**BDAC Removing State and Local Regulatory Barriers Working Group**

On January 31, 2017, the Federal Communications Commission (FCC or Commission) established the Broadband Deployment Advisory Committee (BDAC) to “make recommendations to the Commission on how to accelerate the deployment of high-speed Internet access, or “broadband,” by reducing and/or removing regulatory barriers to infrastructure investment.”[[1]](#footnote-2) To facilitate BDAC’s endeavors, the Commission created five working groups comprised of BDAC members as well as other selected individuals. Each of these working groups was tasked with analyzing specific topics to develop recommendations including possible recommendations for further study.

On May 16, 2017, the Commission announced the membership of the BDAC Removing State and Local Regulatory Barriers Working Group (“Barriers WG”). It was tasked to[[2]](#footnote-3)—

1. Identify patterns of specific instances of actions at the state and local level that serve as barriers to broadband deployment, such as deployment moratoria, unfair or burdensome rights-of-way negotiation and approval processes, excessive fees and other costs, unreasonable conditions, and bad faith negotiation practices. The Working Group will provide policy recommendations to the Commission on how to address the patterns of specific instances identified.
2. Identify examples and discuss the consequences of local governmental restrictions that may “prohibit or have the effect of prohibiting” service by, for example, requiring “undergrounding for wireless facilities,” placing restrictions on the placement of communications facilities in a right of way, prohibiting upgrades to facilities, and prohibiting the placement of new poles in a right-of-way, and to recommend solutions.
3. Examine the extent to which municipalities may single out communications-related deployments for more burdensome treatment than other deployments that have the same or similar impacts on land use, and make policy recommendations for addressing such disparate outcomes.

**BACKGROUND**

Broadband access is an increasingly essential component of modern life. It delivers important civic, educational, and recreational benefits and is an important driver of economic growth. To date, broadband has been deployed via a range of different technologies (wireline, fixed wireless, mobile) and has been deployed by a number of providers, including incumbent local exchange carriers (ILECs), competitive local exchange carriers (CLECs), cable companies, and wireless providers, all of whom operate under different federal and state regulatory regimes. These networks are constantly evolving. Indeed, new services, such as 5G wireless services, are on the horizon.

Deploying new broadband networks and upgrading existing ones is not easy. The deployment of broadband entails local franchising, zoning, permitting and access to rights-of-ways (ROW) as well as clearing environmental and historical approvals. These processes are generally overseen by each local government, and, in some instances, can act (or be perceived as acting) as barriers to the timely deployment of broadband. There are also instances when broadband providers delay the process by failing to provide all the necessary materials requested by a local government. Not all delays, however, are intentional. In many instances, local governments simply lack the resources or expertise to act on requests in a timely manner or otherwise develop deployment-friendly policies. In some cases, state governments have enacted regulations to direct and guide localities in carrying out their oversight of broadband deployment.

Recognizing the complexities of deploying broadband and the challenges faced by stakeholders in the public and private sectors, the Commission opened two proceedings to explore how it might accelerate broadband infrastructure deployment by, among other things, addressing regulatory barriers to wireline and wireless broadband infrastructure deployment consistent with the law and public interest.[[3]](#footnote-4) These proceedings elicited hundreds of comments from a range of stakeholders that provided key insights into the kinds of barriers and impediments to deployment that currently exist: (1) unjustified deployment moratoria; (2) unreasonable delays in negotiations and approvals for ROW agreements and permitting (delays caused by both providers and localities); (3) fees perceived as excessive or duplicative; (4) conditions or requirements perceived as unreasonable in the context of granting access to ROW, permitting, construction, or licensure; and (5) bad faith conduct in negotiations on both sides. While the Working Group reviewed allcomments submitted in these proceedings, many comments fell outside the scope of the Working Group.

Leveraging the information included in these comments, along with the expertise and experiences of its members, the Working Group identified patterns of behavior that act as barriers to timely broadband deployment.

**PRINCIPAL FINDINGS**

While state/local governments and broadband providers share the same goal of providing broadband service to as many communities and end users as possible, they also have interests that may conflict with each other. Many of the delays in deploying broadband exist as a result of the friction between localities and broadband providers having competing economic interests. Localities have an obligation to properly maintain and update public infrastructure as well as managing the public ROW to balance the needs of competing services such as water, electricity, and sewers with telecommunications. Therefore, they need to raise the funds in order to do so—either from taxpayers or from the companies that use the ROW. At the same time, broadband providers want to quickly deploy technology via public ROW at the lowest cost possible, on the quickest timeline, with little regulatory burden. Many local governments also seek to charge what they consider to be “fair market rates” for public infrastructure, while industry often seeks “at cost” or otherwise predictable, standardized pricing. These competing interests create natural conflict.

The Working Group has identified the following patterns that can act as barriers to deploying broadband.

* *Ambiguity*: This barrier occurs when applications, procedures, and decision/approval timelines are absent, arbitrary, unclear, unreasonable, or inflexible, which often manifests as deployment moratoria.
* *Discrimination*: This barrier occurs when state or local authorities levy fees or impose obligations on broadband providers with insufficient transparency, which can result in discrimination among different network providers.
* *Excessive Fees*: This barrier occurs when fees for access to 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.
* *Inflexibility*: This barrier arises when a local government is either unwilling or unable to appropriately adjust its review and approval processes to reflect different broadband technologies or deployment strategies.
* *Inordinance***:** This barrier occurs when the conditions, requests, or requirements put forward by a state or local entity are unreasonable or overly burdensome.
* *Noncompliance*: This barrier occurs when a state or local authority or applicant fails to enforce or comply with their established rules or procedures.

As cited by many in comments to the FCC, broadband providers perceive these barriers as the cause of delayed broadband deployment and explained that these barriers discourage investment in communities. For example, uncertainty around fees–how they are set, and how they compare to fees elsewhere–can result in higher construction costs, which can cause providers to forgo or delay deployment projects. Such delays, coupled with lack of transparency in fee structures, even if unintentional, can increase costs to providers and discourage long-term network investments. Similarly, limited information and untimely communications from providers can frustrate localities that feel they do not have adequate insight into a provider’s long term planning of needs, and therefore cannot readily structure deployment workflows.

In many instances, the existence of these impediments is unintentional, stemming from a number of root causes that, with additional resources and greater collaboration with providers, could be addressed in a collegial and timely manner. These root causes include:

* Lack of Capacity: A government entity might not have the resources or required technical knowledge to process a request in the time frame expected by the provider. This may be a seasonal issue or may be an issue relating to the volume of applications.
* Lack of Information:Providers may not have provided the necessary information regarding requirements and expectations of the city, or the local government might not have provided enough information, knowledge and/or resources to make a decision.
* Lack of Process:The local government might not have a process to cover the type of application/request presented, especially in cases where new technology is being deployed.
* Lack of Flexibility: Some localities might seem to be inflexible because existing procedures embody their preferences and values for how networks should be built in their communities.
* Lack of Agreement:Local governments and broadband providers have conflicting goals and are driven by different incentives, a dynamic that can result in a lack of agreement. For example, a local government might require a provider to compensate them for access to ROWs while a broadband provider may believe the proposed compensation is unreasonable.
* Lack of Principles Regarding Fees:There is little guidance on what comprises an appropriate fee for ROW access and attachments to local assets, even when a provider already has access to the ROW. In certain cases, authorities may intentionally treat providers differently based on technologies, in order to extract additional fees and impose additional obligations.
* Lack of Transparency:Negotiations stall and partnerships fray without insight as to how fees are calculated, both with respect to the fee itself and why fees might be allocated differently among providers.

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For the November 9th BDAC meeting, the individual workgroups were asked to submit recommendations to the BDAC for vote and discussion. In light of this request, and in light of the fact that the Barriers WG is still in the process of working towards consensus on its overall report and recommendations, we singled out the recommendations that we were most comfortable moving forward as a group. Those recommendations are attached as “Vote Recommendations.”

1. *FCC Announces the Establishment of the Broadband Deployment Advisory Committee and Solicits Nominations for Membership*, DA 17-110, Public Notice (rel. Jan. 31, 2017). [↑](#footnote-ref-2)
2. FCC staff instructed the Working Group to focus only on policy recommendations, not on a legal analysis or legal recommendations. Also, the FCC staff informed to the Working Group that its scope did not include Tribal matters. [↑](#footnote-ref-3)
3. *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). *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). [↑](#footnote-ref-4)