

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

REPLY COMMENTS OF INCOMPAS

INCOMPAS respectfully submits these reply comments in response to the Commission’s Notice of Proposed Rulemaking in the above referenced proceeding.¹ While supporting a number of proposals proffered, in these reply comments, INCOMPAS focuses on a certain set of reforms needed to reduce the costs and accelerate the deployment of wireless facilities. Namely, the Commission should 1) exempt small cell deployments from Section 106 Review;² 2) clarify fee related aspects of the historic review process; 3) strengthen shot clocks applicable to wireless siting applications; and 4) limit rights-of-way (“ROW”) use charges and siting application fees, consistent with Sections 253 and 332.

Mobile broadband, although not a substitute for fixed broadband, is nonetheless exploding in usage. The Internet of Things, mobile streaming, smart communities, smart farming, connected cars, and other new data intensive capabilities are expected to contribute to

¹ *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WC Docket No. 17-79 (rel. Apr. 21, 2017) (“Notice” or “NPRM”).

² The Commission should make a similar finding for distributed antenna system (“DAS”) and certain other pole and fiber deployments/replacements. *See also, infra* n. 17 (discussing the fact that Section 106 Review is only even applicable if the activity is within the scope of National Historic Preservation Act (“NHPA”) and there is a valid argument that that is not the case with regard to small cell deployment.)

this tremendous increased demand in wireless data services.³ Mobile data use increased by 18-fold over the last five years and is estimated to increase another seven-fold over the next five years.⁴ It is estimated that telecommunications carriers will invest around \$275 billion in the next seven years to deploy next generation networks, creating three million new jobs and a boost to the U.S. gross domestic product (“GDP”) by a half a trillion dollars.⁵ Connected devices could save the health care sector \$305 billion and self-driving cars could save almost 22,000 lives and result in \$447 billion in savings each year.⁶

Rapid and affordable installation of small cells is needed to address this demand⁷ (as the primary function of small cells is to increase overall capacity while using the same amount of spectrum)⁸ and spur this economic growth. An estimated 100,000 to 150,000 small cells will be constructed by the end of 2018; 455,000 by 2020; and, nearly 800,000 by 2026.⁹ Small cells are typically deployed on structures in the public rights of way such as poles, traffic signals, and

³ See Comments of Verizon, WT Docket No. 17-79, *et al.*, 3 (filed June 15, 2017) (“Verizon Comments”). See also *NPRM* at ¶1.

⁴ See White Paper, Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021, 1, 5 (Feb. 7, 2017), <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/mobile-white-paper-c11-520862.html>.

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

⁶ See Comments of CTIA, WT Docket No. 17-79, *et al.*, 5 (filed June 15, 2017) (“CTIA Comments”) (citing, *Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation*, DELOITTE, at 3 (Jan. 2017), http://www.ctia.org/docs/default-source/default-document-library/deloitte_20170119.pdf).

⁷ See Comments of Sprint, WT Docket No. 17-79, *et al.*, 9 (filed June 15, 2017) (“Sprint Comments”); Verizon Comments at 3.

⁸ See Sprint Comments at 10.

⁹ See *Comment Sought on Streamlining Deployment of Small Cell Infrastructure*, Public Notice, 31 FCC Rcd. 13360 (WTB 2016) (“Public Notice”) at 4-5.

streetlights.¹⁰ Sprint’s small cells are “approximately the size of a shoe box to a fire extinguisher” and require no additional equipment installed on the ground, yet they have the same basic functionality as familiar macro cells.¹¹ While the cost per small cell is in the low tens of thousands of dollars and can take less than a day to install,¹² the record demonstrates that regulatory compliance fees per application can run up to *many* tens-of-thousands of dollars¹³ and compliance can take over a year.¹⁴ The result: Sometimes carriers do not deploy to an area impacted by the regulation. Given the critical need for the deployment of a vast number of small cells across the country, the Commission must take expedited action to address the regulatory barriers carriers are facing.

I. SMALL CELL DEPLOYMENTS SHOULD BE EXEMPT FROM SECTION 106 REVIEW.¹⁵

The record in this proceeding demonstrates that the Commission should exempt from Section 106 review small cell deployment in *any* public or utility rights of way, even those involving new or replacement poles. This exemption should include tribal review where the

¹⁰ See Sprint Comments at 10.

¹¹ *Id.* at 11-12.

¹² See *id.* at 8 and 11.

¹³ See Comments of T-Mobile, WT Docket No. 17-79, *et al.*, 7 (filed June 15, 2017) (“T-Mobile Comments”).

¹⁴ See *id.* at 9 (discussing how it can take over a year before the jurisdiction will even access an application to install facilities in a ROW.); see also Sprint Comments at 44 (discussing how a couple of siting applications have taken more than two years.)

¹⁵ This, however, is only necessary if the activity is a “federal undertaking” and therefore within the scope of NHPA. As Verizon and the Competitive Carriers Association (“CCA”) aptly argue, the Commission could determine that small cell deployments are not a “federal undertaking” and therefore outside the scope of the NHPA altogether. The Commission “does not finance or otherwise assist with small cell deployments, does not require preconstruction authorization, does not license or approve individual facilities, and has no involvement in siting decisions . . . [and] its duty to “rule on” environmental assessments is peripheral, at best, to small cell infrastructure projects.” Verizon Comments at 61. See also Comments of CCA, WT Docket No. 17-79, *et al.*, 47 (filed June 15, 2017) (“CCA Comments”).

ground has already been compromised. Instead, as Sprint suggests, the review process should focus on areas that have not already been disturbed by modern structures. The obligation to notify the Commission and affected tribes under Section IX should be retained if a previously unidentified site that may be a historic property is discovered during construction.

As the comments demonstrate, the existing historic preservation review process—in particular Tribal Nation review—under Section 106 of the NHPA has been a source of substantial delay and increased cost in the deployment small cell facilities. In particular, the number of Tribal Notifications has increased, with the average number being 14 notifications per tower project in March 2017.¹⁶ Carriers report excessive delays from the tribal review process¹⁷ and associated fees averaging \$7,713 per site.¹⁸ Given the vast increase in the number of expected small cell deployments, this means individual carriers are facing hundreds of millions of dollars for tribal historic consultations.¹⁹ This is particularly troubling because in the case of small cell deployment, the Section 106 process has not proven to have an impact on addressing adverse effects of deployment to historic or tribal heritage preservation.

If the Commission finds an activity does not have the potential to cause effects on historic properties it is excluded from Section 106 Review.²⁰ Such a finding is supported by the record. As Verizon explains, generally, the risks posed by wireless facilities to tribal properties of cultural or religious significance occur by physically harming properties or impeding a sacred tribal viewshed. “Neither outcome is possible when locating a small cell on an existing

¹⁶ *NPRM* at ¶ 35.

¹⁷ *See* Sprint Comments at 23 (“The delays caused by the tribal review process are a Gordian knot for carriers.”).

¹⁸ *See id.* at 15.

¹⁹ *See id.*

²⁰ 36 C.F.R § 800.3(a)(1).

structure, or when erecting a new pole (subject to certain size limits) that involves no new ground disturbance.”²¹ Significantly, Verizon found “there were no adverse effects from projects with no new ground disturbance.”²² Sprint also reports not having “a single substantive consultation with tribes over adverse impact on Historic Properties despite thousands of tower and antenna project notification to tribes . . . and paying millions of dollars in ‘consultation’ fees.”²³

Moreover, if the ground is already disturbed, for example, by agriculture, housing construction, shopping malls, roads, electrical transmission towers, stadiums, parking lots—which, for the most part did not require historical or tribal review—it is unclear how the Section 106 application to small cells being deployed in those areas furthers the goal of protecting tribal heritage and historic properties. As Sprint points out, “it is difficult to fathom how the addition of a small cell to the visual landscape would diminish the eligible characteristics beyond that already caused by the support structure itself, let alone other structures in the area.”²⁴ Furthermore, the Section 106 process does not provide redress as it pertains to the existing structures. One Tribal Nation provides an example of this when it discusses a telecommunication carrier’s attempts to upgrade an existing tower.²⁵ The Tribal Nation was not able to get the existing tower removed through the Section 106 process, but it was able to

²¹ Verizon Comments at 46.

²² *Id.* at 46.

²³ Sprint Comments at 16.

²⁴ *Id.* at 28.

²⁵ Comments of Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission, WT Docket No. 17-79, *et al.*, 6 (filed June 15, 2017) (“Navajo Nation and NNTRC Comments”).

leverage the Section 106 process to get the carrier to provide services in its lands.²⁶ While that may be a good outcome, it is not the purpose of the Section 106 process. More appropriate avenues should be examined to serve that purpose, including the Commission's Universal Service regime, rather than using a process that can ultimately result in no deployment at all.

II. THE COMMISSION SHOULD CLARIFY FEE RELATED ASPECTS OF THE HISTORIC REVIEW PROCESS.

The Commission also should clarify that tribal fees are not required under the National Programmatic Agreement and are therefore not required for siting applicants seeking to comply with the NHPA. This is consistent with the Advisory Council on Historic Preservation's ("ACHP's") rules, ACHP's guidance documents, and the NHPA itself. As commenters indicate, deployments are typically halted until a siting applicant pays tribal fees, conducts customized site assessments for individual tribes, or otherwise receives approval from all involved tribes even before a potential historic property is identified. Notably, the ACHP 2001 Guidance states: "When the Federal agency or applicant is seeking the views of an Indian tribe to fulfill the agency's legal obligation *to consult* with a tribe under a specific provision of ACHP's regulation the agency or applicant is not required to pay the tribe for providing its views."²⁷ Importantly, consistent with the guidelines, the Commission should clarify that if "the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligations to consult and is free to move to the next step in the Section 106 process."²⁸

²⁶ *Id.*

²⁷ ACHP, FEES IN SECTION 106 REVIEW PROCESS, 2-3 (2001), www.achp.gov/feesin106.pdf.

²⁸ *Id.*

As the Commission indicates, a fee may be warranted when the Tribal Nation is asked to fulfill a role outside of this function. Such a situation may occur, as Verizon explains, when a tribe finds evidence of an intact historic property within the footprint of the project. In such an instance, the carrier may hire the Tribal Nation to perform professional services to investigate whether that property would be affected.²⁹

III. THE COMMISSION SHOULD STRENGTHEN WIRELESS SITING APPLICATION SHOT CLOCKS.

Section 332(c)(7)(B)(ii) states 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. . . .”³⁰ Accordingly, the Commission adopted rules establishing, through the use of shot clocks, a “reasonable period of time” under this provision. The United State Supreme Court upheld the Commission authority in adopting these rules implementing this statutory provision. Chairman Pai has since stated that the Commission “should give [the] shot clock some teeth by adopting a ‘deemed grant’ remedy, so that a city’s inaction lets the company proceed”³¹—a sentiment echoed resoundingly by carriers in this proceeding. Additionally, as commenters discuss the Commission should harmonize and, in some cases, accelerate its shot clocks.

The comments demonstrate the need for the Commission to modify its rules to provide for a “deemed granted” aspect to the shot clocks for all applications covered by Section 332, including small cell and ROW applications, when a state or locality fails to timely act. Carriers report high percentages of noncompliance with existing shot clocks—one carrier conveying as

²⁹ Verizon Comments at 49.

³⁰ 47 U.S.C. § 332(c)(7)(B)(ii).

³¹ Remarks of FCC Commissioner Ajit Pai at the CCA 2016 Annual Convention, at 2 (Sept. 21, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341365A1.pdf.

high as 70% of its applications for small cell wireless facilities in the public ROW exceeding the shot clock.³² Carriers must navigate multiple and frequently overlapping jurisdictions to obtain the needed franchises, permits, and zoning approvals; the processes vary “from locality to locality, agency to agency and state to state.”³³ The result of the high costs and significant delays in deployment caused by this convoluted process is that “in many cases...the project is no longer a worthy investment for the broadband provider.”³⁴

Some have argued that Section 332(c)(7)(v) precludes the Commission from adopting a “deemed granted” remedy for failures to comply with the shot clocks because it provides that a party adversely affected by “a failure to act” by a state or local government “may commence an action in any court of competent jurisdiction.”³⁵ Yet the United States Supreme Court decided this issue when it upheld the Commission shot clocks under the same provision, in response to the same argument, stating: “It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.”³⁶ While the statute provides a party the option of seeking judicial redress, the statute does not unambiguously limit the parties’ recourse on this matter to the courts. A “deemed granted” rule would not conflict with the provision, because while the rule may reduce the instances of need for judicial

³² T-Mobile Comments at 13.

³³ Comments of Conterra Broadband Services, *et al.*, WT Docket No. 17-79, *et al.*, 8 (filed June 15, 2017) (“Conterra Comments”).

³⁴ Conterra Comments at 10.

³⁵ 47 U.S.C § 332(c)(7)(v).

³⁶ *City of Arlington, TEX v. F.C.C.*, 133 S.Ct. 1863, 1874 (2013).

recourse, it does not preclude a party adversely impacted by a state denial or inaction from seeking judicial review when necessary.

The Commission should also accelerate its existing shot clocks to provide a maximum of 60 days for all collocations (including small cells) and 90 days for all other siting requests. As T-Mobile points out, since the shot clocks were first adopted, localities have acquired considerable experience processing wireless siting applications.³⁷ The Commission should adjust the existing shot clocks to reflect localities' increased experience in reviewing all facility applications, and also the reality that wireless deployment is increasingly relying on small cells, which localities can and should review and approve far more quickly.³⁸ Additionally, there is no basis for differing time-periods for similarly-situated small cell installation requests. Indeed, the lack of harmonization could discourage the use of a more efficient infrastructure.³⁹ Instead, the Commission should clarify that the shot clocks cover all aspect of local approval, *i.e.*, prohibit the local government from requiring any applicant to negotiate or engage in any processes prior to filing the application. Providing some standardization to the process should alleviate the confusion about what is necessary to file.

IV. THE COMMISSION SHOULD LIMIT ROW CHARGES AND APPLICATION FEES.

Section 253 allows state and local governments to obtain from telecommunications carriers “fair and reasonable compensation” that is “on a competitively neutral and nondiscriminatory basis” for the management of the public rights-of-way, as long as the

³⁷ T-Mobile Comments at 20.

³⁸ *See* CTIA Comments at 11.

³⁹ *See* T-Mobile Comments at 21.

compensation is “publicly disclosed by such government.”⁴⁰ It would be reasonable for the Commission to conclude that pursuant to this provision, fees charged to use ROWs and to process small cell and other wireless facility applications should be limited to an amount that recovers “the costs reasonably related to reviewing and issuing ROW permits, and any incremental ROW management costs associated with adding a new wireless facility and applied equally to all ROW users.”⁴¹ Fees that are designed to generate revenue rather than recover direct costs are not compensation, and therefore should be prohibited. Local government demands for free or reduced-prices to access facilities and services, including fiber or other in-kind payment should not be allowed. Fees that are not publicly disclosed should not be enforceable.

V. CONCLUSION

Given the critical need for the deployment of a vast number of small cells across the country, the Commission must take expeditious action to address the regulatory barriers carriers are facing, including: 1) exempting small cell deployment from Section 106 Review; 2) clarifying fee related aspects of the historic review process; 3) strengthening shot clocks applicable to wireless siting applications, and 4) limiting ROW use charges and siting application

⁴⁰ 47 U.S.C. 253(c).

⁴¹ See T-Mobile Comments at 30. See also CTIA Comments at 31-32 (“The Commission can and should interpret the language to mean that localities may recover the costs to review and issue siting permits, supervise the installation of facilities that impact rights of way, and ensure those facilities are properly maintained.”); CCA Comments at 18 (the Commission should clarify that application processing fees and any ROW-related fees should be based on authorities’ actual costs.”)

fees, consistent with Sections 253 and 332.

Respectfully submitted,

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