STATE OF DELAWARE
DEPARTMENT OF TRANSPORTATION
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DOVER, DELAWARE 19903

JENNIFER COHAN
SECRETARY

June 15, 2017

The Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

RE: Notice of Proposed Rulemaking (NPRM) on Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment.
WT Docket No. 17-79

Dear Secretary Dortch:

The State of Delaware, Department of Transportation (DelDOT) is submitting the attached comments concerning Docket Number 17-79, Notice of Proposed Rulemaking (NPRM) on Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment.

Although Docket Number 17-79 poses many questions toward county and local governments, DelDOT is submitting these comments from the perspective of the State of Delaware. Delaware is the second smallest state in the nation at only 1,982 square miles. However, DelDOT has responsibility for 5,464 centerline miles of roadway. That is almost ninety percent of all the roadways in Delaware. DelDOT has by far the greatest involvement in the State of Delaware with respect to the issues being contemplated in your public notice. The county governments in Delaware have no responsibility for roadways or own roadway rights of way. Each of the 57 municipalities in Delaware does have the responsibility for municipal roads and may respond separately to your public notice.

DelDOT

Thank you for the opportunity to offer comment. Should you wish to discuss any of our comments more fully, please feel free to contact me at 302-760-2305.

Sincerely,

Robert B. McCleary, P.E.
Chief Engineer

RM:cf/ls

Cc: Honorable Jennifer Cohan, Secretary, Department of Transportation
Bob Cunningham, Chief of Right of Way Section, DelDOT
Monroe Hite III, Manager, Right of Way Engineering, DelDOT
Eric Cimo, Utilities Engineer, DelDOT

Delaware DOT (DelDOT) comments on FCC 17-79

The Delaware Department of Transportation (DelDOT or the Department) understands expansion of mobile broadband is needed and is a national priority for continued economic development of the United States. Cell phone use has become widespread and is an ever growing form of communication. The Department understands that in some jurisdictions 70% or more of the emergency calls to 911 call centers come in over cellular telephones[1]. Emergency responders across the nation have come to rely on cellular telephones for their daily operations and response. Given these factors, DelDOT wishes to support the expansion of mobile broadband in responsible ways. The Departments responses to FCC docket #17-79 are as follows:

Response to Paragraphs 8-21: The Delaware Department of Transportation has been issuing permits for many decades before the *2009 Declaratory Ruling* or the *2014 Infrastructure Order***.** The Department sees mandatory "shot-clocks" as unnecessary and discriminatory. In order to adhere to proposed FCC regulated artificial timelines, DelDOT may need to hold applications from public utilities at a lower priory which would impact their business and give an unfair advantage to one group of actors in the ROW over all the others who have franchise rights for the use of that public space. Since the same staff who issue utility construction and safety permits are the same staff who issue Residential and Commercial entrance permits, those applicants would also be unfairly bumped out of line by the use of the unfair advantage granted by the use of a shot clock provision to the wireless industry. We believe this approach relegates all other applicants to secondary status to wireless permits. It is particularly disconcerting that such discriminatory action would come at the direction of the FCC against the businesses and citizens of Delaware. Currently the Department does not have a legally mandated response time for issuing permits to enter the State of Delaware ROW. However, the Department does utilize a best business practice of a self-imposed 14 day turnaround time performance standard. The Department's goal is to meet or exceed this value 90% of the time. Permits are processed on a 1st in-1st out basis. (Tables for 2015 and 2014 for entrance and utility permits is located in appendix A at the end of the document.)

In 2016, the Department processed 3460 utility permits. That number is greater than the 3208 utility permits in 2015 and well over the 2611 permits processed in 2014. All of these were processed without a mandatory "shot-clock" and processed in a non-discriminatory process. Mandated "shot-clocks" only are to the benefit of the wireless industry and punishes all other industries that are not wireless, and holds State DOT's responsible while there is no responsibility placed on the wireless industry. A mandatory schedule imposed by the FCC is not in the letter of, or the spirit of the remarks of Chairman Ajit Pai on 29 March, 2017. Chairman Pai stated *"…-we are pursuing a light-touch regulatory approach. This approach suggests that the Internet should be free from heavy-handed government regulation. It seeks to eliminate unnecessary barriers to infrastructure investment that could stifle broadband deployment. It aims to minimize regulatory uncertainty, which can deter long-term investment decisions. It favors facilities-based competition—that is, creating an incentive to build one's own*

[1] https://www.nena.org/?page=911Statistics

network instead of relying on another's (which depresses the deployment incentives of each). It encourages competition among companies using any technology and from any sector—cable, telco, fixed wireless, mobile, and satellite. It embraces regulatory humility, knowing that this marketplace is dynamic and that preemptive regulation may have serious unintended consequences. And it places demands on the FCC itself—to be responsive to the public and to act as quickly as the industry it regulates. This regulatory approach, not the command-and-control rules of the 20th century, is most likely to promote digital infrastructure and opportunity". [2]

"Batches" of requests, as stated in paragraph 18, institute another problem that the Delaware Department of Transportation has had to work through with at least two neutral host providers with in the wireless industry. For example Mobilite summited 5 applications for utility permits on 8/24/2016, 17 more on the next day 8/25/2017, and 13 more the following day on 8/26/2017. 18 of those 35 permits (or 48.6%) were incomplete. On 2/11/2017, Crown Castle summited 36 locations in a 2 ½ square mile area of Delaware, and asked the Department to verify who had jurisdiction of the ROW in this area. In other words, they wanted the Department to do their research work for them. Understand, the Delaware Department of Transportation currently processes a very large number of permits effectively and efficiently with a very limited number of staff, but the Department are at capacity now. Given the economic constraints in Delaware, DelDOT has no ability to hire additional State employees to process permits more quickly. If the "shot-clock" approach is adopted, Delaware will be required to hire consultant help to process these permits within a prescribed "shot-clock" timeframe in order to safeguard public safety as it relates to travelers affected by the work contemplated in these permit applications. This will constitute yet another unfunded federal mandate. Delaware will need a mechanism to recover its actual costs for administering this federal requirement. The FCC needs to consider these impacts in any proposed rulemaking.

Response to Paragraphs 32 - 41: DelDOT is concerned the FCC in their efforts to accelerate deployment of wireless facilities may overlook important necessary steps to protect natural and cultural resources. To be clear, not all areas of the ROW have been "previously disturbed" as that term is used in the National Historic Preservation Act. Of particular concern to DelDOT is that some portions of the State's ROW, and State-owned lands outside ROW, are subject to deed restrictions and environmental covenants, which were put in place to protect natural and cultural resources found on those properties. Those protections run with the land in perpetuity and were identified as important elements of the State's heritage by SHPO and waters of the United States by the US Army Corps of Engineers. Some sites preserve rare, threatened and endangered species. These discoveries and protections came as a result of the processes followed under NHPA and NEPA, as well as the Endangered Species Act. DelDOT urges the FCC to continue the protection of these resources by prohibiting wireless providers from excavating or constructing new infrastructure within the boundaries of these protected sites. The Department further urges the FCC to require wireless providers to follow a deliberate process to identify and avoid impacts to natural and cultural resources in every location where new wireless facilities will be

[2] https://apps.fcc.gov/edocs_public/attachmatch/DOC-344124A1.pdf Remarks of FCC Chairman Ajit Pai at the U.S. – India Business Council.

constructed. DelDOT does not perform the NHPA and/or NEPA application process for utilities who operate within the State ROW nor does DelDOT approve these requests. Delaware State Historic Preservation Office (DE SHPO) is a division of the Delaware Department of State[3], not the Department of Transportation. DelDOT does not have jurisdiction over DE SHPO. DelDOT again does not have any authority over the Delaware Department of Natural Resources and Environmental Control for environmental permitting. To the extent that NHPA or NEPA permitting requirements were waived or relaxed by the FCC only for the wireless industry; this action would be discriminating to all other entities (persons or businesses) that must follow these same rules for any construction project. All utilities in the State ROW must follow these same rules as specified in the DelDOT Utilities Manual regulation section 3.4.5 OTHER PERMITS[4]. The utility is solely responsible to acquire these permits before any work is performed within the ROW.

To the extent that a combined process could be developed which accounts for the protection of the many natural and cultural resources under the many federal and State level statutes, DelDOT would support such an approach.

Response to Paragraph 93: Del DOT does not currently charge an up-front application fee for utility permits or for use and occupancy agreements or a reoccurring fee for use of the State ROW. However, Delaware House Bill 189 is currently under review by the Delaware General Assembly. This bill, written and supported by the wireless industry could allow DelDOT to charge up to $100.00 per small cell facility. Delaware House Bill 189 states"…*wireless providers shall pay the actual, reasonable costs borne by the Department attributable to the processing and administration of a program to authorize the accommodation, review and issuance of construction permits, and conduct inspections of wireless facilities in the ROW if necessary. Such fees shall not exceed $100 for each small cell facility on a permit application. If there are additional non-recurring expenses associated with inspections for new installations or construction, wireless providers shall pay the actual, reasonable cost borne by the Department attributable to each provider's inspections where it exceeds the permit fee collected.*" [5] DelDOT urges the FCC to consider adoption of similar language at the federal level.

Responses to Paragraph 96: DelDOT has both proprietary and regulatory authority over the State's rights of way (ROW) in Delaware. All the State-owned ROW in Delaware was acquired by DelDOT in fee simple on behalf of the State of Delaware through Delaware Code, Title 17, §137 (a) (1) [6]. Further, all existing easements were extinguished at the time of the original acquisition. DelDOT does not grant new easements, so no other entity has a real property interest within DelDOT ROW. The Department owns all real property interests and rights in the ROW. However, DelDOT has granted many public utilities

[3] http://history.delaware.gov/index.shtml

[4] http://deldot.gov/information/business/drc/manuals/utilities_manual_2008_may_5.pdf pg. 25

[5] http://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=25823&legislationTypeId=1&docTypeId=2&legislationName=HB189

[6] http://delcode.delaware.gov/title17/c001/sc03/

franchise rights within the ROW, which is a license for use and can be revoked. DelDOT's regulatory control over the State-owned ROW derives from Delaware Code, Title 17, §131 (a), which states, "*All the public roads, causeways, highways and bridges in this State which have been or may hereafter be constructed, acquired or accepted by the Department of Transportation shall be under the absolute care, management and control of the Department.*"[7]

The FCC has asked," *How should the line be drawn in the context of properties such as public rights of way (e.g., highways and city streets), municipally-owned lampposts or water towers, or utility conduits? Should a distinction between regulatory and proprietary be drawn on the basis of whether State or local actions advance those government entities' interests as participants in a particular sphere of economic activity (proprietary), by contrast with their interests in overseeing the use of public resources (regulatory)?"* "Economic Activity" is not allowed in the State of Delaware ROW. ROW is first and foremost a transportation corridor, not a utility or economic corridor. When Title 23 federal funding is used to acquire real property it must be for the transportation project in an approved Statewide Transportation Improvement Program (STIP) as per 23 CFR §710.203(a)(1), not for economic projects.[8] Because DelDOT has both proprietary and regulatory authority over the State's rights of way (ROW) any utility that is placed, within the ROW has been placed based upon the provisions of 23CFR §645.209, Utility Accommodation[9] and the DelDOT Utility Manual regulation. The Department does not allow utility attachment to any transportation equipment without a full engineering analyses of the utility and how it will impact the Department's structure. Lamp posts, traffic signal poles, and traffic informational structures, have not been designed or tested with wireless industry equipment attachments. As such, these poles and structures may or may not perform as they were originally engineered to perform should they be impacted by errant vehicles or high winds with new wireless attachments on existing poles. For the reason of safety, only Department equipment is authorized and approved to be installed on these poles and structures.

Even though DelDOT could enter into economic interests as the proprietor of the ROW, the Department does not do so over concerns that accommodation of private uses in the ROW will become unmanageable. While wireless services offer significant benefit to their customers, wireless providers are not public utilities under Delaware Code, Title 26, §102 (2) [10]. They are private corporations operating for a private use. As such, DelDOT cannot extend franchise rights to them. If the Department were to enter into a Use & Occupancy agreement with wireless providers, the Department would be

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[7] http://delcode.delaware.gov/title17/c001/sc03/

[8] https://www.ecfr.gov/cgi-bin/text-idx?SID=8b40366d308a8d8f5b088dc37f1b6fcb&mc=true&node+se23.1.710_1203&rgn=div8

[9] https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=c5f1ebfb6613c31cafd46f49f5b9e434&ty=HTML&h=L&r=PART&n=23y1.0.1.7.26#se23.1.645_1209

[10] http://delcode.delaware.gov/title26/c001/sc01/index.shtml

extending the use of the ROW to only one segment of the economy. There are many private corporations that currently provide services to customers via truck delivery such as heating oil, propane, hydrogen for fuel cells, and many industrial gases. They have not enjoyed use of the ROW and in fact have been denied accommodation in the ROW because they are not public utilities or for public use. Likewise, renewables such as wind energy and solar energy have similarly been denied accommodations because they too are for private use. All of these corporations and industries could make similar claims as the wireless providers regarding the benefits to their customers. Accommodation of the private use of the ROW by wireless providers may necessitate accommodation of many other private uses. This could lead to a proliferation of private use of the ROW and create an unmanageable public space with unending conflicts between facility owners. For those reasons, the Department does not enter into proprietorship arrangements for the use of the ROW. The Department's practice of non-accommodation is important for the public safety of all who use the transportation corridor. DelDOT believes it does not create any discriminatory business practice, because all private uses are treated the same and denied access to the ROW.

Responses to Paragraph 97: Cellular telecom-related deployment is treated differently in Delaware than non-cellular telecom deployments and deployments of public utilities in general. This is because cellular telecom is not a public utility[11], is not a public use, and, as such, is not eligible for accommodation in the ROW. Comparatively, non-cellular land line telephone service is a public utility. Public utilities are a public use and are granted franchise rights for accommodation in the ROW.

Further, private uses like cellular telecom pose certain issues for exercising eminent domain rights under Delaware Code, Title 10, §6105 (e), which is an important element in the ongoing management of the State's roadways[12]. It would be difficult if not impossible to provide replacement land to a wireless provider to relocate into when roadways need to be widened. When roadways are widened, existing public utilities (which are public uses) are relocated into areas acquired by the State specifically for that purpose. That may not be possible for wireless facilities because there are two basic tenants of eminent domain law. They are 1) that government cannot exercise a public taking for private use; and 2) government must demonstrate a public necessity for the taking. DelDOT is concerned that future relocation of wireless facilities due to roadway widening will be precluded because the taking is for a private use and there is no public necessity for the taking. Wireless facilities cannot demonstrate a public necessity to be in the ROW as their services are delivered over airwaves. As such, wireless facilities can be located anywhere. It is not a public necessity for wireless facilities to be in the ROW. Traditional pipe and wire type utilities can demonstrate a public necessity to be located in the ROW by virtue of needing to make service connections to each property fronting the roadway. When a transportation improvement project widens a roadway, all property owners are impacted along the transportation corridor because the utilities exist along the entire corridor. For a standalone pole or tower, the wireless provider nor DelDOT can prove through sound engineering practices precisely where

[11] http://delcode.delaware.gov/title26/c001/sc01/index.shtml

[12] http://delcode.delaware.gov/title10/c061/index.shtml

the pole must be placed. For example; how does the Department prove in a condemnation action that the property at 103 Main Street must be taken, but the properties located next door at 101 or 105 Main Street will not be taken? Pole locations for the cellular industry have a non-specific placement location within their network that does not require precise placement at any particular point on the ground. The pole or tower can be placed anywhere within approximately a 200 foot radius of the ideal location as the Department understands wireless cellular technology and as DelDOT has been told by representatives of the wireless industry. This draws into question whether the exercise of eminent domain powers is a viable alternative for securing the necessary ROW to relocate wireless infrastructure in advance of transportation projects; will unnecessarily delay transportation projects; and impact the wireless industry because they may not be able to find a suitable alternate location. Wireless cellular telecom deployments are treated differently because they are a private use and would be difficult or impossible to relocate when needed due to the eminent domain issue that would ensue from government taking real property from one private owner to give to another private owner. If wireless facilities cannot be relocated, their presence in the ROW will delay necessary public safety improvements to our roadways. Treating the wireless industry differently than public utilities needs to continue until such time wireless infrastructure is deemed a public use and can demonstrate an engineering necessity to be in the ROW.

In summary, The Delaware Department of Transportation is in favor of expanded wireless cellular phone service, especially into the more rural areas of the State of Delaware, but not at the detriment of the public's safety. The State of Delaware roadway system and ROW is first and foremost a transportation network to move people, goods and services safely through Delaware. Utilities may be accommodated within this corridor, but it is not an economic or utility corridor. It is for surface transportation. The Department is opposed to any federal policy or rule making that strips local control over land issues from elected state and local authority. And the Department is opposed to any federal policy or rule that could cause the defacement of historical areas or the destruction of environmentally sensitive areas of the State of Delaware.

Appendix A

2015 State of Delaware Approved Permit Totals

Statewide	Residential Entrance Permits				Commercial Entrance Permits				Utility Permits				Total Permits				
Month	On-Time	Late	Total	% On-Tim	On-Time	Late	Total	% On-Tim	On-Time	Late	Total	% On-Tim	On-Time	Late	Total	% On-Tim	Goal
Jan.	77	0	77	100%	13	0	13	100%	212	42	254	83%	302	42	344	88%	90%
Feb.	69	0	69	100%	6	0	6	100%	225	32	257	88%	300	32	332	90%	90%
Mar.	69	4	73	95%	3	0	3	100%	214	17	231	93%	286	21	307	93%	90%
April	67	4	71	94%	7	0	7	100%	185	51	236	78%	259	55	314	82%	90%
May	52	5	57	91%	7	0	7	100%	238	46	284	84%	297	51	348	85%	90%
June	67	1	68	99%	6	0	6	100%	258	45	303	85%	331	46	377	88%	90%
July	65	3	68	96%	14	0	14	100%	286	42	328	87%	365	45	410	89%	90%
Aug.	68	1	69	99%	6	0	6	100%	192	56	248	77%	266	57	323	82%	90%
Sept.	77	0	77	100%	13	0	13	100%	212	35	247	86%	302	35	337	90%	90%
Oct.	69	8	77	90%	6	0	6	100%	296	31	327	91%	371	39	410	90%	90%
Nov.	77	5	82	94%	12	0	12	100%	259	3	262	99%	348	8	356	98%	90%
Dec.	79	5	84	94%	20	0	20	100%	226	5	231	98%	325	10	335	97%	90%
Totals	**836**	**36**	872	96%	**113**	**0**	113	100%	**2803**	**405**	3208	87%	**3752**	**441**	4193	89%	

2014 State of Delaware Approved Permit Totals

Statewide	Residential Entrance Permits				Commercial Entrance Permits				Utility Permits				Total Permits				
Month	On-Time	Late	Total	% On-Tim	On-Time	Late	Total	% On-Tim	On-Time	Late	Total	% On-Tim	On-Time	Late	Total	% On-Tim	Goal
Jan.	67	11	78	86%	5	0	5	100%	120	6	126	95%	192	17	209	92%	90%
Feb.	77	14	91	85%	3	0	3	100%	181	4	185	98%	261	18	279	94%	90%
Mar.	72	2	74	97%	4	0	4	100%	167	10	177	94%	243	12	255	95%	90%
April	86	20	106	81%	12	0	12	100%	193	13	206	94%	291	33	324	90%	90%
May	89	5	94	95%	15	0	15	100%	222	19	241	92%	326	24	350	93%	90%
June	99	1	100	99%	15	1	16	94%	211	26	237	89%	325	28	353	92%	90%
July	95	2	97	98%	17	0	17	100%	197	5	202	98%	309	7	316	98%	90%
Aug.	100	8	108	93%	8	0	8	100%	310	4	314	99%	418	12	430	97%	90%
Sept.	98	5	103	95%	9	0	9	100%	236	3	239	99%	343	8	351	98%	90%
Oct.	84	4	88	95%	15	0	15	100%	211	9	220	96%	310	13	323	96%	90%
Nov.	80	6	86	93%	12	0	12	100%	191	10	201	95%	283	16	299	95%	90%
Dec.	74	3	77	96%	9	0	9	100%	260	3	263	99%	343	6	349	98%	90%
Totals	**1021**	**81**	1102	93%	**124**	**1**	125	99%	**2499**	**112**	2611	96%	**3644**	**194**	3838	95%	