act, identifying "adequate safeguards of the public health and safety" as part of a framework of uniform, nationwide RF regulations); ; *Reassessment of FCC Radiofrequency Exposure Limits and Policies*, First Report and Order, Further Notice of Proposed Rulemaking and Notice of Inquiry, 28 FCC Rcd 3498, 3530-31, para. 103, n.176 (2013).

[73] 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II).

[74] *Id.* The actions in this proceeding update the FCC's approach to Sections 253 and 332 by addressing effective prohibitions that apply to the deployment of services covered by those provisions. Our interpretations in this proceeding do not provide any basis for increasing the regulation of services deployed consistent with Section 621 of the Cable Communications Policy Act of 1984.

area and a lack of feasible alternative locations for siting facilities.[75] Other courts have held that evidence of an already-occurring or complete inability to offer a telecommunications service is required to demonstrate an effective prohibition under Section 253(a).[76] Conversely, still other courts like the First, Second, and Tenth Circuits have endorsed prior Commission interpretations of what constitutes an effective prohibition under Section 253(a) and recognized that, under that analytical framework, a legal requirement can constitute an effective prohibition of services even if it is not an insurmountable barrier.[77]

35. In this Declaratory Ruling, we first reaffirm, as our definitive interpretation of the effective prohibition standard, the test we set forth in *California Payphone*, namely, that a state or local legal requirement constitutes an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[78] We then explain how this "material inhibition" standard applies in the context of state and local fees and aesthetic requirements. In doing so, we confirm the First, Second, and Tenth Circuits' understanding that under this analytical framework, a legal requirement can "materially inhibit" the provision of services even if it is not an insurmountable barrier.[79] We also resolve the conflicting court interpretations of the

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[75] Courts vary widely regarding the type of showing needed to satisfy the second part of that standard. The First, Fourth, and Seventh Circuits have imposed a "heavy burden" of proof on applicants to establish a lack of alternative feasible sites, requiring them to show "not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try." *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 40 (1st Cir. 2014); *accord New Cingular Wireless PCS, LLC v. Fairfax County*, 674 F.3d 270, 277 (4th Cir. 2012); *T-Mobile Northeast LLC v. Fairfax County*, 672 F.3d 259, 266-68 (4th Cir. 2012) (*en banc*); *Helcher v. Dearborn County*, 595 F.3d 710, 723 (7th Cir. 2010) (*Helcher*). The Second, Third, and Ninth Circuits have held that an applicant must show only that its proposed facilities are the "least intrusive means" for filling a coverage gap in light of the aesthetic or other values that the local authority seeks to serve. *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999) (*Willoth*); *APT Pittsburgh Ltd. P'ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999) (*APT*); *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056-57 (9th Cir. 2014); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995-99 (9th Cir. 2009) (*City of Anacortes*).

[76] *See, e.g.*, *County of San Diego*, 543 F.3d at 579-80; *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 533-34 (8th Cir. 2007) (*City of St. Louis*).

[77] *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (*Municipality of Guayanilla*); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (*City of White Plains*); *RT Communications v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) ("[Section] 253(a) forbids any statute which prohibits or has 'the effect of prohibiting' entry. Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it.") (*RT Communications*) (*affirming Silver Star Tel. Co. Petition for Preemption and Declaratory Ruling*, 12 FCC Rcd 15639 (1997)).

[78] *California Payphone*, 12 FCC Rcd at 14206, para. 31. A number of circuit courts have cited *California Payphone* as the leading authority regarding the standard to be applied under Section 253(a). *See, e.g.*, *County of San Diego*, 543 F.3d at 578; *City of St. Louis*, 477 F.3d at 533; *Municipality of Guayanilla*, 450 F.3d at 18; *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004) (*City of Santa Fe*); *City of White Plains*, 305 F.3d at 76. Crown Castle argues that the Eighth and Ninth Circuit cited the FCC's *California Payphone* decision,but read the standard in an overly narrow fashion. *See, e.g.*, Letter from Kenneth J. Simon, Senior Vice Pres. and Gen. Counsel, Crown Castle, *et al*., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 12 (filed June 7, 2018) (Crown Castle June 7, 2018 *Ex Parte* Letter); *see also* Smart Communities Comments at 60-61 (describing circuit split). Some commenters cite selected dictionary definitions or otherwise argue for a narrow definition of "prohibit." *See, e.g.*, Smart Communities Reply at 53. But because they do not go on to dispute the validity of the *California Payphone* standard that has been employed not only by the Commission but also many courts, those arguments do not persuade us to depart from the *California Payphone* standard here.

[79] *See, e.g.*, *City of White Plains*, 305 F.3d at 76; *Municipality of Guayanilla*, 450 F.3d at 18; *see also, e.g.*, Crown Castle June 7, 2018 *Ex Parte* Letter at 12. Because the clarifications in this order should reduce uncertainty regarding the application of these provisions for state and local governments as well as stakeholders, we are not persuaded by some commenters' arguments that an expedited complaint process is required. *See, e.g.*, AT&T Comments at 28; CTIA Reply at 21. We do not address, at this time, recently-filed petitions for reconsideration of our August 2018 *Moratoria Declaratory Ruling*. *See, e.g.,* Smart Communities Petition for Reconsideration, WC

'effective prohibition' language so that continuing confusion on the meaning of Sections 253 and 332(c)(7) does not materially inhibit the critical deployments of Small Wireless Facilities and our nation's drive to deploy 5G.[80]

36. As an initial matter, we note that our Declaratory Ruling applies with equal measure to the effective prohibition standard that appears in both Sections 253(a) and 332(c)(7).[81] This ruling is consistent with the basic canon of statutory interpretation that identical words appearing in neighboring provisions of the same statute generally should be interpreted to have the same meaning.[82] Moreover, both of these provisions apply to wireless telecommunications services[83] as well as to commingled services and facilities.[84]

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Docket No. 17-84 & WT Docket No. 17-79 (filed Sept. 4, 2018); New York City Petition for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (filed Sept. 4, 2018). Nor do we address requests for clarification and/or action on other issues raised in the record beyond those expressly discussed in this order. These other issues include arguments regarding other statutory interpretations that we do not address here. *See, e.g.*, CTIA Reply at 23 (raising broader questions about the precise interplay of Section 253 and Section 332(c)(7)); Crown Castle June 7, 2018 *Ex Parte* Letter at 16-17 (raising broader questions about the scope of "legal requirements" under Section 253(a)). Consequently, this order should not be read as impliedly taking a position on those issues.

[80] *See, e.g.*, Crown Castle June 7, 2018 *Ex Parte* Letter at 11-12 (arguing that "[d]espite the Commission's efforts to define the boundaries of federal preemption under Section 253, courts have issued a number of conflicting decisions that have only served to confuse the preemption analysis sunder section 253" and that "the Commission should clarify that the *California Payphone* standard as interpreted by the First and Second Circuits is the appropriate standard going forward"); *see also* BDAC Regulatory Barriers Report at p. 9 ("The Commission should provide clarity on what actually constitutes an "excessive" fee for right-of-way access and use. The FCC should provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not "fair and reasonable." The Commission should specifically clarify that "fair and reasonable" compensation for right-of way access and use implies some relation to the burden of new equipment placed in the ROW or on the local asset, or some other objective standard."). Because our decision provides clarity by addressing conflicting court decisions and reaffirming that the "materially inhibits" standard articulated in the Commission's *California Payphone* decision is the appropriate standard for determining whether a state or local law operates as an effective prohibition within the meaning of Sections 253 and 332, we reject arguments that our action will increase conflicts and lead to more litigation. *See e.g.*, Letter from Michael Dylan Brennan, Mayor, City of University Heights, Ohio, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Sept. 19, 2018) (stating that "…this framing and definition of effective prohibition opens local governments to the likelihood of more, not less, conflict and litigation over requirements for aesthetics, spacing, and undergrounding").

[81] *See infra* Part III.A, B.

[82] *See County of San Diego*, 543 F.3d at 579 ("We see nothing suggesting that Congress intended a different meaning of the text 'prohibit or have the effect of prohibiting' in the two statutory provisions, enacted at the same time, in the same statute. * * * * * As we now hold, the legal standard is the same under either [Section 253 or 332(c)(7)]."); *see also, e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (reading same term used in different parts of the same Act to have the same meaning); *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973) (per curiam) ("[S]imilarity of language . . . is . . . a strong indication that the two statutes should be interpreted *pari passu*"); Verizon Comments at 9-10; AT&T Reply at 3-4; Crown Castle June 7, 2018 *Ex Parte* Letter at 15.

[83] Common carrier wireless services meet the definition of "telecommunications services," and thus are within the scope of Section 253(a) of the Act. *See, e.g.*, *Moratoria Declaratory Ruling*, FCC 18-111, para 142 n.523; *see also, e.g.*, League of Minnesota Cities Comments at 11; Verizon Reply at 9-10. While some commenters cite certain distinguishing factual characteristics between wireline and wireless services, the record does not reveal why those distinctions would be material to whether wireless telecommunications services are covered by Section 253 in the first instance. *See, e.g.*, City of San Antonio *et al*. Comments, Exh. A at 13; Virginia Joint Commenters Comments at 5, Exh. A at 45-46. To the contrary, Section 253(e) expressly preserves "application of section 332(c)(3) of this title to commercial mobile service providers" notwithstanding Section 253—a provision that would be meaningless if wireless telecommunications services already fell outside the scope of Section 253. 47 U.S.C. § 253(e). For this same reason, we also reject claims that the existence of certain protections for personal wireless services in Section 332(c)(7), or the phrase "nothing in this chapter" in Section 332(c)(7)(A), demonstrate that states' or localities'

37. As explained in *California Payphone* and reaffirmed here, a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially inhibits the provision of such services. We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service.[85] This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service

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regulations affecting wireless telecommunications services must fall outside the scope of Section 253. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at iii, 45-46; Smart Communities Comments at 56. Even if, as some parties argue, the phrase "nothing in this chapter" could be construed as preserving state or local decisions on the placement, construction, or modification of personal wireless service facilities from preemption by other sections of the Communications Act, Section 332(c)(7)(A) goes on to make clear that such state or local decisions are *not* immune from preemption if they violate any of the standards set forth in Section 332(c)(7)(B)--including Section 332(c)(7)(B)(i)(II)'s ban of requirements that "prohibit or have the effect of prohibiting" the provision of service, which is identical to the preemption provision in Section 253(a). Thus, states and localities may charge fees and dispose of applications relating to the matters subject to Section 332(c)(7) in any manner they deem appropriate, so long as that conduct does not amount to a prohibition or effective prohibition, as interpreted in this Declaratory Ruling or otherwise run afoul of federal or state law; but because Sections 332(c)(7)(B)(i)(II) and 253(a) use identical "effective prohibition" language, the standard for what is saved and what is preempted is the same under both provisions.

[84] *See infra* para. 40 (discussing use of small cells to close coverage gaps, including voice gaps); *see also, e.g.*, *Moratoria Declaratory Ruling*, FCC 18-111, para 145 n.531; *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 425, para. 190 (2018); Letter from Andre J. Lachance, Associate General Counsel, Verizon to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 3 (filed Sept. 19, 2018) (confirming that "telecommunications services can be provided over small cells and Verizon has deployed Small Wireless Facilities in its network that provide telecommunications services."); Letter from David M. Crawford, Senior Corporate Counsel, Fed. Reg. Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Sept. 19, 2018) (stating that "small wireless facilities are a critical component of T-Mobile's network deployment plans to support both the 5G evolution of wireless services, as well as more traditional services such as mobile broadband and even voice calls. T-Mobile, for example, uses small wireless facilities to densify our network to provide better coverage and greater capacity, and to provide traditional services such as voice calls in areas where our macro site coverage is insufficient to meet demand."); Letter from Henry G. Hultquist, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Sept. 20, 2018) ("AT&T has operated and continues to operate commercial mobile radio services as well as information services from small wireless facilities..."); *see also, e.g.*, *Coastal Communications Service v. City of New York*, 658 F. Supp. 2d 425, 441-42 (E.D.N.Y. 2009) (finding that a restriction on advertising on newly-installed payphones was subject to Section 253(a) where the advertising was a material factor in the provider's ability to provide the payphone service itself). The fact that facilities are sometimes deployed by third parties not themselves providing covered services also does not place such deployment beyond the purview of Section 253(a) or Section 332(c)(7)(B)(i) insofar as the facilities are used by wireless service providers on a wholesale basis to provide covered services (among other things). *See, e.g.*, T-Mobile Comments at 26. Given our conclusion that neither commingling of services nor the identity of the entity engaged in the deployment activity changes the applicability of Section 253(a) or Section 332(c)(7)(B)(i)(II) where the facilities are being used for the provisioning of services within the scope of the relevant statutory provisions, we reject claims to the contrary. *See, e.g.*, Colorado Communications and Utility Alliance *et al*. Comments at 15-16; City of San Antonio *et al*. Comments, Exh. A at 12; *id*., Exh. C at 13-15. Because local jurisdictions do not have the authority to regulate these interstate services, there is no basis for local jurisdictions to conduct proceedings on the types of personal wireless services offered over particular wireless service facilities or the licensee's service area, which are matters within the Commission's licensing authority. Furthermore, local jurisdictions do not have the authority to require that providers offer certain types or levels of service, or to dictate the design of a provider's network. See 47 U.S.C. § 332(c)(3)(A); *see also Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir. 2000).

[85] By "covered service" we mean a telecommunications service or a personal wireless service for purposes of Section 253 and Section 332(c)(7), respectively.

capabilities.[86] Under the *California Payphone* standard, a state or local legal requirement could materially inhibit service in numerous ways—not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services. Thus, an effective prohibition includes materially inhibiting additional services or improving existing services.[87]

38. Our reading of Section 253(a) and Section 332(c)(7)(B)(i)(II) reflects and supports a marketplace in which services can be offered in a multitude of ways with varied capabilities and performance characteristics consistent with the policy goals in the 1996 Act and the Communications Act. To limit Sections 253(a) and 332(c)(7)(B)(i)(II) to protecting only against coverage gaps or the like would be to ignore Congress's contemporaneously-expressed goals of "promot[ing] competition[,] . . . secur[ing] . . . higher quality services for American telecommunications consumers and encourage[ing] the rapid deployment of new telecommunications technologies."[88] In addition, as the Commission recently explained, the implementation of the Act "must factor in the fundamental objectives of the Act, including the deployment of a 'rapid, efficient . . . wire and radio communication service with adequate facilities at reasonable charges' and 'the development and rapid deployment of new technologies, products and services for the benefit of the public . . . without administrative or judicial delays[, and] efficient and

[86] *See, e.g.*, Crown Castle Comments at 54-55; Free State Foundation Comments at 12; T-Mobile Comments at 43-45; CTIA Reply at 14; WIA Reply at 26; Crown Castle June 7, 2018 *Ex Parte* Letter at 13-14; Letter from Kara Romagnino Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 8-9 (filed June 27, 2018) (CTIA June 27, 2018 *Ex Parte* Letter). As T-Mobile explains, for example, a provider might need to improve "signal strength or system capacity to allow it to provide reliable service to consumers in residential and commercial buildings." T-Mobile Comments at 43; *see also, e.g.*, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket Nos. 13-238, *et al.*, Notice of Proposed Rulemaking, 28 FCC Rcd 14238, 14253, para. 38 (2013) (observing that "DAS and small cell facilities[ ] are critical to satisfying demand for ubiquitous mobile voice and broadband services"). The growing prevalence of smart phones has only accelerated the demand for wireless providers to take steps to improve their service offerings. *See, e.g.*, *Twentieth Wireless Competition Report*, 32 FCC Rcd at 9011-13, paras. 62-65.

[87] Our conclusion finds further support in our broad understanding of the statutory term "service," which, as we explained in our recent *Moratoria Declaratory Ruling*, means "any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ, including to provide existing services more robustly, or at a higher level of quality—such as through filling a coverage gap, densification, or otherwise improving service capabilities." *Moratoria Declaratory Ruling*, FCC 18-111, para. 162 n.594; *see also Public Utility Comm'n of Texas Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3496, para. 74 (1997) (*Texas PUC Order)* (interpreting the scope of 'telecommunications services' covered by Section 253(a) and clarifying that it would be an unlawful prohibition for a state or locality to specify "the means or facilities" through which a service provider must offer service); Crown Castle June 7, 2018 *Ex Parte* Letter at 10-11 (discussing this precedent). We find this interpretation of "service" warranted not only under Section 253(a), but Section 332(c)(7)(B)(i)(II)'s reference to "services" as well.

[88] Preamble to the Telecommunications Act of 1996, Pub. Law. No. 104-104, § 202, 110 Stat. 56 (1996). Consequently, we reject arguments suggesting that the provision of some level of wireless service in the past necessarily demonstrates that there is no effective prohibition of service under the state or local legal requirements that applied during those periods or that an effective prohibition only is present if a provider can provide no covered service whatsoever. *See, e.g.*, City and County of San Francisco Comments at 25-26; Virginia Joint Commenters Comments, Exh. A at 31-33. Nor, in light of these goals, do we find it reasonable to interpret the protections of these provisions as doing nothing more than guarding against a monopoly as some suggest. *See, e.g.*, Smart Communities Comments, WC Docket No. 17-84, at 8-9 (filed June 15, 2017) cited in Smart Communities Comments at 57 n.141.

intensive use of the electromagnetic spectrum.'"[89] These provisions demonstrate that our interpretation of Section 253 and Section 332(c)(7)(B)(i)(II) is in accordance with the broader goals of the various statutes that the Commission is entrusted to administer.

39. *California Payphone* further concluded that providers must be allowed to compete in a "fair and balanced regulatory environment."[90] As reflected in decisions such as the Commission's *Texas PUC Order*, a state or local legal requirement can function as an effective prohibition either because of the resulting "financial burden" in an absolute sense, or, independently, because of a resulting competitive disparity.[91] We clarify that "[a] regulatory structure that gives an advantage to particular services or facilities has a prohibitory effect, even if there are no express barriers to entry in the state or local code; the greater the discriminatory effect, the more certain it is that entities providing service using the disfavored facilities will experience prohibition."[92] This conclusion is consistent with both Commission and judicial precedent recognizing the prohibitory effect that results from a competitor being treated materially differently than similarly-situated providers.[93] We provide our authoritative interpretation below of the circumstances in which a "financial burden," as described in the *Texas PUC Order*, constitutes an effective prohibition in the context of certain state and local fees.

40. As we explained above, we reject alternative readings of the effective prohibition language that have been adopted by some courts and used to defend local requirements that have the effect of prohibiting densification of networks. Decisions that have applied solely a "coverage gap"-based approach under Section 332(c)(7)(B)(i)(II) reflect both an unduly narrow reading of the statute and an outdated view of the marketplace.[94] Those cases, including some that formed the foundation for

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[89] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, FCC 18-30, para. 62 (rel. Mar. 30, 2018) (*Wireless Infrastructure Second R&O*) (quoting 47 U.S.C. §§ 151, 309(j)(3)(A), (D)).

[90] *California Payphone*, 12 FCC Rcd at 14206, para. 31.

[91] *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81; *see also, e.g.*, Crown Castle June 7, 2018 *Ex Parte* at 10-11, 13.

[92] Crown Castle June 7, 2018 *Ex Parte* Letter at 13.

[93] *See, e.g.*, *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81; *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities*, Declaratory Ruling, 15 FCC Rcd 15168, 15173, paras. 12-13 (2000) (*Western Wireless Order*); *Pittencrieff Communications, Inc. Petition for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 1735, 1751-52, para. 32 (1997) (*Pittencrieff*), *aff'd*, *Cellular Telecomm. Indus. Ass'n v. FCC*, 168 F.3d 1332 (5th Cir. 1999); *City of White Plains*, 305 F.3d at 80.

[94] Smart Communities seeks clarification of whether this Declaratory Ruling is meant to say that the "coverage gap" standard followed by a number of courts should include consideration of capacity as well as coverage issues. Letter from Gerard Lavery Lederer, Counsel, Smart Communities and Special Districts Coalition, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Att. at 17 (Sept. 19, 2018) (Smart Communities Sept. 19 *Ex Parte* Letter). We are not holding that prior "coverage gap" analyses are consistent with the standards we articulate here as long as they also take into account "capacity gaps"; rather, we are articulating here the effective prohibition standard that should apply while, at the same time, noting one way in which prior approaches erred by requiring coverage gaps. Accordingly, we reject both the version of the "coverage gap" test followed by the First, Fourth, and Seventh Circuits (requiring applicants to show "not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try") and the version endorsed by the Second, Third, and Ninth Circuits (requiring applicants to show that the proposed facilities are the "least intrusive means" for filling a coverage gap) *See supra* n. 75. We also note that some courts have expressed concern about alternative readings of the statute that would lead to extreme outcomes—either always requiring a grant under some interpretations, or never preventing a denial under other interpretations. *See, e.g.*, *Willoth*, 176 F.3d at 639-41; *APT*, 196 F.3d at 478-79; *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999); *AT&T Wireless PCS v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 1998) (*City Council of Virginia Beach*); *see also, e.g.*, Greenling Comments at 2; City and County of San Francisco Reply

"coverage gap"-based analytical approaches, appear to view wireless service as if it were a single, monolithic offering provided only via traditional wireless towers.[95] By contrast, the current wireless marketplace is characterized by a wide variety of offerings with differing service characteristics and deployment strategies.[96] As Crown Castle explains, coverage gap-based approaches are "simply

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at 16. Our interpretation avoids those concerns while better reflecting the text and policy goals of the Communications Act and 1996 Act than coverage gap-based approaches ultimately adopted by those courts. Our approach ensures meaningful constraints on state and local conduct that otherwise would prohibit or have the effect of prohibiting the provision of personal wireless services. At the same time, our standard does not preclude all state and local denials of requests for the placement, construction, or modification of personal wireless service facilities, as explained below. *See infra* III.B, C.

[95] *See, e.g.*, *Willoth*, 176 F.3d at 641-44; *360 Degrees Commc'ns Co. v.Board of Supervisors of Albemarle County*, 211 F.3d 79, 86-88 & n.1 (4th Cir. 2000) (*Albemarle County*); *see also, e.g.*, ExteNet Comments at 29; T-Mobile Comments at 42; Verizon Comments at 18; WIA Comments at 38-40. Even some cases that implicitly recognize the limitations of a gap-based test fail to account for those limitations in practice when applying Section 332(c)(7)(B)(i)(II). *See, e.g.*, *Second Generation Properties v. Town of Pelham*, 313 F.3d 620, 633 n.14 (4th Cir. 2002) (discussing scenarios where a carrier has coverage but insufficient capacity to adequately handle the volume of calls or where new technology emerges and a carrier would like to use it in areas that already have coverage using prior-generation technology). Courts that have sought to identify limited set of characteristics of personal wireless services covered by the Act essentially allow actual or effective prohibition of many personal wireless services that providers wish to offer with additional or more advanced characteristics. *See, e.g.*, *Willoth*, 176 F.3d at 641-43 (drawing upon certain statutory definitions); *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999) (*Borough of Ho-Ho-Kus*) (concluding that it should be up to state or local authorities to assess and weigh the benefits of differing service qualities); *Albemarle County*, 211 F.3d at 87 (citing 47 CFR §§ 22.99, 22.911(b) as noting the possibility of some 'dead spots'); *cf. USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817 (8th Cir. 2006) (describing as a "dubious proposition" the argument that a denial of a request to construct a tower resulting in "less than optimal" service quality could be an effective prohibition). An outcome that allows the actual or effective prohibition of some covered services is contrary to the Act. Section 253(a) applies to any state or local legal requirement that prohibits or has the effect of prohibiting any entity from providing "any" interstate or intrastate telecommunications service, 47 U.S.C. § 253(a). Similarly, Section 332(c)(7)(B)(i)(II) categorically precludes state or local regulation of the placement, construction, or modification of personal wireless service facilities that prohibits or has the effect of prohibiting the provision of personal wireless "services." 47 U.S.C. § 332(c)(7)(B)(i)(II). We find the most natural interpretation of these sections is that any service that meets the definition of "telecommunications service" or "personal wireless service" is encompassed by the language of each provision, rather than only some subset of such services or service generally. The notion that such state or local regulation permissibly could prohibit some personal wireless services, so long as others are available, is at odds with that interpretation. In addition, as we explain above, a contrary approach would fail to advance important statutory goals as well as the interpretation we adopt. Further, the approach reflected in these court decisions could involve state or local authorities "inquir[ing] into and regulat[ing] the services offered—an inquiry for which they are ill-qualified to pursue and which could only delay infrastructure deployment." Crown Castle June 7, 2018 *Ex Parte* Letter at 14. Instead, our effective prohibition analysis focuses on the service the provider wishes to provide, incorporating the capabilities and performance characteristics it wishes to employ, including facilities deployment to provide existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless service for the benefit of the public.

[96] *See generally, e.g.*, *Twentieth Wireless Competition Report*, 32 FCC Rcd at 8968; *see also, e.g.*, T-Mobile Comments at 42-43; AT&T Reply at 4-5; CTIA Reply at 13-14; WIA Reply at 23-24; Crown Castle June 7, 2018 *Ex Parte* Letter at 15. We do not suggest that viewing wireless service as if it were a single, monolithic offering provided only via traditional wireless towers would have reflected an accurate understanding of the marketplace in the past, even if it might have been somewhat more understandable that courts held such a simplified view at that time. Rather, the current marketplace conditions highlight even more starkly the shortcomings of coverage gap-based approaches, which do not account for other characteristics and deployment strategies. *See, e.g.*, *Twentieth Wireless Competition Report*, 32 FCC Rcd at 8974-75, para. 12 (observing that "[p]roviders of mobile wireless services typically offer an array of mobile voice and data services," including "interconnected mobile voice services"); *id*. at 8997-97, paras. 42-43 (discussing various types of wireless infrastructure deployment to, among

incompatible with a world where the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network coverage."[97] Moreover, a critical feature of these new wireless builds is to accommodate increased in-building use of wireless services, necessitating deployment of small cells in order to ensure quality service to wireless callers within such buildings.[98]

41. Likewise, we reject the suggestion of some courts like the Eighth and Ninth Circuits that evidence of an existing or complete inability to offer a telecommunications service is required under 253(a).[99] Such an approach is contrary to the material inhibition standard of *California Payphone* and the correct recognition by courts "that a prohibition does not have to be complete or 'insurmountable'" to constitute an effective prohibition.[100] Commission precedent beginning with *California Payphone* itself makes clear that an insurmountable barrier is not required to find an effective prohibition under Section 253(a).[101] The "effectively prohibit" language must have some meaning independent of the "prohibit"

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other things, "improve spectrum efficiency for 4G and future 5G services," "to fill local coverage gaps, to densify networks and to increase local capacity").

[97] Crown Castle June 7, 2018 *Ex Parte* Letter at 15; *see also id*. at 13 ("Densification of networks will be key for augmenting the capacity of existing networks and laying the groundwork for the deployment of 5G."); *id*. at 15-16 ("When trying to maximize spectrum re-use and boost capacity, moving facilities by just a few hundred feet can mean the difference between excellent service and poor service. The FCC's rules, therefore, must account for the effect siting decisions would have on every level of service, including increasing capacity and adding new spectrum bands. Practices and decisions that prevent carriers from doing either materially prohibit the provision of telecommunications service and thus should be considered impermissible under Section 332."). Contrary approaches appear to occur in part when courts' policy balancing places more importance on broadly preserving state and local authority than is justified. *See, e.g.*, *APT*, 196 F.3d at 479; *Albemarle County*, 211 F.3d at 86; *City Council of Virginia Beach*, 155 F.3d at 429; *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002); *see also, e.g.*, League of Arizona Cities *et al.* Joint Comments at 45; Smart Communities Reply at 33. As explained above, our interpretation that "telecommunications services" in Section 253(a) and "personal wireless services" in Section 332(c)(7)(B)(i)(II) are focused on the covered services that providers seek to provide —including the relevant service characteristics they seek to incorporate—not only is consistent with the text of those provisions but better reflects the broader policy goals of the Communications Act and the 1996 Act.

[98] *See* WIA Comments at 39; T-Mobile Comments at 43-44.

[99] *See, e.g.*, *County of San Diego*, 543 F.3d at 577, 579-80; *City of St. Louis*, 477 F.3d at 533-34; *see also, e.g.*, Virginia Joint Commenters Comments, Exh. A at 39-41. Although the Ninth Circuit in *County of San Diego* found that "the unambiguous text of §253(a)" precluded a prior Ninth Circuit approach that found an effective prohibition based on broad governmental discretion and the "mere possibility of prohibition," that holding is not implicated by our interpretations here. *County of San Diego*, 543 F.3d at 578; *cf. City of St. Louis*, 477 F.3d at 532. Consequently, those decisions do not preclude the Commission's interpretations here, *see, e.g.*, Verizon Reply at 7, and we reject claims to the contrary. *See, e.g.*, Smart Communities Comments at 60.

[100] *City of White Plains*, 305 F.3d at 76 (citing *RT Commc'ns*, 201 F.3d at 1268); *see also, e.g.*, *Municipality of Guayanilla*, 450 F.3d at 18 (quoting *City of White Plains*, 305 F.3d at 76 and citing *City of Santa Fe*, 380 F.3d at 1269); Crown Castle June 7, 2018 *Ex Parte* Letter at 12; Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach at 5. Indeed, the Eighth Circuit's *City of St. Louis* decision acknowledges that under Section 253 "[t]he plaintiff need not show a complete or insurmountable prohibition," even while other aspects of that decision suggest that an insurmountable barrier effectively would be required. *City of St. Louis*, 477 F.3d at 533 (citing *City of White Plains*, 305 F.3d at 76).

[101] In *California Payphone*, the Commission concluded that the ordinance at issue "does not 'prohibit' the ability of any payphone service provider to provide payphone service in the Central Business District within the meaning of section 253(a)," but went on to evaluate the possibility of an effective prohibition by considering "whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *California Payphone*, 12 FCC Rcd at 14205, 14206, paras. 28, 31. In the *Texas PUC Order*, the Commission found that state law build-out requirements would require "substantial financial investment" and a "comparatively high cost per loop sold" in particular areas, interfering with the

language, and we find that the interpretation of the First, Second, and Tenth Circuits reflects that principle, while being more consistent with the *California Payphone* standard than the approach of the Eighth and Ninth Circuits.[102] The reasonableness of our interpretation that 'effective prohibition' does not require a showing of an insurmountable barrier to entry is demonstrated not only by a number of circuit courts' acceptance of that view, but in the Supreme Court's own characterization of Section 253(a) as "prohibit[ing] state and local regulation that *impedes* the provision of 'telecommunications service.'"[103]

42. The Eighth and Ninth Circuits' suggestion that a provider must show an insurmountable barrier to entry in the jurisdiction imposing the relevant regulation is at odds with relevant statutory purposes and goals, as well. Section 253(a) is designed to protect "any entity" seeking to provide telecommunications services from state and local barriers to entry, and Sections 253(b) and (c) emphasize the importance of "competitively neutral" and "nondiscriminatory" treatment of providers.[104] Yet focusing on whether the carrier seeking relief faces an insurmountable barrier to entry would lead to disparities in statutory protections among providers based merely on considerations such as their access to capital and the breadth or narrowness of their entry strategies.[105] In addition, the Commission has observed in connection with Section 253: "Each local government may believe it is simply protecting the

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"statewide entry" plans that new entrants "may reasonable contemplate" in violation of Section 253(a) notwithstanding claims that the specific new entrants at issue had "'vast resources and access to capital' sufficient to meet those added costs. *Texas PUC Order*, 13 FCC Rcd at 3498, para. 78. The Commission also has expressed "great concern" about an exclusive rights-of-way access agreement that "appear[ed] to have the potential to adversely affect the provision of telecommunications services by facilities-based providers, in violation of the provision of section 253(a)." *Minnesota Order*, 14 FCC Rcd at 21700, para. 3. As another example, in the *Western Wireless Order*, the Commission stated that a "universal service fund mechanism that provides funding only to ILECs" would likely violate Section 253(a) not because it was insurmountable but because it would "effectively lower the price of ILEC-provided service relative to competitor-provided service" and thus "give customers a strong incentive to choose service from ILECs rather than competitors." *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8.

[102] We discuss specific applications of the *California Payphone* standard in the context of certain fees and non-fee regulations in the sections below; we leave others to be addressed case-by-case as they arise or otherwise are taken up by the Commission or courts in the future.

[103] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 491 (2002) (emphasis added); *see also, e.g.*, Level 3 Communications, Petition for a Writ of Certiorari, *Level 3 Communications, LLC v. City of St. Louis*, No. 08-626, at 13 (filed Nov. 7, 2008) ("[T]he term '[p]rohibit' commonly has a less absolute meaning than that adopted below, and properly refers to actions that 'hold back,' 'hinder,' or 'obstruct.'" (quoting Random House Webster's Unabridged Dictionary 1546 (2d ed. 1998)). We thus are not compelled to interpret 'effective prohibition' to set the high bar suggested by some commenters based on other dictionary definitions. Smart Communities Petition for Reconsideration, WC Docket No. 17-84, WT Docket No. 17-79 at 7 (filed Sept. 4, 2018). Because we are unpersuaded that the statutory terminology requires us to interpret an effective prohibition as satisfied only by an insurmountable barrier to entry, we likewise reject commenters' attempts to argue that "effective prohibition" must be understood to set a higher bar by comparison to the "impairment" language in Section 251 of the Act and associated regulatory interpretations of network unbundling requirements taken from that context. *Id* at 6. In addition, commenters do not demonstrate why the statutory framework and regulatory context of network unbundling under Section 251—and the specific concerns about access by non-facilities-based providers to competitive networks underlying the court precedent they cite—is sufficiently analogous to that of Section 253 and Section 332(c)(7)(B)(i)(II) that statements from that context should inform our interpretation here. *See, e.g.*, *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 392. In responding to these discrete arguments raised in a petition for reconsideration of the *Moratoria Declaratory Ruling* that bear on actions we take in this order we do not thereby resolve any of the petition's arguments with respect to that order. The requests for relief raised in the petition remain pending in full.

[104] 47 U.S.C. § 253(a), (b), (c).

[105] *See, e.g.*, *Texas PUC Order*, 13 FCC Rcd at 3498, para. 78 (rejecting claims that there should be a higher bar to find an effective prohibition for providers with significant financial resources and recognizing that the effects of the relevant state requirements on a given provider could differ depending on the planned geographic scope of entry).

interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. We believe that Congress' recognition of this fact was the genesis of its grant of preemption authority to this Commission."[106] As illustrated by our consideration of effective prohibitions flowing from state and local fees, there also can be cases where a narrow focus on whether an insurmountable barrier can be shown within the jurisdiction imposing a particular legal requirement would neglect the serious effects that flow through in other jurisdictions as a result, including harms to regional or national deployment efforts.[107]

B. State and Local Fees

43. Federal courts have long recognized that the fees charged by local governments for the deployment of communications infrastructure can run afoul of the limits Congress imposed in the effective prohibition standard embodied in Sections 253 and 332.[108] In *Municipality of Guayanilla*, for example, the First Circuit addressed whether a city could lawfully charge a 5 percent gross revenue fee. The court found that the "5% gross revenue fee would constitute a substantial increase in costs" for the provider, and that the ordinance consequently "will negatively affect [the provider's] profitability."[109] The fee, together with other requirements, thus "place a significant burden" on the provider.[110] In light of this analysis, the First Circuit agreed that the fee "'materially inhibits or limits the ability'" of the provider "'to compete in a fair and balanced legal and regulatory environment.'"[111] The court thus held that the fee does not survive scrutiny under Section 253. In doing so, the First Circuit also noted that the inquiry is not limited to the impact that a fee would have on deployment in the jurisdiction that imposes the fee. Rather, the court noted the aggregate effect of fees when totaled across all relevant jurisdictions.[112] At the same time, the First Circuit did not decide whether the fair and reasonable compensation allowed under Section 253 must be limited to cost recovery or, at the very least, related to the actual use of the ROW.[113]

44. In *City of White Plains*, the Second Circuit likewise faced a 5 percent gross revenue fee, which it found to be "[t]he most significant provision" in a franchise agreement implementing an ordinance that the court concluded effectively prohibited service in violation of Section 253.[114] While the court noted that "compensation is . . . sometimes used as a synonym for cost,"[115] it ultimately did not resolve whether fair and reasonable compensation "is limited to cost recovery, or whether it also extends to a reasonable rent," relying instead on the fact that "White Plains has not attempted to charge Verizon

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[106] *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21442, para. 106 (1997) (*TCI Cablevision Order*).

[107] *See infra* Part III.B.

[108] The Commission also has recognized the potential for fees to result in an effective prohibition. *See, e.g.*, *Pittencrieff*, 13 FCC Rcd at 1751-52, para. 37 (observing that "even a neutral [universal service] contribution requirement might under some circumstances effectively prohibit an entity from offering a service").

[109] *Municipality of Guayanilla*, 450 F.3d at 18-19.

[110] *Id*. at 19.

[111] *Id*. (quoting *City of White Plains*, 305 F.3d at 76).

[112] *Municipality of Guayanilla*, 450 F.3d at 17 (looking at the aggregate cost of fees charged across jurisdictions given the interconnected nature of the service).

[113] *Id*. at 22 ("We need not decide whether fees imposed on telecommunications providers by state and local governments must be limited to cost recovery. We agree with the district court's reasoning that fees should be, at the very least, related to the actual use of rights of way and that 'the costs [of maintaining those rights of way] are an essential part of the equation.'").

[114] *City of White Plains*, 305 F.3d at 77.

[115] *Id.* In this context, the court stated that the term "compensation" is "flexible" and capable of different meanings depending on the context in which it is used. *Id.*

the fee that it seeks to charge TCG," thus failing Section 253's "competitively neutral and nondiscriminatory" standard.[116] But the court did observe that "Section 253(c) requires compensation to be reasonable essentially to prevent monopolist pricing by towns."[117]

45. In another example, the Tenth Circuit in *City of Santa Fe* addressed a $6,000 per foot fee set for Qwest's use of the ROW.[118] The court held "that the rental provisions are prohibitive because they create[d] a massive increase in cost" for Qwest.[119] The court recognized that Section 253 allows the recovery of cost-based fees, though it ultimately did not decide whether to "measure 'fair and reasonable' by the City's costs or by a 'totality of circumstances test'" applied in other courts because it determined that the fees at issue were not cost-based and "fail[ed] even the totality of the circumstances test."[120] Consequently, the fee was preempted under Section 253.

46. At the same time, the courts have adopted different approaches to analyzing whether fees run afoul of Section 253, at times failing even to articulate a particular test.[121] Among other things, courts have expressed different views on whether Section 253 limits states' and localities' fees to recovery of their costs or allows fees set in excess of that level.[122] We articulate below the Commission's interpretation of Section 253(a) and the standards we adopt for evaluating when a fee for Small Wireless Facility deployment is preempted, regardless how the fee is challenged. We also clarify that the Commission interprets Section 332(c)(7)(B)(i)(II) to have the same substantive meaning as Section 253(a).

47. *Record Evidence on Costs Associated with Small Wireless Facilities.* Keeping pace with the demands on current 4G networks and upgrading our country's wireless infrastructure to 5G require

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[116] *City of White Plains*, 305 F.3d at 79. In particular, the court concluded that "fees that exempt one competitor are inherently not 'competitively neutral,' regardless of how that competitor uses its resulting market advantage," *id.* at 80, and thus "[a]llowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goals of the [1996 Act]," *id.* at 79.

[117] *Id*.

[118] *City of Santa Fe*, 380 F.3d at 1270-71.

[119] *Id*. at 1271.

[120] *Id*. at 1272 (observing that "[t]he City acknowledges . . . that the rent required by the Ordinance is not limited to recovery of costs").

[121] *Compare, e.g., Municipality of Guayanilla*, 450 F.3d at 18-19 (finding that fees were significant and had the effect of prohibiting service); *City of Santa Fe*, 380 F.3d at 1271 (similar); *with, e.g.*, *Qwest v. Elephant Butte Irrigation Dist.*, 616 F. Supp. 2d 1110, 1123-24 (D.N.M. 2008) (rejecting Qwest's reliance on preceding finding of effective prohibition from quadrupled costs where the fee at issue was a penny per foot); *Qwest v. City of Portland*, 2006 WL 2679543, *15 (D. Or. 2006) (asserting with no explanation that "a registration fee of $35 and a refundable deposit of $2,000 towards processing expenses . . . could not possibly have the effect of prohibiting Qwest from providing telecommunications services").

[122] For example and as noted above, in *Municipality of Guayanilla* the First Circuit reserved judgment on whether the fair and reasonable compensation allowed under Section 253 must be limited to cost recovery or if it was sufficient if the compensation was related to the actual use of rights of way. *Municipality of Guayanilla*, 450 F.3d at 22. Other courts have found reasonable compensation to require cost-based fees. *XO Missouri v. City of Maryland Heights*, 256 F. Supp. 2d 987, 993-95 (E.D. Mo. 2003) (*City of Maryland Heights*); *Bell Atlantic–Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 818 (D. Md. 1999) (*Prince George's County*) vacated on other grounds, 212 F.3d 863 (4th Cir. 2000). Still other courts have applied a test that weighs a number of considerations when evaluating whether compensation is fair and reasonable. *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000) (*City of Dearborn*) (considering "the amount of use contemplated . . . the amount that other providers would be willing to pay . . . and the fact that TCG had agreed in earlier negotiations to a fee almost identical to what it now was challenging as unfair").

the deployment of many more Small Wireless Facilities.[123] For example, Verizon anticipates that network densification and the upgrade to 5G will require 10 to 100 times more antenna locations than currently exist. AT&T estimates that providers will deploy hundreds of thousands of wireless facilities in the next few years alone—equal to or more than the number providers have deployed in total over the last few decades.[124] Sprint, in turn, has announced plans to build at least 40,000 new small sites over the next few years.[125] A report from Accenture estimates that, overall, during the next three or four years, 300,000 small cells will need to be deployed—a total that it notes is "roughly double the number of macro cells built over the last 30 years."[126]

48. The many-fold increase in Small Wireless Facilities will magnify per-facility fees charged to providers. Per-facility fees that once may have been tolerable when providers built macro towers several miles apart now act as effective prohibitions when multiplied by each of the many Small Wireless Facilities to be deployed. Thus, a per-facility fee may affect a prohibition on 5G service or the densification needed to continue 4G service even if that same per-facility fee did not effectively prohibit previous generations of wireless service.

49. Cognizant of the changing technology and its interaction with regulations created for a previous generation of service, the *2017 Wireline Infrastructure NPRM/NOI* sought comment on whether government-imposed fees could act as a prohibition within the meaning of Section 253, and if so, what fees would qualify for 253(c)'s savings clause.[127] The *2017 Wireless Infrastructure NPRM/NOI* similarly sought comment on the scope of Sections 253 and 332(c)(7) and on any new or updated guidance the Commission should provide, potentially through a Declaratory Ruling.[128] In particular, the Commission sought comment on whether it should provide further guidance on how to interpret and apply the phrase "prohibit or have the effect of prohibiting."[129]

50. We conclude that ROW access fees, and fees for the use of government property in the ROW,[130] such as light poles, traffic lights, utility poles, and other similar property suitable for hosting

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[123] *See* CTIA June 27, 2018 *Ex Parte* Letter at 6 ("[s]mall cell technology is needed to support 4G densification and 5G connectivity."); *see also* Accelerating Wireless Deployment by Removing Barriers to Infrastructure Investment, Report and Order, 32 FCC Rcd 9760, 9765, para. 12 (2017) (*2017 Pole Replacement Order*) (recognizing that Small Wireless Facilities will be increasingly necessary to support the rollout of next-generation services).

[124] *See* Verizon Comments at 3; AT&T Comments at 1.

[125] *See* Letter from Keith C. Buell, Senior Counsel, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Feb. 21, 2018).

[126] Accelerating Future Economic Value Report at 6; *see also* Deloitte 5G Paper.

[127] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3266, 3296-97, paras. 100 -101 and 3298-99, paras. 104-105 (2017).

[128] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3360, para. 87. In addition, in 2016, the Wireless Telecommunications Bureau released a public notice seeking comment on ways to expedite the deployment of next generation wireless infrastructure, including providing guidance on application processing fees and charges for use of rights of way. *See Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Public Notice, 31 FCC Rcd 13360 (WTB 2016).

[129] *Wireless Infrastructure NPRM/NOI,* 32 FCC Rcd at 3362*,* para. 90.

[130] We do not find these fees to be taxes within the meaning of Section 601(c)(2) of the 1996 Act. *See, e.g.*, Smart Communities Reply at 36 (quoting the savings clause for "State or local law pertaining to taxation" in Section 601(c)(2) of the 1996 Act). It is ambiguous whether a fee charged for access to ROWs should be viewed as a tax for purposes of Section 601(c)(2) of the 1996 Act. *See, e.g.*, *City of Dallas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997) (distinguishing "the price paid to rent use of public right-of-ways" from a "tax" and citing similar precedent). Given that Congress clearly contemplated in Section 253(c) that states' and localities' fees for access to ROWs could be subject to preemption where they violate Section 253—or else the savings clause in that regard would be superfluous—we find the better view is that such fees do not represent a tax encompassed by Section 601(c)(2) of

Small Wireless Facilities, as well as application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of Small Wireless Facilities inside and outside the ROW, violate Sections 253 or 332(c)(7) unless these conditions are met: (1) the fees are a reasonable approximation of the state or local government's costs,[131] (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.[132]

51. We base our interpretation on several considerations, including the text and structure of the Act as informed by legislative history, the economics of capital expenditures in the context of Small Wireless Facilities (including the manner in which capital budgets are fixed *ex ante*), and the extensive record evidence that shows the actual effects that state and local fees have in deterring wireless providers from adding to, improving, or densifying their networks and consequently the service offered over them (including, but not limited to, introducing next-generation 5G wireless service). We address each of these considerations in turn.

52. *Text and Structure.* We start our analysis with a consideration of the text and structure of Section 253. That section contains several related provisions that operate in tandem to define the roles that Congress intended the federal government, states, and localities to play in regulating the provision of telecommunications services. Section 253(a) sets forth Congress's intent to preempt state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[133] Section 253(b), in turn, makes clear Congress's intent that state "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights

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the 1996 Act. We do not address whether particular fees could be considered taxes under other statutes not administered by the FCC, but we reject the suggestion that tests courts use to determine what constitute "taxes" in the context of such other statutes should apply to the Commission's interpretation of Section 601(c)(2) here in light of the statutory context for Section 601(c)(2) in the 1996 Act and the Communications Act discussed above. *See, e.g.*, *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 & n.3 (9th Cir. 2006) (holding that particular fees at issue there were taxes for purposes of the Tax Injunction Act and stating in dicta that had the Tax Injunction Act not applied it would agree with the conclusion of the district court that it was covered by Section 601(c)(2) of the 1996 Act); *MCI Communications Services, Inc. v. City of Eugene*, 359 F. Appx. 692, 696 (9th Cir. 2009) (asserting without analysis that the same test would apply to determine if a fee constitutes a tax under both the Tax Injunction Act and Section 601(c)(2) of the 1996 Act).

[131] By costs, we mean those costs specifically related to and caused by the deployment. These include, for instance, the costs of processing applications or permits, maintaining the ROW, and maintaining a structure within the ROW. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 114 (D.P.R. 2005) (*Guayanilla District Ct. Opinion*), *aff'd*, 450 F.3d 9 (1st Cir. 2006) ("fees charged by a municipality need to be related to the degree of actual use of the public rights-of way" to constitute fair and reasonable compensation under Section 253(c)).

[132] We explain above what we mean by "fees." *See supra* note 71. Contrary to some claims, we are not asserting a "general ratemaking authority." Virginia Joint Commenters Comments at 6. Our interpretations in this order bear on whether and when fees associated with Small Wireless Facility deployment have the effect of prohibiting wireless telecommunications service and thus are subject to preemption under Section 253(a), informed by the savings clause in Section 253(c). While that can implicate issues surrounding how those fees were established, it does so only to the extent needed to vindicate Congress's intent in Section 253. We do not interpret Section 253(a) or (c) to authorize the regulation or establishment of state and local fees as an exercise in itself. We likewise are not persuaded by undeveloped assertions that the Commission's interpretation of Section 253 in the context of fees would somehow violate constitutional separation of powers principles. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 52.

[133] 47 U.S.C. § 253(a).

of consumers" are not preempted.[134] Of particular importance in the fee context, Section 253(c) reflects a considered policy judgment that "[n]othing in this section" shall prevent states and localities from recovering certain carefully delineated fees. Specifically, Section 253(c) makes clear that fees are not preempted that are "fair and reasonable" and imposed on a "competitively neutral and nondiscriminatory basis," for "use of public rights-of-way on a "nondiscriminatory basis," so long as they are "publicly disclosed" by the government.[135] Section 253(d), in turn, provides one non-exclusive mechanism by which a party can obtain a determination from the Commission of whether a specific state or local requirement is preempted under Section 253(a)—namely, by filing a petition with the Commission.[136]

53. In reviewing this statutory scheme, the Commission previously has construed Section 253(a) as "broadly limit[ing] the ability of state[s] to regulate," while the remaining subsections set forth "defined areas in which states may regulate."[137] We reaffirm this conclusion, consistent with the view of most courts to have considered the issue—namely, that Sections 253(b) and (c) make clear that certain state or local laws, regulations, and legal requirements are not preempted under the expansive scope of Section 253(a).[138] Our interpretation of Section 253(a) is informed by this statutory context,[139] and the observation of courts that when a preemption provision precedes a narrowly-tailored savings clause, it is reasonable to infer that Congress intended a broad preemptive scope.[140] We need not decide today whether Section 253(a) preempts all fees not expressly saved by Section 253(c) with respect to all types of deployments. Rather, we conclude, based on the record before us, that with respect to Small Wireless Facilities, even fees that might seem small in isolation have material and prohibitive effects on deployment,[141] particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment.[142] Against this backdrop, and in light of significant evidence, set forth herein, that Congress intended Section 253 to preempt legal requirements that effectively prohibit service, including wireless infrastructure deployment, we view the substantive standards for fees that Congress sought to insulate from preemption in Section 253(c) as an appropriate ceiling for state and local fees that apply to the deployment of Small Wireless Facilities in public ROWs.[143]

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[134] 47 U.S.C. § 253(b).

[135] 47 U.S.C. § 253(c).

[136] 47 U.S.C. § 253(d).

[137] *Texas PUC Order*, 13 FCC Rcd at 3481, para. 44.

[138] *See, e.g., Connect America Fund; Sandwich Isles Communications, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd 5878, 5881, 5885-87, paras. 8, 19-25 (2017) *(Sandwich Isles Section 253 Order)*; *Texas PUC Order*, 13 FCC Rcd at 3480-81, paras. 41-44; *Global Network Commc'ns, Inc. v. City of New York*, 562 F.3d 145, 150-51 (2d Cir. 2009); *Southwestern Bell Tel. Co. v. City of Houston*, 529 F.3d 257, 262 (5th Cir. 2008); *City of St. Louis*, 477 F.3d at 531-32 (8th Cir. 2007); *Municipality of Guayanilla*, 450 F.3d at 15-16; *City of Santa Fe*, 380 F.3d at 1269; *BellSouth Telecomm's, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187-89 (11th Cir. 2001). Some courts appear to have viewed Section 253(c) as an independent basis for preemption. *See, e.g., City of Dearborn*, 206 F.3d at 624 (after concluding that a franchise fee did not violate Section 253(a), going on to evaluate whether it was "fair and reasonable" under Section 253(c)). We find more persuasive the Commission and other court precedent to the contrary, which we find better adheres to the statutory language.

[139] *See, e.g.*, *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014).

[140] *See, e.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44-45 (1987); *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 189-90 (2d Cir. 2010); *Frank v. Delta Airlines, Inc.*, 314 F.3d 195, 199 (5th Cir. 2002); *cf. United States v. Kay*, 359 F.3d 738 (5th Cir. 2004) (justifying a broad reading of a statute given that Congress "narrowly defin[ed] exceptions and affirmative defenses against a backdrop of broad applicability").

[141] *See infra* paras. 62-63.

[142] *See, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30, at para. 64.

[143] *See, e.g.*, Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 9-10. We therefore reject the view of those courts that have concluded that Section 253(a) necessarily requires some additional showing beyond the fact that a particular fee is not cost-based. *See, e.g.*, *Qwest v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006) ("we

54. In addition, notwithstanding that Section 253(c) only expressly governs ROW fees, we find it appropriate to look to its substantive standards as a ceiling for other state and local fees addressed by this *Declaratory Ruling*.[144] For one, our evaluation of the material effects of fees on the deployment of Small Wireless Facilities does not differ whether the fees are for ROW access, use of government property within the ROW, or one-time application and review fees or the like—any of which drain limited capital resources that otherwise could be used for deployment—and we see no reason why the Act would tolerate a greater prohibitory effect in the case of application or review fees than for ROW fees.[145] In addition, elements of the substantive standards for ROW fees in Section 253(c) appear at least analogous to elements of the *California Payphone* standard for evaluating an effective prohibition under Section 253(a). In pertinent part, both incorporate principles focused on the legal requirements to which a provider may be fairly subject,[146] and seek to guard against competitive disparities.[147] Without resolving the precise interplay of those concepts in Section 253(c) and the *California Payphone* standard, their similarities support our use of the substantive standards of Section 253(c) to inform our evaluation of fees at issue here that are not directly governed by that provision.

55. From the foregoing analysis, we can derive the three principles that we articulate in this Declaratory Ruling about the types of fees that are preempted. As explained in more detail below, we also interpret Section 253(c)'s "fair and reasonable compensation" provision to refer to fees that represent a reasonable approximation of actual and direct costs incurred by the government, where the costs being passed on are themselves objectively reasonable.[148] Although there is precedent that "fair and reasonable" compensation could mean not only cost-based charges but also market-based charges in certain instances,[149] the statutory context persuades us to adopt a cost-based interpretation here. In particular, while the general purpose of Section 253(c) is to preserve certain state and local conduct from preemption, it includes qualifications and limitations to cabin state and local action under that savings clause in ways that ensure appropriate protections for service providers. The reasonableness of interpreting the qualifications and limitations in the Section 253(c) savings clause as designed to protect the interests of service providers is emphasized by the statutory language. The "competitively neutral and

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decline to read" prior Ninth Circuit precedent "to mean that all non-cost based fees are automatically preempted, but rather that courts must consider the substance of the particular regulation at issue"). At the same time, our interpretation does not take the broader view of the preemptive scope of Section 253 adopted by the Sixth Circuit, which interpreted Section 253(c) as an independent prohibition on conduct that is not itself prohibited by Section 253(a). *City of Dearborn*, 206 F.3d at 624.

[144] *See supra* note 71.

[145] *Cf. Cheney R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) (observing that the *expressio unius* canon is a "feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved," and concluding there that "Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion").

[146] For ROW compensation to be saved under Section 253(c) it must be "fair and reasonable," while the *California Payphone* standard looks to whether a legal requirement "materially limits or inhibits" the ability to compete in a "fair" legal environment for a covered service. *California Payphone*, 12 FCC Rcd at 14206, para. 31.

[147] For ROW compensation to be saved under Section 253(c) it also must be "competitively neutral and nondiscriminatory," while the *California Payphone* standard also looks to whether a legal requirement "materially limits or inhibits" the ability to compete in a "balanced" legal environment for a covered service. *California Payphone*, 12 FCC Rcd at 14206, para. 31.

[148] *See infra* paras. 69-77; *see also, e.g.*, *City of Maryland Heights*, 256 F. Supp. 2d at 993-95; *Bell Atlantic–Maryland*, 49 F. Supp. 2d at 818.

[149] *See, e.g.*, *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010) (statute did not unambiguously require the SEC to interpret "fair and reasonable" to mean cost-based, and the SEC's reliance on market-based rates as "fair and reasonable" where there was competition was a reasonable interpretation).

nondiscriminatory" and public disclosure qualifications in Section 253(c) appear most naturally understood as protecting the interest of service providers from fees that otherwise would have been saved from preemption under Section 253(c) absent those qualifiers. Under the *noscitur a sociis* canon of statutory interpretation, that context persuades us that the "fair and reasonable" qualifier in Section 253(c) similarly should be understood as focused on protecting the interest of providers.[150] As discussed in greater detail below, while it might well be fair for providers to bear basic, reasonable costs of entry,[151] the record does not reveal why it would be fair or reasonable from the standpoint of protecting providers to require them to bear costs beyond that level, particularly in the context of the deployment of Small Wireless Facilities. In addition, the text of Section 253(c) provides that ROW access fees must be imposed on a "competitively neutral and nondiscriminatory basis." This means, for example, that fees charged to one provider cannot be materially higher than those charged to a competitor for similar uses.[152]

56. Other considerations support our approach, as well. By its terms, Section 253(a) preempts state or local legal requirements that "prohibit" or have the "effect of prohibiting" the provision of services, and we agree with court precedent that "[m]erely allowing the [local government] to recoup its processing costs . . . cannot in and of itself prohibit the provision of services."[153] The Commission has long understood that Section 253(a) is focused on state or local barriers to entry for the provision of service,[154] and we conclude that states and localities do not impose an unreasonable barrier to entry when they merely require providers to bear the direct and reasonable costs caused by their decision to enter the market.[155] We decline to interpret a government's recoupment of such fundamental costs of entry as having the effect of prohibiting the provision of services, nor has any commenter argued that recovery of cost by a government would prohibit service in a manner restricted by Section 253(a).[156] Reasonable state and local regulation of facilities deployment is an important predicate for a viable marketplace for

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[150] *See, e.g.*, *Life Technologies Corp. v. Promega Corp.*, 137 S. Ct. 734 (2017) ("A word is given more precise content by the neighboring words with which it is associated." (internal alteration and quotation marks omitted)).

[151] *See infra* para. 56.

[152] *See, e.g.*, *City of White Plains*, 305 F.3d at 80.

[153] *City of Santa Fe*, 380 F.3d at 1269; *see also* Verizon Comments at 17.

[154] *See, e.g.*, *Sandwich Isles Section 253 Order*, 32 FCC Rcd at 5878, 5882-83, paras. 1, 13; *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8; *Petition of the State of Minnesota for a Declaratory Ruling regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights of Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21707, para. 18 (*Minnesota Order*); *Hyperion Order*, 14 FCC Rcd at 11070, para. 13; *Texas PUC Order*, 13 FCC Rcd at 3480, para. 41; *TCI Cablevision Order*, 12 FCC Rcd at 21399, para. 7; *California Payphone*, 12 FCC Rcd at 14209, para. 38; *see also, e.g.*, *AT&T Comm'ns of the Sw. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tx. 1998) (*AT&T v. City of Dallas*) ("[A]ny fee that is not based on AT&T's use of City rights-of-way violates § 253(a) of the FTA as an economic barrier to entry."); Verizon Comments at 11-12; Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 7. Because we view the *California Payphone* standard as reflecting a focus on barriers to entry, we decline requests to adopt a distinct, additional standard with that as an explicit focus. *See, e.g.*, T-Mobile Comments at 35.

[155] *See, e.g.*, *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5301-03, paras. 142-45 (2011) (rejecting an approach to defining a lower bound rate for pole attachments that "would result in pole rental rates *below* incremental cost" as contrary to cost causation principles); *Investigation of Interstate Access Tariff Non-Recurring Charges*, Memorandum Opinion and Order, 2 FCC Rcd 3498, 3502, para. 34 (1987) (observing in the rate regulation context that "the public interest is best served, and a competitive marketplace is best encouraged, by policies that promote the recovery of costs from the cost-causer"). Our interpretation limiting states and localities to the recovery of a reasonable approximation of objectively reasonable cost also takes into account state and local governments' exclusive control over access to the ROW.

[156] For example, Verizon states that "[a]lthough *any* fee could be said to raise the cost of providing service," Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 9, "[t]he Commission should interpret . . . Section 253(a) to allow cost-based fees for access to public rights-of-way and structures within them, but to prohibit above-cost fees that generate revenue in excess of state and local governments' actual costs." *Id.*, Attach. at 6.

communications services by protecting property rights and guarding against conflicting deployments that could harm or otherwise interfere with others' use of property.[157] By contrast, fees that recover more than the state or local costs associated with facilities deployment—or that are based on unreasonable costs, such as exorbitant consultant fees or the like—go beyond such governmental recovery of fundamental costs of entry. In addition, interpreting Section 253(a) to prohibit states and localities from recovering a reasonable approximation of reasonable costs could interfere with the ability of states to exercise the police powers reserved to them under the Tenth Amendment.[158] We therefore conclude that Section 253(a) is circumscribed to permit states and localities to recover a reasonable approximation of their costs related to the deployment of Small Wireless Facilities.

57. *Commission Precedent*. We draw further confidence in our conclusions from the Commission's *California Payphone* decision, which we reaffirm here, finding that a state or local legal requirement would violate Section 253(a) if it "materially limits or inhibits" an entity's ability to compete in a "balanced" legal environment for a covered service.[159] As explained above, fees charged by a state or locality that recover the reasonable approximation of reasonable costs do not "materially inhibit" a provider's ability to compete in a "balanced" legal environment. To the contrary, those costs enable localities to recover their necessary expenditures to provide a stable and predictable framework in which market participants can enter and compete. On the other hand, in the *Texas PUC Order* interpreting *California Payphone*, the Commission concluded that state or local legal requirements such as fees that impose a "financial burden" on providers can be effectively prohibitive.[160] As the record shows, excessive state and local governments' fees assessed on the deployment of Small Wireless Facilities in the ROW in fact materially inhibit the ability of many providers to compete in a balanced environment.[161]

58. *California Payphone* and *Texas PUC* separately support the conclusion that fees cannot be discriminatory or introduce competitive disparities, as such fees would be inconsistent with a "balanced" regulatory marketplace. Thus, fees that treat one competitor materially differently than other competitors in similar situations are themselves grounds for finding an effective prohibition—even in the case of fees that are a reasonable approximation of the actual and reasonable costs incurred by the state or locality. Indeed, the Commission has previously recognized the potential for subsidies provided to one

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[157] *See, e.g.*, *TCI Cablevision Order*, 12 FCC Rcd at 21441, para. 103; *see also, e.g.*, Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968). States' or localities' regulation premised on addressing effects of deployment besides these costs caused by facilities deployment are distinct issues, which we discuss below. *See infra* Part III.C.

[158] The Supreme Court has recognized that land use regulation can involve an exercise of police powers. *See, e.g.*, *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981). As that Court observed, "[i]t would . . . be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity." *Id*. at 292. At the same time, the Court also has held that "historic police powers of the States" are not to be preempted by federal law "unless that was the clear and manifest purpose of Congress." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (internal quotation marks omitted). As relevant here, we see no clear and manifest intent that Congress intended to preempt publicly disclosed, objectively reasonable cost-based fees imposed on a nondiscriminatory basis, particularly in light of Section 253(c).

[159] We disagree with suggestions that the Commission applied an additional and more stringent "commercial viability" test in *California Payphone*. *See, e.g.*, Crown Castle June 7, 2018 *Ex Parte* Letter at 10. Instead, the Commission was simply evaluating the Section 253 petition on its own terms, *see, e.g.*, *California Payphone*, 12 FCC Rcd at 14204, 14210, paras. 27, 41, and, without purporting to define the bounds of Section 253(a), explaining that the petitioner "ha[d] not sufficiently supported its allegation" that the provision of service at issue "would be 'impractical and uneconomic.'" *Id*. at 14210, para. 41. Confirming that this language was simply the Commission's short-hand reference to arguments put forward by the petitioner itself, and not a Commission-announced standard for applying Section 253, the Commission has not applied a "commercial viability" standard in other decisions, as these same commenters recognize. *See, e.g.*, Crown Castle June 7, 2018 *Ex Parte* Letter at 10.

[160] *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81.

[161] *See infra* paras. 60-65.

competitor to distort the marketplace and create a barrier to entry in violation of Section 253(a).[162] We reaffirm that conclusion here.

59. *Legislative History*. While our interpretation follows directly from the text and structure of the Act, our conclusion finds further support in the legislative history, which reflects Congress's focus on the ability of states and localities to recover the reasonable costs they incur in maintaining the rights of way.[163] Significantly, Senator Dianne Feinstein, during the floor debate on Section 253(c), "offered examples of the types of restrictions that Congress intended to permit under Section 253(c), including [to] 'require a company to pay fees to *recover an appropriate share of the increased street repair and paving costs* that result from repeated excavation.'"[164] Representative Bart Stupak, a sponsor of the legislation, similarly explained during the debate on Section 253 that "if a company plans to run 100 miles of trenching in our streets and wires to all parts of the cities, it *imposes a different burden* on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings," making clear that the compensation described in the statute is related to the burden, or cost, from a provider's use of the ROW.[165] These statements buttress our interpretation of the text and structure of Section 253 and confirm Congress's apparent intent to craft specific safe harbors for states and localities, and to permit recovery of reasonable costs related to the ROW as "fair and reasonable compensation," while preempting fees above a reasonable approximation of cost that improperly inhibit service.[166]

60. *Capital Expenditures*. Apart from the text, structure, and legislative history of the 1996 Act, an additional, independent justification for our interpretation follows from the simple, logical premise, supported by the record, that state and local fees in one place of deployment necessarily have the effect of reducing the amount of capital that providers can use to deploy infrastructure elsewhere, whether the reduction takes place on a local, regional or national level.[167] We are persuaded that providers and infrastructure builders, like all economic actors, have a finite (though perhaps fluid)[168] amount of resources to use for the deployment of infrastructure. This does not mean that these resources are limitless, however. We conclude that fees imposed by localities, above and beyond the recovery of localities' reasonable costs, materially and improperly inhibit deployment that could have occurred elsewhere.[169] This and regulatory uncertainty created by such effectively prohibitive conduct[170] creates an

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[162] *See, e.g.*, *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8.

[163] *See, e.g.*, WIA Comments, Attach. 2 at 70.

[164] WIA Comments, Attach. 2 at 70 (quoting 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from Office of City Attorney, City and County of San Francisco)) (emphasis added)); *see also, e.g.*, Verizon Comments at 15 (similar); *City of Maryland Heights*, 256 F. Supp. 2d at 995-96.

[165] 141 Cong. Rec. H8460-01, H8460 (daily ed. Aug. 4, 1995).

[166] We reject other comments downplaying the relevance of legislative statements by some commenters as inconsistent with the text and structure of the Act. *See, e.g.*, League of Arizona Cities *et al.* Joint Comments at 27-28; NATOA Comments, Exh. A at 26-28; Smart Communities Reply at 57-58; Cities of San Antonio et al. Reply at 20-21; *see also, e.g.*, *City of Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1071-72 (D. Or. 2005).

[167] At a minimum, this analysis complements and reinforces the justifications for our interpretation provided above. While the relevant language of Section 253(a) and Section 332(c)(7)(B)(i)(II) is not limited just to Small Wireless Facilities, we proceed incrementally in our Declaratory Ruling here and address the record before us, which indicates that our interpretation of the effective prohibition standard here is particularly reasonable in the context of Small Wireless Facility deployment.

[168] For example, the precise amount of these resources might shift as a service provider encounters unexpected costs, recovers costs passed on to subscribers, or earns a profit above those costs.

[169] As Verizon observes, "[a] number of states enacted infrastructure legislation because they determined that rate relief was necessary to ensure wireless deployment," and thus could be seen as having "acknowledged that excessive fees impose a substantial barrier to the provision of service." Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 7-8. In view of the evidence in the record regarding the effect of state and local fees on capital expenditures, *see, e.g.,* Corning Sept. 5, 2018 *Ex Parte* Letter (noting that cost savings from reduced small cell attachment and application

appreciable impact on resources that materially limits plans to deploy service. This record evidence emphasizes the importance of evaluating the effect of fees on Small Wireless Facility deployment on an aggregate basis. Consistent with the First Circuit's analysis in *Municipality of Guayanilla*, the record persuades us that fees associated with Small Wireless Facility deployment lead to "a substantial increase in costs"—particularly when considered in the aggregate—thereby "plac[ing] a significant burden" on carriers and materially inhibiting their provision of service contrary to Section 253 of the Act.[171]

61. The record is replete with evidence that providers have limited capital budgets that are constrained by state and local fees.[172] As AT&T explains, "[a]ll providers have limited capital dollars to invest, funds that are quickly depleted when drained by excessive ROW fees."[173] AT&T added that "[c]ompetitive demands will force carriers to deploy small cells in the largest cities. But, when those largest cities charge excessive fees to access ROWs and municipal ROW structures, carriers' finite capital dollars are prematurely depleted, leaving less for investment in mid-level cities and smaller communities. Larger municipalities have little incentive to not overcharge, and mid-level cities and smaller

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fees could result in $2.4 billion in capital expenditure and that 97% of this capital expenditure would go toward investments in rural and suburban areas), we disagree with arguments that fees do not affect the deployment of wireless facilities in rural and underserved areas. *See, e.g.,* Letter from Sam Liccardo, Mayor, City of San Jose, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 4 (filed Sept. 18, 2018) (City of San Jose Sept. 18, 2018 *Ex Parte* Letter) (stating that "whether or not a provider wishes to invest in a dense urban area, including underserved urban areas, or a rural area is fundamentally based on the size of the customer base and the market demand for service-not on the purported wiles of a 'must-serve' jurisdiction somehow forcing investment away from rural areas because a right of way or attachment fee is charged."); Letter from Joanne Hovis, Chief Executive Officer, Coalition for Local Internet Choice, James Baller, President, Coalition for Local Internet Choice, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 3 (filed Sept. 18, 2018) ("in lucrative areas, carriers will pay market fees for access to property just as they would any other cost of doing business. But they will not, as rational economic actors, necessarily apply new profits (created by FCC preemption) to deploying in otherwise unattractive areas.").

[170] *See, e.g.*, CTIA Comments at 32 (identifying "disparate interpretations" regarding the fees that are preempted and seeking FCC clarification to "dispel the resulting uncertainty"); Verizon Comments at 10 (similar); Letter from Cathleen A. Massey, Vice Pres.-Fed. Regulatory Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 7 (filed Sept. 21, 2017) (seeking clarification of Section 253); BDAC Regulatory Barriers Report, p. 9 ("The FCC should provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not 'fair and reasonable.' The Commission should specifically clarify that 'fair and reasonable' compensation for right-of way access and use implies some relation to the burden of new equipment placed in the ROW or on the local asset, or some other objective standard.").

[171] *Municipality of Guayanilla*, 450 F.3d at 19.

[172] *See, e.g.,* AT&T Comments at 2; Conterra Broadband et al. Comments at 6; Mobilitie Comments at 3; Sprint Comments at 17; Letter from Courtney Neville, Associate General Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2-3 (filed July 16, 2018) (CCA July 16, 2018 *Ex Parte* Letter); Letter from Henry Hultquist, Vice President, Federal Regulatory, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed June 8, 2018) (AT&T June 8, 2018 *Ex Parte* Letter); Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Letter from Katharine R. Saunders, Managing Associate General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed June 21, 2018) (Verizon June 21, 2018 *Ex Parte* Letter); Letter from Ronald W. Del Sesto, Jr., Counsel for Uniti Fiber, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 5 (filed Oct. 30, 2017); Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 2-4. When developing capital budgets, companies rationally would account for anticipated revenues associated with the services that can be provided by virtue of planned facilities deployment, and the record does not reveal—nor do we see any basis to assume—that such revenues would be so great as to eliminate constraints on providers' capital budgets so as to enable full deployment notwithstanding the level of state and local fees.

[173] AT&T Aug. 6, 2018 *Ex Parte* Letter at 2.

municipalities have no ability to avoid this harm."[174] As to areas that might not be sufficiently crucial to deployment to overcome high fees, AT&T identified jurisdictions in Maryland, California, and Massachusetts where high fees have directly resulted in paused or decreased deployments.[175] Limiting localities to reasonable cost recovery will "allow[] AT&T and other providers to stretch finite capital dollars to additional communities."[176] Verizon similarly explains that "[c]apital budgets are finite. When providers are forced to spend more to deploy infrastructure in one locality, there is less money to spend in others. The leverage that some cities have to extract high fees means that other localities will not enjoy next generation wireless broadband services as quickly, if at all."[177] Sprint, too, affirms that, because "all carriers face limited capital budgets, they are forced to limit the number and pace of their deployment investments to areas where the delays and impediments are the least onerous, to the detriment of their customers and, ultimately and ironically, to the very jurisdictions that imposed obstacles in the first place."[178] Sprint gives a specific example of its deployments in two adjacent jurisdictions—the City of Los Angeles and Los Angeles County—and describes how high fees in the county prevented Sprint from activating any small cells there, while more than 500 deployments occurred in the city, which had significantly lower fees.[179] Similarly, Conterra Broadband states that "[w]hen time and capital are diverted away from actual facility installation and instead devoted to clearing regulatory roadblocks, consumers and enterprises, including local small businesses, schools and healthcare centers, suffer."[180] Based on the record, we find that fees charged by states and localities are causing *actual* delays and restrictions on deployments of Small Wireless Facilities in a number of places across the country in violation of Section 253(a).[181]

62. Our conclusion finds further support when one considers the aggregate effects of fees imposed by individual localities, including, but not limited to, the potential limiting implications for a nationwide wireless network that reaches all Americans, which is among the key objectives of the statutory provisions in the 1996 Act that we interpret here.[182] When evaluating whether fees result in an effective prohibition of service due to financial burden, we must consider the marketplace regionally and nationally and thus must consider the cumulative effects of state or local fees on service in multiple geographic areas that providers serve or potentially would serve. Where providers seek to operate on a regional or national basis, they have constrained resources for entering new markets or introducing, expanding, or improving existing services, particularly given that a provider's capital budget for a given

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[174] *Id.*

[175] *Id.* (pausing or delaying deployments in Citrus Heights, CA, Oakland, CA and three Maryland counties; decreasing deployments in Lowell, MA and decreasing deployments from 98 to 25 sites in Escondido, CA).

[176] *Id*.

[177] Verizon Aug. 10, 2018 *Ex Parte* Letter at 5, Attach. at 2-4.

[178] Sprint Comments at 17.

[179] Sprint Aug. 13, 2018 *Ex Parte* Letter at 1-2.

[180] Conterra Broadband *et al*. Comments at 6; *see also* Letter from John Scott, Counsel for Mobilitie, LLC to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 ("high fees imposed by some cities hurt other cities that have reasonable fees, because they reduce capital resources that might have gone to those cities, and because they pressure other financially strapped cities not to turn away what appears to be a revenue opportunity").

[181] Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 4 (filed August 10, 2018) (Crown Castle Aug. 10, 2018 *Ex Parte* Letter).

[182] *New England Public Comms. Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19717, para. 9 (1996) (1996 Act intent of "accelerat[ing] deployment of advanced telecommunications services to all Americans by opening all telecommunications markets to competition."); *see also* Crown Castle Aug. 10, 2018 *Ex Parte* Letter at 7.

period of time is often set in advance.[183] In such cases, the resources consumed in serving one geographic area are likely to deplete the resources available for serving other areas.[184] The text of Section 253(a) is not limited by its terms only to effective prohibitions within the geographic area targeted by the state or local fee. Where a fee in a geographic area affects service outside that geographic area, the statute is most naturally read to encompass consideration of all affected areas.

63. A contrary, geographically-restrictive interpretation of Section 253(a) would exacerbate the digital divide by giving dense or wealthy states and localities that might be most critical for a provider to serve the ability to leverage their unique position to extract fees for their own benefit at the expense of regional or national deployment by decreasing the deployment resources available for less wealthy or dense jurisdictions.[185] As a result, the areas likely to be hardest hit by excessive government fees are not necessarily jurisdictions that charge those fees, but rather areas where the case for new, expanded, or improved service was more marginal to start—and whose service may no longer be economically justifiable in the near-term given the resources demanded by the "must-serve" areas. To cite some examples of harmful aggregate effects, AT&T notes that high annual recurring fees are particularly harmful because of their "continuing and compounding nature."[186] It also states that, "if, as S&P Global Market Intelligence estimates, small-cell deployments reach nearly 800,000 by 2026, a ROW fee of $1000 per year …would result in nearly $800 million annually in forgone investment." [187] Yet another commenter notes that, "[f]or a deployment that requires a vast number of small cell facilities across a metropolitan area, these fees quickly mount up to hundreds of thousands of dollars, often making deployment economically infeasible," and "far exceed[ing] any costs the locality incurs by orders of magnitude, while taking capital that would otherwise go to investment in new infrastructure."[188] Endorsing such a result would thwart the purposes underlying Section 253(a). As Crown Castle observes, "[e]ven where the fees do not result in a direct lack of service in a high-demand area like a city or urban core, the high cost of building and operating facilities in these jurisdictions consume [sic] capital and revenue that could otherwise be used to expand wireless infrastructure in higher cost areas. This impact of egregious fees is prohibitory and should be taken into account in any prohibition analysis."[189]

64. Some municipal commenters endorse a cost-based approach to "ensure that localities are fully compensated for their costs [and that] fees should be reasonable and non-discriminatory, and should ensure that localities are made whole"[190] in recognition that "getting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources."[191] Commenters from smaller municipalities recognize that "thousands and thousands of small cells are needed for 5G… [and]

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[183] *See, e.g.*, AT&T June 8, 2018 *Ex Parte* Letter at 2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Verizon June 21, 2018 *Ex Parte* Letter at 2.

[184] *See, e.g.*, *Municipality of Guayanilla*, 450 F.3d at 17 ("Given the interconnected nature of utility services across communities and the strain that the enactment of gross revenue fees in multiple municipalities would have on PRTC's provision of services, the Commonwealth-wide estimates are relevant to determining how the ordinance affects PRTC's 'ability . . . to provide any interstate or intrastate telecommunications service'" under Section 253(a)).

[185] *See, e.g.,* Letter from Sam Liccardo, Mayor or San Jose, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, Attachment at 1-2 (filed Aug. 2, 2018) (describing payment by providers of $24 million to a Digital Inclusion Fund in order to deploy small cells in San Jose on city owned light poles).

[186] AT&T Comments at 19.

[187] AT&T Comments at 19-20.

[188] Mobilitie Comments at 3.

[189] Crown Castle Aug. 10, 2018 *Ex Parte* Letter at 2.

[190] Sal Pace July 30, 2018 *Ex Parte* Letter at 1.

[191] LaWana Mayfield July 31, 2018 *Ex Parte Letter* at 1

old regulations could hinder the timely arrival of 5G throughout the country"[192] and urge the Commission to "establish some common-sense standards insofar as it relates to fees associated with the deployment of small cells [due to] a cottage industry of consultants [] who have wrongly counseled communities to adopt excessive and arbitrary fees."[193] Representatives from non-urban areas in particular caution that, "if the investment that goes into deploying 5G on the front end is consumed by big, urban areas, it will take longer for it to flow outwards in the direction of places like Florence, [SC]."[194] "[R]educing the high regulatory costs in urban areas would leave more dollars to development in rural areas [because] most of investment capital is spent in the larger urban areas [since] the cost recovery can be made in those areas. This leaves the rural areas out."[195] We agree with these commenters, and we further agree with courts that have considered "the *cumulative effect* of future similar municipal [fees ordinances]" across a broad geographic area when evaluating the effect of a particular fee in the context of Section 253(a).[196] To the extent that other municipal commenters argue that our interpretation gives wireless providers preferential treatment compared to other users of the ROW, the record does not contain data about other users that would support such a conclusion.[197] In any event, Section 253 of the Communications Act expressly bars legal requirements that effectively prohibit telecommunications service without regard to whether it might result in preferential treatment for providers of that service.[198]

65. Applying this approach here, the record reveals that fees above a reasonable approximation of cost, even when they may not be perceived as excessive or likely to prohibit service in isolation, will have the effect of prohibiting wireless service when the aggregate effects are considered, particularly given the nature and volume of anticipated Small Wireless Facility deployment.[199] The record reveals that these effects can take several forms. In some cases, the fees in a particular jurisdiction will lead to reduced or entirely forgone deployment of Small Wireless Facilities in the near term for that

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[192] Dr. Carolyn Prince July 31, 2018 *Ex Parte* Letter at 2.

[193] Letter from Ashton J. Hayward III, Mayor, Pensacola, FL to the Hon. Brendan Carr, Commissioner, WT Docket No. 17-79 at 1 (filed June 8, 2018).

[194] Representative Terry Alexander Aug. 7, 2018 *Ex Parte* Letter at 1.

[195] Senator Duane Ankney July 31, 2018 *Ex Parte* Letter at 1; *see also* Letter from Elder Alexis D. Pipkins, Sr. to the Hon. Brendan Carr, Commissioner, FCC at 1 (filed July 26, 2018) ("the race to 5G is global…instead of each city or state for itself, we should be working towards aligned, streamlined frameworks that benefit us all."); Letter from Jeffrey Bohm, Chairman of the Board of Commissioners, County of St. Clair to Brendan Carr, Commissioner, FCC, WT Docket 17-79 at 1-2 (filed August 22, 2018) ("Smaller communities, such as those located in St. Clair County would benefit from having the Commissions reduce the costly and unnecessary fee's that some larger communities place on small cells as a condition of deployment. These fees, wholly disproportionate to any cost, put communities like ours at an unfair disadvantage"); Letter from Scott Niesler, Mayor, City of Kings Mountain, to Brendan Carr, Commissioner, FCC, WT Docket 17-79 at 1-2 (filed June 4, 2018) ("the North Carolina General Assembly has enacted legislation to encourage the deployment of small cell technology to limit exorbitant fees which can siphon off capital from further expansion projects. I was encouraged to see the FCC taking similar steps to enact policies that help clear the way for the essential investment").

[196] *Guayanilla District Ct. Opinion*, 354 F. Supp. 2d at 111-12; *but see, e.g.,* Letter from Nina Beety to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 at 5 (filed Sept. 17, 2018) (Nina Beety Sept. 17, 2018 *Ex Parte* Letter) (asserting that providers artificially under-capitalize their deployment budgets to build the case for poverty).

[197] Letter from Larry Hanson, Executive Director, Georgia Municipal Association to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Sept. 17, 2018) (Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter).

[198] 47 U.S.C. § 253(a).

[199] *See, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30, at para. 64. In addition, although one could argue that, in theory, a sufficiently small departure from actual and reasonable costs might not have the effect of prohibiting service in a particular instance, the record does not reveal an alternative, administrable approach to evaluating fees without a cost-based focus.

jurisdiction.[200] In other cases, where it is essential for a provider to deploy in a given area, the fees charged in that geographic area can deprive providers of capital needed to deploy elsewhere, and lead to reduced or forgone near-term deployment of Small Wireless Facilities in other geographic areas.[201] In both of those scenarios the bottom-line outcome on the national development of 5G networks is the same—diminished deployment of Small Wireless Facilities critical for wireless service and building out 5G networks.[202]

66. Some have argued that our decision today regarding Sections 253 and 332 should not be applied to preempt agreements (or provisions within agreements) entered into prior to this Declaratory Ruling.[203] We note that courts have upheld the Commission's preemption of the enforcement of provisions in private agreements that conflict with our decisions[204] We therefore do not exempt existing agreements (or particular provisions contained therein) from the statutory requirements that we interpret here. That said, however, this Declaratory Ruling's effect on any particular existing agreement will depend upon all the facts and circumstances of that specific case.[205] Without examining the particular features of an agreement, including any exchanges of value that might not be reflected by looking at fee provisions alone, we cannot state that today's decision does or does not impact any particular agreement entered into before this decision.

67. *Relationship to Section 332*. While the above analysis focuses on the text and structure of the Act, legislative history, Commission orders, and case law interpreting Section 253(a), we reiterate that in the fee context, as elsewhere, the statutory phrase "prohibit or have the effect of prohibiting" in Section 332(c)(7)(B)(i)(II) has the same meaning as the phrase "prohibits or has the effect of prohibiting" in Section 253(a). As noted in the prior section, there is no evidence to suggest that Congress intended for virtually identical language to have different meanings in the two provisions.[206] Instead, we find it

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[200] *See, e.g.*, AT&T June 8, 2018 *Ex Parte* Letter at 1-2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2.

[201] AT&T June 8, 2018 *Ex Parte* Letter at 1-2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Verizon June 21, 2018 *Ex Parte* Letter at 2; CCA July 16, 2018 *Ex Parte* Letter at 2-3.

[202] *See, e.g.,* Letter from Thomas J. Navin, Counsel to Corning, Inc. to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Jan 25, 2018), Attach. at 6-7 (comparing different effects on deployment between a base case and a high fee case, and estimating that pole attachment fees nationwide assuming high fees would result in 28.2M fewer premises passed, or 31 percent of the 5G Base case results, and an associated $37.9B in forgone network deployment).

[203] City of San Jose Sept. 18, 2018 *Ex Parte* Letter at 1-2.

[204] *See, e.g., Building Owners and Managers Ass'n Int'l v. FCC,* 254 F.3d 89 (D.C. Cir. 2001) (OTARD rules barring exclusivity provisions in lease agreements). As the D.C. Circuit has recognized, "[w]here the Commission has been instructed by Congress to prohibit restrictions on the provision of a regulated means of communication, it may assert jurisdiction over a party that directly furnishes those restrictions, and, in so doing, the Commission may alter property rights created under State law." *Id.* at 96; s*ee also Lansdowne on the Potomac Homeowners Ass'n v. OpenBand at Lansdowne, LLC,* 713 F.3d 187 (4th Cir. 2013).

[205] For example, the City of Los Angeles asserts that fee provisions in its agreements with providers are not prohibitory and must be examined in light of a broader exchange of value contemplated by the agreements in their entirety. Letter from Eric Garcetti, Mayor, City of Los Angeles to the Hon. Ajit Pai, Chairman, FCC, WT Docket No. 17-79 (filed Sept 18, 2018). We agree that agreements entered into before this decision will need to be examined in light of their potentially unique circumstances before a decision can be reached about whether those agreements or any particular provisions in those agreements are or are not impacted by today's FCC decision.

[206] We reject the claims of some commenters that Section 332(c)(7)(B)(i)(II) is limited exclusively to decisions on individual requests and therefore must be interpreted differently than Section 253(a). *See, e.g.*, San Francisco Comments at 24-26. Section 332(c)(7)(B)(i) explicitly applies to "regulation of the placement, construction, and modification," and it would be irrational to interpret "regulation" in that paragraph to mean something different from the term "regulation" as used in 253(a) or to find that it does not encompass generally applicable "regulations" as well as decisions on individual applications. Moreover, even assuming *arguendo* that San Francisco's position reflects the appropriate interpretation of the scope of Section 332(c)(7)(B)(i)(II), the record does not reveal why a

more reasonable to conclude that the language in both sections generally should be interpreted to have the same meaning and to reflect the same standard, including with respect to preemption of fees that could "prohibit" or have "the effect of prohibiting" the provision of covered service. Both sections were enacted to address concerns about state and local government practices that undermined providers' ability to provide covered services, and both bar state or local conduct that prohibits or has the effect of prohibiting service.

68. To be sure, Sections 253 and 332(c)(7) may relate to different categories of state and local fees. Ultimately, we need not resolve here the precise interplay between Sections 253 and 332(c)(7). It is enough for us to conclude that, collectively, Congress intended for the two provisions to cover the universe of fees charged by state and local governments in connection with the deployment of telecommunications infrastructure. Given the analogous purposes of both sections and the consistent language used by Congress, we find the phrase "prohibit or have the effect of prohibiting" in Section 332(c)(7)(B)(i)(II) should be construed as having the same meaning and governed by the same preemption standard as the identical language in Section 253(a).[207]

69. *Application of the Interpretations and Principles Established Here*. Consistent with the interpretations above, the requirement that compensation be limited to a reasonable approximation of objectively reasonable costs and be non-discriminatory applies to all state and local government fees paid in connection with a provider's use of the ROW to deploy Small Wireless Facilities including, but not limited to, fees for access to the ROW itself, and fees for the attachment to or use of property within the ROW owned or controlled by the government (*e.g.*, street lights, traffic lights, utility poles, and other infrastructure within the ROW suitable for the placement of Small Wireless Facilities). This interpretation applies with equal force to any fees reasonably related to the placement, construction, maintenance, repair, movement, modification, upgrade, replacement, or removal of Small Wireless Facilities within the ROW, including, but not limited to, application or permit fees such as siting applications, zoning variance applications, building permits, electrical permits, parking permits, or excavation permits.

70. Applying the principles established in this Declaratory Ruling, a variety of fees not reasonably tethered to costs appear to violate Sections 253(a) or 332(c)(7) in the context of Small Wireless Facility deployments.[208] For example, we agree with courts that have recognized that gross

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distinction between broadly-applicable requirements and decisions on individual requests would call for a materially different analytical approach, even if it arguably could be relevant when evaluating the application of that analytical approach to a particular preemption claim. In addition, although some commenters assert that such an interpretation "would make it virtually impossible for local governments to enforce their zoning laws with regard to wireless facility siting," they provide no meaningful explanation why that would be the case. *See, e.g.*, San Francisco Reply at 16. While some local commenters note that the savings clauses in Section 253(b) and (c) do not have express counterparts in the text of Section 332(c)(7)(B)(i), *see, e.g.*, San Francisco Comments at 26, we are not persuaded that this compels a different interpretation of the virtually identical language restricting actual or effective prohibitions of service in Section 253(a) and Section 332(c)(7)(B)(i)(II), particularly given our reliance on considerations in addition to the savings clauses themselves when interpreting the "effective prohibition" language. *See supra* paras. 57-65. We offer these interpretations both to respond to comments and in the event that some court decision could be viewed as supporting a different result.

[207] Section 253(a) expressly addresses state or local activities that prohibit or have the effect of prohibiting "any entity" from providing a telecommunications service. 47 U.S.C. § 253(a). In the *2009 Declaratory Ruling*, the Commission likewise interpreted Section 332(c)(7)(B)(i)(II) as implicated where the state or local conduct prohibits or has the effect of prohibiting the provision of personal wireless service by one entity even if another entity already is providing such service. *See 2009 Declaratory Ruling*, 24 FCC Rcd at 14016-19, paras. 56-65.

[208] We acknowledge that a fee not calculated by reference to costs might nonetheless happen to land at a level that is a reasonable approximation of objectively reasonable costs, and otherwise constitute fair and reasonable compensation as we describe herein. If all these criteria are met, the fee would not be preempted.

revenue fees generally are not based on the costs associated with an entity's use of the ROW,[209] and where that is the case, are preempted under Section 253(a). In addition, although we reject calls to preclude a state or locality's use of third party contractors or consultants, or to find all associated compensation preempted,[210] we make clear that the principles discussed herein regarding the reasonableness of cost remain applicable. Thus, fees must not only be limited to a reasonable approximation of costs, but in order to be reflected in fees, the *costs themselves* must also be reasonable. Accordingly, any unreasonably high costs, such as excessive charges by third party contractors or consultants, may not be passed on through fees even though they are an actual "cost" to the government. If a locality opts to incur unreasonable costs, Sections 253 and 332(c)(7) do not permit it to pass those costs on to providers. Fees that depart from these principles are not saved by Section 253(c), as we discuss below.

71. *Interpretation of Section 253(c) in the Context of Fees.* In this section, we turn to the interpretation of several provisions in Section 253(c), which provides that state or local action that otherwise would be subject to preemption under Section 253(a) may be permissible if it meets specified criteria. Section 253(c) expressly provides that state or local governments may require telecommunications providers to pay "fair and reasonable compensation" for use of public ROWs but requires that the amounts of any such compensation be "competitively neutral and nondiscriminatory" and "publicly disclosed."[211]

72. We interpret the ambiguous phrase "fair and reasonable compensation," within the statutory framework we outlined for Section 253, to allow state or local governments to charge fees that recover a reasonable approximation of the state or local governments' actual and reasonable costs. We conclude that an appropriate yardstick for "fair and reasonable compensation," and therefore an indicator of whether a fee violates Section 253(c), is whether it recovers a reasonable approximation of a state or local government's objectively reasonable costs of, respectively, maintaining the ROW, maintaining a structure within the ROW, or processing an application or permit.[212]

73. We disagree with arguments that "fair and reasonable compensation" in Section 253(c) should somehow be interpreted to allow state and local governments to charge "any compensation," and we give weight to BDAC comments that, "[a]s a policy matter, the Commission should recognize that local fees designed to maximize profit are barriers to deployment."[213] Several commenters argue, in

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[209] *See, e.g.*, *Municipality of Guayanilla*, 450 F.3d at 21; *City of Maryland Heights*, 256 F. Supp. 2d at 993-96; *Prince George's County*, 49 F. Supp. 2d at 818; *AT&T v. City of Dallas*, 8 F. Supp. 2d at 593; *see also, e.g.*, CTIA Comments at 30, 45; *id*. Attach. at 17; ExteNet Comments, Exh. 1 at 41; T-Mobile Comments at 7; WIA Comments at 52-53.

[210] *See, e.g.*, CCA Comments at 17-21 (asking the Commission to declare franchise fees or percentage of revenue fees outside the scope of fair and reasonable compensation and to prohibit state and localities from requiring service providers to obtain business licenses for individual cell sites). For example, although fees imposed by a state or local government calculated as a percentage of a provider's revenue are unlikely to be a reasonable approximation of cost, if such a percentage-of-revenue fee were, in fact, ultimately shown to amount to a reasonable approximation of costs, the fee would not be preempted.

[211] 47 U.S.C. § 253(c).

[212] *Guayanilla District Ct. Opinion*, 354 F. Supp. 2d at 114 ("fees charged by a municipality need to be related to the degree of actual use of the public rights-of way" to constitute fair and reasonable compensation under Section 253(c)); *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), *aff'd* 299 F. 3d 235 (3d Cir. 2002) (*New Jersey Payphone*) ("Plainly, a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry.")

[213] BDAC Regulatory Barriers Report, Appendix C, p. 3 (a "[ROW] burden-oriented [fee] standard is flexible enough to suit varied localities and network architectures, would ensure that fees are not providing additional

particular, that Section 253(c)'s language must be read as permitting localities latitude to charge any fee at all[214] or a "market-based rent."[215] Many of these arguments seem to suggest that Section 253 or 332 have not previously been read to impose limits on fees, but as noted above courts have long read these provisions as imposing such limits. Still others argue that limiting the fees state and local governments may charge amounts to requiring taxpayers to subsidize private companies' use of public resources.[216] We find little support in the record, legislative history, or case law for that position.[217] Indeed, our

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revenues for other localities purposes unrelated to providing and maintaining the ROW, and would provide some basis to challenge fees that, on their face, are so high as to suggest their sole intent is to maximize revenue.")

[214] *See, e.g.*, Baltimore Comments at 15-16 (noting that local governments traditionally impose fees based on rent, and other ROW users pay market-based fees and arguing that citizens should not have to "subsidize" wireless deployments); Bellevue *et al*. Reply at 12-13 (stating that "the FCC should compensate municipalities at fair market value because any physical invasion is a taking under the Fifth Amendment, and just compensation is "typically" calculated using fair market value."); NLC Comments at 5 ("local governments, like private landlords, are entitled to collect rent for the use of their property and have a duty to their residents to assess appropriate compensation. This does not necessarily translate to restricting this compensation to just the cost of managing the asset—just as private property varies in value, so does municipal property."); Smart Communities Reply at 7-10 (stating that "fair and reasonable compensation (i.e., fair market value) is not, as some commenters contend, measured by the regulatory cost for use of a ROW or other property; rather it is measured by what it would cost the user of the ROW to purchase rights form a local property owner.").

[215] Draft BDAC Rates and Fees Report, p. 10 (listing "Local Government Perspectives").

[216] *See, e.g.*, NLC Comments, Statement of the Hon. Gary Resnick, Mayor, Wilton Manors, FL Comments at 6-7 ("preemption of local fees or rent for use of government-owned light and traffic poles, or fees for use of the right-of-way amounts to a taxpayer subsidy of wireless providers and wireless infrastructure companies. There is no corresponding benefit for such taxpayers such as requiring the broadband industry to reduce consumer rates or offer advanced services to all communities within a certain time frame."); Letter from Rondella M. Hawkins, Officer, City of Austin—Telecommunications & Regulatory Affairs, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 7, 2018) at 1. These commenters do not explain why allowing recovery of a reasonable approximation of the state or locality's objectively reasonable costs would involve a taxpayer subsidy of service providers, and we are not persuaded that our interpretation would create a subsidy.

[217] As discussed more fully above, Congress intended through Section 253 to preempt state and local governments from imposing barriers in the form of excessive fees, while also preserving state and local authority to protect specified interests through competitively neutral regulation consistent with the Act. Our interpretation of Section 253(c) is consistent with Congress's objectives. Our interpretation of "fair and reasonable compensation" in Section 253(c) is also consistent with prior Commission action limiting fees, and easing access, to other critical communications infrastructure. For example, in implementing the requirement in the Pole Attachment Act that utilities charge "just and reasonable" rates, the Commission adopted rules limiting the rates utilities can impose on cable companies for pole attachments. Based on the costs associated with building and operation of poles, the rates the Commission adopted were upheld by the Supreme Court, which found that the rates imposed were permissible and not "confiscatory" because they "provid[ed] for the recovery of fully allocated cost, including the actual cost of capital." *See FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987). Here, based on the specific language in the separate provision of Section 253, we interpret the "effective prohibition" language, as applied to small cells, to permit state and local governments to recover only "fair and reasonable compensation" for their maintenance of ROW and government-owned structures within ROW used to host Small Wireless Facilities. Relatedly, Smart Communities errs in arguing that the Commission's Order "provides localities 60 days to provide access and sets the rate for access," making it a "classic taking." Smart Communities Sept. 19, 2018 *Ex Parte* Letter at 25. To the contrary, the Commission has not given providers any right to compel access to any particular state or local property. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). There may well be legitimate reasons for states and localities to deny particular placement applications, and adjudication of whether such decisions amount to an effective prohibition must be resolved on a case-by-case basis. In this regard, we note that the record in this proceeding reflects that the vast majority of local jurisdictions voluntarily accept placement of wireless, utility, and other facilities in their rights-of-way. And in any event, cost-based recovery of the type we provide here has been approved as just compensation for takings purposes in the context of such facilities. *See Alabama Power Co. v. FCC*, 311 F.3d 1357, 1368, 1370-71 (11th Cir. 2002). *See also United States v. 564.54 Acres*

approach to compensation ensures that cities are not going into the red to support or subsidize the deployment of wireless infrastructure.

74. The existence of Section 253(c) makes clear that Congress anticipated that "effective prohibitions" could result from state or local government fees, and intended through that clause to provide protections in that respect, as discussed in greater detail herein.[218] Against that backdrop, we find it unlikely that Congress would have left providers entirely at the mercy of effectively unconstrained requirements of state or local governments.[219] Our interpretation of Section 253(c), in fact, is consistent with the views of many municipal commenters, at least with respect to one-time permit or application fees, and the members of the BDAC Ad Hoc Committee on Rates and Fees, who unanimously concurred that one-time fees for municipal applications and permits, such as an electrical inspection or a building permit, should be based on the cost to the government of processing that application.[220] The Ad Hoc Committee noted that "[the] cost-based fee structure [for one-time fees] unanimously approved by the committee accommodates the different siting related costs that different localities may incur to review and process permit applications, while precluding excessive fees that impede deployment.[221] We find that the same reasoning should apply to other state and local government fees such as ROW access fees or fees for the use of government property within the ROW.[222]

75. We recognize that state and local governments incur a variety of direct and actual costs in connection with Small Wireless Facilities, such as the cost for staff to review the provider's siting application, costs associated with a provider's use of the ROW, and costs associated with maintaining the ROW itself or structures within the ROW to which Small Wireless Facilities are attached.[223] We also recognize that direct and actual costs may vary by location, scope, and extent of providers' planned deployments, such that different localities will have different fees under the interpretation set forth in this Declaratory Ruling.

(Continued from previous page)
of Land, 441 U.S. 506, 513 (1979) (recognizing that alternative measure of compensation might be appropriate "with respect to public facilities such as roads or sewers").

[218] *See supra* Parts III.A, B.

[219] *See, e.g., City of White Plains*, 305 F.3d at 78-79; *Guayanilla District Ct. Opinion*, 354 F. Supp. 2d at 114. We disagree with arguments that competition between municipalities, or competition from adjacent private landowners, would be sufficient to ensure reasonable pricing in the ROW. *See e.g.*, Smart Communities Comments, Exh. 2, The Economics of Government Right of Way Fees, Declaration of Kevin Cahill, Ph.D at para. 15. We find this argument unpersuasive in view of the record evidence in this proceeding showing significant fees imposed on providers in localities across the country. *See, e.g.*, AT&T Comments at 18; Verizon Comments at 6-7; *see also* BDAC Regulatory Barriers Report, Appendix. C, p. 2.

[220] *See, e.g.,* Smart Communities Comments Cahill 2A at 2-3 (noting that "…a common model is to charge a fee that covers the costs that a municipality incurs in conducting the inspections and proceedings required to allow entry, fees that cover ongoing costs associated with inspection or expansion of facilities ..."); Colorado Comm. and Utility All. *et al.* Comments at 19 (noting that "application fees are based upon recovery of costs incurred by localities."); Draft BDAC Rates and Fees Report, p. 15-16.

[221] *See also* Draft BDAC Rates and Fees Report, p. 15-16. Although the BDAC Ad Hoc Rates and Fees Committee and municipal commenters only support a cost-based approach for one-time fees, we find no reason not to extend the same reasoning to ROW access fees or fees for the use of government property within the ROW, when all three types of fees are a legal requirement imposed by a government and pose an effective prohibition. The BDAC Rates and Fees Report did not provide a recommendation on fees for ROW access or fees for the use of government property within the ROW, and we disagree with suggestions that our ruling, which was consistent with the committee's recommendation for one-time fees, circumvents the efforts of the Ad Hoc Rates and Fees Committee. *See* Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter at 3.

[222] *See supra* para. 50.

[223] *See*, *e.g.*, Colorado Comm. and Utility All. *et al*. Comments at 18-19 (discussing range of costs that application fees cover).

76. Because we interpret fair and reasonable compensation as a *reasonable approximation* of costs, we do not suggest that localities must use any specific accounting method to document the costs they may incur when determining the fees they charge for Small Wireless Facilities within the ROW. Moreover, in order to simplify compliance, when a locality charges both types of recurring fees identified above (i.e., for access to the ROW and for use of or attachment to property in the ROW), we see no reason for concern with how it has allocated costs between those two types of fees. It is sufficient under the statute that the total of the two recurring fees reflects the total costs involved.[224] Fees that cannot ultimately be shown by a state or locality to be a reasonable approximation of its costs, such as high fees designed to subsidize local government costs in another geographic area or accomplish some public policy objective beyond the providers' use of the ROW, are not "fair and reasonable compensation…for *use* of the public rights-of-way" under Section 253(c).[225] Likewise, we agree with both industry and municipal commenters that excessive and arbitrary consulting fees or other costs should not be recoverable as "fair and reasonable compensation,"[226] because they are not a function of the provider's "use" of the public ROW.

77. In addition to requiring that compensation be "fair and reasonable," Section 253(c) requires that it be "competitively neutral and nondiscriminatory." The Commission has previously interpreted this language to prohibit states and localities from charging fees on new entrants and not on incumbents.[227] Courts have similarly found that states and localities may not impose a range of fees on one provider but not on another[228] and even some municipal commenters acknowledge that governments should not discriminate as to the fees charged to different providers.[229] The record reflects continuing concerns from providers, however, that they face discriminatory charges.[230] We reiterate the Commission's previous determination that state and local governments may not impose fees on some providers that they do not impose on others. We would also be concerned about fees, whether one-time or recurring, related to Small Wireless Facilities, that exceed the fees for other wireless telecommunications infrastructure in similar situations, and to the extent that different fees are charged

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[224] *See supra* note 71 (identifying three categories of fees charged by states and localities).

[225] 47 U.S.C. § 253(c) (emphasis added). Our interpretation is consistent with court decisions interpreting the "fair and reasonable" compensation language as requiring fees charged by municipalities relate to the degree of actual use of a public ROW. *See, e.g, Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534, 543-44 (D.P.R. 2003); *see also Municipality of Guayanilla*, 450 F.3d at 21-24; *City of Maryland Heights*, 256 F. Supp. 2d at 984.

[226] *See* Letter from Ashton J. Hayward III, Mayor, Pensacola, FL to the Hon. Brendan Carr, Commissioner, WT Docket No. 17-79 at 1 (filed June 8, 2018); *see also*, Illinois Municipal League Comments at 2 (noting that proposed small cell legislation in Illinois allows municipalities to recover "reasonable costs incurred by the municipality in reviewing the application.").

[227] *TCI Cablevision of Oakland County*, 12 FCC Rcd. at 21443, para. 108 (1997).

[228] *City of White Plains*, 305 F.3d 80.

[229] City of Baltimore Reply at 15 ("The City does agree that rates to access the right of way by similar entities must be nondiscriminatory."). Other commenters argue that nothing in Section 253 can apply to property in the ROW. City of San Francisco Reply at 2-3, 19 (denying that San Francisco is discriminatory to different providers but also asserting that "[l]ocal government fees for use of their poles are simply beyond the purview of section 253(c)").

[230] *See, e.g.*, CFP Comments at 31-33 (noting that the City of Baltimore charges incumbent Verizon "less than $.07 per linear foot for the space that it leases in the public right-of-way" while it charges other providers "$3.33 per linear foot to lease space in the City's conduit). Some municipal commenters argue that wireless infrastructure occupies more space in the ROW. *See* Smart Communities Reply Comments at 82 ("wireless providers are placing many of those permanent facilities in the public rights-of-way, in ways that require much larger deployments. It is not discrimination to treat such different facilities differently, and to focus on their impacts"). We recognize that different uses of the ROW may warrant charging different fees, and we only find fees to be discriminatory and not competitively neutral when different amounts are charged for similar uses of the ROW.

for similar use of the public ROW.[231]

78. *Fee Levels Likely to Comply with Section 253***.** Our interpretation of Section 253(a) and "fair and reasonable compensation" under Section 253(c) provides guidance for local and state fees charged with respect to one-time fees generally, and recurring fees for deployments in the ROW. Following suggestions for the Commission to "establish a presumptively reasonable 'safe harbor' for certain ROW and use fees,"[232] and to facilitate the deployment of specific types of infrastructure critical to the rollout of 5G in coming years, we identify in this section three particular types of fee scenarios and supply specific guidance on amounts that presumptively are not prohibited by Section 253. Informed by our review of information from a range of sources, we conclude that fees at or below these amounts presumptively do not constitute an effective prohibition under Section 253(a) or Section 332(c)(7), and are presumed to be "fair and reasonable compensation" under Section 253(c).

79. Based on our review of the Commission's pole attachment rate formula, which would require fees below the levels described in this paragraph, as well as small cell legislation in twenty states, local legislation from certain municipalities in states that have not passed small cell legislation, and comments in the record, we presume that the following fees would not be prohibited by Section 253 or Section 332(c)(7): (a) $500 for non-recurring fees, including a single up-front application that includes up to five Small Wireless Facilities, with an additional $100 for each Small Wireless Facility beyond five, or $1,000 for non-recurring fees for a new pole (*i.e.*, not a collocation) intended to support one or more Small Wireless Facilities; and (b) $270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW.[233]

80. By presuming that fees at or below the levels above comply with Section 253, we assume

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[231] Our interpretation is consistent with principles described by the BDAC's Ad Hoc Committee on Rates and Fees. Draft BDAC Rates and Fees Report at 5 (Jul. 24, 2018) (listing "neutral treatment and access of all technologies and communication providers based upon extent/nature of ROW use" as principle to guide evaluation of rates and fees).

[232] BDAC Regulatory Barriers Report, Appendix C, p. 3.

[233] These presumptive fee limits are based on a number of different sources of data. Many different state small cell bills, in particular, adopt similar fee limits despite their diversity of population densities and costs of living, and we expect that these presumptive fee limits will allow for recovery in excess of costs in many cases. 47 CFR § 1.1409; National Conference of State Legislatures, Mobile 5G and Small Cell Legislation, (May 7, 2018), http://www.ncsl.org/research/telecommunications-and-information-technology/mobile-5g-and-small-cell-legislation.aspx (providing description of state small cell legislation); Little Rock, Ark. Ordinance No. 21,423 (June 6, 2017); NCTA August 20, 2018 *Ex Parte* Letter, Attachment; *see also* H.R. 2365, 2018 Leg. 2d Reg. Sess. (Ariz. 2018) ($100 per facility for first 5 small cells in application; $50 annual utility attachment rate, $50 ROW access fee); H.R. 189 149th Gen. Assemb. Reg. Sess. (Del. 2017) ($100 per small wireless facility on application; fees not to exceed actual, direct and reasonable cost); S. 21320th Gen. Assemb. Reg. Sess. (Ind. 2017) ($100 per small wireless facility); H.R. 1991, 99th Gen. Assemb. 2nd Reg. Sess. (Missouri, 2018) ($100 for each facility collocated on authority pole; $150 annual fee per pole); H.R. 38 2018 Leg. Assemb. 2d Reg. Sess. (N.M. 2018) ($100 for each of first 5 small facilities in an application; $20 per pole annually; $250 per facility annually for access to ROW); S. 189, 2018 Leg. Gen. Sess. (Utah 2018) ($100 per facility to collocate on existing or replacement utility pole; $250 annual ROW fee per facility for certain attachments). *See also* Letter from Kara R. Graves, Director, Regulatory Affairs, CTIA, and D. Zachary Champ, Director, Government Affairs, WIA to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 10, 2018) Attach. (listing fees in twenty state small cell legislations) (CTIA/WIA Aug. 10, 2018 *Ex Parte* Letter); Letter from Scott K. Bergmann, Sen. Vice President, Regulatory Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 4, 2018) at 3, Attach. (analyzing average and median recurring fee levels permitted under state legislation). These examples suggest that the fee levels we discuss above may be higher than what many states already allow and further support our finding that there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of Section 253. We recognize that certain fees in a minority of state small cell bills are above the levels we presume to be allowed under Section 253. Any party may still charge fees above the levels we identify by demonstrating that the fee is a reasonable approximation of cost that itself is objectively reasonable.

that there would be almost no litigation by providers over fees set at or below these levels. Likewise, our review of the record, including the many state small cell bills passed to date, indicate that there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of Section 253. In those limited circumstances, a locality could prevail in charging fees that are above this level by showing that such fees nonetheless comply with the limits imposed by Section 253—that is, that they are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory.[234] Allowing localities to charge fees above these levels upon this showing recognizes local variances in costs.[235]

C. Other State and Local Requirements that Govern Small Facilities Deployment

81. There are also other types of state and local land-use or zoning requirements that may restrict Small Wireless Facility deployments to the degree that they have the effect of prohibiting service in violation of Sections 253 and 332. In this section, we discuss how those statutory provisions apply to requirements outside the fee context, both generally and with a particular focus on aesthetic and undergrounding requirements.

82. As discussed above, a state or local legal requirement constitutes an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[236] Our interpretation of that standard, as set forth above, applies equally to fees and to non-fee legal requirements. And as with fees, Section 253 contains certain safe harbors that permit some legal requirements that might otherwise be preempted by Section 253(a). Section 253(b) saves state "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[237] And Section 253(c) preserves state and local authority to manage the public rights-of-way.[238]

83. Given the wide variety of possible legal requirements, we do not attempt here to determine which of every possible non-fee legal requirements are preempted for having the effect of prohibiting service, although our discussion of fees above should prove instructive in evaluating specific requirements. Instead, we focus on some specific types of requirements raised in the record and provide guidance on when those particular types of requirements are preempted by the statute.

84. *Aesthetics*. The *Wireless Infrastructure NPRM/NOI* sought comment on whether deployment restrictions based on aesthetic or similar factors are widespread and, if so, how Sections 253 and 332(c)(7) should be applied to them.[239] Parties describe a wide range of such requirements that allegedly restrict deployment of Small Wireless Facilities. For example, many providers criticize

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[234] Several state and local commenters express concern about the presumptively reasonable fee levels we establish, including concerns about the effect of the fee levels on existing fee-related provisions included in state and local legislation. *See e.g.*, Letter from Kent Scarlett, Exec. Director, Ohio Municipal League to Marlene H. Dortch, Secretary, FCC at 1 (filed Sept. 18, 2018); Letter from Liz Kniss, Mayor, City of Palo Alto to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84 at 1 (filed Sept. 17, 2018). As stated above, while the fee levels we establish reflect our presumption regarding the level of fees that would be permissible under Section 253 and 332(c)(7), state or local fees that exceed these levels may be permissible if the fees are based on a reasonable approximation of costs and the costs themselves are objectively reasonable.

[235] We emphasize that localities may charge fees to recover their objectively reasonable costs and thus reject arguments that our approach requires localities to bear the costs of small cell deployment or applies a one-size-fits-all standard. *See, e,g.*, Letter from Mike Posey, Mayor, City of Huntington Beach, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Sept.11, 2018) (Mike Posey Sept. 11, 2018 *Ex Parte* Letter).

[236] *California Payphone*, 12 FCC Rcd at 14206, para. 31; *see supra* paras. 34-42.

[237] 47 U.S.C. § 253(b).

[238] 47 U.S.C. § 253(c).

[239] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3362-66, paras. 90-92, 95, 97-99.

burdensome requirements to deploy facilities using "stealth" designs or other means of camouflage,[240] as well as unduly stringent mandates regarding the size of equipment, colors of paint, and other details.[241] Providers also assert that the procedures some localities use to evaluate the appearance of proposed facilities and to decide whether they comply with applicable land-use requirements are overly restrictive.[242] Many providers are particularly critical of the use of unduly vague or subjective criteria that may apply inconsistently to different providers or are only fully revealed after application, making it impossible for providers to take these requirements into account in their planning and adding to the time necessary to deploy facilities.[243] At the same time, we have heard concerns in the record about carriers deploying unsightly facilities that are significantly out of step with similar, surrounding deployments.

85. State and local governments add that many of their aesthetic restrictions are justified by factors that the providers fail to mention. They assert that their zoning requirements and their review and enforcement procedures are properly designed to, among other things, (1) ensure that the design, appearance, and other features of buildings and structures are compatible with nearby land uses; (2) manage ROW so as to ensure traffic safety and coordinate various uses; and (3) protect the integrity of

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[240] *See, e.g.,* CCIA Comments at 14-15 (discussing regulations enacted by Village of Skokie, Illinois); WIA Reply Comments (WT Docket No. 16-421) at 9-10 (discussing restrictions imposed by Town of Hempstead, New York); *see also* AT&T Comments at 14-17; PTA-FLA Comments at 19; Verizon Comments at 19-20; AT&T Aug. 6, 2018 *ex parte* at 3.

[241] *See, e.g.,* CCIA Comments at 13-14 (describing regulations established by Skokie, Illinois that prescribe in detail the permissible colors of paint and their potential for reflecting light); AT&T Aug. 6, 2018 *ex parte* at 3 ("Some municipalities require carriers to paint small cell cabinets a particular color when like requirements were not imposed on similar equipment placed in the ROW by electric incumbents, competitive telephone companies, or cable companies," and asserts that it often "is highly burdensome to maintain non-factory paint schemes over years or decades, including changes to the municipal paint scheme," due to "technical constraints as well such as manufacture warranty or operating parameters, such as heat dissipation, corrosion resistance, that are inconsistent with changes in color, or finish."); AT&T Comments at 16-17 (contending that some localities "allow for a single size and configuration for small cell equipment while requiring case-by-case approval of any non-conforming equipment, even if smaller and upgraded in design and performance," and thus effectively compel "providers [to] incur the added expense of conforming their equipment designs to the approved size and configuration, even if newer equipment is smaller, to avoid the delays associated with the approval of an alternative equipment design and the risk of rejection of that design."); *id.* at 17 (some local governments "prohibit the placement of wireless facilities in and around historic properties and districts, regardless of the size of the equipment or the presence of existing more visually intrusive construction near the property or district").

[242] *See, e.g.,* Crown Castle Comments at 14-15 (criticizing San Francisco's aesthetic review procedures that discriminate against providers and criteria and referring to extended litigation); CTIA Reply Comments at 17 ("San Francisco imposes discretionary aesthetic review for wireless ROW facilities."); T-Mobile Comments at 40; *but see* San Francisco Comments at 3-7 (describing aesthetic review procedures). *See also* AT&T Comments at 13-17; Extenet Comments at 37; CTIA Comments at 21-22; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8.

[243] *See, e.g.,* AT&T Comments at 13-17; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8. WIA cites allegations that an unnamed city in California recently declined to support approval of a proposed small wireless installation, claiming that the installations do not meet "Planning and Zoning Protected Location Compatibility Standards," even though the same equipment has been deployed elsewhere in the city dozens of times, and even though the "Protected Location" standards should not apply because the proposals are not on "protected view" streets). WIA Reply Comments, WT Docket No. 16-421 at 9-10; *id.* at 8 (noting that one city changed its aesthetic standards after a proposal was filed); AT&T Comments at 17 (noting that a design approval took over a year); Virginia Joint Commenters, WT Docket No. 16-421 (state law providing discretion for zoning authority to deny application because of "aesthetics" concerns without additional guidance); Extenet Reply Comments at 13 (noting that some "local governments impose aesthetic requirements based entirely on subjective considerations that effectively give local governments latitude to block a deployment for virtually any aesthetically-based reason")

their historic, cultural, and scenic resources and their citizens' quality of life.[244]

86. Given these differing perspectives and the significant impact of aesthetic requirements on the ability to deploy infrastructure and provide service, we provide guidance on whether and in what circumstances aesthetic requirements violate the Act. This will help localities develop and implement lawful rules, enable providers to comply with these requirements, and facilitate the resolution of disputes. We conclude that aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.

87. Like fees, compliance with aesthetic requirements imposes costs on providers, and the impact on their ability to provide service is just the same as the impact of fees. We therefore draw on our analysis of fees to address aesthetic requirements. We have explained above that fees that merely require providers to bear the direct and reasonable costs that their deployments impose on states and localities should not be viewed as having the effect of prohibiting service and are permissible.[245] Analogously, aesthetic requirements that are reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible. In assessing whether this standard has been met, aesthetic requirements that are more burdensome than those the state or locality applies to similar infrastructure deployments are not permissible, because such discriminatory application evidences that the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment. For example, a minimum spacing requirement that has the effect of materially inhibiting wireless service would be considered an effective prohibition of service.

88. Finally, in order to establish that they are reasonable and reasonably directed to avoiding aesthetic harms, aesthetic requirements must be objective—*i.e.*, they must incorporate clearly-defined and ascertainable standards, applied in a principled manner—and must be published in advance.[246] "Secret" rules that require applicants to guess at what types of deployments will pass aesthetic muster substantially increase providers' costs without providing any public benefit or addressing any public harm. Providers cannot design or implement rational plans for deploying Small Wireless Facilities if they cannot predict in advance what aesthetic requirements they will be obligated to satisfy to obtain permission to deploy a facility at any given site.[247]

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[244] *See, e.g.,* NLC Comments, WT Docket No. 16-421 at 8-10; Smart Communities Comments, WT Docket No. 16-421 at 35-36; New York City Comments at 10-15; New Orleans Comments at 1-2, 5-8; San Francisco Comments at 3-12; CCUA Reply Comments at 5; Irvine (CA) Comments at 2; Oakland County (MI) Comments at 3-5; Florida Coalition of Local Gov'ts Reply Comments at 6-12 (justifications for undergrounding requirements); *id.* at 16-421 (justifications for municipal historic-preservation requirements); *id.* at 22-16 (justifications for aesthetics and design requirements).

[245] *See supra* paras. 55-56.

[246] Our decision to adopt this objective requirement is supported by the fact that many states have recently adopted limits on their localities' aesthetic requirements that employ the term "objective." *See, e.g.,* Letter from Scott Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 8 (filed Sept. 19, 2018) (noting requirements enacted in the states of Arizona, Delaware, Missouri, North Carolina, Ohio, and Oklahoma, that local siting requirements for small wireless facilities be "objective"); *see also* Letter from Kara R. Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 8 (filed Sept. 4, 2018)

[247] Some local governments argue that, because different aesthetic concerns may apply to different neighborhoods, particularly those considered historic districts, it is not feasible for them to publish local aesthetic requirements in advance. *See, e.g.,* Letter from Mark J. Schwartz, County Manager, Arlington County, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018) (Arlington County Sept. 18 *Ex Parte* Letter); Letter from Allison Silberberg, Mayor, City of Alexandria, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018). We believe this concern is unfounded. As noted above, the fact that our approach here (including the publication requirement) is consistent with that already enacted in many state-level small cell bills supports the feasibility of our decision. Moreover, the aesthetic requirements to be published in advance need not

89. We appreciate that at least some localities will require some time to establish and publish aesthetics standards that are consistent with this Declaratory Ruling. Based on our review and evaluation of commenters' concerns, we anticipate that such publication should take no longer than 180 days after publication of this decision in the Federal Register.

90. *Undergrounding Requirements.* We understand that some local jurisdictions have adopted undergrounding provisions that require infrastructure to be deployed below ground based, at least in some circumstances, on the locality's aesthetic concerns. A number of providers have complained that these types of requirements amount to an effective prohibition.[248] In addressing this issue, we first reiterate that, while undergrounding requirements may well be permissible under state law as a general matter, any local authority to impose undergrounding requirements under state law does not remove such requirements from the provisions of Section 253. In this regard, we believe that a requirement that *all* wireless facilities be deployed underground would amount to an effective prohibition given the propagation characteristics of wireless signals. In this sense, we agree with the U.S. Court of Appeals for the Ninth Circuit when it observed that, "[i]f 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."[249] Further, a requirement that materially inhibits wireless service, even if it does not go so far as requiring that all wireless facilities be deployed underground, also would be considered an effective prohibition of service. Thus, the same criteria discussed above in the context of aesthetics generally would apply to state or local undergrounding requirements.

91. *Minimum Spacing Requirements.* Some parties complain of municipal requirements regarding the spacing of wireless installations—*i.e.*, mandating that facilities be sited at least 100, 500, or 1,000 feet, or some other minimum distance, away from other facilities, ostensibly to avoid excessive overhead "clutter" that would be visible from public areas.[250] We acknowledge that while some such requirements may violate 253(a), others may be reasonable aesthetic requirements.[251] For example, under the principle that any such requirements be reasonable and publicly available in advance, it is difficult to envision any circumstances in which a municipality could reasonably promulgate a new minimum spacing requirement that, in effect, prevents a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use. Such a rule change with retroactive effect would

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prescribe in detail every specification to be mandated for each type of structure in each individual neighborhood. Localities need only set forth the objective standards and criteria that will be applied in a principled manner at a sufficiently clear level of detail as to enable providers to design and propose their deployments in a manner that complies with those standards.

[248] *See, e.g.,* AT&T Comments at 14-15; Crown Castle Comments at 54-56; T-Mobile Comments at 38; Verizon Comments at 6-8; WIA Comments at 56; CTIA Reply at 16. *But see* Chicago Comments at 15; City of Claremont (CA) Comments at 1; City of Kenmore (WA) Comments at 1; City of Mukilteo (WA) Comments at 2; Florida Coalition of Local Gov'ts Comments at 6-12; Smart Communities Comments at 74.

[249] *County of San Diego*, 543 F.3d at 580, *accord*, BDAC Model Municipal Code at 13, § 2.3.e (providing for municipal zoning authority to allow providers to deploy small wireless facilities on existing vertical structures where available in neighborhoods with undergrounding requirements, or if no technically feasible structures exist, to place vertical structures commensurate with other structures in the area).

[250] *See, e.g.,* Verizon Comments at 8 (describing requirements imposed by Buffalo Grove, Illinois); CCIA Comments at 14-15 ("These restrictions stifle technological innovation and unnecessarily burden the ability of a provider to use the best available technological to serve a particular area. For example, 5G technology will require higher band spectrum for greater network capacity, yet some millimeter wave spectrum simply cannot propagate long distances over a few thousand feet—let alone a few hundred. Therefore, a local requirement of, for example, a thousand-foot minimum separation distance between small cells would unnecessarily forestall any network provider seeking to use higher band spectrum with greater capacity when that provider needs to boost coverage in a specific area of a few hundred feet."). *See also* AT&T Comments at 15; CTIA Reply at 17.

[251] 47 U.S.C. § 253(a).

almost certainly have the effect of prohibiting service under the standards we articulate here. Therefore, such requirements should be evaluated under the same standards for aesthetic requirements as those discussed above.[252]

D. States and Localities Act in Their Regulatory Capacities When Authorizing and Setting Terms for Wireless Infrastructure Deployment in Public Rights of Way

92. We confirm that our interpretations today extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.[253] As explained below, for two alternative and independent reasons, we disagree with state and local government commenters who assert that, in providing or denying access to government-owned structures, these governmental entities function solely as "market participants" whose rights cannot be subject to federal preemption under Section 253(a) or Section 332(c)(7).[254]

93. First, this effort to differentiate between such governmental entities' "regulatory" and "proprietary" capacities in order to insulate the latter from preemption ignores a fundamental feature of the market participant doctrine.[255] As the Ninth Circuit has observed, at its core, this doctrine is "a

[252] Another type of restriction that imposes substantial burdens on providers, but does not meaningfully advance any recognized public-interest objective, is an explicit or implicit *quid pro quo* in which a municipality makes clear that it will approve a proposed deployment only on condition that the provider supply an "in-kind" service or benefit to the municipality, such as installing a communications network dedicated to the municipality's exclusive use. *See, e.g.*, Comcast Comments at 9-10 Verizon Comments at 7, Crown Castle Comments at 55-56. Such requirements impose costs, but rarely, if ever, yield benefits directly related to the deployment. Additionally, where such restrictions are not cost-based, they inherently have "the effect of prohibiting" service, and thus are preempted by Section 253(a). *See also* BDAC Regulatory Barriers Report, Appendix E at 1 (describing "conditions imposed that are unrelated to the project for which they were seeking ROW access" as "inordinately burdensome"); BDAC Model Municipal Code at 19, § 2.5a.(v)(F) (providing that municipal zoning authority "may not require an Applicant to perform services . . . or in-kind contributions [unrelated] to the Communications Facility or Support Structure for which approval is sought").

[253] *See supra* paras. 50-91. Some have argued that Section 224 of the Communications Act's exception of state-owned and cooperative-owned utilities from the definition of "utility," "[a]s used in this section," suggests that Congress did not intend for any other portion of the Act to apply to poles or other facilities owned by such entities. City of Mukilteo, et. al. Ex Parte Comments on the Draft Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from James Bradford Ramsay, General Counsel, NARUC to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79 at 7 (filed Sept. 19, 2018). We see no basis for such a reading. Nothing in Section 253 suggests such a limited reading, nor does Section 224 indicate that other provisions of the Act do not apply. We conclude that our interpretation of effective prohibition extends to fees for all government-owned property in the ROW, including utility poles. *Compare* 47 U.S.C. § 224 *with* 47 U.S.C. § 253. We are not addressing here how our interpretations apply to access or attachments to government-owned property located outside the public ROW.

[254] *See, e.g.,* AASHTO Comments, Att. 1 (Del. DOT Comments) at 3-5; New York City Comments at 2-8; San Antonio *et al.* Comments at 14-15; Smart Communities Comments at 62-66; San Francisco Comments at 28-30; League of Arizona Cities *et al.* Comments, WT Docket No. 16-421 at 3-9; San Antonio *et al.* Comments, WT Docket No. 16-421 at 14-15. *See also Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3364-65, para. 96 (seeking comment on this issue).

[255] The market participant doctrine establishes that, unless otherwise specified by Congress, federal statutory provisions may be interpreted as preempting or superseding state and local governments' activities involving regulatory or public policy functions, but not their activities as "market participants" to serve their "purely proprietary interests," analogous to similar transactions of private parties. *Building & Construction Trades Council*

presumption about congressional intent," which "may have a different scope under different federal statutes."[256] The Supreme Court has likewise made clear that the doctrine is applicable only "[i]n the absence of any express or implied indication by Congress."[257] In contrast, where state action conflicts with express or implied federal preemption, the market participant doctrine does not apply, whether or not the state or local government attempts to impose its authority over use of public rights-of-way by permit or by lease or contract.[258] Here, both Sections 253(a) and Section 332(c)(7)(B)(i)(II) expressly address preemption, and neither carves out an exception for proprietary conduct.[259]

94. Specifically, Section 253(a) expressly preempts certain state and local "legal requirements" and makes no distinction between a state or locality's regulatory and proprietary conduct. Indeed, as the Commission has long recognized, Section 253(a)'s sweeping reference to "State [and] local statute[s] [and] regulation[s]" and "other State [and] local legal requirement[s]" demonstrates Congress's intent "to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services."[260] Section 253(b) mentions "requirement[s]," a phrase that is even broader than that used in Section 253(a) but covers "universal service," "public safety and welfare," "continued quality of telecommunications," and "safeguard[s for the] rights of consumers." The subsection does not recognize a distinction between regulatory and proprietary. Section 253(c), which expressly insulates from preemption certain state and local government activities, refers in relevant part to "manag[ing] the public rights-of-way" and "requir[ing] fair and reasonable compensation," while eliding any distinction between regulatory and proprietary action in either context. The Commission has previously observed that Section 253(c) "makes explicit a local government's continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public

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v. Associated Builders & Contractors, 507 U.S. 218, 229, 231 (1993) (*Boston Harbor*); *see also Wisconsin Dept. of Industry, Labor, and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (*Gould*).

[256] *See*, *e.g.*, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Distr.,* 498 F.3d 1031, 1042 (9th Cir. 2007); *Johnson v. Rancho Santiago Comm. College*, 623 F.3d 1011, 1022 (9th Cir. 2010).

[257] *See Boston Harbor*, 507 U.S. at 231.

[258] *See American Trucking Ass'n v. City of Los Angeles,* 569 U.S. 641, 650 (2013) (*American Trucking*).

[259] At a minimum, we conclude that Congress's language has not unambiguously pointed to such a distinction. *See* Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Aug. 23, 2018) (Verizon Aug. 23, 2018 *Ex Parte* Letter). Furthermore, we contrast these statutes with those that do not expressly or impliedly preempt proprietary conduct. *Compare*, *e.g.*, *American Trucking*, 569 U.S. 641 (finding that FAA Authorization Act of 1994's provision that "State [or local government] may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property" expressly preempted the terms of a standard-form concession agreement drafted to govern the relationship between the Port of Los Angeles and any trucking company seeking to operate on the premises), *and Gould*, 475 U.S. at 289 (finding that NLRA preempted a state law barring state contracts with companies with disfavored labor practices because the state scheme was inconsistent with the federal scheme), *with Boston Harbor*, 507 U.S. at 224-32. In *Boston Harbor*, the Supreme Court observed that the NLRA contained no express preemption provision or implied preemption scheme and consequently held:

> In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.

Id. (internal citations omitted).

[260] *See Minnesota Order*, 14 FCC Rcd at 21707, para. 18. We find these principles to be equally applicable to our interpretation of the meaning of "regulation[s]" referred to under Section 332(c)(7)(B) insofar as such actions impermissibly "prohibit or have the effect of prohibiting the provision of personal wireless services." *Supra* paras. 34-42.

rights-of-way."[261] We conclude here that, as a general matter, "manage[ment]" of the ROW includes any conduct that bears on access to and use of those ROW, notwithstanding any attempts to characterize such conduct as proprietary.[262] This reading, coupled with Section 253(c)'s narrow scope, suggests that Congress's omission of a blanket proprietary exception to preemption was intentional, and thus, that such conduct can be preempted under Section 253(a). We therefore construe Section 253(c)'s requirements, including the requirement that compensation be "fair and reasonable," as applying equally to charges imposed via contracts and other arrangements between a state or local government and a party engaged in wireless facility deployment.[263] This interpretation is consistent with Section 253(a)'s reference to "State or local legal requirement[s]," which the Commission has consistently construed to include such agreements.[264] In light of the foregoing, whatever the force of the market participant doctrine in other contexts,[265] we believe the language, legislative history, and purpose of Sections 253(a) and (c) are incompatible with the application of this doctrine in this context. We observe once more that "[o]ur conclusion that Congress intended this language to be interpreted broadly is reinforced by the scope of section 253(d)," which "directs the Commission to preempt any statute, regulation, or legal requirement *permitted* or imposed by a state or local government if it contravenes sections 253(a) or (b). A more restrictive interpretation of the term 'other legal requirements' easily could permit state and local restrictions on competition to escape preemption based solely on the way in which [state] action was structured. We do not believe that Congress intended this result."[266]

95. Similarly, and as discussed elsewhere,[267] we interpret Section 332(c)(7)(B)(ii)'s references to "any request[s] for authorization to place, construct, or modify personal wireless service facilities" broadly, consistent with Congressional intent. As described below, we find that "any" is unqualifiedly broad, and that "request" encompasses anything required to secure all authorizations necessary for the deployment of personal wireless services infrastructure. In particular, we find that Section 332(c)(7) includes authorizations relating to access to a ROW, including but not limited to the

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[261] *See Minnesota Order*, 14 FCC Rcd at 21728-29, para. 60, quoting H. R. Rep. No. 104-204, U.S. Congressional & Administrative News, March 1996, vol.1, Legislative History section at 41 (1996).

[262] Indeed, to permit otherwise could limit the utility of ROW access for telecommunications service providers and thus conflict with the overarching preemption scheme set up by Section 253(a), for which 253(b) and 253(c) are exceptions. By construing "manage[ment]" of a ROW to include some proprietary behaviors, we mean to suggest that conduct taken in a proprietary capacity is likewise subject to 253(c)'s general limitations, including the requirement that any compensation charged in such capacity be "fair and reasonable."

[263] *Cf. Minnesota Order*, 14 FCC Rcd at 21729-30, para. 61-62 (internal citations omitted) ("Moreover, Minnesota has not shown that the compensation required for access to the right-of-way is 'fair and reasonable.' The compensation appears to reflect the value of the exclusivity inherent in the Agreement [which provides the developer with exclusive physical access, for at least ten years, to longitudinal rights-of-way along Minnesota's interstate freeway system] rather than fair and reasonable charges for access to the right-of-way. Nor has Minnesota shown that the Agreement provides for 'use of public rights-of-way on a nondiscriminatory basis.'")

[264] *Cf.* Crown Castle June 7, 2018 *Ex Parte* Letter at 17 n.83 ("Section 253(c), which carves out ROW management, would hardly be necessary if all ROW decisions were proprietary and shielded from the statute's sweep.").

[265] We acknowledge that the Commission previously concluded that "Section 6409(a) applies only to State and local governments acting in their role as land use regulators" and found that "this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt 'non regulatory decisions[.]'" *See 2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 237-240. To the extent necessary, we clarify here that the actions and analysis there were limited in scope given the different statutory scheme and record in that proceeding, which did not, at the time, suggest a need to "further elaborate as to how this principle should apply to any particular circumstance" (there, in connection with application of Section 6409(a)). Here, in contrast, as described herein, we find that further elucidation by the Commission is needed.

[266] *Minnesota Order*, 14 FCC Rcd at 21707, para. 18 (internal citations omitted) (emphasis omitted).

[267] *See infra* Part IV.C.1 (Authorizations Subject to the "Reasonable Period of Time" Provision of Section 332(c)(7)(B)(ii)).

"place[ment], construct[ion], or modif[ication]" of facilities on government-owned property, for the purpose of providing "personal wireless service." We observe that this result, too, is consistent with Commission precedent such as the *Minnesota Order*, which involved a contract that provided exclusive access to a ROW. As but one example, to have limited that holding to exclude government-owned property within the ROW even if the carrier needed access to that property would have the effect of diluting or completely defeating the purpose of Section 332(c)(7).[268]

96. Second, and in the alternative, even if Section 253(a) and Section 332(c)(7) were to permit leeway for states and localities acting in their proprietary role, the examples in the record would be excepted because they involve states and localities fulfilling regulatory objectives.[269] In the proprietary context, "a State acts as a 'market participant with no interest in setting policy.'"[270] We contrast state and local governments' purely proprietary actions with states and localities acting with respect to managing or controlling access to property within public ROW, or to decisions about where facilities that will provide personal wireless service to the public may be sited. As several commenters point out, courts have recognized that states and localities "hold the public streets and sidewalks in trust for the public" and "manage public ROW in their regulatory capacities."[271] These decisions could be based on a number of regulatory objectives, such as aesthetics or public safety and welfare, some of which, as we note elsewhere, would fall within the preemption scheme envisioned by Congress. In these situations, the state or locality's role seems to us to be indistinguishable from its function and objectives as a regulator.[272] To

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[268] *See also infra* para. 134-36 and cases cited therein. Precedent that may appear to reach a different result can be distinguished in that it resolves disputes arising under Section 332 and/or 253(a) without analyzing the scope of Section 253(c). Furthermore, those situations did not involve government-owned property or structures within a public ROW. *See*, *e.g.*, *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420-21 (2d Cir. 2002) (declining to find preemption under Section 332 applicable to terms of a school rooftop lease); *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 195-96, 200-01 (9th Cir. 2013) (declining to find preemption under Section 332 applicable to restrictions on lease of parkland).

[269] In this regard, also relevant to our interpretations here is courts' admonition that government activities that are characterized as transactions but in reality are "tantamount to regulation" are subject to preemption, *Gould*, 475 U.S. at 289, and that government action disguised as private action may not be relied on as a pretext to advance regulatory objectives. *See*, *e.g.*, *Coastal Communications Service v. City of New York*, 658 F. Supp. 2d 425, 441-42 (E.D.N.Y. 2009) (finding that a restriction on advertising on newly-installed payphones was subject to section 253(a) where the advertising was a material factor in the provider's ability to provide the payphone service itself).

[270] *See*, *e.g.*, *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008).

[271] *See* Verizon Comments at 26-28 & n.85; T-Mobile Comments at 50 & n.210 and cases cited therein.

[272] Indeed, the Commission has long recognized that, in enacting Sections 253(c) and 332(c)(7), Congress affirmatively protected the ability of state and local governments to carry out their responsibilities for maintaining, managing, and regulating the use of ROW and structures therein for the benefit of the public. *TCI Cablevision Order,* 12 FCC Rcd at 21441, para. 103 (1997) ("We recognize that section 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way."); *Moratoria Declaratory Ruling*, FCC 18-111, para. 142 (same); *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling, and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103, para. 39 (1996) (same). We find these situations to be distinguishable from those where a state or locality might be engaged in a discrete, *bona fide* transaction involving sales or purchases of services that do not otherwise violate the law or interfere with a preemption scheme. *Compare*, *e.g.*, *Cardinal Towing & Auto Repair, Inc., v. City of Bedford*, 180 F.3d 686, 691, 693-94 (5th Cir. 1999) (declining to find that the FAA Authorization Act of 1994, as amended by the ICC Termination Act of 1995, preempted an ordinance and contract specifications that were designed only to procure services that a municipality itself needed, not to regulate the conduct of others), *with NextG Networks of N.Y., Inc. v. City of New York*, 2004 WL 2884308 (N.D.N.Y., Dec. 10, 2004) (crediting allegations that a city's actions, such as issuing a request for proposal and implementing a general franchising scheme, were not of a purely proprietary nature, but rather, were taken in pursuit of a regulatory objective or policy). This action could include, for example, procurement of services for the state or locality, or a

the extent that there is some distinction, the temptation to blend the two roles for purposes of insulating conduct from federal preemption cannot be underestimated in light of the overarching statutory objective that telecommunications service and personal wireless services be deployed without material impediments.

97. Our interpretation of both provisions finds ample support in the record of this proceeding. Specifically, commenters explain that public ROW and government-owned structures within such ROW are frequently relied upon to supply services for the benefit of the public, and are often the best-situated locations for the deployment of wireless facilities.[273] However, the record is also replete with examples of states and localities refusing to allow access to such ROW or structures, or imposing onerous terms and conditions for such access.[274] These examples extend far beyond governments' treatment of single structures;[275] indeed, in some cases it has been suggested that states or localities are using their proprietary roles to effectuate a general municipal policy disfavoring wireless deployment in public ROW.[276] We believe that Section 253(c) is properly construed to suggest that Congress did not intend to permit states and localities to rely on their ownership of property within the ROW as a pretext to advance regulatory objectives that prohibit or have the effect of prohibiting the provision of covered services, and thus that such conduct is preempted.[277] Our interpretations here are intended to facilitate the implementation of the scheme Congress intended and to provide greater regulatory certainty to states, municipalities, and regulated parties about what conduct is preempted under Section 253(a). Should factual questions arise about whether a state or locality is engaged in such behavior, Section 253(d) affords state and local governments and private parties an avenue for specific preemption challenges.

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contract for employment services between a state or locality and one of its employees. We do not intend to reach these scenarios with our interpretations today.

[273] *See, e.g.,* Verizon Aug. 23, 2018 *Ex Parte* Letter at 4-5.

[274] *See supra* para. 25.

[275] *Cf. Sprint Spectrum L.P. v. Mills*, 283 F.3d 404.

[276] *See NextG Networks of N.Y., Inc. v. City of New York*, 2004 WL 2884308; *Coastal Communications Service v. City of New York*, 658 F. Supp. 2d at 441-42.

[277] We contrast this instance to others in which we either declined to act or responded to requests for action with respect to specific disputes. *See*, *e.g.*, *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 237-240; *Continental Airlines Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion and Order, 21 FCC Rcd 13201, 13220, para. 43 (2006) (observing, in the context of a different statutory and regulatory scheme, that "[g]iven that the Commission intended to preempt restrictions [regarding restrictions on Continental's use of its Wi-Fi antenna] in private lease agreements, however, Massport would be preempted even if it is acting in a private capacity with regard to its lease agreement with Continental."); *Sandwich Isles Section 253 Order*, 32 FCC Rcd at 5883, para. 14 (rejecting argument that argument that Section 253(a) is inapplicable where it would affect the state's ability to "deal[] with its real estate interests . . . as it sees fit," such as by granting access to "rights-of-way over land that it owns); *Minnesota Order*, 14 FCC Rcd at 21706-08, paras. 17-19; *cf. Amigo.Net Petition for Declaratory Ruling*, Memorandum Opinion and Order, 17 FCC Rcd 10964, 10967 (WCB 2002) (Section 253 did not apply to carrier's provision of network capacity to government entities exclusively for such entities' internal use); *T-Mobile West Corp. v. Crow*, 2009 WL 5128562 (D. Ariz., Dec. 17, 2009) (Section 332(c)(7) did not apply to contract for deployment of wireless facilities and services for use on state university campus). We clarify here that such prior instances are not to be construed as a concession that Congress did not make preemption available, or that the Commission lacked the authority to support parties' attempts to avail themselves of relief offered under preemption schemes, when confronted with instances in which a state or locality is relying on its proprietary role to skirt federal regulatory reach. Indeed, these instances demonstrate the opposite—that preemption is available to effectuate Congressional intent—and merely illustrate application of this principle. Also, we do not find it necessary to await specific disputes in the form of Section 253(d) petitions to offer these interpretations. In the alternative and as an independent means to support the interpretations here, we clarify that we intend for our views to guide how preemption should apply in fact-specific scenarios.

E. Responses to Challenges to Our Interpretive Authority and Other Arguments

98. We reject claims that we lack authority to issue authoritative interpretations of Sections 253 and 332(c)(7) in this Declaratory Ruling. As explained above, we act here pursuant to our broad authority to interpret key provisions of the Communications Act, consistent with our exercise of that interpretive authority in the past.[278] In this instance, we find that issuing a Declaratory Ruling is necessary to remove what the record reveals is substantial uncertainty and to reduce the number and complexity of legal controversies regarding certain fee and non-fee state and local legal requirements in connection with Small Wireless Facility infrastructure. We thus exercise our authority in this Declaratory Ruling to interpret Section 253 and Section 332(c)(7) and explain how those provisions apply in the specific scenarios at issue here.[279]

99. Nothing in Sections 253 or 332(c)(7) purports to limit the exercise of our general interpretive authority.[280] Congress's inclusion of preemption provisions in Section 253(d) and Section 332(c)(7)(B)(v) does not limit the Commission's ability pursuant to other sections of the Act to construe and provide its authoritative interpretation as to the meaning of those provisions.[281] Any preemption under Section 253 and/or Section 332(c)(7)(B) that subsequently occurs will proceed in accordance with the enforcement mechanisms available in each context. But whatever enforcement mechanisms may be available to preempt specific state and local requirements, nothing in Section 253 or Section 332(c)(7) prevents the Commission from declaring that a category of state or local laws is inconsistent with Section 253(a) or Section 332(c)(7)(B)(i)(II) because it prohibits or has the effect of prohibiting the relevant covered service.[282]

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[278] *See, e.g.*, *Moratoria Declaratory Ruling*, FCC 18-111, paras. 161-68; *2009 Declaratory Ruling*, 24 FCC Rcd at 14001, para. 23.

[279] Targeted interpretations of the statute like those we adopt here fall far short of a "federal regulatory program dictating the scope and policies involved in local land use" that some commenters fear. League of Minnesota Cities Comments at 9.

[280] We also reject claims that Section 601(c)(1) of the 1996 Act constrains our interpretation of these provisions. *See, e.g.*, NARUC Reply at 3; Smart Communities Reply at 33, 35-36. That provision guards against implied preemption, while Section 253 and Section 332(c)(7)(B) both expressly restrict state and local activities. *See, e.g.*, *Texas PUC Order*, 13 FCC Rcd at 3485-86, para. 51. Courts also have read that provision narrowly. *See, e.g.*, *In re FCC 11-161*, 753 F.3d 1015, 1120 (10th Cir. 2014); *Qwest Corp. v. Minnesota Pub. Utilities Comm'n*, 684 F.3d 721, 730-31 (8th Cir. 2012); *Farina v. Nokia Inc.*, 625 F.3d 97, 131 (3d Cir. 2010). Although the Ninth Circuit in *County of San Diego* asserted that there is a presumption that express preemption provisions should be read narrowly, and that the presumption would apply to the interpretation of Section 253(a), *County of San Diego*, 543 F.3d at 548, the cited precedent applies that presumption where "the State regulates in an area where there is no history of significant federal presence." *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005). Whatever the applicability of such a presumption more generally, there is a substantial history of federal involvement here, particularly insofar as interstate telecommunications services and wireless services are implicated. *See, e.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003); *Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 490–92 (2d Cir. 1968); 47 U.S.C., Title III.

[281] *See, e.g.*, California PUC Comments at 11; Verizon Comments at 31-33; CTIA Reply at 22-23; WIA Reply at 16-18. We thus reject claims to the contrary. *See, e.g.*, City of New York Comments at 8; Virginia Joint Commenters Comments, Exh. A at 41-44; City of New York Reply at 1-2; NATOA Reply at 9-10; Smart Communities Reply at 34. Indeed, the Fifth Circuit upheld just such an exercise of authority with respect to the interpretation of Section 332(c)(7) in the past. *See generally City of Arlington*, 668 F.3d at 249-54. While some commenters assert that the questions addressed by the Commission in the order underlying the Fifth Circuit's *City of Arlington* decision are somehow more straightforward than our interpretations here, they do not meaningfully explain why that is the case, instead seemingly contemplating that the Commission would address a wider, more general range of circumstances than we actually do here. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 44-45.

[282] Consequently, we reject claims that relying on our general interpretative authority to interpret Section 253 and Section 332(c)(7) would render any provisions of the Act mere surplusage, *see, e.g.*, Smart Communities Reply at 34-35, or would somehow "usurp the role of the judiciary." Washington State Cities Reply at 14. We likewise

100. Although some commenters contend in general terms that differences in judicial approaches to Section 253 are limited and thus there is little need for Commission guidance,[283] the interpretations we offer in this Declaratory Ruling are intended to help address certain specific scenarios that have caused significant uncertainty and legal controversy, irrespective of the degree to which this uncertainty has been reflected in court decisions. We also reject claims that a Supreme Court brief joined by the Commission demonstrates that there is no need for the interpretations in this Declaratory Ruling.[284] To the contrary, that brief observed that some potential interpretations of certain court decisions "would create a serious conflict with the Commission's understanding of Section 253(a), and [] would undermine the federal competition policies that the provision seeks to advance."[285] The brief also noted that, if warranted, "the Commission can restore uniformity by issuing authoritative rulings on the application of Section 253(a) to particular types of state and local requirements."[286] Rather than cutting against the need for, or desirability of, the interpretations we offer in this Declaratory Ruling, the brief instead presaged them.[287]

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reject other arguments insofar as they purport to treat Section 253(d)'s provision for preemption as more specific than, or otherwise controlling over, other Communications Act provisions enabling the Commission to authoritatively interpret the Act. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 43. To the contrary, "[t]he specific controls but only within its self-described scope." *Nat'l Cable & Telecomm. Ass'n v. Gulf Power*, 534 U.S. 327, 336 (2002). In addition, concerns that the Commission might interpret Section 253(c) in a manner that would render it a nullity or in a manner divorced from relevant context—things we do not do here—bear on the reasonableness of a given interpretation and not on the existence of interpretive authority in the first instance, as some contend. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 43-44.

[283] *See, e.g.*, City of San Antonio *et al*. Comments, Exh. B at 26-27; Fairfax County Comments at 20; Smart Communities Comments at 61. Some commenters assert that there are reasonable, material reliance interests arising from past court interpretations that would counsel against our interpretations in this order because "localities and providers have adjusted to the tests within their circuits" and "reflected those standards in local law." Smart Communities Comments, WT Docket No. 16-141 at 67 (filed Mar. 8, 2017) cited in City of Austin Comments at 2 n.3. Arguments such as these, however, merely underscore the regulatory patchwork that inhibits the development of a robust nationwide telecommunications and private wireless service as envisioned by Congress. By offering interpretations of the relevant statutes here, we intend, thereby, to eliminate potential regional regulatory disparities flowing from differing interpretations of those provisions. *See, e.g.*, WIA Reply at 19-20.

[284] *See* City of San Antonio *et al*. Comments, Exh. B at 27 (citing Brief for the United States as Amicus Curiae, *Level 3 Commc'ns v. City of St. Louis*, Nos. 08-626, 08-759 at 9, 11 (filed May 28, 2009) (Amicus Brief)).

[285] Amicus Brief at 12-13. The brief also identified other specific areas of concern with those cases. *See, e.g.*, *id*. at 13 ("The court appears to have accorded inordinate significance to Level 3's inability to 'state with specificity what additional services it might have provided' if it were not required to pay St. Louis's license fee. That specific failure of proof—which the court of appeals seems to have regarded as emblematic of broader evidentiary deficiencies in Level 3's case—is not central to a proper Section 253(a) inquiry." (citation omitted)); *id*. at 14 ("Portions of the Ninth Circuit's decision, moreover, could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail. As discussed above, limiting the preemptive reach of Section 253(a) to legal requirements that completely preclude entry would frustrate the policy of open competition that Section 253 was intended to promote." (citation omitted)).

[286] *Id*. at 18.

[287] Contrary to some claims, the need for these clarifications also is not undercut by prior determinations that advanced telecommunications capability is being deployed in a reasonable and timely fashion to all Americans. *See, e.g.*, Letter from Nancy Werner, General Counsel, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21, 2018) (NATOA June 21, 2018 *Ex Parte* Letter) (citing *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 33 FCC Rcd 1660, 1707-08, para. 94 (2018) (*2018 Broadband Deployment Report*)). These commenters do not explain why the distinct standard for evaluating deployment of advanced telecommunications capability, *see 2018 Broadband Deployment Report*, 33 FCC Rcd at 1663-76, paras. 9-39, should bear on the application of Section 253 or Section 332(c)(7). Further, as the Commission itself observed, "[a] finding that deployment of advanced

101. Our interpretations of Sections 253 and Section 332(c)(7) are likewise not at odds with the Tenth Amendment and constitutional precedent, as some commenters contend.[288] In particular, our interpretations do not directly "compel the states to administer federal regulatory programs or pass legislation."[289] The outcome of violations of Section 253(a) or Section 332(c)(7)(B) of the Act are no more than a consequence of "the limits Congress already imposed on State and local governments" through its enactment of Section 332(c)(7).[290]

102. We also reject the suggestion that the limits Section 253 places on state and local ROW fees and management will unconstitutionally interfere with the relationship between a state and its political subdivisions.[291] As relevant to our interpretations here, it is not clear, at first blush, that such concerns would be implicated.[292] Because state and local legal requirements can be written and structured in myriad ways, and challenges to such state or local activities could be framed in broad or narrow terms, we decline to resolve such questions here, divorced from any specific context.

IV. THIRD REPORT AND ORDER

103. In this Third Report and Order, we address the application of shot clocks to state and local review of wireless infrastructure deployments. We do so by taking action in three main areas. First, we adopt a new set of shot clocks tailored to support the deployment Small Wireless Facilities. Second, we adopt a specific remedy that applies to violations of these new Small Wireless Facility shot clocks, which we expect will operate to significantly reduce the need for litigation over missed shot clocks. Third, we clarify a number of issues that are relevant to all of the FCC's shot clocks, including the types of authorizations subject to these time periods.

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telecommunications capability is reasonable and timely in no way suggests that we should let up in our efforts to foster greater deployment." *Id*. at 1664, para. 13.

[288] *See, e.g.*, City of San Antonio *et al*. Comments, Exh. A at 28; Smart Communities Comments at 77-78; Smart Communities Reply at 48-50; NATOA June 21, 2018 *Ex Parte* Letter at 3.

[289] *Montgomery County*, 811 F.3d at 128; *see Printz v. United States*, 521 U.S. 898 (1997) (*Printz*); *New York v. United States*, 505 U.S. 144 (1992) (*New York*). These provisions preempting state law thus do not "compel the States to enact or administer a federal regulatory program," *Printz*, 521 U.S. at 900, or "dictate what a state . . . may or may not do." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018) (*Murphy*).

[290] *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25. The Communications Act establishes its own framework for oversight of wireless facility deployment—one that is largely deregulatory, *see, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30, at para. 63; *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480-81, para. 182 (1994)—and it is reasonable to expect state and local governments electing to act in that area to do so only in a manner consistent with the Act's framework. *See, e.g.*, *Murphy*, 138 S. Ct. at 1470-71, 1480. Thus, the application of Section 253 and Section 332(c)(7)(B) is clearly distinguishable from the statute the Supreme Court struck down in *Murphy*, which did not involve a preemption scheme but nonetheless prohibited state authorization of sports gambling. *Id*. at 1481. The application here is also clearly distinguishable from the statute in *Printz*, which mandated states to run background checks on handgun purchases, *Printz*, 521 U.S. at 904–05, and the statute in *New York*, which required states to enact state laws that provide for the disposal of radioactive waste or else take title to such waste. *New York*, 505 U.S. at 151–52.

[291] *See, e.g.*, City of New York Comments at 9-10; Smart Communities Comments at 78.; *see also, e.g.*, *Nixon v. Mo. Mun. League*, 541 U.S. 125, 134 (2004) (identifying Tenth Amendment issues with the application of Section 253 where that application would implicate "state or local governmental self-regulation (or regulation of political inferiors)").

[292] For example, where a state or local law or other legal requirement simply sets forth particular fees to be paid, or where the legal requirement at issue is simply an exercise of discretion that governing law grants the state or local government, it is not clear that preemption would unconstitutionally interfere with the relationship between a state and its political subdivisions.

A. New Shot Clocks for Small Wireless Facility Deployments

104. In 2009, the Commission concluded that we should use shot clocks to define a presumptive "reasonable period of time" beyond which state or local inaction on wireless infrastructure siting applications would constitute a "failure to act" within the meaning of Section 332.[293] We adopted a 90-day clock for reviewing collocation applications and a 150-day clock for reviewing siting applications other than collocations. The record here suggests that our two existing Section 332 shot clocks have increased the efficiency of deploying wireless infrastructure. Many localities already process wireless siting applications in less time than required by those shot clocks, and a number of states have enacted laws requiring that collocation applications be processed in 60 days or less.[294] Some siting agencies acknowledge that they have worked to gain efficiencies in processing siting applications and welcome the addition of new shot clocks tailored to the deployment of small scale facilities.[295] Given siting agencies' increased experience with existing shot clocks, the greater need for rapid siting of Small Wireless Facilities nationwide, and the lower burden siting of these facilities places on siting agencies in many cases, we take this opportunity to update our approach to speed the deployment of Small Wireless Facilities.[296]

1. Two New Section 332 Shot Clocks for Deployment of Small Wireless Facilities

105. In this section, using authority confirmed in *City of Arlington*, we adopt two new Section 332 shot clocks for Small Wireless Facilities—60 days for review of an application for collocation of Small Wireless Facilities using a preexisting structure and 90 days for review of an application for attachment of Small Wireless Facilities using a new structure. These new Section 332 shot clocks carefully balance the well-established authority that states and local authorities have over review of wireless siting applications with the requirements of Section 332(c)(7)(ii) to exercise that authority "within a reasonable period of time… taking into account the nature and scope of the request."[297] Further, our decision is consistent with the BDAC's Model Code for Municipalities' recommended timeframes, which utilize this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures[298] and are similar to shot clocks enacted in state level small cell bills and the real world

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[293] *2009 Declaratory Ruling*, 24 FCC Rcd at 13994.

[294] *See infra* para. 106.

[295] Chicago Comments at 7 ("[T]he City has worked to achieve efficient processing times even for applications where no federal deadline exists."); New Orleans Comments at 3 ("City supports the concept proposed by the Commission . . . to establish . . . more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class.").

[296] *See* LaWana Mayfield July 31, 2018 *Ex Parte* Letter at 2 ("However, getting this infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources. The solution is to streamline relevant policies—allowing more modern rules for modern infrastructure."); Letter from John Richard C. King, House of Representatives, South Carolina, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed Aug. 27, 2018) ("A patchwork system of town-to-town, state-to-state rules slows the approval of small cell installations and delays the deployment of 5G. We need a national framework with guardrails to streamline the path forward to our wireless future"); Letter from Andy Thompson, State Representative, Ohio House District 95, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 24, 2018) ("In order for 5G to arrive as quickly and as effectively as possible, relevant infrastructure regulations must be streamlined. It makes very little sense for rules designed for 100-foot cell towers to govern the path to deployment for modern equipment called small cells that can fit into a pizza box."); Letter from Todd Nash, Wallowa County Board of Commissioners, Oregon, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 2 (filed Sept. 10, 2018) (FCC should streamline regulatory processes by, for example, tightening the deadlines for states and localities to approve new network facilities).

[297] 47 U.S.C. § 332(c)(7)(ii).

[298] The BDAC Model Municipal Code recommended, for certain types of facilities, shot clocks of 60 days for collocations and 90 days for new constructions on applications for siting Small Wireless Facilities. BDAC Model

experience of many municipalities which further supports the reasonableness of our approach.[299] Our actions will modernize the framework for wireless facility siting by taking into consideration that states and localities should be able to address the siting of Small Wireless Facilities in a more expedited review period than needed for larger facilities.[300]

106. We find compelling reasons to establish a new presumptively reasonable Section 332 shot clock of 60 days for collocations of Small Wireless Facilities on existing structures. The record demonstrates the need for, and reasonableness of, expediting the siting review of these collocations.[301] Notwithstanding the implementation of the current shot clocks, more streamlined procedures are both reasonable and necessary to provide greater predictability for siting applications nationwide for the deployment of Small Wireless Facilities. The two current Section 332 shot clocks do not reflect the evolution of the application review process and evidence that localities can complete reviews more quickly than was the case when the existing Section 332 shot clocks were adopted nine years ago. Since 2009, localities have gained significant experience processing wireless siting applications.[302] Indeed, many localities already process wireless siting applications in less than the required time[303] and several

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Municipal Code at §§ 2.2, 2.3, 3.2a(i)(B). Our approach utilizes the same timeframes set forth in the Model Municipal Code, and we disagree with comments that it is inconsistent with or ignores the work of the BDAC. GMA September 17 *Ex Parte* Letter at 4-5.

[299] For instance, while the City of Chicago opposes the shot clocks adopted here, we note that the City has also stated that, "[d]espite th[e] complex review process, involving many utilities and other entities, CDOT on average processed small cell applications last year in 55 days." Letter from Edward N. Siskel, Corp. Counsel, Dept. of Law, City of Chicago, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 19, 2018).

[300] Just like the shot clocks originally established in 2009—later affirmed by the Fifth Circuit and the Supreme Court—the shot clocks framework in this Third Report and Order are no more than an interpretation of "the limits Congress already imposed on State and local governments" through its enactment of Section 332(c)(7). *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25. *See also City of Arlington*, 668 F.3d at 259. As explained in the *2009 Declaratory Ruling*, the shot clocks derived from Section 332(c)(7) "will not preempt State or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification," and they "will continue to decide the outcome of personal wireless service facility siting applications pursuant to the authority Congress reserved to them in Section 332(c)(7)(A)." *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25.

[301] CTIA Comments, WT Docket No. 16-421, at 33 (filed Mar. 8, 2017); Letter from Juan Huizar, City Manager of the City of Pleasanton, TX, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed June 4, 2018) (describing the firsthand benefit of small cells and noting that communications infrastructure is a critical component of local growth); Letter from Sara Blackhurst, President, Action 22, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 2 (filed May 18, 2018) (Action 22 *Ex Parte*)("While we understand the need for relevant federal rules and protections appropriate for larger wireless infrastructure, we feel these same rules are not well-suited for smaller wireless facilities and risk slowing deployment in communities that need connectivity now."); Letter from Maurita Coley Flippin, President and CEO, MMTC, to the Hon. Ajit Pai, Chairman, FCC, WT Docket No. 17-79 at 2 (filed Sept. 5, 2018) (encourages the Commission to remove unnecessary barriers such as unreasonable delays so deployment can proceed expeditiously); Fred A. Lamphere Sept. 11, 2018 *Ex Parte* Letter at 1 (It is critical that the Commission continue to remove barriers to building new wireless infrastructure such as by setting reasonable timelines to review applications).

[302] T-Mobile Comments at 20; Crown Castle Reply at 5 (noting that the adoption of similar time frames by several states for small cell siting review confirms their reasonableness, and the Commission should apply these deadlines on a nationwide basis).

[303] Alaska Dep't of Natural Resources Comments at 2 ("[W]e are currently meeting or exceeding the proposed timeframe of the 'Shot Clock.'"); *see also* CTIA Aug. 30, 2018 *Ex Parte* Letter at 5 ("Eleven states—Delaware, Florida, Indiana, Kansas, Missouri, North Carolina, Rhode Island, Tennessee, Texas, Utah, and Virginia—recently adopted small cell legislation that includes 45-day or 60-day shot clocks for small cell collocations."); Jason R. Saine Sept. 14, 2018 *Ex Parte* Letter.

jurisdictions require by law that collocation applications be processed in 60 days or less.[304] With the passage of time, siting agencies have become more efficient in processing siting applications.[305] These facts demonstrate that a shorter, 60-day shot clock for processing collocation applications for Small Wireless Facilities is reasonable.[306]

107. As we found in 2009, collocation applications are generally easier to process than new construction because the community impact is likely to be smaller.[307] In particular, the addition of an antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community.[308] The size of Small Wireless Facilities poses little or no risk of adverse effects on the environment or historic preservation.[309] Indeed, many jurisdictions do not require public hearings for approval of such attachments, underscoring their belief that such attachments do not implicate complex issues requiring a more searching review.[310]

108. Further, we find no reason to believe that applying a 60-day time frame for Small Wireless Facility collocations under Section 332 creates confusion with collocations that fall within the scope of "eligible facilities requests" under Section 6409 of the Spectrum Act, which are also subject to a 60-day review.[311] The type of facilities at issue here are distinctly different and the definition of a Small Wireless Facility is clear. Further, siting authorities are required to process Section 6409 applications involving the swap out of certain equipment in 60 days, and we see no meaningful difference in processing these applications than processing Section 332 collocation applications in 60 days. There is

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[304] North Carolina requires its local governments to decide collocation applications within 45 days of submission of a complete application. N.C. Gen. Stat. Ann. § 153A-349.53(a2). The same 45-day shot clock applies to certain collocations in Florida. Fla. Stat. Ann. § 365.172(13)(a)(1), (d)(1). In New Hampshire, applications for collocation or modification of wireless facilities generally have to be decided within 45 days (subject to some exceptions under certain circumstances) or the application is deemed approved. N.H. Rev. Stat. Ann. § 12-K:10. Wisconsin requires local governments to decide within 45 days of receiving complete applications for collocation on existing support structure that does not involve substantial modification, or the application will be deemed approved, unless the local government and applicant agree to an extension. Wis. Stat. Ann. § 66.0404(3)(c). Local governments in Indiana have 45 days to decide complete collocation applications, unless an extension is allowed under the statute. Ind. Code Ann. § 8-1-32.3-22. Minnesota requires any zoning application, including both collocation and non-collocation applications, to be processed in 60 days. Minn. Stat. § 15.99, subd. 2(a). By not requiring hearings, collocation applications in these states can be processed in a timely manner.

[305] Chicago Comments at 7 ("[T]he City has worked to achieve efficient processing times even for applications where no federal deadline exists."); New Orleans Comments at 3 ("City supports the concept proposed by the Commission . . . to establish . . . more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class."); Action 22 *Ex Parte* at 2 ("While we understand the need for relevant federal rules and protections appropriate for larger wireless infrastructure, we feel these same rules are not well-suited for smaller wireless facilities and risk slowing deployment in communities that need connectivity now.").

[306] CCA Comments at 11-14; T-Mobile Comments at 20; Incompas Reply at 9; Sprint Comments at 45-47 (noting that Florida, Indiana, Kansas, Texas and Virginia all have passed small cell legislation that requires small cell application attachments to be acted upon in 60 days); T-Mobile Comments at 18 (arguing that the Commission should accelerate the Section 332 shot clocks for all sites to 60 days for collocations, including small cells).

[307] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para. 40.

[308] TIA Comments at 4.

[309] *Wireless Infrastructure Second R&O*, FCC 18-30 at para. 42 (citing Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1, Appx. B, § VI (Collocation NPA)); *see also* 47 CFR § 1.1306(c)(1) (excluding certain wireless facilities from NEPA review).

[310] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para. 46.

[311] DESHPO Comments at 2 ("opposes the application of separate time limits for review of facility deployments not covered by the Spectrum Act, as it would lead to confusion within the process for all parties involved (Applicants/Carrier, Consultants, SHPO)").

no reason to apply different time periods (60 vs. 90 days) to what is essentially the same review: modification of an existing structure to accommodate new equipment.[312] Finally, adopting a 60-day shot clock will encourage service providers to collocate rather than opting to build new siting structures which has numerous advantages.[313]

109. Some municipalities argue that smaller facilities are neither objectively "small" nor less obtrusive than larger facilities.[314] Others contend that shorter shot clocks for a broad category of "smaller" facilities are too restrictive,[315] and would fail to take into account the varied and unique climate, historic architecture, infrastructure, and volume of siting applications that municipalities face.[316] We take those considerations into account by clearly defining the category of "Small Wireless Facility" in our rules and allowing siting agencies to rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face. For similar reasons, we disagree that establishing shorter shot clocks for smaller facilities would impair states' and localities' authority to regulate local rights of way.[317]

110. While some commenters argue that additional shot clock classifications would make the siting process needlessly more complex without any proven benefits,[318] any additional administrative burden from increasing the number of Section 332 shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process.[319] We

[312] CTIA Aug. 30, 2018 *Ex Parte* Letter at 6.

[313] Letter from Richard Rossi, Senior Vice President, General Counsel, American Tower, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 3 (filed Aug. 10, 2018) ("The reason to encourage collocation is straightforward, it is faster, cheaper, more environmentally sound, and less disruptive than building new structures.").

[314] League of Az Cities and Towns Comments at 13, 29 (arguing that many small cells or micro cells can be taller and more visually intrusive than macro cells).

[315] *See, e.g.,* Letter from Geoffrey C. Beckwith, Executive Director & CEO, Mass. Municipal. Assoc., Boston, MA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, (filed Sept. 11, 2018) (Geoffrey C. Beckwith Sept. 11, 2018 *Ex Parte* Letter); Mike Posey Sept. 11, 2018 *Ex Parte* Letter; Letter from John A. Barbish, Mayor, City of Wickliffe, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 13, 2018); Letter from Pauline Russo Cutter, Mayor, City of San Leandro, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 12, 2018); Letter from Ed Waage, Mayor, City of Pismo Beach, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from Scott A. Hancock, Executive Director, MML, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Sept. 18, 2018); Letter from Leon Towarnicki, City Manager, Martinsville, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from Thomas Aujero Small, Mayor, City of Culver City, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018).

[316] Philadelphia Comments at 4-5 (arguing that shorter shot clocks should not be implemented because "cities are already resource constrained and any further attempt to further limit the current time periods for review of applications will seriously and adversely affect public safety as well as diminish the proper role, under our federalist system, of state and local governments in regulating local rights of way"); Smart Communities Comments, Docket 16-421, at 13 (filed Mar. 8, 2017) (included by reference by Austin's Comments); Alaska Dept. of Trans. Comments at 2. *See, e.g.,* TX Hist. Comm. Comments at 2 (current shot clocks are appropriate and that further shortening these shot clocks is not warranted); Arlington, TX Comments at 2; Letter from William Tomko, Mayor of Chagrin Falls, OH, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 1-2 (filed Sept. 17, 2018); Nina Beety Sept. 17, 2018 *Ex Parte* Letter; Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter at 4.

[317] League of Az Cities and Towns *et al.* Comments at 26-27, 29-35; Cities of San Antonio *et. al* Comments at 8; Philadelphia Comments at 4.

[318] T-Mobile Comments at 22; Florida Coalition Comments at 9 (creating new shot clocks would result in "too many 'shot clocks' and both the industry and local governments would be confused as to which shot clock applied to what application").

[319] While several parties proposed additional shot clock categories, we believe that the any benefit from a closer tailoring of categories to circumstances is not outweighed by the administrative burden on siting authorities and

also reject the assertion that revising the period of time to review siting decisions would amount to a nationwide land use code for wireless siting.[320] Our approach is consistent with the Model Code for Municipalities that recognizes that the shot clocks that we are adopting for the review of Small Wireless Facility deployment applications correctly balance the needs of local siting agencies and wireless service providers.[321] Our balance of the relevant considerations is informed by our experience with the previously adopted shot clocks, the record in this proceeding, and our predictive judgment about the effectiveness of actions taken here to promote the provision of personal wireless services.

111. For similar reasons as set forth above, we also find it reasonable to establish a new 90 day Section 332 shot clock for new construction of Small Wireless Facilities. Ninety days is a presumptively reasonable period of time for localities to review such siting applications. Small Wireless Facilities have far less visual and other impact than the facilities we considered in 2009, and should accordingly require less time to review.[322] Indeed, some state and local governments have already adopted 60-day maximum reasonable periods of time for review of *all* small cell siting applications, and, even in the absence of such maximum requirements, several are already reviewing and approving small-cell siting applications within 60 days or less after filing.[323] Numerous industry commenters advocated a 90-day shot clock for all non-collocation deployments.[324] Based on this record, we find it reasonable to conclude that review of an application to deploy a Small Wireless Facility using a new structure warrants more review time than a mere collocation, but less than the construction of a macro tower.[325] For the reasons explained below, we

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providers to manage these categories. *See* TX Hist. Comm. Comments at 2 (stating that it "could support a shorter review period for new structures less than fifty (50) feet tall, or where structures are located within or adjacent to existing utility rights-of-way (but not transportation rights-of-way) with existing utility structures taller than the proposed telecommunications structure"); Georgia Dept. of Trans. Comments at 2 (stating that time frames based on the zoning area are reasonable).

[320] Cities of San Antonio *et. al* Comments, Exh. A at 17-18. In the same vein, the Florida Department of Transportation contends that "[p]ermit review times should comply with state statutes," especially if the industry insists on being treated similarly as other utilities. AASHTO Comments, Attach. at 13 (Florida Dept. of Trans. Comments); *see also* Alaska Dept. of Trans. Comments at 2; TX Dept. of Trans. Comments at 2 (explaining that variations in topography, weather, government interests, and state and local political structure counsel against standardized nationwide shot clocks). The Maryland Department of Transportation is concerned about the shortened shot clocks proposed because they would conflict with a Maryland law that requires a 90-day comment period in considering wireless siting applications and because certain applications can be complex and necessitate longer review periods. AASHTO Comments, Attach. at 40 (MD Dept. of Trans. Comments).

[321] BDAC Model Municipal Code at § 3.2a(i)(B).

[322] CTIA Comments, Attach. 1 at 38.

[323] T-Mobile Comments at 19-20 (stating that some states already have adopted more expedited time frames to lower siting barriers and speed deployment, which demonstrates the reasonableness of the proposed 60-day and 90-day revised shot clocks); Incompas Reply at 9 (stating that there is no basis for differing time-periods for similarly-situated small cell installation requests, and the lack of harmonization could discourage the use of a more efficient infrastructure); CCA Comments at 14 n.52 (citing CCA Streamlining Reply at 7-8 that in Houston, Texas, the review process for small cell deployments "usually takes 2 weeks, but no more than 30 days to process and complete the site review. In Kenton County, Kentucky, the maximum time permitted to act upon new facility siting requests is 60 days. Louisville, Kentucky generally processes small cell siting requests within 30 days, and Matthews, North Carolina generally processes wireless siting applications within 10 days").

[324] CTIA Reply at 3 (stating that the Commission should shorten the shot clocks to 90 days for new facilities); CTIA Comments at 11-12 (asserting that the existing 150-day review period for new wireless sites should be shortened to 90 days); Crown Castle Comments at 29 (stating that a 90-day shot clock for new facilities is appropriate for macro cells and small cells alike, to the extent such applications require review under Section 332 at all); ExteNet Comments at 8 (asserting that the Commission should accelerate the shot clock for all other non-collocation applications, including those for new DNS poles, from 150 days to 90 days); WIA Reply at 2.

[325] CCUA argues that the new shot clocks would force siting authorities to deny applications when they find that applications are incomplete. Letter from Kenneth S. Fellman, Counsel, CCUA, to Marlene H. Dortch, Secretary,

also specify today a provision that will initially reset these two new shot clocks in the event that a locality receives a materially incomplete application.

112. Finally, we note that our 60- and 90-day approach is similar to that in pending legislation that has bipartisan congressional support, and is consistent with the Model Code for Municipalities. Specifically, the draft STREAMLINE Small Cell Deployment Act, would apply a 60-day shot clock to collocation of small personal wireless service facilities and a 90-day shot clock to any other action relating to small personal wireless service facilities.[326] Further, the Model Code for Municipalities recommended by the FCC's Broadband Deployment Advisory Committee also utilizes this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures.[327]

2. Batched Applications for Small Wireless Facilities

113. Given the way in which Small Wireless Facilities are likely to be deployed, in large numbers as part of a system meant to cover a particular area, we anticipate that some applicants will submit "batched" applications: multiple separate applications filed at the same time, each for one or more sites *or* a single application covering multiple sites.[328] In the *Wireless Infrastructure NPRM/NOI*, the Commission asked whether batched applications should be subject to either longer or shorter shot clocks than would apply if each component of the batch were submitted separately.[329] Industry commenters contend that the shot clock applicable to a batch or a class of applications should be no longer than that applicable to an individual application of the same class.[330] On the other hand, several commenters, contend that batched applications have often been proposed in historic districts and historic buildings (areas that require a more complex review process), and given the complexities associated with reviews of that type, they urge the Commission not to apply shorter shot clocks to batched applications.[331] Some localities also argue that a single, national shot clock for batched applications would fail to account for unique local circumstances.[332]

114. We see no reason why the shot clocks for batched applications to deploy Small Wireless Facilities should be longer than those that apply to individual applications because, in many cases, the batching of such applications has advantages in terms of administrative efficiency that could actually

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FCC, WT Docket No. 17-79 et al., at 3 (filed Sept. 18, 2018) (Kenneth S. Fellman Sept. 18, 2018 *Ex Parte* Letter). We disagree that this would be the outcome in such an instance because, as explained below, siting authorities can toll the shot clocks upon a finding of incompleteness.

[326] STREAMLINE Small Cell Deployment Act, S. 3157, 115th Cong. (2018).

[327] BDAC Model Municipal Code at § 3.2a(i)(B),

[328] We define either scenario as "batching" for the purpose of our discussion here.

[329] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 18; *see also Mobilitie PN*, 31 FCC Rcd at 13371.

[330] *See, e.g.,* Extenet Comments at 10-11 ("The Commission should not adopt a longer shot clock for batches of multiple DNS applications."); Sprint Comments, Docket No. 16-421, at 43-44 (filed Mar. 8, 2017); CCA Comments at 16 ("The FCC also should ensure that batch applications are not saddled with a longer shot clock than those afforded to individual siting applications . . . ."); Verizon Comments at 42 ("The same 60-day shot clock should apply to applications proposing multiple facilities—so called 'batch applications.'"); Crown Castle Comments at 30 ("Crown Castle also does not support altering the deadline for 'batches' of requests."); T-Mobile Comments at 22-23 ("[A]n application that batches together similar numbers of small cells of like character and in proximity to one another should also be able to be reviewed within the same time frame . . . ."); CTIA Comments at 17 ("There is, however, no need for the Commission to establish different shot clocks for batch processing of similar facilities . . . .").

[331] San Antonio Comments, Exh. A at 17, 19-20; *see also* Smart Communities Comments, Docket No. 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin's Comments).

[332] Cities of San Antonio *et al*. Comments, Exh. A at 17, 19-20; *see also* Smart Communities Comments, Docket 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin's Comments).

make review easier.[333] Our decision flows from our current Section 332 shot clock policy. Under our two existing Section 332 shot clocks, if an applicant files multiple siting applications on the same day for the same type of facilities, each application is subject to the same number of review days by the siting agency.[334] These multiple siting applications are equivalent to a batched application and therefore the shot clocks for batching should follow the same rules as if the applications were filed separately. Accordingly, when applications to deploy Small Wireless Facilities are filed in batches, the shot clock that applies to the batch is the same one that would apply had the applicant submitted individual applications. Should an applicant file a single application for a batch that includes both collocated and new construction of Small Wireless Facilities, the longer 90-day shot clock will apply, to ensure that the siting authority has adequate time to review the new construction sites.

115. We recognize the concerns raised by parties arguing for a longer time period for at least some batched applications, but conclude that a separate rule is not necessary to address these concerns. Under our approach, in extraordinary cases, a siting authority, as discussed below, can rebut the presumption of reasonableness of the applicable shot clock period where a batch application causes legitimate overload on the siting authority's resources.[335] Thus, contrary to some localities' arguments,[336] our approach provides for a certain degree of flexibility to account for exceptional circumstances. In addition, consistent with, and for the same reasons as our conclusion below that Section 332 does not permit states and localities to prohibit applicants from requesting multiple types of approvals simultaneously,[337] we find that Section 332(c)(7)(B)(ii) similarly does not allow states and localities to refuse to accept batches of applications to deploy Small Wireless Facilities.

B. New Remedy for Violations of the Small Wireless Facilities Shot Clocks

116. In adopting these new shot clocks for Small Wireless Facility applications, we also provide an additional remedy that we expect will substantially reduce the likelihood that applicants will need to pursue additional and costly relief in court at the expiration of those time periods.

117. At the outset, and for the reasons the Commission articulated when it adopted the 2009 shot clocks, we determine that the failure of a state or local government to issue a decision on a Small Wireless Facility siting application within the presumptively reasonable time periods above will constitute a "failure to act" within the meaning of Section 332(c)(7)(B)(v). Therefore, a provider is, at a minimum, entitled to the same process and remedies available for a failure to act within the new Small Wireless Facility shot clocks as they have been under the FCC's 2009 shot clocks. But we also add an additional remedy for our new Small Wireless Facility shot clocks.

118. State or local inaction by the end of the Small Wireless Facility shot clock will function not only as a Section 332(c)(7)(B)(v) failure to act but also amount to a presumptive prohibition on the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II). Accordingly, we would expect the state or local government to issue all necessary permits without further delay. In cases where such action is not taken, we assume, for the reasons discussed below, that the applicant

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[333] *See, e.g.,* Sprint Comments, Docket No. 16-421, at 43-44 (filed Mar. 8, 2017); Verizon Comments at 42; CTIA Comments at 17.

[334] WIA Comments at 27 ("Merely bundling similar sites into a single batched application should not provide a locality with more time to review a single batched application than to process the same applications if submitted individually.").

[335] *See infra* paras. 117, 119. *See* Letter from Nina Beety, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 17, 2018); Letter from Dave Ruller, City Manager, City of Kent, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Sept. 18, 2018).

[336] Cities of San Antonio *et al*. Comments, Exh. A at 17, 19-20; *see also* Smart Communities Comments, Docket 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin's Comments).

[337] *See infra* para. 144.

would have a straightforward case for obtaining expedited relief in court.[338]

119. As discussed in the Declaratory Ruling, a regulation under Section 332(c)(7)(B)(i)(II) constitutes an effective prohibition if it materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.[339] Missing shot clock deadlines would thus presumptively have the effect of unlawfully prohibiting service in that such failure to act can be expected to materially limit or inhibit the introduction of new services or the improvement of existing services.[340] Thus, when a siting authority misses the applicable shot clock deadline, the applicant may commence suit in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(i)(II), in addition to a violation of Section 332(c)(7)(B)(ii), as discussed above. The siting authority then will have an opportunity to rebut the presumption of effective prohibition by demonstrating that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services.

120. Given the seriousness of failure to act within a reasonable period of time, we expect, as noted above, siting authorities to issue without any further delay all necessary authorizations when notified by the applicant that they have missed the shot clock deadline, absent extraordinary circumstances. Where the siting authority nevertheless fails to issue all necessary authorizations and litigation is commenced based on violations of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii), we expect that applicants and other aggrieved parties will likely pursue equitable judicial remedies.[341] Given the relatively low burden on state and local authorities of simply acting—one way or the other—within the Small Wireless Facility shot clocks, we think that applicants would have a relatively low hurdle to clear in establishing a right to expedited judicial relief. Indeed, for violations of Section 332(c)(7)(B), courts commonly have based the decision whether to award preliminary and permanent injunctive relief on several factors. As courts have concluded, preliminary and permanent injunctions fulfill Congressional intent that action on applications be timely and that courts consider violations of Section 332(c)(7)(B) on an expedited basis.[342] In addition, courts have observed that "[a]lthough Congress in the Telecommunications Act left intact some of local zoning boards' authority under state law," they should not be owed deference on issues relating to Section 332(c)(7)(B)(ii), meaning that "in the majority of cases the proper remedy for a zoning board decision that violates the Act will be an order. . . instructing the board to authorize construction."[343] Such relief also is supported where few or no issues remain to be decided, and those that remain can be addressed by a court.[344]

121. Consistent with those sensible considerations reflected in prior precedent, we expect that

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[338] Where we discuss litigation here, we refer, for convenience, to "the applicant" or the like, since that is normally the party that pursues such litigation. But we reiterate that under the Act, "[a]ny person adversely affected by" the siting authority's failure to act could pursue such litigation. 47 U.S.C. § 332(c)(7)(B)(v).

[339] *See supra* paras. 34-42.

[340] *Id.*

[341] *See, e.g.*, *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para. 284.

[342] *See, e.g.*, *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 41 (1st Cir. 2014) (addressing claimed violation of Section 332(c)(7)(B)(i)(II) of the Act); *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21-22 (1st Cir. 2002) (*Nat'l Tower*) (same); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999) (addressing violation of Section 332(c)(7)(B)(v) of the Act); *AT&T Mobility Servs., LLC v. Vill. of Corrales*, 127 F. Supp. 3d 1169, 1175-76 (D.N.M. 2015) (addressing violation of Section 332(c)(7)(B)(i)(II)); *Bell Atl. Mobile of Rochester v. Town of Irondequoit*, 848 F. Supp. 2d 391, 403 (W.D.N.Y. 2012) (addressing violation of Section 332(c)(7)(B)(ii)); *New Cingular Wireless PCS, LLC v. City of Manchester*, 2014 WL 79932, *8 (D.N.H. Feb. 28, 2014) (addressing violation of Section 332(c)(7)(B)(i)(II)).

[343] *See, e.g.*, *Nat'l Tower*, 297 F.3d at 21-22; *AT&T Mobility*, 127 F. Supp. 3d at 1176.

[344] *See, e.g.*, *Green Mountain Realty*, 750 F.3d at 41-42; *Nat'l Tower*, 297 F.3d at 24-25; *Cellular Tel. Co.*, 166 F.3d at 497; *Bell Atl. Mobile*, 848 F. Supp. 2d at 403; *New Cingular Wireless PCS*, 2014 WL 79932, *8.

courts will typically find expedited and preliminary and permanent injunctive relief warranted for violations of Sections 332(c)(7)(B)(i)(II) and 332(c)(7)(B)(ii) of the Act when addressing the circumstances discussed in this Order. Prior findings that preliminary and permanent injunctive relief best advances Congress's intent in assuring speedy resolution of issues encompassed by Section 332(c)(7)(B) appear equally true in the case of deployments of Small Wireless Facilities covered by our interpretation of Section 332(c)(7)(B)(ii) in this Third Report and Order.[345] Although some courts, in deciding whether an injunction is the appropriate form of relief, have considered whether a siting authority's delay resulted from bad faith or involved other abusive conduct,[346] we do not read the trend in court precedent overall to treat such considerations as more than relevant (as opposed to indispensable) to an injunction. We believe that this approach is sensible because guarding against barriers to the deployment of personal wireless facilities not only advances the goal of Section 332(c)(7)(B) but also policies set out elsewhere in the Communications Act and 1996 Act, as the Commission recently has recognized in the case of Small Wireless Facilities.[347] This is so whether or not these barriers stem from bad faith. Nor do we anticipate that there would be unresolved issues implicating the siting authority's expertise and therefore requiring remand in most instances.

122. In light of the more detailed interpretations that we adopt here regarding reasonable time frames for siting authority action on specific categories of requests—including guidance regarding circumstances in which longer time frames nonetheless can be reasonable—we expect that litigation generally will involve issues that can be resolved entirely by the relevant court. Thus, as the Commission has stated in the past, "in the case of a failure to act within the reasonable time frames set forth in our rules, and absent some compelling need for additional time to review the application, we believe that it would also be appropriate for the courts to treat such circumstances as significant factors weighing in favor of [injunctive] relief."[348] We therefore caution those involved in potential future disputes in this area against placing too much weight on the Commission's recognition that a siting authority's failure to act within the associated timeline might not always result in a preliminary or permanent injunction under the Section 332(c)(7)(B) framework while placing too little weight on the Commission's recognition that policies established by federal communications laws are advanced by streamlining the process for deploying wireless facilities.

123. We anticipate that the traditional requirements for awarding preliminary or permanent injunctive relief would likely be satisfied in most cases and in most jurisdictions where a violation of 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is found. Typically, courts require movants to establish the following elements of preliminary or permanent injunctive relief: (1) actual success on the merits for permanent injunctive relief and likelihood of success on the merits for preliminary injunctive relief, (2) continuing irreparable injury, (3) the absence of an adequate remedy at law, (4) the injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (5) award of injunctive relief would not be adverse to the public interest.[349] Actual success on the merits would be

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[345] *See Green Mountain Realty Corp.*, 750 F.3d at 41 (reasoning that remand to the siting authority "would not be in accordance with the text or spirit of the Telecommunications Act); *Cellular Tel. Co*, 166 F.3d at 497 (noting "that injunctive relief best serves the TCA's stated goal of expediting resolution" of cases brought under 47 U.S.C. § 332(c)(7)(B)(v)).

[346] *See, e.g.*, *Nat'l Tower*, 297 F.3d at 23; *Up State Tower Co. v. Town of Kiantone*, 718 Fed. Appx. 29, 32 (2d Cir. 2017) (Summary Order).

[347] *See, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30 at para. 62; *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332, para. 5.

[348] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para, 284.

[349] *Pub. Serv. Tel. Co. v. Georgia Pub. Serv. Comm'n*, 755 F. Supp. 2d 1263, 1273 (N.D. Ga.), *aff'd*, 404 F. App'x 439 (11th Cir. 2010); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004); *Nat. Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 941 (3d Cir. 1990); *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007); *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914–15 (1st Cir. 1989).

demonstrated when an applicant prevails in its failure-to-act or effective prohibition case; likelihood of success would be demonstrated because, as discussed, missing the shot clocks, depending on the type of deployment, presumptively prohibits the provision of personal wireless services and/or violates Section 332(c)(7)(B)(ii)'s requirement to act within a reasonable period of time.[350] Continuing irreparable injury likely would be found because remand to the siting authority "would serve no useful purpose" and would further delay the applicant's ability to provide personal wireless service to the public in the area where deployment is proposed, as some courts have previously determined.[351] There also would be no adequate remedy at law because applicants "have a federal statutory right to participate in a local [personal wireless services] market free from municipally-imposed barriers to entry," and money damages cannot directly substitute for this right.[352] The public interest and the balance of harms also would likely favor the award of a preliminary or permanent injunction because the purpose of Section 332(c)(7) is to encourage the rapid deployment of personal wireless facilities while preserving, within bounds, the authority of states and localities to regulate the deployment of such facilities, and the public would benefit if further delays in the deployment of such facilities—which a remand would certainly cause—are prevented.[353] We also expect that the harm to the siting authority would be minimal because the only right of which it would be deprived by a preliminary or permanent injunction is the right to act on the siting application beyond a reasonable time period,[354] a right that "is not legally cognizable, because under [Sections 332(c)(7)(B)(i)(II) and 332(c)(7)(B)(ii)], the [siting authority] has no right to exercise this power."[355] Thus, in the context of Small Wireless Facilities, we expect that the most appropriate remedy in typical cases involving a violation of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is the award of injunctive relief in the form of an order to issue all necessary authorizations.[356]

124. Our approach advances Section 332(c)(7)(B)(v)'s provision that certain siting disputes, including those involving a siting authority's failure to act, shall be heard and decided by a court of competent jurisdiction on an expedited basis. The framework reflected in this Order will provide the courts with substantive guiding principles in adjudicating Section 332(c)(7)(B)(v) cases, but it will not dictate the result or the remedy appropriate for any particular case; the determination of those issues will remain within the courts' domain.[357] This accords with the Fifth Circuit's recognition in *City of Arlington*

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Note that the standards for permanent injunctive relief differ in some respects among the circuits and the states. For example, "most courts do not consider the public interest element in deciding whether to issue a permanent injunction, though the Third Circuit has held otherwise." *Klay*, 376 F.3d at 1097. Courts in the Second Circuit consider only irreparable harm and success on the merits. *Omnipoint Commc'ns, Inc. v. Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 225 (S.D.N.Y. 2004). The Third and Fifth Circuits have precedents holding that irreparable harm is not an essential element of a permanent injunction. *See Roe v. Operation Rescue*, 919 F.2d 857, 873 n. 8 (3d Cir. 1990); *Lewis v. S. S. Baune*, 534 F.2d 1115, 1123–24 (5th Cir. 1976). For the sake of completeness, our analysis discusses all of the elements that have been used in decided cases.

[350] *See New Jersey Payphone*, 130 F. Supp. 2d at 640.

[351] *See Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d at 225–26 (quoting *Nextel Partners, Inc. v. Town of Amherst, N.Y.,* 251 F. Supp. 2d 1187, 1201 (W.D.N.Y. 2003)); *see Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 318 (N.D.N.Y. 2017).

[352] *New Jersey Payphone*, 130 F. Supp. 2d at 641.

[353] *City of Arlington*, 668 F.3d at 234.

[354] *Contra* 47 U.S.C. 332(c)(7)(B)(ii).

[355] *New Jersey Payphone*, 130 F. Supp. 2d at 641.

[356] *See Cellular Tel. Co*, 166 F.3d at 496. While our discussion here focused on cases that apply the permanent injunction standard, we have the same view regarding relief under the preliminary injunction standard when a locality fails to act within the applicable shot clock periods. *See, e.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (discussing the standard for preliminary injunctive relief).

[357] Several commenters support this position, urging the Commission to reaffirm that adversely affected applicants must seek redress from the courts. *See, e.g.,* League of Ar Cities and Towns *et al*. Comments at 14-21; Philadelphia

that the Act could be read "as establishing a framework in which a wireless service provider must seek a remedy for a state or local government's unreasonable delay in ruling on a wireless siting application in a court of competent jurisdiction while simultaneously allowing the FCC to issue an interpretation of § 332(c)(7)(B)(ii) that would guide courts' determinations of disputes under that provision."[358]

125. The guidance provided here should reduce the need for, and complexity of, case-by-case litigation and reduce the likelihood of vastly different timing across various jurisdictions for the same type of deployment.[359] This clarification, along with the other actions we take in this Third Report and Order, should streamline the courts' decision-making process and reduce the possibility of inconsistent rulings. Consequently, we believe that our approach helps facilitate courts' ability to "hear and decide such [lawsuits] on an expedited basis," as the statute requires.[360]

126. Reducing the likelihood of litigation and expediting litigation where it cannot be avoided should significantly reduce the costs associated with wireless infrastructure deployment. For instance, WIA states that if one of its members were to challenge every shot clock violation it has encountered, it would be mired in lawsuits with forty-six localities.[361] And this issue is likely to be compounded given the expected densification of wireless networks. Estimates indicate that deployments of small cells could reach up to 150,000 in 2018 and nearly 800,000 by 2026.[362] If, for example, 30 percent (based on T-Mobile's experience[363]) of these expected deployments are not acted upon within the applicable shot clock

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Comments at 2; Philadelphia Reply at 4-6; City of San Antonio *et al*. Comments, Exh. B at 14-15; San Francisco Comments at 16-17; Colorado Munis Comments at 7; CWA Reply at 5; Fairfax County Comments at 12-15; AASHTO Comments at 20-21, 23 (ID Dept. of Trans. Comments); NATOA Comments, Attach. 3 at 53-55; NLC Comments at 3-4; Smart Communities Comments at 39-43. Our interpretation thus preserves a meaningful role for courts under Section 332(c)(7)(B)(v), contrary to the concern some commenters expressed with particular focus on alternative proposals we do not adopt, such as a deemed granted remedy. *See, e.g.*, Colorado Comm. and Utility All. *et al*. Comments at 6-7; League of Az Cities and Towns *et al*. Comments at 14-23; Philadelphia Comments at 2; Baltimore Reply at 11; City of San Antonio *et al*. Reply at 2; San Francisco Reply at 6; League of Az Cities and Towns *et al*. Reply at 2-3. In addition, our interpretation of Section 332(c)(7)(B)(ii) does not result in a regime in which the Commission could be seen as implicitly issuing local land use permits, a concern that states and localities raised regarding an absolute deemed granted remedy, because applicants are still required to petition a court for relief, which may include an injunction directing siting authorities to grant the application. *See* Alexandria Comments at 2; Baltimore Reply at 10; Philadelphia Reply at 8; Smart Cities Coal Comments at ii, 4, 39.

[358] *City of Arlington*, 668 F.3d at 250.

[359] The likelihood of non-uniform or inconsistent rulings on what time frames are reasonable or what circumstances could rebut the presumptive reasonableness of the shot clock periods stems from the intrinsic ambiguity of the phrase "reasonable period of time," which makes it susceptible of varying constructions. *See City of Arlington*, 668 F.3d at 255 (noting "that the phrase 'a reasonable period of time,' as it is used in § 332(c)(7)(B)(ii), is inherently ambiguous"); *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them."). *See also* Lightower Comments at 3 ("The lack of consistent guidance regarding statutory interpretation is creating uncertainty at the state and local level, with many local jurisdictions seeming to simply make it up as they go. Differences in the federal courts are only exacerbating the patchwork of interpretations at the state and local level.").

[360] 47 U.S.C. § 332(c)(7)(B)(v).

[361] WIA Comments at 16.

[362] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13363-64 (2016) (citing S&P Global Market Intelligence, John Fletcher, Small Cell and Tower Projections through 2026, SNL Kagan Wireless Investor (Sept. 27, 2016)).

[363] T-Mobile Comments at 8.

period, that would translate to 45,000 violations in 2018 and 240,000 violations in 2026.[364] These sheer numbers would render it practically impossible to commence Section 332(c)(7)(B)(v) cases for all violations, and litigation costs for such cases likely would be prohibitive and could virtually bar providers from deploying wireless facilities.[365]

127. Our updated interpretation of Section 332(c)(7) for Small Wireless Facilities effectively balances the interest of wireless service providers to have siting applications granted in a timely and streamlined manner[366] and the interest of localities to protect public safety and welfare and preserve their authority over the permitting process.[367] Our specialized deployment categories, in conjunction with the acknowledgement that in rare instances, it may legitimately take longer to act, recognize that the siting process is complex and handled in many different ways under various states' and localities' long-established codes. Further, our approach tempers localities' concerns about the inflexibility of the *Wireless Infrastructure NPRM/NOI*'s deemed granted proposal because the new remedy we adopt here accounts for the breadth of potentially unforeseen circumstances that individual localities may face and the possibility that additional review time may be needed in truly exceptional circumstances.[368] We further find that our interpretive framework will not be unduly burdensome on localities because a number of states have already adopted even more stringent deemed granted remedies.[369]

128. At the same time, there may be merit in the argument made by some commenters that the FCC has the authority to adopt a deemed granted remedy.[370] Nonetheless, we do not find it necessary to decide that issue today, as we are confident that the rules and interpretations adopted here will provide substantial relief, effectively avert unnecessary litigation, allow for expeditious resolution of siting applications, and strike the appropriate balance between relevant policy considerations and statutory

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[364] These numbers would escalate under WIA's estimate that 70 percent of small cell deployment applications exceed the applicable shot clock. WIA Comments at 7.

[365] *See* CTIA Comments at 9 (explaining that, "[p]articularly for small cells, the expense of litigation can rarely be justified); WIA Comments at 16 (quoting and discussing Lightower's Comments in 2016 Streamlining Public Notice); T-Mobile Comment, Attach. A at 8.

[366] *See, e.g.,* AT&T Comments at 26; CCA Comments at 7, 9, 11-12; CCA Reply at 5-6, 8; Cityscape Consultants Comments at 1; CompTIA Comments at 3; CIC Comments at 17-18; Crown Castle Comments at 23-28; Crown Castle Reply at 3; CTIA Comments at 7-9, Attach. 1 at 5, 39-43, Attach. 2 at 3, 23-24; GCI Comments at 5-9; Lightower Comments at 7, 18-19; Samsung Comments at 6; T-Mobile Comments at 13, 16, Attach. A at 25; WIA Comments at 15-17.

[367] *See, e.g.,* Arizona Munis Comments at 23; Arizona Munis Reply at 8-9; Baltimore Reply at 10; Lansing Comments at 2; Philadelphia Reply at 9-12; Torrance Comments at 1-2; CPUC Comments at 14; CWA Reply at 5; Minnesota Munis Comments at 9; *but see* CTIA Reply at 9.

[368] *See, e.g.,* Chicago Comments at 2 (contending that wireless facilities siting entails fact-specific scenarios); AASHTO Comments, Attach. at 40 (MD Dept. of Trans. SHA Comments) (describing the complexity of reviewing proposed deployments on rights-of-way); AASHTO Comments, Attach. at 51 (Wyoming DOT Comments); Baltimore Reply at 11; Philadelphia Comments at 4; Alexandria Comments at 6; Mukilteo Comments at 1; Alaska Dept. of Trans. Comments at 2; Alaska SHPO Reply at 1.

[369] *See* Fla. Stat. Ann. § 365.172(13)(d)(3.b); Ariz. Rev. Stat. Ann. § 9-594(C) (3); 53 Pa. Stat. Ann. § 11702.4; Cal. Gov't Code § 65964.1; Va. Code Ann. § 15.2-2232; Va. Code Ann. § 15.2-2316.4; Va. Code Ann. § 56-484.29; Va. Code Ann. § 56-484.28; Ky. Rev. Stat. Ann. § 100.987; N.H. Rev. Stat. Ann. § 12-K:10; Wis. Stat. Ann. § 66.0404; Kan. Stat. Ann. § 66-2019(h)(3); Del. Code Ann. tit. 17, § 1609; Iowa Code Ann. § 8C.7A(3)(c)(2); Iowa Code Ann. § 8C.4(4)(5); Iowa Code Ann. § 8C.5; Mich. Comp. Laws Ann. § 125.3514. *See also* CCA Reply at 9.

[370] *See, e.g.*, CTIA Comments at 10-11; T-Mobile Comments at 15-18, Verizon Comments at 37, 39-41, WIA Comments at 17-20.

objectives[371] guiding our analysis.[372]

129. We expect that our decision here will result in localities addressing applications within the applicable shot clocks in a far greater number of cases. Moreover, we expect that the limited instances in which a locality does not issue a decision within that time period will result in an increase in cases where the locality then issues all needed permits. In what we expect would then be only a few cases where litigation commences, our decision makes clear the burden that localities would need to clear in those circumstances.[373] Our updated interpretation of Section 332 for Small Wireless Facilities will help courts to decide failure-to-act cases expeditiously and avoid delays in reaching final dispositions.[374] Placing this burden on the siting authority should address the concerns raised by supporters of a deemed granted remedy—that filing suit in court to resolve a siting dispute is burdensome and expensive on applicants, the judicial system, and citizens—because our interpretations should expedite the courts'

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[371] *City of Arlington*, 668 F.3d at 234 (noting that the purpose of Section 332(c)(7) is to balance the competing interests to preserve the traditional role of state and local governments in land use and zoning regulation and the rapid development of new telecommunications technologies).

[372] *See supra* paras. 119-20 (explaining how the remedy strikes the proper balance between competing interests). Because our approach to shot clocks involves our interpretation of Section 332(c)(7)(B)(ii) and the consequences that flow from that—and does not rely on Section 253 of the Act—we need not, and thus do not, resolve disputes about the potential use of Section 253 in this specific context, such as whether it could serve as authority for a deemed granted or similar remedy. *See, e.g.*, San Francisco Comments at 9-10; CPUC Comments at 10; Smart Communities Comments at 4-11, 21; Smart Communities Reply at 78-79; League of Az Cities and Towns *et al*. Reply at 4; Alexandria Comments at 5; Irvine Comments at 5; Minnesota Cities Comments at 11-13; Philadelphia Reply at 2, 7; Fairfax County Comments at 17; Greenlining Reply at 4; NRUC Reply at 3-5; NATOA June 21, 2018 *Ex Parte* Letter. To the extent that commenters raise arguments regarding the proper interpretation of "prohibit or have the effect of prohibiting" under Section 253 or the scope of Section 253, these issues are discussed in the Declaratory Ruling, *see supra* paras. 34-42.

[373] *See* App Association Comments at 9; CCI Comments at 6-8; Conterra Comments at 14-17; ExteNet Comments at 13; T-Mobile Comments at 17; Quintillion Reply at 6; Verizon Comments at 8-18; WIA Comments at 9-10. WIA contends that adoption of a deemed granted remedy is needed because various courts faced with shot clock claims have failed to provide meaningful remedies, citing as an example a case in which the court held that the town failed to act within the shot clock period but then declined to issue an injunction directing the siting agency to grant the application. WIA Comments at 16-17. However, a number of cases involving violations of the "reasonable period of time" requirement of Section 332(c)(7)(B)(ii)—decided either before or after the promulgation of the Commission's Section 332(c)(7)(B)(ii) shot clocks—have concluded with an award of injunctive relief. *See, e.g.*, *Upstate Cellular Network*, 257 F. Supp. 3d at 318 (concluding that the siting authority's failure to act within the 150-day shot clock was unreasonable and awarding a permanent injunction in favor of the applicant); *Am. Towers, Inc. v. Wilson County*, No. 3:10-CV-1196, 2014 WL 28953, at *13–14 (M.D. Tenn. Jan. 2, 2014) (finding that the county failed to act within a reasonable period of time, as required under Section 332(c)(7)(B)(ii), and granting an injunction directing the county to approve the applications and issue all necessary authorizations for the applicant to build and operate the proposed tower); *Cincinnati Bell Wireless, LLC v. Brown County*, Ohio, No. 1:04-CV-733, 2005 WL 1629824, at *4–5 (S.D. Ohio July 6, 2005) (finding that the county failed to act within a reasonable period of time under Section 332(c)(7)(B)(ii) and awarding injunctive relief). *But see Up State Tower Co. v. Town of Kiantone*, 718 Fed. Appx. 29 (2d Cir. 2017) (declining to reverse district court's refusal to issue injunction compelling immediate grant of application). Courts have also held "that injunctive relief best serves the TCA's stated goal of expediting resolution of" cases brought under Section 332(c)(7)(B)(v). *Cellular Tel. Co.*, 166 F.3d at 497; *Brehmer v. Planning Bd. of Town of Wellfleet*, 238 F.3d 117, 121 (1st Cir. 2001). Under these circumstances, we do not agree with WIA that courts have failed to provide meaningful remedies to such an extent as would require the adoption of a deemed granted remedy.

[374] *Zoning Bd. of Adjustment of the Borough of Paramus, N.J.*, 21 F. Supp. 3d at 383, 387 (more than four-and-a-half years for Sprint to prevail in court), *aff'd*, 606 F. App'x 669 (3d Cir. 2015); *Vill. of Corrales*, 127 F. Supp. 3d 1169 (nineteen months from complaint to grant of summary judgment); *Orange County–Poughkeepsie Ltd. P'ship v. Town of E. Fishkill*, 84 F. Supp. 3d 274, 293 (S.D.N.Y.), *aff'd sub nom.*, *Orange County–County Poughkeepsie Ltd. P'ship v. Town of E. Fishkill*, 632 F. App'x 1 (2d Cir. 2015) (seventeen months from complaint to grant of summary judgment).

decision-making process.

130. We find that the more specific deployment categories and shot clocks, which presumptively represent the reasonable period within which to act, will prevent the outcome proponents of a deemed granted remedy seek to avoid: that siting agencies would be forced to reject applications because they would be unable to review the applications within the prescribed shot clock period.[375] Because the more specific deployment categories and shot clocks inherently account for the nature and scope of a variety of deployment applications, our new approach should ensure that siting agencies have adequate time to process and decide applications and will minimize the risk that localities will fail to act within the established shot clock periods. Further, in cases where a siting authority misses the deadline, the opportunity to demonstrate exceptional circumstances provides an effective and flexible way for siting agencies to justify their inaction if genuinely warranted. Our overall framework, therefore, should prevent situations in which a siting authority would feel compelled to summarily deny an application instead of evaluating its merits within the applicable shot clock period.[376] We also note that if the approach we take in this Order proves insufficient in addressing the issues it is intended to resolve, we may again consider adopting a deemed granted remedy in the future.

131. Some commenters also recommend that the Commission issue a list of "Best Practices" or "Recommended Practices."[377] The joint comments filed by NATOA and other government associations suggest the "development of an informal dispute resolution process to remove parties from an adversarial relationship to a partnership process designed to bring about the best result for all involved" and the development of "a mediation program which could help facilitate negotiations for deployments for parties who seem to have reached a point of intractability."[378] Although we do not at this time adopt these proposals, we note that the steps taken in this order are intended to facilitate cooperation between parties to reach mutually agreed upon solutions. For example, as explained below, mutual agreement between the parties will toll the running of the shot clock period, thereby allowing parties to resolve disagreements in a collaborative, instead of an adversarial, setting.[379]

C. Clarification of Issues Related to All Section 332 Shot Clocks

1. Authorizations Subject to the "Reasonable Period of Time" Provision of Section 332(c)(7)(B)(ii)

132. As indicated above, Section 332(c)(7)(B)(ii) requires state and local governments to act "within a reasonable period of time" on "any request for authorization to place, construct, or modify personal wireless service facilities."[380] Neither the *2009 Declaratory Ruling* nor the *2014 Wireless Infrastructure Order* addressed the specific types of authorizations subject to this requirement. Industry commenters contend that the shot clocks should apply to all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment.[381] Local siting authorities, on the other hand, argue that a broad application of Section 332 will harm public safety and welfare by not

[375] Baltimore Reply at 12; Mukilteo Comments at 1; Cities of San Antonio *et al*. Reply at 10; Washington Munis Comments, Attach. 1 at 8-9; *but see* CTIA Reply at 9.

[376] We also note that a summary denial of a deployment application is not permitted under Section 332(c)(7)(B)(iii), which requires the siting authority to base denials on "substantial evidence contained in a written record."

[377] KS Rep. Sloan Comments at 2; Nokia Comments at 10.

[378] NATOA *et al*. Comments at 16-17.

[379] *See infra* paras. 145-46.

[380] *See* 47 U.S.C. § 332(c)(7)(B)(ii).

[381] *See, e.g.,* CTIA Comments at 15; CTIA Reply at 10; Mobilitie Comments at 6-7; WIA Comments at 24; WIA Reply at 13; T-Mobile Comments at 21-22; CCA Reply at 9; Sprint June 18 *Ex Parte* at 3.

giving them enough time to evaluate whether a proposed deployment endangers the public.[382] They assert that building and encroachment permits should not be subsumed within the shot clocks because these permits incorporate essential health and safety reviews.[383] After carefully considering these arguments, we find that "any request for authorization to place, construct, or modify personal wireless service facilities" under Section 332(c)(7)(B)(ii) means all authorizations necessary for the deployment of personal wireless services infrastructure. This interpretation finds support in the record and is consistent with the courts' interpretation of this provision and the text and purpose of the Act.

133. The starting point for statutory interpretation is the text of the statute,[384] and here, the statute is written broadly, applying to "any" request for authorization to place, construct, or modify personal wireless service facilities. The expansive modifier "any" typically has been interpreted to mean "one or some indiscriminately of whatever kind," unless Congress "add[ed] any language limiting the breadth of that word."[385] The title of Section 332(c)(7) ("Preservation of local zoning authority") does not restrict the applicability of this section to zoning permits in light of the clear text of Section 332(c)(7)(B)(ii).[386] The text encompasses not only requests for authorization to *place* personal wireless service facilities, e.g., zoning requests, but also requests for authorization to *construct* or *modify* personal wireless service facilities. These activities typically require more than just zoning permits. For example, in many instances, localities require building permits, road closure permits, and the like to make construction or modification possible.[387] Accordingly, the fact that the title standing alone could be read

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[382] League of Az Cities and Towns *et al*. Reply at 21-22. *See also* Arlington County, Sept. 18 *Ex Parte* Letter at 1-2 (asserting that it is infeasible to have the shot clock encompass all steps related the small cell siting process because there is no single application to get ROW access, public notice, lease negotiations, road closures, etc.; because these are separate processes involving different departments; and because the timeline in some instances will depend on the applicant, or the required information may interrelate in a manner that makes doing them all at once infeasible); Letter from Robert McBain, Mayor, Piedmont, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 3 (filed Sept. 18, 2018).

[383] League of Az Cities and Towns *et al*. Reply at 21-22.

[384] *Implementation of Section 402(b)(1)(a) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 11233 (1996); *2002 Biennial Regulatory Review*, Report, 18 FCC Rcd 4726, 4731–32 (2003); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *Communications Assistance for Law Enf't Act & Broadband Access & Servs.*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14989, 14992–93, para. 9 (2005) (interpreting an ambiguous statute by considering the "structure and history of the relevant provisions, including Congress's stated purposes" in order to "faithfully implement[] Congress's intent"); *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007) (using legislative history "to identify Congress's clear intent"); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 858 (1st Cir. 1998) (same).

[385] *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)); *HUD v. Rucker*, 535 U.S. 125, 131 (2002).

[386] *See Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528–29 (1947) ("[H]eadings and titles are not meant to take the place of the detailed provisions of the text."). Our conclusion is also consistent with our interpretation that Sections 253 and 332(c)(7) apply to fees for all applications related to a Small Wireless Facility. *See supra* para. 50.

[387] *See, e.g.,* Virginia Joint Commenters Comments at 21-22 (stating that deployment of personal wireless facilities generally requires excavation and building permits); San Francisco Comments at 4-7, 12, 20-22 (describing the permitting process in San Francisco, the layers of multi-departmental review involved, and the required authorizations before certain personal wireless facilities can be constructed); Smart Cities Coal. Comments at 33-34 (describing several authorizations necessary to deploy personal wireless facilities depending on the location, e.g., public rights-of-way and other public properties, of the proposed site and the size of the proposed facility).

to limit Section 332(c)(7) to zoning decisions does not overcome the specific language of Section 332(c)(7)(B)(ii), which explicitly applies to a variety of authorizations.[388]

134. The purpose of the statute also supports a broad interpretation. As noted above, the Supreme Court has stated that the 1996 Act was enacted "to promote competition and higher quality in American telecommunications services and to encourage the rapid deployment of new telecommunications technologies" by, *inter alia*, reducing "the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers."[389] A narrow reading of the scope of Section 332 would frustrate that purpose by allowing local governments to erect impediments to the deployment of personal wireless services facilities by using or creating other forms of authorizations outside of the scope of Section 332(c)(7)(B)(ii).[390] This is especially true in jurisdictions requiring multi-departmental siting review or multiple authorizations.[391]

135. In addition, our interpretation remains faithful to the purpose of Section 332(c)(7) to balance Congress's competing desires to preserve the traditional role of state and local governments in regulating land use and zoning, while encouraging the rapid development of new telecommunications technologies.[392] Under our interpretation, states and localities retain their authority over personal wireless facilities deployment. At the same time, deployment will be kept on track by ensuring that the entire approval process necessary for deployment is completed within a reasonable period of time, as defined by the shot clocks addressed in this Third Report and Order.

136. A number of courts have either explicitly or implicitly adopted the same view, that all necessary permits are subject to Section 332. For example, in *Cox Communications PCS, L.P. v. San Marcos*, the court considered an excavation permit application as falling within the parameters of Section 332.[393] In *USCOC of Greater Missouri, LLC v. County of Franklin*, the Eighth Circuit reasoned that "[t]he issuance of the requisite building permits" for the construction of a personal wireless services facility arises under Section 332(c)(7).[394] In *Ogden Fire Co. No. 1 v. Upper Chichester Township*, the Third Circuit affirmed the district court's order compelling the township to issue a building permit for the

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[388] *See Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947). If the title of Section 332(c)(7) were to control the interpretation of the text, it would render superfluous the provision of Section 332(c)(7)(B)(ii) that applies to "authorization to . . . construct, or modify personal wireless service facilities" and give effect only to the provision that applies to "authorization to place . . . personal wireless service facilities." This result would "flout[] the rule that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

[389] *City of Rancho Palos Verdes v. Abrams*, 544 U.S. at 115 (internal quotation marks and citations omitted).

[390] For example, if we were to interpret Section 332(c)(7)(B)(ii) to cover only zoning permits, states and localities could delay their consideration of other permits (e.g., building, electrical, road closure or other permits) to thwart the proposed deployment.

[391] *See, e.g.*, Virginia Joint Commenters Comments at 21-22; San Francisco Comments at 4-7, 12, 20-22; Smart Communities Comments at 33-34; CTIA Comments at 15 (stating that some jurisdictions "impose multiple, sequential stages of review"); WIA Comments at 24 (noting that "[m]any jurisdictions grant the application within the shot clock period only to stall on issuing the building permit"); Verizon Comments at 6 (stating that "[a] large Southwestern city requires applicants to obtain separate and sequential approvals from three different governmental bodies before it will consider issuing a temporary license agreement to access city rights-of-way"); Sprint June 18 *Ex Parte* at 3 (noting that "after a land-use permit or attachment permit is received, many localities still require electric permits, road closure permits, aesthetic approval, and other types of reviews that can extend the time required for final permission well beyond just the initial approval.").

[392] *City of Arlington*, 668 F.3d at 234.

[393] *Cox Commc'ns PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).

[394] *USCOC of Greater Mo., LLC v. County of Franklin*, 636 F.3d 927, 931-32 (8th Cir. 2011).

construction of a wireless facility after finding that the township had violated Section 332(c)(7).[395] In *Upstate Cellular Network v. Auburn*, the court directed the city to approve the application, including site plan approval by the planning board, granting a variance by the zoning authority, and "any other municipal approval or permission required by the City of Auburn and its boards or officers, including but not limited to, a building permit."[396] And in *PI Telecom Infrastructure V, LLC v. Georgetown–Scott County Planning Commission*, the court ordered that the locality grant "any and all permits necessary for the construction of the proposed wireless facility."[397] Our interpretation is also consistent with judicial precedents involving challenges under Section 332(c)(7)(B) to denials by a wide variety of governmental entities, many of which involved variances,[398] special use/conditional use permits,[399] land disturbing activity and excavation permits,[400] building permits,[401] and a state department of education permit to install an antenna at a high school.[402] Notably, a lot of cases have involved local agencies that are separate and distinct from the local zoning authority,[403] confirming that Section 332(c)(7)(B) is not limited in application to decisions of zoning authorities. Our interpretation also reflects the examples in the record where providers are required to obtain other types of authorizations besides zoning permits before they can "place, construct, or modify personal wireless service facilities."[404]

137. We reject the argument that this interpretation of Section 332 will harm the public because it would "mean that building and safety officials would have potentially only a few days to

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[395] *Ogden Fire Co. No. 1 v. Upper Chichester TP.*, 504 F.3d 370, 395-96 (3d Cir. 2007).

[396] *Upstate Cellular Network*, 257 F. Supp. 3d at 319.

[397] *PI Telecom Infrastructure V, LLC v. Georgetown–Scott County Planning Commission*, 234 F. Supp. 3d 856, 872 (E.D. Ky. 2017). *Accord T-Mobile Ne. LLC v. Lowell*, Civil Action No. 11–11551–NMG, 2012 WL 6681890, *6-7, *11 (D. Mass. Nov. 27, 2012) (directing the zoning board "to issue all permits and approvals necessary for the construction of the plaintiffs' proposed telecommunications facility"); *New Par v. Franklin County Bd. of Zoning Appeals*, No. 2:09–cv–1048, 2010 WL 3603645, *4 (S.D. Ohio Sept. 10, 2010) (enjoining the zoning board to "grant the application and issue all permits required for the construction of the" proposed wireless facility).

[398] *See, e.g., New Par v. City of Saginaw*, 161 F. Supp. 2d 759, 760 (E.D. Mich. 2001), *aff'd*, 301 F.3d 390 (6th Cir. 2002)

[399] *See, e.g., Virginia Metronet, Inc. v. Bd. of Sup'rs of James City County*, 984 F. Supp. 966, 968 (E.D. Va. 1998); *Cellular Tel. Co.*, 166 F.3d at 491; *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299, 1303 (10th Cir. 2008); *City of Anacortes*, 572 F.3d at 989; *Helcher*, 595 F.3d at 713-14; *AT&T Wireless Servs. of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1152 (S.D. Cal. 2003); *PrimeCo Pers. Commc'ns L.P. v. City of Mequon*, 242 F. Supp. 2d 567, 570 (E.D. Wis.), *aff'd*, 352 F.3d 1147 (7th Cir. 2003); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1212 (11th Cir. 2002).

[400] *See, e.g., Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392, 394 (6th Cir. 2005); *Cox Commc'ns PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).

[401] *See, e.g., Upstate Cellular Network,* 257 F. Supp. 3d at 319; *Ogden Fire Co. No. 1 v. Upper Chichester Twp.*, 504 F.3d 370, 395-96 (3rd Cir. 2007).

[402] *Sprint Spectrum, L.P. v. Mills*, 65 F. Supp. 2d 148, 150 (S.D.N.Y. 1999), *aff'd*, 283 F.3d 404 (2d Cir. 2002).

[403] *See, e.g., Tennessee ex rel. Wireless Income Props., LLC v. City of Chattanooga*, 403 F.3d 392, 394 (6th Cir. 2005) (city public works department); *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 720 (9th Cir. 2009) (city public works director, city planning commission, and city council); *Sprint Spectrum, L.P. v. Mills*, 65 F. Supp. 2d at 150 (New York State Department of Education).

[404] *See, e.g.,* Virginia Joint Commenters Comments at 21-22 (stating that deployment of personal wireless facilities generally requires excavation and building permits); San Francisco Comments at 4-7, 12, 20-22 (describing the permitting process in San Francisco, the layers of multi-departmental review involved, and the required authorizations before certain personal wireless facilities can be constructed); Smart Communities Comments at 33-34 (describing several authorizations necessary to deploy personal wireless facilities depending on the location, e.g., public rights-of-way and other public properties, of the proposed site and the size of the proposed facility).

evaluate whether a proposed deployment endangers the public."[405] Building and safety officials will be subject to the same applicable shot clock as all other siting authorities involved in processing the siting application, with the amount of time allowed varying in the rare case where officials are unable to meet the shot clock because of exceptional circumstances.

2. Codification of Section 332 Shot Clocks

138. In addition to establishing two new Section 332 shot clocks for Small Wireless Facilities, we take this opportunity to codify our two existing Section 332 shot clocks for siting applications that do not involve Small Wireless Facilities. In the *2009 Declaratory Ruling*, the Commission found that 90 days is a reasonable time frame for processing collocation applications and 150 days is a reasonable time frame to process applications other than collocations.[406] Since these Section 332 shot clocks were adopted as part of a declaratory ruling, they were not codified in our rules. In the *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on whether to modify these shot clocks.[407] We find no need to modify them here and will continue to use these shot clocks for processing Section 332 siting applications that do not involve Small Wireless Facilities.[408] We do, though, codify these two existing shot clocks in our rules alongside the two newly-adopted shot clocks so that all interested parties can readily find the shot clock requirements in one place.[409]

139. While some commenters argue for a 60-day shot clock for all collocation categories,[410] we conclude that we should retain the existing 90-day shot clock for collocations not involving Small Wireless Facilities. Collocations that do not involve Small Wireless Facilities include deployments of

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[405] League of Az Cities and Towns *et al*. Reply at 21-22.

[406] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012-013, paras. 45, 48.

[407] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332-33, 3334, 3337-38, paras. 6, 9, 17-19.

[408] Chicago Comments at 2 (supporting maintaining existing shot clocks); Bellevue *et al*. Comments at 13-14 (supporting maintaining existing shot clocks).

[409] We also adopt a non-substantive modification to our existing rules. We redesignate the rule adopted in 2014 to codify the Commission's implementation of the 2012 Spectrum Act, formerly designated as section 1.40001, as section 1.6100, and we move the text of that rule from Part 1, Subpart CC, to the same Subpart as the new rules promulgated in this Third Report and Order (Part 1, Subpart U). This recognizes that both sets of requirements pertain to "State and local government regulation of the placement, construction, and modification of personal wireless service facilities" (the caption of new Subpart U). The reference in paragraph (a) of that preexisting rule to 47 U.S.C. § 1455 has been consolidated with new rule section 1.6001 to reflect that all rules in Subpart U, collectively, implement both § 332(c)(7) and § 1455. With those non-substantive exceptions, the text of the 2014 rule has not been changed in any way. Contrary to the suggestion submitted by the Washington Joint Counties, *see* Letter from W. Scott Snyder et al., Counsel for the Washington Cities of Bremerton, Mountlake Terrace, Kirkland, Redmond, Issaquah, Lake Stevens, Richland, and Mukilteo, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 6-7 (filed June 19, 2018), this change is not substantive and does not require advance notice. We find that "we have good cause to reorganize and renumber our rules in this fashion without expressly seeking comment on this change, and we conclude that public comment is unnecessary because no substantive changes are being made. Moreover, the delay engendered by a round of comment would be contrary to the public interest." *See 2017 Pole Replacement Order*, 32 FCC Rcd at 9770, para. 26; *see also* 5 U.S.C. §553(b)(B) (notice not required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

[410] CCIA Comments at 10; CCA Comments at 13-14; CCA Reply at 6 (arguing for 30-day shot clock for collocations and a 60-to-75-day shot clock for all other siting applications); WIA Reply at 21. *See also* Letter from Jill Canfield, NTCA Vice President Legal & Industry and Assistant General Counsel, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 19, 2018) (stating that NTCA supports a revised interpretation of the phrase "reasonable period of time" as found in Section 332(c) (7)(B)(ii) of the Communications Act as applicable to small cell facilities and that sixty days for collocations and 90 days for all other small cell siting applications should provide local officials sufficient time for review of requests to install small cell facilities in public rights-of-way).

larger antennas and other equipment that may require additional time for localities to review and process.[411] For similar reasons, we maintain the existing 150-day shot clock for new construction applications that are not for Small Wireless Facilities. While some industry commenters such as WIA, Samsung, and Crown Castle argue for a 90-day shot clock for macro cells and small cells alike, we agree with commenters such as the City of New Orleans that there is a significant difference between the review of applications for a single 175-foot tower versus the review of a Small Wireless Facility with much smaller dimensions.[412]

3. Collocations on Structures Not Previously Zoned for Wireless Use

140. Wireless industry commenters assert that they should be able to take advantage of the Section 332 collocation shot clock even when collocating on structures that have not previously been approved for wireless use.[413] Siting agencies respond that the wireless industry is effectively seeking to have both the collocation definition and a reduced shot clock apply to sites that have never been approved by the local government as suitable for wireless facility deployment.[414] We take this opportunity to clarify that for purposes of the Section 332 shot clocks, attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities. As the Commission stated in the *2009 Declaratory Ruling*, "an application is a request for collocation if it does not involve a 'substantial increase in the size of a tower' as defined in the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas."[415] The definition of "[c]ollocation" in the NPA provides for the "mounting or installation of an antenna on an existing tower, *building or structure* for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, *whether or not there is an existing antenna on the structure.*"[416] The NPA's definition of collocation explicitly encompasses collocations on structures and buildings that have not yet been zoned for wireless use. To interpret the NPA any other way would be unduly narrow and there is no persuasive reason to accept a narrower interpretation. This is particularly true given that the NPA definition of collocation stands in direct contrast with the definition of collocation in the

[411] *Wireless Infrastructure Second R&O*, FCC 18-30 at paras. 74-76.

[412] New Orleans Comments at 2-3; Samsung Comments at 4-5 (arguing that the Commission should reduce the shot clock applicable to new construction from 150 days to 90 days); Crown Castle Comments at 29 (stating that a 90-day shot clock for new facilities is appropriate for macro cells and small cells alike, to the extent such applications require review under Section 332 at all); TX Hist. Comm. Comments at 2 (arguing that the reasonable periods of time that the FCC proposed in 2009, 90 days for collocation applications and 150 days for other applications appear to be appropriate); WIA Comments at 20-23; WIA Reply at 11 (arguing for a 90-day shot clock for applications involving substantial modifications, including tower extensions; and a 120-day shot clock for applications for all other facilities, including new macro sites); CTIA Reply at 3 (stating that the Commission should shorten the shot clocks to 90 days for new facilities).

[413] AT&T Comments at 10; AT&T Reply at 9; Verizon Reply at 32; WIA Comments at 22; ExteNet Comments at 9.

[414] Bellevue *et al.* Reply at 6-7 (arguing that the Commission has rejected this argument twice and instead determined that a collocation occurs when a wireless facility is attached to an existing infrastructure that houses wireless communications facilities; San Francisco Reply at 7-8 (arguing that under Commission definitions, a utility pole is neither an existing base station nor a tower; thus, the Commission simply cannot find that adding wireless facilities to utility pole that has not previously been used for wireless facilities is an eligible facilities request). *See, e.g.*, Letter from Bonnie Michael, City Council President, Worthington, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 18, 2018); Letter from Jill Boudreau, Mayor, Mount Vernon, WA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 18, 2018).

[415] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para 46.

[416] 47 CFR Part 1, App. B, NPA, Subsection C, Definitions.

Spectrum Act, pursuant to which facilities only fall within the scope of an "eligible facilities request" if they are attached to towers or base stations that have already been zoned for wireless use.[417]

4. When Shot Clocks Start and Incomplete Applications

141. In the *2014 Wireless Infrastructure Order*, the Commission clarified, among other things, that a shot clock begins to run when an application is first submitted, not when the application is deemed complete.[418] The clock can be paused, however, if the locality notifies the applicant within 30 days that the application is incomplete.[419] The locality may pause the clock again if it provides written notice within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information.[420] In the *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on these determinations.[421] Localities contend that the shot clock period should not begin until the application is deemed complete.[422] Industry commenters argue that the review period for incompleteness should be decreased from 30 days to 15 days.[423]

142. With the limited exception described in the next paragraph, we find no cause or basis in the record to alter the Commission's prior determinations, and we now codify them in our rules. Codified rules, easily accessible to applicants and localities alike, should provide helpful clarity. The complaints by states and localities about the sufficiency of some of the applications they receive are adequately addressed by our current policy, particularly as amended below, which preserves the states' and localities' ability to pause review when they find an application to be incomplete.[424] We do not find it necessary at this point to shorten our 30-day initial review period for completeness because, as was the case when this review period was adopted in the *2009 Declaratory Ruling*, it remains consistent with review periods for completeness under existing state wireless infrastructure deployment statutes[425] and still "gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants

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[417] *See* 47 CFR § 1.40001(b)(3), (4), (5) (definitions of eligible facilities request, eligible support structure, and existing). Each of these definitions refers to facilities that have already been approved under local zoning or siting processes.

[418] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, at para. 258.

[419] *2009 Declaratory Ruling*, 24 FCC Rcd at 14014, paras. 52-53 (providing that the "timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information").

[420] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, para. 259.

[421] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.

[422] *See, e.g.*, Maine DOT Comments at 2-3; Philadelphia Comments at 6; League of Az Cities and Towns *et al.* at 4, 8-9; Letter from Barbara Coler, Chair, Marin Telecommunications Agency, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 4, 2018) (Barbara Coler Sept. 4, 2018 *Ex Parte* Letter); Letter from Sam Liccardo, Mayor, San Jose, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 5 (filed Sept. 18, 2018).

[423] Verizon Comments at 43. *See* Sprint June 18 *Ex Parte* at 2 (asserting that the shot clocks should begin to run when the application is complete and that a siting authority should review the application for completeness within the first 15 days of receipt or it would waive the right to object on that basis).

[424] *See, e.g.*, Barbara Coler Sept. 4, 2018 *Ex Parte* Letter at 2 (the pace of installation may be affected by incomplete applications); Kenneth S. Fellman Sept. 18, 2018 *Ex Parte* Letter at 3 (not uncommon to find documents not properly prepared and not in compliance with relevant regulations).

[425] Most states have a 30-day review period for incompleteness. *See, e.g.*, Colo. Rev. Stat. Ann. § 29-27-403; Ga. Code Ann. § 36-66B-5; Iowa Code Ann. § 8C.4; Kan. Stat. Ann. § 66-2019; Minn. Stat. Ann. § 237.163(3c)(b); 53 Pa. Stat. Ann. § 11702.4(b)(1); Cal. Gov't Code § 65943. A minority of states have adopted either a longer or shorter review period for incompleteness, ranging from 5 days to 45 days. *See* N.C. Gen. Stat. Ann. § 153A-349.53 (45 days); Wash. Rev. Code Ann. § 36.70B.070 (28 days); N.H. Rev. Stat. Ann. § 12-K:10 (15 days); Del. Code Ann. tit. 17, § 1609 (14 days); Va. Code Ann. §§ 15.2-2316.4; 56-484.28; 56-484.29 (10 days); Wis. Stat. Ann. § 66.0404(3) (5 days).

from a last minute decision that an application should be denied as incomplete."[426]

143. However, for applications to deploy Small Wireless Facilities, we implement a modified tolling system designed to help ensure that providers are submitting complete applications on day one. This step accounts for the fact that the shot clocks applicable to such applications are shorter than those established in the *2009 Declaratory Ruling* and, because of which, there may instances where the prevailing tolling rules would further shorten the shot clocks to such an extent that it might be impossible for siting authorities to act on the application.[427] For Small Wireless Facilities applications, the siting authority has 10 days from the submission of the application to determine whether the application is incomplete. The shot clock then resets once the applicant submits the supplemental information requested by the siting authority. Thus, for example, for an application to collocate Small Wireless Facilities, once the applicant submits the supplemental information in response to a siting authority's timely request, the shot clock resets, effectively giving the siting authority an additional 60 days to act on the Small Wireless Facilities collocation application. For subsequent determinations of incompleteness, the tolling rules that apply to non-Small Wireless Facilities would apply—that is, the shot clock would toll if the siting authority provides written notice within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information.

144. As noted above, multiple authorizations may be required before a deployment is allowed to move forward. For instance, a locality may require a zoning permit, a building permit, an electrical permit, a road closure permit, and an architectural or engineering permit for an applicant to place, construct, or modify its proposed personal wireless service facilities.[428] All of these permits are subject to Section 332's requirement to act within a reasonable period of time, and thus all are subject to the shot clocks we adopt or codify here.

145. We also find that mandatory pre-application procedures and requirements do not toll the shot clocks.[429] Industry commenters claim that some localities impose burdensome pre-application requirements before they will start the shot clock.[430] Localities counter that in many instances, applicants submit applications that are incomplete in material respects, that pre-application interactions smooth the application process, and that many of their pre-application requirements go to important health and safety matters.[431] We conclude that the ability to toll a shot clock when an application is found incomplete or by

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[426] *2009 Declaratory Ruling*, 24 FCC Rcd at 14014-15, para. 53.

[427] *See, e.g.*, Geoffrey C. Beckwith Sept. 11, 2018 *Ex Parte* Letter at 1; Letter from Brad Cole, Executive Director, Illinois Municipal League, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al. at 1 (filed Sept. 14, 2018); Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter at 2.

[428] *See* Sprint June 18 *Ex Parte* at 3; *cf.* Virginia Joint Commenters Comments at 21-22; San Francisco Comments at 4-7, 12, 20-22; CTIA Comments at 15 ("The Commission should declare that the shot clocks apply to the entire local review process.").

[429] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.

[430] *See, e.g.*, CCA Reply at 7 (noting also that some localities unreasonably request additional information after submission that is either already provided or of unreasonable scope); GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteNet Comments at 4, 15-16; Mobilitie Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.

[431] *See, e.g.*, Philadelphia Reply at 9 (arguing that shot clocks should not run until a complete application with a full set of engineering drawings showing the placement, size and weight of the equipment, and a fully detailed structural analysis is submitted, to assess the safety of proposed installations); Philadelphia Comments at 6; League of Az Cities and Towns *et al*. Comments at 4 (arguing that the shot clock should not begin until after an application has been "duly filed," because "some applicants believe the shot clock commences to run no matter how they submit their request, or how inadequate their submittal may be"); Colorado Comm. and Utility All. *et al*. Comments at 14 (explaining that the pre-application meetings are intended "to give prospective applicants an opportunity to discuss code and regulatory provisions with local government staff, and gain a better understanding of the process that will be followed, in order to increase the probability that once an application is filed, it can proceed smoothly to final decision"); Smart

mutual agreement by the applicant and the siting authority should be adequate to address these concerns. Much like a requirement to file applications one after another, requiring pre-application review would allow for a complete circumvention of the shot clocks by significantly delaying their start date. An application is not ruled on within "a reasonable period of time after the request is duly filed" if the state or locality takes the full ordinary review period after having delayed the filing in the first instance due to required pre-application review. Indeed, requiring a pre-application review before an application may be filed is similar to imposing a moratorium, which the Commission has made clear does not stop the shot clocks from running.[432] Therefore, we conclude that if an applicant proffers an application, but a state or locality refuses to accept it until a pre-application review has been completed,[433] the shot clock begins to run when the application is proffered. In other words, the request is "duly filed" at that time,[434] notwithstanding the locality's refusal to accept it.

146. That said, we encourage *voluntary* pre-application discussions, which may well be useful to both parties. The record indicates that such meetings can clarify key aspects of the application review process, especially with respect to large submissions or applicants new to a particular locality's processes, and may speed the pace of review.[435] To the extent that an applicant voluntarily engages in a pre-application review to smooth the way for its filing, the shot clock will begin when an application is filed, presumably after the pre-application review has concluded.

147. We also reiterate, consistent with the *2009 Declaratory Ruling*, that the remedies granted under Section 332(c)(7)(B)(v) are independent of, and in addition to, any remedies that may be available under state or local law.[436] Thus, where a state or locality has established its own shot clocks, an applicant may pursue any remedies granted under state or local law in cases where the siting authority fails to act within those shot clocks.[437] However, the applicant must wait until the Commission shot clock period has expired to bring suit for a "failure to act" under Section 332(c)(7)(B)(v).[438]

V. PROCEDURAL MATTERS

148. *Final Regulatory Flexibility Analysis*. With respect to this Third Report and Order, a Final Regulatory Flexibility Analysis (FRFA) is contained in Appendix C. As required by Section 603 of

(Continued from previous page)
Communities Comments at 15, 35 (pre-application procedures "may translate into faster consideration of individual applications over the longer term, as providers and communities alike, gain a better understanding of what is required of them, and providers submit applications that are tailored to community requirements"); UT Dept. of Trans. Comments at 5 ("The purpose of the pre-application access meeting is to help the entity or person with the application and provide information concerning the requirements contained in the rule."); CCUA *at al*. Reply at 6 ("[Pre-application meetings] provide an opportunity for informal discussion between prospective applicants and the local jurisdiction. Pre-application meetings serve to educate, answer questions, clarify process issues, and ultimately result in a more efficient process from application filing to final action."); AASHTO Comments, Attach. at 3 (GA Dept. of Trans. contending that pre-application procedures "should be encouraged and separated from an 'official' "application submittal"); League of Az Cities and Towns *et al*. Comments at 5-7 (providing examples of incomplete applications).

[432] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12971, at para. 265.

[433] *See, e.g.*, CCA Reply at 7; GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteNet Comments at 4, 15-16; Mobilitie Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.

[434] 47 U.S.C. § 332(c)(7)(B)(ii).

[435] *See* CCUA *et al*. Comments at 14; Smart Communities Comments at 15, 35; UT Dept. of Trans. Comments at 5; CCUA *et al*. Reply at 6; Mukilteo Reply, Docket No. WC 17-84, at 1 (filed July 10, 2017).

[436] *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

[437] *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

[438] 47 U.S.C. § 332(c)(7)(B)(v).

the Regulatory Flexibility Act, the Commission has prepared a FRFA of the expected impact on small entities of the requirements adopted in this Third Report and Order. The Commission will send a copy of the Third Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

149. *Paperwork Reduction Act*. This Third Report and Order does not contain new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

150. *Congressional Review Act*. The Commission will send a copy of this Declaratory Ruling and Third Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA), *see* 5 U.S.C. § 801(a)(1)(A).

VI. ORDERING CLAUSES

151. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i)-(j), 7, 201, 253, 301, 303, 309, 319, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 157, 201, 253, 301, 303, 309, 319, 332, that this Declaratory Ruling and Third Report and Order in WT Docket No. 17-79 IS hereby ADOPTED.

152. IT IS FURTHER ORDERED that Part 1 of the Commission's Rules is AMENDED as set forth in Appendix A, and that these changes SHALL BE EFFECTIVE 90 days after publication in the Federal Register.

153. IT IS FURTHER ORDERED that this Third Report and Order SHALL BE effective 90 days after its publication in the Federal Register. The Declaratory Ruling and the obligations set forth therein ARE EFFECTIVE on the same day that this Third Report and Order becomes effective. It is our intention in adopting the foregoing Declaratory Ruling and these rule changes that, if any provision of the Declaratory Ruling or the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of such Declaratory Ruling and the rules not deemed unlawful, and the application of such Declaratory Ruling and the rules to other person or circumstances, shall remain in effect to the fullest extent permitted by law.

154. IT IS FURTHER ORDERED that, pursuant to 47 CFR § 1.4(b)(1), the period for filing petitions for reconsideration or petitions for judicial review of this Declaratory Ruling and Third Report and Order will commence on the date that a summary of this Declaratory Ruling and Third Report and Order is published in the Federal Register.

155. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Declaratory Ruling and Third Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

156. IT IS FURTHER ORDERED that this Declaratory Ruling and Third Report and Order SHALL BE sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

Streamlining State and Local Review of Wireless Facility Siting Applications

Part 1—Practice and Procedure

1. Add subpart U to Part 1 of Title 47 to read as follows:

Subpart U—State and Local Government Regulation of the Placement, Construction, and Modification of Personal Wireless Service Facilities

§ 1.6001 Purpose.

This subpart implements 47 U.S.C. 332(c)(7) and 1455.

§ 1.6002 Definitions.

Terms used in this subpart have the following meanings:

(a) *Action* or *to act* on a siting application means a siting authority's grant of a siting application or issuance of a written decision denying a siting application.

(b) *Antenna*, consistent with section 1.1320(d), means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under part 15 of this title.

(c) *Antenna equipment*, consistent with section 1.1320(d), means equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when collocated on a structure, is mounted or installed at the same time as such antenna.

(d) *Antenna facility* means an antenna and associated antenna equipment.

(e) *Applicant* means a person or entity that submits a siting application and the agents, employees, and contractors of such person or entity.

(f) *Authorization* means any approval that a siting authority must issue under applicable law prior to the deployment of personal wireless service facilities, including, but not limited to, zoning approval and building permit.

(g) *Collocation*, consistent with section 1.1320(d) and the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas, Appendix B of this part, section I.B, means—

(1) Mounting or installing an antenna facility on a pre-existing structure, and/or

(2) Modifying a structure for the purpose of mounting or installing an antenna facility on that structure.

(3) The definition of "collocation" in paragraph (b)(2) of section 1.6100 applies to the term as used in that section.

(h) *Deployment* means placement, construction, or modification of a personal wireless service facility.

(i) *Facility* or *personal wireless service facility* means an antenna facility or a structure that is used for the provision of personal wireless service, whether such service is provided on a stand-alone basis or commingled with other wireless communications services.

(j) *Siting application* or *application* means a written submission to a siting authority requesting authorization for the deployment of a personal wireless service facility at a specified location.

(k) *Siting authority* means a State government, local government, or instrumentality of a State government or local government, including any official or organizational unit thereof, whose authorization is necessary prior to the deployment of personal wireless service facilities.

(l) *Small wireless facilities*, consistent with section 1.1312(e)(2), are facilities that meet each of the following conditions:

(1) The facilities—

(i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or

(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or

(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under part 17 of this chapter;

(5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).

(m) *Structure* means a pole, tower, base station, or other building, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service (whether on its own or comingled with other types of services).

Terms not specifically defined in this section or elsewhere in this subpart have the meanings defined in Part 1 of Title 47 and the Communications Act of 1934, 47 U.S.C. 151 *et seq*.

§ 1.6003 Reasonable periods of time to act on siting applications

(a) *Timely action required.* A siting authority that fails to act on a siting application on or before the shot clock date for the application, as defined in paragraph (e) of this section, is presumed not to have acted within a reasonable period of time.

(b) *Shot clock period*. The shot clock period for a siting application is the sum of—

(1) the number of days of the presumptively reasonable period of time for the pertinent type of application, pursuant to paragraph (c) of this section, plus

(2) the number of days of the tolling period, if any, pursuant to paragraph (d) of this section.

(c) *Presumptively reasonable periods of time*.

(1) The following are the presumptively reasonable periods of time for action on applications seeking authorization for deployments in the categories set forth below:

(i) Review of an application to collocate a Small Wireless Facility using an existing structure: 60 days.

(ii) Review of an application to collocate a facility other than a Small Wireless Facility using an existing structure: 90 days.

(iii) Review of an application to deploy a Small Wireless Facility using a new structure: 90 days.

(iv) Review of an application to deploy a facility other than a Small Wireless Facility using a new structure: 150 days.

(2) *Batching*.

(i) If a single application seeks authorization for multiple deployments, all of which fall within a category set forth in either paragraph (c)(1)(i) or paragraph (c)(1)(iii) of this section, then the presumptively reasonable period of time for the application as a whole is equal to that for a single deployment within that category.

(ii) If a single application seeks authorization for multiple deployments, the components of which are a mix of deployments that fall within paragraph (c)(1)(i) and deployments that fall within paragraph (c)(1)(iii) of this section, then the presumptively reasonable period of time for the application as a whole is 90 days.

(iii) Siting authorities may not refuse to accept applications under paragraphs (c)(2)(i) and (c)(2)(ii).

(d) *Tolling period*. Unless a written agreement between the applicant and the siting authority provides otherwise, the tolling period for an application (if any) is as set forth below.

(1) *For an initial application to deploy Small Wireless Facilities, if the siting authority notifies the applicant on or before the 10th day after submission that the application is materially incomplete, and clearly and specifically identifies the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information,* the shot clock date calculation shall restart at zero on the date on which the applicant submits all the documents and information identified by the siting authority to render the application complete.

(2) *For all other initial applications,* the tolling period shall be the number of days from –

(i) The day after the date when the siting authority notifies the applicant in writing that the application is materially incomplete and clearly and specifically identifies the missing documents or information that the applicant must submit to render the application complete and the specific rule or regulation creating this obligation, until

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete,

(iii) But only if the notice pursuant to paragraph (d)(2)(i) is effectuated on or before the 30th day after the date when the application was submitted; or

(3) *For resubmitted applications following a notice of deficiency*, the tolling period shall be the number of days from—

(i) The day after the date when the siting authority notifies the applicant in writing that the applicant's supplemental submission was not sufficient to render the application complete and clearly and specifically identifies the missing documents or information that need to be submitted based on the siting authority's original request under paragraph (d)(1) or paragraph (d)(2) of this section, until

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete,

(iii) But only if the notice pursuant to paragraph (d)(3)(i) is effectuated on or before the 10th day after the date when the applicant makes a supplemental submission in response to the siting authority's request under paragraph (d)(1) or paragraph (d)(2) of this section.

(e) *Shot clock date*. The shot clock date for a siting application is determined by counting forward, beginning on the day after the date when the application was submitted, by the number of calendar days of the shot clock period identified pursuant to paragraph (b) of this section and including any pre-application period asserted by the siting authority; *provided*, that if the date calculated in this manner is a "holiday" as defined in section 1.4(e)(1) or a legal holiday within the relevant State or local jurisdiction, the shot clock date is the next business day after such date. The term "business day" means any day as defined in section 1.4(e)(2) and any day that is not a legal holiday as defined by the State or local jurisdiction.

3. Redesignate § 1.40001 as § 1.6100, remove and reserve paragraph (a) of newly redesignated § 1.6100, and revise paragraph (b)(7)(vi) of newly redesignated § 1.6100 by changing "1.40001(b)(7)(i)(iv)" to "1.6100(b)(7)(i)-(iv)."

4. Remove subpart CC.

APPENDIX B

Comments and Reply Comments

Comments

5G Americas
Aaron Rosenzweig
ACT | The App Association
Advisory Council on Historic Preservation
Advisors to the International EMF Scientist Appeal
African American Mayors Association
Agua Caliente Band of Cahuilla Indians Tribal Historic Preservation Office
Alaska Department of Transportation & Public Facilities
Alaska Native Health Board
Alaska Office of History and Archaeology
Alexandra Ansell
American Association of State Highway and Transportation Officials
American Bird Conservancy
American Cable Association
American Petroleum Institute
American Public Power Association
Angela Fox
Arctic Slope Regional Corporation
Arizona State Parks & Trails, State Historic Preservation Office
Arkansas SHPO
Arnold A. McMahon
Association of American Railroads
AT&T
B. Golomb
Bad River Band of Lake Superior Tribe of Chippewa Indians
Benjamin L. Yousef
BioInitiative Working Group
Blue Lake Rancheria
Board of County Road Commissioners of the County of Oakland
Bristol Bay Area Health Corporation
Cahuilla Band of Indians
California Office of Historic Preservation, Department of Parks and Recreation
California Public Utilities Commission
Cape Cod Bird Club, Inc.
Catawba Indian Nation Tribal Historic Preservation Office
Charter Communications, Inc.
Cheyenne River Sioux Tribe Cultural Preservation Office
Chickasaw Nation
Chippewa Cree Tribe
Choctaw Nation of Oklahoma
Chuck Matzker
Cindy Li
Cindy Russell
Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee
Citizen Potawatomi Nation
Citizens Against Government Waste

City and County of San Francisco
City of Alexandria, Virginia; Arlington County, Virginia; and Henrico County, Virginia
City of Arlington, Texas
City of Austin, Texas
City of Bellevue, City of Bothell, City of Burien, City of Ellensburg, City of Gig Harbor, City of Kirkland, City of Mountlake Terrace, City of Mukilteo, City of Normandy Park, City of Puyallup, City of Redmond, and City of Walla Walla
City of Chicago
City of Claremont (Tony Ramos, City Manager)
City of Eden Prairie, MN
City of Houston
City of Irvine, California
City of Kenmore, Washington, and David Baker, Vice-Chair, National League of Cities Information Technology and Communications Committee
City of Lansing, Michigan
City of Mukilteo
City of New Orleans, Louisiana
City of New York
City of Philadelphia
City of Springfield, Oregon
Cityscape Consultants, Inc.
Coalition for American Heritage, Society for American Archaeology, American Cultural Resources Association, Society for Historical Archaeology, and American Anthropological Association
Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), and Colorado Municipal League (CML)
Colorado River Indian Tribes
Colorado State Historic Preservation Office
Comcast Corporation
Commissioner Sal Pace, Pueblo Board of County Commissioners
Community Associations Institute
Competitive Carriers Association
CompTIA (The Computing Technology Industry Association)
Computer & Communications Industry Association (CCIA)
Confederated Tribes of the Colville Reservation
Confederated Tribes of the Umatilla Indian Reservation Cultural Resources Protection Program
Consumer Technology Association
Conterra Broadband Services, Southern Light, LLC, and Uniti Group, Inc.
Critical Infrastructure Coalition
Crow Creek Sioux Tribe
Crown Castle
CTIA
CTIA and Wireless Infrastructure Association
David Roetman, Minnehaha County GOP Chairman
Defenders of Wildlife
Department of Arkansas Heritage (Arkansas Historic Preservation Program)
DuPage Mayors and Managers Conference
East Bay Municipal Utility District
Eastern Shawnee Tribe of Oklahoma
Edward Czelada
Elijah Mondy
Elizabeth Doonan

Ellen Marks
EMF Safety Network, Ecological Options Network
Environmental Health Trust
ExteNet Systems, Inc.
Fairfax County, Virginia
FibAire Communications, LLC d/b/a AireBeam
Florida Coalition of Local Governments
Fond du Lac Band of Lake Superior Chippewa
Forest County Potawatomi Community of Wisconsin
Fort Belknap Indian Community
Free State Foundation
General Communication, Inc.
Georgia Department of Transportation
Georgia Historic Preservation Division
Georgia Municipal Association, Inc.
Gila River Indian Community
Greywale Advisors
History Colorado (Colorado State Historic Preservation Office)
Hongwei Dong
Hualapai Department of Cultural Resources
Illinois Department of Transportation
Illinois Municipal League
INCOMPAS
Information Technology and Innovation Foundation
International Telecommunications Users Group
Jack Li
Jackie Cale
Jerry Day
Joel M. Moskowitz, Ph.D.
Jonathan Mirin
Joyce Barrett
Karen Li
Karen Spencer
Karon Gubbrud
Kate Kheel
Kaw Nation
Kevin Mottus
Keweenaw Bay Indian Community
Kialegee Tribal Town
League of Arizona Cities and Towns, League of California Cities, and League of Oregon Cities
League of Minnesota Cities
Leo Cashman
Lower Brule Sioux Tribe
Li Sun
Lightower Fiber Networks
Lisbeth Britt
Lower Brule Sioux Tribe
Maine Department of Transportation
Marty Feffer
Mary Whisenand, Iowa Governor's Commission on Community Action Agencies
Mashantucket (Western) Pequot Tribe
Mashpee Wampanoag Tribe

Matthew Goulet
Mayor Patrick Furey, City of Torrance, California
McLean Citizens Association
Miami Tribe of Oklahoma
Missouri State Historic Preservation Office
Mobile Future
Mobilitie, LLC
Mohegan Tribe of Indians of Connecticut
Montana State Historic Preservation Office
Monte R. Lee and Company
Muckleshoot Indian Tribe
Muscogee (Creek) Nation
National Association of Tower Erectors (NATE)
National Association of Tribal Historic Preservation Officers
National Black Caucus of State Legislators
National Conference of State Historic Preservation Officers
National Congress of American Indians
National Congress of American Indians, National Association of Tribal Historic Preservation Officers, and United South and Eastern Tribes Sovereignty Protection Fund
National Congress of American Indians and United South and Eastern Tribes Sovereignty Protection Fund
National League of Cities
National League of Cities, United States Conference of Mayors, International Municipal Lawyers Association, Government Finance Officers Association, National Association of Counties, National Association of Regional Councils, National Association of Towns and Townships, and National Association of Telecommunications Officers and Advisors
National Tribal Telecommunications Association
National Trust for Historic Preservation
Native Public Media
NATOA
Natural Resources Defense Council
Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission
Naveen Albert
NCTA—The Internet & Television Association
nepsa solutions LLC
New Mexico Department of Cultural Affairs, Historic Preservation Division
Nez Perce Tribe
Nina Beety
Nokia
North Carolina State Historic Preservation Office
Northern Cheyenne Tribal Historic Preservation Office
NTCA—The Rural Broadband Association
Office of Historic Preservation for the Mashantucket Pequot Tribal Nation of Connecticut
Ohio State Historic Preservation Office
Oklahoma History Center State Historic Preservation Office
Olemara Peters
Omaha Tribe of Nebraska
ONE Media, LLC
Oregon State Historic Preservation Office
Osage Nation
Otoe-Missouri Tribe
Pala Band of Mission Indians

Patrick Wronkiewicz
Pechanga Band of Luiseno Indians
Pennsylvania State Historic Preservation Office
Prairie Island Indian Community
PTA-FLA, Inc .
Pueblo of Laguna
Pueblo of Pojoaque
Pueblo of Tesuque
Puerto Rico State Historic Preservation Office
Quad Cities Cable Communications Commission
Quapaw Tribe of Oklahoma
R Street Institute
Rebecca Carol Smith
Red Cliff Band of Lake Superior Chippewa
Representative Tom Sloan, State of Kansas House of Representatives
Representatives Anna G. Eshoo, Frank Pallone, Jr., and Raul Ruiz, U.S. House of Representatives
Rhode Island Historical Preservation and Heritage Commission
Rosebud Sioux Tribe Tribal Historic Preservation Cultural Resource Management Office
Ronald M. Powell, Ph.D.
S. Quick
Sacred Wind Communications, Inc.
Samsung Electronics America, Inc.
Santa Clara Pueblo
Sault Ste. Marie Tribe of Chippewa Indians
SCAN NATOA, Inc.
Seminole Nation of Oklahoma
Seminole Tribe of Florida
Senator Duane Ankney, Montana State Senate
Shawnee Tribe
Sisseton Wahpeton Oyate
Skokomish Indian Tribe Tribal Historic Preservation Office
Skull Valley Band of Goshute
Smart Communities and Special Districts Coalition
Soula Culver
Sprint
Standing Rock Sioux Tribe
Starry, Inc.
State of Washington Department of Archaeology & Historic Preservation
Sue Present
Swinomish Indian Tribal Community
Table Mountain Rancheria Tribal Government Office
Tanana Chiefs Conference
Telecommunications Industry Association
Texas Department of Transportation
Texas Historical Commission
Thlopthlocco Tribal Town
T-Mobile USA, Inc.
Tonkawa Tribe of Oklahoma
Triangle Communication System, Inc.
Twenty-Nine Palms Band of Mission Indians
United Keetoowah Band of Cherokee Indians In Oklahoma
Utah Department of Transportation

Ute Mountain Ute Tribe
Utilities Technology Council
Verizon
Wampanoag Tribe of Gay Head (Aquinnah)
WEC Energy Group, Inc.
Wei Shen
Wei-Ching Lee, MD, California Medical Association Delegate of Los Angeles County
Winnebago Tribe of Nebraska
Wireless Infrastructure Association
Wireless Internet Service Providers Association
Xcel Energy Services Inc.

Reply Comments
Alaska State Historic Preservation Office
American Cable Association
American Public Power Association
Association of American Railroads
California Public Utilities Commission
Catherine Kleiber
Chippewa Cree Tribe
Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee
City of Baltimore, Maryland
City of New York
City of Philadelphia
Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), and Colorado Municipal League (CML)
Comcast Corporation
Communications Workers of America
Competitive Carriers Association
Consumer Technology Association
Conterra Broadband Services, Southern Light, LLC, and Uniti Group Inc.
Critical Infrastructure Coalition
CTIA
Dan Kleiber
Enterprise Wireless Alliance
Environmental Health Trust
ExteNet Systems, Inc.
Florida Coalition of Local Governments
Confederated Tribes of Grand Ronde Community of Oregon Historic Preservation Department
INCOMPAS
Irregulators
League of Arizona Cities and Towns, League of California Cities, and League of Oregon Cities
National Association of Regulatory Utility Commissioners
National Association of Telecommunications Officers and Advisors, National League of Cities, National Association of Towns and Townships, National Association of Regional Councils, United States Conference of Mayors, and Government Finance Officers Association
National Congress of American Indians, United South and Eastern Tribes Sovereignty Protection Fund, and National Association of Tribal Historic Preservation Officers
National Organization of Black Elected Legislative (NOBEL) Women
National Rural Electric Cooperative Association

Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission
NCTA—The Internet & Television Association
Pueblo of Acoma
Puerto Rico Telephone Company, Inc., d/b/a Claro
Quintillion Networks, LLC, and Quintillion Subsea Operations, LLC
Rebecca Carol Smith
SDN Communications
Skyway Towers, LLC
SmallCellSite.Com
Smart Communities and Special Districts Coalition
Sue Present
The Greenlining Institute
T-Mobile USA, Inc.
Triangle Communication System, Inc.
United States Conference of Mayors
Verizon
Washington, D.C. Office of the Chief Technology Officer
Wireless Internet Service Providers Association
Xcel Energy Services Inc.

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA)[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* (*NPRM*), released in April 2017.[2] The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The comments received are addressed below in Section B. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

A. Need for and Objectives of the Rules

2. In the *Third Report and Order*, the Commission continues its efforts to promote the timely buildout of wireless infrastructure across the country by eliminating regulatory impediments that unnecessarily delay bringing personal wireless services to consumers. The record shows that lengthy delays in approving siting applications by siting agencies has been a persistent problem.[4] With this in mind, the *Third Report and Order* establishes and codifies specific rules concerning the amount of time siting agencies may take to review and approve certain categories of wireless infrastructure siting applications. More specifically, the Commission addresses its Section 332 shot clock rules for infrastructure applications which will be presumed reasonable under the Communications Act. As an initial matter, the Commission establishes two new shot clocks for Small Wireless Facilities applications. For collocation of Small Wireless Facilities on preexisting structures, the Commission adopts a 60-day shot clock which applies to both individual and batched applications. For applications associated with Small Wireless Facilities new construction we adopt a 90-day shot clock for both individual and batched applications.[5] The Commission also codifies two existing Section 332 shot clocks for all other Non-Small Wireless Facilities that were established in the *2009 Declaratory Ruling* without codification.[6]These existing shot clocks require 90-days for processing of all other Non-Small Wireless Facilities collocation applications, and 150-days for processing of all other Non-Small Wireless Facilities applications other than collocations.

3. The *Third Report and Order* addresses other issues related to both the existing and new shot clocks. In particular we address the specific types of authorizations subject to the "Reasonable Period of Time" provisions of Section 332(c)(7)(B)(ii), finding that "any request for authorization to place, construct, or modify personal wireless service facilities" under Section 332(c)(7)(B)(ii) means all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment of personal wireless services infrastructure.[7] The Commission also addresses collocation on structures not previously zoned for wireless use,[8] when the four Section 332 shot clocks begin to run,[9]

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

[2] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Notice of Proposed Rulemaking, 32 FCC Rcd 3330 (2017).

[3] *See* 5 U.S.C. § 604.

[4] *See supra* paras. 23-9.

[5] *See supra* paras. 111-12.

[6] *See supra* paras. 138-39; *2009 Declaratory Ruling*.

[7] *See supra* paras. 132-37.

[8] *See supra* para. 140.

the impact of incomplete applications on our Section 332 shot clocks,[10] and how state imposed shot clocks remedies effect the Commission's Section 332 shot clocks remedies.[11]

4. The Commission discusses the appropriate judicial remedy that applicants may pursue in cases where a siting authority fails to act within the applicable shot clock period.[12] In those situations, applicants may commence an action in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(i)(II) and seek injunctive relief granting the application. Notwithstanding the availability of a judicial remedy if a shot clock deadline is missed, the Commission recognizes that the Section 332 time frames might not be met in exceptional circumstances and has refined its interpretation of the circumstances when a period of time longer than the relevant shot clock would nonetheless be a reasonable period of time for action by a siting agency.[13] In addition, a siting authority that is subject to a court action for missing an applicable shot clock deadline has the opportunity to demonstrate that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services thereby rebutting the effective prohibition presumption.

5. The rules adopted in the *Third Report and Order* will accelerate the deployment of wireless infrastructure needed for the mobile wireless services of the future, while preserving the fundamental role of localities in this process. Under the Commission's new rules, localities will maintain control over the placement, construction and modification of personal wireless facilities, while at the same time the Commission's new process will streamline the review of wireless siting applications.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. Only one party—the Smart Communities and Special Districts Coalition—filed comments specifically addressing the rules and policies proposed in the IRFA. They argue that any shortening or alteration of the Commission's existing shot clocks or the adoption of a deemed granted remedy will adversely affect small local governments, special districts, property owners, small developers, and others by placing their siting applications behind wireless provider siting applications.[14] Subsequently, NATOA filed comments concerning the draft FRFA.[15] NATOA argues that the new shot clocks impose burdens on local governments and particularly those with limited resources. NATOA asserts that the new shot clocks will spur more deployment applications than localities currently process.

7. These arguments, however, fail to acknowledge that Section 332 shot clocks have been in place for years and reflect Congressional intent as seen in the statutory language of Section 332. The record in this proceeding demonstrates the need for, and reasonableness of, expediting the siting review of certain facility deployments.[16] More streamlined procedures are both reasonable and necessary to provide greater predictability. The current shot clocks do not reflect the evolution of the application review process and evidence that localities can complete reviews more quickly than was the case when the original shot clocks were adopted nine years ago. Localities have gained significant experience processing wireless siting applications and several jurisdictions already have in place laws that require

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[9] *See supra* paras. 141-46.

[10] *Id*.

[11] *See supra* para. 147.

[12] *See supra* paras. **Error! Reference source not found.**-131.

[13] *See supra* para. 127.

[14] Smart Communities Comments at 81; *see also* Letter from Gerard Lavery Lederer, Counsel, Smart Communities, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, *Ex Parte* Submission at 33 (filed Sept. 19, 2018).

[15] Letter from Nancy Werner, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 4-5 (filed Sept. 19, 2018).

[16] *See supra* para. 106.

applications to be processed in less time than the Commission's new shot clocks. With the passage of time, sitting agencies have become more efficient in processing siting applications and this, in turn, should reduce any economic burden the Commission's new shot clock provisions have on them.

8. The Commission has carefully considered the impact of its new shot clocks on siting authorities and has established shot clocks that take into consideration the nature and scope of siting requests by establishing shot clocks of different lengths of time that depend on the nature of the siting request at issue.[17] The length of these shot clocks is based in part on the need to ensure that local governments have ample time to take any steps needed to protect public safety and welfare and to process other pending utility applications.[18] Since local siting authorities have gained experience in processing siting requests in an expedited fashion, they should be able to comply with the Commission's new shot clocks.

9. The Commission has taken into consideration the concerns of the Smart Communities and Special Districts Coalition and NATOA. It has established shot clocks that will not favor wireless providers over other applicants with pending siting applications. Further, instead of adopting a deemed granted remedy that would grant a siting application when a shot clock lapses without a decision on the merits, the Commission provides guidance as to the appropriate judicial remedy that applicants may pursue and examples of exceptional circumstance where a siting authority may be justified in needing additional time to review a siting application then the applicable shot clock allows.[19] Under this approach, the applicant may seek injunctive relief as long as several minimum requirements are met. The siting authority, however, can rebut the presumptive reasonableness of the applicable shot clock under certain circumstances. The circumstances under which a sitting authority might have to do this will be rare. Under this carefully crafted approach, the interests of siting applicants, siting authorities, and citizens are protected.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

10. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.[20]

11. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

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

12. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[21] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[22] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[23] A "small business

[17] *See supra* paras. 105-112.

[18] *Id*.

[19] *See supra* paras. 116-131.

[20] 5 U.S.C. § 604(a)(3).

[21] *See* 5 U.S.C. § 604(a)(3).

[22] 5 U.S.C. § 601(6).

[23] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an

concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[24]

13. *Small Businesses, Small Organizations, Small Governmental Jurisdictions*. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.[25] First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.[26] These types of small businesses represent 99.9 percent of all businesses in the United States which translates to 28.8 million businesses.[27]

14. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[28] Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).[29]

15. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[30] U.S. Census Bureau data from the 2012 Census of Governments[31] indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.[32] Of this number there were

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agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[24] 15 U.S.C. § 632.

[25] *See* 5 U.S.C. § 601(3)-(6).

[26] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 1—What is a small business?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

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

[28] 5 U.S.C. § 601(4).

[29] Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than $100,000. Of this number 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of $50,000 or less on the IRS Form 990-N for Small Exempt Organizations and 261,784 nonprofits reporting total revenues of $100,000 or less on some other version of the IRS Form 990 within 24 months of the August 2016 data release date. *See* http://nccs.urban.org/sites/all/nccs-archive/html//tablewiz/tw.php where the report showing this data can be generated by selecting the following data fields: Report: "The Number and Finances of All Registered 501(c) Nonprofits"; Show: "Registered Nonprofits"; By: "Total Revenue Level (years 1995, Aug to 2016, Aug)"; and For: "2016, Aug" then selecting "Show Results".

[30] 5 U.S.C. § 601(5).

[31] *See* 13 U.S.C. § 161. The Census of Government is conducted every five (5) years compiling data for years ending with "2" and "7". *See also* Program Description Census of Government *https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG#.*

[32] *See* U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG02.US01. Local governmental jurisdictions are classified in two categories - General purpose governments (county, municipal and town or township) and Special purpose governments (special districts and independent school districts).

37, 132 General purpose governments (county[33], municipal and town or township[34]) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts[35] and special districts[36]) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000.[37] Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of "small governmental jurisdictions."[38].

16. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless Internet access, and wireless video services.[39] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[40] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[41] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[42] Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications

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[33] *See* U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01. There were 2,114 county governments with populations less than 50,000.

[34] *See* U.S. Census Bureau, 2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States—States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.

[35] *See* U.S. Census Bureau, 2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. There were 12,184 independent school districts with enrollment populations less than 50,000.

[36] *See* U.S. Census Bureau, 2012 Census of Governments, Special District Governments by Function and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG09.US01. The U.S. Census Bureau data did not provide a population breakout for special district governments.

[37] *See* U.S. Census Bureau, 2012 Census of Governments, **C**ounty Governments by Population-Size Group and State: 2012 - United States-States - https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States–States - https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments the majority of the 38, 266 special district governments have populations of less than 50,000.

[38] *Id.*

[39] U.S. Census Bureau, 2012 NAICS Definitions, "517210 Wireless Telecommunications Carriers (Except Satellite)," *See* https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&typib&id=ib.en./ECN.NAICS2012.517210.

[40] 13 CFR § 121.201, NAICS Code 517210.

[41] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5*, Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

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

carriers (except satellite) are small entities.

17. The Commission's own data—available in its Universal Licensing System—indicate that, as of May 17, 2018, there are 264 Cellular licensees that will be affected by our actions.[43] The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.[44] Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[45] Thus, using available data, we estimate that the majority of wireless firms can be considered small.

18. *Personal Radio Services.* Personal radio services provide short-range, low-power radio for personal communications, radio signaling, and business communications not provided for in other services. Personal radio services include services operating in spectrum licensed under Part 95 of our rules.[46] These services include Citizen Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service.[47] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. All such entities in this category are wireless, therefore we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which the SBA's small entity size standard is defined as those entities employing 1,500 or fewer persons.[48] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[49] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[50] Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. We note however that many of the licensees in this category are individuals and not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities that may be affected by our actions in this proceeding.

19. *Public Safety Radio Licensees.* Public Safety Radio Pool licensees as a general matter, include police, fire, local government, forestry conservation, highway maintenance, and emergency

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[43] *See* http://wireless.fcc.gov/uls. For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

[44] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf.

[45] *See id*.

[46] 47 CFR Part 90.

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

[48] 13 CFR § 121.201, NAICS Code 517312.

[49] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5*, Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

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

medical services.[51] Because of the vast array of public safety licensees, the Commission has not developed a small business size standard specifically applicable to public safety licensees. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications. The appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees. [52] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[53] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[54] Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. With respect to local governments, in particular, since many governmental entities comprise the licensees for these services, we include under public safety services the number of government entities affected. According to Commission records, there are a total of approximately 133,870 licenses within these services.[55] There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.[56] We estimate that fewer than 2,442 public safety radio licensees hold these licenses because certain entities may have multiple licenses.

20. *Private Land Mobile Radio Licensees*. Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically applicable to PLMR users. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engag*ed in radiotelephone communications.*[57] The appropriate size standard for this category under SBA rules is that such a business

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

[52] *See* 13 CFR § 121.201, NAICS Code 517210.

[53] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210. https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

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

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

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

[57] U.S. Census Bureau, 2012 NAICS Definitions, "517210 Wireless Telecommunications Carriers (Except Satellite)," *See* https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517210 (last visited Mar. 6, 2018).

is small if it has 1,500 or fewer employees.[58] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[59] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[60] Thus under this category and the associated size standard, the Commission estimates that the majority of PLMR Licensees are small entities.

21. According to the Commission's records, a total of approximately 400,622 licenses comprise PLMR users.[61] Of this number there are a total of 3,374 licenses in the frequencies range 173.225 MHz to 173.375 MHz, which is the range affected by the *Third Report and Order*.[62] The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

22. *Multiple Address Systems***.** Entities using Multiple Address Systems (MAS) spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, Profit-based Spectrum use, the size standards established by the Commission define "small entity" for MAS licensees as an entity that has average annual gross revenues of less than $15 million over the three previous calendar years.[63] A "Very small business" is defined as an entity that, together with its affiliates, has average annual gross revenues of not more than $3 million over the preceding three calendar years.[64] The SBA has approved these definitions.[65] The majority of MAS operators are licensed in bands where the Commission has implemented a geographic area licensing approach that requires the use of competitive bidding procedures to resolve mutually exclusive applications.

23. The Commission's licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission's licensing database indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission's licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS

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[58] *See* 13 CFR § 121.201, NAICS Code 517210.

[59] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210. https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

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

[61] This figure was derived from Commission licensing records as of September 19, 2016. Licensing numbers change on a daily basis. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of PLMR licensees that have fewer than 1,500 employees.

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

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

[64] *Id*.

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

licenses in 176 EAs was conducted.[66] Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

24. With respect to the second category, Internal Private Spectrum use consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definition developed by the SBA would be more appropriate than the Commission's definition. The closest applicable definition of a small entity is the "Wireless Telecommunications Carriers (except Satellite)" definition under the SBA rules.[67] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[68] For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[69] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[70] Thus under this category and the associated small business size standard, the Commission estimates that the majority of firms that may be affected by our action can be considered small.

25. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high-speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[71]

26. *BRS* - In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[72] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent

[66] *See Multiple Address Systems Spectrum Auction Closes*, Public Notice, 16 FCC Rcd 21011 (2001).

[67] 13 CFR § 121.201, NAICS Code 517210.

[68] *Id*.

[69] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

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

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

[72] 47 CFR § 21.961(b)(1).

BRS licensees do not meet the small business size standard).[73] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

27. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[74] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[75] Auction 86 concluded in 2009 with the sale of 61 licenses.[76] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

28. *EBS* - The Educational Broadband Service has been included within the broad economic census category and SBA size standard for Wired Telecommunications Carriers since 2007. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.[77] The SBA's small business size standard for this category is all such firms having 1,500 or fewer employees.[78] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.[79] Of this total, 3,083 operated with fewer than 1,000 employees.[80] Thus, under this size standard, the majority of firms in this industry can be considered small. In addition to Census Bureau data, the Commission's Universal Licensing System indicates that as of October 2014, there are 2,206 active EBS licenses. The Commission estimates that of these 2,206 licenses, the majority are held by non-profit educational

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[73] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

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

[75] *Id.* at 8296 para. 73.

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

[77] U.S. Census Bureau, 2017 NAICS Definitions, "517311 Wired Telecommunications Carriers,", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2017.

[78] *See* 13 CFR § 121.201. The Wired Telecommunications Carrier category formerly used the NAICS code of 517110. As of 2017 the U.S. Census Bureau definition shows the NAICs code as 517311 for Wired Telecommunications Carriers. *See*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[79] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

[80] *Id.*

institutions and school districts, which are by statute defined as small businesses.[81]

29. *Location and Monitoring Service (LMS)*. LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $15 million.[82] A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $3 million.[83] These definitions have been approved by the SBA.[84] An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

30. *Television Broadcasting*. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound."[85] These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.[86] These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having $38.5 million or less in annual receipts.[87] The 2012 Economic Census reports that 751 firms in this category operated in that year.[88] Of that number, 656 had annual receipts of $25,000,000 or less, 25 had annual receipts between $25,000,000 and $49,999,999 and 70 had annual receipts of $50,000,000 or more.[89] Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

31. The Commission has estimated the number of licensed commercial television stations to be 1,377.[90] Of this total, 1,258 stations (or about 91 percent) had revenues of $38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on November 16, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 384.[91] Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how

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[81] The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

[82] *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Second Report and Order, 13 FCC Rcd 15182, 15192 para. 20 (1998); *see also* 47 CFR § 90.1103.

[83] *Id*.

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

[85] U.S. Census Bureau, 2017 NAICS Definitions, "515120 Television Broadcasting," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017.

[86] *Id*.

[87] 13 CFR § 121.201; 2012 NAICS Code 515120.

[88] U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515120.

[89] *Id*.

[90] *Broadcast Station Totals as of* June 30, 2018, Press Release (MB, rel. Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals Press Release), https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf.

[91] *Id*.

many such stations would qualify as small entities. There are also 2,300 low power television stations, including Class A stations (LPTV) and 3,681 TV translator stations.[92] Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

32. We note, however, that in assessing whether a business concern qualifies as "small" under the above definition, business (control) affiliations must be included.[93] Our estimate, therefore likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of "small business" requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive. Also, as noted above, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent.

33. *Radio Stations.* This Economic Census category "comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources."[94] The SBA has established a small business size standard for this category as firms having $38.5 million or less in annual receipts.[95] Economic Census data for 2012 show that 2,849 radio station firms operated during that year.[96] Of that number, 2,806 operated with annual receipts of less than $25 million per year, 17 with annual receipts between $25 million and $49,999,999 million and 26 with annual receipts of $50 million or more.[97] Therefore, based on the SBA's size standard the majority of such entities are small entities.

34. According to Commission staff review of the BIA/Kelsey, LLC's Publications, Inc. Media Access Pro Radio Database (BIA) as of January 2018, about 11,261 (or about 99.92 percent) of 11,270 commercial radio stations had revenues of $38.5 million or less and thus qualify as small entities under the SBA definition.[98] The Commission has estimated the number of licensed commercial AM radio stations to be 4,633 stations and the number of commercial FM radio stations to be 6,738, for a total number of 11,371.[99] We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,128.[100] Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

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[92] *Id.*

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

[94] U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017.

[95] 13 CFR § 121.201, NAICS Code 515112.

[96] U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* NAICS Code 515112, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

[97] *Id.*

[98] BIA/Kelsey, MEDIA Access Pro Database (viewed Jan. 26, 2018).

[99] Broadcast Station Totals as of June 30, 2018, Press Release (MB Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals), https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf.

[100] *Id.*

35. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.[101] The Commission's estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, to be determined a "small business," an entity may not be dominant in its field of operation.[102] We further note, that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these basis, thus our estimate of small businesses may therefore be over-inclusive. Also, as noted above, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

36. *FM Translator Stations and Low Power FM Stations.* FM translators and Low Power FM Stations are classified in the category of Radio Stations and are assigned the same NAICS Code as licensees of radio stations.[103] This U.S. industry, Radio Stations, comprises establishments primarily engaged in broadcasting aural programs by radio to the public.[104] Programming may originate in their own studio, from an affiliated network, or from external sources.[105] The SBA has established a small business size standard which consists of all radio stations whose annual receipts are $38.5 million dollars or less.[106] U.S. Census Bureau data for 2012 indicate that 2,849 radio station firms operated during that year.[107] Of that number, 2,806 operated with annual receipts of less than $25 million per year, 17 with annual receipts between $25 million and $49,999,999 million and 26 with annual receipts of $50 million or more.[108] Therefore, based on the SBA's size standard, we conclude that the majority of FM Translator Stations and Low Power FM Stations are small.

37. *Multichannel Video Distribution and Data Service (MVDDS)*. MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[109] These definitions were approved by the SBA.[110] On January 27, 2004, the Commission

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[101] 13 CFR § 121.103(a)(1). "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both."

[102] 13 CFR § 121.102(b).

[103] *See*, U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017.

[104] *Id.*

[105] *Id*.

[106] 13 CFR § 121.201, NAICS code 515112.

[107] U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* NAICS Code 515112, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

[108] *Id.*

[109] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers,*

completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[111] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[112]

38. *Satellite Telecommunications.* This category comprises firms "primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."[113] Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of $32.5 million or less in average annual receipts, under SBA rules.[114] For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.[115] Of this total, 299 firms had annual receipts of less than $25 million.[116] Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

39. *All Other Telecommunications.* The "All Other Telecommunications" category is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.[117] This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.[118] Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.[119] The SBA has developed a small business size standard for "All Other Telecommunications," which consists of all such firms with gross annual receipts of $32.5 million or less.[120] For this category, U.S. Census data for 2012 show that there

(Continued from previous page)
Ltd. to Provide A Fixed Service in the 12.2–12.7 GHz Band, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

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

[111] *See* "*Multichannel Video Distribution and Data Service Spectrum Auction Closes; Winning Bidders Announced*," Public Notice, 19 FCC Rcd 1834 (2004).

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

[113] U.S. Census Bureau, 2017 NAICS Definitions, "517410 Satellite Telecommunications," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517410&search=2017+NAICS+Search&search=2017.

[114] 13 CFR § 121.201, NAICS Code 517410.

[115] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS Code 517410, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517410.

[116] *Id.*

[117] *See* U.S. Census Bureau, 2017 NAICS Definitions, NAICS Code "517919 All Other Telecommunications", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017.

[118] *Id.*

[119] *Id*.

[120] 13 CFR § 121.201, NAICS Code 517919.

were 1,442 firms that operated for the entire year.[121] Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 42 firms had annual receipts of $25 million to $49, 999,999.[122] Thus, a majority of "All Other Telecommunications" firms potentially affected by our action can be considered small.

40. *Fixed Microwave Services*. Microwave services include common carrier,[123] private-operational fixed,[124] and broadcast auxiliary radio services.[125] They also include the Local Multipoint Distribution Service (LMDS),[126] the Digital Electronic Message Service (DEMS),[127] the 39 GHz Service (39 GHz),[128] the 24 GHz Service,[129] and the Millimeter Wave Service[130] where licensees can choose between common carrier and non-common carrier status.[131] At present, there are approximately 66,680 common carrier fixed licensees, 69,360 private and public safety operational-fixed licensees, 20,150 broadcast auxiliary radio licensees, 411 LMDS licenses, 33 24 GHz DEMS licenses, 777 39 GHz licenses, and five 24 GHz licenses, and 467 Millimeter Wave licenses in the microwave services.[132] The Commission has not yet defined a small business size standard for microwave services. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) and the appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.[133] U.S. Census Bureau data for 2012, show that there were 967 firms in this category that operated for the entire year.[134] Of this total, 955 had employment of 999 or fewer, and 12 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

41. The Commission notes that the number of firms does not necessarily track the number of

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[121] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

[122] *Id*.

[123] *See* 47 CFR Part 101, Subpart I.

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

[125] *See* 47 CFR Parts 74, 78 (governing Auxiliary Microwave Service) Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. Auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes TV pickup and CARS pickup, which relay signals from a remote location back to the studio.

[126] *See* 47 CFR §§ 101, 1001-101, 1017.

[127] *See* 47 CFR §§ 101, 101.501-101.538.

[128] *See* 47 CFR Part 101, Subpart N (reserved for Competitive bidding procedures for the 38.6-40 GHz Band).

[129] *See id.*

[130] *See* 47 CFR §§ 101, 101.1501-101.1527.

[131] *See* 47 CFR §§ 101.533, 101.1017.

[132] These statistics are based on a review of the Universal Licensing System on September 22, 2015.

[133] 13 CFR § 121.201.

[134] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series, "Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

licensees. The Commission also notes that it does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. The Commission estimates however, that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

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

43. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a "Constructed" status and 13,987 registration records reflecting a "Granted, Not Constructed" status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.[135] Regarding towers that do not require ASR registration, we do not collect information as to the number of such towers in use and therefore cannot estimate the number of tower owners that would be subject to the rules on which we seek comment. Moreover, the SBA has not developed a size standard for small businesses in the category "Tower Owners." Therefore, we are unable to determine the number of non-licensee tower owners that are small entities. We believe, however, that when all entities owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands. In addition, there may be other non-licensee owners of other wireless infrastructure, including Distributed Antenna Systems (DAS) and small cells that might be affected by the measures on which we seek comment. We do not have any basis for estimating the number of such non-licensee owners that are small entities.

44. The closest applicable SBA category is All Other Telecommunications, and the appropriate size standard consists of all such firms with gross annual receipts of $32.5 million or less.[136] For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year.[137] Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 15 firms had annual receipts of $25 million to $49, 999,999.[138] Thus, under this SBA size standard a majority of the firms potentially affected by our action can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

45. The *Third Report and Order* does not establish any reporting, recordkeeping, or other

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

[136] 13 CFR § 121.201, NAICS Code 517919.

[137] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012,* NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

[138] *Id*.

compliance requirements for companies involved in wireless infrastructure deployment.[139] In addition to not adopting any reporting, recordkeeping or other compliance requirements, the Commission takes significant steps to reduce regulatory impediments to infrastructure deployment and, therefore, to spur the growth of personal wireless services. Under the Commission's approach, small entities as well as large companies will be assured that their deployment requests will be acted upon within a reasonable period of time and, if their applications are not addressed within the established time frames, applicants may seek injunctive relief granting their siting applications. The Commission, therefore, has taken concrete steps to relieve companies of all sizes of uncertainly and has eliminated unnecessary delays.

46. The *Third Report and Order* also does not impose any reporting or recordkeeping requirements on state and local governments. While some commenters argue that additional shot clock classifications would make the siting process needlessly complex without any proven benefits, the Commission concludes that any additional administrative burden from increasing the number of Section 332 shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process.[140] The Commission's actions are consistent with the statutory language of Section 332 and therefore reflect Congressional intent. Further, siting agencies have become more efficient in processing siting applications and will be able to take advantage of these efficiencies in meeting the new shot clocks. As a result, the additional shot clocks that the Commission adopts will foster the deployment of the latest wireless technology and serve consumer interests.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

47. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[141]

48. The steps taken by the Commission in the *Third Report and Order* eliminate regulatory burdens for small entities as well as large companies that are involved with the deployment of person wireless services infrastructure. By establishing shot clocks and guidance on injunctive relief for personal wireless services infrastructure deployments, the Commission has standardized and streamlined the permitting process. These changes will significantly minimize the economic burden of the siting process on all entities, including small entities, involved in deploying personal wireless services infrastructure. The record shows that permitting delays imposes significant economic and financial burdens on companies with pending wireless infrastructure permits. Eliminating permitting delays will remove the associated cost burdens and enabling significant public interest benefits by speeding up the deployment of personal wireless services and infrastructure. In addition, siting agencies will be able to utilize the efficiencies that they have gained over the years processing siting applications to minimize financial impacts.

49. The Commission considered but did not adopt proposals by commenters to issue "Best Practices" or "Recommended Practices,"[142] and to develop an informal dispute resolution process and

[139] *See supra* para. 144.

[140] *See supra* para. 110.

[141] 5 U.S.C. § 603(c)(1)-(4).

[142] KS Rep. Sloan Comments at 2; Nokia Comments at 10.

mediation program,[143] noting that the steps taken in the *Third Report and Order* address the concerns underlying these proposals to facilitate cooperation between parties to reach mutually agreed upon solutions.[144] The Commission anticipates that the changes it has made to the permitting process will provide significant efficiencies in the deployment of personal wireless services facilities and this in turn will benefit all companies, but particularly small entities, that may not have the resources and economies of scale of larger entities to navigate the permitting process. By adopting these changes, the Commission will continue to fulfill its statutory responsibilities, while reducing the burden on small entities by removing unnecessary impediments to the rapid deployment of personal wireless services facilities and infrastructure across the country.

Report to Congress

50. The Commission will send a copy of the *Third Report and Order*, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.[145] In addition, the Commission will send a copy of the *Third Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Third Report and Order* and FRFA (or summaries thereof) also will be published in the *Federal Register*.[146]

[143] NATOA *et al*. Comments at 16-17.

[144] *See supra* para. 131.

[145] 5 U.S.C. § 801(a)(1)(A).

[146] 5 U.S.C. § 604(b).

STATEMENT OF
CHAIRMAN AJIT PAI

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79*; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84

Perhaps the defining characteristic of the communications sector over the past decade is that the world is going wireless. The smartphone's introduction in 2007 may have seemed an interesting novelty to some at the time, but it was a precursor of a transformative change in how consumers access and use the Internet. 4G LTE was a key driver in that change.

Today, a new transition is at hand as we enter the era of 5G. At the FCC, we're working hard to ensure that the United States leads the world in developing this next generation of wireless connectivity so that American consumers and our nation's economy enjoy the immense benefits that 5G will bring.

Spectrum policy of course features prominently in our 5G strategy. We're pushing a lot more spectrum into the commercial marketplace. On November 14, for example, our 28 GHz band spectrum auction will begin, and after it ends, our 24 GHz band spectrum auction will start. And in 2019, we plan to auction off three additional spectrum bands.

But all the spectrum in the world won't matter if we don't have the infrastructure needed to carry 5G traffic. New physical infrastructure is vital for success here. That's because 5G networks will depend less on a few large towers and more on numerous small cell deployments—deployments that for the most part don't exist today.

But installing small cells isn't easy, too often because of regulations. There are layers of (sometimes unnecessary and unreasonable) rules that can prevent widespread deployment. At the federal level, we acted earlier this year to modernize our regulations and make our own review process for wireless infrastructure 5G fast. And many states and localities have similarly taken positive steps to reform their own laws and increase the likelihood that their citizens will be able to benefit from 5G networks.

But as this *Order* makes clear, there are outliers that are unreasonably standing in the way of wireless infrastructure deployment. So today, we address regulatory barriers at the local level that are inconsistent with federal law. For instance, big-city taxes on 5G slow down deployment there and also jeopardize the construction of 5G networks in suburbs and rural America. So today, we find that all fees must be non-discriminatory and cost-based. And when a municipality fails to act promptly on applications, it can slow down deployment in many other localities. So we mandate shot clocks for local government review of small wireless infrastructure deployments.

I commend Commissioner Carr for his leadership in developing this *Order*. He worked closely with many state and local officials to understand their needs and to study the policies that have worked at the state and local level. It should therefore come as no surprise that this *Order* has won significant support from mayors, local officials, and state legislators.

To be sure, there are some local governments that don't like this *Order*. They would like to continue extracting as much money as possible in fees from the private sector and forcing companies to navigate a maze of regulatory hurdles in order to deploy wireless infrastructure. But these actions are not only unlawful, they're also short-sighted. They slow the construction of 5G networks and will delay if not prevent the benefits of 5G from reaching American consumers. And let's also be clear about one thing: When you raise the cost of deploying wireless infrastructure, it is those who live in areas where the

investment case is the most marginal—rural areas or lower-income urban areas—who are most at risk of losing out. And I don't want 5G to widen the digital divide; I want 5G to help close that divide.

In conclusion, I'd like to again thank Commissioner Carr for leading this effort and his staff for their diligent work. And I'm grateful to the hardworking staff across the agency who have put many hours into this *Order*. In particular, thanks to Jonathan Campbell, Stacy Ferraro, Garnet Hanly, Leon Jackler, Eli Johnson, Jonathan Lechter, Kate Matraves, Betsy McIntyre, Darrel Pae, Jennifer Salhus, Dana Shaffer, Jiaming Shang, David Sieradzki, Michael Smith, Don Stockdale, Cecilia Sulhoff, Patrick Sun, Suzanne Tetreault, and Joseph Wyer from the Wireless Telecommunications Bureau; Matt Collins, Adam Copeland, Dan Kahn, Deborah Salons, and John Visclosky from the Wireline Competition Bureau; Chana Wilkerson from the Office of Communications Business Opportunities; and Ashley Boizelle, David Horowitz, Tom Johnson, Marcus Maher, Bill Richardson, and Anjali Singh from the Office of General Counsel.