September 19, 2018

VIA ELECTRONIC FILING

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

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

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules,[1] Crown Castle hereby submits this notice of *ex parte* communications and additional *ex parte* comments regarding the FCC's draft *Declaratory Ruling and Third Report and Order* in the above-reference proceedings, which the Commission released on September 5, 2018 (the "*Draft Order*").

On Monday, September 17, 2018, Joshua Turner of Wiley Rein and Roger Sherman of Waneta Strategies, LLC met with Erin McGrath and Kagen Despain of Commissioner O'Rielly's office. On Tuesday, September 18, 2018, Mr. Turner and Mr. Sherman met with Nicholas Degani and Rachael Bender with Chairman Pai's office, and on that same day Mr. Sherman and Monica Gambino of Crown Castle (by telephone) met with Umair Javed with Commissioner Rosenworcel's office, and Mr. Turner spoke via telephone with Will Adams in Commissioner Carr's office. In each meeting, the Crown Castle representatives discussed Crown Castle's remaining concerns with the *Draft Order*; the points of discussion were in line with Crown Castle's previous comments and *ex partes*, as well as the points laid out below.

Crown Castle appreciates the Commission's continued efforts to streamline the process for deploying infrastructure to support advanced broadband networks. The *Draft Order* includes a number of proposals that will advance this objective, and Crown Castle looks forward to their prompt adoption and implementation. Although Crown Castle applauds the Commission for adopting a balanced approach that will expedite deployment of next generation wireless networks while respecting the authority of states and localities, it also provides the following additional information and requests for clarification, in order to improve the *Draft Order*.

Crown Castle notes that the FCC's proposed action to limit application fees is both timely and necessary. To illustrate that, Crown Castle provides the following additional information: In

[1] 47 C.F.R. § 1.1206.

Hillsborough, California, Crown Castle submitted applications covering 16 nodes, and was assessed $60,000 in application fees. Not only did Hillsborough go on to deny these applications, following that denial it also then sent Crown Castle an invoice for an additional $351,773 (attached as Exhibit A), most of which appears to be related to outside counsel fees—all for equipment that was not approved and has not yet been constructed.

As it has said in its previous filings, Crown Castle continues to believe that it is urgent for the Commission to clarify the application of certain rules that it has adopted to implement Section 6409. To the extent that the Commission cannot address those issues in the *Draft Order,* the company urges the agency to move promptly in issuing a further declaratory ruling on these questions. In that regard, Crown Castle reiterates the points that it set out in its August 10, 2018 *ex parte*, and urges the FCC to take note of the various examples provided therein.[2]

Finally, Crown Castle offers the following comments and suggestions to clarify certain ambiguities in the *Draft Order* and ensure that the final order achieves the FCC's stated purpose of "remov[ing] regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support these new services."[3]

Aesthetic Standards/Undergrounding/Minimum Spacing

Crown Castle understands the desire of local governments to maintain the appearance of the right-of-way, and has previously detailed its efforts to utilize facilities that are aesthetically pleasing and consistent with their surroundings.[4] At the same time, Crown Castle has encountered communities that utilize aesthetic concerns as a pretense to delay wireless infrastructure projects and others that impose aesthetic standards in an unreasonable and discriminatory manner. Accordingly, Crown Castle supports the Commission's efforts to establish guidelines for when aesthetic standards constitute reasonable ROW management and when they constitute an effective barrier to telecommunications service. The three-pronged approach that the FCC proposes in the *Draft Order* will help ensure that aesthetic standards are transparent, reasonable, and applied on a non-discriminatory basis.[5]

As drafted, however, the second prong of the Commission's test—that aesthetic requirements must be "no more burdensome than those applied to other types of infrastructure deployments"—could permit the imposition of standards more appropriate for other forms of infrastructure in the ROW on small wireless facilities. In addition, the lack of a requirement for objectivity in the standards may significantly undercut the effectiveness of the standards that the Commission adopts here. For example, a municipality may argue that even existing zoning

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[2] *See, e.g.*, Comments of Crown Castle Int'l Corp., WT Docket No. 17-79, at 47-49 (June 15, 2017) ("Crown Castle Comments"); Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle, to Marlene H. Dortch, WT Docket Nos. 17-79, 16-421, at 10-15 (Aug. 10, 2018).

[3] *Draft Order* ¶ 1.

[4] *See* Reply Comments of Crown Castle Int'l Corp., WT Docket No. 17-79 at iii (July 17, 2017).

[5] *Draft Order* ¶ 83.

codes are transparent, reasonable, and non-discriminatory, thus evading the intent of the FCC's *Draft Order* entirely. Standards that do not impose sufficient specificity could impede the deployment of wireless infrastructure to support 5G networks and beyond. Accordingly, Crown Castle recommends that the Commission amend the last sentence of Paragraph 83 as follows:

> We conclude that aesthetics requirements are not preempted if they are (1) objective and reasonable, (2) no more burdensome than those applied to other types of **utility** infrastructure deployments, and (3) published in advance.

This change is consistent with the FCC's intent to ensure that the aesthetic requirements are no more burdensome "than those the state or locality applies to ***similar infrastructure deployments***"[6] and clarifies that the nondiscrimination prong should be measured by reference to those similar deployments (*i.e.*, utility deployments), rather than to all infrastructure in the ROW. It also permits local jurisdictions substantial latitude in making choices about the aesthetics of their ROWs, while establishing objective baselines that all parties are aware of and can measure their deployments against.

The Commission should further clarify that the conditions for aesthetic standards in Paragraph 83 also apply to undergrounding requirements. Although the principles of transparency, reasonability, and non-discrimination apply equally in this context, it is not clear from the *Draft Order* that the FCC intends to apply the same standard to undergrounding requirements as it does to other aesthetic requirements. To address this ambiguity, the Commission should add the following to the end of Paragraph 86: "Consistent with our treatment of other aesthetic standards above, any undergrounding requirements must be (1) objective and reasonable, (2) no more burdensome than those applied to other types of utility infrastructure deployments, and (3) published in advance."

Finally, with regard to minimum spacing requirements in Paragraph 87 of the *Draft Order*, the Commission should clarify that any spacing requirement that would interfere with densification or capacity improvement using any specific technology or any particular frequency is presumptively unreasonable. Spacing requirements have the potential to undermine densification efforts, which are the backbone of 5G networks. Enforced gaps of 300', or 200', or any arbitrary number, will make it difficult or impossible to add equipment, reduce cell size, and increase network capacity to meet surging user demand of these exciting new services. And spacing requirements are quite literally "prohibitions," in that they explicitly prohibit the placement of wireless facilities in certain geographic areas. To address this concern, the FCC should add at the end of the last sentence of Paragraph 87 ", provided that spacing requirements that would impair densification or capacity improvements using any specific technology or any specific frequency are presumptively unreasonable."

Application of Shot Clocks

Crown Castle appreciates the Commission's efforts to establish shot clocks that are both reasonable and enforceable. Crown Castle is concerned, however, that the exceptions in

[6] *Id.* ¶ 84 (emphasis added).

Paragraphs 111 and 116 for "exceptional cases" and "extraordinary circumstances" not only have the potential to swallow the rule, but may lead to additional perverse results.

As an initial matter, it is not clear from the *Draft Order* what constitutes such an "exceptional case" or "extraordinary circumstance" so as to overcome the presumption that the shot clocks are reasonable. As the *Draft Order* explains, the new shot clocks flow from the FCC's existing policy for Section 332 shot clocks, under which "if an applicant files multiple siting applications on the same day for the same type of facilities, each application is subject to the same number of review days by the siting agency."[7] It is unclear to Crown Castle under what circumstances a departure from this approach would be appropriate. To the extent the Commission is intent on providing this safety valve, it is imperative that it provide some parameters around the exception.

It is also unclear from the *Draft Order* at what point a jurisdiction must assert the existence of an "exceptional case" or "extraordinary circumstance." This is particularly problematic in the context of Section 332, where an applicant has just 30 days from the failure to act to commence a court action.[8] Even for applications under Section 253, an applicant may not know when it may commence litigation and when the exception applies. To address this concern, the Commission should add a sentence to the end of Footnote 308 that reads: "In such cases, a siting authority must notify Applicants: (1) of the need for additional time within 15 days of receiving a completed application, and (2) of the reasonable date at which the extended period will end, not to exceed 60 days beyond the otherwise applicable review period. Failure to do so should waive any argument that 'exceptional' circumstances apply. Such notification shall not toll the deadline for action, but the issuance tolls the deadline for bringing a challenge by the applicant until 30 days following the reasonable date provided by the siting authority." The FCC should add similar language at the end of Footnote 341.

Finally, to avoid abuse of the tolling provisions in Section 1.6003(d), the Commission should amend Section 1.6003(d) to require a legal justification for the request as follows:

> (d) *Tolling period*. The tolling period for an application (if any) is—
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> (1) The period of time established by written agreement of the applicant and the siting authority; or
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> (2) The number of days from—
>
> (i) The day after the date when the siting authority notifies the applicant in writing that the application is materially incomplete and clearly and specifically identifies the missing documents or information that the applicant must submit to render the application complete **and the specific rule or regulation creating this obligation**, until

[7] *Id.* ¶ 110.

[8] *See* 47 U.S.C. § 332(c)(7)(B)(v).

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete,

(iii) But only if the notice pursuant to paragraph (d)(2)(i) is effectuated on or before the 30th day after the date when the application was submitted; or

(3) The number of days from—

(i) The day after the date when the siting authority notifies the applicant in writing that the applicant's supplemental submission was not sufficient to render the application complete and clearly and specifically identifies the missing documents or information that need to be submitted based on the siting authority's original request under paragraph (d)(2) of this section, until

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete,

(iii) But only if the notice pursuant to paragraph (d)(3)(i) is effectuated on or before the 10th day after the date when the applicant makes a supplemental submission in response to the siting authority's request under paragraph (d)(2) of this section.

Remedies for Shot Clock Violations

Crown Castle is concerned that the Commission's failure to establish a deemed granted remedy at this juncture could undermine many of the important actions proposed in the *Draft Order*. While the availability of "expedited and permanent injunctive relief" should, in theory, provide an effective remedy, Crown Castle has previously detailed how "expedited" cases under Section 332 can extend for years and deny the benefits of deployment in the interim.[9] To address this concern, the FCC should clarify that the use of the term "expedited" here means that the new remedies it is establishing apply both to permanent and preliminary injunctive relief. Specifically, the FCC should modify the references to "permanent injunctive relief" and "permanent injunctions" in Paragraphs 116-119 to reference, simply, "injunctive relief" or "injunctions".[10] Furthermore, the Commission should amend the first sentence of Paragraph 117

[9] *See* Crown Castle Comments at 24-25.

[10] Indeed, there are numerous examples of court awarding preliminary injunctions for violations of Sections 253 and 332. *See, e.g.*, *T-Mobile Ne. LLC v. City of Lawrence*, 755 F. Supp. 2d 286 (D. Mass. 2010) (grant of preliminary injunction for denial of special permits and variances); *Indep. Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409 (D. Vt. 2003) (grant of preliminary injunction for denial of conditional use permits); *Telecorp Realty, LLC v. Town of Edgartown*, 81 F. Supp. 2d 257 (D. Mass. 2000) (granting preliminary injunction for denial of

to read, "Consistent with those sensible considerations reflected in prior precedent, we expect that courts will typically find expedited and ~~permanent~~ injunctive relief **(including, as applicable, preliminary injunctive relief)** warranted for violations or asserted violations of Sections 332(c)(7)(B)(i)(II) and 332(c)(7)(B)(ii) of the Act when addressing the circumstances discussed in this Order." Finally, the Commission should add to Paragraph 119 a discussion of the similar standard for preliminary injunctive relief: (1) that the movant is likely to succeed on the merits; (2) that it is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest.[11]

Collocation on Structures Not Previously Zoned for Wireless Use

Crown Castle supports the Commission's clarification that for the purposes of the Section 332 shot clocks, attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities. Consistent with the FCC's November 2017 Report and Order,[12] it should further clarify that the same shot clock applies to replacement towers by adding after the third sentence in Paragraph 136: "For the purpose of this paragraph, collocations include existing poles that must be structurally hardened or replaced prior to the installation of Small Wireless Facility."

When Shot Clocks Start

The *Draft Order* properly recognizes that multiple authorizations are often required before a deployment can begin. This principle is not, however, limited to the Section 332 context. Accordingly, Crown Castle recommends modifying the last sentence of Paragraph 139 to read: "All of these permits are subject to ~~Section 332's requirement to act~~ **the rules we have adopted regarding the requirement to act on a shot clock** within a reasonable period of time."

Municipal Inquiry into Covered Services

In footnote 75 of the *Draft Order*, the Commission takes an important step in acknowledging that "wireless service facilities" may be constructed and operated by entities that are not themselves licensed CMRS providers. This footnote also emphasizes that the fact that wireless service facilities are also used to provide information services does not alter their regulatory status; "commingled" facilities remain subject to both Sections 332 and 253. This is especially true for the facilities deployed by Crown Castle. Crown Castle deploys numerous DAS and small cell facilities around the country that fall within the Commission's Small Wireless Facility definition and provide both voice and data services. Indeed, because Crown Castle provides services to wireless carrier customers, its facilities must be able to accommodate whatever needs its customers have, whether that is wireless voice or data. Moreover, Crown Castle's status as an

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permits); *Sprint Spectrum, L.P. v. Mills*, 65 F. Supp. 2d 148 (S.D.N.Y. 1999) (granting preliminary injunction for denial of siting application).

[11] *See, e.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

[12] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, Report and Order, 32 FCC Rcd. 9760 (2017) (recognizing that replacement poles have no effect on historic properties).

infrastructure provider that contracts with wireless carriers to carry their signals back to the network means that all of the services the company offers are, from a regulatory perspective, telecommunications services, regardless of whether Crown Castle's wireless carrier customer provided its end users with information or telecommunications services.

Furthermore, some jurisdictions have taken the position that they have the authority to require wireless facility build-out across the entire jurisdiction or in certain parts of the jurisdiction, as a condition of approving any wireless build-out by a given provider. This is incorrect, as a matter of law; dictating placement of facilities constitutes federally prohibited entry regulation under Section 332(c)(3)(A).[13]

In order to further reduce uncertainty, the agency should (in addition to the points already made in footnote 75) also emphasize that because local jurisdictions are not empowered to regulate interstate telecommunications or information services, they thus do not have the authority to conduct proceedings focused on the mix of services offered over particular facilities. Footnote 75 should thus be revised to include a concluding sentence such as: "Because local jurisdictions do not have the authority to regulate these interstate services, there is no basis for local jurisdictions to conduct proceedings on the types of services offered over particular wireless service facilities. Furthermore, local jurisdictions do not have the authority to require that providers offer certain types or levels of service, or to dictate the placement of particular wireless service facilities. *See* 47 U.S.C. ¶ 332(c)(3)(A); *see also Bastien v. AT&T Wireless Servs., Inc.,* 205 F.3d 983, 989 (7th Cir. 2000)."

* * *

Crown Castle appreciates the work the Commission has done to date to streamline the deployment of infrastructure to support broadband networks and believes the changes identified above will help fulfill the FCC's vision of removing barriers to rapid broadband deployment.

[13] 47 U.S.C. ¶ 332(c)(3)(A); *see also Bastien v. AT&T Wireless Servs., Inc.,* 205 F.3d 983, 989 (7th Cir. 2000) (States are preempted from dictating where facilities should be built, because "[t]he statute makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure, as well as the rates and conditions that can be offered for the new service.")

Respectfully submitted,

CROWN CASTLE
INTERNATIONAL CORP.

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EXHIBIT A

INVOICE

Town of Hillsborough
1600 Floribunda Avenue
Hillsborough, CA 94010-6418
Phone: (650) 375-7490
Fax: (650) 375-7417

Due Date	Invoice Date	Total Due	Payment Amount
7/20/2018	6/20/2018	$351,773.25	
Invoice No.	**Reference No.**	**Customer No.**	**Page**
2006246	6163	CROWN	1

CUSTOMER

SHARON JAMES, GOVT REL MANAGER
CROWN CASTLE
SMALL CELL & FIBER SOLUTIONS
NORTHERN CALIFORNIA DISTRICT
695 RIVER OAKS PARKWAY
SAN JOSE, CA 95134-

REMIT TO

Town of Hillsborough
1600 Floribunda Avenue
Hillsborough, CA 94010-6418

UNDERPAYMENT OF DEPOSIT FOR DAS CELL SITES WCF16-0002.SEE ATTACHED.

----------Please Return Top Portion of Invoice with Payment----------

Quantity	Item Code	Description	Price	Amount
1.000	WAD	WIRELESS APPLICATION DEPOSIT-	$351,773.25	$351,773.25

Subtotal:	**$351,773.25**
Discount:	**$0.00**
Tax:	**$0.00**
Total Due:	**$351,773.25**

Please make checks payable to Town of Hillsborough

TOWN OF HILLSBOROUGH

Deposit Tracking Log

Crown Castle DAS Cell Sites - WCF16-0002 / ENC17-0013- ENC17-0028

DEPOSIT	*Deposit Subtotal:*	$60,000.00
PAYMENTS	*Payment Subtotal*	$333,232.65
STAFF TIME	*Staff Time Subtotal:*	$78,540.60
	DEPOSIT BALANCE:	($351,773.25)