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Ex Parte Communication

VIA ELECTRONIC SUBMISSION

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

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

Dear Ms. Dortch:

In its recent *Declaratory Ruling*, the Federal Communications Commission (“Commission”) declared that, with rare exceptions, moratoria on the acceptance, processing, or approval of applications or permits for telecommunications services or facilities violate Section 253 of the Communications Act.¹ AT&T urges the Commission to further use its authority to interpret Sections 253 and 332(c)(7) to clarify the types of municipal regulations that “have the effect of prohibiting” the provision of wireless service, primarily as they affect small cell deployments. Unreasonable municipal regulations on small cell placement continue to act as barriers to entry, reduce competition, and materially impede a provider’s ability to deploy wireless services. Commission action is needed now to remove those barriers. Carriers are scaling up their small cell deployments in rights-of-way (“ROW”), including on municipal vertical structures, to add capacity in high demand areas. Those small cell sites will serve as the foundation of initial 5G networks, allowing for quick overlay and activation of 5G equipment as soon it becomes available. But, this foundation is threatened, promising to harm 5G deployment. Many municipalities continue to impose unreasonable barriers that would delay or discourage carriers from upgrading networks with more capacity and from building this 5G infrastructure. As with municipal moratoria, only Commission action will remove these deployment barriers.

¹ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, FCC 18-111, at 73-82 (released August 3).

Unreasonably high municipal fees are a substantial barrier to the provision of service

Non-cost based fees² that many municipalities charge to access the ROW and/or municipally-owned ROW structures are the highest barrier to small cell deployments. The Commission can have the greatest impact by clarifying that the portion of such fees in excess of costs violates Section 253. Competitive demands will force carriers to deploy small cells in the largest cities. But, when those largest cities charge excessive fees to access ROWs and municipal ROW structures, carriers' finite capital dollars are prematurely depleted, leaving less for investment in mid-level cities and smaller communities. Larger municipalities have little incentive to not overcharge, and mid-level cities and smaller municipalities have no ability to avoid this harm.

Unfortunately, many mid-level cities and smaller communities also charge excessive ROW and ROW infrastructure access fees on the faulty premise that they are matching the so-called "market rate" demanded by the large cities. In reality, there is no competitive "market" for ROW access, as municipalities have a monopoly over ROWs and municipally-owned ROW infrastructure; these are monopoly rates. Faced with demands for excessive fees and the need to move forward to meet customer needs, AT&T and other carriers freeze or scale back their deployments while working for a reasonable investment environment and/or reassign their limited resources to communities with reasonable access rates that are more open to broadband deployment. The following examples demonstrate the point:

Lincoln, NE: AT&T has paused its 2018 small cell deployment plans in large part due to the city's demand for an annual recurring fee of \$1,995 per node.

Howard County, Baltimore City, and Montgomery County, MD: AT&T has pushed its 2018 project to deploy small cells in these Maryland jurisdictions to at least 2019 due to multiple excessive fees to deploy small cells, such as follows.

- Howard County demands nonrecurring fees of \$10,000 upon execution of an agreement and \$1,800 per permit and annual recurring fees of \$25,000 for ROW rights and \$1,000 per node.
- Montgomery County reserves the right to charge an access fee of 5% of gross revenues or such other amount set by County law.
- Baltimore City demands annual recurring fees of up to \$5,000 per pole.

Oakland, CA: AT&T is at an impasse after nine months of negotiations with the city for an initial deployment of about 60 nodes due to the city's demand for recurring rate of \$2300 per node.

² Non-cost based fees include, but are not limited to, revenue-based fees (e.g., franchise type fees), monopoly (e.g., so called "market-rate") fees, and cost-plus fees (i.e., fees reflecting charges for overly burdensome or inefficient processes).

Citrus Heights, CA: AT&T's has put its small cell deployment plans on hold due to the city's demand for an annual recurring fee of \$2,000 per node.

Lowell, MA: AT&T has limited its small cell build to only the few most capacity constrained locations due to the city's demand for a nonrecurring fee of \$20,000 and an annual recurring fee of \$6,000.

Escondido, CA: AT&T reduced its deployment plans from 98 nodes to approximately 25 nodes due to the city's continued demand that AT&T waive its rights under any federal or state law that would invalidate the city's annual recurring fee of \$1,650 per node or small cell design or location requirements.

These examples are just the tip of the iceberg and are representative of the fee demands in states without small cell legislation and the decisions that carriers must make in response to those demands. Commission clarification that fees to access ROW and municipal ROW infrastructure must be cost-based to survive scrutiny under Section 253 would remove fees as barriers to deployment and municipalities could no longer use ROW fees to fund activities other than management of the ROW.

Non-fee restrictions can similarly impede broadband deployment.

Non-fee restrictions on small cell deployment also continue to arise. For example, many municipalities demand that carriers needlessly replace or undertake multi-year maintenance responsibility for street light or traffic poles, even if not needed to insure the structural integrity of the pole or to care for the carrier's equipment. Other local governments demand a variety of bartered good or services, such as carriers supplying or reserving dark fiber for municipal use. These so-called in-kind contributions typically require onerous one-off negotiations, substantially complicating and lengthening the siting process, and are rarely valued properly, if at all, for determining what is "fair and reasonable." Moreover, in-kind contributions undermine the Section 253 obligation to make compensation public.

Some municipalities require carriers to paint³ small cell cabinets a particular color when like requirements were not imposed on similar equipment placed in the ROW by electric incumbents, competitive telephone companies, or cable companies. Other cities require that carriers place all fiber underground if it supports a small cell facility, a requirement not imposed on other services

³ Painting, while seemingly mundane, is highly burdensome to maintain non-factory paint schemes over years or decades, including changes to the municipal paint scheme. Often there are technical constraints as well such as manufacture warranty or operating parameters, such as heat dissipation, corrosion resistance, that are inconsistent with changes in color, or finish.

using the ROW. These non-fee restrictions are not only discriminatory, but also impede broadband deployment. For example, one of AT&T's backhaul providers has cancelled multiple fiber installs for AT&T's small cell facilities due to these types of local requirements, causing substantial delay in completing (and the potential for AT&T to cancel) those small cell projects. For carriers deploying nationwide over thousands of different municipalities, the cumulative effect of these operational constraints and administrative burden is a material barrier to provisioning service.

Municipal contractors are bound by Section 253 to the same extent as the municipality.

The Commission should also clarify that municipalities cannot avoid their Section 253 obligations by contracting the administration and/or management of the ROW and municipal ROW infrastructure to a third party. Third-party contractors retained by municipalities to lease or manage municipality-owned ROW infrastructure often argue, with the support of the municipality they represent, that they are not subject to the limits of Sections 253 and 332 (or of state small cell legislation) and thus can charge any fee they choose for access to the ROW and municipal ROW infrastructure. Contractors that only manage, but do not lease, ROWs and municipal ROW infrastructure on behalf of a municipality often charge exorbitant fees to manage the ROW or its municipal infrastructure, which the municipality typically passes through to carrier applicants as part of its "cost." The Commission should clarify that the third-party contractor stands in the shoes of, and has no greater rights or lesser responsibility than, the municipality with which it has contracted. As an agent of the municipality, the third-party contractor's activities are also covered by Section 253.

Macrocell coverage gap concepts are inapposite to small cell deployments.

Other municipalities also refuse to approve or delay approving small cell placements unless the carrier can show a significant gap in coverage, as if this were a macro cell application. Overwhelming, small cells are deployed to overlay *capacity* to an area that already has network coverage. And, to be sure, network congestion can and does adversely affect network performance, preventing customers from using demanding applications. Of course, carriers cannot wait until after the network is congested to begin a multiyear process to deploy small cells, all while network performance continues to degrade and customer impact increases. Typically, carriers forecast where and when capacity will begin to exhaust and seek to augment capacity in that localized area. Blocking small cells, or materially interfering with their deployment, merely because a carrier already provides some level of service in the area will act as a barrier to this process and ultimately to the provision of services. Also, local governments have neither the expertise nor the authority to analyze the technical network issues associated with small cell builds.

Pursuant to Section 1.1206 of the Commission's rules, an electronic copy of this letter is being filed for inclusion in this docket.

Marlene H. Dortch
August 6, 2018
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Sincerely,

A handwritten signature in black ink, appearing to read "Henry G. Hultquist". The signature is fluid and cursive, with a prominent initial "H" and a long, sweeping underline.

Henry G. Hultquist