Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ASSOCIATION OF AMERICAN RAILROADS, Plaintiff, v. JEHMAL T. HUDSON, et al. Defendants.	)	Case No. 1:23-CV-815-MSN-WEF

Brief of *Amicus Curiae* Virginia, Maryland, and Delaware Association of Broadband Cooperatives in Support of Defendants' Motions to Dismiss

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The Virginia, Maryland, and Delaware Association of Broadband Cooperatives ("VMDABC"), by counsel, hereby submits this *amicus* brief in support of Defendants' motions to dismiss the Complaint filed by Plaintiff Association of American Railroads ("Railroad Association").

INTRODUCTION

Railroads once were the engines of technological progress. The rapid expansion of rail networks linked urban and rural areas and fueled America's explosive economic growth in the late 19th and early 20th centuries. Now, however, railroads stand in the way of technological development. Broadband providers have been trying for decades to expand high-speed internet connections to rural areas. But railroads are using their rights of way (acquired largely through eminent domain) to block the roll-out of high-speed data networks. In order to reach rural customers, broadband providers frequently need to cross railroad rights-of-way. But they cannot cross those rights of way without the railroads' permission. Railroads have used this leverage to extract enormous fees for even the most routine of crossings, squeezing as much money as they can from those who wish to expand fiber-optic networks to rural areas. This occurs even on taxpayer-supported projects. The result has been to keep rural broadband both rare and expensive.

Virginia Code § 56-16.3 attempts to solve this problem by establishing: (1) a reasonable standard fee for broadband crossings of railroad rights of way, and (2) an expedited timetable for processing crossing applications. Having failed in their attempt to block this legislation in the General Assembly, the railroads are now trying to use this Court to block it. This Court, however, is not a legislative body and so should decline the Railroad Association's invitation for it to act like one. For reasons stated below the VMDABC supports Defendants' motions to dismiss.

STATEMENT OF *AMICUS* INTEREST

VMDABC is a trade association representing rural broadband providers and installers throughout the Commonwealth. Its voting members (the "Broadband Cooperatives") include both retail providers of broadband services[1] and middle-mile and wholesale providers.[2] The Broadband Cooperatives are owned by not-for-profit electric cooperatives.

VMDABC has an interest in this litigation insofar as it is in the business of building out broadband networks in rural Virginia (and Maryland). Building such networks entails numerous crossings of railroad rights-of-way. As explained below, railroads[3] have demanded unreasonable crossing fees and have engaged in unreasonable delays in processing railroad-crossing applications. This has impeded the deployment of fiber broadband services to rural Virginia. Code § 56-16.3 provides an administrative solution to these problems and will promote expansion of broadband to currently underserved areas of the Commonwealth. VMDABC and its members have an interest in seeing that Code § 56-16.3 is enforced. They submit this *amicus* brief to explain the practical problems that gave rise to the statute, and to supplement jurisdictional arguments made by the Defendants.

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[1] EMPOWER Broadband (owned by Mecklenburg Electric Cooperative), RURALBAND (owned by Prince George Electric Cooperative), Firefly Fiber Broadband (owned by Central Virginia Electric Cooperative), BARC Connects (owned by BARC Electric Cooperative), Bee Online Advantage (owned by Craig-Botetourt Electric Cooperative), and Choptank Fiber (owned by Choptank Electric Cooperative in Maryland).

[2] Rappahannock Electric Cooperative and Northern Neck Electric Cooperative. These are Virginia utility consumer-services cooperatives.

[3] In some instances, railroads have sold rights-of-way or created subsidiaries to hold and manage them. The same arguments apply to those other parties. Thus, when this brief refers to "railroads," it means both operating railroads and non-railroad property management companies acting as agents of the railroad. *See* Code § 56-16.3(A) (defining "railroad company" to include such entities).

BACKGROUND

Deployment of Rural Broadband Necessarily Entails Crossing Railroad Rights-of-Way

Access to high-speed internet is the *sine qua non* for enjoying the benefits of the digital economy and digital culture. As the COVID-19 pandemic made clear, broadband[4] is a prerequisite for remote instruction, tele-medicine, online shopping, and videoconferencing. And it is the backbone of much of popular culture (e.g., using Netflix, YouTube, and TikTok). Broadband is so ubiquitous that, like electricity and running water, most of us take it for granted. Yet even now—more than a quarter century after Amazon.com began taking online orders—there remain hundreds of thousands of Virginians, mostly in rural areas, who lack access to high-speed internet.[5] Not only does this impoverish individual lives, it creates a socioeconomic "digital divide" between the digital haves and have-nots.[6]

In 2016 and 2017, Virginia began making grants to the "Virginia Telecommunication Initiative" ("VATI"). This is an ambitious plan to bridge that digital divide and bring high-speed internet to all Virginians. The VMDABC comprises entities who are building out the infrastructure needed to deliver affordable high-speed internet to rural areas. To date, the principal obstacle has been cost. Much of this arises from distance and geography. "The cost of

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[4] "Broadband" is commonly used to characterize internet links with download speed of at least 25Mbps, and upload speed of at least 3 Mbps. *Demand for Broadband in Rural Areas: Implications for Universal Access, Congressional Research Service* (December 9, 2019) ("*Demand for Broadband*"), at 12. Available at https://crsreports.congress.gov/product/pdf/R/R46108 (last visited 8/24/2023). The retail Broadband Cooperatives aim to provide service many times faster than that—up to 1 Gbps.

[5] This includes wireless, as LTE and 5G towers require broadband "backhauls" connections to provide high-speed internet access. Nationally, around 20 million people lack broadband access. *See Demand for Broadband*, at 1.

[6] *Demand for Broadband*, at 3.

building and maintaining networks in sparsely populated areas with difficult terrain is prohibitive for many providers. It's a cost intensive process with little return on investment."[7]

Some of the obstacles to rural broadband deployment are, however, man-made. Most rural broadband lines follow existing electric infrastructure. The existing electric infrastructure frequently crosses railroad rights-of-way. Virginia's rail network is extensive, crossing from north to south, and east to west. As a result, it is hard to travel any significant distance without crossing one or more railroad rights-of-way. Deployment of broadband to currently unserved areas necessarily entails hundreds of such crossings. Obtaining the right to cross those rights-of-way has proven to be a major—and unnecessary—obstacle to the delivery of broadband to all of the Commonwealth.

Railroads Have Impeded the Deployment of Rural Broadband

Railroad lines do not pose serious physical or technical obstacles to the expansion of broadband. Almost all crossings are aerial, along existing electric-line rights-of-way. For these, executing a rail crossing entails stringing broadband fiber between two existing utility poles. This is a simple operation typically involving six workers and taking less than an hour. Most of this work involves installing appropriate hardware on the "launch pole" and the "receiving pole." The actual crossing blocks the tracks for only a short time, i.e., while the workers are: (1) crossing the track with the communication cable, (2) handing the cable to linemen on both poles, (3) hoisting the cable to the appropriate height, and (4) adjusting the cable to the proper sag, height, and tension. The total time for these four steps is between five and ten minutes. In

[7] *See Breaking Barriers: Streamlining Permitting to Expedite Broadband Deployment, Hearing before the United States House of Representatives Committee on Energy and Commerce, Subcommittee on Communications and Technology*, 118th Congress (April 19, 2023) (hereafter, "*Breaking Barriers*") (testimony of Louis Finkel–National Rural Electric Cooperative Association), at 1. *See also Demand for Broadband*, at 3.

most crossings, including underground crossings, interference with rail traffic is somewhere between *de minimis* and non-existent.

Railroad rights-of-way, however, have presented significant legal obstacles to broadband expansion. Even where there are pre-existing electric-line crossings, broadband providers must obtain permission to cross the railroad rights-of-way. Ordinary property law gives railroads the right to refuse such permission. This creates a monopoly "holdout" situation: broadband providers cannot deploy their networks without paying the railroads a fee—in effect, a "toll"—to cross their rights-of-way.[8] This gives railroads the power to extract economic rents.[9]

Railroads have abused that monopoly power by treating the broadband-crossing-approval process as just another revenue stream to be maximized. To begin with, they have asked for

[8] *See* Eric A. Posner and E. Glen Weyl, "Property is Only Another Name for Monopoly" 9 Journal of Legal Analysis 106 (2017) ("Property laws scholars have long recognized that 'public property' doctrines may be justified in party by monopoly problems, including the problem of assembling pieces of privately owned land (often called the holdout problems) and the problem of denial of access that would occur if a single person owned a road way or navigable river."); Richard Posner, *Economic Analysis of Law* 62 (5th Ed. 1998) (describing situation of extending rights-of-way as a "problem of bilateral monopoly"); Sean M. Collins, R. Mark Isaac, *Holdout: Existence, Information, and Contingent Contracting*, 55 J.L. & Econ. 793 (2012) (defining holdout as "a circumstance in which one entity cannot undertake an action without consent of another entity").

[9] The Railroad Association states that fees should be determined by "market value." (Compl. ¶¶ 89–91.) But there is no "market" for railroad crossings. If a broadband provider needs to cross a railroad right-of-way to reach a community, but is unhappy about the price the railroad charges, it cannot go to a competing railroad in search of a lower price. It is precisely the absence of a market that has enabled railroads to charge extortionate prices for routine crossings. This is a classic "market failure." *See* Posner and Weyl, *supra* note 8, at 106-07 ("[M]arket value is not an accurate estimate of the value of property in precisely the circumstances in which private taking power is justified—when monopoly problems interfere with bargaining.") Code § 56-16.3 is designed to correct the abuses enabled by this market failure, while still allowing railroads fair compensation.

"outrageous" fees for straightforward aerial or underground crossings.[10] Crossing fees regularly exceed $20,000—typically broken down into a $1,500 "Application Fee," a $1,900 "Risk Fee," and a $15,000 to $18,000 "Occupancy Fee."[11] Some railroads charge on a per-strand basis. The high per-strand cost leads broadband providers to throttle the bandwidth available to those residential users who live, literally, on the "wrong side of the tracks."[12] Railroads also impose exorbitant fees for flaggers, often charging several thousands of dollars for a few minutes' work.[13] Michael O'Rielly, a former FCC commissioner, characterizes "[t]he process that private railroads use to permit crossings by broadband companies [as] borderline predatory."[14]

The practical effect of these excessive crossing fees is to increase the costs of building out rural broadband. Those costs are ultimately passed on to customers.[15] Worse, anticipation of such costs has led would-be providers to conclude that broadband expansion is uneconomical for

[10] *Breaking Barriers* (testimony of Michael O'Rielly—MPPRielly Consulting Inc.), at 4 (characterizing crossing fees imposed by railroads as "outrageous").

[11] *See, e.g., Ex Parte* Notice from Michael Romano, Senior Vice President NTCA—The Rural Broadband Association, to Marlene H. Dorch, Secretary, Federal Communications Commission ("Commission"), WT Docket No. 17-79, WC Docket No. 17-84 (Oct. 16, 2020) ("[F]ees for thousands or even tens of thousands of dollars and delays of several weeks or even months can ensue for work (e.g., boring under a railroad crossing for the purpose of installing fiber) that is complete in a matter of hours.").

[12] *Breaking Barriers*, *supra* note 7, (Testimony of Ernesto Falcon, Senior Legislative Counsel—Electric Frontier Foundation), at 11–12.

[13] *Breaking Barriers*, *supra* note 7, (Testimony of Romano), at 5.

[14] *Breaking Barriers*, *supra* note 7 (Testimony of O'Rielly), at 4.

[15] *Ex Parte* Notice from Michael Romano, *supra* note 11, at 2 ("The excessive fees and delays imposed by railroads leveraging the status conferred by state and local laws divert resources that could have been spent elsewhere and limit NTSCA members' ability to expand the quality and reach of their broadband networks.").

certain areas.[16] The situation gets worse the sparser the population. If, for example, a provider needs to cross a right-of-way to serve only a few residences, it will be impossible for it recoup the tens of thousands of dollars paid for the right to cross. The result is that these homes do not get broadband. Securing crossing rights for reasonable fees has been one of the major obstacles to rural broadband expansion.[17]

Railroads also have impeded broadband expansion by their dilatory processing of railroad-crossing applications. The largest railroad in the Commonwealth, Norfolk Southern, does not even process these applications in-house. It uses a third party in California—RailPros—to do this. As a result, application approval can take anywhere between 3 and 18 months. Clearly these applications are not high-priority items for railroad companies. Although railroads blame applicants for delays, that is usually not the case.[18] Indeed, sometimes it is the delay itself that causes an application to be denied.[19] Moreover, even *after* an application is approved, broadband companies often must wait an *additional* 3 to 6 months for railroads to set a crossing date and to schedule flaggers.

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[16] *Ex Parte* Notice from Michael Romano, *supra* note 11, at 2 (noting that the excessive fees "limit NTSCA members' ability to expand the quality and reach of their broadband networks.").

[17] *See supra*, note 11.

[18] Railroads often claim that the volume of crossing requests makes prompt turnaround impossible. But this is a problem of their own making. The cost of adequate staffing is a small fraction of what railroads extract for the privilege of crossing a right-of-way.

[19] Insurance certificates are issued on a project-by-project basis and typically are valid only for 12 months. In at least one instance, Norfolk Southern denied an application because of an invalid insurance certificate—but the insurance certificate was invalid only because of Norfolk Southern's own dilatory conduct. By the time Norfolk Southern got around to reviewing the application, the insurance certificate had expired.

Delay is anathema to any type of construction project. But it is *particularly* harmful to broadband deployment, which is subject to time constraints imposed by federal and state grants. The Broadband Equity, Access, and Deployment Program ("BEAD") has allocated $42.45 billion to expand high-speed internet access.[20] Virginia has recently been awarded $1.48 billion from the BEAD program. The Department of Housing and Community Development awards this funding to broadband providers in accordance with VATI. Recipients of VATI funds, which include local governments and members of VMDABC, have 36 months under federal guidelines to complete their build-out. If the build-out is *not* completed by then, the remaining funding is subject to claw-back by the government. Delays imposed by railroads threaten federal and state funding of rural broadband expansion.

SCC Regulation of Broadband Rail Crossings Under Virginia Code § 56-16.3

Virginia Code § 56-16.3, effective as of July 1, 2023, solves both the market failure caused by railroads' exploitation of their bilateral monopoly position, and the inordinate delays caused by their dilatory processing of railroad-crossing applications.[21] Railroads are public service companies regulated by the Virginia State Corporation Commission ("SCC"). *See* Va. Code, Title 56, Chapter 13. The SCC, created by the Virginia Constitution in 1902, performs many roles vis-à-vis railroads, including: investigating citizen complaints regarding the blocking of rail crossings, conducting accident investigations, inspecting railroad tracks and bridges to promote safe movement of freight and passengers throughout the state, and inspecting rail cars

[20] BEAD was a component of the Infrastructure Investment and Jobs Act ("IIJA"), Pub. L. 117–58 (Nov. 15, 2021).

[21] Virginia is not alone in enacting legislation responding to state-law difficulties in obtaining crossing rights: "To date, about 18 states have adopted such laws to make easements and rights-of-way more compatible with broadband expansion." *Breaking Barriers* (testimony of Finkel). The FCC also has proposed model legislation. *See supra*, note 22.

and locomotives to ensure compliance with Federal Railroad Administration standards. *Id.* When administering laws regulating public service corporations, including § 56-16.3, the SCC sits as a "court of record." Va. Code § 56-6. *See also* Va. Const. art. IX, § 3 (delineating SCC powers as a court of record). There is an appeal of right from the SCC to the Supreme Court of Virginia. Va. Const. art. IX,§ 4; Va. Code §§ 12.1-39, 17.1-406.

Virginia Code § 56-16.3 explicitly recognizes that it is the policy of the Commonwealth "to promote the rapid deployment of broadband throughout the Commonwealth." It creates a streamlined process for submitting and reviewing railroad-crossing applications, while at the same time ensuring that railroad operations are not impeded, the crossings are safe, and the holders of the rights-of-way are compensated fairly. Thus, it requires applicants to submit a detailed application that includes all necessary engineering and construction information. Code § 56-16.3(C)(1). It requires applicants to pay a standard $2000 crossing fee ($1000 if the right-of-way no longer is used for railroad services, and $0 if it is within a public right-of-way).[22] Code § 56-16.3(G). It requires that all crossings be at points that do not "impede or obstruct, in any material degree, the works and operations of the railroad to be crossed." Code § 56-16.3(D)(iii). And it requires applicants to pay up to $5000 to reimburse the railroad for their expenses, if any, in connection with the crossing.

Addressing concerns about inordinate delay, the statute gives railroad companies 35 days from receipt of the application to either (1) grant the application, or (2) petition the SCC for relief (e.g., because the statutory fee is inadequate, or the crossing creates an undue burden on

[22] This is *four times* what the FCC recommends in its "State Model Code for Accelerating Broadband Infrastructure Deployment and Investment." The December 6, 2018 draft, § 2.4.1 proposes a "Standard Crossing Fee" of $500. A copy of this draft model statute is available at https://www.fcc.gov/sites/default/files/bdac-12-06-2018-model-code-for-states-approved-rec.pdf.

the railroad). Code § 56-16.3(H). If the railroad grants the application, then it must coordinate a crossing to occur within 30 days (or another agreed-upon date). Code § 56-16.3(E). If, on the other hand, the railroad company petitions the SCC, the SCC must issue a decision within 90 days from the railroad's receipt of the broadband provider's application. Code § 56-16.3(H). The SCC has broad judicial powers to administer the statute, and "may make any necessary findings of fact and determinations related to the adequacy of compensation, the existence of undue hardship on the railroad company, or the imminent likelihood of danger to public health or safety, as well as any relief to be granted, including any amount to which the railroad company is entitled in excess of the license fee prescribed in subsection G." *Id.* The statute also permits the SCC to consult independent experts to evaluate petitions, with the costs divided equally between the parties. *Id.* Parties dissatisfied with the SCC's decision can appeal it directly to the Supreme Court of Virginia. Va. Const. art. IX,§ 4; Va. Code §§ 12.1-39, 17.1-406. Code § 56-16.3 statute went into effect as of July 1, 2023. Its implementation will remove a major impediment to the development of rural broadband networks.

ARGUMENT

VMDABC largely concurs with the arguments presented in Defendants' briefs in support of their respective motions to dismiss. [ECF Nos. 19 & 21.] It will not recapitulate their arguments here, but instead offers the following supplementary remarks.

I. Railroad companies are not ordinary property owners.

Much of the Railroad Association's Complaint rests on the faulty premise that railroad companies are just like "any other property holder." (Compl. ¶ 1.) Not so. Indeed, the expansion of railroads in America was made possible only because railroads were given extraordinary rights and privileges—rights not granted to "any other property holder." Railroads need long and continuous tracts of property on which to build their rail networks. In the early

19th century, this created a major hold-out problem. Property owners easily could surmise where a rail line was heading. Owners in the path of the future railroad could then demand exorbitant prices for land in the path of the projected line. Under the common-law, railroads were stuck with a Hobson's choice: either pay the price or terminate the rail line.

Because of the public interest in expanding the nation's rail infrastructure, Congress and the General Assembly gave private railroads the tools to overcome those obstacles. Among the tools given to railroads was the power of eminent domain, i.e., the right to acquire property at a fair value without the consent of the prior owner.[23] *See, e.g.*, Va. Code § 56-347. Eminent domain eliminated the hold-out problem and enabled railroads to acquire their extensive linear networks. With these rights came obligations. As public service corporations, railroads were subject to special regulations, and to the jurisdiction of the SCC.

Another way in which railroad companies differ from "any other property holder" is the shape of their holdings. Railroad rights-of-way are mostly linear and can stretch for dozens, or even hundreds, of miles. This unique shape creates unique problems. With ordinary non-railroad property, third parties seldom—if ever—need to traverse the owner's land. For railroad lines, however, it is just the opposite. In rural Virginia, it is often impossible to go from point A to point B without crossing one or more railroad lines. This creates a bilateral-monopoly situation. Parties wishing to extend broadband lines from point A to point B must get permission from the owners of any intervening railroad rights-of-way. There is no getting around it. Railroads were able to obtain their uniquely linear rights-of-way only by wielding the extraordinary power of eminent domain.

[23] To borrow Plaintiff's language, giving railroads this power truly *was* "an extraordinary and unprecedented condemnation and seizure power" given to "for-profit [railroad] companies."

There is historical resonance—and irony—in the railroads' current practice of demanding exorbitant crossing fees from broadband providers. The country's extensive rail networks could not have been built without giving railroads extraordinary rights and privileges—including the power of eminent domain. It was eminent domain that enabled railroads to acquire rights-of-way without paying the extortionate demands of property owners standing in the way of rail expansion. Yet now railroads (the emerging technology of the 19th century) are standing in the way of broadband providers (the emerging technology of the 21st century) and demanding unreasonable prices to cross their rights-of-way. They are engaged in exactly the sort of strategic behavior as the owners of land they once sought to acquire. And they are now complaining about legislation analogous to the legislation that benefitted them some 150 years ago.

II. The Court lacks subject matter jurisdiction over Plaintiff's facial challenge to Code § 56-16.3

This Court must dismiss the Complaint because there is no subject-matter jurisdiction. *Regency Photo & Video, Inc. v. Am. Online, Inc.*, 214 F. Supp. 2d 568, 574 (E.D. Va. 2002) (noting that a district court has a duty to dismiss, even sua sponte, a case where it finds subject-matter jurisdiction missing). Among other things, it has not alleged sufficient facts to ground a facial challenge to the statute. As a result, the Railroad Association cannot establish an injury-in-fact, cannot establish standing, and so cannot establish subject-matter jurisdiction.

A. Plaintiff lacks standing to make a preemption challenge to Code § 56-16.3.

1. Facial challenges.

In Count I, Plaintiff claims that Code § 56-16.3 is barred by the preemption provision of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b). This is a facial challenge to Code § 56-16.3, not an as-applied challenge. *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 415 (2015) ("A facial challenge is an attack on a statute itself as opposed

to a particular application."). Facial challenges are disfavored—indeed, they are "the most difficult ... to mount successfully." *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). To succeed in a facial challenge, the plaintiff must show that there is "'no set of circumstances . . . under which the Act would be valid.'" *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Salerno*, 481 U.S. at 745).

There are three main reasons why courts are reluctant[24] to entertain facial challenges. **First**, facial challenges force the reviewing court to evaluate a statute on a hypothetical and imaginary set of facts—often before courts have had a chance to apply any limiting constructions. *Washington State Grange*, 552 U.S. at 450. This creates a real danger of "'premature interpretation of statutes on the basis of factually barebones records.'" *Id.* (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). **Second**, facial challenges "run contrary to the fundamental principle of judicial restraint that courts should [not] anticipate a question of constitutional law in advance of the necessity of deciding it." *Id.* (internal quotation marks omitted). *See also Baggett v. Bullitt*, 377 U.S. 360 (1964) (noting that the Court "presumes that the [state] statute will be construed in such a way as to avoid the constitutional question presented"). **Third**, "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange*, 552 U.S. at 451.

[24] There are some limited areas, such as First Amendment cases, where the Supreme Court historically has permitted facial challenges. These exceptions are motivated by unique considerations, such as the concern in First Amendment cases about prior restraints on speech. Takings cases do not fall into any such category.

The law governing facial challenges is intertwined with the law of standing. "'Article III standing,'" like the law governing facial challenges, is "'built on separation-of-powers principles.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)). It "serves to prevent the judicial process from being used to usurp the powers of the political branches.'" "To establish Article III standing, a plaintiff must show (1) an "injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" that the injury "will be redressed by a favorable decision." *Id.* at 157–58 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To satisfy the injury-in-fact requirement, the injury must be "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper*, 568 U.S. at 409 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149, (2010)). Moreover, the "threatened injury must be *certainly impending*." *Id.* (emphasis in original). Alleging a "*possible* future injury" is insufficient to establish injury-in-fact. *Id.* (emphasis in original) (internal quotes omitted).

The upshot of all of this is that "federal courts do not issue advisory opinions." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Instead, they decide only matters "of a Judiciary Nature." *Id.* (quoting James Madison in 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)). So, unless there is *no possible way* that a statute could be applied constitutionally, a facial challenge will fail for lack of subject-matter jurisdiction.

2. Preemption claims in ordinary rail crossings must be raised in as-applied challenges, not facial challenges.

Plaintiff grounds Count I on the ICCTA's express-preemption provision: 49 U.S.C. § 10501(b).[25] The Surface Transportation Board ("STB") and reviewing courts have interpreted this section to categorically preempt two, and only two, kinds of state laws: (1) "'state or local permitting that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations,'" and (2) "'state or local regulation of matters directly regulated by the [STB].'" *City of Ozark, Arkansas v. Union Pacific Railroad Company*, 843 F.3d 1167, 1171 (8th Cir. 2016) (quoting *CSX Transp., Inc.*, Fin. Dkt No. 34662, 2005 WL 1024490, at *2–3 (S.T.B. May 3, 2005)). These kinds of preemption challenges may be brought as facial preemption challenges. All other preemption claims—including "routine crossing cases"—must be brought as "as applied" challenges. *Id.* (noting that "'preemption claims in routine crossing cases fall into the category of as-applied preemption challenges.'") (quoting *Franks Inv. Co. LLC v. Union Pac. R.R.*, 593 F.3d 404, 413 (5th Cir. 2010)).

The present case concerns crossings of communication lines over or under a railroad right-of-way. Such crossings are routine. So any preemption challenges to state action concerning such crossings must be brought on an as-applied basis. Plaintiff, however, has brought a facial preemption challenge to Va. Code § 56-16.3. Because preemption challenges based on routine rail crossings cannot be brought as facial challenges, Plaintiff's preemption claim fails for lack of subject-matter jurisdiction.

[25] Preemption, including express preemption, derives from the Supremacy Clause. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479, 200 L. Ed. 2d 854 (2018) ("Preemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it simply provides 'a rule of decision.'").

Yet even Plaintiff *could*, under existing STB law, bring a facial preemption claim under 49 U.S.C. § 10501(b)—and it cannot—any such claim would fail because Plaintiff cannot show that Code § 56-16.3 is unconstitutional in all its possible applications. The gist of Plaintiff's preemption claim is that Virginia discriminates against railroads by (1) capping railroad crossing fees for broadband carriers, (2) impairing railroads' ability to evaluate the safety of a particular crossing, (3) allowing crossings without addressing the possible effects of future changes of railroad use of the tracks, (4) allowing the SCC to determine a monetary remedy for the crossing, (5) burdens rail transportation, and (6) poses undue safety risks. To support these claims, Plaintiff conjures up hypothetical situations that it claims would discriminate against railroads in one or more of these ways.

These allegations do not support a valid facial preemption claim. Rather than show the possibility that *some applications* of Code § 56-16.3 might be preempted, Plaintiff must demonstrate that *all possible applications* of Code § 56-16.3 are preempted. In other words, the possible existence of even a single non-preempted application of the statute will defeat Plaintiff's facial preemption challenge.

It takes little imagination to think of a hypothetical, yet plausible, non-preempted application of Code § 56-16.3. Suppose a broadband provider wishes to make an aerial crossing, using existing power poles, over a spur track that is used only once or twice a year. That such a crossing would present serious safety hazards or materially interfere with rail operations is, to put it bluntly, laughable. As is any claim that a license fee of $2000 (or potentially more, if the railroad petitions the SCC) would not be fair compensation for the privilege to cross the rail line.[26] There are countless such potential broadband rail crossings in rural Virginia—crossings

[26] The observations apply with redoubled force to decommissioned lines.

that threaten none of the litany of harms recited in Plaintiff's Complaint. Thus, Plaintiff cannot show that every potential application of Code § 56-16.3 is preempted. This means that it cannot assert a facial challenge, and so lacks standing to assert its present claim. Accordingly, this Court should dismiss Count I for lack of subject matter jurisdiction.

B. Plaintiff lacks standing to assert its federal Takings Clause claims in Counts II-V.

In Counts II–V, Plaintiff asserts that Code § 56-16.3 violates the Fifth Amendment insofar as it authorizes a taking for "private use" (Count III), without just compensation (Count II), and improperly shifts the burden to railroads to establish the amount of compensation that would be just (Count IV). Because Plaintiff is asserting a facial challenge, it must show that "no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Washington State Grange*, 552 U.S. at 449 (internal quotes omitted). The Complaint makes no such allegations.

Take, first, "public use." Plaintiff makes the broad claim that broadband rail crossings are not for a "public use" because they are for a "private enterprise" and will confer a "private benefit" to broadband providers. But so long as a taking benefits the public, a taking that also benefits a private party still can be a "public use." *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("[A] State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.").

Furthermore, when evaluating whether a taking is for a public use, courts defer to legislative determinations. *Kelo*, 545 U.S. at 483. Because of its respect for federalism, the Supreme Court's "public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording [state] legislatures broad latitude in determining what public needs

justify the use of the takings power." *Kelo*, 545 U.S. at 469. The very passage of Code § 56-16.3, in and of itself, expresses the General Assembly's conclusion that streamlining the process of crossing railroad rights-of-way is in the interest of the Commonwealth's citizens. Moreover, the General Assembly explicitly stated its policy aims within the statute itself. *See* Code 56-16.3(G) ("The establishment of a license fee cap by the Commonwealth is an exercise of its stated policy to promote the rapid deployment of broadband throughout the Commonwealth.").

This Court should not, and may not, interfere with the General Assembly's judgment about what measures will, or will not, benefit the Commonwealth's citizens. Seen in the light of history, moreover, there can be no doubt that this was in the public interest. Broadband expansion to rural areas "mirrors the story of rural electrification nearly 100 years ago."[27] Few people would dispute that rural electrification served a valuable public purpose, even while benefitting private electric companies and cooperatives. The same is true here. Like the railroads, and like rural electrification, expanding broadband access to rural areas will have the effect of knitting Virginians together using the tools of modern technology. This "unquestionably serves a public purpose." *Kelo*, 545 U.S. at 469.

Plaintiff also has not alleged—and cannot demonstrate—that there are no possible applications of Code § 56-16.3 that satisfy the public-use requirement. The potential existence of a single public use is enough to defeat Plaintiff's facial challenge.[28] Again, it is not difficult to imagine a case that would absolutely, positively, and unequivocally serve a public purpose.

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[27] *Breaking Barriers* (Testimony of Finkel), at 1.

[28] The VMDABC does not concede that it is appropriate to view the "public use" issue on a piecemeal, rather than holistic basis. It presents this argument hypothetically to demonstrate that even if the Court ignored legislative intent and viewed the matter of "public use" on a case-by-case basis, Count III still fails.

Suppose a broadband provider applied for a railroad crossing to enable it to deliver free broadband service to a public school, a public hospital, various first responders, a barracks for the Virginia National Guard, a state university, and a home for widows and orphans. For Plaintiff to succeed in its facial "public use" challenge, it needs to aver that such a crossing serves no public use. Yet even the most die-hard anti-takings crank would have to acknowledge that such a crossing was for a public use. So Plaintiff's facial "public use" challenge fails as a matter of law. The Court should dismiss Count III for lack of subject matter jurisdiction.

Similar problems plague Plaintiff's claim, in Count II, that Code § 56-16.3 does not provide fair compensation. Again, plaintiff must show that, *for every conceivable crossing*, the default amounts specific in Code § 56-16.3(G) do not provide fair compensation. Plaintiffs have not alleged facts establishing this. Nor can they. For most crossings, the effect on the right-of-way owner's enjoyment of its property is nil. As noted above, most railroad crossings are aerial, using existing electrical infrastructure. Furthermore, many of the crossings are for abandoned rail lines—including tracks that have not seen trains since the Johnson Administration. Even Plaintiff must concede there are many applications of Code § 56-16.3 where $2000 (for active lines) or $1000 (for abandoned lines) would be fair—indeed, generous—compensation.[29]

Plaintiff attempts to dodge the issue by saying that "*[g]enerally*, neither the market value nor the highest and best use of any crossing" is worth the default license fees under Code § 56-16.3. (Complaint ¶¶ 89-91) (emphasis added). To make a successful facial challenge, however, Plaintiff must allege that there is *no possible instance* where the statute would provide adequate compensation for a crossing. "Generally" will not cut it. So long as there is a single instance

[29] As noted supra, note 22, $2000 is *four times* the default amount in the FCC's model statute. As for crossings along public rights-of-way, the railroad has no right to exclude and so $0 is fair compensation.

where the default statutory compensation is adequate (say, a broadband line over an abandoned and overgrown coal line in a long-forgotten corner of Southwest Virginia), Plaintiff's facial challenge fails for lack of subject-matter jurisdiction.

Yet even if Plaintiff had done the impossible and alleged facts showing that all possible crossings cause railroads to suffer harm for which the statutory defaults do not fairly compensate them—and it has not—Plaintiff still could not establish a facial Takings Clause challenge because Code § 56-16.3 allows railroads to petition the SCC for additional compensation. Under subsection H, railroad companies can petition the SCC if they believe that the default statutory amounts are insufficient to fairly compensate them. To establish a facial takings claim, Plaintiff would need to establish that in *every* such case before the SCC, the SCC would violate its obligations under the statute and fail to award just compensation. This is, to understate the matter, a "speculative, attenuated, and inchoate" notion. *See Daiichi Sankyo, Inc. v. Vidal*, ___ F.Supp.3d ___, No. 121CV899LMBJFA, 2023 WL 4453638, at *18 (E.D. Va. July 11, 2023) (dismissing facial challenge for similar reasons).

Finally, Count IV claims that Code § 56-16.3 violates the Takings Clause because, Plaintiff alleges, the statute impermissibly "shifts the burden of proof regarding public use from the condemning party . . . to the party whose property is to be condemned." (Compl. ¶ 140.) It is difficult to understand this claim. "Public use" is not relevant to any of the three issues that SCC is charged with adjudicating under the statute: i.e., adequacy of compensation, undue hardship, and imminent likelihood of danger to public health or safety. Code § 56-16.3(H). *A fortiori*, the statute does not allocate the burden of proof on the issue. If the question of public use is raised with the SCC, the SCC can address the question of burden of proof at that time. There is no need for the Court issue an advisory opinion now.

C. Plaintiff lacks standing to assert the claims under the Virginia Constitution in Counts V-VII and the Court should not exercise supplemental jurisdiction to entertain them.

Plaintiff's state-law takings and due-process claims (Counts V-VII) suffer from the same infirmities as the corresponding Fifth Amendment counts.[30] Simply put, Plaintiff cannot establish that every application of § 56-16.3 would impose a constitutional injury on the owner of the right-of-way. *See supra*. Furthermore, the Court should decline supplemental jurisdiction under 28 U.S.C. § 1367(c)(1). Plaintiff's state-law claims raise Virginia constitutional issues about a Virginia statute that has never been interpreted by Virginia courts. "[F]ederal court[s] should be exceedingly cautious about invalidating a state statute or a local ordinance under a state constitution." *S. Blasting Servs., Inc. v. Wilkes Cnty., NC*, 288 F.3d 584, 592 (4th Cir. 2002). *See also Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949) (finding that validity of New Jersey statute under New Jersey Constitution was "ultimately for the state courts"). Thus, in addition to the reasons stated in Section II.B, *supra*, the Court should decline supplemental jurisdiction over Plaintiff's claims that Code § 56-16.3 violates the Virginia Constitution.

III. Principles of abstention also favor dismissal.

Finally, even if the Court determines that it could assert subject-matter jurisdiction in the present case—and, for all the reason stated above, it cannot—the Court should decline jurisdiction under the abstention principles elaborated in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

[30] Plaintiff claims that the Virginia Constitution bars the use of eminent domain by "for-profit, private entities." (Compl. ¶ 98.) But it is the SCC that is wielding power under Code § 56-16.3. Furthermore, nothing in the Virginia Constitution bars using eminent domain in a way that will benefit private parties. It simply bars applications of eminent domain where the "primary use" is for private gain or benefit.

District courts have a "virtually unflagging duty to hear and decide" cases over which they have jurisdiction. *B.R. v. F.C.S.B.*, 17 F.4th 485, 496 (4th Cir. 2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (internal quotation marks omitted). There are, however, exceptions to this rule. Relevant here, district courts may exercise their equitable powers to abstain from cases that concern local disputes whose adjudication in federal court might either disrupt an enforcement regime carefully worked out by state law, or interject a novel construction of an as-yet uninterpreted statute.

Burford involved a Texas law that dictated how near new oil wells could be situated to existing oil wells. The statute established a default distance. But it allowed exceptions to this rule under special circumstances. It was enforced by the Texas Railroad Commission, whose decisions were subject to judicial review. Over the years, the Commission and Texas Courts had developed a body of law for determining when, and to what extent, exceptions to the default distance should be granted. The adjudications themselves depended on case-specific circumstances, such as the past behavior of the owners of nearby wells.

The plaintiff in *Burford* brought a diversity case in federal court asserting, among other things, that the statutory scheme violated its due-process rights. The district court dismissed the action, but the Fifth Circuit reversed. On further appeal, the Supreme Court reversed the Fifth Circuit and reinstated the District Court's order dismissing the case. It noted that "[a]lthough a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion . . . refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest." 319 U.S. at 317–18 (ellipses added and internal quotes omitted). One such circumstance, it held, was where a federal action would disrupt a state regulatory regime and be "dangerous to the success of state policies." *Id.* at 332–34. It noted that "[i]t is particularly

desirable to decline to exercise equitable jurisdiction when the result [of declining jurisdiction] is to permit a State court to have an opportunity to determine questions of State law which may prevent the necessity of decision on a constitutional question." *Id.* at 333, n.29. Abstaining in such cases was necessary out of respect for "the independence of state action." *Id.* at 334.

Thibodaux was a takings case in which the condemnee had removed the action to federal court. At issue was a Louisiana statute that had "never been interpreted" vis-à-vis the circumstances presented in the case. The district court *sua sponte* stayed the matter, and the Supreme Court upheld this ruling. In its opinion, the Court noted that "eminent domain is a prerogative of the state, which . . . may be exercised in any way that the state thinks fit." 360 U.S. 26 (quoting *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 257 (1905) (Holmes, J., dissenting). Thus, it held, it was appropriate for district courts to stay their hands in "a state eminent domain proceeding brought in, or removed to, federal court." *Id.* at 28. Doing so "avoid[s] the hazards of serious disruption by federal courts of state government," and avoids "needless friction between state and federal governments." *Id.* Moreover, where a state statute had yet to be interpreted by state courts, it was better for a district court to await such state-law interpretations than to "make a dubious and tentative forecast" itself. *Id.* at 29. Doing so was not an "abnegation of judicial duty;" it was a "wise and productive discharge of it." *Id.* As in *Burford*, the *Thibodaux* Court grounded its decision on "regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State." *Id.*

In the present case, as in *Burford* and *Thibodaux*, the relief requested by Plaintiff necessarily would interfere with a state administrative and judicial scheme that relates to important state objectives. The Commonwealth's express policy is to "promote the rapid

deployment of broadband throughout the Commonwealth." As an enforcement regime, Code § 56-16.3 is well calibrated to balance the interests of railroad companies, broadband providers, and the general public. An important component of this enforcement regime is speed of adjudication. Allowing federal courts to interfere in this procedure would disrupt the Commonwealth's implementation of the statute. For all these reasons, the present case is *exactly* the sort of case in which a district court, in deference to the sovereignty of the Commonwealth, should decline jurisdiction. Accordingly, even if the Court were to determine that it could exercise subject-matter jurisdiction, it should use its equitable discretion to abstain from exercising that jurisdiction in deference to Virginia's scheme for addressing broadband crossings of railroad-company property.

CONCLUSION

For all the foregoing reasons, VMDABC supports Defendants' request that this Court dismiss the present action.

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