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FCC Should Preempt Local Cost Barriers to Fiber Deployment

by

Seth L. Cooper *

Fiber broadband is a tremendous boon to local communities, providing consumers, businesses, schools, as well as hospitals with high-speed Internet connections. Yet onerous fees and regulations imposed by local governments often slow or stop fiber expansion. A case in point is presented by Bluebird Network's petition to the FCC that challenges a Missouri city's fees on fiber facilities that are excessive, discriminatory, and bear no relation to the city's rights-of-way costs. The Commission should grant the petition and preempt the city's cost barrier to fiber expansion.

Within the proper scope of its authority, the FCC ought to encourage fiber deployment. One way the Commission should do so is by proactively exercising its authority under Section 253(a) of the Communications Act to preempt arbitrary local regulations and high fees that effectively prohibit broadband services or unfairly advantage some providers over others. Declaratory rulings by the Commission can help resolve current disputes more quickly than costly and lengthy lawsuits. Establishing agency precedents that further define violations of Section 253(a) also can help avoid future local government impositions of cost and other regulatory barriers to infrastructure construction and thereby promote fiber broadband buildout to more Americans.

Timely laying of fiber optic cables and construction of other wireline infrastructure is critical to improving job growth as well as other economic and social opportunities for local communities

across the country. Fiber networks deliver high-capacity and high-speed broadband Internet services to retail subscribers, business customers, as well as to public safety and educational institutions. Today, most fiber-based networks use gigabit passive optical network (GPON) technology that has download speed capabilities of 2.5 Gbps. Increasingly, fiber providers are transitioning to XGS-PON technology, which features speed capabilities up to 10 Gbps.

Additionally, fiber networks provide wireless backhaul support for fixed wireless connections, cell phone calls, and mobile data services. It is widely recognized that 5G networks depend on data traffic connections to capacious and fast fiber facilities.

But the public benefits of these new fiber network deployments are being held back in many localities by excessive fees and arbitrary regulatory requirements imposed by local governments via their powers over permitting, rights-of-way, and zoning. The FCC has compiled record evidence of these types of local barriers to broadband wireline and wireless infrastructure deployment in its *Shot Clock Order* (2009), *Infrastructure Order* (2014), *Moratoria Order* (2018), and *5G Upgrade Order* (2020). And I and other Free State Foundation scholars have written about these barriers, and the FCC's actions to combat them, many times.

Federal law prohibits local barriers to broadband network infrastructure deployment, and it confers on the FCC the responsibility to remove such barriers. For instance, Section 253(a) of the Communications Act specifies that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Section 253(c) acknowledges the authority of local governments "to require fair and reasonable compensation from telecommunications providers... for use of public rights-of-way" – but only so long as fees are imposed "on a competitively neutral and nondiscriminatory basis." Importantly, Section 253(d) requires that "the Commission shall preempt" any "statute, regulation, or legal requirement" that the agency determines is contrary to Section 253(a).

In its 1997 *California Payphone Order*, the FCC interpreted Section 253(a) to mean that a local government regulation constitutes an effective prohibition on providing service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." The Commission should again exercise its delegated authority under Section 253 and build on the agency's *California Payphone* precedent by preempting a right-of-way recovery (ROW) fee scheme imposed by the city of Columbia, Missouri, on Bluebird Network.

Columbia has imposed a \$1.91 per linear foot ROW fee on all of Bluebird's fiber optic facilities in the city. What's more, there is no cap on the ROW fees. In addition to per linear foot charges, Bluebird is required to pay all costs reasonably incurred by the city for permit reviews and inspections as well as for related repair and restoration of the city's streets and structures in its rights-of-way.

Bluebird paid about \$75,000 in ROW fees in 2020. Yet Bluebird anticipates that its annual ROW fees for 2022 will skyrocket over 630%, to about \$552,000. This is because Bluebird intends to add over 60 route miles of fiber optic cable within Columbia. It will expand services in the city to

medical facilities, schools, and libraries. The fiber deployment is part of a multi-state Midwest expansion that will connect over 500 additional wireless towers across 28 local markets in support of 5G network services. The prospective \$552,000 annual ROW fee would exceed 31% of Bluebird's expected gross revenue in fiscal year 2022. That would be a steep financial burden for a small provider like Bluebird and potentially stall or stop its fiber entry into new locations.

The city of Columbia's ROW fee scheme is contrary to Section 253(a) and the *California Payphone Order* because the fee amount is astonishingly high relative to Bluebird's expected revenues. Additionally, Columbia's fee scheme materially inhibits Bluebird's ability to compete in a fair and balanced regulatory environment because the city apparently imposes significantly steeper charges on Bluebird compared to its competitors without adequate justification. Bluebird's competitors lack extensive fiber facilities in the city, and they are assessed fees according to different standards that apparently impose far lower costs. Also, importantly, the city's ROW per linear foot fee – with no cap – materially inhibits Bluebird's ability to compete because the fee simply bears no relationship to Columbia's direct costs in managing its rights-of-way.

FCC preemption of the city of Columbia's unreasonable fee scheme would clear away a harmful regulatory barrier to Bluebird's fiber buildout. It also would provide a pro-deployment precedent regarding excessive cost barriers that other local governments would have to heed. The Commission's 2018 order barring express and implied moratoria of infrastructure permit applications excluded fees from the scope of its interpretation of Section 253(a). Thus, a Commission decision on Bluebird's petition could fill a void in the agency's precedents that will encourage construction of next-gen fiber facilities.

Beyond FCC preemption of Columbia's onerous fee scheme, the Commission should be more assertive in identifying fees and regulations in other localities that conflict with federal law and obstruct competitive entry or construction of broadband infrastructure – and preempt them. Faced with arbitrary and overly-strict local regulatory obstacles to deploying new infrastructure, broadband service providers in some instances file federal lawsuits. Several such lawsuits are now pending in federal courts across the country. But litigation is costly and adds several months, if not years, of additional delays to infrastructure expansions. Commission rulings on local restrictions that violate Section 253(a) can help bring speedier resolution of existing disputes, and help deter future violations in other localities.

* Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

Further Readings

Randolph J. May and Seth L. Cooper, "[Real Infrastructure Opportunity for Congress: Speed Deployment of 5G Network](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 36 (July 21, 2021).

Randolph J. May and Seth L. Cooper, "[Wireless Infrastructure Reforms Rest on Solid Constitutional Foundations: Congress Should Preempt Local Obstacles to 5G Deployment](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 29 (June 8, 2021).

Seth L. Cooper, "[The FCC Should Promote Timely Transitions to Next-Gen Broadband Networks](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 63 (December 1, 2020).

Andrew Long, "['10 G' Can Help Future-Proof Broadband Infrastructure](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 47 (September 11, 2020).

Seth L. Cooper, "[FCC Should Clear Obstacles to Wireless Infrastructure Upgrades](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 26 (September 25, 2019).

Seth L. Cooper, "[FCC's Proposals Promoting Infrastructure Deployment Don't Violate Anti-Commandeering Rule](#)," *Perspectives from FSF Scholars*, Vol. 13, No. 29 (July 17, 2018).