

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

Build America: Eliminating Barriers to
Wireline Deployments

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WC Docket No. 25-253

COMMENTS OF

THE FREE STATE FOUNDATION¹

I. Introduction and Summary

The Free State Foundation (“FSF”) hereby submits these comments in response to the FCC’s Notice of Proposed Rulemaking seeking comment on reforms to the permitting process for wireline deployment of broadband. The proposed rules are meant to protect broadband providers from unnecessary costs and delays when seeking state and local rights of way.² As Free State Foundation President Randolph May commented in a similar rulemaking procedure for wireless deployments: “Proposals in this proceeding go right to the heart of enabling the prompt deployment of advanced broadband wireless services that is essential to benefiting consumers, promoting economic growth, and protecting America’s preeminent position of 5G wireless leadership.”³ This statement applies equally to wireline broadband deployment.

¹ These comments express the views of Randolph J. May, President, and Joseph V. Kennedy, Director of Policy Studies and Senior Fellow of the Free State Foundation. The views expressed in these comments do not necessarily reflect the view of others on the staff of the Free State Foundation or those affiliated with it. The Free State Foundation is a nonpartisan, non-profit free-market-oriented think tank.

² Notice of Proposed Rulemaking, Build America: Eliminating Barriers to Wireline Deployments, WT Docket No. 25-253, <https://docs.fcc.gov/public/attachments/DOC-422166A1.pdf>.

³ Reply Comments of the Free State Foundation to the Federal Communications Commission, Notice of Proposed Rulemaking, Eliminating Barriers to Wireless Deployments, WT Docket No. 25-276, January 15, 2026, <https://freestatefoundation.org/wp-content/uploads/2026/01/FSF-Reply-Comments-Eliminating-Barriers-to-Wireless-Deployment-Final-011526.pdf>.

Implementing the proposed rules is central to furthering the success of the FCC's "Build America" program. The rapid installation of modern information networks, including advanced high-speed broadband, is a key policy goal of the Trump Administration because it is an important driver of economic growth. It's worth highlighting at the outset that this proceeding, along with other current dockets before the Commission, such as the proceeding considering whether to preempt *California's Carrier of Last Resort* requirements, and the *Accelerating Network Modernization* and *Advancing IP Interconnection* proceedings, all have the same aim of advancing FCC Chairman Brendan Carr's "Build America" agenda. They all are important in the effort to ensure that America's broadband infrastructure is upgraded and modernized as rapidly as possible.

In the Infrastructure and Jobs Act of 2021, Congress devoted \$42.45 billion to the Broadband Equity, Access, and Deployment (BEAD) Program to extend broadband coverage to parts of the nation that remained unserved or underserved. In order to accomplish BEAD's objective within the statutory deadline, as well as complete other non-BEAD broadband deployments, Internet service providers will have to obtain rights-of-way to thousands of sites controlled by state and local agencies.

While many state and local agencies work cooperatively with broadband providers to grant approvals in a reasonable time and at a reasonable cost, the record shows that others are either unable to respond to the significant increase in permit activity or they use an approval requirement as an "opportunity" to make unreasonable demands. This results in significant delays and cost increases which impede the timely delivery of new or enhanced broadband services.

To speed deployments of telecommunications services by removing barriers to entry, in adopting the Telecommunications Act of 1996, Congress added Section 253 to the Communications Act. This provision forbids state and local governments from imposing rules that effectively prohibit broadband deployments, and it directs the FCC to preempt rules that violate this prohibition. Recently, in response to a growing record of abuses, the FCC has moved forward to adopt regulations that impose reasonable limits on state and local practices to prevent what, in effect, amounts to the rejection of requests for rights-of-way.

The rules proposed in the Commission's Notice would establish the following requirements and procedures:

- The Commission will rely on rebuttable presumptions that state and local governments have effectively prohibited the provision of wireline telecommunications services if they fail to process applications for access and use of public rights-of-way within 120 days.
- All fees must be reasonable and nondiscriminatory.
- The value of any in-kind compensation should count toward safe harbor fee levels.
- Fees may not contain additions just because the infrastructure may be used to offer other services.

Free State Foundation scholars have consistently supported the exercise of the Commission's preemptive authority under the circumstances described in the *Notice* and have also supported the policies contained in the Commission's infrastructure siting reforms.⁴ These reforms appear to have been successful elsewhere, such as in the *2018 Small Cell Order*, in

⁴ See, e.g., Comments of the Free State Foundation, Notice of Proposed Rulemaking, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79, June 15, 2017, <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, Mobilitee, LLC Petition for Declaratory Ruling, WT Docket No. 16-421 April 7, 2017, <https://freestatefoundation.org/wp-content/uploads/2019/08/FSF-Reply-Comments-%E2%80%93-Streamlining-Deployment-of-Small-Cell-Infrastructure-by-Improving-Wireless-Facilities-Siting-Policies-040717.pdf>.

reducing permit processing obstacles and promoting infrastructure upgrades and new deployments.

In implementing these reforms, the Commission's proposal to rely on rebuttable presumptions – a procedural mechanism that Free State Foundation scholars have advocated using for over a decade – is very important and deserves special commendation. While not outcome-determinative in and of itself, employment of the presumption, along with the agency's other proposals, should allow for more timely deployments when broadband service providers confront unreasonable obstructive tactics by state and local governments.

II. The Commission Should Use Rebuttable Presumptions to Evaluate Specific Permitting Practices

Over fifteen years ago, Free State Foundation President Randolph May advocated the use of rebuttable presumptions as a procedural vehicle to aid in the elimination of unnecessary and costly regulations. It is gratifying that the Commission is now proposing their use. The *Notice* specifically seeks "comment on codifying rules that would [] establish a rebuttable presumption that state and local governments have effectively prohibited the provision of wireline telecommunications services if they fail to process all authorizations for use of public rights-of-way to provide wireline telecommunications services or to deploy wireline telecommunications infrastructure within 120 days."⁵

And elsewhere the Commission "proposes to establish a rebuttable presumption that would enable small governmental jurisdictions to offer evidence that its timelines, fees, and other associated requirements do not prohibit or effectively prohibit the provision of

⁵ Notice of Proposed Rulemaking, Build America: Eliminating Barriers to Wireline Deployments, WT Docket No. 25-253, <https://docs.fcc.gov/public/attachments/DOC-422166A1.pdf>.

wireline telecommunications services, or that they fall within the scope of Section 253's savings clauses."⁶

Without dictating the outcome of any particular dispute, employing rebuttable presumptions to each of the proposed rules should result in speeding deployments that should not be delayed, while making it easier for the Commission to defend its position upon judicial review. They allow governments to rebut the presumption by providing sufficient evidence and persuasive reasoning.

The Commission has the authority to adopt rebuttable presumptions through the use of its rulemaking authority.⁷ Although implementing the proposed rules should cover most cases, there will undoubtedly be exceptions to the rule in which the particular facts of a given situation justify an outcome different than the presumption otherwise would dictate. As stated, Free State Foundation President Randolph May has a long record of encouraging the Commission to adopt rebuttable presumptions in aid of getting rid of old legacy regulations or against creating new regulations unless there is a clear economic need.⁸ That same rationale applies for employing them here in order to achieve the important "Build America" objective of accomplishing broadband deployment without undue delays and imposition of unreasonable costs.

Rebuttable presumptions would not violate any other provision of the Communications Act. Courts have generally upheld such presumptions, provided they are not contrary to the underlying statute and the agency has articulated a connection between the facts giving rise to

⁶ Ibid.

⁷ Randolph J. May, "The FCC Should Employ Rebuttable Presumptions to Reduce Unnecessary Regulation," *Perspectives from FSF Scholars*, Vol. 14, No.1, January 8, 2019 (citing many cases in which courts have upheld FCC presumptions), <https://freestatefoundation.org/wp-content/uploads/2019/05/The-FCC-Should-Employ-Rebuttable-Presumptions-in-Forbearance-and-Regulatory-Review-Proceedings-010719.pdf>.

⁸ Randolph J. May, "Rolling Back Regulation at the FCC: How Congress Can Let Competition Flourish," *Perspectives from FSF Scholars*, Vol. 6, No. 11, April 18, 2011, <https://freestatefoundation.org/wp-content/uploads/2019/02/Rolling-Back-Regulation-at-the-FCC-041811.pdf>.

the presumption and the facts presumed by the agency.⁹ For example, the Commission proposes establishing presumptions that a period of 120 days is sufficient for an agency to act on a request for rights-of-way and that any fees that do not meet the requirements of a safe harbor have the effect of prohibiting a provider from building-out telecom service and are not recoverable. State and local agencies whose actions fall within the FCC’s presumption would still enjoy the benefits of clearer guidance and faster resolution of disputes. On the other hand, agencies that do not meet the safe harbor can still challenge the Commission’s decision before the Commission or in court. However, to win they would need to show by clear and convincing evidence that applying the presumption in their case is not warranted.

III. FSF Supports the Specific Actions Described in the Notice of Proposed Rulemaking

In its Notice of Proposed Rulemaking, the Commission described several provisions that it proposes to adopt.¹⁰ These include:

- Rebuttable presumptions that guide the Commission but allow exceptions for unique circumstances.
- A 120-day “shot clock” establishing a presumption that failure by a state or local government to act within 120 days on all applications for authorizations to access rights-of-way to provide wireline telecommunications services or deploy wireline telecommunication infrastructure constitutes an effective prohibition violating Section 253(a) of the Communications Act. The clock starts when a builder submits a written application for authorization. It is noteworthy that the Commission is not proposing a rule that would deem any project as being approved if the government agency does not make a decision within the 120-day shot clock.
- A requirement that all state and local fees be limited to a reasonable approximation of the government’s actual and direct cost of managing its public rights-or-way in connection with a particular wireline telecommunications authorization, provided those costs are

⁹ Randolph J. May, “The FCC Should Employ Rebuttable Presumptions to Reduce Unnecessary Regulation, *Perspectives from FSF Scholars*, Vol. 20, No. 14, March 10, 2025, <https://freestatefoundation.org/wp-content/uploads/2025/03/Reprise-The-FCC-Should-Employ-Rebuttable-Presumptions-to-Reduce-Unnecessary-Regulations-031025.pdf>.

¹⁰ Notice of Proposed Rulemaking, Build America: Eliminating Barriers to Wireline Deployments, WT Docket No. 25-253, <https://docs.fcc.gov/public/attachments/DOC-422166A1.pdf>.

objectively reasonable, competitively neutral, and nondiscriminatory. The Commission has indicated that it will provide a safe harbor upon which agencies may rely.

- A requirement that the cost of in-kind compensation demanded by state and local governments should count toward any safe harbor fee levels adopted by the Commission.
- A prohibition on imposing additional requirements beyond the safe harbor on wireline telecommunications infrastructure that can also be used to provide other services.

We support each of these requirements and specifically recommended several of them in our comments responding to the Commission’s Notice of Inquiry for this docket.¹¹

IV. The Commission May Preempt Permitting Policies That Prohibit the Ability to Provide Interstate or Intrastate Telecommunications Service

To achieve its purpose in passing the Communications Act, Congress gave the Commission broad powers. Section 5 of the Act gives the Commission the power 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.”¹²

The Commission asked for comments regarding its conclusion that it has the legal power under the Communications Act to:¹³

- “make findings concerning what constitutes a violation of Section 253(a) [of the Communications Act] and what qualifies for the Section 253(b) or (c) exceptions.”
- “adopt regulations that enable the Commission to better effectuate its authority under Section 253(d) to preempt statutes, regulations, or legal requirements that violate Sections 253(a) or (b).”
- “conclude that the Commission’s authority to address effective prohibitions as described in Section 253(a) is not limited to case-by-case consideration (or, where appropriate, preemption) of specific state or local legal requirements.”

¹¹ Comments of The Free State Foundation, Notice of Inquiry, Build America: Eliminating Barriers to Wireline Deployments, WT Docket 25-253, November 18, 2025, <https://freestatefoundation.org/wp-content/uploads/2025/11/FSF-Comments-Eliminating-Barriers-to-Wireline-Deployments-Final-111825.pdf>.

¹² 47 U.S. Code §154(i).

¹³ Notice of Proposed Rulemaking, Build America: Eliminating Barriers to Wireline Deployments, WT Docket No. 25-253, (footnotes omitted), <https://docs.fcc.gov/public/attachments/DOC-422166A1.pdf>.

The need supporting the Commission's preemptive actions is amply supported in the record that the Commission has compiled so far. Numerous parties have filed comments detailing specific instances in which unnecessary delays and/or costs have reduced their incentive to deploy broadband coverage in many areas.

The proposed rules are also fully consistent with other actions that the Commission has recently taken. These include the adoption of rules in the *2018 Small Cell Order* regarding wireless infrastructure.¹⁴ The Commission has also released a Notice of Proposed Rulemaking for Wireless Deployments.¹⁵ Both efforts are similar to the proposals discussed here.

Most important, implementing the proposed rules is consistent with the balance Congress struck when it passed the Telecommunications Act of 1996. The Act sought to protect public property and rights-of-way on the one hand and not unduly slow the deployment of new communication technologies on the other. Section 253(a) forbids state or local action that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹⁶

However, some regulation is allowed. Section 253(b) provides that “[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance

¹⁴ Declaratory Ruling and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, 33 FCC Rcd 9088, (2018) (*2018 Small Cell Order*), <https://docs.fcc.gov/public/attachments/fcc-18-133a1.pdf>. aff’d in pertinent part, *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/12/18-72689.pdf>.

¹⁵ Proposed Rule, “Build America: Eliminating Barriers to Wireless Deployments,” *Federal Register*, December 1, 2025, WT Docket No. 25-276, <https://www.federalregister.gov/documents/2025/12/01/2025-21620/build-america-eliminatingbarriers-to-wireless-deployments>.

¹⁶ 47 U.S. Code §253(a).

universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”¹⁷

The Act also states that "nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”¹⁸

Section 253(d) preserves this balance by providing that:

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” (emphasis added).¹⁹

Section 332 contains a similar balance and gives support for the Commission’s interpretation of its authority. It provides that in the regulation of personal wireless service facilities state and local governments may not “unreasonably discriminate among providers of functionally equivalent services” or “prohibit or have the effect of prohibiting the provision of personal wireless services.”²⁰ As the Notice of Proposed Rulemaking points out:

Several commentators responding to the *2025 Notice of Inquiry* argue that, given the comparable language and purposes of Section 253 and Section 332, it is appropriate to construe Section 253 to similarly authorize limits on the time that state and local governments may take to review and act on wireline telecommunications authorization requests.²¹

¹⁷ 47 U.S. Code §253(b).

¹⁸ 47 U.S. Code §253(c).

¹⁹ 47 U.S. Code §253(d).

²⁰ 47 U.S. Code §332(c)(7)(B)(i).

²¹ Notice of Proposed Rulemaking, Build America: Eliminating Barriers to Wireline Deployments, WT Docket No. 25-253, (footnotes omitted), <https://docs.fcc.gov/public/attachments/DOC-422166A1.pdf>.

It is therefore appropriate to look to Section 332 for guidance on the Commission's overall powers regarding permitting. For instance, Section 332 provides procedural protections for providers and state and local governments. Agencies must act on any request for authorization to deploy personal wireless service facilities "within a reasonable period of time after the request is duly filed" with the agency.²² Any decision to deny a request shall be in writing and supported by substantial evidence contained in a written record.²³ Providers are authorized to commence a court action 30 days after losing any final action or inaction.²⁴

In prior actions the Commission has exercised its preemption powers to cover violations of section 332(c)(7)(B)(i)(II). This is appropriate. Any state or local regulations or ordinances that violate section 332(c)(7)(B)(i)(II) by having the effect of prohibiting the ability of any entity to provide telecommunications service is subject to preemption under section 253(d). To hold otherwise would make the former provision superfluous.

The Commission's legal position is also backed by court rulings. A recent survey examining the FCC's preemption powers finds that the agency generally prevails in such conflicts. Under the Constitution's Supremacy Clause and the Communications Act, the FCC has broad authority to preempt state laws that conflict with or frustrate its actions.²⁵ "While Section 332(c)(7) does not expressly address the FCC's ability to implement Section 332(c)(7)(B)'s limitations, federal courts of appeals have held that the FCC may use its general rulemaking authority under the Communications Act to clarify the extent to which state laws are preempted by this section."²⁶

²² 47 U.S. Code §253(c)(7)(B)(ii).

²³ 47 U.S. Code §253(c)(7)(B)(iii).

²⁴ 47 U.S. Code §253(c)(7)(B)(v).

²⁵ Eric N. Holmes and Chris D. Linebaugh, "Stepping In: The FCC's Authority to Preempt State Laws Under the Communications Act," Congressional Research Service, R46736, updated May 12, 2025, <https://www.congress.gov/crs-product/R46736>.

²⁶ Ibid. p. 10.

In *City of Portland v. United States*, the Ninth Circuit upheld all of the FCC's 2018 *Small Cell Order*, except for its aesthetic requirement.²⁷ The Court upheld the FCC's determination that a "material inhibition" would constitute an action to "prohibit or effectively prohibit" the provision of services under Sections 253 and 332. It also found that the FCC's use of shot clocks and fee limitations were subject to preemption as consistent with the statute.

V. Conclusion

The Commission's case for promulgating its proposed rules is compelling. There is no doubt about the importance of extending broadband coverage in a timely and cost-efficient manner. And there's no doubt regarding the fact that, in some jurisdictions, the imposition of unreasonable delays and/or unreasonable costs is common. In adopting the relevant provisions of the Communications Act, Congress meant to both forbid state and local jurisdictions' efforts from thwarting timely deployment and to give the Commission the authority to preempt rules that have this effect. A correct reading of the legislative language and the complementarity of Sections 253 and 332 support this view.

The Commission's proposal to employ rebuttable presumptions in connection with its proposed rules almost certainly will be helpful in achieving the key objective of facilitating broadband deployment on a timely basis. Doing so does not alter the substantive criteria currently provided by the Communications Act but rather merely changes the burden of proof when the Commission seeks to impose these rules. This is a permissible exercise of the Commission's authority.

The Commission's specific proposed rules relating to "shot clocks," fee limitations, and so forth are within the Commission's authority and should be adopted. They are also consistent

²⁷ *City of Portland v. United States*, 969 F.3d 1012 (9th Cir. 2020); see also *City of Arlington v. FCC*, 668 F.3d, 229, (5th Cir. 2012) *aff'd* 569 U.S. 290 (2013).

with other FCC actions, including the *2018 Small Cell Order* and the proposed rules for speeding wireless deployment.

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

Respectfully submitted,

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