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Washington is Moving to Strip Away Your Right-of-Way Authority

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Agenda

1. FCC Preemption of Local Zoning and Rights of Way
2. Potential Changes in Federal Preemption in Congress
3. Q&A

Guidepost two:

POTENTIAL CHANGES IN LOCAL PREEMPTION AT THE FCC and in CONGRESS

One constant is Mayor Brian Wahler.





- **Wireless and Wireline Telecomm Dockets**
- **AI/Data Centers**
- **Universal Service, Digital Equity, E-Rate**

FCC Proposals Pending

- *Build America: Eliminating Barriers to Wireless Deployments*, Notice of Proposed Rulemaking, WT Docket No. 25-276, FCC 25-67, 40 FCC Rcd 8115 (Sept. 30, 2025), https://www.fcc.gov/document/fcc-aims-accelerate-wireless-infrastructure-buildout-0.

- *Build America: Eliminating Barriers to Wireline Deployments*, Notice of Proposed Rulemaking, WC Docket No. 25-253, FCC 26-40 (June 26, 2026), https://www.fcc.gov/document/fcc-looks-streamline-modern-high-speed-wireline-deployment-0.

FCC Wireless Siting NPRM

FCC Proposal	Local Government Response
Extend small-cell rules—including fee limits, shortened shot clocks, and the "materially inhibit" standard—to macro towers and other facilities.	Rules developed for dense small-cell deployments should not automatically govern other facilities. An effective prohibition should require an actual inability to provide service. Permitting fees, recurring right-of-way compensation and rent for government-owned property serve different purposes.
Continue using or expanding previous expansive FCC interpretations of the Communications Act.	*Loper Bright* and *McLaughlin* no longer permit the FCC to override court interpretations of the law. Old interpretations must be reconsidered.
Expand deemed-granted remedies.	Section 332 does not use the same language as Section 1455 and thus does not authorize a deemed-granted remedy.
Create an FCC "rocket docket" under Section 253(d).	Siting disputes are reserved for courts in the law, and FCC procedures are ill-suited for these fact-intensive disputes.
Apply the rules to facilities supporting both telecommunications and information services.	Broadband internet is not a telecommunications service and Sections 253 and 332 should apply only when the facility offers at least one telecommunications service.

Wireless Eligible Facilities Requests

FCC proposal	Local-government response
Limit “concealment” to facilities designed to look like something else.	Concealment should also include measures that hide or reduce visibility, such as painting and setbacks.
Permit modifications within numerical size limits despite aesthetic requirements or approval conditions.	Defeating concealment or violating permit conditions should be considered “substantial,” not mandatory.
Treat facilities as “existing” after an underlying permit (such as conditional or special use) expires.	An expired permit should not create a continuing entitlement to modify the facility.
Restrict enforcement and review during permit renewal.	Renewal review protects structural safety and addresses abandonment, decommissioning, and changed land uses.

Wireline NPRM: Timing, Jurisdiction, and Scope

FCC proposal	Local-government response
Establish a presumptive 120-day deadline for wireline applications.	Section 253 does not contain “reasonable period of time” language authorizing a shot clock. Project complexity also makes a uniform deadline unworkable.
Apply Section 253 to commingled facilities and address unused facilities.	Section 253 applies only where facilities provide telecommunications services, rather than broadband or other information services alone.
Apply federal deadlines and fee limits to government-owned poles, conduit, and other property.	Sections 253(c) and (d) do not authorize the FCC to compel access to proprietary government property.

Wireline NPRM: Fees

FCC proposal	Local-government response
Limit fees to each provider's direct costs.	"Fair and reasonable compensation" in Section 253 includes more than direct costs. Direct-cost limits exclude significant shared and ongoing costs, including right-of-way acquisition, maintenance, engineering, inspection, traffic management, restoration, enforcement, and infrastructure damage.
Adopt nationwide safe harbor for fees.	A national rate would disregard differences in land values, construction conditions, congestion, and local costs and would discriminate against larger, higher cost jurisdictions.
Prohibit gross-revenue, per-foot, and recurring fees.	Recurring rent is compensation for private use of public property and encourages providers to removed unused facilities from the right-of-way.
Offset fees by the value of providers' in-kind contributions.	Mutually negotiated agreements are often win-win. Existing negotiated arrangements should be grandfathered. If an offset were adopted, it should reflect the provider's marginal cost.

Congress



[Committee Print]

[SHOWING THE TEXT OF H.R. 2289, AS FORWARDED BY THE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY ON NOVEMBER 18, 2025]

119TH CONGRESS 1ST SESSION	H. R. 2289

To provide that an eligible facilities request under section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 is not subject to requirements to prepare certain environmental or historical preservation reviews.

IN THE HOUSE OF REPRESENTATIVES

MARCH 24, 2025

THREATS IN 119TH CONGRESS – GOALS IN 120TH CONGRESS



Dec. 3, 2025, Vote Tally on Reporting H.R. 2289 out of E&C

- 26-24
- 4 GOP votes missing
  - Mr. Bilirakis (R-FL)
  - Mrs. Houchin (R- Indiana)
  - Mr. Kean (R-NJ)
  - Mr. Evans (R-Co.)

As of 02/24/2025

COMMITTEE ON ENERGY AND COMMERCE
119TH CONGRESS
ROLL CALL VOTE # 9

BILL: H.R. 2289, American Broadband Deployment Act of 2025

AMENDMENT: Final Passage

DISPOSITION: Agreed to, by a roll call vote of 26 yeas and 24 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Guthrie	X			Mr. Pallone		X	
Mr. Latta	X			Ms. DeGette		X	
Mr. Griffith	X			Ms. Schakowsky		X	
Mr. Bilirakis				Ms. Matsui		X	
Mr. Hudson	X			Ms. Castor		X	
Mr. Carter (GA)	X			Mr. Tonko		X	
Mr. Palmer	X			Ms. Clarke		X	
Mr. Dunn	X			Mr. Ruiz		X	
Mr. Crenshaw	X			Mr. Peters		X	
Mr. Joyce	X			Mrs. Dingell		X	
Mr. Weber	X			Mr. Veasey		X	
Mr. Allen	X			Ms. Kelly		X	
Mr. Balderson	X			Ms. Barragán		X	
Mr. Fulcher	X			Mr. Soto		X	
Mr. Pfluger	X			Ms. Schrier		X	
Mrs. Harshbarger	X			Ms. Trahan		X	
Mrs. Miller-Meeks	X			Ms. Fletcher		X	
Mrs. Cammack	X			Ms. Ocasio-Cortez		X	
Mr. Obernolte	X			Mr. Auchincloss		X	
Mr. James	X			Mr. Carter (LA)		X	
Mr. Bentz	X			Mr. Menendez		X	
Mrs. Houchin				Mr. Mullin		X	
Mr. Fry	X			Mr. Landsman		X	
Ms. Lee	X			Ms. McClellan		X	
Mr. Langworthy	X						
Mr. Kean							
Mr. Rulli	X						
Mr. Evans							
Mr. Goldman	X						
Mrs. Fedorchak	X						

12/03/2025

H.R. 2289 – Usurps State & Local Government Police Powers & Property Rights

Shot Clocks and Deemed Granted –

Wireless siting *and (for the first time) wireline franchise/ROW permit applications* are "deemed granted" if not acted upon by shot clock deadlines (again, shot clocks for wireline applications would be totally new).

- Much shorter time periods than Congress provides for federal government. (270 days v. as few as 60 days.)
- *No public safety protections* for construction of "deemed granted" facilities.
- Imposes artificially short timelines that are virtually impossible to meet.
- Creates technical grounds for defeating incompleteness notices.
- Requires a local government to draft, publish and deliver to an applicant, on the same day that the local governing body hears and votes on the application, a written denial decision.
- Empowers providers to install wireless facilities where they choose regardless of local zoning, thus eliminating the ability of local government to balance providers' and neighbors' interests, and jeopardizing the ability of local governments to impose stealth or concealment factors.

H.R. 2289 – Recurring Right-of-Way Fees Sharply Limited to Very Narrowly Defined Costs

Limits all local fees to a locality's direct and objectively reasonable costs. Unlike current FCC rules and safe harbor pricing, localities must cost justify their fees using a complex, burdensome ratemaking formula that seems intended to exclude most recurring costs (and thus minimize recurring fees).

- Would spell the end of gross revenue-based and per-access-line ROW fees, and probably also the end of per-linear-foot fees.
- Would place a heavy (and costly) burden on localities to prove costs directly attributable to placement of facilities in the ROW.
- Would result in massive transfer of public ROW asset value from local governments and their taxpayers to industry members and their shareholders.

H.R. 2289 – Rewrites Cable Act to Eliminate Renewals and Enforcement. Replaces Court with FCC.

Cable: Removes Ability of State and Local Franchise Authorities to Enforce Franchises

- Eliminates cable franchise renewals, thereby removing ability of state or local communities to enforce franchise obligations such as build-out, customer service, and PEG.
- Grants a cable operator the unilateral right to terminate a franchise, but creates no obligation to remove cable system from rights-of-way.
- Affirmatively grants cable operators the right to provide non-cable services while prohibiting localities from imposing any fees on cable operators' revenue from non-cable services.

- Substitutes FCC for local federal district court as reviewing body for challenges to decisions.
  - Breaking promise made by Congress in 1996 that local governments would not be required to travel to Washington to defend local decisions.

H.R. 2289 (New Reasons to Oppose)

JUDICIAL REVIEW (OR LACK THEREOF):

- In response to *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp*., in every section of the bill (wireline, wireless, EFR and cable) there is a specific denial of review at the trial court level of any FCC decisions.
- H.R. 2289 would create an FCC alternative to review local permitting decisions, undoing the 1996 Telecom Act's assignment of most disputes to courts. FCC is given 120 days to make a decision.

SHOT CLOCK MODIFICATIONS

- In each of the components of the bill, the ability to extend or toll a shot clock is limited to 30 days, despite any additional time to which the parties might agree.
- Bill clarifies that all hearings, permits and authorizations that are required for a project must be acted upon with the timeframe outlined in the shot clock.

EFR EXPANSION

- A new expansion of EFR rules includes the hardening of sites – no additional transmission equipment or capability is required for the EFR expansion.
- Codifies FCC's definition of transmission equipment – prior basis for EFR eligibility.

H.R. 2289 (Reasons to Oppose) (cont.)

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TELECOMMUNICATIONS SERVICE FACILITY IS REPLACED BY WIRELINE COMMUNICATIONS FACILITY

- Result would be that non-telecommunications providers would be granted same protections as parties that contribute
  to universal service and 911 services.

CABLE

- Local government can only ask for information that is reasonable and directly related to qualifications.
- While cable operators must inform LFAs of repairs, they don't need LFA's permission if the repair was a result of
  actions outside of the operator's control.
- Expands and codifies mixed use rule by redefining "covered equipment" to include any equipment or materials
  (including any cable, fiber, conduit, or electronics) used in or attached to a cable system to provide any service.
- Creates new grounds and deemed granted relief for cable operator requests for franchise modifications.

What does the Code say?

- Under 47 CFR § 25.104 – Local governments can regulate larger dishes if the city's regulations have a clearly defined health, safety, or aesthetic objective that is stated in the text of the regulation. (By the way, in the Rockford case above, the FCC found that the Preamble of the regulation was sufficient to meet this requirement.)
- Cities don't have carte blanche to regulate even if the regulation makes clear its purpose if the regulation "unnecessarily burden[s]… the federal interests in ensuring access to satellite services…."

Where is the deployment to take place?

- 47 CFR § 25.104 (b)(1) provides a rebuttable presumption of preemption:
  - If the dishes are 2 meters or smaller in diameter, and
  - Deployed in "any area where commercial or industrial uses are generally permitted."
- 47 CFR § 25.104 (b)(2) outlines how to overcome the presumption – but with the current FCC in place and the favor in which SpaceX is held – I don't think a local government would be successful in overcoming any such presumption.

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Questions?

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Gerry's unique background as a nationally recognized telecommunications, cable and small cell advocate combined with his experiences as a registered federal lobbyist provides clients unparalleled service in seeking both legislative and transactional solutions. Prior to joining Best Best & Krieger LLP as a partner in the Municipal Law practice group in Washington, D.C., Gerry was an attorney with Miller & Van Eaton, a highly regarded local government rights of way law firm, and he was the former General Counsel of The United States Conference of Mayors.