

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
)

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

#### COMMENTS OF CARY, NORTH CAROLINA

The Town of Cary, North Carolina files these comments in response to the Notice of Inquiry (â€œNOIâ€), released April 7, 2011, in the above-entitled proceeding. Through these comments, the Town of Cary seeks to provide the Commission with basic information regarding its local right-of-way and facility management practices and charges. The Commission should not interfere with these local policies here. The Town of Cary has developed considerable expertise applying its policies to protect and further public safety, economic development, and other community interests. By adopting rules in this area, the Commission could disrupt this process at substantial cost to local taxpayers and to the local economy. We believe that a basic respect for federalism, a fair reading of the Constitution and the Communications Act, and an honest assessment of the Commissionâ€™s limited expertise on local land use matters all point to the same conclusion: this is no place for federal regulation. The Town of Cary has successfully managed its property to encourage deployment of several broadband networks to date. As a result, broadband service is available to 100% of the households and businesses in our jurisdiction. According to our statistically valid biennial survey, in 2008, 93.8% of our citizens are connected to broadband. There is no evidence that our policies or charges with respect to placement of facilities in the rights-of-way or on City property (such as water towers) have discouraged broadband deployment. Our community welcomes broadband deployment, and our policies allow us to work with any company willing to provide service. We believe our policies have helped to avoid problems and delays in broadband deployment by ensuring that broadband deployment goes smoothly for both the providers who follow the rules and the larger community. On the other hand, we also know that many entities seeking access to our rights-of-way and facilities would prefer to live without rules or regulations, to the great detriment of other users, abutting landowners, commuters, and the general taxpayer. However, the Town of Cary imposes requirements that construction must meet our Standard Specifications and Details, we do not charge for access to our rights of way. Broadband providers may request permission to encroach on public rights of way through a simple application process. Approval is generally granted in about a week, if the application is complete. Even this step is not necessary if a franchise agreement is in place that

also provides for right-of-way encroachment. The Town code clearly explains the process for obtaining an encroachment agreement (see Attachment).

In response to the NOI, the Town of Cary provides the following information:

#### I. Application Procedures, Forms, Substantive Requirements, and Charges.

The Commission asks whether all necessary application procedures, forms, substantive requirements, and charges are readily available.

The Town of Cary applies the following right-of-way management and facility placement procedures. Applicants may obtain information about right of way encroachment procedures online or by calling the Engineering Department. The Code of Ordinances outlines the process and requirements (see Attachment).

#### II. Sources of Delays.

The Commission asks what factors are chiefly responsible to the extent applications are not processed in a timely fashion. The Commission also asks about errors or omissions in applications.

In the Town of Cary, most applications are processed very quickly, generally in about a week.

However, in some cases, applicants do not provide complete information; in this case, the decision is delayed until the applicant provides the remaining information.

#### III. Improvements.

The Commission asks whether there are particular practices that can improve processing.

The Town of Cary provides information online, in person and over the telephone. If necessary, we work with applicants to ensure that their applications are complete.

#### IV. Permitting Charges.

The Commission seeks data on current permitting charges, including all recurring and non-recurring charges, as well as any application, administrative, or processing fees. Specifically, the Commission asks commenters to identify:

- the type of facilities for which such charges are assessed;

- how such charges are structured (e.g., per foot or percent of revenue in the case of rights of way fees);

- whether the community is subject to comprehensive state franchising or rights-of way-laws;

- whether the charges are published in advance or individually negotiated, designed to approximate market rates or merely recover costs (direct and/or indirect), and accompanied by comprehensive terms, and conditions; and

- the value of any in-kind contributions required for access or permit approval.

The Commission further asks whether such charges are related to impacts on the local community, such as pavement restoration costs for projects that involve trenching in roadways.

In the Town of Cary, we do not charge for use of the rights-of-way.

#### V. Local Policy Objectives.

The Commission asks what policy goals and other objectives underlie the local practices and charges in this area.

While we do not charge for use of the rights of way, our policies are designed to implement a fair and

orderly process for the applying for and granting of permission for private parties to occupy and use the public rights of way, minimize inconvenience and disruption to the public, provide for the efficient and orderly current and future use of public rights of way, and preserve adequate capacity for existing and future uses. Encroachers are required to comply with the Town's Standard Specifications and Details to minimize accelerated deterioration to roads that accompany street cut and avoid damage to other property.

#### VI. Possible Commission Actions.

Finally, the Commission asks what actions the Commission might take in this area.

As noted above, the Town of Cary strongly urges the FCC to refrain from regulating local right-of-way management and facility placement processes. These are highly fact-specific matters, which turn on local engineering practices, local environmental and historical conditions, local traffic and economic development patterns, and other significant community concerns and circumstances. These matters are managed by local staffs with considerable expertise. Imposing a federal regulatory regime would create unnecessary costs for our community, and it would have the potential to undermine important local policies. Likewise, Commission regulation of charges for use of the rights-of-way could have significant impacts on the community, and may actually make it infeasible to continue to maintain or provide important public services. If the Commission feels compelled to act in this area at all, it should limit itself to voluntary programs and educational activities, and to implementing its own recommendations in the National Broadband Plan for working cooperatively with state and local governments.

#### CONCLUSION

The Town of Cary urges the Commission to conclude that right-of-way and facility management are not impeding broadband deployment. As indicated above, in Cary's policies and procedures are designed to protect important local interests, and have done so for many years. As the high broadband penetration suggests, there is no evidence that the policies have impaired any company from providing broadband service here, and there are many reasons to believe that federal regulations would prove costly and disruptive to our community.

Respectfully submitted,

Town of Cary

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## ATTACHMENT

### Cary, NC Code of Ordinances, Chapter 28 Streets, Sidewalks and Other Public Places Article VI: Encroachments

#### Sec. 28-154. Purpose and intent.

The purposes for, and intentions behind this article, are as follows:

(1) The public streets, whose primary purpose is movement of vehicular and other traffic, are valuable public resources that have required, and will continue to require, substantial investment by the town; and

(2) The town desires to structure and implement a fair and orderly process for the application for, and granting of, permission for private parties to occupy and use the public street or street rights-of-way, consistent with applicable law, and which appropriately accounts for the varied reasons that private parties seek such permission.

(3) The town desires to minimize inconvenience and disruption to the public, provide for the orderly and efficient use of the public streets and street rights-of-way, now and in the future, and to preserve adequate capacity for existing and future uses of the public streets and street rights-of-way; and

(4) The town intends to exercise, to the fullest extent permitted by applicable law, its authority in regulating the occupation and use of public streets and street rights-of-way.

(Code 1982, Â§ 17-101; Ord. No. 00-031, 12-14-2000)

#### Sec. 28-155. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Encroach or encroachment means any digging in public streets or street rights-of-way, or the placing therein, thereover or below any pipes, poles, wires, fixtures or other appliances of any kind, either on, above, or below the ground surface.

Person shall mean an individual, partnership, association, organization, corporation or any other legal entity including any lawful successor transferee of said individual or entity.

Public streets means the public streets, sidewalks, alleys, bridges and other ways of public passage within the town's corporate limits, except for any such streets or bridges over which authority and control is exercised by the board of transportation.

Street rights-of-way or a street right-of-way means the real property interest the town holds over or adjoining existing public or private streets, or in corridors reserved for future public streets.

(Code 1982, Â§ 17-102; Ord. No. 00-031, 12-14-2000)

#### Sec. 28-156. Permission to encroach, through appropriate agreement, required.

(a) It shall be a violation of this article for any person to encroach upon any public street or street right-

of-way without first receiving authority to do so from the town pursuant to this article.

(b) Permission to encroach shall be granted in appropriate cases through the terms of an encroachment agreement, to be signed by the applicant and an appropriate town representative, using whatever form the town devises for that purpose. However, if the applicant must also receive a franchise for their intended business or activity from the town, permission to encroach upon a public street or street right-of-way may be granted through the terms of an appropriate franchise agreement. (Code 1982, Â§ 17-103; Ord. No. 00-031, 12-14-2000)

Sec. 28-157. Application for permission to encroach.

(a) Application for the right to encroach upon a public street or street right-of-way shall be submitted to the town's engineering department, and shall be submitted on any form the town devises for that purpose.

(b) All persons desiring authorization to encroach upon a public street or street right-of-way must provide the town with the following information:

- (1) Identify the relevant public street or right-of-way;
- (2) A description of the items the person desires permission to install in the public street or right-of-way, and the purpose those items would serve;
- (3) A description of how the person intends to install the item in the public street or street right-of-way, including whether any excavation in the public street or right-of-way will be required;
- (4) Whether installation of the relevant items will cause any temporary disruption in traffic flow in any public street, and if so, what precautions the applicant intends to take to minimize that disruption, and to protect human safety;
- (5) A site plan, with sufficient detail to show the proposed location of the items the applicant seeks permission to install in the public street or street right-of-way, including any manholes or overhead poles, the size, type and proposed depth of any conduit or other enclosures, and the proximity of the applicant's items, if installed, to all existing poles, utilities, sidewalks, pavement, telecommunications or cable systems, and other improvements existing in the relevant public streets or street rights-of-way;
- (6) A proposed construction schedule and sequence;
- (7) Identify and describe any insurance the person has, or would obtain if granted permission to encroach on the relevant public street or street rights-of-way, that will cover his desired activities in the public street or street rights-of-way. (Homeowners seeking permission to encroach on a street right-of-way adjoining their residence should check their homeowners' policy in this regard);
- (8) The name, address and telephone number of the person the town may contact concerning the application; and
- (9) Such other information as the town may determine to be necessary or appropriate to evaluate the application or otherwise in furtherance of the public interest.

(c) Business and other commercial applicants, in addition, should submit the following information:

- (1) A general description of the person's business; and

(2) A description of the services, if any, the person proposes to provide to others through the infrastructure he desires permission to install in the right-of-way, identifying also the geographic scope in which such services would be provided, and to whom they would be provided.

(d) Any person who must also receive a franchise from the town for their intended business or activity may provide the information set forth above in their franchise application.

(e) The town may reject any application to encroach upon a public street or street right-of-way that is incomplete or otherwise fails to comply with the terms of this article or other applicable law.

(Code 1982, Â§ 17-104; Ord. No. 00-031, 12-14-2000)

#### Sec. 28-158. Public availability of applications to encroach.

Applications and other submissions by which any person seeks permission to encroach upon any public street or street right-of-way, including any additions, modifications or amendments thereto, shall be available for public inspection at the town engineering department during normal business hours.

(Code 1982, Â§ 17-105; Ord. No. 00-031, 12-14-2000)

#### Sec. 28-159. Procedure for consideration of, and action on, applications.

(a) The authority to grant a private party with the right to encroach upon a public street or street right-of-way shall be exercised by the town manager or designee. In his discretion, however, the town manager may submit any application for such a right of encroachment for review and an initial decision to the town council, with or without a recommendation from the town manager. In such cases, the grant of authority, if given, will be made by adoption of a resolution by the town council. In any case, the grant of such authority shall be conditioned upon such terms as shall be specified in the relevant encroachment or franchise agreement.

(b) The town may make such investigations and take or authorize the taking of such other steps as they deem necessary or appropriate to consider and act upon applications to encroach upon a public street or street right-of-way and determine whether such applications should be granted.

(c) If a business or commercial applicant seeks permission to encroach upon public street or street right-of-way, the town may set a public hearing to give the public an opportunity to comment on the application.

(Code 1982, Â§ 17-106; Ord. No. 00-031, 12-14-2000)

#### Sec. 28-160. Factors for review of application to encroach.

(a) In deciding whether to grant any application for permission to encroach upon any public street or street right-of-way, the town may consider such factors as it deems appropriate and in the public interest, provided such factors are consistent with applicable law, including without limitation:

- (1) The willingness and ability of the applicant to meet construction and physical requirements and to abide by all lawful conditions, limitations, requirements and policies with respect to the encroachment;
- (2) The ability of the applicant to maintain the property of the town in good condition throughout the

term of the relevant franchise or encroachment agreement;

(3) Any services or uses of the public streets or street rights-of-way that may be precluded by the grant of the requested permission to encroach, and the adverse impact of the proposed encroachment on the efficient use of the public streets and street rights-of-way at present and in the future;

(4) The adequacy of the terms and conditions of the proposed encroachment or franchise agreement to protect the public interest, consistent with applicable law; and

(5) Any other public interest factors or considerations that the town has a lawful right to consider and that are deemed pertinent by the town for safeguarding the interests of the town and the public.

(b) Consistent with applicable law, the town may develop and implement policies and requirements to ensure that the public streets have sufficient capacity reasonably to accommodate existing and future uses in a rational and efficient manner. In evaluating an applicant for the right to encroach upon a public street or street right-of-way, the town may consider an applicant's proposals for addressing capacity needs and compliance with town policies and requirements in that regard.

(Code 1982, Â§ 17-107; Ord. No. 00-031, 12-14-2000)

Sec. 28-161. Indemnity, insurance and bonding requirements, and other terms and conditions.

(a) No right of encroachment on any public street or street right-of-way shall be granted unless, as a condition to that grant, the applicant is willing to and agrees to indemnify, defend and hold harmless the town, its officers, boards, commissions and employees against any and all claims and liabilities arising from the person's activities or items in the public street or street right-of-way, including reasonable attorneys fees and court costs.

(b) Depending upon the extent of a person's desired excavation, construction or other activities in any public street or street rights-of-way, the town may exercise its authority to require an applicant to secure and provide documentation of an appropriate performance bond or letter of credit, and/or insurance, covering such activities, pursuant to terms acceptable to the town.

(c) The other terms and conditions by which the town grants a person authority to encroach upon a public street or street right-of-way shall be set forth in the relevant encroachment or franchise agreement.

(Code 1982, Â§ 17-108; Ord. No. 00-031, 12-14-2000)

Sec. 28-162. Responsibilities of persons granted rights to encroach.

It shall be the responsibility of each person granted the right to encroach upon a public street or street right-of-way to:

(1) Ensure that any excavation, construction or other work done by them or on their behalf in the relevant public street rights-of-way is performed consistent with the town's published standard specifications and details for construction activities, including the requirements therein regarding restoration of the affected area.

(2) If requested by the town due to a need for the town or its contractors to complete any work in a

public street or street right-of-way, temporarily remove or relocate their items located below or above the public street, or within the street right-of-way.

(3) Otherwise comply with the terms of their encroachment agreement or the encroachment provisions in their franchise agreement, and all applicable laws, ordinances, resolutions, rules, regulations and other directives of the town and any federal, state or local governmental authority having jurisdiction over the person's activities in or near such rights-of-way.

(Code 1982, Â§ 17-109; Ord. No. 00-031, 12-14-2000)

Sec. 28-163. Authority to encroach is nonexclusive.

Any grant of permission to encroach upon a public street or street right-of-way given by the town pursuant to this article shall be nonexclusive. The town specifically reserves the right to grant, at any time, such additional rights of access to the public streets or street rights-of-way that it deems appropriate.

(Code 1982, Â§ 17-110; Ord. No. 00-031, 12-14-2000)

Sec. 28-164. Remedies.

In the event that any person encroaches upon a public street or street right-of-way without prior permission from the town, or violates the conditions by which authority to do so were granted by the town, or otherwise violates any provision of this article, the town manager or designee may, in addition to any other remedies provided by any other applicable article or other law:

(1) Issue an order to the person commanding them to immediately cease and desist their unpermitted or otherwise wrongful activities in the public street or street right-of-way, and to restore the affected area;

(2) Revoke any permission previously granted allowing the permission to encroach in a public street or street right-of-way;

(3) Issue civil penalties up to \$500.00 per day for any continuing violation of this article; or

(4) Any combination of the above-referenced remedies.

(Code 1982, Â§ 17-111; Ord. No. 00-031, 12-14-2000)

Sec. 28-165. Rights of appeal.

(a) In cases where the town manager or designee denies a person's application to encroach upon a public street or street right-of-way, or is willing to grant that request but subject to conditions or terms the applicant deems to be unsatisfactory, resulting in an inability to finalize the requisite encroachment or franchise agreement, the applicant may seek review of the town manager's (or designee's) decision before the town council.

(b) Any person subject to any enforcement action pursuant to section 28-164 above may appeal the enforcement action to the town council.

(c) In any case where a person seeks review by the town council of any decision made by the town manager or designee pursuant to this section, the applicant must request a hearing before the town council in writing to the town engineering department, within ten days of the applicant's notice of the town manager's (or designee's) decision at issue. In such submission, the applicant must identify the issues or disagreements he has with the town manager's (or designee's) relevant decision. In such cases, the town council shall make the final municipal decision, through adoption of an appropriate resolution.

(Code 1982, Â§ 17-112; Ord. No. 00-031, 12-14-2000)

Sec. 28-166. Applicability.

To the extent permitted by law, the town may determine to apply all or certain provisions of this article to persons granted permission to encroach upon a public street right-of-way before the effective date of the ordinance from which this article is devised.

(Code 1982, Â§ 17-113; Ord. No. 00-031, 12-14-2000)