New England Connectivity and Telecommunications Association

WRITTEN COMMENTS OF THE NEW ENGLAND CONNECTIVITY & TELECOMMUNICATIONS ASSOCIATION, INC. REGARDING S.181

January 22, 2024

Dear Chair Cummings, Vice-Chair MacDonald, and Members of the Senate Committee on Finance,

On behalf of the New England Connectivity and Telecommunications Association (NECTA), I appreciate the opportunity to provide testimony regarding S.181, *An act relating to the Community Media Public Benefit Fund*. NECTA is a five-state regional trade association representing substantially all private telecommunications companies in Vermont, Connecticut, Massachusetts, New Hampshire, and Rhode Island. In Vermont our member companies include Comcast and Charter Communications. The networks built and maintained by our companies deliver gigabit speeds to more Vermonters than any other provider. NECTA members serve 190 Vermont municipalities with broadband, video, voice, and home security and automation services. Over the past decade, our members have collectively invested over $200 million developing state-of-the-art networks in Vermont. Today, we provide high-speed broadband to 157,000 homes and businesses through approximately 9,000 miles of fiber.

Senate bill 181 proposes to create a new multimillion-dollar funding stream for Vermont's Access Management Organizations (AMOs) by annually assessing $15 for each attachment by a communications service provider (CSP) to a utility pole. First and foremost, this proposal runs counter to Vermont's goals for increasing broadband availability throughout the state as it creates a significant increase in costs for deployment. At a time when Vermont, buoyed by federal broadband infrastructure funding, has an opportunity to close the digital divide, this legislation would *double* or *triple* what CSPs must pay to attach to poles, eating away at funding for deployment. Because federal funding cannot be used to cover the ongoing operational costs created by pole fees, the bill would magnify equity and affordability challenges. This proposal conflicts with directives from federal regulators overseeing the funding flowing to Vermont for broadband deployment as they have been very clear that states are required to *eliminate* regulatory barriers to deployment as part of these efforts.[1] Instead of seeking out ways to make broadband buildout more cost-effective in order to maximize federal dollars, this proposal would do the opposite by significantly increasing the costs associated with expanded network deployment, which could harm Vermont's successful implementation of these federal programs.

[1] *See* NTIA, Notice of Funding Opportunity, *Broadband Equity, Access, and Deployment Program* 32, 48 (2022).

In addition to jeopardizing Vermont's goals for broadband deployment, S.181 also raises several legal issues that could subject Vermont to costly litigation. *First*, under the federal Cable Act, any charges a cable operator is required to pay to fund the operating expenses of public, educational, and government ("PEG") programming are considered "franchise fees,"[2] which are subject to a federal cap of 5% of the cable operator's cable service revenues.[3] Vermont is unique when compared to other states where, instead of allocating only a portion of cable franchise fees toward PEG operating costs, Vermont devotes 100 percent of its franchise fee revenue to support PEG operating costs through the AMOs. This funding scheme means cable operators are already paying the maximum amount to AMOs pursuant to receiving their certificates of public good.[4] While S.181 permits a cable operator to deduct these payments from what they owe under the proposed pole attachment fee, *any fee* assessed against the cable operator beyond this deduction would exceed the 5% cap and constitute a violation of the Cable Act. It is also important to note that outside of the 5% franchise fee, AMOs receive additional funding from cable operators for their capital needs as negotiated in individual certificates of public good for each cable operator.

Second, the proposed pole fee would violate section 253 of the federal Communications Act by massively increasing the costs of deploying and maintaining communications networks. Section 253(a) preempts state laws that materially inhibit the deployment of infrastructure used for telecommunications and other services,[5] including by creating a "massive increase" in a provider's "cost of doing business."[6] Depending on the pole owner, the $15 pole attachment fee may be more than twice the rate that NECTA's member companies typically already pay to pole owners for attachments. This massive increase clearly violates section 253(a).

Third, the proposed pole attachment fee would independently violate section 253 of the Communications Act because it does not reflect costs incurred by the government. Under section 253, state charges that are mandatory for use of public rights-of-way (ROW) to deploy communications infrastructure must reflect a "reasonable approximation" of the government's "costs *specifically related to and caused by the deployment.*"[7] Generally, a CSP's deployment of facilities on a utility-owned pole does not impose any new governmental costs. To the extent the state may incur costs to review deployments in state-controlled ROW, those costs are already recovered through permit fees.[8] Even if there were such government costs, the proposed pole attachment fee could not possibly compensate the government for them under this bill, as the revenues go exclusively to AMOs to cover *their* unrelated PEG operating costs. Furthermore, even if the state could lawfully use pole attachment fees to recover the PEG operating costs incurred by

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[2] 47 U.S.C. § 542(g); *Third 621 Order*, 34 FCC Rcd. 6844 ¶¶ 91-92 (2019). PEG capital funds are not franchise fees subject to the cap, but must be reasonable and adequate under the Cable Act.
[3] 47 U.S.C. § 542(b).
[4] 30 V.S.A. § 503
[5] 47 U.S.C. § 253(a) *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d. Cir. 2002); *see Moratoria Order*, 33 FCC Rcd. 7705 ¶ 167 (2018) (holding that section 253 applies to "infrastructure that can be used for the provision of both telecommunications and other services on a commingled basis"); *Infrastructure Order*, 33 FCC Rcd. 9088 ¶ 36 (2018) (same); *see also Cellco P'ship v. City of Rochester*, 623 F.Supp.3d 184, 197-98 (W.D.N.Y. 2022) (confirming that the rulings in these FCC orders apply to both wireless and wireline infrastructure).
[6] *See, e.g.*, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270-71 (10th Cir. 2004) (holding that a law violated section 253 because it created a "massive increase" in the provider's "cost of doing business" in the relevant jurisdiction).
[7] *Infrastructure Order* ¶ 50 & n.131 (emphasis added); *see also id*. ¶¶ 55, 56 76 (same).
[8] *See* 19 V.S.A. § 1111.

AMOs (which it cannot), the pole attachment fee would still be unjustified, because the pole attachments do not give rise to any new PEG operating costs either.

Fourth, the exemption for "publicly owned communications facilities" further violates section 253. The Federal Communications Commission and the courts have repeatedly held that section 253 preempts state and local legal requirement that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[9] Section 253 does not permit the State to exempt a favored class of providers from financial burdens that apply to other providers.[10] Section 253(c) likewise limits permissible right-of-way fees to those that are "competitively neutral and nondiscriminatory." As the Second Circuit has recognized, "competitive neutrality is undermined" where one provider is exempt from a fee another provider must pay.[11] Exempting publicly owned communications facilities from being subject to the proposed pole fee clearly violates these requirements and would therefore be preempted on this additional ground.

Senate bill 181 also raises numerous and difficult implementation issues. As the apparent basis for determining the amount each CSP must pay in pole attachment fees, the legislation would require each pole owner to report to the state within 60 days of a request from the Commissioner of Taxes: (1) the number of poles it owns; (2) an inventory of all attachments to each of those poles; and (3) which CSP owns each of those attachments. Far from being a straightforward exercise, this proposed framework raises a number of complex issues that make it unworkable. Many poles are jointly owned by more than one pole owner. Any attachment to such poles would appear on the inventories of *each* co-owner. Simply tallying up the total number of attachments on these inventories would thus result in double- or even triple-counting the vast majority of pole attachments. To make matters worse, some large pole owners have joint-use agreements that allow them to buy and sell poles between themselves on a monthly basis, where even a single transaction can create discrepancies in pole owner records. The frequency of such transactions multiplies the chances of extensive errors. Given these complications, there would always be a high probability that the number of attachments attributed to any CSP on any utility's inventory would be materially inaccurate for one reason or another. The additional complications of avoiding double- or triple-counting attachments would make it all but certain that each assessment by the Commissioner could and would be challenged for accuracy. For these existing reasons, it will be difficult for the committee to receive an accurate estimation of revenue that would be generated under this proposal.

In summary, S.181 is not only fraught with technical and legal complications but undermines Vermont's current policies on broadband deployment and should be rejected. Thank you for your time and attention to this testimony. Please reach out should you have any questions.

Sincerely,

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[9] *See, e.g.*, *Cal. Payphone Ass'n*, Memorandum Opinion and Order, 12 FCC Rcd. 14,191 ¶ 31 (1997); *Infrastructure Order* ¶ 35; *TCG New York,* 305 F.3d at 76.
[10] *Infrastructure Order* ¶ 39 (citing and discussing FCC and judicial precedent).
[11] *TCG New York*, 305 F.3d at 79-81 (holding that a right-of-way fee was preempted by section 253 where it did not apply to all providers).

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