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March 14, 2018

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

Re: Promoting Wireless Broadband Deployment by Removing Barriers to Infrastructure Development - WT Docket No. 17-79

Dear Ms. Dortch:

The Cities of Boston, Massachusetts and Portland, Oregon, and the Texas Coalition of Cities for Utility Issues (collectively, "Cities") appreciate the opportunity to submit this letter in response to the Commission's release of draft text for the Second Report and Order[1] ("Draft R&O") in Wireless Bureau Docket No. 17-79. The Draft R&O, in calling for the elimination of all federal historic and environmental review for wireless sites qualifying as "small cells." represents a *de facto* agency rewrite of NHPA and NEPA.

So while Cities recognize and support the deployment of current and next-generation wireline and wireless broadband technologies, we are concerned that the Draft R&O:

- Ignores without justification Commission precedent in this area,
- Fails to adequately consider the practical impacts of its proposal by focusing solely on the size of small cell's antennae and disregarding the rest of the site's equipment; and
- Is blind to the impact of the proposal's impact on Section 6409 reviews in areas heretofore subject to federal NHPA and NEPA review.

In summary, the Draft R&O applies a flawed analysis intended to justify an exemption, and instead uses it to justify wholesale abandonment of federal environmental and historic protections.

[1] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Second Report and Order Draft* (rel. Mar. 1, 2018) ("Draft R&O").

I. The Draft R&O's Departure from Precedent is Not Justified

A. The Draft R&O Fails to Adequately Explain its Departure from Commission Precedent

Under Commission precedent, any construction of a wireless facility is a federal undertaking and major federal action.[2] To be sure, the fact that something is a "federal undertaking" does not mean that a person engaged in that activity must automatically prepare an analysis of the impact of the installation, *see, e.g.* 47 CFR 1.1312(e), and other categorical exemptions exist in 47 C.F.R. Section 1.1307. Under NEPA and the NHPA, exemptions seem based on the likely impacts of the proposed activity, and not a determination that the activity is not a federal undertaking. The Draft R&O attempts an analysis intended to justify an exemption from the application of historical and environmental review, but then uses that flawed analysis to justify instead a different finding that federal environmental and historical protection laws fundamentally do not apply to the facilities in question.

Indeed, as the Draft R&O recognizes, the courts have upheld determinations that the construction of wireless facilities are federal undertakings. The U.S. Court of Appeals for the D.C. Circuit rejected a CTIA challenge to the FCC's adoption of a Nationwide Programmatic Agreement in 2004 governing Section 106 review of tower and antenna placement (the "2004 Programmatic Agreement).[3] CTIA claimed that the FCC had acted arbitrarily in treating the construction of wireless facilities as a federal undertaking. The D.C. Circuit upheld Commission determinations that tower construction constituted a federal undertaking under two separately articulated theories.[4]

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[2] "Major federal action" and "federal undertaking" have roughly equivalent meaning, as the Commission notes (Draft R&O at ¶ 34 note 42). "Federal undertaking" is used throughout this submission to refer collectively to both terms.

[3] *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, 30 FCC Rcd. 1073 (2004) ("2004 Order") *aff'd* CTIA v. FCC, 466 F.3d 105 (D.C. Cir. 2006).

[4] CTIA, 466 F.3d at 112-118. That finding, of course, does not imply that the placement of wireless facilities would not be a federal undertaking under other theories. The decision notes that under the NHPA, "a federal undertaking is a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including- (A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit [,] license, or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." (The definition now appears at 57 U.S.C. § 300320.)

The Commission's primary support for its departure from precedent, in addition to its public interest analysis allegedly justifying an exclusion, appears to be that the agency simply could not have foreseen small cells or 5G coming, and thus could not have meant for its precedent, adopted in a macrocell era, to have applied to small cells. The Draft R&O offers no support for this conclusion. The Draft R&O simply insists that because small cells were not in existence at the time, the public interest analysis engaged in in the past is wholly irrelevant, and may be conducted anew with a narrow focus on small cells. The 2004 Programmatic Agreement ("2004 NPA") conflicts with this view, however. The 2004 NPA not only addresses the placement of towers, but also the placement of antennas and smaller wireless facilities on buildings and other structures. The Commission noted that "due to the increasing usage of wireless services and advancements in technology, providers of certain types of service are increasingly finding it feasible to utilize antennas mounted on short structures, often 50 feet or less in height, that resemble telephone or utility poles."[5] Accordingly, the Commission granted a categorical exemption to certain of these facilities located in or near public rights of way, but not those located in historic districts, notably.[6] Furthermore, "[d]ue to the limited size of the structures permitted under this exclusion and their close similarity to existing structures" the Commission declined to require research regarding nearby historic properties. Even this exemption was not absolute, however, since particular placements could be subject to further review on complaint.

Thus, contrary to the Draft R&O's assertions that the FCC has never examined small cells, the 2004 Order appears to have done just that. Therefore, the Commission cannot use the development of small cells alone as justification for its departure from precedent.

B. The Draft R&O Fails to Adequately Justify its Abandonment of Exemptions and Programmatic Agreements to Govern Pre-Construction Review

The 2004 Order is not the only time the FCC has granted exemptions, streamlined processes, or specifically addressed small cells. In addition to the NPA adopted by the 2004 Order, the Commission's 2001 Collocation Agreement was amended in August 2016 to add specific exceptions for small cells.[7] The 2016 Amendment added new rules specifically for "collocation of small wireless antennas and associated equipment on buildings and non-tower structures that are outside of historic districts and are not historic properties" and for "small or minimally visible wireless antennas and associated equipment in historic districts or on historic

[5] 2004 Order at ¶ 63
[6] *Id.*
[7] *Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, DA 16-900 (rel. Aug. 8, 2016).

property."[8] The Draft R&O omits this amendment from its discussion of relevant history, and never references any alleged failure or shortcoming in its approach which justifies the Commission's actions here. Nor does the Draft R&O offer any exceptions or protection for historic districts – Colonial Williamsburg enjoys no more protection, under the Draft R&O, than a commercial office park in a California suburb or an industrial facility in Michigan.

As recently as 2016, the Commission believed that small cell collocation was a sufficient federal undertaking to support and justify the first amendment to the collocation agreement. Less than two years later, the Commission's only discussion of those programmatic agreements is to state, in the context of dismissing arguments that an NPA would be a more appropriate vehicle than sweeping regulatory changes, that "[w]e are not persuaded that it would be preferable to rely on programmatic agreements or similar measures to streamline or exclude small wireless facility deployment from review."[9] The Draft R&O never assesses the 2016 Amendment nor its impacts, or provides any justification for its insufficiency, beyond its statement that programmatic agreements take too long to negotiate and require consideration of things other than the Communications Act.[10] Nor, it should be noted, does the Draft R&O discuss any impact its actions may have on the collocation agreement, including but not limited to conflicts and gaps created by the Draft R&O's expansive "small cell" definition.

The Draft R&O appears, in short, to focus solely on the parts of Commission precedent which support its assertions, while either dismissing or outright ignoring those findings and actions which might contradict the Commission's desired result. While the agency has wide latitude to address, revise, and depart from its precedent, it does not enjoy the discretion to simply ignore the past when convenient. The Draft R&O is fatally flawed by its adoption of just such an approach, failing to acknowledge and address more than a decade of Commission precedent explicitly contemplating the unique needs and attributes of small cell deployments and their associated historical and environmental reviews.

As importantly, the Draft R&O never explains its determinations in light of the applicable statutory standards, including those quoted at n.4, *supra*. There is no question, for example, that small cells are installed pursuant to FCC licenses; that those cells are subject to FCC regulations (governing RF radiation, for example); and that the FCC has adopted regulations that govern local and state authority to control the placement of wireless facilities. Under the FCC rules adopted to implement 47 U.S.C. Section 1455, for example, a permit may "deemed granted" by federal fiat within 60 days of submission of an application unless approved by a local or state

[8] *First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, at VI and VII (rel. Aug. 8, 2016) ("2016 Amendment").
[9] *See* Draft R&O at ¶ 85.
[10] *Id.*

authority. That is, the current FCC rules for "eligible facilities requests" do directly involve a type of compelled licensing. The public interest justifications proffered – even if accurate – provide no basis for avoiding responsibilities under the NHPA or NEPA.

II. The Draft R&O Fails to Accurately Address the Nature and Extent of Proposed Small Cell Deployments While Dismissing any Possibility of Harm

The Draft R&O should be rejected, or at least modified, as it fails to adequately examine the true nature and extent of what it takes to deploy small cells. Further, the document contains significant internal inconsistencies, while failing to address numerous, but vitally important issues. For instance, the Draft R&O emphasizes the small size of antennas, but ignores completely the size concerns generated by the ancillary equipment that is necessary for a small cell to function. The Draft R&O seeks to create a narrative in which small cells are akin to Wi-Fi devices by creating small cell antenna size restrictions akin to Wi-Fi a fundamentally different technology. An example of an unaddressed, but vitally important issue can also be seen in the Draft R&O's repeated acknowledged of the tens of thousands of small cells that will be deployed.[11] Nonetheless, the Draft R&O never addresses the impact of these multiple deployments within targeted, but small geographic areas. And in all respects, the Draft R&O conducts at most a cursory analysis of the potential for environmental or historic impacts, focusing overwhelmingly on considerations of cost and time as outweighing what few other factors it considers at all. This analysis would provide no basis for even an exemption, much less a determination that federal laws should not apply in any respect.

NCTA made many of these same points in their recent visit to the Commission: "small cell installations are not just limited to the small cell antenna—they actually involve many equipment components, including, for example, support structures, electric meters, disconnects, cabling, and potentially backup power supplies—and taken as a whole can exceed the size of many monopoles or macrocells. The cumulative size and weight of these components may also raise site-specific issues requiring individualized review."[12] The Draft R&O disregards all these considerations, focusing narrowly and inexplicably on the antenna as the sole determining factor.

A. The Proposed Small Cell Definition Incorrectly Focuses Exclusively on Antenna Size

First, the Draft R&O takes an improperly narrow focus, defining "small cells" almost entirely on the basis of the size of their antennas. While it is true that small cell antennas often fit within the proposed 3 cubic feet volume limit, the Draft R&O cites for comparison entirely self-

[11] *See e.g. id.* at ¶¶ 36-37, 61-62.
[12] Ex Parte Letter from Rick Chessen, Chief Legal Officer, NCTA, WT Docket No. 17-79 (Mar. 9, 2018).

contained facilities like consumer wireless routers and home signal boosters.[13] Small cells, as the Draft R&O elsewhere acknowledges, come with associated equipment including radio units, surge protectors, cable and ducting, power meters, and other equipment. The Draft R&O excludes all of these from consideration, basing its analysis of potential impact on the impact of antennas alone. The result is a Draft R&O which adopts rules that at best misrepresent the true size and impact of small wireless facilities.

B. The R&O Improperly Ignores Other Factors Included in State Law and Commission Precedent

In support of its small cell antenna size limit, the Draft R&O cites the 2016 Amendment to the Collocation Agreement.[14] However, the Draft R&O strips away essential context from the collocation agreement in an effort to broaden the scope and size of facilities covered, without consideration for the additional potential impact. The 2016 Amendment, for example, recognizes that multiple antennas may be located on a single pole, amplifying the potential impact. In an effort to balance collocation with impact, therefore, the 2016 Amendment includes an aggregate size limit for all antennas on a structure of six cubic feet.[15] No such aggregate limit is included in the Draft R&O's proposal, significantly expanding the scope of the exemption from all Federal environmental and historical protection without any analysis as to the tradeoffs of such a move.

The 2016 Amendment also includes cumulative size restrictions for associated equipment at each site. These restrictions range in size based on the specific nature of the facility, but average around 28 cubic feet – approximately the size of a refrigerator. As discussed below, in numerous states the wireless industry has endorsed 28 cubic foot size limits. The Draft R&O includes neither per-antenna nor aggregate site-wide size limits for associated equipment, yet again expanding the scope of the exception without explanation as to why.

Furthermore, the Draft R&O cites numerous state small cell laws for support of its 3 cubic foot antenna size limit.[16] These state laws, however, include a variety of cumulative and associated equipment size limits, along with other restrictions, intended to ensure an appropriate balance is struck between the need for deployment and the risk of adverse impact. And of course, the state laws are in addition to, and not a replacement for historical review. Indeed, it is not clear that the same rules would have been adopted if the states had understood that they (or localities) would be the sole entities responsible for historical or environmental reviews.

[13] *See* Draft R&O at ¶¶ 63, 71-73.
[14] *Id.* at ¶ 39.
[15] 2016 Amendment at VI.A.5.a.
[16] *See* Draft R&O at ¶ 71 note 122.

The 2016 Amendment to the Collocation Agreement also includes restrictions on the permissible degree of ground disturbance. No such restrictions are found in the Draft R&O, substantially expanding the potential scope of potential harm to include disruption to historic streets and other property. No explanation is offered by the Commission for its exclusion of any ground disturbance related conditions.

Lastly, the Draft R&O appears to apply to *all* new constructions, not simply to collocations. While the Commission determined in 2016 that aggregate size limits, and associated equipment size limits, were appropriate to minimize the impact of expansions to collocation facilities, the Draft R&O articulates no justification for their omission here. The Draft R&O makes no effort to explain why the associated equipment for new facilities need not be limited in size, or why the aggregate size of a facility need not be limited at all, yet is quick to assert that a small cell facility will pose zero environmental or historical risk, so long as no individual antenna is more than 3 cubic feet.

The Draft R&O does not acknowledge any of this context, this balancing of interests and reasoned, consistent approach. It instead focuses far too narrowly on one single attribute of small cells, ignoring all others and drastically expanding the scope of the existing small cell exemptions from Federal historic and environmental review, all without offering any explanation of the Commission's reasoning on these points.

C. The R&O Fails to Consider the Impact of High Site Density

The Draft R&O also makes no mention of site density as a consideration. As noted above, the wireless industry acknowledges that the equipment associated with each small cell may be as large as 28 cubic feet – a refrigerator. And the Draft R&O repeatedly emphasizes just how many small cells are needed.[17] Common sense and basic economics suggest these will be deployed first in dense, high-demand areas with above-average population density, but the Draft R&O ignores the reality that multiple facilities will be placed within mere hundreds of feet of one another. The problem this creates is compounded by the failure to include any special treatment for historic districts in the Draft R&O. Large historic areas like Boston's Patriot's Walk, Portland's Skidmore and Old Town districts, and San Antonio's Alamo all attract great numbers of visitors, generating substantial demand for wireless service, but are also more sensitive to the historic and environmental impacts of widespread and dense small cell deployment than other areas. The Draft R&O proposes to dismiss any concerns they might have out of hand, giving these cherished historic districts the same Federal environmental protections as an interstate freeway median, an industrial district, or a shopping mall parking lot. Not only does the Draft R&O offer no explanation for this approach; it also fails to explain why, for the

[17] *See e.g. id.* at ¶¶ 36-37, 61-62.

first time when considering historic and environmental review exemptions, the Commission now believes elevated historic district protections are unnecessary or not in the public interest.[18]

III. State and Local Siting Review Implications

Cities appreciate that the Draft R&O does not intended to preempt state and local environmental and historical review, and thus leaves open the possibility that states and localities may be able to provide protections that had been provided through the Section 106 and NEPA processes. It is, of course, also the case that many states have their own versions of NEPA and Section 106, and the current levels of review all work together.

However, assuming that the FCC justifies its own actions on the existence or possible existence of state or local review, it is incumbent on the agency to ensure that review can be conducted in a way that allows for protection of environmental and historical interests. Thus, for example, 47 USC 332(c)(7) expressly protects state and local authority over broad aspects of wireless facility deployment, but is constrained by Section 6409(a) of the Middle Class Tax Relief & Job Creation Act of 2012 as implemented by the FCC.[19] The FCC's definition of "substantial change" for purposes of Section 6409 is far different from the size and other constraints that apply under current NEPA and NHPA review; the FCC cannot at once rely on states and local review, while essentially requiring approval of proposed facility expansions that the Commission has essentially recognized present significant risks in historical or environmentally sensitive areas. That is, the Commission would need to be clear that its Section 6409 rules do not apply where state or local law may require historical or environmental reviews (or it would need to modify those rules to more closely mimic those it found appropriate to discharge its own responsibilities under applicable law). Likewise, it should be clear that the timing for review may be longer than the 60 days provided under Section 6409 where environmental or historical preservation concerns arise.[20]

[18] *See, e.g.* 2004 Order at ¶ 64; 2016 Amendment at VII.
[19] Middle Class Tax Relief & Job Creation Act of 2012, Pub. L. 112-96, Sec 6409(a) (codified at 47 U.S.C. 1455).
[20] Under Section 332, existing rules at least permit a state or locality to show that failure to satisfy shot clocks were justified by the circumstances of a particular application.

While the Commission does not base its actions here on a reliance on the presence of state and local review, its analysis is incomplete in that it fails to acknowledge the real gaps in protection created by the adoption of the Draft R&O in its current form. The Draft R&O applies a flawed analysis intended to justify an exemption, and instead uses it to justify wholesale abandonment of federal environmental and historic protections.

Sincerely,

Gerard Lavery Lederer
of BEST BEST & KRIEGER LLP