

**FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Build America: Eliminating Barriers to Wireline Deployments	)))	WC Docket No. 25-253
--	-------------	----------------------

**COMMENTS OF
THE FREE STATE FOUNDATION¹**

I. Introduction and Summary

These comments are submitted in response to the Commission’s request for public comments regarding its Notice of Inquiry into state and local requirements that needlessly constrain the deployment of modern, high-speed wireline infrastructure. In these comments, we recommend that the Commission clear away state and local permitting delays and regulatory cost barriers for deploying wireline facilities in public rights-of-way by adopting “shot clock” and fee limit rules and also, based on Section 253 of the Communications Act and other sources of lawful authority, preempt local actions that violate those rules.

The Commission has long recognized that the time delays and financial costs of accessing and deploying infrastructure are major impediments to the deployment of next-generation broadband services. To address those concerns, between 2018 and 2021, the Commission adopted several reforms that cleared local regulatory obstacles to the construction of wireless and wireline broadband facilities, including the *2018 Moratorium Order* and *2018 Small Cell Order*. Those reforms appear to have been successful in reducing permit processing

¹ These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Adjunct Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

obstacles and promoting infrastructure upgrades and new deployments. That success is reflected in significantly improved broadband access for Americans compared to 2018 and the increased number of wireless facilities serving Americans today compared to several years ago.

But local regulatory obstacles remain, and rural areas still lag behind urban areas in broadband access, with service gaps remaining. Moreover, if multi-billion-dollar broadband subsidy programs such as the Broadband Equity Access and Deployment (BEAD) program are to be at all successful, after languishing for months on end in bureaucratic dead zones and regulatory traps, it is imperative that taxpayers' subsidy dollars are able to be put directly to work building out networks to reach all Americans in a timely fashion.

Free State Foundation scholars have long supported FCC adoption of reforms addressed specifically to wireline facility deployments in public rights-of-way. The Commission deserves credit for issuing its Notice of Inquiry, which identifies this ripe area for reform.

We recommend the Commission adopt 120-day “shot clock” timeframes which constitute presumptive reasonable periods for state and local governments to make decisions on applications to use public rights-of-way for deployment of wireline broadband facilities. Additionally, the Commission should prohibit excessive fees for use of rights-of-way and establish safe harbor amounts that local governments may presumptively charge wireline infrastructure providers. To enforce these rules, the Commission should exercise its statutory authority to review petitions by wireline broadband infrastructure providers alleging violations and provide relief by deeming delayed permits granted under federal law and by preempting excessive fees. The Commission likewise should be proactive in making declaratory rulings that preempt state and local requirements regarding wireline facilities deployments in rights-of-way upon the filing of a petition or by initiating notice-and-comment proceedings *sua sponte*.

By taking these steps, the Commission can clear away obstacles to new wireline deployments and facilities upgrades and improve Americans' access to broadband.

II. The FCC Should Build on Efforts to Remove Regulatory Barriers to Broadband Facilities Deployments by Focusing on Wireline Facilities in Rights-of-Way

As the Notice recognizes: “To build out to consumers, providers must obtain authorizations from state and local governments to deploy facilities in the public rights-of-way and use them to provide service.”² But as the Commission has observed on several prior occasions, local permit approval and other regulatory costs have long posed one of the most significant barriers to broadband deployment.

Between 2018 and 2021, the Commission adopted several reforms that cleared local regulatory obstacles to the construction of wireless and wireline broadband facilities; namely, the *2018 Moratorium Order*, *2018 Small Cell Order*, *2018 One-Touch-Make-Ready Order*, *2020 5G Upgrade Order*, and *2020 Over-the-Air-Reception-Devices Order*. Free State Foundation scholars have consistently supported the legal authority and policies contained in the Commission's infrastructure siting reforms.³ And the agency's previous reforms appear to have been successful in reducing permit processing obstacles and promoting infrastructure upgrades and new deployments. Since 2018 broadband access increased significantly, and the number of operational cell sites rose sharply compared to the years that preceded those reforms.

² Build America: Eliminating Barriers to Wireline Deployments, WC Docket No. 25-253, Notice of Inquiry (“Notice”) (released September 30, 2025), at ¶ 2.

³ See, e.g., Comments of the Free State Foundation, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79 (June 15, 2017), at: <https://freestatefoundation.org/wp-content/uploads/2019/08/FSF-Comments-Re-Accelerating-Wireless-Broadband-Deployment-by-Removing-Barriers-to-Infrastructure-Investment-061517.pdf>; Reply Comments of the Free State Foundation, Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilite, LLC Petition for Declaratory Ruling, WT Docket No. 16-421 (April 7, 2017), at: <https://freestatefoundation.org/wp-content/uploads/2019/08/FSF-Reply-Comments---Streamlining-Deployment-of-Small-Cell-Infrastructure-by-Improving-Wireless-Facilities-Siting-Policies-040717.pdf>.

To ensure that the BEAD Program and other massive broadband subsidy programs operate efficiently and successfully to timely expand broadband access, adoption, and affordability, the Commission should build on its prior reforms by addressing excessive administrative delays and costs in deploying wireline facilities in rights-of-way. Indeed, Free State Foundation scholars have long endorsed FCC adoption of reforms to accelerate wireline facility deployments in rights-of-way.⁴

III. The Commission Should Adopt and Enforce “Shot Clocks” for Local Governments to Make Decisions About Wireline Deployment in Rights-of-Way

The Commission should amend its rules regarding wireline broadband infrastructure by adopting “shot clocks” and fee caps for deployments of wireline facilities in state and local rights-of-way.⁵

In 2009, the Commission first adopted “shot clock” time limits for local government to act on applications to deploy wireless facilities. The Commission has since expanded and updated its shot clocks for wireless infrastructure. Notably, in its 2018 *Small Cell Order*, the Commission adopted “shot clocks” for local governments to act on permit applications for constructing and upgrading wireless infrastructure in public rights-of-way. That order was upheld by the Ninth Circuit in *City of Portland v. FCC* (2020).⁶ In that case, the court affirmed the agency’s determination that local governments act not in a proprietary capacity but in a regulatory capacity when they restrict access to public rights-of-way.⁷ The Commission should

⁴ See, e.g., Seth L. Cooper and Andrew K. Magloughlin, “The FCC Should Preserve and Expand its Broadband Infrastructure Reforms,” *Perspectives from FSF Scholars*, Vol. 17, No. 30 (June, 2022), at: <https://freestatefoundation.org/wp-content/uploads/2022/06/The-FCC-Should-Preserve-and-Expand-its-Broadband-Infrastructure-Reforms-060822.pdf>; 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), at: <https://freestatefoundation.org/wp-content/uploads/2021/10/Real-Infrastructure-Opportunity-for-Congress-Speed-Deployment-of-5G-Network-072121.pdf>.

⁵ See Notice at ¶¶ 24-25.

⁶ *City of Portland v. FCC*, 969 F.3d 1020 (9th Cir. 2020).

⁷ *City of Portland*, 969 F.3d. at 1045-1046.

rely on its judicially-approved agency precedent in the 2018 *Small Cell Order* by establishing “shot clocks” for local government decisionmaking on applications for wireline deployments in rights-of-way.

We recommend that the Commission establish a “shot clock” time period of 120 days as the period of time in which local governments should act on wireline permit applications involving rights-of-way. Even if the Commission were to opt for a longer time period, it should not exceed 150 days – which is consistent with its codified rule for review of applications to deploy a facility other than a small wireless facility using a new structure.⁸ Although “shot clocks” have not previously been adopted in the context of wireline infrastructure, local governments have acknowledged processing permits within shot clock timeframes for wireless facilities. Local governments should be expected to bring that experience to bear for applications involving wireline facilities.

Consistent with agency rules regarding shot clocks for wireless facilities other than small facilities,⁹ the shot clock should begin to run when an application is first submitted, not when the application is deemed complete. But the clock can be paused if the local government notifies the applicant within 30 days that its application is incomplete or deficient. Also, the local government may pause the clock again if it provides a written notice within 10 days that the applicant’s supplemental submission by the local government did not provide the information identified in the original notice, delineating missing information.

“Shot clocks” provide a much-needed incentive for local governments to avoid excessive delays. Under the Commission’s rules regarding wireless facilities, if local government inaction

⁸ See 47 C.F.R. § 1.6003(c)(1)(iv).

⁹ See 47 C.F.R. § 1.6003(c)(2) and –(3). See also 2018 Order, at ¶¶ 141-142; 2014 Wireless Infrastructure Order, at ¶¶ 258-259, 2009 Declaratory Ruling, at ¶¶ 52-53.

on an application continues past the allotted time period, the delay is presumptively unreasonable, and the infrastructure provider can seek relief in federal court. The rebuttable presumption provides practical guidance for judicial review. And the presumption also is decidedly fair to local governments because it allows them to offer explanations for their delay and to thereby potentially rebut the presumption with evidence and reasoned arguments.

Aside from federal court enforcement, the Commission also should affirm the agency's authority to review and enforce petitions by wireline broadband infrastructure providers alleging that the shot clock is exceeded.¹⁰ The terms of Section 253(d), provides that the "the Commission shall preempt" "any statute, regulation, or legal requirement" that violates Section 253(a) or -(b) and the Commission's general powers under Section 5 of the Communications Act to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions" appear to provide the agency with clear authority to issue a declaratory ruling on the merits of a petition.¹¹ Utilizing such authority, the Commission could preempt the local government's inaction regarding the application if the agency determines that the local government did not provide reasons or evidence sufficient to overcome the presumption. Although the Commission is most likely precluded by the Supreme Court's anti-commandeering doctrine from compelling local governments to issue permits, in preempting the state action, the Commission has the authority to deem a pending permit application granted under federal law. The Commission's authority to enforce such a petition also appears to be supported by Section 5(d) of the Administrative Procedure Act, which provides that an agency "in its sound discretion, may issue a declaratory

¹⁰ See Notice, at ¶28.

¹¹ 47 U.S.C. § 154(i).

order to terminate a controversy or remove uncertainty.”¹² The Commission’s enforcement of its “shot clocks” would save the parties time and expense compared to litigation in federal court.

IV. The Commission Should Adopt and Enforce Limits on Fees That Local Governments Can Charge for Wireline Deployment in Rights-of-Way

Similar to the Commission’s determination in the 2018 *Small Cell Order*, the Commission should determine that excessive fees and rates charged for use of public rights-of-way by wireline infrastructure providers “have the effect of prohibiting” services under Section 253 and fall outside of the scope of “fair and reasonable compensation” under Section 253(c).¹³ Excessive fees harm the business case for new wireline broadband facilities deployments and network upgrades, draining the limited financial resources of providers and inhibiting consumer access to broadband.

Accordingly, the Commission should adopt rules that conclude: (1) “Fees above a reasonable approximation of cost [for use of rights-of-way] will have the effect of prohibiting [wireline broadband] service in violation of Section 253(a), even if they do not appear to be prohibitive in isolation, when the aggregate effects on wireline deployments are considered”;¹⁴ and (2) “Fees must not only be limited to a reasonable approximation of costs, but the costs included in the fees must themselves be objectively reasonable.”¹⁵ To facilitate determinations of objectively reasonable approximate costs, the agency should establish safe harbor amounts for all total fees charged to a provider for use of rights-of-ways, whereby all fees actually charged by a local government that are equal to the safe harbor amounts are presumptively fair and reasonable compensation, and all fees that exceed the safe harbor level are unfair and unreasonable.¹⁶

¹² 5 U.S.C. § 554(e).

¹³ See Notice at ¶¶ 31-34.

¹⁴ Notice, at ¶ 33 (citing 2018 *Small Cell Order*, at ¶¶ 50, 65, 70).

¹⁵ Notice, at ¶ 33 (citing 2018 *Small Cell Order*, at ¶¶ 50, 70).

¹⁶ See Notice, at ¶ 42.

It may be sensible for the Commission to acknowledge local governments' ability to recover some of their joint and common costs for administration and upkeep of rights of ways, but only so long as any such recovery is minimal and capped at a small fixed dollar amount or a small percentage of the fees charged to the provider.¹⁷

Furthermore, the fees charged by local governments for use of rights-of-way by wireline infrastructure providers should be reduced by the approximate fair market value of any in-kind compensation that the local government charges for use of rights of way, ¶ 52. In the cable context, the Commission determined in a 2019 order that in-kind contributions that cable operators are required to pay local franchising authorities count toward the statutory cap on franchise fees.¹⁸ That same approach is warranted in the wireline broadband context. A requirement that the value of in-kind contributions be included in assessing total fees charged will help avoid diversions of wireline broadband provider capital resources that would harm investment in next-generation networks and even lead to higher consumer prices.

Importantly, the Commission also should affirm the agency's authority to review and enforce petitions by wireline broadband infrastructure providers alleging that the local governments have charged excessive fees for use of rights-of-way in violation of the agency's rule. Utilizing its authority under Section 253(a), -(d), and Section 5 of the Communications Act, as well as Section 5(d) of the APA, the Commission could preempt the local government's assessment of fees if the agency determines that the local government did not provide reasons or evidence sufficient to overcome the safe harbor presumption.

¹⁷ See Notice, at ¶ 47.

¹⁸ See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Third Report and Order (released August 2, 2019). See *City of Eugene, Oregon, et al v. FCC*, 998 F.3d 701 (6th Cir. 2021) (affirming most of the order, including the order's provisions regarding in-kind contributions).

V. The FCC Should Proactively Preempt Local Government Requirements That Impose Harmful Barriers to Wireline Deployment in Rights-of-Way

The Commission can accelerate future broadband deployments by proactively issuing declaratory rulings that preempt harmful local rules or parts of rules that impose costly and unreasonable delays or prohibitions on permits for deployment of wireline infrastructure in public rights-of-way. Section 253(d) of the Communications Act provides:

If, after notice and an opportunity for public comment the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

That is, the Commission may preempt state or local government actions regarding infrastructure permit applications for rights-of-way that are not “competitively neutral” or that “prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications services.”

The Commission should make clear that the agency’s preemptive authority applies when local governments consider applications for deployment of wireline broadband infrastructure on public rights-of-way. And the Commission should make known its readiness to expeditiously exercise its preemptive authority in this setting. In addition to considering petitions filed by parties seeking federal preemption of local government rules that allegedly violate federal statutes or the Commission’s rules, the agency also should be willing to initiate proceedings on its own accord when local restrictions come to the Commission’s attention.

Preemption of specific local rules or provisions can eliminate barriers to infrastructure deployment with less cost and delay than litigation in federal court. Such declaratory rulings would also establish agency precedents to guide local governments reviewing wireless infrastructure siting applications.

VI. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

Randolph J. May
President

Seth L. Cooper
Adjunct Senior Fellow

Free State Foundation
P.O. Box 60680
Potomac, MD 20854

November 18, 2025