Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

NTCA–THE RURAL BROADBAND ASSOCIATION
OPPOSITION TO PETITION FOR RECONSIDERATION

NTCA-The Rural Broadband Association ("NTCA")[1] hereby submits this Opposition to the Petition for Reconsideration[2] filed in response to the Declaratory Ruling and Third Report and Order[3] adopted by the Federal Communications Commission ("Commission") in September 2018 in the above-captioned proceedings. The Petition seeks to undo certain provisions adopted by the Commission that will expedite and lower the cost of 5G wireless infrastructure installation in municipally-controlled rights-of-way.

As background, NTCA's interest in this proceeding is two-fold. For one, many NTCA members utilize fixed and mobile wireless technology to meet consumer demand for voice and

[1] NTCA represents approximately 850 independent, community-based telecommunications companies and cooperatives and more than 400 other firms that support or are themselves engaged in the provision of communications services in the most rural portions of America. All NTCA service provider members are full service rural local exchange carriers ("RLECs") and broadband providers, and many provide fixed and mobile wireless, video, satellite and other competitive services in rural America as well.

[2] Petition for Reconsideration of the City of New Orleans, et al., WC Docket No. 17-84, WT Docket No. 17-79 (fil. Nov. 14, 2018) ("Joint Petitioners" or "Petition").

[3] *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, Declaratory Ruling and Third Report and Order, FCC 18-133 (rel. Sep. 27, 2018) ("Declaratory Ruling" or "Third Report and Order").

broadband services. These carriers are also eager to utilize more advanced wireless services where it makes sense to do so, and are looking as well at the opportunity to help respond to a vastly expanded need for backhaul service that will emerge as next-generation wireless technology is unleashed. Thus, any steps that the Commission can take to expedite or lower the cost of access to municipally-controlled rights-of-way are welcome. Secondly, the provisions contained in the Declaratory Ruling and Third Report and Order, as well as an August 2018 Third Report and Order,[4] are useful initial steps as well as a foundation for future Commission action to tackle remaining barriers that rural wireline providers often face in connection with network deployment. NTCA therefore urges the Commission to reject the arguments made by Joint Petitioners and then expeditiously move to address other unreasonable barriers to wireline and wireless broadband deployment.

To be clear, expedited or lower cost access to municipally-controlled rights-of-way will not, standing alone, expand the reach of or enable upgrades to wireline or wireless broadband networks in sparsely-populated RLEC service areas where distance and density present significant challenges. Nonetheless, the provisions adopted by the Commission in August and then in September 2018, if expanded to cover technologies of all kinds, can certainly provide many positive benefits in terms of expediting deployment when a business case for deployment can be made and reducing unnecessary or unreasonable costs that otherwise undermine that business case.

[4] *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, Third Report and Order and Declaratory Ruling, FCC 18-111 (rel. Aug. 3, 2018) ("Third Report and Order" or "Declaratory Ruling").

Turning to the Petition, NTCA specifically opposes Joint Petitioners' attempt to overturn the Commission's determination that fees for access to municipally-controlled rights-of-way for the purposes of 5G infrastructure installation should be "nondiscriminatory and represent a reasonable approximation of the locality's reasonable costs."[5] Joint Petitioners' arguments are mostly focused on attacking the presumptive $270 per small cell site recurring fee set forth in the Declaratory Ruling, and rest on the notion that the Commission has failed to account for "true cost recovery" and has not accounted for variances in costs between different jurisdictions. The Petition in particular points to the Commission's alleged lack of expertise as to costs as compared to a municipality. Yet Joint Petitioners fail to acknowledge that the $270 fee is a "presumed reasonable" fee and not an absolute cap. Or as the Declaratory Ruling states, "a locality could prevail in charging fees that are *above this level* by showing that such fees nonetheless comply with the limits imposed by Section 253—that is, that they are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory."[6] More to the point of Joint Petitioners' assertion that the Commission fails to account for the fact that costs may vary across different municipalities, the Declaratory Ruling goes on to state that "[a]llowing localities to charge fees above these levels upon this showing recognizes local variances in costs."[7] In other words, the Declaratory Ruling merely sets "guardrails," in the form of a presumptively reasonable fee that any municipality can rebut when

5 Declaratory Ruling and Third Report and Order, ¶ 11.

6 *Id*., ¶ 80 (emphasis added).

7 *Id*.

challenged if it believes that this fee fails to provide sufficient compensation for the costs actually incurred in issuing permits and otherwise managing the right-of-way.

Joint Petitioners also miss the mark with their assertion that municipalities are somehow prohibited from adopting small cell siting requirements that address their aesthetic concerns due to the Declaratory Ruling's undergrounding provisions.[8] Joint Petitioners point to the efforts of one municipality to bury energy utility facilities and assert that the Declaratory Ruling would somehow "thwart" similar efforts. However, with respect to the "aesthetic" provisions in the Declaratory Ruling, the Commission yet again merely sets out "guardrails" similar to those adopted for fees for access to municipally controlled rights-of-way. As the Declaratory Ruling states, municipalities can address their aesthetic concerns as long as they are "(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance."[9] "Reasonable" is further defined as allowing a municipality to adopt aesthetic-based rules if they "are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments."[10] With this explanation of said guardrails, it is difficult to understand how a prohibition on requiring all wireless facilities to be buried prevents a municipality from adopting aesthetic-based small cell siting rules, particularly since the undergrounding rules simply recognize the simple fact that wireless service does not work too well when buried.

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8 Petition, p. 25.

9 Declaratory Ruling, ¶ 86.

10 *Id*., ¶ 87.

With the Declaratory Ruling, as well as the August 2018 Third Report and Order, as a good starting point supported by the Commission's statutory authority, the agency should take the foundation it has created and build upon it to address any and all state and local laws that impede network deployment. While it is important to respect state and local authority to manage rights-of-way as the Commission has in the Declaratory Ruling, when such management produces unnecessary and excessive fees and delays, the direction of Congress as found in Section 253 of the Communications Act ("the Act") is clear that such barriers should be swept away. Indeed, the legal reasoning underpinning the Declaratory Ruling—while focused primarily upon small cell wireless infrastructure—governs with equal force in the context of all kinds of network facilities and technologies, wireline and wireless network facilities alike.

NTCA therefore encourages the Commission to continue to consider means of advancing deployment of communications infrastructure through the authority it has been provided under the Act. NTCA members have led the charge in deploying broadband-capable infrastructure in rural areas, delivering upgraded broadband capabilities to households, businesses, schools, libraries and hospitals in areas with low population densities, challenging geographic terrain, and short construction seasons. While the business case for deployment of rural broadband infrastructure is difficult enough in deeply rural areas, adding in excessive fees beyond those reasonably necessary for state and local jurisdictions to recoup costs or enforcing rights-of-way provisions that invite excessive construction delays can exacerbate the costs for deployment and/or the time required for upgrading of existing facilities. In addition, as NTCA has already stated, the Commission should also turn its attention to state and local laws that enable railroads to act as "gatekeepers" with respect to railroad crossings that intersect with public rights-of-way.

As NTCA recently noted,[11] exorbitant fees for access to railroad crossings are common, as are delays of several months for directional boring of telecommunications fiber optic cable under railroad crossings—and this is typically for work that begins and ends in the public right-of-way and never touches railroad property. Yet certain state and local property laws grant railroads the ability to act as "gatekeepers" and hold up providers for increasingly outrageous fees that waste precious and limited resources. The foundation created by the Declaratory Ruling should be used by the Commission to sweep away these and other unreasonable barriers to broadband deployment.

Respectfully submitted,

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[11] *Ex Parte* Letter, NTCA–The Rural Broadband Association, WC Docket Nos. 17-84 and 17-79 (fil. Sep. 6, 2018). ("As just one example: One NTCA member received a request from a business for a fiber broadband connection lacking one currently. Providing the connection to the potential customer involved the underground installation of fiber in a public ROW adjacent to a state highway that at one point intersected with the railroad crossing at issue. The railroad quoted fees of nearly $20,000, which was composed of more than $10,000 for the permit once it was issued, a separate upfront application fee, an "engineer mobilization" fee, and a "flagging/observer" fee; the railroad also required the broadband provider to purchase insurance at a cost of nearly $2,000. These fees as quoted by the railroad did not include any of the construction fees that the broadband provider was also required to incur. When the business customer balked at the special construction cost associated with such fees and a local economic development coordinator intervened, the railroad reduced its quote by several thousand dollars. The directional boring of the fiber optic cable was completed in one day, traversing a grand total of 15 feet under the railroad crossing and emerging on the other side also in the public ROW.").