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August 8, 2018

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Room TWA325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
WT Docket No. 17-79; WC Docket No. 17-84**

Dear Ms. Dortch:

On Monday, August 6, 2018, Tim Strafford, Associate General Counsel of the Association of American Railroads (“AAR”),¹ along with Michele Farquhar and Arpan A. Sura, outside counsel for AAR, met with Will Adams, Legal Advisor to Commissioner Brendan Carr. We discussed the Commission’s efforts to remove barriers to wireless and wireline infrastructure deployment and presented the slides attached to this letter.

AAR commended the Commission for its wireless infrastructure efforts to date, including adopting the *PTC Program Comment* in 2014,² as well as the *Second Report & Order* in 2018³ that covers Positive Train Control (“PTC”) and non-PTC deployments and streamlines Section 106 review. As AAR noted, however, the Commission can further streamline wireless deployment, particularly deployments within railroad corridors that are heavily disturbed, present no incremental risk of affecting historic properties, and have already been reviewed as part of the PTC review process. AAR also thanked the Commission for its efforts in working with the railroad industry as the industry implements PTC.

In addition, AAR noted that the railroad industry’s practices to grant other parties access to railroad crossings and rights-of-way (“ROWs”)—which are largely private property—are fair, transparent, and reasonably related to public safety and cost recovery. AAR pointed out that railroads hold exclusive-use property interests in their ROWs, and that crossings over ROWs are generally limited easements

¹ AAR is a voluntary non-profit membership organization whose freight railroad members operate 83 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. AAR members also include Amtrak, the nation’s principal intercity passenger railroad, and Metra, the primary commuter railroad serving the Chicago metropolitan area. More information on AAR is available at its website: <https://www.aar.org/Pages/Home.aspx>.

² See *Wireless Telecommunications Bureau Announces Adoption of Program Comment to Govern Review of Positive Train Control Wayside Facilities*, Public Notice, 29 FCC Rcd 5340, Attachment (WTB 2014).

³ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79 (rel. Mar. 30, 2018).

across the railroad tracks.⁴ Moreover, rail crossings and railroad ROWs present unique safety risks and commercial burdens when non-railroad personnel enter these spaces. In light of the need to promote interstate commerce and protect public safety, Congress vested exclusive jurisdiction in the Surface Transportation Board and the Federal Railroad Administration over rail transportation and safety, notwithstanding any other federal or state law.⁵ Consistent with these federal prerogatives, Congress expressly withheld jurisdiction from the Commission to prescribe the terms and conditions by which railroads grant access over their ROWs under Section 224 of the Communications Act.⁶ Likewise, we explained why Section 253 of the Communications Act⁷ does not provide statutory authority to regulate railroad ROW access or the bilateral, private negotiations between railroads and telecommunications providers.⁸

Pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced dockets. Please contact the undersigned with any questions.

Respectfully submitted,

/s/ Michele C. Farquhar

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cc: Will Adams

Enclosure

⁴ While some wireless and wireline companies assert that the access railroads provide somehow imparts to the public a broad right to use the ROW, and specifically the right of those entities to use the ROW without compensation, the U.S. Supreme Court has properly described and limited the "public" use aspect of the railroad ROW. 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. Pennsylvania Railroad Co.*, 195 U.S. 540, 570 (1904). Moreover, the railroad ROW "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.*

⁵ 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).

⁶ See 47 U.S.C. § 224(a)(1) ("The term 'utility' means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. **Such term does not include any railroad**, any person who is cooperatively organized, or any person owned by the Federal Government or any State.") (emphasis added).

⁷ 47 U.S.C. § 253.

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



Association of American Railroads

*Accelerating Wireline Broadband Deployment by Removing Barriers
to Infrastructure Investment*

WT Docket No. 17-84

August 6, 2018

Agenda

1. The Facts

- Railroads' practices are reasonable and based on safety
- Railroads have unique private property rights in ROWs and crossings

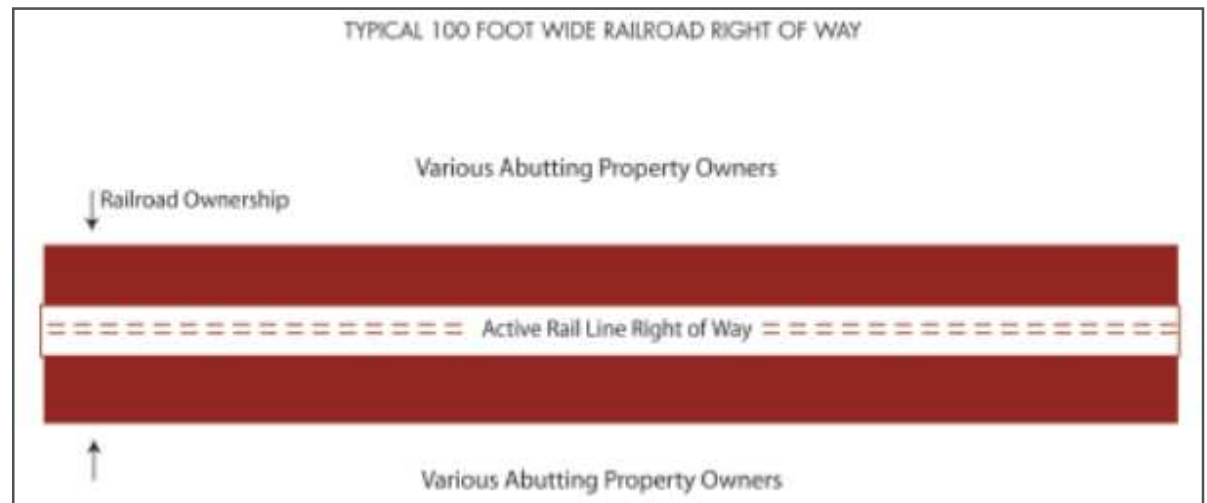
2. The Law

- There is a special federal statutory regime governing railroad operations
- The FCC and local regulators cannot intrude on rail transportation

The Facts

The Typical Railroad ROW

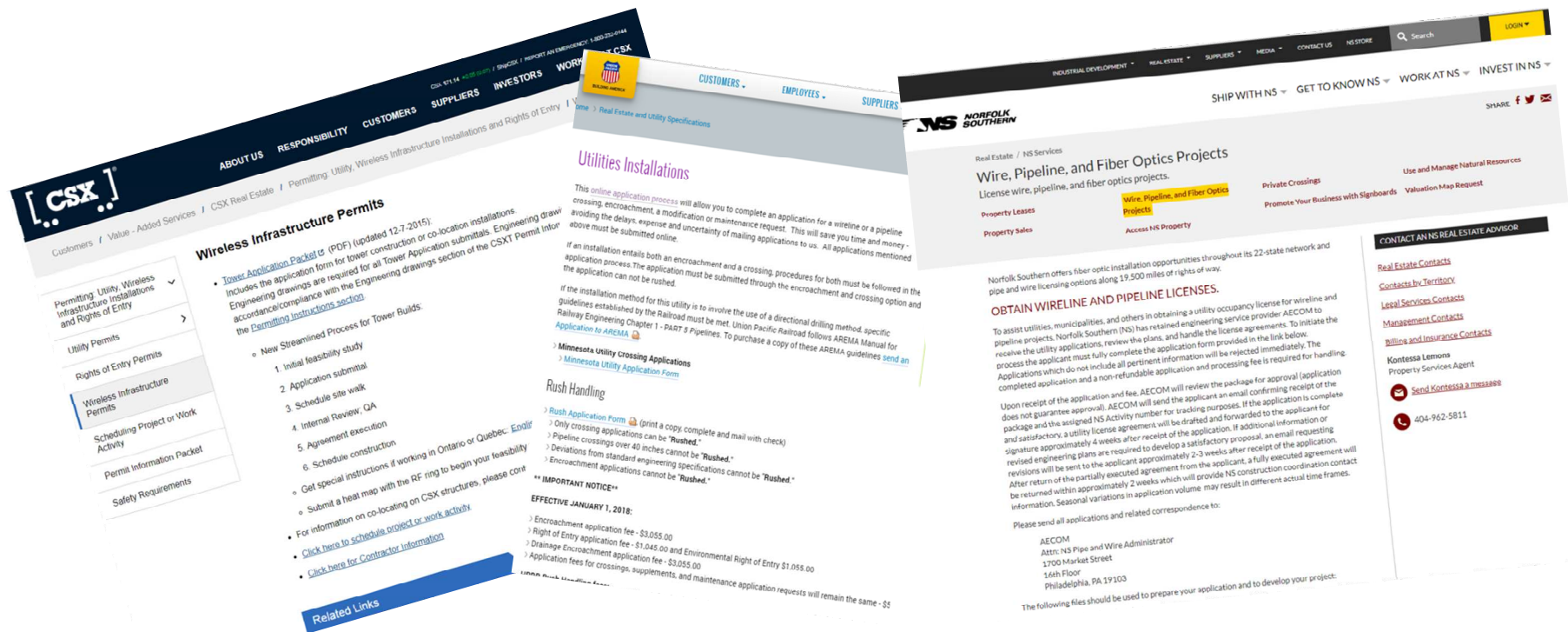
- Private property
- Held by railroads for decades, if not hundreds of years
- Acquired through private transactions, grants, or eminent domain
- Governed by the deed and common-law property rules
- Active transportation corridors with strict safety requirements



Railroad ROWs Are Private Property

- “A railroad right of way in this state is **not a mere easement** or user for railroad purposes. Like other property it is acquired by purchase or condemnation and vests a fee in the company acquiring it which **cannot be divested** except as the law provides.” — *Atlantic Coast Line R. Co. v. Duval County*, 154 So. 331 (Fla. 1934).
- “A railroad right-of-way is a **very substantial thing**. It is more than a mere right of passage. [A right-of-way] is more than an easement. . . . [I]f a railroad’s right-of-way was an easement it was ‘one having the attributes of the fee, perpetuity and **exclusive use and possession**; also the remedies of the fee, and, like it corporeal, not incorporeal property.’” — *Wash. Wildlife Pres. v. State*, 329 N.W.2d 543, 546 (Minn. 1983).
- “Railroad tracks and rights-of-way are **private property** with access strictly limited to railroad personnel and persons who have been granted permission from the railroad. Anyone else on the track or grounds of the railroad is trespassing.” — Public Service Commission of West Virginia

Railroads' Practices Are Fair and Transparent



The Law

Section 224

- “[T]he Commission shall regulate the rates, terms, and conditions for ***pole attachments*** to provide that such rates, terms, and conditions are just and reasonable...”
 - 47 U.S.C. § 224(b)(1)
- “The term ‘***pole attachment***’ means 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.***”
 - 47 U.S.C. § 224(a)(4)
- “The term ‘***utility***’ means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. ***Such term does not include any railroad,*** any person who is cooperatively organized, or any person owned by the Federal Government or any State.”
 - 47 U.S.C. § 224(a)(1)

Section 253

- “No ***State or local statute or regulation***, or other ***State or local legal requirement***, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”
 - 47 U.S.C. § 253(a)
- “***Nothing in this section affects the authority of a State or local government to manage the public rights-of-way*** or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”
 - 47 U.S.C. § 253(c)

Interstate Commerce Commission Termination Act (ICCTA)

- “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.***”
 - 49 U.S.C. § 10501(b)
- “Transportation” includes “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, ***property***, facility, instrumentality, or equipment of any kind ***related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.***”
 - 49 U.S.C. § 10102(9).

Federal Rail Safety Act (FRSA)

- “The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for ***every area of railroad safety*** ...”
 - 49 U.S.C § 20103(a)
- “Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security ***shall be nationally uniform*** to the extent practicable.”
 - 49 U.S.C § 20106(a)(1)



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