Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION

June 15, 2017

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I. INTRODUCTION & SUMMARY

NTCA–The Rural Broadband Association ("NTCA")[1] hereby submits these comments in response to the two notices seeking comment on actions the Federal Communications Commission ("Commission") could take to accelerate broadband deployment by removing barriers to investment in wireline[2] and wireless[3] infrastructure. NTCA responds herein to both notices.

As an initial matter, NTCA strongly supports proposals in both notices (as well as efforts by the Broadband Deployment Advisory Council ("BDAC")) to remove barriers to broadband

[1] NTCA represents more than 800 independent, community-based telecommunications companies. All NTCA members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

[2] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37 (rel. Apr. 21, 2017) ("*Wireline Barriers Notice*").

[3] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 17-38 (rel. Apr. 21, 2017) ("*Wireless Barriers Notice*").

deployment. With respect to the issues raised specifically in the *Wireline and Wireless Barriers Notices*, NTCA offers several recommendations for steps that the Commission can take to expedite, simplify and ultimately reduce the cost of infrastructure deployment in rural areas.

First, NTCA proposes a streamlined process for small broadband providers' access to utility-owned poles. This process balances the needs of pole owners and existing attachers to maintain the integrity of facilities already installed but also provides smaller operators a shortened timeframe for installing new attachments. NTCA also proposes that the Commission inject additional transparency into the charges for make-ready work, limit make-ready charges to those costs actually incurred, and rationalize the process through which the capital costs of poles are recovered. For RLECs operating in rural areas of the nation with small subscriber bases and rugged terrain, make-ready costs have a very real effect on the costs of deployment, and these costs are ultimately passed on to end-users.

Second, NTCA proposes that the Commission create model "best practices" to streamline the federal agency permitting process. NTCA members typically report that delays, complications, and expenses involved in extending or upgrading facilities on federal lands far exceed those that arise on the state and local level. The process of developing model best practices would allow both federal agencies and operators to identify common delays and points of failure and propose solutions that can expedite processes and be adopted across the federal government.

Third, NTCA recommends that the Commission provide clarity with respect to its National Environmental Protection Act ("NEPA") and the National Historic Protection Act ("NHPA") processes, particularly as those relate to deployment on tribal lands. Specifically, the Commission should adopt clear guidance on the circumstances under which a licensee or

applicant is obligated to consult with tribal entities, the criteria for judging a project, guidelines outlining the circumstances for which fees are due, along with a presumptively reasonable schedule of fees.

Finally, NTCA proposes that the Commission provide clarity with respect to the Section 214 discontinuance of service process. Network upgrades that expand, rather than limit or constrain, the customer experience should not require agency approval.

At the same time that all of these steps could prove important in helping to facilitate broadband deployment, the Commission must not lose sight of the importance of universal service mechanisms that are the foundation of rural Americans' access to the very same communications services as are available to their urban brethren. Each of the issues discussed in the notices and by the BDAC are critical to *expediting* the provision of broadband service to those currently lacking it and upgrading existing networks to ensure that such service once available keeps pace with consumer demand. But all the relief in the world with respect to expedited pole attachments or rights-of-way access and standardized permitting will not, standing alone, drive the expanded reach of or upgraded capacity of broadband networks if rural local exchange carriers ("RLECs") cannot make the business case for such investment and deployment in the first instance. Thus, a sufficient and effective High-Cost Universal Service Fund ("USF") program that solves for the economics of areas where the cost of deploying and operating a network far exceeds what any consumer could possibly afford remains the foundation for broadband investment and sustainability. In the absence of sufficient and predictable USF support, the effectiveness of much-needed deployment reforms in the nearly 40 percent of the United States landmass served by RLECs will be limited, at best.

II. THE COMMISSION SHOULD TAKE SEVERAL STEPS TO EXPEDITE AND RATIONALIZE THE MAKE-READY PROCESS FOR ACCESS TO UTILITY-OWNED POLES.

A. The Commission should adopt a condensed timeframe for the make-ready process applicable to small broadband providers' access to utility-owned poles.

The *Wireline Barriers Notice* seeks comment on methods to expedite the pole attachment timeline[4] as it is currently governed by rules set forth by the Commission in 2011.[5] NTCA proposes herein a modification of the existing make-ready timeframe to apply to small broadband providers' access to utility-owned poles.

In 2011, the Commission adopted a pole attachment timeline that, for "routine" attachments in the "communications space" of a utility-owned pole, sets forth a process that takes place in four separate stages that can last from between 133 and 148 days.[6] On the whole, NTCA members report having good working relationships with utilities that own poles in their service areas (and NTCA members frequently have "joint use" agreements in place that simplify the process of access to poles). However, despite these relationships, the length of the make-ready timeline continues to operate as a barrier to the deployment of broadband infrastructure for small providers.

NTCA therefore proposes a shortened pole attachment timeline (the specifics of which are discussed below) that would apply to small providers' applications for access to utility-owned poles ("small providers" as defined by the Initial Regulatory Flexibility Analysis set forth

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4 *Wireline Barriers Notice*, ¶¶ 6-31.

5 *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC 11-50 (rel. Apr. 7, 2011) ("*2011 Pole Attachment Order*"), ¶¶ 19-49.

6 *Id.*, ¶ 23, Table 1.

in Appendix B of the *Wireline Barriers Notice*).[7] Many of the small providers that comprise NTCA's membership operate in rural areas of the nation that have rugged terrain that necessitates the use of aerial facilities because trenching cable is prohibitively expensive or impractical, if not impossible. The added challenges of great distances and difficult weather (weather that in many parts of the country shortens construction seasons) significantly increase the costs and time involved in any infrastructure deployment, and access to poles for the purposes of building broadband networks is no exception.

In addition, the make-ready process often involves working with more than one existing attacher, and thus new attachers must often work through the four-stage process with two or more parties that themselves must work with contractors to complete the necessary work. Thus, while the process is intended to enable a new attacher to have access to a pole for the purposes of installing necessary facilities in 148 days at the most, the reality is that the process can take much longer. In fact, despite the 148 day timeline adopted by the Commission in 2011, the process can often take far longer (NTCA members have reported that make-ready can take a year or more) for even very small orders (less than 100 pole attachments per year)). The small providers that make up NTCA's membership are just beginning the work of adhering to buildout obligations as set forth in the *Commission's 2016 Rate-of-Return Reform Order*[8] and this involves for many a significant expansion as well as upgrade of existing facilities throughout their rural service areas,

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[7] *Wireline Barriers Notice*, Appendix B, ¶ 12 (stating that under the definition chosen for a small business local exchange carrier "such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.").

[8] *Connect America Fund*, et al., WC Docket No. 10-90, et al., Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 16-33 (rel. March 30, 2016) ("*Rate-of-Return Reform Order*").

work requiring access to poles throughout their vast service areas. Keeping up with the pace of construction necessary to meet these obligations and to ensure that their rural communities continue to keep pace with urban America requires operating as efficiency as possible, and thus these providers simply cannot afford a make-ready timeline that stretches to as long as a year for even very small orders of poles.

Moreover, NTCA's proposal would apply only to "routine" make-ready work, i.e., work that is not reasonably expected to cause a customer outage. NTCA recognizes that the planning necessary to ensure that work expected to cause customer outages does not disturb more consumers than necessary may require a longer time frame, and thus the existing process for such make-ready work should remain in place. Moreover, because the NTCA proposal would only apply to such "routine" requests and for applications by small providers for a small number of poles (orders of 100 per six month period), it fairly balances the burdens imposed on pole owners and existing attachers when receiving and processing an application for a new attachment and performing the make-ready work while ensuring that small broadband providers are able to complete their infrastructure deployment as rapidly as possible.

As to the specifics of this proposal, this shortened timeframe would only apply for providers of such a size requesting access to utility-owned poles for "routine"[9] make-ready work in the "communications space" of a pole. To shorten the timeframe, NTCA proposes: (1) that the Commission first shorten the "Stage 1" "Application and Review" period of the existing pole attachment process from 45 to 30 days; (2) collapse the "Stage 2" "Estimate" period into "Stage 1;" and (3) cut the "Stage 4" period in which make-ready work is performed from 60 to 30 days.

[9] *Wireline Barriers Notice*, ¶ 14 (defining routine make-ready as work that is not reasonably expected to cause a customer outage).

NTCA also proposes that such a shortened timeframe would only apply to orders of 100 poles or less within a state in a six-month time period. This proposal is consistent with a compressed timeframe already recognized by the Commission as a "best practice" in its *2011 Pole Attachment Order*. As to the practical effect of this proposal, it would simply cut by 15 days the "Stage 1" period during which a pole owner assesses the application of a new attacher and surveys the poles for which access is requested. It also folds into Stage 1 the period in which pole-owners estimate make-ready costs. Finally, it shortens by 30 days the period during which the make-ready work must be completed.

B. The Commission should rationalize the make-ready cost structure as applicable to new attachers and should exclude certain capital expenditures from pole attachment rates.

The *Wireline Barriers Notice* also seeks comment on ways that the Commission could reduce make-ready costs and make such costs more transparent.[10] NTCA supports the proposals to limit make-ready charges to costs actually incurred in performing such work and to rationalize the process through which the capital costs of poles are recovered. The Commission should at every turn ensure that pole attachment rates and make-ready costs (like any other critical input to broadband deployment) are just and reasonable and do not impose unnecessary or excessive costs on broadband providers. For RLECs operating in rural areas of the nation with small subscriber bases and rugged terrain, these costs can have a very real effect on the costs of deployment.

With respect to the Section 224(b)(1) requirement that make-ready charges be "just and reasonable,"[11] the *Wireline Barriers Notice* correctly identifies increased transparency as an

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10 *Id.*, ¶¶ 32-43.

11 47 U.S.C. § 224(b)(1).

important piece of the puzzle. Injecting such transparency through a provision that requires pole owners to provide new attachers with a schedule of make-ready charges is an important step, as it would give new attachers an increased ability to plan for the costs of new construction. RLECs working to meet buildout obligations as noted above are doing so over the course of five to ten years, and the ability to factor make-ready costs (or any costs for that matter) into planning is a critical part of planning long-term network investments.

NTCA also supports the *Wireline Barriers Notice* proposal to adopt a rule that specifically limits make-ready charges to those costs incurred by the owner as a direct result of performing work for a new attacher.[12] As the Notice makes clear, while precedent established by the Commission through the complaint process has held that the costs of unnecessary or defective make-ready work cannot be passed on to the new attacher, codification of such a rule will ensure that such practices are applied uniformly across the board.

Finally, NTCA supports the *Wireline Barriers Notice* proposal to exclude certain capital costs from pole attachment rates.[13] More specifically, the *Wireline Barriers Notice* proposes to formally adopt a provision under which capital costs received by utilities as part of the make-ready process are excluded from pole attachment rates. As the *Notice* states, such a provision would be consistent with the Commission's four decades old guidance which provides that when a utility has already recovered non-recurring costs from a third-party, those costs should be subtracted from the utility's capital account to prevent cable providers from being charged twice

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12 *Wireline Barriers Notice*, ¶ 35.

13 *Id.*, ¶¶ 38-39.

for the same costs.[14] As it relates to the *Wireline Barriers Notice* proposal, for instances in which a pole must be replaced to provide space for a new attacher and that party reimburses the pole owner in full, this non-recurring cost should be fully and specifically excluded from the expenses used by the utility to calculate the pole attachment rates charged to all attachers. As the *Wireline Barriers Notice* indicates, absent such a requirement, existing and future new attachers' pole attachment rates may produce a "double recovery" for the pole owner. Ultimately, such double recovery comes at the expense of consumers if such double recovery is passed on to end-users or limits new attachers' ability to cost-effectively extend service to additional consumers.

C. The Commission should establish a pole access complaint "shot clock."

To expedite the pole access process and give teeth to some of the other proposals made herein and in the *Wireline Barriers Notice*, the Commission should adopt a 180-day "shot clock" on Enforcement Bureau disposal of pole access complaints filed pursuant to Section 1.1409 of the Commission's rules.[15] A specifically defined complaint process is important for RLECs for several reasons. First, for small operators, initiation of a complaint with no end in sight is not an attractive proposition in the face of the many other challenges that come with network construction in rural America, and thus most small broadband providers understandably must yield when dealing with unreasonable rates, terms, and conditions for make-ready work. A small operator approaching a deadline to complete a phase of network construction before winter puts a hold on the project simply cannot wait on a complaint the resolution of which can span even

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[14] *Id.*, ¶ 38, citing *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Second Report and Order, 72 FCC 2d 59, 72, para. 27 (1979); *Florida Cable Telecom. Assn., Inc. et al. v. Gulf Power Co.*,EB Docket No. 04-381, Decision, 26 FCC Rcd 6452, 6455-56, para. 9 (2011).

[15] *Id.*, ¶¶ 47-51.

multiple construction seasons. Such a result not only renders the complaint process almost worthless, it unnecessarily diverts resources (in the form of unreasonable make-ready charges or unnecessary delays in access to poles) that could have been used for better purposes. A 180-day "shot clock" would inject much needed predictability into the complaint process and "give it teeth," and in fact would likely have a reciprocal effect on parties potentially the subject of a complaint, spurring recalcitrant pole owners to adopt more reasonable terms and conditions in the negotiation process.

III. THE COMMISSION SHOULD CREATE MODEL "BEST PRACTICES" TO STREAMLINE THE STATE AND FEDERAL PERMITTING PROCESS.

Perhaps no single barrier to deployment vexes wired and wireless rural broadband providers' than regulatory red tape and delay. Indeed, NTCA members typically resort to engaging expert outside legal counsel or other consultants to navigate what has become a frustratingly byzantine process. The Commission can help overcome these challenges by encouraging sound policies at the federal, state and local levels.[16] Publicly available "best practices" for each level of review and specific guidance where appropriate would help provide certainty to applicants and reduce manpower and financial expenditures of carriers better spent on broadband deployment.

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[16] *See* Statement of Shirley Bloomfield, Chief Executive Officer of NTCA-The Rural Broadband Association before the United States Senate Committee on Commerce, Sciene & Transportation, *Connecting America: Improving Access to Infrastructure for Communities Across the Country,"* March 1, 2017. http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=9D2190D3-D34E-422B-9E8D-BD2404BBAF90. Furthermore, there are many efforts already underway to examine and address such concerns. In addition to the Commission's efforts, the Mobile NOW legislation introduced by Chairman Thune and Ranking Member Nelson highlights the significance of streamlined permitting and siting in a national broadband deployment strategy. *See*, Summary, S. 19, *Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act or the MOBILE NOW Act*, https://www.congress.gov/bill/115th-congress/senate-bill/19

A. Federal Review

Perhaps most frustrating to small broadband providers is the time, money and effort consumed in trying to construct broadband infrastructure on or across federal lands. As then Commissioner and now Chairman Ajit Pai noted in his introduction to his "Digital Empowerment Agenda" in September 2016, "[o]n average, it takes twice as long to deploy broadband on federal lands—parts of this country that can be critical to serving rural America—than it does to deploy on commercial property."[17] NTCA members typically report that delays, complications, and expenses involved in extending or upgrading facilities on federal lands far exceed those that arise on the state and local level. In Utah, providers have faced construction delays due to inter-agency permitting disagreements between the Bureau of Land Management and the U.S. Department of Transportation. In South Dakota, a small rural provider's multimillion-dollar fiber deployment requiring U.S. Forest Service approval faced delays that took more than a year to resolve. Also in South Dakota, work on historical preservation coordination among different entities forced a company to assign four staff members over the course of a year to work on getting it resolved. NTCA members have also raised concerns about experiences with inefficient and repetitive required studies at the federal level and unnecessary and expensive bonding requirements. NTCA members have also raised concerns about experiences with inefficient and repetitive required studies at the federal level and unnecessary and expensive bonding requirements. The fact that multiple agencies across the various levels of government can have authority over rights-of-way for a single project or even small pieces of that project produces further complication, expense, and delay.

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[17] Remarks of FCC Commissioner Ajit Pai, "A Digital Empowerment Agenda, September 13, 2016, available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf.

While NTCA members report they often have a close working relationship with local officials and have become familiar over time with the process of obtaining access to public RoWs and other permitting and zoning issues on the state and local level, such is typically not the case when attempting to work with officials to obtain access to federal lands.

NTCA recognizes that the Commission lacks the legal authority to address these issues head-on. Yet, the Streamlining Federal Siting BDAC working group could, in addition to its current charge,[18] develop "model best practices" that federal agencies could look to as a model for ways in which a particular agency – or even better still, *all* federal agencies – could standardize and streamline permitting approval processes. NTCA members often report that such processes vary across federal agencies and even across different departments or divisions of an individual agency. Model best practices would enable agencies to benefit from the expertise on broadband deployment that the Commission and, more importantly, the entities subject to its jurisdiction that deploy broadband on a daily basis already have. The process of developing model best practices would allow both federal agencies and operators to identify common delays and points of failure and propose solutions that can expedite processes and be adopted across the federal government. By identifying processes that produce unnecessary delays, this would also identify processes that also fail to effectuate agencies' goals while retaining those that protect and properly allocate access to federal land. The result would be a more uniform and expedited process that would reduce manpower and financial expenditures of carriers better spent on

[18] *See* Broadband Deployment Advisory Committee, Overview, April 21, 2017 (stating that the Federal Siting Working Group will, among other things, "develop recommendations to improve the process of siting on federal lands and federally managed properties," provide "recommendations on how to standardize the duration of leases and easements" and consider "whether to recommend a shot clock for the processing of applications for facilities siting on Federal land by Federal agencies."), available at: https://www.fcc.gov/sites/default/files/bdac-4-21-2017-presentation-overview.pdf.

broadband deployment. Moreover, much like the "model code" that will be produced by the Model Code for Municipalities and Model Code for States BDAC working group, such model best practices could be developed by the Streamlining Federal Siting BDAC working group and include representatives from federal agencies to ensure that agencies' interests and missions are fulfilled while streamlining processes. Ultimately, the expansion of broadband infrastructure across large swaths of rural America is dependent upon efficient access to federal lands, and Commission developed model best practices can be a driver of such improved access and rural American's access to broadband service.

B. Updating the Commission's Approach to the National Historic Preservation Act and National Environmental Protection Act.

Many NTCA members have expressed frustration with environmental and historic preservation review processes that increase costs and delays. Providers are required to make determinations as to whether a project will have effects on historic properties and obtain input from State Historic Preservation Officer and Tribal Nations. Members report that inconsistencies and delays reign.[19]

The Commission should take specific action to expedite the process for deployment. The Commission should address local inconsistencies in the review process and ensure that procedures do not unnecessarily prevent the simultaneous review of application by multiple entities. Clear guidance on the circumstances under which a licensee or applicant is obligated to consult with entities, the criteria for judging a project, guidelines outlining the circumstances for which fees are due, along with a presumptively reasonable schedule of fees, would provide all

[19] *See, e.g.*, Triangle Communication System, Inc. Emergency Motion for Expedited Review and Emergency Motion to Dissolve Injunction and Emergency Application for Review, In the Matter of Beaver Creek Tower, Havre, MT, *et.al.*, Stop Work Order, TCNS Nos 140296 and 140295, ULS File No. 0007577256 (fil. Jan 27, 2017).

parties with a clearer path in which to move forward. It would also help companies better forecast the financial impact of a construction project before committing resources to a build that could be later deemed infeasible because of the unanticipated costs associated with a review.

The Commission should also expand the list of projects not subject to review to include specific construction projects that, by their nature, would not cause effects to historic properties. For example, NTCA supports excluding pole replacements from Section 106 review, regardless of whether a pole is located in a historic district, provided that the replacement is of substantially the same size as the original pole and within the same property boundaries, similar to the current exclusion for replacement towers. NTCA also supports shortening the distance from a historic property for which Section 106 review is required for collocations of wireless facilities and excluding from review collocations that involve no new ground disturbance, as well as non-substantial collocations on existing structures in urban rights-of-way or indoors.

C. Streamlining State and Local Review

Although NTCA's members report that they have an effective working relationship with local officials (perhaps in large part due to all parties residing in the same small communities), the application process is often complicated by a multijurisdictional effort that requires carriers to navigate different processes at various levels of government in addition to doing so across federal agencies. In particular, wireless technologies have advanced beyond what is accommodated by traditional laws and regulation, and deployment is often constrained.

The Commission's authority to regulate at the local level is constrained[20] and the Commission has correctly interpreted its duty to act when action by a locality "materially inhibits

[20] Sections 253(a) and 332(c)(7) establish that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity" to

or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[21] However, NTCA encourages the Commission to incent States and municipal authorities to adopt laws, rules and regulations that fit within Commission created guidelines and establish the parameters in which the Commission would consider restrictions, fees and approval timelines to be presumptively reasonable.[22] Beyond the "model code" that will be produced by the Model Code for Municipalities and Model Code for States BDAC working group, the Commission should offer a certification or similar recognition program for state and localities that recognizes their efforts and that provides the opportunity for municipalities to announce that they are wireless and wireline "broadband friendly."[23] For an example, the Commission could look to the Wisconsin Broadband Forward initiative. Under this program administered by the Wisconsin Public Service Commission, a local government can either adopt a model ordinance or enact provisions that it certifies as meeting the criteria of that model. Having done so, the political subdivision at issue is considered "broadband ready" and is certified as a "Broadband Forward" community. Certification "ensures the local unit of government has streamlined its administrative procedures by appointing a single point of contact for all matters relating to a broadband network project, adhering to a timely approval process, charging only reasonable fees for reviewing applications and issuing permits, imposing only

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provide personal wireless services or other telecommunications services. 47 U.S.C. § 253(a); 47 U.S.C. § 332(c)(7)((B)(ii).

21 *California Payphone Association Petition for Preemption* 12 FCC Rcd 14191, 14206,¶ 31 (1997).

22 *See* Comments of NTCA, WT Docket No. 16-421, pp. 6-8 (March 8, 2017).

23 This concept is similar to the "Municipal Race-to-the-Top" program suggested by the Commission's Technological Advisory Council in 2011, which encouraged best practices and model rights of way codes. In a similar vein at the federal level, Recommendation 2 suggested a streamlined and coordinated approach to encourage infrastructure deployment on federal lands and buildings. *See*, Technological Advisory Council – 2011 (TAC 2011), https://www.fcc.gov/oet/tac/2011.

reasonable conditions on a permit and not discriminating between telecommunications service providers."[24] A similar certification program administered by the Commission could serve as a powerful incentive to local communities seeking to drive economic development by luring new businesses seeking "broadband ready" areas of the nation in which to locate or re-locate operations.

IV. THE COMMISSION SHOULD INITIATE A PROCEEDING TO EXAMINE RAILROAD CROSSING FEES AND EXPEDITE BROADBAND PROVIDERS' ACCESS TO SUCH CROSSINGS.

While not specifically the subject of questions posed in the *Wireline Barriers Notice*, NTCA urges the Commission to initiate a proceeding to examine railroad crossing fees and access to railroad rights-of-way fees and the other terms and conditions under which broadband providers access such railroad facilities. NTCA members report that these fees and the terms and conditions of their access to railroad crossings and rights-of-way for the purposes of installing broadband infrastructure often operate as a top barrier to broadband deployment. Despite the efforts of some states to cap such fees, unreasonable and unpredictable fees and other terms and conditions that lead to unnecessary expenses (ultimately passed on to consumers) and unnecessary construction delays persist. NTCA members report excessive (and growing) fees for insurance premiums, railroad safety officers' presence during construction, fees for construction permits and fees assessed on outside contractors performing infrastructure installation. Worst of all, fees of thousands of dollars and delays of several weeks or even months can ensue for work (e.g., boring under a railroad right-of-way for the purpose of installing fiber) that is complete in a matter of hours.

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[24] Broadband Forward! Community Model Ordinance, Public Service Commission of Wisconsin, available at: https://psc.wi.gov/Documents/bbForwardModelOrdinance.pdf.

Here again the Commission can utilize its expertise in the area of broadband deployment to create a "model code" for state legislation in the area of broadband providers' access to railroad rights-of-way. NTCA recognizes that railroads have a legitimate interest in ensuring that their facilities are undisturbed by the installation of any utilities' facilities and must ensure the safety of all parties involved. On the other hand, these concerns can and must be addressed in a manner that does not unnecessarily impede broadband infrastructure deployment. A model code for the interaction of railroads and broadband providers can identify common points of delay or controversy that impede infrastructure deployment and potentially produce agreed upon processes that satisfy parties on both sides. Such a process can also inject additional predictability into the process and spur additional deployment.

V. THE COMMISSION SHOULD PROVIDE CLARITY WITH RESPECT TO THE SECTION 214 DISCONTINUANCE OF SERVICE PROCESS AND MAKE CLEAR THAT NETWORK UPGRADES THAT EXPAND, RATHER THAN LIMIT OR CONSTRAIN, THE CUSTOMER EXPERIENCE DO NOT REQUIRE AGENCY APPROVAL.

In several sections of the *Wireline Barriers Notice*, the Commission seeks comment on issues that can be described generally as relating to "technology transitions," or "the IP transition." These include service discontinuances, standards by which "replacement services" are evaluated, and notice of network change requirements.[25] At the outset of this discussion, NTCA notes that certain of these requirements are tied to obligations created by Section 251(c)(5) of the Act, and do not apply where a rural carrier enjoys an exemption pursuant to Section 251(f). Nevertheless, in the interest of advocating for meaningful regulatory processes that promote investment and remove disincentives or ambiguities, NTCA will comment on these specific policies that may inform other Commission actions.

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25 *See Wireline Barriers Notice*, ¶¶ 53-62, 70-103, and 122-129.

NTCA members endeavor consistently to improve and expand service offerings to customers in their remote, difficult-to-serve territories. These efforts require careful balancing and incorporation of high-cost support, private capital, and other state and Federal programming such as those offered under the aegis of the U.S. Department of Agriculture. NTCA members, as demonstrated by data set forth in annual NTCA broadband availability surveys, have overcome low population densities, challenging geographic terrain, and short building/construction seasons to deploy increasing broadband capabilities to their consumers.[26] The *Wireline Barriers Notice* seeks comment on several issues that implicate providers' abilities to focus financial and other resources on the business of building broadband, rather than regulatory processes whose value is not discernibly proportionate to the burdens and costs they impose. As an overarching principle that guides these comments, NTCA submits that carrier resources are more wisely directed to the task of building new network capabilities than to analyzing whether particular upgrades or other service amendments that take advantage of evolving technological capabilities trigger requirements to file for Section 214 network discontinuance.

The Commission proposes to set aside rules adopted in 2015 that addressed circumstances in which providers would be required to file for Section 214 discontinuance of service.[27] The Commission proposes to eliminate all or some of the changes that were adopted in 2015, and which had the effect of expanding both the duration of a discontinuance proceeding and the universe of parties that would receive specific notice. The Commission proposes a return to the pre-2015 requirements. NTCA submits that the 2015 changes to Part 51 network

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[26] For comprehensive access to rural U.S. provider data, please visit the NTCA Survey Reports webpage at http://www.ntca.org/survey-reports/survey-reports.html.

[27] *Wireline Barriers Notice*, ¶ 54.

disclosure rules tend to extend, rather than decrease, the copper retirement process, and divert capital from network improvements to prolonged regulatory compliance measures. Therefore, NTCA recommends the Commission to set aside the 2015 standards.

NTCA notes that the Commission seeks comment on whether it should preserve the 2015 elimination of the process by which competitive LECs can "object to and seek to delay an incumbent LEC's planned copper retirement . . . ."[28] NTCA supports the retention of this 2015 amendment. The open-ended ability of a third-party to delay or otherwise obstruct efforts to migrate networks to more capable and more efficient designs can have a catastrophic impact on a firm's ability to plan deployment and follow-on marketing and other efforts. This would represent an undue and quite illogical constraint at a time that the Commission and other private and public interests are expressing growing interest in broadband networks and the economic, educational, and public health and safety applications they support. The capital (and, in the case of NTCA members, community-oriented) interests of providers to improve their service offerings should not be held back by firms whose business models rely upon another entity's legacy network.

The technology conversions that are potentially subject to a Section 214 requirement are fully consistent with the on-going Commission encouragement and obligations for providers to deploy broadband as a condition to receiving high-cost support. Therefore, from a purely logical perspective, requirements to file for authority to *discontinue* service that are triggered by efforts to *expand* capabilities would beg for explanation.

The looming irony of recent amendments to the Commission's rules (which the Commission now seeks to set aside) is that they tend to place additional obstacles in the path of

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[28] *Id.*, ¶ 56.

progress that NTCA members traverse actively. Current industry standards contemplate the replacement of TDM facilities with IP capable networks. This is an evolution that reflects pervasive technological innovation; products availability; and market demand. Stated differently, rapidly evolving applications that underlie voice communications and support disciplines as varied as education, health care and public safety are designed, built, and delivered to operate on IP networks. These new services generally surpass in function, capacity, and capability TDM-based offerings. And, yet, the most recent Commission rules addressing service discontinuance leave carriers in a vague land of determining whether the incorporation of *more* capability triggers a requirement to seek authorization to *discontinue* service.

Toward these ends, NTCA supports, as an alternative to the elimination of Section 51.332, the "second alternative proposal" offered by the Commission. This includes limiting the entities to which notice must be provided; reducing the waiting period between the Commission's release of the public notice before copper retirement can commence; offering greater flexibility governing the timing of the filing; reducing the waiting period where copper facilities are no longer being used; and, eliminating the "good faith communication" requirement and other obligations relating to information about prices, terms, and conditions that would be affected by the change. [29] These are sensible alternatives that reduce the burden upon firms that are endeavoring to complete investments and deployments to respond to market and technological demands.

To the extent that consumer protection is at the heart of the Commission's inquiry, regulations relating to the provision of service should focus on the ultimate impact on consumers. The Commission is commended to consider the potentially *adverse* consequence of

[29] *Id.*, ¶ 60.

requiring discontinuance notices or consumer-facing communications that warn of impending service discontinuance. Overall, customers care that the capabilities they have purchased will be available. NTCA submits that consumers are not served by requirements to offer *information* about the discontinuance of a TDM service and its successor IP-enabled service. NTCA submits that consumers focus generally on service, rather than the underlying technology. To the extent a specific element of a new service may implicate a consumer concern, it is that narrow issue that should be addressed to ensure the consumer interest. The Commission has previously carved a path toward this route. By way of example, responding to concerns about access to 911 by IP-enable voice offerings, the Commission instituted requirements pertaining to customer notifications and back-up power.[30] These actions are more effective and better suited to capturing the necessary public attention than notices of general applicability that pertain to technical matters that in practice have little or no impact on the consumer experience.

These issues are implicated in several of the Commission's specific proposals. For example, the Commission seeks comment on the "grandfathering" of existing customers.[31] "Grandfathering" refers to the practice of not accepting new customers for a service while continuing to provide it to existing subscribers. The Commission seeks comment on streamlining the period in which such applications would be granted automatically. The Commission also seeks comment on the scope of services that would be implicated by this proposal, including TDM services at various speed levels ranging from 1.544 Mbps (DS1) or

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30 *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174, FCC 15-98, Report and Order (rel. Aug. 7, 2015) ("Report and Order").

31 *Wireline Barriers Notice*, ¶¶ 82-88.

services rated below 10 or 25 Mbps.[32] Finally, the Commission asks whether certain applications could be granted without a period for public comment, and what criteria might govern that type of process.

NTCA submits that the Commission's inquiries provide the answers. Customers who are not offered a "grandfathered" service would have neither reason nor expectation to be informed that it is not available, while customers that are currently receiving the service have neither reason nor expectation to be informed that new customers will be able to subscribe to the service. Requirements to provide notice to either set of customers, or to other parties, simply add regulatory burdens to operators. Likewise, the Commission's request for comment on decreasing the duration of the comment and "automatic grant" periods for times for instances in which one type of voice service is replaced by another[33] should be governed by similar perspectives.

The Commission also proposes to eliminate the "adequate replacement" test[34] and seeks specific comment on the petition for reconsideration filed by NASUCA concerning the testing methodology.[35] In comments filed in support of the NASUCA petition, NTCA did not comment on the specific outcomes requested by NASUCA.[36] Instead, NTCA focused on the core elements of service expected by consumers. NTCA explained that voice communications

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32 *Id.*,¶ 76.

33 *Id.*,¶¶ 73-75.

34 *Id.*,¶ 90, *et seq.*

35 *Id.*,¶ 91.

36 *See Ensuring Customer Premises Backup Power for Continuity of Communications; Technology Transitions; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services: Response to Oppositions of NTCA-The Rural Broadband Association*, Docket Nos. 14-174, 13-5, 05-25, RM-10593, RM-11358 (fil. Dec. 19, 2016).

warrant a unique regulatory outlook as contrasted against data services, generally, or *other* data services where the voice service in question is an over-the-top offering. NTCA submitted that even if standard (i.e., non-commercial or non-emergency) consumer use could be conceived to tolerate compromised quality, electronically-enabled voice communications should not be subject to latency, jitter, or other interruption. Voice Quality of Service ("QoS") has occupied a defined space in the regulatory paradigm, and that should not be compromised as the technological underpinnings evolve. NTCA therefore urged the Commission to recognize in its rulemaking and implementation that QoS governs the length of a voice call from end-to-end. Sound public policy should not rely upon "best efforts" public Internet networks to ensure mission-critical and latency-sensitive traffic. However, where the replacement service meets the definition of the service as described in the governing tariff, no further inquiry need be made. To be sure, the Commission must implement those measures as may be necessary to ensure that QoS for voice communications exists *end-to-end*, and contemplate the *full route of transmission* across numerous networks and miles. But, where the contours of the service match the contents of the tariff, the analysis should be complete. As the Commission proposes, a "carrier's description in its tariff – or customer service agreement in the absence of a tariff"[37] should be the standard against which a Section 214(a) discontinuance notice would be triggered. The Commission's observation in these regards captures the essence of concerns NTCA notes in these regards: it is the substance of the service, rather than the underlying technology, that should govern notification requirements. NTCA agrees that the "functional test" is unduly vague and does not properly get to the heart of the matter, which is the consumer experience. NTCA agrees with USTelecom that this rule can trigger unnecessary filings whose costs would be better

[37] *Wireline Barriers Notice*, ¶ 123.

absorbed in actual deployment and upgrades, speeding the way to the new and more capable networks.[38]

VI. CONCLUSION

For all of the reasons discussed above, NTCA urges the Commission to:

- Streamline the pole access timeline for small broadband providers and reduce unnecessary make-ready costs;
- Create model "best practices" to streamline the federal and state agency permitting processes and for access to railroad-owned facilities for the purposes of installing broadband infrastructure;
- Update the Commission's approach to the National Historic Preservation Act and National Environmental Protection Act, particularly as those relate to deployment on tribal lands; and
- Provide clarity with respect to the Section 214 discontinuance of service process and make clear that network upgrades that expand, rather than limit or constrain, the customer experience do not require agency approval.

Respectfully submitted,

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[38] *Id.*, ¶ 126.