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VIA Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

Dear Ms. Dortch:

On Thursday, October 19, 2015, Hank Hultquist, Robert Vitanza, Colleen Thompson, and Richard Clarke of AT&T Services, Inc. (AT&T), and Scott Delacourt of Wiley Rein LLP met with Don Stockdale, Dana Shaffer, Garnet Hanly, Suzanne Tetreault, David Sieradzki, Adam Copeland, Paul D'Ari, Patrick Sun and Catherine Matraves (by telephone) of the Wireless Telecommunications Bureau. The purpose of the meeting was to discuss AT&T's position regarding issues raised in the above-captioned docket.

Consistent with its initial and reply comments, AT&T discussed the Commission's authority under Section 253 of the Communications Act to preempt right-of-way (ROW) access fees that are not cost-based. Although Section 253 permits these fees, it proscribes fees that may inhibit or limit broadband deployment and allows only those fees that are "fair and reasonable." ROW access fees that are not cost-based inhibit or limit the provision of broadband service by discouraging providers from investing in or expanding their networks. As a result, providers forgo deploying small cells in certain municipalities or diminish the size of or even abandon a project.[1] If, as S&P Global Market Intelligence estimates, small-cell deployments reach nearly 800,000 by 2026,[2] a ROW fee of $1,000 per year (a modest sum relative to current ROW access and attachment fees) would result in nearly $800 million *annually* in foregone investment. This lost investment would harm consumers and materially inhibit or limit a service provider's ability to provide wireless services.

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1 *See, e.g.*, Comments of AT&T Services, Inc., WT Docket No. 17-79 at 18-19 (filed June 15, 2017).

2 *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, 13364 n.23 (citing *SNL Kagan Wireless Investor*).

The Commission should recognize the abundant record demonstrating this potential for lost investment and establish a presumptively reasonable safe harbor fee for use of the ROW and municipally-owned structures in the ROW. A reasonable safe harbor fee to locate in the ROW could be based on the fees in small cell legislation adopted by multiple states, such as the $50 annual fee in Arizona.[3] A reasonable safe harbor fee for placement of small cell equipment on municipal structures could also be based on these small cell model codes and on the Commission's pole attachment rules. Fees that fall within these safe harbors would be predictable and could be relied on by service providers and municipalities.

AT&T also maintains that the FCC has the authority to establish a "shot clock" for Tribal consultation. Pursuant to AT&T's shot clock proposal, the Tribal representative must complete its review of a project and provide a conclusive response to the applicant within a 60-day timeline. Such a timeline would be consistent with the process and timeline adopted by the Commission in its 2005 Declaratory Ruling[4] for inquiries to which a Tribal Nation fails to respond to an inquiry, and would close the loophole that currently exists when a Tribal Nation initially requests review but subsequently provides no decision.

Applications would be "deemed approved" if a Tribal Nation fails to provide a conclusive response within that 60-day period. Escalations to the Commission, both formal and informal, would no longer be performed.[5] Instead, applicants could self-certify through the TCNS their compliance with the Tribal notifications required by Section 106.[6] Applicants could then proceed with construction without direct Commission involvement. The Commission could ensure that certifications are truthful and well-founded by treating the certification obligation the same as other Commission obligations—subject to existing enforcement processes with the risk of forfeitures for abuse.

Commission authority to adopt a "deemed approved" remedy is built into the Nationwide Programmatic Agreement (NPA). For example, when an applicant provides information to a Tribe to determine whether an undertaking will have an impact on native sites, it must provide a "reasonable" time for the Tribe to respond to such communications.[7] The NPA generally defines a reasonable time for a Tribe to respond to information provided by an applicant as 30 days.[8] The NPA does not contemplate that a Tribe may halt the review process by electing to not respond. Indeed, at other points in the Tribal review process the NPA already provides for a

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3 Ariz. Rev. Stat. §9-592, D.4, adopted in Ariz. H.B. 2365 (2017).

4 *Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement, Declaratory Ruling*, 20 FCC Rcd 16092 (2005).

5 In AT&T's experience, escalations have proved to be ministerial only, as AT&T personnel working on Section 106 issues cannot recall a single escalation that has resulted in the THPO requesting that AT&T mitigate or abandon a site.

6 *NPRM*, 32 FCC Rcd at 3352, ¶ 61.

7 NPA Section IV.F.4

8 *Id.*

deemed approved remedy. For example, where an applicant makes a determination regarding the effect of an undertaking on a native site, a Tribe has 30 days to respond or, depending on the determination of the applicant, it will be: (1) deemed that no historic property exists in the Area of Potential Effect; (2) deemed the undertaking will have no effect on the native site; or (3) presumed that the Tribe has concurred with the applicant's finding of no adverse effect.[9]

While the review process set forth in the NPA contemplates Tribal participation, and works best if such participation occurs, it does not require Tribal participation and may not be paralyzed by a Tribe's decision not to participate. Moreover, the NPA contemplates that the Commission can act in the absence of Tribal participation – applicants are directed to seek guidance from the FCC in the event of Tribal non-responsiveness.[10] And the FCC has the authority under the NPA to establish guidelines and best practices for communications between applicants and Tribes.[11] Accordingly, Commission adoption of a "deemed approved" remedy as outlined in AT&T's comments is authorized under the NPA and can be implemented without opening the NPA to renegotiation.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules. Should you have any questions, please contact the undersigned.

Sincerely,

Colleen Thompson

cc (via e-mail): Don Stockdale
Dana Shaffer
Garnet Hanly
Suzanne Tetreault
David Sieradzki
Adam Copeland
Paul D'Ari
Patrick Sun
Catherine Matraves

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9 NPA Section VII.B.2, C.2.
10 NPA Section IV.G.
11 NPA Section IV.J.