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FEDERAL COMMUNICATIONS COMMISSION

[WC Docket No. 17-84; FCC 17-37]

Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment

AGENCY: Federal Communications Commission

ACTION: Notice

SUMMARY: This Notice of Inquiry (Notice) seeks comment on whether the Commission should enact rules to promote the deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment, such as state and local moratoria on market entry or the deployment of telecommunications facilities, excessive delays in negotiations and approvals for rights-of-way agreements and permitting for telecommunications services, excessive state and local fees that may have the effect of prohibiting the provision of telecommunications services, unreasonable conditions or requirements in the context of granting access to rights-of-way, permitting, construction, or licensure related to the provision of telecommunications services, bad faith conduct in the context of deployment, rights-of-way, permitting, construction, or licensing negotiations and processes, and any other instances where state or local legal requirements or practices prohibit the provision of telecommunications services. This Notice also seeks comment on whether there are state laws governing the maintenance or retirement of copper facilities that serve as a barrier to deploying next-generation technologies and services that the Commission might seek to preempt. The Commission adopted the Notice in conjunction with a Notice of Proposed Rulemaking and Request for Comment in WC Docket No. 17-84.

DATES: Comments are due on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER],** and reply comments are due on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

ADDRESSES: All filings in response to the Notice must refer to WC Docket No. 17-84. The Commission strongly encourages parties to develop responses to the Notice that adhere to the

organization and structure of the Notice. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS):

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: https://www.fcc.gov/ecfs/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.
- People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

For detailed instructions for submitting comments and additional information on the rulemaking process, see the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Wireline Competition Bureau, Competition Policy Division, Michele Berlove, at (202) 418-1477, or Michael Ray, at (202) 418-0357.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Inquiry (Notice) in WC Docket No. 17-84, adopted April 20, 2017 and released April 21, 2017. The full text of

this document is available for public inspection during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC 20554. It is available on the Commission's Web site at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0421/FCC-17-37A1.pdf.

Synopsis

I. Introduction

1. High-speed broadband is an increasingly important gateway to jobs, health care, education, information, and economic development. Access to high-speed broadband can create economic opportunity, enabling entrepreneurs to create businesses, immediately reach customers throughout the world, and revolutionize entire industries. Today, we propose and seek comment on a number of actions designed to accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment.

2. This Notice seeks to better enable broadband providers to build, maintain, and upgrade their networks, which will lead to more affordable and available Internet access and other broadband services for consumers and businesses alike. Today's actions, through this Notice and accompanying Notice of Proposed Rulemaking and Request for Comment, propose to remove regulatory barriers to infrastructure investment at the federal, state, and local level; suggest changes to speed the transition from copper networks and legacy services to next-generation networks and services; and propose to reform Commission regulations that increase costs and slow broadband deployment.

II. Prohibiting State and Local Laws Inhibiting Broadband Deployment

3. We seek comment on whether we should enact rules, consistent with our authority under Section 253 of the Act, to promote the deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment. Section 253(a), which generally provides that no state and local legal requirements "may prohibit or have the effect of prohibiting" the provisioning of interstate or intrastate telecommunications services, provides the Commission with "a rule of preemption" that "articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers." Section 253(b), provides exceptions for state and local legal

requirements that are competitively neutral, consistent with Section 254 of the Act, and necessary to preserve and advance universal service. Section 253(c) provides another exception described by the Eighth Circuit as a "safe harbor functioning as an affirmative defense" which "limits the ability of state and local governments to regulate their rights-of-way or charge 'fair and reasonable compensation.'" Under Section 253(d), Congress directed the FCC to preempt the enforcement of any legal requirement which violates 253(a) or 253(b) "after notice and an opportunity for public comment."

4. While we recognize that not all state and local regulation poses a barrier to broadband development, we seek comment below on a number of specific areas where we could utilize our authority under Section 253 to enact rules to prevent states and localities from enforcing laws that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." In our preliminary view, restrictions on broadband deployment may effectively prohibit the provision of telecommunications service, and we seek comment on this view. What telecommunications services are effectively prohibited by restrictions on broadband deployment? In each case described below, we seek comment on whether the laws in question are inconsistent with Section 253(a)'s prohibition on local laws that inhibit provision of telecommunications service.

5. Deployment Moratoria. First, we seek comment on adopting rules prohibiting state or local moratoria on market entry or the deployment of telecommunications facilities. We also seek comment on the types of conduct such rules should prevent. We invite commenters to identify examples of moratoria that states and localities have adopted. How do state and local moratoria interfere with facilities deployment or service provision? What types of delays result from local moratoria (e.g., application processing, construction)? How do moratoria affect the cost of deployment and providing service, and is this cost passed down to the consumer? Are there any types of moratoria that help advance the goals of the Act? If we adopt the proposal to prohibit moratoria, should we provide an exception for certain moratoria, such as those that are limited to exigent circumstances or that have certain sharply restricted time limits? If so, what time limits should be permissible?

6. Rights-of-Way Negotiation and Approval Process Delays. Second, we seek comment on

adopting rules to eliminate excessive delays in negotiations and approvals for rights-of-way agreements and permitting for telecommunications services. We invite commenters to identify examples of excessive delays. How can the Commission streamline the negotiation and approval process? For instance, should the Commission adopt a mandatory negotiation and/or approval time period, and if so, what would be an appropriate amount of time for negotiations? For purposes of evaluating the timeliness of negotiations, when should the Commission consider the negotiations as having started and having stopped? For example, the Commission adopted rules placing time limits on applicants for cable franchises. We seek comment on similar rules for telecommunications rights-of-way applicants. How have slow negotiation or approval processes inhibited the provision of telecommunications service? Are there any examples of delays that jeopardized investors or deployment in general? How can local governments expedite rights-of-way negotiations and approvals? Are there any examples of successful expedited processes? How should regulations placing time limits on negotiations address or recognize delays in processing applications or negotiations that result from local moratoria? For example, in 2014, the Commission clarified that the shot clock timeframe for wireless siting applications runs regardless of any moratorium. Are stalled negotiations and approvals ever justified, and if so how could new rules take these situations into account?

7. Excessive Fees and Other Excessive Costs. Third, we seek comment on adopting rules prohibiting excessive fees and other costs that may have the effect of prohibiting the provision of telecommunications service. We invite commenters to identify examples of fees adopted by states and localities that commenters consider excessive. For example, we note that many states and localities charge rights-of-way fees. Our preliminary view is that Section 253 applies to fees other than cable franchise fees as defined by Section 622(g) of the Act and we seek comment on this view. By "rights-of-way fees," we refer to those fees including, but not limited to, fees that states or local authorities impose for access to rights-of-way, permitting, construction, licensure, providing a telecommunications service, or any other fees that relate to the provision of telecommunications service. We recognize Section 622 of the Act governs the administration of cable franchise fees, and that Section 622(i) limits the Commission's authority to "regulate the amount of the franchise fees paid by a cable operator, or regulate

the use of funds derived from such fees," except as otherwise permitted elsewhere in Section 622. Our preliminary view is that Section 622(i) would prevent the Commission from enacting rules pursuant to Section 253 to address "excessive" cable franchise fees, but that such franchise fees could be taken into account when determining whether other types of fees are excessive. We seek comment on this view. Also, we seek comment on whether there are different types of state or local fees, authorized under the provisions of the Act other than 622, for which application of Section 253 would not be appropriate.

8. We recognize that states and localities have many legitimate reasons for adopting fees, and thus our focus is directed only on truly excessive fees that have the effect of cutting off competition. We seek comment on how the Commission should define what constitutes "excessive" fees. For example, should rights-of-way fees be capped at a certain percentage of a provider's gross revenues in the permitted area? If so, at what percentage? For example, Section 622 of the Act provides that for any twelve-month period, the franchise fees paid by a cable operator with respect to a cable system shall not exceed five percent of the cable operator's gross revenues derived from a cable service. When a provider seeks to offer additional services using the rights-of-way under an existing franchise or authorization, are there circumstances in which it may be excessive to require the provider to pay additional fees in connection with the introduction of additional services? More broadly, are fees tied to a provider's gross revenues "fair and reasonable" if divorced from the costs to the state or locality of allowing access? If we look at costs in assessing fees, should we focus on the incremental costs of each new attacher? Should attachers be required to contribute to joint and common costs? And if so, should we look holistically at whether a state or locality recovers more than the total cost of providing access to the right of way from all attaching entities? We seek comment on evaluating other fees in a similar manner. Are states and localities imposing fees that are not "fair and reasonable" for access to local rights-of-way? How do these fees compare to construction costs? Should fees be capped to only cover costs incurred by the locality to maintain and manage the rights-of-way? Should we require that application fees not exceed the costs reasonably associated with the administrative costs to review and process an application? Should any increase in fees be capped or controlled? For example, should fees increases be capped at ten percent a year? What types of fees should we consider within the scope of any rule we adopt? How do excessive

fees impact consumers?

9. Unreasonable Conditions. Fourth, we seek comment on adopting rules prohibiting unreasonable conditions or requirements in the context of granting access to rights-of-way, permitting, construction, or licensure related to the provision of telecommunications services. For example, we seek comment on rights-of-way conditions that inhibit the deployment of broadband by forcing broadband providers to expend resources on costs not related to rights-of-way management. Do these conditions make the playing field uneven for smaller broadband providers and potential new entrants? If the Commission were to adopt such rules, how should the Commission define what constitutes an "unreasonable" rights-of-way condition? We seek comment from both providers and local governments on conditions that they consider are reasonable and unreasonable. Should the Commission place limitations on requirements that compel the telecommunications service provider to furnish service or products to the right-of-way or franchise authority for free or at a discount such as building out service where it is not demanded by consumers, donating equipment, or delivering free broadband to government buildings? Should non-network related costs be factored into any kind of a fee cap? For instance, the Commission determined that non-incidental franchise-related costs and in-kind payments unrelated to the provision of cable service required by local franchise authorities for cable franchises count toward the five percent cable franchise fee cap. We seek comment on whether the Commission should adopt similar rules for telecommunication rights-of-way agreements.

10. Bad Faith Negotiation Conduct. Fifth, we seek comment on whether the Commission should adopt rules banning bad faith conduct in the context of deployment, rights-of-way, permitting, construction, or licensure negotiations and processes. We seek comment on what types of bad faith conduct such rules should prohibit and examples of such conduct. Should the Commission ban bad faith conduct generally, specific forms of bad faith conduct, or both? Should the Commission establish specific objective criteria that define the meaning of "bad faith" insofar as the Commission prohibits "bad faith" conduct generally? If so, we seek comment on proposed criteria. What types of negotiation conduct have directly affected the provision of telecommunications service? Would a streamlined

process for responding to bad faith complaints help negate such behavior? What would that process look like?

11. Other Prohibitive State and Local Laws. Finally, we seek comment regarding any other instances where the Commission could adopt rules to preempt state or local legal requirements or practices that prohibit the provision of telecommunications service. For instance, should the Commission adopt rules regarding the transparency of local and state application processes? Could the Commission use its authority under Section 253 to regulate access to municipally-owned poles when the actions of the municipality are deemed to be prohibiting or effectively prohibiting the provisions of telecommunications service? If so, could the Commission use its Section 253 authority in states that regulate pole attachment under Section 224(c)? Are there any other local ordinances that erect barriers to the provision of telecommunications service especially as applied to new entrants? Are there any other specific rights-of-way management practices that frustrate, delay or inhibit the provision of telecommunications service? The Commission has described Section 253(a) as preempting conduct by a locality that materially inhibits or limits the ability of a provider "to compete in a fair and balanced legal and regulatory environment." Is this the legal standard that should apply here? We seek comment on identifying particular practices, regulations and requirements that would be deemed to violate Section 253 in order to provide localities and industry with greater predictability and certainty.

12. Authority to Adopt Rules. The Commission has historically used its Section 253 authority to respond to preemption petitions that involve competition issues and relationships among the federal, state and local levels of government. We seek comment on our authority under Section 253 to adopt rules that prospectively prohibit the enforcement of local laws that would otherwise prevent or hinder the provision of telecommunications service. Our view is that under Section 201(b) and Section 253, the Commission has the authority to engage in a rulemaking to adopt rules that further define when a state or local legal requirement or practice constitutes an effective barrier to the provision of telecommunications service under Section 253(a). We seek comment on this approach. We also recognize that state and local governments have authority, pursuant to Sections 253(b) and (c) to, among

other things, regulate telecommunications services to protect the public safety and welfare, provide universal service, and to manage public rights-of-way on a non-discriminatory basis. How can we ensure that any rules we adopt comport with Sections 253(b) and (c)? Should we adopt the text of Sections 253(b) and (c), to the extent relevant, as explicit carve-outs from any rules that we adopt? Could we include the substance of Sections 253(b) and (c) in rules without an explicit, verbatim carve-out? Would enacting rules conflict with Section 253(b) or (c)?

13. Would adopting rules to interpret or implement Section 253(a) be consistent with Section 253(d), which directs the Commission to preempt the enforcement of particular State or local statutes, regulations, or legal requirements "to the extent necessary to correct such violation or inconsistency"? Subsection (d) directs the Commission to preempt such particular requirements "after notice and an opportunity for public comment." Does this preclude the adoption of general rules? Would notice, comment, and adjudicatory action in a Commission proceeding to take enforcement action following a rule violation satisfy these procedural specifications? Can we read Section 253(d) as setting forth a non-mandatory procedural vehicle that is not implicated when adopting rules pursuant to Sections 253(a)-(c)? If the Commission were to adopt rules pursuant to Section 253, we seek comment on whether Section 622 of the Act limits the Commission's authority to enact rules with respect to non-cable franchise fee rights-of-way practices that might apply to cable operators in their capacities as telecommunications providers.

14. Collaboration With States and Localities. We also seek comment on actions the Commission can take to work with states and localities to remove the barriers to broadband deployment. The Commission's newly formed Broadband Deployment Advisory Committee (BDAC) includes members from states and localities, and it has been charged with working to develop model codes for municipalities and states. The BDAC will also consider additional steps that can be taken to remove state and local regulatory barriers. Are there additional actions outside of the BDAC that the Commission can take to work with states and localities to promote adoption of policies that encourage deployment?

15. We recognize that states and localities play a vital role in deployment and addressing the needs of their residents. How can we best account for states' and localities' important roles? Are

collaborative efforts such as the development of recommendations through the BDAC sufficient to address the issues described above? What are the benefits and burdens of such an approach? To what extent should we rely on collaborative processes to remove barriers to broadband deployment before resorting to preemption?

III. Preemption of State Laws Governing Copper Retirement

16. We seek comment on whether there are state laws governing the maintenance or retirement of copper facilities that serve as a barrier to deploying next-generation technologies and services that the Commission might seek to preempt. For example, certain states require utilities or specific carriers to maintain adequate equipment and facilities. Other states empower public utilities commissions, either acting on their own authority or in response to a complaint, to require utilities or specific carriers to maintain, repair, or improve facilities or equipment or to have in place a written preventative maintenance program. First, we seek comment on the impact of state legacy service quality and copper facilities maintenance regulations. Next, we seek comment on the impact of state laws restricting the retirement of copper facilities. In each case, how common are these regulations, and in how many states do they exist? How burdensome are such regulations, and what benefits do they provide? Are incumbent LECs or other carriers less likely to deploy fiber in states that continue to impose service quality and facilities maintenance requirements than in those states that have chosen to deregulate?

17. We seek comment on whether Section 253 of the Act provides the Commission with authority to preempt state laws and regulations governing service quality, facilities maintenance, or copper retirement that are impeding fiber deployment. Do any such laws "have the effect of prohibiting the ability of [those incumbent LECs] to provide any interstate or intrastate telecommunications service?" Are such laws either not "competitively neutral" or not "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," such that state authority is not preserved from preemption under Section 253(b)? Commenters arguing in favor of preemption should identify specific

state laws they believe to be at issue. Would preemption allow the Commission to develop a uniform nationwide copper retirement policy for facilitating deployment of next-generation technologies? Are there other sources of authority for Commission preemption of the state laws being discussed that we should consider using?

IV. Procedural Matters

A. Ex Parte Rules

18. The proceeding related to this Notice shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

V. Ordering Clause

19. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), and 403 of the Communications Act of 1934, as amended, 47 U.S.C 151, 154(i), 154(j), and 403, this Notice IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary.

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