Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Build America: Eliminating Barriers to Wireline Deployments	)	WC Docket No. 25-253
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COMMENTS OF THE
COMPETITIVE ENTERPRISE INSTITUTE

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Denison (DJ) Hatch, Policy Analyst
Center for Technology and Innovation
1310 L Street NW, 7th Floor
Washington, DC 20005

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The Competitive Enterprise Institute ("CEI") respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking[1] in the above-captioned proceeding. CEI is a non-profit public policy organization dedicated to limited government, free markets, and individual liberty, with longstanding interests in communications regulation and the deployment of the infrastructure on which modern networks depend. CEI submits that the Commission's core proposals reflect the best reading of Section 253 and merit adoption, and that three of the Notice's extensions reach past what Section 253 will bear and should be declined or substantially narrowed.

I. INTRODUCTION AND SUMMARY

The Commission's fundamental proposals are sound, and CEI supports them. A presumptive deadline for acting on rights-of-way authorization requests, and a cost-based standard for the fees and in-kind demands that state and local governments may require, are each the best reading of Section 253. Neither requires deference. In addition, after *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) neither should be defended as though deference remained available.

[1] *Build America: Eliminating Barriers to Wireline Deployments*, Notice of Proposed Rulemaking, WC Docket No. 25-253, FCC 26-40 (rel. June 26, 2026) [hereinafter "Notice"].

Three extensions, however, reach past what Section 253 will bear. Accordingly, CEI urges the Commission to decline or substantially narrow each. First, applying the deadline to facilities outside the public rights-of-way stretches the statute's rights-of-way basis (as the Notice's own question about the reach of Section 253(c) concedes).[2] Second, the theory that fees in one jurisdiction prohibit deployment nationally in the aggregate rests on a holding that *Chevron* deference sustained in *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), and that no longer governs. Third, and most significantly, using the commingled-facilities theory to reach state rate regulation of broadband raises a major questions problem the Commission should not invite. The third is this comment's principal qualification.

A note on what the record does and does not establish. The deployment barriers described in this proceeding are real, and they can render marginal projects (particularly rural ones) economically nonviable. They are not, however, shown to be the binding constraint on deployment nationally. Deployment turns principally on density, demand, construction cost, and (presently) the availability of skilled trades labor, with regulatory friction operating as one cost input among several. The Commission can and should, however, act on the regulatory input.

II. THE POLICY CASE

The affirmative case for the Commission's core proposals is an institutional one, and it does not depend on any general presumption against regulation.

A state or local government controlling access to the public rights-of-way holds a monopoly over an input that has no substitute. A wireline provider cannot route around a jurisdiction the way a manufacturer can route around a supplier, because the network must physically traverse the ground the jurisdiction controls. That position permits the extraction of

[2] Notice para. 23.

payments untethered from any cost the jurisdiction incurs. Also, the ordinary discipline that prevents a seller from pricing above cost, which is the threat that the buyer will go elsewhere, is absent by construction.

The resulting harm does not stay put. A provider's capital budget is finite within any planning period, and a payment demanded in one jurisdiction is capital unavailable for a buildout in the next one. Considering that fiber networks are planned across jurisdictional boundaries and not within them, the jurisdiction imposing the demand captures the full benefit while bearing only a fraction of the cost (which is the structure of an externality rather than a bargain). Congress addressed that structure directly in Section 253 by limiting compensation to what is fair and reasonable for use of the rights-of-way.

It should be noted, nonetheless, that the independent evidence on deployment attributes the largest share of variation to population density, demand-side characteristics, civil construction cost, and the supply of skilled construction labor, with permitting and fees appearing as a secondary input. Accordingly, the claim CEI advances is the narrow one that survives contact with that evidence. Specifically, excessive delay and above-cost fees can render marginal deployments, and disproportionately rural ones, uneconomical. That is precisely the harm Section 253(a) addresses, which speaks to requirements having the effect of prohibiting service and not only to requirements that prohibit it outright.

III. LEGAL AUTHORITY

The Notice places legal authority last, at § III.F (para. 74). This comment takes it first, because every substantive proposal stems from it.

A) Section 253(a)'s Effective-Prohibition Standard Authorizes a Presumptive Deadline Without Borrowing From Section 332

The relevant question is narrow: whether sufficiently extended delay falls within Section 253(a)'s existing prohibition standard. The issue here is not whether the Commission may impose a reasonable-time requirement on state and local governments. It is whether sufficiently extended delay falls within language Section 253(a) already contains, which bars any requirement that prohibits or has the effect of prohibiting the provision of telecommunications service.[3] The Commission has framed this correctly. Namely, the proposed deadline marks the point at which delay presumptively constitutes an effective prohibition, and not the amount of time that review reasonably should take.[4] This distinction is significant. A reasonable-time rule asks how long the task ought to require. An evidentiary threshold under Section 253(a) asks when delay has become long enough that prohibition may be presumed. The two inquiries take different inputs and produce different answers.

The effective-prohibition standard reaches barriers that fall short of an absolute bar. The Tenth Circuit, construing the statutory text directly, has held that Section 253(a) forbids any statute that prohibits or has the effect of prohibiting entry, and that nothing in the statute requires a bar to entry to be insurmountable.[5] That standard originates in the Commission's own *California Payphone* ruling, under which a requirement effectively prohibits service if it materially inhibits the ability to compete.[6] Multiple circuits have adopted this as the governing test. The Commission applied the standard to delay in the *Moratoria Order*, determining that

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[3] 47 U.S.C. § 253(a).
[4] Notice para. 17.
[5] *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000), *aff'g Silver Star Telephone Co.*, 12 FCC Rcd 15639 (1997).
[6] *California Payphone Ass'n*, 12 FCC Rcd 14191, 14206 para. 31 (1997).

indefinite or unreasonable delay in processing applications effectively prohibits service.[7] The Ninth Circuit affirmed that determination, though under deference that no longer governs.[8] The proposition the deadline requires, that delay is cognizable under the effective-prohibition standard, does not depend on that deference. It is independently established by the materially-inhibits standard and by the fact-bound holding in *White Plains* discussed below.

The Second Circuit has also found delay prohibitive on the facts before it, holding that extensive delays in processing a franchise request prohibited the provider from furnishing service for the duration of the delays.[9] CEI notes the limit of that authority rather than relying on it beyond its terms. *White Plains* was a fact-bound holding on a delay spanning years, and it does not establish a numerical threshold. It establishes that delay is cognizable under the effective-prohibition standard, which is the proposition the deadline requires.

The surplusage objection dissolves rather than needs to be defeated. State and local commenters argue that reading Section 253(a) to reach prohibitive delay renders superfluous the separate requirement in Section 332(c)(7)(B)(ii) that governments act on wireless siting requests within a reasonable period of time.[10] This redundancy never arises. The Commission applies only Section 253(a)'s effect-of-prohibiting standard and asks at what point delay crosses into presumptive prohibition. It does not apply (and does not need) a reasonable-time standard. Because the two provisions operate on different triggers, Section 332(c)(7)(B)(ii) retains independent work even after the deadline is adopted. Namely, it governs timing in the wireless siting context on a reasonableness measure that Section 253 does not supply.

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[7] *Moratoria Order*, 33 FCC Rcd 7705, 7780-82 paras. 149-53 (2018).
[8] *City of Portland v. United States*, 969 F.3d 1020, 1038 (9th Cir. 2020).
[9] *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *see* Notice para. 14 & n.36
[10] Notice para. 16.

The anti-surplusage canon offers additional support, but the argument here does not depend on it. This canon disfavors constructions that render statutory language redundant.[11] It is an interpretive aid rather than an absolute rule, and the Court has declined to apply it where the resulting reading would be repugnant to the statute's structure.[12] CEI accordingly rests the point on the structural dissolution above and cites the canon in support.

The negative-implication objection is the states' stronger argument, and it fails for a different reason. The serious version of the objection is not redundancy but disparate inclusion. Congress wrote an express timing clause into Section 332 and none into Section 253, and language included in one section and omitted in another is ordinarily presumed intentional.[13] The inference does not hold here because the provisions differ in scope. Section 332(c)(7) is a specific, self-contained framework for personal wireless service facility siting, carrying its own timing clause and its own judicial review provisions. Section 253 is a general preemption mandate sweeping across all telecommunications services. The Notice states the point precisely in asking whether the reasonable-time requirement simply imposes a more specific standard for wireless siting than the effective-prohibition standard in Section 253(a), which sweeps more broadly.[14] A specific timing clause inserted into a narrow framework carries no implication that a broader standard cannot reach prohibitive delay through its own text.

The parallel structure of the two provisions confirms rather than undermines this reading. The Commission has already determined that its interpretation of the effective-prohibition standard applies with equal measure to the identical language appearing in Section 253(a) and

[11] *Corley v. United States*, 556 U.S. 303, 314 (2009); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).
[12] *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001).
[13] *Russello v. United States*, 464 U.S. 16, 23 (1983).
[14] Notice para. 16.

Section 332(c)(7)(B)(i)(II), invoking the canon that identical words in neighboring provisions of the same statute carry the same meaning.[15] CEI cites that parallel reading for the textual proposition only. The Ninth Circuit sustained portions of the *Small Cell Order* under deference that no longer governs, and the parallel-language point does not depend on those portions.

B) The Commission May Fix the Threshold by Rule, and Should Frame the Rule as a Delegated Evidentiary Presumption

Legislative-rule authority exists. The Commission may implement Section 253 through binding rules and is not confined to adjudicating individual preemption petitions. Section 201(b) authorizes the Commission to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act, and the Supreme Court has held that this authority extends to the provisions the Telecommunications Act of 1996 added to the Communications Act.[16]

CEI states the scope of that holding accurately and argues the extension rather than assuming it. *Iowa Utilities Board* addressed Sections 251 and 252. It did not, however, address Section 253. The extension is nonetheless sound. Section 253 was added to the same Act by the same 1996 amendments and sits in the same chapter as the provisions the Court addressed. The Court's reasoning turned on the general grant in Section 201(b) reaching the Act as amended, not on any feature peculiar to Sections 251 and 252. Nothing in Section 253 displaces that general grant. CEI notes that a dissenting opinion read Section 201(b) as limited to interstate communication, and that the argument was not accepted by the Court.

[15] *Small Cell Order*, 33 FCC Rcd 9088, 9103 para. 36 (2018); *see* Notice para. 15.
[16] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 377-86 (1999).

The Commission should include Section 201(b) in its statement of authority. Section 201(b) appears in the Notice's discussion of legal authority but does not appear in the Initial Regulatory Flexibility Analysis's statement of legal basis or in the ordering clauses, which list Sections 1, 4(i), 253, 303, and 403.[17] Section 201(b) is the provision supplying legislative-rule authority as distinct from adjudicatory authority. Its uneven appearance invites an argument that the final rule exceeds the authority actually invoked to adopt it. The Commission should cite Section 201(b) in the ordering clauses of any final order. The correction is costless now and bars an avoidable challenge later.

What the rule is worth in court is the harder question, and the Commission should answer it candidly. After *Loper Bright*, a court adjudicating a Section 253 dispute exercises independent judgment on the meaning of "effective prohibition."[18] It does not accept the Commission's construction because that construction is reasonable. Standing alone, therefore, the Commission's rule is persuasive authority and not a substitute for the court's own reading. The Notice's own formulation (that its determinations would be persuasive authority to courts "at a minimum") followed immediately by the question whether courts would be legally bound, reflects the uncertainty accurately.[19] CEI raises the point to place the rule on ground that will hold, not to weaken it.

There is a framing under which the rule carries more weight, and the Commission should adopt it. *Loper Bright* preserves judicial respect for an agency's exercise of authority that Congress has delegated to it. Courts are to independently identify and respect such delegations, police the outer statutory boundaries of those delegations, and ensure that agencies

[17] Notice para. 74; *id.* para. 83.
[18] *Loper Bright*, 603 U.S. at 392-95.
[19] Notice para. 31.

exercise their discretion consistent with the Administrative Procedure Act.[20] Section 253(d) directs the Commission to preempt violating requirements to the extent necessary to correct the violation.[21] A presumptive threshold, cast as an evidentiary rule implementing that delegated preemption authority, is an exercise of delegated discretion reviewed for statutory boundaries and reasoned decision making rather than reconstructed de novo.

The framing materially strengthens the rule's standing on review, though the characterization is ultimately the court's to make. Cast as an evidentiary presumption implementing a delegated standard, the rule occupies the space *Loper Bright* expressly preserved. Cast, however, as the Commission's definitive construction of a statutory phrase, it occupies the space *Loper Bright* expressly closed. The Commission should adopt the first framing.

CEI advises against building the rule to depend on the principle that an agency may displace a prior judicial construction of an ambiguous statute.[22] *Brand X* has not been overruled. Its premise, that deference overcomes stare decisis, is nonetheless in evident tension with *Loper Bright's* independent-judgment holding, and at least one court of appeals has declined to treat *Brand X* as controlling in an analogous posture, reasoning that *Loper Bright's* preservation of prior holdings extends to the specific agency actions those cases upheld rather than to the interpretive methodology.[23] A rule that does not rely on *Brand X* is unaffected by how that tension is eventually resolved. A rule that relies on it is hostage to the resolution.

[20] *Loper Bright*, 603 U.S. at 395.
[21] 47 U.S.C. § 253(d).
[22] *See National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).
[23] *Ohio Telecom Ass'n v. FCC*, 124 F.4th 993 (6th Cir. 2025).

The framing has practical stakes. Most Section 253 disputes are resolved in federal court rather than in preemption petitions to the Commission, and the courts are divided on the availability of a private action, with several circuits permitting equitable relief on preemption grounds while denying a private right of action for damages.[24] The Notice acknowledges that courts have entertained direct challenges without treating a Section 253(d) petition as the exclusive path.[25] The practical value of the rule therefore turns almost entirely on the weight courts give it, which is why the delegated-presumption framing is worth adopting deliberately rather than by default.

IV. THE 120-DAY DEADLINE

A) The Deadline Is the Best Reading of Section 253(a)

The proposed deadline applies the standard established above and requires no separate justification. Sufficiently extended delay is itself an effective prohibition within Section 253(a), and the deadline codifies the point at which that presumption attaches.[26] The Commission should ground the rule on the materially-inhibits standard and the delay determinations affirmed in *City of Portland*, rather than on any proposition that a numerical threshold has previously been endorsed by a court. No court has adopted one. The Commission is considering whether it may, and the answer derives from the statute rather than from specific precedent.

B) A 120-Day Threshold Is Defensible and Conservative

The threshold is well chosen and, if anything, errs toward leniency. Commenters proposed timeframes ranging from 30 to 150 days, and the Commission selected a figure near the

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[24] Notice para. 30 & n.90.
[25] *Id.*
[26] Notice paras. 12, 14.

top of that range.[27] The record indicates that many jurisdictions already act well within 120 days, which suggests the threshold will reach only those governments whose review practices have a presumptively prohibitive effect.[28] Considering that the deadline is calibrated to prohibition rather than to ordinary processing time, a threshold set at the generous end of the record is harder to attack as arbitrary, not easier. The cable franchising timelines, under which an authority must act within 90 or 180 days, offer a structural analogue for a deadline of this magnitude.[29] CEI notes that the analogy speaks to the reasonableness of the interval and not to the deemed-grant remedy that accompanies it in that context.

The Commission should characterize the record's delay examples for what they are. The nine-month Los Angeles permitting average, the thirteen-department Ohio review, and the multi-year Illinois and Minnesota accounts are provider-submitted and were selected by parties with an interest in the outcome.[30] They are credible illustrations of a real problem at the margin. They are not a representative sample, and the Commission should not describe them as one. Likewise, the record indicates that some delay is attributable to incomplete provider applications rather than to obstruction, and at least one commenter disputes a specific provider account on that basis.[31] Acknowledging this strengthens rather than weakens the case for the rule, because it identifies precisely which delays the presumption should and should not reach.

C) The Clock Should Run from the First Mandatory Submission

The 120-day period should begin when the provider files its first mandatory submission or takes the first mandatory pre-application step, not when the government deems the application

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[27]Notice para. 17.
[28]*Id.*
[29]Notice para. 17 n.50.
[30]Notice para. 12.
[31]*Id.* para. 12 n.29.

complete.[32] A completeness trigger would permit a government inclined to delay to withhold the completeness determination indefinitely, which would render the deadline meaningless by the government's own choice. The Commission identifies this risk itself.[33]

There is nothing objectionable in a government's interest in not running a clock on an application it cannot evaluate. The difficulty is that a completeness trigger addresses that interest by handing the government control of the clock. The Commission can meet the legitimate concern through the notice mechanism it raises: a government that fails to notify the applicant of a specific deficiency within a defined period loses incompleteness as a basis for rebutting the presumption.[34] That accommodation preserves the government's ability to demand a complete application while removing its ability to defer the start of review at will.

D) A Single Deadline Should Govern All Authorizations for a Given Deployment

One 120-day period should cover all authorizations a government requires for a particular deployment in a particular right-of-way.[35] Sequential authorization demands stretching across months are themselves a mechanism of prohibition, and a rule resetting the clock for each successive permit would leave the deadline hollow while appearing to impose one.[36]

There is nothing objectionable in a government's need to process genuinely sequential authorizations in order, where a later approval depends on the outcome of an earlier one. The Commission should meet that need through a narrow and defined extension rather than by restarting the clock (which is one of the possibilities it identifies).[37] An extension preserves the

[32]Notice para. 19.
[33]*Id.*
[34] *Id.*
[35]Notice para. 20.
[36]*Id.*
[37]Notice para. 21.

presumption and places the burden on the government to justify the additional time. A restart transfers control of the deadline back to the party the deadline constrains.

E) The Deadline Operates Within the Savings Clauses

The deadline is consistent with Sections 253(b) and (c) and does not displace them. One hundred twenty days ordinarily suffices for the public-welfare and rights-of-way management tasks those provisions protect, as the record's evidence of routine processing in far less time confirms, and as the shorter periods some states have codified demonstrate.[38] Where a particular task genuinely requires more time, the rebuttable presumption is the safety valve, and the burden properly falls on the government asserting the exception.[39]

Considering that the presumption accommodates the savings-clause functions rather than overriding them, the Section 253(b) inquiry is largely moot in this position. If a government's practice creates no prohibitive effect under Section 253(a), Section 253(b) has nothing to save.[40]

F) The Reach to Facilities Outside the Public Rights-of-Way Should Be Narrowed

The Commission should decline, or substantially narrow, the application of the deadline to facilities outside the public rights-of-way. This is the most vacatur-exposed element of Section III.A.

Section 253's protective architecture is anchored to the rights-of-way. Section 253(c) preserves state and local authority over the management of the public rights-of-way and over compensation for their use, and it speaks in those terms exclusively.[41] The Notice asks whether that savings clause would apply at all to facilities placed outside the rights-of-way, "given that

[38] Notice para. 24 & n.73 (citing Hawaii, Ohio, and Michigan provisions establishing 60-day and 45-day review periods).
[39] Notice para. 26.
[40] Notice para. 24.
[41] 47 U.S.C. § 253(c).

the statutory provision expressly applies to uses and management of public rights-of-way."[42] That question is the difficulty stated in the Commission's own words. The core rule is defensible because Section 253(a)'s prohibition standard and Section 253(c)'s savings clause operate as a calibrated pair, the first reaching prohibitive requirements and the second preserving genuine management authority. Outside the rights-of-way, the second half of that pair may not operate, and the balance that makes the core defensible does not hold.

There is nothing objectionable in this underlying concern. Barriers to siting a fiber hut on private land can prohibit service as surely as barriers within the right-of-way, and Section 253(a)'s text is not limited to the rights-of-way. The problem is the method, not the concern. A national presumption extended to conduct the savings clause may not reach asks the Commission to regulate at the outer edge of its authority in the same rule that adopts the core provisions. CEI recommends that the Commission address non-rights-of-way barriers through case-by-case adjudication under Section 253(d), where the record can establish what the categorical rule must assume.

G) The Deadline Properly Reaches Government-Owned Structures Within the Rights-of-Way

Applying the deadline to government-owned structures within the rights-of-way, including municipal poles, is well grounded, and CEI supports it.

Courts have long recognized (in contexts outside Section 253) that a municipality controlling access to its streets acts in a sovereign and regulatory capacity rather than as a market participant. In the pipeline context, the Ninth Circuit held that a city in its sovereign capacity owns the streets and land for the purpose of maintaining a transportation system, and acts as a

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[42] Notice para. 23.

regulator when it conditions their use.[43] The same court held earlier that a city setting franchise fees for use of its streets is not a market participant, because it holds the streets in its sovereign capacity.[44]

CEI is specific about what those cases are. Both arose under the dormant Commerce Clause and related doctrines rather than under Section 253, and neither construes the statute at issue here. They supply a general principle of municipal capacity. *City of Portland* is the decision that applied that principle to Section 253, and it did so by citing *Olympic Pipe Line* directly, concluding that governments act in a regulatory capacity when they restrict access to the public rights-of-way because they are acting to fulfill regulatory objectives.[45] The advantage of anchoring the point this way is durability. The underlying principle predates *Chevron* by decades, arises outside telecommunications, and does not depend on the deference-sustained portions of *City of Portland*.

The Section 224 objection fails for the reason the Commission and the Ninth Circuit have already given. Section 224's exclusion of state-owned and cooperative-owned utilities from the definition of "utility" does not indicate a congressional intent to remove such infrastructure from Section 253's separate and broader reach.[46]

H) The Commission Is Correct to Decline Deemed-Grant and Injunctive Remedies

The Commission's restraint on remedies is sound, and CEI endorses it without qualification. The Commission has declined at this time to propose a deemed-granted remedy, and has observed that Section 253(d) does not expressly authorize injunctive relief.[47]

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[43] *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 877-81 (9th Cir. 2006).
[44] *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1057-58 (9th Cir. 1987).
[45] *City of Portland*, 969 F.3d at 1045; *see* Notice para. 28 & n.85.
[46] Notice para. 59 n. 179; *Small Cell Order*, 33 FCC Rcd at 9134, para. 92 n.253.
[47] Notice paras. 30, 32.

That restraint is required, not merely prudent. Section 332(c)(7) expressly authorizes court actions and, as courts have held, injunctive relief for wireless siting.[48] Section 253 contains no parallel authorization. The remedy Congress specified in Section 253(d) is preemption, to the extent necessary to correct the violation. The negative implication that fails against the states in Part III.A above runs in favor of restraint here, and for the same structural reason: where Congress supplied an express remedial provision in the narrower framework and none in the broader one, the omission is meaningful regarding remedies even though the effective-prohibition standard reaches delay through its own text.

CEI notes the practical stake as well. An implied remedial overreach would be litigated together with the core rule, and would place a defensible deadline at risk in service of relief the statute does not authorize.

V. THE COST-BASED FEE STANDARD

The authorities in this section divide along a line the Commission should keep in view. The circuit decisions construing Section 253(c) were courts exercising independent judgment in private litigation, and they survive *Loper Bright* intact. The aggregate-effect theory was sustained in *City of Portland* under *Chevron*. The fee standard should rest on the former.

A) A Cost-Based Reading of Section 253(c) Is the Best Reading

The best reading of Section 253(c) limits state and local fees to a reasonable approximation of the government's actual and direct costs of managing the rights-of-way in connection with the particular authorization. The provision permits fair and reasonable compensation for use of the public rights-of-way, imposed on a competitively neutral and

[48] Notice para. 31 n.90.

nondiscriminatory basis, and publicly disclosed.[49] Each qualifier constrains what a government may charge. Read together, they are difficult to reconcile with a construction permitting governments to price access to a monopoly input at whatever the traffic will bear.

The circuit authority supports that reading without compelling it, and CEI characterizes it accordingly. The First Circuit held that a five percent gross-revenue fee effectively prohibited service under Section 253(a), where the fee would have reduced the provider's Commonwealth-wide profits substantially, and explained that compensation under Section 253(c) should at the very least relate to the government's actual costs.[50] The Tenth Circuit preempted a discretionary appraisal-based rental scheme, reasoning that it was sufficient to show that the rental provisions were prohibitive because they created a massive increase in cost for the provider, and concluding that a rent the city conceded was not cost-based did not constitute fair and reasonable compensation.[51] The Second Circuit observed that Section 253(c) requires compensation to be reasonable essentially to inhibit monopolistic pricing by towns, and that compensation is sometimes used as a synonym for costs.[52]

None of these decisions holds that fees must be cost-limited in every case, and the Commission is right to acknowledge as much.[53] The First and Second Circuits each expressly declined to decide the question. Some courts have upheld gross-revenue fees.[54] The cost-based reading rests finally on the statutory text, which these decisions confirm rather than establish.

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[49]47 U.S.C. § 253(c).
[50]*Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18-19, 22 (1st Cir. 2006).
[51]*Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270-73 (10th Cir. 2004).
[52]*TCG New York*, 305 F.3d at 77, 80.
[53]Notice paras. 38-39.
[54]*Id.* para. 38 n.116.

CEI urges the Commission to state the authority at this strength and no higher, because the alternative invites a reviewing court to discover the overstatement for itself.

One structural point buttresses the text. Congress has authorized non-cost-based compensation when it meant to, capping cable franchise fees at five percent of gross revenues in Section 622(b) of the Act.[55] The existence of that express authorization elsewhere in the Act, and its absence from Section 253(c), supports reading Section 253(c) as the more limited grant.

B) The National Aggregate-Effect Theory Should Not Ground the Fee Standard

The Commission should ground the fee standard in the direct, in-jurisdiction prohibitive effect of above-cost fees, and should treat any cross-jurisdictional aggregate theory as reinforcement rather than as the basis of the rule.

The aggregate theory holds that fees in one jurisdiction prohibit deployment in others by diverting a provider's finite capital.[56] The Ninth Circuit sustained that theory, but it did so in reviewing the *Small Cell Order* under *Chevron*, and over a partial dissent rejecting the premise that all above-cost fees have a prohibitive effect.[57] After *Loper Bright*, a holding that rested on deference to a reasonable agency reading no longer supplies what it once did. The Notice quotes that passage with the deference framing embedded in it, describing the Ninth Circuit as having concurred where the Commission "has reasonably determined" the aggregate effect.[58] A rule built on that sentence inherits its foundation.

There is nothing objectionable in the Commission's underlying concern, which is that above-cost fees consume capital that would otherwise fund deployment. The difficulty is which

[55] 47 U.S.C. § 542(b).
[56] Notice paras. 36, 42-43.
[57] *City of Portland*, 969 F.3d 1020.
[58] Notice para. 39.

authority the rule rests on. A fee standard resting on direct, in-jurisdiction prohibitive effect stands on *Guayanilla*, *Santa Fe*, and *White Plains*, each of which construed the statute independently, and it reaches the fees that actually matter. A fee standard resting on the aggregate theory rises and falls with a *Chevron*-era holding.

CEI adds that the aggregate theory is thinner on the facts than on the law. The proposition that fees in one jurisdiction prevent deployment in another is an assertion about how firms allocate capital across a portfolio of projects. The record support for it consists principally of provider statements to that effect.[59] The independent evidence attributes capital allocation in fiber deployment principally to density, demand, and construction input costs, including labor availability. The Commission would be on firmer ground treating the aggregate mechanism as plausible and unquantified rather than as established.

C) Safe Harbors Should Rest on Wireline Cost Data

Safe harbors are a sound device and CEI supports their adoption. Fees at or below a safe-harbor level would be presumptively compliant, sparing governments the burden of justifying every fee and giving providers advance certainty.[60]

The levels should rest on the wireline cost data the Commission has requested, and not on the figures adopted for Small Wireless Facilities. The Commission established the $500 and $270 small cell safe harbors after reviewing small cell legislation in twenty states, local ordinances, its pole attachment rate formulas, and record cost surveys.[61] Those inputs were specific to a different technology with a different cost structure, and the Commission candidly

[59] Notice para. 36.
[60] Notice para. 51.
[61] Notice para. 54 n.160.

notes that it did not receive comparable wireline data sets in response to the Notice of Inquiry.[62] Importing the small cell numbers would substitute an unexamined analogy for the record the Commission has asked commenters to build.

The Commission may reasonably tier safe harbors by jurisdiction type, geography, or deployment method, as it examines.[63] A tiered, cost-anchored structure preserves the certainty that makes the device valuable while grounding the levels in reasoning that survives independent review. A single national figure defended by the aggregate theory does not.

D) The Cost-Based Standard Does Not Constitute a Taking

A cost-based standard does not constitute a taking under the Fifth Amendment. The Supreme Court has held that regulation of rates chargeable from the employment of private property devoted to public use is constitutionally permissible, and that so long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition.[64] A standard that expressly permits a government to recover its actual and direct costs sets no confiscatory rate.

CEI cites *Florida Power* for the confiscatory-rate standard and not beyond it. The Court's conclusion that no taking had occurred rested in part on the voluntary character of the attachments at issue, and the Court reserved the question of compelled access.[65] A commenter defending a mandatory-access regime with a fee cap should not rely on the no-taking holding wholesale, and CEI does not.

The states' contention that fair and reasonable compensation requires payment of fair market value misunderstands the asset. The public rights-of-way are not bought and sold in a

[62] Notice para. 53.
[63] Notice paras. 53-54.
[64] *FCC v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987).
[65] *Florida Power*, 480 U.S. at 251 n.6.

market; they are subject to the monopolistic control of the government that holds them, as the Commission observes.[66] Where no market price exists, actual cost is the reasonable proxy, and the objection reduces to a demand for a valuation method the asset cannot support.

E) The Commission Should Apply the Standard to Fee Types Rather Than Prohibit Them

The Commission should apply the cost-based standard to gross-revenue, market-value, and linear-foot fees rather than prohibit those structures categorically.

There is nothing objectionable in the Commission's premise that such fees are typically untethered from cost. That is usually true, and the record supports it. The difficulty is that a categorical ban reaches the fee's structure rather than its amount. The Commission's own reasoning in the small cell context concedes the point: a fee not calculated by reference to cost might nonetheless land at a level that is a reasonable approximation of objectively reasonable costs, and if it meets the criteria it would not be preempted.[67] A categorical ban is therefore unnecessary, because the standard already reaches profit-generating fees whatever they are called, and overinclusive, because it would preempt a compliant fee on account of its form and generate as-applied litigation to correct the result. The predictability the Commission seeks comes from the safe harbor, which fixes an amount, not from banning fee forms, which does not.

F) The Standard Properly Reaches Government-Owned Poles and Conduit

The cost-based standard properly reaches fees for attaching to government-owned poles and conduit in the rights-of-way, for the regulatory-capacity reasons set out in Part IV.G.[68]

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[66]Notice para. 46.
[67]Notice para. 58 (quoting *Small Cell Order*).
[68]Notice para. 59.

Where a government incurs genuinely higher costs for pole access, including the cost of engineering review, the answer is calibration rather than exemption. The Commission should establish safe harbor levels for attachments to government-owned structures that reflect those higher actual costs, on data the Commission has asked commenters to supply.[69] Exempting government-owned infrastructure from the standard would leave the largest single category of monopoly-controlled attachment points outside the rule.

VI. IN-KIND CONTRIBUTIONS

A) In-Kind Demands Are Subject to the Same Cost-Based Standard

In-kind compensation is compensation, and the same cost-based standard governs it. A demand that a provider supply goods, services, or facilities as a condition of authorization increases the cost of deployment exactly as a monetary fee does, and qualifies as fair and reasonable compensation under Section 253(c) only on the same cost basis. The value of in-kind compensation should count against any safe-harbor level, so that a government cannot evade the fee standard by taking its excess in kind.[70]

The Commission's treatment of in-kind cable exactions supports the approach. The Commission has determined that cable franchise fees encompass both monetary payments and in-kind payments, and that specified categories of cable-related in-kind contributions are franchise fees subject to the five percent statutory cap.[71] The Sixth Circuit affirmed that determination on independent review, agreeing that noncash cable-related exactions the Act permits but does not mandate are franchise fees subject to the cap, while holding that Act-

[69]Notice para. 60.
[70]Notice paras. 63-67.
[71]*Implementation of Section 621(a)(1) of the Cable Communications Policy Act*, Third Report and Order, 34 FCC Rcd 6844 (2019); *see* Notice paras. 63-67 (citing Sections 622(g) and 622(b) of the Act).

mandated obligations are not.[72] The court construed the statute without deference, so the proposition survives *Loper Bright*.

B) In-Kind Compensation Should Be Valued at the Provider's Cost

In-kind compensation should be valued at the provider's actual cost to supply it, measured in labor and materials, rather than at the market price the government would otherwise have paid.[73] The Commission's own illustration adopts the provider-cost measure, deducting the provider's $1,200 installation cost from a $3,000 safe-harbor allowance.[74] The Sixth Circuit adopted the same measure as a matter of statutory text, holding that noncash cable-related exactions must be valued at the cable operator's cost of providing them rather than at market value, because nothing in the statute permits a franchise fee to include the operator's hypothetical profit.[75]

A market-value measure would reintroduce the profit element the cost-based standard exists to exclude, because the market price of a good includes the seller's margin and the government is not selling. Valuing in-kind demands at provider cost keeps the standard internally consistent across its monetary and non-monetary halves.

C) Demands Unrelated to Rights-of-Way Use Are Not Saved by Section 253(c)

The relatedness requirement in Section 253(c) supplies the principled line between a compensable condition and an impermissible exaction, and CEI urges the Commission to draw it there. Section 253(c) saves only compensation for use of the public rights-of-way. An in-kind demand untethered from that use, such as a requirement to furnish the government free capacity

[72] *City of Eugene v. FCC*, 998 F.3d 701 (6th Cir. 2021).
[73] Notice paras. 63-67.
[74] *Id.*
[75] *City of Eugene*, 998 F.3d at 701.

or to install infrastructure the government then leases to a competitor, falls outside the savings clause and is preempted if it has a prohibitive effect.[76]

There is nothing objectionable in a government requiring genuine mitigation of the provider's physical work. Restoring a street cut, repairing a curb the provider damaged, and similar measures are costs of the work itself and are properly borne by the party performing it. The difficulty arises when the demand bears no relation to the provider's use, at which point it is a transfer rather than compensation. The Commission asks precisely the right questions about the intermediate cases, including spare conduit, dark fiber, and dig-once requirements.[77] CEI recommends resolving those cases through adjudication rather than by categorical rule, because the answer depends on facts the Commission does not yet have and a rule drawn now would be drawn blind.

D) Section 253(b) Provides a Narrow Backstop

A genuinely prohibitive, non-cost in-kind demand may still be saved under Section 253(b) if it is necessary to preserve universal service, protect the public safety and welfare, ensure service quality, or safeguard consumers.[78] That exception is narrow and the government bears the burden of establishing it.[79] As elsewhere in Section 253, if a demand creates no prohibitive effect under subsection (a), subsection (b) has no work to do.

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[76] Notice paras. 63-67.
[77] *Id.*
[78] 47 U.S.C. § 253(b).
[79] Notice paras. 63-67.

VII. COMMINGLED FACILITIES

A) Infrastructure Does Not Lose Section 253 Protection Because It Also Carries Other Traffic

A state or local government may not evade Section 253 by pointing to the fact that wireline infrastructure also carries broadband or other non-telecommunications traffic. Where infrastructure is used to provide telecommunications service, Section 253 protects its deployment against prohibitive barriers whatever else the infrastructure carries. CEI supports this proposal without reservation.

The principle is settled and long-standing. The Commission determined nearly twenty years ago that Section 332(c)(7)(B) continues to apply where a provider uses the same infrastructure to furnish personal wireless services and information-service broadband, explaining that commingling services does not change the fact that the facilities are being used to provide the protected service.[80] The Supreme Court reasoned the same way under Section 224, holding that a pole attachment does not cease to be one if it is later also used to provide high-speed internet access.[81] The statutory text focuses in the same direction, reaching any requirement that prohibits or has the effect of prohibiting the ability of any entity to provide any telecommunications service.[82]

A government that imposes heavier permitting burdens on a fiber build because the fiber will also carry broadband is regulating the deployment of telecommunications infrastructure, and Section 253 reaches that conduct.

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[80] *Wireless Broadband Internet Access Service Declaratory Ruling*, 22 FCC Rcd 5901, 5924 para. 65 (2007); *see* Notice paras. 68-72.
[81] *National Cable & Telecommunications Association v. Gulf Power Co.*, 534 U.S. 327, 333 (2002).
[82] 47 U.S.C. § 253(a).

B) The Commission Should Not Reach State Broadband Rate Regulation Through the Commingled-Facilities Theory

The Commission should decline to use Section 253 to preempt state rate regulation of broadband. This is CEI's principal caveat in this proceeding.

The two propositions are different. There is a critical difference between preventing a government from obstructing the deployment of dual-use infrastructure, which Part VII.A supports, and preempting a government's economic regulation of broadband because the same fiber also carries telecommunications traffic. The Notice's proposal reaches the second. It would bar requirements imposed on the ground that infrastructure may be used to provide other services, and it frames the operative trigger expansively: if a provider deploys infrastructure that enables the ability to provide telecommunications services, no state or local requirement may prohibit or have the effect of prohibiting it, regardless of what other services ride the same facilities.[83] The record on which the Commission relies identifies the target expressly: a commenter the Notice quotes approvingly offers "state rate regulation of broadband" as an example of the requirements the proposed rule would reach.[84] The proposed rule's breadth would reach it.

Major questions. Preempting state rate regulation of broadband is a question of vast economic and political significance, and Section 253 does not clearly authorize it. An agency asserting authority over such a question must point to clear congressional authorization.[85] A provision enacted in 1996 to remove barriers to the deployment of telecommunications infrastructure is not a clear authorization to resolve the long-contested question of broadband

[83]Notice paras. 68-72.
[84]Notice para. 70 & n.209.
[85]*West Virginia v. EPA*, 597 U.S. 697, 716-24 (2022).

economic regulation. The economic significance is apparent from the subject matter, and the political significance from the history: the classification and regulatory treatment of broadband has been reversed by successive Commissions and litigated repeatedly for two decades.

CEI frames this argument independently of how broadband is classified at any given moment (and urges the Commission to do the same). The classification has changed repeatedly and remains contested. What matters here is the significance of the question and the absence of a clear authorization in Section 253, and both hold whatever classification obtains. A comment or an order that assumes a particular classification acquires an expiration date it does not need.

Federalism clear statement. The same conclusion follows from the clear-statement rule. Congress must speak with unmistakable clarity before a statute is read to intrude on traditional state regulatory authority.[86] The Supreme Court has already applied that demanding standard to this statute, holding that Section 253(a)'s reference to the ability of any entity was not forthright enough to satisfy *Gregory* and displace traditional state authority.[87]

CEI states the limits of that authority openly. *Nixon* concerned a different question under Section 253, namely whether the statute reaches a state's own political subdivisions. It did not address broadband rate regulation and holds nothing about it. What *Nixon* establishes is that Section 253 is subject to a demanding clear-statement rule and that its general language did not satisfy that rule as to a core area of state authority. The extension to public utility rate regulation, which is among the most traditional of state regulatory functions, is an argument by analogy. It is a strong one, and CEI presents it as an analogy rather than as a holding.

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[86] *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).
[87] *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140-41 (2004).

A court of appeals has already set aside this move. The D.C. Circuit vacated a Commission attempt to preempt state regulation of broadband categorically, holding that the Commission lacked authority to do so once its own classification placed broadband outside its regulatory jurisdiction, and that Congress did not grant it freestanding authority to displace state law in areas it does not otherwise regulate.[88] The court was careful to vacate only preemption reaching beyond ordinary conflict-preemption principles, which is the line CEI urges here: the Commission may address genuine conflicts case by case, but may not categorically preempt state broadband regulation through Section 253.

The strongest counterargument does not reach rate regulation. The Commission may invoke its 2019 cable ruling, which preempted duplicative fees on franchised cable operators and barred franchising authorities from requiring an additional franchise to provide non-cable services over a cable system.[89] That ruling does not supply the authority the commingling proposal would need, for two reasons. The Sixth Circuit reviewed that ruling[90] and the review reinforces rather than undermines the point made here. The court upheld the preemption of the fee at issue on the terms of the express Title VI scheme, and it expressly declined to decide whether a state or local government may impose a fee on the telecommunications services of a cable operator, observing that the question was neither fully briefed nor clearly presented.[91] A reviewing court construing the closest analogous scheme thus stopped short of the broader reach the commingling proposal would require.

First, it rests on an express Title VI scheme. Section 622(b) caps franchise fees by statutory formula, and the mixed-use rule was built on the franchising provisions of Title VI. The

[88] *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).
[89] Notice paras. 68-72.
[90] *City of Eugene v. FCC*, 998 F.3d 701 (6th Cir. 2021).
[91] *Id.* at 712 n.2.

ruling demonstrates that Congress authorized preemption where it wrote an express scheme. It does not demonstrate that Section 253, which contains no comparable provision addressing the economic regulation of a second service, does the same.

Second, and more directly, the 2019 ruling preempted fees and duplicative franchising requirements. It did not preempt rate regulation of the non-cable service. The analogy therefore reaches the proposition that a government may not use its authority over one service as a toll booth for another, which CEI accepts, and stops short of the proposition that a government may not regulate the rates of the second service at all.

The commingling precedents discussed in Part VII.A are subject to the same limit. *Gulf Power* and the 2007 declaratory ruling establish that dual-use infrastructure retains its protected character for purposes of deployment protection. Neither authorizes affirmative preemption of the economic regulation of the other service.

Two adjustments would preserve the defensible rule. The Commission should narrow the trigger from infrastructure that enables the ability to provide telecommunications service to infrastructure actually used to provide it. As drafted, the trigger has no textual stopping point, because nearly any modern fiber deployment enables the ability to provide telecommunications service. The Commission should also state expressly that the rule reaches requirements imposed on deployment and does not reach state rate regulation of broadband as such. So adjusted, the rule protects deployment of commingled facilities, which is the harm the record establishes, without asserting authority the statute does not confer.

The narrower trigger invites an objection, and the objection deserves a direct answer. Narrowing protection to infrastructure actually used to provide telecommunications service, the argument runs, is difficult to administer: modern facilities carry a shifting mix of services, and a rule keyed to which services traverse a given facility at a given moment would turn a deployment's protected status into a moving target and invite disputes over transient facts. CEI takes that concern seriously. It reflects a real feature of how networks are built and used, and it is the strongest argument for the broader trigger the Commission proposed.

The concern does not, however, support construing "telecommunications service" more broadly than the statutory text allows. Administrability is a consideration in the design of a rule; it is not a canon that expands a defined statutory category. Where a reading is the best reading of the enacted text, the fact that a broader reading would be more convenient does not make the broader reading lawful (the more so where a reviewing court owes the Commission no deference on the meaning of the operative term). The workability concern is therefore an argument addressed to the institutions that design rules, not to the construction of the statute the Commission must apply.

That observation points toward a constructive path rather than away from one. To the extent the Commission concludes that capability-based protection is the sounder policy, the durable route is to pursue it through the appropriate forum: to develop the question as a matter of policy where the Commission's discretion reaches it, and to look to Congress where a firmer statutory footing is required. Protection grounded in an express legislative judgment would rest on secure authority and survive review; protection grounded in a stretched reading of an existing term would remain exposed. CEI shares the deployment objective the concern reflects, and offers the point in that spirit: the goal is best served by building it on ground that will hold.

VIII. UNUSED FACILITIES IN THE PUBLIC RIGHTS-OF-WAY

The Commission is correct not to propose a rule addressing unused or abandoned facilities, and CEI supports that restraint. The Notice seeks comment on whether the

Commission could encourage removal under Section 253 or other authority, but proposes no measure.[92]

No rule is warranted. Removal of abandoned facilities is governed by existing state and local law and by provider practice, and it is not a barrier to deployment of the kind Section 253 addresses. The direction of the statute is the point: Section 253 removes requirements that prohibit deployment. An affirmative federal mandate directing providers to remove old facilities would run the opposite way and would require a source of authority the Notice does not identify. The Commission should note the issue and go no further.

IX. CONCLUSION

The Commission's core proposals are the best reading of Section 253, and CEI supports them. A presumptive deadline for acting on authorization requests, and a cost-based standard for the fees and in-kind demands governments may impose, follow from the statute's text and from the weight of independent judicial precedent, and they do not depend on deference that no longer governs. The Commission should adopt them, ground its rulemaking authority expressly in Section 201(b) in the ordering clauses of any final order, and frame the deadline as an evidentiary presumption implementing its delegated preemption authority under Section 253(d).

The Commission should decline, or substantially narrow, the three extensions that reach past what Section 253 will bear: the application of the rules to facilities outside the public rights-of-way, the national aggregate-effect theory of prohibitive fees, and, above all, the use of the commingled-facilities theory to reach state rate regulation of broadband. Narrowing these extensions costs the Commission nothing it is entitled to. It secures the durable core against the

[92]Notice para. 73.

challenges the extensions would otherwise invite, and it leaves the Commission with a rule that will still be in force when the litigation is over.

Respectfully submitted,

/s/

COMPETITIVE ENTERPRISE INSTITUTE
Denison (DJ) Hatch, Policy Analyst
Center for Technology and Innovation
1310 L Street NW, 7th Floor
Washington, DC 20005
(202) 331-1010

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