

June 7, 2019

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Room TW-A325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
GN Docket No. 17-83; WC Docket No. 17-84**

Dear Ms. Dortch:

On June 5, 2019, Timothy J. Strafford, Associate General Counsel of the Association of American Railroads (“AAR”), along with Arpan A. Sura, outside counsel for AAR, met with staff from the Commission’s Wireless Telecommunications Bureau (“WTB”) and Wireline Competition Bureau (“WCB”). Those attending the meeting from the Commission were: Justin Faulb, Zachary Ross, Darrel Pae, Pamela Arluk, Annick Banoun, Megan Schuman, Kelsey Fayer, Becky Chambers, Mike Ray, Daniel Kahn, Adam Copeland (by phone), and Janice Gorin (by phone).

During the meeting, we discussed the numerous procedural and substantive deficiencies in Article 5 of the *State Model Code for Accelerating Broadband Infrastructure Deployment and Investment* (“State Model Code”)¹ adopted by the Commission’s Broadband Deployment Advisory Committee (“BDAC”). As we explained, Article 5 was drafted and approved without meaningful consultation from the railroad industry, the Surface Transportation Board, or the Federal Railroad Administration. The exclusion of the federal railroad regulators is particularly significant, given their exclusive jurisdiction over transportation by rail carriers and railroad safety, respectively.²

The lack of meaningful input from key stakeholders has created avoidable side effects in the State Model Code. For example, Article 5 is unnecessarily overbroad in its stated goal of accelerating wireline deployment. It appears to give preferential access not only to cable, fiber, and other wireline companies (defined as “communications providers”), but also to providers of drainage, gas, electricity, public lighting, hazardous liquids, heating, water, sewage, transportation networks, and waterway networks (defined as “network support infrastructure owners”).³ The latter class of entities has nothing to do with broadband deployment. Furthermore, Article 5 fails to clarify

¹ Broadband Deployment Advisory Committee, *State Model Code for Accelerating Broadband Infrastructure Deployment and Investment* (Dec. 6-7, 2018) (“State Model Code”), <https://bit.ly/2P0GpPn>.

² See, e.g., 49 U.S.C. § 10501(b) (“The jurisdiction of the [Surface Transportation Board] over transportation by rail carriers ... is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation **are exclusive and preempt the remedies provided under Federal or State law.**”) (emphasis added); 49 U.S.C. § 20103(a) (“The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for **every area of railroad safety** ...”) (emphasis added).

³ See State Model Code at Art. 2 (definitions); *id.* at Art. 5 §§ 2.3, 2.4 (applying the relevant provisions to “network support infrastructure owners”).

definitively that its provisions are limited to crossings of railroad property and do not extend to pole attachments or other longitudinal occupancies on railroads' facilities along the rights-of-way.

Beyond these drafting errors, Article 5 reflects a variety of false assumptions about the railroad industry and existing siting practices. For example, the one-time fee of \$500⁴ appears to make a factual determination about the "true cost" of processing a railroad crossing application. As we explained, however, AAR's members incur crossing application-related expenses that exceed \$500 because of the safety and engineering steps that must be taken. The BDAC's prescribed fee also does not account for the opportunity costs railroads bear in having to shut down their tracks. Thus, by forcing the railroad industry into commercial arrangements that would effectively subsidize broadband and other utility companies, Article 5 impinges on railroads' private property interests and threatens the safe operation of the rail system.

Article 5 also provides that no railroad crossing fee is required where the railroad ROW intersects with a public right-of-way.⁵ That provision appears to reflect the assumption that such intersections are "public property" over which railroads enjoy only limited property rights. That assumption gets it exactly backwards, however, because railroad rights-of-way often pre-date roads and highways by decades, and railroads did not lose their private property rights when the road or highway was built later. In reality, public roads typically represent limited easements over railroads' exclusive-use property rights.⁶

As we explained, no showing has been made that the invasive measures contained in Article 5 concerning the railroads' private property are necessary to accelerate broadband deployment. Railroad processes and fees related to crossings are transparent and available online for public inspection.⁷ Moreover, railroads have every incentive to approve an application and complete wireline deployment as soon as practicable so that rail operations may resume. Indeed, one of AAR's members has reported that the average turnaround time for a crossing permit in 2018—from engineering review to the mailing of agreement for signatures—averaged 41 days in 2018. In short, there is no evidence of a "problem" in the record to which Article 5's heavy-handed mandates represent a "solution." Instead, Article 5 compromises railroads' private property rights by subsidizing unrelated third-parties who wish to use railroad property.

Reopening Article 5 to further comment and evidence from excluded rail stakeholders would best balance the objectives of facilitating broadband deployment, respecting railroads' private property interests, and promoting the safe operations of the nation's interstate transportation system.

⁴ *Id.* at Art. 5, § 2.4.

⁵ *Id.* at Art. 5, § 2.4.3.

⁶ While some wireless and wireline companies assert that the access railroads provide somehow imparts to the public a broad right to use the railroad right-of-way, and specifically the right of those entities to use the right-of-way without compensation, the U.S. Supreme Court has properly described and limited the "public" use aspect of the railroad right-of-way. A railroad's right-of-way "has ... the substantiality of the fee, and it is private property, even to the public, in all else but an interest and benefit in its uses." *Western Union Telegraph Co. v. Penn. RR Co.*, 195 U.S. 540, 570 (1904). Moreover, the railroad right-of-way "cannot be invaded without guilt of trespass ... [and] cannot be appropriated in whole or part except upon the payment of compensation ... [and] is entitled to the protection of the Constitution." *Id.*

⁷ See, e.g., CSX, *Construction Tower Permits*, <http://bit.ly/2uiOwfv> (last visited June 6, 2019); CN, *Utility Installations*, <https://bit.ly/2KB564z> (last visited June 6, 2019); Union Pacific, *Utilities Installation*, <http://bit.ly/2tjhFqC> (last visited June 6, 2019); Norfolk Southern, *Wire, Pipeline, and Fiber Optics Projects*, <http://bit.ly/2uhmZw> (last visited June 6, 2019).

Further, adding a conspicuous disclaimer to the State Model Code and the BDAC website clarifying that the FCC has not written or endorsed the State Model Code would avoid misunderstandings that appear to be occurring in state legislatures throughout the country about the role of the BDAC.

AAR has championed broadband infrastructure reform throughout the Commission's infrastructure reform proceedings,⁸ and it encourages the Commission and the BDAC to take a fresh look at Article 5 to help state legislatures enact reforms that reflect the facts on the ground and best accomplish the Commission's goals. Pursuant to Section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office. Please contact me with any questions.

Respectfully submitted,

/s/ Arpan A. Sura

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⁸ See *generally* Comments of the Association of American Railroads, WT Docket No. 17-79 (filed June 15, 2017); Reply Comments of the Association of American Railroads, WT Docket No. 17-79 *et al.* (filed July 17, 2017).