# CITY OF RYE

**JOSH COHN**
**MAYOR**

Federal Communications Commission

Re: Accelerating Wireless Broadband
Deployment by Removing Barriers to
Infrastructure Investment

WT Docket No. 17-79
WC Docket no. 17-84

The City of Rye, New York, respectfully requests that the Federal Communications Commission (the "Commission") not adopt the proposed Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84 (the "Proposed Order"). The City of Rye urges the Commission to heed section 332(c)(7)(A) of the Telecommunications Act and not abridge municipal authority over placement, construction and modification of wireless facilities, whether by imposition of destructive restrictions on aesthetic review or unreasonable review timelines. The City of Rye additionally urges the Commission not to convert the value that is in the municipal right of ways to a source of corporate welfare for wireless providers. The value in the right of ways should be dedicated to the citizens of the municipalities that own them.

1. Aesthetic Concerns

Section 332(c)(7)(A) of the Telecommunications Act is headed "Preservation of Local Zoning Authority." Aesthetic review is a zoning commonplace throughout the United States.

The City of Rye (the "City") is a suburban city of approximately 16,000 people located twenty miles northeast of New York City on the shore of Long Island Sound. Sometimes referred to as "Norman Rockwell-esque", the City's building stock still includes structures dating back to the 17th and 18th centuries, some of which are designated as historical landmarks or located within historical areas. The

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City's residents feel strongly about the City's aesthetics. It has been on the basis of aesthetics, community character and damage to property value that residents have resisted the Crown Castle/Verizon effort to install unsightly and noisy 2007 vintage equipment in the right of way literally on people's lawns and beside houses throughout residential Rye. In many, and perhaps most cases, the facilities proposed are not intended to provide coverage or fill capacity gaps on highly traveled roads. Instead, the facilities have generally been designed to provide service to the residents of a neighborhood – the very residents who object to the proposed installations. This is exactly the local situation in which the FCC does not belong, and where we think there are no real "prohibition" concerns. This is a matter for local, municipal processes. In New York, it is also a matter subject to our State Environmental Quality Review Act, which, where applicable, requires a person proposing a project that, considered *in toto* may have an adverse effect on the environment (including aesthetics), to consider alternatives that mitigate impacts. As we understand it, the Commission has itself decided that it will leave historical and environmental reviews to states and localities, but its order does not allow those reviews to proceed in the manner required by law. The Proposed Order would diminish both local and state law. The Proposed Order is not consistent with Section 332(c)(7)(A) or the property and procedural interests of the community and its residents, and it is arbitrary and capricious.

The Not More Burdensome Standard. The Proposed Order would require that aesthetic standards in local laws applicable to small wireless facilities be not more burdensome than those applicable to "similar infrastructure deployments." Setting aside that Section 332(c)(7)'s discrimination provisions only apply to discrimination as among providers of functionally similar services, the not more burdensome standard ignores the fact that there actually have not been similar infrastructure deployments, that is mass deployment in the municipal right of way of antennas and supporting equipment used to provide service directly to end users. If "similar" infrastructure deployments are defined broadly to include deployments supporting any of the services customarily found in the municipal right of way, then a wireless provider will be under no compulsion to produce quality equipment design specific to wireless installations.

In addition, the standard will fail to recognize important distinctions between different types of infrastructure. The Commission suggests that in some respects wireless antennas cannot be treated the same as other infrastructure. Its discussion of undergrounding is one instance. If the Commission is requiring differential treatment, it cannot at the same time require us to treat apples like oranges (but better). If, for example, the "not more burdensome" standard would allow a wireless provider the same design liberties that it may be necessary to permit an electricity provider to have with respect to transformers and the like, then the standard simply makes a nonsense of aesthetic regulation with respect to small wireless facilities. This would be a "just as ugly as" standard, detrimental to the national environment.

The fundamental flaw in the not more burdensome standard is that it is to be applied to new, developmental technology to be installed in volume, but it looks backwards to regulation relevant to designs for old and inapposite technologies. If the standard means that a wireless antenna can look just

like an electric transformer, then the standard excuses the wireless industry from design responsibilities in the right of way. If the standard invokes rules for aged technologies or technologies that escaped regulation, then the standard is harmful and unacceptable. Similarly, if the standard defeats regulation that calls for consideration of technology and design alternatives, like New York State's Environmental Quality Review Act, then the standard is harmful and unacceptable.

2. Shot Clock

Impossible Time Constraints. The Proposed Order would impose a time limit of 60 days on location of a small wireless facility on an existing structure and 90 days if a new structure is built. These time limits are shorter than the already dysfunctionally short 90- and 150- day limits previously declared by the Commission.

In the City's experience, it is unlikely that an applicant will be ready to proceed within even a 90-day period. The City is a small city, and its own processes are hardly set up to move at the speed that the Commission wishes. Finally, the permitting of small wireless facilities next to peoples' houses is every bit as sensitive and difficult a process as siting a larger facility. A shortening by the FCC of the already too short shot clock requirements would be unreasonable and wantonly destructive of local oversight, and will make it difficult for those most affected by the facilities to participate in review of the applications.

3. Fees

The Right of Way is City Property and the City Should be Fairly Compensated For Use. As the Commission is no doubt aware, the right of municipalities to charge for access to the right of way has been recognized in the United States for nearly 150 years. The City of Rye collects fees from various ROW users pursuant to both federal and state law for use of the rights of way. Those fees (as opposed to fees for permits like building permits) were not established on the basis of cost to the municipality; but instead on the value of the right of way used. The de minimis cost-based fees in the Proposed Order trivialize the value of ROW access to the wireless provider and more importantly, trivialize the return on sale of ROW access to the community.

As we read it, the Commission intends to require cost-based charges that favor wireless providers as compared to other users of the rights of way. In general, if fees were limited to cost, you would expect providers to be required to pay (a) the costs that they cause (including the regulatory costs that they cause); and (b) a fully allocated share of the joint and common costs; and (c) some payment that reflects the cost of capital invested in the infrastructure. But the FCC seems to suggest that costs are limited to the first category only, and full costs are not always to be recovered. For example, because other providers pay fees based on gross revenues or some other statutorily or established standard, we have had little reason to perform a cost study to identify or allocate right of way costs. If the City is required to do so, the only beneficiaries would be the companies covered by the FCC's order – they would be the cost causers. Yet the FCC does not clearly indicate that those costs are recoverable by the City.

There are Many Fair Alternatives to Cost-Based Fees . The Proposed Order rejects fees for small cells that are based on revenues. Yet Crown Castle has tried for years to force Rye to accept a deal calling for Crown to pay an adjusted gross revenue-based charge per installation. The Proposed Order indicates such a fee basis doesn't work for mass installations. Yet this is exactly the fee basis that Crown has in many contracts that provide for mass installation. Based on our experience and discussions with other Westchester communities, we know that this standard is embedded in standard contracts drafted by Crown Castle or its predecessors, and under which Crown Castle has been operating. It is obviously not prohibitory, and there is no evidence that it has actually prevented Crown from deploying anywhere. It is also a typical model that reflects the value of the property used, both in the rights of way (cable systems being an example) and also in commercial real estate settings, where rents may require payment of a percentage of revenues. It benefits new entrants, since they pay less as business develops than might be required under a different approach.

Just as a revenue basis is quite obviously workable, other fee bases can be found. Calibrating them to be non-prohibitive should be easily possible, simply on a free market basis, And if, the Commission (counter-intuitively) is not comfortable with the market setting the price, then the Commission should at least be able to work with municipalities and providers to construct fair rate structures informally, rather than through dictate.

4. Conclusion

The Proposed Order would violate the Telecommunications Act, as described above. It would effect a huge transfer of value from the people of the United States to wireless carriers. This would be an enormous taking of public value for the benefit of a relative few in the wireless industry.

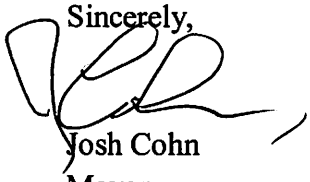
The taking will not be only of the value of access to the municipal rights of way. It will be a taking from the people of the United States of the opportunity to benefit from the best broadband access. It is well-known that wired fiber connections are far superior to wireless and are likely to remain that way as fiber technology continues to advance most data purposes can be best-served with wired connections to homes and businesses – supplemented with wifi as desired. Wireless should have its place where mobility is needed, but where mobility is not needed, wireless is second rate and vastly more intrusive to the environment than wired service.

The present goal of wireless industry densification is to encourage cable cutting with massive 4G LTE presence and to enable wireless providers to dominate data transmission for years to come. This will diminish investment in more effective and less intrusive technology.

If there is anything at all to be won in the purported "global race to 5G" imagined in the Proposed Order, there is nothing that could possibly justify this disservice to the U.S.

For all of the foregoing reasons, the City again requests that the FCC reject or amend the Proposed Order.

Sincerely,



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