



November 8, 2023 (updated from October 25, 2023)

U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining

Re: Letter in opposition to S.2855

Dear Chairs Manchin and Cortez Masto, Ranking Members Barrasso and Lee, Members of the Energy & Natural Resources Committee, and Senator Sinema,

We are writing today in opposition of [S.2855](#), as currently drafted.

We are a grassroots organization that advocates for high-speed, wired broadband deployment, which should be universally accessible to all Americans. Unfortunately, the bill in its current form is likely to perpetuate the digital divide, while causing irreversible harm to our federal lands. These lands represent 670 million acres, including national parks, rangeland, national forests, wildlife refuges, and tribal lands, which is nearly 30% of all land area in the US.

We also recognize that in some states federal land makes up a significant portion of the land area, such as 47% in Wyoming and 39% in Arizona,¹ and there is a role for Congress to determine the best way to use this land to support high-speed broadband deployment.

Our position with respect to communications deployment on federal land is as follows:

1. Wired broadband is a superior technology and Congress should focus on encouraging wired broadband deployment to all Americans. The reason we have a digital divide is because of Band-Aid, inferior solutions,² the latest iterations of which are fixed wireless and satellite Internet.
2. Congress can be technology neutral with respect to wired technologies, which principally means fiber and coax. Providers benefiting from federal support should meet minimum speed standards.
3. When deploying wired solutions on federal land, all efforts should be made, and first priority should be given to, deployments in existing rights-of-way, such as roads, long-distance power transmission corridors, pipelines, or similar easements. Improvements in the Federal permitting process, if any are needed, should apply only to these deployments.

¹ <https://wisevoter.com/state-rankings/federal-land-by-state/>

² A witness in a 9/21/23 House Energy & Commerce hearing noted: “Fiber is the most scalable, reliable, long-term, future proof strategy we have. So the cost efficiency is really lost when we have to keep coming to these hearings and re-appropriating funds year after year to do technologies that are only are Band-Aid approaches to the solution.” https://www.youtube.com/live/ptQJ_wbtHYc?si=ef-HupBMwr7M6hm8&t=6029

4. If a provider believes it is necessary to cut a new corridor across federal land, these applications should be subject to careful scrutiny and existing, applicable federal statutes, such as NEPA and NHPA, which should continue to apply. Federal land management agencies have a duty, as stewards of these national resources, to review these applications adequately and weigh the public interest between, on the one hand a rushed deployment, and on the other hand a deliberate, long-term sustainable approach. “Streamlining” in this context can mean accelerating or rushing the review process in the interest of forcing a Band-Aid deployment before a thorough review is completed, and/or before land managers can work with applicants to adapt its ecological footprint. No streamlining should apply to these applications.

The digital divide exists in rural America for three principal reasons:

- 1) laying wires to remote rural areas is far less profitable than in more densely populated areas. This is a classic example of a market failure. Rural America faced a similar challenge of running wires to remote locations to provide electricity almost 100 years ago. Congress stepped in to address this market failure, passing the Rural Electrification Act of 1936. America could run wires in 1936 and we can run them today with appropriate public policy. A second example is rural home delivery by the post office. USPS own website notes that in the mid-1800s “the costs to the Post Office Department of delivering mail outside of cities was seen as too high.”³ Yet policymakers were able to provide universal postal service.
- 2) Congress and the states have not implemented the kind of universal service policies, as was done with electrification and rural Postal Service, to address the digital divide. Instead, policymakers have been repeatedly persuaded by a telecom industry that has promised universal high-speed Internet in exchange for “deregulation.”⁴ The result has been private investment in the areas that are most profitable, and a perpetuation of the market failure mentioned above. In the past, ISDN and DSL were the Band-Aid solutions to run over existing copper phone lines, while more profitable areas received fiber and hybrid fiber/coax. Fixed wireless and satellite service is the latest “Spruce Moose” promised in exchange for “deregulation”, which in practice has meant granting a small number of private companies free reign to operate on public and private lands, while preempting states’ rights and local communities’ democratic rights to participate in land-use decisions.
- 3) Areas with lower household incomes may spend less money on telecommunication services, and either not subscribe to broadband, or may subscribe to fewer ancillary services and have a lower monthly bill. Collectively, the issue of affordability makes certain areas less profitable for companies to make infrastructure investments.

Instead of addressing the reasons above, this bill will allow industry to cherry pick the technologies that are the least expensive to deploy, even if they are inferior, while only deploying in the areas that are most profitable. These companies would be acting rationally for their shareholders – to maximize revenue and minimize costs. However the societal outcome is not what Congress is seeking – the very definition of a market failure.⁵

³ <https://www.uspsoig.gov/sites/default/files/reports/2023-01/RISC-WP-19-007.pdf>

⁴ Former CTIA President and FCC Chairman, Tom Wheeler, and in his March 2021 Congressional testimony, points to major subsidies having been given to the wireless industry to build out ubiquitous service which never occurred, Tom Wheeler’s Testimony to Congress, https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Wheeler_FC_2021.03.22.pdf

⁵ https://en.wikipedia.org/wiki/Market_failure

The spirit of this bill, as well as the express language of certain sections, is to eliminate NEPA and NHPA with respect to a range of communications facilities. Some of these provisions are included in two bills in the House, which face significant opposition: HR 3557 and HR 4141. HR 3557 passed out of the House Energy & Commerce Committee on party lines and HR 4141 passed out of House Natural Resources Committee also on party lines. These bills have been opposed by the US Conference of Mayors, National Association of Counties, National League of Cities, Earthjustice, League of Conservation Voters, National Resources Defense Council, and the National Trust for Historic Preservation.⁶ Rather than pursue a similar bill in the Senate, we urge the Committee to identify the true impediments to universal broadband deployment and craft bipartisan solutions to this bipartisan problem.

With this context in mind, the following is a section by section analysis of the bill.

Section 2: Definitions

- Communications Facility and Communications Use should be amended to expressly exclude wireless and related equipment from definitions of communications facility.
- Cost Recovery Fee should also include the operation, monitoring, and compliance associated with a communications facility.
- Previously Disturbed Federal Land should be defined as federal land within 6 feet of the location of a prior communications use authorization.
- Underserved Broadband Location and Unserved Broadband Location should both be defined as lacking access to wired broadband, in addition to the speed minimums.

Section 3: Streamlining of applications

The necessity for this section is unclear; in the absence of demonstrated necessity, we would strike this section. Federal land management agencies are already motivated to deploy broadband, are required by a 2018 statute to process these applications within 270 days, and are required to provide a written statement of the reasons for a denial.⁷ It's also unclear whether the process should be "uniform and standardized" across agencies. For example, the National Park Service may have different needs than the Bureau of Land Management. Below are preliminary comments about specific provisions in this section:

- The entire section should apply only to "previously disturbed land", as defined above.
- Amend subsection (a)(2) so that the term "technology neutral" applies only among wired technologies
- Strike (a)(3), which overrides the definition of cost recovery fee above, and prohibits land managers from recovering costs for ongoing monitoring or compliance.
- Amend (b)(2) to reflect 15-year minimum lease term, which is a more typical standard than 30 years. Land managers still have discretion to implement longer leases.
- Consider whether (c)(1), which encourages conducting reviews in parallel, is feasible (for example, does step 2 in the process require the results from step 1?)
- Note that this entire section would apply only to wired deployments, after amending the definitions in Section 2.

⁶ <https://ehtrust.org/wp-content/uploads/EHT-Factsheet-3557-Factsheet-Federal-Legislation-Wireless-Final-.pdf>

⁷ See 47 USC 1455(b)(3), as amended in 2018 (Public Law 115–141)

<https://www.govinfo.gov/content/pkg/PLAW-115publ141/pdf/PLAW-115publ141.pdf>

Section 4: Surface transportation provisions

- Strike this section entirely.

Fixing America’s Surface Transportation Act of 2015 established the Federal Permitting Improvement Steering Council, which was intended to push forward large infrastructure projects greater than \$200 million per project. The Council is 80% funded by taxpayers. This section would apply the resources of this Council to communications projects with no minimum size. This is a mismatch of taxpayer resources. If the Council has reason to believe that such resources are necessary, for example to lay a fiber-optic backbone cable over a very large distance, this section should be amended to a) align with the position statement at the beginning of this letter, b) maintain the minimum size limit of \$200 million, c) be applicable for wireline projects only, and d) allow the Council to recover 100% of its costs via fees.

Section 5: Improving “public safety”

Strike this section entirely.

- This section requires the establishment of a categorical exclusion from NEPA for changes “involving an existing communications facility that would improve public safety” on federal land.
- We all support public safety, however the language is sufficiently ambiguous that it could easily be used for unfettered deployments, exempt from environmental review, on federal lands.

Section 6: Previously Disturbed Land

Strike this section entirely.

- This section exempts from NEPA and NHPA any communications use on any “previously disturbed” federal land.
- If such land is truly “previously disturbed” and a new deployment will not materially alter the environmental footprint incurred by the previous disturbance, then such facilities are unlikely to require environmental review under NEPA and NHPA. If the new deployment does materially alter or expand the environmental footprint, then it should not be statutorily exempted from review, therefore obviating the rationale for the section.

Section 7: 6409(a) exemptions

Strike this section entirely

- Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (Public Law 112–96, [47 USC 1455](#)) preempts state and local rights. It provides that once an antenna is deployed in a particular location, that facility can be modified or expanded and the state or local government is required to approve it. Hundreds of localities around the country have sued the FCC over its rules implementing this section.⁸

⁸ *Montgomery County v. FCC* (2015 Fourth Circuit, No. 15-1240) <https://www.ca4.uscourts.gov/Opinions/Published/151240.P.pdf>
City of Boston v. FCC (pending in the Ninth Circuit) <https://dockets.justia.com/docket/circuit-courts/ca9/20-72749>

- 6409(a) has applicability far broader than federal land; it applies to all states, local governments, public and private land.
- Section 7 removes the savings clause for NEPA and NHPA from Section 6409(a) which would have the effect of exempting any expansion of any site, under state or local control, with an existing antenna from NEPA and NHPA.
- Most deployments under 6409(a) are already exempted under the FCC’s categorical exclusions from NEPA.⁹ While several lawsuits have challenged these categorical exclusions, none has had much impact at the FCC.¹⁰
- To reiterate, this section has little to do with federal land and affects every state, county, town, Main Street, urban, suburban, residential and commercial location in the United States. Identical language has already been widely opposed by the US Conference of Mayors, National League of cities, and various environmental groups.¹¹

Section 8: Online Portals

Amendment: expressly clarify that these online portals are applicable for wired deployment only and exclude wireless.

- We support efforts to make the federal government more efficient in handling wired applications. We do not support any “streamlining” or promoting wireless deployments, which have little to do with broadband or bridging the digital divide.

Section 9: Fee limits

Strike this section entirely

- This section dramatically limits the fees that land management agencies can collect to recover their costs for managing communications infrastructure. The phrase “Notwithstanding any other provision of law” overrides all other laws governing cost recovery fees relating to communications facilities on these federal lands.
- Land management agencies should be able to recover their costs from processing these applications, as well as ongoing monitoring and compliance to ensure facilities operate in accordance with the terms of their authorization. Rather than subsidizing all applications anywhere in the country, Congress could use more targeted tools to identify applications that will specifically benefit wired broadband deployment in unserved and underserved areas and provide subsidies to facilitate those deployments, i.e. addressing the market failures described above.
- Subsection (b) allows the Secretary of Interior to delegate review of applications to industry consultants and subsection (c) allows the Forest Service to do the same, a clear conflict of interest.

⁹ <https://www.ecfr.gov/current/title-47/chapter-I/subchapter-A/part-1/subpart-I>

¹⁰ *The Balance Group v. FCC* (opening brief, DC Circuit, 2020)

https://www.thebalancegroup.net/uploads/7/0/4/2/7042138/viasat.bg_-_opening_brief.pdf

Keetoowah Band of Cherokee Indians v. FCC (DC circuit, 2019)

[https://www.cadc.uscourts.gov/internet/opinions.NSF/4001BED4E8A6A29685258451005085C7/\\$file/18-1129-1801375.pdf](https://www.cadc.uscourts.gov/internet/opinions.NSF/4001BED4E8A6A29685258451005085C7/$file/18-1129-1801375.pdf)

¹¹ For a more complete list of opposition:

<https://ehtrust.org/wp-content/uploads/EHT-Factsheet-3557-Factsheet-Federal-Legislation-Wireless-Final-.pdf>

Section 10: Land Management Working Group

Amendment: ensure that the scope of activities for this group applies only to 1) wired facilities and expressly excludes wireless, and 2) to addressing the needs of unserved or underserved areas.

- We understand the benefit of establishing a Federal Land Management Agency Working group that actually helps to address the digital divide, rather than simply being an instrument to proliferate wireless facilities.

Thank you for your consideration. We welcome the opportunity to speak with you that will truly help to eliminate the digital divide in the United States.

Respectfully submitted,

National Call for Safe Technology
<https://www.TheNationalCall.org>
hello@thenationalcall.org