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

COMMENTS OF
THE FREE STATE FOUNDATION[*]

I. Introduction and Summary

These comments are submitted in response to the Commission's request for public comments regarding its Notice of Proposed Rulemaking and Notice of Inquiry to accelerate wireless broadband deployment by removing barriers to infrastructure investment. The primary focus of these comments is on how and why the Commission should adopt a broadly applicable "deemed granted" remedy when local governments fail to act upon infrastructure siting applications within the Commission's "shot clock." Also, these comments urge the Commission to reduce "shot clock" timeframes and establish clearer standards for identifying impermissible local government actions that "prohibit or have the effect of prohibiting" wireless services.

Ongoing 4G LTE wireless network upgrades enable faster speeds, higher capacity, and improved reliability. In the near future, assuming regulatory obstacles and impediments are curtailed, 5G wireless networks will enable speeds up to 100 times

[*] These reply comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

faster than 4G networks. Next-generation wireless capabilities will enable innovative services and applications, thereby enhancing economic opportunities for consumers and business enterprises. Such advances in wireless technology will also generate time and cost savings for users, including reduced per-megabit prices. Moreover, 5G infrastructure investment is projected to reach as much as $275 billion, create as many as 3 million jobs, and spur gross domestic product (GDP) by up to $500 billion. Even if these figures turn out to be overstated, nevertheless, by all accounts, the benefits surely will be extraordinary.

Nationwide, an incredibly large number of new cell towers, base stations, and small cell sites – along with widespread modifications to existing sites – will be necessary to attain the extraordinary potential of next-generation wireless services. However, arbitrary restrictions on new siting and modification applications and lengthy permit processing delays by local governments pose barriers to wireless broadband deployment and infrastructure investment. In its *Wireless Competition Reports*, the Commission repeatedly has recognized that "obtaining the necessary regulatory and zoning approvals from state and local authorities" is one of the most "significant constraints faced by wireless services providers that need to add or modify cell sites." The Commission has also compiled evidence of such constraints in *Shot Clock Order* (2009), *Infrastructure Order* (2014), and ongoing *Small Cell Infrastructure* proceedings.

The Commission can lessen the impact of such regulatory barriers by establishing a "deemed granted" remedy in connection with local governments' "failure to act" within the Commission's 90- and 150-day "shot clocks" for making decisions on wireless infrastructure permit applications. A deemed granted remedy would significantly reduce

the costs and delays involved in litigating local government failures to act. It would also spur more timely decisions on permit applications by local governments.

The Commission should adopt all three options proposed in its Notice for implementing a deemed granted remedy. That is, the Commission should: (1) adopt an irrebuttable presumption that failure to act within the shot clock is unreasonable and therefore results in the permit being granted by operation of law; (2) declare that local government failures to act within the shot clock result in a lapse of its authority over the wireless siting applications at issue; and (3) establish its "deemed granted" remedy by adopting an implementing rule under Section 332(c)(7), to preempt any contrary law or action by a state or local government. These reinforcing proposals would promote dispatch and certainty regarding local government decisions and also provide a solid basis for agency authority to remove barriers to deployment and investment. If adopted, local governments would still retain authority to make fact-specific determinations regarding wireless infrastructure siting permit application prior to expiration of the shot clock.

The Commission should also shorten shot-clock timeframes for reviewing wireless infrastructure siting permit applications. It should adopt its Notice proposal to reduce the current 90-day shot clock period collocation applications and harmonize it with the 60-day shot clock for applications subject to the Spectrum Act.[1] Or, at the very least, the Commission should adopt its alternative proposal of reducing non-Spectrum Act collocation permit applications to 60 days for those collocations that fit the size dimensions of the Spectrum Act but are otherwise outside its scope.[2]

[1] Notice, at ¶ 18
[2] *Id.*

Wireless infrastructure siting applications are not a new phenomenon. With experience, local governments should become more proficient in conducting reviews and reaching decisions. Over time, local governments should be better able to tap the knowledge of neighboring localities with more experience, municipal associations, legal counsel, technology consultants, or agencies such as state PUCs and the Commission. These reasonable expectations support shot clock timeframe reductions. Also, the Commission should commit to revisiting this topic within 18 months to 24 months of any declaratory ruling or order to inquire whether timeframes should be further reduced.

The Commission also should provide new interpretative guidance regarding Sections 253(a) and 332(c)(7)(B)(i)(II), both of which proscribe local government actions that "prohibit or have the effect of prohibiting" telecommunications services. Federal courts have applied different interpretations – some of which discourage deployment and investment. The Commission should therefore issue a declaratory ruling to the effect that any state or local government law or policy that, by its nature, *may* have the effect of prohibiting a provider from offering wireless services, even if no actual prohibition has occurred, falls within the statutory proscription. The category for this prohibition should include – but not be limited to – onerous application processes or requirements tantamount to franchise agreements.

Also, the Commission should declare that when a denial of a siting application results in a substantial gap in coverage, the applicant challenging the denial in court should only be required to show that its proposed facilities are the "least intrusive means" for filling a coverage gap in light of the values that the local government seeks to serve. Saddling applicants with a "heavy burden" of proving a lack of alternative feasible sites

and proving that further search is fruitless is unnecessarily titled against achieving deployment.

Additionally, the Commission should declare that neither mere functionality of existing service by a wireless provider nor mere presence of a signal in a given area constitutes coverage sufficient to overcome a claimed substantial coverage gap. Reflecting the importance of next-generation wireless infrastructure upgrades, the Commission should consider ruling that a substantial gap exists when a denial of a permit application prevents 4G or 5G service or an otherwise significant network upgrade in the geographic area in question.

II. Next Generation Wireless Services Depend Upon New and Upgraded Wireless Infrastructure, but Deployment and Investment Are Being Inhibited by Local Government Actions Concerning Facilities Siting

Investment-backed deployments of new and upgraded infrastructure are essential for maximizing the economic and social benefits of next-generation wireless broadband services. Ongoing 4G LTE wireless network upgrades – including network "densification" in high data traffic areas – enable faster speeds, higher capacity, and improved reliability. Near future 5G wireless networks potentially will enable average speeds up to 10 times faster than 4G networks and peak speeds up to 100 times faster.[3] Next-generation advances in wireless transmission capabilities will enable innovative services and applications, enhancing economic opportunities for consumers and business enterprises. Such advances in wireless technology will also generate value to users through time and cost savings, including reduced per-megabit prices.

[3] *See* Thomas K. Sawanobori & Paul V. Anuszkiewicz, *High Band Spectrum: The Key to Unlocking the Next Generation of Wireless*, CTIA, at 5 (June 13, 2016), available at http://www.ctia.org/docs/default-source/default- document-library/5g-high-band-white-paper.pdf.

It is projected that industry will invest as much as $275 billion in 5G infrastructure deployment, create as many as 3 million jobs, and spur GDP by up to $500 billion.[4] Even if estimates end up overstating matters, the benefits that will result from future wireless infrastructure investment and deployment will be tremendous.

Nationwide, an incredibly large number of new cell towers, base stations, and small cell sites – along with widespread modifications to existing cell sites – will be necessary to attain the extraordinary potential of next-generation wireless broadband services. However, arbitrary restrictions on new wireless infrastructure sitings and modifications as well as lengthy permit processing delays by local governments pose barriers to wireless broadband deployment and infrastructure investment. In its *Wireless Competition Reports*, the Commission has recognized that "obtaining the necessary regulatory and zoning approvals from state and local authorities" is one of the most "significant constraints faced by wireless services providers that need to add or modify cell sites."[5] The Commission has compiled evidence of local government regulatory barriers to wireless infrastructure deployment pursuant to adoption of its *Shot Clock Order* (2009) and *Infrastructure Order* (2014).[6] Additionally, the Commission has

[4] Accenture Strategy, "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities" (January 2017), at 1, at: https://ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf.

[5] *See, e.g.*, FCC, 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, Sixteenth Report, WT Docket No. 11-186 (March 21, 2013), at 209, ¶ 328. Other Reports contain similar observations.

[6] FCC, Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238, Report and Order (*Infrastructure Order*) (October 28, 2014), at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-153A1.pdf; FCC, 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, Declaratory Ruling (*Shot Clock Order*), WT Docket No. 08-165 (November 18, 2009), at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf.

obtained evidence of regulatory obstruction at the local level in its ongoing *Small Cell Infrastructure* proceeding.[7]

Under the Commission's existing policy, local governments are required to act within a presumptively "reasonable period of time" – 90 days for collocation applications and 150 days for new facilities applications. A local government's "failure to act" within the 90/150-day "shot clock" triggers an applicant's right to file a federal lawsuit challenging that government's inaction. However, litigation can last several months or even several years, generating legal expenses that can exceed the cost of towers, base stations, or antennas that are the subject of the litigation. Such delays and costs effectively constitute regulatory barriers to infrastructure deployment and investment.

III. The Commission Should Adopt a "Deemed Granted" Remedy for When Local Governments Fail to Act on Wireless Infrastructure Siting Applications Within the "Shot Clock"

The Commission can partially alleviate local regulatory barriers and accelerate wireless broadband infrastructure deployment and investment by establishing a "deemed granted" remedy for local government actions that violate Section 332(c)(7)(B)(ii).[8] More particularly, establishment of a deemed granted remedy in connection with a local government's "failure to act" within the Commission's 90/150-day "shot clocks" for wireless infrastructure applications would remove barriers to deployment and investment.

A deemed granted remedy would enhance the shot clock's effectiveness at achieving its underlying purpose. First and foremost, a deemed granted remedy would significantly reduce the costs and delays involved in litigating local government failures

[7] *See* FCC, Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities by Improving Wireless Facilities, Mobilitie, LLC Petition for Declaratory Ruling, WT Docket No. 16-421.
[8] These comments are directed to cell siting applications that do not fall within the scope of the Spectrum Act and the "deemed granted" remedy established by the Commission in connection with a 60-day shot clock for acting on applications. 47 U.S.C. § 1544(a); *Infrastructure Order, supra.*

to act. Also, a deemed granted remedy would likely improve local government review processes. With a deemed granted remedy in place for failure to act, local governments would be spurred to act with greater dispatch and care in considering the merits of wireless infrastructure siting applications.

The Commission should adopt all three options proposed in its Notice for implementing a deemed granted remedy. That is, the Commission should: (1) convert the rebuttable presumption that failure to act within the shot clock is an unreasonable failure to act into an irrebuttable presumption that failure to act within the shot clock is unreasonable and therefore results in the permit being granted by operation of law;[9] (2) interpret Section 332(c)(7)'s "expect as provided" provision regarding state and local government authority over wireless service facilities siting to mean that local government failure to act within the shot clock – and resulting failure to act "within a reasonable period of time" under Section 332(c)(7)(B)(ii) – results in a lapse of its authority in decisionmaking concerning the wireless siting application at issue, thereby obviating the need for the application to obtain local government approval;[10] and (3) establish its "deemed granted" remedy through adoption of an implementing rule under Section 332(c)(7), which would have the effect of preempting any contrary law, decision, or action by a state or local government.[11]

These three proposals have unity of purpose in promoting dispatch and certainty in local government decisionmaking and avoiding costs of delay. If adopted in tandem, these reinforcing proposals would provide solid foundation for Commission policy to remove barriers to wireless broadband deployment and infrastructure investment.

[9] Notice, at ¶ 10.
[10] *Id*. at ¶ 14.
[11] *Id*. at ¶ 15.

Moreover, under a rule that: (A) conclusively regards local government failures to act on a permit application within the shot clock as failures to act within a reasonable time; and (B) regards local government decisionmaking authority over such permit applications as having lapsed in the event of such failures, local governments would retain authority to make fact-specific decisions on wireless infrastructure siting permit application.

When wireless infrastructure siting application poses public health, safety, or other pertinent concerns, in most instances those concerns will be readily apparent and will justify local government decisions responsive to those concerns. Even if a "deemed granted" remedy is adopted by the Commission, in highly unusual circumstances, where siting permit applications pose serious public concerns that require particularly lengthy exam, local governments should still be able to seek injunctive relief in a court of law to delay operation of the "deemed granted" remedy and obtain necessary additional time to consider the unique circumstances posed by the applications.

The Commission's legal authority for adopting its deemed granted proposals is supported by reasoned application of the Communications Act and by the reasoning of the Fifth Circuit's decision in *City of Arlington v. FCC*, which upheld the 2009 *Shot Clock Order*, and was upheld by the U.S. Supreme Court in 2013.[12] The Fourth Circuit's decision in *Montgomery County v. FCC*, which upheld the 2014 *Infrastructure Order*, similarly recognizes the Commission's legal authority in implementing Section 332(c)(7). A deemed granted remedy constitutes a reasonable follow-up to those agency precedents.

IV. The Commission Should Reduce "Shot Clock" Timeframes

The Commission should shorten shot-clock timeframes for reviewing wireless infrastructure siting permit applications. In particular, the Commission should adopt its

[12] 668 F.3d 229, 250-1 (5th Cir. 2012), affirmed by 133 S.Ct. 1863 (2013).

Notice proposal to reduce the Commission's current 90-day shot clock period generally applicable to wireless infrastructure collocation applications and harmonize it with the 60-day shot clock that the Commission has adopted for applications subject to the Spectrum Act.[13] Or, at the very least, the Commission should adopt its alternative proposal of reducing non-Spectrum Act collocation permit applications to 60 days for collocations that fit the size dimensions of the Spectrum Act but are otherwise outside its scope.[14]

Wireless infrastructure siting applications, whether for new towers, base stations, or collocations on existing sites, or for small cell infrastructure, are not a new phenomenon. As local governments become more experienced in processing such applications, they should also become more proficient in conducting reviews and reaching decisions. Over time, local governments should be better able to tap the experience of localities with more experience, municipal associations, legal counsel, consultants, or other government agencies, such as state PUCs or the Commission. The Commission's policy toward wireless infrastructure siting should reflect the reasonable expectation that local governments can and ought to act more expeditiously on permit applications going forward. This reasonable expectation supports reduction of shot clock timeframes.

Also, regardless of the extent to which the Commission reduces shot clock timeframes based on its Notice proposals, the Commission should commit to revisiting the topic of reduced timeframes within 18 months or 24 months of its adoption of any declaratory ruling or order in this proceeding. Given the economic and social importance

[13] Notice, at ¶ 18
[14] *Id.*

of accelerating wireless infrastructure deployment and investment, and in view of the reasonable expectations regarding gradually increasing local government competencies already identified, a follow up inquiry is well warranted as to whether or under what circumstances shot clocks timeframes should be further reduced.

V. The Commission Should Adopt Clearer Standards for Identifying Impermissible Local Government Laws and Actions That "Prohibit or Have the Effect of Prohibiting" Telecommunications Services

The Commission's Notice also requests comment on whether it should provide guidance on how to interpret and apply statutory language in Sections 253(a) and 332(c)(7)(B)(i)(II) that proscribes local government rules or actions that "prohibit or have the effect of prohibiting" telecommunications services. As the Notice observes, different federal circuit courts of appeal have applied differing interpretations of what constitutes an actual or effective prohibition, and established different evidentiary burdens in connection with those provisions. Clarification of terms would provide uniformity that is now lacking. And the Commission can provide guiding interpretations more conducive to wireless broadband deployment and infrastructure investment than what now prevails in some federal circuits.

In particular, the Commission should issue a declaratory ruling that interprets the phrase "prohibit or have the effect of prohibiting" in Section 253(a) and 332(c)(7)(B)(i)(II) as preempting any state or local government law or general policy that by its nature *may* have the effect of prohibiting the ability of an entity to provide telecommunications services, even if no actual prohibition has occurred. The category for this prohibition certainly should include – but not be limited to – onerous application processes or requirements that are tantamount to franchise agreements.

Further, the Commission should declare that when a local government denies a wireless infrastructure siting application and results in a substantial gap in coverage, the applicant who challenges the denial in a court of law should be required to show 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.

It is misguided to require – as some circuit courts do – that applicants in such circumstance must bear a "heavy burden" of proof to establish a lack of alternative feasible sites and that "further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time to try." In practice, placement of such a high burden on applicants makes judicial relief almost certainly unattainable. At the very least, such a burden is obviously unconducive to a policy of accelerating wireless broadband deployment and infrastructure investment. By contrast, adoption of the "least intrusive means" interpretative standard for both Sections 253(a) and 332(c)(7)(B)(i)(II) is more likely to result in removal of regulatory barriers to deployment and investment.

Also, the Commission should declare that neither the mere functionality of existing service by a wireless service provider or mere presence of a signal in a given geographic area are not sufficient to establish there is coverage sufficient to overcome a claim of effective prohibition of service. The Commission's interpretation of Sections 253(a) and 332(c)(7)(B)(i)(II) should reflect a policy of promoting next-generation wireless infrastructure upgrades. Therefore, the Commission should issue a ruling that a substantial gap exists when a denial of a permit application prevents 4G or 5G service or an otherwise significant network upgrade in the geographic area in question.

VI. Conclusion

For the foregoing reasons, the Commission should act in accord with the views expressed herein.

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