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December 19, 2017

Via ECFS

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

Ms. Elizabeth Bowles
Chair, Broadband Deployment Advisory
Committee
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: City of Eugene, Oregon – *Ex Parte* Submission, *Broadband Deployment Advisory Committee*, GN Docket No. 17-83; *Accelerating Wireline Broadband Deployment*, WC Docket No. 17-84; *Accelerating Wireless Broadband Deployment*, WT Docket No. 17-79

Dear Secretary Dortch and Chair Bowles:

On behalf of my client, the City of Eugene, Oregon (“Eugene” or “City”), I write in response to assertions made about allegedly “excessive” and “duplicative” right-of-way fees in the October 31, 2017, draft report and findings (“Draft Barriers Report”) of the BDAC’s Removing State and Local Regulatory Barriers Working Group.

In particular, the City takes exception to the Draft Barriers Report’s assertion (at 3) that a “barrier occurs when fees for access to ROW and local assets are viewed as unreasonably high relative to the incremental burden on the ROW, duplicative of fees already paid, or otherwise cannot be measured by some objective metric.” Appendix C of the Draft Report then goes on to single out Eugene, claiming that

Several commenters also cited a Eugene, Oregon, ordinance that requires broadband providers to pay the municipality seven percent of their broadband revenues for access to the public ROW, despite the fact that many providers are offering their service over existing plant on which they are already paying a franchise fee.

Draft Barriers Report, Appendix C, at 8.

Eugene is disappointed that, at least in its draft, the BDAC's State and Local Barriers Working Group apparently chose to accept uncritically the claims of industry commenters while overlooking, or deciding to ignore, the wealth of legal and factual arguments submitted by Eugene, as well as other local governments, rebutting the very industry claims on which the Working Group relies. To facilitate the Working Group's, as well as the BDAC's, consideration of the City's legal and factual arguments on the ROW compensation issue, the following are attached to this letter:

Attachment 1: The Comments of the Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee ("Eugene City Coalition") in *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Development*, WT Docket No. 17-79 ("Wireless Barriers") (filed June 15, 2017).

Attachment 2: Eugene City Coalition Comments in *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 ("Wireline Barriers") (filed June 15, 2017).

Attachment 3: The exhibits to the Eugene City Coalition's Comments in the *Wireless Barriers* and *Wireline Barriers* proceedings, which comprise:

Exhibit A: Eugene City Coalition Comments in *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421 ("Mobilitie Petition") (filed March 8, 2017).

Exhibit B: Reply Comments of the Eugene City Coalition in *Mobilitie* (filed April 7, 2017).

Exhibit C: Comments of the City of San Antonio in *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59 ("Acceleration of Broadband Deployment") (filed July 18, 2011).

Exhibit D: Comments of the City of Eugene, *Acceleration of Broadband Deployment* (filed July 18, 2011).

Exhibit E: Reply Comments of the City of San Antonio, *Acceleration of Broadband Deployment* (filed Sept. 30, 2011).

Attachment 4: Reply Comments of the City of Eugene, *Acceleration of Broadband Deployment* (filed Sept. 30, 2011).

Attachment 5: Reply Comments of the Eugene City Coalition in the *Wireless Barriers* and *Wireline Barriers* dockets (filed July 17, 2017).

Attachment 6: December 12, 2017, letter from Director, Oregon External Affairs, AT&T Services, to Executive Director, City of Eugene Planning and Development Department.

These filings establish two critical points.

First, the plain language of the Communications Act, relevant legislative history, and court precedent make clear that (1) gross revenue-based ROW fees are consistent with Section 253¹; (2) the Act does not preempt or otherwise prohibit the imposition of non-discriminatory, gross revenue-based ROW fees on cable operators' provision of non-cable services²; and (3) Subsections 253(c) and (d) were specifically intended to make clear that courts, *not* the FCC, were to determine what is "fair and reasonable" ROW compensation under Section 253(c).³

Second, the premise of the Draft Barriers Report – that gross revenue-based ROW fees in general, and Eugene's 7% ROW fee in particular, are "barriers to deployment" – is flatly contradicted by the factual record. That unrefuted record reveals that Eugene enjoys substantially greater broadband deployment than the rest of the nation, as well as other areas of Oregon, that impose lesser, or no, ROW fees.⁴

As broadbandmap.gov data shows, "100% of Eugene's population has access to landline broadband, and 96.4% of Eugene's residents have access to at least three landline providers, compared to only 56% of the population nationwide."⁵ Likewise, while 96.4% of Eugene residents have access to at least three landline broadband service providers, only 82.1% of Oregon residents do.⁶ "The City's ROW policies and practices have therefore certainly been no obstacle whatsoever to broadband deployment in Eugene. To the contrary, since 1996, the City has issued 1,168 utility cut permits for the installation of telecom/broadband and related infrastructure in the City's ROW. Approximately 328 miles of such infrastructure have been installed in the City's ROW to date, and the applications continue."⁷

¹ See Attachment 5 at 18-22; Attachment 3, Exhibit A at 21-28; Attachment 3, Exhibit B at 21-25; Attachment 3, Exhibit C at 13-19; Attachment 3, Exhibit D at 11-18; Attachment 3, Exhibit E at 6-10; Attachment 4 at 3-12.

² See Attachment 5 at 24-35; Attachment 3, Exhibit C at 13-14; Attachment 3, Exhibit D at 11-13; Attachment 3, Exhibit E at 6-10; Attachment 4 at 3-12; *City of Eugene v. Comcast of Or. II*, 375 P.2d 446, 538 (Or. 2016).

³ See Attachment 5 at 14-18, Attachment 3, Exhibit A at 22-25; Attachment 3, Exhibit B at 21-24; Attachment 3, Exhibit C at 13-15; Attachment 3, Exhibit D at 11-13; Attachment 3, Exhibit E at 9; Exhibit 4 at 9-10.

⁴ See Attachment 5 at 26; Attachment 3, Exhibit D at 6-9.

⁵ Attachment 5 at 26 (citing <https://broadbandmap.gov/summarize/state/oregon/census-places/eugene>).

⁶ <https://www.broadbandmap.gov/summarize/state/oregon>.

⁷ Attachment 3, Exhibit D at 6.

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Moreover, Eugene has become one of the nation's leading high-tech and broadband communities, thereby further disproving the Draft Barriers Report's assumptions about the City's ROW fee. Among the accolades the City has received are:

Eugene named a Quality of Life Top Ten City, NerdWallet, November 2017 <https://www.nerdwallet.com/blog/credit-cards/best-cities-for-quality-of-life/>

Eugene Receives \$1.9 Million in Fiber Optic Network Funding from US Department of Commerce, May 2017. <https://www.eugene-or.gov/CivicAlerts.aspx?AID=3002&ARC=6419>

Eugene named a Top Ten Recruitment City for Tech Jobs, 2015
<https://www.fastcompany.com/3048391/the-next-top-10-cities-for-tech-jobs>

Eugene Digital Youth Coding Program received a national Broadband Digital Literacy Award, 2015 <https://www.meetup.com/Eugene-Region-CoderDojo-Hub/messages/boards/thread/49136821?cookie-check=nnnkX0jvCLvDSe4V>

Eugene, Ore., Named 'Gigabit City' by Nonprofit Mozilla Foundation, (GovTech, March 15, 2017) <https://www.cedmagazine.com/news/2017/03/mozilla-nsf-and-us-ignite-reveal-300k-grants-gig-based-projects-oregon-and-louisiana>.

Eugene's Tech Connection OPEN FOR BUSINESS, (November, 2016)

Finally, Eugene's broadband permitting practices for wireless facilities have received industry praise for the City's "reasonable and predictable processing of permits" and for the City staff's "responsiveness and guidance during review of . . . permit applications." *See* Attachment 6.

The City therefore asks that in its final report, the Working Group delete the Draft Barriers Report's criticism of gross revenue-based ROW fees and of Eugene's application of its ROW fee to the non-cable services of cable operators.

Respectfully submitted,

/s/ Tillman L. Lay

Tillman L. Lay

Counsel for the City of Eugene, Oregon

TLL:smh
Attachments