



MEMORANDUM

4/17/2023

To: Members, Subcommittee on Communications and Technology
From: Majority Staff
Re: Communications and Technology Subcommittee Hearing

I. INTRODUCTION

On Wednesday, April 19, 2023, at 10:30 a.m., the Subcommittee on Communications and Technology will hold a hearing in 2322 Rayburn House Office Building titled “Breaking Barriers: Streamlining Permitting to Expedite Broadband Deployment.” The following witnesses are expected to testify:

II. WITNESSES

- Mr. Michael Romano, Executive Vice President, NTCA—The Rural Broadband Association
- Mr. Michael Saperstein, Senior Vice President of Government Affairs and Chief Strategy Officer, Wireless Infrastructure Association
- The Honorable Michael O’Rielly, President, MPORielly Consulting, LLC
- Mr. Louis Finkel, Senior Vice President of Government Relations, National Rural Electric Cooperative Association
- Mr. Ernesto Falcon, Senior Legislative Counsel, Electronic Frontier Foundation

III. BACKGROUND

Before a broadband provider can begin construction for new or modified broadband infrastructure, it must secure zoning and construction permits, pay application fees, and conduct environmental and historic preservation reviews. This process often requires cooperation among federal agencies, state and local governments, and many times, the owners of utility poles. But the unpredictable timelines for permit approvals and high fees for processing applications have made it more expensive and burdensome to deploy broadband infrastructure.¹ Streamlining these regulations is essential to encouraging and expediting broadband infrastructure deployment throughout the United States.

¹ See, e.g., Streamlining Federal Siting Working Group Final Report, FCC Broadband Deployment Advisory Committee (Jan. 23-24, 2018), <https://www.fcc.gov/sites/default/files/bdac-federalsiting-01232018.pdf> (discussing Federal regulatory barriers to broadband deployment); Report Of The Removal of State and Local Regulatory Barriers Working Group, FCC Broadband Deployment Advisory Committee (Jan. 10, 2018), <https://www.fcc.gov/sites/default/files/bdac-regulatorybarriers-01232018.pdf> (discussing State and local barriers).

A. Federal Barriers

The federal government manages a significant amount of land through the Department of the Interior and the Department of Agriculture, in addition to federal buildings across the country. As a result, these agencies are responsible for reviewing and approving applications to deploy broadband on federal property. Federal agencies, however, often take significant time to review these applications, which results in project delays.² To address this, Congress directed federal agencies to develop one or more master contracts to govern the placement of broadband infrastructure on property owned by the federal government, use a common application form, and established a 270-day shot clock for federal agencies to process applications to place communications facilities on federal property.³ Nonetheless, reviews often last beyond 270 days, and there is currently no penalty when federal agencies miss this deadline.

Despite Congressional direction and interagency recommendations for improvement, many challenges remain unaddressed. For example, not all federal agencies use an online application portal for processing these broadband installation applications, which may result in uncertainty or unnecessary delay.⁴

Other federal laws complicate broadband infrastructure deployment. The National Historic Preservation Act (NHPA)⁵ and the National Environmental Policy Act of 1969 (NEPA)⁶ have reportedly created obstacles to deployment projects due to permitting application costs and lengthy reviews.⁷ The Federal Communications Commission (FCC) has tried streamlining these processes. In March 2018, the FCC adopted a Report and Order exempting small-cell construction from historic-preservation review under NHPA and NEPA,⁸ but the U.S. Court of Appeals for the District of Columbia Circuit vacated that action in August 2019,⁹ which further emphasizes the need for Congressional action.

The National Telecommunications and Information Administration (NTIA) plays a leading role in the American Broadband Initiative (ABI), a multi-agency effort established under the Trump administration to identify and remove barriers to broadband access and leverage

² See [Linda Hardesty](https://www.fiercetelecom.com/broadband/whoa-fiber-permitting-process-could-crush-digital-divide-dreams), Whoa – The Fiber Permitting Process Could Crush Digital Divide Dreams, Fierce Telecom (Dec. 9, 2021), <https://www.fiercetelecom.com/broadband/whoa-fiber-permitting-process-could-crush-digital-divide-dreams> (describing federal approvals needed to deploy broadband).

³ 47 U.S.C. § 1455(b)(3)(A).

⁴ See NTIA, Final Report On Status of Implementation of MOBILE NOW Act Section 606(c) Requirements (2020) at 4, https://ntia.gov/sites/default/files/publications/mobile_now_act_section_606c_report_2022.pdf.

⁵ 54 U.S.C. § 300101 *et seq.*

⁶ 42 U.S.C. § 4321 *et seq.*

⁷ See, e.g., Jordan Crenshaw, Update NEPA to Help Drive America's Digital Potential, U.S. Chamber of Commerce (Feb. 25, 2020), <https://www.uschamber.com/series/above-the-fold/update-nepa-help-drive-america-s-digital-potential> (arguing that updating the NEPA permitting process could help unlock investment in broadband).

⁸ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Second Report, Second Report and Order, 33 FCC Rcd 3102 (2018).

⁹ *United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, 933 F.3d 728 (D.C. Cir. 2019) (vacating an FCC order eliminating NEPA and NHPA requirements as arbitrary and capricious for failing to justify that public interest did not require review of small cell deployments).

public assets and resources to expand broadband.¹⁰ ABI made a number of recommendations and proposals to streamline the federal agency process for obtaining access to federal real property, rights-of-way, or land managed by federal agencies, including:

- Developing a common application form for broadband permitting;
- Proposing rules to streamline internal agency procedures for permitting on federal lands;
- Providing tools to help understand federal permitting processes;
- Proposing rules to streamline federal environmental reviews; and
- Identifying opportunities to harmonize fees.¹¹

B. State and Local Government Obstacles

State and local governments play a key role in facilitating or hindering broadband infrastructure deployment. They regulate land use, review siting applications, and issue relevant permits. State and local governments' review processes can be inconsistent with each other and costly, which can delay or even prohibit broadband deployment. For example, some state and local governments charge excessive fees for applications or to access the public rights-of-way for construction and impose no deadlines to review applications.¹²

Federal law preempts state and local authority to regulate communications facilities. Under Section 253 of the Communications Act of 1934, “no 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.”¹³ Section 253 requires the Commission to preempt the enforcement of any such law.¹⁴ Similarly, Section 332(c)(7) of the Communications Act states that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”¹⁵

The FCC has used its authority to address state and local barriers to broadband infrastructure deployment. In 2018, the FCC adopted a Declaratory Ruling and Report and Order to streamline state and local government review of wireless small-cell siting applications by limiting application fees state and local governments could charge an applicant, established new shot clocks for small wireless facilities, codified existing shot clocks for non-small cell wireless facility deployments, and adopted a new remedy for failing to act within the shot-clock.¹⁶ The

¹⁰ NTIA, America Broadband Initiative, <https://ntia.gov/category/american-broadband-initiative#:~:text=NTIA%20plays%20a%20leadership%20role,efficiency%20in%20government%20broadband%20programs..>

¹¹ NTIA, American Broadband Initiative Progress Report (2020),

https://ntia.gov/sites/default/files/publications/abi_progress_report_june2020_0.pdf.

¹² *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (2018).

¹³ 47 U.S.C. § 253(a).

¹⁴ *Id.* § 253(d).

¹⁵ 47 U.S.C. § 332(c)(7)(B)(i).

¹⁶ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (2018).

United States U.S. Court of Appeals for the Ninth Circuit upheld this action after a challenge from a number of local governments.¹⁷

In 2018, the FCC also issued a Declaratory Ruling declaring that state and local moratoria on the deployment of telecommunications services or facilities prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.¹⁸ Thus, state and local governments cannot ban the deployment of telecommunications services or facilities or enact de facto bans, such as blanket refusals to process applications, refusals to issue permits for a category of structures, or frequent and lengthy delays.

In 2020, the FCC adopted a Declaratory Ruling on state and local government review of modifications to existing wireless infrastructure to facilitate 5G deployment.¹⁹ The item clarified when the 60-day shot clock for local review begins, how certain aspects of proposed modifications affect eligibility for streamlined review, and when FCC applicants need to submit environmental assessments based only on potential impacts to historic properties.²⁰ A number of municipalities are challenging this item in the U.S. Court of Appeals for the Ninth Circuit.²¹

Last May, the National Telecommunications and Information Administration released the Notice of Funding Opportunity (NOFO) for the Broadband Deployment, Equity, Access, and Deployment (BEAD) program. In its NOFO, NTIA encourages states and territories, and their subdivisions, to “remove time and cost barriers associated with BEAD projects, including by expediting permitting timelines and waiving fees where applicable, where doing so does not undermine other critical policy goals.”²²

C. Pole Attachments

Deploying broadband infrastructure—particularly fiber infrastructure—sometimes requires access to utility poles. Broadband providers attach their fiber, antennas, and other communications equipment to poles as they build their networks. The regulation of rates and terms and conditions for pole attachments differs depending on which entity owns a given pole. The FCC regulates attachments to poles owned by investor-owned utilities and private companies in States that do not regulate pole rates and terms and conditions to ensure they are “just and reasonable.”²³ Poles owned by telephone and electric cooperatives, municipalities, and

¹⁷ *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

¹⁸ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705 (2018); 47 U.S.C. § 253.

¹⁹ *Implementation of State and Local Governments’ Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, Declaratory Ruling and Notice of Proposed Rulemaking, WT Docket No. 19-250, FCC 20-75 (rel. Jun. 10, 2020), <https://docs.fcc.gov/public/attachments/FCC-20-75A1.pdf>.

²⁰ *Id.*

²¹ *League of Calif. Cities, et al. v. FCC, et al.*, No. 20-71765 (9th Cir., filed June 22, 2020).

²² “Notice of Funding Opportunity, Broadband, Equity, Access, and Deployment Program,” National Telecommunications and Information Administration at 32 (rel. May 13, 2022).

²³ *Id.* § 224(b)(1).

public utilities, however, are exempt from these regulations,²⁴ as are poles in twenty-three states and the District of Columbia that have certified that their regulations meet certain federal standards.²⁵

Costs, zoning, and other local restrictions limit the construction of new poles. In some areas, cooperatives or municipalities own the only available poles. As a result, attachers face large discrepancies in pole attachment rates. One study found that cooperatives and municipalities charge pole attachment rates that are 2-3 times the rates charged by investor-owned utilities,²⁶ making it more costly to deploy in those areas. And in many areas, cooperatives and municipalities now offer broadband of their own, making them direct competitors with their attachers, which may create an incentive to charge higher rates.²⁷ Cooperatives, on the other hand, argue that factors such as low population density and higher costs associated with rural areas are the cause of higher rates.²⁸

IV. Related Legislation

On Wednesday, the Subcommittee on Communications and Technology will review the following legislation.

1. H.R. ____, the Winning the International Race for Economic Leadership and Expanding Service to Support Leadership (WIRELESS Leadership) Act

The discussion draft is led by Subcommittee on Communications and Technology Chair Latta (R-OH). The discussion draft would streamline permitting processes for wireless providers by preserving State and local zoning authority subject to reasonable limitations, like shot clocks and cost-based fees, to ensure providers receive an answer on their applications in a timely manner.

2. H.R. ____, Barriers and Regulatory Obstacles Avoids Deployment of Broadband Access and Needs Deregulatory Leadership (BROADBAND Leadership) Act

The discussion draft is led by Rep. Griffith. This discussion draft would streamline permitting processes for telecommunications service providers by preserving State and local zoning authority subject to reasonable limitations, like shot clocks and cost-based fees, to ensure providers receive an answer on their applications in a timely manner.

3. H.R. ____, Cable Access for Broadband and Local Economic Leadership (CABLE Leadership) Act

²⁴ *Id.* § 224(a)(1) (excluding “any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State” from the definition of “utility.”).

²⁵ *Id.* § 224(c).

²⁶ Michelle Connolly, Ph.D, The Economic Impact of Section 224 Exemption of Municipal and Cooperative Poles (July 12, 2019), <https://ssrn.com/abstract=4267326>.

²⁷ *Id.*

²⁸ Brian O’Hara, Rural Electric Cooperatives: Pole Attachment Policies and Issues, NRECA (June 2019), https://www.cooperative.com/programs-services/government-relations/regulatory-issues/Documents/2019.06.05%20NRECA%20Pole%20Attachment%20White%20Paper_FINAL.pdf

The discussion draft is led by Rep. Balderson. It would place shot clocks on a cable franchising authority to act on a request for a new franchise to speed up deployment.

4. **H.R. ____, Connecting and Building Lines for Expedited Expansion (CABLE Expansion) Act**

The discussion draft is led by Rep. Lesko. It would streamline permitting processes for cable operators by preserving franchising authority subject to reasonable limitations, like shot clocks, to ensure cable operators receive an answer on applications to upgrade or deploy new facilities in a timely manner.

5. **H.R. ____, Consumer Access to Broadband for Local Economies and Competition (CABLE Competition) Act**

The discussion draft is led by Rep. Burgess. It would streamline the transfer of a franchise from a franchise authority to a cable operator.

6. **H.R. ____, Cable Transparency**

The discussion draft is led by Rep. Weber. This draft would clarify and make more transparent the terms for a cable franchise.

7. **H.R. ____, Broadband Expansion And Deployment Fee Equity and Efficiency (BEAD FEES) Act**

The discussion draft is led by Rep. Allen. This discussion draft would require states accepting BEAD money to ensure that application fees charged by state and local governments are transparent, competitively neutral, and cost-based.

8. **H.R. ____, Granting Remaining Applications Not Treated Efficiently or Delayed (GRANTED)**

The discussion draft is led by Rep. Obernolte. This draft would create a deemed grant remedy for applications to place infrastructure on federal lands that remain pending after 270 days.

9. **H.R. ____, 5G Using Previously Granted Rulings that Accelerate Deployment Everywhere (5G UPGRADE) Act**

The discussion draft is led by Rep. Harshbarger. It would speed up the process to modify wireless facilities on existing infrastructure by codifying shot clocks to review and approve applications.

10. **H.R. ____, Streamlining Permitting to Enable Efficient Deployment for Broadband Infrastructure (SPEED for Broadband Infrastructure) Act**

The discussion draft is led by Rep. Pence. It would reduce federal red tape by exempting broadband facilities from burdensome environmental and historic preservation reviews on federal property where a previous communications facility has already been approved.

11. H.R. ____, Wireless Broadband Competition and Efficient Deployment

The discussion draft is led by Rep. Johnson. It would remove the requirement to prepare an environmental or historic preservation review in order to add or upgrade wireless facilities on existing infrastructure.

12. H.R. ____, Broadband Competition and Efficient Deployment

The discussion draft is led by Rep. Joyce. It would remove the requirement to prepare an environmental or historic preservation review in order to add or upgrade wireline facilities.

13. H.R. ____, Wireless Resiliency and Flexible Investment

The discussion draft is led by Rep. Bucshon. This draft would make it easier to improve the resiliency of communications networks by expediting the approval process to modify existing wireless facilities to provide backup power or more reliable connection capabilities.

14. H.R. ____, Broadband Resiliency and Flexible Investment

The discussion draft is led by Rep. Crenshaw. It would expedite the approval process for modifications to wireline facilities that would not substantially expand their existing footprint, including those that would improve public safety and resiliency.

15. H.R. ____, Proportional Reviews for Broadband Deployment

The discussion draft is led by Rep. Carter. This discussion draft would speed up the process to modify an existing wireless tower or base station through the addition, removal, or replacement of transmission equipment.

16. H.R. ____, Reducing Antiquated Permitting for Infrastructure Deployment (RAPID Deployment) Act

The discussion draft is led by Rep. Hudson. It would provide clarity and certainty for providers to comply with historical regulations and speed up the deployment of wireless infrastructure.

17. H.R. ____, Coastal Broadband Deployment

The discussion draft is led by Rep. Bilirakis. The draft would remove the requirement to prepare an environmental or historic preservation review for the deployment of broadband projects entirely within a floodplain.

18. H.R. ____, Brownfields Broadband Deployment

The discussion draft is led by Rep. Walberg. It would remove the requirement to prepare an environmental or historic preservation review for the deployment of a broadband project entirely within a brownfields site, which is previously disturbed land.

19. H.R. ____, Timely Replacement Under Secure and Trusted for Early and Dependable Broadband Networks (TRUSTED Broadband) Act

The discussion draft is led by Rep. Guthrie. This draft would remove the requirement to prepare an environmental or historic preservation review prior to removing and replacing network equipment that puts our national security at risk.

20. H.R. ____, Connecting Communities Post Disaster

The discussion draft is led by Rep. Dunn. The draft would accelerate replacing and improving communications facilities in Presidentially-declared disaster areas.

21. H.R. ____, Wildfire Wireless Resiliency

The discussion draft is led by Committee on Energy and Commerce Chair Rodgers. This draft would speed up the deployment of projects to replace or improve communications facilities damaged after a wildfire.

22. H.R. ____, Reducing Barriers for Broadband on Federal Lands Act

This discussion draft is led by Rep. Fulcher. It would remove the requirement to prepare an environmental or historic preservation review for the deployment of broadband projects on previously disturbed federal lands.

23. H.R. ____, Standard Fees to Expedite Evaluation and Streamlining (Standard FEES) Act

This discussion draft is led by Rep. Palmer. It would establish a common fee for processing applications to deploy communications facilities on federal property.

24. H.R. ____, Enhancing Administrative Reviews for Broadband Deployment

This discussion draft is led by Rep. Armstrong. It would require a study on administrative barriers faced by requests to deploy broadband infrastructure on federal land.

25. H.R. ____, Expediting Federal Broadband Deployment

This discussion draft is led by Rep. Duncan. The draft would direct NTIA to lead an interagency strike force to help prioritize reviews for requests to deploy broadband on federal land.

26. H.R. ___, Deploying Infrastructure with Greater Internet Transactions And Legacy Applications (DIGITAL Applications) Act

This discussion draft is led by Rep. Cammack. The draft would establish an online portal to accept, process, and dispose of the common form application to deploy a communications facility on federal property.

27. H.R. ___, Facilitating the Deployment of Infrastructure with Greater Internet Transactions And Legacy Applications (Facilitation DIGITAL Applications) Act

This discussion draft is led by Rep. Miller-Meeks. It would require the NTIA to update Congress on whether the Departments of Interior and Agriculture have established an online portal for the acceptance, processing, and disposal of the common form application to deploy a communications facility on federal property.

28. H.R. ___, Federal Broadband Deployment Tracking

This discussion draft is led by Rep. Pfluger. The draft would require NTIA to submit a plan to Congress on tracking the acceptance, processing, and disposal of requests for communications use authorizations on federal property.

29. H.R. ___, Rural Broadband Permitting Efficiency

This discussion draft is led by Rep. Curits. It would allow federal departments to delegate federal environmental compliance for broadband projects to states and Indian Tribes.

30. H.R. ___, Fair Access to Internet Ready Poles (FAIR Poles) Act

This discussion draft would remove the municipal/cooperative exception to pole attachment regulation from entities that have received federal broadband support.

31. H.R. 1241, Broadband Incentives for Communities Act

This bill is led by Rep. Fletcher. It would create a grant program at NTIA to assist local governments and Indian Tribes improve the efficiency of their broadband permitting reviews.

32. H.R. 2552, Community Broadband Act

This bill is led by Rep. Eshoo. It would preempt state laws that prohibit municipal broadband networks.

V. KEY QUESTIONS

- What challenges exist at the federal, state, and local levels that delay or burden broadband deployment?
- How can Congress help expedite or streamline the process for broadband deployment?
- Is attaching telecommunications equipment on municipally or cooperatively-owned poles more difficult or expensive than on other poles?

VI. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Kate O'Connor or John Lin of the Committee Staff at (202) 225-3641.