

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA-The Rural Broadband Association (“NTCA”)¹ hereby submits this Opposition to Petitions for Reconsideration² filed in response to the Third Report and Order and Declaratory Ruling³ adopted by the Federal Communications Commission (“Commission”) in the above-captioned proceeding. These Petitions seek to undo certain provisions adopted by the Commission that will enable NTCA members to access certain utility poles at reasonable rates, terms and conditions and to avoid being stymied in their attempts to bring new and upgraded communications facilities to rural consumers by state or local laws and policies that have the effect of prohibiting or unnecessarily impeding broadband deployment.

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

² Petition for Reconsideration of the Coalition of Concerned Utilities (“CCU”), WC Docket No. 17-84, WT Docket No. 17-79 (fil. Oct. 15, 2018); Petition for Reconsideration of the Smart Communities and Special Districts Coalition (“Smart Communities”), WC Docket No. 17-84, WT Docket No. 17-79 (fil. Sept. 4, 2018).

³ *Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, FCC 18-111 (rel. Aug. 3, 2018) (“Third Report and Order” or “Declaratory Ruling”).

As background, NTCA’s RLEC members provide broadband and other services in rural communities of the nation initially ignored by larger providers. In these areas, it is difficult if not impossible for any provider to make a business case to deploy network facilities absent the critical support enabled by the High Cost Universal Service Fund (“USF”). Expedited or lower cost access to poles or municipally controlled rights-of-way will not, standing alone, drive the expanded reach of or upgraded capacity of broadband networks in sparsely populated RLEC service areas where distance and density present significant challenges. That said, certain of the provisions adopted by the Commission in August 2018 and the subject of the Petitions can expedite deployment when the business case for deployment can be made and reduce unnecessary or unreasonable costs that otherwise exacerbate and undermine the business case.

NTCA specifically opposes the attempt by the Coalition of Concerned Utilities (“CCU”) to narrow the protections adopted by the Commission in the Third Report and Order that will place RLECs on a level playing field with other providers and reduce RLECs’ deployment costs. In its Petition, the CCU argues that ILECs are granted an unfair advantage over other providers by virtue of the Third Report and Order and in particular points to the presumption adopted by the Commission which grants ILECs parity with “similarly situated” attachers in cases of “newly-renewed” joint use agreements.⁴ CCU’s request for reconsideration should be denied for several reasons. For one, CCU seems to base their entire argument on the notion that ILECs receive from joint use agreements substantial benefits not enjoyed by other attachers that as a result render ILECs incapable of being similarly situated to other providers. However, if that is true, utilities affected by the presumption are free to rebut. Nothing in the Third Report and

⁴ CCU, pp. 4-7.

Order adopts a “rigid rule” that grants ILECs an unfair advantage as the newly amended provisions are simply a presumption.⁵ Utilities that believe an ILEC does in fact gain substantial benefits from a joint use agreement that grants them an advantage over other providers need only step forward and rebut the presumption pursuant to the provisions adopted by the Third Report and Order.⁶

Moreover, CCU also misses that the Commission’s decision to amend the rules at issue and adopt the presumption to which the former objects was based on changed circumstances.⁷ As the Third report and Order makes clear, the original rules to which CCU would like to revert were adopted at a time of “parity” in pole ownership between ILECs and utilities.⁸ That parity has been diminished—as the Commission found based on the record⁹—and thus the agency made the entirely reasonable determination that fairness and the reduction of costs for providers seeking to expand broadband access would be served by a reset of its rules and adoption of the rebuttable presumption at issue. CCU has failed to demonstrate that this decision was made in error or will place ILECs at an “unfair advantage” vis-à-vis other providers; to the contrary,

⁵ Third Report and Order, ¶ 126 (“[w]e recognize that there may be some cases in which incumbent LECs may continue to possess greater bargaining power than other attachers, for example in geographic areas where the incumbent continues to own a large number of poles. Therefore we establish a presumption that may be rebutted rather than a more rigid rule.”).

⁶ *Id.*, ¶ 128 (adopting a presumption that utilities can rebut via a formal compliant proceeding and discussing the showing that utilities must make to demonstrate that ILECs in joint use agreements do in fact have benefits not enjoyed by other attachers).

⁷ *Id.*, ¶ 126 (“We therefore conclude that incumbent LEC bargaining power vis-à-vis utilities has continued to decline. Therefore, *based on these changed circumstances*, we agree with incumbent LEC commenters’ arguments that, for new and newly-renewed pole attachment agreements between utilities and incumbent LECs, we should presume that incumbent LECs are similarly situated to other telecommunications attachers and entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers.”) (emphasis added).

⁸ *Id.*, ¶¶ 124-125.

⁹ *Id.*, ¶ 125.

NTCA submits that this determination is a reasonable measure that will help to advance the availability of broadband throughout the nation.

Turning to the Petition filed by Smart Communities, NTCA also opposes this request for reconsideration that would substantially reduce or outright eliminate the authority the Commission has to reduce unnecessary barriers to broadband deployment. The Commission correctly noted in the Declaratory Ruling that express and *de facto* moratoria on the deployment of broadband facilities violate Section 253(a) and are not saved by the exceptions found in Section 253(b) and (c).¹⁰ For NTCA members, the Commission’s authority to tackle unnecessary and unreasonable impediments to broadband deployment such as moratoria is critical. As noted above, these small providers operate in rural areas of the nation where it is difficult if not impossible to make the business case for broadband deployment absent High-Cost USF support. Once that support is provided, it would undermine the Commission’s universal service goals—as well as the wishes of Congress¹¹ and the needs of consumers that lack sufficient or affordable access—to allow unnecessary or unreasonable impediments to deployment including but not limited to moratoria to drive up providers’ costs or slow down deployment or even stop it in its tracks.

For NTCA members, even moratoria that fall short of express prohibitions can function as unnecessary barriers to effective and efficient broadband deployment and drive up their costs that must be passed on to end-users. As the Declaratory Ruling states “even moratoria that are

¹⁰ Declaratory Ruling, ¶ 144.

¹¹ See Letters from 130 members of the United States House of Representatives and 63 members of the US Senate asking FCC Chairman Ajit Pai to address the underfunded High-Cost USF budget to ensure that it can support the availability and affordability of broadband in rural areas. Available at: <https://www.ntca.org/ruraliscool/newsroom/press-releases/2018/15/ntca-applauds-members-congress-urging-action-long-term>.

actually time limited force providers either to delay or cancel their planned deployments.”¹² For RLECs operating in areas of the nation where construction comes to a halt for several months when the ground freezes, any unnecessary delays forced by municipalities’ refusal to timely process applications for access to public rights-of-way can be costly. Construction crews that could otherwise be doing their job may sit idle for months due to municipally imposed delays and then sit even longer once winter hits. When “time is money” and the costs of deployment are already higher in rural areas and the customer base is much smaller and more geographically dispersed, RLECs need every advantage they can get and the provisions adopted in the Declaratory Ruling can do just that by placing municipalities on notice that unnecessary delays are not acceptable.

With the Declaratory Ruling as a good starting point supported by the Commission’s statutory authority, the agency should next turn its attention to state and local laws that enable railroads to act as “gatekeepers” with respect to railroad crossing that intersect with public rights-of-way. As NTCA recently noted, the barriers to broadband deployment presented in certain instances by the need to place communications network facilities near or under railroad crossings are significant.¹³ As just one example:

One NTCA member received a request from a business for a fiber broadband connection lacking one currently. Providing the connection to the potential customer involved the underground installation of fiber in a public ROW adjacent to a state highway that at one point intersected with the railroad crossing at issue. The railroad quoted fees of nearly \$20,000, which was composed of more than \$10,000 for the permit once it was issued, a separate upfront application fee, an “engineer mobilization” fee, and a “flagging/observer” fee; the railroad also required the broadband provider to purchase insurance at a cost of nearly \$2,000.

¹² Declaratory Ruling, ¶ 148 (internal citations and quotations omitted).

¹³ *Ex Parte* Letter, NTCA–The Rural Broadband Association, WC Docket Nos. 17-84 and 17-79 (fil. Sept. 6, 2018).

These fees as quoted by the railroad did not include any of the construction fees that the broadband provider was also required to incur. When the business customer balked at the special construction cost associated with such fees and a local economic development coordinator intervened, the railroad reduced its quote by several thousand dollars. The boring of the fiber was completed in one day, traversing a grand total of 15 feet under the railroad crossing and emerging on the other side also in the public ROW.¹⁴

Such fees are common in NTCA members' experience. Also common are delays of several months for boring under railroad crossings – and similar to the example discussed above this is typically for work that begins and ends in the public right-of-way, never touches railroad property, and is completed in an hour. Yet certain state and local property laws grant railroads the ability to act as “gatekeepers” and hold up providers for increasingly outrageous fees that waste precious and limited resources. Going forward, the Commission should take the foundation it has created via the Declaratory Ruling and build upon it to address state and local laws that impede broadband deployment. While NTCA respects – and the Commission should respect as well – state and local authority to manage public rights-of-way, when such management or the underlying legal provisions that railroads abuse impose on broadband providers unnecessary and excessive fees and delays, the direction of Congress as found in Section 253 is clear that such barriers should be swept away.

¹⁴ *Id.*, p. 2

Respectfully submitted,



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