

Before the  
Federal Communications Commission  
Washington D.C. 20554

In the Matter of )  
 )  
Framework for Broadband Internet Service ) GN Docket No. 10-127  
 )

**COMMENTS OF THE CITY OF NEW YORK**  
**IN RESPONSE TO NOTICE OF INQUIRY**

The City of New York (“the City”) submits these comments for the specific purpose of responding to those particular portions of the above-captioned Notice of Inquiry (the “*Broadband Framework Notice*”) which seek comment regarding the scope of state and local government authority with respect to the provision of “broadband Internet service” (which phrase is used here as it is defined in the *Broadband Framework Notice*). Specifically, the City seeks to respond in this filing to the matters raised by the Commission in the last three sentences of Paragraph 87, and in Paragraphs 109 and 110, of the *Broadband Framework Notice*.

The City notes the Commission’s expressed goal of maintaining continuity with existing broadband Internet service policy and re-establishing, on firmer legal ground after the recent decision in *Comcast Corp. v. FCC*<sup>1</sup>, longstanding elements of such Commission policy as they existed prior to *Comcast*<sup>2</sup>. Consistent with this goal of continuity, the City urges the Commission to undertake any re-classification of broadband Internet service in a manner that

---

<sup>1</sup> 600 F.3d 642 (D.C. Cir. 2010) (“*Comcast*”).

<sup>2</sup> See, e.g., *Broadband Framework Notice*, Paragraphs 4, 10, 28, 29.

does not inadvertently create new, inappropriate encroachments on the legitimate and lawful role of state and local governments with respect to broadband Internet service. Such new encroachments in the context of re-classification would be inconsistent with the Commission's articulated goal for any such re-classification of preserving the substance of existing policy and practice with respect to broadband Internet service.

In particular, the City notes that the status quo with respect to broadband Internet service is that such service, ever since the FCC's classification of such service as an "information service", has not been subject to 47 USC Section 253(a), because that section by its terms deals only with "telecommunications service". It was clearly the goal of Congress in limiting the application of Section 253(a) to "telecommunications service" to apply the preemptive effect of Section 253(a) only to those services covered by the traditional panoply of public requirements associated with the category of "telecommunications service". To the extent that the Commission now moves forward to re-classify broadband Internet services in a kind of hybrid, "third way", or "light touch" context, the goal of which is essentially to preserve the regulatory status quo in effect prior to the *Comcast* decision, it would be profoundly inappropriate, and inconsistent with Congressional intent, to allow the application of Section 253(a) to expand beyond the pre-*Comcast* status quo.

The City was pleased to note that the language of the *Broadband Framework Notice*, in its references to Section 253(a) in Paragraph 87, seems to anticipate the goal of preserving the status quo with respect to Section 253(a), by raising the procedural question as to whether the Commission could forbear from the application of Section 253(a) to re-classified broadband Internet service, in the same way it can forbear (under 47 USC Section 160) from the application of other provisions of Title II of the Communications Act. It is not clear to the City that

“forbearance” from Section 253(a), pursuant to Section 160, would be a sufficiently certain method of maintaining the federalism status quo with respect to broadband Internet services. Service providers may argue that the structure of Section 253 does not lend itself to being construed as subject to the forbearance contemplated by Section 160. It may be, however, that the Commission could accomplish the same practical effect as forbearance if it were to find, as part of a “third way” re-classification implementation, that, for the same reasons that the Commission would be choosing to forbear from application to broadband Internet service of many of the regulatory provisions of Title II, the conditions for a prohibitory effect that trigger Section 253(a) are inapplicable to re-classified broadband Internet services. Such a finding would likely represent the equivalent of Section 160 “forbearance” in this regard, without the risk that Section 160 forbearance itself might be found technically inapplicable to Section 253.<sup>3</sup>

With respect to the more general federalism questions raised in Sections 109 and 110, the City simply notes here certain principles that the City urges the Commission to keep in mind in considering the federalism implications of re-classification. First, the Commission should keep in mind the distinction between regulatory authority and franchise authority. As noted by the Fifth Circuit Court of Appeals in *City of Dallas v. FCC* 165 F.3d 341 (5<sup>th</sup> Cir. 1999), Commission authority to preempt local right-of-way franchising activities must be established by an express grant by Congress to the Commission, and such preemption authority may not arise from the Commission’s implied powers. Additionally, with respect to services provided by cable operators, subsections (a) and (d) of 47 USC Section 552 grant states and franchise authorities

---

<sup>3</sup> The City has noted, in another matter before the Commission, that the Commission lacks jurisdiction to rule on Section 253 matters where they arise from circumstances that implicate Section 253(c). (See Comments of the City of New York in *WC Docket No. 09-153, In the Matter of Level 3 Communications, LLC, Petition For Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority are Preempted Under Section 253*). However, the Commission does have jurisdiction with respect to Section 253 in the context of matters implicating Section 253(b). In that context, the Commission may be able to reach a conclusion as part of a “third way” reclassification that, as a functional equivalent to forbearance, the Commission finds Section 253(a) to be inapplicable to “third way” telecommunications services.

certain express powers with respect to consumer protection that are not subject to Commission preemption. Lastly, the City urges the Commission in considering federalism issues to swiftly convene the joint “Right-Of-Way Task Force” contemplated in the Commission’s recently issued National Broadband Plan<sup>4</sup>. The state, tribal and local government expertise that will be available on that panel will be a valuable resource to fully inform the Commission’s resolution of the issues raised in Paragraphs 87, 109 and 110 of the *Broadband Framework Notice*. The City is ready, able and eager to play an active role in the planned Right-of-Way Task Force and the City believes that this panel will be well-positioned to help the Commission respond in the most fully informed way to some of the federalism issues the Commission has raised in the *Broadband Framework Notice*.

Respectfully submitted,

/s/

---

Bruce Regal, Senior Counsel  
New York City Law Department  
100 Church Street, Room 6-155  
New York, New York 10007  
(212) 788-1327

Mitchel Ahlbaum, General Counsel  
Tanessa Cabe, Telecommunications Counsel  
New York City Department of Information  
Technology and Telecommunications  
75 Park Place, Ninth Floor  
New York, New York 10007  
(212) 788-6640

July 15, 2010

---

<sup>4</sup> See Recommendation 6.6, page 131, of the National Broadband Plan: “The FCC should establish a joint task force with state, Tribal and local policymakers to craft guidelines for rates, terms and conditions for access to public rights-of-way.”