Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act	)	GN Docket No. 09-47
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
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, as Amended by the Broadband Data Improvement Act.	)	GN Docket No. 09-137
	)	
Comment Sought on the Contribution of Federal, State, Tribal and Local Government to Broadband	)	DA 09-2122
	)	

NBP Public Notice # 7

To: The Commission

<u>Comments of the Blooston Rural Carriers</u>
<u>NBP Public Notice #7</u>

The law firm of Blooston Mordkofsky Dickens Duffy & Prendergast, LLP ("Blooston"), on behalf of its rural telecommunication carrier clients listed in Attachment A (the "Blooston Rural Carriers"), respectfully submits the following comments in the above-captioned proceeding. Specifically, the Blooston Rural Carriers comment on the role of non-profit or private sector partnerships in governmental broadband solutions, and the Commission's approach to resolving rights of way and zoning disputes under §§ 253 and 332(c)(7) of the Communications Act of 1934, as amended[1]. The Blooston Rural Carriers support government

[1] 47 U.S.C. §§ 253 and 332(c)(7)

cooperation with non-profit and private sector entities in the deployment and maintenance of broadband networks. Governments can play an important role in making broadband deployment possible by providing access to tower sites and acting as an anchor customer for governmental operations such as public safety, public works and infrastructure maintenance, giving commercial carriers the opportunities they need to provide sustainable broadband. However, governmental participation in broadband solutions should not rise to the level of independent market competition, creating an unjustifiable risk to taxpayer dollars and amounting to unfair competition to the Commission's spectrum auction winners.

I. Government Involvement in Non-Profit and Private Sector Partnerships For Broadband Solutions Should be Cooperative, not Controlling

The Blooston Rural Carriers generally support government cooperation with non-profit and private sector entities to bring broadband to rural areas and other hard to sustain markets. However, when governmental involvement rises to the level of inextricability, needless risk arises for taxpayer dollars. The Commission's Public Notice broadly requests discussion of the conclusions that can be drawn from particular initiatives, with an eye toward practices that should be replicated or avoided.[2] A recent and notable attempt at government-sponsored broadband deployment is Philadelphia's municipal wireless initiative. Announced in April of 2005, the initiative endeavored to form a public-private partnership to run a citywide wireless network, wherein the network build-out and operation would be outsourced to a private entity.[3] EarthLink submitted the winning bid in the Request for Proposal proceeding, but ultimately

[2] PN at p2, q2-b

[3] *See* Wireless Philadelphia Business Plan, February 9, 2005, at pages 12 – 13. A copy of the Plan is available at: http://www.wirelessphiladelphia.org/documents/Wireless_Phila_Business_Plan_.pdf.

elected to discontinue supporting the network after three years (and other similar networks).[4] In another example, the provider pulled out of its deal to provide municipal Wi-Fi in Tempe, Arizona as well, after concluding that it could not recoup investments in networks via advertising revenue or residential subscriptions.[5] In both cases, government involvement in broadband deployment rose to a level which created an unnecessary risk to taxpayer dollars, rather than giving the private-sector entity the freedom to make the best business choices to ensure a successful operation. While it appears that the wireless Philadelphia project is continuing in some form in the wake of EarthLink's withdrawal, other programs are still failing, due to reasons that go beyond the general concerns of commercial broadband provision. One of the first communities in the United States to deliver citywide Wi-Fi was St. Cloud, Florida, which recently stated it would be shutting down public access to its network.[6] Originally regarded as one of the more successful projects of its kind, the city's decision was fueled by budgetary concerns; in particular, the city expects to save $600,000 a year by shutting down.[7] Put another way, the city's taxpayers would otherwise lose $600,000 per year subsidizing the commercial service provided over the network.

In this regard, governmental participation in broadband solutions beyond a passive, cooperative level is often not in the public interest because it can result in unfair competition. Rural carriers and others have invested millions in acquiring spectrum and equipment to provide expensive, last-mile service. This investment, encouraged by the Federal government, would be

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[4] *See* Matt Hamblen, "End Appears to be Near for Philly Wi-Fi Network", ComputerWorld, May 13, 2008, (at http://www.computerworld.com/s/article/9085318/End_appears_to_be_near_for_Philly_Wi_Fi_network).

[5] *See* Matt Hamblen, "Doubts cast on Municipal Wi-Fi as Projects Hit Potholes," ComputerWorld, February 25, 2008 (at http://www.computerworld.com/s/article/313315/Doubts_Cast_on_Municipal_Wi_Fi_as_Projects_Hit_Potholes)

[6] *See* Esme Vos, "St. Cloud shuts down free citywide Wi-Fi service", MuniWireless, September 28, 2009 (\ at http://www.muniwireless.com/2009/09/28/st-cloud-shuts-down-free-citywide-wifi-service/)

[7] *Id*.

undercut by the addition of a government-subsidized alternative. Government broadband initiatives run the risk of intruding upon the service opportunities that should be afforded to spectrum auction winners, and subverting the business plans these carriers developed in good faith to compete in Commission-run spectrum auctions. Decreased government involvement also provides stronger incentive for private industry to get things right, since they are competing with their own funds. Conversely, projects that involve government support place taxpayer dollars at risk.

Generally, solutions that rely mostly on the experience and capability of established private sector providers are best supported by government cooperation, not directed by government mandate. The Commission should generally allow free-market forces to provide for infrastructure deployment and management, emphasizing the need to meet governmental as well as consumer goals without significant government investment. To the extent that governmental entities form partnerships with private sector entities, it should be pursuant to the proper completion of applicable competitive request for proposal ("RFP") and appropriations processes; and to the extent that the private sector entity will provide service to public safety as a substitute for a government-owned network, the private sector service should comport with the public safety interoperability and non-interference standards and related restrictions established by Congress, the Commission and the Public Safety Spectrum Trust.

II. The Commission Should Take the Opportunity to Provide Federal Guidance for Courts Interpreting Sections 253 and 332

The Blooston Rural Carriers respectfully submit that the Commission should take the opportunity in this proceeding and the ongoing tower structure siting inquiry,[8] to provide more structured and unified guidance on the role of state and local governments in interpreting and enforcing Sections 253 and 332(c)(7) of the Act, in order to ensure that broadband deployment is not hindered. Wireless technology is playing an increasing role in nationwide broadband deployment, but many recent technologies are being deployed higher in the spectrum band, and therefore do not propagate as well as cellular. Mobile broadband radio services, for example, now operate at frequencies as high as 3.65 GHz; and fixed wireless broadband can operate at frequencies as high as 39 GHz. At such high frequencies, it is important that commercial carriers be able to place antennas in closer proximity to the areas needing reliable signal coverage. The case-by-case approach that state and local governments (including courts) have taken toward §§ 253 and 332 disputes has resulted in an uncertain and in some cases overly restrictive approach to antenna placement, making it harder for providers to get access to the sites they need to provide the ubiquitous coverage their customers demand.

The Blooston Rural Carriers respectfully point the Commission's attention to a recent holding in the U.S. 9th Circuit Court of Appeals which effectively curtailed the further deployment of wireless services in the city of Palos Verdes Estates.[9] San Francisco, San Diego County, La Cañada Flintridge, and other communities have fought on similar grounds and, for

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[8] Petition For Declaratory Ruling By CTIA - The Wireless Association To Clarify Provisions Of Section 332(c)(7)(B), WT Docket No. 08-165.

[9] Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates, 2009 U.S. App. LEXIS 22514 (9th Cir. Cal. Oct. 14, 2009).

the most part, have successfully thwarted the attempted antenna structure placement.[10] In this case, the wireless provider was not able to avail itself of the protection afforded by the Act, which forbids municipalities to take actions that result in an effective prohibition on the provision of wireless services. The ruling is potentially harmful to wireless carriers trying to provide ubiquitous coverage that their customers have come to expect. This is especially true in a market like San Francisco that is confined by terrain features, making it difficult to provide a reliable signal from remote tower sites. Cases such as these, are becoming more and more common, and are resulting in greater obstacles to the timely and efficient construction of wireless broadband services. The Commission should take this opportunity as the Federal agency with the most expertise in this area, to provide state and local governments with guidance on the need for antenna placement by newer broadband wireless services.

The current case-by-case approach has also allowed for conflicting decisions between, and even within judicial circuits. For example, in 2008, the 9th Circuit also overruled a 2001 decision interpreting § 253, further restricting § 253 protection by holding that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition"[11] This relatively recent decision makes it harder for providers to avail themselves of the protection Congress contemplated in the enactment of § 253.

III. Conclusion

The Blooston Rural Carriers applaud the Commission's proactive information-gathering approach to tackling the varied and complicated issues facing the nation as it seeks to deploy

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[10] Carol J. Williams, "Court says cities have the right to bar telecommunications towers", Los Angeles Times, October 26, 2009.

[11] *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc) (overruling *City of Auburn v. Qwest Corp*., 260 F.3d 1160 (9th Cir. 2001)

broadband. The Blooston Rural Carriers respectfully submit that the Commission's goals are best achieved by encouraging government cooperation rather than subsidized competition with private companies, and by providing further federal guidance on §§ 253 and 332(c)(7) to further expand and protect the expansion of wireless services.

Respectfully Submitted,

BLOOSTON RURAL CARRIERS

/s/

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BLOOSTON RURAL CARRIERS

All West Communications, Inc.	Kamas, UT
BEK Communications Cooperative	Steele, ND
Big Bend Telephone Company	Alpine, TX
CL Tel Wireless Inc.	Clear Lake, IA
Consolidated Telcom	Dickinson, ND
Dakota Central Telecommunications Cooperative Inc.	Carrington, ND
Dickey Rural Networks	Ellendale, ND
Dubois Telephone Exchange, Inc.	Dubois, WY
Horizon Telcom	Chillicothe, OH
Jefferson Telephone Company	Jefferson, IA
Kennebec Communications, LLC	Kennebec, SD
LigTel Communications, Inc.	Ligonier, IN
Midstate Telephone Company	Stanley, ND
MLGC, LLC	Enderlin, ND
North Dakota Telephone Company	Devils Lake, ND
Peñasco Valley Telecommunications	Artesia, NM
Plains Cooperative Telephone Association	Joes, CO
Polar Communications Mutual Aid Corporation	Park River, ND
Public Service Communications	Reynolds, GA
Red River Rural Telephone Association	Abercrombie, ND
Santel Communications Cooperative	Woonsocket, SD
SRT Communications, Inc.	Minot, ND
UBTA-UBET Communications, Inc. dba Strata Networks	Roosevelt, UT
United Telephone Mutual Aid Corp.	Langdon, ND
Van Buren Telephone Company, Inc.	Keosauqua, IA
Venture Communications Cooperative, Inc.	Highmore, SD
Walnut Telephone Company, Inc.	Walnut, IA