

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

_____)
In the Matter of)
)
Inquiry Concerning the Deployment of)
Advanced Telecommunications Capability to) GN Docket 04-54
All Americans in a Reasonably Timely)
Fashion, and Possible Steps to Accelerate Such)
Deployment Pursuant to Section 706 of the)
Telecommunications Act of 1996)
_____)

REPLY COMMENTS
OF THE UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION
OF COUNTIES, AMERICAN PUBLIC WORKS ASSOCIATION, TEXAS COALITION
OF CITIES FOR UTILITY ISSUES, MONTGOMERY COUNTY, MARYLAND, AND
THE MOUNT HOOD CABLE REGULATORY COMMISSION

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I. INTRODUCTION

The United States Conference of Mayors, National Association of Counties, American Public Works Association, the Texas Coalition of Cities for Utility Issues, Montgomery County, Maryland, and the Mount Hood Cable Regulatory Commission (collectively “Local Government”¹) jointly file Reply Comments in this proceeding² to:

- Recommend for Commission consideration the Comments of the National Association of Telecommunications Officers and Advisors;
- Point out to the Commission that a § 706 review of barriers occurs only upon finding that advanced services are not being deployed in a reasonable and timely manner;
- Challenge claims that the United States is trailing other countries in the deployment of broadband networks and the advanced services such platforms make possible;
- Encourage the Commission to resist falling prey to the promise of fiber to the home in exchange for regulatory relief, yet again;
- Document that the industry commenters seek to invent a standard of review for right-of-way management and rent that is not found in 47 U.S.C. § 253;
- Demonstrate that the industry commenters tell different audiences different stories.

¹ See Comments of the United States Conference of Mayors, National Association of Counties, American Public Works Association, Texas Coalition of Cities for Utility Issues, Montgomery County, Maryland, and the Mount Hood Cable Regulatory Commission, filed May 10, 2004, in the above-captioned proceeding (hereafter “Local Government Comments”) at 2-4 for a description of the parties.

² Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Notice of Inquiry, GN Docket No. 04-54 (rel. Mar. 17, 2004) (hereafter “NOI”).

II. NATOA's Comments are Instructive and Deserve Special Commission Attention.

Local Government supports the Comments filed by the National Association of Telecommunications Officers and Advisors and the Alliance for Community Media in this proceeding on May 10, 2004 ("NATOA Comments"). Local Government would especially like to call to the Commission's attention that section of the NATOA Comments addressing the history and insights of the FCC's Local and State Government Advisory Committee. That section of the NATOA Comments was written by the Honorable Ken Fellman, the Mayor of Arvada, Colorado and former chair of the LSGAC.³

III. A Section 706 Review of Barriers Occurs Only Upon Finding that Advanced Services Are Not Being Deployed in a Reasonable and Timely Manner.

Congress did not direct the Commission in its Section 706 Reports to begin with an examination of barriers to infrastructure investment. Congress directed that such an examination occur only upon a finding that advanced capabilities are not being "deployed to all Americans in a reasonable and timely manner." Specifically, the Congress established the two-part process as follows:

. . . [T]he Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment . . .⁴

While the Commission may have posed the question of barriers in the NOI in this conditional fashion to ensure that the agency's resources are used economically, there is nothing in the record to warrant the Commission's deviation from its conclusion in the first three 706

³ See NATOA Comments at 8-12.

⁴ Section 706(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. §157.

Reports that the deployment of advanced telecommunications capability has been reasonable and timely nationwide.⁵

Additionally, every party that addressed the issue of timely deployment agreed that advanced telecommunications capabilities continue to be available on a timely basis, even if they may have disagreed on the reasons for such deployment or what next steps the Commission should take.⁶ There is no basis, therefore, for the Commission to undertake an investigation of barriers to entry, let alone the well-worn fictitious claims that right-of-way management and reasonable rent for the occupation of right-of-way are barriers to infrastructure investment.

IV. Broadband and Advanced Services Are Available.

Local Government would like to bring to the Commission's attention a symposium held by the Heritage Foundation on May 13th, three days after the Local Government Comments were filed, on the state of broadband deployment in the U.S.⁷ According to press accounts of the symposium, former FCC Commissioner Harold Furchtgott-Roth stated, "We already have universal broadband' ...and...it is a myth that 'the government needs an ambitious agenda.'"⁸ Commissioner Furchtgott-Roth is also credited with stating that the availability of satellite-based broadband services, cable modem, digital subscriber line (DSL), and other services such as Wi-Fi have made broadband service available to virtually all Americans.⁹

⁵ NOI at ¶ 6.

⁶ See, e.g., Comments of Sprint Corporation filed May 10, 2004, at 3; Comments of OPASTCO filed May 10, 2004 at 2; Comments of USTA filed May 10 at 3; Comments of NTCA filed May 10, 2004 at 2; Comments of AT&T filed May 10, 2004 at 5 et. seq.; Comcast at 1 ("The answer is unquestionably 'yes.'"); Comments of Verizon filed May 10, 2004 at 6.

⁷ This event may be viewed on-line at <http://www.heritage.org/Press/Events/ev051304a.cfm>.

⁸ *Communications Daily*, "Telecomm Notes," May 14, 2004 at 14. See also *TR Daily*, "President Bush Should Declare Victory on Broadband," May 13, 2004.

⁹ *TR Daily*, "President Bush Should Declare Victory on Broadband," May 13, 2004.

At this symposium Commissioner Furchtgott-Roth debunked the myth that the United States is trailing the world in access to the Internet and broadband deployment. He did note that there are studies placing the US 11th worldwide in broadband deployment, but pointed out that such studies refer only to the rate of residential broadband deployment and ignore broadband services available to U.S. businesses.¹⁰ Commissioner Furchtgott-Roth concluded that a more realistic view of the state of advanced services in the United States is that it is not just competitive, it is still the world leader. “The U.S. is at the center of Internet activity . . . and whether or not people have it in their homes, business thrives on it . . .”¹¹

V. The Commission Should Refuse to Chase the “Fiber Carrot.”

Many in the industry will continue, in this forum and before the Congress, to perpetuate the myth that we as a nation are falling behind in the global marketplace. It is a convenient advocacy ploy for requesting special treatment in terms of regulatory forbearance and government-mandated subsidies. BroadbandReports.com documents the practice of at least one commenter (Verizon) in promising fiber to the home in exchange for regulatory forbearance:¹²

...If you've paid attention (which Business Week hasn't), you've been hearing these same fiber promises from Verizon for more than a decade.

From Nynex in their 1993 annual report: "We're prepared to install between 1.5 million and 2 million fiber-optic lines through 1996 to begin building our portion of the information superhighway."

¹⁰ He also noted that other than Korea, the list of countries in the top 15 are all in a virtual tie for deployment.

¹¹ *TR Daily*, “President Bush Should Declare Victory on Broadband,” May 13, 2004.

¹² Karl Bode, “The Boy Who Cried Fiber: Verizon excites media with tales of TV,” *Broadband Reports.com*, available at <http://www.broadbandreports.com/shownews/43936>. The article first protests Verizon’s new promises for fiber to the home highlighted in a Business Week story (Rosenbush, Lowry, Crockett and Grow, “Verizon: Take That, Cable,” *Business Week*, April 21, 2004), and then goes on to document the number of times Verizon has rolled out the same promises.

From a Bell Atlantic press release in 1996: "Later this year, Bell Atlantic will begin installing fiber-optic facilities and electronics to replace the predominantly copper cables between its telephone switching offices and customers - The company plans to add digital video broadcast capabilities to this 'fiber-to-the-curb,' switched broadband network by the third quarter of 1997."

As of 2003 however, only 39,000 US homes were connected to fiber lines. While we're finally seeing some very strong movement toward fiber by Verizon in 2004, it's far from a national rollout, which some analysts predict could take up to a decade to complete.

The truth is, promises of fiber to the home have been held out like a carrot in the face of regulators for decades....¹³

If the Commission and Congress were tempted to accept, yet again, Verizon's promises of future deployments in exchange for additional regulatory benefits, it is interesting to note that not all of Verizon's RBOC brethren share Verizon's commitment. In the *Business Week* article touting Verizon's plans for the rollout of fiber, BellSouth and SBC, which presumably would be equally entitled to any regulatory relief granted to Verizon, make it clear that they have no intentions of rolling out additional fiber.

Verizon's peers are more cautious. BellSouth Corp. (BLS) is testing fiber technology, and SBC Communications Inc. (SBC) is planning to offer video service over fiber optics in some new housing developments this year. But no mass deployments are planned. "I'm not sure it's going to make sense to take fiber all the way to the home in existing neighborhoods," says Jeffrey G. Weber, vice president of corporate planning at SBC.¹⁴

The *Peanuts* image of Lucy moving the ball yet again as Charlie Brown approaches, despite her repeated promises, should be instructive to state legislatures, public utility commissions, the Federal Communications Commission and Congress as it hears the promises of

¹³ *Id.*

¹⁴ Rosenbush, Lowry, Crockett and Grow, "Verizon: Take That, Cable," *Business Week*, April 21, 2004, available at www.businessweek.com/magazine/content/04_21/b3884113_mz063.htm. See also Reuters, "Verizon Pushes Fiber Network While Rivals Wait," May 19, 2004, available at http://zdnet.com.com/2100-1103_2-5214992.html.

the fiber carrot yet again. The statistics from state after state document that deregulation does not drive deployment: capital and market share do.¹⁵

VI. The Industry Seeks to Create a New Standard for Forced Access to Local Public Rights-of-Way.

As stated in Section III above, the question of barriers to investment is not properly before the Commission in this proceeding, as the Commission has not made a negative determination as to the timely deployment of advanced capabilities. Local Government would also remind the Commission of the limitations Congress placed on the Commission in enacting 47 U.S.C. § 253(d) and Section 601(c) of the Telecommunications Act of 1996.¹⁶ Still, because a number of commenters¹⁷ have sought to make right-of-way management and rent an issue, Local Government will again address the issue.

Congress, in enacting Section 253, established that no local statute or requirement "may *prohibit* or have the effect of *prohibiting* the ability of any entity to provide any interstate or

¹⁵ See Pub. Util. Comm'n of Tex., *Report to the 77th Texas Legislature: Availability of Advanced Services in Rural and High Cost Areas* (2001); Richard Waters, *CLECs Prepare for a Rough Ride in the Financial Markets: Competitive Local Exchange Carriers are Scrambling To Cut Spending as Investors and Lenders Become Skittish*, *Financial Times* (London), at 38 ("Most are now scrambling to cut spending and bring forward the point at which they can report a profit"); Lee Bergquist, *New Cable Company Pulling Plug; Digital Access Cites Inability to Raise Capital*, *Milwaukee Journal Sentinel*, Mar. 3, 2001, at 1D ("when financing is drying up for many companies that want to build cable systems in markets where there is existing cable operator."); Mavis Scanlon, *RCN: After the Fall*, *Cable World*, Jan. 1, 2001 ("The pull back in the capital markets 'definitely' is going to effect every overbuilder"). See also Local Government Comments at 29-32.

¹⁶ See Local Government Comments at 4-13 for a general discussion of the legislative history.

¹⁷ See, e.g., Comcast at 17, 18; Verizon at 36 ("Currently, many state and local authorities (and even agencies of the Federal Government) impose unreasonable information collection requirements on applicants for access to public rights of way"); MCI at 21("[N]on cost-based fees imposed by local governments for use of the right-of-way and delays in the permitting process have emerged as significant barriers to the deployment of advanced telecommunications and broadband networks."); GCI at 18("[Despite its] successes in bringing advanced services to customers across the state of Alaska, GCI has experienced its share of barriers to deployment along the way.")

intrastate telecommunications service."¹⁸ Congress did not ban all local regulations or rules that might cost a provider money or impact the provider's bottom line. Yet, over and over again industry has requested that the Commission¹⁹ and courts²⁰ find that reasonable compensation violates Section 253, without ever making a showing that such compensation would *prohibit* service. The industry comments in this docket follow the same trend.²¹

The language of Section 253 as enacted would justify a bright-line threshold test in reviewing an industry claim of a violation of § 253. Such a test would first ask whether the party making the claim is currently providing interstate or intrastate telecommunications services in the jurisdiction in which it alleged the barrier. If the complaining company is providing service in that jurisdiction, this would *ipso facto* establish that service had not been prohibited, and the claim would be dismissed.

Applying this simple test exposes the credibility gap implicit in the claim that reasonable right-of-way management and compensation policies have inhibited the ability of the carrier to deploy a broadband platform capable of providing advanced services. Two of the industry commenters, Verizon and Comcast, are the largest ILEC and MSO in the country respectively. In what jurisdiction has Verizon or Comcast been denied the ability to provide services?

VII. Commenters Change Their Messages for Different Audiences.

The industry does not always tell the same story to Congress that it tells to the Commission; at a minimum, the industry tends to assign entirely different priorities to issues in

¹⁸ 47 U.S.C. § 253 (emphasis added).

¹⁹ See, e.g., *In the Matter of TCI Cablevision of Oakland County*, 12 FCC Rcd. 21,396 at ¶ 101, *aff'd* 13 FCC Rcd. 16,400 (1998).

²⁰ See, e.g., *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); *BellSouth Telecommunications, Inc., v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001); *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81 (S.D.N.Y. 2000).

each forum. The timing of a CEO hearing before the Senate Commerce Committee²² on the need for a new Telecommunications Act just two days after comments were due in this proceeding provides an opportunity to examine the consistency of the industry's message.

In its comments in this proceeding at 18, Comcast complains that “[g]overnment could also do more to break down barriers that hinder broadband providers from accessing public rights-of-way.” Yet two days later in his testimony to the Senate, Comcast CEO Brian Roberts does not mention rights-of-way as a barrier at all. Indeed, during the question time period, Mr. Roberts indicated that he did not see a need to revise the Telecommunications Act (although the federal courts of appeals have more often than not disagreed with the industry's misreading of Section 253).

Similarly, Verizon, in its comments in this proceeding at 36, prays: “Pre-emption of more onerous state and local regulation is necessary order to remove regulatory obstacles to the deployment of advanced telecommunications capability, in fulfillment of the mandate Congress gave the Commission in Section 706.” Yet Verizon CEO Ivan Seidenberg's testimony at the Senate hearing is silent on the issue of rights-of-way.

If right-of-way management and fees really constituted the kind of threat to broadband deployment that these companies claim in their comments, one would have expected them to take the same position before Congress. It appears that the companies are willing to make unsupported allegations in the relatively restricted arena of Commission proceedings that they are not inclined to submit to the full glare of publicity in a congressional hearing.

²¹*See* note 17 *supra*.

²² “Telecommunications Policy Review: A View from Industry,” Hearing before the Senate Commerce Committee, May 12, 2004. Statements and testimony from the hearing are available at <http://commerce.senate.gov/hearings/witnesslist.cfm?id=1187>.

VIII. CONCLUSION

Fair and reasonable compensation requirements, like right-of-way management, lie outside the FCC's jurisdiction. Further, they lie outside the sphere of discussion in this proceeding unless and until the Commission should reach a negative determination as to the availability of advanced telecommunications capabilities in the United States.

At the same time, the Commission's own spectrum auction policies, and the policies of federal right-of-way managers outlined in NTIA's *Improving Rights-of-Way Management Across Federal Lands: A Roadmap for Greater Broadband Deployment*, are directly analogous to the practices of local government in managing rights-of-way. Spectrum and rights-of-way are both scarce resources that are most efficiently allocated through a market price mechanism such as an auction or fair market value compensation.

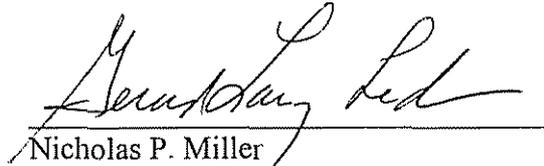
Local property cannot be given away by the federal government to telecommunications companies without just compensation. The federal courts, led by the Supreme Court in *City of St. Louis v. Western Union Tel.*,²³ and ratified by the Fifth Circuit in *City of Dallas v. FCC*,²⁴ recognize that local governments have the normal rights of all property owners in controlling all elements and benefits of their right-of-way property. Thus, declining the invitations extended by

²³ *City of St. Louis v. Western Union Tel.*, 148 U.S. 92 (1893), opinion on reh'g, 149 U.S. 465 (1893).

²⁴ *City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997).

industry commenters, the Commission should continue its “hands off” policy with respect to local property rights.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nicholas P. Miller", is written over a horizontal line.

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