July 27, 2018

VIA ELECTRONIC FILING

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

RE: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

Dear Ms. Dortch,

The National Association of Telecommunications Officers and Advisors ("NATOA"),[1] writes to express our concerns regarding the FCC's proposed Declaratory Ruling related to local moratoria on telecommunications services and facilities deployment, which the Commission is to consider at its meeting on August 2, 2018. NATOA supports the Commission's objective of encouraging broadband deployment to all Americans, however we object to this ill-defined attempt to bend federal law to accommodate industry desires while ignoring the impact on communities across the country and doing nothing to address the digital divide.

The Declaratory Ruling takes the position that in order to "accelerate broadband deployment," the Commission can and should invoke Section 253(a) of the Telecommunications Act of 1996—a provision expressly limited to Title II telecommunications services providers—to preempt local processes that might delay or "discourage" providers from seeking to deploy.[2] The flaws in this logic are evident.

[1] NATOA's membership includes local government officials and staff members from across the nation whose responsibility it is to develop and administer communications policy and the provision of such services for the nation's local governments.

[2] *See* Proposed Declaratory Ruling at ¶ 140. In addition to the issues raised in this letter, NATOA and others have previously filed in these proceedings objecting to the application of Section 253 to wireless services. *See, e.g.*, Letter from Nancy L. Werner, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79; WC Docket No. 17-84, filed June 21, 2018, p. 2; Letter from Angelina Panettieri, National League of Cities, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, filed July 17, 2018, p. 2; Comments of Smart Communities and Special Districts Coalition, WT Docket No. 17-79 (Jun. 15, 2017), p. 55-58. Comments of Smart Communities and Special Districts Coalition, WC Docket No. 17-84 (Jun. 15, 2017), p. 5-6; Comments of the City and County of San Francisco, WT Docket No. 17-79 (Jun. 15, 2017), p. 23-24.

First, the Commission has declared that broadband services are not telecommunications services. In doing so, it declared that Section 253 "has no relevance here, given our finding that broadband Internet access service is an information service."[3] Yet, just weeks after the RIF Order took effect, the Commission intends to rely on Section 253 for authority to preempt local governments with respect to broadband Internet access services.

The justification for this contradictory interpretation of the Communications Act is unavailing. The proposed Declaratory Ruling opines that "we have authority over infrastructure that can be used for the provision of both telecommunications and other services on a commingled basis. Infrastructure for wireline and wireless telecommunication services frequently is the same infrastructure used for the provision of broadband Internet access service."[4] While the latter may be true, nothing in the proposed Ruling requires that it be proven true in any given challenge brought to the Wireline Competition Bureau or the Wireless Telecommunications Bureau. Having firmly declared that Section 253 does not apply to broadband services, the Commission should require more than an assumption that facilities "can be" and "frequently" are used to provide telecommunications services as the basis for invoking Section 253.

There is a more fundamental problem with this justification. It references the Commission's authority over infrastructure, but Section 253 addresses only prohibition of services. The proposed Declaratory Ruling does not address the very likely scenario—especially given the extensive buildout of communications facilities in many areas targeted for new small wireless facilities—that the applicant will already be providing services in the area where they are seeking to densify their network. How can a delay in reviewing an application be deemed an effective prohibition of services where a provider *is* providing services, and will continue to do so regardless of the decision on the application?

Second, the proposed Ruling does not provide clarity on what constitutes a moratorium. The proposed Ruling defines a moratorium using ambiguous phrases like "an unreasonably long or indefinite amount of time such that providers are discouraged from filing applications" and "the action or inaction has the effect of preventing carriers from deploying certain types of facilities or technologies."[5] This does not "remove uncertainty" as contemplated in the Administrative Procedures Act and FCC rules,[6] nor does it "provide states and localities the opportunity to ensure that their requirements comply with federal law."[7]

To the contrary, the proposed Ruling creates more uncertainty by establishing subjective standards of what constitutes a moratorium. The proposed standards allow a challenge by a provider that feels "discouraged from filing" an application, which is not an objective standard that local governments can use to establish conforming rules. Similarly, it is unclear if it is a *de facto* moratorium to, for example, require a stealth installation on decorative streetlights where the provider may be prevented from "deploying certain types of facilities" because they must use facilities that work in a stealth design.

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[3] *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order ("RIF Order"), at ¶ 204, n. 754.
[4] Proposed Declaratory Ruling at ¶ 157.
[5] *Id*. at ¶ 140.
[6] U.S.C. § 554(e); 47 CFR § 1.2.
[7] Proposed Declaratory Ruling at ¶ 156.

NATOA requests that the Commission not adopt the proposed Declaratory Ruling. In addition to the issues raised above, the proposed Ruling does not articulate a need for the Commission to act. The draft does not cite any instance in which commenters alleging a moratorium have invoked the remedy provided in Section 253(d) or taken action for violation of existing shot clocks. Were moratoria preventing the provision of telecommunications services, one would think there would be a robust record of these actions by allegedly impacted providers. Instead, industry continues to tout the rapid pace of deployment[8] and announce plans for future 5G deployments.[9] It seems clear that local governments and industry are partnering to deploy broadband without the need for federal intervention. Let us continue on that path.

Respectfully submitted,

Nancy Werner
General Counsel
NATOA

[8] *See* Letter from Gerald Lavery Lederer, Smart Communities and Special Districts Coalition, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79; WC Docket No. 17-84, filed July 18, 2018.

[9] *See, e.g.*, http://about.att.com/story/5g_to_launch_in_more_us_cities_in_2018.html.