September 3, 2024

VIA E-MAIL

Ms. Danielle Boudreaux
Rules Coordinator
Department of State Lands
775 Summer St. NE, Suite 100
Salem, OR 07301
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Re: Administrative Rules for Authorizing Communications Site Leases on State-Owned Land, 2024 Revisions

Dear Ms. Boudreaux:

CTIA[1] submits the following comments regarding the Department of State Lands' (the "Department's") July 30, 2024 Notice of Proposed Rulemaking and accompanying proposed regulations (the "Proposed Rules") regarding siting on state-owned lands.

CTIA appreciates the Department's willingness to work collaboratively with stakeholders to improve the Proposed Rules. CTIA previously commented on the Proposed Rules in 2022,[2] after which the Department issued revisions as well as a summary document describing its rationale.[3] In its 2022 Comments, CTIA emphasized the need for removing barriers to broadband deployment. That need has only intensified as a result of the steady increase in

[1] CTIA – The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless providers, device manufacturers, and suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] CTIA Letter Re: Administrative Rules for Authorizing Communications Site Leases on State-Owned Land, July 31, 2022 ("2022 Comments").

[3] State of Oregon Department of State Lands, OAR 141-126 Rulemaking Public Comments and Agency Response, March 2023 ("Agency Response"). Because the Proposed Rules were not submitted for subsequent legislative consideration in 2023, CTIA has not had the opportunity to comment on the 2023 revisions until present, so it takes the 2023 and 2024 revisions together herein.

consumer demand for broadband. 2022 saw the greatest increase in mobile data traffic on record, nearly double the year-over-year increase from 2020 to 2021. The nation's wireless networks supported more than 73.7 trillion MB of data traffic that year.[4] To keep pace with this demand, wireless investment increased for the fifth year in a row, with a historic $39 billion invested in wireless networks —up nearly 12% from the previous year's record setting total.[5]

CTIA appreciates the Department's willingness to incorporate stakeholder feedback in the revisions of the Proposed Rules. In particular, the Proposed Rules now appropriately treat "macro cellular facilities" and qualifying "small wireless facilities" ("SWF") differently, putting them on a different schedule of fees for leasing and applications.

CTIA remains concerned, however, many provisions in the Proposed Rules would create significant barriers to deployment on Department-managed lands, and offers the following suggestions for the Department:

- The Department should reduce its fees for larger facilities and co-locations and make clear that its annual fees represent a cap on rents, not a minimum;
- The Department should clarify the Proposed Rules to include fixed wireless access within its definitions;
- The Department should implement "shot clock" timelines for applications – not applicants – in accordance with the FCC's rules; and
- The Department should eliminate its regulation of radiofrequency interference in the Proposed Rules, which infringes on the FCC's exclusive authority to address any such conflicts.

Given the scope of these changes, CTIA also asks the Department to schedule a workshop (or workshops) to better address these issues.

By taking these steps to refine the Proposed Rules, the Department will help remove barriers to deployment and promote certainty in investment, helping it better meet its stated goal of increasing broadband access to underserved communities in Oregon.

[4] CTIA, "2023 Annual Survey Highlights" (July 25, 2023), *available at* https://www.ctia.org/news/2023-annual-survey-highlights.

[5] *Id.*

I. THE DEPARTMENT SHOULD REDUCE FEES FOR LARGER CELLULAR FACILITIES AND REVISE THE PROPOSED RULES TO ESTABLISH MAXIMUM, NOT MINIMUM, ANNUAL FEES.

CTIA appreciates that the Department has nominally lowered its proposed leasing fees from previous revisions of the rules. Unfortunately, these changes may not have any impact because the Proposed Rules continue to treat these fees as a floor, rather than a ceiling, on siting rents.

Proposed Rule 141-126-0150 states that the annual fees are merely a "minimum base amount" that not only will automatically increase by three percent every year to reflect inflation, but can be set even higher: "The Department reserves the right to establish the base annual compensation in amounts that may be greater than the minimum base annual compensation." As a result, there is no practical impact of the changes to the fees because, as before, there is no upper bound on what they can be. Moreover, the Proposed Rules are unclear on how the Department will set the fees and when in the process applicants will be apprised of the cost of their potential deployment, creating massive uncertainty that could deter providers from investment.

The issue is more pronounced for small wireless facilities, for which the FCC has established $270 as the maximum at which annual fees are presumptively reasonable.[6] The Proposed Rules not only allow for higher fees but ensure that the annual fee for a small wireless facility will exceed the FCC's safe harbor no later than a year after siting. Under the FCC's rules, fees above $270 require the Department to "demonstrat[e] that the fee is a reasonable approximation of cost that itself is objectively reasonable."[7]

And despite the improvements in the revisions to the Proposed Rules, annual fees for both macro cellular sites as well as collocations are still high, even at the "base rent" level, and could be prohibitive to deployment – and prohibited by federal law, to the extent that they discriminate between telecommunications providers.

The Department proposes to charge an annual fee of $10,000 for a non-SWF "cellular" facility. While this is less than the Department's 2022 proposal for a $20,000 annual fee, it is still more than the tiered $4,000-$8,000 annual fees for a "commercial" facility which are to be based on the population of the county where the facility is constructed. This would mean that in

[6] *See In re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, Report and Order, 33 FCC Rcd 9088 (Sep. 27, 2018) ("2018 FCC Small Cell Order").

[7] *Id. at* n. 214.

counties with small populations, a commercial facility would pay the Department $2,000 annually while a cellular facility would pay $10,000 – five times as much.

The fee distinction the Department intends to draw between these terms is unclear given that a "cellular" facility is a subset of a "commercial uses" under the Department's definitions. In any event, the distinction would be arbitrary because both cellular and non-cellular facilities use antennas mounted on towers or other structures, and they both receive and transmit communications. Nor are cellular antennas larger or more complex than all other types of antennas.

Without a valid reason, this policy of charging different rates for wireless facilities than other types of communications facilities would violate 47 U.S.C. §253 on its face, which only allows states to require fair and reasonable compensation from telecommunications providers for use of public rights-of-way "on a competitively neutral and nondiscriminatory basis."[8] The fees for larger cellular facilities should thus align with those for other commercial facilities.

With regard to co-locations, co-locators would have to pay a minimum annual rent of 25 percent of the annual rent that the lessor pays to the Department – *i.e.*, at least $2,500 (with no upper bound.) Again, the Department supplies no basis for this fee, and the FCC and courts have found that such large government-imposed fees deter investment in new infrastructure.[9] Moreover, the Department would already be collecting the annual fee from the pre-existing site user. Double- or triple-charging for the same facility is unwarranted given that the Department should incur no additional costs because there is no new facility to occupy space or require maintenance.

While the Department notes that the fees generate revenue for the Oregon's Common School Fund, courts have invalidated fees that similarly seek to raise revenues without being based on the costs governments incur to oversee granting siting applications and overseeing deployment. These courts have found that where fees are revenue-based and bear no relationship to governmental costs, they can effectively prohibit communications service in violation of federal law.[10]

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[8] 47 U.S.C. §253(c).

[9] *See* 2018 FCC Small Cell Order at para. 41 *et seq.*

[10] *See, e.g., City of Portland v. United States,* 969 F.3d 1020, 1039 (9th Cir. 2020) ("The statute requires that compensation be 'fair and reasonable"; this does not mean that state and local governments should be permitted to make a profit by charging fees above costs."); *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 994 (E.D. Mo. 2003) ("Thus, to meet the definition of "fair and reasonable compensation" a fee charged by a municipality must be directly related to the actual costs incurred by the municipality when a telecommunications

Accordingly, CTIA asks that the Department make the following revisions to the proposed rules:

- Set cost-based, predictable, maximum annual fees for all categories of wireless facilities.
- Clarify that annual fees may not be increased over the term of a lease.
- Reduce the annual fee for macro cellular facilities to track the tiered base amounts for "commercial" facilities:
    - $4,000 for facilities in counties with a population of less than 50,000.
    - $6,000 for facilities in counties with a population of 50,000-150,000.
    - $8,000 for facilities in counties with a population of more than 150,000.
- Reduce the additional rental fees that co-locators must pay to no more than $1,000.

II. THE DEPARTMENT SHOULD MODIFY THE PROPOSED RULES TO CLARIFY THE STATUS OF FIXED WIRELESS ACCESS.

CTIA appreciates the steps the Department took in its 2023 revisions to the Proposed Rules to separate larger wireless facilities from small cells. The Department should maintain these improvements, which better reflect the nature of modern wireless siting, in the Proposed Rules.

The Department should, however, clarify its definitions to ensure that sites supporting fixed wireless access, which is a significant part of the modern wireless ecosystem, are not treated as "commercial" under the Department's definition. In general, the term "cellular" communications is both dated and narrow with regard to wireless facilities, and the Department should consider replacing it with a broader term like "wireless communications services." At minimum, though, the Department should clarify the definition of "Cellular Communications" in the Proposed Rules to explicitly include fixed wireless access.

III. THE DEPARTMENT SHOULD STREAMLINE APPLICATION PROCEDURES, INCLUDING REVISING ITS IMPLEMENTATION OF "SHOT CLOCK" TIMELINES TO REFLECT THE FCC'S FOCUS ON REDUCING APPLICATION DELAYS.

In its 2022 Comments, CTIA noted the Proposed Rules had indeterminate timelines for application processing and urged the Department to amend the Proposed Rules to align them with the FCC's "shot clock" timelines for siting: to complete application review within

provider makes use of the rights-of-way. . . [P]lainly a fee that does more than make a municipality whole is not compensatory in the literal sense, and instead risks becoming an economic barrier to entry.").

150 days for new macro sites (90 days for co-locations) and 90 days for small wireless facilities (60 days for co-locations).[11] In response, the Department revised the Proposed Rules to reduce the time that applicants are required to file an application in advance of a proposed deployment. In the Agency Response, the Department noted that "the timelines for the Department to process an application have been adjusted to conform with the FCC's 2009 and 2018 declaratory rulings on "shot clocks" for both macro cellular and small wireless facilities."[12] Unfortunately, the Department's revisions to the Proposed Rules did not accomplish this.

The FCC's "shot clock" timelines are imposed *on a reviewing agency*, not an applicant. While the Proposed Rules require an applicant to file an application 60/90/150 days in advance of a proposed deployment, nothing in the Proposed Rules guarantees that an applicant will know whether it is approved to deploy at the end of that period.

At present, the Proposed Rules do not set any deadline for the Department to seek public comment, respond to any such comments, and act on an application. This creates significant uncertainty for an applicant, as its application may be delayed for any length of time - potentially creating significant delays for broadband deployment, as the FCC has noted.

Accordingly, CTIA asks that the Department amend the Proposed Rules to make clear that the Department must approve or deny (with cause) an application within the timelines indicated.

IV. THE DEPARTMENT SHOULD ELIMINATE REGULATION OF RADIOFREQUENCIES FROM THE PROPOSED RULES TO COMPLY WITH THE FCC'S EXCLUSIVE JURISDICTION.

Proposed Rule 141-16-0160(16) requires the lease holder to notify the Department of "any equipment modifications resulting in a change of frequency." The Department will then notify other users, and the leaseholder "must resolve the frequency issue." Further, Proposed Rule 141-16-0140 (8b) and Proposed Rule 141-16-0160(16) directly address frequency conflicts and require that the applicant provide documentation from the FCC that the proposed use or frequency change "will not interfere with existing uses at the communication site". These provisions are contrary to federal law and should be eliminated.

[11] *See* 2022 Comments at 11-12.

[12] Agency Response at 5.

The federal Communications Act preempts states and localities from regulating the use of radio frequencies, granting that authority exclusively to the FCC.[13] The FCC has "exclusive authority over technical matters" relating to use of radiofrequency spectrum,[14] and the FCC's exclusive occupation of the field of radiofrequency spectrum regulation and usage under Title III of the Communications Act is a bedrock principle in communications law.[15]

The FCC has set specific power and other limits on the frequencies that wireless service providers can use and addresses interference issues that may arise. This federal regime is designed to ensure that all wireless services can coexist and that problems can be quickly resolved.

By requiring leaseholders to resolve any complaints from other frequency users under the Proposed Rules and provide documentation of "frequency compliance," the Department is setting conditions for lease approval based on jurisdiction it does not have. Denying leases on these grounds is not an issue of notification, as the Department suggests in the Agency Response – it is squarely one of regulation. In the Agency Response, the Department notes that it "has had complaints in the past about interference from other user's new frequencies."[16] But it is unlawful for the Department to handle such complaints – only the FCC may do so.

The Proposed Rules put all the onus for avoiding interference on the leaseholder/applicant. But it may well be the complainant that is in violation of the FCC's rules by infringing on licensed use. Or it may be the case that – such as for certain bands of unlicensed spectrum – all parties are required to *accept* interference under the FCC's rules. But by requiring the applicant to show that its uses do not interfere with any others, the Department is not just impermissibly regulating interference disputes, it is adjudicating them without the facts.

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[13] *See* 47 U.S.C. § 303.

[14] *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 105 (2d Cir. 2010) (citation and internal quotations omitted); *see also Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963). ("[T]he Commission's jurisdiction over technical matters such as a frequency allocation … is clearly exclusive").

[15] *See, e.g.*, *Cellco P'Ship v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012) (quoting *NBC v. United States*, 319 U.S. 190 (1943)). *See also Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185, 1190 (10th Cir. 1999); *Freeman v. Burlington Broadcasters Inc.*, 204 F.3d 311, 320 (2d Cir. 2000); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994).

[16] Agency Response at 6.

It is an applicant's responsibility to comply with the FCC's rules regarding frequency management, just as it is for all frequency users. The FCC has a public portal to handle interference complaints and an Enforcement Bureau that resolves such issues.

Additionally, as a practical matter, it is nearly inconceivable that a lease applicant would be able to produce FCC documentation demonstrating the proposed use or frequency change "will not interfere with existing uses at the communication site". The FCC does not offer such documentation. To the extent that the Department is interested in identifying licensed users of a spectrum band, that information is made publicly available by the FCC through its Universal Licensing System search function.

Accordingly, the Proposed Rules should be amended to eliminate regulation of RF interference, which authority is exclusively vested in, and is already comprehensively regulated by, the FCC. To the extent the Department is receiving any complaints regarding frequency interference issues, the Department should inform complainants that the proper forum for such issues is the FCC. CTIA suggests that, to the extent the Department is still concerned with such issues, it simply include a clause requiring lessees to comply with all applicable federal regulations for operation of their telecommunications equipment.

V. THE DEPARTMENT SHOULD SCHEDULE ONE OR MORE WORKSHOPS TO ADDRESS CONCERNS WITH THE PROPOSED RULES.

While CTIA appreciates that a public hearing was held on the Proposed Rules, that venue was extremely limited for productive discussion, with speakers limited to three minutes and no real discussion between the Department and stakeholders. Given the significant impact of the Proposed Rules on telecommunications siting and the concerns voiced herein, CTIA asks the Department to schedule at least one workshop following the comment round to allow stakeholders and the Department to meet collaboratively and discuss the issues raised over the course of this proceeding.

VII. CONCLUSION.

CTIA appreciates the opportunity to express its concerns with the Proposed Rules and urges the Department to make the revisions discussed herein in order to better meet the Department's goal of promoting broadband access in Oregon. While CTIA encourages the Department to schedule a workshop to gather all stakeholders to discuss these issues in a more formal setting, to the extent the Department has any questions regarding these

changes, or needs more information regarding issues related to wireless technology, CTIA remains available as a resource and would be happy to meet with the Department on an informal basis to answer questions and discuss any concerns prior to submission of the Proposed Rules to the Legislature.

Sincerely,

/s/ Matthew DeTura

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