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Supreme Court No. 97169-2

Court of Appeals No. 77310-1-I

SUPREME COURT
OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a
Washington municipal corporation,

Respondent,

v.

COMCAST OF WASHINGTON IV, INC., a Washington corporation;
CENTURYTEL OF WASHINGTON, INC., a Washington corporation;
and FALCON COMMUNITY VENTURES I, L.P., a California limited
partnership d/b/a CHARTER COMMUNICATIONS,

Appellants.

**BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF
WASHINGTON BUSINESS IN SUPPORT OF PETITION FOR
REVIEW**

Robert A. Battles
WSBA No. 22163
ASSOCIATION OF WASHINGTON BUSINESS
1414 Cherry Street SE
Olympia, WA 98507
Telephone: (360) 943-1600

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I. INTRODUCTION

The Association of Washington Business (“AWB”) approaches this Court concerned about the effects of the Court of Appeals’ published opinion on the business community of Washington. First, the opinion arrests broadband deployment. The opinion allows Public Utility Districts (PUDs) in Washington to charge pole attachment rates far in excess of those of investor-owned utilities charge for pole attachments, with next to no judicial review of the PUD’s costs input into the rates. This will lead to a dramatic increase in the cost of expanding broadband infrastructure, discourage private investment, and deter existing broadband providers from extending their networks, particularly in rural areas. This is especially problematic because the Washington legislature has endorsed the conclusion of the Federal Communications Commission (“FCC”) that broadband expansion is the “great infrastructure challenge of the early 21st century.”

AWB’s second concern is the Court of Appeals’ re-write of Washington administrative law. The opinion lacks meaningful review of the PUD’s discretionary action under the “arbitrary and capricious” standard. This upends longstanding standards for the review for arbitrary and capricious conduct, applicable to the actions of any Washington

administrative agency. For these reasons, AWB asks the Court to review the Court of Appeals' decision and reverse it.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Association of Washington Business ("AWB") is Washington State's principal representative of the state's business community. AWB is the state's oldest and largest general business membership federation, representing the interests of approximately 7,000 Washington companies who, in turn, employ over 700,000 employees, approximately one-quarter of the state's workforce. AWB serves as both the state's Chamber of Commerce and the manufacturing and technology association. AWB members are located throughout Washington, represent a broad array of industries, and range from sole proprietors to large, Washington-based corporations that do business across the country and around the world.

AWB members have a vested interest in the outcome of this matter. AWB members include broadband and telecommunications providers -- and, more critically, businesses that need the expansion of broadband that will be dramatically impeded by the Court of Appeals' decision. Further, AWB members rely on the consistent application of administrative law and judicial review of administrative action.

III. ISSUES OF CONCERN TO *AMICUS CURIAE*

This brief addresses the substantive impact of the Court of

Appeals' decision on Washington businesses. First, the opinion hinders broadband deployment. As will be discussed below, in a report specifically approved by the Washington legislature, the FCC determined that excessive pole attachment rates seriously impede broadband deployment, especially in rural areas. The Court of Appeals' decision enables PUDs in Washington to charge excessive pole attachment rates with little or no threat of judicial review of the costs that the PUDs input into the rates. The effect will be to chill private investment and extension of broadband in Washington at a time when it is critically needed.

The administrative law issue is also troubling and will affect a broader range of Washington businesses¹. The decision virtually eliminates any meaningful review of discretionary action under the "arbitrary and capricious" standard. This includes expressly ratifying decisions that are in the PUD's economic interest but are contrary to legislative intent and undisputed facts. This has never been the law in Washington. Instead, courts have consistently (and properly) held that discretion is not limitless and administrative agencies cannot act unreasonably. The effects of the case will be widespread, as the standards

¹ AWB is aware that CenturyLink's co-defendants chose not to seek review by this Court. Respectfully, the decision of two businesses exhausted by more than a decade of litigation does not change AWB's assessment of the danger posed by the Court of Appeals' decision to the broader business community.

for determining whether actions are “arbitrary and capricious” are the same for PUDs, other municipal corporations, and administrative agencies. AWB members and citizens in the general public must be able to challenge agency action as arbitrary and capricious in a correspondingly wide array of settings. If this decision stands, doing so will become virtually impossible.

IV. STATEMENT OF THE CASE

AWB adopts and joins in the Statement of the Case in the Petition for Review filed by CenturyLink of Washington, Inc., formerly known as CenturyTel of Washington, Inc. in this matter.

V. ARGUMENT

The Court of Appeals erred in at least two ways.

A. The Court of Appeals’ Opinion Will Obstruct Broadband Expansion In Washington State.

The FCC studied the need for development of broadband internet access in the United States in the National Broadband Plan² (the “Plan”); the Washington legislature specifically noted its approval of the plan. 2019 Laws ch. 365, §1(4). The FCC concluded that Broadband internet “is a modern necessity of life, [and] ought to be found in every village, in

² Federal Communications Commission, National Broadband Plan (“the Plan”) (2010), available at <https://www.fcc.gov/general/national-broadband-plan>.

every home and on every farm in every part of the United States.”

Appendix A at 28 (hereinafter “App.”). The FCC states that it will be critical to creating a “high-performance America”:

An America of universal opportunity and unceasing innovation, an America that can continue to lead the global economy, an America with world-leading, broadband-enabled health care, education, energy, job training, civic engagement, government performance and public safety.

App. 14. Fueled primarily by private sector investment and innovation, the American broadband ecosystem has evolved rapidly, but the FCC estimated that as of 2010, approximately 100 million Americans still did not have broadband at home. App. 7.

To address this issue, Congress directed the FCC to develop a plan to ensure every American has “access to broadband capability.” App. 6. Congress required that the plan include “a detailed strategy for achieving affordability and maximizing use of broadband” in America. App. 7. The FCC held countless public workshops and hearings, digested tens of thousands of public comments and *ex parte* filings, and collaborated with other government agencies and Congress to create and release the Plan. *Id.* The Plan is “a call to action for governments, businesses and non-profits” and proposes well-researched and “targeted, challenging actions” designed to drastically improve access to broadband internet for all Americans App.

28. For the Court’s convenience, we have attached relevant portions of the Plan as **Appendix A**.

A critical action area identified by the FCC is the “significant” costs broadband providers incur when they attach their cables to “existing infrastructure” like “poles, conduits, ducts, and rights-of-way” App. 18. “[C]ollectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment.” *Id.* Because “[s]ecuring rights to this infrastructure is often a difficult and time-consuming process that discourages private investment,” the Plan urges state and local governing bodies “[t]o support the goal of broadband deployment,” by setting pole attachment rates as low as possible. App. 18–19.

The Court of Appeals’ decision in this case allows PUDs to completely obstruct the FCC’s plan to support broadband deployment. PUDs will now be able to charge pole attachment rates that are double or more what investor-owned utilities charge for pole attachments, with little or no meaningful judicial review of the cost inputs that the PUD includes in the rates. This dramatically increases the cost of stringing cables, especially in rural areas, where “there often are more poles per mile than households.” App. 19. An increased cost to string cables will discourage

private investment and deter existing broadband providers from extending their networks. All this at a time when the FCC urges state and local governments to *reduce* the costs incurred by private industry when attaching to poles to deploy broadband.

For this reason, AWB urges the Court to review and reverse the Court of Appeals' opinion.

B. The Court of Appeals' Decision Lacks The Meaningful Judicial Review of Discretionary Action That The Law Requires.

AWB is concerned with the Court of Appeals' utter lack of review of the Public Utility District No. 2 Of Pacific County ("the District")'s inputs into the rates that it charges pole attachers. The Court of Appeals' radical decision, upholding the District's actions contrary to fact and legislative direction, threatens to upend generally applicable administrative law.

Under Washington law, "arbitrary and capricious" refers to "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." *Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 858-59, 576 P.2d 888 (1978). The "arbitrary and capricious" standard of review is not just applicable to the actions of municipal utilities such as PUDs; rather, it is a key component of the

review exercised by Washington courts over the actions of all administrative agencies. RCW 34.05.570(2)(c), (3)(i), (4)(c)(iii). This Court regularly exercises discretion over administrative actions under the “arbitrary and capricious” standard. *See, e.g., Rios v. Wash. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 508, 39 P.3d 961 (2002).

In this case, the Court of Appeals ignored clear precedent and applied an unduly deferential review of the challenged District actions. For example, when the court affirmed the District’s classification of “safety space” as “unusable space” (which increases the amount of unusable space on a pole, driving up rates), rather than “usable space,” the Court did so in the face of contrary, admitted fact that the PUD itself *uses* the “safety space.” This, *by definition*, is arbitrary and capricious conduct. *See Abbenhaus*, 89 Wn.2d at 858-59.

Moreover, when the Court of Appeals permitted the District to include taxes on its electrical operations as an input, it essentially reasoned that because the taxes are a component of the District's utility pole system, and attachers “would have nowhere to attach their equipment without that system,” it is appropriate to require them to pay a share. This logic is simply wrong: it would mean that any cost is fair game, because attachers would have nowhere to attach without the District’s poles. Further, it is

undisputed that the taxes are not “attributable to” pole attachments, which is directly contrary to the statute. *See* RCW 54.04.045(3)(a). The District therefore *cannot* charge a share of the taxes to CenturyLink without exceeding its statutory authority. *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 695, 743 P.2d 793 (1987) (a municipal utility exceeds its authority when it acts contrary to express statutory limitations). The court’s uncritical acceptance of the District’s input is the antithesis to a proper application of the arbitrary and capricious standard of review.

The Court of Appeals also improperly allowed the District to include a return on equity as an input in the pole attachment rate charged to attachers. RCW 54.04.045(3)(a) expressly *excludes* any allowance for “just compensation.” If RCW 54.04.045(3)(a) does not authorize the District to recover “just compensation” by including a return-on-investment component in its pole attachment cost, the District has no discretion to act contrary to its statutory authority. It was error for the Court of Appeals to fail to reject this input as arbitrary and capricious.

Under Washington law, a court must review challenged municipal action to determine whether the action was arbitrary and capricious, no matter that the standard is deferential or that the municipality may be trying to achieve a legitimate end. In the instant case, the Court of Appeals

applied an unduly deferential review of the challenged District actions. AWB members regularly challenge administrative agency action under the “arbitrary and capricious” standard of review in Washington courts. AWB therefore is very concerned that the Court of Appeals’ unreasoned decision upholding the District’s actions contrary to fact and legislative direction upends administrative law will negatively affect its members in countless ways.

VI. CONCLUSION

For the reasons stated above, AWB urges this Court to refrain from creating a new standard for “arbitrary and capricious” that will discourage the expansion of broadband in Washington while also harming every Washington citizen who might look to the courts for protection from “arbitrary and capricious” action by an administrative agency. AWB urges the Court to accept CenturyLink’s Petition for Review and reverse the Court of Appeals.

Dated: July 3, 2019.

THE ASSOCIATION OF WASHINGTON
BUSINESS

By  _____

Robert A. Battles WSBA No. 22163

General Counsel

The Association of Washington Business

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CONNECTING
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PREFACE

The staff of the Federal Communications Commission (FCC) created the National Broadband Plan. To an extraordinary extent, however, the author of this plan is America itself.

The FCC started the process of creating this plan with a Notice of Inquiry in April 2009. Thirty-six public workshops held at the FCC and streamed online, which drew more than 10,000 in-person or online attendees, provided the framework for the ideas contained within the plan. These ideas were then refined based on replies to 31 public notices, which generated some 23,000 comments totaling about 74,000 pages from more than 700 parties. The FCC also received about 1,100 *ex parte* filings totaling some 13,000 pages and nine public hearings were held throughout the country to further clarify the issues addressed in the plan.

The FCC also engaged in significant collaboration and conversations with other government agencies and Congress, since the scope of the plan included many issues outside of the FCC's traditional expertise. Many people from across government contributed expertise and advice along the way, for which the FCC staff is eternally grateful.

The Internet also provided new ways to involve the public. Through an innovative Web presence at www.broadband.gov, the FCC posted more than 130 blog entries and received nearly 1,500 comments in return. The FCC's Twitter feed now has more than 330,000 followers, making it the third most popular government Twitter feed after the White House and the Centers for Disease Control.

The FCC staff digested this extensive record and worked long hours analyzing and debating the record. Every comment cannot be referenced in the plan, but they were all read, considered and valued.

Public comment on the plan does not end here. The record will guide the path forward through the rulemaking process at the FCC, in Congress and across the Executive Branch, as all consider how best to implement the plan's recommendations. The public will continue to have opportunities to provide further input all along this path.

This is America's plan, written by and for Americans. It's now time to act and invest in our nation's future by bringing the power and promise of broadband to us all.

THE OMNIBUS BROADBAND INITIATIVE (OBI)

EXECUTIVE SUMMARY

Broadband is the great infrastructure challenge of the early 21st century.

Like electricity a century ago, broadband is a foundation for economic growth, job creation, global competitiveness and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge.

Fueled primarily by private sector investment and innovation, the American broadband ecosystem has evolved rapidly. The number of Americans who have broadband at home has grown from eight million in 2000 to nearly 200 million last year. Increasingly capable fixed and mobile networks allow Americans to access a growing number of valuable applications through innovative devices.

But broadband in America is not all it needs to be. Approximately 100 million Americans do not have broadband at home. Broadband-enabled health information technology (IT) can improve care and lower costs by hundreds of billions of dollars in the coming decades, yet the United States is behind many advanced countries in the adoption of such technology. Broadband can provide teachers with tools that allow students to learn the same course material in half the time, but there is a dearth of easily accessible digital educational content required for such opportunities. A broadband-enabled Smart Grid could increase energy independence and efficiency, but much of the data required to capture these benefits are inaccessible to consumers, businesses and entrepreneurs. And nearly a decade after 9/11, our first responders still lack a nationwide public safety mobile broadband communications network, even though such a network could improve emergency response and homeland security.

Fulfilling the Congressional Mandate

In early 2009, Congress directed the Federal Communications Commission (FCC) to develop a National Broadband Plan to ensure every American has “access to broadband capability.” Congress also required that this plan include a detailed strategy for achieving affordability and maximizing use of broadband to advance “consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.”

Broadband networks only create value to consumers and businesses when they are used in conjunction with broadband-capable devices to deliver useful applications and content. To fulfill Congress’s mandate, the plan seeks to ensure that the entire broadband ecosystem—networks, devices, content and applications—is healthy. It makes recommendations to the FCC, the Executive Branch, Congress and state and local governments.

The Plan

Government can influence the broadband ecosystem in four ways:

1. Design policies to ensure robust competition and, as a result maximize consumer welfare, innovation and investment.
2. Ensure efficient allocation and management of assets government controls or influences, such as spectrum, poles, and rights-of-way, to encourage network upgrades and competitive entry.
3. Reform current universal service mechanisms to support deployment of broadband and voice in high-cost areas; and ensure that low-income Americans can afford broadband; and in addition, support efforts to boost adoption and utilization.
4. Reform laws, policies, standards and incentives to maximize the benefits of broadband in sectors government influences significantly, such as public education, health care and government operations.

1. Establishing competition policies. Policymakers, including the FCC, have a broad set of tools to protect and encourage competition in the markets that make up the broadband ecosystem: network services, devices, applications and content. The plan contains multiple recommendations that will foster competition across the ecosystem. They include the following:

- **Collect, analyze, benchmark and publish detailed, market-by-market information on broadband pricing and competition**, which will likely have direct impact on competitive behavior (e.g., through benchmarking of pricing across geographic markets). This will also enable the FCC and other agencies to apply appropriate remedies when competition is lacking in specific geographies or market segments.
- **Develop disclosure requirements for broadband service providers** to ensure consumers have the pricing and performance information they need to choose the best broadband

offers in the market. Increased transparency will incent service providers to compete for customers on the basis of actual performance.

- **Undertake a comprehensive review of wholesale competition rules** to help ensure competition in fixed and mobile broadband services.
- **Free up and allocate additional spectrum for unlicensed use**, fostering ongoing innovation and competitive entry.
- **Update rules for wireless backhaul spectrum** to increase capacity in urban areas and range in rural areas.
- **Expedite action on data roaming** to determine how best to achieve wide, seamless and competitive coverage, encourage mobile broadband providers to construct and build networks, and promote entry and competition.
- **Change rules to ensure a competitive and innovative video set-top box market**, to be consistent with Section 629 of the Telecommunications Act. The Act says that the FCC should ensure that its rules achieve a competitive market in video “navigation devices,” or set-top boxes – the devices consumers use to access much of the video they watch today.
- **Clarify the Congressional mandate allowing state and local entities to provide broadband in their communities** and do so in ways that use public resources more effectively.
- **Clarify the relationship between users and their online profiles to enable continued innovation and competition in applications and ensure consumer privacy**, including the obligations of firms collecting personal information to allow consumers to know what information is being collected, consent to such collection, correct it if necessary, and control disclosure of such personal information to third parties.

2. Ensuring efficient allocation and use of government-owned and government-influenced assets. Government establishes policies for the use of spectrum and oversees access to poles, conduits, rooftops and rights-of-way, which are used in the deployment of broadband networks. Government also finances a large number of infrastructure projects. Ensuring these assets and resources are allocated and managed efficiently can encourage deployment of broadband infrastructure and lower barriers to competitive entry. The plan contains a number of recommendations to accomplish these goals. They include the following:

- **Spectrum** is a major input for providers of broadband service. Currently, the FCC has only 50 megahertz in inventory, just a fraction of the amount that will be necessary to match growing demand. More efficient allocation and assignment of spectrum will reduce deployment costs, drive

investment and benefit consumers through better performance and lower prices. The recommendations on spectrum policy include the following:

- **Make 500 megahertz of spectrum newly available** for broadband within 10 years, of which 300 megahertz should be made available for mobile use within five years.
- **Enable incentives and mechanisms to repurpose spectrum** to more flexible uses. Mechanisms include incentive auctions, which allow auction proceeds to be shared in an equitable manner with current licensees as market demands change. These would benefit both spectrum holders and the American public. The public could benefit from additional spectrum for high-demand uses and from new auction revenues. Incumbents, meanwhile, could recognize a portion of the value of enabling new uses of spectrum. For example, this would allow the FCC to share auction proceeds with broadcasters who voluntarily agree to use technology to continue traditional broadcast services with less spectrum.
- **Ensure greater transparency** of spectrum allocation, assignment and use through an FCC-created spectrum dashboard to foster an efficient secondary market.
- **Expand opportunities for innovative spectrum access models** by creating new avenues for opportunistic and unlicensed use of spectrum and increasing research into new spectrum technologies.
- **Infrastructure** such as poles, conduits, rooftops and rights-of-way play an important role in the economics of broadband networks. Ensuring service providers can access these resources efficiently and at fair prices can drive upgrades and facilitate competitive entry. In addition, testbeds can drive innovation of next-generation applications and, ultimately, may promote infrastructure deployment. Recommendations to optimize infrastructure use include:
 - **Establish low and more uniform rental rates for access to poles**, and simplify and expedite the process for service providers to attach facilities to poles.
 - **Improve rights-of-way management for cost and time savings**, promote use of federal facilities for broadband, expedite resolution of disputes and identify and establish “best practices” guidelines for rights-of-way policies and fee practices that are consistent with broadband deployment.
 - **Facilitate efficient new infrastructure construction**, including through “dig-once” policies that would make federal financing of highway, road and bridge projects contingent on states and localities allowing joint deployment of broadband infrastructure.

- **Provide ultra-high-speed broadband connectivity to select U.S. Department of Defense installations** to enable the development of next-generation broadband applications for military personnel and their families living on base.

3. Creating incentives for universal availability and adoption of broadband. Three elements must be in place to ensure all Americans have the opportunity to reap the benefits of broadband. All Americans should have access to broadband service with sufficient capabilities, all should be able to afford broadband and all should have the opportunity to develop digital literacy skills to take advantage of broadband. Recommendations to promote universal broadband deployment and adoption include the following:

- **Ensure universal access to broadband network services.**
 - **Create the Connect America Fund (CAF)** to support the provision of affordable broadband and voice with at least 4 Mbps *actual* download speeds and shift up to \$15.5 billion over the next decade from the existing Universal Service Fund (USF) program to support broadband. If Congress wishes to accelerate the deployment of broadband to unserved areas and otherwise smooth the transition of the Fund, it could make available public funds of a few billion dollars per year over two to three years.
 - **Create a Mobility Fund to provide targeted funding** to ensure no states are lagging significantly behind the national average for 3G wireless coverage. Such 3G coverage is widely expected to be the basis for the future footprint of 4G mobile broadband networks.
 - **Transition the “legacy” High-Cost component of the USF** over the next 10 years and shift all resources to the new funds. The \$4.6 billion per year High Cost component of the USF was designed to support primarily voice services. It will be replaced over time by the CAF.
 - **Reform intercarrier compensation**, which provides implicit subsidies to telephone companies by eliminating per-minute charges over the next 10 years and enabling adequate cost recovery through the CAF.
 - **Design the new Connect America Fund and Mobility Fund in a tax-efficient manner** to minimize the size of the broadband availability gap and thereby reduce contributions borne by consumers.
 - **Broaden the USF contribution base** to ensure USF remains sustainable over time.
- **Create mechanisms to ensure affordability to low-income Americans.**
- **Expand the Lifeline and Link-Up programs by allowing subsidies provided to low-income Americans to be used for broadband.**
 - **Consider licensing a block of spectrum with a condition to offer free or low-cost service** that would create affordable alternatives for consumers, reducing the burden on USF.
- **Ensure every American has the opportunity to become digitally literate.**
 - **Launch a National Digital Literacy Corps** to organize and train youth and adults to teach digital literacy skills and enable private sector programs addressed at breaking adoption barriers.

4. Updating policies, setting standards and aligning incentives to maximize use for national priorities. Federal, Tribal, state and local governments play an important role in many sectors of our economy. Government is the largest health care payor in the country, operates the public education system, regulates many aspects of the energy industry, provides multiple services to its citizens and has primary responsibility for homeland security. The plan includes recommendations designed to unleash increased use, private sector investment and innovation in these areas. They include the following:

- **Health care.** Broadband can help improve the quality and lower the cost of health care through health IT and improved data capture and use, which will enable clearer understanding of the most effective treatments and processes. To achieve these objectives, the plan has recommendations that will:
 - Help ensure health care providers have access to affordable broadband by transforming the FCC’s Rural Health Care Program.
 - Create incentives for adoption by expanding reimbursement for e-care.
 - Remove barriers to e-care by modernizing regulations like device approval, credentialing, privileging and licensing.
 - Drive innovative applications and advanced analytics by ensuring patients have control over their health data and ensuring interoperability of data.
- **Education.** Broadband can enable improvements in public education through e-learning and online content, which can provide more personalized learning opportunities for students. Broadband can also facilitate the flow of information, helping teachers, parents, schools and other organizations to make better decisions tied to each student’s needs and abilities. To those ends, the plan includes recommendations to:

- Improve the connectivity to schools and libraries by upgrading the FCC's E-Rate program to increase flexibility, improve program efficiency and foster innovation by promoting the most promising solutions and funding wireless connectivity to learning devices that go home with students.
 - Accelerate online learning by enabling the creation of digital content and learning systems, removing regulatory barriers and promoting digital literacy.
 - Personalize learning and improve decision-making by fostering adoption of electronic educational records and improving financial data transparency in education.
- **Energy and the environment.** Broadband can play a major role in the transition to a clean energy economy. America can use these innovations to reduce carbon pollution, improve our energy efficiency and lessen our dependence on foreign oil. To achieve these objectives, the plan has recommendations that will:
 - Modernize the electric grid with broadband, making it more reliable and efficient.
 - Unleash energy innovation in homes and buildings by making energy data readily accessible to consumers.
 - Improve the energy efficiency and environmental impact of the ICT sector.
- **Economic opportunity.** Broadband can expand access to jobs and training, support entrepreneurship and small business growth and strengthen community development efforts. The plan includes recommendations to:
 - Support broadband choice and small businesses' use of broadband services and applications to drive job creation, growth and productivity gains.
 - Expand opportunities for job training and placement through an online platform.
 - Integrate broadband assessment and planning into economic development efforts.
- **Government performance and civic engagement.** Within government, broadband can drive greater efficiency and effectiveness in service delivery and internal operations. It can also improve the quantity and quality of civic engagement by providing a platform for meaningful engagement with representatives and agencies. Through its own use of broadband, government can support local efforts to deploy broadband, particularly in unserved communities. To achieve these goals, the plan includes recommendations to:
 - Allow state and local governments to purchase broadband from federal contracts such as Networx.
 - Improve government performance and operations through cloud computing, cybersecurity, secure authentication and online service delivery.
 - Increase civic engagement by making government more open and transparent, creating a robust public media

ecosystem and modernizing the democratic process.

- **Public safety and homeland security.** Broadband can bolster efforts to improve public safety and homeland security by allowing first responders to send and receive video and data, by ensuring all Americans can access emergency services and improving the way Americans are notified about emergencies. To achieve these objectives, the plan makes recommendations to:
 - Support deployment of a nationwide, interoperable public safety mobile broadband network, with funding of up to \$6.5 billion in capital expenditures over 10 years, which could be reduced through cost efficiency measures and other programs. Additional funding will be required for operating expenses.
 - Promote innovation in the development and deployment of next-generation 911 and emergency alert systems.
 - Promote cybersecurity and critical infrastructure survivability to increase user confidence, trust and adoption of broadband communications.

Long-Term Goals

In addition to the recommendations above, the plan recommends that the country adopt and track the following six goals to serve as a compass over the next decade.

Goal No. 1: At least 100 million U.S. homes should have affordable access to actual download speeds of at least 100 megabits per second and actual upload speeds of at least 50 megabits per second.

Goal No. 2: The United States should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation.

Goal No. 3: Every American should have affordable access to robust broadband service, and the means and skills to subscribe if they so choose.

Goal No. 4: Every American community should have affordable access to at least 1 gigabit per second broadband service to anchor institutions such as schools, hospitals and government buildings.

Goal No. 5: To ensure the safety of the American people, every first responder should have access to a nationwide, wireless, interoperable broadband public safety network.

Goal No. 6: To ensure that America leads in the clean energy economy, every American should be able to use

broadband to track and manage their real-time energy consumption.

Meeting these six goals will help achieve the Congressional mandate of using broadband to achieve national purposes, while improving the economics of deployment and adoption. In particular, the first two goals will create the world's most attractive market for broadband applications, devices and infrastructure and ensure America has the infrastructure to attract the leading communications and IT applications, devices and technologies. The third goal, meanwhile, will ensure every American has the opportunity to take advantage of the benefits broadband offers, including improved health care, better education, access to a greater number of economic opportunities and greater civic participation.

Budget Impact of Plan

Given the plan's goal of freeing 500 megahertz of spectrum, future wireless auctions mean the overall plan will be revenue neutral, if not revenue positive. The vast majority of recommendations do not require new government funding; rather, they seek to drive improvements in government efficiency, streamline processes and encourage private activity to promote consumer welfare and national priorities. The funding requests relate to public safety, deployment to unserved areas and adoption efforts. If the spectrum auction recommendations are implemented, the plan is likely to offset the potential costs.

Implementation

The plan is in beta, and always will be. Like the Internet itself, the plan will always be changing—adjusting to new developments in technologies and markets, reflecting new realities, and evolving to realize the unforeseen opportunities of a particular time.

As such, implementation requires a long-term commitment to measuring progress and adjusting programs and policies to improve performance.

Half of the recommendations in this plan are offered to the FCC. To begin implementation, the FCC will:

- Quickly publish a timetable of proceedings to implement plan recommendations within its authority.
- Publish an evaluation of plan progress and effectiveness as part of its annual 706 Advanced Services Inquiry.
- Create a Broadband Data Depository as a public resource for broadband information.

The remaining half of the recommendations are offered to the Executive Branch, Congress and state and local governments. Policymakers alone, though, cannot ensure success. Industry, non-profits, and government together with the American people, must now act and rise to our era's infrastructure challenge.

INTRODUCTION

CHAPTER 1

IN EVERY ERA, AMERICA MUST CONFRONT THE CHALLENGE OF CONNECTING OUR NATION ANEW.

In the 1860s, we connected Americans to a transcontinental railroad that brought cattle from Cheyenne to the stockyards of Chicago. In the 1930s, we connected Americans to an electric grid that improved agriculture and brought industry to the Smoky Mountains of Tennessee and the Great Plains of Nebraska. In the 1950s, we connected Americans to an interstate highway system that fueled jobs on the line in Detroit and in the warehouse in L.A.

Infrastructure networks unite us as a country, bringing together parents and children, buyers and sellers, and citizens and government in ways once unimaginable. Ubiquitous access to infrastructure networks has continually driven American innovation, progress, prosperity and global leadership.

Communications infrastructure plays an integral role in this American story. In the 1920s, '30s, '40s and '50s, telephony, radio and television transformed America, unleashing new opportunities for American innovators to create products and industries, new ways for citizens to engage their elected officials and a new foundation for job growth and international competitiveness.

Private investment was pivotal in building most of these networks, but government actions also played an important role. Treasury bonds and land grants underwrote the railroad,¹ the Rural Electrification Act brought electricity to farms and the federal government funded 90% of the cost of the interstate highways.²

In communications, the government stimulated the construction of radio and television facilities across the country by offering huge tracts of the public's airwaves free of charge. It did the same with telephony through a Universal Service Fund, fulfilling the vision of the Communications Act of 1934 "to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."³

Today, high-speed Internet is transforming the landscape of America more rapidly and more pervasively than earlier infrastructure networks. Like railroads and highways, broadband accelerates the velocity of commerce, reducing the costs of distance. Like electricity, it creates a platform for America's creativity to lead in developing better ways to solve old problems. Like telephony and broadcasting, it expands our ability to communicate, inform and entertain.

Broadband is *the* great infrastructure challenge of the early 21st century.

But as with electricity and telephony, ubiquitous connections are means, not ends. It is what those connections enable that matters. Broadband is a platform to create today's

high-performance America—an America of universal opportunity and unceasing innovation, an America that can continue to lead the global economy, an America with world-leading, broadband-enabled health care, education, energy, job training, civic engagement, government performance and public safety.

Due in large part to private investment and market-driven innovation, broadband in America has improved considerably in the last decade. More Americans are online at faster speeds than ever before. Yet there are still critical problems that slow the progress of availability, adoption and utilization of broadband.

Recognizing this, one year ago Congress echoed the Communications Act of 1934 and directed the FCC to develop a National Broadband Plan ensuring that every American has "access to broadband capability." Specifically, the statute dictates:

"The national broadband plan required by this section shall seek to ensure that all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal. The plan shall also include:

- *an analysis of the most effective and efficient mechanisms for ensuring broadband access by all people of the United States,*
- *a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public,*
- *an evaluation of the status of deployment of broadband service, including progress of projects supported by the grants made pursuant to this section, and*
- *a plan for use of broadband infrastructure and services in advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes."⁴*

This is a broad mandate. It calls for broadband networks that reach higher and farther, filling the troubling gaps we face in the deployment of broadband networks, in the adoption of broadband by people and businesses and in the use of broadband to further our national priorities.

Nearly 100 million Americans do not have broadband today.⁵ Fourteen million Americans do not have access to broadband infrastructure that can support today's and tomorrow's applications.⁶ More than 10 million school-age children⁷ do not have home access to this primary research tool used by most students for homework.⁸ Jobs increasingly require Internet skills; the share of Americans using high-speed Internet at work grew by 50% between 2003 and 2007,⁹ and the number of jobs in information and communications technology is growing 50%

faster than in other sectors.¹⁰ Yet millions of Americans lack the skills necessary to use the Internet.¹¹

What's more, there are significant gaps in the utilization of broadband for other national priorities. In nearly every metric used to measure the adoption of health information technology (IT), the United States ranks in the bottom half among comparable countries,¹² yet electronic health records could alone save more than \$500 billion over 15 years.¹³ Much of the electric grid is not connected to broadband, even though a Smart Grid could prevent 360 million metric tons of carbon emissions per year by 2030, equivalent to taking 65 million of today's cars off the road.¹⁴ Online courses can dramatically reduce the time required to learn a subject while greatly increasing course completion rates,¹⁵ yet only 16% of public community colleges—which have seen a surge in enrollment¹⁶—have high-speed connections comparable to our research universities.¹⁷ Nearly a decade after 9/11, our first responders still require access to better communications.

Unless we reform our approach to these gaps, we will fail to seize the opportunity to improve our nation, and we will fall behind those countries that do. In fact, other countries already have adopted plans to address these gaps.

The ways that other countries have confronted this challenge help inform how we might approach the problem. But each country's experiences and challenges have critical differences. Our solutions must reflect the unique economic, institutional and demographic conditions of our country.

The United States is distinct in many ways. For example, many countries have a single, dominant nationwide fixed telecommunications provider; the United States has numerous providers. Cable companies play a more prominent role in our broadband system than in other countries. The U.S. is less densely populated than other countries. Unlike most other countries, we regulate at both the state and federal levels. Our plan should learn from international experiences, but must also take into account the distinguishing realities of broadband in the United States.

Our plan must be candid about where current government policies hinder innovation and investment in broadband. Government or influences critical inputs needed to build broadband networks—such as spectrum, universal service funds and rights-of-way—yet all are structured to serve the priorities of the past, not the opportunities of the future. In addition, current government policies maintain incentives for our schools, hospitals and other public interest institutions to use outdated technologies and practices, disadvantaging our people and hindering our economy. Just as this plan should build on the distinctive attributes of the American market, it should also correct the problematic policies found here.

Above all, an American plan should build on American strengths. The first of these strengths is innovation. The United States maintains the greatest tradition of innovation and entrepreneurship in the world—one that combines creativity with engineering to produce world-leading applications, devices and content, as well as the businesses that bring them to market.

Our national plan must build on this strength to ensure that the next great companies, technologies and applications are developed in the United States. U.S. leadership in these spheres will advance our most important public purposes. A healthy environment for innovation will enable advances in health care, energy, education, job training, public safety and all of our national priorities. Creativity is a national virtue that has catalyzed American leadership in many sectors. America's plan should unlock that creativity to transform the public sector, too.

We have just begun to benefit from the ways broadband unleashes innovations to improve American lives: a job seeker in South Bend telecommuting for a company in the Deep South; a medical specialist in Chapel Hill providing medical consultations to a patient in the Hill Country; grandparents in Cleveland video-chatting with their grandchildren in Colorado Springs; firefighters downloading blueprints of a burning building. The applications that broadband enables provide innovative, efficient solutions to challenges Americans confront every day.

Many international broadband plans emphasize speeds and networks, focusing only on technical capacity as a measure of a successful broadband system. Our plan must go beyond that. While striving for ubiquitous and fast networks, we must also strive to use those networks more efficiently and effectively than any other country. We should lead the world where it counts—in the use of the Internet and in the development of new applications that provide the tools that each person needs to make the most of his or her own life.

The United States is well positioned to lead in creating those applications. We have leading health research centers; we should also lead the world in effective health care applications. We have leading educational institutions; we should also lead the world in effective educational applications. We should seize this opportunity to lead the world in applications that serve public purposes.

The second great American strength is inclusion. As a country, we believe that to march ahead we don't need to leave anyone behind. We believe that all deserve the opportunity to improve their lives. We believe that where you start shouldn't dictate where you finish, that demography isn't destiny, that privilege isn't a necessary prologue to success.

This ideal doesn't just compel us to rebuke discrimination; it compels us to be proactive. It inspires us to live up to an

obligation we have to each other—to ensure that everyone has an opportunity to succeed.

This desire for equal opportunity has long guided our efforts to make access to technologies universal, from electricity to telephony, from television to radio. Today, as technology continues to change the way the world interacts, to be on the outside is to live in a separate, analog world, disconnected from the vast opportunities broadband enables.

While broadband adoption has grown steadily, it is still far from universal. It lags considerably among certain demographic groups, including the poor, the elderly, some racial and ethnic minorities, those who live in rural areas and those with disabilities. Many of these Americans already struggle to succeed. Unemployment rates are high, services like job training are difficult to obtain and schools are substandard.

Broadband can help bridge these gaps. Today, millions of students are unprepared for college because they lack access to the best books, the best teachers and the best courses. Broadband-enabled online learning has the power to provide high-quality educational opportunities to these students—opportunities to which their peers at the best public and private schools have long had access. Similarly, with broadband, people with disabilities can live more independently, wherever they choose.¹⁸ They can telecommute and run businesses from their homes or receive rehabilitation therapy in remote and rural areas.

Of course, access to broadband is not enough. People still need to work hard to benefit from these opportunities. But universal broadband, and the skills to use it, can lower barriers of means and distance to help achieve more equal opportunity.

Absent action, the individual and societal costs of digital exclusion will grow. With so many Americans lacking broadband access or the skills to make it matter, the Internet has the potential to exacerbate inequality. If learning online accelerates your education, if working online earns you extra money, if searching for jobs online connects you to more opportunities, then for those offline, the gap only widens. If political dialogue moves to online forums, if the Internet becomes the comprehensive source of real-time news and information, if the easiest way to contact your political representatives is through e-mail or a website, then those offline become increasingly disenfranchised.

Until recently, not having broadband was an inconvenience. Now, broadband is essential to opportunity and citizenship.

While we must build on our strengths in innovation and inclusion, we need to recognize that government cannot predict the future. Many uncertainties will shape the evolution of broadband, including the behavior of private companies and consumers, the economic environment and technological advances.

As a result, the role of government is and should remain limited. We must strike the right balance between the public and private sectors. Done right, government policy can drive, and has driven, progress. In the 1960s and '70s, government research funding supported the development of the technology on which the Internet is based.¹⁹ In the 1990s, the Federal Communications Commission acted to ensure that telephone providers would not stall use of the Internet.²⁰ An act of Congress stimulated competition that caused cable companies to upgrade their networks and, for the first time, offer broadband to many Americans.²¹ Auctions for public spectrum promoted competitive wireless markets, prompting continual upgrades that first delivered mobile phones and, now, mobile broadband.²²

Instead of choosing a specific path for broadband in America, this plan describes actions government should take to encourage more private innovation and investment. The policies and actions recommended in this plan fall into three categories: fostering innovation and competition in networks, devices and applications; redirecting assets that government controls or influences in order to spur investment and inclusion; and optimizing the use of broadband to help achieve national priorities.

A thoughtful approach to the development of electricity, telephony, radio and television transformed the United States and, in turn, helped us transform the world. Broadband will be just as transformative.

The consequences of our digital transformation may not be uniformly positive. But the choice is not whether the transformation will continue. It will. The choice is whether we, as a nation, will understand this transformation in a way that allows us to make wise decisions about how broadband can serve the public interest, just as certain decisions decades ago helped communications and media platforms serve public interest goals. This plan is the first attempt to provide that understanding—to clarify the choices and to point to paths by which all Americans can benefit.

INFRASTRUCTURE

CHAPTER 6

JUST AS WIRELESS NETWORKS USE PUBLICLY OWNED SPECTRUM, wireless and wired networks rely on cables and conduits attached to public roads, bridges, poles and tunnels. Securing rights to this infrastructure is often a difficult and time-consuming process that discourages private investment. Because of permitting and zoning rules, government often has a significant role in network construction. Government also regulates how broadband providers can use existing private infrastructure like utility poles and conduits. Many state and local governments have taken steps to encourage and facilitate fiber conduit deployment as part of public works projects like road construction. Similarly, in November 2009, the Federal Communications Commission (FCC) established timelines for states and localities to process permit requests to build and locate wireless equipment on towers.¹

While these are positive steps, more can and should be done. Federal, state and local governments should do two things to reduce the costs incurred by private industry when using public infrastructure. First, government should take steps to improve utilization of existing infrastructure to ensure that network providers have easier access to poles, conduits, ducts and rights-of-way. Second, the federal government should foster further infrastructure deployment by facilitating the placement of communications infrastructure on federally managed property and enacting “dig once” legislation. These two actions can improve the business case for deploying and upgrading broadband network infrastructure and facilitate competitive entry.

RECOMMENDATIONS

Improving utilization of infrastructure

- The FCC should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, as amended, to promote broadband deployment.
- The FCC should implement rules that will lower the cost of the pole attachment “make-ready” process.
- The FCC should establish a comprehensive timeline for each step of the Section 224 access process and reform the process for resolving disputes regarding infrastructure access.
- The FCC should improve the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way.
- Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way.

- The FCC should establish a joint task force with state, Tribal and local policymakers to craft guidelines for rates, terms and conditions for access to public rights-of-way.

Maximizing impact of federal resources

- The U.S. Department of Transportation (DOT) should make federal financing of highway, road and bridge projects contingent on states and localities allowing joint deployment of conduits by qualified parties.
- Congress should consider enacting “dig once” legislation applying to all future federally funded projects along rights-of-way (including sewers, power transmission facilities, rail, pipelines, bridges, tunnels and roads).
- Congress should consider expressly authorizing federal agencies to set the fees for access to federal rights-of-way on a management and cost recovery basis.
- The Executive Branch should develop one or more master contracts to expedite the placement of wireless towers on federal government property and buildings.

6.1 IMPROVING UTILIZATION OF INFRASTRUCTURE

The cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands.² Collectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment.³

These costs can be reduced directly by cutting fees. The costs can also be lowered indirectly by expediting processes and decreasing the risks and complexities that companies face as they deploy broadband network infrastructure.

The FCC has already begun to take important steps in this direction with policies that will speed the deployment of wireless equipment on towers. With regard to other infrastructure such as utility poles, the FCC has authority to improve the deployment process and should use that authority. Lowering the costs of infrastructure access involves every level of government; active consultation among all levels of government will be needed to put in place pro-deployment policies such as joint trenching, conduit construction and placement of broadband facilities on public property.

RECOMMENDATION 6.1: The FCC should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, to promote broadband deployment.

As Exhibit 6-A shows, the rental rates paid by communications companies to attach to a utility pole vary widely—from approximately \$7 per foot per year for cable operators to \$10 per foot per year for competitive telecommunications companies to more than \$20 per foot per year for some incumbent local exchange carriers (ILECs).³ The impact of these rates can be particularly acute in rural areas, where there often are more poles per mile than households.⁵ In a rural area with 15 households per linear mile, data suggest that the cost of pole attachments to serve a broadband customer can range from \$4.54 per month per household passed (if cable rates are used)

to \$12.96 (if ILEC rates are used). If the lower rates were applied, and if the cost differential in excess of \$8 per month were passed on to consumers, the typical monthly price of broadband for some rural consumers could fall materially.⁶ That could have the added effect of generating an increase—possibly a significant increase—in rural broadband adoption.

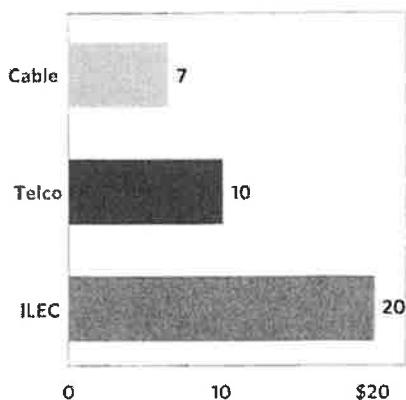
Different rates for virtually the same resource (space on a pole), based solely on the regulatory classification of the attaching provider, largely result from rate formulas established by Congress and the FCC under Section 224 of the Communications Act of 1934, as amended (“the Act”).⁸ The rate structure is so arcane that, since the 1996 amendments to Section 224, there has been near-constant litigation about the applicability of “cable” or “telecommunications” rates to broadband, voice over Internet protocol and wireless services.⁹

To support the goal of broadband deployment, rates for pole attachments should be as low and as close to uniform as possible. The rate formula for cable providers articulated in Section 224(d) has been in place for 31 years and is “just and reasonable” and fully compensatory for utilities.¹⁰ Through a rulemaking, the FCC should revisit its application of the telecommunications carrier rate formula to yield rates as close as possible to the cable rate in a way that is consistent with the Act.

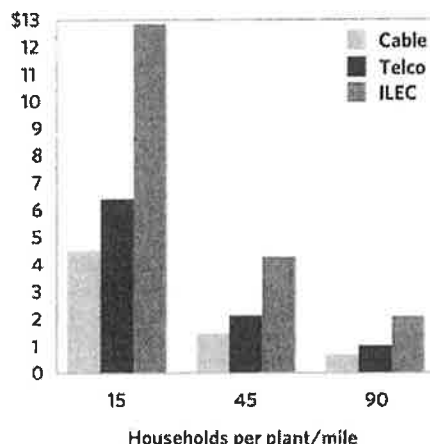
Applying different rates based on whether the attacher is classified as a “cable” or a “telecommunications” company distorts attachers’ deployment decisions. This is especially true with regard to integrated, voice, video and data networks. This uncertainty may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers). By

*Exhibit 6-A:
Annual Pole Rates
Vary Considerably by
Provider Type⁷*

Average pole attachment rates
Dollars per foot of pole space per year



Pole attachment operating expenditure/subscribing household
Dollars per foot of pole space per year



expanding networks and capabilities, these providers risk having a higher pole rental fee apply to their entire network.¹¹

FCC rules that move toward low rates that are as uniform as possible across service providers would help remove many of these distortions. This approach would also greatly reduce complexity and risk for those deploying broadband.

RECOMMENDATION 6.2: The FCC should implement rules that will lower the cost of the pole attachment “make-ready” process.

Rearranging existing pole attachments or installing new poles—a process referred to as “make-ready” work—can be a significant source of cost and delay in building broadband networks. FiberNet, a broadband provider that has deployed 3,000 miles of fiber in West Virginia, states that “the most significant obstacle to the deployment of fiber transport is FiberNet’s inability to obtain access to pole attachments in a timely manner.”¹²

Make-ready work frequently involves moving wires or other equipment attached to a pole to ensure proper spacing between equipment and compliance with electric and safety codes. The make-ready process requires not only coordination between the utility that owns the pole and a prospective broadband provider, but also the cooperation of communications firms that have already attached to the pole. Each attaching party is generally responsible for moving its wires and equipment, meaning that multiple visits to the same pole may be required simply to attach a new wire.

Reform of this inefficient process presents significant opportunities for savings. FiberNet commented that its make-ready charges for several fiber runs in West Virginia averaged \$4,200 per mile and took 182 days to complete,¹³ but the company estimates that these costs should instead have averaged \$1,000 per mile.¹⁴ Another provider, Fibertech, states that the make-ready process averages 89 days in Connecticut and 100 days in New York, where state commissions regulate the process directly.¹⁵

Delays can also result from existing attachers’ action (or inaction) to move equipment to accommodate a new attacher, potentially a competitor.¹⁶ As a result, reform must address the obligations of existing attachers as well as the pole owner.

An evaluation of best practices at the state and local levels reveals ample opportunities to manage this process more efficiently. Yet, absent regulation, pole owners and existing attachers have few incentives to change their behavior.

To lower the cost of the make-ready process and speed it up, the FCC should, through rulemaking:

- Establish a schedule of charges for the most common categories of work (such as engineering assessments and pole construction).
- Codify the requirement that gives attachers the right to use

space- and cost-saving techniques such as boxing or extension arms where practical and in a way that is consistent with pole owners’ use of those techniques.¹⁷

- Allow prospective attachers to use independent, utility-approved and certified contractors to perform all engineering assessments and communications make-ready work, as well as independent surveys, under the joint direction and supervision of the pole owner and the new attacher.¹⁸
- Ensure that existing attachers take action within a specified period (such as 30 days) to accommodate a new attacher. This can be accomplished through measures such as mandatory timelines and rules that would allow the pole owner or new attacher to move existing communications attachments if the timeline is not met.
- Link the payment schedule for make-ready work to the actual performance of that work, rather than requiring all payment up front.

These cost-saving steps can have an immediate impact on driving fiber deeper into networks, which will advance the deployment of both wireline and wireless broadband services.

RECOMMENDATION 6.3: The FCC should establish a comprehensive timeline for each step of the Section 224 access process and reform the process for resolving disputes regarding infrastructure access.

There are no federal regulations addressing the duration of the entire process for obtaining access to poles, ducts, conduit and rights-of-way. While the FCC in the past has recognized that “time is critical in establishing the rate, terms and conditions for attaching,” current FCC rules only require that a utility provide a response to an application within 45 days.¹⁹ The FCC does not have any deadlines for subsequent steps in the process, which can drag on for months if not years.²⁰ This causes delays in the deployment of broadband to communities and anchor institutions.²¹

Several states, including Connecticut and New York, have established firm timelines for the entire process, from the day that a prospective attacher files an application, to the issuance of a permit indicating that all make-ready work has been completed.²² Timelines speed the process considerably in states where they have been implemented,²³ thus facilitating the deployment of broadband.

The FCC should establish a federal timeline that covers each step of the pole attachment process, from application to issuance of the final permit. The federal timeline should be implemented through a rulemaking and be comprehensive and applicable to all forms of communications attachments.²⁴ In addition, the FCC should establish a timeline for the process of certifying wireless equipment for attachment.²⁵

The FCC also should institute a better process for resolving access disputes. For large broadband network builds, the pole attachment process is highly fragmented and often involves dozens of utilities, cable providers and telecommunications providers in multiple jurisdictions. Yet there is no established process for the timely resolution of disputes.²⁶

The FCC has the authority to enforce its pole attachment rules, but today it generally attempts to informally resolve attachment disputes through mediation. This process has significant flaws. Under the current system of case-by-case adjudication, the attachers always bears the burden of bringing a formal complaint.²⁷ The formal dispute rules also do not provide for compensation dating from the time of the injury, so attachers have minimal incentive to initiate costly formal pole attachment cases that may linger for years.

Also, because time is often of the essence during the make-ready process, methods for resolving disputes over application of individual safety and engineering standards may be necessary. Informal local procedures and mediation may sometimes result in satisfactory settlements, but they do not create precedents for what constitutes a “just and reasonable” practice under Section 224 of the Act.

In revising its dispute resolution policies, the FCC should consider approaches that not only speed the process but also provide future guidelines for the industry. Institutional changes, such as the creation of specialized fora and processes for attachment disputes, and process changes, such as target deadlines for resolution, could expedite dispute resolution and serve the overarching goal of lowering costs and promoting rapid broadband deployment. The FCC also could use its authority under Section 224 to require utilities to post standards and adopt procedures for resolving safety and engineering disagreements and encourage appropriate state processes for resolving such disputes. Finally, awarding compensation that dates from the denial of access could stimulate swifter resolution of disputes.

RECOMMENDATION 6.4: The FCC should improve the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way.

There are hundreds of private and public entities that own and control access to poles, ducts, conduits and rights-of-way, and an even greater number of parties that use that infrastructure. Accurate information about pole owners and attachments is critical if there is to be a timely and efficient process for accessing and utilizing this important infrastructure.²⁸ The FCC should ensure that attachers and pole owners have the data they need to lower costs and accelerate the buildout of broadband networks.

Consistent with its current jurisdiction under Section 224, the FCC should ensure that information about utility poles and conduits is up-to-date, readily accessible and secure, and

that the costs and responsibility of collecting and maintaining data are shared equitably by owners and users of these vital resources. For example, data could be collected systematically as in Germany, which is mapping fiber, ducts and conduits and is planning to coordinate these data with information about public works and infrastructure projects.²⁹ Existing industry efforts to collect and coordinate data could be expanded and made more robust.³⁰ In addition, the participation of all pole owners subject to Section 224 and attaching parties in any such database effort could be regulated and streamlined. These databases should be easily searchable, identify the owner of each pole and should contain up-to-date records of attachments and make-ready work that has been performed. For conduits and ducts, any database should note whether there is space available. Whichever methods are used, data must be regularly updated, secure and accessible in order to further the FCC's efforts to ensure that broadband providers have efficient access to essential infrastructure information.

RECOMMENDATION 6.5: Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way.

Even if the FCC implemented all of the recommendations related to its Section 224 authority, additional steps would be needed to establish a comprehensive national broadband infrastructure policy. As previously discussed, without statutory change, the convoluted rate structure for cable and telecommunications providers will persist. Moreover, due to exemptions written into Section 224, a reformed FCC regime would apply to only 49 million of the nation's 134 million poles.³¹ In particular, the statute does not apply in states that adopt their own system of regulation and exempts poles owned by co-operatives, municipalities and non-utilities.³²

The nation needs a coherent and uniform policy for broadband access to privately owned physical infrastructure. Congress should consider amending or replacing Section 224 with a harmonized and simple policy that establishes minimum standards throughout the nation—although states should remain free to enforce standards that are not inconsistent with federal law. The new statutory framework could provide that:

- All poles, ducts, conduits and rights-of-way be subject to a regulatory regime addressing a minimum set of criteria established by federal law.
- All broadband service providers, whether wholesale or retail, have the right to access pole attachments, ducts, conduit and rights-of-way based on reasonable rates, terms and conditions.
- Infrastructure access be provided within standard timelines established by the FCC, and that the FCC has the authority to award damages for non-compliance.

- The FCC has the authority to compile and update a comprehensive database of physical infrastructure assets.

RECOMMENDATION 6.6: The FCC should establish a joint task force with state, Tribal and local policymakers to craft guidelines for rates, terms and conditions for access to public rights-of-way.

Because local, state, Tribal and federal governments control access to important rights-of-way and facilities, a comprehensive broadband infrastructure policy necessarily requires a coordinated effort among all levels of government.

There is wide diversity among state and local policies regarding access to and payment for accessing public rights-of-way. Many jurisdictions charge a simple rental fee. Other jurisdictions use other compensation schemes, including per-foot rentals, one-time payments, in-kind payments (such as service to public institutions or contributions of fiber to city telecommunications departments) and assessments against general revenues.³³ Some jurisdictions calculate land rental rates based on local real estate “market value” appraisals.

Many states have limited the rights-of-way charges that municipalities may impose, either by establishing uniform rates (Michigan) or by limiting fees to administrative costs (Missouri).³⁴ Other states, including South Carolina, Illinois and Florida, do not allow municipalities to collect rights-of-way fees directly; instead, the state compensates local governments for the use of their rights-of-way with proceeds from state-administered telecommunications taxes.

Broadband service providers often assert that the expense and complexity of obtaining access to public rights-of-way in many jurisdictions increase the cost and slow the pace of broadband network deployment.³⁵ Representatives of state and local governments dispute many of these contentions.³⁶ However, nearly all agree that there can and should be better coordination across jurisdictions on infrastructure issues.³⁷

Despite past efforts by the National Telecommunications and Information Administration (NTIA) and the National Association of Regulatory Utility Commissioners (NARUC),³⁸ a coordinated approach to rights-of-way policies has not taken hold. There are limits to state and local policies; Section 253 of the Communications Act prohibits state and local policies that impede the provision of telecommunications services while allowing for rights-of-way management practices that are nondiscriminatory, competitively neutral, fair and reasonable.³⁹ However, disputes under Section 253 have lingered for years, both before the FCC and in federal district courts.⁴⁰

In consultation and partnership with state, local and Tribal authorities, the FCC should develop guidelines for public rights-of-way policies that will ensure that best practices from state and local government are applied nationally. For example, establishing common application information and inspection

protocols could lower administrative costs for the industry and governmental agencies alike. Fee structures should be consistent with the national policy of promoting greater broadband deployment. A fee structure based solely upon the market value of the land being used would not typically take into account the benefits that the public as a whole would receive from increased broadband deployment, particularly in unserved and underserved areas. In addition, broadband network construction often involves multiple jurisdictions. The timing of the process and fee calculations by one local government may not take into account the benefits that constituents in neighboring jurisdictions would receive from increased broadband deployment. The cost and social value of broadband cut across political boundaries; as a result, rights-of-way policies and best practices must reach across those boundaries and be developed with the broader public interest in mind.

To help develop this consistent rights-of-way policy, the FCC should convene a joint task force of state, local and Tribal authorities with a mandate to:

- Investigate and catalog current state and local rights-of-way practices and fee structures, building on NTIA’s 2003 compendium and the 2002 NARUC Rights-of-Way Project.
- Identify public rights-of-way and infrastructure policies and fees that are consistent with the national public policy goal of broadband deployment and those that are inconsistent with that goal.⁴¹
- Identify and articulate rights-of-way construction and maintenance practices that reduce overall capital and maintenance costs for both government and users and that avoid unnecessary delays, actions, costs and inefficiencies related to the construction and maintenance of broadband facilities along public rights-of-way.⁴²
- Recommend appropriate guidelines for what constitutes “competitively neutral,” “nondiscriminatory” and “fair and reasonable” rights-of-way practices and fees.
- Recommend a process for the FCC to use to resolve disputes under Section 253. Creating a process should expedite resolution of public rights-of-way disputes in areas either unserved or underserved by broadband.

The FCC should request that the task force make its recommendations within six months of the task force’s creation. These recommendations should then be considered by the FCC as part of a proceeding that seeks industry-wide comment on these issues.

6.2 MAXIMIZING IMPACT OF FEDERAL RESOURCES

Federal government can also play an important role in directly lowering the costs of future infrastructure deployment. The federal government has already made efforts to simplify access to federal rights-of-way under President George W. Bush,⁴³ and to improve access to federal government facilities for wireless services under President William J. Clinton.⁴⁴ However, policies have generally taken a permissive approach, simply allowing the federal government to take steps, rather than requiring that those steps be taken.

RECOMMENDATION 6.7: The U.S. Department of Transportation (DOT) should make federal financing of highway, road and bridge projects contingent on states and localities allowing joint deployment of conduits by qualified parties.

RECOMMENDATION 6.8: Congress should consider enacting “dig once” legislation applying to all future federally funded projects along rights-of-way (including sewers, power transmission facilities, rail, pipelines, bridges, tunnels and roads).

Although pushing fiber deeper into broadband networks considerably improves the performance and reliability of those networks, deploying a mile of fiber can easily cost more than

\$100,000 (see Exhibit 6-B). The largest element of deployment costs is not the fiber itself, but the placement costs associated with burying the fiber in the ground (or attaching it to poles in an aerial build). These placement costs can, in certain cases, account for almost three-quarters of the total cost of fiber deployment. Running a strand of fiber through an existing conduit is 3–4 times cheaper than constructing a new aerial build.⁴⁵

Substantial savings can be captured if fiber builds are coordinated with other infrastructure projects in which the right-of-way (e.g., road, water, sewer, gas, electric, etc.) is already being dug. For example, the city of San Francisco has a “trench once” policy, in which a 5-year moratorium is placed on opening up a road bed once the trench along that road bed has been closed.⁴⁷ San Francisco uses a notification process to ensure that other interested parties have the opportunity to install conduits and cabling in the open trench.⁴⁸ The city of Boston has implemented a “Shadow Conduit Policy,” in which the first company to request a trench takes a lead role, inviting other companies to add additional empty (or “shadow”) conduits for future use by either the city of Boston or a later entrant.⁴⁹ The city of Chicago seeks to “inexpensively deploy excess conduit when streets are opened for other infrastructure and public works projects.”⁵⁰ In the Netherlands, a committee in the city of Amsterdam similarly coordinates digging and trenching activities between the public and private sector.⁵¹

These policies have clear benefits, as shown by the case of Akron, Ohio. When Akron was deploying facilities and conduit to support its public safety network, it shared those facilities with OneCommunity, a northeast Ohio public-private partnership that aggregates demand by public institutions and private

*Exhibit 6-B:
Joint Deployment Can
Materially Reduce
the Cost of Fiber
Deployment⁴⁶*



broadband service providers. As a result of that coordination, those same facilities and conduits now support health care institutions, schools and Wi-Fi access in Akron.⁵² Similarly, along Interstate 91 in western Massachusetts, collaboration among the Massachusetts Department of Transportation, the Massachusetts Broadband Institute and the federal DOT is resulting in the installation of 55 miles of fiber optic cable with 34 interconnection points.⁵³

DOT should implement “joint trenching” and conduit policies to lower the installation costs for broadband networks.⁵⁴ At a minimum, states and localities undertaking construction along rights-of-way that are partially or fully financed by DOT should be required to give at least 90 days’ notice before projects begin. This would allow private contractors or public entities to add conduits for fiber optic cables in ways that do not unreasonably increase cost, add to construction time or hurt the integrity of the project. Opportunities for joint trenching and conduit deployment are varied, from construction of Intelligent Transportation Systems alongside interstates to building and maintenance of recreational rail trails.⁵⁵ As a result, information about potential joint trenching and conduit deployment opportunities should be available and accessible to prospective broadband network providers whenever government engages in an infrastructure project, subject to security precautions.

Congress also should consider enacting “dig once” legislation to extend similar joint trenching requirements to all rights-of-way projects (including sewers, power transmission facilities, rail, pipelines, bridges, tunnels and roads) receiving federal funding.

RECOMMENDATION 6.9: Congress should consider expressly authorizing federal agencies to set the fees for access to federal rights-of-way on a management and cost recovery basis.

RECOMMENDATION 6.10: The Executive Branch should develop one or more master contracts to expedite the placement of wireless towers on federal government property and buildings.

The federal government is the largest landowner in the country—650 million acres, constituting nearly one-third of the land area of the United States.⁵⁶ The federal government’s General Services Administration (GSA) also owns or leases

space in 8,600 buildings nationwide.⁵⁷ To effectively deploy broadband, providers often need to be able to place equipment on this federally controlled property, or to use the rights-of-way that pass through the property.

Based on an August 1995 executive memorandum by President Clinton,⁵⁸ GSA developed guidelines to allow wireless antennas on federal buildings and land.⁵⁹ Additionally, since 1989, GSA has run the National Antenna Program to facilitate wireless tower placement on federal government buildings.⁶⁰ On more than 1,900 buildings administered by GSA, there are currently antennas covered by approximately 100 leases that result in millions of dollars in revenue for the Federal Buildings Fund annually.⁶¹ For each of the leases managed by GSA, market rent is charged, and the leases are tightly crafted to cover rooftop space, specific equipment and technology.

Even given this progress, the federal government can do more to facilitate access to its rights-of-way and facilities that it either develops or maintains. In many instances, federal law currently requires that rental fees for rights-of-way controlled by federal agencies be based upon the market value of the land. As a result, these fees are often much higher than the direct costs involved.⁶² To facilitate the development of broadband networks, Congress should consider allowing all agencies to set the fees for access to rights-of-way for broadband services on the basis of a direct cost recovery approach, especially in markets currently underserved or unserved by any broadband service provider.

The Executive Branch should also develop one or more master contracts for all federal property and buildings covering the placement of wireless towers. The contracts would apply to all buildings, unless the federal government decides that local issues require non-standard treatment. In the master contracts, GSA should also standardize the treatment of key issues covering rooftop space, equipment and technology. The goal of these master contracts would be to lower real estate acquisition costs and streamline local zoning and permitting for broadband network infrastructure.

While reducing the prices for leases on government property may reduce fees paid to governments at the local, state and federal levels, the decline in prices may also greatly increase the number of companies that acquire leases on government property. In any case, the increased deployment of broadband will stimulate investment and benefit society.

CHAPTER 6 ENDNOTES

- 1 *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Red 13994 (2009).
- 2 See Letter from Judith A. Dumont, Director, Massachusetts Broadband Initiative, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 (Jan. 8, 2010) (Dumont Jan. 8, 2010 *Ex Parte*) at 2 (noting that permitting requirements and procedures for rights of way, poles, conduits and towers "are key to the efficient and streamlined deployment of broadband," and that difficulties in such access "often prove to be the greatest impediment to the efficient, cost-effective, and timely deployment of broadband.").
- 3 We derive this estimate from several sources. OMNIBUS BROADBAND INITIATIVE, THE BROADBAND AVAILABILITY GAP (forthcoming). See Letter from Thomas Jones, Counsel to FiberNet, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket No. 07-245 (Sept. 16, 2009) (FiberNet Sept. 16, 2009 *Ex Parte*) at 20 (noting average cost for access to physical infrastructure of \$4,611–\$6,487 per mile); *Comment Sought on Cost Estimates for Connecting Anchor Institutions to Fiber—NBP Public Notice #12*, GN Docket Nos. 09-47, 09-51, 09-137, Public Notice, 24 FCC Red 12510 (2009) (NBP PN #12) App. A (Gates Foundation estimate of \$11,500–\$21,120 per mile for fiber optic deployment); see also Letter from Charles B. Stockdale, Fibertech, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 (Oct. 28, 2009) at 1–2 (estimating costs ranging from \$3,000–\$42,000 per mile).
- 4 One wireless carrier has cited instances in which it has been asked to pay a rental rate of \$1,200–\$3,000 per pole per year. See, e.g., Letter from T. Scott Thompson, Counsel for NextG Networks, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11303 (June 27, 2008) Attach. at 11.
- 5 See, e.g., Am. Cable Ass'n Comments in re National Broadband Plan NOI, filed June 8, 2009, at 8–9; *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Report and Order, 15 FCC Red 6453, 6507–08, para. 118 (2000) ("The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers.").
- 6 This analysis assumes that the customer purchases from an ILEC that rents all of its poles.
- 7 NCTA Comments in re American Electric Power Service Corp. et al., *Petition for Declaratory Ruling that the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service*, WC Docket No. 09-154 (filed Aug. 17, 2009) (Pole Attachments Petition), filed Sept. 24, 2009, App. B at 8–10; Letter from Thomas Jones, Counsel, Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC RM-11293, RM 11303 (Jan. 16, 2007) Attach., US Telecom Comments in re Pole Attachments Petition, filed Sept. 24, 2009, at 8; GEORGE S. FORD ET AL., PHOENIX CTR., THE PRICING OF POLE AMENDMENT: IMPLICATIONS AND RECOMMENDATIONS 7 (2008); Independent Telephone and Telecommunications Alliance (ITTA) Comments in re implementation of Section 224 of the Act: *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Notice of Proposed Rulemaking, 22 FCC Red 20195 (2007) (Pole Attachments NPRM), filed Mar. 7, 2008. As Pelcovits notes, monthly cost assumes 35 poles per mile and a 30% take rate. NCTA Comments in re Pole Attachments Petition, filed Sept. 24, 2009, App. B at 14. Additionally, this analysis assumes that all poles are rented by the broadband provider and not owned by it.
- 8 The variation in rates charged to incumbent LECs also can arise from the history of pole ownership by the incumbent LECs and certain "joint use" agreements that exist between some incumbent LECs and electric utilities.
- 9 See, e.g., *Nat'l Cable & Telecom. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).
- 10 See, e.g., *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).
- 11 See, e.g., Letter from Daniel L. Brenner, Counsel, Bright House Networks, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 (Jan. 8, 2010) Attach. at 4; Letter from Daniel L. Brenner, Counsel, Bright House Networks, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 (Feb. 16, 2010) Attach. (Affidavit of Nick Lencich) (providing example of how application of higher telecommunications rate for poles would increase expense of deploying Fast Ethernet connections to a large school district by \$220,000 annually); NCTA Comments in re Pole Attachments Petition, filed Sept. 24, 2009, at 15–17.
- 12 Iw Telecom et al. Comments in re NBP Staff Workshops PN (The Commission Welcomes Responses to Staff Workshops), GN Docket No. 09-51, Public Notice, 24 FCC Red 11592 (WCB 2009) (NBP Staff Workshops PN), filed Sept. 15, 2009, at 14.
- 13 FiberNet Sept. 16, 2009 *Ex Parte* Attach.; Letter from Thomas Jones, Counsel, FiberNet, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (Nov. 16, 2009) (filed by One Communications Corp.) (FiberNet Nov. 16, 2009 *Ex Parte*) at 3 (providing cost estimate breakdown). Similarly, Fibertech reports that it pays pole owners anywhere from \$225–\$780 to move a single cable on a pole, even though it estimates that it could do the work itself for \$60. Fibertech Comments in re NBP PN #12, filed Oct. 26, 2009, at 2–3; see also Dumont Jan. 8, 2010 *Ex Parte* at 5–6 (proposing changes to pole attachment regulations so as to "facilitate easier access to existing infrastructure," including reform to the application and make-ready process).
- 14 FiberNet Nov. 16, 2009 *Ex Parte* Attach. C (providing cost estimate breakdown).
- 15 Letter from Kelley A. Shields, Counsel, Fibertech and Kentucky Data Link, Inc. (KDL), to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, WC Docket No. 07-25, RM-11293, RM-11303 (Jan. 7, 2009) Attach. 2 at 2.
- 16 Letter from Joseph R. Lawhon, Counsel, Georgia Power Co., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket Nos. 09-29, 09-51 (Nov. 17, 2009) Attach. B (noting one example covering 294 poles in Georgia in which the electric utility completed its work within 55 days but in which the process of coordinating with existing attachers took an additional 5 months).
- 17 The FCC has already decided that utilities cannot discriminatorily prohibit such techniques when they use those techniques themselves. See *Salsgiver Commc'ns, Inc. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Red 20536, 20543–44 (EB 2007); *Cavalier Tel. v. Virginia Elec. and Power Co.*, Order and Request for Information, 15 FCC Red, 9563, 9572 (EB 2000). One provider asserts that rules allowing these practices more generally in Connecticut has allowed it to deploy many more miles of fiber in its Connecticut markets. Fibertech & KDL Comments in re Pole Attachments NPRM, filed Mar. 25, 2009, at 7–8.
- 18 Letter from John T. Nakahata, Counsel to Fibertech and KDL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, RM 11293, RM 11303, GN Docket Nos. 09-29, 09-51 (July 29, 2009) at 7.
- 19 *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Red 6777, 6787–88, para. 17 (1998) (1998 Pole Attachment Order).
- 20 See, e.g., Crown Castle Comments in re Pole Attachments NPRM, filed Mar. 11, 2008, at 7 (12 month delay); Suncoys Comments in Petition for Rulemaking of Fibertech Networks, LLC, RM-11303 (Dec. 7, 2005) (Fibertech Petition), filed Jan. 30, 2006, at 11 (15 months); The DAS Forum Comments in re Pole Attachments NPRM, filed Mar. 7, 2008, at 11 (3 years); T-Mobile Comments in re Pole Attachments NPRM, filed Mar. 7, 2008, at 7 (4 years).
- 21 See, e.g., Fibertech & KDL Comments in re Pole Attachments NPRM, filed Mar. 25, 2009, at 4 (describing project to construct fiber to three rural school districts in Kentucky that KDL was unable to complete because of pole access delays); 1998 Pole Attachment Order, 13 FCC Red. at 6788, para. 17 (delays in resolving access disputes can "delay a telecommunication's carrier's ability to provide service and unnecessary[ly] obstruct the process").
- 22 *Order Adopting Policy Statement on Pole Attachments*, Case 03-M-0432 (New York Pub. Serv. Comm'n 2004) (New York Timeline Order) (requiring that all work be completed in 105 days), available at [116 FEDERAL COMMUNICATIONS COMMISSION | WWW.BROADBAND.GOV](http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId={0C4902C-7D96-4E20-936B-2174CE0621A7}; Review of the State's Public Service Company Utility Pole Make-Ready Procedures</i>, Decision, Docket No. 07-02-13 (Conn. Dep't of Pub. Util. Control, Apr. 30, 2008) (Connecticut Timeline Order) available at

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- [http://www.dpuc.state.ct.us/doekhist.nsf/8e6fc37a54110e3e852576190052b64d/69eb9118f035bc38525755a005df44a/\\$FILE/070213-043008.doc](http://www.dpuc.state.ct.us/doekhist.nsf/8e6fc37a54110e3e852576190052b64d/69eb9118f035bc38525755a005df44a/$FILE/070213-043008.doc) (90 days or 125 days when poles must be replaced).
- 23 See, e.g., Fibertech Comments in re NBP PN #12, filed July 21, 2009, Attach. (noting that since implementing timelines, in Connecticut it takes pole owners an average of 89 days to issue licenses and New York pole owners average 100 days for Fibertech's applications, compared to longer intervals elsewhere).
- 24 See, e.g., Connecticut *Timeline Order: New York Timeline Order*, Utah Admin. Code § R746-345-3; Vermont Public Service Board, Rules 3.708; See also *Utility Pole Make-Ready Procedures*, Docket No. 07-02-13 (Conn. Dep't of Pub. Util. Control, 2008), available at <http://www.dpuc.state.ct.us/doekhist.nsf/8e6fc37a54110e3e852576190052b64d/69eb9118f035bc38525755a005df44a?OpenDocument>; Sunesys Comments in re National Broadband Plan NOI, filed June 8, 2009, at 6 ("By permitting pole owners to have an uncapped and unspecified period of time in which to issue a permit, many pole owners have caused tremendous delays in the process, thereby undermining broadband deployment."); Letter from Jacqueline McCarthy, Counsel, Broadband & Wireless Pole Attachment Coalition, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 (Feb. 23, 2009) at 1-5.
- 25 Wireless providers assert that negotiations with pole owners to attach wireless devices "often face a period of years in negotiating pole agreements." NTIA—The Wireless Infrastructure Association & The DAS Forum Comments in re National Broadband Plan NOI, filed June 8, 2009, at 7. As telecommunications providers, wireless providers have the right to attach to poles under Section 224 of the Act to provide service.
- 26 Letter from Joshua Seidemann, Vice President, Regulatory Affairs, ITTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11293, WC 09-154 (Dec. 22, 2009) (ITTA Dec. 22, 2009 *Ex Parte*) at 3 (noting a pole attachment dispute pending before a state for five years before the parties settled).
- 27 See 47 C.F.R. §§ 1.1404-1.1410 (pole attachment complaint procedures).
- 28 See, e.g., ITTA Dec. 22, 2009 *Ex Parte* at 3 (noting that one provider alone deals with 600 separate entities and that the "lack of uniform rules, standards, and oversight makes negotiating reasonable attachment terms very difficult and extremely time consuming").
- 29 Fed. Ministry of Econ. & Tech., Gov't of Germany, THE FEDERAL GOVERNMENT'S BROADBAND STRATEGY 12 (2009), available at <http://www.bmwi.de/English/Redaktion/Pdf/broadband-strategy,property=pdf,bereich=bmwi,sp-rache=en,rwb=true.pdf>.
- 30 For example, many pole owners utilize the National Joint Utilities Notification System (NJUNS) for maintaining and communicating data about their pole infrastructure. See generally National Joint Utilities Notification System—NJUNS, Inc., http://www.njuns.com/NJUNS_Home/default.htm (last visited Mar. 2, 2010).
- 31 NCTA Comments in re Pole Attachments Petition, filed Sept. 24, 2009, App. B (Declaration of Dr. Michael D. Pelcovits) Attach. 2 (Methodology and Sources) at 1-3.
- 32 Nineteen states and the District of Columbia (representing approximately 45% of the U.S. population) have exercised this type of "reverse preemption" and have certified that they directly regulate utility-owned infrastructure in their regions. See *Corrected List of States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 07-245, Public Notice, 23 FCC Red 4878 (WCB 2008). Section 224(a)(1) expressly excludes poles owned by cooperatives from regulation, an exemption that dates back to 1978. According to the National Rural Electric Cooperative Association, electric co-operatives own approximately 42 million poles. Letter from David Predmore, National Rural Electric Cooperative Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137, WC Docket No. 09-245 (Feb. 26, 2010). The exclusion of co-operatives from Section 224 regulation may impede broadband deployment in rural areas. For instance, one small broadband cable company claims that it ceased offering service in two rural communities in Arkansas because of an increase in pole attachment rates by unregulated electric cooperatives that owned the poles in those communities. Letter from Bennett W. Hooks, Jr., Beford Media Group, LLC, to Bernadette McGuire-Rivera, Assoc. Adm'r, Office of Telecom. & Info. Admin., Dep't of Comm. (Apr. 13, 2009) at ¶¶ 2, 3, available at <http://www.ntia.doc.gov/broadbandgrants/comments/79C5.pdf>.
- 33 For a review of various approaches to state and local rights of way policies, see NTIA, STATE AND LOCAL RIGHTS OF WAY SUCCESS STORIES, available at <http://www.ntia.doc.gov/ntiahome/staterow/ROWstatesstories.pdf>.
- 34 In 2003, the NTIA compiled a comprehensive survey of state rights-of-way approaches that may be found at NTIA, Rights-of-Way Laws by State, <http://www.ntia.doc.gov/ntiahome/staterow/rowtableexcel.htm> (last visited Feb. 18, 2010). In 2002, the National Association of Regulatory Utility Commissions undertook a similar project and issued a comprehensive report. See NARUC, PROMOTING BROADBAND ACCESS THROUGH PUBLIC RIGHTS-OF-WAY AND PUBLIC LANDS (July 31, 2002).
- 35 See, e.g., Level 3 Comments in re National Broadband Plan NOI, filed Jun. 8, 2009, at 19; Windstream Comments in re National Broadband Plan NOI, filed Jun. 8, 2009, at 2; Verizon Comments in re National Broadband Plan NOI, filed June 8, 2009, at 66; Qwest Comments in re National Broadband Plan NOI, filed June 8, 2009, at 27. Sunesys urges the FCC to "clarify the standards related to timely and reasonably priced access to necessary governmental rights of way." Sunesys Comments in re NBP PN #7 (*Comment Sought on the Contribution of Federal, State, Tribal, and Local Government to Broadband—NBP Public Notice #7*, GN Docket Nos. 09-47, 09-51, 09-137, Public Notice, 24 FCC Red 12110 (WCB 2009) (NBP PN #7)), filed Nov. 6, 2009, at 4.
- 36 See, e.g., NATOA et al. Reply in re NBP PN #30, (Reply Comments Sought in Support of National Broadband Plan—NBP Public Notice #30, GN Docket Nos. 09-47, 09-51, 09-137, Public Notice 25 FCC Red 241 (2010) (NBP PN #30) filed Jan. 27, 2010, at 12-13; NATOA et al. Comments in re NBP PN #7, filed Nov. 7, 2009, at 46-47; City of New York Comments in re NBP PN #7, filed Nov. 6, 2009, at 8; City and County of San Francisco Comments in re NBP PN #7, filed Nov. 6, 2009, at 16-20. *But cf.* Dumont Jan. 8, 2010 *Ex Parte* at 2 (noting that "difficulties involved in negotiating and gaining access to the rights of way often prove to be the greatest impediment to the efficient, cost-effective, and timely deployment of broadband.");
- 37 For example, the Broadband Principles adopted by the National Association of Telecommunications Officers and Advisors (NATOA), an organization for local government agencies, staff and public officials, states that "[t]he desired development of high capacity broadband networks and broadband services will require extensive collaboration among parties: local communities, regions, state governments, national government, the private sector, interest groups, and others." NATOA et al. Comments in re National Broadband Plan NOI, filed Jun. 8, 2009, at 3; see also Gary Gordier, CIO and IT Director, El Paso, Texas, Remarks at the FCC State and Local Government Workshop 161 (Sept. 1, 2009) ("There needs to be a lot better coordination across all jurisdictional levels to economize and share jointly in the infrastructure"), available at http://www.broadband.gov/docs/ws_19_state_and_local.pdf; Ray Baum, Comm'r, Oregon Pub. Util. Comm'n, Remarks at FCC State and Local Government Workshop 61 (Sept. 1, 2009) ("[W]e have a lot of infrastructure out there owned by utilities[,] both public and private[,] that sitting there that could be better utilized than it is today"); Lori Sherswood, Cable Adm'r, Howard County, Maryland, Remarks at the FCC State and Local Government Workshop 120 (Sept. 1, 2009) ("We have an opportunity to do this right and 25 years from now we don't want to say that we should have done a better job coordinating and talking to each other. For development of a national policy, the FCC should draw on its decade of government experiences including local governance.");
- 38 See note 34, *supra*.
- 39 See 47 U.S.C. § 253(c).
- 40 A public record search by FCC Staff revealed that since passage of the 1996 Act, the FCC has taken an average of 661 days to resolve Section 253 disputes filed before it, and federal district court litigation of similar disputes has taken an average of 580 days to conclude. Disputes often extend further through review by courts of appeal, as well.
- 41 See NATOA et al. Reply in re NBP PN #30, filed Jan. 27, 2010, at 38 (recommending that the FCC "consider creating a special task force" of rights-of-way experts that would "catalog federal, state, and local right-of-way practices and fees in an effort to identify and articulate existing best practices being employed by federal, state, and local authorities for different categories of public rights of way and infrastructure."). As proposed by NATOA, the task force "could also examine and report to the Commission regarding the advantages and disadvantages of alternative forms of compensation for use of public rights of way, and other rights of way related infrastructure, such as poles and conduits." *Id.* at 39.

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- 42 See NATOA et al. Reply in re NBP PN #30, filed Jan. 27, 2010, at 38-39.
- 43 Memorandum on Improving Rights-of-Way Management Across Federal Lands to Spur Greater Broadband Deployment, 40 WKLY. COMP. PRES. DOC. 696 (May 3, 2004).
- 44 Memorandum on Facilitating Access to Federal Property for the Siting of Mobile Services Antennas, 31 WKLY. COMP. PRES. DOC. 1424 (Aug. 10, 1995).
- 45 See Letter from Thomas Cohen, Counsel for the Fiber to the Home Council, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 (Oct. 14, 2009).
- 46 "Splicing" includes splice kit, installation of splicing enclosure, and splicing of fiber. Splice kit is excluded from "materials" cost. Cost of construction in joint deployment case refers to construction of a single 1-mile, 2" conduit containing 216-count fiber, when coordinated with a road construction project. Additional costs reflect the same project independent of road construction. Letter from Matthew R. Johnson, Legal Fellow, NATOA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 (Sept. 17, 2009) (attaching COLUMBIA TELECOMM. CORR. BUREAU ENGINEERING ASSESSMENT: EFFICIENCIES AVAILABLE THROUGH SIMULTANEOUS CONSTRUCTION AND CO-LOCATION OF COMMUNICATIONS CONDUIT AND FIBER tbls. 1, 2 (2009)).
- 47 Moratoria on re-opening streets for further telecommunications facilities could impede broadband deployment in certain circumstances.
- 48 DEP'T OF PUBLIC WORKS, CITY AND COUNTY OF SAN FRANCISCO, ORDER NO. 176,707 (RVSD): REGULATIONS FOR EXCAVATING AND RESTORING STREETS IN SAN FRANCISCO § 5 (Mar. 26, 2007), available at http://www.sfgov.org/site/uploadedfiles/sfdpw/hsm/secc/DPW_Order_176-707.pdf; see also City and County of San Francisco Department of Public Works, Coordinating Street Construction, <http://www.sfgov.org/site/sfdpw.page.asp?id=32429> (last visited Jan. 4, 2010).
- 49 Pub. Improvement Comm'n, City of Boston, Policy Relating to Grants of Location for New Conduit Network for the Provision of Commercial Telecommunications Services (Aug. 4, 1988), as amended.
- 50 Hardik V. Bhatt, CIO, City of Chicago, Remarks at FCC State and Local Governments: Toolkits and Best Practices Workshop (Sept. 1, 2009), available at http://www.broadband.gov/docs/ws_19_state_and_local.pdf; see also *id.* at 94 ("we have now started knowing every time a street gets dug up either for putting in a traffic signal interconnect, or putting some street light interconnects, or maybe a private utility has dug up the street, we have an opportunity to see if we could leverage that digging up of the street and maybe put conduit or if conduit is there to put fiber there").
- 51 Gordon Cook, *Amsterdam's Huge FTTH Build*, BROADBAND PROPERTIES, Sept. 2006, at 68.
- 52 NATOA et al. Comments in re NBP PN #7, filed Nov. 9, 2009, App. at 14.
- 53 Dumont Jan. 8, 2010 *Ex Parte* at 3.
- 54 Dumont Jan. 8, 2010 *Ex Parte* at 4 (recommending "a mechanism to ensure that all U.S. Department of Transportation projects are deploying conduit, and that space is created for four cables").
- 55 Dumont Jan. 8, 2010 *Ex Parte*.
- 56 United States Department of the Interior, National Atlas of the United States, <http://www.nationalatlas.gov/printable/fedlands.html> (last visited Jan. 7, 2010).
- 57 General Services Administration, GSA Properties Overview, http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=8513 (last visited Jan. 7, 2010).
- 58 Memorandum on Facilitating Access to Federal Property for the Siting of Mobile Services Antennas, 31 WKLY. COMP. PRES. DOC. 1424 (Aug. 10, 1995).
- 59 See Siting Antennas on Federal Property, 41 C.F.R. §§ 102-79.70-100.
- 60 GSA, *GSA's National Antenna Program Wins Vice President Al Gore's Hammer Award Agency's National Antenna Program Fosters Innovation and Saves Tax Dollars, Showing Government Can Work Better and Cost Less*, GSA #9552 (press release), Jan. 13, 1999 (GSA, *GSA's National Antenna Program*), http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=9125.
- 61 GSA, *GSA's National Antenna Program*. These facts have been confirmed via follow-up e-mails and conversations with GSA.
- 62 NTIA, IMPROVING RIGHTS-OF-WAY MANAGEMENT ACROSS FEDERAL LANDS: A ROADMAP FOR GREATER BROADBAND DEPLOYMENT 31-33, available at <http://www.ntia.doc.gov/reports/fedrow/frowreport> (discussing applicable statutes and agency procedures). For example, the Federal Land Policy Management Act of 1976, which applies to the Department of Interior Bureau of Land Management and National Forest Service, requires that "fair market value, as determined by the Secretary." 43 U.S.C. § 1764(g). In addition, OMB Circular A-25 (rvsd), § 6(a)(2)(b) requires that agencies assess "user charges based on market prices," although exceptions can be granted.

17.4 CONCLUSION

This plan is premised on the potential of broadband to improve lives today and for generations.

But broadband alone will not solve America's problems. It cannot guarantee that the United States will lead the world in the 21st century. It cannot promise that the U.S. and other nations will conquer crippling inequality. It cannot ensure that the U.S. bestows the best job, education, health care, public safety and government services on every American.

Broadband is a critical prerequisite, though, to solutions to many of America's problems. It can open up ways for American innovators and entrepreneurs to reassert U.S. leadership in some areas and extend it in others. It can unlock doors of opportunity long closed by geography, income and race. It can enable education beyond the classroom, health care beyond the clinic and participation beyond the town square.

In 1938, President Roosevelt travelled to Gordon Military College in Barnesville, Georgia, to speak at the dedication of a local utility. "Electricity is a modern necessity of life, not a luxury," the President told the audience, "That necessity ought to be found in every village, in every home and on every farm in every part of the wide United States."⁴⁷

He added, "Six years ago, in 1932, there was such talk about the more widespread and the cheaper use of electricity." But words did not matter until the country, "reduced that talk to practical results."⁴⁸

Broadband, too, is a modern necessity of life, not a luxury. It ought to be found in every village, in every home and on every farm in every part of the United States.

There has long been talk of the widespread and affordable use of broadband. This plan is a transition from simple chatter to the difficult but achievable reality of implementation. It is a call to action for governments, businesses and non-profits to replace rhetoric with targeted, challenging actions.

It is time again to reduce talk to practical results.

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 3, 2019, I served a true and correct copy of the foregoing document on counsel of record, by sending the same via electronic and U.S. Mail by directing delivery to the following:

James Edward Horne
Donald Stewart Cohen
Gordon Thomas Honeywell LLP
600 University St., Suite 2100
Seattle, WA 98101
jhorne@gth-law.com
dcohen@gth-law.com

Richard A. Finnigan
Law Office of Richard A.
Finnigan
2112 Black Lake Blvd. SW
Olympia, WA 98512
rickfinn@localaccess.com

Timothy J. O'Connell
Anne Dorshimer
Stoel Rives LLP
600 University Street, Suite
3600
Seattle, WA 98101
tim.oconnell@stoel.com
anne.dorshimer@stoel.com

Eric Stahl
Davis Wright Tremaine LLP
920 Fifth Ave., Suite 3300
Seattle, WA 98104
ericstahl@dwt.com

John McGrory
Davis Wright Tremaine LLP
1300 SW Fifth Ave., Suite 2400
Portland, OR 97201
johnmcgrory@dwt.com

DATED: July 3, 2019.



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