September 4, 2018

VIA ELECTRONIC FILING

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

Re: **Ex Parte Presentation,** *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; *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Siting Policies*, WT Docket No. 16-421

Dear Ms. Dortch:

CTIA commends the Commission for its recent efforts to identify and address barriers to wireless deployment and writes here to ask that the Commission rule that state and local aesthetic requirements must be reasonable, objective, published, and nondiscriminatory to pass muster under the Communications Act. Last month, the Commission clarified that moratoria that block or effectively block wireless deployment are prohibited,[1] rightly finding that both express and *de facto* moratoria have the effect of prohibiting wireless service and thus violate Section 253(a) of the Communications Act. CTIA urges the Commission to take similar action prohibiting a different regulatory barrier: unbounded aesthetic requirements. Such requirements can have the same effect of prohibiting service by imposing unreasonably long delays, injecting uncertainty into providers' deployment plans, and driving higher compliance costs.[2]

---

[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79, ¶¶ 140-18 (rel. Aug. 3, 2018) ("*Third R&O and Declaratory Ruling*").

[2] *See Third R&O and Declaratory Ruling* ¶ 150 (prohibiting *de facto* moratorium because they involve delays that continue for unreasonably long or indefinite amounts of time such that providers are discouraged from filing

Many localities have adopted aesthetic requirements as part of their oversight of wireless deployment. It typically is appropriate for aesthetic reviews to be undertaken at the local level, since many communities have unique needs or characteristics. And where those regulations are objective, published, nondiscriminatory and reasonable, providers are able to comply and deployment can proceed. However, CTIA and other parties have documented examples of vague, subjective, and/or discriminatory requirements.[3] These requirements impede and frustrate providers that seek to construct new facilities, thus undermining the national priority to advance broadband deployment that the Commission is working to achieve.

Almost all of the states that recently adopted legislation to promote broadband recognized this problem, and thus prohibited subjective or discriminatory aesthetic requirements. These state laws underscore that there can be no justification for delaying or blocking needed new facilities based on unreasonable, subjective, or unpublished requirements. Nor can there be any justification for compelling a wireless provider to comply with such restrictions when other providers were not subject to them. A Commission ruling would be consistent with those states' policies by setting minimal standards for aesthetic requirements, but would not disturb localities' authority to adopt requirements that meet these standards. In short, the record and the actions of numerous states supply ample grounds for the Commission to declare that Section 253(a) prohibits wireless siting aesthetic requirements that are subjective, unpublished, discriminatory, and/or unreasonable.

Subjective Requirements Cause Uncertainty and Delay. Subjective aesthetic requirements fail to inform wireless providers of the appearance or design criteria with which they must comply, deterring deployment because of the uncertainty and delay inherent in how those

---

applications, or have the effect of preventing carriers from deploying certain types of facilities or technologies); ¶ 151 (finding that "if applicants cannot reasonably foresee when approval will be granted because of indefinite or unreasonable delay," that constitutes a *de facto* moratoria that violates Section 253(a)); and n. 556 (noting that other types of barriers that may prohibit or have the effect of prohibiting service, even where those barriers do not rise to the level of moratoria, nonetheless violate Section 253(a)).

[3] *See* Ex Parte Letter from Kara Romagnino Graves, CTIA, to Marlene H. Dortch, FCC, WT Docket Nos. 17-79 and 16-421, WC Docket No. 17-84 (filed June 27, 2018).

subjective standards will be applied. As CTIA and others have recognized, localities have an interest in overseeing the visual impact of new infrastructure along rights-of-way, and ensuring that it does not create public safety hazards by interfering with pedestrians or traffic. Nevertheless, the record demonstrates that many localities go far beyond advancing that interest. Instead, they impose unjustified, ad hoc, "we know it when we see it" aesthetic restrictions that effectively prohibit new service or fail to give applicants notice of what is required.[4]

Unpublished Requirements Likewise Impede Deployment. Requirements that are unpublished or otherwise not publicly disclosed erect the same barrier to deployment because, without transparency, providers cannot ascertain how their facilities must be designed to secure approval. Once providers can finally determine what the locality's requirements are, they may need to redesign the site, procure alternative equipment, or abandon the site altogether. Requiring all aesthetic requirements to be published and thus publicly available promotes the value of transparency, without imposing a burden on localities.

Discriminatory Requirements Impose Additional Burdens, Particularly on New Entrants. Discriminatory aesthetic requirements should be prohibited in their own right, even if they are objective and/or published, because they impose additional burdens, costs, and delays on new entrants that previous rights-of-way occupants did not face, making it comparatively less attractive or more expensive to build facilities. Congress recognized that such discriminatory regulations impede service in violation of Section 253(a), and thus determined that regulations are lawful under Section 253(c) (an exception to Section 253(a) that allows certain conduct that involves "legitimate rights-of-way management")[5] only if they are "competitively neutral and non-

---

[4] *See* Comments of CTIA, WT Docket No. 17-79, WC Docket No. 17-84, at 28-29 (filed June 15, 2017); Comments of AT&T, WT Docket No. 16-421, at 1516 (filed Mar. 8, 2017) (describing a California locality that delayed a project to install 90 small cell nodes on municipal light poles for one year waiting for design approval and identifying other subjective aesthetics ordinances); Comments of T-Mobile USA, Inc., WT Docket No. 17-79, WC Docket No. 17-84, at 39-40 (filed June 15, 2017) ("T-Mobile Comments"); Comments of Crown Castle, WT Docket No. 17-79, at 11, 14 (filed June 15, 2017); Comments of Extenet Systems, WT Docket No. 17-79, at 17-19 (filed June 15, 2017) ("Extenet Comments").

[5] *See Third R&O and Declaratory Ruling* ¶ 148.

discriminatory." As CTIA previously noted, aesthetic requirements are discriminatory where localities have deployed their own equipment on poles in the rights-of-way—such as electric transformers, sensors, traffic cameras, solar panels, and Wi-Fi antennas that can be at least as visually obtrusive as small cell antennas—but did not subject those facilities to the same restrictions placed on wireless providers. Localities also discriminate against wireless providers by imposing aesthetic requirements on wireless equipment that they do not apply to other right-of-way occupants such as electric utilities, wireline carriers, and cable companies.[6] San Francisco, for example, singled out wireless facilities, but not similarly-sized landline or utility facilities, for discretionary pre-deployment aesthetic review.[7] Wireless providers continue to identify these discriminatory requirements,[8] indicating that Commission action is necessary and warranted.

Any Aesthetic Requirements Imposed Must Be Reasonable. Unreasonable aesthetic requirements are those that are not based on any relationship to the locality's safety, traffic, or other publicly stated policies for wireless facilities. If a locality wants to impose aesthetic requirements, it should be able to explain how those requirements promote the locality's objectives and policies.

Recently Enacted State Laws Recognize That Minimal Guardrails Around Aesthetic Requirements Can Be Imposed Without Impeding Local Opportunities For Review. A ruling by the Commission prohibiting subjective, unpublished, discriminatory, and/or unreasonable aesthetic requirements would be consistent with recent state legislation and establish a consistent standard against which such requirements would be judged. In the past two years, twenty states have

---

[6] *See, e.g.*, Extenet Comments at 17 ("49 percent of surveyed communities subjected Extenet to processes and standards that differed from those required of wireline providers and utilities in public ROWs, even though Extenet's attachments are similarly-sized and impose no greater ROW management burden than their wireless or utility counterparts"); T-Mobile Comments at 7; Comments of the Wireless Infrastructure Association, WT Docket No. 17-79, WC Docket No. 17-84, at 59 (filed June 15, 2017).

[7] T-Mobile Comments at 40 (citing S.F. Ord. No. 12-11 (as amended by S.F. Ord. No. 18-15)).

[8] *See, e.g.*, Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 3 (filed Aug. 6, 2018) (discussing painting requirements that were imposed on wireless providers even though "like requirements were not imposed on similar equipment placed in the ROW by electric incumbents, competitive telephone companies, or cable companies").

adopted legislation that is designed to promote wireless deployment. Many of these laws declare that their purpose is to lower regulatory barriers in order to drive faster, more robust, and more expansive deployment that will benefit their citizens.[9]

Most of these recent state laws (17 of the 20 enacted) identify aesthetic requirements as one such barrier and they take a balanced approach to addressing the issue. Importantly, these state provisions do not attempt to delineate each type of requirement that is allowed or, alternatively, is barred. But nor do they leave such requirements to each locality's unbridled discretion. Instead, they adopt an overarching framework that localities must comply with: Aesthetic or design requirements must, for example, be "objective,"[10] "published" or "written,"[11] "reasonable,"[12] and/or "nondiscriminatory."[13] The attached chart identifies the many state laws that cabin local aesthetic requirements in these ways.

The Commission should adopt the same balanced approach that these states have enacted. It should prohibit aesthetic requirements that are subjective, discriminatory, unpublished, and/or unreasonable, while preserving localities' rights to adopt requirements that comply with these principles. No locality should object to ensuring that its regulations meet these general standards. This approach provides flexibility to a locality to adopt appropriate aesthetic requirements, but places reasonable constraints on those requirements that will advance the national policy objectives that the Commission has identified: To foster faster, more robust, and expansive deployment that responds to the public's growing reliance on wireless services.

---

[9] For example, the North Carolina statute declares that wireless facilities "are instrumental to the provision of emergency services and to increasing access to advanced technology and information for the citizens of North Carolina," and thus providers "must have access to the public rights-of-way and the ability to attach to pole and structures in the public rights of way to densify their networks and provide next generation services." H.B. 310 § 1 (2017); Session Law 2017-159.

[10] *See, e.g.*, Arizona, Delaware, Missouri, North Carolina, Ohio, Oklahoma, and Rhode Island.

[11] *See, e.g.*, Hawaii, Illinois, Ohio, Oklahoma, and Tennessee.

[12] *See, e.g.*, Arizona, Delaware, Hawaii, Illinois, Indiana, Kansas, Minnesota, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, and Utah.

[13] *See, e.g.*, Hawaii, Illinois, Kansas, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, Tennessee, and Utah.

* * *

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

Sincerely,

/s/ Kara R. Graves

Kara R. Graves
Director, Regulatory Affairs

Attachment

Aesthetic Provisions in Recently Enacted State Small Cell Legislation	
Arizona A.R.S. § 9-592(K)(2)(b)	New or modified poles can be required to comply with "objective design standards and reasonable stealth and concealment requirements."
Delaware 17 Del. C. § 1609(b)(5)(c)	An application for a wireless facility, utility pole, and wireless support structure shall be approved unless it fails to comply with "objective, reasonable design standards and stealth and concealment requirements."
Hawaii H.B. 2651, 29th Leg., Reg. Sess. §§ 5(b) & (e) (Haw. 2018)	Feasible design and collocation standards, if adopted, must "be made available in published guidelines and apply ninety calendar days after their publication." In a historic district, "reasonable, technically feasible, non-discriminatory, and technologically neutral design or concealment measures" may be required. Such measures cannot "have the effect of prohibiting any provider's technology."
Illinois 50 ILCS §§ 835/15(d)(6)(E), (H), & (I)	Providers "shall comply with reasonable and nondiscriminatory requirements that are … adopted by an authority regarding the location, size, surface area and height of small wireless facilities." Providers must comply with "written design standards that are generally applicable for decorative utility poles, or reasonable stealth, concealment, and aesthetic requirements that are identified by the authority in an ordinance, written policy adopted by the governing board of the authority, a comprehensive plan, or other written design plan that applies to other occupiers of the rights-of-way, including on a historic district or in a historic district." Facilities located in historic districts must comply with "reasonable technical feasible and non-discriminatory design or concealment measures;" any such measures "may not have the effect of prohibiting any provider's technology."

Aesthetic Provisions in Recently Enacted State Small Cell Legislation	
Indiana IC § 8-1-32.3-26(b)(2)	A permit authority may not impose "unreasonable requirements regarding the maintenance or appearance of the small cell facility and associated supporting structure, including requirements concerning the types of materials to be used or the screening or landscaping of the location."
Iowa Iowa Code § 8C.7A(3)(b)(3)	An authority may "require that a small wireless facility reasonably match the aesthetics of an existing utility pole or wireless support structure that incorporates decorative elements."
Kansas K.S.A. § 1702(d)	"A city may exercise its home rule powers in its administration and regulation related to the management of the public right-of-way provided that any such exercise must be competitively neutral and may not be unreasonable or discriminatory."
Minnesota Minn. Stat. § 237.163, Subd. 3c(a)(2)	An authority may condition approval of a small wireless facility permit on "reasonable accommodations for decorative wireless support structures or signs."
Missouri R.S. Mo. §§ 67.5112(7); 67.5113(3)(5)	An authority may "require reasonable, technically feasible, nondiscriminatory, and technologically neutral design or concealment measures in a historic district" but "such design or concealment measures shall not have the effect of prohibiting any provider's technology." When considering an application, an authority may require a small wireless facility "to comply with reasonable, objective, and cost-effective concealment or safety requirements adopted by the authority."
New Mexico NMSA § 63-9I-3(H)	An authority may require for small wireless facilities located in design districts or historic districts "reasonable, technical feasible, nondiscriminatory and technically neutral design or concealment measures and reasonable measures for conforming to design aesthetics or design districts or historic districts, as long as the measures do not have the effect of prohibiting a wireless provider's technology."

Aesthetic Provisions in Recently Enacted State Small Cell Legislation	
North Carolina N.C. Gen. Stat. § 160A-400-54(d)(5)	A city may deny a small wireless facility collocation application if it does not meet "objective design standards for decorative utility poles, city utility poles, or reasonable nondiscriminatory stealth and concealment requirements, including screening or landscaping for ground-mounted equipment."
Ohio O.R.C. § 4939.0314(C)	A locality may "adopt reasonable written design guidelines with objective, technologically feasible criteria that reasonably match the aesthetics and character of the immediate area," but guidelines "shall be applied in a nondiscriminatory manner."
Oklahoma 11 OK Stat. § 36.503(G)	"An authority may adopt written guidelines establishing reasonable and objective stealth or concealment criteria…. Such guidelines may be adopted only if they apply on a nondiscriminatory basis to all other occupants of the right of way, including the authority."
Rhode Island R.I. Gen. Laws §§ 39-32-3(6) & (7)	In historic districts, collocations may be required to "meet reasonable design, context, color and stealth and concealment requirements and make reasonable accommodation for location within the district." In other areas, a permit may require a collocation "on an authority pole that is a decorative pole to meet objective design standards, including that a collocation meet reasonable location, context, color and stealth and concealment requirements" that are "adopted by ordinance, regulation or rule."

Aesthetic Provisions in Recently Enacted State Small Cell Legislation	
Tennessee Tenn. Code Ann. §§ 13-24-402(1); 13-24-408(a)(1), (c)(1)(A); 13-23-411(2)	An authority may "require reasonable, nondiscriminatory, and technology neutral design or concealment measures in a historic district" if such measures "do not have the effect of prohibiting any applicant's technology or substantially reducing the functionality of the small wireless facility, and the local authority permits alternative design or concealment measures." An authority may require applicants to "follow an aesthetic plan … for a defined area, neighborhood, or zone by complying with generally applicable and nondiscriminatory standards on all entities" as long as all deployment of small wireless facilities is not precluded. Aesthetic plans must be publicly available written resolutions and nondiscriminatory.
Texas Texas Local Government Code § 284.105(a)	In a historic district or design district with decorative poles, an authority may require "reasonable design or concealment measures for the new network nodes or new node support poles."
Utah Utah Code Ann. § 54-21-208(1)	An authority may require a "reasonable, technically feasible, nondiscriminatory, or technologically neutral design or concealment measure in an historic district" as long as it does not have the effect of "prohibiting a provider's technology."