**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Build America: Eliminating Barriers to Wireline Deployment | ) | WC Docket No. 25-253 |
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**COMMENTS OF**
**USTELECOM – THE BROADBAND ASSOCIATION**


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USTelecom – The Broadband Association ("USTelecom")[1] submits these comments in response to the Federal Communications Commission's ("FCC's" or "Commission's") Notice of Proposed Rulemaking ("NPRM") in the above-referenced docket.[2]

## I. INTRODUCTION AND SUMMARY

USTelecom strongly supports the Commission's efforts to accelerate the deployment of modern wireline infrastructure across the United States. Wireline networks form the backbone of the nation's broadband ecosystem and are essential to achieving universal, reliable, high-speed connectivity. The NPRM recognizes that removing unnecessary barriers to wireline deployment is critical to advancing the Chairman's Build America agenda and ensuring that all Americans benefit from next-generation broadband services.

USTelecom recognizes that numerous state and local governments process right-of-way and permitting applications efficiently and work cooperatively with broadband providers to

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[1] USTelecom is the premier trade association representing service providers and suppliers for the communications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. Its broad membership ranges from international publicly traded corporations to local and regional companies and cooperatives, serving consumers and businesses across the country.

[2] *Build America: Eliminating Barriers to Wireline Deployments*, WC Docket No. 25-253, Notice of Proposed Rulemaking, FCC 26-40 (rel. June 26, 2026) ("NPRM").

facilitate deployment. Those jurisdictions demonstrate that reasonable oversight and timely infrastructure buildout are fully compatible objectives. USTelecom's members value these productive partnerships and seek to build upon them.

At the same time, providers continue to confront a patchwork of prolonged reviews, unpredictable procedures, excessive fees, permit throttles, and unrelated conditions imposed by many jurisdictions that materially inhibit wireline deployment. These barriers are not isolated inconveniences; they represent structural impediments that alter rational investment and construction decisions. When a provider faces months-long delays or must navigate widely varying requirements across adjacent jurisdictions, the economic calculus shifts, and deployment that would otherwise occur is deferred, rerouted, or abandoned entirely. Section 253(a) of the Communications Act prohibits state and local legal or regulatory barriers that have the effect of prohibiting the ability of any entity to provide telecommunications service, and the Commission has both the authority and the responsibility to give that provision meaningful effect.[3]

First, the Commission should adopt clear and appropriately tailored shot clocks to ensure timely action on wireline deployment applications. Specifically, USTelecom urges the Commission to establish a 60-day shot clock for standard applications and a 90-day shot clock for genuinely complex projects. These timeframes are sufficient for any jurisdiction exercising reasonable diligence to review an application and render a decision, while preventing the open-ended delays that currently plague providers in many localities. The shot clocks should encompass the entire governmental authorization process from initial submission to final action, permit only narrow and well-defined tolling, include robust anti-evasion protections to prevent procedural gamesmanship, and provide an effective remedy when a jurisdiction fails to act

[3] 47 U.S.C. § 253(a).

within the prescribed period.

Second, the Commission should take decisive action to limit fees to a reasonable approximation of actual and direct right-of-way-management costs, require advance disclosure of all applicable fees and conditions, and treat in-kind demands, such as requirements to install conduit for municipal use, provide free service, or make payments to unrelated funds, as compensation subject to the same reasonableness standard. While Section 253(c) preserves the authority of state and local governments to manage public rights-of-way and require fair and reasonable compensation, that authority does not extend to the extraction of fees or conditions untethered to legitimate management functions.[4]

Section 253 gives the Commission authority to address the deployment-inhibiting effects of state and local requirements through prospective, generally applicable rules. And the statute's protection applies to facilities capable of supporting telecommunications service even when the same facilities also carry broadband or other services. Clear national standards will preserve the legitimate interests of state and local governments in managing public rights-of-way and protecting public safety while preventing outlier practices from materially inhibiting the wireline deployment needed to advance America's digital infrastructure future. The reforms proposed in the *NPRM* are well within the Commission's authority, firmly grounded in the statutory text, and urgently needed. USTelecom urges the Commission to act promptly and decisively.

## II. STATE AND LOCAL PERMITTING REQUIREMENTS MATERIALLY INHIBIT WIRELINE DEPLOYMENT.

Wireline construction is a highly coordinated undertaking that requires providers to align design, financing, contractors, crews, materials, customer commitments, and construction

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[4] 47 U.S.C. § 253(c) (preserving state and local authority to "manage the public rights-of-way" and "require fair and reasonable compensation" on a "competitively neutral and nondiscriminatory basis").

seasons across routes that may span dozens of jurisdictions. A delay or unexpected condition imposed in one jurisdiction can disrupt an entire route or regional deployment plan. Because each segment depends on the timely completion of others, a bottleneck at any point cascades forward, raising costs, breaking commitments, and undermining the business case for investment that would otherwise proceed.

Section 253(a) of the Communications Act prohibits state and local legal or regulatory requirements that have the effect of prohibiting the ability of any entity to provide telecommunications service.[5] The Commission has long recognized that this prohibition turns on the practical effect of a requirement, not on whether deployment remains theoretically possible. A requirement materially inhibits service when the costs, delays, or uncertainty it imposes materially alter deployment decisions, including by causing providers to cancel, scale back, postpone, or redirect deployment to other markets.[6]

The record in this proceeding demonstrates that state and local permitting requirements, as applied in many jurisdictions, cross this threshold. They impose costs, delays, and uncertainty that cause rational providers to alter, reduce, or abandon deployment plans. The Commission should find that these practices, individually and cumulatively, materially inhibit the provision of telecommunications services in violation of Section 253(a).

### A. Permitting Delays and Procedural Uncertainty Increase Costs and Disrupt Network Planning

Open-ended or unpredictable permitting reviews prevent providers from sequencing construction efficiently and committing resources with confidence.[7] Wireline construction

[5] 47 U.S.C. § 253(a).

[6] *California Payphone Ass'n*, 12 FCC Rcd 14191, ¶ 31 (1997).

[7] *NPRM* ¶¶ 11-13 (discussing record evidence of deployment delays attributable to permitting).

depends on careful scheduling: contractors must be retained, crews mobilized, materials procured and staged, and traffic-control and restoration plans coordinated with local authorities. When a provider cannot predict when — or whether — a permit will issue, it cannot hold these resources indefinitely. The result is wasted investment, idle capacity, and missed construction windows.

Even when a permit ultimately issues, the delay itself inflicts real harm. A provider that has mobilized crews and staged materials for a planned construction start must demobilize and later remobilize when the permit finally arrives — incurring duplicate costs each time. Delayed permits can require redesign of the approved route, overtime labor to compress a schedule that has slipped, extended materials storage, and reassignment of crews and capital from other planned projects. Each of these consequences increases the cost of the delayed project and reduces the resources available for deployment elsewhere.

The effects of permitting delay extend well beyond the individual application. Wireline routes and market builds are interdependent. A permitting bottleneck in one jurisdiction can jeopardize customer commitments across an entire route, prevent work from proceeding in neighboring jurisdictions that have already issued permits, and push construction into a later season or budget year. A provider that has committed to serving an anchor tenant by a date certain may be unable to meet that commitment if a single jurisdiction along the route fails to act in a timely manner. The result is not merely delay — it is the unraveling of coordinated deployment plans that took months to assemble. The Commission has recognized the same dynamic in the wireless context, explaining that missed deployment deadlines can materially limit or inhibit the introduction of new services.[8] The same principle applies here. A wireline

[8] *See* Declaratory Ruling and Third Report and Order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 9088, ¶ 119 (2018) ("*Small Cell Order*"),

route that misses its construction window may be canceled, reduced, or deferred to a later budget cycle.

Recent provider experience illustrates the scale of those consequences. One provider reports that a city delayed four fiber projects for more than two years by failing to issue administrative permits for limited underground directional boring, even though approximately 75 percent of the planned network was aerial. The projects are intended to connect hundreds of households and establish a core feeder route for the broader network.

Another USTelecom member reports that permitting and right-of-way delays accounted for approximately 30 percent of identified risks across its long-haul network projects portfolio over an approximately 20-month period. Those issues placed approximately $33 million in contracted customer commitments at risk across 17 routes and 36 project sites. During the same period, the provider incurred approximately $7.9 million in acceleration, overtime, and remobilization change orders due to permitting delays.

The consequences can be particularly acute in rural areas with short construction seasons. A provider serving Montana and Wyoming explains that permitting delays cause remobilization and redesign costs, reduce expected returns, and can lead the provider to reallocate capital. If an authorization delay causes the provider to miss a fall construction window, work may be postponed until spring and affect two budget years. These effects show why a nominally temporary delay can materially alter the timing, cost, and scope of deployment. For smaller providers operating with limited capital budgets, this kind of disruption can mean the difference between building and not building.

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*aff'd in pertinent part, City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020) ("*City of Portland*").

## B. Permitting Barriers Are Directly Connected to Canceled, Reduced, and Postponed Deployments

Section 253 does not require a provider to complete a project on commercially unacceptable terms or incur the very costs that make deployment infeasible before seeking relief. The statute protects a provider's ability to offer service, including its ability to construct the facilities necessary to do so.[9] A requirement has already impaired the ability to provide service when it causes a rational provider to abandon a build, reduce its scope, postpone construction, or invest elsewhere. Nor should the Commission examine each burden in isolation. Delay, fees, survey requirements, inspection practices, restoration obligations, and access conditions may collectively eliminate the business case even if no single requirement independently prevents construction.[10]

The pending Lumos petition provides concrete examples. According to that petition, Lumos canceled its planned deployment in Stark County, Ohio after more than twelve months of delay and the imposition of unpublished and allegedly discriminatory requirements. By then, Lumos had spent approximately $1.4 million on engineering, planning, inventory, and labor without connecting a single location. The petition also explains that Mahoning County, Ohio's field-verified professional-survey requirement would have added approximately $3.91 million and made deployment along county rights-of-way commercially infeasible, reducing Lumos's planned footprint by more than 60,000 households.[11]

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[9] *See* 47 U.S.C. § 253(a); *City of Portland*, 969 F.3d at 1035.

[10] *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271-72 (10th Cir. 2004); *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 17-19, 21-23 (1st Cir. 2006); *City of Portland*, 969 F.3d at 1034-35.

[11] *See* Petition of Lumos Fiber of Ohio, LLC for Preemption and Declaratory Ruling Pursuant to Section 253(d) of the Communications Act of 1934, WC Docket No. 26-167, at ii-iii, 14-19 (filed June 18, 2026) ("Lumos Petition").

Other providers report the same connection between permitting burdens and investment decisions. Permitting and fee disputes with Stark County and municipalities within the county caused another provider to cancel, pause, or postpone dozens of fiber projects representing more than $18 million in planned investment. In Oregon, a USTelecom member abandoned a planned build serving approximately 2,500 premises in a city after it demanded a franchise fee on internet-access and data-service revenue and declined to agree to terms excluding that revenue. A similar dispute in another Oregon locality prevented the provider from completing a build serving approximately 10,000 premises. These examples confirm that excessive delay, expense, and uncertainty are much more than an inconvenience. They have the real impact of leaving consumers unserved and moving investment away from not only the communities imposing the barriers, but also those that surround them.

## III. THE COMMISSION SHOULD ADOPT 60- AND 90-DAY SHOT CLOCKS WITH EFFECTIVE ANTI-EVASION PROTECTIONS

A uniform federal backstop is necessary because authorization timelines vary widely, and prolonged outlier delays disrupt multi-jurisdictional construction. USTelecom therefore supports a 60-day deadline for standard authorization requests and a 90-day deadline for genuinely complex requests, consistent with the approach it recommended in response to the Notice of Inquiry.[12] The Commission has rightly recognized the need for clear federal deadlines to address this problem.[13] The NPRM's proposed 120-day period, however, would allow routine applications to remain pending too long and, as discussed further below, would risk becoming the default rather than an outer limit.

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[12] *See* Comments of USTelecom – The Broadband Association, WC Docket No. 25-253, at 14-15 (filed Nov. 18, 2025) ("USTelecom NOI Comments"); NPRM ¶ 17 & n.48.

[13] NPRM ¶¶ 17-18.

A meaningful deadline also must govern the entire authorization process within each jurisdiction. It must include narrow tolling rules, prevent jurisdictions from throttling applications or construction, and provide a prompt remedy when the deadline expires. Otherwise, a jurisdiction could comply with the nominal clock for an individual permit while delaying the deployment through other mandatory steps or procedural restrictions.

### A. Sixty- and Ninety-Day Deadlines Provide Sufficient Time for Legitimate Review

The Commission should presume that 60 days is sufficient for standard authorization requests and 90 days is sufficient for genuinely complex requests. Those periods allow ample time for legitimate engineering, safety, and right-of-way review while providing the predictability necessary to schedule construction. The 90-day period should be reserved for projects whose scope or complexity objectively warrants additional review—not invoked merely because an application involves substantial footage, several reviewing departments, or a high volume of routine work.

The NPRM's proposed 120-day deadline is too long for routine requests. It would allow a standard application to remain pending for four months before the provider could invoke the Commission's remedy. It also could convert an outer limit into the ordinary processing period, thereby *lengthening* reviews in jurisdictions that currently act more quickly. That additional delay is not harmless. An additional 30 or 60 days can force providers to re-sequence construction, remobilize crews, miss seasonal windows, and postpone service. The broader the permissible review period, the more difficult it becomes to plan a coordinated deployment.

Current experience confirms that ordinary review can be completed well within the proposed periods. A nationwide provider reports that the vast majority of its permits are granted in fewer than 90 days and that 120 days falls far outside a reasonable processing period. A regional provider reports median processing times of five days for the City of Vancouver, Washington, ten days for District 3 of the Idaho Transportation Department, and fifteen days at the Oregon Department of Transportation. Another provider reports a one-day median for 56 traffic-control permits in Cedar Rapids and a 73-day median for 58 city right-of-way permits for new construction in Chicago. These examples show that both routine permits and more substantial construction authorizations can be processed within the proposed periods. Those examples do not suggest that national rules are unnecessary. They show that the proposed 60- and 90-day periods preserve sufficient time for legitimate review, and that a 120-day standard would be calibrated to protracted delay rather than ordinary permitting practice.

Existing state and local programs provide additional confirmation that shorter permitting deadlines are both practical and compatible with thorough government review. For example, Hawaii, Ohio, and Wisconsin require action on broadband right-of-way applications within 60 days; Michigan requires action within 45 days; Tennessee requires action within 30 business days; and Indiana imposes a 10-day deadline. San Luis Obispo, California, averages 15 working days.[14] County governments in Wyoming, Utah, and Nevada completed permitting of multiple in-line amplifier projects with a median review time of 20 days. These examples confirm that legitimate review does not require four months.

The Commission need not set the deadline at the last possible point before delay effectively prohibits service. Section 253 permits the Commission to prevent material inhibition; it does not require the agency to tolerate avoidable delay until a provider is on the verge of canceling a project. A 60- and 90-day framework would provide a reasonable, administrable

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[14] *See* NPRM ¶ 17 & nn.51, 73 (discussing state and local broadband-permitting programs with deadlines of 60 days or less). Relatedly, traffic management and public safety permitting can be resolved on similarly expeditious timelines: Cedar Rapids, Iowa, processed 56 traffic permits with a median review time of one day, while Kansas City, Missouri, and the Colorado Department of Transportation reported median review times of 12 and 33 days, respectively.

presumption while allowing a jurisdiction and a provider to agree to additional time when genuinely unusual circumstances require it.

### B. The Shot Clocks Should Encompass the Entire Governmental Authorization Process

The applicable clock within each jurisdiction should begin at the first mandatory procedural step or written request for authorization in that jurisdiction and end only when the provider has final governmental authorization from that jurisdiction to begin construction. It should encompass franchises, licenses, right-of-way agreements, construction and excavation permits, encroachment approvals, traffic-control plans, public safety review, and every other required state or local authorization. A clock limited to one intermediate permit would not address the delay that Section 253 prohibits.

Related reviews should proceed concurrently. A jurisdiction should not be permitted to reset, postpone, or multiply the clock by dividing a deployment among departments, authorization categories, project phases, roads, or aerial and underground segments. The Commission's proposal appropriately recognizes that the relevant authorization process includes all approvals required for the provider to access and use the right-of-way.[15]

For one provider's projects in Hawaii, civil-engineering review can take approximately 90 days and may involve repeated rounds of feedback, including corrections unrelated to the substance of the construction. Only after that review is complete may the provider begin a separate excavation-permit process that can require another 14 to 90 days. That sequential process illustrates why the clock must run through final construction authorization rather than stop at an intermediate approval.

[15] *See* NPRM ¶¶ 19-21.

### C. Tolling Should Be Narrow, Objective, and Limited to Promptly Identified Deficiencies

A shot clock is only as strong as its tolling provisions. Broad or ill-defined tolling can convert a firm deadline into an aspirational target. Tolling should be available only when a jurisdiction promptly provides a written notice identifying each material deficiency with specificity. The clock should pause only until the applicant supplies the identified information. If the jurisdiction does not provide a timely and specific notice, the request should be treated as complete for shot-clock purposes.

The Commission also should prevent rolling or strategic deficiency notices. A jurisdiction should not receive additional tolling for newly created requirements or matters it reasonably could have identified during the initial completeness review. Nor should a request for information unrelated to legitimate right-of-way management suspend the clock. Limiting tolling to genuine deficiencies that a jurisdiction promptly identifies and that relate to legitimate right-of-way management would encourage a thorough initial review while preserving tolling for genuine omissions.

Provider experience shows that prompt completeness review is administrable. One provider reports that Washington municipalities generally issue initial deficiency notices within approximately two weeks. Idaho agencies generally respond within approximately two to four weeks, and most Montana agencies respond within approximately two weeks. In Oregon, by contrast, some agencies take considerably longer or introduce new requirements after submission, forcing the provider to revise completed work and causing additional delay.

Mutually agreed extensions can accommodate genuinely unusual projects without creating an open-ended exception. But the absence of an agreement should not permit a jurisdiction to extend the clock unilaterally. The Commission's rules should place both parties in a position to identify unusual circumstances and establish a definitive revised deadline.

### D. Permit Caps, Footage Limits, Serial Review, and Short Validity Periods Cannot Be Used to Evade the Shot Clocks

The Commission's rules should prohibit practices that comply with the deadline for a single application while artificially limiting the pace of an overall deployment. Caps on pending or active permits, permit-size or footage limits, serial review, restoration prerequisites, and refusals to accept applications can function as de facto moratoria. The same principle applies when inspection and closeout delays prevent providers from obtaining additional permits or restrictions on permissible construction days and hours prevent providers from using issued permits at a reasonable pace. The operative question should be whether the restriction materially limits the provider's ability to submit, obtain, and use authorizations at a reasonable construction pace.

The rules also should prevent jurisdictions from postponing deployment through restrictions unrelated to the time needed to review the application. For example, a franchise agreement in one Virginia city prohibits excavation in a public right-of-way constructed, reconstructed, repaved, or resurfaced during the preceding three years unless the public-works director grants a waiver. That restriction can delay deployment for at least three years and demonstrates why a jurisdiction should not be permitted to use restoration prerequisites to circumvent the Commission's deadlines.

Permit-size and active-permit caps can produce similar delays. A 5,000-linear-foot limit and advance-notice requirement in one Washington locality are expected to delay completion of the provider's build in that market until 2027. A five-active-permit limit in another Washington locality is expected to delay completion of the provider's build until 2028. Processing each individual permit within 60 or 90 days would provide little relief if the jurisdiction controls the overall rate of construction by refusing to accept the applications needed to complete the network.

Active-permit limits become even more restrictive when a completed permit cannot be closed until the jurisdiction conducts a final inspection. One provider reports that its crews repeatedly have completed construction but remained unable to move to the next segment because the completed permit was awaiting inspection or final acceptance. In other instances, weather or unsuitable ground conditions prevented completion of a minor aesthetic improvement, leaving the permit open even though crews were available and conditions were suitable for construction elsewhere. Because the open permit continued to count against the jurisdiction's active-permit limit, work on other segments could not proceed.

Restrictions on permissible construction days and hours can compound these delays. For example, one member reports that a city in New Jersey notified it that work may not begin before 9:00 a.m. and must end by 4:00 p.m. on all city roadways. Another provider reports that one jurisdiction permits construction only from Monday through Thursday between 9:00 a.m. and 4:30 p.m. and prohibits work on holidays. Contractors capable of working five or six full construction days each week are therefore limited to four shortened days, or fewer during holiday weeks, even though equipment, supervision, lodging, and other costs continue. Together, the permit caps, closeout delays, and work-hour restrictions caused two non-local contractors to begin work on the project and then withdraw because they could not operate profitably under those conditions. The resulting loss of construction resources further delayed the provider's deployment.

Permits also must remain valid for a reasonable construction period. A jurisdiction should not be able to nullify timely approval by issuing an authorization that expires before the provider reasonably can sequence and complete the work. In one provider's review, 29 of 173 permits were valid for fewer than 180 days, 33 expired or were scheduled to expire before construction could be completed, and the shortest validity period was only 70 days. In that jurisdiction, the provider thus was expected to complete all work authorized by the permit in substantially less time than the Commission's proposed 120-day period would allow the jurisdiction merely to process the application. That comparison reinforces that 60- and 90-day review periods provide more than sufficient time.

### E. Failure to Meet the Commission's Shot Clocks Must Produce an Effective and Administrable Remedy.

A deadline without a meaningful consequence will not create the certainty necessary to support investment and construction. The Commission therefore should provide that an authorization is deemed granted when the applicable period expires without a decision. Any denial should include a reasoned written explanation, preventing a jurisdiction from nominally stopping the clock through a summary denial that gives the provider no meaningful basis to respond.

The Commission should not rely solely on its proposed presumption that excessive delay violates Section 253. A presumption that must be enforced through a separate challenge would require a provider to undertake additional litigation after already waiting through the applicable period. A complete application therefore should be deemed granted when the deadline expires, while the jurisdiction retains authority to enforce objective, generally applicable construction and safety requirements.[16]

[16] *See* NPRM ¶ 32.

A provider should not be forced to undertake lengthy litigation simply to obtain the benefit of the Commission's rule. Such a process would reproduce the very delay the rule is intended to prevent. If the Commission permits a jurisdiction to rebut the consequence of a missed deadline, the jurisdiction should bear the burden of establishing genuinely extraordinary circumstances, and the Commission should provide an expedited process for resolving disputes.[17]

The need for a deemed granted remedy is concrete. Among one provider's 1,166 approved right-of-way permits, 353 took longer than 120 days and 71 took longer than one year. These figures do not establish that such review periods are necessary. They show what can occur when jurisdictions face no effective consequence for failing to act. A deemed-granted remedy would create the incentive necessary to make the Commission's deadlines meaningful while leaving jurisdictions ample time to complete legitimate review.

## IV. THE COMMISSION SHOULD LIMIT FEES TO A REASONABLE APPROXIMATION OF ACTUAL AND DIRECT RIGHT-OF-WAY COSTS

Excessive and unpredictable fees can inhibit deployment as materially as delay. Section 253(c) preserves state and local authority to require fair and reasonable compensation for use of public rights-of-way, but it does not authorize localities to use that authority to extract rent or raise general revenue.[18] The Commission should adopt a clear cost-based standard, presumptions against methodologies untethered to governmental costs, carefully structured safe harbors, and advance-disclosure requirements.

[17] *See* NPRM ¶¶ 30-32; USTelecom NOI Comments at 15.

[18] *See* 47 U.S.C. § 253(c); NPRM ¶¶ 35-42.

### A. Excessive and Unpredictable Fees Materially Inhibit Deployment and Divert Capital From Network Investment

Fees affect deployment through both their amount and their uncertainty. A provider cannot reliably evaluate the business case for a route or market when charges depend on revenue, footage, project value, uncapped third-party costs, or unpublished negotiations. Because providers have finite deployment budgets, every dollar spent on fees exceeding a government's actual costs is a dollar that cannot be invested in constructing or expanding the network. The effect is often greatest for long routes and lower-density builds. Recurring per-foot fees increase with the length of the network rather than the government's cost to review a project. Fixed application, consultant, and inspection charges also must be spread across fewer potential customers in rural or remote areas. These methodologies can cause an otherwise viable project to be reduced, delayed, or abandoned.

Real-world examples illustrate the harm. In an Ohio locality, an inspection-fee formula produced a $10,500 charge for a single project valued at approximately $800,000. The formula was based not on the jurisdiction's actual inspection costs but on the estimated value of the provider's infrastructure. Escalating inspection charges in the same jurisdiction caused the provider to cancel or pause multiple projects worth millions of dollars in planned investment.

Unpredictability compounds the problem. A rural provider reports that fees in numerous jurisdictions are rarely posted or easy to find and most often are disclosed only upon request, negotiation, or in unpublished right-of-way agreements. A provider that cannot determine what a jurisdiction will charge until it is already engaged in the permitting process cannot accurately evaluate the project before committing resources. The lack of advance fee disclosure forces providers to proceed with incomplete information or to avoid jurisdictions where the cost structure is opaque. Either outcome impairs deployment.

### B. Section 253 Protects Reasonable Right-of-Way Management Costs, Not Rent Extraction or General Revenue Generation

Section 253(c) preserves the authority of state and local governments to manage public rights-of-way and to require fair and reasonable compensation from telecommunications providers that use those rights-of-way. It does not authorize rent extraction or general revenue generation. Recoverable amounts therefore should bear a reasonable relationship to the actual, direct, and objectively reasonable costs caused by the provider's proposed use. Any approximation must be closely tethered to documented actual and direct costs and may not substitute for evidence of those costs. A cost-based rule respects legitimate local management without allowing access to essential public property to become a source of unrelated revenue.[19] Section 253(c) operates as a safe harbor, not an independent source of charging authority. Once a provider establishes a prima facie violation of Section 253(a), the jurisdiction should bear the burden of showing that its charge is fair, reasonable, competitively neutral, nondiscriminatory, and publicly disclosed.[20]

The recoverable-cost standard should exclude generalized governmental overhead, revenue-generating markups, duplicative or unnecessary inspections, systemwide mapping or surveying beyond what is reasonably necessary to review the particular deployment, and unsupported, unreasonable, or uncapped legal, engineering, and consultant expenses. Those costs either do not result from the provider's use of the right-of-way or improperly shift to the provider work that benefits the jurisdiction or other users.

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[19] *See* 47 U.S.C. § 253(c); *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 21-23 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271-72 (10th Cir. 2004); NPRM ¶¶ 38-42, 48-50.

[20] *See Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528, 531-32 (8th Cir. 2007).

One provider's data further illustrates the disconnect that can exist between the permitting fees charged and the permitting work performed. A city in Texas charged $7,847 for a zoning permit approved in one day, while a city in Maryland charged $8,996 for a permit approved in eight days. By comparison, the provider reported that 32 authorizations in the same permit classes carried no fee and that the median zoning-permit fee across the jurisdictions it reviewed was $200. These disparities, particularly when compared with the limited review time involved, indicate that some charges bear no reasonable relationship to the government's actual and direct costs.

These concerns are grounded in reality. One USTelecom member reports that one city in New York requires applicants to identify other utilities and city-owned facilities, thereby compelling applicants to perform work beyond identifying their own proposed facilities. This practice treats the provider's application as an occasion to perform general right-of-way inventory work at the applicant's expense. An Ohio municipality requires reimbursement of its attorneys' fees up to $3,500 and engineering expenses subject to an initial $1,000 deposit, in addition to substantial permit, per-foot, crossing, and bonding requirements. The cumulative burden of these charges can make deployment uneconomic even where no single charge is independently prohibitive. These examples show why the Commission should require a close relationship between the amount charged and the reasonable cost of reviewing and managing the provider's particular deployment.

### C. Fee Methodologies Untethered to Government Costs Should Be Presumptively or Categorically Prohibited

Charges based on a provider's revenue, the fair market rental value of occupying the public right-of-way, or the value of the provider's network or facilities should be presumptively prohibited. Those methodologies treat the right-of-way as revenue-generating property and the provider as a commercial tenant. They do not limit compensation to the government's actual and direct costs of managing the provider's use. Unsupported per-foot charges, project-value formulas, uncapped professional-services pass-throughs, and duplicative charges likewise should be presumed unlawful.[21] Jurisdictions should also be prohibited from imposing duplicative fees. Some jurisdictions impose annual charges based on gross revenues, access lines, or occupied right of way in addition to separate fees for permit review. Any recurring charge should reflect only actual and direct costs not already recovered through project-specific fees; a jurisdiction should not be allowed to recover the same costs twice.

A jurisdiction should bear the burden of substantiating any fee above a generally applicable safe harbor. It should provide documentation identifying the actual and direct costs attributable to the proposed use. Speculation, generalized budget needs, or the asserted value of access should not suffice. A documentation requirement will help providers evaluate proposed charges and permit the Commission or a reviewing court to distinguish legitimate cost recovery from rent extraction.

Non-cost and revenue-based fee methodologies are widespread and affect actual deployment decisions. One provider reports that franchise agreements in at least 15 states impose charges ranging from two to seven percent of revenue. Two Louisiana localities demand either $5 per linear foot or five percent of gross revenue. The same provider reports that similar franchise demands throughout Louisiana have prevented it from reaching reasonable terms for access and, in some jurisdictions, caused it not to proceed with certain deployments. Another provider abandoned a planned fiber deployment serving approximately 2,500 premises in an

[21] *See* NPRM ¶¶ 38-42, 48-50, 58.

Oregon locality after the city demanded a franchise fee on internet-access and data-service revenues and declined to agree to terms excluding those revenues.

Other methodologies present the same defect. The Colorado Department of Transportation (CDOT) imposes a one-time permitting fee of $0.05 per foot and an annual "Property Use Surcharge" of $0.10 per foot in urban counties and $0.03 per foot in rural counties, subject to annual adjustment.[22] And an Ohio municipality has calculated inspection charges by reference to estimated infrastructure cost or third-party costs, producing $54,250 in permit and inspection fees for one project. Recently, a city in Maryland doubled its linear foot fee, citing increased costs to maintain the conduit and funding safety improvements specifically tied to gas lines.[23] These charges differ in form but share the same problem: the amount is not limited to the reasonable cost caused by the provider's use of the right-of-way.

### D. Fee Safe Harbors Should Provide Certainty Without Becoming Mandatory Charges

Properly structured safe harbors can reduce disputes and provide useful certainty. But a safe harbor should operate as a presumptively reasonable ceiling, not an amount every jurisdiction is entitled to collect. If a jurisdiction's actual and direct costs are lower, it should charge less. A jurisdiction seeking more should have to document the additional reasonable costs attributable to the particular authorization.[24] The Ninth Circuit upheld comparable

[22] *See* Colorado Department of Transportation, Fiber Leases & Right of Way (ROW) Use (June 5, 2024).

[23] While local providers and the city had an agreement in place to provide sufficient notice and opportunities to engage on any potential fee increases, the city decided to move forward after only providing 8 days' notice before passing the increase in a city meeting.

[24] *See* NPRM ¶¶ 51-54.

presumptive fee levels for small wireless facilities as so clearly reasonable that additional justification was unnecessary.[25]

The wide variation in actual charges confirms why safe harbors must not become mandatory fees. Providers report routine permit fees as low as $20 in South Cle Elum, Washington, $50 in Athol, Idaho, and $80 in Linn County, Oregon, while authorizations in other jurisdictions carry charges reaching many thousands of dollars. Automatically allowing every jurisdiction to collect the safe-harbor amount would increase costs in places that currently review applications efficiently and inexpensively. Commission rules should preserve those lower-cost practices.

### E. All Fees and Supporting Methodologies Should Be Publicly Disclosed in Advance

Section 253(c) expressly requires that compensation demanded by state and local governments be publicly disclosed.[26] This requirement is not incidental to the statutory scheme, but essential to its operation. Public disclosure enables providers to evaluate the business case for a route or market before committing capital, enables the Commission and courts to evaluate whether fees comply with the cost-based standard, and discourages discriminatory treatment by ensuring that all providers can see the fees that other providers are being charged. The Commission should require jurisdictions to publish fee schedules, formulas, supporting cost methodologies, and generally applicable third-party charges. And a jurisdiction should not be permitted to introduce a new or undisclosed charge after review begins.[27]

Advance disclosure will improve investment planning, discourage discriminatory

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[25] *See City of Portland*, 969 F.3d at 1039.

[26] 47 U.S.C. § 253(c) (requiring that compensation be "publicly disclosed by such government").

[27] *See* 47 U.S.C. § 253(c); NPRM ¶ 56.

treatment, and enable the Commission and providers to evaluate compliance with Section 253. The need for transparency extends beyond any single dispute. For example, one provider serving Montana and Wyoming reports that fees are rarely publicly posted or are difficult to locate and most often are disclosed only upon request, during negotiations, or in unpublished right-of-way agreements. And the Lumos petition likewise asserts that Stark County disclosed material per-foot, inspection, and survey requirements only after permitting had begun.[28]

## V. IN-KIND AND EXCESSIVE RESTORATION REQUIREMENTS MUST BE SUBJECT TO THE COMMISSION'S COMPENSATION STANDARD

A cost-based monetary fee rule will be ineffective if jurisdictions can obtain equivalent value through required goods, services, facilities, or unrelated restoration. The Commission therefore should apply a single compensation standard to cash and noncash demands. That approach will preserve legitimate safety and restoration requirements while preventing jurisdictions from circumventing the fee rules through the form of the required payment.[29]

### A. In-Kind Contributions Constitute Compensation and Must Count Toward Any Fee Limit

Fiber, conduit, service, connections, equipment, or other noncash benefits provided to a jurisdiction constitute compensation and should count toward the provider's total compensation burden. The rule should apply regardless of whether the contribution results from a franchise, ordinance, permit, right-of-way agreement, or informal negotiation. Otherwise, a jurisdiction could evade a monetary limit simply by requiring equivalent value in another form. The Tenth Circuit has recognized the same problem, concluding that excess-conduit requirements that increased installation costs by 30 to 59 percent contributed to a violation of Section 253.[30]

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[28] *See* Lumos Petition at 6-8 & nn.20-31, 29-31.

[29] *See* NPRM ¶¶ 63-67.

[30] *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271-72 (10th Cir. 2004).

Provider experience illustrates the need for this protection. A proposed right-of-way agreement and supplemental construction requirements in an Illinois locality required free municipal service; construction enabling connections to three schools and extending facilities throughout a private development; prescribed customer terms; and video inspection of sewer pipes. The cumulative obligations were commercially unacceptable, and the provider did not proceed with the build.

Other compelled contributions can impose comparable burdens. For example, the New York State Department of Transportation requires providers deploying along state-controlled highways to retrace the highway boundaries on both sides of the route. In New Jersey, providers may be required to pay for police details even when trained flaggers perform the actual traffic control. One member expects to spend millions of dollars this year on those police details, in addition to an equivalent amount for the flaggers who direct traffic. And the Wyoming Department of Transportation requires one provider to supply two fiber strands for future state use and, upon request, construct certain future connections without charge. Depending on project size, the value of that obligation can range from thousands of dollars to hundreds of thousands of dollars. Such requirements therefore must count toward any compensation limit.

**B. Demands Unrelated to Rights-of-Way Management Should Be Prohibited**

Jurisdictions may require a provider to repair damage and return the right-of-way substantially to its pre-construction condition. They should not use restoration authority to demand betterments or public benefits unrelated to the provider's deployment work. A permissible condition should have a direct nexus to the construction and be proportionate to the actual disturbance.[31]

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[31] *See* NPRM ¶ 66; *City of Santa Fe*, 380 F.3d at 1271-72; *Puerto Rico Telephone Co.*, 450 F.3d at 21-23.

Free service, excess fiber or conduit, unrelated utility work, and restoration far beyond the affected area generally fail that standard. USTelecom members have faced requirements to perform full-width repaving after a narrow trench cut, replace an entire block of sidewalk, repave an entire block from end to end, replace 100 feet of roadway curb-to-curb following a small bore pit, and replace sparse vegetation with new sod requiring daily watering. These obligations do more than repair construction-related damage. They require the provider to fund improvements beyond the condition of the affected right-of-way before construction.[32]

Disproportionate undergrounding requirements can impose similar burdens. One provider was required to place a new route underground at an estimated additional cost of $500,000, even though an existing pole line carried electric, communications, and other utility facilities and the provider had obtained licenses to attach to those poles. The town justified the requirement only by stating that it did not want additional aerial construction along the route.

The Commission can prohibit such demands without interfering with legitimate state and local authority. A rule requiring a direct nexus and proportionality would continue to permit reasonable construction, safety, and restoration conditions. It would prevent only the use of the authorization process to obtain unrelated benefits or improvements at the provider's expense.

## VI. THE COMMISSION HAS LEGAL AUTHORITY TO ADOPT ITS PROPOSED RULES.

The Commission's proposed rules rest on firm statutory footing. Section 201(b) of the Communications Act grants the Commission broad authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[33] The rules the Commission proposes in the NPRM carry out Section 253, a provision

[32] NPRM ¶ 66.

[33] 47 U.S.C. § 201(b).

Congress added to Title II of the Communications Act as part of the Telecommunications Act of 1996, to prevent state and local governments from erecting barriers to the ability to provide telecommunications services. As explained below, the Commission has authority to adopt rules defining the terms in Section 253, which applies to facilities capable of supporting telecommunications services. In addition, delays in processing permit applications can materially inhibit the ability to provide telecommunications services. Finally, *Loper Bright* does not alter the analysis.

### A. The Commission Has Authority To Adopt Rules That Define the Terms in Section 253

The Commission's rulemaking authority derives from the plain text of Section 201(b). The Supreme Court addressed this authority squarely in *AT&T Corp. v. Iowa Utilities Board*, holding that "the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include" provisions "added by the Telecommunications Act of 1996."[34] That authority extends even to provisions that "take[] the regulation of local telecommunications . . . away from the States" because, "[w]ith regard to the matters addressed by the 1996 Act, [Congress] unquestionably has" created a "new *federal* regime," which is "to be guided by federal-agency regulations."[35]

Section 253 is one such provision that Congress added to Title II of the Communications Act through the 1996 Act, so it comes within the Commission's Section 201(b) rulemaking authority. The Commission therefore has authority to adopt rules to carry out Section 253's mandate, including by giving concrete content to statutory terms such as "effect of prohibiting," "competitively neutral basis," "fair and reasonable compensation," and "competitively neutral

[34] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

[35] *Id.* at 378 n.6.

and nondiscriminatory basis."[36] The Commission exercised precisely this authority when it adopted rules implementing the parallel provision in Section 332(c)(7) in the *Small Cell Order*, which the Ninth Circuit upheld on appeal in *City of Portland*.[37] The same reasoning supports the Commission's authority to adopt rules here.

The fact that the Commission also possesses authority to preempt specific state or local requirements through case-by-case adjudication does not diminish its Section 201(b) rulemaking authority.[38] The Supreme Court long ago rejected the notion that a statutory scheme providing for individualized determinations precludes an agency from relying on rulemaking. As the Court explained, a "statutory scheme [that] contemplates . . . individualized determinations based on evidence adduced at a hearing" does not prevent an agency from "rely[ing] on its rulemaking authority to determine issues that do not require case-by-case adjudication."[39] Otherwise, the agency would "continually [have] to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding."[40]

There is thus "no conflict" between Section 253(d) — "a provision that empowers the [Commission] to (reactively) review" specific state or local requirements — and Section 201(b), which "empowers the [Commission] to (proactively) set regulatory policy" through generally applicable rules.[41] As the D.C. Circuit has observed, "[i]n interpreting and administering its

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[36] 47 U.S.C. § 253(a)–(c).

[37]NPRM n.2.

[38] 47 U.S.C. § 253(d).

[39] *Heckler v. Campbell*, 461 U.S. 458, 467 (1983).

[40] *Id.*; *see also American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1991) ("Even if a statutory scheme requires individualized determinations, the decision-maker has the authority to rely on rulemaking to resolve certain issues of general applicability, unless Congress clearly expresses an intent to withhold that authority.").

[41] *CBOE Glob. Mkts. v. SEC*, 155 F.4th 704, 715 (D.C. Cir. 2025).

statutory obligations under the Act, the Commission has very broad discretion to decide whether to proceed by adjudication or rulemaking."[42] The proposed rules in this proceeding are a straightforward exercise of that authority.

### B. Section 253 Applies to Facilities Capable of Supporting Telecommunications Services

The Commission correctly concludes in the *NPRM* that Section 253 preempts state or local requirements that apply to facilities capable of supporting telecommunications services.[43] Section 253(a) preempts state or local legal requirements that "prohibit or have the effect of prohibiting the *ability* of *any* entity to provide any interstate or intrastate telecommunications service."[44] Both italicized terms confirm that the preemption extends to state or local requirements affecting wireline facilities that could be used to provide telecommunications services, whether by the deploying entity or another and whether currently used for that purpose.

First, Section 253(a) preempts requirements that materially inhibit the ability of "any entity" — not merely the entity responsible for deploying the facilities — to provide telecommunications services over those facilities. The statute therefore protects both entities that provide telecommunications service directly and infrastructure providers whose facilities enable another entity to provide such service.[45]

Second, Section 253(a) preempts requirements that materially inhibit "the ability . . . to provide . . . telecommunications services," not only the actual provision of those services. The

[42] *Conference Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013). The Commission also has authority to apply Section 251 through adjudications, *see* 47 U.S.C. § 252(e)(5), yet the Supreme Court recognized its authority to adopt rules defining the meaning of the terms in that section, *see Iowa Utils. Bd.*, 525 U.S. at 378.

[43] NPRM ¶ 68.

[44] 47 U.S.C. § 253(a) (emphases added).

[45] *See Crown Castle Fiber, L.L.C. v. City of Pasadena*, 76 F.4th 425, 436 (5th Cir. 2023).

statute therefore preempts requirements that materially inhibit the deployment of facilities with a genuine capability to support telecommunications services, even if such services are not yet being provided over those facilities or the facilities will primarily be used for broadband service.[46] As the Sixth Circuit has noted, "[i]t would be strange for [the] Congress" that adopted as "the policy of the United States" ensuring that the Internet remains "unfettered by . . . State regulation" to, "in the same bill, shackl[e] Internet access providers with onerous . . . regulation."[47] Instead, the better reading of Section 253(a) is that it preempts all state or local requirements that inhibit the deployment of facilities — including broadband facilities — that could carry telecommunications services.

Section 253(a) also differs from Section 332(c)(7), which preempts state or local requirements that "have the effect of prohibiting *the provision of* personal wireless services."[48] Congress's use of the broader "ability . . . to provide" rather than the narrower "the provision of" shows that Section 253(a) preempts a state or local requirement even when telecommunications services are not yet being provided over the facility at issue. That textual distinction is deliberate, and the Commission is right to give it effect.

Instead, Section 253(a) is more like Section 153(24), which defines "information service" as the "*offering of a capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[49] The Sixth Circuit rejected the argument that a service offers those capabilities only when the service provider is, itself, generating, transforming, or making available information and not when the

[46] *See City of Portland*, 969 F.3d at 1035.

[47] *In re MCP No. 185*, 124 F.4th 993, 1004 (6th Cir. 2025) (quoting 47 U.S.C. § 230(b)(2)).

[48] 47 U.S.C. § 332(c)(7)(B)(i)(II) (emphasis added).

[49] 47 U.S.C. § 153(24) (emphasis added).

service enables consumers to interact with information in those ways. The court found that the argument "reads out the key phrase — 'offering of a capability' — that precedes the gerunds . . . in § 153(24)."[50] Similarly, any argument that Section 253(a) preempts only state and local laws that materially inhibit telecommunications services that are already being provided "reads out the key phrase" — "the ability of any entity to provide" — that precedes "any interstate or intrastate telecommunications service."

The D.C. Circuit's discussion in *Mozilla Corp. v. FCC* concerning Section 224 and broadband-only networks does not counsel otherwise.[51] Section 224 applies to pole attachments "by a cable television system or provider of telecommunications service" — it does not apply to pole attachments by a provider that currently falls in neither category, even if that provider has "the ability to" qualify as one at a later point in time.[52] Section 253(a) uses different language that reaches more broadly. The Commission's reading gives effect to that difference and is consistent with the statute's purpose of preventing state and local governments from impeding the deployment of modern telecommunications infrastructure.

### C. The Commission Correctly Concludes That Delay in Processing Permit Applications Can Materially Inhibit the Ability of Carriers To Provide Telecommunications Services

The Commission has already recognized that unreasonable delays in processing permit applications can effectively prohibit the provision of telecommunications services. In the *Small Cell Order*, the Commission found that delays can violate both the "reasonable period of time" and the "shall not prohibit or have the effect of prohibiting" language in Section 332(c)(7).[53]

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[50] *In re MCP No. 185*, 124 F.4th 993, 1003-04 (6th Cir. 2025).

[51] *See Mozilla Corp. v. FCC*, 940 F.3d 1, 66-68 (D.C. Cir. 2019); NPRM ¶ 69 n.205.

[52] 47 U.S.C. § 224(a)(4).

[53] NPRM ¶ 15; *Small Cell Order* ¶¶ 118-19.

Specifically, the Commission concluded that "[m]issing shot clock deadlines" can "have the effect of unlawfully prohibiting service in that such failure to act can be expected to materially limit or inhibit the introduction of new services or the improvement of existing services."[54]

The Commission can and should reach the same conclusion here. The record is replete with evidence that delays in processing right-of-way permit applications are one of many ways that some states and localities materially inhibit the deployment of facilities capable of being used to provide telecommunications services.[55] The evidence shows that delays cause canceled builds, diverted capital, missed construction seasons, and cascading disruption across multi-jurisdictional networks. These effects are precisely what Section 253 was designed to prevent.

The absence of similar "reasonable period of time" language in Section 253 is not an impediment.[56] In Section 332(c)(7), Congress imposed a number of independent limitations on state and local decisions regarding wireless facility siting — including no unreasonable discrimination, no effective prohibitions, action within a reasonable period of time, denials in writing supported by substantial evidence, and no regulation based on RF effects. Each of those is an *independent* limitation on state and local authority.[57]

That is why courts finding one violation of Section 332(c)(7) often recognize that they need not address other potential violations.[58] The "reasonable period of time" requirement thus stands as its own, self-contained limitation on state and local decisions regarding wireless facility

[54] *Small Cell Order* ¶ 119.

[55] *See supra* Parts II-III (detailing evidence of delays that materially inhibit deployment).

[56] *See* NPRM ¶ 16 (citing comments pointing to that absence).

[57] *See*, *e.g.*, *New Cingular Wireless PCS, LLC v. Town of Stoddard*, 853 F. Supp. 2d 198, 206–08 (D. N.H. 2012); *Masterpage Commc'ns, Inc. v. Town of Olive*, 418 F. Supp. 2d 66, 80–81 (N.D.N.Y. 2005).

[58] *See*, *e.g.*, *T-Mobile Ne. LLC v. City of Lawrence*, 755 F. Supp. 2d 286, 292 (D. Mass. 2010); *USOC of Greater Iowa, Inc. v. City of Bellevue*, 279 F. Supp. 2d 1080, 1083 (D. Neb. 2003).

siting. Its presence in Section 332(c)(7) means that a wireless siting delay violates federal law *even when* the delay does not also have the effect of prohibiting the provision of wireless services.

The absence of a "reasonable period of time" provision from Section 253 therefore means only that federal law does not preempt unduly long processing periods for wireline permit applications in and of themselves. But where such delays *do* prohibit or have the effect of prohibiting the ability to provide telecommunications services, such delays violate Section 253(a). In drafting Section 253, Congress cannot be understood to have concluded that such delays can *never* have that effect or to have limited the Commission's authority under Section 201(b) to promulgate rules where, as here, the record shows that delays of a certain length regularly *do* have that effect. The Commission should not hesitate to act on that evidence.

### D. *Loper Bright* Does Not Alter the Commission's Authority to Promulgate These Rules

Because the Communications Act expressly authorizes the Commission to promulgate rules to carry out the Act's provisions, the Supreme Court's decision in *Loper Bright* does not alter the analysis. As the Third Circuit recognized shortly after *Loper Bright*, the Supreme Court's decision "does not undermine the validity of" Commission regulations that courts will "consider in analyzing preemption."[59] The Second Circuit has similarly held that "*Loper Bright* does not subvert agencies' authority to promulgate preemptive regulations pursuant to the authority vested in them by statute."[60]

Moreover, the Commission's assessments about whether particular types of state or local requirements will "have the effect of prohibiting the ability of any entity to provide any . . .

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[59] *Schaffner v. Monsanto Corp.*, 113 F.4th 364, 381 n.9 (3d Cir. 2024).

[60] *Yousefzadeh v. Johnson & Johnson Consumer Inc.*, 184 F.4th 130, 145 n.9 (2d Cir. 2026).

telecommunications service," 47 U.S.C. § 253(a), are reviewed under "the APA's arbitrary-and-capricious standard" — not a *de novo* standard — because such determinations involve an agency's "predictive judgment."[61] Courts will not substitute their own view for the Commission's reasoned assessment of whether permitting delays and excessive fees materially inhibit the ability to provide telecommunications services.

In addition, the Commission's contemporaneous and long-standing interpretation of the "effect of prohibiting" language in Section 253(a) — the "materially inhibits" standard the Commission first adopted in *California Payphone*[62] and to which it has adhered ever since — is "especially useful" to courts construing those statutory terms.[63] That interpretation has guided the Commission's Section 253 enforcement for nearly three decades and was promulgated less than a year after Congress enacted the statute. Courts have given weight to exactly that kind of contemporaneous agency construction.

The Commission also has "discretion to interpret 'competition'" — a concept at the heart of both Section 253(b) and (c), which preserve only competitively neutral and nondiscriminatory state and local requirements — "so as best to serve the public interest."[64] Similarly, whether a particular demand for payment constitutes "fair and reasonable compensation" for the use of public rights-of-way[65] is for the Commission to determine in the first instance, as "broad and

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[61] *Airlines for Am. v. Dep't of Transp.*, 127 F.4th 563, 579 n.13 (5th Cir. 2025); *see also Seven Cty. Infrastructure Coal. v. Eagle Cty., Colo.*, 605 U.S. 168, 179-80 (2025) ("[W]hen an agency exercises discretion granted by a statute, judicial review is typically conducted under the Administrative Procedure Act's deferential arbitrary-and-capricious standard.").

[62] *See* Memorandum Opinion and Order, *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd 14191, ¶ 31 (1997).

[63] *Milligan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 173 F.4th 128, 135 (4th Cir. 2026).

[64] *Zimmer Radio of Mid-Mo., Inc. v. FCC*, 145 F.4th 828, 844-45 (8th Cir. 2025).

[65] 47 U.S.C. § 253(c).

open-ended grants of authority under the heading of terms like 'reasonable' . . . unambiguously convey discretion" to the agency.[66]

These are precisely the kinds of determinations Congress entrusted to the Commission when it enacted Section 253 and granted the Commission rulemaking authority to carry out the Act's provisions. The proposed rules give concrete, administrable content to broad statutory standards — "effect of prohibiting," "fair and reasonable compensation," "competitively neutral" — in a context where the Commission's technical and industry expertise is most relevant. Where, as here, "the question is one of line drawing" involving "a 'technical subject matter' presenting a 'policy choice[],'" Congress has "appropriately delegated to 'the responsible agency'" the authority to draw those lines.[67] *Loper Bright* did not withdraw that delegation, and it provides no basis to challenge the Commission's authority here.

For all these reasons, the Commission has ample legal authority to adopt the proposed rules. The statutory text, Supreme Court precedent, and decades of agency practice all confirm that the Commission may — and should — exercise its Section 201(b) rulemaking authority to give concrete meaning to the terms in Section 253 and thereby advance Congress's goal of eliminating barriers to the deployment of modern telecommunications infrastructure.

## VII. CONCLUSION

State and local permitting barriers materially inhibit wireline deployment when excessive delay, uncertainty, cost, or unrelated conditions alter rational investment and construction decisions. Section 253(a) of the Communications Act prohibits state and local legal or regulatory barriers that have the effect of prohibiting the ability of any entity to provide

[66] *Pickens v. Hamilton-Ryker IT Sols., Inc.*, 133 F.4th 575, 587 (6th Cir. 2025).

[67] *See Zimmer Radio*, 145 F.4th at 845-46.

telecommunications service, and the Commission has both the authority and the responsibility to give that provision meaningful effect. Specifically, the Commission should adopt 60- and 90-day shot clocks with narrow tolling, effective anti-evasion protections, and a meaningful deemed granted remedy. It also should limit monetary and in-kind demands to reasonable right-of-way-management costs, require advanced disclosure, and protect facilities capable of supporting telecommunications services. These reforms will advance Chairman Carr's Build America agenda by speeding wireline deployment and expanding connectivity while preserving legitimate state and local management of public rights-of-way.

Respectfully submitted,

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