

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Accelerating Wireline Broadband Deployment by)	WC Docket No. 17-84
Removing Barriers to Infrastructure Investment)	

**COMMENTS OF THE CITY OF NEW YORK ON FURTHER NOTICE OF PROPOSED
RULEMAKING ADOPTED NOVEMBER 16, 2017, RELEASED NOVEMBER 29, 2017**

Introduction.

The City of New York (the “City” or “New York City”) submits these comments in the above-captioned proceeding, in response to the Commission’s issuance of a Further Notice of Proposed Rulemaking (the “FNPRM”) as part of a larger document (Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking) adopted November 16, 2017 and released November 29, 2017 (“FCC 17-154”). Although the City reserves the right to further comment on issues raised in the FNPRM, this filing will focus in particular on the matters raised in paragraphs 178-179 (“¶¶ 178-179”) of FCC 17-154 within the FNPRM.

Discussion.

(1) Over the past twelve months, the City has submitted several sets of comments in Commission proceedings describing in substantial detail the limits on the Commission’s legal authority to preempt local government action.¹ To the extent the Commission is considering any steps with respect to such preemption in the context of natural disasters, an area it raises generally in ¶¶ 178-179, the City urges the Commission to review these recent prior City submissions. There is nothing in any of the federal statutory provisions the Commission cites in ¶¶ 178-179 that suggests even remotely that natural disaster scenarios, or other emergency circumstances, lessen the constraints on Commission preemption authority, or expand its preemption powers, with respect to local government activity. The limits the City has previously described on such Commission preemption thus would continue to apply in all respects in such circumstances. Congress expressly barred the construction of other provisions of the Telecommunications Act of 1996 (the “TCA”) to imply preemptive effect (TCA Section 601(c)(1)). If the Commission believes as a policy matter that it should be granted some sort of preemption authority in natural disaster scenarios, it should seek such authority from Congress, rather than claim it without statutory permission. Aside from this general observation that follows from the City’s previous recent comments on Commission inquiries regarding preemption, the City also adds the following comments on the specific matters raised in ¶¶ 178-179:

¹ See the City’s comments in the WTB 16-421 docket, and the City’s comments and reply comments in the WTB 17-79 docket and this WC 17-84 docket.

(2) These paragraphs purport to be part of a "Notice of Proposed Rulemaking" while proposing no rule or any specific action whatsoever and more properly fit as an amendment to the earlier Notice of Inquiry in this docket, not in a Notice of Proposed Rulemaking. ¶¶ 178-179 provide not the remotest inkling of what the Commission has in mind in terms of what sort of "rule" or "rules" it might be considering here, if any, other than the vague references to the broad concepts of preemption and natural disasters. The Commission has not identified in even general terms what the subjects of such potential preemption might be, such as the sorts of laws, decisions or activities of local governments that give rise to the Commission's questions about potential preemption. Neither has the Commission suggested even generally what it might do with some theoretical preemption authority that would cure some similarly unidentified problems with local requirements in the natural disaster context. None of these subjects or issues are even remotely named, identified, described or revealed. While the City appreciates any opportunity to weigh in on such matters early in the Commission's process, so input can be provided while the subjects and issues to be considered are still being formulated rather than after they are identified, such preliminary involvement cannot be appropriately described as participation in a "Notice of Proposed of Rulemaking" that could then validly be followed by issuance of a final rule in compliance with 5 USC Section 553(b)(3). If the Commission is serious about considering potential preemption steps of some sort specifically applicable to natural disaster circumstances, at the current level of discussion these matters could properly be raised, perhaps, by reopening for comment the existing Notice of Inquiry in this docket, with the general questions raised in ¶¶ 178-179 added to the questions originally asked in that Notice. Or perhaps a separate Notice of Inquiry might be appropriate, depending on what the Commission actually has in mind here, which as noted is extremely unclear. But what is surely not an appropriate characterization of, or setting for, ¶¶ 178-179 in their current form is a Notice of Proposed Rulemaking.

(3) The question the Commission asks in ¶ 179 is self-contradictory: "How can we ensure that any preemptive action we take helps rather than inhibits state and local efforts?" The very concept of taking preemptive action is that the Commission would be overruling what would otherwise be a state or local government action; preemption is inherently not an act of helping state and local efforts. In the case of a state or local law or rule that may be temporarily inappropriate to apply in a natural disaster or other emergency circumstance, state or local officials may choose not to enforce such local law or rule, whether pursuant to state or local emergency laws or rules that themselves empower such officials to make such decisions, or pursuant to generally applicable administrative or executive discretion in the application of enforcement authority. What such officials neither need nor seek is the "help" of federal officials purporting to choose via preemption what state or local laws or rules will or will not apply in such circumstances. Although as an abstract notion it might seem that in some natural disaster situations state or local officials might welcome the inapplicability of certain state or local legal constraints that seem inappropriate under the special circumstances, if such inapplicability derives from federal-level decision-making or authority that limits either the discretion of such officials or the applicability of the state and local laws or rules under which they operate, it will not serve as help but as interference from external action likely to be poorly tailored to critical and immediate local emergency preparation, response or recovery needs.

In addition, the question the Commission asks contradicts its other work on telecommunications resiliency and disaster recovery. The Commission continues to encourage wireless providers to adopt the Wireless Network Resiliency Cooperative Framework, submitted by CTIA and a number

of wireless carriers,² which proposes a voluntary, cooperative approach to work with wireless carriers to improve resiliency and ensure wireless networks remain available during natural disasters and other emergencies. It seems counter-productive for the Commission to now propose to impose restrictions on a state and locality's ability to act while allowing the wireless industry to act cooperatively on a voluntary basis.

(4) To "best work with state and local regulators to get broadband infrastructure operational after a natural disaster" (§ 179), federal agencies may be asked to provide federal resources and/or to exercise federal authority over private action that might not be available at the state or local levels. But the one federal power a local government is least likely to find useful or helpful, and most likely to find disruptive and distracting, is purported preemption of local law.

In neither the 9/11 nor the Hurricane Sandy emergencies did the City seek Commission preemption of the City's own laws and rules, nor would such preemption have been helpful. New York City and State each have their own legal ability to respond flexibly to natural (or other) disaster or emergency situations without the need for federal preemption of our own laws and rules. Certainly, federal activation of appropriate powers, that cities or states may not otherwise possess, to require or limit action by private parties may be helpful in some disaster situations and the City may actively seek such assistance in some contexts. But that is very different than the counter-productive notion that Commission suggests -- that preemption of the City's own laws and requirements, as they may be applicable in emergency or disaster situations, would be at all helpful to the City's efforts. To the contrary, such efforts at preemption would likely create only confusion and contradiction where clarity for local emergency workers, law enforcement officers and public officials, applying the laws and rules they have been trained to apply and following the chains of command they are best prepared to abide by and which have been tailored to local conditions and needs, would be most urgently desirable.

Conclusion.

The very general area of potential preemption of some entirely unspecified kind, as raised in §§ 178-179 is a matter more properly treated as a subject for a Notice of Inquiry than a Notice of Proposed Rulemaking, and its mere inclusion here in a portion of a document designated as a Further Notice of Proposed Rulemaking could not provide the proper procedural groundwork for a subsequent issuance of a rule. However, in hopes of providing useful information to the Commission, the City has here treated the questions asked in §§ 178-179 as if they were what they should be, that is, questions in a Notice of Inquiry, preliminary to any subsequent issuance of a proposed rulemaking notice that the Commission might later decide to pursue. In that context, the City suggests that, based on the City's own experience, Commission preemption of state or local governments for the ostensible purpose of supporting state and local government efforts to preserve and/or restore broadband service is unlikely to be useful and indeed is more likely to be counter-productive. And in any event, as the City has noted in previous, recent comments to the Commission, the Commission's authority to preempt state and local governments has been

² See Federal Communications Commission Order in the Matter of Reliability and Continuity of Communications Networks, Including Broadband Technologies, PS Docket No. 11-60 (Adopted Dec. 14, 2016).

carefully constrained by Congress and the existence of a natural disaster or emergency situation does not vitiate or lessen such statutory constraints on the Commission's authority.

Sincerely,

/s/
THE CITY OF NEW YORK

January 17, 2018