

In The Matter of )  
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A National Broadband Plan for Our Future ) GN Docket No. 09-51

## I. INTRODUCTION

The task of ensuring that all Americans have meaningful access to broadband service is crucial, but also daunting. To compare a project of at least comparable importance and scope, between 1958 and 1991 the federal government spent about \$114 billion in then-current dollars, or the equivalent of approximately \$400 billion in 2009 dollars, on the construction of the Interstate Highway System (“IHS”), which was built to be the nation’s primary arterial transportation system for motor vehicles (see <http://www.fhwa.dot.gov/programadmin/interstate.cfm>). Through this initiative and complementary projects around the nation to expand and improve local streets and roads, the United States assured the presence of an infrastructure that allows almost every

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citizen in America to travel by car, bus or truck from the door of their homes or businesses to just about any other location anywhere in the 48 contiguous states. The price of access for users of this ubiquitous system of streets and highways is mostly limited to the gasoline taxes drivers pay to fill their tanks, assuring virtually unlimited access to the nation's roads and highways to all Americans, regardless of economic status.

To achieve a comparable level of ubiquity and ease of access for every citizen to the information transmission network that will be the 21<sup>st</sup> century equivalent of the roads and highways built in the previous century, a comparable national commitment must be considered. Unlike the basic approach that the United States has historically taken to building roadways, which has largely been a task for government, our nation has traditionally, since at least the dawn of the telegraph, treated the construction of information transmission infrastructure as an endeavor for private capital to undertake. This approach has in the past moved some of the financial burden of network construction and maintenance away from the public sector.

On the other hand, however, relying on the private sector for much of our information transmission infrastructure has meant that difficult policy questions, related to universality of coverage, access and affordability, and structural limitations on the benefits of market competition where vast infrastructure investments are required, have arisen and continue to arise in ways that contrast with the history of the publicly built and mandated roads and highways network. In considering the task before it, which can in its essence be defined as an effort to assure that America's high speed information networks are as freely, openly and ubiquitously available as our streets and roads, it must be recognized that the scope of the task is likely to require a national commitment, with

contributions from both the private and public sectors, as deep as that which created the Interstate Highway System and the local road networks to which the IHS interconnects.

The City has at some length already commented on the essential need, in providing funding for broadband efforts, for the federal government to commit at least as much in resources to assuring *affordable* access to broadband services as it does to mere construction of broadband facilities to unserved locations.<sup>2</sup> It is unnecessary for the City to repeat itself here, especially as many others have made this point well in the initial comments in this proceeding.<sup>3</sup> The City simply emphasizes here that if the Interstate Highway System had been built in a manner that assured construction throughout the country, but allowed access to the system to be so costly that it remained unavailable as a practical matter to large portions of the American population, including large portions of America's urban population, that system would have failed in its goals. A real national broadband infrastructure must be truly accessible to all, both physically and economically. Physical access alone, especially where such access is dependent on private infrastructure owners whose goals may not always be in accord with those of the public, is not sufficient.

In these reply comments, the City will focus on its experiences with respect to the productive, indeed essential, role the City has played in contributing to the growth of broadband through its role as the manager of local public-rights-of-way, and will urge the Commission not to further restrict local authority to act in that capacity.

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<sup>2</sup> Comments of The City Of New York, *American Recovery and Reinvestment Act of 2009 Broadband Initiatives*, NTIA Docket No. 090309298-9299-01, at 4-10 (filed on April 13, 2009); Comments of The City Of New York, GN Docket No. 09-40 (filed on April 13, 2009).

<sup>3</sup> Private and public commenters agree on the importance of affordable access. *See, e.g.*, Comments of Cox Communications, GN Docket No. 09-51, at 5 (filed on June 8, 2009); Comments of Time Warner Cable, GN Docket No. 09-51, at 20 (filed on June 8, 2009); Comments of The National Association of Telecommunications Officers and Advisors et. al., GN Docket No. 09-51, at 10-11 (filed on June 8, 2009) ("NATOA").

## **II. LOCAL MANAGEMENT OF PUBLIC RIGHTS OF WAY, AND THE ROLE OF SUCH MANAGEMENT IN ACHIEVING THE NATION'S BROADBAND GOALS.**

In Paragraph 50 of the NOI, the Commission asks: “to what extent do tower siting, pole attachments, backhaul costs, cable franchising and rights of way issues... stand as impediments to further broadband deployments....”<sup>4</sup> A number of parties commenting in this proceeding have offered their suggestions on this part of the Commission’s inquiry, and the City seeks to respond with observations about its own experience with respect to such matters.

It is the City’s experience that, contrary to the apparent cast of the Commission’s question, as expressed in the NOI, municipal and state participation in such matters, by assuring that local conditions and local needs are taken into account when public rights-of-way of land use matters are involved, have *enhanced* and will continue to *enhance* the deployment and effectiveness of broadband services across the United States.<sup>5</sup>

Between 2.5% and 3% of all the residential households in the United States are located within the five boroughs of New York City.<sup>6</sup> It is precisely due to local cable franchising that virtually *every* household in the City has physical access to wired, broadband service provided by cable television companies using a hybrid fiber-coax architecture in local rights of way. And it is precisely due to local cable franchising that *every* household in New York City is now contractually guaranteed, pursuant to a 2008

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<sup>4</sup> NOI at ¶ 50

<sup>5</sup> See also, NATOA, at 41-49 (discussing the importance of local rights-of-way management).

<sup>6</sup> As of the 2000 census, about 3 million of the nation’s 100 million or so households are located within the City of New York. <http://quickfacts.census.gov/qfd/states/36/3651000.html>; <http://quickfacts.census.gov/qfd/states/00000.html> (last accessed 7/20/2009).

franchise contract with Verizon, to have physical access to a second, competing, wired, broadband service – this service using highly advanced fiber-to-the-home architecture, known as FiOS. It is imperative to emphasize that this result would almost certainly not have been achieved absent concentrated and determined efforts by City officials, utilizing the cable franchising authority available to them under common law and state law, and further protected and assured under federal cable television law.

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 broadband facilities of the quality and capacity offered by Time Warner, Cablevision and Verizon's FiOS. That is, some locations in the City would not be expected, by a corporate provider acting solely in response to market forces, to generate a sufficient return on investment to justify installation of such broadband facilities. 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 (including a commitment to build to *all* homes in the franchise area), that universal access to multiple competing wired broadband services could be achieved.

Franchise negotiations on ubiquitous access have historically been contentious, and potential franchisees are often reluctant to surrender discretion to leave unserved those locations where profit margins may be lower than others. By remaining steady in the commitment to demanding franchise obligations for universal buildout, the City has utilized its franchise authority to establish an environment for ubiquitous competitive current and future wired broadband infrastructure that is unsurpassed.

Local franchising is (especially compared with, say, notions that have been debated regarding “federal franchising”) particularly well-tailored to achieve the positive outcomes for broadband infrastructure the City has successfully pursued. Physical and economic conditions vary widely from community to community, and the effort to attract private broadband investment to serve as fully as possible all sectors of a community, without being so demanding as to drive such investment away from the community entirely, is a nuanced process that frequently requires intimate knowledge of local conditions, needs and potential. Under the “national franchise” proposals that were heavily promoted by some private broadband providers in Congress only a couple of years ago, the City would certainly not have the contractual commitment that has been achieved, to the benefit of both the City and the nation, for the construction of ubiquitous, universal access to fiber-to-the-home infrastructure across the entire City.

Some private providers regularly raise anecdotal evidence of one or another municipality ostensibly “abusing” its franchise authority to make excessive demands that supposedly fail to serve the public interest.<sup>7</sup> Arguments have been made in the past that such examples show that local franchising is an impediment to broadband deployment and service, and, thus, that local franchising should be eliminated or heavily restricted. But argument by (often apocryphal) anecdote is harmful in this context. There are also examples one could gather of abuse of discretion by private broadband providers, but such anecdotes do not mean that the private sector’s role in the achievement of national broadband policy should be eliminated or fundamentally restricted; the same is true of

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<sup>7</sup> See, e.g., Comments of The National Cable & Telecommunications Association, GN Docket No. 09-51, at 45 (filed June 8, 2009).

local franchising. It is not in a local government's interest to impede or delay the provision of broadband services in its community.

To suggest, as some have in the past, that the federal government understands the value of broadband availability in a way local officials do not, such that the federal government needs to strip away the local "impediment" of cable franchising, is to mistake the relationship between local officials and their constituents. Local officials must carefully balance the varied needs of their communities, including encouraging investment in technology infrastructure while also assuring that such investment is broadly disbursed. 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.

The Commission has also received comments from some in the wireless services industry arguing that their industry needs new protections from the supposedly wayward or incompetent influence of local governments bent on slowing the buildout of wireless broadband services.<sup>8</sup> Such claims that local land use management and/or local control of street poles and other locally-owned or managed facilities in public rights of way are supposedly fundamental impediments to wireless broadband buildout fail to reflect the real world necessity of balancing land use and streetscape issues with the strong desire, as important at the local level as at the state and national level, with assuring that wireless infrastructure is in place to serve expanding community needs.

It would be simple in this respect for national policymakers to repeat the kind of mistake made in the past with respect to environmental issues that have led to widespread

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<sup>8</sup> See *e.g.*, Comments of CTIA–The Wireless Association, GN Docket No. 09-51, at 15-19 (filed June 8, 2009); Comments of Verizon, GN Docket No. 09-51, at 63 (filed June 8, 2009).

concerns about climate change and ecological degradation. In the past, policymakers and businesses treated air, water and other natural resources as essentially 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 the federal government to mandate that the demands that their facilities place on the visual and esthetic value of landscapes and streetscapes be treated without due consideration, and that those charged with the difficult task of balancing such values against the widely recognized importance of expanding the availability of broadband wireless services represent impediments to technological innovation that must be rushed out of the way. Such an approach reflects a fundamental error in assessing what local governments do. New York City's experience with requests for access to its street light and traffic light poles may serve as an illustration of the real issues at stake in these matters.

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 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 a first-come basis as has been proposed, 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 is 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 *seven* different competitors).

To summarize the City's observations with respect to paragraph 50 of the NOI, local (and, to some extent, state) governments are best positioned to deal with a range of issues that implicate uniquely local, community-based matters, such as (among other things) maximizing dispersion of service availability throughout the community, assuring the efficient use of scarce local resources, and protecting local landscape and streetscape

esthetic values. 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. To the contrary, protecting such local authority will better assure that nationwide broadband service deployment and adoption is swift, efficient and effective. New York City's experience with these matters is strong evidence of that conclusion.

Finally, customer service represents another crucial area that arises in the context of local right-of-way franchising that, while not touched on directly in the Commission's NOI, is necessary to ensure that users have a positive broadband experience. The City and other municipalities frequently find themselves the first "port of call" for frustrated or confused customers, and often the "last great hope" after these same customers have made a round of calls to state and federal agencies. An explicit statement from the Commission about local governments' ability to establish and enforce broadband customer service requirements will help to address a number of customer service issues in the broadband area.

While increased competition should over time address a number of customer service matters, it is also the case that certain issues require more oversight. For example, a growing number of consumers feel they do not receive adequate notice about what they perceive as "hidden" restrictions and rate increases in their service plans. In a truly competitive market, customers would make informed decisions based on perfect knowledge about the services they are purchasing.

Local governments are often best positioned to identify the trends in customer service problems, and should be able to use their full local franchising authority to address such matters. With regard to cable operators, the Communications Act

specifically delegates this authority to local governments. Section 552 of the Communications Act states that “[a] franchising authority may establish and enforce – (1) customer service requirements of the cable operator...”<sup>9</sup> The provision is not limited to customer service requirements pertaining to cable *service*, but rather applies to *all* services provided by the cable operator. With respect generally to providers of information services, Congress has nowhere in federal statute preempted, or authorized the Commission to preempt, local franchising authority with respect to information services franchises. An explicit recognition by the Commission in this proceeding of local governments’ franchise authority in the area of broadband customer service will enable local governments to better address legitimate customer service problems.

#### **IV. CONCLUSION**

In these reply comments, the City has reiterated that a national broadband plan must reflect not merely physical access to broadband infrastructure but the *availability* of services in a practical sense, including affordability. It has also described how local right-of-way authority has served to *support*, not deter, national broadband goals and how

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<sup>9</sup> 47 U.S.C. § 552(a)(1).

such authority can continue to play an important supportive role going forward. The City looks forward to continuing to work with the Commission, the Congress, relevant industries and other jurisdictions in the on-going development of a national broadband plan.

Respectfully submitted,

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