Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
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Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	)	WC Docket No. 11-59
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COMMENTS OF THE CITY OF NEW YORK

I. INTRODUCTION

The City of New York ("City") hereby submits the following comments in response to the Federal Communications Commission's ("the Commission" or "the FCC") Notice of Inquiry in the above-captioned proceeding.[1] The City supports the FCC's goals of increasing broadband accessibility nationwide, in terms of facility deployment and adoption,[2] as well as its efforts to update existing regulatory paradigms

[1] *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, WC Docket No. 11-59 (rel. April 7, 2011) ("*NOI*").

[2] In this regard, the City has been an active participant in proceedings before the FCC and the National Telecommunications and Information Administration ("NTIA") on these matters. *See e.g.* Comments of the City of New York, *American Recovery and Reinvestment Act of 2009 Broadband Initiatives*, Docket No. 090309298-9299-01 (filed with the NTIA on April 13, 2009); Reply Comments of the City of New York, *In the Matter of A National Broadband Plan For Our Future*, GN Docket No. 09-51 (filed July 21, 2009); Comments of the City of New York, *NBP Public Notice # 7: Contribution of Federal, State, Tribal, and Local Government to Broadband*, GN Docket Nos. 09-47, 09-51, 09-137 (filed Nov. 6, 2009); Comments of the City of New York, *In the Matter of Additional Comment Sought on Public Safety, Homeland Security, and Cybersecurity Elements of National Broadband Plan, NBP Public Notice # 8*, GN Docket Nos. 09-47, 09-51, 09-137, PS Docket Nos. 06-229, 07-100, 07-114, WT Docket No. 06-150, CC

to account for the critical nature of broadband.[3] While it is appropriate at this time to consider whether the existing regulatory models are best suited to promote broadband accessibility, the City emphasizes that it has used the existing regulatory tools to achieve the very goal that has eluded national policymakers – namely, universal deployment of broadband facilities by competing service providers. Consequently, the City cautions the FCC against attempts to limit the authority given to local governments by Congress, as any such limitations may ultimately thwart the goal of universal broadband deployment.

In response to the Commission's questions, these comments describe the procedures the City has utilized to achieve competitive universal wireline broadband deployment within the City's borders. The Comments also address the NOI's questions about time periods and procedures for siting of wireless service facilities, as well as the Commission's authority with regard to local rights-of-way management and zoning matters. Finally, we describe recommendations for next steps that the Commission and other interested stakeholders can pursue to both expedite universal broadband deployment in the U.S. and reduce unnecessary regulation.

While the City strongly supports this Commission's data-centric approach to policy-making, the City also believes that the threshold assumptions upon which data is collected are vital to the establishment of good policies. In this regard, the City believes

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Docket No. 94-102, WC Docket No. 05-196 (filed Nov. 17, 2009); and Comments of the City of New York, *American Recovery and Reinvestment Act of 2009 Broadband Technology Opportunities Program and Broadband Initiatives Program*, Docket No 0907141137-91375-05 (filed with the NTIA on Nov. 30, 2009).

[3] *See e.g. Connect America Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, (rel. Feb. 9, 2011); *In the Matters of Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, Notice of Proposed Rulemaking, FCC 11-32 (rel. March 4, 2011).

that the Commission, working with all stakeholders, can play an important role in highlighting best practices. The fundamental question though is "what is a best practice?" Is it a best practice to establish time periods for right-of-way access and permitting decisions, based on some theoretical construct of what is "reasonable," if those purportedly "reasonable time periods" never result in facility deployment, or only limited facility deployment? Perhaps, a better indicator of a "best practice" is instead whether the practice has resulted in service providers actually deploying facilities ubiquitously in a given area.

Given the vital importance of broadband to our nation, policies about its deployment should be not be based on the old service provider mantra of "if you lower it (i.e., supposed entry barriers), we will come." Instead, we urge the FCC to look at where service providers *have actually come* and place greater emphasis in its policies on the experiences of those communities. "They" have come to New York City, and they have done so in a way that is beneficial to increasing both competition and service coverage. Below is a description of our experiences.

II. DEPLOYMENT OF WIRELINE BROADBAND FACILITIES IN THE CITY

The City recently filed reply comments in the FCC's annual video competition proceeding describing the City's success in obtaining universal broadband deployment.[4] In these reply comments, the City noted that, based on the most recent census figures, about 3 million of the nation's 112 million households were located within the City of

[4] See Reply Comments of the City of New York, *In the Matter of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269 ("*2011 Video Competition Proceeding*") (filed July 8, 2011) ("2011 Reply Comments").

New York.[5] Using its existing cable franchising authority,[6] the City has been able to work with service providers to craft franchise agreements which ensure that between 2.5% and 3% of U.S. households will have *contractually guaranteed* access to at least two wireline broadband operators by 2014.[7] By remaining steady in the commitment to demanding franchise obligations for universal build-out, the City has utilized its franchise authority to establish an environment for ubiquitous competitive current and future wired infrastructure that is unsurpassed.

As noted in the City's 2011 Reply Comments, there are households within the boundaries of the City of New York that, because of neighborhood demographics and/or location and infrastructure issues, would not, as a purely market-based matter, be served by facilities of the quality and capacity offered by the City's cable franchisees. It is only because City policymakers held, and exercised, franchise authority to assure that *all* households in the City would be served, and that a franchisee's investment decision would reflect not a household-by-household economic evaluation but a broader evaluation of the profit potential of investment across its franchise area as a whole

[5] *See* http://quickfacts.census.gov/qfd/states/36000.html (last accessed July 8, 2011) (number of households in New York City obtained by adding together households in the five counties included within City limits – New York, Bronx, Kings, Queens, and Richmond).

[6] New York State does not have statewide cable franchising.

[7] Based on franchise agreements with Time Warner Cable of New York City ("Time Warner") and Cablevision Systems New York City Corporation ("Cablevision"), virtually every household in the City has had guaranteed physical access to at least one wireline MVPD operator for well over a decade. Based on a 2008 franchise agreement with Verizon, City residents are also now *contractually guaranteed* to have physical access to a second, competing, wireline MVPD operator. Construction of Verizon's competitive FiOS system is already far along ("homes passed" for FiOS in the City is now well past the 50% mark) and pursuant to carefully negotiated local franchise requirements, will achieve the goal of making competitive service available to all households in the City within the next several years.

(including a commitment to build to *all* homes in the franchise area), that universal access commitments from multiple competing wireline broadband providers could be achieved.

The City recognizes that the highly successful result achieved via franchising authority here in New York was to some extent made possible by the particular demographic and economic context of New York City, and that the exact same results are not necessarily replicable in every local community. But it is precisely *because* local demographic, economic, and other conditions are crucial to determining the best methods to achieve maximum broadband buildout, adoption, quality, and competition that it is absolutely essential that the authority of local governments, who can be maximally responsive to unique local circumstances, not be compromised. Just as the specific franchising formula that has led to a vast and ubiquitous competitive buildout in New York City does not necessarily provide an inflexible model for how to achieve the best possible broadband buildout in communities of very different size and nature, so too it would be utterly inappropriate – and destructive to the broadband rollout effort -- to apply the same franchising standards that may have proven workable in a small rural community to the very different circumstances in New York City. The Commission must not turn this NOI process, or a search of "best practices" into a "race to the bottom" in which it searches for those communities that impose the least oversight and then concludes that if some communities have adopted such limited approaches that must be appropriate for all. We know in New York that the measured exercise of substantial local authority to demand ubiquitous buildout (while also assuring substantial compensation for the use of local rights-of-way and support for public, educational and government

uses of the installed facilities) was not only consistent with, but crucial to, the achievement of maximum, competitive, broadband availability.

It is the very essence of the job of local officials to carefully balance the varied needs of their communities, including encouraging investment in technology infrastructure while also assuring that such investment is broadly disbursed and that the benefits of such investment redound to the entire community. To limit or divest the ability of local officials to engage in such balancing would be to eliminate a critical tool in the ongoing achievement of any national broadband plan.

III. SITING OF WIRELESS FACILITIES

The Commission asks about the time periods associated with obtaining permits for wireless facility siting. The City, undoubtedly like many other municipalities, recognizes the vital role that wireless services play in promoting and sustaining economic growth. Consequently, the City has sought to establish procedures that balance the City's legitimate zoning needs with the service providers' need for swift implementation. In New York City, the average number of days during the period of July 2010-June 2011 for processing cell antenna application permits was 25.17. While this time period falls well within the timeframes established in the Commission's *Shot Clock Ruling*,[8] it is the City's position that all municipalities should be able to use the authority granted to them by

[8] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, FCC 09-99 (rel. Nov. 18, 2009) ("*Shot Clock Ruling*").

Congress in the 1996 Telecommunications Act to make legitimate zoning decisions based on local needs.[9]

Moreover, in the City's view looking only at "time periods" or fees does not adequately reflect whether the market is working well in this area. New York City's experience with requests for access to its street light and traffic light poles may serve as an illustration of the myriad issues at stake in these matters.

On the issue of wireless service facility siting, the City cautions national policymakers against repeating past mistakes with respect to environmental issues. Just as policymakers and businesses once treated air, water, and other natural resources as unlimited, free assets to be used and abused without respect to the costs that society pays with the loss of such resources ultimately recognized as scarce and exhaustible, wireless service and equipment providers today would like to be able to make unlimited demands on the visual and esthetic value of landscapes and streetscapes. Instead, those charged with regulation must accomplish the difficult task of balancing such values against the widely recognized importance of expanding the availability of broadband wireless services. Maintaining that balance is fundamental to what local governments do.

After being approached by several companies interested in placing wireless antenna equipment on City-owned and managed street light poles, the City developed a franchise system that provides for a small base compensation rate paid by all who choose to participate, and for a fair selection process that offers all participants an opportunity to select pole locations around the City in a manner intended to accommodate multiple

[9] 47 U.S.C. § 332(c)(7).

potential competitors and networks, while also assuring that space remains available for future development. To gain higher priority in this selection process, participants are invited to submit bids as to how much they are willing to pay per pole in return for an opportunity to select some pole locations ahead of others bidding less.

The City has been sued by one provider claiming this methodology is inconsistent with federal law and an impediment to the efficient development of wireless systems. The provider has argued that the City should instead be obligated to hand over its street light poles to whatever company asks for them first, and that the City may not seek compensation for the use of such City-owned poles beyond the "costs" that the City incurs in allowing the use of its poles.

In the first instance, such argument ignores the fact that were the very same antennas placed on nearby private property, private property owners would of course be able to charge a market rent for the use of their property for such purpose. If the City were barred from doing the same it would merely encourage providers to "game the system," and shift antenna facilities from private property to public street property where their visual impact on the public may be greater. But in the larger sense, the demand the City faced that street pole locations simply be handed over on a first-come first-served basis fails to recognize that such street pole locations are taxpayer-funded, scarce commodities for which a market-based allocation system, such as the bidding process the City has established, best assures the most efficient uses.

Were the City required to hand out antenna locations on City streetlight poles on a first-come basis, as has been proposed by some, there is no assurance whatsoever that

such first-come provider will offer service that effectively serves public demands. And precisely because the most advantageous street pole locations are a scarce, not an unlimited resource, allocating such facilities on a first-come, or by other some other essentially random basis, would potentially freeze out the providers that would be most successful in the marketplace. On the other hand, a bidding system such as the one the City has implemented, in which the scarce resource of specific pole locations are allocated to the highest bidder, uses classic market incentives to allocate scarce resources to providers who offer the most desirable and efficient service to the public, as evidenced by their ability to offer the highest bids for priority sites. In a world where antenna sites are scarce resources, the City's approach – in which a market mechanism is established to allocate priority to the most desirable sites, while also preserving some site availability for all interested providers (so as to assure that no provider can claim to be prohibited or effectively prohibited from providing service) and for future innovation – reflects a balance well-designed to assure efficient deployment of wireless broadband services that the public will want.

The federal government itself has recognized that efficient allocation of scarce resources is better achieved with such market pricing techniques. For many years, the prevailing federal methodology for distribution of wireless spectrum to private, profit-making entities was essentially to give such spectrum away. But Congress and the Commission have recognized in recent years that an important tool in maximizing efficient allocation of scarce spectrum resources is through market pricing mechanisms (such as auctions), which are intended to advantage those providers most likely to provide services that will be desirable and successful in the public marketplace.

Fundamental economic principles suggest that those companies most likely to have an efficient and market-desired product will be able to bid the highest for scarce spectrum. It is those very same market-based principles that the City has embraced in its approach to allocating street poles in its franchises covering the use of such assets (such City franchises are currently held by no less than *five* different competitors, and the City has recently received additional proposals from others seeking to join this system as well).

IV. LEGAL AUTHORITY

In the *NOI*, the Commission asks about its legal authority to promulgate rules pursuant to sections 253 and 332(c)(7) of the Communications Act,[10] as well as its authority to adjudicate rights-of-way cases under section 253(c).[11] The Commission asks whether its general grants of authority under sections 706(a), 201(b), 303(r), and 4(i) in any way bolster its ability to promulgate rules pursuant to sections 253 and 332(c)(7).[12]

In the City's view, both sections 253 and 332(c)(7) circumscribe the Commission's role with regard to rights-of-way management and wireless facility siting, respectively. The *general* grants of authority cited by the Commission in no way change the *specific* limiting language contained in the provisions at issue.

To construe sections 253 and 332(c)(7) as vesting the Commission with rulemaking authority is tantamount to disregarding the very text of these provisions. Although both provisions were part of the 1996 Telecommunications Act, they are distinct from other sections of the Act. In these other sections, Congress either directed the Commission to

[10] *NOI* at ¶ 57.

[11] *Id.* at ¶ 51.

[12] *Id.* at ¶ 57.

conduct a rulemaking,[13] or was silent on the issue,[14] arguably leaving it to the Commission's discretion. In contrast, sections 253 and 332(c)(7) provide a clear path of review for actions taken by state and local governments pursuant to these provisions.

Pursuant to section 253(d), Congress provides for preemption by the Commission in the event of a violation of either section 253(a) or 253(b). The fact that Congress did not authorize the Commission to act in any other manner demonstrates Congress's determination to prohibit the FCC from promulgating rules pursuant to these provisions. Likewise, other than for matters concerning section 332(c)(7)(B)(iv), a plain reading of section 332(c)(7) vests authority for reviewing section 332(c)(7) matters with the courts.[15]

Any attempt by the Commission to promulgate rules pursuant sections 253(a)-(b) or 332(c)(7), on the basis of the general authority granted to the Commission in sections 706(a), 201(b), 303(r), or 4(i), would not only contravene a well-recognized rule of legislative interpretation – that the specific provision trumps the general one – but also completely undermine Congress's directive about when the Commission is permitted to act. Why would Congress specifically direct the Commission to engage in preemption (a targeted form of oversight) under section 253(d) if it meant to allow the Commission to promulgate rules (a broad form of oversight) under the same provision? Likewise, why would Congress, as part of a statute that almost exclusively deals with the Commission's

[13] *See e.g.*, 47 U.S.C. § 251(d) and 47 U.S.C. § 254(a)(2).

[14] *See e.g.*, 47 U.S.C. § 222 and 47 U.S.C. §. 271.

[15] *See* 47 U.S.C. § 332(c)(7) (stating "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action, or failure to act, commence an action in any court of competent jurisdiction.").

authority, specifically carve out actions taken by state and local governments under section 332(c)(7) for court review, if it meant for Commission implementation via rulemaking? The very title of the provision – "Preservation of Local Zoning Authority" – runs counter to such a conclusion.

With regard to section 253(c), it is clear from the text of the Act[16] and the legislative history associated with section 253(c),[17] that the Commission has no authority to adjudicate such matters, let alone to undertake a rulemaking on them. The City notes that the issue of the Commission's authority to adjudicate section 253(c) matters was presented squarely in the Petition for Declaratory Ruling filed by Level 3 Communications, LLC, in 2009.[18] The City and others filed detailed comments on the issue in that proceeding. The City requests that, to the extent the Commission chooses to act on that matter in the instant proceeding the comments from the Level 3 proceeding be incorporated in this record.

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[16] Section 253(a) states:

> "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Sections 253(b) and (c) then provide what have generally been viewed as safe harbors under which a statute, regulation, or legal requirement that violates (a) is saved from preemption. Finally, section 253(d) provides for preemption by the Commission in the event of a violation of either subsection (a) or (b), but not subsection (c).

[17] Senator Gorton – the sponsor of the amendment that became the present version of Section 253(d) – stated that under his amendment "in the case of these purely local matters dealing with rights-of-way, there will be no jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances." *See* 141 Cong. Rec. S8306 (daily ed. June 14, 1995); *see also BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1190-91 (11th Cir. 2001) (describing legislative history, quoting remarks of Senator Gorton). According to Senator Gorton, his amendment "retains not only the right of local communities to deal with their rights of way, but their right *to meet any challenge on home ground in their local district courts*." (emphasis added). *See* 141 Cong. Rec. S8308 (daily ed. June 14, 1995).

[18] *Wireline Competition Bureau Seeks Comment on Level 3 Communications, LLC, Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253*, WC Docket No. 09-153 (rel. Aug. 25, 2009).

V. NEXT STEPS

As noted above, the City believes that there is immense value to gathering data about and highlighting "best practices" with regards to right-of-way management and wireless facility siting. But, in the first instance, one must determine what evidence of a "best practice" is. In the City's view, the success stories are those where we have seen widescale deployment of broadband, preferably on a competitive basis.

The City recognizes the concerns of service providers about multiple layers of federal, state, and municipal regulatory requirements. While the City supports efforts to simplify regulations, the City notes that cable operators – i.e., the very entities that have had to work with municipalities all over the country to gain entry into the market - were, in fact, the trailblazers in the area of broadband deployment. In the words of the National Cable & Telecommunications Association, cable operators "were the *first* to offer broadband Internet access service."[19]

This is not to suggest that dealing with franchise authorities necessarily or automatically begets deployment of high tech facilities, but it does demonstrate that the converse is not necessarily true. In fact, in the City's view, the cable franchising model is a good starting point for establishing a "best practice" going forward. New York City and other municipalities have successfully used this model to obtain widespread deployment of broadband facilities.[20] The 1984 Cable Act established a right-of-way

[19] *See, e.g.,* Comments of the National Cable & Telecommunications Association, *2011 Video Competition Proceeding,* at 4 (filed June 8, 2011).

[20] *See generally* Comments of Anne Arundel and Montgomery Counties, Maryland, and the Cities of Boston, Massachusetts, and Laredo, Texas, *2011 Video Competition Proceeding* (filed June 8, 2011).

access paradigm that accounted for local concerns within the context of federal parameters.

The communications landscape, however, has changed dramatically since passage of the 1984 Cable Act. In an era when all services are essentially transmitted over the same pipe, the old regulatory distinctions of "telecommunications," "cable," and "broadband" increasingly do not apply. Regulation based on largely outdated definitions not only leads to a potentially unnecessary expenditure of time and energy associated with fitting the proverbial "square peg in the round hole,"[21] but may actually skew market outcomes.

To best address these matters the Commission should expeditiously establish the Intergovernmental Advisory Committee ("IAC"),[22] and allow it to work with the FCC to develop proposals about both best practices and updates to the existing regulatory paradigms. Such proposals must account both for the oversight responsibilities of states and localities, as well as the logistical concerns of service providers. Only after the IAC has had an opportunity to be involved in the process should any formal rulemaking (where legally appropriate) on these issues be commenced.

VI. CONCLUSION

Where state and municipal governments are best positioned to deal with a range of issues that implicate uniquely local, community-based matters, such as maximizing dispersion of service availability throughout the community, assuring the efficient use of

[21] In this regard, harmonization of the regulatory scheme may also lead to a reduction in regulations that are currently based on outdated definitions. *See Statement from FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies*, (rel. July 11, 2011) (noting the direction to "FCC staff to prepare a plan to continue identifying outmoded or counterproductive rules.").

[22] *FCC Seeks Nominations for the Reauthorized Intergovernmental Advisory Committee*, DA 11-708 (rel. April 18, 2011).

scarce local resources, and protecting local landscape and streetscape esthetic values, the City respectfully suggests that states and municipalities' existing authority should not be eroded. Constraining the authority of local officials best positioned to deal with such issues will not in the long run enhance the deployment and use of broadband services across the country. But, working with local and state officials to establish a new paradigm that addresses current and legitimate service provider concerns offers the best guarantee for efficient and effective broadband deployment.

Respectfully submitted,

/s/_____

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