June 21, 2018

VIA ELECTRONIC FILING

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

RE: **Notice of *Ex Parte***
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; *Accelerating Broadband Deployment, Broadband Deployment Advisory Committee*, GN Docket No. 17-83; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; *Streamlining Deployment of Small Cell Infrastructure*, WT Docket No. 16-421; *Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies*, ET Docket No. 13-84

On June 19, 2018, the undersigned, along with Angelina Panettieri, National League of Cities, Mike Lynch, NATOA's Board President and Director of the City of Boston's Broadband and Cable in the Department of Innovation and Technology, and Gerry Lederer, outside counsel for the City of Boston, met with following FCC Wireless Telecommunications Bureau staff members: Patrick Sun, Jiaming Shang, Suzanne Tetreault, Jonathan Lechter, Stacy Ferraro, David Sieradzki, Colin Williams, Joseph Wyer, Elizabeth McIntyre, Jonathan Campbell, and Garnet Hanly. Also attending the meeting were Marcus Maher, Office of General Counsel and John Visclosky, Wireline Competition Bureau.

During the meeting, we discussed a number of issues of concern to local governments that have been raised through comments filed to date in these proceedings by NATOA, NLC, and the City of Boston (as part of the Smart Communities and Special Districts Coalition). We discussed the distinction between permit fees, which are imposed related to permits a local government issues to authorize a specific deployment and generally are limited to cost-recovery, and fees for use of public property such as poles and rights-of-way, for which private parties should pay market-based rent.

We also discussed the application of Section 332(c)(7) to small wireless facilities, the inapplicability of Section 253 to such facilities, the need for an updated RF study on small cell deployments, and the expert reports submitted by the Smart Communities and Special Districts Coalition. We discussed the individual site reviews required for most small wireless deployments in the rights-of-way to address specific safety, ADA clearance and other site-specific issues, and offered to arrange a site visit to enable staff to better understand these concerns.

We reiterated that the Commission lacks authority to implement many of the preemptions and regulations proposed by the wireless industry. The statutes on which these arguments rely either do not apply to the wireless facilities at issue in these proceedings, or rest on faulty assumptions of the scope of these statutes.

As discussed in previous filings, Section 253 does not apply to the placement of personal wireless facilities.[1] Section 332(c)(7)(A) plainly states that "nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." Nor does Section 253 apply to wireless or wireline broadband services in the wake of the *Restoring Internet Freedom* Order.[2]

Even if it did apply, Section 253(d) contemplates a case-by-case analysis of whether a particular statute, regulation or legal requirement violates Section 253(a).[3] It does not grant the Commission the authority to issue blanket preemptions of every state and municipal rights-of-way management and compensation requirement. This is especially true where the Commission has found "that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion."[4] This finding contradicts any notion that the provision of telecommunications services is being prohibited to such an extent that the Commission may step in and impose a nation-wide preemption of state and local government.

Further, nothing in Section 332(c)(7) authorizes the Commission to impose a "deemed granted" remedy, nor does Section 253 authorize shot clocks or deemed granted remedies of any kind. The existing shot clocks under Section 332(c)(7) are based on language in that statute requiring siting decisions to be issued "within a reasonable period of time."[5] That language is not found in Section 253, and no other provision of Section 253 supports the implementation of shot clocks. Further, neither statute requires localities to grant applications, in stark contrast to the

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[1] *See, e.g.*, Comments of Smart Communities and Special Districts Coalition, WT Docket No. 17-79 (Jun. 15, 2017), p. 55-58 ("Smart Communities Wireless Comments").

[2] *See id*. at 55. *See also* Comments of Smart Communities and Special Districts Coalition, WC Docket No. 17-84 (Jun. 15, 2017), p. 5-6 ("Smart Communities Wireline Comments").

[3] *See* 47 U.S.C. § 253(d) ("If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.") The plain language of this provision reflects the intent to require individual review of a particular government's specific legal requirement that is alleged to violate subsection (a), not a general review and preemption of all state and local laws or legal requirements. *See* Smart Communities Wireless Comments at 57-58; Smart Communities Wireline Comments at 10.

[4] *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 17-199, par. 94.

[5] 47 U.S.C. 332(c)(7)(B)(ii).

Spectrum Act.[6] It is arbitrary and capricious to find a deemed granted remedy in statutes that do not require approval of applications.[7]

To find otherwise—to find that the Commission has the authority to authorize a wireless provider to deploy in local rights-of-way without permission from the municipality (other than as provided in the Spectrum Act)—would grant wireless providers a *right* to use local rights-of-way that is not provided in Section 332(c)(7) or Section 253. Broadly speaking, both statutes prohibit municipalities from imposing effective prohibitions on services, but this cannot be mistaken for an affirmative right to use public rights-of-way or other property. The granting of such a right implicates the Fifth and Tenth Amendments, including the anticommandeering doctrine as recently discussed by the Supreme Court in *Murphy v. NCAA.*[8]

Finally, the argument that increased costs or time to deploy caused by local rights-of-way requirements are "effective prohibitions" that the Commission can and should preempt relies on the unstated assumption that Section 332(c)(7) or Section 253 grants the wireless industry the right to use public property. They do not. Assuming, *arguendo*, that Section 253 applies to wireless facilities and that imposing fees for use of public property is a regulatory rather than proprietary act (both of which we dispute), the appropriate question is whether the local legal requirement effectively prohibits *the provision of telecommunications services*, not whether it prohibits access to the rights-of-way. This necessarily is a fact-specific inquiry, as noted above, and such an inquiry is indispensable should Section 253 apply to small wireless facilities, which in many cases could be sited outside the rights-of-way with no impact on the ability of the provider to provide telecommunications services.

As noted in this docket, the United States led the world in 4G deployment, which required providers to deploy wireless facilities on private property for which they had to pay rent.[9] Thus, paying rent does not *ipso facto* effectively prohibit services. To the contrary, history shows us that the wireless industry thrives in an environment where it pays market-based rent for use of property it does not own. There is no reasonable basis to assume that paying rent to municipalities rather than private property owners would constitute an effective prohibition that requires the Commission to set an arbitrary cap, substituting its judgment for what would otherwise be the same market-based solution that propelled 4G deployment.

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[6] *See* 47 U.S.C. § 1455(a)(1) ("… a State or local government may not deny, and shall approve, any eligible facilities request…").

[7] In addition, Section 332(c)(7)(B)(v) creates a *judicial* remedy in the event a municipality fails to act in a reasonable time. There is no authority for the Commission to impose its own remedy.

[8] 584 U. S. ____ (May 14, 2018). *See also* Smart Communities Wireless Comments at 76-78; Smart Communities Wireline Comments at 14-21; Reply Comments of NATOA, NLC, *et al*., WT Docket No. 16-421 (April 7, 2017), p. 2-6.

[9] *See, e.g.*, Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, Secretary, FCC, filed April 17, 2018, p. 2.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this letter is being electronically submitted in the record of these proceedings and provided to the Bureau participants. Please do not hesitate to contact the undersigned with any questions.

Respectfully submitted,

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