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
	)	
Revising the Historic Preservation Review Process For Wireless Facility Deployments	)	WT Docket No. 15-180

COMMENTS
OF
THE CITY OF NEW ORLEANS, LOUISIANA

The City of New Orleans, Louisiana ("New Orleans"), through counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby respectfully submits its Comments in response to the Commission's Notice of Proposed Rule Making ("NPRM") in the above-captioned proceeding.[1]

I. BACKGROUND

New Orleans is the largest city and metropolitan area in the State of Louisiana. With over 1.1 million residents in the greater New Orleans Metropolitan area, it is the 46th largest in the United States. New Orleans is also a major United States port.

There are several aspects of New Orleans, which make the city unique and therefore important to the Commission's consideration of changes to broadband deployment policies. New Orleans is world-famous for its abundance of unique architectural styles, which reflect the city's historic roots and multicultural heritage. Twenty National Register Historic Districts have been established, along with fourteen local historic districts. Thirteen of the local historic

[1] *Order*, WT Docket No. 17-79, DA 17-525, released May 26, 2017.

districts are administered by the New Orleans Historic District Landmarks Commission ("HDLC"), with one (the famous "French Quarter") administered by the Vieux Carre Commission. In addition, the National Park Service, via the National Register of Historic Places, and the HDLC have landmarked individual buildings. These unique architectural aspects of New Orleans make the City one of the Top 10 most-visited cities in the United States. In 2004 alone, there were over 10.1 million visitors to the city. As a result, preservation of these historic landmarks and architectural styles mandate careful consideration of any proposal, which could alter these landmarks, or the character of these neighborhoods.

At the same time, the sheer number of visitors in the City at any one time mean that the use of wireless communications within the City is significantly higher than might otherwise be experienced by a City of the same size. Therefore, maximization of access to communications is also of vital interest to the City. The careful balancing of these competing interests gives New Orleans a unique background in matters of wireless deployment, and the Commission should carefully consider the City's interests in attempting any rewrite of the Commission's Rules and broadband deployment policies.

II. COMMENTS

Initially, the City notes that there are very few significant efforts by cities and towns across the country trying to stifle the growth of wireless communications services for the municipality's citizens. Rather, there are legitimate concerns of municipalities in trying to balance the often-competing interests of carriers versus residents, of infrastructure versus aesthetics, or of capacity versus saturation. Of equal importance is the need to recognize the fundamental difference in a municipality receiving an application for a single 175-foot tower, versus the costs imposed to quickly review a proposal for dozens of smaller antennas all over a

municipality. Thus, while the Commission may wish to eliminate a "case-by-case assessment of the relevant circumstances,"[2] establishment of a hard line "cookie-cutter" approach is simply unacceptable, and ignores the reality that not all applications are the same, and not all geographic areas are the same.

When Congress defined a "reasonable period of time" under Section 332(c)(7)(B)(ii) as 90 days for certain types of applications, and 150 days for others,[3] it was dealing with a different set of circumstances than are present today. Specifically, eight years ago there was no proliferation of small cell deployments, no consideration about what a 5G build-out would mean within a jurisdiction. Rather (although not exclusively), Congress was considering tower applications in a single, tall tower scenario. Eight years later, these types of applications remain, and while the standard established by Congress at that time may well remain relevant for tall tower applications of limited number, there must be a separate category established for the types of applications now widely seen in the municipal inbox.

On this basis, the City supports the concept proposed by the Commission in paragraph 16 of the NPRM to establish to identify more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class.[4] The City believes that the criteria suggested by the FCC in paragraph 16 of the NPRM represents a good starting point for such classifications. However, the City recommends that the Commission add to its "type of area" classification consideration of historical area issues.[5]

[2] *See*, NPRM at para. 11.
[3] *See*, NPRM at para. 16.
[4] *See*, NPRM at para. 16.
[5] The City recognizes the Historic Preservation Review Section 106 process presently in place. However, consideration must also be given by the City to the fourteen local historic districts, in addition to the nationally designated historic districts.

The City recognizes the difficulty, which may be experienced by some wireless carriers in having to construct facilities at a reasonable speed and at a reasonable cost, while having to comply with a multitude of different regulations from adjoining municipalities. At the same time, size of a municipality, size of the proposed project and existence of a municipal plan mandate differing approaches in some situation.

Commission employees are encountering similar issues. During the Commission's June 7, 2017 Annual Tower Training Workshop, a Commission employee said:

> We are aware and part of the reason the NPRM is out there right now, that there are more efficiencies and there are more clarifications that we need to make as these technologies become more commonly being proposed. We have been in this situation right now, since I would say August of last year, that we have had a carrier come out with thousands and thousands and thousands or projects that were initiated that were small cell projects, and so we are grappling real-time with how do you batch those and lessons learned. So I want to say all of that because as we look at these questions I think we are all like – some of them will have to say we working on it.

Thus, even the Commission is struggling with the changes wrought by the upgrades necessary for DAS and small-cell systems. Like the Commission, the City of New Orleans is "working on it."

The Commission's approach as delineated in the NPRM, with "deemed granted" applications[6] and irrebuttable presumptions[7] will only yield further litigation. This results in delayed facility construction, exorbitant costs for carriers and municipalities and continued uncertainty. Such a result directly contrary to the Commission's intention in this proceeding.

On this basis, it is the position of the City of New Orleans that the Commission must consider the interests of all parties, and design compromises that best accomplish the goal of efficient deployment of broadband facilities for all residents. In this regard, the creation of the

[6] *See*, NPRM at para. 7.
[7] *See*, NPRM at para. 9.

Broadband Deployment Advisory Committee ("BDAC") is appreciated.[8] The City believes that this represents an important step in resolving the differences between these competing interests, and the City hopes that the recommendations from the BDAC result in useful draft regulations, which can be employed by the Commission and municipalities.

The City of New Orleans urges the Commission and the BDAC to expeditiously complete its work and provide its recommendations, all in consideration of the size and complexity of the task. In doing so, the BDAC has the unique opportunity to resolve an urgent issue for the nation and its communications infrastructure.

Of particular interest to the City is the Commission's consideration of alterations to the State Historic Preservation Officer ("SHPO") review process.[9] The Commission must recognize that not all delays are bad delays. Considerations of aesthetics are by their very nature somewhat subjective, and therefore not always appropriate for cookie-cutter processes. Further, not every application is a thorough one. A well thought-out plan requiring SHPO consent may be easily reviewed within the delineated timelines, but poorly produced applications may require additional time where the significant historic review issues unique to cities like New Orleans come into play. While there may be cases of delays and cost issues for plans of "minimal likelihood of harm," as claimed by Sprint,[10] not all situations are the "fault" of the municipality, and there should not be a broad brush painting all agencies as misfeasors.

Further, the mere fact that the planned deployment is small cell does not necessarily eliminate a historic preservation concern. In some historic areas, the location of hundreds of poles in rights of way can actually be more of an historic intrusion than a single high site. The United States is not a single, homogenous area of land. Thus, homogenous rules should not be

[8] https://apps.fcc.gov/edocs_public/attachmatch/DA-17-328A1.pdf.
[9] *See*, NPRM at para. 37.
[10] *See*, NPRM at para. 38.

employed. While delays that are mere attempts to prevent build-outs should not be countenanced, a "rush to build" should not be the rule of the day.

For this reason, the City of New Orleans opposes the expansion of NHPA Exclusions for small facilities, as proposed in paragraph 62 of the NPRM, beyond those already excluded in paragraph 88 of the *2014 Infrastructure Order.*[11] Similarly, a pole replacement within a historic district should not be categorically excluded, even if the pole is smaller.[12] Size is not the sole consideration in historic districts, and the Commission should not arbitrarily deny a municipality of its ability to retain its character, particularly in areas where such historic considerations are a fundamental part of the municipality and its economy.

While the City recognizes that transportation rights of way are amongst the highest demand areas for wireless service, exclusions for these areas in historic districts presents the potential of fundamentally altering the character of a neighborhood, and the City must oppose this suggestion, at least with regard to historic neighborhoods.[13] The New Orleans transportation rights of way are unique in and of themselves. While substituting one pole for another may seem to present little potential harm, the reality is that not all poles are the same, and retention of character and design cannot automatically be trumped by carrier expediency.

Aesthetics, particularly in areas such as New Orleans, must continue to be a legitimate part of any proposal review. However, because the nature of aesthetics is inherently subjective, it is difficult to create bright line tests to determine when there is a "legitimate denial" versus a

[11] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 29 FCC Rcd 12865 (2014) at para. 88.
[12] *NPRM* at para. 64.
[13] *NPRM* at para. 65.

"generalized concern."[14] The City looks forward to the guidance of the BDAC in arriving at a fair set of guidelines which may be employed.

Beyond aesthetics, the City opposes any reinterpretation of the difference of a municipality as a regulator versus the municipality's role as an owner of a public resource.[15] Eliminating this distinction could have significant negative impact on a municipality's legitimate role in planning and guiding the future of a city or town. Indeed, it would be a bizarre result if a private owner could prevent an antenna from being placed on top of a building, but a municipality could not take similar action merely because the municipality owned the building. Should the Commission change this distinction, it could have the impact of requiring the Bureau of Land Management, a federal agency, from denying access to certain mountaintops. Similarly, provided there is no discrimination, the regulation of fees should not be imposed by the Commission.

New Orleans is governed by the Home Rule Charter of the City of New Orleans ("City Charter") and is the sole owner of the majority of the City's rights-of-way. Where the state and local governments are acting in their proprietary capacity or administering their own land and properties, the law is properly understood as treating them no differently than it treats other private property owners vis-a-vis the use of their own property.

Second, as discussed above, a staple of the City of New Orleans' economy is its tourism industry, and the city's ability to attract tourists is primarily driven by the City's historic attractions, culture, and historic architecture, especially in the French Quarter. While the City has a fervent interest in strengthening its wireless communications services, preserving the historic integrity of the city's structures, the viewscape of its historically landmarked structures,

[14] *NPRM* at para. 88.
[15] *NPRM* at para. 90.

and the *tout ensemble* of the city's historic districts, is an essential component to maintain the City of New Orleans' economic well-being. As a result, a careful amount of scrutiny, analysis, and inspection from the City's historic experts, architectural review commission/staff, and appropriate city departments is necessary to determine suitable locations, architectural compatibility, size, and design standards for proposed wireless facility build-outs, towers, nodes, and poles in city-owned public right-of-ways.

In addition, the City must also determine if the infrastructure provider and/or carriers' site plans conflict with the City's streetlight locations, underground wire/fiber optic infrastructure, and/or utility poles. This level of review and inspection takes time and requires feedback from its historic commission directors and affected city departments, especially the Department of Public Works, which maintains city-owned streetlights. This is why it is imperative that the City's ability to control and maintain the aesthetics of our public right-of-ways is crucial without the application of rigid timelines or "shot clocks."

Third, the City of New Orleans' City Charter mandates that its "[City] Council shall have the power to grant franchises, privileges, and permits, fixed or indeterminate, for the use of the streets and other public places for the furnishing of any service to the City or to its inhabitants. All franchises, privileges and permits and any renewals, extensions and amendments thereof, shall be granted only by ordinance." Each proposed ordinance granting an applicant use of the city-owned public right-of-ways requires notice, a twenty day lay-over period, and publication in the City's official journal before the City Council can take the matter up at a regular City Council meeting to approve, disapprove, or amend the proposed ordinance. As such, no infrastructure provider or carrier can occupy the city-owned public right-of-way without the authorization of the City Council via a franchise agreement/ordinance.

There are no limits or timeframes on the decision-making abilities of private property owners, constitutionally or otherwise, as to whether or not to enter lease agreements with infrastructure providers or carriers. Thus, the City of New Orleans, as landowners, should not be restricted or controlled via shot clocks, timeframes, or otherwise in any regard in its decisions to authorize the use of its own land and property. Furthermore, in light of the City of New Orleans' historic expert reviews, city department inspections, and City Council franchising consideration process, wireless facility approvals cannot and should not be constrained or restricted.

In contrast, the City does not oppose excluding from Section 106 review those colocation proposals that have received local approval, as suggested in paragraph 71 of the NPRM. This appears to represent a fair compromise between appropriate review and over-review.

The "undergrounding" of facilities, as discussed in paragraph 93 of the NPRM raises difficult issues. Some towns have been specifically constructed with such plans in mind. Yet the prospect of multiple service providers placing poles above ground is the antithesis of the community plan. Such plans do not discriminate against certain providers, but rather were designed with other concepts in mind. While not a specific concern in New Orleans, the Commission cannot force a community to change its predesigned character. This is a role properly left to the residents and voters of that community. Again, provided there is no discrimination, the Commission should refrain from imposing such draconian results.

III. CONCLUSION

The City of New Orleans believes that these issues, and the City's position, should be the subject of review by the BDAC. The City would appreciate the opportunity to discuss these important issues within the BDAC framework, and the City urges the Commission to refrain from action in this proceeding until such time as the BDAC's recommendations are published.

WHEREFORE, the premises considered, it is respectfully requested that the Commission act in accordance with the views expressed herein.

Respectfully submitted,

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