N A R U C
National Association of Regulatory Utility Commissioners

November 3, 2017

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

RE: Notice of Oral Ex Parte:

***In the Matter(s) of Bridging the Digital Divide for Low-Income Consumers,* WC Docket No. 17-287, *Lifeline and Link Up Reform and Modernization*, WC Docket 11-42, *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket 09-197; *Connect America Fund*, WC Docket 10-90, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket 17-84, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket 17-79, *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling,* WT Docket 16-421.**

Ms. Dortch:

On November 1, 2017, I met separately with **Thomas Johnson**, *FCC General Counsel*, **Claude Aiken,** *Legal Advisor, Wireline, Office of Commissioner Clyburn*, and **Any Bender**, *Legal Advisor, Wireline, Office of Commissioner O'Reilly*. On November 2, 2017, I met separately with **Jay Schwartz**, *Wireline Advisor, Office of Chairman Pai* and **Travis Litman,** *Chief of Staff and Senior Legal Advisor, Wireline and Public Safety, Office of Commissioner Rosenworcel*.

In all of these meetings, I addressed the following:

As a preliminary matter, I complemented the FCC and the Chairman for the explicit recognition of role assigned to NARUC's member commissions by Congress in the 1996 legislation in the draft Lifeline proposed rulemaking circulated for action at the upcoming November FCC Agenda meeting.

[1] Universal Service - Deficits in funding for the federal high cost program must be addressed.

As noted in a July 2017 NARUC *Resolution Calling for Sufficient Funding of the High-Cost Universal Service Program for Rate Return Carriers*, in the face of increased buildout obligations, rural phone companies are incurring greater costs, at the same time the non-model USF budget control mechanism has already reduced USF support for RLECs from an average of 4.5 percent in late 2016 to 9.1 percent in early 2017, and to 12.4 percent for the remainder of 2017 and early 2018. This continues to increase rates and has instigated repeated bipartisan calls by hundreds of members of Congress in 2014, 2015, and 2017,[1] for the FCC to make targeted

[1] *See, e.g.,* "*Bipartisan Group of Senators Urge FCC to Ensure Access to Affordable Broadband in Rural Communities; 39 Senators press FCC to address the USF Budget shortfall.*" **(November 1, 2017)** online here; "*Peterson and Cramer lead bipartisan letter in support of rural broadband funding*" (**October 3, 2017**) ("The bipartisan letter, signed by 37 Members of Congress, argues that a lack of sufficient funding for rural broadband development puts millions of

reforms to the USF mechanisms to enable lower prices for standalone broadband services that are "reasonably comparable" to those available in urban areas.

The time is past for reform.

I also mentioned a related problem - that the continued delay in the release of a Joint Board recommended decision on contribution form necessarily impacts State programs. FCC action on a Joint Board recommendation revising the federal contribution method is needed to provide a template for State level contribution reform. It is not clear that all the States with complementary programs can afford to wait much longer.

During the discussion on this issue, I pointed out that the FCC's widely anticipated decision to reclassify broadband internet access service as an "information service" in tandem with the FCC's continued refusal to acknowledge the status of VoIP services as "telecommunications services" will, at some point cause problems for the federal program. While a Court has found §254(d) permits the FCC to access support for universal service from "any other provider of interstate telecommunications," it is equally clear only providers of "telecommunication services" can be designated §214 eligible *telecommunications carriers* and receive funding.[2]

[2] Wireline Agenda Item – FCC should not eliminate State copper retirement notifications.

The FCC agenda for the November meeting, includes a Report and Order that streamlines copper retirement process by, among other things, eliminating the requirement that incumbent LECs provide direct notice of planned copper retirements to State commissions and specifying when an incumbent LEC invokes its disaster recovery plan, it gets an up to 180 days exemption from all advance notice and waiting period requirements associated with copper retirements that are a direct result of damage caused by that event.

The FCC should not eliminate State notice requirements – especially in situations requiring a carrier to invoke its disaster recovery plan. Federal agencies and policy are necessarily blunt instruments. The agency, which has opined in various forums about the absence of or limited authority any State agency has over IP-based data and voice services, should be very careful about handicapping State options to address real issues that can arise in the wake of a natural disaster and in the wake of technology transitions. It should be particularly careful about changes or restoration efforts that could impact the health and safety of consumers.

Americans at a significant disadvantage."), online at: https://collinpeterson.house.gov/press-release/peterson-and-cramer-lead-bipartisan-letter-support-rural-broadband-funding; *Letter to Ajit Pai from Senator John Thune, Chairman of the Senate Commerce Committee* (July 17, 2017) (Letter points out that "the High Cost program" is "facing particular funding constraints."), online at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-346804A2.pdf; *Letter from 101 members of Congress* (May 2, 2017) (Notes that "despite the reforms last year, millions of rural consumers are still not seeing widespread affordable standalone broadband services due to insufficient USF support. Meanwhile, the limited USF budget also created the need to reduce the amount available to carriers electing new "model-based" USF support, resulting in tens of thousands of rural consumers receiving lesser broadband speeds than intended by the model or, even worse, no broadband at all."), online at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-345823A7.pdf; *Letter to Chairman Pai and Commissioners O'Reilly and Clyburn from the Chairman of the Senate Agriculture Subcommittee on Rural Development and Energy* (April 11, 2017) (Letter points out that the FCC's "March 2016 Order, that was intended to improve access to affordable "standalone broadband" for rural consumers, has still left outstanding challenges for operators wanting to provide this service."), (April 11, 2017) online at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-345823A2.pdf.

[2] "Telecommunications carriers" is a defined term. According to 47 U.S.C. §153(51) they are "any provider of telecommunications services." See, *IN RE: FCC11-161*, 753 F.3d 1015, at 1048-1049 (10th Cir. 2014), confirming that carriers must be designated as an eligible *telecommunications carrier* and have *common carrier* status to access federal USF funds.

Congress expected States to continue to play a crucial role in "advancing and pressuring" universal service, protecting the public safety and welfare, and in "safeguarding the rights of consumers." 47 U.S.C. §253(b). The FCC should take care not to undermine the federal scheme. NARUC's member commissions do fill this niche Congress assigned - particularly with respect to coordination and restoration of electric, gas and telephone services after disasters.

The California, Pennsylvania, and Ohio commissions all opposed this suggestion in comments.[3] The California commission pointed out that improperly noticed copper retirements could "hamper emergency services" and urged the FCC not to eliminate or reduce the expanded notice requirements to protect vulnerable customers.[4] The CPUC also specifically urged, at p. 24, the FCC to retain the requirement for carriers to give notice State commissions, pointing out at p. 26, that in California, absent such notice, "customers being switched from copper might find themselves without free access to 9-1-1 or functionality or coverage, or access to relay services."

[3] Wireline and Wireless Proceedings.

[A] The Broadband Deployment Advisory Committee (BDAC)

NARUC commended Chairman Pai for creating the BDAC. However, the composition of this federal advisory committee lacks balance. This imbalance in composition will necessarily be reflected in any recommendations from the committee. This in turn, will make them more suspect and reduce their utility and influence.

There are obvious ways to improve the process. One is to increase the membership and include a broader range of entities involved in the issues pending before the working groups. *See, e.g.*, NARUC's August 21, 2017 Letter to FCC on BDAC Composition. A less effective option, but one that would likely increase the usefulness of the proposals, might be to assure that the public and all unrepresented interests have an opportunity to provide input before the BDAC votes on any final recommendation.

Chairman Pai has created the template for such action. It is no secret that the agency, at his instruction, now releases the full text of a proposed item three weeks before an Agenda votes. He also recently proposed putting out the text of circulated items before final votes. In the case of the "tentative agenda", the chairman's new procedure provides a two week window for parties to raise issues, point out potential unintended consequences, and correct misstatements of fact in the record.

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[3] June 2017 Comments of the California Public Utilities Commission, (CPUC Comments), *at: https://ecfsapi.fcc.gov/file/10616232699616/Docket%20Nos.%2017-84%2C%2017-79%20Comment.pdf* June 2017 Comments of the Pennsylvania Public Utility Commission, (PA PUC Comments), *online at: https://ecfsapi.fcc.gov/file/1061578473575/PaPUC%20Cmt%20re%20Wireline%20Broadband%20Deployment%20NPRM.pdf;* and June 2017 Comments of the Public Utilities Commission of Ohio, (PUCO Comments), *at: https://ecfsapi.fcc.gov/file/106140692122944/Comments 061517.docx.pdf*.

[4] *See*, CPUC Comments at pp. 19 – 33. *Compare*, Alarm Industry Comments, at p. 8, online at https://ecfsapi.fcc.gov/file/1061589743765/aicc-comments-17-84.pdf:

> [A] number of companies providing alarm services in the areas in the Northeast and Mid-Atlantic states in which Verizon is retiring copper facilities have experienced a dramatic increase in the number of failed signals and invalid reports in the first and second quarters of 2017 . . .The vast majority of these failures have been traced back to alarm systems using communications services with Verizon ANIs. It is reasonable to conclude that the increase in failures is tied to Verizon's copper retirement program.

Note, misstatements of fact, the prospect of unintended consequences, and unaddressed issues are all likely characteristics of any group that lacks adequate representation of all interested stakeholders. The Chairman's idea for putting out items BEFORE a vote, is a good one (endorsed by NARUC) and even more suited for the BDACs operations given its current composition. There it would make more sense to provide a longer time period for comment.

[B] The FCC lacks statutory authority to take most of the proposed actions in these proceedings.

In this case, as a review of NARUC's comments in both proceedings[5] demonstrate, the text of 47 U.S.C. §§ 253, 332, and 224 simply do not support broad FCC preemptive power vis-à-vis pole attachments in States that have reverse preempted, rights-of-way or city owned structures.[6] NARUC is not the only one to see the obvious. Recently announced plans on Capitol Hill to buttress the FCC's authority indicate pretty clearly that some industry sectors are concerned the agency lacks the authority to implement most of its proposals.

But even if the FCC did have authority, there is simply no statistical record to justify FCC intervention.[7] And, given the stage in 5G facilities deployments thus far, it is unlikely the industry, can compile sufficient data to demonstrate a wide-spread problem exists.

What do we know?

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[5] See, NARUC's July 17, 2017 Reply comments in wireless infrastructure deployment dockets, online at: https://ecfsapi.fcc.gov/file/10717205297221/17%200717%20NARUC%20Reply%20Comments%20Wireless%20%20%20NPRM%20NOI.pdf, and Reply comments in the wireline infrastructure deployment docket at: https://ecfsapi.fcc.gov/file/106151758516325/17%200615%20NARUC%20Initial%20Comments%20Wireline%20NPRM.pdf, our June 6, 2017, initial comments in the wireline deployment docket, online at: https://ecfsapi.fcc.gov/file/106151758516325/17%200615%20NARUC%20Initial%20Comments%20Wireline%20NPRM.pdf and our March 3, 2017 initial comments on the Mobilitie petition, online at: https://ecfsapi.fcc.gov/file/103101393726288/17%200308%20NARUC%20Initial%20Comments%20Motilitie%20petition.errata.pdf

[6] From a policy perspective, pursuing distorted constructions of clear statutory text is a bad idea. Indeed, the FCC's past successes have provided more legal precedent that the 1996 Act does not place any real limits on the agency's authority to either regulate or deregulate. The fact is, as logic – and history since 1996 - demonstrates, every time the agency successfully expands its authority beyond the plain text of the statute, it results in less long term certainty for the legal rules and regulations that will be applied by a future FCC. Note, during the discussion of these supported statutory bases for FCC action, I pointed out all only provide the FCC with authority with respect to "telecommunication services." The FCC's widely anticipated decision to reclassify broadband internet access service as an "information service" in tandem with the FCC's continued refusal to acknowledge the status of VoIP services as "telecommunications services" pretty much undermines any rationale based on these statutory provisions.

[7] *See, e.g.* Gibbs, Colin, *Mobilitie Downplays Small Cell Concerns, Says Sprint Really is Spending on Network Upgrades*, FierceWireless (June 22, 2016), online at: http://www.fiercewireless.com/wireless/mobilitie-downplays-small-cell-concerns-says-sprint-really-spending-network-upgrades (last accessed March 8, 2017). ("Finally, from Mobilitie, we heard a very contrarian and constructive view on Sprint's network initiatives," Jennifer Fritzsche of Wells Fargo wrote in a research note. "Mobilitie did indicate despite all the noise out there, *it is getting through the zoning and permitting stage much faster than the market appreciates* and *there have been no municipalities that have pushed a full-on moratorium on small cell deployment as some have speculated.*" (Emphasis added).) Cf. November 15, 2016 filed *Mobilitie Petition for Declaratory Ruling*, online at: https://ecfsapi.fcc.gov/file/122306218885/mobilitie.pdf, at 14, noting the company "has concluded rights-of-way agreements" with Los Angeles, CA, Anaheim, CA, Minneapolis, MN, Overland Park, KS, Olathe, KS, Independence, MO, Newark, NJ, Union City, NJ, Bismark, ND, Price, UT, Racine, WI, and Wautawtosa, WI – vs. unspecified problems with "many other localities."

Heretofore, the wireless tower industry has, under current laws, in the view of at least one analyst, "grown rapidly."[8] True, the record reflects that a very large number of additional cell sites will be needed to deploy 5G networks. But other than a few anecdotes, there is no statistical data that the current process either is not working or will not work. Anecdotal descriptions of flawed or stalled initial rollouts, the fact that some areas of the country will be more receptive that others, should not be either a surprise or, at this stage, constitute a justification for intervention.

Some have speculated that two BDAC working groups will provide factual evidence to fill this deficit. But, as referenced earlier, it is only logical to assume the perspective and presentation *will necessarily reflect the viewpoint of those that put that information together*. Which means it is likely to, like the BDAC itself, lack balance.

Perhaps these groups will present a list of places where the process is moving slowly or temporarily stalled or is "too expensive." It is unlikely they will provide an analogous list of the numbers and places where successful deployments have occurred or where the negotiations are proceeding (or the allegedly recalcitrant jurisdictions' rationales for "excessive" charges or for "slowing down" a proceeding) – all arguably necessary to determine if there is an actual need for action.

So far, there is little evidence in the record demonstrating anything other than (i) a utility must pay for access to right-of-way owned by the public and (ii) that different configurations and placements in different communities have different prices.

Given the wide difference in property values and tax bases among communities, this is to be expected.

Absent a much stronger factual showing, any free market advocate or federal entity charged, in part, with protecting the public interest should tread carefully. This is particularly true in the circumstances presented, where [1] the FCC concedes "as did Congress in enacting Sections 253 and 332 of the Communications Act . . . localities play an important role in preserving local interests such as aesthetics and safety,"[9] and [2] rights-of-way have always served the public interest by enabling citizens to obtain and use essential services, such as electricity, telephone, gas, water, and transportation Rights-of-way are used for many things, and the ongoing provision of these crucial services requires detailed review of applications for both cell tower and wireless telecommunications facilities to ensure that they will not raise safety or reliability concerns with respect to current right-of-way uses.

Consider that the FCC could not step in and tell a private landowner what compensation he must take to allow a tower company to use his or her land. For the same reason, the FCC should hesitate before telling elected officials that the citizens that voted them into office must subsidize specific uses of their property via an FCC mandate. Such decisions should continue to be made locally by elected officials with demonstrated unique expertise and knowledge relative to management of their rights-of-way as a guardian and trustee for their citizens. Not by an agency thousands of miles away with no local knowledge, expertise or – significantly - accountability to local and voting citizens.

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[8] See, *Market Realist, An Overview of the Wireless Tower Industry*, by Steve Sage, January 11, 2016, online at http://marketrealist.com/2016/01/overview-wireless-tower-industry/ ("In the past few years, the wireless tower construction industry has grown rapidly. This rapid growth is attributed to the demand for mobile data and high-speed data connections . . . There is a total of 205,000 cell phone towers in the United States. Most of them are owned by Crown Castle International (CCI), American Tower (AMT), and SBA Communications (SBAC).") (last accessed March 8, 2017).

[9] Courts too have recognized that distinctions based on traditional zoning principles, including aesthetic impact, e.g., *T-Mobile Ne. LLC v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259 (4th Cir. 2012), and business – residential zoning differences, e.g., *Omnipoint Commc'ns Enters. v. Zoning Hearing Bd. of Easttown Twp.*, 331 F.3d 386 (3d Cir. 2003), *cert. denied,* 540 U.S. 1108 (2004).

I am providing a copy of this ex parte to each of the cited FCC representatives. I have attempted to fairly cover the arguments I presented. If any of those FCC representatives points out a deficit in this overview, I will immediately refile an amended letter to cover that deficit.

If you have questions about this ex parte, please do not hesitate to contact NARUC's General Counsel – Brad Ramsay at 202.898.2207 (w), 202.257.0568(c) or at jramsay@naruc.org.

Respectfully Submitted,

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