Jenkins, Elizabeth

From: Gary Conway <grc.conway@gmail.com>
Sent: Thursday, June 8, 2023 11:55 AM
To: Jenkins, Elizabeth
Cc: Ells, Mark
Subject: Wireless Document - Draft

Follow Up Flag: Follow up
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(Comments on Second Draft of Wireless Document)

Hi Ms. Jenkins -

First let me thank the town for making possible our second review of the wireless draft policy for the Town of Barnstable. I am directing my comments to just the red lined versions of the text in the draft policy. I continue to support Mr. Wood's letter of several months ago that offered initial comments on the original draft. My prior set of comments included the following passage with additional comments on the second draft of the wireless policy:

- *"Please recognize my complete support of all issues raised by Mr. Doug Wood in the March 17 letter with attachment. Most notably, the need to advertise the requirement for a public meeting for any proposed antenna in a residential area, residents living within 250 feet (I would like to see 1000 feet if at all possible) should be notified by the applicant. Please also give strong consideration to adding the specifications for fire and safety into the finished draft. Also, noteworthy are the suggestions to increase the Town's liability insurance to cover liability claims due to the items raised in Mr. Wood's letter to include RF radiation."*

- The only mention of radiation is on page 5 of the draft wireless policy as follows under Small Wireless Facilities which indicated, (6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.307(b). I am not familiar with this legal reference and I was speaking of a change to the policy with the town with regards to liability insurance not within this wireless draft document. So, if the policy with the town could be modified to address this requirement and need and referenced here that would be appropriate but make it broader than small wireless facilities but all forms of wireless radiation and liability.

- The wireless document includes extensive coverage of "poles" but I am not sure this applies in any way to church steeples so perhaps adding this to the list of conceivable poles, including the fall zone reference as well, would be a positive addition to the document.

Hopefully, these comments will be welcomed by the town and the town manager. Thank you for this opportunity and warmest regards to all.

Respectfully,

Gary Conway

June 20, 2023

Elizabeth Jenkins
Director of Planning and Development
Town of Barnstable
367 Main Street
Hyannis MA 02601

Re: Further Comments on Revised Amendments to the Town Manager Regulations, Part IV of the Code of the Town of Barnstable, "Grant of Location" Regulations

Dear Ms. Jenkins:

CTIA®, the trade association for the wireless communications industry, respectfully submits these further comments on Barnstable's revised amendments to its proposed "Grant of Location Regulations."

Wireless users – including Town residents, schools and businesses and its many visitors – increasingly count on wireless services for their text, voice and broadband communications. This includes internet access and connectivity during emergencies. Meeting the public's growing demand for wireless communications requires reliable and ubiquitous service, which in turn requires our members to effectively upgrade and expand their networks. By implementing reasonable and predictable regulations, our members can help achieve high quality service while promoting the Town's interests.

It is in that spirit that CTIA's March 23, 2023 letter proposed a number of modifications to the initial draft of the proposed Regulations. CTIA appreciates the revisions the Town has made to the draft Regulations to address several of our concerns. For example, enabling all companies who build facilities to be used by service providers to obtain permits (Sections XXX-3 and XXX-6(B)(13)), extending the construction period from 6 to 12 months (Section XXX-5(B)) and reducing the required performance bond (Section XXX-6(C)(A)) benefit Town residents and visitors by promoting improved wireless service.

However, other proposed Regulations continue to impose unjustified and burdensome requirements and violate federal law. We address several of those requirements here. We look forward to working with Town officials to discuss our concerns about these provisions, as well as the other provisions discussed in our earlier letter. We hope to collaborate on suitable modifications that can lead to the establishment of reasonable and lawful Regulations.

300-Foot Separation Requirement

The Town proposes to add another restriction on the location of wireless facilities with a new Section XXX-B(4)(d) stating, "Personal Wireless Service Facilities of a Grantee shall be placed at least 300 feet apart; provided, however, that the Grantee may propose a modification to this spacing standard based on technical considerations."

CTIA opposes this spacing requirement because it is likely to inhibit the provision of wireless service. Small cell technology relies on small antennas – often no more than three cubic feet in size – that are placed close to the ground, typically on utility or light poles. While this technology avoids the visual effects of large antenna towers or other structures, wireless signals using it cannot propagate as far. In some cases, depending on the presence of trees, buildings or other obstructions, the signal may not provide reliable high-speed service at a distance of 300 feet away. For this reason, a spacing minimum can inhibit service and thus violate Sections 253 and 332 of the Communications Act.

The FCC has expressly held that Sections 253 and 332 prohibit restrictions that impede improvements to existing service, not only the expansion of service to uncovered areas. *State/Local Siting Order*, 33 FCC Rcd at 9104-05 (a state or local requirement can violate these statutes if it materially inhibits "densifying a wireles network, introducing new services or otherwise improving service capabilities."). Small cells are frequently used to improve existing service by enabling networks to deliver higher speeds and better performance quality to consumers. Imposing a 300-foot separation distance impedes improved wireless service and thus violates Sections 253 and 332.

Notably, a federal court recently invalidated a requirement in the City of Pasadena that a provider's small cells be separated by at least 300 feet. The court concluded that the restriction had the effect of prohibiting service and thus violated Sections 253 and 332. (The court also invalidated the requirement as unlawfully discriminatory because it did not apply to other users of the right-of-way.) *Crown Castle Fiber LLC v. City of Pasadena,* 618 F.Supp.3d 567 (S.D. Tex. 2022).

Although the proposed Regulation would allow the provider to seek a modification to the spacing standard, it fails to establish objective criteria that the Town would apply to small cells that would be separated by less than 300 feet. The Regulations do not specify procedures or requirements for such modifications, nor does it give sufficient notice to providers as to what "technical considerations" they would need to demonstrate. For example, if the provider proposes a new small cell that is 100 feet away from an existing small cell, what technical showing would be required for this to be approved? Without clear and specific criteria, the Regulation will deter providers from seeking modifications. The result would likely be to leave certain areas of the Town without reliable high-speed service. For these reasons, CTIA asks that the new 300-foot minimum separation requirement not be adopted.

Requirement to Demonstrate "No Feasible Alternative"

CTIA's March 23 letter opposed the language in Sections XXX-5(H), XXX-5(Q), and XXX-6(B)(2), (3) and (4) of the proposed Regulations that would require an applicant for a permit to demonstrate that there is "no feasible alternative" to a proposed facility's location. CTIA pointed out that this requirement raises both legal and practical concerns. In a 2018 order that was upheld by a United States appeals court, the Federal Communications Commission (FCC) held that state or local siting regulations that have the effect of inhibiting deployment violate Sections 253 and 332 of the federal Communications Act. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* 33 FCC Rcd 9088, 9102, *aff'd in part sub nom. City of Portland v. U.S.,* 969 F.3d 1020 (9th Cir. 2020) *("State/Local Siting Order").*

Conditioning a permit grant on the applicant's demonstration that there is "no feasible alternative" has precisely that deleterious effect on deployment. The FCC's rules already impose service coverage obligations on wireless providers. A provider must conduct extensive technical studies to determine how it can best meet those obligations and achieve reliable service coverage to a geographic area while minimizing the number of sites it must build to accomplish those goals. Compelling a provider to prove there are no other "feasible" locations intrudes on the provider's right to design its network in accordance with the FCC's rules. It second-guesses the provider's technical analysis of how it can best provide high-quality coverage to an area. Although there may be other locations that could be feasible, they may not optimize coverage and service.

Moreover, a "no feasible alternative" condition for approving a site creates an enormous practical problem for the provider by requiring it to "prove a negative." Effectively, it must demonstrate that it considered innumerable other locations and studied their feasibility, and the Town could still ask that it test even more locations. The time and cost of conducting these "alternative location" analyses can be prohibitive. For all these reasons, requiring the applicant to prove there is no feasible alternative inhibits deployment and thus violates federal law. The FCC has stated that "local jurisdictions do not have the authority to require that providers offer certain types or levels of service, or to dictate the design of a provider's network." *See State/Local Siting Order*, 33 FCC Rcd at 9104.

Removing the "no feasible alternative" requirement from the Regulations will not undermine Barnstable's interest in ensuring that wireless facilities are constructed to address appearance, safety and other concerns. Many other provisions in the Regulations already address antenna height, surface area, color, lighting, fire safety and other concerns. These and other aesthetic standards are sufficient to protect the Town's interest in managing the appearance of facilities. CTIA thus renews its request that the "no feasible alternative" requirement be deleted from Sections XXX-5(H), XXX-5(Q), and XXX-6(B)(2), (3) and (4).

RF Emissions Requirements

CTIA's March 23 letter objected to Section XXX-6(B)(7) and (9) because they unlawfully impose requirements related to radiofrequency (RF) emissions that exceed FCC requirements. In Section 332(c)(7) of the Communications Act, Congress granted the FCC exclusive authority to regulate RF emissions and imposing RF-related siting conditions. The FCC implemented that authority by adopting rules for all wireless providers. CTIA thus asked that the following requirements be removed:

- *Section XXX-6(B)(7)(b)*, which requires providers to conduct annual RF emissions monitoring and submit reports on that monitoring, effectively regulates how providers comply with the FCC RF rules, which is preempted by the FCC. The FCC has the exclusive authority to determine substantive compliance with its RF exposure regulations. (*See FCC Review of RF Exposure Policies,* 28 FCC Rcd. 3498, 3699 (2013)). Subparagraph (a) already obligates providers to review RF emissions levels when they install or modify a facility and to notify the Town that the site complies the FCC's RF rules – and CTIA does not object to that obligation. However, the requirements in subparagraph (b) for subsequent monitoring and reporting 90 days after

construction and annually thereafter exceed the locality's authority, since the FCC imposes no such reporting obligations.

- *Section XXX-6(B)(7)(c)*, which requires third-party "random and unannounced tests" of wireless facilities, constitutes impermissible additional compliance monitoring by the town of an FCC rule. Again, providers must comply with that rule but localities may not regulate compliance.

- *Section XXX-6(B)(9)*, which requires carriers to operate and maintain their facilities "in a manner that is not detrimental or injurious to public health or safety," appears to regulate RF emissions. This language should be removed or clarified to state that it does not authorize the Town to impose any such operating and maintenance requirements that are related to RF emissions.

The most recent amendments do not improve these provisions. Instead, they would expand Section XXX-6(B)(7)(b) to additionally require a provider to supply "a copy of its RFE compliance and safety practices, including any ongoing review of compliance with the FCC's RFE regulations." Again, the FCC does not require such self-reporting and the amendment is impermissibly vague because it fails to give providers sufficient notice of what "ongoing" reporting is required and when.

In its response to CTIA's letter, the Town argues that localities may require "proof of compliance with the FCC's RFE regulations." (Letter at 8.) CTIA agrees that the Town may require proof of compliance, as explained above, and thus can request the permittee for a compliance showing upon installation or modification of a site. However, the proposed amendments would impose ongoing monitoring and reporting obligations that go far beyond what the FCC's rules require. The Town has no authority to impose these obligations, as Section 332 and the FCC have preempted local regulation of RF emissions.

Thank you for the opportunity to submit these further comment on the proposed Regulations.

Sincerely,

Jeremy Crandall

Jeremy Crandall
Assistant Vice President
State Legislative Affairs

Cc: Mark Ells, Town Manager, Town of Barnstable