Railroad Crossing Memorandum

Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

I. Introduction and Background

The Federal Communications Commission ("FCC" or "Commission") has emphasized that efficient and effective deployment of broadband infrastructure is crucial to the FCC's efforts to serve the public interest. As Chairman Pai noted, "[i]f we do our job—if we can make the deployment of wireless infrastructure easier, consistent with the public interest—then we can help close the digital divide in our country."[1] Indeed, as Commissioner Brendan Carr recently observed, "[a]ccess to high-speed Internet service means access to jobs and opportunity."[2] This is particularly true as the global race to deploy the next generation of wireless broadband ("5G") heats up. And as companies begin to lay the groundwork for 5G, the Commission needs to ensure that rural areas are not left behind. Efficient infrastructure deployment is crucial to closing the urban-rural divide.[3] The agency has taken a number of actions recently to promote 5G deployment and broadband service generally, and sought information on what additional steps it can take to remove barriers to broadband deployment as part of its ongoing wireless and wireline broadband proceedings.

One such step is to ensure that incumbent industries do not limit communications companies' ability to deploy broadband infrastructure. For years, railroads have relied on state and local property laws to assert the right to act as gatekeepers to the public rights-of-way ("ROW"). Often relying on unspecified or ill-defined claims of title, they have argued that state laws give them the power to enact policies that impede infrastructure deployment by levying fees and requirements that exceed any reasonable standard. Additionally, railroads generate significant profits from leases to the utility industry, including crossings in the public ROW.[4] As rural communities and other

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[1] Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure, *Notice of Proposed Rulemaking and Notice of Inquiry*, Statement of Chairman Ajjt Pai, 32 FCC Rcd 3330, 3385 (Apr. 21, 2017).

[2] Commissioner Brendan Carr, *New FCC rules could lead to more broadband for more people*, THE BALTIMORE SUN, Mar. 20, 2018, http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0321-broadband-rules-20180320-story.html

[3] Johnny Kampis, *Closing the Broadband Divide: Meet the FCC's Brendan Carr*, THE AMERICAN SPECTATOR, Apr. 11, 2018 ("In my mind, it's not a success if we see 5G just deployed in New York or San Francisco. I want to see 5G deployed as ubiquitously as possible…"), https://spectator.org/closing-the-broadband-divide-meet-fcc-commissioner-brendan-carr/

[4] MCI WorldCom's 1999 projected payments totaled $1.151 billion directed towards "Telecommunications Facilities and Rights of Way." *See Hallaba v. Worldcom Network Serv., Inc.*, No. 98-CV-895-H, 2000 U.S. Dist. LEXIS 13974 (N.D. Okla. Mar. 31, 2000).

small-market groups struggle with broadband connectivity,[5] the railroads' behavior only exacerbates the digital divide. For these and the reasons described below, we ask that the Commission exercise its Section 253 authority to prevent railroads from unreasonably restricting access to public ROW.

II. The Commission should exercise its Section 253 authority to preempt laws that give railroads the ability to act as gatekeepers to the ROW.

A. Section 253 gives the Commission broad authority to preempt state or local laws that prohibit or have the effect of prohibiting an entity's ability to provide telecommunications service.

Section 253 of the Communications Act authorizes the Commission to preempt state or local laws that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[6] The Commission has interpreted Section 253's "prohibit or have the effect of prohibiting" language as barring any local government action that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[7] As the language of the statute makes clear, state or local actions need not be absolute restrictions to pose a barrier to entry. Actions that *materially inhibit* the provision of service also constitute prohibitions on service. And Section 253 extends beyond laws that are expressly directed at preventing telecommunications services. Threats to deployment may come from innocuous-seeming state or local regulations and policies that serve to impose administrative hassles, fees, or delays.

The FCC and the courts have recognized this and endorsed the use of Section 253 to preempt state and local legal requirements in a number of contexts. For example:

- In *Sandwich Isles*, the FCC preempted an exclusive license that effectively barred telecommunications competition on the Hawaiian home islands.[8] The exclusive license violated Section 253(a) because it "constitute[d] a State legal requirement that prohibit[ed] or ha[d] the effect of prohibiting the ability of any

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[5] Commissioner Brendan Carr, *From Connected Cows to a Bear that Deploys Broadband—How Connectivity Brings Opportunity to Rural Communities*, MEDIUM, Apr. 23, 2018, https://medium.com/@BrendanCarrFCC/from-connected-cows-to-a-bear-that-deploys-broadband-how-connectivity-brings-opportunity-to-rural-2e7f7f29628f

[6] 47 U.S.C. § 253(a), (d).

[7] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14191, ¶ 31 (1997). Many commenters have suggested that the Commission affirm that this standard is the proper test for determining whether state or local action violates Section 253(a). *See* Comments of AT&T, WT Docket No. 17-79 at 3 (filed June 15, 2017); Comments of T-Mobile, WT Docket No. 17-79 at 35-36 (filed June 15, 2017).

[8] *Connect Am. Fund Sandwich Isles Commc'ns, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd 5878, ¶ 1 (2017) ("*Sandwich Isles Order*").

entity other than Sandwich Isles to provide intrastate or interstate telecommunications services."[9]

- In *Puerto Rico Tel. Co.*, the First Circuit found that an ordinance increasing the municipal license fee from 0.5% to 5% of gross revenue would "materially inhibit or limit the ability" of a telecommunications company to "compete in a fair and balanced legal and regulatory environment."[10]
- In *Qwest Corp*, the Tenth Circuit held that an ordinance establishing new procedures for telecommunications providers seeking access to city-owned ROW was preempted under Section 253(a).[11] The preempted provision gave the locality "unfettered discretion" in determining whether or not to accept a lease application and created substantial new costs for telecommunications providers, such as the cost of obtaining an appraisal.[12]
- When a state entered an agreement with a telecommunications service provider that deprived other providers of ROW access, the FCC found that the agreement was a "legal requirement" under Section 253(a) because it legally bound the state's action regarding telecommunications providers.[13]

These and other cases demonstrate the FCC's broad Section 253 authority to preempt various laws that create barriers to efficient infrastructure deployment.

B. The Commission's Section 253 authority extends to preemption of state or local laws that allow railroads to act as gatekeepers to the ROW.

Commissioner Carr recently highlighted how state and local laws can burden broadband deployment and noted that Congress vested the Commission with authority to remove those barriers.[14] As detailed below, state and local property laws—as well as common law property rights—that give railroads superior rights to access or control public ROW effectively make railroads the gatekeepers of these ROW. When railroads wield this power to charge excessive fees or cause unreasonable delays, the relevant property law is a "legal requirement" that has the effect of prohibiting the provision of telecommunications service. To mitigate this, the Commission can and should use its

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9 *Id.* at ¶ 9.

10 *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 19 (1st Cir. 2006).

11 *Qwest Corp. v. City of Santa Fe*, *New Mexico*, 380 F.3d 1258 (10th Cir. 2004).

12 *Id*. at 1271.

13 *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, ¶ 17 (1999) ("*Minnesota Petition*") (internal quotation marks omitted).

14 Johnny Kampis, *Closing the Broadband Divide: Meet the FCC's Brendan Carr*, THE AMERICAN SPECTATOR, Apr. 11, 2018 ("[W]e also have decisions that Congress made in the Telecommunications Act in terms of making sure there aren't state and local barriers to the deployment of 5G."), https://spectator.org/closing-the-broadband-divide-meet-fcc-commissioner-brendan-carr/

Section 253 authority to preempt state and local legal requirements that limit broadband deployment by (1) providing railroads with monopoly control over public ROW access, or (2) restricting utilities' rights to those procured by costly eminent domain actions.

Railroads have abused the favored position afforded them under certain state and local laws by engaging in activities that greatly impede infrastructure deployment. Among other examples, telecommunications providers report:

- Imposition of Excessive Fees.
    - ***Document Preparation Fees.*** A railroad charged $24,750 in fees to cross a New Jersey mile post, including a $21,500 "Document Preparation Fee."
    - ***Application Fees.*** Some railroads charge between $1,250 and $2,500 application fees for the most routine lateral crossings for a telecommunications cable in the public ROW.
    - ***Public ROW Crossing Fees.*** One railroad charged $66,807 for a public ROW crossing. Another railroad charged application fees as well as a $2,000 annual fee to cross a public ROW.
    - ***Engineering Review Fees.*** A railroad charged a fiber optics company seeking to cross a public street ROW a $1,500 engineering review fee, a $2,000 annual fee, a $1,000 application fee, and a $1,500 right of entry fee. In sum, this railroad assessed a $6,000 fee for access to property it did not even own.
- Adoption of Unreasonable Requirements.
    - ***Flagging.*** Railroads require companies to hire flaggers for crossings in the ROW and charge crossers significant fees for their services. One railroad charged $9,500 in flagging fees for a public crossing. These requirements are routinely imposed even for underground crossings which do not require any incursion onto active tracks.
    - ***Insurance.*** Railroads also require crossers to carry expensive insurance covering minimal risks, with fees up to $2,500 per crossing.

These high fees and unnecessary requirements exceed any reasonable standard and cumulatively serve to impede the deployment of broadband infrastructure.

C. State and local laws effectively promote or obstruct broadband deployment.

Most states have not enacted laws addressing railway crossings. In analyzing the state laws that do exist, there are generally two categories: 1) state laws that provide utilities

the right to condemn railroad property; and 2) state laws that establish reasonable fees and timelines for railroad crossing review.

State laws that simply provide utilities the right to condemn railroad property are ineffective. Florida, Georgia, North Carolina, Oklahoma, and Vermont allow telecommunications utilities the ability to condemn railroad property by way of eminent domain.[15] Facially, these laws appear to promote deployment of telecommunication infrastructure. Unfortunately, in practice, these laws enable railroads to leverage unreasonable fee demands due to the substantial time and costs (attorneys' fees, appraisals, mediations, and court costs) involved in securing ROW using eminent domain actions. Furthermore, such actions are time intensive and may take over a year to resolve.

On the other hand, some states have pushed back on this kind of railroad control over public ROW by establishing reasonable fees and timelines for railroad crossing review. For example, Wisconsin requires public utilities accessing railroad ROW for the construction of new facilities or maintenance of existing facilities, whether on public or private property, to pay the railroad a $500 fee for each crossing in lieu of any license fees.[16] The Wisconsin statute also establishes a notification period for conducting operations within a railroad ROW rather than requiring utilities to seek permission from the railroad.[17] This simple and workable framework properly balances the interests of both the railroads and the utilities seeking access to the ROW. Tellingly, the railroads have not brought a legal challenge against the Wisconsin statute, which became effective in 1996.

Similarly, Minnesota specifies that "no crossing fee is required if the crossing is located within a public right-of-way" and limits the fees railroads can charge and the type of expenses for which railroads seek reimbursement.[18] Despite this clear directive, railroads have found creative ways to circumvent the rules. For example, one railroad in Minnesota raised the flagging fee to $5,000 per day, seemingly to make up for the fact the railroad could not charge a license fee. That fee is unreasonable and unrelated to any actual expense.

Any claims that FCC involvement here would impinge on longstanding property interests should be discredited. The railroad industry has been remarkably inconsistent in classifying their property, shifting their characterization of the legal status of their holdings depending on regulatory advantage. In the 1970s, when federal funds were

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15 *See,* Fla. Stat. Ch. 73.161; Ga. Code Ann. §§ 22-3-1 (2002) 46-5-1(a) (2002); N.C. Gen. Stat. § 62-183 (2002): Okla. Stat. Tit.18 § 601 (2003); VT. Stat. Ann. tit. 30 § 2513 (2002).

16 WIS. ADMIN. CODE PSC §§ 132.01, 132.03.

17 *Id*. § 132.06. *See also* MICH COMP. LAWS § 462.265 (establishing a 30-day notice period for entities string any wire or electrical over or across a public railway ROW).

18 MINN. STAT. ANN. § 237.045.

being made available to improve the safety of public crossings,[19] many railroads designated their crossings as "public" rather than "private" so as to receive taxpayer-funded safety equipment. In contrast, today railroads often claim that such crossings are private and compel utilities to pay excessive fees for crossings.

To curb these abuses, the Commission should use its Section 253 authority to preempt state statutes that effectively impede the ability to deploy telecommunications infrastructure and state or local laws that allow railroads to exercise monopoly control over access to the public ROW. These are "legal requirements" that prohibit broadband deployment in direct contravention of Section 253 and FCC policy.

III. The Commission should reject arguments that railroads are immune from Section 253 and strike down barriers to accessing railroad-managed ROW.

Historically, railroads have claimed immunity from FCC regulation on a number of bases. While the Commission generally lacks the authority to directly regulate railroad activity, Section 253 clearly reaches *state laws and regulations* that railroads use to deny or impede telecommunications companies from accessing the ROW. The railroads also rely on claims regarding safety and the Fifth Amendment that have no basis in fact.

A. The Commission is not barred from using Section 253 authority to regulate private agreements.

The Association of American Railroads ("AAR") claims that "ROW crossing agreements are not creatures of the state—they are private contracts freely negotiated between two parties to access private property"[20] and thus not subject to Section 253. This argument rests on an interpretation of Section 253 that is far narrower than the text and the Commission's previous decisions demand. The Commission has recognized that Section 253 extends not just to legislation and regulations, but also to state-enforced "legal requirements."[21] In fact, the Commission has specifically held that the term "legal

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[19] *See, e.g.* Federal-Aid Highway Act of 1973, Pub.L. No. 93-87, 87 Stat. 250 § 203 (1973); Surface Transportation Assistance Act of 1978, Pub.L. No. 95-599, 92 Stat. 2689 § 203 (1978) (allocating millions of federal funds for projects for the elimination of hazards of railway-highway crossings on any public road.).

[20] Reply Comments of the Association of American Railroads, WT Docket No. 17-79 *et al.*, at 18-19 (July 17, 2017) ("*AAR Comments*").

[21] *Minnesota Petition*, 14 FCC Rcd at ¶ 18 ("We conclude that Congress intended that the phrase, 'State or local statute or regulation, or other State or local legal requirement' in section 253(a) be interpreted broadly. The fact that Congress included the term 'other legal requirements' within the scope of section 253(a) recognizes that State and local barriers to entry could come from sources other than statutes and regulations. The use of this language also indicates that section 253(a) was meant to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services… A more restrictive interpretation of the term 'other legal requirements' easily could permit state and local restrictions on competition to escape preemption based solely on the way in which action was structured. We do not believe that Congress intended this result").

requirements" extends to private contracts, including leases, where those contracts impose obligations under state law.[22]

Of course, not all contractual provisions are within the scope of Section 253. The FCC has held that the relevant inquiry is the degree to which the contractual provision impinges on the ability of telecommunications carriers to provide service.[23] But, while Section 253 does not cover all private contracts, there is simply no merit to AAR's argument that private contracts are immune from FCC review.

In most circumstances, railroads do not assert private-contract rights to exclude carriers from the public ROW. Rather, railroads most often point to vaguely defined assertions of property rights stemming from state law to exclude carriers or force them into signing leases or license agreements with unreasonable conditions. There, the fact that telecommunications carriers have been forced to enter a private contract for access to the ROW does not shield the underlying legal requirement from FCC review. The Commission has both the power and the obligation under Section 253 to consider whether state and local laws giving railroads the right to exclude carriers from the ROW are improperly limiting the provision of telecommunications service.

B. Section 224 in no way prohibits the FCC from exercising its Section 253 authority over state and local statutes, regulations, or legal requirements.

AAR also argues that Section 224 of the Communications Act strips the Commission of jurisdiction to regulate railroads' control over the ROW.[24] Section 224 authorizes the Commission to regulate "pole attachments"—defined as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[25] Section 224(a)'s definition of "utility" excludes "any railroad, any person who is cooperatively organized… or any person owned by… any State."[26] Thus, according to AAR, "Section 224 prohibits the Commission from regulating the fees, rates, terms, and conditions of access to railroads' property, including their ROWs."[27]

AAR's interpretation of Section 224 has no bearing on Crown Castle's request for the Commission to preempt certain types of state and local action. Section 224 addresses the Commission's ability to regulate rates; it does not limit the Commission's ability to preempt prohibitory legal requirements. AAR suggests that Section 224's exclusion of Commission authority over railroads in pole attachment rates removes Commission

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22 *Id.* at ¶ 16; *Sandwich Isles Order*, 32 FCC Rcd at ¶ 13.

23 *Sandwich Isles Order*, 32 FCC Rcd at ¶ 16.

24 *AAR Comments* at 3.

25 47 U.S.C. § 224(a)(4).

26 *Id.* at (a)(1).

27 *AAR Comments* at 18.

authority over railroads writ large. Thus, AAR argues that if railroads are beyond Section 224's reach, they must also be beyond the reach of Section 253.

But Section 224 and Section 253 are separate statutory provisions, and there is no indication that Congress intended for Section's 224 carveouts to extend to Section 253. Section 253 does not contain an exception for action involving railroads—or any other subject matter. Had Congress wanted to exempt railroads from Section 253, it would have explicitly done so. The better reading of Section's 224 carveouts and Section 253's lack thereof—and the reading consistent with fundamental principles of statutory interpretation—is that the two provisions *cannot* be read the same.[28] Indeed, the Commission has recognized Congress's intent in organizing this regulatory scheme by routinely using Section 253 to preempt regulations affecting state-owned ROW.[29] AAR's argument—that entities excluded from Section 224 must have been excluded *sub silentio* from Section 253—thus proves too much. There is no justification for adopting this novel reading of the statute.

C. Permitting telecommunications providers access to railroad ROW would not harm public safety.

AAR argues that preferential treatment in the ROW is necessary to ensure the rail system's safe operation. It broadly claims that "[a]ny entry onto active railroad property by a non-railroad entity is trespassing and can be dangerous to railroad employees and the general public."[30] It points to hypothetical examples like the disturbance of railroad signal lines caused by facilities bored under rail track; impairment of the ability to move trains caused by overhead facilities; and disturbances caused by heavy installation equipment like bulldozers.[31]

It is notable that AAR relies on theoretical harms, only pointing to a single incident where a sinkhole developed far from the track, with no "train derailment or any reported

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[28] *Iselin v. United States*, 270 U.S. 245, 250 (1926) (holding that when Congress subjected specific categories of ticket sales to taxation but failed to cover another category, extending the coverage, given the "particularization and detail" with which Congress had set out the categories, would amount to "enlargement" of the statute rather than "construction" of it). *See also Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress… does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not… hide elephants in mouseholes."); *Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004) (finding that courts should not add words to a statute because "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

[29] *See, e.g. Sandwich Isles Order*, 32 FCC Rcd at ¶ 16 (finding that an exclusive license to "build, construct, repair, maintain, and operate a network to provide telecommunications services" that was granted by the state violated Section 253); *In re Classic Telephone, Inc.*, 11 FCC Rcd 13082 (Sept. 18, 1997) (noting that while Section 253 preserves the authority of state and local governments to manage the public ROW, the FCC may preempt laws that are not competitively neutral); *Minnesota Petition*, 14 FCC Rcd at ¶ 1 (denying a Petition for a Declaratory Ruling that would have allowed the state to provide a fiber optics company with exclusive access to the ROW).

[30] *AAR Comments* at 22.

[31] *Id.*

injuries."[32] Despite this, Crown Castle and other telecommunications providers are often required to schedule for the provision of flagging crews during installations with AAR-member railroads. AAR's argument that railroad safety requires monopoly control over the network is reminiscent of the arguments made in *Hush-A-Phone*,[33] and the FCC need not completely preempt railroads' ability to ensure safe access to facilities to rein in railroads' more egregious barriers to entry.

D. Exercise of Section 253 authority would not amount to a taking under the Fifth Amendment.

Finally, AAR argues that "depriving railroads of the use of their property interests without just compensation would amount to an unconstitutional taking under the Fifth Amendment."[34] The Fifth Amendment stipulates that "private property [shall not] be taken for public use, without just compensation."[35] The most straightforward takings claim arises when the government physically occupies or directs the occupation of a landowner's property without compensation.[36] The relief requested here—preemption of state and local requirements that give railroads the ability to impose prohibitory requirements—is far removed from a mandatory physical occupation.[37] And Crown Castle does not oppose providing *reasonable* compensation for ROW access.

Crown Castle's proposals also do not implicate regulatory takings, in which the government restricts the use of property to further public ends. The Supreme Court has held that a restriction is not a taking merely because it impairs the value of the land's utility; rather, a regulation is a taking that requires just compensation when it "goes too

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[32] *Id.* at 23.

[33] In the *Hush-A-Phone* cases, the Bell System Companies, which were then essentially a monopoly, filed tariffs forbidding attachment of any device not furnished by the companies to the telephone. The companies claimed that use of the Hush-A-Phone device might adversely affect telephone service such as by creating difficulty returning the handset to its mounting. *Hush-A-Phone Corp. & Harry C. Tuttle, Complainants Am. Tel. & Tel. Co., et al., Defendants*, 20 F.C.C. 391, 411 (1955). On appeal, the court found that the tariffs were "unwarranted interference with the telephone subscriber's right to reasonably use his telephone in ways which are privately beneficial without being publicly detrimental." *Hush-A-Phone v. U.S.*, 238 F.2d 266, 269 (D.C. Cir. 1956).

[34] *Id.* at 24.

[35] U.S. Const. amend. V.

[36] *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a New York law mandating cable installation in apartment buildings constituted a taking because it "involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall" without compensation); *Kaiser Aetna v United States*, 444 U.S. 164 (1979); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).

[37] Even if this fell into the same category, the Court has clarified that governmental regulation of compensation related the use of private property for public purposes is not a taking if the rates are not confiscatory. *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987) (noting that it is "settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible"). *See also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936).

far."[38] The Court has declined to adopt per se rules for analyzing a regulation and "[prefers] to examine a number of factors rather than a simple mathematically precise formula."[39] But generally, a regulatory taking involves destruction of a company's "reasonable investment-backed expectations."[40]

Here, Section 253 preemption would not interfere with railroads' "reasonable investment-backed expectations." Rather, it would allow telecommunications providers to expand service while still permitting railroads to operate and realize returns. Furthermore, access requested by these providers is often extremely minimal and limited to either additional strands of cable added to existing utility poles or additional inches of underground access to install conduit. These requests do not represent a substantial burden nor do they frustrate the railroads' continued enjoyment of the underlying property. As such, it is certainly possible for railroads and other entities to share the ROW without destroying the economic value that railroads gain from ROW access. Crown Castle merely asks the Commission to ensure equal access to the ROW through preemption of state and local laws that permit railroads to act as gatekeepers.

IV. Conclusion

For the reasons stated above, Crown Castle asks the Commission to exercise its Section 253 authority and preempt state and local laws that allow railroads to act as gatekeepers to the ROW. We look forward to working with the Commission to close the digital divide and lay the groundwork for efficient next-generation broadband infrastructure across the country.

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[38] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[39] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002) (internal quotation marks omitted). Whether a restriction amounts to a taking "depends largely upon the particular circumstances in that case." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (internal quotation marks omitted). In *Penn Central*, the Court identified several factors for determining if an action amounts to a taking. Of primary importance is "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," the "character of the governmental action" may also be relevant. There, the Court rejected the argument that New York City's Landmark Preservation Law was a taking. Although it prevented landowners from exploiting their land, it did not prevent them from realizing a "reasonable return" on their investment.

[40] *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In in *Kaiser Aetna*, the owners of a private pond had invested money in dredging the pond, developing it into an exclusive marina, and building a surrounding marina community. The marina was open only to fee-paying members, and the fees were paid in part to "maintain the privacy and security of the pond." The government sought to compel free public use of the private marina, claiming that the marina became subject to the federal navigational servitude because the owners had dredged a channel connecting it to "navigable water." The Court found that the government's attempt to create a public right of access to the improved pond interfered with Kaiser Aetna's "reasonable investment-backed expectations."