

September 18, 2018

Ex Parte Communication

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

RE: Ex Parte Submission – Docket Nos. WT-17-79 and WC-17-84 – Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

Dear Ms. Dortch:

As submitted on August 2, 2018, the City of San José (City) continues to act in good faith on the belief that working together with broadband infrastructure providers is the best way to deploy high quality service to residents, bridge the digital divide, and balance the interests and obligations of the municipality and its citizens with those of the broadband providers seeking access to public assets for their private investments.

The City of San José shares the Federal Communications Commission's (FCC) acknowledgement that we are in a watershed moment with the exciting deployment of 5G technology. The City of San José has been a leader in streamlining processes, hiring appropriate staff, and collaborating with wireless providers through equitable agreements carefully negotiated and agreed upon by both the City and broadband providers to enable 5G deployment funded through reasonable, market-based costs.

However, we fundamentally disagree with the FCC declaratory ruling, third report and order for Docket No. WT 17-79 and Docket No. WC 17-. We disagree with the premise that the FCC can interpret the reservation of powers to local governments in Section 253(c) so as to expand the prohibitory effects the FCC is authorized to regulate under Section 253(a). In this ex parte letter, the City of San José argues:

- **Honor Existing Agreements**
- **Fee Caps Constitute Public Subsidy for Private Investment**
- **Shot Clocks Require Commensurate Funding and Symmetrical Responsiveness**
- **Limit Cubic Volume to 28 Cubic Feet and Four Devices for Design Standards**

The declaratory ruling would preempt existing agreements and negotiated reasonable fee structures and unfairly place the burden on local governments to justify departure from pre-determined fee caps. Fee caps subsidize providers to access tax-payer-financed infrastructure prevent tax payers from accruing the benefits of a free market-based fee for the permitting, deployment, and maintenance of streetlights. The FCC order would establish shot clocks that, without necessary funding, would impose significant implementation challenges for local governments. This order will negatively impact under-

resourced local governments, leaving them unable to fully recover the cost of providing high-quality, safe service.

In the name of accelerating small cell deployment, ultimately, the FCC order may have the unintended consequence of *decelerating* deployment across the country as existing partnerships with broadband providers are derailed and the order is challenged in court. The City of San José submits this ex parte letter to encourage true partnership so the United States is on the right path to win the 5G deployment race.¹

Honor Existing Agreements

The express ability of parties to freely negotiate and honor the terms of existing arms-length agreements is fundamental to a fair legal system providing a predictable, efficient, and mature marketplace. The City of San José has successfully reached freely negotiated small cell deployment agreements with AT&T, Verizon, and Mobilitie.

These successful agreements are a balance of maximizing mutual interests toward a shared goal: accelerating broadband deployment in the City of San José. In good faith, these agreements commit the City to 30- and 60-day permit timelines, outperforming the FCC's shot clock in most cases. That is possible because the agreements provide for required funding through permit and usage fees, thereby allowing investment in process improvements, staffing, and technology. The City of San José is working with carriers on a non-discriminatory basis as partners in reaching our 5G future. The fee structure also incents large-scale deployments by reducing the usage fee for a commitment to install a greater number of small cell nodes, thereby creating a more robust network and competitive marketplace for San José residents because a clear public benefit of a larger network is provided to obtain the lower usage fee. Similarly, mobile carriers recognize the role of the permit process to protect public safety by ensuring the small cells are verified to comply with building, electrical, and safety codes while integrating with the built environment's design.

Under the rubric of preempting pre-existing agreements because the mutually agreed upon fees are interpreted after the fact to "prohibit or have the effect of prohibiting the provision of service," the FCC uses a novel interpretation of Section 253(a) and Section 332(c)(7)(B). But invalidating existing agreements that include freely negotiated, non-discriminatory fees threatens local governments' ability to enter into agreements with willing parties in good faith. We urge the FCC to reconsider the preemptory interpretation in order to protect this fundamental legal tenet of conducting business across all levels of government and grandfather existing agreements

The agreements are rooted in a market reality that should be honored because of choice carriers have for how they would like to work with property owners to build their networks. 5G is not limited to publicly-owned vertical infrastructure as the only path for success because deployment options are readily available to install nodes on private property, as addressed in the Spectrum Act. This erodes the claim that localities are "prohibiting the provision of service" in how they manage their infrastructure in the public right of way. Carriers have options: small cell nodes can be collocated on rooftops, building surface mounts, and poles on private property to meet the network needs of carriers just as easily as they can be mounted on publicly-owned streetlights and other vertical infrastructure. In fact, some carriers' networks favor this type of real property deployment rather than rely upon network designs that are heavily based on publicly-owned streetlights. There is therefore no reason to impose limitations on the City's ability to contract for the use of its property.²

¹ The City also incorporates by reference the filings submitted by and on behalf of other local government entities.

² The FCC's rejection of local government's authority to enter into valid contracts in these circumstances represents a significant departure from authorities equating local government transactions with regulation. *See, e.g., Am. Trucking Ass'n v. City of Los Angeles*, 569 U.S. 641, 650 (2013) (government acting in regulatory—not proprietary—capacity where contractual provisions would be enforced via criminal citation); *Wisc. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 291 (1986) (policy prohibiting state agencies from doing business with entities that had violated federal

Moreover, this order joins the trend at the federal and state levels of government in moving from traditional preemption—meant to establish minimum standards—to maximum preemption to remove local authority. Nullifying valid agreements through preemption hampers cities— which, as the most connected to the community served, are on the front lines of policy innovation and executing on real projects—while gridlock continues at higher levels of government.³ The City of San José collaborates with our mobile carrier partners and considers their needs while innovating our processes to ensure safe and successful small cell installations.

Fee Caps Constitute Public Subsidy for Private Investment

The City of San José fully appreciates and understands how fees that address true costs of deployment must include the full scope of the permit process to fund and enable the 60-day shot clock for predictable, scalable, and dependable review of complex small cell installations. Limiting fees to a maximum \$500 application for five Small Cell Facilities with an additional \$100 for each facility beyond five along with the annual cap of \$270 per year per facility for Right of Way and/or attachment fee does not cover the true and full cost of business for the City to perform its due diligence and safety inspection for each small cell installation.

The City of San José’s permit fees are cost-based per small cell node with annual usage fees starting at \$750 per year (depending upon the overall number of nodes installed for volume discounting). The fees provide the cost recovery to make the necessary investment possible to provide fast, predictable, and professional permit review and maintenance of the infrastructure. These rates have proven successful as three mobile carriers have reached freely negotiated, non-discriminatory agreements with the City of San José (with other carriers expressing strong interest), demonstrating a powerful market response in our balanced approach. This strong market response undermines the interpretation of Section 332(c)(7)(B)(i)(II) that any fee over and above the initial \$500 application fee and \$270 per year “prohibits or has the effect of prohibiting” service in violation of Section 253(a). The San Jose way of engaging providers is proving to be an enabling, rather than a prohibitive, force.

By limiting the amount of fees, the FCC is unfairly shifting the financial burden to cities to review, inspect, and perform due diligence at their own expense, essentially using public funds to subsidize safe access to publicly-owned infrastructure to be used for private investment. Far more than the FCC’s assertion that fees are a “substantial barrier to deployment,” de facto, the capping of fees will create a substantial barrier to local government fiscal policy because cities will be forced to absorb the true cost of reviewing the small cell installations by taking funds away from essential services and programs to cover the costs to perform small cell deployment reviews.

The order would also unfairly shift the burden to cities to justify fees in excess of those identified as presumptively reasonable—even where freely negotiated agreements have already established reasonable rates. Though the order does not purport to require any particular accounting methods, it nonetheless contemplates that local governments tie costs associated with a provider’s application and use of a right of way to the fees charged that provider.⁴ Determining a reasonable approximation of costs would require calculating the costs of employee time and local government resources associated with each provider’s deployment and ongoing maintenance attributable to each provider. And, in the face of a challenge, the local government would have the further burden to show those costs are

labor law preempted because state policy was in effect an attempt to enforce federal law); Petition of the State of Minnesota for a Declaratory Ruling regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights of Way, Memorandum Opinion and Order (“*Minnesota Order*”), 14 FCC Rcd 21697, 21729-30, para. 61-62 (contract for exclusive access to government right of way preempted).

³ Lori Riverstone-Newell. “*The Rise of State Preemption Laws in Response to Local Policy Innovation.*” *Publius: The Journal of Federalism*, Volume 47, Issue 3, 1 July 2017, Pages 403–425, <https://academic.oup.com/publius/article/47/3/403/385264>

⁴ See FCC-CIRC1809-02 Declaratory Ruling, §72-73

“objectively reasonable.” The order would therefore impose further burdens on local governments that would detract from efforts to facilitate deployments.

These burdens would also include the unintended market impact that localities would lose the ability to reserve space for Smart City applications for current and future use, Internet of Things (IoT) applications, and other local government uses including current public safety technology—such as traffic detection, traffic light preemption, and surveillance—squelching the full potential of 5G as the foundational network for innovation that can save and improve people’s lives. In addition to protecting IoT applications, it may be more difficult to protect the considerable investments in historic districts. Meanwhile, carriers could maneuver their streetlight reservations to secure geographic monopolies without the localities empowered to control the streetlight supply with fair, non-discriminatory access for all carriers and protecting opportunities for IoT, public safety, and preserving districts.

Moreover, the claim that urban cities occupy a unique position that extracts more capital away from less wealthy or less dense jurisdictions in a zero sum game is particularly troubling⁵ because the argument is silent as to the market-based realities of a higher and faster return on investment in dense areas. Dense areas remain sound investments for providers not only due to the technical needs of small cells that can propagate a high frequency signal only hundreds of feet, but also because the same infrastructure serves more customers in a population dense area, generating far more revenue for capital reinvestment. Whether or not a provider wishes to invest in a dense urban area, including underserved urban areas, or a rural area is fundamentally based on the size of the customer base and their market demand for service—not on the purported wiles of a “must-serve” jurisdiction somehow forcing investment away from rural areas because a right of way or attachment fee is charged.

Rather than using the small cell usage fees to extract excess revenue, the City of San José guides the way through our policy innovations. All of the usage fee revenue in the City of San José is to be reinvested into the Digital Inclusion Program Fund to close the digital divide and sets the example for ensuring the use of city-owned infrastructure and the corresponding revenue is reinvested to benefit those who might otherwise remain excluded from the benefits of fast, affordable, and relevant internet access at home. Through a market-based solution, the Digital Inclusion Fund is generated through the usage fees to address the market failure to serve lower-income communities. By preempting the usage fee rates, deployment will slow to underserved communities. The impact of fee caps on digital inclusion is staggering: Over \$2.2 million in annual lost revenue will result, nearly two-thirds of the estimated revenue, to be dedicated to digital inclusion once all networks are built to scale. This loss directly translates to the ongoing loss of underserved communities excluded from the benefits of a digital life.

If the FCC believes there is a zero sum game structure to 5G small cell capital investments, then it should require that a portion of the excess revenue generated in dense urban areas through carrier investments be reinvested in underserved areas. Otherwise, there is no guarantee that the public infrastructure provided at a fraction of its demonstrated market value will automatically flow to underserved investment areas, be they urban or rural communities, that remain excluded from broadband networks.

Shot Clocks Require Commensurate Funding and Symmetrical Responsiveness

Without commensurate fees to fund and sustain process improvements, staff, and technology, 60-day shot clocks will compromise quality and safety controls. Typical investments that make a 60-day shot clock possible at dense urban scale include updating Geographic Information Systems (GIS) for an up-to-date streetlight reservation system, electronic construction drawing submittals systems, and weekly meetings with carriers to accelerate permit commenting and reviews. The cost of these improvements far exceed the \$270 per year cap, and it takes considerable time to realize improvement investments

⁵ See FCC-CIRC1809-02 Declaratory Ruling, §61.

with staff, technology, and processes. The City of San José contains costs by performing the permitting work in-house with cost-based permit fees where we are accelerating the timelines, often exceeding the FCC’s 60-day shot clock. A higher fee to fund these types of process improvements does not constitute a significant barrier to deployment as defined Section 253(a).

Permitting is a complex process where—though streetlight poles and the wireless facilities can be reviewed in partial template forms—there are always unique circumstances that take time, expertise, and equal responsiveness from the providers and their contractors. Staff must review the antenna and all equipment associated with the facility to withstand 85 mph sustained wind loads, meet electrical code with UL-listed equipment, check the facility will not harm the public safety lighting of the streetlight if there is a structural or electrical failure of the circuit or equipment, confirm the structural soundness of the pole and its foundation for constructability to handle the increased weight and volume of the facility, as well as ensure a clean design that does not detract from the neighborhood so the small cell node remains optimally functional for carriers and their customers and does not detract from the neighborhood.⁶

As with the previous 6409(a) shot clock in the Spectrum Act, the shot clock format remains asymmetrical in that the countdown begins upon initial submission and does not stop or create responsibilities and responsiveness requirements for the applicant when the applicant possesses the actionable step beyond completing an application or merely responding to missing information. Without symmetry, the shot clock structure can be abused, as only the permitting agency is penalized for a “failure to act.”

While the shot clock can be paused if a locality notifies the applicant that the application is incomplete within 30 days, and may be paused again if a supplemental submission did not provide the information previously identified as missing,⁷ the asymmetry remains in that localities must evaluate and maintain public safety under the artifice of the shot clock whereas the applicant merely must provide responses that may or may not be full and compliant with relevant safety codes. Allowing the shot clock to toll by mutual agreement or encouraging “*voluntary* pre-application discussions” acknowledges portions of this asymmetry but does not cure it with a mutual structure of a shared shot clock that promotes and protects partnership.⁸

Limit Cubic Volume to 28 Cubic Feet and Four Devices for Design Standards

With current technology and supply chains, the City of San José knows it is feasible to design and install a small cell node facility to remain under 28 cubic feet, including the antenna. As written, the FCC declaratory ruling defines all antenna equipment associated with the facility—excluding the antenna—cannot exceed 28 cubic feet in total volume. The additional three cubic feet allowed per node per antenna has the potential to drastically increase the size of the equipment. While this may positively impact costs for providers, allowing more than four devices (1 antennae, 2 user equipment relays, and 1 electrical shut off switch), with unnecessary volumes for more than one antenna will produce heavier, unsightly installations that will impact the neighborhood and create additional structural review to ensure safety. The City of San José advises the FCC to consider a definition of antenna facilities limited to four devices where all equipment is contained within 28 cubic feet, including the antenna and radome.

⁶ We appreciate how the FCC order recognizes that aesthetic requirements can be reasonable and not a burden to deployment. See FCC-CIRC1809-02 Declaratory Ruling, §§83-85.

⁷ See FCC-CIRC1809-02 Declaratory Ruling, §137.

⁸ See FCC-CIRC1809-02 Declaratory Ruling, §140-141.

Despite our concerns, the City of San José remains committed to working in partnership with carriers because we recognize the importance of small cell deployment for the broadband industry and our community.

Respectfully submitted,

A handwritten signature in black ink that reads "Sam Liccardo". The signature is written in a cursive style with a large, looping initial "S".

Sam Liccardo
Mayor
City of San José

Cc: Chairman Ajit Pai
Commissioner Brendan Carr
Commissioner Michael O'Reilly
Commissioner Jessica Rosenworcel