July 25, 2018

VIA ELECTRONIC FILING

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

Re: *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Development*, WT Docket No. 17-79

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules,[1] Crown Castle hereby submits these *ex parte* comments regarding the FCC's draft *Third Report and Order and Declaratory Ruling* in the above-referenced proceedings, which the Commission released on July 12, 2018 (the "*Draft Order*").

Crown Castle appreciates the Commission's efforts to streamline the process for deploying infrastructure to support advanced broadband networks. The *Draft Order* includes a number of proposals that will advance this objective, and Crown Castle looks forward to their prompt adoption and implementation.

It is Crown Castle's belief that certain paragraphs in the *Draft Order* may be misconstrued by parties to this proceeding and ultimately cause delays or increase the cost of deploying next generation broadband networks. In order to provide clarity on this issue, Crown Castle respectfully requests the below-proposed revisions to the *Draft Order*.

Utility Construction Standards and Requirements.

Crown Castle appreciates the FCC's consideration of its request to prohibit blanket bans by utilities on the attachment of equipment in the unusable space on a pole and, in particular, its express willingness to revisit this matter in the future. *Draft Order* ¶ 125. Given that the *Draft Order* takes strong and decisive action against *de facto* moratoria in the municipal context, Crown Castle posits that it would be appropriate for the Commission to address blanket bans by utilities in the same order, as these issues present largely parallel questions of policy and equity.

[1] 47 C.F.R. § 1.1206.

Crown Castle is concerned that some parties may interpret the Commission's unwillingness to revisit blanket bans at this time as a relaxation of the current requirements with regard to attachments in the unusable space. To avoid this misinterpretation, the agency should clarify that it is preserving the existing process for denying an attachment request that a utility must provide a detailed, written rationale for denial, and that the concerns cited by the utility must be reasonable and legitimate.

Section 1.1403(b) of the Commission rules requires that a utility denying a request for access to its poles must confirm such denial in writing within 45 days, and that such denial must be "specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards."[2]

In its 2011 Pole Attachment Order, the Commission recognized that the standard in Section 1.1403(b) was "susceptible to abuse" and sought to clarify a utility's obligation when denying an attachment request.[3] Specifically, the FCC stated:

> It is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about a type of attachment or technology, or a generalized citation to section 224. Instead, we find that a utility must explain in writing its precise concerns--and how they relate to lack of capacity, safety, reliability, or engineering purposes--in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue. Furthermore, such concerns must be reasonable in nature in order to be considered nondiscriminatory. Concerns that appear to be mere pretexts rather than legitimate reasons for denying statutory rights to access will be given serious scrutiny by the Commission, including in any complaint proceeding arising out of a denial of access. We believe that this clarification regarding the specificity of denials will encourage communication and cooperation between utilities and wireless attachers, and thereby promote the deployment of and competition for telecommunications and broadband services.[4]

The inclusion of this language has encouraged utilities to work with Crown Castle to make exceptions to blanket rules or standards prohibiting equipment attachments in the unusable space of the pole on a case-by-case basis.

To ensure that the language of the *Draft Order* does not inadvertently result in a departure from existing practice, Crown Castle proposes that the FCC add the following to Paragraph 125 of the *Draft Order*:

> We take this opportunity to reaffirm our comments in the 2011 Pole Attachment Order that: (i) a utility must explain in writing its precise concerns—and how they

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[2] *Id.* § 1.1403(b).

[3] *In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 ¶ 76 (2011).

[4] *Id.*

> relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue; and (ii) such concerns must be reasonable in nature in order to be considered nondiscriminatory. The Commission expects attachers and utilities to work together to find code-compliant solutions that address any concerns raised by a utility.

This clarification should help prevent disputes regarding the effect of the FCC's most recent action and potentially avoid the need for future Commission intervention.

Pre-Existing Violations

Crown Castle welcomes the FCC's clarification that new attachers are not responsible for pre-existing violations but believes the Commission can do more to ensure that existing violations and safety conditions do not serve as a barrier to broadband deployment.

On occasion, utilities have denied Crown Castle access to existing poles that the utility claims are non-compliant with safety standards – and that the utility has therefore classified "no touch" or "red tagged" poles. Such poles may be placed on replacement schedules spanning many years, or are sometimes simply red tagged for pre-existing violations with no concurrent planned replacement or repair date. In these instances, if a new attacher applies to attach after poles have been marked "no touch," the new attacher is told that it will bear responsibility for the full replacement cost of the poles prior to being able to attach its fiber to them. Crown Castle is currently facing just this scenario with a large IOU that covers multiple states. In that case, Crown Castle is facing a bill of approximately $20-40 million for pole replacements in one large small cell project alone. Crown Castle is told that there is no replacement schedule for the underlying poles; it could be many years before the entity is actually required to replace the poles itself. As one might imagine, the addition of a $20-40 million dollar line item to this project makes it unfeasible. The fee unfairly penalizes the new attacher and functions as an obvious barrier to access. Because the IOU has no plan in place for replacing the poles and because they are taking such a conservative view of the NESC loading guidelines, this ban could be in place for over a decade if the IOU doesn't put this plant into its replacement schedule soon.

The *Draft Order* represents a good start toward addressing issues like the one detailed above. Clarifying that "utilities may not deny new attachers access to the pole based on safety concerns from a pre-existing violation" will ensure that a utility cannot use a pre-existing violation as a basis for a *de facto* denial of access.[5] However, the Commission should go one step further and add: "Nor may utilities require new attachers to pay for repairs or pole replacements necessitated by pre-existing safety violations, which would amount to an effective denial based on safety issues."

A related concern is the time that it may take for a utility to make any required repairs or pole replacements. For example, when certain utilities red tag a pole, they do not provide a timeline for when the pole will be replaced, leaving potential attachers in limbo. Thus, while the *Draft Order* provides some relief by declaring that "a utility cannot delay completion of make-ready

[5] *Draft Order* ¶ 113.

while the utility attempts to identify or collect from the party who should pay for correction of the preexisting violation,"[6] it should also clarify that a utility must replace in an expedited timeframe any pole on which it would otherwise deny an attachment request due to safety concerns. Utilities should also be required to provide attachers with a schedule in which the poles will be remedied. Because the *Draft Order* considers make-ready involving pole replacements complex, the appropriate timeframe is thirty (30) days for poles involving only wireline attachments, and sixty (60) days for those involving wireless attachments.

Applicability of Rules to Bargained Solutions

Crown Castle understands and appreciates the Commission's desire to provide flexibility in its rules to allow parties to negotiate agreements that will result in more efficient solutions. At the same time, Crown Castle is concerned that the flexible language in Paragraph 13 of the *Draft Order* may encourage parties to refuse to incorporate the rules into a negotiated agreement and result in more complicated and drawn-out negotiations. To resolve this concern, the Commission should clarify that its rules serve as a floor, and that just as state requirements must not conflict with the new rules, negotiated agreements must incorporate the new rules as a baseline and build upon, rather than replace, them.

Relatedly, the Commission should clarify that a party cannot delay the filing of a "complete application" by seeking to negotiate rates, terms, and conditions that unreasonably deviate from those assured by the rules.[7] Using negotiations to impose lengthy delays prior to the submission of applications to attach is a behavior similar to the *de facto* moratoria that the FCC is seeking to eliminate in the Declaratory Ruling portion of the *Draft Order*. As such, the Commission should clarify that this is an impermissible practice.

"Simple" vs. "Complex" Make-Ready

While the one-touch make-ready framework proposed in the *Draft Order* will greatly expedite deployment of broadband infrastructure, Crown Castle is concerned that the definition of "complex" make-ready may be so broad as to allow the exception to swallow the rule.

The *Draft Order* defines "complex" make-ready as "transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are to be considered complex."[8]

As an initial matter, defining all wireless activity within the communications space as "complex" is an overly conservative approach that will put wireless providers at a competitive disadvantage compared to other communications providers. There is nothing inherent in wireless make-ready

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[6] *Id.*

[7] *See Draft Order* Appx. A (amendment to Sections 1.1412(c)(1), (j)(1)(ii)) & ¶ 28.

[8] *Draft Order* at App'x A (amendment to Section 1.1402(p)) & ¶ 18.

work that leads to the conclusion it is "reasonably likely to cause a service outage or facility damage," so long as the work is confined to the communications space. Any wireless facilities small enough to reside within the comm space are no more likely to cause disruptions than wired facilities. As a result, the Commission should revisit this conclusion, and determine that placement of wireless facilities wholly within the communincations space is not a "complex" operation.

Even if the Commission elects to retain this determination, neither the proposed rule nor the BDAC recommendations on which it is based defines the term "wireless activities." This raises the concern that, notwithstanding the very clear language that "utilities may not require an attacher to obtain its approval for overlashing," some parties may take the position that deploying strand-mounted wireless facilities on existing wires is a "wireless activity" subject to the more time-consuming "complex" make ready procedures.

To resolve this concern, the FCC should either adopt a definition of "wireless activity" that makes clear that it does not apply to strand mounted wireless facilities and/or modify proposed Section 1.1416(a) to read " A utility shall not require prior approval for an existing attacher that overlashes its existing wires (including strand mounted wireless facilities) on a pole."

Timelines When Using Attacher's Surveys

Paragraph 77 of the *Draft Order* sensibly allows a utility to use a new attacher's previously performed survey rather than performing a potentially duplicative survey. However, in addition to the cost savings that come from not duplicating the survey process, the utility will also reduce the time required for its review. Accordingly, the Commission should clarify that in the event a utility elects to use survey results from the attacher's pre-application survey, the 45-day period for survey and engineering would not apply, but would be supplanted by a 15-day review period (same as the period for review under the one-touch make ready process). This will have the effect of further expediting deployment efforts.

Scope of Section 253(a) – Declaratory Ruling

Crown Castle appreciates the Commission's effort in the Declaratory Ruling portion of the *Draft Order* to make clear that both actual and *de facto* moratoria violate Section 253(a). The Agency correctly concludes that because *de facto* moratoria "by their operation, prohibit deployment of telecommunications services and/or telecommunications facilities," they cannot be reconciled with Section 253(a).[9]

Crown Castle is concerned, however, that while the analysis in the Declaratory Ruling is narrowly focused on *de facto* moratoria and does not purport to consider whether other actions by states and localities constitute an "effective prohibition," parties may attempt to read the Declaratory Ruling as suggesting that *de facto* moratoria represent the outside scope of an effective prohibition.[10]

[9] *Id.* ¶ 139.

[10] *See id.* ¶ 140-42.

That would be erroneous. Section 253(a)'s bar on those state and local laws that would have the effect of prohibiting telecommunications service reaches well beyond the *de facto* moratoria that are discussed in the draft Declaratory Ruling. As Crown Castle recently explained, the Commission's precedent on this point is clear: Any law, regulation, or legal requirement that materially inhibits or limits the ability of a competitor or potential competitor to compete in a fair and balanced legal and regulatory environment constitutes an effective prohibition.[11] Unreasonable or discriminatory fees and other requirements can constitute an effective prohibition even if they do not result in an "unreasonably long or indefinite" delay.

To avoid any confusion, the Commission should clarify in the final Declaratory Ruling that the discussion in Paragraphs 140-142 is limited to when a delay constitutes a *de facto* moratorium, and that the Declaratory Ruling does not purport to define the outer limits of what constitutes an effective prohibition under Section 253(a).

In particular, the agency should consider adding the following to the last sentence of Paragraph 130, which would allow the deletion of footnote 471:

> We emphasize that this Declaratory Ruling deals only with the question of whether express and *de facto* moratoria are barred by Section 253. We do not have occasion in this order to determine what other state or local laws, regulations, or legal requirements might rise to the level of an effective prohibition and be covered by the statute.

The Commission should also consider adding a new footnote to Paragraph 141 to underline this point. The Draft Order states:

> Indeed, we view the formulation that Congress used in section 253(a)—"prohibit or have the effect of prohibiting"—as anticipating the distinction we draw today between express and *de facto* moratoria, and recognizing that not all barriers to the provision of service will come expressly labeled as such.

In order to ensure that there is no doubt about the scope of the agency's holding here, it would be helpful to add a footnote to this sentence which reads:

> We note that Congress used this broad language in Section 253(a) to ensure that *all* state or local laws, regulations, or legal requirements that have the effect of prohibiting service are preempted, regardless of what they are called. Not all effective prohibitions under the statute will rise to the level of *de facto* moratoria.

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Crown Castle appreciates the work the Commission has done to date to streamline the deployment of infrastructure to support broadband networks and believes the changes identified above will help fulfill the FCC's vision of removing barriers to rapid broadband deployment.

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[11] *See* Crown Castle Ex Parte Letter, WT Docket No. 17-79, WT Docket No. 16-421 (July 7, 2018), at 12-13.

Respectfully submitted,

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