

## NATIONAL RAILROAD PASSENGER CORPORATION (“AMTRAK”) ACCELERATING WIRELINE BROADBAND DEPLOYMENT

Accelerating Wireline Broadband Deployment, WC Docket No. 17-84, *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment*, FCC 17-37 (rel. Apr.21, 2017) (“**NPRM**”).

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**Issue:** Paragraph 30 of the NPRM seeks comment on potential actions “the Commission might be able to undertake to speed deployment of next generation networks by facilitating access to infrastructure owned by entities not subject to Section 224” (*i.e.*, railroads, electric cooperatives, and governmentally owned entities). The NPRM specifically asks:

- i. How the Commission can “encourage or facilitate access to information about pole attachment rates and costs with respect to these entities, and what are the benefits and drawbacks of these potential steps?”; and
- ii. Whether access to such information would “benefit potential attachers to non-Commission-regulated poles by providing data that would be useful in contractual negotiations” and whether this would “facilitate broadband deployment?”

**Short Answer:** Requiring railroads to collect and disclose information regarding pole attachment rates and costs would do nothing to advance broadband deployment because unlike co-ops and local governments, railroads are not significantly involved in the last mile distribution of broadband services over public rights-of-way (“**ROW**”). Imposing such obligations on railroads would instead impair a functioning free market for third party telecommunications uses of limited railroad ROW and inflict unnecessary costs and burdens on railroads.

**Discussion: Railroads Have No Significant Role In The Last Mile Distribution Of Broadband Services, And Subjecting Them To Information Collection And Disclosure Requirements Would Not Advance Broadband Deployment.**

- Congress exempted railroads from pole attachment regulation<sup>1</sup> because it recognized that railroads have an “insignificant role” in cable plant distribution,<sup>2</sup> which is concentrated in the last mile. Even when railroad ROW is available for non-railroad telecommunications purposes, its use often is for fiber network backbone rather than last-mile broadband deployment.
  - Unlike railroads, cooperatives and governmental entities have become extensively involved in the last mile distribution of broadband facilities and services<sup>3</sup> since adoption of the Pole Attachment Act in 1977. Amtrak takes no position on the possible establishment of new information collection and disclosure requirements for cooperatives and governmental entities, but observes that the Commission is free to reach separate determinations for each of these entities.
  - Amtrak’s ROW is reserved primarily for occupancies that support railroad operations and requirements, which in the case of telecommunications includes functions such as signaling and safety communications. Under the relatively limited circumstances where substantial longitudinal space in Amtrak’s ROW is available for third-party telecommunications uses consistent with railroad operations, however, these uses support the Commission’s goals of accelerating the deployment of advanced broadband networks and faster broadband transmission rates. In contrast to use of the public ROW for last-mile distribution, such longitudinal use of Amtrak’s ROW allows for uninterrupted, long-distance fiber backbones that can transmit ultrahigh-speed data and reduce the latency associated with last-mile facilities.
- Since at least 1875, Congress has separately addressed many railroad ROW issues,<sup>4</sup> which further explains the basis for the railroad exemption in Section 224 and confirms the inappropriateness of subjecting railroads to information collection and disclosure requirements. Moreover, railroads already are subject to extensive regulation by the Surface Transportation Board, the Federal Railroad Administration, and the Department of Transportation.<sup>5</sup> In an analogous context, Chairman Pai has recognized the value of a “consistent and comprehensive” regulatory framework and the dangers of

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<sup>1</sup> 47 U.S.C. § 224(a)(1).

<sup>2</sup> S. Rep. No. 95-580, at 19 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 127.

<sup>3</sup> See, e.g., City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 *et seq.*; Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, *Memorandum Opinion and Order*, 30 FCC Rcd 2408 (2015), *reversed sub nom. State of Tennessee; State of North Carolina v. FCC*, 832 F.3d 597 (6<sup>th</sup> Cir. 2016).

<sup>4</sup> General Railroad Right-of Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482. Congress most recently addressed railroad ROW issues in the Fixing America’s Surface Transportation Act (the FAST Act), Pub. L. No. 114-94, 129 Stat. 1312 (2015), and the Passenger Rail Investment and Improvement Act of 2008 (PRIAA), Pub. L. No. 110-432, 122 Stat. 4848 (2008).

<sup>5</sup> See Association of American Railroad Reply Comments, WC Docket No. 17-84, at 3, 21-24 (July 17, 2017) (“The ICC Termination Act (“ICCTA”) vests exclusive jurisdiction in the STB over rail transportation and gives the STB broad authority over ground, property, and facilities necessary for rail transportation. Just as the STB exercises jurisdiction over rail transportation, the Federal Railroad Safety Act (“FRSA”) gives the DOT and the FRA jurisdiction over “every area of railroad safety.”) (footnotes omitted) (citing 49 U.S.C. §§ 1301-1306, 10101, and 20103(a)).

infringing upon the jurisdiction of other federal agencies.<sup>6</sup> The FCC should avoid potential conflicts with other agencies that have primary jurisdiction over railroads.

- Amtrak and its counter-parties establish the rates, terms, and conditions of their telecommunications ROW leases in private, free-market negotiations that account for the unique attributes of railroad operations and the unique needs of the lessees. Mandating the disclosure of such rates, terms, and conditions would not advance broadband deployment, but would constitute unwarranted government interference in a free-market negotiation for the benefit of one party to those negotiations. This likely would impede rather than accelerate the deployment of next generation networks.
  - The Commission has declined to require the collection and disclosure of such proprietary information in, for example, broadcaster-cable television retransmission consent negotiations even where, unlike here, the parties and the negotiations are already subject to Commission regulations. Even if collected, such confidential commercial information would in any case be protected from disclosure under FOIA exemption 4, 5 U.S.C. § 552(b)(4).
- The comments and *ex parte* notices filed in this proceeding regarding the issues raised in paragraph 30 of the NPRM demonstrate that the conduct of electric cooperatives and governmental entities rather than railroads is at issue. Amtrak has found only two direct references to regulating railroad ROW for pole attachment purposes (other than in the reply comments of the Association of American Railroads). Moreover, those references either simply noted the existence of at least one state's limited jurisdiction in the context of federal preemption, or advocated for establishing a "model code for state legislation" by initiating a new proceeding, rather than for establishing any kind of requirements for railroads here.<sup>7</sup> The Commission therefore has no basis in the record for sweeping railroads into a new information collection and disclosure requirement.
  - The initial ACA *ex parte* that led to adding paragraph 30 to the final NPRM briefly alluded to issues associated with railroad crossings, but admitted that this factor ultimately did not impede broadband deployment given the availability of alternate routes.<sup>8</sup> Moreover, with the exception of this passing reference to railroads in its initial *ex parte* submitted prior to adoption of the NPRM, neither ACA's comments or reply comments in this proceeding even mention railroads or the issues raised in paragraph 30, which further demonstrates that railroads should not be included in any action the Commission may take in this regard. The comments and reply comments of other parties addressing paragraph 30 similarly confirm this conclusion because they are focused on electric cooperatives and governmental entities that control public ROW used for last-mile distribution instead of the use of railroad ROW for the uninterrupted, long-distance fiber backbones that support broadband services.

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<sup>6</sup> See Statement of FCC Chairman Ajit Pai on Ninth Circuit Decision to Rehear *FTC v. AT&T* Case (May 9, 2017); Joint Statement of FCC Chairman Ajit Pai and Acting FTC Chairman Maureen K. Ohlhausen on Protecting Americans' Online Privacy (March 1, 2017).

<sup>7</sup> Minnesota Telecom Alliance Comments, WC Docket No. 17-84, at 3-5 (June 15, 2017); NTCA Comments, WC Docket No. 17-84, at 16-17 (June 15, 2017).

<sup>8</sup> Letter from Thomas Cohen, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-421, et al., at 3-4 (filed April 3, 2017).

- The significant burdens associated with collection and disclosure requirements for railroads outweigh their non-existent benefits because such requirements would do nothing to accelerate broadband deployment in the last mile of the distribution system. Unlike electric utilities and telephone companies that account for capital costs associated with pole attachments pursuant to either detailed Federal Energy Regulatory Commission (“**FERC**”)<sup>9</sup> or FCC ARMIS regulations,<sup>10</sup> railroads do not maintain their accounts under these regulations. Therefore, realistic comparisons between railroads and other regulated and unregulated entities regarding the costs and rates for pole attachments are essentially impossible, and in any event would provide no useful information for potential attachers. Moreover, mandatory disclosure of rates and costs is particularly inappropriate for railroad ROW, where circumstances are fundamentally different than in last-mile distribution systems, safety concerns take on added importance, and non-discriminatory access as envisioned under Section 224 is both impossible and prohibited by the statute.

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<sup>9</sup> See 18 C.F.R. Part 101.

<sup>10</sup> See 47 C.F.R. Part 32.