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October 29, 2018

VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation

Wireless Infrastructure, WT Docket No. 17-79
Wireline Infrastructure, WC Docket No. 17-84

Dear Ms. Dortch:

On October 25, 2018, Rick Chessen and Steve Morris of NCTA-The Internet & Television Association, Cristina Chou of Davis Wright Tremaine LLP on behalf of NCTA, Elizabeth Andrion and Christianna Barnhart of Charter Communications, Inc., Howard Symons of Jenner & Block LLP on behalf of Charter, David Don of Comcast Corporation, David Murray of Willkie Farr & Gallagher LLP on behalf of Comcast, and Jennifer Prime of Cox Enterprises met with Kris Monteith, Lisa Hone, Adam Copeland, John Visclosky, Ramesh Nagarajan, Benjamin Plante, Matthew Collins, Daniel Kahn, and Melissa Kirkel of the Wireline Competition Bureau; Holly Saurer of the Media Bureau; and William Richardson, David Konczal, and William Layton of the Office of General Counsel regarding the above-captioned proceedings.

During the meeting, we expressed support for a declaratory ruling that extended the legal analysis of Section 253 in the *Wireless Infrastructure Declaratory Ruling*[1] to all "commingled" facilities that are capable of providing telecommunications services, including cable systems that utilize their facilities to provide telecommunications services along with cable, broadband, and/or VoIP services. We explained that cable companies offer telecommunications services

[1] *Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, FCC 18-133 ¶ 36 (rel. Sept. 27, 2018) ("*Wireless Infrastructure Declaratory Ruling*").

through certificated competitive local exchange carrier affiliates in states where they operate.[2] These affiliates currently offer an array of telecommunications services, including certain enterprise services, wireless backhaul, switched access, and private line, and may also serve as wholesale carriers for their VoIP affiliates.[3] The increased burdens imposed by local governments in the form of multiple authorizations and duplicative fees for rights-of-way violate Section 253 by materially inhibiting the ability of cable companies to expand those services.[4] We also noted, however, that an entity need not be a telecommunications provider to invoke Section 253, which "is designed to protect 'any entity' *seeking to provide* telecommunications services from state and local barriers to entry."[5] We pointed out that the record in these proceedings makes clear this issue involves intermodal competition among different providers that is not unique to cable,[6] and so is best addressed through a generally applicable declaratory ruling.

We noted that in the *Wireless Infrastructure Declaratory Ruling*, the Commission recognized that unwarranted local regulation and excessive fees violate Section 253(a)[7] and impede the deployment of 5G infrastructure. We emphasized that similar impediments were hindering wireline broadband deployment,[8] including deployment of the wireline infrastructure necessary for 5G. NCTA has previously documented these burdens,[9] and we urged the Commission to declare that burdens identified in the *NCTA June 11 Ex Parte* violate Section 253. We also urged the Commission to rule that any rights-of-way fees (whether denominated as

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[2] *See* Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 12 & n.39 (June 11, 2018) ("*NCTA June 11 Ex Parte*") (noting that "[m]any cable operators provide telecommunications services on a common carrier basis").

[3] It is well-established that a wholesale carrier is still considered a telecommunications carrier, even if its only customer is a VoIP affiliate. *See In the Matter of Bright House Networks, LLC, et al.*, 23 FCC Rcd 10,704, 10,717-20 ¶¶ 37-41 (2008), *aff'd*, *Verizon California, Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009) ("Like the Commission, we are not troubled by the fact that Bright House and Comcast-affiliated carriers are currently serving only their affiliates.").

[4] *See Wireless Infrastructure Declaratory Ruling* ¶ 42 (rejecting suggestion Section 253 applies only to an insurmountable barrier to entry); *id.* ¶ 39 ("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").

[5] *Id.* ¶ 42 (emphasis added).

[6] Other parties have noted that the Section 253 analysis in the *Wireless Infrastructure Declaratory Ruling* "governs with equal force in the context of all kinds of network facilities and technologies." *See* Letter from Michael Romano, Senior Vice President – Industry Affairs and Business Development, NTCA-The Rural Broadband Association, to Marlene H. Dortch, WT Docket No. 17-79; WC Docket No. 17-84 (filed Sept. 12, 2018), at 2; *see also* Letter from Ted Heckmann, Senior Director, Regulatory & Government Affairs, Cincinnati Bell, Inc., WT Docket No. 17-79; WC Docket No. 17-84 (filed Sept. 17, 2018).

[7] *See Wireless Infrastructure Declaratory Ruling* ¶¶ 43-45 (excessive fees) (citing with approval judicial decisions holding that a 5 percent gross revenue fee for rights-of-way access "can run afoul of" Section 253); *id.* ¶¶ 81-83 (other requirements).

[8] *See generally NCTA June 11 Ex Parte*.

[9] *See NCTA June 11 Ex Parte*, at 3-9; Comments of NCTA, WT Docket No. 17-79; WC Docket No. 17-84 (filed June 15, 2017), at 22-32.

"fees," "taxes," or some other nomenclature[10]) in excess of a cable operator's 5 percent franchise fee violate Section 253. We noted that the *Wireless Infrastructure Declaratory Ruling* approvingly cites court decisions holding that a 5 percent gross revenue fee cannot survive scrutiny under that section,[11] making fees in excess of this amount even more questionable.

Finally, we explained that requiring cable operators to obtain a second or third authorization to access the public rights-of-way where there is no material additional burden on the rights-of-way from the provision of telecommunications service violates Section 253 because such a requirement "materially limits or inhibits the ability of [a] competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[12] Such a requirement also creates a competitive disparity between wireless and wireline providers, which itself also violates Section 253.[13] As the Commission recognized in the *Wireless Infrastructure Declaratory Ruling*, every dollar spent on duplicative or burdensome regulation and excessive fees could be put to work to deploy broadband infrastructure for telecommunications and other services that benefit the public.[14] Moreover, preemption of these impediments should be broadly applied, since regulatory and financial burdens imposed by one jurisdiction can impede broadband deployment elsewhere.[15]

We urged quick action to extend the interpretation of Section 253 to wireline providers, including cable operators, in order to remove these barriers. In this regard, we noted that the *Wireline Infrastructure NOI* squarely presented these issues as they affect cable operators.[16] The

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[10] *See Wireless Infrastructure Declaratory Ruling* ¶ 50 n.130.

[11] *See id.* ¶¶ 43-44.

[12] *See id.* ¶ 82 (noting that the Commission's interpretation of this standard "applies equally to fees and to non-fee legal requirements") (internal quotation marks omitted).

[13] *See id.* ¶ 39 ("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…'" (citation omitted)).

[14] *See Wireless Infrastructure Declaratory Ruling* ¶¶ 60-61.

[15] *See id.* ¶¶ 62-63.

[16] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket 17-84, 32 FCC Rcd 3266, 3298 ¶ 104 (2017) ("*Wireline Infrastructure NOI*") ("Our preliminary view is that Section 253 applies to fees other than cable franchise fees as defined by Section 622(g) of the Act…. [F]ranchise fees could be taken into account when determining whether other types of fees are excessive."); *id.* ¶ 105 ("Section 622 of the Act provides that for any twelve-month period, the franchise fees paid by a cable operator with respect to a cable system shall not exceed five percent of the cable operator's gross revenues derived from a cable service. When a provider seeks to offer additional services using the rights-of-way under an existing franchise or authorization, are there circumstances in which it may be excessive to require the provider to pay additional fees in connection with the introduction of additional services?"); *see also id.* at 3299 ¶ 106 ("[W]e seek comment on adopting rules prohibiting unreasonable conditions or requirements in the context of granting access to rights-of-way, permitting, construction, or licensure related to the provision of telecommunications services."), *id.* ¶ 108 (raising question of whether there are "local ordinances that erect barriers to the provision of telecommunications service especially as applied to new entrants"). The fact that questions specific to the authority of state and local governments under Title VI of the Communications Act are the subject of another Commission proceeding, *see Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Second Further Notice of Proposed Rulemaking, MB Docket No. 05-

record strongly supports the action that we request.[17]

Please direct any questions regarding the foregoing to the undersigned.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen

cc: Kris Monteith
Lisa Hone
Adam Copeland
John Visclosky
Ramesh Nagarajan
Benjamin Plante
Matthew Collins
Daniel Kahn
Melissa Kirkel
Holly Saurer
William Richardson
David Konczal
William Layton

311, FCC 18-131 (rel. Sept. 25, 2018), does not preclude the Commission from acting in the above-captioned proceedings regarding the applicability of Section 253 to cable operators.

[17] *See, e.g.*, NCTA Comments at 23-24 ("The Commission should exercise its authority under Section 253 to prohibit local governments from imposing fees for broadband or telecommunications services offered by cable operators that place no additional burden on the public right-of-way."); Comments of Charter Communications, Inc., WT Docket 17-79, WC Docket 17-84 (filed June 15, 2017), at 25-26; *NCTA June 11 Ex Parte* at 12-13; Comments of Comcast Corp., WC Docket No. 17-84 & WT Docket No. 17-79 (filed June 15, 2017), at 7-10, 13-16. Government entities have responded to these arguments. *See, e.g.*, Reply Comments of the Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee, WC Docket No. 17-84, WT Docket No. 17-79 (filed July 17, 2017), at 32-35; Letter from Tillman L. Lay, Counsel, City of Eugene, Oregon, to Marlene H. Dortch, WC Docket No. 17-84 (filed Sept. 19, 2018) (specifically replying to the *NCTA June 11 Ex Parte*).