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Ex Parte Communication

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

Re: 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

Dear Ms. Dortch:

On September 18, 2018, I discussed by telephone with Will Adams, Wireless Advisor to Commissioner Carr, the Federal Communications Commission's *Draft Declaratory Ruling and Third Report and Order* ("*Draft Ruling and Order*") in the above-referenced dockets.[1] I explained that AT&T strongly supports the *Draft Ruling and Order* and its promise to remove state and local regulatory hurdles that unnecessarily delay and add costs to wireless infrastructure deployments. If adopted, the *Draft Ruling and Order* would help prepare the nation's wireless infrastructure to meet the rapidly increasing demand for wireless services and to deploy 5G services. AT&T encourages the Commission to adopt the Declaratory Ruling and Third Report and Order with the following few modifications to clarify key principles and provide direction on how those principles should apply in some more nuanced and specific scenarios.

- *Clarify access to poles, ROW, and all municipally-owned infrastructure in the ROW.* The Commission has ruled that moratoria on the deployment of telecommunications services and facilities have the effect of prohibiting the provision of service under Section 253[2] and is rightfully poised to make a similar finding with respect to "fees imposed by localities, above

[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, FCC-CIRC1809-02 (rel. September 5, 2018) ("*Draft Ruling and Order"*).

[2] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, FCC 18-111, at ¶¶149-60 (rel. Aug. 3, 2018).

and beyond the recovery of localities' reasonable costs."[3] Given these findings, we can infer that broader and more permanent restrictions—such as prohibitions on access to the ROW and to all municipal infrastructure in the ROW (including not just streetlights but also municipally-owned electric and other utility poles and substructure)[4] and on the placement of new or replacement poles in the ROW—likewise prevent the provision of service and violate Section 253. As the Commission concludes, limits on a state and local government's management of the ROW under Section 253 extends to "*any conduct* that bears on access to and use of those ROW."[5] Clarifying that this principle prohibits municipalities from preventing access to the ROW and all municipally-owned structures in the ROW would ensure that municipalities and providers understand the full extent of the Commission's *Draft Ruling and Order*.

- *Clarify the application of the Sections 253/332 standards to third parties standing in the shoes of the municipality.* The Commission should clarify that the Sections 253 and 332 standards articulated in a final Declaratory Ruling and Third Report and Order apply to all entities that stand in the shoes of a municipality, including third parties to which cities outsource, assign, or otherwise transfer management or control of ROWs or their municipal assets in ROWs (e.g., poles, conduit). These third parties typically claim to be insulated from Sections 253 and 332 and in turn impose significant fees for ROW access and their management. The *Draft Ruling and Order* would preclude "exorbitant consultant fees or the like" because they go beyond the recovery of a municipality's costs.[6] The Commission should clarify that this finding (and Sections 253 and 332 overall) extend to third parties assuming the traditional role of the municipality in managing the ROW or municipally-owned infrastructure in the ROW.

- *Clarify that the fee standard applies to existing agreements.* The *Draft Ruling and Order* would clarify that recurring and nonrecurring fees for the placement of small wireless facilities must be a reasonable approximation of costs, objectively reasonable, and non-discriminatory.[7] The Commission should clarify that this standard applies not only to municipal regulations, but also to existing and future agreements between municipalities and carriers. Otherwise, carriers paying exorbitant fees under an existing agreement with a jurisdiction will operate at a competitive disadvantage relative to new entrants who pay presumptively reasonable fees to

[3] *Draft Ruling and Order* at ¶59.
[4] The Commission's authority under Section 253 and 332 to preempt state and local laws that prohibit or have the effect of prohibiting the provision of wireless service extends to the actions of municipal electric utilities that regulate access to and use of their utility poles. The exclusions for municipal electric utility poles provided in Section 224 do not extend to Section 253. Congress generally acts intentionally and purposefully when it uses particular language in one section of a statute, but omits it in another section of the same Act. *Russello v. United States*, 464 U.S. 16, 23 (1983).
[5] *Id.* at ¶90 (emphasis added).
[6] *Id.* at ¶54. Obviously, this should include any fees originating from the third party.
[7] *Id.* at ¶¶66-77.

that same jurisdiction for access to ROW and ROW structures. Such a result would contravene the draft findings that "state and local governments may not impose fees on some providers that they do not impose on others"[8] and that "fees [are] discriminatory and not competitively neutral when different amounts are charged for similar uses of the ROW."[9]

- *Small wireless facilities should be subject to the same aesthetic requirements as all other infrastructure in the ROW, including municipal infrastructure.* The *Draft Ruling and Order* would allow municipalities to regulate the aesthetics of small wireless facilities if the regulation is (1) reasonable (for example, but not limited to, avoiding or remedying unsightly or out-of-character deployments), (2) no more burdensome than those applied to other types of infrastructure deployments; and (3) published in advance.[10] The Commission should clarify that "other types of infrastructure deployments" pertains to all infrastructure, including that deployed by state and local governments and their instrumentalities and utilities (e.g., municipal electric utilities). A municipality cannot sanction the placement of or itself deploy transformers, cameras, traffic lights, electronic signs, Wi-Fi, and other facilities while finding that similar sized equipment operated by wireless carriers are too displeasing to countenance. For example, the final Declaratory Ruling could provide more objective guidance by explaining that small wireless facilities, as defined by draft Rule Section 1.6002(l), are presumptively reasonable in appearance and cannot be subject to arbitrary design requirements (e.g., painting, camouflaging, size or shape mandates).

- *Simplify administrative processes.* When adopted, the *Draft Ruling and Order* will remove some burdensome administrative processes by requiring municipalities to accept batched applications.[11] But, municipalities impose other, often more rigorous, administrative burdens, such as requiring applicants to submit detailed maps of all wireless facilities in a jurisdiction, demonstrate a gap in coverage, address potential locations that considered but not selected, and other information that is not pertinent to the placement of the small wireless facility in the planned location. These excessive administrative processes are burdensome, discourage providers from applying for facility placement, and will grow exponentially when small wireless facility deployments over the next few years reach the hundreds of thousands. The Commission can resolve this problem by clarifying that all information requested in a cell site application must pertain directly to the proposed small wireless facility.[12]

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[8] *Id.* at ¶74.
[9] *Id.* at note 211.
[10] *Id.* at ¶83.
[11] *Id.* at ¶111.
[12] The Commission can make this finding without deviating from its prior conclusion that local governments are best suited to decide what specific information they need to process an application. *See, e.g.,* Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *et al.*, WT Docket No. 13238, WC Docket 11-59, WT Docket No. 13-32, 29 FCC Rcd 12865, 12971 (2014).

- *Minimum separation or location requirements for small wireless facilities inherently prohibit the provision of service.* The *Draft Ruling and Order* acknowledges that minimum separation requirements between small wireless facilities can violate Section 253 and proposes subjecting such requirements to the standard for aesthetic limitations.[13] The Commission should instead find that minimum separation and location requirements act as effective prohibitions of service. Given the hundreds of thousands of small wireless facilities that carriers expect to deploy throughout the nation in the next few years, many in high traffic areas and with multiple carriers, it is inevitable that some of those facilities will be placed in close proximity to each other. Separation requirements, such as 500 feet or greater, could effectively preclude seamless 5G coverage using millimeter wave spectrum, which will propagate over much shorter distances than 4G signals, or at best significantly reduce its value by creating gaps in coverage and reduced throughput, either or both of which could derail planned internet of things (IoT) services. For example, an approximately 500-foot separation distance between small cell facilities for a single carrier's 5G network using 39 GHz spectrum would require over 9% more sites for about 20% less coverage and reduced network capacity over a 20 x 7 block downtown area than an unconstrained deployment. If that separation distance must be kept between any small wireless facility, only islands of 5G coverage would be available. Restricting small wireless facilities to only certain designated locations, such as mid-block or intersections would similarly prohibit service.

- *Clarify that limited undergrounding requirements can unlawfully prohibit service.* In the *Draft Ruling and* Order, the Commission finds that undergrounding requirements, such as one requiring undergrounding of *all* wireless facilities, including antennas, can effectively prohibit the provision of service.[14] The final Declaratory Ruling should find that all undergrounding requirements for wireless facilities, other than transport facilities, have that effect. Even limited undergrounding restrictions, such as those covering small geographic areas or applying to associated equipment only (and not antennas), can prohibit the provision of service. A municipality that establishes an undergrounding district along only Main Street is still effectively prohibiting the provision of service around that street, which may be the area with the highest demand for wireless services. Likewise, requiring underground associated equipment will prohibit the provision of service because current (and expected future 5G) radios must be deployed on the pole very near the antenna to minimize path loss and reach throughput requirements. Moreover, many geographic areas cannot feasibly accommodate underground small wireless equipment due to ice, a high water table (e.g., in coastal areas), or the presence of existing underground structures. Even where undergrounding is feasible, it would be prohibitively expensive if performed on a large scale, as it would add between about $6,000 (if only a new manhole is needed) and about $22,000 (if a controlled environment vault is needed) per underground facility.

[13] *Id.* at ¶87.
[14] *Id.* at ¶86.

- *Expressly state that a single shot clock applies to multi-jurisdictional authorizations.* The *Draft Ruling and Order* would correctly apply the Section 332 shot clock to "all authorizations necessary for the deployment of personal wireless services infrastructure."[15] In reaching this draft conclusion, the Commission observes that a contrary finding would allow local governments to circumvent Section 332 by creating multiple forms of authorization, such as multi-departmental siting reviews or multiple authorizations.[16] The Commission should clarify its intention to apply a single shot that runs concurrently for all municipal review processes, including those with multiple reviews. Multiple reviews should proceed concurrently under this single shot clock to avoid inefficient to avoid prohibitive delays. The Commission can further assist municipalities by encouraging them to use a single application for these types of multi-department reviews.

- *Use of the Small Wireless Facilities definition.* The *Draft Ruling and Order* clarifies the limits of state and local authority under Sections 253 and 332 to regulate and review the deployment of "small wireless facilities," as defined by draft Rule Section 1.6002(l). Subpart (4) of this definition, which is derived from Commission Rule Section 1.1312(e)(2), should be deleted, as registration of an antenna structure with the Commission has no bearing on whether local regulation prohibits the provision of service. Moreover, the Commission should clarify that the placement of poles is included in the definition of "small wireless facilities" to ensure that authorizations for pole placements are subject to the 90-day shot clock for the "construction of new small wireless facilities" in draft Rule Section 1.6003(c)(iii).

Pursuant to Section 1.1206 of the Commission's rules, an electronic copy of this letter is being filed for inclusion in this docket.

Sincerely,

Henry G. Hultquist

[15] *Id.* at ¶128.
[16] *Id.* at ¶130.