

POLICY ESSAY

FEDERALISM AND THE DIGITAL DIVIDE: HOW SMART PERMITTING REFORMS CAN UNLEASH RURAL BROADBAND ACCESS

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ABSTRACT

Millions of Americans lack access to high-speed broadband, which is important for connectivity in the modern world. For me, as a Member of the House Committee on Energy and Commerce, closing this digital divide is a top priority. In this Essay, I discuss how a streamlined permitting process, as outlined by my American Broadband Deployment Act, can promote investment and innovation while also connecting more Americans with this vital service.

I. INTRODUCTION	226
II. UNDERSTANDING THE CURRENT PERMITTING PATCHWORK	230
A. <i>Overview</i>	230
B. <i>Challenges</i>	232
C. <i>Existing Policy Solutions</i>	237
D. <i>The Broadband Deployment, Equity, Access, and Deployment (“BEAD”) Program</i>	241
III. BREAKING DOWN THE AMERICAN BROADBAND DEPLOYMENT ACT	242
A. <i>Timing</i>	243
B. <i>Cost-Based Fees</i>	244
C. <i>Preemption</i>	244
D. <i>NHPA and NEPA</i>	244
E. <i>Cable Systems Reform</i>	245
IV. IDENTIFYING THE PROPER ROLE OF THE FEDERAL GOVERNMENT: FEDERALISM IN THE CONTEXT OF BRIDGING THE DIGITAL DIVIDE	246
V. CONCLUSION	249

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I. INTRODUCTION

In a century best defined by technological advances, the internet, and the dot-com boom, access to broadband is an important part of modern life. The U.S. Bureau of Economic Analysis estimated the value of the digital economy to be 10.3% of U.S. gross domestic product (“GDP”), or 8 million jobs, in 2021.¹ A study cited by technology services company Dell EMC estimates that “there will be 41.6 billion [Internet of Things] devices in 2025, capable of generating 79.4 zettabytes of data.”² Yet there remains a significant gap in access to the digital economy. At least seven percent of Americans lack access to fixed terrestrial broadband services (excluding satellite).³ In rural areas, that number is as high as twenty-eight percent, and twenty-three percent of people on Tribal lands lack that access as well.⁴ According to the Federal Communications Commission (“FCC”), more than 8.3 million homes and businesses lack access to high-speed broadband.⁵ In the state of Georgia alone, there are 204,968 unserved addresses, ninety percent of which are in rural areas.⁶ This gap in access to broadband is known as the “digital divide,” and is often characterized as the discrepancy in internet access and digital literacy most often affecting low-income communities and rural areas. However, more significantly, the digital divide has a profound and widespread impact on the American economy, individual economic opportunity, and access to educational, and health care resources, with those living in rural areas having access to these benefits at far lower levels.⁷

¹ TINA HIGHFILL & CHRISTOPHER SURFIELD, BUREAU OF ECON. ANALYSIS, U.S. DEP’T OF COM., NEW AND REVISED STATISTICS OF THE U.S. DIGITAL ECONOMY, 2005–2021 1 (2022), <https://www.bea.gov/system/files/2022-11/new-and-revised-statistics-of-the-us-digital-economy-2005-2021.pdf> [<https://perma.cc/Y28N-8CVV>].

² SAM LUCIDO & PHIL HUMMEL, DELL TECHS., EDGE TO CORE AND THE INTERNET OF THINGS: DELL EMC EDGE GATEWAY SYSTEMS AND SAP EDGE SERVICES 1 (2020), <https://infohub.delltechnologies.com/static/media/client/7phukh/487958f6-2dcf-4079-80ac-7fc0e1158130.pdf> [<https://perma.cc/DCK5-APL7>] (citing *The Growth in Connected IoT Devices Is Expected to Generate 79.4ZB of Data in 2025, According to a New IDC Forecast*, INT’L DATA CORP. (June 18, 2019), <https://web.archive.org/web/20200807021542/https://www.idc.com/getdoc.jsp?containerId=prUS45213219> [<https://perma.cc/YLC4-HXQR>]).

³ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, 2024 Section 706 Report*, FED. COMM’N COMM’N (Feb. 22, 2024), <https://docs.fcc.gov/public/attachments/DOC-400675A1.pdf> [<https://perma.cc/SX3Z-2E7X>].

⁴ *Id.*

⁵ Jessica Rosenworcel, *National Broadband Map: It Keeps Getting Better*, FED. COMM’N COMM’N: NOTES FROM THE FCC (May 30, 2023), <https://www.fcc.gov/national-broadband-map-it-keeps-getting-better> [<https://perma.cc/S4YL-QB6F>]; see also *FCC National Broadband Map*, FED. COMM’N COMM’N, <https://broadbandmap.fcc.gov/home> [<https://perma.cc/FM4D-FKKR>].

⁶ GA. TECH. AUTH., GEORGIA ANNUAL STATE IT REPORT: FISCAL YEAR 2023 15 (2024), <https://gta.georgia.gov/document/document/annual-state-it-report-2023-final-4-january-2024/download> [<https://perma.cc/5JAL-ED23>].

⁷ See Edward Carlson & Justin Goss, *The State of the Urban/Rural Digital Divide*, NAT’L TELECOMM. & INFO. ADMIN., U.S. DEP’T OF COM., www.ntia.gov/blog/2016/state-urbanrural-digital-divide [<https://perma.cc/B928-NBH6>].

Fixed broadband adoption accounted for nearly eleven percent of the accumulated growth in the U.S. GDP between 2010 and 2020.⁸ The impact broadband has on the economy has been studied extensively, with one such study finding that “for every one percentage point increase in broadband penetration in a state, employment is projected to increase 0.2% to 0.3% per year.”⁹ Reliable internet access allows for market penetration in areas previously thought to be unreachable, allowing small businesses to expand their operations, agricultural commodities to reach overseas markets, and job opportunities to increase.

Remote education provides an important case study on the digital divide’s impacts. During the COVID-19 pandemic, remote learning skyrocketed. Ninety-three percent of homes with school-age children reported that they used some form of remote learning during this period.¹⁰ However, not all students were able to reliably access online learning resources. In Georgia school systems with fewer than 1,000 students, fifty-six percent of student households do not have access to high-speed internet.¹¹

A study in Michigan during the pandemic found that only forty-seven percent of students who live in rural areas can access high-speed internet at home, compared to seventy-seven percent of students in suburban areas.¹²

⁸ RAUL KATZ & JUAN JUNG, *THE CONTRIBUTION OF FIXED BROADBAND TO THE ECONOMIC GROWTH OF THE UNITED STATES BETWEEN 2010 AND 2020* 5 (2022), https://www.teleadv.com/wp-content/uploads/ContributionofFixedBroadbandtoEconomicGrowth_RaulKatz.pdf [<https://perma.cc/ENS8-28RF>].

⁹ ROBERT CRANDALL, WILLIAM LEHR, & ROBERT LITAN, BROOKINGS INST., *THE EFFECTS OF BROADBAND DEPLOYMENT ON OUTPUT AND EMPLOYMENT: A CROSS-SECTIONAL ANALYSIS OF U.S. DATA 2* (2007), https://www.brookings.edu/wp-content/uploads/2016/06/06labor_crandall.pdf [<https://perma.cc/KM2W-4KAQ>]; see also Timothy Bresnahan & Michael Trajtenberg, *General Purpose Technologies: Engines of Growth*, 65 J. ECONOMETRICS 83, 84–86 (1995).

¹⁰ Kevin McElrath, *Nearly 93% of Households with School-Age Children Report Some Form of Distance Learning During COVID-19*, U.S. CENSUS BUREAU: AMERICA COUNTS (Aug. 26, 2020), <https://www.census.gov/library/stories/2020/08/schooling-during-the-covid-19-pandemic.html> [<https://perma.cc/J2DG-NSPM>].

¹¹ Stephen Owens, *Online Instruction Could Leave Rural Schools, Vulnerable Students Behind*, GA. BUDGET & POL’Y INST. (Apr. 8, 2020), <https://gbpi.org/online-instruction-could-leave-rural-schools-vulnerable-students-behind/> [<https://perma.cc/7LAU-58TY>]; Ross Williams, *With Georgia Classrooms Closed for the School Year, Digital Divide Emerges*, GA. RECORDER (Apr. 6, 2020), <https://georgiarecorder.com/2020/04/06/with-georgia-classrooms-closed-for-the-school-year-digital-divide-emerges/> [<https://perma.cc/TUH2-HKS9>]; Anna Akins, *The Quest to Narrow the Digital Divide in Georgia*, GA. TECH RSCH. INST. (Dec. 15, 2021), <https://www.gtri.gatech.edu/newsroom/quest-narrow-digital-divide-georgia> [<https://perma.cc/YZX8-VPWG>].

¹² *Poor Internet Connection Leaves Rural Students Behind*, MSUTODAY (Mar. 20, 2020) [hereinafter *Poor Internet Connection*], <https://msutoday.msu.edu/news/2020/poor-internet-connection-leaves-rural-students-behind> [<https://perma.cc/YNR7-J2JQ>]; KEITH N. HAMPTON, LALEAH FERNANDEZ, CRAIG T. ROBERTSON & JOHANNES M. BAUER, *BROADBAND AND STUDENT PERFORMANCE GAPS 21* (2020) [hereinafter HAMPTON ET AL. (2020)], https://quello.msu.edu/wp-content/uploads/2020/03/Broadband_Gap_Quello_Report_MSU.pdf [<https://perma.cc/K6HH-EFVZ>]; see also KEITH N. HAMPTON, GABRIEL E. HALES & JOHANNES M. BAUER, *BROADBAND AND STUDENT PERFORMANCE GAPS AFTER THE COVID-19 PANDEMIC 16* (2023), <https://quello.msu.edu/wp-content/uploads/2023/08/Broadband-and-Student-Performance-Gaps-After-the-COVID-19-Pandemic.pdf> [<https://perma.cc/8QH3-NERA>].

Fifty-eight percent of students without high-speed access live in a rural setting, such as a farm; thirty-six percent of those without access live in a home with no computer.¹³ During the COVID-19 pandemic, students impacted by the digital divide were unable to access the internet or complete their homework assignments. Some students resorted to taking advantage of free Wi-Fi in fast-food parking lots to finish their schoolwork.¹⁴

The impact on students was immediate. Researchers found that “by the spring of 2022, the average student was lagging by approximately one-half year in math and one-third of a year in reading.”¹⁵ While COVID-19 restrictions certainly contributed to this decline, the digital divide played a significant role as well. In April 2020, “only about two thirds of households with income less than \$25,000 per year reported having computers and internet access available for children’s remote learning,” meaning the impacts on low-income and rural students were substantial.¹⁶ This resulted in “the complete cancellation of schooling for some low-income youth and a mixture of paper packets and remote schooling for others.”¹⁷

When students have reliable access to broadband, their grades improve. Grade point averages for key classes such as “English, social sciences, mathematics, and science” are “0.19 points higher for students with home broadband access than for students with no home access or only mobile wireless access.”¹⁸ In the long term, students without reliable internet access may not develop technological skills needed for college or the workforce. For example, students impacted by COVID-19 learning losses, which we know correlated

¹³ *Poor Internet Connection*, *supra* note 12; HAMPTON ET AL. (2020), *supra* note 12, at 6.

¹⁴ Cecilia Kang, *Parking Lots Have Become a Digital Lifeline*, N.Y. TIMES (May 20, 2020), www.nytimes.com/2020/05/05/technology/parking-lots-wifi-coronavirus.html [<https://perma.cc/BQK2-E4F7>].

¹⁵ Ryan Doan-Nguyen, *Post-COVID Learning Losses*, HARV. MAG. (July 17, 2023), www.harvardmagazine.com/2023/07/kane-covid-learning-losses [<https://perma.cc/5FZR-WY6N>]; ERIN FAHLE, THOMAS J. KANE, SEAN F. REARDON & DOUGLAS O. STAIGER, EDUC. RECOVERY SCORECARD, *THE FIRST YEAR OF PANDEMIC RECOVERY: A DISTRICT-LEVEL ANALYSIS 7* (2024), <https://educationrecoverycorecard.org/wp-content/uploads/2024/01/ERS-Report-Final-1.31.pdf> [<https://perma.cc/5BQH-5Y3C>].

¹⁶ Shira K. Haderlein, Anna Rosefsky Saavedra, Morgan S. Polikoff, Daniel Silver, Amie Rapaport & Marshall Garland, *Disparities in Educational Access in the Time of COVID: Evidence from a Nationally Representative Panel of American Families*, 7 AERA OPEN 1, 1, 8 (2021), <https://journals.sagepub.com/doi/pdf/10.1177/233285842111041350> [<https://perma.cc/HU9A-ZEJH>].

¹⁷ Alexandra R. Golden, Emily N. Srisarajivakul, Amanda J. Hasselle, Rory A. Pfund & Jerica Knox, *What Was a Gap Is Now a Chasm: Remote Schooling, the Digital Divide, and Educational Inequities Resulting from the COVID-19 Pandemic*, 52 CURRENT OP. PSYCH., Aug. 2023, at 2, <https://www.sciencedirect.com/science/article/pii/S2352250X23000775> [<https://perma.cc/XUH9-J4XN>].

¹⁸ JOSHUA SEIDEMANN & ROXANNA BARBOZA, NTCA: RURAL BROADBAND ASS’N, *RURAL IMPERATIVES IN BROADBAND ADOPTION AND DIGITAL INCLUSION 11* (2021), <https://www.ntca.org/sites/default/files/documents/2022-03/src-whitepaper-broadband-adoption-and-digital-inclusion.pdf> [<https://perma.cc/LT75-Q8QA>].

with broadband access, will see an estimated \$70,000 decline in their lifetime earning potentials.¹⁹

The digital divide expands beyond education; the lack of high-quality broadband access is felt in nearly every industry, including healthcare. The FCC has reported that the least connected counties “generally have the highest rates of chronic disease” and have the “worst access to primary care physicians.”²⁰ Much of this gap exists due to the difficult nature of building and maintaining broadband networks in rural areas where customers-per-square-mile are often in the single digits.²¹ To make matters worse, a number of other factors drive up the cost of communication services in rural areas, including geography, weather-shortened construction seasons, and burdensome regulatory requirements.²²

While Congress cannot legislate away weather and geographic challenges, Congress is uniquely positioned to ease some of the burdensome regulatory barriers to broadband deployment. Bureaucracy should not be the barrier between a student and their homework, a job seeker and their interview, or a patient and their telehealth provider. Fortunately, this issue is a federal priority, highlighted by the federal government’s more than 130 programs dedicated to achieving universal broadband access—collectively spending over \$44 billion between 2015 and 2020.²³ H.R. 3557, the American Broadband Deployment Act (“ABDA”), seeks to address the burdensome permitting system, thereby incentivizing growth and access without sacrificing safety, environmental protection, or reliability.²⁴

This Essay details the current permitting framework, its challenges, and how the ABDA can streamline the permitting process so that it works for broadband providers, users of the network, and regulators, bridging the digital divide and ensuring that every American can access this vital connection point between individuals and the modern world.

¹⁹ Zach Schonfeld, *COVID-19 Learning Loss Could Cost Pandemic Students \$70K in Lifetime Earnings: Study*, THE HILL (Dec. 28, 2022), <https://thehill.com/blogs/blog-briefing-room/3790593-covid-19-learning-loss-could-cost-pandemic-students-70k-in-lifetime-earnings-study/> [<https://perma.cc/E3TZ-FPCX>].

²⁰ *Mapping Broadband Health in America 2017*, FED. COMM’N COMM’N (2017), www.fcc.gov/sites/default/files/connect2health.key_findings.pdf [<https://perma.cc/PP9G-HNZY>].

²¹ *Our Members*, NTCA: RURAL BROADBAND ASS’N, <https://www.ntca.org/about-us/our-members> [<https://perma.cc/2RYF-Y9SH>].

²² Brian Whitacre, *Research and Analysis: Rural Internet Subscribers Pay More, New Data Finds*, DAILY YONDER (Nov. 28, 2023), <https://dailyyonder.com/research-and-analysis-rural-internet-subscribers-pay-more-new-data-confirms/2023/11/28/> [<https://perma.cc/7TH4-2J5E>].

²³ *Broadband: A National Strategy Needed to Coordinate Fragmented, Overlapping Federal Programs*, U.S. GOV’T ACCOUNTABILITY OFF. (May 10, 2023), <https://www.gao.gov/products/gao-23-106818> [<https://perma.cc/ELB6-3WNA>]; *Broadband: National Strategy Needed to Guide Federal Efforts to Reduce Digital Divide*, U.S. GOV’T ACCOUNTABILITY OFF. (May 31, 2022), <https://www.gao.gov/products/gao-22-104611> [<https://perma.cc/EL29-HP6U>].

²⁴ American Broadband Deployment Act of 2023, H.R. 3557, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/3557> [<https://perma.cc/KMG8-84EX>].

II. UNDERSTANDING THE CURRENT PERMITTING PATCHWORK

A. Overview

The terms “broadband” and “high-speed internet” are often interchangeable. Broadband technologies such as fiber, wireless, satellite, digital subscriber line, and cable are the backbones that allow for the transmission of digital information. According to the National Telecommunications and Information Administration (“NTIA”), “broadband in telecommunication means a wide bandwidth which can transport multiple signals over a ‘broad’ range of frequencies and support different internet traffic types, allowing multiple data streams to be sent at once.”²⁵

Broadband networks are an impressive feat of infrastructure engineering on par with efforts to build the national highway system and rural electrification. Millions of miles of wireline infrastructure, generally a combination of coaxial cable and/or fiber optics, cross the country, connecting homes, businesses, and people.²⁶ On top of this wireline backbone sits hundreds of thousands of cell site towers and antennas that provide wireless coverage across the majority of the country.²⁷ Maintaining networks requires coordinating traffic across all of these assets and ensuring the physical infrastructure is deployed in the areas where it is needed. However, the breadth and complexity of these networks means deployment will generally cross several jurisdictions at the state, local, and federal levels, along with requiring approval from private landowners.²⁸ As detailed below, this often-byzantine process can add significant time and cost delays to broadband projects which impedes the process of providing connectivity to all Americans.²⁹

A broadband permit, simply defined, is government “permission for a broadband project to be deployed.”³⁰ Depending on whether a project is running on public or private lands, or near key infrastructure such as railroads and interstates, different permits will be required at the federal, state, and local levels. Permitting also depends on the type of broadband being deployed.

²⁵ *Introduction to Broadband and High Speed Internet*, NAT’L TELECOMMS. & INFO. ASS’N 4 (2022), broadbandusa.ntia.doc.gov/sites/default/files/2022-12/Introduction_to_Broadband_and_High_Speed_Internet_FINAL_0.pdf [https://perma.cc/B4QJ-JGBV].

²⁶ *How Broadband Infrastructure Gets Built*, PEW (July 7, 2022), www.pewtrusts.org/en/research-and-analysis/fact-sheets/2022/07/how-broadband-infrastructure-gets-built [https://perma.cc/P9W4-EMCL].

²⁷ *See generally Wireless Infrastructure by the Numbers: 2022 Key Statistics*, WIRELESS INFRASTRUCTURE ASS’N (Mar. 15, 2023), <https://wia.org/wireless-infrastructure-by-the-numbers-2022-key-statistics/> [https://perma.cc/NC8J-UKNH].

²⁸ *Id.*

²⁹ *Id.*

³⁰ NAT’L TELECOMMS. & INFO. ASS’N, *WHAT IS PERMITTING?* 2 (2022), broadbandusa.ntia.doc.gov/sites/default/files/2022-12/What_is_Permitting_BEAD_2022.pdf [https://perma.cc/7TLF-S946].

At the federal level, there are two types of permits a broadband deployment may require. The first, called an easement, is required when a broadband project crosses “government or privately owned land, bridges, overpasses, railroads, buried deployment (running cables underground), aerial deployment (attaching cables to utility poles and tower builds), etc.”³¹ This type of permit is required when a broadband deployment is seeking permission to exist in, on, or over land owned by a public or private entity.³²

The federal government is a major stakeholder in this process of deploying broadband, owning twenty-eight percent of U.S. land.³³ Commonly, the primary federal agencies a project would seek an easement from include, but are not limited to: Department of Energy, Department of Agriculture (“USDA”), Department of Defense, Department of Commerce, Department of Interior, Army Corps of Engineers, Department of Transportation, and the General Services Administration.³⁴

The second permit relates to environmental and historic preservation. A vast majority of planned broadband projects must “perform a National Environmental Policy Act (“NEPA”) analysis and meet applicable state, local, and/or Tribal government environmental and historic preservation permitting requirements.”³⁵ NEPA and the National Historic Preservation Act (“NHPA”) create processes for federal agencies to review projects that may impact the environment and/or certain historic resources, which we detail in the following section.³⁶ While these statutes are separate and require different reviews by expert consultants, the regulations often work in tandem when deploying telecommunications facilities.³⁷ The FCC, a substantial federal actor for purposes of NEPA and NHPA reviews of communications projects, first adopted rules to implement NEPA in 1974, at a time when the agency “had a significant, federal role in approving construction of specific wireless communications facilities in a given location.”³⁸ In the intervening years, the FCC has adjusted its framework for environmental and historic preservation reviews even as its role over specific wireless sites has narrowed.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 4.

³⁵ NAT’L TELECOMMS. & INFO. ASS’N, PREPARING FOR PERMITTING TO ACCELERATE BROADBAND DEPLOYMENT 4, 7, 8, 16–19 (Dec. 2022), broadbandusa.ntia.doc.gov/sites/default/files/2022-12/IFA_Permitting_101_PDF.pdf [https://perma.cc/XYS3-4GQZ].

³⁶ See 54 U.S.C. § 300101 (2014); 42 U.S.C. § 4321 (2010).

³⁷ Federal courts have long treated “major federal actions” and “undertakings” under NEPA and NHPA, respectively, as largely coextensive given their operational similarity. See, e.g., *Karst Env’t Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291 (D.C. Cir. 2007); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001).

³⁸ Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Second Report and Order, 33 FCC Rcd. 3102 para. 49 (2018); see also Implementation of the National Environmental Policy Act, Report and Order, 49 F.C.C.2d 1313 (1974).

State and local governments also play a significant role in the deployment of communications infrastructure, with a statutorily defined role in the siting process that the FCC has, in recent years, sought to clarify to the benefit of all stakeholders to the process—industry and government alike.

B. Challenges

Based on a Fiber Broadband Association survey of nearly 300 mid- to small-size internet service providers constructing fiber to the home in 2023, concerns about obtaining permitting approvals was a top three concern regarding completing work.³⁹ Before detailing the challenges within the permitting process, it is important to understand the requirements established by two of the biggest laws governing this process. NEPA requires federal agencies to identify and evaluate the environmental effects of proposed “major Federal actions significantly affecting the quality of the human environment.”⁴⁰ The term major Federal action means “an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility.”⁴¹ Types of effects considered in this process include ecological, aesthetic, historic and social effects.⁴² Agencies may exempt certain actions through a categorical exclusion, which is an activity that does not significantly affect the quality of the human environment.⁴³ Each agency maintains its own list of categorical exclusions and can adopt another agency’s exclusion under certain circumstances.⁴⁴ When an action does not fall within a categorical exclusion, the agency must prepare an Environmental Assessment (“EA”) to determine whether the proposed action will have a significant environmental effect.⁴⁵ If the EA finds that the action will have a significant impact, the agency must conduct an Environmental Impact Statement (“EIS”).⁴⁶ The EIS is a much more detailed and burdensome study than the EA, whereby the agency generally must assess the reasonably foreseeable effects of a proposed action, identify “irreversible and irretrievable” resource commitments, and consider a reasonable range of alternatives to the proposed action, among other criteria.⁴⁷ Agencies are required to solicit public input on the process, the timing of

³⁹ RVA LLC, FIBER INSTALLATION CONSTRAINTS STUDY (2024), <https://fiberbroadband.org/wp-content/uploads/2024/03/Fiber-Installation-Constraint-Study.pdf> [<https://perma.cc/L334-477K>].

⁴⁰ 42 U.S.C. § 4332.

⁴¹ 42 U.S.C. § 4336e(10)(A).

⁴² 40 C.F.R. § 1508.1(g).

⁴³ 42 U.S.C. § 4336e(1); 40 C.F.R. §§ 1501.4, 1507.3(e)(2)(ii).

⁴⁴ 40 C.F.R. § 1500.4(a); 42 U.S.C. § 4336c.

⁴⁵ 42 U.S.C. § 4336(b)(2).

⁴⁶ 42 U.S.C. § 4336(b)(1); 40 C.F.R. § 1502.

⁴⁷ U.S. ARMY CORPS OF ENGINEERS, WHAT IS AN ENVIRONMENTAL IMPACT STATEMENT? (2012), <https://www.swg.usace.army.mil/Media/News-Stories/Article/480374/what-is-an-environmental-impact-statement/> [<https://perma.cc/UC9T-JUUY>].

which varies.⁴⁸ NEPA also established the Council on Environmental Quality, which issues regulations and guidance detailing how federal agencies must implement NEPA.⁴⁹

Similarly, NHPA's section 106 requires federal agencies to consider the impact that "undertakings" permitted by the agencies have on certain historic properties and provide the Advisory Council on Historic Preservation ("ACHP") "a reasonable opportunity to comment with regard to the undertaking."⁵⁰ This includes any undertaking pursued by the federal agency itself and actions that the agency determines are undertakings, including "those carried out with Federal financial assistance" and "those requiring a Federal permit."⁵¹ Properties include any prehistoric or historic districts, sites, buildings, structures, or objects that are listed or are eligible for listing on the National Register of Historic Places.⁵² Section 106 reviews generally go through a four-stage process: the agency determines whether an action is an undertaking; if so, it identifies the historic properties within a certain area, called the Area of Potential Effects ("APE"); it then assesses whether the action would have adverse effects on those historic properties; and finally, the agency helps relevant parties agree on how to address any adverse effects. The relevant parties may range from a few—e.g., the entity building the undertaking, the relevant agency, and the state historic preservation officer or tribal historic preservation officer—to hundreds (including interested individuals), depending on the scope of the project.

As one telecommunications provider stated, completing NEPA and NHPA reviews before the FCC "comprised, on average, 26 percent of the total small cell deployment costs, including equipment [costs]," with the NEPA and NHPA share of total costs ranging from nineteen percent to thirty-seven percent.⁵³ This number is astounding yet unsurprising given the breadth of these requirements and the complexity of compliance. Moreover, the FCC is not the only agency that deals with NEPA and NHPA reviews in the telecommunications industry. Pursuant to the FCC's rules, the Federal Aviation Authority, for instance, is consulted when a tower deployment exceeds a certain height or takes place near an airport or aviation glide slope.⁵⁴ The loans and grants for rural broadband infrastructure provided by the Rural Utilities Service at

⁴⁸ 40 C.F.R. §§ 1503, 1505.2.

⁴⁹ 42 U.S.C. § 4342.

⁵⁰ 54 U.S.C. § 306108 (2014).

⁵¹ 36 C.F.R. §§ 800.3(a), 800.16(y).

⁵² 54 U.S.C. § 300308.

⁵³ FED. COMM'N COMM'N, ACCELERATING WIRELESS BROADBAND DEPLOYMENT BY REMOVING BARRIERS TO INFRASTRUCTURE INVESTMENT 24, 7 n. 34 (2018) (citing Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Feb. 23, 2018)), <https://docs.fcc.gov/public/attachments/FCC-18-30A1.pdf> [<https://perma.cc/ZA4K-HAKP>].

⁵⁴ See Table of Frequency Allocations, 37 C.F.R. § 2.106 (2021).

the USDA are subject to NEPA and NHPA.⁵⁵ NTIA also requires NEPA and NHPA reviews for certain projects using NTIA funds.⁵⁶ When communications undertakings occur on federally owned or managed lands, other federal agencies (e.g., the Bureau of Land Management (“BLM”), the National Park Service, and the U.S. Forest Service) must conduct those NEPA and NHPA reviews. These reviews can take many months or even years. As providers attempt to meet consumer demand for higher broadband speeds, greater wireless connectivity, and more robust fiber backhaul, NEPA and NHPA reviews risk becoming the long pole in the regulatory review process—both in terms of costs and timing.

To highlight this issue in practice, consider one provider who was delayed by almost three years while waiting for U.S. Forest Service approval for a single fiber route between two Arizona communities surrounded by national forest lands.⁵⁷ In March 2016, the provider applied for permission to deploy fiber through a national forest adjacent to an established state highway between the two communities. Biological surveys are required for such a project under NEPA, and cultural surveys were required under NHPA before construction. The provider and its consulting contractor began conducting the NEPA surveys in May 2016 and submitted them to the agency in July 2016. After a series of reversals, in August 2017, the Forest Service finally determined that a NEPA Categorical Exclusion applied to the provider’s planned deployment. This ultimately avoided a full EA, which would have added an additional several months and hundreds of thousands (if not millions) of dollars to the project; however, the Forest Service did not conduct a parallel NHPA analysis, choosing instead to start this process once NEPA was completed.⁵⁸ This prevented the project from getting full approval and beginning construction until 2019—roughly three years after initial applications were submitted. Another co-op reported that “the NEPA process took nearly four years to permit a 150-mile transmission line and associated facilities to enhance reliability.”⁵⁹

⁵⁵ See generally U.S. DEP’T AGRIC., ACCELERATING NATIONWIDE PROGRAMMATIC AGREEMENT AMONG THE U.S. DEPARTMENT OF AGRICULTURE RURAL DEVELOPMENT PROGRAMS, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, TRIBAL SIGNATORIES, AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION FOR SEQUENCING SECTION 106 (2018), www.rd.usda.gov/sites/default/files/USDA_RD_Nationwide_Programmatic_Agreement.pdf [<https://perma.cc/95V9-BDZJ>].

⁵⁶ See, e.g., NAT’L TELECOMMS. & INFO. ADMIN., NEPA REVIEW: ENVIRONMENTAL ASSESSMENTS (2023), https://broadbandusa.ntia.doc.gov/sites/default/files/2023-03/NEPA_Review_Environmental_Assessments.pdf [<https://perma.cc/FSR3-YSC2>]; NAT’L TELECOMMS. & INFO. ADMIN., NEPA NATIONAL HISTORIC PRESERVATION ACT, SECTION 106, CONSULTATION PROCESS (2022), https://broadbandusa.ntia.doc.gov/sites/default/files/2022-12/NHPA_Sect_106_Consultation_Process_Fact_Sheet.pdf [<https://perma.cc/7JE8-TJZQ>].

⁵⁷ See *Ex Parte* Submission of Cable One, Inc., WC Docket No. 17-84: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment (Dec. 20, 2018), <https://www.fcc.gov/ecfs/document/122073340594/1> [<https://perma.cc/US62-RWPP>].

⁵⁸ See *id.* at 2.

⁵⁹ Cathy Cash, *NRECA Applauds Streamlining of NEPA Federal Environmental Permitting Process*, COOPERATIVE.COM (July 17, 2020), www.cooperative.com/news/Pages/

In addition to complications with the NEPA and NHPA review processes, a complex patchwork of federal, state, and local regulations contributes to excessive delays and fees. Each federal agency has different missions, rules, and regulations governing the use of its public lands, which can drive up costs for providers to extend broadband services in all areas, especially rural ones, before even considering privately owned property or the additional requirements and fees on state and local levels. In California alone, there are multiple examples of how different jurisdictions' approaches to broadband permitting slow down the process and deter investment:

- Palo Alto pushes providers to batch their small cell permit applications so if there is a problem with one node in the batch, they hold approval for the entire batch.⁶⁰
- San Francisco is one of many jurisdictions nationwide that are upgrading many of their poles to decorative poles for aesthetic purposes and rejecting any attempts to attach new equipment to poles.⁶¹

Cable operators are required to negotiate with state and local authorities to secure franchises that allow them to deploy their cable systems in public rights-of-way.⁶² As a result, there are possibilities for significant delays when applying for franchises to serve entirely new areas or when applying for permits to do construction in the public rights-of-way. Additionally, delays can be caused by the requirement that cable operators must periodically renegotiate the right to remain in the rights-of-way, and in many states, separate agreements are needed for every municipality they serve.⁶³ Moreover, if cable operators seek to sell a cable system, or seek to merge, the transaction can be

NRECA-Appraises-Streamlining-of-NEPA-Federal-Environmental-Permitting-Process.aspx [https://perma.cc/P54S-8UHH].

⁶⁰ See, e.g., CITY OF PALO ALTO, APPEAL OF CROWN CASTLE CLUSTER 2 WIRELESS COMMUNICATION FACILITIES (2019), <https://www.cityofpaloalto.org/files/assets/public/v/1/agendas-minutes-reports/reports/city-manager-reports-cmrs/year-archive/2019/9429.pdf?t=60065.04> [https://perma.cc/VT6C-W5D4].

⁶¹ San Francisco codifies its aesthetic requirements in its Master Lease Agreements carriers are forced to agree to if they want a permit to deploy wireless infrastructure or attach to poles. See SAN FRANCISCO MUN. TRANSP. AGENCY, MASTER LICENSE FOR OUTDOOR DISTRIBUTED ANTENNA SYSTEM POLE INSTALLATION § 2.1.4 (Mar. 23, 2023), https://www.sfmta.com/sites/default/files/reports-and-documents/2023/04/city_of_sf_mla_final_-_mobilitie_partially_executed.pdf [https://perma.cc/KA2N-EAHR]; see also S.F. Pub. Works Code §1521, Am. Legal Publ'g 2011, [codelibrary.amlegal.com/codes/san_francisco/latest/sf_publicworks/0-0-0-5390](https://www.codelibrary.com/codes/san_francisco/latest/sf_publicworks/0-0-0-5390) [https://perma.cc/U2KL-QVQ2].

⁶² See Communications Act of 1934, 47 U.S.C. § 541 (1934).

⁶³ *Id.* § 546; see also *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Third Report and Order, 34 FCC Rcd. 6844, 6905, para. 114 (2019) (noting that many states have left franchising to local authorities, although twenty-three states have empowered a state-level entity to grant cable franchise authorizations).

delayed because in many states, each franchising authority (i.e., every city served) has the right to independently review and evaluate the transaction.⁶⁴

Telecommunications providers often seek to leverage existing electric utility poles for the deployment of broadband services, especially in rural areas. In many instances, however, existing rights-of-way and easements only apply to electric service and not to broadband, which impacts not only electric cooperatives deploying broadband but also any electric utility seeking to lease out excess fiber capacity to third-party telecommunications providers. Many electric cooperatives and electric utilities are including fiber to support electric operations or implement smart grid technologies. Fiber installed to support electric operations is typically allowed in existing electric utility rights-of-way, but if a co-op leases excess fiber to a third party for retail broadband, or chooses to provide retail broadband themselves, it could trigger a violation of the existing agreement. This could result in litigation, regulatory penalties, and more. Providers of various types report lengthy delays to get access to existing facilities on federal lands. Entities such as rural electric cooperatives on more than one occasion have been told by environmental specialists at the U.S. Forest Service that it can take up to 270 days to review a broadband deployment permit application when using existing poles in existing rights-of-way, despite having existing permits for electric service on the same poles in the same rights-of-way.⁶⁵ In many instances, the Forest Service has taken significantly longer to review these permitting applications, with some electric cooperatives reporting wait times of a year or more for a response.⁶⁶ Small internet service providers have reported delays of eighteen to twenty-four months or longer to simply replace existing copper wire with more modern fiber.⁶⁷ Additionally, rights-of-way or easement agreements must be renegotiated with each state agency, federal agency, local jurisdiction, or private landowner. This can ultimately take years and cost millions of dollars.

A case study out of Colorado highlights how burdensome reviews contribute to high permitting costs and disincentivize investment in broadband infrastructure. When a rural electric cooperative in Colorado won a USDA

⁶⁴ See Communications Act of 1934, 47 U.S.C. § 537 (1934).

⁶⁵ *Breaking Barriers: Streamlining Permitting to Expedite Broadband Deployment: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Communications and Technology on Unleashing U.S. Communications Innovation*, 118th Cong. (2023) (testimony of Louis Finkel, Senior Vice President for Government Relations, National Rural Electric Cooperative Association), https://d1dth6e84htgma.cloudfront.net/4_19_23_Testimony_Finkel_9aa03b120a.pdf?updated_at=2023-04-18T17:37:56.898Z [<https://perma.cc/S7ZX-27X6>]; see also NAT'L TELECOMMS. & INFO. ADMIN., FINAL REPORT ON STATUS OF IMPLEMENTATION OF MOBILE NOW ACT SECTION 606(C) REQUIREMENTS, https://www.ntia.gov/sites/default/files/publications/mobile_now_act_section_606c_report_2022.pdf [<https://perma.cc/4PTF-PX6K>].

⁶⁶ *Breaking Barriers*, *supra* note 65.

⁶⁷ *The Broadband for Americans Through Responsible Streamlining Act: Hearing on H.R. 4141 Before the H. Comm. on Natural Resources, Subcomm. on Federal Lands*, 118th Cong. (2023) (testimony of John Stuart, President and CEO, MTE Communications), https://naturalresources.house.gov/uploadedfiles/testimony_stuart.pdf [<https://perma.cc/4WAL-5GSN>].

ReConnect award to provide broadband service, it planned to use existing electric infrastructure for the project and did not anticipate permitting problems. However, the project sought to cross land managed by the U.S. Interior Department's BLM, which required full oversight and review of the USDA-funded project simply because the project involved broadband rather than electric service. Despite using the same rights-of-way and existing utility poles that provide electric service to the same communities for the provision of broadband service, the co-op was required to undergo an expensive and time-consuming permitting process through BLM that added months of delays and an unbudgeted \$800,000 to the project.⁶⁸

The permitting process is further complicated by the Army Corps of Engineers, which alone owns two percent of federal land and has a unique set of requirements for electric cooperatives and other providers seeking to deploy broadband on its land.⁶⁹ The Corps' non-recreational outgrant policy requires a project to either have no viable alternative or provide a direct benefit to the government to receive consideration for an easement or right-of-way.⁷⁰ Cooperatives cite this as a particularly burdensome requirement. In many instances, broadband projects have been forced to build around Army Corps-managed land, adding significant costs and delays to project completion, as obtaining the easement from the agency was either too difficult or too expensive.

Fortunately, there are both existing and proposed policy solutions that address these common barriers to broadband deployment.

C. Existing Policy Solutions

Over the years, Congress and regulators have proposed and implemented various laws and regulations aimed at streamlining and improving the permitting process.

In 2017, the Advisory Council on Historic Preservation ("ACHP"), an independent federal governmental agency advising on national historic preservation policy, issued its Program Comment for Communications Projects on Federal Lands and Property,⁷¹ creating a simplified NHPA compliance process that agencies may choose to employ in meeting their obligations. Recognizing the limited environmental impacts of standard telecommunications projects, the revised processes identify an alternative pathway for accomplishing

⁶⁸ *Breaking Barriers*, *supra* note 65.

⁶⁹ Douglas Jehl, *How to Lease Federal Land from the Army Corps of Engineers and Avoid Rent*, N.Y. TIMES (Mar. 13, 2003), <https://www.nytimes.com/2003/03/13/us/how-to-lease-federal-land-from-the-army-corps-of-engineers-and-avoid-rent.html> [<https://perma.cc/SP7L-4JSC>].

⁷⁰ *Non-Recreation Outgrant Policy*, U.S. ARMY CORPS OF ENGINEERS, ER1130-2-550, ch. 17-3 (Sept. 30, 2013), www.saw.usace.army.mil/Portals/59/docs/recreation/Land%20Use/USACE%20Non-Recreation%20Outgrant%20Policy%20ER1130-5-550%20Ch.%2017%20.pdf [<https://perma.cc/Y4ZA-K6Y9>].

⁷¹ Notice of Issuance of Program Comment for Communications Projects on Federal Lands and Property, 82 Fed. Reg. 23818 (May 24, 2017).

statutory compliance that significantly relieves NHPA burdens on network builders, while simultaneously reducing the regulatory and administrative backlog at the agency level without sacrificing environmental or historical protections. For example, the Program Comment permits attaching new cable to existing poles and structures without another NHPA section 106 review.⁷² Further, the APE for installation of buried cable—which can often be more than 100-feet wide for a ground disturbance of only a few inches in width—is reduced to the width of the construction right-of-way, commonly twelve to sixteen feet.⁷³ Additionally, replacing communications cable located in existing rights-of-way (for example, by upgrading existing coax cable with fiber optic cable) would likewise require no further section 106 review.⁷⁴ The potential of these streamlining solutions are so beneficial that federal agencies are currently applying the National Program Comment to all telecommunications projects supported by federal dollars. Unfortunately, although the Program Comment has existed since 2017, its processes have not been commonly used to reduce permitting delays occasioned by section 106 compliance. Owing to an apparent lack of awareness, federal land management field offices have declined to use the streamlined processes for communications projects. Federal agencies that are not included in or not utilizing the Program Comment must individually consider the effects of communications projects on historic properties, which has led to myriad different applications of the NHPA by agencies that must otherwise develop and implement their own processes to evaluate the potential effects of a project, significantly obstructing deployment of critical connectivity to unserved and underserved populations. The ACHP recently proposed to amend this Program Comment to enable more federal agencies to use it for Broadband Deployment, Equity, Access, and Deployment-funded projects,⁷⁵ and to apply it even outside projects on federal lands.⁷⁶ The assistance of relevant agencies informing local permit granting offices of the time-saving effects of the Program Comment processes is critical.

The FCC has also worked in recent years to provide clarity regarding the NEPA and NHPA processes for reviews by Tribal Nations and Native Hawaiian Organizations (“NHOs”) for communications projects on non-Tribal lands. Among other things, the FCC has clarified the timelines and procedures for engaging Tribal Nations and NHOs in historic preservation reviews as well as the obligations regarding hiring qualified consultants and contractors, and it also clarified that applicants have no legal obligation to pay up-front fees

⁷² *Id.* § VIII.A.

⁷³ *Id.* § IX.A.

⁷⁴ *Id.* § IX.B.

⁷⁵ For an analysis of the Broadband Deployment, Equity, Access, and Deployment (“BEAD”) program, see *infra* Part II.D.

⁷⁶ See Proposed Amendment to the Program Comment for Communications Projects on Federal Lands and Property, ACHP (Nov. 7, 2023), <https://www.achp.gov/sites/default/files/2023-11/Communications%20Projects%20PC%20draft%20amendment%2020231107.pdf> [<https://perma.cc/NAE2-BNW8>].

when providing Tribal Nations and NHOs with an opportunity to comment on proposed facilities deployments.⁷⁷

A number of statutory provisions aimed at simplifying state and local permitting processes have also been enacted and implemented by the FCC, including sections 253 and 332 of the Communications Act of 1943, as amended, and section 6409 of the Spectrum Act of 2012. These statutes enable the FCC to preempt state law pursuant to the Constitution's Supremacy Clause—i.e., when state and federal law conflict, federal law governs.⁷⁸ Section 253 of the Communications Act bars state and local regulations that prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications service.⁷⁹ Section 332 includes similar language, which imposes limits on state and local regulation, requires action on infrastructure applications in a “reasonable” period of time, and requires denial of applications to be in writing and supported by substantial evidence in a written record.⁸⁰ Under the authority of those statutes, the FCC in 2009 established “shot clocks,” or presumptively reasonable timeframes for government action on a permit application.⁸¹ For collocations, which include mounting or installing an antenna facility on a pre-existing structure or modifying a structure for the purpose of mounting or installing an antenna facility on that structure, that timeline is ninety days.⁸² For other projects, states and localities have 150 days to approve or deny a permit application.⁸³ In 2018, the FCC codified these shot clocks in its rules, alongside newly adopted shot clocks for small wireless facilities (specifically, a sixty-day shot clock for small wireless facility collocations and a ninety-day shot clock for new facilities supporting small wireless facilities).⁸⁴ At the same time, the FCC provided further guidance on what constitutes an impermissible or effective prohibition on providing service under sections 253 and 332, including when fees act as a prohibition, and principles regarding state and locality recovery of costs for right-of-way management.⁸⁵

In 2014, the FCC adopted rules to implement section 6409, which was enacted to streamline state and local government review of requests to modify

⁷⁷ Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Second Report and Order, 33 FCC Rcd. 3102 (2018).

⁷⁸ U.S. CONST. art. VI, cl. 2.

⁷⁹ Communications Act of 1934, 47 U.S.C. § 253(a) (1934).

⁸⁰ *Id.* § 332.

⁸¹ Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, 24 FCC Rcd. 13994 (2009) [hereinafter Declaratory Ruling].

⁸² 47 C.F.R. § 1.6002(g) (2009).

⁸³ Declaratory Ruling, *supra* note 81.

⁸⁴ Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (2018) [hereinafter Third Report], *aff'd in relevant part*, City of Portland v. United States, 969 F.3d 1020, 1043–44 (9th Cir. 2020).

⁸⁵ Third Report, *supra* note 84.

existing wireless facilities, similar to the provisions discussed above.⁸⁶ Those rules, among other provisions, established a sixty-day shot clock for approving applications covered by section 6409, namely requests to modify existing wireless facilities that do not substantially change the facilities' physical dimensions, and provided that a relevant application is deemed granted if a state or locality fails to act on it within the specified time.⁸⁷

The steps taken by the FCC in recent years to update its implementation of NEPA and NHPA, sections 253 and 332 of the Communications Act, and 6409 of the Spectrum Act recognized the expanding need for wireless infrastructure to accommodate the deployment of 5G and other advanced wireless networks. It made no sense, for example, to treat small cells, which are antennas often no larger than a backpack, as the same kind of undertaking as macro towers, which can be hundreds of feet tall and host much larger antennas.

The FCC's implementing regulations and interpretive orders have promoted more efficient wireless siting processes for both new and existing facilities and remain the law of the land. For example, sixty-two percent of the cell sites built in the United States from 2016 to 2021 were built after the federal siting reforms were in effect.⁸⁸ Yet, while these clarifications and interpretations of statutory authority remain critical to deployment, create a uniform and efficient framework for promoting deployment, and have been regularly affirmed on appeal, they are not codified in law, making them vulnerable to political whims.⁸⁹ The national interest in certainty regarding the deployment of broadband infrastructure counsels toward congressional action to codify these reasoned decisions.

⁸⁶ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156, 232–33 (2012) (codified at 47 U.S.C. § 1455(a)(1)) (“a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station”); Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order, 29 FCC Rcd. 12865 (2014).

⁸⁷ In 2020, the FCC clarified the application of the section 6409 shot clock and addressed what constitutes a “substantial change” in physical dimensions. See *In the Matter of Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, Declaratory Ruling, 35 FCC Rcd. 5977 (2020).

⁸⁸ CTIA, 2022 ANNUAL SURVEY HIGHLIGHTS 5 (2022), <https://www.ctia.org/news/2022-annual-survey-highlights> [<https://perma.cc/9WDS-E5UB>].

⁸⁹ See, e.g., *City of Portland*, 969 F.3d 1020; *United Keetoowah Band of Cherokee Indians v. FCC*, 933 F.3d 728 (D.C. Cir. 2019); *Montgomery Cnty. v. FCC*, 811 F.3d 121 (4th Cir. 2015); see also *League of California Cities v. FCC*, No. 20-71765 (9th Cir. filed June 22, 2020).

D. *The Broadband Deployment, Equity, Access, and Deployment (“BEAD”) Program*

At \$42.45 billion, the BEAD Program,⁹⁰ established in November 2021, represents the most significant federal investment aimed at closing the digital divide and will contribute an estimated \$84.8 billion to the U.S. GDP, double the initial investment.⁹¹ Funding is split among states and territories based on the share of locations lacking adequate service and the projected cost of serving them with a defined minimum reliable speed of at least 100 Mbps for downloads and twenty Mbps for uploads.⁹² With such a large sum of taxpayer dollars on the table for this likely once-in-a-generation opportunity, it is imperative that BEAD funds are spent efficiently and responsibly.

Though BEAD primarily funds broadband deployment, reaching the program’s ultimate goal of closing the digital divide cannot be fulfilled through infrastructure alone. Other barriers, including digital literacy, education about broadband infrastructure, and consumer assistance, among others, contribute to the digital divide.⁹³ Acknowledging this, the BEAD program allows for funds that remain after network construction has been completed to be used to address these ancillary issues, allowing new and existing broadband deployments to reach populations that cannot afford the cost of subscribing to broadband or do not want to subscribe to networks.

Additionally, NTIA’s BEAD proposal guidance “strongly encourage[s]” states and territories to reduce regulatory barriers and costs. Recommendations include streamlining permitting processes and expediting timelines, providing easy access to poles and rights-of-way, and encouraging “dig-once” policies.⁹⁴ A number of states propose to collaborate with stakeholders and publish best practices for localities to adhere to.⁹⁵ Some states have taken additional measures to minimize waste and delays. California, for example, “requires localities to undertake ‘batch processing.’”⁹⁶ Georgia’s Department of

⁹⁰ NAT’L TELECOMMS. & INFO. ADMIN., NOTICE OF FUNDING OPPORTUNITY, BROADBAND, EQUITY, ACCESS, AND DEPLOYMENT PROGRAM 2 (2022).

⁹¹ NAT’L TELECOMMS. & INFO. ADMIN., THE BROADBAND EQUITY, ACCESS AND DEPLOYMENT (BEAD) PROGRAM OVERVIEW 1 (2022); *see also* Ian Tufts, *Fact of the Week: The Bipartisan Infrastructure Law’s Broadband Investments Could Add \$146 Billion to US GDP*, INFO. TECH. & INNOVATION FOUND. (Dec. 11, 2023), itif.org/publications/2023/12/11/infrastructure-laws-broadband-investments-could-add-146-billion-to-us-gdp/ [<https://perma.cc/2WVG-UWAK>].

⁹² NAT’L TELECOMMS. & INFO. ADMIN., *supra* note 90, at 16.

⁹³ Jessica Dine, *The Digital Inclusion Outlook: What It Looks Like and Where It’s Lacking*, INFO. TECH. & INNOVATION FOUND. (May 1, 2023), itif.org/publications/2023/05/01/the-digital-inclusion-outlook-what-it-looks-like-and-where-its-lacking/ [<https://perma.cc/JS6E-XCJJ>].

⁹⁴ NAT’L TELECOMMS. & INFO. ADMIN., INTERNET FOR ALL, BEAD INITIAL PROPOSAL GUIDANCE, VOLUMES I AND II 72 (2023).

⁹⁵ *See, e.g.*, 1 NEV. GOVERNOR’S OFF. OF SCI., INNOVATION & TECH., HIGH SPEED IV: BEAD INITIAL PROPOSAL 2 (Sept. 2023), [https://osit.nv.gov/uploadedFiles/ositnv.gov/Content/Broadband/NV%20Initial%20Proposal%20\(BEAD%20IP\)%20Volume%20I%20-%20For%20Public%20Comment.pdf](https://osit.nv.gov/uploadedFiles/ositnv.gov/Content/Broadband/NV%20Initial%20Proposal%20(BEAD%20IP)%20Volume%20I%20-%20For%20Public%20Comment.pdf) [<https://perma.cc/F5HJ-F4UC>].

⁹⁶ 2 CAL. PUB. UTILS. COMM’N, INITIAL PROPOSAL: BROADBAND EQUITY, ACCESS, AND DEPLOYMENT (BEAD) PROGRAM 140 n.138 (Nov. 2023) (citing CAL. GOV’T CODE § 65964.3

Community Affairs promotes the use of a Model Ordinance to “streamline permitting by creating a single point of contact for permits, creating a standard timeline for the review of permits, and standardizing and limiting the fees charged for permits, among other measures,” and are likely to attract more broadband investment in their area.⁹⁷

III. BREAKING DOWN THE AMERICAN BROADBAND DEPLOYMENT ACT

Broadband delayed is broadband denied—this adage is the guiding philosophy behind the ABDA, which was reported positively out of the House Energy & Commerce Committee in October 2023.⁹⁸ This bill addresses eight major actionable items, helping bridge the digital divide by enabling broadband providers to rapidly deploy infrastructure designed to offer citizens affordable, reliable, high-speed broadband service to their homes and businesses. Specifically, the ABDA will:

- Streamline the broadband permitting processes at the federal, state, and local levels, by establishing predictable timeframes and procedures for state and local permitting processes related to broadband deployment.⁹⁹
- Establish presumptively reasonable fees state and local governments may charge for permit application reviews and use of public rights-of-way, requiring that those fees be based on actual costs.¹⁰⁰
- Reform the cable franchising process by establishing predictable timeframes for reviews of requests for new franchises and expansion of cable systems.¹⁰¹
- Add transparency to franchise terms and streamline the process for transferring cable systems.¹⁰²
- Exempt certain broadband-deployment projects from environmental and historic preservation reviews.¹⁰³

(2023)), <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M520/K763/520763574.PDF> [<https://perma.cc/HEX4-4YNB>].

⁹⁷ 2 GA. TECH. AUTH., INITIAL PROPOSAL: BROADBAND EQUITY ACCESS AND DEPLOYMENT (BEAD) GRANT PROGRAM 101 (Feb. 2024) (citing GA. DEP’T OF CMTY. AFFS., AN ORDINANCE FOR A BROADBAND READY COMMUNITY), <drive.google.com/file/d/14bTxEmMia1RKISWhncxZrHtz1IsYshr/view> [<https://perma.cc/JFD6-NE8V>].

⁹⁸ *Actions Overview: H.R. 3557 - American Broadband Deployment Act of 2023*, CONGRESS.GOV, <https://www.congress.gov/bill/118th-congress/house-bill/3557/actions> [<https://perma.cc/KMG8-84EX>].

⁹⁹ American Broadband Deployment Act of 2023, H.R. 3557, 118th Cong. §§ 101, 102, 202(a) (2023) (as reported by H. Comm. on Energy & Com., Oct. 2, 2023).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* §§ 201, 202(a).

¹⁰² *Id.* §§ 203, 204(a).

¹⁰³ *Id.* § 301.

- Codify the Tribal notification process for new wireless infrastructure.¹⁰⁴
- Deem granted applications to deploy broadband on federal lands that remain pending beyond the existing 270-day timeframe for such reviews.¹⁰⁵
- Require states to certify that projects funded by grants from the BEAD Program are charged cost-based fees from state and local governments.¹⁰⁶
- Protects the ability of state and local authorities to regulate the placement, construction, or modification of personal wireless service facilities, as long as the regulation does not discriminate between providers or preclude the provision of service.¹⁰⁷

A. *Timing*

The ABDA will speed up federal and state approvals by establishing firm “shot clocks” to ensure broadband providers receive timely permitting approvals. Under this section, requests would be deemed granted if a permitting authority failed to take final action—either granting or denying the request—within the established timeframes. Critically, it preserves state and local zoning authority and standards, provided that those requirements are objective, reasonable, and nondiscriminatory.¹⁰⁸ The ABDA codifies the FCC’s existing rules under section 332 of the Communications Act, including the shot clocks for collocations, small cells, and other projects.¹⁰⁹ The ABDA also codifies shot clocks for section 6409-eligible projects, including the deemed granted remedy and clarifications regarding when an application is deemed submitted for purposes of starting the timelines for review.¹¹⁰ A deemed granted remedy is also codified for projects exceeding the 270-day review timeline for sites on federal lands.¹¹¹

The ABDA also codifies in section 302 the FCC’s shot clocks for the Tribal notification process for wireless towers and antennas to be deployed on non-Tribal lands. Applicants must provide information reasonably necessary for the Tribe to ascertain whether historic properties of religious or cultural significance may be affected by the undertaking. If a Tribe does not act on a request within forty-five days of receipt, it will be presumed to have disclaimed interest in the site. Section 302(b) would establish factors for a Tribe to overcome any presumption established in this section. These factors

¹⁰⁴ *Id.* § 302.

¹⁰⁵ *Id.* § 401(a).

¹⁰⁶ *Id.* § 402.

¹⁰⁷ *Id.* § 101.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* § 103.

¹¹¹ *Id.* § 401; *see also* MOBILE NOW Act, Pub. L. No. 115-141, div. P, tit. VI, § 606, 132 Stat. 1097, 1101 (2018).

include whether the applicant failed to make a reasonable attempt to follow up with the Tribe between thirty and fifty days after submitting their application, and whether the applicant violated the Nationwide Programmatic Agreement outline processes jointly agreed to by the FCC, ACHP, and National Conference of State Historic Preservation Officers for streamlined section 106 review for collocations and other wireless facilities.¹¹²

B. Cost-Based Fees

The ABDA addresses how states and local governments assess fees for rights-of-way and easements. Under the ABDA, Congress would mandate that fees be competitively neutral, nondiscriminatory, established in advance, calculated based on actual and direct costs, and described to a requesting party in a way that distinguishes between various types of fees, including recurring and nonrecurring fees.¹¹³ The ABDA expects that only objectively reasonable costs may be factored into these fees.

C. Preemption

The ABDA would replace section 253 of the Communications Act with stronger language, stating that “[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide, improve, or enhance the provision of an interstate or intrastate telecommunications service.”¹¹⁴ This language will ensure that modifications to existing broadband infrastructure will not be subject to unnecessary, duplicative permitting approvals. It also specifies that, if this provision is violated, judicial review at a federal district court will be expedited,¹¹⁵ preventing a long and drawn-out appeals process that artificially delays projects and increases costs.

D. NHPA and NEPA

The ABDA would exempt covered projects, under specific conditions, from NEPA and NHPA reviews.¹¹⁶ Covered projects defined in section 304 would include:

- A project to collocate a personal wireless facility on an existing structure or to modify a personal wireless facility;

¹¹² American Broadband Deployment Act of 2023, H.R. 3557, 118th Cong. § 302 (2023) (as reported by H. Comm. on Energy & Com., Oct. 2, 2023); *see also* Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. pt. 1, App’x B (2020); Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 C.F.R. pt. 1, App’x C (2005).

¹¹³ American Broadband Deployment Act of 2023, H.R. 3557, 118th Cong. §§ 101, 102, 202(a), 402 (2023) (as reported by H. Comm. on Energy & Com., Oct. 2, 2023).

¹¹⁴ *Id.* § 102 (emphasis added).

¹¹⁵ *Id.*

¹¹⁶ *Id.* § 301.

- A project to place, construct, or modify a communications facility where another communications facility or utility has already been granted an easement on federal property, or where another communications facility has been granted an easement in a public right-of-way;
- A project to deploy a small personal wireless facility (small cell);
- A project to deploy or modify a communications facility carried out entirely within a floodplain;
- A project to deploy or modify a communications facility carried out entirely within a brownfield site;
- A project to permanently replace equipment or services from vendors posing a national security threat with equipment or services from trusted vendors;
- A project to replace a communications facility damaged by a natural disaster or emergency within an area where the President, Governor, or Chief Executive of a Tribe declared a major disaster or an emergency, or improve a communications facility in that area as necessary for recovery, or to prevent or mitigate future disaster or emergency; and,
- A project to place a communications facility in a right-of-way on federal land where a communications facility previously existed, the new facility is a small cell, or the new facility is no more than fifty feet tall, or ten feet taller than an existing structure in the right-of-way.¹¹⁷

The ABDA would identify minimally disruptive modifications and exempt certain providers from being subject to a full NHPA and NEPA review for such modifications.¹¹⁸ This would streamline the difficult federal permitting process with common-sense reforms without causing undue harm to our natural environment and historic sites.

E. Cable Systems Reform

Sections 201–204 of the ABDA address various cable reforms involving the timeline for requests for a new cable franchise, adding a new subsection to address requests regarding placement, construction, or modification of facilities by cable operators; the elimination or modification of requirements in a cable operator franchise; and the sale and transfer of cable systems. These reforms are intended to encourage the deployment of cable systems that, like their telecommunications counterparts, can provide end-user customers much needed broadband services.

¹¹⁷ *Id.* §§ 301, 304.

¹¹⁸ *Id.* § 301.

IV. IDENTIFYING THE PROPER ROLE OF THE FEDERAL GOVERNMENT: FEDERALISM IN THE CONTEXT OF BRIDGING THE DIGITAL DIVIDE

This Part addresses friction between states and localities, and federal efforts to close the digital divide. Specifically, I discuss what happens when state and local policies conflict with national objectives, and how those concerns can be resolved. As stated previously, the federal government recently allocated \$42.45 billion to address the digital divide through the BEAD program, reiterating that closing the digital divide is a federal priority;¹¹⁹ however, state and local permitting policies can impede the swift delivery of broadband, raising an important question about the proper role of the federal government in achieving universal broadband access. Fortunately, the ABDA relies on tried-and-true federalist principles that respect state and local needs without sacrificing the goal of universal broadband access.

Federalism is an important part of our legal and political system. The founders articulated this principle in the Tenth Amendment, stating that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹²⁰ The U.S. Supreme Court has interpreted this to mean that “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.”¹²¹ In other words, the federal government must point to a source of authority within the Constitution to enact legislation; otherwise, that power is given to the states.

For purposes of deploying broadband, the U.S. Congress gets its authority under the Commerce Clause in Article I of the Constitution.¹²² The Commerce Clause allows Congress to pass laws that “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹²³ The courts have consistently upheld Congress passing laws that regulate interstate communications services and interpreted the Commerce Clause as giving Congress broad and exclusive authority to do so.¹²⁴ In short, states and localities are rather limited in their ability to regulate broadband deployment as the federal government has almost unfettered preemptive authority in this space.

Even if a communications firm’s network does not breach interstate lines, Congress can still regulate it because the nature of the service is interstate.

¹¹⁹ *Broadband Equity Access and Deployment Program*, NAT’L TELECOMMS. & INFO. ADMIN.: BROADBANDUSA, broadbandusa.ntia.doc.gov/funding-programs/broadband-equity-access-and-deployment-bead-program [https://perma.cc/MJ5S-YGGP].

¹²⁰ U.S. CONST. amend. X.

¹²¹ *New York v. United States*, 505 U.S. 144, 156 (1992).

¹²² *City of Portland v. United States*, 969 F.3d 1020, 1049 (9th Cir. 2020) (acknowledging that “the 1996 Telecommunications Act [was] adopted by Congress pursuant to its delegated authority under the Commerce Clause . . .”).

¹²³ U.S. CONST. art. I, § 8.

¹²⁴ *See United States v. Sw. Cable Co.*, 392 U.S. 157, 168–69 (1968); *see also Gen. Tel. Co. v. FCC*, 413 F.2d 390, 401 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1969).

As the Second Circuit has held, “[t]he key to [federal] jurisdiction is the nature of the communication itself rather than the physical location of the technology.”¹²⁵ Congress may even preempt state regulation of intrastate communications services when a service crosses jurisdictions and “it is impossible or impractical to separate the service’s intrastate and interstate components, and the state regulation interferes with valid federal rules or policies.”¹²⁶ Hence, it is generally up to Congress to decide how states and localities can interact with or regulate intrastate services, not states.

The federal government can preempt state permitting laws, too. For example, the Ninth Circuit has upheld the FCC’s use of sections 253 and 332 of the Communications Act to promulgate the 5G Small Cell Order, One-Touch-Make-Ready (“OTMR”) Order, and Local Moratoria.¹²⁷ Even on issues where the Ninth Circuit agreed that the FCC had misinterpreted the statute, the Court did not agree with state and local governments’ claim that the FCC’s Small Cell Order and OTMR Order violated the Tenth Amendment.¹²⁸ The Ninth Circuit held that “the FCC is interpreting and enforcing the 1996 Telecommunications Act, adopted by Congress pursuant to its delegated authority under the Commerce Clause, to ensure that municipalities are not charging small cell providers unreasonable fees.”¹²⁹ In other words, states and local governments do not have legal standing to claim that the federal government is outside of its authority when regulating broadband deployment under Article I of the Constitution. While the federal government cannot commandeer state and local officials to execute federal law under the Tenth Amendment, the Ninth Circuit has held that preempting certain state and local policies does not amount to commandeering as envisioned in the Tenth Amendment and, thus, does not violate it.¹³⁰

It is true that local governments generally have discretion over where certain installations (e.g., utility poles and traffic lights) should be placed in public rights-of-way. But this does not discharge Congress of its preemptive authority, especially when certain aspects of those installation restrictions impact interstate communications services. Indeed, courts have upheld the FCC’s use of section 332 of the Communications Act to impose shot clocks on state and local authorities.¹³¹ Moreover, courts have said that section 253(a) of the Communications Act can preempt state and locality rules in those rights-of-way that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹³²

¹²⁵ *N.Y. Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980).

¹²⁶ *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 576 (8th Cir. 2007); *see also* *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368 (1986).

¹²⁷ *See City of Portland*, 969 F.3d at 1033.

¹²⁸ *See id.* at 1049.

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *See id.* at 1044.

¹³² *Id.* at 1034 (quoting Communications Act of 1934, 47 U.S.C. § 253(a) (1934)).

Installations may be owned by the municipalities themselves or other entities, such as public and private utilities. As the Ninth Circuit wrote, “when a municipality is acting like a private business, and not acting as a regulator or policymaker, there can be no preemption by [Congress] because the municipality was not engaged in regulation... It was acting as a property owner.”¹³³ In these cases, federal authority is limited. If, however, the federal government can prove that the state or local authority’s action adversely impacts broadband deployment, then they can override state actions as they see fit. The Ninth Circuit has also stated that “cities operate in a regulatory capacity when they manage access to public rights-of-way and public property thereon.”¹³⁴ Thus, when cities prevent access to public rights-of-way, they are not acting as owners of the property and Congress’ preemptive authority is intact. None of this is to say that states have no role in aspects of broadband deployment; their role is merely limited when state and local policies conflict with national priorities, such as closing the digital divide.

One of the ways the ABDA reaffirms state and local authority is by acknowledging the important role and impact major broadband builds can have on the aesthetics of a neighborhood and city operations, such as street closures to lay fiber or streetlight shutdowns to put up a small cell. The ABDA places express limits on the federal government from stripping such related authority from state and local governments.

As part of his written congressional testimony, the Executive Vice President of NTCA: The Rural Broadband Association, Michel Romano, gave staggering insight into the issues smaller carriers are facing when building out to their communities:

[An] NTCA member sought to install fiber in a public right-of-way adjacent to a state highway that intersected with a railroad crossing at a single point. To place fiber beneath 15 feet of the railroad line along this state highway, the railroad quoted fees totaling \$19,000, including the permit fee, an application fee, an “engineer mobilization fee,” and \$2,500 for a flagger/observer—in addition to costs needed for additional insurance beyond that otherwise carried for the project. (To be clear, these were just the crossing fees, and did not include any of the actual costs of network construction.) Ultimately, the intervention of a local economic development office helped in reducing the fees to \$12,000—and, after all this process and cost, the fiber was deployed for the 15 feet under the railroad crossing along the state highway without ever touching the railroad assets.¹³⁵

¹³³ *Id.* at 1045 (citing *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 231–32 (1993)).

¹³⁴ *Id.* (citing *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 881 (9th Cir. 2006)).

¹³⁵ *Breaking Barriers: Streamlining Permitting to Expedite Broadband Deployment: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Communications and Technology*

The ABDA delineates the respective roles of each sovereign with respect to broadband deployment. For too long, the U.S. has operated under contorted and, at times, conflicting statutory regimes that have unnecessarily increased the cost to deploy networks. This has an outsized effect on regions currently lacking high-speed broadband due to the high cost of deployment in these areas. Worse, a lack of clarity has led to a slew of complications when it comes to advancing the goal of promoting universal broadband, as detailed in this section.

V. CONCLUSION

Unfortunately, access to [broadband] infrastructure is not readily available in rural America, despite it having become a fundamental necessity. The challenges facing those without access to digital infrastructure are enormous. It can contribute to decreased agricultural productivity, lack of fresh food, education achievement gaps, declining rural communities and main streets, lower health care outcomes, hospital closures and lack of access to credit.¹³⁶

As the billions of dollars allocated by Congress for broadband deployment, along with the sustained investment and matching funds from the private sector, begin to impact the marketplace in earnest, there will be a significant additional strain on federal, state, and local permitting agencies. The time to ensure effective permitting processes are in place is now, not once funds have already been allocated and projects are nearly ready to go. The ABDA provides commonsense rules that will add predictability and proportionality to broadband permitting processes across the country. These reforms are based on best practices derived from existing state and federal rules developed with multi-stakeholder input. They aim to ensure a balance between state and local governments' need to have a say in deployments in their communities with the federal need to quickly deploy broadband everywhere Americans live, work, and travel.

The goal of bridging the digital divide cannot be reached without participation and buy-in from states and localities. The ABDA creates the framework necessary to allow states and localities to assist in achieving that goal. In short, the ABDA preserves the right of state and local governments to manage their cities, while continuing to advance the nationwide goal of universal broadband access.

on Unleashing U.S. Communications Innovation, 118th Cong. (2023) (statement of Michael Romano, Executive Vice President, NTCA).

¹³⁶ TASK FORCE FOR REVIEWING THE CONNECTIVITY AND TECHNOLOGY NEEDS OF PRECISION AGRICULTURE IN THE UNITED STATES 3 (2023).

The ABDA is based in part on existing state and federal programs, some of which have been in effect for over a decade and have been proven effective in reducing delays for broadband permitting. Indeed, over thirty states have already adopted rules that are consistent with provisions in the ABDA pertaining to small wireless facilities. Additionally, numerous states and localities have enacted rules to streamline the application process for modifications to existing infrastructures. The ABDA recognizes these successes and builds on them by enshrining them into law. This will increase predictability for both government and industry without spending limited resources on redundant or ineffective regulatory reviews.

Closing the digital divide in America is increasingly within reach. However, bringing connectivity to the remaining unserved and underserved locations will require a whole-of-government approach. Funding alone will not be sufficient. State and local governments play an important role in ensuring responsible deployment within their jurisdictions, but it is critical that the federal government create clear, predictable, and consistent permitting laws across the country to reduce costs of and minimize barriers to broadband deployment and upgrades. The ABDA will provide a national framework that respects the important role of state and local governments while also unleashing new economic activity and deployment.