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September 18, 2018

Federal Communications Commission
Attn: Marlene H. Dortch, Secretary
445 12th Street SW
Washington, D.C. 20554

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

Dear Ms. Dortch,

This letter is filed on behalf of the Colorado Communications and Utility Alliance ("CCUA"), the Colorado Chapter of the National Association for Telecommunications Officers and Advisors. CCUA has previously filed comments and reply comments in these dockets, as well as in *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421. Information on CCUA and its membership are included in those previous filings, and we restate our positions as set forth in those prior filings here.

CCUA has concerns with the Commission's draft Declaratory Ruling and Report and Order ("Draft Ruling and Order"). While CCUA shares the Commission's goal of promoting efficient and timely deployment of broadband networks throughout all parts of the country, we are concerned that the Draft Ruling and Order fails to preserve local governments' responsibility to protect the public health, safety, and welfare of its residents and businesses, that it fails to respect the substantial work and cost that has been undertaken to comply with state laws addressing the siting of small wireless facilities and that it will have the unintended effect of delaying deployment, due to the interpretive disputes and inevitable litigation that will result from the Draft Ruling and Order's lack of clarity in certain areas.

In Paragraph 6 of the Draft Ruling and Order, the Commission states "… we reach a decision today that does not preempt nearly any of the provisions passed in recent state-level small cell bills." Colorado passed its state-level small cell bill in 2015[1]. Problematically, the Draft Ruling and Order, while claiming not to preempt "nearly any" of state law provisions, does not state with any clarity which provision of state-level small cell bills are preempted.

Colorado state law changed land use law in Colorado, by granting wireless providers and infrastructure companies a *use-by-right* to locate small wireless facilities *in any zoning district* within any local community. While the use-by-right was granted by state law, it is subject to

[1] House Bill 17-1193, https://leg.colorado.gov/sites/default/files/documents/2017A/bills/2017a_1193_signed.pdf

local zoning requirements. The Colorado law describes total antenna size for small cells at 3 cubic feet, with associated equipment a maximum of 17 cubic feet. The Draft Ruling and Order has a total antenna size for small wireless facilities at 3 cubic feet, but provides for associated equipment not to exceed 28 cubic feet. The Colorado law has a 90 day shot clock for considering small cell requests, while the draft report and order has a 60 and 90 day shot clock, depending upon the type of deployment. As noted above, while the Colorado law grants the right to locate small cells in the rights-of-way in any zoning district, the actual structure must comply with local zoning requirements. This means that a residential zoning district with a 35 foot height limitation would limit small cell facilities to that height limitation, yet the Draft Ruling and Order considers anything up to 50 feet in height a permissible small wireless facility. Compliance with the Colorado statute could lead to a determination that the preservation of local zoning limits under 50 feet in height are considered by the Commission to have the effect of prohibiting service. It is not clear, and an argument can certainly be made, that rather than failing to preempt "nearly any" of the provisions of Colorado's state-level small cell bill, the Draft Ruling and Order purports to preempt almost all of it.

The preservation of the local zoning authority in Colorado's small cell bill is important because it allows communities to address local public health, safety, and welfare issues. For example, the City of Aurora is Colorado's third largest city and home to Buckley Air Force Base. The United States Air Force has concerns about height limitations on structures within large portions of Aurora's municipal limits that can impact operations at the Base. If a city like Aurora is stripped of its zoning authority to the extent that it cannot prohibit a pole in the right-of-way less than 50 feet tall in order to address concerns regarding operations at Buckley, the Commission will be essentially prioritizing its view of the needs of wireless providers over the concerns of the United States Air Force.

Colorado state law also requires that local government fees be tied to costs. *See*, *Bloom v. City of Fort Collins*, 784 P.2d 304 (1989). For years, Colorado local governments have evaluated actual costs incurred as a result of various permitted activities, and demonstrated that fees are a fair reflection of costs incurred. Often times, one significant factor in determining a fee is the value of the employee's time administering the permit. A one size fits all fee like those described in the Draft Ruling and Order ignores the fact that personnel costs can vary greatly in different parts of the country. A CCUA member that has done an analysis and determined that its fee for reviewing and acting on a specific site request for a wireless facility in the right-of-way is $522, would be presumed by Commission dictate to be prohibiting service – despite the fact that the fee has been calculated in accordance with state law and limited to actual cost recovery.

Further, while the Commission's regulatory flexibility analysis contained in Exhibit C to the Draft Ruling and Order focused on the shot clocks, and to the extent that any part of the Draft Ruling and Order is deemed to preempt state-level small cell bills, it failed to consider the impact on small jurisdictions in states that have adopted these bills. In Colorado, local governments have spent of thousands of hours and dollars amending local codes and changing internal processes to come into compliance with Colorado's small cell bill. Many have begun entering into license or permit agreements to facilitate the siting of small wireless facilities. More than

half of CCUA's members fit within the category of small jurisdictions. The Commission's regulatory flexibility analysis does absolutely nothing to address the impact on these small jurisdictions of having to re-write their codes and their internal processes for the second time in two years, and rewrite almost new license and permit agreements, if the Draft Ruling and Order preempts Colorado's statutory requirements.

There is a simple way to address these problems and to eliminate the Commission's failure to conduct a regulatory flexibility analysis addressing these issues. The Commission should state clearly and unequivocally that *nothing* in the Draft Ruling and Order is intended to preempt *any* provisions of state level small cell bills.

CCUA also has concerns that in many cases the new, shorter shot clock will have the unintended consequence of delaying deployment *and* increasing costs. The City and County of Denver points out that often times an application will appear to be complete in that each document listed on the application form has been submitted. However, once staff begins a substantive review of the documents submitted, it is not uncommon to find (particularly with respect to wireless companies that contract out their application responsibilities to consulting firms) that the documents were not prepared properly and/or do not comply with relevant regulations that would apply to a given site. In this situation, the City has been able to work with applicants to update documentation through resubmittals, and complete a second substantive review process in compliance with Colorado's statutory shot clock. With a shorter shot clock, these applications which appear complete on their face, but subsequently are found to be deficient in one or more respects, will not have sufficient time to submit new drawings and undertake new reviews of resubmittals. In order to comply with the Commission's shorter shot clock, there will be more denials of applications, resulting in the need to file new applications, together with new application fees.

Finally, CCUA is aware that a number of its local government partners including the National Association for Telecommunications Officers and Advisors, the National League of Cities, and many other individual municipalities and counties are submitting their concerns to the Commission with the Draft Ruling and Order, and CCUA supports the requests for the Commission to address those concerns as well before final action is taken.

On behalf of the CCUA, we appreciate the Commission's careful consideration of these concerns.

Very truly yours,
KISSINGER & FELLMAN, P.C.

Kenneth S. Fellman

cc: CCUA Board of Directors