September 19, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, District of Columbia 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,

The National Association of Telecommunications Officers and Advisors ("NATOA"),[1] the National League of Cities ("NLC"),[2] the National Association of Counties ("NACo"),[3] the United States Conference of Mayors ("USCM")[4] and the National Association of Regional Councils ("NARC")[5] ("Local Governments") urge the Commission to reject the Declaratory Ruling and Third Report and Order ("Order") to be considered at the September 26, 2018 meeting. Local Governments share the federal government's goal of ensuring affordable broadband access for every American, regardless of their income level or address. The proposed Order, however, will not achieve that goal.

[1] NATOA's membership includes local government officials and staff members from across the nation whose responsibility it is to develop and administer communications policy and the provision of such services for the nation's local governments.
[2] The National League of Cities is the oldest and largest organization representing cities and towns across America. NLC represents 19,000 cities and towns of all sizes across the country.
[3] NACo represents county governments, and provides essential services to the nation's 3,069 counties.
[4] USCM is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,192 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor.
[5] NARC represents more than 500 councils of government, metropolitan planning organizations, and other regional planning organizations throughout the nation.

The Order establishes an unreasonable and unworkable standard of what constitutes an effective prohibition, which will impose costs on local governments and interfere with public safety and other local protections that are the heart of localism. In short, the Order undermines local governments' ability to ensure fair and reasonable deployments, and fails to ensure any public benefits.

A. The FCC's Proposed Definition of "Effective Prohibition" is Overly Broad and Relies on an Unsupportable Interpretation of the Communications Act

The Local Governments previously noted the significant issues with the Commission's proposed interpretation of the Communications Act.[6] The proposed Order exacerbates these concerns by proposing to adopt the standard from a misinterpretation of *California Payphone*[7] to support far-reaching conclusions.

One example of the Order's overreach is its interpretation of the Commission's *California Payphone* decision and its progeny to support its finding of a presumptive "effective prohibition" regardless of whether there is any impact on the provision of telecommunications services. *California Payphone* states that a consideration in determining an effective prohibition is "whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." It does not, as the draft Order seems to do, set out a "materially inhibits" test *and* a "complete in a fair and balanced regulatory environment" test.

Yet, the Order finds "an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service."[8] This finding apparently, and inexplicably, applies even where the provider is and may continue to provide services, and without regard to any implications on the ability to compete in a fair and balanced regulatory environment. Similarly, the Order cites the Commission's *Texas PUC Order*[9] decision as reflecting the notion that a "competitive disparity" can be an effective prohibition without any analysis of whether or not telecommunications services are "materially inhibited."[10] While the Local Governments reject that the *California Payphone* standard as articulated in the Order is a reasonable interpretation of Section 253, if the Commission is adopting it, it should follow it—all of it, not just the portions that support its conclusions.

The Commission then stretches this standard to seemingly allow a provider to deploy in local rights of way any facilities it wishes to deploy for any "service the provider wishes to

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[6] *See, e.g.*, Reply Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Towns and Townships, the National Association of Regional Councils, United State Conference of Mayors and the Government Finance Officers Association; WT Docket No. 17-79 and WC Docket No. 17-84.
[7] *California Payphone Ass'n*, 12 FCC Rcd 14191 (1997).
[8] Order ¶ 36.
[9] *Public Utility Comm'n of Texas, et al.*, Pet. for Decl. Ruling and/or Preemption of Certain Provisions of the Texas Pub. Util. Reg. Act of 1995, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997).
[10] Order ¶ 38.

provide…".[11] This standard would preclude local governments from enforcing even the most basic requirements to ensure efficient use of the rights of way. Providers would have an incentive to deploy the largest size and number of small wireless facilities, knowing local governments would have no ability to question the needs for numerous oversized small wireless facilities. The Commission's Technological Advisory Committee has acknowledged this issue and the need to avoid "over-engineered systems" that are "way beyond what is required" being deployed by unchecked providers.[12]

In addition, the proposed definition of "effective prohibition" does not "remove … substantial uncertainty" and "reduce the number and complexity of legal controversies," but rather invites challenges to long-standing local rights of way requirements unless they meet a subjective and unclear set of guidelines.[13] For example, the Order proposes to find that aesthetic requirements must be "reasonable," a term it describes in reference to "unsightly or out-of-character deployments"—a phrase that is rife with uncertainly and will not avoid legal controversies.[14] With respect to spacing requirements, the Order states that "while some such requirements may violate Section 253(a), others may be reasonable aesthetic requirements," and refers to the same "reasonable" standard without further guidance.[15] It is difficult to discern how this will assist municipalities or providers in assessing what is a permissible aesthetic consideration.

B. The Shot Clocks Jeopardize Public Safety and Burden Local Governments

The proposed shot clocks do not leave sufficient time for local governments to complete necessary reviews to protect the public safety or meet basic due process standards, and place an unreasonable burden on local governments. Despite a record establishing the demands placed on local governments from the many utilities, developers and other applicants seeking local approvals, all of which may have important public safety and local economic implications, the Order puts small wireless facilities at the head of the line.

Of particular concern is that the Order designates any preexisting structure, regardless of its design or suitability for attaching wireless equipment (not to mention up to three cubic feet of antenna and twenty-eight cubic feet of additional equipment), as eligible for a new expedited sixty day shot clock. When paired with the FCC's previous decision exempting small wireless facilities from federal historic and environmental review, this places an unreasonable burden on local governments to prevent historic preservation and environmental harms that previously may have been resolved at the federal level.[16] Adding to the burden is need to review these deployments for

[11] Order n. 78.
[12] Technological Advisory Council Meeting, April 12, 2018 at 43:02-44:08.
[13] Order ¶ 94.
[14] Order ¶ 84.
[15] Order ¶ 87.
[16] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Second Report and Order (March 30, 2018). In exempting small wireless facilities from federal environmental and historic preservation review, the Second Report and Order relies on the availability of state and local reviews to protect against harms. To now impose new shot clocks that further limit the time for such review calls into question the premise of the Second Report and Order.

public safety harms to the community, which range from line of sight concerns to the very stability of the structure on which the facility is deployed.

The short timelines proposed in the Order also implicate the due process clause of federal and state constitutions. Among other issues, the shot clocks may prevent municipalities from providing due process to property owners adjacent to new small wireless facility deployments. As previously noted in the record, under both federal and state law, prior notice and an opportunity to be heard is an essential due process protection that applies to property owners impacted by local land use decisions.[17] Municipalities need sufficient time to meet these fundamental obligations of local government. Shortening local review and appeal processes opens municipalities to liability from those whose due process protections have been given short shrift by the proposed Order.

For example, South Carolina law allows "any person aggrieved or by any officer, department, board, or bureau of the municipality or county" to file an appeal within a "reasonable period of time," which is presumed to be thirty days.[18] The statute also requires at least fifteen days' public notice prior to the hearing, among other procedural requirements.[19] The proposed Order would not leave sufficient time to go through even these basic procedures.

In addition, shortening the approval timeline also shortens the time for an applicant to respond to an objection or appeal filed by a third party, which may implicate the due process rights of the applicant. In the South Carolina example, regardless of which shot clock applies in a given instance, a local government would need to schedule the appeal hearing with little, if any, more than the fifteen-day notice to leave time to hold the hearing and issue a decision before the shot clock expires. This, in turn, leaves the applicant with less time to prepare for the hearing, opening the door to a due process claim against the municipality by the applicant.

The proposed remedy for failing to act within the applicable shot clocks, which allows the applicant to seek injunctive relief in court, at which point the local government may attempt to rebut the presumptive reasonableness of the clock, does not make these timelines more reasonable or workable. It simply forces local governments to confront a host of risks and costs—curbing necessary public safety reviews to meet the timelines; risking violations of the due process rights of its residents and/or the applicant; incurring the time and expense of the injunction—that fails to result in timely deployments that adequately balance the public interest with applicants' needs.

The shot clocks impose a significant burden on local governments, particularly smaller municipalities with limited resources. The Order does not give weight to these burdens, and in particular the Final Regulatory Flexibility Analysis ("RFA") fails to adequately address the shot clocks' impact on these small government agencies. The RFA addresses small government entities

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[17] *See* Joint Comments of The League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities, WT Docket No. 17-79, at 24-26, *citing Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1049 (9th Cir. 2014) (*quoting Horn v. Cnty. of Ventura*, 596 P.2d 1134, 1140 (Cal. 1979)).

[18] South Carolina Code of Laws § 6-29-800(B).

[19] *Id*. at § 6-29-800(D). San Francisco describes its hearing and appeal process in its comments, which is similarly impacted by the proposed shot clocks. Comments of the City and County of San Francisco, WT Docket No. 17-79 at 4-7; 22.

only in the context of responding to issues raised in comments on the Initial Regulatory Flexibility Analysis. The RFA dismisses the concerns of small government agencies by pointing to existing shot clocks and the lack of a "deemed granted" remedy in the Order. This cursory response is insufficient.

The Commission appears to dismiss any issues with the new shot clocks by pointing to the fact that there are existing shot clocks. This rationale is undermined by the Order itself, which has as its purpose "accelerating" deployment of small wireless facilities and notes the "need to deploy large numbers of wireless sites."[20] It is unreasonable to assume that the new shot clocks will have no impact where the intent of the Order is to spur many more applications than localities currently must process within these limited timelines.

The RFA further dismisses the shot clocks' impact by arguing the remedy—the applicant seeking an injunction from a court—is somehow less burdensome than a "deemed granted" remedy. There is no analysis regarding why a requirement that a small government agency litigate the shot clocks' reasonableness is any protection at all. As noted above, this remedy imposes significant costs and risks on local governments. Further, where a small government agency has many pending permit applications, it would be in its financial and legal interest to prioritize the applications subject to the Order, thereby impacting other applicants as cited in the record.[21]

Finally, the RFA does not address the financial implications to small government agencies in meeting the new shot clocks. In addition to being forced to enact new ordinances to comply with the Order, the record indicates they will need additional staff to meet shot clock requirements.[22]

C. The Proposed Fee Caps are Unsupported by the Act and are Unreasonable

The Commission's conclusion that Section 253(a) and 253(c) limits local governments' compensation for use of the rights of way to a reasonable approximation of costs, which it presumes to be $270 per small cell site, is arbitrary and unreasonable. This conclusion is illustrated by the many municipalities that have worked to negotiate fair deals with wireless providers that include higher fees, in addition to other benefits to the community.[23] The Local Governments

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[20] Order ¶ 24.

[21] *See* Smart Cities and Special Districts Coalition Comments at 81; cited in the RFA at ¶ 6.

[22] *See, e.g., Id.* at 53 (citing CTC Declaration at 21); Letter from Larry H. Hanson, Georgia Municipal Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79; WC Docket No. 17-84, at 4 (filed September 17, 2018) ("75% of cities in Georgia have a population of fewer than 5,000. City governments often have very limited staff available to perform a myriad of day to day administrative tasks for the city, from issuing building permits to processing water bill payments and maintaining all records and documents for the city."); Letter from Brad J. Townsend, City of West Carrollton, Ohio, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79; WC Docket No. 17-84, at 2 (filed September 17, 2018) ("A 'one size fits all' approach to review does not consider the size and more limited resources of a community such as ours [pop. approx. 13,000] which may limit our ability to review applications within the expedited time frame.").

[23] The Order does not address these existing agreements and thus appears to preempt them to the extent they are inconsistent with the Order. We strongly object to the Commission attempting to interfere with

reject the premise that the Commission has the authority dictate the rates charged by municipalities for public property, or has the need to intervene on behalf of the wireless industry that has ample resources and leverage to negotiate reasonable compensation.

Referencing state small cell bills to support these caps is a *non sequitur*. The FCC's authority over municipal rights of way is not comparable to that of the states. To the contrary, federal law has consistently preserved local rights of way authority from intrusion by the federal government.[24] Purporting to follow the lead of state legislators not only ignores this long-standing Congressional intent, but also ignores the more than thirty states that did not enact legislation to address small wireless facilities, or opted not to impose fees caps in that legislation. Finally, it mistakenly assumes the Commission can or should substitute its judgement for that of state elected officials.

The Commission also notes in its own Order that it will have a multibillion-dollar aggregate impact on local governments, the vast number of which are small entities.[25] However, the Commission's specific proposals in the Order have not been subject to a sufficient period of time for public comment and sufficient intergovernmental consultation on these impacts. The Commission plans to remove billions of dollars in resources from local governments and impose substantial new unfunded mandates, yet has not convened a single meeting of its Intergovernmental Advisory Committee in 2018 to discuss this issue – or any other.

D. If the Commission Approves the Order, A Stay is Required

If the Commission votes to approve the Order, we request the Commission delay the effective date until the resolution of any reconsideration petitions and appeals. The Order is a sweeping change to the status quo, preempting inconsistent state small cell bills and local ordinances, as well as existing local agreements with providers, thwarting not only state and local policy choices, but also providers' business decisions. The impacts of the proposed Order on local governments and providers are significant and cannot easily be remedied or reversed should the Order be reconsidered or vacated on review. Any small wireless facilities deployed under the Order would be subject to uncertainty—such as potential changes or removal and additional fees—should the rules under which they are deployed be changed. State and local governments as well as providers would benefit from the certainty of operating under rules that are not undergoing legal review.

While we urge the Commission to delay the effective date of the Order pending any reconsideration or court review, in the event the Commission opts not to do so, we ask the Commission to delay the effective date for at least six months after publication in the Federal

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municipal agreements voluntarily entered into by providers who are entirely capable of determining what is in their best interest.

[24] *See, e.g.*, 47 U.S.C. §§ 541; 524 (establishing a framework of local franchise agreements and franchise fee payments of up to five percent of gross revenue for cable operators); 542. 47 U.S.C. § 253(c) (preserving local authority "to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers…"); 47 U.S.C. §§ 151, note 1 (preserving local authority to impose fees on internet service providers for the benefit of using the rights of way).

[25] Order ¶ 7.

Register to give local governments a sufficient transition period to amend their codes consistent with the Order and new rules. This is especially important given the requirement that, to be applicable, aesthetic requirements must be in place prior to application submission. Local governments cannot discharge their basic duty of protecting the community if they do not have time to update their requirements. Further, as discussed above, well established state and local land use codes include processes that cannot be completed in the time provided in the Order, necessitating changes not just to right of way-related ordinances, but also in many cases generally-applicable land use codes. A delayed effective date is needed to provide sufficient time for local governments to implement thoughtful requirements that balance local processes and concerns with providers' deployment needs, which is best achieved where there is time for input from the public and wireless providers.

E. Conclusion

The Local Governments urge the Commission to oppose the draft Order, which will have significant, negative impacts on our communities with no commitment of public benefits in return. Local elected officials are far better suited than the Commission—and have every incentive—to implement policies that meet their unique local needs while incentivizing robust and timely deployment of communications services for the benefit of the entire community.

Sincerely,

Nancy Werner
General Counsel
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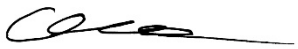

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