



October 26, 2015

TO: Members, Subcommittee on Communications and Technology

FROM: Committee Majority Staff

RE: Legislative Hearing on “Breaking Down Barriers to Broadband Infrastructure Deployment”

I. INTRODUCTION

On Wednesday, October 28, 2015, at 10:00 a.m. in 2123 Rayburn House Office Building, the Subcommittee on Communications and Technology will hold a hearing entitled “Breaking Down Barriers to Broadband Infrastructure Deployment.”

On July 22, 2015, this Subcommittee convened a hearing on the current deployment of broadband services to better understand the challenges to deploying infrastructure to support wireless and wireline broadband services. Witnesses described the significant investment required to dig trenches for fiber or to construct towers for wireless facilities. The National Broadband Plan noted that access to conduits, ducts, poles, and rights-of-way (ROW) on public and private land comprises a significant portion of the costs of deploying broadband. For fiber optic systems, it can amount to as much as 20 percent of the deployment cost.¹ Moreover, delays and uncertainty in the permitting process can increase the costs considerably. The Subcommittee will consider measures to reduce the costs of obtaining access to rights of way as a way to speed broadband deployment.

II. WITNESSES

- Heather Burnett Gold, President and CEO, FTTH Council Americas;
- Jeb Benedict, Vice President, Federal Regulatory Affairs and Regulatory Counsel, Centurylink;
- Scott Bergmann, Vice President, Regulatory Affairs, CTIA; and
- Deb Socia, Executive Director, NextCentury Cities.

III. DISCUSSION

¹ FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010) at 109 (National Broadband Plan).

The Federal government is the largest landowner in the country – holding roughly 640 million acres or 28 percent of the 2.27 billion acres of land in the United States.² The federal government’s General Services Administration (GSA) also owns or leases space in 9,600 buildings nationwide.³ Swift access to federal property would facilitate deployment of broadband facilities. However, navigating the labyrinth of the federal governments’ permitting process is often unwieldy and opaque. Duplicative review requirements, disparities in process from field office to field office, lack of clear direction, and unexplainable delays have stymied those seeking to construct towers, attach antennas, or trench fiber across public rights of way.⁴

Both Republican and Democratic administrations have attempted to streamline the process of federal permitting. For example, in 1995, President Clinton required GSA to develop guidelines to permit deployment of wireless antennas on Federal buildings and lands.⁵ In March 2007, the GSA updated these procedures and declared them effective indefinitely.⁶ And, per the 1995 presidential memo, the rents that the government may charge are expected to be reasonable and based on “market value.”⁷

During the George W. Bush administration, the President’s Council of Advisors on Science and Technology (PCAST) evaluated the process of broadband deployment and concluded that “[i]f ROW access is unfairly denied, delayed, or burdened with unjustified costs, broadband deployment is slowed, and our citizens are deprived of access to vital communications facilities.”⁸ Accordingly, the PCAST report recommended that the Administration seek to facilitate the balance between the interests of governmental entities in protecting citizens and property while expeditiously granting broadband deployers the rights of way and authorizations necessary to provide service to consumers.⁹ President Bush convened an inter-agency Federal Rights-of-Way Working Group, which made recommendations on ways to improve the availability of information on the permitting process, accelerating resolution on the permitting process, simplifying cost recovery, fees, and rental payments, and ensuring compliance by permit seekers.¹⁰ During this time, the Federal Communications Commission (FCC) entered into a Nationwide Programmatic Agreement that streamlined and tailored the

² Ross W. Gorte, *et al.*, “Federal Land Ownership: Overview and Data,” CRS Report R42346 (Feb. 8, 2012) available at <http://fas.org:8080/sgp/crs/misc/R42346.pdf>.

³ See GSA, GSA Properties Overview at <http://www.gsa.gov/portal/content/104501>.

⁴ See, e.g., Comments of PCIA, CTIA, Google, USTelecom, ITTA, National Cable & Telecommunications Association, or Fiber to the Home Council Americas, in response to the Broadband Opportunity Council Notice and Request for Comment, NTIA Docket No. 1540414365-5365-01 (Jun. 12, 2015). All of these separate comments are available at <http://www.ntia.doc.gov/federal-register-notice/2015/broadband-opportunity-council-comments>.

⁵ See Memorandum on Facilitating Access to Federal Property for the Siting of Mobile Services Antennas, 31 Weekly Comp. Pres. Doc. 1424 (Aug. 10, 1995); see also 41 C.F.R. §§ 102-79.70 through 102-79.100.

⁶ See 72 Fed. Reg. 11,881 (2007).

⁷ *Id.*

⁸ See PCAST Report on Building Out Broadband – Findings and Recommendations (Dec. 2002) at 9, at <https://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-02-broadband.pdf>.

⁹ *Id.*

¹⁰ See Federal Rights-of-Way Working Group Report, “Improving Rights-of -Way Management Across Federal Lands: A Roadmap for Greater Broadband Deployment” (Apr. 2004) at http://www.ntia.doc.gov/files/ntia/publications/frowreport_4-23-2004.pdf.

review process required under the National Historic Preservation Act for communications towers.¹¹

President Obama's administration has also recognized the general challenges faced by all major infrastructure builders.¹² In 2011, the President established a Steering Committee on Federal Infrastructure Permitting and Review Process Improvement as well as a permitting dashboard to track applications in real-time.¹³ The Steering Committee, composed of members from twelve different agencies, has attempted to review and streamline permitting processes across multiple agencies and increase interagency cooperation.¹⁴

With regard to broadband deployment specifically, the President issued Executive Order 13616 on "Accelerating Broadband Infrastructure Deployment," establishing the Broadband Deployment on Federal Property Working Group.¹⁵ The Working Group is composed of representatives from fourteen federal agencies and offices with significant land ownership or management responsibilities or expertise relevant to broadband infrastructure deployment on federal lands and buildings. The group's most recent report was issued in 2013.¹⁶ Finally, a presidential memorandum issued this year established the Broadband Opportunity Council (BOC), a group comprised of 25 federal agencies and departments intended to determine how to improve adoption of, investment in, and deployment of broadband services.¹⁷ In September of this year, the BOC released a report detailing several recommendations to promote broadband deployment and expand access to federal assets.¹⁸

¹¹ See *Nationwide Programmatic Agreement Regarding The Section 106 National Historic Preservation Act Review*, Report and Order, 20 FCC Rcd 10732 (2002). See also National Historic Preservation Act of 1966, Pub. L. 89-665, title I, §106, Oct. 15, 1966, now codified at 54 U.S.C. § 306108.

¹² See Memorandum on Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review (Aug. 31, 2011) at <https://www.whitehouse.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more> (directing expedited reviews of high-priority infrastructure projects as well as improvements in accountability, transparency, and efficiency in the permitting process); Memorandum on Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures (May 17, 2013) at <https://www.whitehouse.gov/the-press-office/2013/05/17/presidential-memorandum-modernizing-federal-infrastructure-review-and-pe> (seeking to streamline and eliminate duplications across multiple agencies and institutionalize best practices in permitting processes).

¹³ Exec. Order No. 13,604, 77 Fed. Reg. 18885 (Mar. 22, 2012).

¹⁴ See, e.g., Implementation Plan for the Presidential Memorandum on Modernizing Infrastructure Permitting at <https://www.permits.performance.gov/tools/implementation-plan>.

¹⁵ Exec. Order No. 13,616, 77 Fed. Reg. 36903 (Jun. 14, 2012).

¹⁶ Broadband Deployment on Federal Property Working Group Report on Implementing Executive Order 13616: Progress on Accelerating Broadband Infrastructure Deployment, A Progress Report to the Steering Committee on Federal Infrastructure Permitting and Review Process Improvement (Aug. 2013) at https://www.whitehouse.gov/sites/default/files/microsites/ostp/broadband_eo_implementation.pdf.

¹⁷ See Memorandum on Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training (Mar. 23, 2015) at <https://www.whitehouse.gov/the-press-office/2015/03/23/presidential-memorandum-expanding-broadband-deployment-and-adoption-addr>.

¹⁸ See Broadband Opportunity Council Report and Recommendations Pursuant to the Presidential Memorandum on Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training (Aug. 20, 2015, rel. Sept. 21, 2015) at http://www.ntia.doc.gov/files/ntia/publications/broadband_opportunity_council_report_final.pdf.

Despite the variety of efforts launched by the executive branch to streamline federal permitting processes, these initiatives do not appear to have yet yielded meaningful change. The Subcommittee will consider legislation to bolster the administration's attempts to clarify the process for reviewing broadband infrastructure projects. This legislation would add accountability and clarity to the process of improving the permitting process. Moreover, the legislation can provide additional authority that is beyond the ambit of the executive branch. Accordingly, the Subcommittee will consider the following draft legislation:

A. A Draft Bill to Create an Inventory of Federal Assets and Encourage Agencies to Track Speed of Permitting

This draft bill would require the National Telecommunications and Information Administration (NTIA) to establish and maintain a database of federal assets on which broadband infrastructure can be attached or installed. As a result of earlier executive orders, an effort is already underway to create such a database under the aegis of the Department of Transportation. However, it is unclear if agencies are providing the information necessary for a complete picture of these assets. The draft bill requires all landholding agencies to provide the requisite information and a point of contact for permitting purposes. The draft bill also requires clear identification of properties implicated as historic properties. The draft bill requires timely updates to the data and also requires NTIA to ensure that the data is adequately protected from cybersecurity risks and other dangers. Similarly, the draft bill also provides for discretion to determine whether the data on federal property may be too sensitive to include in the database for reasons of national security and allows for exemptions.

The draft bill also charges the Senior Real Property Officer (SRPO) of each landholding agency with the responsibility of tracking the permit process and assessing whether the agency has fulfilled its obligation to improving the permitting process for broadband deployment. The Federal Real Property Council, which is comprised of all SRPOs, must provide an annual report to Congress, detailing the progress in improving the permitting process for broadband deployment.

B. A Draft Bill to Improve Access to Federal and other Poles

Congress has long recognized that access to poles is critical to network deployment as stringing wires along poles is usually a faster, less expensive method of deployment when compared to burying cable under streets. In adopting section 224 of the Communications Act, Congress balanced the rights of pole owners — generally utilities and incumbent telephone companies — against the rights of telephone, cable, and today, broadband operators seeking to attach wires and antennas.¹⁹ Section 224 grants the FCC the authority regulate the “rates, terms, and conditions of pole attachments” to ensure that they are “just and reasonable.”²⁰

¹⁹ 47 U.S.C. § 224.

²⁰ 47 U.S.C. § 224(b)(1).

Current law exempts poles owned by the federal government, as well as municipally owned and state-owned utilities and rural cooperatives from the statutory rates. This draft bill requires federally owned poles to charge the same FCC-determined rate as investor-owned utilities. The draft bill also applies a nondiscriminatory access requirement across the board to all pole owners. The draft bill also requires states that opt to regulate pole attachments within their own states, certify that the state's regulation ensures nondiscriminatory access to all broadband service providers.

The draft bill also requires all pole owners to provide the FCC with rate data, in order to allow the FCC to report on rate data annually. Pole owners are also required to provide the FCC with pole location data to facilitate an inventory of pole locations. The draft bill also requires the FCC to conduct an inquiry reviewing make-ready costs – the costs it required to rearrange attachments or completely replace a pole in order to accommodate a new attachment. It also clarifies that pole tops, which are a prime location for wireless broadband attachments, are part of the usable space of the pole.

C. H.R. 3805, Broadband Conduit Deployment Act of 2015

This bill requires the Department of Transportation, in conjunction with NTIA and the FCC, to evaluate whether broadband conduit should be installed in any highway construction project using federal funds. If the evaluation indicates that additional broadband capacity would be needed in the next 15 years, the project must include the deployment of broadband conduit. Further, the broadband conduit must be made available by the states to any broadband provider at cost-based rates and the availability of the broadband conduit must be published in the National Broadband Map. This is a step that has long been recommended by the National Broadband Plan and others as a substantial cost-savings effort in deploying broadband.

D. A Draft Bill to Streamline National Historic Preservation Act Section 106 Review and National Environmental Preservation Act Review

This draft bill requires the FCC to work to expand its Nationwide Programmatic Agreement (NPA) to expedite section 106 reviews for wireless broadband tower siting. Section 106 reviews are generally required when a federal agency is involved in authorizing an infrastructure project. The NPA permits federal agencies to eliminate duplicative reviews. For example, if FirstNet were to build towers for its network, section 106 reviews could be required from FirstNet, DHS, FBI, as well as the FCC. The NPA allows FirstNet, DHS, and the FBI to agree to the FCC's section 106 review. This draft bill would require Department of Interior, Department of Defense, and the Forest Service to determine whether they could also eliminate their reviews in favor of the FCC's section 106 evaluation.

Additionally, this draft bill requires that the FCC begin the process of developing an NPA for wireline projects. If an FCC section 106 process for wireline is adopted, the draft bill requires Department of Homeland Security, Department of Interior, Department of Defense, and the Forest Service to evaluate whether they can eliminate their section 106 reviews in favor of the FCC's.

Also, this draft bill requires similar steps to be taken on the reviews required of agencies by the National Environmental Preservation Act. It first requires the Council on Environmental Quality to consider whether any of its regulations for evaluating broadband undertakings by federal agencies could be streamlined or consolidated. The draft bill then requires federal agencies to determine whether they can further consolidate their own reviews in order to eliminate duplication of effort and delays in deployment.

E. A Draft Bill to Streamline the Permitting Processes of the Department of the Interior, the Forest Service, and the Department of Defense

This draft bill requires each of these agencies to determine by rulemaking whether they can streamline and consolidate permitting requirements among their own bureaus and offices. The rulemaking must adopt a five to twenty year minimum lease term to allow broadband providers to recoup their investments in the lease with an automatic right to renewal unless the authorization has been revoked for good cause; a procedure for tracking applications from broadband providers; streamlined renewal processes; and appropriate review periods for processing applications for new deployments and deployments on previously disturbed rights-of-way. The agencies must also adopt cost-based fees for rights of way, easements, or other authorizations. Additionally, the agencies must consider whether they can run their reviews in parallel and whether they can eliminate any overlapping requirements between bureaus and offices. Once the rulemaking has been completed, the draft bill requires the agencies to communicate and enforce the new processing guidelines to all field offices, or bases, in the case of the Department of Defense.

Additionally, the draft bill also requires that the U.S. Fish and Wildlife Service consider the impact of its proposed Programmatic Environmental Impact Statement on wireless tower siting and directs the agency to clarify its mitigation policies.

F. A Draft Bill to Require Agencies to Use the Master Forms, Contracts, and Fee Schedules Established in Section 6409 of the Middle Class Tax Relief Act for Wireless Broadband Infrastructure

Section 6409(c) of the Middle Class Tax Relief and Job Creation Act of 2012 directed GSA to develop master forms, contracts, and section 6409 fee schedules. By standardizing the placement of wireless antennas, among other considerations, these master contracts would lower real estate costs and streamline local zoning and permitting for network infrastructure. Despite a deadline in 2012 deadline, GSA has only recently completed its task, but it lacks the authority to ensure that agencies employ the template documents. This draft bill requires all landholding agencies to use these templates when leasing space for wireless broadband attachments.

IV. STAFF CONTACTS

If you have any questions regarding this hearing, please contact David Redl or Grace Koh of the Committee staff at (202) 225-2927.