Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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	)	WC Docket No. 11-59
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REPLY COMMENTS OF THE CITY OF NEW YORK

INTRODUCTION

The City of New York ("City") hereby submits the following reply comments in response to initial comments filed in the Federal Communications Commission's ("the Commission" or "the FCC") Notice of Inquiry in the above-captioned proceeding.[1] In these reply comments, the City responds to allegations made by service providers in their opening comments about the City's right-of-way and zoning practices, and expresses its support for the initial comments filed by the National League of Cities, et. al. ("NLC").[2]

[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] Comments of the National League of Cities, et. al. (filed July 18, 2011) ("NLC Comments").

In an effort to garner a clear and detailed record, the Commission asked service providers to give the names of local authorities when discussing their conduct. Below, the City addresses specific assertions made about its practices by CenturyLink, NextG, and PCIA.

In CenturyLink's comments, it claims that the City is seeking franchise compensation from CenturyLink while receiving no such franchise compensations from Verizon.[3] In fact, however, the City is now receiving millions of dollars in franchise compensation annually from Verizon, and seeks only fair and reasonable compensation from CenturyLink. In previous litigation (ultimately resolved via settlement) CenturyLink (formerly Qwest) repeatedly pointed to the ostensible "prohibition" the City was placing on CenturyLink's ability to provide telecommunications services by seeking reasonable compensation for private profit-making occupation of local rights-of-way. Yet, both before and after such litigation, CenturyLink has proved fully capable of offering competitive telecommunications services in the City while paying the City reasonable compensation for the use of its rights-of-way that is not arbitrarily limited to some view of the "costs." The City can imagine what CenturyLink's reaction would be if it was limited by the Commission in charging for use of *its* facilities to its "costs."

CenturyLink lists a series of issues or disputes it has had with various governments regarding compensation for use of its rights-of-way.[4] It is the City's experience that some providers tend to approach these matters confrontationally and others amicably, but that the City has successfully administered a highly competitive,

[3] Comments of CenturyLink at 9-10 (filed July 18, 2011).

[4] *Id.* at 4-11.

varied, and open communications marketplace while also seeking fair compensation for use of the rights-of-way. CenturyLink and others had some early success in convincing some courts to interpret the Telecommunications Act of 1996 in ways not supported by the language of the statute. Now that the courts are correcting that initial error,[5] CenturyLink is asking the Commission to overrule this more accurate series of court decisions and restore a view that the judiciary is now rejecting. The Commission must not, and indeed lacks the authority to, take up this invitation.

NextG alleges in its comments that the City's treatment of NextG "is an example of delay, discrimination, and municipal treatment of wireless deployment as a revenue center."[6] In fact, NextG pursued litigation against the City for years while others signed reasonable franchise agreements with the City. All the while NextG claimed in court that it could not financially support the City's compensation requirements and that the City's system for allocating pole locations fairly among different competitors was unworkable for NextG. But somehow, as soon as NextG had a customer seeking antennas in New York City, NextG signed the very franchise it had claimed it could not possibly operate under, and has built a huge network of antennas on poles around the City under those very terms.

In its initial comments, the City has already described its system for allocating the limited space available on City light poles, and the reasoning behind this approach.[7] NextG's claim that the City delayed in issuing an initial RFP disregards the fact that, at

[5] *See e.g. Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), *cert. denied*, 129 S. Ct. 2859, 174 L. Ed. 2d 576 (2009); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2860, 174 L.Ed. 2d 576 (2009).

[6] Comments of NextG Networks, Inc. at 11 ("Comments of NextG").

[7] Comments of the City of New York at 6-10 (filed July 18, 2011).

the time, NextG was presenting to the City a new type of service. The City needed time to respond in a comprehensive fashion, taking account not only of NextG's needs, but also the needs of other service providers who might seek access to the same light poles. At that time, the City was particularly cautious, having recently dealt with a prior occupier of the poletops, whose bankruptcy had imposed upon the City the burden and expense of removing the company's equipment.[8] Consequently, the City wished to ensure that any future allocation scheme prevented a repeat of this occurrence. The approach developed by the City not only provides a fair mechanism for allocating scarce space, but the financial commitment associated with placing the bids provides an added assurance that those who get the space will have the wherewithal to follow through on their business plan. This is similar to some of the reasoning behind the federal spectrum auctions.

Ultimately, NextG's claims that the City's allocation mechanism "makes planning a network essentially impossible in Manhattan" is belied by the fact that there are five different competitors holding poletop franchises. Moreover, NextG alone has located approximately 1,500 DAS facilities on the City's poletops. With regard to the pending litigation that NextG claims is associated with its request for access to the City's light poles, both parties sought some time ago to have the matter dismissed.

In footnote 104 of its comments, PCIA cites to a New York City Council franchise authorizing resolution for reasons which are incomprehensible to the City.[9] This footnote argues against applying a percentage of revenue form of compensation with

[8] http://news.cnet.com/Metricom-leaves-1-billion-debt-trail/2100-1033_3-269438.html

[9] Comments of PCIA at n.104 (filed July 18, 2011).

respect to DAS facilities, but the authorizing resolution cited requires no such form of compensation, and indeed the City does not charge its DAS providers a percentage of revenue. The text to which footnote 104 is associated seems to refer (although somewhat confusingly) to DAS providers being "burdened" with "regulations" applicable to cable TV or ILEC providers. But the New York City Council resolution cited in footnote 104, apparently to support this point, deals with mobile services only and is unrelated to cable television or ILEC services or providers. The City is thus mystified as to why this City Council resolution is cited by PCIA in its comments.

As a general matter, the City observes the following of PCIA's comments: DAS systems are in effect simply another form of wireless transmission and reception, along with antennas systems on towers and on rooftops. When a provider seeks to install antennas on a tower on state or municipal land, or on state or municipal building rooftops (be it a city hall, school, or police station), that provider deals with the owner of the property in the same legal context as it would deal with the private property owner next door. The public owner of such properties should have, and under the law does have, the same discretion to authorize or not authorize, and to condition in whatever manner, the use of that publicly owned property. DAS providers, by merely shifting the location of the relevant antennas from towers and rooftops to the tops of poles on local streets, should not thereby gain some additional rights to demand access to public property for antenna locations that antenna installers do not otherwise have.

PCIA asks the Commission to clarify the application of Section 253, Section 332(c)(7), and the "Shot Clock" rules to providers.[10] When local governments determine whether, and if so on what terms, to make public property available for DAS equipment, such determinations are not zoning or land use determinations that regulate the use of private property; [11] thus, neither Section 332(c)(7), nor the Shot Clock, are applicable. And, because DAS antennas on public property are by their nature an optional alternative to antennas on private property, decisions regarding them cannot have the prohibitive effect that is a prerequisite of the application of preemption under Section 253. To the extent that any clarification should be made with respect to such matters, these are the only clarifications that would be appropriate or consistent with the Commission's authority with respect to DAS equipment installations on public property.

The City does not oppose DAS installations – indeed, we have actively encouraged them and, as noted, we have permitted a huge number of them. The City believes they can, under some circumstances, contribute to the communications infrastructure, at least in New York City. But, as a matter of law and policy, local governments must retain the discretion to decide whether and on what terms the installations of such systems on public property are in the public interest in a particular community or location.

Some of the other difficulties described by service providers highlight how so many of the decisions associated with local right-of-way management and zoning are based on the unique needs of a given community. These instances further exemplify

[10] Comments of PCIA at 39-43.

[11] *See Sprint Spectrum L.P. v. Richard P. Mills, et. al.*, 283 F.3d 404 (2nd Cir. 2002).

why it would be administratively impossible for the federal government to take on the role of managing all of this.

For example, although some service providers may find problematic the City's prohibition on installation of utility poles in the public rights-of-way in Manhattan, this policy reflects the City's determination, going back over a century, to underground all utility wiring in the City's densest areas, including Manhattan.[12] In a rural area, such a prohibition might not be needed. Similarly, AT&T, while not questioning the legitimacy of the requirement, states that the City's new fire code restrictions "can significantly limit the location of antennas and equipment on rooftops."[13] Again, the City of New York, with its extremely high density of multiple dwelling buildings, dating from a wide range of historical eras, and the unique demands of fire protection required to protect those who live, work, and visit the City, has unique fire protection needs that must be carefully balanced when rooftop occupancy issues are raised. The Commission cannot and must not put itself in the position of making fire-protection policy determinations in the context of ostensibly trying to make it a little easier to place wireless antenna facilities.

In short, decisions about such matters as whether and where to place utilities underground, how best to balance a community's safety needs against its communications needs, and the evaluation of fair and reasonable compensation for the profit-making occupancy of local rights-of-way, are all uniquely local matters in nature. San Francisco's reply comments in the instant proceeding similarly demonstrate that many local factors, including topography, the concerns of a particular community, and

[12] *See, e.g.*, Comments of NextG at 11.

[13] Comments of AT&T at 9 (filed July 18, 2011).

local environmental requirements, can affect the outcome in facility siting determinations.[14] It would be both ill-advised and beyond the scope of its legal authority for the Commission to devise a federal regulatory scheme that could account for the varied scenarios presented in these determinations.

The City supports the comments filed by the NLC and its statements that Commission attempts to regulate right-of-way management and zoning matters is both unnecessary and violative of the Telecommunications Act of 1996. The NLC's comments show that there is no correlation between limiting local authorities' ability to engage in right-of-way management and broadband deployment. Rather, similar to the City's own experience, the NLC's comments demonstrate that effective use of the right-of-way authority granted to municipalities by Congress often leads to more widespread broadband deployment – guaranteeing service to less profitable or harder to serve areas.

The City supports the NLC's recommendation that the Commission focus on carefully tailored voluntary and educational efforts rather than seeking to regulate local right-of-way management and zoning, responsibilities that Congress has squarely placed with local authorities.[15] In this regard, the City urges the Commission to take up the role outlined in the NLC's comments about educating the public regarding the environmental effects of radiofrequency emissions.[16] As noted by the NLC, members of the public frequently raise this issue before local officials in zoning proceedings, even though local

[14] See Reply Comments of the City and County of San Francisco, WC Docket No. 11-59 (filed Sept. 30, 2011).

[15] NLC Comments at 41.

[16] *Id.* at 50-51.

governments have a limited role in this area.[17] Finally, the City strongly supports the NLC's recommendation that the Commission do more to address the broadband adoption issue.[18] It is increasingly adoption barriers, rather than deployment barriers, that are limiting wide-scale broadband usage among some populations.

[17] *Id.* at 51.

[18] *Id.* at 52.

CONCLUSION

The City appreciates the Commission's strong commitment to increasing broadband deployment and usage. The City believes that expeditious establishment of the Intergovernmental Advisory Committee will provide an appropriate forum for federal, state, and local governments to work together on the regulatory issues associated with enhancing broadband availability.

Respectfully submitted,

/s/_____

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