

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

Acceleration of Broadband Deployment:	)	
Expanding the Reach and Reducing the Cost of	)	
Broadband Deployment by Improving Policies	)	WC Docket No. 11-59
Regarding Public Rights of Way and Wireless	)	
Facilities Siting	)	

**COMMENTS OF THE CITY OF LANCASTER, PENNSYLVANIA**

**I. INTRODUCTION**

The City of Lancaster, located in Lancaster County, Pennsylvania, files these comments in response to the Notice of Inquiry (“Notice”) in the above captioned proceeding. As requested in the Notice, these comments include a description of the City’s policies and procedures related to broadband access to the public rights-of-way (“ROW’s). They also include a description of the City’s authority under Pennsylvania law for adopting and implementing its ROW policies and procedures. Finally, the comments respond to the Commission’s questions regarding possible actions it should take or not take with respect to ROW management practices. These comments do not address wireless facilities siting issues, except as they relate to wireless facilities in the ROW’s.

The City strongly supports the Commission’s policy objective of expanding broadband deployment throughout the nation. We also share the Commission’s view that ROW access by broadband providers must be on fair and reasonable terms through a predictable and timely process. The record below demonstrates that the City’s ROW policies and procedures place minimal cost and require minimal effort by broadband providers, are fully transparent and result in prompt disposition of permit applications. In short, the City is not an obstacle to broadband access to the ROW’s. The City strongly opposes, therefore, any effort on the part of the Commission to adopt guidelines or promulgate rules that address municipal ROW practices or fees. Any such attempt would amount to a solution in search of a problem.

In addition, City’s ROW management practices reflect multiple underlying policy interests of the City. Whether those interests are public safety, physical maintenance of the streets and roads, protection of the City’s own facilities in the ROW’s or control of traffic disruption, the City must balance these interests with the interests of private occupants of the ROW’s. This balancing of interests reflects the individual and unique conditions of our roads and our local community. A “one size fits all” regulatory regime imposed on a national scale would undermine these local interests, would be harmful to broadband deployment and simply would not work as applied to thousands of diverse communities throughout the nation.

## **II. MUNICIPAL RIGHT-OF-WAY POLICIES**

### **A. Timeliness and Ease of Permitting Process**

A broadband provider that wishes to install or maintain aerial wires and/or other equipment in the ROW's of the City of Lancaster is not required to obtain a permit or provide any information to the City. If electrical lines are proposed to be installed from a building into the ROW, then the Code Compliance Division must review the proposed work prior to the installation being performed. Should the provider wish to install wires and/or other equipment underground or perform work underground, however, it must obtain a Street Opening Permit from the Department of Public Works pursuant to Chapter 262, Article VI of the City Code. (§§262-42 through 262-58).<sup>1</sup>

The information required by the City's Street Opening Permit Application is as follows: 1) contractor contact information and name of company that hired the contractor; 2) description and purpose of the work; 3) location of the proposed work; and 4) estimated excavation area (in square yards) and estimated starting date. In addition, the contractor must supply a certificate of insurance reflecting coverage in the amounts of at least \$300,000 for bodily injury and at least \$100,000 for property damage, and either an indemnity or corporate surety bond. The bond amounts are \$50,000 for public utilities for a full calendar year and \$5,000 plus an additional amount per square yard (depending on the pavement material) for all other companies.

The Street Opening Permit application must be submitted to the Public Works Department at least two workdays prior to the proposed excavation. Should the broadband provider need to excavate curbs and/or sidewalks as part of its underground work, it must also complete a Curb and Sidewalk Permit Application and obtain a permit for such work.

Information regarding this permitting process, including the applicable City Code sections and fee schedule, is available on the City's website as well as by phone or in person. The City is also planning to make its permit applications available online. Permit applications are typically processed and issued by the City in less than 1 day (and often within 1 hour) of receipt of a completed application. Upon information and belief, the above-described ROW requirements have not been updated since at least 1994.

### **B. Reasonableness of Charges**

The ROW-related fees assessed by the City are fair and reasonable. Specifically, the administrative fee for the Street Opening Permit is a one-time fee of \$60.00. In addition, there is an inspection fee for street openings that is based on the total number of square yards to be excavated. The inspection fee has a range of \$3.00 for 5 or fewer square yards to \$130.00 for 100 square yards (openings of more than 100 square yards add \$1.00 for each additional square yard over 100). The fee for a Curb and Sidewalk permit is \$20.00.

In addition to the above-referenced fees, the City assesses a Street Degradation Fee for the depreciation of the street due to the street opening. This fee varies depending on the

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<sup>1</sup> There is an exception in the City Code for emergencies, which is defined as "any unforeseen circumstance which calls for immediate action to protect or safeguard life and/or property. (§262-42)

pavement material and the number of years since the street has been constructed, reconstructed or resurfaced. The fee ranges from \$12.00 per square yard of opening for concrete streets that have been resurfaced within the past year to \$4.50 for macadam or vitrified block or granite block that have been resurfaced within the past 3-5 years to \$1.50 for unpaved streets. Finally, there is an annual license tax applicable to all telephone companies in the amount of \$500.00 per year. It appears that ROW-related fees have not been adjusted since at least 1997. Please note that the City is currently reviewing all of its ROW-related costs and fee schedule.

### **C. Non-Discriminatory Treatment**

The City does not discriminate between or among broadband providers with respect to access to the ROW's. All are treated the same consistent with the processes and fees described above.

### **D. Policy Goals and Any Industry Complaints**

The City has several policy goals underlying its ROW practices and fees. The first and foremost goal is public safety. It is critical that the wires, pipes, poles, pedestals, antennae and other equipment in the ROW's are installed and maintained in a safe and secure manner. The presence of potentially hazardous electrical lines overhead and gas lines underground makes it incumbent upon the City to insist that these and other equipment are safely constructed and properly maintained. Solely by way of example, the City's Street Opening Permit states that "[t]he Permittee shall be fully responsible at all times for maintaining a safe work site for his workers and the public and for the maintenance and protection of vehicular and pedestrian traffic..."

Second, the City has an obligation to protect and maintain its own facilities in the ROW's. These include, but are not limited to, traffic signals, water and sewer facilities, storm drainage basins, etc. These facilities must reside in close proximity with the facilities of all the other occupants of the ROW's. Third, the City has a strong interest in maintaining its streets and roads in good condition. The public ROW's are one of the most important assets of any municipality and must be maintained, repaired and reconstructed on a regular basis. Finally, it is important that vehicular traffic disruption be safely controlled during installation or maintenance of all communications facilities.

The ROW procedures and fees outlined above are reasonable and pose no obstacle to broadband providers. This is not only illustrated by the description of the City's ROW management practices described above, but also by the fact that there have been no known complaints by broadband providers regarding the City's procedures or fees.

## **III. MUNICIPAL RIGHT-OF-WAY AUTHORITY IN PENNSYLVANIA**

The City of Lancaster is classified as a Third Class City under Pennsylvania statutory law, and the Third Class City Code prescribes the specific powers granted to such cities. In addition, the City has adopted an Optional Home Rule Charter as a Mayor-Council form of government. This Optional Home Rule Charter provides the City with "the greatest power of

local self-government consistent with the Constitution of the State” and specifies that all municipal power “shall be liberally construed in favor of the City.” 53 P.S. §41304. This liberal construction encompasses the City’s right to regulate its street and roads.

The City has express “police powers” pertaining to the safety and welfare of the City. See 53 P.S. §37403. It is well established that these powers are broad and provide cities with significant discretion in the exercise of these powers. In addition to its police powers, cities also have significant powers over streets and roads. To begin with, Section 1725 of the Municipal Code states that “all cities in this commonwealth shall have the power, without petition of property owners, to grade, pave, curb, macadamize and otherwise improve any public street or public alley, or part thereof, within their corporate limits.” 53 P.S. §1725.

The City’s authority over streets is underscored and arguably strengthened in the Third Class City Code. Section 37915 of the Code states: “Cities, with or without any petition of property owners, may open, widen, straighten, alter, extend and improve, and may establish or reestablish the grades of, and *keep in order and repair and in safe passable condition, any street, or any part thereof, within the city limits...*” 53 P.S. §37915. (emphasis added) The Third Class City Code also includes a specific authority over streets with respect to electric and telecommunications providers. Section 50 of the “Specific Powers” provision of the Code grants a city the power

[t]o define a reasonable district within which all electric light wires, telephone and telegraph wires shall be placed under ground in conduits owned and constructed either by the municipality or by corporations owning such wires...In all cases in which such conduits are owned by any private corporation, partnership or individual, there shall be reserved to the city, whether expressed in the ordinance or not, the right to regulate, by ordinance, the manner in which such conduit shall be used, and the terms and conditions of such use...

53 P.S. §37403 (50).

In addition to its general police powers and its authority over streets, the City also has specific statutory powers with respect to public utilities. Section 1991 of the Municipal Code, entitled “Use of Streets by Public Utilities”, provides in pertinent part:

The proper corporate authorities of such municipality shall have the right to issue permits determining the manner in which public service corporations...shall place, on or under or over such municipal streets or alleys...pipes, conduits, telegraph lines, or other devices used in furtherance of business; and nothing herein contained should be construed to in any way affect or impair the rights, powers, and privileges of the municipality in, on, under, over or through public streets or alleys of such municipalities, except as herein provided.

53 P. S. §1991. The operative part of this section is that municipalities have the legal right to issue permits to public utilities.

A similar right for municipalities with respect to public utilities is embedded in the Pennsylvania Business Corporation Law. Section 1511, entitled “Additional Powers of Certain

Public Utility Corporations,” primarily provides public utilities with the right to condemn property for utility-related purposes. Subsection (e) of the section, however, outlines the rights of utilities to use the streets and the parallel rights of municipalities to regulate that use. It states, in pertinent part, that “[b]efore entering upon any street, highway or other public way, the public utility corporation shall obtain such permits as may be required by law and shall comply with the lawful and reasonable regulations of the governmental authority having responsibility for the maintenance thereof.” 15 Pa. C. S. §1511(e).

The City of Lancaster, therefore, has well established legal authority over the streets and roads within its jurisdictional boundaries. These include its general police powers to adopt ordinances for the management of the City and for the safety and welfare of its residents. It also includes the exclusive authority to control and direct all improvements of the ROW and all construction activity within the ROW. The City’s powers that flow from this authority include the power to require permits and to assess fees.

### **III. THE COMMISSION SHOULD NOT REGULATE LOCAL RIGHT-OF-WAY MANAGEMENT**

#### **A. Introduction**

The City of Lancaster supports the Commission’s policy objective of expanding broadband deployment throughout the nation and throughout our City. We agree that broadband technology and services promote economic development and vastly improve education, healthcare and other critical services. In addition, broadband competition has the potential to lower rates and improve customer service for our residents. For that reason, we have encouraged and welcomed broadband deployment and competition in our community.

The City also shares the Commission’s view, as expressed in Paragraph 4 of the Notice, that access by broadband providers to the ROW’s must be on fair and reasonable terms through a predictable and timely process. For that reason, the City has developed a regulatory structure, as described above, that places minimal cost and requires minimal effort by broadband providers, that is fully transparent and that results in prompt disposition of applications. The City has developed an expertise in managing broadband providers, along with other occupants of the ROW’s, in a manner that reflects the particular, local conditions of our community.

The City strongly opposes, therefore, any effort on the part of the Commission to adopt policy guidelines or rules that address municipal ROW practices or fees. There is no evidence whatsoever that the City’s ROW policies or practices discourage broadband deployment. On the contrary, the City’s policies encourage broadband deployment. This is not only illustrated by the City’s ROW management practices, as described in Section II above, but also by the fact that there have been no known complaints by broadband providers regarding these practices. If there was a problem, the providers no doubt would have brought it to the attention of the City. This has not occurred.

The purpose of the Notice is to explore “specific steps that could be taken to identify and reduce unnecessary obstacles to obtaining access to rights-of-way...” (NOI ¶10). Based on the

City's ROW practices with respect to broadband providers and its legal authority for managing the ROW's described in Section III above, the City poses no obstacle to broadband deployment. We urge the Commission, therefore, not to attempt to regulate, through new rules, guidelines or other mandatory mechanisms, local management of the ROW's.

### **B. ROW Procedures and Fees**

The Notice asks for a detailed description of the City's broadband policies and procedures with respect to the ROW's. Section II above demonstrates that the City's ROW regulations are neither complicated nor obtuse. They are straightforward and easily accessible. The information requested from broadband providers relates only to the company's physical use of the ROW's. There is no discriminatory treatment among broadband providers—either wired or wireless. In addition, ROW permit applications are processed in a timely fashion and permits are issued promptly.

The fees charged by the City for ROW permits are also fair and reasonable. The City is aware that municipalities throughout the country typically elect one of two methods for determining ROW management fees—the “value method” or the “cost method.” By “value method” we mean the market value of the ROW as customarily assessed as a percentage of the provider's gross revenues. This is the statutorily permitted method, of course, for determining franchise fees from cable operators for use of the ROW's. *See* 47 U.S.C. § 542. This is also a legitimate method for municipalities to employ with respect to broadband providers and most closely approximates the actual value of the property that the municipality holds as a public trust.

The “cost method”, on the other hand, is based on the municipality's actual costs in managing the ROW's. These costs necessarily include the City's direct operating costs (including, but not limited to, personnel time in permitting and inspections), indirect operating costs (including, but not limited to, support functions for ROW management), capital costs (including, but not limited to, equipment, computer hardware and software) street degradation costs (the reduction in street life due to excavations), etc. The City's current ROW-related fees are significantly lower than the fees that would be assessed by both the “value method” and the “cost method.”

### **C. Policy Goals and the Need for Local Control**

The policies underlying the City's ROW practices are myriad and reflect the multiple public policy interests of the municipality. These interests must be balanced with the interests of the private occupants of the ROW's to achieve an effective regulatory structure. The first and foremost goal is public safety. It is critical that the wires, pipes, poles, pedestals and other equipment in the ROW's are installed and maintained in a safe manner. By way of example, there have been at least two recent incidents in Pennsylvania in which communications company contractors pierced gas lines in the ROW that resulted in personal injury and destruction of property. This occurred in Hempfield Township in Westmoreland County on March 22, 2000 and in Moon Township in Allegheny County on March 16, 2005.

Second, the City has a strong interest in maintaining its streets and roads in good condition. The public ROW's are one of the most important assets of any municipality and must be properly maintained. The streets and roads of different municipalities are completely

different from each other, depending on such factors as terrain, the time period in which they were constructed, whether they have sidewalks, the density of the residential or commercial corridor, etc. For municipalities in the Northeast/Midwest, ROW maintenance can be especially challenging during harsh winters.

Third, the City has an obligation to protect and maintain its own facilities in the ROW's. These include, but are not limited to, traffic signals, water and sewer facilities, storm drainage basins, etc. These facilities must reside in close proximity with the equipment and facilities of the other occupants of the ROW's. Finally, it is important that vehicular traffic disruption be safely controlled during installation or maintenance of communications facilities.

In short, the City must balance multiple ROW public policy goals that reflect the particular conditions of the City. These goals apply not only to broadband providers, but also to telephone, gas, electric, water and other providers. These goals are inherently local and reflect the individual and unique conditions of our roads and our local community. They are inconsistent with the Commission's national perspective.

While the City embraces the goal of broadband expansion and has adopted minimal and reasonable regulations for broadband access to the ROW's, it must balance this goal with its own local interests. A "one size fits all" regulatory regime imposed on a national scale simply will not work. It will undermine these local interests and harm broadband deployment, causing extensive delays as municipalities attempt to integrate a national template into its local practices.

#### **D. The Commission Should Not Interfere With Local ROW Management and Should Take Action to Preempt Pennsylvania's Municipal Broadband Prohibition**

The City's ROW practices as outlined in Section II above are reasonable and flow from the legal authority granted to it by the Commonwealth of Pennsylvania as outlined in Section III above. They do not present any obstacle to broadband deployment. As such, the City strongly opposes any effort by the Commission to engage in rulemaking or adjudication with respect to municipal ROW management or fees.

In response to the specific questions posed in the Notice regarding "Solutions" (Notice, ¶¶34-50), the City could potentially support and participate in Commission sponsored educational efforts and voluntary activities (¶37) as well as the compilation of best/worst practices (¶ 38). Any efforts to adopt policy guidelines (¶46), promulgate rules (¶47), make recommendations to Congress (¶44) or establish Commission sponsored mediation (¶42), however, would be an unnecessary and harmful interference with local ROW management.

Having said this, a law in Pennsylvania that is a genuine obstacle to broadband deployment is the prohibition against municipal broadband deployment embodied in Chapter 30 of the Pennsylvania Public Utilities Code. Specifically, Section 3014(h) states that political subdivisions (generally municipalities or counties) are prohibited from offering broadband services to the public for compensation. 66 Pa. C.S. §3014(h). The only exception is if the municipality or county submits a written request to the incumbent local exchange carrier (ILEC),

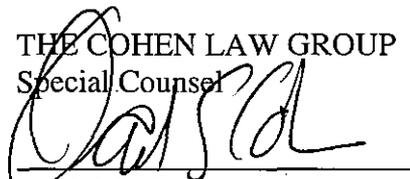
and if the ILEC decides not to deploy the requested broadband service (at the requested data speeds) in that jurisdiction.<sup>2</sup>

This conditional prohibition on community broadband has had a major “chilling effect” on broadband deployment in Pennsylvania. A large portion of Pennsylvania is comprised of rural communities, and many providers appear to have decided, presumably after performing a cost-benefit analysis, not to deploy broadband in many of these communities. As a result, these communities often have slow and substandard internet service that stymies economic development and impedes advances in education, healthcare and other services.

The Commission is well aware of the rapid growth of community broadband networks throughout much of the nation. With rare exceptions, however, the deployment of such networks is effectively barred in Pennsylvania. We strongly urge the Commission to take the appropriate steps, through either regulation or recommendation of legislation, to preempt the prohibition of municipal broadband networks in Pennsylvania and similarly situated states.

Respectfully submitted,

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National Association of Telecommunications Officers and Advisors  
Pennsylvania League of Cities and Municipalities  
Pennsylvania State Association of Boroughs  
Pennsylvania State Association of Township Commissioners  
Pennsylvania State Association of Township Supervisors  
The United States Conference of Mayors

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<sup>2</sup> If the ILEC agrees to provide the requested broadband service, then it must do so within 14 months of the receipt of the request from the municipality or county. Id.