



August 27, 2020

Ex Parte Notice

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84.*

Dear Ms. Dortch:

On Wednesday, August 26, 2020, the undersigned and Brian Ford on behalf of NTCA–The Rural Broadband Association (“NTCA”)¹ met with Will Adams, Legal Advisor to Commissioner Brendan Carr of the Federal Communications Commission (“Commission”). The parties discussed the *City of Portland* decision recently released by the 9th Circuit Court of Appeals upholding several infrastructure streamlining decisions enacted by the Commission pursuant to Sections 253 and 332 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“the Act”).²

In the meeting, NTCA reiterated its support for efforts to address any and all barriers presented by excessive fees or other terms and conditions for access to public rights-of-way (“RoWs”). Deploying new and upgraded broadband capabilities to households and businesses in the areas served by RLECs already requires these providers to overcome low population densities, challenging geographic terrain, and short building/construction seasons. Adding in excessive fees beyond those reasonably necessary to recoup costs or adding in unnecessary delays can drive up even further the costs for deployment and/or upgrading of existing facilities, to the detriment of the consumers in need of better broadband (or any broadband access at all).

One persistent barrier NTCA members report in terms of expanding broadband networks relates to the fees and the terms and conditions of their access to railroad crossings and other property for the purposes of installing broadband infrastructure. Despite the forward-looking efforts of some states to cap such fees, unreasonable and unpredictable fees and other terms and conditions that lead to unnecessary expenses (ultimately passed on to consumers) and unnecessary construction delays persist elsewhere. NTCA members report excessive fees for insurance premiums, railroad employees’ presence during construction, fees for construction

¹ NTCA represents approximately 850 rural local exchange carriers (“RLECs”). All of NTCA’s members are voice and broadband providers, and many of its members provide wireless, video, and other competitive services to their communities.

² *City of Portland v. United States of America*, No. 18-72689 (9th Cir. Aug. 12, 2020).

permits, and fees assessed on outside contractors performing infrastructure installation. Worst of all, fees of thousands or even tens of thousands of dollars and delays of several weeks or even months can ensue for work (e.g., boring under a railroad crossing for the purpose of installing fiber) that is complete in a matter of hours.³

Fortunately, the recent *City of Portland* decision provides affirmation of the Commission’s ability to use Section 253 of the Act to help address this problem. Even as the Commission rules at issue therein focused primarily upon small cell wireless infrastructure, the reasoning employed by the agency and upheld by the 9th Circuit with respect to the scope of Section 253 governs with equal force in the context of all kinds of network facilities and technologies.⁴ Indeed, such an interpretation is essential as a practical matter to further the specific goals of promoting the deployment of next-generation communications services and ensuring that the Commission’s streamlining actions upheld by the Ninth Circuit have the greatest impact. To a significant degree, 5G wireless services will rest upon a foundation of wireline backhaul facilities: even where licensed spectrum may be available to function as backhaul in some instances, the densification of small cells that will power this new technology will certainly require a densification of fiber not seen before in this nation’s history.

With respect to Section 253, subsection (a) states that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁵ *City of Portland*, most importantly, rejected arguments that the Commission must find an “actual prohibition” in a state or local regulation of communications services or the placement of facilities necessary to deliver these to consumers. To the contrary, the court stated that the Commission is simply required to find that a state or local legal requirement is “materially inhibiting” the deployment of service. Moreover, the court supported the Commission’s ultimate determination that excessive fees charged for access to public RoWs can inhibit or delay facilities deployment.

NTCA previously urged the Commission to apply the same analysis to excessive fees for access to railroad crossings and other property for the purposes of installing broadband infrastructure specifically in those instances where a railroad is exercising that capability against the backdrop of a state or local law that grants the railroad such “gatekeeper” status. The excessive fees and delays imposed by railroads leveraging the status conferred by state and local laws divert resources that could have been spent elsewhere – and indeed, NTCA members have reported redirecting limited resources to deployment in other parts of their service areas simply to avoid the excessive fees and unnecessary delays associated with railroad crossings. These fees thus “materially inhibit” broadband deployment in much the same way as the excessive fees

³ See *Ex Parte* Letter from Michael Romano, NTCA, to Marlene H. Dortch, Secretary, Federal Communications Commission (“Commission”), WC Docket No. 17-84 and WT Docket No. 17-79 (fil. Sep. 6, 2018).

⁴ *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, Third Report and Order and Declaratory Ruling, FCC 18-111 (rel. Aug. 3, 2018); *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, Declaratory Ruling and Third Report and Order, FCC 18-133 (rel. Sep. 27, 2018).

⁵ 47 U.S.C. § 253(a).

preempted by the Commission with respect to small cell placement in public RoWs and upheld in *City of Portland*. Commission action to address railroads going forward would and should not interfere, however, with state or local laws that, for example, are found to set already a reasonable fee for access to railroad crossings and/or to set reasonable timelines for the processing of requests for such access.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

Sincerely,
/s/ Michael Romano
Michael Romano
Senior Vice President – Industry Affairs
and Business Development
NTCA-The Rural Broadband Association

cc: Will Adams