September 19, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: **Ex Parte Presentation**, *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; *Streamlining Deployment of Small Cell Infrastructure*, WT Docket No. 16-421

Dear Ms. Dortch:

CTIA strongly supports the Commission's draft Declaratory Ruling and Third Report and Order in these proceedings.[1] It promotes the Commission's objective to remove regulatory barriers that obstruct the deployment of next-generation wireless networks, while respecting the important role that localities play in the siting process. And it accomplishes that by interpreting and applying Sections 253 and 332 of the Communications Act ("Act") consistent with the language of those provisions and the efforts of 20 forward-looking states to modernize their infrastructure siting policies. By creating a national framework that balances all of these goals, the Commission will directly benefit all Americans, increase investment, and strengthen U.S. technological leadership.

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

Establishing reasonable timelines for reviewing requests for deployment of small wireless facilities and adopting a deemed granted remedy will ensure the efficient provision of service to consumers. CTIA applauds the Commission for clarifying in the Draft Order the timelines for processing small wireless facility requests. As CTIA has noted in the record, while many states and localities process siting applications quickly—including on timelines shorter than the Commission is adopting here—many communities continue to hinder deployment by failing to act on facility requests in a reasonable period of time or neglecting to include all mandatory processes within the shot clock periods.[2] Specifically, the Draft Order adopts a 60-day shot clock for collocations of small wireless facilities onto existing structures, where such small wireless facilities do not otherwise qualify for the shot clock adopted pursuant to Section 6409(a); and a 90-day shot clock for deployment of new small wireless facilities, including on new support structures. These reasonable timelines for processing requests for small wireless facilities and new structures supporting those facilities build off efforts already taken by states and localities across the country.

The Draft Ruling and Order also correctly recognizes the need for stronger remedies for violations of the Section 332 shot clocks.[3] Specifically, the Commission determines that a violation of the new small wireless facility shot clocks by a state or local authority constitutes a presumptive prohibition of service contrary to Section 332(c)(7)(B)(i)(II),[4] with an expectation that courts will grant injunctive relief in those cases.[5] The Draft Ruling and Order concludes that, because of the

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[2] *See, e.g.*, Letter from Meredith Attwell Baker, CTIA, to Chairman Ajit Pai at Commissioners, WT Docket No. 17-79, *et al*., at 3 (filed Sept. 18, 2018); Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79, *et al.* (filed Aug. 30, 2018).

[3] *See* Draft Order ¶¶ 112, 125; *id*. ¶ 25 (discussing record evidence showing that many local siting authorities are not complying with the Section 332 shot clocks). *See also* Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79, *et al*. (filed Aug. 30, 2018).

[4] *See* Draft Order ¶¶ 114-15. The Draft Ruling and Order concludes that this small wireless facility remedy is in addition to the process available to providers for any violation of the Section 332 shot clocks—namely, the option to sue in court for a "failure to act" within the meaning of Section 332(c)(7)(B)(v). *See id*. ¶ 113.

[5] *See id*. ¶¶ 13, 116-17; *see also id*. ¶ 119 ("[I]n the context of Small Wireless Facilities, we expect that the most appropriate remedy in typical cases involving a violation of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is the award of permanent injunctive relief in the form of an order to issue all necessary authorizations.").

rules and interpretations it is adopting, the Commission need not adopt a deemed granted rule.[6]

These proposed actions are helpful, and we encourage the Commission to strengthen its language to ensure its objective to avoid protracted litigation comes to fruition and that deployment will not be delayed. However, CTIA asks the Commission to revisit its conclusion regarding a deemed granted remedy in this proceeding, as a presumptive prohibition of service coupled with an expectation of injunctive relief does not go far enough. The presumption can be overcome and result in a reviewing court sending the case back to the locality to act—at which point the locality can (after further delay) deny the application.[7] By contrast, a deemed granted remedy eliminates the ability of a locality to effectively extend the shot clock timeframe in this way, and would enable an applicant to go to court to enforce the deemed grant.

The Commission states that it finds convincing the arguments regarding the agency's authority to adopt a deemed granted remedy, explaining "we see merit in the argument made by some commenters that the FCC has the authority to adopt a deemed granted remedy."[8] And, the record includes strong legal support for the Commission's authority to adopt such a remedy for violations of its Section 332 shot clocks.[9] CTIA therefore continues to urge the Commission to adopt an enforceable deemed granted remedy. Such action would help to enforce Congress's

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[6] *See id*. ¶ 124 ("[W]e do not find it necessary to decide [whether to adopt a deemed granted remedy] today, as we are confident that the rules and interpretations adopted here will provide substantial relief.").

[7] *See id*. ¶ 115 ("[W]hen a siting authority misses the applicable shot clock deadline, the applicant may commence suit in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(i)(II), in addition to a violation of Section 332(c)(7)(B)(ii) …. The siting authority then will have an opportunity to rebut the presumption of effective prohibition by demonstrating that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services.").

[8] *Id*. ¶ 124.

[9] *See, e.g.*, Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79, *et al*. (filed June 20, 2018); Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, FCC, WT Docket No. 17-79, *et al*. (filed July 26, 2018).

expectation that action on applications be timely,[10] and it would be consistent with actions taken in nearly all of the states that recently enacted legislation to modernize small cell siting policies.

If, however, the Commission declines to adopt a deemed granted remedy at this juncture, it should at a minimum extend its presumption and expectation of injunctive relief to violations of *all* Section 332 shot clocks, not just the new small wireless facility shot clocks. The Draft Ruling and Order provides an enhanced remedy only for its small wireless facility shot clocks. This leaves towers and non-small wireless facility collocations in the same position they are in today when localities fail to timely act—putting them at a distinct disadvantage compared to facilities that meet the small wireless facility definition. Yet, the record shows many shot clock violations involve macro facilities[11] or facilities that would not meet the small wireless facility definition, and that such facilities remain critical to wireless deployment, particularly in rural areas.[12] The delay and substantial litigation costs associated with missed shot clocks slows and thwarts those deployments. The Commission should eliminate this potential disparity.

By taking these measured steps, the Commission can enhance the Draft Ruling and Order to better achieve the agency's goals to "provide substantial relief, effectively avert unnecessary litigation, [and] allow for expeditious resolution of siting applications."[13]

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[10] *See* Draft Order ¶¶ 116, 119; 47 U.S.C. § 332(c)(7)(b)(ii) (requiring siting authorities to act on applications within a "reasonable period of time"); 47 U.S.C. § 332(c)(7)(b)(v) (requiring court action "on an expedited basis").

[11] *See* Draft Ruling ¶ 26. For example, the record shows that, in one national carrier's experience, "roughly 30% of *all of its recently proposed sites*," which include both macro and small facilities, "involve cases where the locality failed to act in violation of the shot clock." Comments of T-Mobile USA, Inc., WT Docket No. 17-79, *et al.*, at 8 (filed June 15, 2017) (emphasis added); *see also, e.g.*, *Up State Tower Co., LLC v. Town of Kiantone*, 2016 U.S. Dist. LEXIS 170827 (W.D.N.Y. 2016), *aff'd*, 718 Fed. Appx. 29 (2d Cir. 2017) (multi-year litigation following locality's failure to act on a macro tower application within the 150-day shot clock).

[12] *See, e.g.*, Letter from Michael H. Pryor, Counsel for American Tower, to Marlene H. Dortch, FCC, WT Docket No. 17-79, at 1 (filed Sept. 13, 2018) (noting that "some local governments have a mistaken belief that existing macro towers may no longer be necessary in light of the coming deployment of small cells," and expressing concern that "that this viewpoint might inadvertently be bolstered by the Draft Order's emphasis on the anticipated extent of small cell deployments without also indicating the important role that macro towers play in increasingly heterogeneous network configurations").

[13] *Id.* ¶ 124.

Clarification of the standard for identifying prohibitions to wireless service will benefit providers and localities alike. The Draft Ruling reaffirms the Commission's longstanding interpretation of Section 253 to prohibit a state or local requirement that "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,"[14] and it extends that interpretation to the identical language in Section 332(c)(7). Affirmation of the *California Payphone* standard and its application to both provisions of the Act is clearly supported by the statutory language and record evidence of state and local processes that greatly increase the costs and timelines for small cell deployment. Providing this clarification will resolve the uncertainty and confusion produced by varying judicial interpretations that forced providers and localities to expend resources on litigation, rather than on building new infrastructure. Moreover, this standard correctly applies to *all* wireless facilities, because there is no distinction in Sections 253 or 332 based on the size or type of facility, even if the *implementation* of those provisions may differ by facility.[15] To underscore that the *California Payphone* standard applies to *all* wireless facilities, as it should and as the text of the Draft Ruling already implies,[16] the word "Small" should be deleted from the heading of Section III.A.

Clarification regarding recoverable costs is amply supported and will provide certainty within the siting process. CTIA applauds the Commission for clarifying that, to comply with Sections 253 and 332(c)(7), fees must be nondiscriminatory and must reasonably approximate a government's "objectively reasonable" costs—*i.e.*, "those costs specifically related to and caused by the deployment."[17] This clarification regarding recoverable costs is appropriate because it allows a locality to recover its expenses that would not have been incurred "but for" that facility. To provide further clarity, the Commission should import the text of footnote 116 into the body of

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[14] Draft Ruling ¶¶ 34-40, citing *California Payphone Ass'n*, Memorandum Opinion and Order, 12 FCC Rcd 14191 (1997).

[15] Of course, application of the standard to different types of facilities could produce different conclusions as to whether a particular action or requirement violates Sections 253 or 332, but the same legal standard should apply to all facilities.

[16] Given that many of the cases the Draft Ruling discusses involved macro towers and other sites, the discussion of the *California Payphone* standard logically encompasses those sites as well as small wireless facilities.

[17] Draft Ruling ¶ 48 n.116.

paragraphs 69 and 73, which more broadly refer to "costs of maintaining the ROW."

The Commission also validly applies the framework regarding objectively reasonable, nondiscriminatory costs to one-time application fees for all small wireless facilities (both along and outside of rights-of-way ("ROW")), and to recurring costs within the ROW.[18] In other words, the Commission distinguishes between one-time application fees and recurring ROW fees, and it reiterates that the Draft Ruling covers the former regardless of where a small wireless facility is installed. Encompassing all application fees is appropriate because, when a city acts on an application, it does so in its regulatory capacity, regardless of where the facility is located. For consistency within the Draft Ruling, the Commission should clarify the text in paragraph 66 to state that the framework "applies to all state and local government *non-recurring fees (including application fees) for all small wireless facilities, as well as to all recurring* fees paid in connection with a provider's use of the ROW . . ." (added words italicized). Similarly, the second sentence of this paragraph should omit the phrase "within the ROW," because this sentence addresses application and similar non-recurring permit or other fees. These changes will reaffirm that Sections 253 and 332 apply to all non-recurring fees for small wireless facilities, whether or not those facilities are within the ROW.

Importantly, the Draft Ruling also identifies amounts for recurring fees (*e.g.*, attachment and ROW fees) and one-time, non-recurring fees (*e.g.*, application fees) that are presumed to be fair and reasonable compensation under Section 253.[19] CTIA supports this approach. *First*, it provides guidance to both providers and localities regarding the upper limit of presumptively reasonable fees while affording an opportunity to evaluate charges that may be outside the presumptively reasonable amounts in the Draft Ruling. *Second*, adopting these amounts will ease the administrative burden on localities, minimize disputes over fees, and accommodate varying costs across localities of managing deployments. *Third*, there is record evidence that many

[18] *Id*. ¶¶ 32 n.62, 48.

[19] *Id*. ¶¶ 75-77. It is apparent that the Commission intends that the presumptively reasonable fees for applications established in paragraph 76 ($500 for a single application of up to five small wireless facilities and $100 for each additional facility) are for single, one-time fees only. Nevertheless, the Commission should clarify this point throughout the Draft Ruling by inserting the words "non-recurring fee of" before each of these figures.

localities' costs are in fact *lower* than the presumptively reasonable amounts identified by the Commission. A number of states have imposed caps on recurring fees for small wireless facilities that are lower than the amounts in the Draft Ruling, suggesting that localities in those states have costs that are lower.[20] Indeed, a study reviewing state small cell legislation concluded that the average of the *maximum* total recurring charges within the enacted state small cell legislation is $145 and the median is $50—well below the $270 presumptively reasonable aggregate recurring charges that the Draft Ruling adopts.[21] Moreover, many states limit attachment rates specifically to the Commission's pole attachment formula, which is designed to ensure cost recoupment, with a profit component, and can be roughly approximated to $20 per year.[22] *Finally*, the record supports the Draft Ruling's conclusion that promoting cost-based fees will further the public interest objectives of Sections 253 and 332. For example, a separate study determined that reducing small cell fees could reduce deployment costs by $2.0 billion over five years and that these savings could generate an additional $2.4 billion in capital expenditures—97 percent of which would go toward investment in rural and suburban areas.[23]

The Commission's approach to certain requirements governing small wireless facility deployment is flexible enough to accommodate localized needs. The Draft Ruling takes an important step to set guardrails around practices that could otherwise hinder the rapid deployment of consumer-benefitting services while ensuring that localities' role in the siting process is protected. By adopting reasonable guidelines around localities' use of aesthetics-based restrictions on small wireless facilities deployments, for instance, the Commission appropriately

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[20] For example, Indiana limits attachment fees to $50 annually per pole; Oklahoma sets attachment fees and access fees at $20 each; Ohio limits attachment fees to $200 annually and allows no separate access fees; and Tennessee limits attachment fees at $100 and allows no separate access fees. *See* Letter from Kara R. Graves, CTIA, and D. Zachary Champ, Wireless Infrastructure Association, to Marlene H. Dortch, FCC, WT Docket No. 17-79, *et al.* (filed Aug. 10, 2018).

[21] *See* Scott Mackey, *Analysis of State Small Cell Fee Data*, LEONINE PUBLIC AFFAIRS (Sept. 4, 2018), *attached to* Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79, *et al.*, at 3 (filed Sept. 4, 2018).

[22] *Id*.

[23] *See Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 3*, CMA STRATEGY CONSULTING (Sept. 2018), *attached to* Letter from Thomas J. Navin, Counsel to Corning Inc., to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Sept. 5, 2018).

recognizes that different localities have different aesthetics concerns and thus does not bar specific restrictions. Rather, the Draft Ruling requires them to be reasonable, nondiscriminatory, and published in advance.

The record, however, identifies one additional guardrail that the Draft Ruling should include: aesthetic restrictions should also be "objective." Providers identified numerous regulations that grant unbounded, subjective discretion to local officials.[24] Subjective rules impede deployment because they fail to inform providers of the criteria they should design sites to meet. And they allow discrimination among providers because they do not impose effective checks on a local official's discretion to grant or deny an application on unknowable aesthetic grounds. Many states have recently adopted limits on their localities' aesthetic requirements that employ the term "objective."[25] The Commission should do the same. Like the other guardrails, this additional one will not preclude a locality from taking aesthetics standards into account in reviewing applications, but will obligate it to inform providers what those standards are.

Additionally, the Commission helpfully clarifies that it does not attempt in the Draft Ruling to determine every possible requirement that has the effect of prohibiting service.[26] In that vein, the Commission should make clear that a state or local requirement will not satisfy the "reasonable" criteria for a permissible *aesthetic* requirement[27] if that requirement prohibits or effectively prohibits service. For instance, the Commission properly concludes that a requirement that "*all* wireless facilities be deployed underground would amount to an effective prohibition

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[24] *See* Letter from Kara R. Graves, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79, *et al.* (filed Sept. 4, 2018) ("CTIA Sept. 4 Letter"); *see also* Letter from Kara R. Graves, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79, *et al.* (filed June 27, 2018) ("CTIA June 27 Letter").

[25] CTIA Sept. 4 Letter at 4-8 (quoting requirements enacted in the states of Arizona, Delaware, Missouri, North Carolina, Ohio, and Oklahoma, that local siting requirements for small wireless facilities be "objective").

[26] Draft Ruling ¶ 80.

[27] *See* Draft Ruling ¶ 83 (noting that the Commission is intending in the Draft Ruling to "provide guidance on whether and in what circumstances *aesthetic* requirements violate the Act") (emphasis added); *id*. ¶¶ 86-87 (discussing undergrounding requirements and minimum spacing requirements in the context of the aesthetics criteria). *See also* CTIA June 27 Letter at 7-8.

given the propagation characteristics of wireless signals."[28] It does not, however, address the situation where *parts* of a facility must be placed underground—a requirement that, in some circumstances, could be prohibitive even if the other aesthetics criteria are satisfied—or where an undergrounding requirement imposes prohibitive costs, delays, or other risks. Similarly, minimum spacing requirements may have the effect of prohibiting service even if the other aesthetics criteria are otherwise met. The Commission should thus include additional language in the Draft Ruling indicating that an aesthetic, undergrounding, or minimum spacing requirement could constitute an effective prohibition because it fails to meet the "reasonable" prong of the aesthetics criteria. Alternatively, the Commission should make clear that, even if a state or local requirement satisfies the criteria for a permissible *aesthetic* requirement, it may nonetheless violate Section 253(a) or other portions of the Act.

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CTIA commends the Commission for taking this critical step to ensure consumers and businesses have access to the wireless services they value and demand. By setting guardrails around practices that could otherwise hinder deployment, the Commission can ensure that localities' role in the siting process is protected while also fostering the rapid deployment of services that will benefit communities across the country.

Pursuant to Section 1.1206(a) of the Commission's rules, a copy of this letter is being electronically submitted into the record of these proceedings. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Scott K. Bergmann

Scott K. Bergmann
Senior Vice President, Regulatory Affairs

[28] Draft Ruling ¶ 86 (emphasis original).