



October 16, 2020

Ex Parte Notice

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20002

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 Thursday, October 15, 2020, the undersigned and Brian Ford on behalf of NTCA–The Rural Broadband Association (“NTCA”)¹ met with Sean Spivey, Wireless and International Advisor to Federal Communications Commission (“Commission”) Chairman Ajit Pai. The parties discussed access to railroad crossings and other property for the purposes of installing broadband infrastructure, and NTCA noted that this has been a persistent barrier that NTCA members as well as other operators face in terms of expanding broadband networks.²

NTCA stated that despite the forward-looking efforts of some states to promote the reasonableness of such fees, unreasonable and unpredictable fees and other terms and conditions for access to railroad crossings and other property persist in many areas. NTCA members report excessive fees for insurance premiums, railroad employees’ presence during construction, fees for construction permits, and fees assessed on outside contractors performing infrastructure installation. Worse still, 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.

NTCA further noted that such excessive fees and delays are particularly problematic as its members work diligently to meet broadband buildout obligations attached to high-cost universal service support or other broadband deployment initiatives. Moreover, such costs of deployment must often be passed on to consumers or result in the diversion of resources that could have

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 *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); *Ex Parte* Letter from Robert Millar, Associate General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, Federal Communications Commission (“Commission”), WC Docket No. 17-84 and WT Docket No. 17-79 (fil. June 1, 2018).

been used for further network investment. In addition, 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. Any barrier to continued fiber deployment thus will serve as a barrier to expanded availability of these next-generation wireless services.

Fortunately, the recent *City of Portland* decision issued 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”),³ 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.

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.

The Commission should apply the same analysis as discussed above to address the railroad crossing barrier to broadband deployment. Specifically, in those instances where a railroad is exercising its “gatekeeper” status and impeding broadband deployment, and doing so against the backdrop of a state or local law that grants them such capability, those provisions “materially inhibit” the deployment of service as required by Section 253. 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 limit NTCA members’ ability to expand the quality and reach of their broadband networks. These fees thus “materially inhibit” broadband deployment in much the same way as the excessive fees preempted by the Commission with

³ *City of Portland v. United States of America*, No. 18-72689 (9th Cir. Aug. 12, 2020).

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).

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 already set 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: Sean Spivey