

**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)
Regarding Public Rights of Way and Wireless)
Facilities Siting)

WC Docket No. 11-59

COMMENTS OF THE CITY OF PITTSBURGH, PENNSYLVANIA

I. INTRODUCTION

The City of Pittsburgh, located in Allegheny 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

Pursuant to Chapter 427 of the City Code, the City of Pittsburgh requires any entity that wishes to construct or operate a communications system in the ROW's to obtain an annual Telecommunications License from the City Information Systems ("CIS") Department. This license requirement does not apply to cable operators or certified public utilities. Any application for a Telecommunications License or renewal must include evidence of insurance coverage with the City as an additional insured, a bond in an amount set by CIS and a map showing the location of its facilities in the ROW's.

In addition and pursuant to Chapter 412 of the City Code, all occupants of the ROW's must register with the City Department of Public Works ("DPW"). The information required as part of the registration application includes the following: 1) contractor contact information and name of company that hired the contractor; 2) certificate of insurance naming the City as an additional insured; 3) written evidence that the applicant is authorized to do business in PA; 4) if applicable, a construction and maintenance plan; and 5) mapping data showing the horizontal and vertical locations of all equipment in the ROW's owned or controlled by the applicant.

Should a provider wish to install wires and/or other equipment underground or perform work underground, then it must obtain a Street Opening Permit from the DPW pursuant to Chapter 415 of the City Code. An applicant for a Street Opening Permit must file a bond with the City in the following amounts: \$20,000 for a concrete street opening, \$10,000 for an asphalt street opening and \$75,000 for an indefinite number of street openings. (§415.01) Permit holders must, of course, restore the street to its original condition in accordance with the written specifications of DPW. If a company wishes to install wires and/or other equipment or perform work on a bridge, then it must obtain a separate Bridge Occupancy Permit from DPW. Should any work involve the cutting of a curb or sidewalk, the company must also obtain a Sidewalk Opening or Curb Cut Permit from DPW. (§415.04)

Information regarding this 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. Average processing times for permit applications are estimated to be as follows:

- Telecommunications License:
 - CIS: 2-3 weeks for an initial license, shorter period for a renewal license.
 - DPW: Approximately 2 weeks for drawing review prior to issuance of license.
- Street Opening Permit: Approximately 1 day.
- Bridge Occupancy Permit: Approximately 2 weeks for engineering review of weight load on bridge.

B. Reasonableness of Charges

The ROW-related fees assessed by the City are fair and reasonable. With respect to the Telecommunications License, the fees as administered by CIS are as follows. For a communications system that serves no customers other than itself (typically, university or healthcare institutions), the fee is \$1.90 per linear foot outside the Central Business District ("CBD") and \$2.25 within the CBD. These fees are adjusted for inflation on an annual basis using the National Consumer Price Index. For a communications system that serves customers within the City, the annual fee is five percent (5%) of gross revenues derived from the City. (§427.11)

Street Opening fees administered by DPW are determined on the basis of the size of the street opening. The one-time fees range from \$80.00 for openings of 3 square yards or fewer to \$320.00 for openings of 50 to 100 square yards (openings of more than 100 square yards add \$1.00 for each additional square yard over 100). The Sidewalk Opening fee is \$30.00 for 20 square feet or fewer with an additional \$1.00 for each additional lineal foot. These are one-time fees. (§415.02)

Curb Cut fees are as follow: \$75.00 for a residential curb cut and \$15.00 per lineal foot (minimum of \$75.00) for a commercial curb cut. (§415.02 and §416.02) For Bridge Occupancy Permits, the initial permit fee is \$30.00 times the weight in pounds of the utility structure divided by 1000. Thereafter, each annual permit is \$26.00 times the weight in pounds of the utility structure divided by 1000 plus \$45.00. Please note that the City is currently reviewing all of its ROW-related costs and fees.

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.

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 and storm drainage catch basins. 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 ROW procedures or fees.

III. MUNICIPAL RIGHT-OF-WAY AUTHORITY IN PENNSYLVANIA

Under Pennsylvania law, the City of Pittsburgh is classified as a Second Class City and as such is governed by statutes pertaining to Cities of the Second Class. 53 P.S. § 23101 *et seq.* Cities of the Second Class in Pennsylvania have populations between 250,000 and 999,000. Pittsburgh is the only Second Class City in the Commonwealth Pennsylvania. Pennsylvania statutes in general, and Second Class City statutes more specifically, provide Pittsburgh with substantial and broad regulatory authority over its ROW's. They also require that Pittsburgh approach its right-of-way management in a competitively neutral and non-discriminatory manner.

The City has broad police powers that provide it with the authorization:

[t]o make all such ordinances, by-laws, rules and regulations, not inconsistent with the Constitution and laws of this Commonwealth, as may be expedient or necessary, in addition to the special powers in this section granted, for the proper management, care and control of the city and its finances, and the maintenance of the peace, good government and welfare of the city...

53 P.S. §23158. Right-of-way management falls within these broad police powers. More specifically, with respect to streets and roads, the City retains:

[a]ll right, title, and interest of the Commonwealth in and to all streets, lanes and alleys laid out by the Commonwealth and not maintained by the Commonwealth, including its reversionary rights therein, which are now or may hereafter be located within the corporate limits of cities of the second class, is hereby ratified and confirmed as being vested absolutely in such cities.

53 P.S. §24352.

In addition, Pittsburgh has a Home Rule Charter form of government, which enhances its legal authority. 53 Pa. C.S. 2901 *et seq.* Its Home Rule scope and powers are set forth at 53 Pa. C.S. §2961. In pertinent part, this section provides:

A municipality which has adopted a home rule charter may exercise any powers and perform any function not denied by the Constitution of Pennsylvania, by statute or by its home rule charter. All grants of municipal power to municipalities governed by a home rule charter under this subchapter...shall be liberally construed in favor of the municipality.

This liberal construction encompasses the City's right to regulate its street and roads. Additionally, embedded within the Second Class City statutes are numerous other provisions that address the City's responsibilities over its streets and sidewalks. Collectively, these statutes

underscore the authority that the Commonwealth places in Second Class Cities to regulate and maintain its rights-of-way in an appropriate and safe manner.

In addition to the powers that Pittsburgh derives from Second Class City Statutes, it also has specific statutory powers with respect to public utilities that are applicable to all municipalities throughout Pennsylvania. 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 all Pennsylvania municipalities with respect to public utilities is found 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).

In sum, the City of Pittsburgh has well established legal authority over the streets and roads within its jurisdictional boundaries. This includes 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 authority to regulate all activity within its rights-of-way, which includes the authority to require permits and to assess fees. This authority applies to all occupants of the rights-of-way, including broadband providers.

IV. THE COMMISSION SHOULD NOT REGULATE LOCAL RIGHT-OF-WAY MANAGEMENT

The City of Pittsburgh 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 reasonable 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.

A. 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 fair and reasonable. The Telecommunications License fee reflects a common and legitimate method for the determination of ROW occupancy fees. The City's other ROW-related fees, including Street Opening, Sidewalk Opening and Curb Cut fees, are well below the City's actual costs for permitting, inspection and related regulatory activities.

B. 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.

C. 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

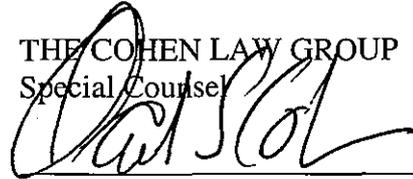
of the Pennsylvania Public Utilities Code. Specifically, Section 3014(h) states that political subdivisions (generally municipalities or counties) are prohibited from offering broadband services to the public for compensation. 66 Pa. C.S. §3014(h). The only exception is if the municipality or county 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.¹

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

¹ 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.