

**Broadband Deployment Advisory Committee  
Rates and Fees Committee  
DRAFT - Final Report to the BDAC (v 2.5)**

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## I. SUMMARY

The Rates and Fees Ad Hoc Committee (“Committee”) submits this report and guidance to the Broadband Deployment Advisory Committee (“BDAC”). The Committee was formed to more deeply explore rates and fees for broadband and provide guidance to the BDAC and Commission. The work was daunting, inhibited by a number of current and historical challenges between the different groups and interests regarding the issues surrounding the setting of rates and fees for broadband deployments. These challenges are discussed in detail in the document. The ultimate questions are “what constitutes reasonableness” and “how does one set fees that are considered reasonable by all parties involved?”

The Committee explored the most common methods for setting rates and fees for broadband infrastructure deployment, including their definitions and multiple perspectives and opinions on the pros and cons of each method. The Committee looked at models and examples from numerous implementations reviewed the rates and fees comments, and recommendations from each of the BDAC workgroups. Data was collected and analyzed under the guidance of Professor Christopher Yoo with more than 1,000 data points.<sup>1</sup>

The most important parts of our work were the determination of principles under the “What Really Matters” section and the simplification of three key categories of fees, both which guided our work and became critical elements of our analysis and guidance to the BDAC.

A set of seven key principles were unanimously developed and should become a guide for the development of reasonable rates and fees. The Committee believes this approach could provide a benchmark to weigh against approaches, methods, and models. The Committee feels that this provides a solid base for interested parties to start and guide conversations regarding access, rates, and fees in the public right of way.

The Committee simplified our view of rates and fees into three distinct types: Event or One-time fees, Rental fees, and Access fees. This simplification allowed us to narrow down the areas of conflict and treat each of these separately. There was unanimous agreement within the Committee that one-time fees should be based on the actual cost required to support these activities.

Finally, the Committee reviewed in great detail each of the most common methods for determining rates and fees, including definitions and industry and local government perspectives for each. This work enlightened the group and provides a better understanding

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<sup>1</sup>Although Committee member Professor Christopher Yoo collected and analyzed certain data concerning rates and fees voluntarily provided by various parties under the protection of non-disclosure agreements, due to the non-disclosure agreements, the Committee did not use the data or the analysis as a principal basis for any of our recommendations.

of why certain methods are or are not supported by the different stakeholders. This information should prove informative for the Commission as it further explores issues relating to fees for broadband deployment.

## **II. WHAT REALLY MATTERS: GUIDING PRINCIPLES ON RATES AND FEES TO ENCOURAGE BROADBAND DEPLOYMENT**

### **What Really Matters/Principles**

This section is to outline key issues of importance for both governmental entities and communication providers related to fees and rates assessed for access by the latter to public rights-of-way (“ROW”). Such access is essential for the purposes of insuring all citizens have equal access to broadband services.

The Committee defines Fees to be one-time or event driven charges and Rates as those that are reoccurring. This is consistent with the Model Code Workgroup definitions. Refer to IV-B in this document for a more detailed explanation.

### **What Really Matters:**

*Robust and affordable broadband should be available and accessible to all citizens, both urban and rural, throughout the United States.*

Broadband access is important because of the unprecedented opportunities and benefits for consumers, businesses, and the U.S. economy that it generates. Citizens are increasingly using broadband to identify and pursue job opportunities, obtain education and training, secure government services and a host of other opportunities. Broadband is powering new technologies, such as smart grids and smart cities, and is critical to economic growth. It is improving health care and providing rural areas with access to higher quality and more specialized services. It is also providing first responders with unprecedented capabilities to help persons in need.

Communication providers’ access to the public ROW will be critical to the achievement of broadband infrastructure deployment, including but not limited to small cell infrastructure builds and the underlying wired infrastructure that will be essential to deliver on the promise of such services. Ensuring that broadband fees and rates do not impede essential new broadband infrastructure within the public ROW should be a national priority. With over 30,000 jurisdictions located in the United States and several federal and state land-managing agencies as well, transparency and predictability in fees and rates will be critical to the timely deployment of broadband infrastructure and availability of services.

Communication providers and government agencies must work together to ensure the vision of future broadband capabilities (Smart Cities, 5G, economic benefits, IoT, etc.) is realized within the next few years. Urban challenges will undoubtedly require different

solutions than rural challenges, but robust and affordable solutions for broadband access by all users will be critical to both.

Excessive fees and rates on broadband deployment, while undefined, can impose a barrier that impairs achievement of the national goal of ubiquitous and reliable broadband service. In addition, broadband providers and their consumers face a variety of state and local taxes, fees, and rates that create competitive disparities among providers. Rationalizing ROW fees and rates so that they apply equally to all broadband providers – wired and wireless – on competitively neutral basis and based upon their respective ROW use would promote competition while ensuring that municipalities are fairly compensated for ROW use. Similarly, excessive fees and/or rates related to access to poles, conduits, and the ROW can impede the deployment of broadband infrastructure and services. Fees for applications – application processing, pre-constructions surveys, make-ready, etc. – will need to be fair and reasonable as well.

For these reasons, there are seven principles that the Committee has used to guide our evaluation of fees and rates. All principles are of equal importance.

**Principles:**

- Fair partnership
  - Fair and equitable for all parties to insure a lasting relationship
- Transparent
  - Clear visibility and understanding of all fees and rates
- Public Rights-of-Way for the use and benefit of the greater community
  - Deployment and delivery of services for the greater good
- Nondiscriminatory
  - Neutral treatment and access of all technologies and communication providers based upon the extent/nature of ROW use
- Future proof
  - Allow for growth and innovation while being sensitive to community needs
- Sense of Urgency
  - Provide all Americans with broadband as timely as possible
- Simplicity
  - Clear and well-defined solutions that are not unnecessarily complex or time consuming

### III. METHODS

#### A. Cost Based Fees

**Background.** Some industry members posit that local fees for deploying broadband facilities should be cost-based, transparent, and non-discriminatory, as such an approach ensures localities are fully compensated for expenses incurred as a result of the deployment, while accommodating different siting-related costs that different localities may incur. Conversely, some municipalities posit that, while cost-based fees are an option for some localities, other methods, including negotiation, are valid and potentially preferable, depending on the locality.

#### Description of Cost-Based Fees.

- Cost-based fees would allow the locality to recover its actual and direct costs of issuing and processing permits, reviewing plans, allowing attachments to public infrastructure and conducting physical inspections related to issuing and processing permits.
- Under a cost-based fee framework, localities can recover the costs to review and issue siting permits, build and maintain municipal infrastructure, supervise the installation of facilities that impact rights-of-way, and ensure those facilities are properly maintained.
- These costs would primarily include the costs that are attributable to permit managers and other employees who perform those application review and construction oversight functions and the costs associated with building and maintaining municipal infrastructure. Fees must, in short, be based on localities' costs of managing the siting process, maintaining infrastructure, and supervising use of right-of-way that results from broadband deployment.
- The Committee discussed, but did not establish, potential elements that could be part of a cost-based fee calculation. Not all of these would apply to each type of fee. The elements the Committee discussed as being potentially included are: Direct costs or incremental cost, such as permitting, utility coordination, and inspections; Indirect costs, such as central support functions and other “overhead costs”; Street degradation costs (i.e., depreciation of the useful life of the street); and/or Opportunity costs, such as those that recognize the value of using the public ROW. (e.g., traffic disruption)

#### Common Perspectives.

- Event/One-Time fees should be cost based.

## **Industry Perspectives.**

- Local fees for application submission and processing, access to rights-of-way, and the use of municipal-owned utility and light poles should be cost-based.
- Cost-based fees are essential to broadband deployment.
  - The FCC recognized in commencing its “Accelerating Broadband Deployment” proceedings that regulatory barriers can deter deployment and thus undermine the critical national priority of promoting broadband investment.
  - The record in the FCC’s proceedings establishes that providers have not deployed in various localities, or deployed less extensive networks, due to high local fees. By setting high fees, localities disserve their own residents.
  - Ensuring that providers can cost-effectively install next-generation communications network facilities in the public rights-of-way delivers value to the local community in the form of upgraded and new services.
  - Building communications networks is expensive and requires substantial up-front capital expenditures. Fees increase those up-front costs. The higher the fee, the greater the risk of not earning a sufficient return on investment, which discourages deployment.
  - Even where broadband providers deploy notwithstanding high fees, those fees increase the costs of broadband deployment and are borne by consumers.
  - High fees could deter deployment of small cells. While a macrocell serves a wide area, handles substantial traffic, and thus is generally able to absorb local fees, small cells serve a smaller area and have lower traffic, and thus must be built at greater scale. The coming proliferation of small cells will also require a large amount of fiber and/or microwave backhaul. Fees can make small cells and these necessary backhaul facilities cost-prohibitive to deploy.
- Given that providers have a limited supply of capital to invest, higher fees can result in less extensive or less robust coverage.
- A cost-based fee structure accommodates the different siting-related costs that different localities may incur to review and process permit applications and oversee the installation and maintenance of facilities in rights-of-way, while precluding excessive fees that impede deployment.
- Cost-based fees are set at a level that ensures localities are fully compensated and by definition ensures that providers’ facilities are not subsidized by taxpayers. Tying fees to costs thus means that no locality will incur expenses that are not fully recouped.
- A locality’s general right-of-way costs (such as for road repair or trash removal) should not be included in a cost-based fee calculation because the locality incurs those costs even without the deployment of broadband facilities.

- Charging a broadband provider based on the provider's revenues or number of subscribers, or based on the market value of adjacent property, are not related to the cost of managing the right-of-way and should not be allowed under a cost-based fee framework.
- Because identifying the costs that are attributable to siting involves information within a locality's knowledge, the locality has the burden to show its fees are set to recover those costs.
- Limiting fees to actual and direct costs appropriately allows fees to reflect and be consistent with the extent of a party's use of the right-of-way.

### **Local Government Perspectives.**

- Cost-based fees are not fair and reasonable compensation. Cost-based fees do not allow the public to recover their fair market value for use of the rights-of-way and municipally owned assets by profit-making companies, which local governments have a responsibility to do and in many cases will run counter to the existing gratuity clauses in many states. Cost-based fees create an unfair subsidy for one industry. The existence of unfair subsidies will counter local governments' ability to maintain reasonably comparable fees among all companies in the rights-of-way.
- Local governments prefer choice and flexibility, depending on the locality and the needs of the locality. Requiring cost-based fees will restrict local governments' ability to be flexible and creative when working with industry.
- The rights-of-way are intended for use for transportation and other public purposes, with utilities/communications as a secondary use that generally is subject to the underlying use of the rights-of-way. ; Cost-based access fees presume that private, for-profit communications providers should have the same priority over the rights-of-way as transportation and other public uses, which is not the case.
- Cost-based fees may force localities to subsidize profit-making providers with no assurances whatsoever in return that such subsidies will result in broadband expansion, especially to underserved and rural areas. Taxpayers may object to this subsidy yet have no recourse when local elected officials are required by federal regulations to authorize the subsidy.
- In jurisdictions in which other rights-of-way users are paying access fees that are not limited to costs, these users may effectively subsidize communications providers, even where these users (such as electric and water utilities) have a mandate to serve the entire community that most communications providers will not have. In addition, local governments may face claims of discriminatory pricing.
- Calculation of actual and direct cost-based fees requires additional administrative overhead for the cities. It also creates an environment where components of the calculation may become contentious and slow down the process of permitting. The

cities may believe certain components should be included where the provider may not.

- Fees only based on actual and direct costs inadequately reflect the cost to manage, acquire and improve the public right-of-way and represent a cost to cities. In addition to the day-to-day public right-of-way management costs, cities incur acquisition costs associated with public right-of-way often at or above market value, opportunity costs associated with being in the public right-of-way, and expenditures that must be made by a city to manage, construct and improve the public right-of-way so that it can accommodate an ever increasing amount of occupants while remaining safe and accessible to all. These represent unfunded mandates to cities requiring resources to be reallocated for the sole benefit of private industry. This is exacerbated in the event a locality has the burden to show its fees are set to recover costs.

## **B. Market Rates & Fees**

### **Description of Market-Based Fees.**

Market Rate is a method that appears to be favored by local and state governments to charge for use of the public right-of-way and public infrastructure. Some different ways to interpret Market Rate are as follows:

- Fair market rental based on the market rates of private property in the area
- Land values may be determined by:
  - Values attributed to rights of way by Census Tract or other Census Tract information
  - Independent third-party appraisal
  - County or government authority appraisals
  - Benchmarking with other area communities
  - Negotiation

Consideration may be made to determine rates based on **exclusivity** (monopoly rates) versus **shared** (multi-carrier rates). In the current climate, the concept of exclusivity or monopoly is not in favor. Competition is an important goal.

Market rates may be determined based on certain criteria:

- Value of property/asset
- Scale of deployment
- Uniformity of deployment
- Other Factors may include: Impact, competition for use of assets, expediting, and character of the installation and how it aligns with the character of the community or neighborhood

- Ability to realize policy goals including universal broadband coverage and adoption
- Size/impact/weight/obtrusiveness/aesthetics, length of term

### **Common Perspectives:**

Agreement was not reached on common perspectives by the group.

### **Industry Perspectives.**

Industry in general opposes the use of market rates for various reasons including the following:

- There is no “market” for access to the ROW or to municipal-owned poles because localities have monopoly control over that access and there are circumstances where there is no “market” for vertical infrastructure (e.g., in areas where utility plant is underground, light poles and other municipal infrastructure are the only facilities available for deployment). Thus, there can be no “fair market value” for access to the ROW or to municipal-owned poles or other vertical infrastructure. Examples of what providers are charged currently, or averaged rates, are thus not guides to reasonable rates. Instead, they are examples of monopoly rent.
- Use of so-called “market” rates is not directly related to the impact or burden placed on the ROW or public infrastructure by the deployment of communications equipment.
- The public ROW and public infrastructure are public assets that are intended for use for the public good. Localities have detailed laws, ordinances, and rules dealing with ROW access, confirming that they manage ROWs for the benefit of the public, not as private landowners.
- Wide variation of rates from community to community cause uncertainty and challenges in planning, thereby imposing barriers to deployment.
- Use of market rates could create or exacerbate competitive disparities if governmental entity determines that one provider should be charged more than another because the provider derives greater value from ROW access
- Market-based rates are inconsistent with Section 253 of the Communications Act

### **Local Government Perspectives.**

The majority of Local and State governments support market rates because of the following:

- Fair and reasonable compensation for use of the public ROW and public infrastructure means market-based rent. If private industry had to pay for access to private land, their costs would be significantly higher and there would be wide variability of their arrangements with private property owners. Use of the public ROW and public infrastructure allows communication providers the ability to build

a contiguous network. Market based rates promote non-discriminatory treatment of users of the rights of way and maintain consistency with decades of accepted practice.

- Many state constitutions and/or statutes prohibit or limit (or may be interpreted to limit) local authority to give private entities use of municipal property at less than fair value. Mandating less than market-based fees could result in litigation based on these statutes.
- It is unfair to prioritize one industry (wireless industry) over all others in pricing the public rights-of-way and public infrastructure access. Equal pricing of private access to public assets is especially a concern where there is no obligation for providers to serve all residents (which is required of other users of the rights-of-way who may pay market-based fees).
- High profile and positioning of the public ROW and public infrastructure may be more intrusive than many private property installations and thus are more impactful to the public thus warranting higher compensation
- Land values can be quantified based on a known set of data that does not rely on the existence (or lack thereof) of alternative locations for communications providers. The value of ROW can be determined in multiple ways. ROW has value to the public by providing the location of needed infrastructure to serve homes and businesses, for transportation, public safety and other utilities. In addition, it has market value to private companies who wish to use it by virtue of their request to do so.
- Less administrative burden
- Local governments have many competing uses for assets in the ROW, including but not limited to, public safety, traffic mitigation, public and private infrastructure.
- Local and State government have an obligation to taxpayers to ensure efficient use of public resources, fair compensation for use of the public ROW, and equitable management of public infrastructure.
- Use of a market rate approach has the potential for removing administrative time delays and costs due to the existence of data to support land values. This is an understandable and somewhat fixed variable.

### **C. Revenue-Sharing**

#### **Description of Revenue-Sharing-Based Fees.**

Some providers enter into “revenue sharing” arrangements with state and local governments, where a percentage of the provider’s revenue is assessed and paid to localities in part to compensate them for use of the public rights-of-way.

Revenue-sharing arrangements between cable operators and localities are denominated as a franchise fee. The Federal Cable Act provides that, “for any twelve-month period,”

franchise fees “shall not exceed 5 percent of such cable operator’s gross revenues derived in such period from the operation of the cable system to provide cable services.”<sup>2</sup> In practice, franchise fees include not only recurring monthly cable operator receipts from traditional cable television services, but also revenues from pay-per-view and on-demand programming as well as revenue from advertising, home shopping, installation and the rental of set-top boxes. Under a federal court decision, the franchise fee collected from customers is considered revenue that is subject to the five percent franchise fee.

Landline telephone companies may also be subject to revenue-based compensation arrangements established under state law for their use of the public rights-of-way. Landline rights-of-way agreements are not subject to a federal revenue cap, but they are limited by state law. Wireless infrastructure providers are also subject to revenue-based compensation for their use of ROW in some localities.

### **Common Perspectives:**

Agreement was not reached on common perspectives by the group.

### **Industry Perspectives.**

Different types of communications providers each have concerns with the application of a revenue-based fee model to their particular industries.

***Wireline Industry Perspective.*** Revenue-based fees by their nature are unrelated to the actual cost of the rights-of-way management, and often exceed such costs. The cable industry notes that, although a five-percent franchise fee based on cable revenues may have represented an acceptable compromise between cable operators and franchising authorities when Congress authorized it as an acceptable franchise fee in 1984, marketplace changes since then and the cable industry’s experience with franchise fees (as well as court precedent that expanded the imposition of franchise fees to broadband services) raise fundamental questions about the continued viability and fairness of this approach.

Moreover, cable operators often pay application and permit fees in addition to franchise fees when they must enter the rights-of-way to construct or modify their plant. They are also almost always required to provide in-kind compensation to franchising authorities, such as free or discounted service; public access channels and supporting capital investments; and institutional networks – much of which is not subject to the five percent revenue cap. As noted above, some jurisdictions have also imposed additional fees and obligations on cable operators for providing broadband, VoIP, or telecommunications services over their network. Cable operators also pay sales and other taxes in addition to franchise fees. Subscriber taxes and fees added \$4.2 billion in revenues to state and local governments over and above franchise fees—some of these taxes are not taxes of general

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<sup>2</sup> 47 U.S.C. § 542(b).

applicability. These significant taxes and fees create disincentives to cable infrastructure buildout.

Cable operators argue that the imposition of disparate revenue-based ROW fees creates a substantial disparity among providers subject to such fees. To the extent that other broadband or video providers are subject to different and fewer taxes and fees for the deployment of comparable facilities, the franchise fee framework undermines competition and harms broadband deployment, as well as increases the amount that consumers pay for service. For example, as noted below, providers of radio-based video programming services are statutorily exempt from the payment of franchise fees.

Finally, cable operators argue that under federal law a cable franchise authorizes the construction and operation of a cable system to provide any communications service, and that the cable franchise fee is the sole compensation to which localities are entitled for the operation of the cable system regardless of the services provided. Nonetheless, an increasing number of localities have taken the position that they can impose separate fees on the broadband and wireless services offered over a cable system, and at least one state court has affirmed this position.

Legacy telephone providers have also voiced similar concerns about additional fees imposed on them for their use of the public ROW for services outside of their voice services. For instance, legacy landline telephone companies may also be subject to similar fees and obligations when they provide video or other non-telecommunications services over their telecommunications networks.

***Wireless Industry Perspective.*** Wireless industry representatives also raise policy and legal concerns with revenue-based approaches. They note, for example, that Title VI of the Communications Act explicitly exempts services provided by radio communications from Title VI regulation, which include franchise fees. They argue that franchise fees can prohibit or have the effect of prohibiting service in contravention of Sections 253 and 332. They also note that the wireless industry often has to pay other local and state taxes that do not apply to other users. More broadly, wireless industry representatives argue that the revenue-based model does not account for the lesser use of the rights-of-way by wireless facilities, as compared to wired networks. Under a revenue-based approach, providers with similar revenues but substantially different uses of the right-of-way would be required to pay identical or higher rates. Put another way, a requirement that the wireless provider pay a percentage of its revenues is not tied to the provider's actual use of rights-of-way. Nor would such a requirement reflect the actual costs incurred by local authorities for right-of-way management. For these reasons, application of a revenue-based model would add costs that could otherwise be invested into building out networks, and may disincentivize buildout and foreclose opportunities for smaller providers and new entrants altogether.

### **Local Government Perspectives.**

Title VI, Section 253 or Section 332 of the Communications Act allows revenue-based fees for use of public assets. Local jurisdictions have decades of proven history that revenue-based franchise fees reflect the public interest in the competitively neutral administration of the public rights of way that providers use to deliver their services. Localities view application and permitting fees as appropriate because the fees represent compensation for the costs incurred by local governments in connection with particular construction projects, separate from the property interest reflected in a video or other franchise fee.

As noted above, some local governments also take the position that the franchise fee covers only the service providers' use of the public rights-of-way to provide cable service, and that additional revenue-based fees should be imposed for other communications services provided over the cable system. Otherwise, it may be argued that local government is not being nondiscriminatory because telecommunications service providers would pay fees that cable operators do not have to pay. Every provider paying the same percentage of revenue for all services provided over facilities in the public rights of way is one method to better ensure competitively neutral and nondiscriminatory fees.

Revenue-based fees enable competition because 1) they are competitively neutral, 2) new entrants will not be required to pay such fees until they generate revenue and 3) the fees are not paid by providers but instead by consumers as a line item on their bill. These types of fees are also easier to administer than fees that require quantifying the amount of use each provider makes of the rights of way. Furthermore, application of a revenue-based model will encourage investment into building out networks to serve entire communities and are a historically proven method to incentivize buildout for smaller providers and new entrants.

## IV. GUIDANCE

### A. Principles

The following principles may be used as a set of criteria to guide, test, and determine the reasonableness of rates and fees. These are discussed in detail in the Section II above, titled “What Really Matters: Guiding Principles on Rates and Fees to encourage Broadband Deployment.”

- Fair partnership
  - Fair and equitable for all parties to insure a lasting relationship
- Transparent
  - Clear visibility and understanding of all fees and rates
- Public Rights-of-Way for the use and benefit of the greater community
  - Deployment and delivery of services for the greater good
- Nondiscriminatory
  - Neutral treatment and access of all technologies and communication providers based upon the extent/nature of ROW use
- Future proof
  - Allow for growth and innovation while being sensitive to community needs
- Sense of Urgency
  - Provide all Americans with broadband as timely as possible
- Simplicity
  - Clear and well-defined solutions that are not unnecessarily complex or time consuming

### B. Simplified Categorizations

The Committee found the segmentation and simplification of fees types was significant to understanding how to address the setting of fees. Our observation was that all types of rates and fees were being lumped together during discussions on how rates and fees should be determined. Through following the above principles, we determined that using the categories below steered us to make progress, in finding agreement on some of the types. The Committee encourages the BDAC to use this fee framework for their recommendations to the Commission.

## TYPES OF RATES AND FEES

**One-Time Fees.** As reflected in their name, “event” or “one-time” fees include fees that providers pay on a non-recurring basis. For example, a provider may be required to pay fees during the application process to cover the costs related to processing building or

construction permits, street closures, or a one-time permitting or application fee. One-time or event fees can be achieved through different methodologies, but because event or one-time fees are by definition tied to a specific event, the Committee recommends that these fees should be based on the actual cost associated with that event. A cost-based fee structure unanimously approved by the committee accommodates the different siting-related costs that different localities may incur to review and process permit applications, while precluding excessive fees that impede deployment. These fees should be transparent, plainly outlined, and publicly disclosed by a municipality so that all parties are clear.

**Rental Rates.** Rental rates are recurring rates for attachments to leased property, usually a wireless facility on a per pole/structure per year arrangement. Rental rates are either set by the property owner or, in some instances, by law or regulation. Rental rates may be determined in a variety of ways, including costs-based, market rates, or through negotiation. Wireless pole attachment rental rates are the most common type. The Committee generally agreed that this is a cost based model but differed on what should be included in the “cost” of a public right-of-way.

**Access Rates.** Access rates are recurring rates that are charged in some instances to compensate for access to the public right-of-way, which includes the area on, below, or above a public roadway, highway, street, sidewalk, alley, utility easement, or similar property. Access rates are applied to some, but not all, infrastructure or service providers for access to the public right-of-way. Access rates can be achieved through different methodologies – including cost-based, market-based, revenue sharing, taxes, or other rates, to the extent they are imposed at all. One way access fees have been assessed on some providers, such as cable operators, is through revenue sharing arrangements.

## V. APPENDICES

### 1. ESTABLISHMENT AND PURPOSE OF BDAC

- Established in January 2017, with five working groups created in April – Model Code for Municipalities, Model Code for States, Competitive Access to Broadband Infrastructure, Removing State and Local Regulatory Barriers, and Streamlining Federal Siting. Working group members were announced in May.
- BDAC is organized and operates under Federal Advisory Committee Act.
- Purpose: To “make recommendations to the FCC on how to accelerate the deployment of high-speed Internet Access, or ‘broadband,’ by reducing and/or removing regulatory barriers to infrastructure investment.”
- BDAC is to draft for the FCC’s consideration state and local model codes covering local franchising, zoning, permitting, and ROW regulation; recommend reforms to pole attachment rules, identify regulatory barriers to deployment, and recommend further reforms to promote broadband. [FCC Jan. 31 Public Notice]

### 2. BDAC MEETINGS TO DATE

- April and July 2017: Organizational meetings and progress reports from working groups, discussion of issues raised in working group meetings and next steps.
- November 9, 2017: Working groups provide verbal progress reports. The Model Code for Municipalities and Model Code for States working groups provide status reports and initial work product; the other three submit a written report and recommendations to the FCC, but note that they may revise those documents for the next BDAC meeting.
- January 23-24, 2018: Three working groups presented final reports that included numerous recommendations: Competitive Access to Broadband Infrastructure, Removing State and Local Regulatory Barriers, and Streamlining Federal Siting. BDAC adopted all three reports.
- April 25, 2018: The Competitive Access to Broadband Infrastructure Working Group presented an Addendum to its January report relating to contractors that perform make-ready work for pole attachments, which BDAC voted to adopt. The Model Code for Municipalities Working Group presented a “Draft Model Code,” and the State Model Code Working Group presented a “State Model Code.” The Model Code for Municipalities addresses when and where facilities can be installed, whether they are subject to discretionary review (typically by zoning board or city council)

or administrative review (a simpler, permit process). The Model Code for States makes more information available to providers about infrastructure, streamlines the deployment process through deadlines for acting on permit applications and limiting fees, includes dig once and make-ready procedures, contains additional programs to promote rural broadband, and creates a state Broadband Infrastructure Manager to promote deployment. BDAC voted both model codes out of their respective working groups and created a Harmonization Working Group to bring both codes closer together. The Harmonization Working Group has been charged with proposing amendments to both codes. Those amendments are to create a unified work product for review by the BDAC. The Harmonization Working Group will take into consideration the comments and concerns expressed by BDAC members at the meeting and in written comments that members were asked to submit by April 27.

### **3. CREATION OF RATES AND FEES AD HOC COMMITTEE**

- At the November 9, 2017 meeting, several working group presentations referenced the application and other fees that most jurisdictions impose for access to ROW, and for attachments to muni-owned, utility-owned, or other privately-owned property. There were divergent views on appropriateness of fees, whether fees were barriers to broadband deployment, and how fees should be established. Several members said there should be a methodology for determining the reasonableness of fees. BDAC decided to create an ad hoc fees committee, comprised of a small number of BDAC working group members, to make recommendations.
- At the April 25, 2018 BDAC meeting, the Rates and Fees Ad Hoc Committee presented a preliminary report, which identified seven principles that should be considered regarding any fees assessed: fair and equitable, future-proof, nondiscriminatory and neutral, public ROWs are for the use and benefit of the greater community, sense of urgency, simplicity, and transparency.

### **4. BDAC WORKING GROUPS RECOMMENDATIONS OR PROPOSALS**

Several BDAC Working Groups have looked at the role played by fees in various contexts surrounding broadband deployment, and either made recommendations or submitted proposals to the full BDAC for resolution. These recommendations and proposals are discussed below.

- **Removing State and Local Regulatory Barriers Working Group:**
  - The Removing State and Local Regulatory Barriers Working Group reviewed the role played by governmental fees to access the right of way, identified excessive fees as occurring when fees for access to the ROW and local assets are “viewed as unreasonably high relative to the incremental

burden on the ROW, duplicative of fees already paid, or otherwise cannot be measured by some other objective metric,” noted that there is “little guidance on what comprises an appropriate fee for ROW access and attachments to local assets,” and found that some authorities may “intentionally treat providers differently based on technologies, in order to extract additional fees and impose additional obligations.”

- The BDAC approved a recommendation at the January meeting that the FCC encourage greater transparency regarding how fees are calculated by requiring localities to make fee schedules publicly available, and to provide a brief explanation of how fees were calculated. It has also recommended discussion of whether to urge the FCC to “provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not ‘fair and reasonable.’”
- At the January meeting, the Group also encouraged the FCC to eliminate certain practices that unreasonably restrict deployment. For example, the FCC should “discourage the practice of requiring that broadband providers obtain additional franchise agreements or pay additional fees to deploy broadband facilities within the ROW when they already paid to access the ROW and the additional facilities do not impose more burdens on the municipality.” It also asked the FCC to consider enacting new rules such as a declaratory ruling that would provide guidance or develop best practices. The Group suggested including a “fee schedule disclosure as part of any “broadband certified” checklist.”
- **Competitive Access to Broadband Infrastructure Working Group:**
  - The Competitive Access to Broadband Infrastructure Working Group looked at fees in the context of access to infrastructure such as poles, ducts, and public facilities. At the January meeting, the BDAC approved the Group’s proposal to urge the FCC to clarify that pole owners should not be able to recover capital costs previously recovered in the make-ready process more than once. [Note: FCC took this action in its November 29, 2017 R&O in WC Docket No. 17-84, amending its pole attachment rules “to exclude capital expenses already recovered via non-recurring make-ready fees from recurring pole attachment rates.”]
  - The Group also found that pole attachment rates and related information for electric cooperatives are not easily obtainable, and during the January meeting, the BDAC approved a proposal to have NRECA publish on its public website contact information for statewide electric cooperative managers to facilitate a pole attacher’s ability to determine pole attachment rates, terms, and conditions.
- **Streamlining Federal Siting Working Group:**

- The Streamlining Federal Siting Working Group analyzed fees specifically in the context of access to federal land and facilities. The Group recommended, and the BDAC approved at the January meeting, that administrative fees for siting of broadband facilities on federal lands be standardized and set at a national level, and that schedules of those fees be published, subject to certain guidelines:
  - Each agency would publish a public fee schedule that outlines the costs associated with the grant of a property interest to providers.
  - The Working Group suggests that such published and standardized fees would increase predictability for providers and save time wasted negotiating fees.
  - The fees could also incorporate an escalation clause to account for inflation, using predictable metrics like the Consumer Price Index or fixed percentages.
- In addition, the Working Group has urged several other policy changes to the federal fee structure that were also approved at the January meeting:
  - Security deposits should be eliminated, but if retained, security deposits should be refunded if no agreement is executed, due to fault other than an applicant's;
  - Fair market appraisal updates should be conducted every ten years (not five);
  - Providers should not be required to share with the agency any revenue they obtain from subsequent collocators; and
  - If a military installation is sole or primary beneficiary of infrastructure, agency should permit rent elimination or in-kind rent reduction.
- **Model Code for States Working Group – Model State Code:**
  - The Model Code for States Working Group considered various proposals for how states should treat fees assessed on broadband providers within state regulatory frameworks, including application fees, fees for accessing the rights of way, pole attachment fees, and fees for make-ready work.
  - The Model State Code presented to BDAC at the April 25 meeting adopts a cost-based fee structure for application fees that local authorities may assess for wireless support structures or small wireless facilities.
    - An application fee may be charged only “if such fee is required for similar types of commercial development within the Authority’s jurisdiction.” Even then the fee shall be based “solely on the actual, direct and reasonable costs to process and review such Applications and managing the Public Right-of Way.” Fees must be publicly

disclosed and competitively neutral, cannot result in recovery where existing fees already recover the Authority's costs, and cannot be in the form of a franchise or other fee based on the applicant's revenues or number of customers. (Article 9.3)

- Rather than delineating any specific fee amounts, the Model State Code instead leaves it to each State's legislature or, alternatively, the State Broadband Infrastructure Manager or its designee, to determine the rates to be applied, subject to cost-based principles. By way of background, the State Broadband Infrastructure Manager's principle purpose "is to implement and manage the State Model Code for Accelerating Broadband Infrastructure Deployment and Investment with a view to promoting an increase in the availability of affordable Broadband internet facilities including by reducing the time, cost and environmental impact of rolling-out Communications Networks." (Article 13.1)
- For make-ready work, the Model State Code similarly proposes cost-based fees: "Fees for make-ready work, including any pole replacement, may not exceed actual costs or the amount charged to Communications Providers other than Wireless Providers for similar work and may not include any consultant fee or expense. (Article 2.2.3)
- Annual or other recurring fees an Authority may charge for attaching to an Authority-owned pole are computed pursuant to the FCC's telecommunications pole attachment rules or capped at a fee to be determined by the Legislature or Manager as designated by the State. Such fees may not include fees or other charges for routine maintenance, replacement of existing structures, or installation, placement, maintenance, or replacement of micro wireless facilities. (Article 9.3.6)
- The document was voted out of the working group, pending further assessment and review by the Harmonization Committee that is evaluating the State and Municipal model codes holistically.
- **Model Code for Municipalities Working Group:**
  - The Model Code for Municipalities Working Group also considered various proposals for fees assessed on broadband providers within municipal codes.
  - The Group has noted that fees are among its most debated topics to date, and that "industry seeks cost-based fees for access to ROW infrastructure, especially in regards to small cell deployment," while local governments often seek market-based fees. It has also noted that there are problems surrounding transparency in pricing, and proposed topics for discussion, including:

- Whether localities should avoid using a “monopoly rent” approach (providing access to the highest bidder), and instead should evaluate fair rental value through a comparison to the way a private property owner would evaluate the value of making its property available; and
- Jurisdictions’ option of determining that local access to wireless is sufficiently desirable that less than market rental value is acceptable. For example, they may choose to limit fees to incurred costs related to installation and could ensure that benefits redound to community and not only to providers (*i.e.*, to underserved communities or those with special needs).
- The Model Code for Municipalities presented at the BDAC April 25 meeting states, “The Working Group is not recommending further specifics regarding amounts or formulas for various fees and rates since an analysis of same is being by [sic] the BDAC “Fees and Rates Ad Hoc Working Group.” (Model Code at 5)
- The document was voted out of the working group, pending further assessment and review by the Harmonization Committee that is evaluating the State and Municipal model codes holistically.