Davis Wright Tremaine LLP

Suite 800
1919 Pennsylvania Avenue N.W.
Washington, D.C. 20006-3401

T. Scott Thompson
202.973.4208 tel
202.973.4995 fax

scottthompson@dwt.com

August 28, 2017

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

Re: *Ex Parte* Submission, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84

Dear Secretary Dortch:

On August 24, 2017, Scott Thompson of Davis Wright Tremaine LLP, and Monica Gambino and Robert Millar of Crown Castle, met with Dan Kahn, Division Chief; Adam Copeland, Assistant Division Chief; Mike Ray, Attorney-Advisor; and Gail Krutov, Fellow, of the Wireline Competition Bureau's Competition Policy Division. The purpose of the meeting was to discuss Crown Castle's comments filed in the above referenced docket,[1] and its proposals to streamline deployment of wireline broadband infrastructure.

Pole-Attachment Issues

Crown Castle discussed how some pole owners are inhibiting the deployment of broadband infrastructure by adopting "construction standards" that vastly exceed National Electric Safety Code ("NESC") and other industry-wide standards. For example, for decades, it has been common and standard utility industry practice to attach equipment to poles in the "unuseable" space (*i.e.*, below the lowest communications line).[2] Yet, particularly over the past several years, Crown Castle has encountered a growing number of pole owners, whose territories cover many states, who have adopted blanket bans on attaching any equipment in the common space – despite the fact that this is a well-established and long-standing practice.

[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017). *See* Comments of Crown Castle International Corp., WC Docket No. 17-84 (filed June 15, 2017); *See* Reply Comments of Crown Castle International Corp., WC Docket No. 17-84 (filed July 17, 2017).

[2] *In the Matter of Texas Cablevision Company v. Southwestern Electric Power Company*, 1985 FCC LEXIS 3818, ¶6 (1985) ("to the extent this ancillary equipment may occupy the 18-28 feet designated as 'ground clearance,' which by definition is excluded from usable space, it is to be omitted from any measurements"); *Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co.*, 1984 FCC LEXIS 2443, ¶ 23 (1984) ("[T]he space deemed occupied by CATV includes not only the cable itself, but also any other equipment normally required by the presence of CATV.").

Crown Castle also emphasized the problem with excessive clearance requirements. The 2017 version of the NESC adopted a change that now requires a vertical clearance between pole top antennas and power lines of only 6 inches for lines at 8.7kV, 8 inches at 13kV, and ultimately only 22 inches even at 50kV.[3] Yet, several major national investor owned utility now demands a 10 foot clearance, and others require six feet or more. Adopting these standards serves to exclude altogether or otherwise inhibit many attachments. Essentially, pole owners are adopting *de facto* blanket bans under the guise of adopting their own "construction standards." Such requirements also have significant negative ramifications for local government and community reaction to the proposed installations. Therefore, in its comments, Crown Castle requested that the Commission adopt a rule that any "construction standard" imposed by a utility that exceeds the NESC clearance standard by more than 20 percent is presumptively unfair and unreasonable in violation of Section 224 of the Communications Act.[4]

Next, Crown Castle discussed how the Commission can improve broadband deployment through amendments to its timeline rules. Crown Castle discussed how the Commission's current four-stage timeline for wireline and wireless requests to access the "communications space" on utility poles generally promotes efficiency. However, Crown Castle is deeply concerned with a growing number of utilities who require a "pre-application" process before they will accept an application – thus preventing attaching entities from starting the clock on the Commission's four-stage timeline. Crown Castle stated that although the Commission has previously held that the timeframe starts upon submission of a "complete" application, the increasing use of "pre-application" mechanisms delays starting the clock. Crown Castle suggested the Commission amend its pole attachment rules to follow its wireless Shot Clock and Section 6409 rules. Consequently, the timelines should start immediately upon submission of a request to attach – regardless of how characterized by the pole owner.

Crown Castle also reiterated the point from its comments that companies should be allowed to use approved contractors to complete make-ready in the electric space. Under the current rules, if make-ready work in the communications space is not timely completed, Crown Castle has a remedy to use approved contractors to finish the work.[5] But if the make-ready work is in the electric space, Crown Castle does not have the same remedy, or at least that is the position advanced by pole owners. This is a significant gap in the Commission's rules that leaves Crown Castle without a meaningful remedy when the electric utility fails to perform make-ready work in a timely fashion, particularly with regardsto pole-top antenna installations.

---

[3] Institute of Electrical and Electronics Engineers, Inc., Nat'l Electric Safety Code, Rule 235I, Table 235-6 Ln. 1.c. (2017 Edition).

[4] 47 U.S.C. § 224(b)(1) (requiring terms and conditions for pole attachment to be "just and reasonable").

[5] *2011 Pole Attachment Order*, ¶¶ 49-61 (stating that "if a utility does not meet the deadline to complete a survey or make-ready established in the timeline, an attacher may hire contractors to complete the work in the communications space"); *See also* 47 CFR § 1.1420.

Crown Castle suggested the Commission modify its rules to allow attaching parties to use utility-approved contractors for all aspects of make-ready work, not just communications space make-ready work. This point was also recently supported by the American Cable Association in its *ex parte* notice filed on August 3, 2017.[6]

Crown Castle also discussed the practice by electric utilities to either refuse, or fail, to timely complete electric power activation of attachments, which impedes the make-ready timeline. Crown Castle's equipment requires electricity to function, and because of its location on the poles, power connections – sometimes including power line extensions and meters or other methods to monitor power consumption - must be installed.[7] If make-ready, and ultimately a guaranteed right to use poles under Section 224(f), are to be meaningful, at the end of the process, the attaching entity must have everything done at the pole that is necessary for it to provide service – including electricity. Therefore, Crown Castle urged the Commission to recognize electric power activation of all attachments as part of the make-ready work that must be completed within the Commission's defined timeframe.

Rights-of-Way Issues

Crown Castle discussed how moratoria are a fundamental barrier to deploying broadband infrastructure in the public rights-of-way, and how the Commission should adopt a rule explicitly preventing such action. Crown Castle described how in its deployment of broadband infrastructure, it has often encountered both *de facto* and explicit moratoria imposed by municipalities. For example, in the case of fiber and distributed antenna system or small cell deployment, Crown Castle described how it has often been told that the municipality will not process any applications or permits related to the use of public rights-of-way until the municipality rewrites its ordinance. Therefore, in order to prevent the use of moratoria by municipalities, Crown Castle urged the Commission to adopt a rule outlawing moratoria and, at a minimum, codifying its interpretation of Section 253(a) in *California Payphone*: a local requirement prohibits the provision of telecommunications service in violation of Section 253(a) if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[8]

---

[6] Letter from Thomas Cohen, Counsel to American Cable Association, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84 at 4-5 (filed Aug. 3, 2017).

[7] Crown Castle has had to undertake extraordinary measures to bring power to its attachments in the past. Bringing power from a source of electricity to the poles is often extremely time consuming and resource intensive. For example, Crown Castle has spent approximately $1 million bringing power to a single pole in the past. These measures could be remedied if utilities begin to monitor Crown Castles' power consumption through a use of a small meter on or near the pole.

[8] *California Payphone*, 12 FCC Rcd. at 14206 ¶ 31; *see also Texas PUC Order*, 13 FCC Rcd. at 3470, ¶ 22.

Next, Crown Castle discussed how it has encountered difficulty obtaining access to municipally-owned poles, as a threshold matter and also on reasonable terms and conditions, which has delayed its deployment of broadband infrastructure. Crown Castle reiterated the problem where Crown Castle is seeking to use local government-owned poles because there are no utility-owned poles in the area and the local government will not allow Crown Castle to install its own pole. In such situations, access to the public rights of way is only possible through access to the local government's poles. In effect, access to the municipal poles is access to the public rights-of-way. If Crown Castle is denied access to those poles, or denied access on reasonable rates, terms, and conditions, it is effectively prohibited from providing telecommunications service in violation of Section 253.

Furthermore, local governments' focus on whether poles or even rights-of-way are "proprietary" is misplaced. The relevant legal issue is that they are exercising their governmental authority. Contrary to the local government's arguments, courts have not held that Section 253 does not apply to "proprietary" interests. Section 253(a) preempts any local government "regulation, or any other . . . legal requirement. . . ."[9] Thus, whether the city's actions are "proprietary" or not is irrelevant under Section 253. The Commission recently confirmed this point in the recent *Sandwich Isles Order*. In that matter, the local government argued that Section 253(a) does not apply where it would affect the State's ability to "deal[] with its real estate interests . . . as it sees fit."[10] Relying on the *Minnesota Order*, the Commission rejected that argument, emphasizing that "the relevant inquiry in determining whether Section 253(a) applies is the legal requirement's 'effect on the provision of telecommunications service,' *not how the requirement could be characterized or 'the purported subject matter' of the requirement*."[11] Consequently, Section 253 regulates access to municipally-owned poles, and the Crown Castles urges the Commission to adopt a rule stipulating as such.

Crown Castle described by example how cities are using their control over the public rights-of-way to force providers to use only city-owned poles, and then enriching itself with excessive rental demands. Crown Castle noted how, in its comments, the City of Chicago argued that nothing in Section 253 limits the ability of local governments to recover the "value" for public rights-of-way when acting in a proprietary capacity.[12] However, Crown Castle argued that such a proposition is not supported by the law, and insisted that the Commission put to rest the assertion that local governments can charge "fair market value" for use of the public rights-of-way.[13] The fundamental flaw in municipal arguments for "market based" compensation for

---

[9] 47 U.S.C. § 253(a).

[10] *In Re Connect America Fund, Sandwich Isles Communications, Inc.*, FCC 17-85 at ¶ 14 (rel. July 3, 2017) (*Sandwich Isles Order*) (applying Section 253 to state agency that controls property).

[11] *Id.* (emphasis added).

[12] American Public Power Association Comments at 12-14; City of Chicago Comments at 17.

[13] Smart Communities Comments at 20.

use of the rights-of-way and existing utility or light poles is that there is simply no such market. Congress enacted Section 253 to empower the Commission to "to remove any state or local legal mandate that "prohibits or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service."[14] Even if local communities have a legitimate role in seeking to encourage broadband deployment, Section 253 makes clear that they are not allowed to manipulate access to the right-of-way to accomplish that goal. Therefore, Crown Castle requested that the Commission adopt a rule, or at least a declaratory ruling, holding that access to all local government controlled infrastructure – be it poles, conduits, or rights-of-way – is governed by Section 253 of the Act, and that local governments cannot deny access to their "property" or impose unreasonable or discriminatory fees for its use.

Lastly, Crown Castle emphasized that the Commission should declare that Section 253 prohibits local governments from treating telecommunications providers differently based on the technologies or services that they deploy.[15] In Section 253(c), Congress only reserved limited authority to local governments to "manage the public rights-of-way . . . on a competitively neutral and nondiscriminatory basis. . . ."[16] Crown Castle explained that Section 253(c) is a savings clause, reserving only whatever authority local government may have under their organic state authority, and that his statutory structure has been recognized to provide a broad preemption of local requirements and a narrow reservation of authority to municipalities.[17] Crown Castle explained that such reservation does not permit localities to manage the rights-of-way for their own benefit, and that the Commission should declare that Section 253(c) permits municipalities to recoup only their actual costs reasonable related to managing the use of their poles or conduits.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter if being filed via ECFS.

Respectfully submitted,

_/s/ T. Scott Thompson_____
T. Scott Thompson

[14] *Texas PUC Order*, ¶ 22 (emphasis added).

[15] Smart Communities et al. Comments at 22-25.

[16] 47 U.S.C. § 253(c).

[17] *See, e.g.*, *TCI Cablevision*, ¶¶ 103-109; 8 F. Supp. 2d 582 (N.D. Tex. 1998) ("*Dallas I*"). The court subsequently granted a second injunction in favor of a wireless telecommunications provider, 52 F. Supp. 2d 756 (N.D. Tex. 1998) ("*Dallas II*"), and finally granted summary judgment and a permanent injunction against Dallas' imposition of various service requirements and fees. 52 F. Supp. 2d 763 (N.D. Tex. 1999) ("*Dallas III*"). The Fifth Circuit vacated the district court's decision on the grounds that it was made moot by a subsequent state statute which required the city to repeal the ordinance. *AT&T Commc'ns of Southwest, Inc. v. City of Dallas*, 243 F.3d 928 (5th Cir. 2001). The district court's widely followed reasoning, however, remains sound and applicable.

Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW, Suite 800
Washington, DC 20006 – 3401

Counsel to Crown Castle

cc: Dan Kahn
Adam Copeland
Mike Ray
Gail Krutov