Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

REPLY OF THE WIRELESS INFRASTRUCTURE ASSOCIATION TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

The Wireless Infrastructure Association ("WIA"),[1] pursuant to Section 1.429(g), respectfully submits this reply in support of various Oppositions[2] filed against the petitions for reconsideration of the Declaratory Ruling filed in the captioned proceedings.[3] As discussed in

[1] WIA is the principal organization representing companies that build, design, own, and manage telecommunications facilities throughout the world. WIA's members include infrastructure providers, carriers, and professional services firms.

[2] CTIA Opposition to Petitions for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (Nov. 9, 2018) ("CTIA Opposition"); Verizon Opposition to Petitions for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (Nov. 9, 2018) ("Verizon Opposition"); NCTA – The Internet & Television Association, Opposition to Petitions for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (Nov. 9, 2018) ("NCTA Opposition"); NTCA – The Rural Broadband Association, Opposition to Petitions for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (Nov. 9, 2018) ("NTCA Opposition"); USTelecom – The Broadband Association, Opposition to Petitions for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (Nov. 9, 2018) ("USTelecom Opposition").

[3] Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, *Third Report and Order and Declaratory Ruling*, WC Docket No. 17-84, WT Docket No. 17-79, FCC 18-111 (rel. Aug. 3, 2018) ("Declaratory Ruling"). On September 4, 2018, petitions for reconsideration of the Declaratory Ruling were filed by the Smart Communities and Special Districts Coalition ("Smart Communities Petition"), the City of

(continued on next page)

this Reply and the Oppositions, reconsideration of the Declaratory Ruling is inappropriate because the Commission correctly and lawfully concluded that state and local moratoria on the deployment of telecommunications facilities violate Section 253(a) of the Communications Act ("Act").

INTRODUCTION

The Commission has made important strides toward lowering barriers to wireless infrastructure deployment in furtherance of its fundamental mission, "to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications."[4] The Declaratory Ruling is a critical component of these efforts.[5] The Declaratory Ruling was issued after review of a comprehensive record demonstrating that localities continue to adopt moratoria and rely on them as a basis for refusing to act on wireless siting applications.[6] WIA's members have been directly impacted by these moratoria. The record demonstrates, for example, that one member alone was prohibited from deploying

(footnote continued)
New York ("New York Petition"), and the County Road Association of Michigan ("Road Association Petition") in WC Docket No. 17-84 and WT Docket No. 17-79.

[4] 47 U.S.C. § 151.

[5] *See* Comments of WIA, WC Docket No. 17-84 & WT Docket No. 17-79, at 7 (June 15, 2017) ("WIA Comments").

[6] *See, e.g.*, Declaratory Ruling ¶ 143; CTIA Opposition at 8; NCTA Opposition at 8; WIA Comments at 10-12.

approximately eighty-five small wireless facilities in nine jurisdictions that have either enacted a moratorium or entered an indefinite holding pattern constituting a *de facto* moratorium.[7]

The Smart Communities and Special Districts Coalition ("Smart Communities") and the City of New York ("New York") (collectively "Petitioners") urge the Commission to reconsider its declaration that express and *de facto* moratoria violate Section 253(a), in order to preserve their ability to impose wireless siting moratoria.[8] Opponents correctly note, however, that the Petitioners fail to provide any grounds for reconsideration. As discussed below, WIA agrees with Opponents that (i) the Commission had ample legal authority to issue the Declaratory Ruling,[9] (ii) the Commission correctly interpreted Section 253,[10] and (iii) the Declaratory Ruling does not constitue a taking under the U.S. Constitution.[11]

DISCUSSION

I. THE COMMISSION HAD AMPLE LEGAL AUTHORITY TO ISSUE THE DECLARATORY RULING

Petitioners claim that the Commission lacked the authority to issue the Declaratory Ruling, with Smart Communities further alleging that the Commission was required either to

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[7] WIA Comments at 11.

[8] The County Road Association of Michigan ("Road Association") sought reconsideration of the Declaratory Ruling's impact on Michigan laws imposing weight restrictions on roads during the Spring. Road Association Petition at 1-10. As CTIA notes, however, the Declaratory Ruling clearly states that it does not "specifically preempt any state or local law." CTIA Opposition at 7 (citing Declaratory Ruling ¶ 164). Accordingly, the Road Association Petition provides no basis for reconsideration.

[9] *See* NCTA Opposition at 7; USTelecom Opposition at 12; *accord* WIA Comments at 29-30.

[10] *See* NCTA Opposition at 7-9; NTCA Opposition at 4; *accord* WIA Comments at 55-56.

[11] CTIA Opposition at 19-21. WIA also agrees that the Petitions mischaracterize the scope of the ruling and that such mischaracterizations do not provide a basis for reconsideration. *See* CTIA Opposition at 6-10.

conduct a rulemaking or only preempt specific regulations/requirements after notice and comment.[12] These claims are without merit.

As WIA has previously demonstrated,[13] the FCC has broad discretion as to how it conducts its proceedings,[14] including whether to proceed by declaratory ruling.[15] The Commission properly concluded that it has "authority under the Administrative Procedure Act (APA) and our rules to issue a declaratory ruling to terminate a controversy or remove uncertainty. . . ."[16] As various Opponents note, it is well established that the Commission can issue declaratory rulings interpreting ambiguous provisions of the Communications Act.[17] And Commission authority to interpret ambiguities in Section 253 has been upheld by courts on multiple occasions.[18] Indeed, the Supreme Court held in *AT&T Corp. v. Iowa Utilities Board* that the Commission has broad authority to interpret provisions of the Telecommunications Act

[12] Smart Communities Petition at 21-22; New York Petition at 10-11.

[13] WIA Comments at 29.

[14] *FCC v. Schreiber*, 381 U.S. 279, 289-90 (1965); 47 U.S.C. § 154(j).

[15] *See* 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; *see also Viacom Int'l v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982); *Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir. 1976).

[16] Declaratory Ruling ¶ 161.

[17] *See* CTIA Opposition at 11; NCTA Opposition at 7-9; Verizon Opposition at 17; *accord* WIA Comments at 29.

[18] *See* WIA Comments at 29 (citing *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 n.l1 (11th Cir. 2001); *N.Y. State Thruway Auth. v. Level 3 Commc'ns, LLC*, 734 F. Supp. 2d 257, 265 (N.D.N.Y. 2010)).

of 1996, which includes Sections 253.[19] Simply put, there is no basis for Petitioners' arguments that the Commission lacked authority to issue the Declaratory Ruling.[20]

II. THE DECLARATORY RULING CORRECTLY INTERPRETS SECTION 253

Petitioners claim that the Declaratory Ruling is flawed – and reconsideration thus appropriate – because it incorrectly interprets Section 253.[21] Opponents correctly demonstrate, however, that no such flaws exist.[22]

A. The Commission Correctly Stated that Section 253(a) Does Not Require a Physical Gap in Coverage

New York argues that, because Section 253(a) only addresses "service," the Commission may prohibit moratoria only to the extent they prevent providers from closing a "service" coverage gap. This service gap argument, however, was already considered and rejected by the Commission.[23] Nothing in the New York Petition justifies a different result on reconsideration.

New York's attempt to distinguish between "service" and "deployment" is misguided. As CTIA notes, "there can be no service without deployment."[24] Moreover, the Declaratory Ruling merely affirms the Commission's conclusion in *California Payphone* that Section 253 is not limited in scope to service or coverage gaps, but rather applies whenever a regulation

[19] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999).

[20] As USTelecom notes, the Commission already considered and rejected these arguments and it therefore "should reject these rehashed and unpersuasive arguments about the scope of its authority to preempt moratoria under section 253(a)." USTelecom Opposition at 12.

[21] *See* New York Petition at 4-18; Smart Communities Petition at 4-12.

[22] *See* CTIA Opposition at 10-16; Verizon Opposition at 21-22.

[23] *See* CTIA Opposition at 12 (citing Declaratory Ruling).

[24] CTIA Opposition at 12.

"materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[25]

B. The Commission Correctly Concluded that Section 253(a) Applies to Comingled Facilities

New York claims that the Commission's reclassification of broadband Internet access as an information service "cripples" the Declaratory Ruling.[26] The reclassification had no such impact. As CTIA correctly notes:

> the Commission correctly held, consistent with prior decisions, that where a facility can be used for commingled information and telecommunications services, Section 253(a) applies. Again, the City of New York fails to demonstrate why this holding is an unreasonable interpretation of the Act.[27]

C. The Commission Correctly Stated that Nothing in Section 253 Precludes the FCC from Interpreting Section 253(a)

Petitioners claim that various provisions in Section 253 compel the Commission to reconsider its declaration that express and *de facto* moratoria violate Section 253(a).[28] WIA agrees with Opponents, however, that nothing in Section 253 precludes issuance of the Declaratory Ruling interpreting Section 253(a).[29]

First, Section 253(b) does not protect the ability of states and localities to adopt siting moratoria.[30] Although Section 253(b) may preserve reasonable time, place, and manner

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[25] California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, *Memorandum Opinion and Order*, 12 FCC Rcd 14191, 14206 (1997); *see* Verizon Opposition at 21-22; WIA Comments at 33.

[26] New York Petition at 7.

[27] CTIA Opposition at 14 (citation omitted).

[28] Smart Communities Petition at 9; New York Petition at 14.

[29] *See* CTIA Opposition at 13-14; NCTA Opposition at 9; NTCA Opposition at 4.

[30] Smart Communities Petition at 9.

restrictions, moratoria are not such restrictions.[31] The Declaratory Ruling also does not preclude the imposition of time, place, and manner restrictions but merely declares that localities cannot enact complete bans (or effective bans) on siting applications.[32] Moreover, "the Commission provided a sound explanation [in the Declaratory Ruling] for why the prohibited types of moratoria are not protected under the limited exceptions in Sections 253(b). . . ."[33]

Second, New York incorrectly claims that Section 253(c) preserves the ability of localities to enact moratoria limited to rights-of-way.[34] As NCTA correctly notes, the Commission fully explains why Section 253(c) does not preclude issuance of the Declaratory Ruling.[35] Moreover, as CTIA demonstrates, ROW moratoria are not competitively neutral because they favor existing ROW occupants over new entrants.[36] Accordingly, ROW moratoria are not protected by Section 253(c), which only preserves "competitively neutral and nondiscriminatory" ROW management.[37]

Third, Section 253(d) does not preclude issuance of the Declaratory Ruling clarifying application of Section 253(a) to moratoria, as alleged by Smart Communities.[38] Section 253(d) establishes a procedure for preempting specific laws, but the Declaratory Ruling expressly

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[31] CTIA Opposition at 13; *see* NTCA Opposition at 4 ("The Commission correctly noted in the Declaratory Ruling that express and *de facto* moratoria on the deployment of broadband facilities violate Section 253(a) and are not saved by the exceptions found in Section 253(b) and (c)" (citation omitted); NCTA Opposition at 9; WIA Comments at 27-28.

[32] *Accord* CTIA Opposition at 13.

[33] *See* NCTA Opposition at 9.

[34] New York Petition at 14.

[35] NCTA Opposition at 9.

[36] CTIA Opposition at 13-14.

[37] 47 U.S.C. § 253(c).

[38] *Compare* Smart Communities Petition at 10-11.

declines to preempt any specific laws.[39] Thus, this claim is without merit and cannot justify reconsideration.[40]

III. THE DECLARATORY RULING DID NOT RESULT IN A TAKING UNDER THE U.S. CONSTITUTION

Smart Communities makes the meritless claim that reconsideration is warranted because the Declaratory Ruling results in a taking in violation of the the Consistution.[41] As CTIA and Verizon correctly note, the Declaratory Ruling does not require localities to grant any wireless siting applications, nor does it diminish the economic value of any property. Therefore, the Declaratory Ruling has no impact on property rights that would trigger a taking analysis.[42] The ruling merely prohibits outright refusals to accept and consider wireless siting applications. Accordingly, the "takings" argument does not provide any basis for reconsideration.

CONCLUSION

As stated above, WIA agrees with Opponents that the Petitions for Reconsideration of the Declaratory Ruling are without merit and should be denied.

Respectfully submitted,

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[39] Declaratory Ruling ¶ 164.

[40] *See* WIA Comments at 29-30.

[41] Smart Communities Petition at 24-25.

[42] *See* CTIA Opposition at 19-21; Verizon Opposition at 27.