BDAC Removing State and Local Regulatory Barriers Working Group

On January 31, 2017, the Federal Communications Commission (FCC or Commission) established the Broadband Deployment Advisory Committee (BDAC) to "make recommendations to the Commission on how to accelerate the deployment of high-speed Internet access, or "broadband," by reducing and/or removing regulatory barriers to infrastructure investment."[1] To facilitate BDAC's endeavors, the Commission created five working groups comprised of BDAC members as well as other selected individuals. Each of these working groups was tasked with analyzing specific topics to develop recommendations including possible recommendations for further study.

On May 16, 2017, the Commission announced the membership of the BDAC Removing State and Local Regulatory Barriers Working Group ("Barriers WG"). It was tasked to[2]—

1) Identify patterns of specific instances of actions at the state and local level that serve as barriers to broadband deployment, such as deployment moratoria, unfair or burdensome rights-of-way negotiation and approval processes, excessive fees and other costs, unreasonable conditions, and bad faith negotiation practices. The Working Group will provide policy recommendations to the Commission on how to address the patterns of specific instances identified.

2) Identify examples and discuss the consequences of local governmental restrictions that may "prohibit or have the effect of prohibiting" service by, for example, requiring "undergrounding for wireless facilities," placing restrictions on the placement of communications facilities in a right of way, prohibiting upgrades to facilities, and prohibiting the placement of new poles in a right-of-way, and to recommend solutions.

3) Examine the extent to which municipalities may single out communications-related deployments for more burdensome treatment than other deployments that have the same or similar impacts on land use, and make policy recommendations for addressing such disparate outcomes.

BACKGROUND

Broadband access is an increasingly essential component of modern life. It delivers important civic, educational, and recreational benefits and is an important driver of economic growth. To date, broadband has been deployed via a range of different technologies (wireline, fixed wireless, mobile) and has been deployed by a number of providers, including incumbent local exchange carriers (ILECs), competitive local exchange carriers (CLECs), cable companies, and wireless providers, all of whom operate under different federal and state regulatory regimes.

---

[1] *FCC Announces the Establishment of the Broadband Deployment Advisory Committee and Solicits Nominations for Membership*, DA 17-110, Public Notice (rel. Jan. 31, 2017).

[2] FCC staff instructed the Working Group to focus only on policy recommendations, not on a legal analysis or legal recommendations. Also, the FCC staff informed to the Working Group that its scope did not include Tribal matters.

These networks are constantly evolving. Indeed, new services, such as 5G wireless services, are on the horizon.

Deploying new broadband networks and upgrading existing ones is not easy. The deployment of broadband entails local franchising, zoning, permitting and access to rights-of-ways (ROW) as well as clearing environmental and historical approvals. These processes are generally overseen by each local government, and, in some instances, can act (or be perceived as acting) as barriers to the timely deployment of broadband. There are also instances when broadband providers delay the process by failing to provide all the necessary materials requested by a local government. Not all delays, however, are intentional. In many instances, local governments simply lack the resources or expertise to act on requests in a timely manner or otherwise develop deployment-friendly policies. In some cases, state governments have enacted regulations to direct and guide localities in carrying out their oversight of broadband deployment.

Recognizing the complexities of deploying broadband and the challenges faced by stakeholders in the public and private sectors, the Commission opened two proceedings to explore how it might accelerate broadband infrastructure deployment by, among other things, addressing regulatory barriers to wireline and wireless broadband infrastructure deployment consistent with the law and public interest.[3] These proceedings elicited hundreds of comments from a range of stakeholders that provided key insights into the kinds of barriers and impediments to deployment that currently exist: (1) unjustified deployment moratoria; (2) unreasonable delays in negotiations and approvals for ROW agreements and permitting (delays caused by both providers and localities); (3) fees perceived as excessive or duplicative; (4) conditions or requirements perceived as unreasonable in the context of granting access to ROW, permitting, construction, or licensure; and (5) bad faith conduct in negotiations on both sides. While the Working Group reviewed all comments submitted in these proceedings, many comments fell outside the scope of the Working Group.

Leveraging the information included in these comments, along with the expertise and experiences of its members, the Working Group identified patterns of behavior that act as barriers to timely broadband deployment.

[3] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37 (rel. Apr. 21, 2017). *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 17-38 (rel. Apr. 21, 2017).

PRINCIPAL FINDINGS

While state/local governments and broadband providers share the same goal of providing broadband service to as many communities and end users as possible, they also have interests that may conflict with each other. Many of the delays in deploying broadband exist as a result of the friction between localities and broadband providers having competing economic interests. Localities have an obligation to properly maintain and update public infrastructure as well as managing the public ROW to balance the needs of competing services such as water, electricity, and sewers with telecommunications. Therefore, they need to raise the funds in order to do so —either from taxpayers or from the companies that use the ROW. At the same time, broadband providers want to quickly deploy technology via public ROW at the lowest cost possible, on the quickest timeline, with little regulatory burden. Many local governments also seek to charge what they consider to be "fair market rates" for public infrastructure, while industry often seeks "at cost" or otherwise predictable, standardized pricing. These competing interests create natural conflict.

The Working Group has identified the following patterns that can act as barriers to deploying broadband.

- *Ambiguity*: This barrier occurs when applications, procedures, and decision/approval timelines are absent, arbitrary, unclear, unreasonable, or inflexible, which often manifests as deployment moratoria.

- *Discrimination*: This barrier occurs when state or local authorities levy fees or impose obligations on broadband providers with insufficient transparency, which can result in discrimination among different network providers.

- *Excessive Fees*: This 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 other objective metric.

- *Inflexibility*: This barrier arises when a local government is either unwilling or unable to appropriately adjust its review and approval processes to reflect different broadband technologies or deployment strategies.

- *Inordinance*: This barrier occurs when the conditions, requests, or requirements put forward by a state or local entity are unreasonable or overly burdensome.

- *Noncompliance*: This barrier occurs when a state or local authority or applicant fails to enforce or comply with their established rules or procedures.

As cited by many in comments to the FCC, broadband providers perceive these barriers as the cause of delayed broadband deployment and explained that these barriers discourage investment in communities. For example, uncertainty around fees–how they are set, and how they compare to fees elsewhere–can result in higher construction costs, which can cause

providers to forgo or delay deployment projects. Such delays, coupled with lack of transparency in fee structures, even if unintentional, can increase costs to providers and discourage long-term network investments. Similarly, limited information and untimely communications from providers can frustrate localities that feel they do not have adequate insight into a provider's long term planning of needs, and therefore cannot readily structure deployment workflows.

In many instances, the existence of these impediments is unintentional, stemming from a number of root causes that, with additional resources and greater collaboration with providers, could be addressed in a collegial and timely manner. These root causes include:

- Lack of Capacity: A government entity might not have the resources or required technical knowledge to process a request in the time frame expected by the provider. This may be a seasonal issue or may be an issue relating to the volume of applications.

- Lack of Information: Providers may not have provided the necessary information regarding requirements and expectations of the city, or the local government might not have provided enough information, knowledge and/or resources to make a decision.

- Lack of Process: The local government might not have a process to cover the type of application/request presented, especially in cases where new technology is being deployed.

- Lack of Flexibility: Some localities might seem to be inflexible because existing procedures embody their preferences and values for how networks should be built in their communities.

- Lack of Agreement: Local governments and broadband providers have conflicting goals and are driven by different incentives, a dynamic that can result in a lack of agreement. For example, a local government might require a provider to compensate them for access to ROWs while a broadband provider may believe the proposed compensation is unreasonable.

- Lack of Principles Regarding Fees: There is little guidance on what comprises an appropriate fee for ROW access and attachments to local assets, even when a provider already has access to the ROW. In certain cases, authorities may intentionally treat providers differently based on technologies, in order to extract additional fees and impose additional obligations.

- Lack of Transparency: Negotiations stall and partnerships fray without insight as to how fees are calculated, both with respect to the fee itself and why fees might be allocated differently among providers.

For the November 9th BDAC meeting, the individual workgroups were asked to submit recommendations to the BDAC for vote and discussion. In light of this request, and in light of the fact that the Barriers WG is still in the process of working towards consensus on its overall report and recommendations, we singled out the recommendations that we were most comfortable moving forward as a group. Those recommendations are attached as "Vote Recommendations."

APPENDICES

These appendices are the result of the work the "Barriers" Work Group's efforts to date. The "vote recommendations" that were sent to the BDAC leadership team on October 31 were synthesized from these appendices based on a discussion of what the workgroup wanted to forward for a vote on the November 9 BDAC meeting.

In addition to voting items, we thought our body of detailed work would be useful to the full BDAC. These appendices include a description of the "barriers" to broadband deployment that we uncovered, an explanation as to why each barrier (or perceived barrier) exists, and recommendations for dealing with the barriers. These appendices are presented as a "work in progress" and are thus labeled as "Draft for Discussion Purposes." Thus, in their current form, they should not be taken as the workgroup's agreed to position.

Appendix G is a little different than the other ones, and deserves its own disclaimer.
During our analysis of deployment barriers, the Working Group observed fundamentally different positions among stakeholders regarding the potential use of preemption as a means of removing certain state and local regulatory barriers. By and large, broadband providers support greater use of preemption, viewing it as a way to provide more consistency and certainty in processes impacting access to ROW. Localities and states, on the other hand, view preemption as unnecessary because it would undermine their ability to ensure their legal obligation to maintain the health, safety and welfare of their constituents are met, and to effectively manage the competing needs on the public ROW (e.g., electricity, water, sewers). Much productive discussion helped us shape Appendix G, but the workgroup is still undecided as to whether the analysis should be part of the group's final submission in its current form or at all.

APPENDIX A

AMBIGUITY BARRIER:
ANALYSIS AND RECOMMENDATIONS

BARRIER SUMMARY. This barrier occurs when applications, procedures, and decision/approval timelines are absent, arbitrary, unclear, unreasonable, or inflexible, which often manifests as deployment moratoria.

WHY THIS BARRIER ARISES.

1. ***Lack of Information –*** Local governments do not have enough information regarding the requested application to make an informed decision. Providers do not have proper or complete information regarding requirements and expectations of the city.
2. ***Lack of Process –*** The local government does not have a process to cover the type of application/request presented. This may be the case in the deployment of new technologies and new techniques. Essentially it is policy and process that is not keeping up with the technology.
3. ***Lack of Capacity –*** Local government does not have the resources or required technical knowledge to process the request in a reasonably timely manner. This may be a seasonal issue or may be an issue relating to the volume of permits filed at once.
4. ***Lack of Agreement*** **-** When parties are not coming to agreement on terms. Improper assumptions or misaligned objectives may drive lack of agreement. There are also situations where there are different or non-transparent motives.

RECOMMENDATIONS.

1. **Lack of Information**
    a. Improve information flow – Recommend proactive discussion between industry and government groups to address each other's information and understanding gaps and needs. Recommend pro-active leadership by local and state government in developing models for local and state governments to draw from.
    b. Recommend the engagement of ROW managers and recognize their critical role in developing the relationships between providers and local governments that contribute to closing the information gaps and facilitate smooth permit execution processes. ROW managers establish strong working relationships with industry partners and utility providers. They are a bridge to developing a common understanding of provider needs and goals, municipal requirements, and technical challenges for successfully working in the public right-of-way. Their work is to facilitate the timely and safe deployment of infrastructure in the ROW. However, at a minimum, any ROW manager's travel costs should not be imposed on providers, and any costs from a contingency or results-based arrangement should not be imposed on providers.
    c. Recommend pre-permitting discussions, similar to pre-construction meetings where project stakeholders meet to share information. This may be particularly useful for facilitating bundling requests.
    d. Recommend developing or establishing a common set of definitions or terminology to facilitate information sharing.

e. Recommend for new technologies the local government consider issuing RFI requesting further information on how to permit or process this technology or type of application. *Assuming that this technology is not outside the current permitting process, this must not unnecessarily delay the application and must include specific timelines.*

2. Lack of Process

a. Development and implementation of model codes and streamlined permitting processes to address the implementation of new technologies, processes and techniques.

3. Lack of Capacity

a. Recommend developing standards and process for bundling permits that streamlines the process but also meets both parties' needs. Master agreements between cities and providers may be a starting point. Consider pulling out non-uniform issues to be dealt with individually and let the standard items move forward.

b. Consider adding a joint site-visit/drive-through as part of the pre-permitting process. If it is too time-consuming or the ROI is not clear to do this for every bundling/ permitting request, it could also be considered as a periodic component of a stakeholder education process.

c. Recommend examining opportunities for contracting and outsourcing to share responsibilities and manage workloads. Look for opportunities in the process that can help expedite permitting. An example is the 811/call-before-you-dig system. A similar system could be considered for evaluating pole readiness.

4. Lack of Agreement

a. Expectations need to be clearly and reasonably defined.

b. As noted elsewhere in the Working Group's recommendation, the Commission should explore whether mediation, arbitration or negotiation by outside parties (example: state public utility commissions), will expedite dispute resolution and actually better facilitate deployment than the current litigation remedy.

ADDITIONAL COMMENTS.

Preemptive actions were most often cited in the comments analyzed for this work. These included shot clocks, preempting blanket moratoria, and allowing access without approval from local governments. Preemption is covered more fully in a separate analysis (see Appendix G).

APPENDIX B

DISCRIMINATION BARRIER: ANALYSIS AND RECOMMENDATIONS

BARRIER SUMMARY. This barrier occurs when state or local authorities levy fees or impose obligations on broadband providers with insufficient transparency, which can result in discrimination among different network providers

WHY THIS BARRIER ARISES. The potential for friction between localities and network providers exists in part because of competing economic interests. Localities have an obligation to properly maintain, manage and update public infrastructure and balance competing interests in the public ROW (e.g., water, sewer, and electricity). They need to raise the funds in order to do so—either from taxpayers or from the companies that use the public ROW and some localities seek to use ROW and attachment fees to generate revenues for purposes unrelated to broadband deployment. Companies want to quickly deploy technology on these public rights of way at the lowest cost possible, on the quickest timeline, with minimal regulatory delay. Additionally, some local governments believe that they are required to charge what they consider to be "fair market rates" for public infrastructure while industry often disagrees that this is required and seeks "at cost" pricing. These competing interests create natural conflict.

Discrimination does not occur in all states or localities. However, it is often found when the process to accessing ROWs is opaque and obligations, fees and other rules are not clearly defined. The barrier is worsened in cities and states where there is little transparency or public information on the fees and obligations of accessing public rights of way. This lack of transparency in how fees and obligations are levied creates an environment of distrust and creates the potential for discriminatory and unequal treatment between providers.

Lack of transparency can be driven by several factors: 1) cities not having permitting frameworks for new technologies 2) few reference points as new technology emerges and 3) the lack of internal resources to properly support and manage ROW access requests. Additionally, pricing models are sometimes outdated as they reference previous generations of networks; and cities and local governments, especially smaller ones, may lack capacity to update pricing.

There are also cases cited in comments of industry purposely requesting excessive numbers of permits to overload or lock in assets early to prevent competition from competitors, which adds to the environment of distrust between local governments and providers.

Discrimination can occur in two ways:

- *Unintentional*. States and localities may lack the dedicated resources to creating a transparent and consistent framework of fees and obligations for access to ROWs. Cities may not have adequate personnel to review and determine the appropriate fees and those individuals may lack subject matter expertise, which can unintentionally create barriers and an unequal playing field between providers.
- *Intentional*. In select cases, states and localities may use the process of accessing ROWs to extract fees from providers as a means to generate revenue. Some may treat

providers differently based on technologies, or arbitrarily, in order to extract more fees and obligations. While there are no accurate counts on the frequency of this behavior, industry cites numerous examples through submitted comments.

RECOMMENDATIONS.

1. **Be Technology-Agnostic**. Increasing broadband deployment means recognizing that broadband, to the home or to the consumer, will be delivered in various ways: fixed wireline, fixed wireless, and mobile. Accessing ROWs to deploy broadband networks is critical, regardless of the type of technology used to deliver broadband to the consumer. The FCC should encourage states and local authorities to review their policies regarding ROWs access to encourage policies that are technology neutral so that local policies don't have the unintentional effect of picking winners and losers in broadband deployment technologies. The FCC should encourage local governments to not create policies that clearly confer a competitive advantage to one technology or set of providers over another.
2. **Encourage Transparency**. Discrimination often occurs when there is little to no information available to providers to help them understand the types of fees and obligations that may be levied in order for them to access ROWs. A lack of transparency creates opportunities for providers to be treated differently, even if they are providing similar services or seeking similar access, and not placing an additional burden on the ROW. Additionally, where economically justified, states and localities should balance the fees charged to earlier entrants with those of later ROW entrants to ensure technology neutrality and nondiscrimination. We recommend that states and local authorities work to create tools that allow for transparency in fees such as published rates on city websites for access to various right-of-way assets. Additionally, making public the formula or approach to calculating fees and obligations used by states and localities to any provider that seeks access to ROWs would be immensely helpful in creating trust, goodwill, and better help providers accurately plan capital investments in additional broadband deployment.
3. **Discriminatory Treatment Should be Looked at Holistically**. When discrimination occurs, it is often not a single occurrence. In order to better understand whether there is a pattern of intentional or unintentional discrimination, we recommend that states and local authorities take a holistic view of the fees being levied and obligations being imposed on providers. Taking a holistic view can help determine whether or not improper discriminatory practices are being employed and how a provider is being treated across its efforts to provide its services.
4. **Encourage Education and Capacity-Building for State and Local Government**. Broadband has widespread economic benefits, and can boost educational and job opportunities for Americans. Working together, industry, states, and localities that have built successful model codes to speed broadband deployment that work for all sides should systematically share lessons acquired broadly. Simple principles such as transparent pricing, better education on how to deploy next generation networks, and transparent design standards can speed deployment in the long term.

APPENDIX C

EXCESSIVE FEES BARRIER:
ANALYSIS AND RECOMMENDATIONS

BARRIER SUMMARY. This barrier occurs when fees for access to ROW and local assets are viewed as unreasonably high relative to the incremental burden on the ROW, or duplicative of fees already paid, or unrelated to some other objective metric.

WHY THIS BARRIER ARISES. This deployment barrier arises when localities and providers cannot agree on appropriate compensation for ROW access and use of local assets. To some extent, this barrier is born of competing interests. Localities need funds to properly maintain public infrastructure and support other public services, and sometimes seek to generate revenues for purposes unrelated to the costs of the ROW and local assets. Private companies, on the other hand, want to quickly deploy technology within the public ROW at the lowest cost possible, on the quickest timeline, with minimal regulatory delay.

Many comments were submitted in the *Accelerating Broadband Deployment* dockets that named excessive fees as a deployment barrier. In comments, providers noted the numerous fees that they pay when deploying in the public ROW, and questioned whether some of those fees were excessive and/or duplicative. These fees included initial and recurring ROW access and licensing fees, pole attachment fees on municipal owned poles, consultant fees, and miscellaneous supplementary fees. These fees are often assessed in different ways depending on the municipality, and can include fees based on attachment location or revenue. Broadband providers also noted that it is often unclear why certain ROW fees are assessed, how those fees are calculated, or what authority is relied upon to assess those fees. Some providers suggest that they are suffering from discriminatory treatment. Some broadband providers also believe they are charged duplicative or excessive fees that are not related to the burden caused by placing these services and local assets in the ROW.

Excessive fees discourage investment and impede broadband deployment efforts. Higher construction costs and uncertain fee structures caused by the lack of transparency can cause providers to forgo or delay deployment projects. Excessive fees also are passed through to consumers thereby increasing costs to consumers and depressing adoption. Lower adoption rates reduce projected rates of return, which can make broadband deployment uneconomic. This effect is especially undesirable in unserved or underserved areas, where ROW access and use fees can greatly compound already high deployment costs.

Based on the comments provided, below is an analysis of why this barrier exists.

1. **Competing Economic Interests.** The potential for friction between localities and private companies exists because of their competing economic interests. As noted above, localities need funds to properly maintain public infrastructure and support other public services, and sometimes seek to generate revenues for purposes unrelated to broadband deployment. Private companies, on the other hand, want to quickly deploy technology in the public ROW at the lowest cost possible, on the quickest timeline, with

minimal regulatory delay. Commenters suggested that increased competition between localities and private companies may add to this friction.

2. **Different Methods of Calculating "Fair and Reasonable" Compensation.** On record, stakeholders disagree regarding how best to determine "fair and reasonable" compensation for ROW use. For example, many municipal parties charge "rent-based" fees based on a "fair market value" calculus, which may include auctions or other methodologies. This difference of opinion extends to the courts, as to what constitutes a "fair and reasonable" fee.
3. **Lack of Principles Regarding Fees.** There are currently no principles that guide municipal fee assessment on broadband providers, which has led to disagreements and disputes. Many commenters provided examples of fees being charged that are duplicative and/or in excess of the burden providers are putting on the ROW and local assets to deploy broadband, and appear solely motivated to generate revenue.[1] Litigating these disputes, commenters note, is not a sustainable solution or good policy. Litigation drains resources, further delays deployment, and creates inconsistent precedent between jurisdictions.
4. **Lack of Transparency.** Negotiations stall and partnerships fray without insight as to how fees are calculated, both with respect to the fee itself and why fees might be allocated differently between providers.

RECOMMENDATIONS.

Successful partnerships between localities and broadband providers are necessary to provide broadband connectivity to as many communities as possible. The Working Group acknowledges that providers must pay to use public property resources, and localities' best serve constituents by making these resources available on mutually beneficial terms and conditions. In order to better facilitate those negotiations, the FCC should provide leadership and clarity on what actually constitutes an "excessive" or "duplicative" fee for ROW access and use, and is therefore outside the meaning of "fair and reasonable" compensation. Therefore, the Working Group recommends that the FCC take the following actions:

1. **The Working Group advises the Commission to introduce greater transparency regarding the way ROW fees are determined by requiring localities to make fee schedules publicly available, along with a brief explanation of how fees were calculated, and why fees may be applied differently between providers or services.** It is not necessary for the Commission to prescribe an identical fee calculation on every municipality to ensure next-generation networks are successfully installed. Publicly disclosing siting fees will introduce helpful cost predictability for deploying carriers, and the additional accountability will encourage thoughtful, rational ROW and use fees.
2. **The Commission should clarify that "fair and reasonable" compensation for ROW access and use implies some relationship to a deployment's actual incremental burden on the ROW and local assets**. As a policy matter, the Commission should recognize that local fees designed to maximize profit are barriers to deployment. A burden-oriented

[1] The considerable rate difference between rate-regulated investor-owned and unregulated municipal owned pole attachment rental rates underscores the ideas that many localities may be overcharging when it comes to ROW and use fees.

standard is flexible enough to suit varied localities and network architectures, would ensure that fees are not providing additional revenues for other localities purposes unrelated to providing and maintaining the ROW, and would provide some basis to challenge fees that, on their face, are so high as to suggest their sole intent is to maximize revenue. For example, record evidence shows some providers are charged around $10,000.00 per wireless node in up-front licensing and application charges, and similar annual rents. 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 for which they are already paying a franchise fee. The Commission could also establish a presumptively reasonable "safe harbor" for certain ROW and use fees, although the Working Group acknowledges this may be a challenge considering some similar services are nonetheless governed by different statutory fee rules.

3. **The Working Group also encourages the Commission to eliminate certain practices that the record suggests unreasonably restrict deployment.** For example, the FCC should discourage the practice of requiring broadband providers obtain additional franchise agreements, or pay additional fees, to deploy broadband facilities within the ROW when they have already paid to access the ROW and the additional facilities do not impose more burdens on the municipality. The Commission can also discourage states and localities from transferring to providers unending consulting fees by limiting to what extent consulting fees are considered "fair and reasonable," and prohibit contingency-based compensation for consultants.
4. **The Working Group acknowledges that the Commission has many tools to create positive changes throughout the siting process with respect to ROW fees.** The Working Group advises the Commission to first ensure that the BDAC Model Code for States and Model Code for Localities each implement the fee-related policy recommendations described above. As a next step, the Commission should consider enacting new rules in the *Accelerating Deployment* dockets, issuing a declaratory ruling providing guidance, or developing best practices. Including fee schedule disclosure as part of any "broadband certified" checklist would also support expedited deployment.

APPENDIX D

INFLEXIBILITY BARRIER:
ANALYSIS AND RECOMMENDATIONS

BARRIER SUMMARY. This barrier arises when a local government is either unwilling or unable to appropriately adjust its review and approval processes to reflect different broadband technologies (*e.g.*, 4G v. 5G) or deployment strategies (*e.g.*, undergrounding v. aerial)

WHY THIS BARRIER ARISES. There are several instances when an inflexibility barrier might arise:

1. Cities might be unwilling to change their review processes because they do not see the use in changing procedures that they perceive as working well. This likely stems from a lack of understanding of differences in how new technologies are deployed.
2. Some cities might be intentionally inflexible because existing procedures embody their preferences, values, etc. for how networks should be built.
3. Other cities might be unintentionally inflexible due to lack of resources, technical expertise, or general knowledge of new broadband network characteristics. Deployment moratoria and other process-related delays might arise as a result as cities attempt to clear a backlog of applications, seek to acquire the information to make informed decisions, etc.

RECOMMENDATIONS.

1. ***"Broadband Ready" Certification Checklists.*** The FCC should either develop or encourage states to develop a process (checklist) by which localities can certify that they are "broadband ready." Such could be modeled on processes/checklists set forth in legislation recently enacted in Indiana and Wisconsin. Certification might include, at a minimum, requirements around:
    a. Specific commitments related to the determination of permit completeness (e.g., 10 days) and final approval or rejection (e.g., 60 days);
    b. Transparency and reasonable fees associated with the broadband investments; and
    c. Designating a single point of contact for broadband projects. This would allow broadband providers to know exactly who is responsible for the timelines outlined in the law.
2. ***Other Legislative Guidance.*** The FCC should encourage states, working with localities and other stakeholders, to adopt legislation that clarifies for localities that new broadband technologies and network deployment strategies require different review and approval processes at the local level. A possible first step would be for the FCC – either on its own or via BDAC and its working groups – to work with national organizations representing state and municipal policymakers to develop and promote model codes that could be implemented across the country.
3. ***Provider-Driven Education & Outreach.*** The FCC should encourage greater collaboration between providers seeking to deploy new facilities and local officials tasked with reviewing applications for such. In a growing number of instances, such close consultation has assisted localities in more rapidly understanding technical aspects of

new broadband networks, which in turn has helped to hasten agreement to ROW access and other critical elements of network deployment.

4. ***Additional Educational Opportunities.*** The FCC should explore how to leverage other expert stakeholders to provide localities and states with opportunities for acquiring the knowledge and skills needed to streamline the deployment of new broadband networks. These efforts might include:
    a. The convening of regional roundtables and/or online forums wherein state and local officials could gather for practical training, educational sessions, and the sharing of best practices. These might be modeled on workshops and webinars organized and hosted by NTIA over the last few years and could be broadened to include municipal and state perspectives to educate industry on how best to work with them.
    b. Designating a handful of higher educational institutions in key parts of the U.S. as hubs where localities and states in their regions might go for expert advice, resources, best practices, case studies, etc.
    c. Encouraging communities to work together and share resources to better address novel issues as they arise. The FCC could help to facilitate the creation of an information-sharing hub and/or a digital platform through which similarly situated communities could identify one another and connect.
    d. Partnering with relevant national associations (e.g., NCSL, NGA, USCM) to develop and disseminate tool kits, best practices, etc.
    e. Development of an online "master" guidebook for use by local officials when engaging in reviews for new network deployments.
5. ***Identify Incentives to Assure Forward Progress.*** The FCC should explore funding for states and localities to engage in the kinds of educational and self-improvement activities described above.

APPENDIX E

INORDINANCE BARRIER:
ANALYSIS AND RECOMMENDATIONS

BARRIER SUMMARY. This barrier occurs when the conditions, requests, or requirements put forward by a state or local entity are unreasonable or overly burdensome

WHY THIS BARRIER ARISES. The working group has identified that this kind of barrier occurs when a state or local authority conditions, requests, or requirements are unfair, inappropriate, unreasonable, or overly burdensome. To highlight the practical applicability of this definition, the working group and some commenters identified a number of practices that are considered "inordinately burdensome." Some of the practices identified include:

- Conditions imposed that are unrelated to the project for which they were seeking ROW access;
- Unrealistic Conditions on size, space, and location, including unrealistic restrictions imposed on the size, amount of space, and location of equipment and facilities;
- Practices prohibiting upgrades to facilities in ROW, including requiring a full review process even when upgrading existing facilities or making changes that are not substantially different from existing equipment; and
- Requiring all infrastructure to be underground, without allowing for alternative facilities.

RECOMMENDATIONS.

The Working Group recognized that preemption should be a last resort and, as such, the FCC should work closely with states and localities to come to amicable solutions wherever possible. As the comments filed in the dockets made clear, certain barriers such as moratoria may arise unintentionally due to small cities or localities lacking the resources, time, or expertise necessary to conduct prompt and thorough reviews quickly. To this end, we recommend that the FCC investigate the costs and benefits of developing a process for timely and efficient review of disputes — perhaps resembling arbitration — to assist all parties with working through issues that arise.

For example, we recommend that the FCC:

a. Engage, along with expert partners, in comprehensive outreach and education efforts to communicate the impacts of inordinate review/approval processes on network deployment, consumers, etc. and find solutions to speed deployment while preserving public safety.
b. Work, either on its own or via the BDAC and with municipal stakeholders, to standardize the application process to the extent possible, recognizing that one size cannot necessarily fit all communities. It should develop standard guidelines and materials that can be tailored to the need of local communities and all providers could take advantage of. This will be helpful to identify the circumstances under which additional materials can be requested and conditions imposed.
c. Work with localities — perhaps through national organizations like NCSL, NLC, USCM, NATOA, etc. — to reach consensus on floor/ceiling standards vis-à-vis aesthetics and

related items. These efforts should include the clear identification of the circumstances under which a locality or state can supplement/change these standards. Carve-outs for historic districts and similarly unique areas should also be considered.

d. Develop, either on its own or via the BDAC and with municipal stakeholders, a range of model codes/approaches that are tailored for different circumstances. Rather than one model code, the FCC might consider having model codes/approaches for large urban areas, smaller urban ones, rural towns, etc. Such an approach would ensure that each model code would properly take into account the nuances associated with its relevant geographic area.
e. Outline best practices for developing streamlined, simplified, and predictable permitting processes to guide states and localities.
f. Develop more clarity of "character of the neighborhood" or "aesthetics" between cities and providers. Such a discussion should occur prior to permitting in order to establish clear and transparent expectations and options on both sides up front.
g. Urge batch permitting for small cell antenna on structures in the ROW. Installations within the batch should be on the same kind of structure in areas with similar characteristics. Localities should have the ability to pull troublesome installations that might be caused by a number of things including ROW uses that are more complicated out of the batch, thus allowing the rest of the conforming batch to proceed forward.
h. Encourage cities to create more predictability in the permitting and install processes by developing zones as a layer in their comprehensive plans that predefine types of installations allowed, character of the neighborhood, compensation for use of the ROW and local assets, types of existing and available structures and guidance for new construction. These zones should remove barriers and increase predictability for providers to build out broadband networks. The zones could also potentially allow the city to incentivize deployment in areas that are underserved.

APPENDIX F

NONCOMPLIANCE BARRIER: ANALYSIS AND RECOMMENDATIONS

BARRIER SUMMARY. This barrier occurs when a state or local authority or applicant fails to enforce or comply with its established rules or procedures

WHY THIS BARRIER ARISES. There are typically two driving factors behind why instances of noncompliance might arise:

1. *Unintentional*. Incidental or unavoidable noncompliance barriers can occur when state or local authorities lack sufficient resources to meet its obligations or do not have an existing code in place by which to make decisions. Noncompliance can also occur when applicants inadvertently submit incorrect or incomplete applications.
2. *Intentional*. Willful noncompliance barriers can occur when state or local authorities resist or ignore shot clock obligations, lack the desire or ability to allow for nuanced or tiered treatment of applicants, or attempt to use their authority to extract unwarranted value from applicants or prioritize their own competing interests. Willful noncompliance can also occur when applicants submit bad-faith applications or install facilities prior to obtaining a permit.

RECOMMENDATIONS.

1. ***Education & Training*.** In order to head off noncompliance before it occurs, state and local authorities should be educated on newer technologies and their components (e.g. generalized background on small cell or fixed wireless technologies). This fosters a stronger understanding of the needs of various network providers, informs the decision-making process, and promotes opportunities for collaboration among all stakeholders.
2. ***Collaboration & Guidance Tools*.** Key industry, government, and trade or other collective interest representatives (e.g., alongside organizations like the National League of Cities) should work collaboratively to develop solutions to noncompliance challenges.
    - The development of a clear application, along with clear guidance materials that accompany the application, could promote mutual understanding among government and industry stakeholders and avoid and repair adversarial interactions.
    - Examples of related best practices: The states of Georgia and Michigan provide clear directives/guidance to localities with the METRO Act.
3. ***State Default Agreement.*** This mandate would provide parties with the option to resort to a "default agreement" in instances where they cannot reach a mutually satisfactory agreement within a reasonable amount of time, or where localities lack sufficient resources to adhere to their shot clocks or other obligations.
    - The default agreement must be a flexible mandate that allows for something other than a one-size-fits-all solution. The agreement must comply with state constitutions and other laws. It must go into effect automatically if the parties cannot successfully negotiate other terms.

- "Other terms" would include things like an extension of the shot clock requirements or a fee reduction in exchange for additional review time, not just a "final" agreement.
- The state mandatory default agreement should be developed collaboratively with the input of all relevant stakeholder types to ensure fairness and respect for the process. Furthermore, this practice will incentivize adherence to the agreements, because the alternative may be preemption or a federal code.

4. ***"Interconnection Contract."*** Providers can negotiate a deal with one county or municipality and another county or municipality can request the same deal with the provider if they "opt-in" to be part of the network. Conversely, providers can request the same deal other providers previously negotiated with counties or localities. However, it should not be mandatory for the government entity or the provider to accept such a request. If parties aren't able to negotiate mutually agreeable contract terms, they could utilize the state mandatory default agreement or take the issue to a PUC to arbitrate. (For more details regarding how this type of contract could operate, see Sections 251 & 252 of Title 47.)
5. ***Study a Mediation/Arbitration Process.*** Legal action is one of the few remedies to this barrier, but it is expensive and precludes limited-resource newer entrants. In order to maintain an appropriate level of municipal and state authority in the resolution of state and local matters, expanding legal recourse for noncompliance through the development of streamlined, state-level complaint and remediation/arbitration process that incorporates financial or other penalties for noncompliant parties on each side could serve as a more efficient, transparent, and cost-effective method of resolving noncompliance challenges than going to court. Such a process could be administered by a neutral third party with an escalator (i.e., appeals process) for non-functioning processes to a federal-level review for final de novo determination including preemption (with no deference granted to the mediation/arbitration decision).
    - Examples of related best practice: Public and private stakeholders in Minnesota developed and utilize a noncompliance adjudication process established with the PUC. The New York state Broadband Program Office serves as state-level agency that coordinates between state and local agencies for all permitting.
6. ***Resource "Sharing".*** Establish a voluntary pool to which providers can contribute in order to offset a locality's overtime pay costs, so that applications can be processed expediently where resources are otherwise limited. Require the pool to operate on a 1st-in-1st-out processing basis to prevent special treatment in favor of businesses that contribute to the pool over those that do not contribute or businesses that contribute greater amounts to the pool than other contributors. Establish a "human capital sharing" program among localities to enable localities with limited human capital to access qualified personnel in times of greater need than the local market can supply.

APPENDIX G

PREEMPTION ANALYSIS

INTRODUCTION

Every level of government — local, state, and federal — plays a role in broadband deployment. Indeed, the process by which networks are built is impacted by a range of rules and regulations enacted by an array of government entities. These rules typically seek to balance core public interests (*e.g.*, safety; aesthetics; financial considerations) against the imperative to deploy advanced communications infrastructure in a timely and cost-effective manner. In many instances, the process works smoothly: broadband providers and their counterparts in government work together to agree on mutually beneficial terms and construction parameters. But sometimes, the process is anything but smooth: overly burdensome rules, the unwillingness of one party or the other to act in good faith, or any number of other reasons mean delays in broadband deployment. When this happens, it might be necessary for a state legislature or the FCC to explore preemption to remove a barrier or provide clarity regarding the path forward. But when is it most appropriate to seek such significant redress? And what factors must be considered when deciding whether, and how, to wield this very powerful tool?

The following analysis sets forth a conceptual framework that all stakeholders involved in broadband deployment — *i.e.,* both public and private — should use when evaluating the appropriateness of preemption. This framework recognizes that FCC preemption may be necessary when presented with evidence of behavior or rules set by a state or local entity that are so inordinately burdensome or unreasonable relative to the underlying government interest that they can be prohibited *per se* (*i.e.,* outright). Yet many practices perceived as "barriers" to broadband deployment fall in an expansive middle ground where disputes between a broadband provider and a government entity could, or should, be resolved without preemption. In these instances, preemption is best seen as a last resort to be pursued only after every other option (*e.g.,* negotiation, arbitration, *etc*.) has been exhausted, and where measures designed to avoid such disputes in the first place (*e.g.,* transparency, *etc*.) have failed.

A BRIEF OVERVIEW OF FCC PREEMPTION

The legal mechanics of preemption are complex — and beyond the scope of this analysis. Suffice it to say that Congress has given the FCC several sources of authority for preempting state or local actions that are considered overly disruptive to the deployment of communications services. These provisions of the Communications Act include:

1. Requiring just & reasonable rates, terms and practices for most non-government-owned poles under Section 224.[2]
2. Time limits, or "shot clocks" under Section 332(c)(7)(B)(ii): state and local governments must act on wireless facilities siting requests within a "reasonable time."
3. Non-discriminatory treatment of providers generally under:
    a. Section 253(c) "for use of public rights-of-way" generally, and

[2] Unless Congress extends Section 224 to government-owned assets — something the BDAC should consider — it has no relevance for this working group.

b. Section 332(c)(7)(B)(i)(I) for "providers of functionally equivalent services" in the "regulation of the placement, construction, and modification of personal wireless service facilities" (which includes more than just the rights of way, *e.g.*, private buildings).

4. No prohibitions, or effective prohibitions, on deployment under:
   a. Section 253(a): "No State or local statute or regulation, or other … legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service;" and
   b. Section 332(c)(7)(B)(i)(I): the same for personal wireless services.

Such preemption is never without conflict. Litigation almost always ensues as state and local entities attempt to preserve their authority and right to self-determination. Unfortunately, the case law stemming from these disputes is riddled with contrasting interpretations of the appropriateness and reach of these preemption provisions in the context of advanced communications deployment.

Even so, it is undisputed that the Commission has a duty pursuant to sections 253 and 332 to remove state and local regulatory barriers to broadband deployment that act as prohibitions and effective prohibitions.[3] However, both sections are subject to three important limitations.

- First, they apply to "telecommunications services" (or facilities for providing them), and thus the FCC's power under these sections may be reduced or undermined if broadband is no longer a telecommunications service subject to Title II.[4] However, given that most networks will likely continue to provide telephony, which remains subject to Title II, the FCC will retain *some* power to use these provisions to ease broadband deployment.
- Second, both sections set a high bar for justifying FCC preemption (at least relative to Section 224's "just and reasonable" standard), focusing on either discrimination or the prohibitive effects on deployment. Furthermore, at least two federal appeals courts have required *actual*, not merely potential, proof of discrimination or prohibitive effect on deployment.[5]
- Third, as a matter of federalism, courts have held that the FCC may apply these provisions only to state and local "regulatory" functions (*e.g.*, permissions), but not to

[3] What constitutes a "prohibition" or "effective prohibition" is discussed below.

[4] *See Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017), https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1_Rcd.pdf (proposing "to restore the Internet to a light-touch regulatory framework by classifying broadband Internet access service as an information service.").

[5] As the Ninth Circuit ruled in 2008, "[u]nder both [Sections 253(a) and 332(c)(7)(B)(i)(II)], a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiffs showing that a locality could potentially prohibit the provision of telecommunications services is insufficient." *See Sprint Telephony v. San Diego*, 543 F.3d 571, 577 (9th Cir. 2008) (overruling *City of Auburn v. Qwest* Corp., 385 F.3d 1236 (9th Cir. 2004) (quoting *Level 3 Commc'ns, L.L.C v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007)).

"proprietary" functions.[6] Acknowledging this distinction, and that only Congress could change it (because preemption requires a "clear statement" from Congress to supersede state sovereignty), the FCC's recent NOI sought comment on how to apply it.[7] Informing such line-drawing by the FCC — or by Congress — could prove to be among the BDAC's most important recommendations and deserves additional scrutiny by this working group.

FINDINGS: THE POTENTIAL ROLE OF PREEMPTION IN FACILITATING BROADBAND DEPLOYMENT

The following findings are evident after studying the issue of preemption and considering its potential role(s) in the context of hastening broadband deployment:

- Each level of government has legitimate and compelling interests in assuring a robust role in the broadband deployment process. For cities and states, these interests revolve primarily around protecting the safety and welfare of their citizens.
- Preemption is a powerful tool that should only be used (in the context of broadband deployment) in certain well-defined instances lest its overuse undermines the sovereignty of states and the statutory authority of their localities to manage their rights-of-way and other assets.
- Preemption can bring order to the chaos of conflicting or overlapping regulatory approaches in place at the state and/or local levels. Indeed, preemption can be helpful in providing clear guidance about who decides which issues and about the standards that should be used to assure timely decision-making.
- Preemption can also be impactful as a remedy in instances where a government entity engages in behavior that is deemed to be *per se* unreasonable or in clear conflict with the preferences or approach articulated by a higher-level government entity.
- Preemption in the context of addressing discrete barriers to broadband deployment that are not *per se* unreasonable should be viewed as a last resort.

[6] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies,* Report and Order, 29 FCC Rcd 12865, 12964-65, ¶¶ 239-40 (2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-153A1_Rcd.pdf [hereinafter 2014 Infrastructure Order] (concluding that "Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities…. We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt 'non regulatory decisions of a state or locality acting in its proprietary capacity.'") (quoting *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity")).

[7] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3364-65, ¶ 95-96 (2017), https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-38A1_Rcd.pdf [hereinafter 2017 Wireless Infrastructure NOI] ("We also seek comment on the extent to which [Section 253(a) and 332(c)(7)] apply to States and localities acting in a proprietary versus regulatory capacity, and on what constitutes a proprietary capacity.").

A Conceptual Framework for Deciding When Preemption Might Be Appropriate to Hasten Broadband Deployment

Clarifying how the Commission might wield its preemption powers would provide greater certainty to all stakeholders regarding the instances when the FCC would consider a petition for preemption to be ripe and when the Commission might act on its own to address a particular issue. This certainty would encourage broadband deployment, respect the sovereignty of the states and local autonomy, and also allow Congress to clearly assess whether it needs to revisit the FCC's preemption authority. Below follows a potential model for how the FCC might conceptualize and operationalize its preemption authority.

In reviewing how courts and regulators apply general standards (*e.g.*, in negligence and antitrust), a spectrum of possible rules is evident:

- ***Per se* bans**: A limited number of practices so egregious that they are declared, *ex ante* (in advance), unlawful ***per se*** (in themselves);
- **Rebuttable presumptions** that less egregious practices might be unlawful but that could be rebutted according to some standard;
- **A "rule of reason"** governing most issues, usually applied case by case and dependent upon certain defined factors; and
- **Safe harbors** that define certain practices as *per se* lawful, usually to ensure adoption of some minimum standard of good conduct.

The same framework could guide the FCC's thinking on preemption.

Before Contemplating Preemption, Focus on Cooperation, Capacity-Building and Education

As much as possible, the FCC should explore measures that can avoid the need for preemption. Cooperation with the FCC on these measures could qualify a government entity for a safe harbor from preemption, while the opposite could weigh negatively in preemption analysis. For example:

- To address existing impediments that arise due to lack of expertise or resources[8] — the FCC, on its own and in partnership with a range of entities, should engage in comprehensive education and outreach activities to make available opportunities for equipping localities and states with the resources needed to make informed decisions and to speed up reviews. Failure by a state or local entity to avail itself of these resources in a timely manner could bolster a case for preemption.
- To prevent new impediments from arising, service providers and the government entities with which they work to build networks should both commit to improving their practices and how they interact with one another. For example, failure by a service provider to submit complete applications for review could weigh against a future case for preemption. Similarly, failure by a locality to be more transparent in the rates it charges for ROW access or to demonstrate that a fee is related to the cost of access to ROW could weigh in favor of preemption. The FCC, in partnership with state and local representatives, could seek to jumpstart such self-improvement by

[8] Numerous barriers cited in other sections of this report highlight these kinds of shortcomings in cities and towns across the country. *See, e.g Ambiguity Barrier Appendix*.

developing more standardized applications and review processes and best practices for being more transparent.[9]

- Evaluation of applications for collocation on locality-owned vertical infrastructure (e.g. light poles, traffic lights), including refusal to allow attachment to above ground structures in designated mandatory undergrounding areas, for reasons of health, safety, or sound engineering principles, or aesthetic conditions limited to reasonable objective standards (e.g., common shroud or container) might be protected from FCC preemption in a safe harbor — while decisions made for *other* reasons would be presumed unlawful (though that presumption could be rebutted by localities).

Preemption as a Last Resort: Dispute Resolution / Escalation Mechanisms Prior to Preemption Petitions

In the vast majority of cases where parties fail to reach agreement over ROW access and other parameters impacting broadband deployment, preemption should be a last resort. To govern such cases, the FCC should call for, or adopt, two distinct but related kinds of mechanisms.

The first would be holistic, akin to standards-setting, intended to bring together providers and relevant government agencies in an effort to resolve known issues and determine best or standard practices (which, in turn, might function as safe harbors against FCC preemption. The FCC could provide guidance regarding its preferred approach for how this process might proceed, including information regarding whether and to what extent this is a formal or informal process, who would serve as the arbitrator, burdens and standards of proof, the enforceability of remedies, the appeals process, etc. As an intermediate step, the FCC could encourage state governments to address these issues — *e.g.,* via intervention in an effort to reach a resolution prior to arbitration and legislation to address the issue more broadly across the state (like what is happening in the small cell context).

Second, the FCC could use the same or similar fora as mechanisms for resolving *particular* disputes before they reach the FCC. Preemption petitions could be filed with the FCC upon a showing that, despite the best efforts of the parties involved, progress toward an acceptable resolution within a reasonable period of time could not be made. A demonstration of bad faith (*e.g.,* willful non-cooperation by a party) could trigger action earlier. The FCC should issue guidance regarding how this process would play out (*e.g.,* in an adjudicatory manner or via a formal rulemaking). This two-fold approach could maximize the agency's limited resources, minimize intrusion upon state sovereignty, and balance the interests of competing stakeholders. But to be effective, it must be backed up by a credible, clear threat of FCC preemption in appropriate circumstances.

Preemption as a First Step: *Per Se* Bans on Certain Egregious Practices

Even if preemption is generally the *last* resort, it must *sometimes* be the first resort. Sections 253 and 332 leave it to the Commission to decide what constitutes (i) outright prohibitions on deployment, (ii) effective prohibitions on deployment, and (iii) "unreasonable discrimination" among broadband providers by state and local governments. The first two clearly contemplate

[9] These kinds of practices are discussed elsewhere in this report. *See, e.g. Excessive Fees Appendix*.

both outright moratoria and *de facto* moratoria, while the third contemplates, at a minimum, patterns of actions or inactions that unnecessarily slow deployment or raise the costs associated with it for certain categories of providers relative to others.

In extreme cases, a *per se* ban on such practices may be appropriate — to ensure that such practices cease completely and deny states and localities the opportunity of attempting to justify the practice in a particular case. A *per se* ban is justified only when we are so certain that the practice is inherently harmful that litigating about particular instances is not worth the cost involved and uncertainty created by leaving the door open to such practices.

Rebuttable Presumptions

More flexible than a *per se* ban is a rebuttable presumption, which a state or locality would have the opportunity to rebut. Into this category should fall practices which are generally harmful on net.

Because the stakeholders engaged in broadband deployment operate according to different motivations and incentives, there will likely be disagreement over the scope of activities that ought to be considered *per se* bans. Indeed, it would behoove ISPs to argue for a broader conception of such actions than the government entities with whom they must work to access ROWs. Conversely, government entities would argue for a much narrower conception in an effort to preserve as much autonomy as possible when it comes to negotiating with their counterparts in the private sector. As such, disagreements on the margins of the *per se* standard are inevitable. This could be compounded by the fact that different providers will view the same set of criteria for ROW access differently: provider A might deem a particular request or requirement reasonable, while provider B might not.[10]

To resolve such cases, the FCC should develop a dispute resolution process that includes rebuttable presumptions about these kinds of marginal activities. This process would play out as an intermediate step that must be completed prior to filing a formal petition for preemption. The party alleging that a particular action ought to be considered a *per se* ban would have the initial burden of offering evidence demonstrating that the alleged action rises to the level of a *per se* ban. After that point, the burden would shift to the other party to demonstrate that the action is reasonable or otherwise not rising to the level of a *per se* ban. In every case, the parties should be encouraged to engage in the activities discussed in the next section in an effort to resolve the impasse without resorting to preemption.

Ultimately, attempting to articulate a list of such practices might be counterproductive since it will inevitably be incomplete. As such, it will be incumbent upon the FCC to develop standards for evaluating actions or inactions that might, in practice, operate as "effective prohibitions" or be unreasonably discriminatory. The following attempts to frame out how the FCC might go about establishing these kinds of standards.

---

[10] One example that has been documented by this Working Group is in the provision of Wi-Fi services. Some wireless providers have agreed to deploy such services as part of an agreement around 5G deployments. Others, however, have balked at city requests for such services. [*See Inflexibility Appendix*]

A Standard for Evaluating "Effective Prohibitions"

When attempting to set a standard for evaluating what activities constitute "effective prohibitions," both on a case-by-case basis under a rule of reason and in deciding which practices merit *per* se bans or rebuttable presumptions *ex ante,* the FCC's analysis should include the following:

1. **Economic Analysis**. Broadband providers and those with whom they negotiate for ROW access have competing economic interests: providers wish to build networks as cheaply as possible, while many of those setting the fees for critical ROWs oftentimes wish to maximize their return on making those assets available. Balancing these interests is difficult since both are, at bottom, rational. However, in the context of hastening broadband deployment, there are practices that can render deployment in certain areas uneconomic.[11] Consequently, it will be incumbent upon the FCC's new Office of Economics and Data to examine how two critical economic principles operate in the broadband deployment context:
   a. **Marginal effect**. The question of deploying service is, in economic terms, always one made at the margin. The average effects are irrelevant. The question to be asked is: How do certain practices impact the marginal cost of building out network components?
   b. **Opportunity cost**. Any increased costs of deployment caused by an action that makes deployment uneconomic or inordinately expensive in a certain area will likely deflect available resources that could otherwise have been spent on deployment. The FCC needs an economic model for evaluating such effects.
2. **Geographic effects**. Effective prohibition can occur on a sub-municipality level. For example, a particular action by a municipality could "effectively prohibit" provision of service only to a small area — *e.g.,* 5% of a municipality — leaving those particular consumers unserved, or underserved. In these instances, FCC preemption might be most appropriate because the political decision-making process may systematically undervalue the needs of these consumers for connectivity.[12] As such, the Commission might explore whether to distinguish between (1) practices that make deployment to a specific area impractical and (2) practices that make an entire planned deployment sufficiently more expensive that it has to be shrunk, leaving some areas unserved.
3. **Network Upgrades**. Communications networks are not static; their deployment is generally an iterative process. The FCC will have to decide how to use its preemption authority not only over practices that may "effectively prohibit" deployment of entirely new networks, but also the deployment of upgrades to already existing networks. As with geographic effects, the FCC's analysis should focus on the nature and quality of services provided to consumers. Ideally, this analysis would measure all services provided to consumers (but, as noted above, undoing reclassification may constrain the FCC's preemption powers because the agency will have to focus on those services that remain telecommunications services).

[11] For additional discussion and recommendations for addressing these specific issues, *see Excessive Fees Appendix*.

[12] Among other things, this would be consistent with the FCC's duty under Section 706 of the 1996 Telecommunications Act to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."

A Standard for Evaluating Discrimination

Discriminatory actions – *e.g.,* subjecting ISPs to different rules for accessing ROWs – can also rise to the level of *per se* bans on broadband deployment. When developing a standard for evaluating whether certain behavior rises to this level, the Commission will have to decide what makes discrimination among broadband providers "unreasonable," an undertaking that will, in part, turn on how comparable broadband providers are treated.[13] In general, as above, the Commission's focus should be on the consumer: differences in technical architecture *might* justify different rates, terms or practices from local governments, but the more similar the essential offerings are for consumers, the more the burden should fall on the government entity to justify differential treatment. Accordingly, some but not all discriminatory behavior might operate as *per se* bans. Actions that are blatantly discriminatory, like refusing to offer provider B the same terms for ROW access as provider A, are *per se* discriminatory and would likely be ripe for preemptive action. However, there might be actions that do not quite meet this standard.[14] In those instances, it might be best to apply a framework built around rebuttable presumptions to resolve these disputes.

[13] Section 332(c) governing wireless siting applications (*e.g.*, on private buildings) applies only to discrimination among "providers of functionally equivalent services," while Section 253(c), governing "use of public rights-of-way" generally, contains no such requirement. Even so, any assessment of the reasonableness of discrimination among providers will inevitably turn on how comparable they are. The Commission might conclude that the latter statute sets a lower bar for comparable-ness than the former, but will still have to assess how apples-to-apples the comparison is before deciding whether differences in the rates or terms offered to one provider but not the other should be unlawful.

[14] See Discrimination Appendix

APPENDIX H

BROADBAND READINESS CHECKLIST

The working group identified a number of items that aid in expediting advanced telecommunications deployment within localities that do not necessarily rise to the level of inclusion in a code or ordinance. The recommendation is to develop a list of these items that a community can use as a tool to proactively prepare to facilitate telecommunications development projects. Below is a high level draft of what might be included in such a list.

Project Management

- Establish, identify and publish a single point of contact/project manager/ROW manager for broadband deployment projects. Include other relevant contacts as appropriate.
- Identify clear escalation process/procedures with specific contact information for any issue that arise

Assets & Data

- Identify and locate any existing maps of available infrastructure, planned construction, etc.
- Identify expeditious process for making existing GIS data available
- Identify any known contacts for electrical and backhaul sources

Rate Structure

- Publish detailed rate/application fee information:
    - Wireline attachment, microcell (by type of pole)
    - Establish pre-program master attachment and maintenance agreements
    - Summarize impacting state/federal/local regulations, pole/strand exemptions/ restrictions, utility impacts; identify impact of currently in place agreements (if any).
    - Publish a rate study guide.

Permitting

- Publish permit fees
- Create or identify rapid processes for permit review and processing along with specific timeframes for permit issuing
- Identify duration of permit and any restrictions that may be relevant

Construction

- Publish underground and aerial standards (e.g. boring, micro-trenching, National Electrical Safety Code (NESC), minimum clearances between communications attachments and power attachments).
- Publish insurance and bonding requirements.
- Identify seasonal timelines and any other time-based limitations.
- Identify utility reroute/deployment/maintenance policies.
- Identify any required use of specialized crews/deployment management on assists.

- Publish any additional training requirements mandated by a particular utility to work on/ access a site, and identify any requirements for partnerships with utility-approved contractors.
- Publish aesthetic considerations that have been codified, and are clear and consistent across providers.
- Publish any provisions that are in place to expedite moving of pole attachments so that each attachment doesn't need a separate truck roll to be moved, such as one touch make ready.
- Publish engineered plans showing equipment that will be attached to poles and an analysis of the existing pole and if it will handle the new attachments.
- Publish the layout of power supplies and cable or fiber to receive and send signals to new equipment.

Maintenance

- Create and make available a policy on emergency facilities maintenance procedures
- Create a process for sharing road closure information
- Identify appropriate communication channels for maintenance issues
- Identify requirements for incumbent utility/municipal/DOT maintenance agreements

BDAC REMOVING STATE AND LOCAL REGULATORY BARRIERS WORKING GROUP

VOTE RECOMMENDATIONS
The FCC should work, either on its own or via the BDAC, with industry and state/local agencies (or national associations) to develop a broadband readiness checklist.
The FCC should either develop or encourage states to develop a process by which localities can certify that they are "broadband ready."
The FCC should finalize, via BDAC, and with industry, states, and local governments that have implemented successful model codes, a voluntary, flexible model code or set of guidelines to speed broadband deployment.
The FCC should encourage greater transparency regarding the way fees are calculated by requiring localities to make fee schedules publicly available, along with a brief explanation of how fees were calculated.
The FCC should study whether a streamlined mediation and arbitration process administered by a neutral third-party would in fact expedite deployment.
The FCC should explore how to leverage other expert stakeholders to provide localities and states with opportunities for acquiring the knowledge and skills needed to streamline the deployment of new broadband networks.
The FCC should study the establishment of a voluntary pool of experts to which providers can contribute in order to offset a locality's overtime pay costs, so that applications can be processed expediently where resources are otherwise limited.
The FCC should explore funding and certification programs for states and localities to engage in educational and self-improvement activities related to accelerating broadband deployment.
The FCC could help to facilitate the creation of an information-sharing hub and/or a digital platform through which similarly situated communities could identify one another and connect.

BDAC REMOVING STATE AND LOCAL REGULATORY BARRIERS WORKING GROUP

RECOMMENDATIONS FOR DISCUSSION
The FCC should work with localities (perhaps through national organizations like NCSL, NLC, USCM) to collaboratively develop an optional default agreement that has standardized terms and conditions.
The FCC should provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not "fair and reasonable."
The FCC should work, either on its own or via the BDAC and with municipal stakeholders, to standardize the application process to the extent possible, recognizing that one size cannot necessarily fit all communities.