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File No. 51059.00093

October 27, 2012

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of 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. 12-228

Dear Ms. Dortch:

Montgomery County, MD filed reply to comments on October 22, 2012 in the above-captioned proceeding.

The attached version of the County's reply to comments corrects typographical errors related to the footnotes, which have been corrected as follows:

On page 6, a new footnote number 14 has been added which states the following:

"Verizon and Verizon Wireless Comments at 8 (Verizon Comments); *See* Comments of Frank Shammo, Verizon Communications Inc. EVP and CFO, "Verizon at Goldman Sachs Communacopia Conference" transcript, September 20, 2012 at 13 (Verizon Transcript). Available online at: http://www22.verizon.com/idc/groups/public/documents/adacct/goldman_vz_transcript_092012.pdf (last accessed October 20, 2012)."

The remaining footnotes have been renumbered.

The text in renumbered footnote number 32 has been deleted and replaced with the following:

"*Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002); upheld in *Cable & Telecomm. Ass'n v. Brand X Internet Svcs*, 545 U.S. 967 (2005); *Appropriate Framework for Broadband Access to the Internet over Wireline*

Facilities, 20 FCC Rcd 14853 (2005); upheld in *Time Warner Telecom v. FCC, et al.*, 507 F.3d 205 (3rd Cir. 2007)."

Attachment 2 is included – Right of Way NOI Montgomery County Reply Comments.

Thank you for your attention to this matter.

Sincerely,

/s/

Gail A. Karish
BEST BEST & KRIEGER LLP

GAK:njr
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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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. 12-228

REPLY COMMENTS OF MONTGOMERY COUNTY, MARYLAND

(Errata Corrections to Pages 6 and 12 dated
October 27, 2012)

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Counsel for Montgomery County, Maryland

October 22, 2012

SUMMARY

The County shares the Commission's desire to see ubiquitous broadband deployment and adoption. In particular, the County seeks to promote deployment of competitive broadband services; improve access by residents and small businesses to reasonably priced, reliable broadband service; facilitate broadband adoption; and to ensure availability of cost-effective, reliable high speed broadband for public safety first responders, schools, libraries, community colleges and government agencies. In addition, the County supports free WiFi in public spaces to facilitate access to government services and to promote economic development.

The County urges the Commission to adopt policies that support and do not thwart these goals. In this filing, the County responds to comments filed by other participants to make the following points:

- Fixed (wireline) broadband deployment has stalled but the cause is not local government policies;
- Wireless broadband has been deployed rapidly; local governments have not been a barrier;
- Deregulation has not served the public interest; further deregulation is both unnecessary and counter-productive; and
- There are several actions the Commission can and should take to improve and promote broadband deployment and adoption, including:
    - Encouraging 100 percent build out of cable franchise areas;
    - Ensuring that scarce public funds are used only to subsidize broadband deployment in areas where market forces will not support such buildout; and

- Seeking additional commitments from providers to offer low priced services, equipment and training to low income households.

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REPLY COMMENTS OF MONTGOMERY COUNTY, MARYLAND

Montgomery County, Maryland hereby submits these reply comments in response to the above-captioned Notice of Inquiry ("Ninth NOI"), released August 21, 2012, seeking "data, information that will inform the Commission's determination and allow [the Commission] to evaluate all of the factors that influence the availability of broadband to all Americans." In these reply comments, the County responds to comments filed by other participants to make the following points: 1. fixed (wireline) broadband deployment has stalled but the cause is not local government policies. 2. wireless broadband has been deployed rapidly and local governments have not been a barrier. 3. deregulation has not served the public interest; and 4) there are several actions the Commission can and should take to improve and promote broadband deployment and adoption. Further deregulation is both unnecessary and counter-productive.

I. <u>INTRODUCTION</u>

The County's goals with respect to broadband are to: promote deployment of competitive broadband services; improve access by residents and small businesses to reasonably priced, reliable broadband service; facilitate broadband adoption; and to ensure availability of cost-effective, reliable high speed broadband for public safety first responders, schools, libraries, community colleges and government agencies. In addition, the County supports free WiFi in public spaces to facilitate access to government services and to promote economic development. The County seeks to work cooperatively with the federal government to implement effective policies that support these goals.

Local governments promote broadband deployment – arguments to the contrary are not supported by the facts. Historically, local cable franchising has been and continues to be the reason why wireline fixed broadband has been deployed to the majority of residences in this nation. In the 1980's, local cable franchises initially required cable service to be delivered to all households within a reasonable build out period. In the late 1990's, local governments required upgrades to be made available to all cable subscribers. These build out requirements then enabled cable modem innovations to cost-effectively reach 85 percent of all households. Cable modem technology now offers the broadest coverage area of any fixed broadband technology and is the major contributor to a national fixed broadband deployment rate of more than 94 percent of all households.[1]

Local zoning regulation has not hindered the rapid pace of wireless broadband deployment. According to the Eighth Broadband Progress Report, mobile broadband services now reach nearly 94 percent of households as well,[2] and industry commenters in this proceeding remark that deployment is continuing to grow.[3]

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[1] *In the Matter of 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. 11-121, Eighth Report, ¶ 60 and Chart 1 (rel. August 21, 2012) ("Cable providers continue to report the largest coverage area (85 percent) followed by DSL providers (79 percent).") ("Eighth Broadband Progress Report").

[2] Eighth Broadband Progress Report at ¶ 89, Table 15, reporting the number of Americans without access to mobile broadband at 6.2 percent.

[3] Verizon Comments at 5; CTIA Comments at 4; MetroPCS Comments at 11-12.

Recent federal policy emphasizing deregulation and preemption of local regulation has been unnecessary and, in some ways, counter-productive. The Commission’s record demonstrates that the elimination of local build out requirements has not improved fixed broadband deployment in historically unserved areas. The Commissioner's record further demonstrates it has allowed *de facto* monopoly and duopoly market conditions to persist or develop in both fixed and mobile broadband markets. This limited competition leaves broadband prices high and harms consumers.

The County calls on the Commission to take positive actions that foster marketplace conditions that support greater deployment and adoption. The County also urges the Commission engage in a fact-based evaluation of the effects of federal policy actions. The County further suggests that the Commission improve broadband deployment by: (a) Encourage cable providers engaged in franchise renewal negotiations to commit to 100 percent buildout in franchise areas, including new buildout commitments and timetables to reach small businesses and areas with low housing density. (b) Ensure that the Connect America Fund and similar funding mechanisms are used only for remote areas and not to subsidize deployment that market forces will support. (c) Seek further commitments from all major broadband providers to offer low-priced services and equipment for all low income households – particularly households with older Americans, and to support local and regional community-based digital literacy training.

II. AFTER INITIAL SUCCESS UNDER LOCAL FRANCHISING, FIXED (WIRELINE) BROADBAND DEPLOYMENT HAS STALLED

A. LOCAL CABLE FRANCHISE BUILDOUT REQUIREMENTS WERE A MAJOR FACTOR IN ACHIEVEMENT OF HIGH LEVELS OF FIXED BROADBAND DEPLOYMENT

Wireline broadband providers note that the Eighth Broadband Progress Report finds 94 percent fixed broadband deployment in the nation.[4] Comcast also points out the United States leads the world in cable modem coverage.[5] This success is a direct benefit of effective local government franchise regulation. Federal pressure to limit buildout requirements is in fact a principal reason why broadband does not reach more households, nor a significant number of small businesses.[6] As a result, in Montgomery County, providers have limited deployment to areas of their choosing, avoided areas with low density levels of inhabitants, by-passed many small businesses, and have been unable or unwilling of offer competitive broadband services multi-dwelling units. The results have been similar elsewhere.[7] State franchising regimes that have no or limited build out requirements have also exacerbated this problem.

The high levels of *past* investment in fixed broadband discussed in industry comments in this proceeding cannot be expected to expand *future* deployment. Fixed broadband providers are investing significant amounts to upgrade their existing footprints.[8] This an important means of enhancing existing deployment of, or current plans to expand deployment of, broadband

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[4] Comcast Comments at 2; AT&T Comments at 3; Verizon Comments at 4 cite a higher figure, 96.07 percent, based on a different report (*Broadband Statistics Report: Access to Broadband Technology by Speed* at 3 (data as of Dec. 2011; report published June 2012).

[5] Comcast Comments at 9.

[6] *See e.g., Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television* Consumer *Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, 22 FCC Rcd. 5101 at 5116-5122 (rel. March 5, 2007) ("Local Franchising Order").

[7] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Fourteenth Report, Table 2 (on page 18) (rel. July 20, 2012) indicates 1.5 percent of homes (2 million homes) have access to no wireline MVPD at all.

[8] Verizon Comments at 8 (discussing cable companies' upgrades).

services. However, the cable industry's own data shows that the growth in homes passed by cable broadband has slowed considerably in recent years. From 2003 to 2006 the number of homes passed by cable broadband increased by 27 percent, from 90.6 million to 115.2 million. But over the next five years, from 2006 to 2011, growth in homes passed by cable modem fixed broadband slowed to less than 9 percent ending the period at 125.4 million.[9]

Cable companies are doing little to expand their network footprints. Little evidence has been submitted to demonstrate that any cable company has voluntarily agreed to expand its buildout obligations, despite the fact that as many of these companies are entering into their second franchise renewal, *i.e.*, have been offering services for 30 years. Today, the remaining areas that are unserved are comprised primarily of lower density areas within cable franchise territories and or generally rural areas where franchised cable service never developed. The only incumbent cable operator that reports any buildout activity to new areas in this proceeding is Comcast, and it reports activity undertaken due to merger conditions imposed by the Commission when it approved the Comcast NBC Universal merger transaction.[10] The reported buildout figures are tiny compared to the immense size of Comcast's existing network. Comcast reports it expanded its broadband network by 2,044 miles in 2011, allowing it to offer broadband to an additional 199,876 homes.[11] In marketing materials dated 2010, Comcast boasts a network of 600,000 plant miles.[12] In percentage terms, this 2044 mile expansion represents a 0.34 percent increase in the size of Comcast's network, little more than mere mathematically rounding. The increase of nearly 200,000 homes passed is equally miniscule in context. At the

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[9] Homes Passed by Cable High-Speed Internet (HSI) Service 2003-2011, http://www.ncta.com/Stats/BroadbandAvailableHomes.aspx (last accessed October 22, 2012)

[10] Comcast Comments at 6.

[11] *Id.*

[12] "Comcast Business Class, The Comcast Network, Built For Business." http://business.comcast.com/docs/general-docs/Network_Brochure.pdf?sfvrsn=0 (last accessed October 22, 2012).

end of 2011, Comcast's cable system passed an estimated 52.5 million homes and businesses,[13] and this increase represents an expansion of only 0.38 percent. Likewise, although Verizon comments that it "continues to invest and deploy" its FiOS network, its management has also indicated that it is nearing the end of its planned deployment.[14]

Commission and state actions have permitted fixed broadband providers to effectively end their buildout out efforts before the job has been completed.[15] Providers now appear willing to serve these customers only if they are granted across-the-board concessions on right-of-way fees, and the like, or if they are subsidized with funds such as the Connect America Fund.

B. LOCAL GOVERNMENTS ARE NOT A BARRIER TO BROADBAND DEPLOYMENT

The Commission has ample evidence before it in prior proceedings, particularly last year's Rights-of-Way NOI proceeding, demonstrating conclusively that local governments are not a barrier to broadband deployment.[16] Specifically, this evidence reveals:

- Local rights-of-way practices are a minimal factor in a broadband provider's deployment calculus, as they add little to overall constructions costs and can actually

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[13] Comcast 2011 Annual Report on Form 10-K at 2, available online at http://files.shareholder.com/downloads/CMCSA/2129807639x0x561695/79426950-eb48-4e46-a761-f999d155a226/BookmarkedComcast10K.pdf (last accessed on October 22, 2012).

[14] Verizon and Verizon Wireless Comments at 8 (Verizon Comments); *See* Comments of Frank Shammo, Verizon Communications Inc. EVP and CFO, "Verizon at Goldman Sachs Communacopia Conference" transcript, September 20, 2012 at 13 (Verizon Transcript). Available online at: http://www22.verizon.com/idc/groups/public/documents/adacct/goldman_vz_transcript_092012.pdf (last accessed October 20, 2012).

[15] See discussion *infra* at 12ff.

[16] *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, Notice of Inquiry (rel. April 7, 2011) ("Rights-of-Way NOI"), Comments of The National League of Cities, the National Association of Counties, the United States Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association (filed July 18, 2011), and in particular the studies in Exhibits E through I, ("National Associations' Rights-of-Way NOI Comments"), attached hereto as Attachment 1.

reduce costs to the extent that these practices ease coordination or prevent property damage.[17]

- The relatively small percentage of communities unserved by fixed broadband are in isolated locations, far from centers of population and commerce, and typically have few residences and businesses dispersed across large geographic areas, such that the costs of installing broadband infrastructure and providing service greatly exceed the revenues that providers can earn on these services.[18]
- Limiting or abolishing rights-of-way fees to subsidize broadband deployment in unserved areas would likely have no measurable effect on broadband deployment, as the savings would be, at most, a small fraction of the required investment.[19]

C. THE PRINCIPLE FACTORS HINDERING BROADBAND ADOPTION ARE CONSUMER INTEREST AND PRICE

The Commission's most recent comparative study of broadband rates shows the results are disappointing for consumers in the United States. The Commission ranks the United States internationally in terms of price (in 2011) for residential fixed stand-alone broadband plans, with the United States ranking (lower ranking means higher prices):

- 14th out of 24 countries in the 1-5 Mbps speed tier.
- 21st out of 33 countries in the 5-15 Mbps speed tier.
- 26th out of 32 countries in the 15-25 Mbps speed tier.

[17] *See* in particular, *An Engineering Analysis of Public Rights-of-Way Processes in the Context of Network Design and Construction* (July 13, 2011) ("CTC Report"), Attachment 1, Exhibit F and ECONorthwest, Effect on Broadband Deployment of Local Government Right of Way Fees and Practices (June 18, 2011), Attachment 1, Exhibit G ("ECONorthwest Report").

[18] *See generally* ECONorthwest Report.

[19] *Id.*

For wireless smart phone data plans, ranking countries by the price per gigabit without usage limits and not accounting for speed, the United States ranked a disappointing 11th out of 19 countries.[20]

High prices are inhibiting broadband adoption in the United States. For example, comments of the deaf, hard-of-hearing, late-deafened and deaf-blind consumers in this proceeding state unequivocally that the retirement of copper loops by incumbent local exchange carriers in favor of fiber optic facilities which offer only more expensive broadband services, *is reducing the availability of broadband by decreasing its affordability.*[21] Commenters in the video competition proceeding have expressed concerns that wireline multichannel video programming distributors (MVPDs) may be cross-subsidizing video services with higher rates for Internet.[22]

Moreover, a recent NTIA study further supports the conclusion that high prices inhibit broadband adoption. According to the NTIA study, the three most important reasons households cite as a reason for being without broadband Internet or dial-up service are: (1) lack of need or interest (47 percent); (2) lack of affordability (24 percent); and (3) inadequate computer (15 percent).[23] Further, the study found households citing affordability as the major barrier to subscribing to broadband service said important factors were both the fixed cost of purchasing a computer and the recurring monthly subscription costs. It may also be true that cost is a factor for those households citing relevance as the primary reason for not adopting broadband.

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[20] *In the Matter of International Comparison Requirements Pursuant to the Broadband Data Improvement Act International Broadband Data Report,* IB Docket No. 10-171, GN Docket 11-121, Third Report, (rel. Aug. 21, 2012) at ¶ 33.

[21] Consumer Groups' Comments at 4-5.

[22] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203 (filed Sept. 10, 2012), DirecTV Comments at 16-18.

[23] U.S. Dept. Commerce, Exploring the Digital Nation: Computer and Internet Use at Home, Nov. 2011, http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_computer_and_internet_use_at_home_11092011.pdf (last accessed October 22, 2012)

Anecdotally, consumers have expressed relevance as a cost-benefit analysis, *i.e.*, "there is nothing I use broadband for that makes it worth the cost."

The evidence demonstrates that local and State government regulation adds very little to the cost of broadband[24] and yet, conversely, local and State programs can be significant drivers in boosting broadband relevancy perception and broadband literacy. Local and State governments offer a significant number of services on-line. This expands access to government services for people and businesses with broadband access, but may make it more inconvenient to access government services for those without broadband access. Efforts to reduce paper consumption and printing costs have driven governments of all sizes to replace printed publications with electronic copies made available only on-line. Public schools frequently require students to perform Internet-based research and provide information for parents that is only available on-line. Government jobs, like many private sector positions, must be applied for using on-line applications. Thus, local and State governments have a compelling need to support efforts to ensure that all residents and small businesses have affordable broadband access.

Therefore, in addition to providing incentives for consumers and businesses to use on-line services, local governments also make investments to ensure that all residents have access to these on-line services. In addition to the buildout requirements discussed above, local governments invest in making free Internet access available in school libraries, public libraries and at community centers, and often provide free access to printers as well. More and more governments are making free public wireless broadband (wi-fi) available in government

[24] Local government regulatory and right-of-way fees are not primary factors influencing deployment. Rights-of-Way NOI, Comments of the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association (filed July 18, 2011), and in particular the studies in Exhibits E and I of National Associations' Rights-of-Way NOI Comments.

buildings (including libraries) and in public spaces. Local governments provide free and low cost courses to improve Internet skills, from basic digital literacy, to workforce computer skills, to 'how to apply for jobs on-line courses,' to advanced website development and youth and community media training. In Montgomery County, the use of libraries as a means to access the Internet is so overwhelming that, increasingly, libraries have to restrict use of computer terminals by time limiting use by users or by limiting computer use for specific purposes such as employment searches and application submissions. Thus, reducing local government regulatory authority and fees does not significantly reduce or promote broadband deployment and does not seemingly increase the percentage of residents who think the Internet is not relevant, cutting a primary funding source for local government deployment of communications networks to provide free and low cost community broadband access, as well as broadband adoption and digital literacy training programs, does in fact reduce broadband deployment, increase broadband costs for those who cannot afford broadband at home, and diminished efforts to address the broadband relevancy problem.

As discussed in the next sections, both the stall in fixed broadband deployment, and the persistent high prices for broadband, are indicative of a failure of federal policy which does not address, except perhaps to facilitate, the *de facto* monopoly pricing power of the incumbents.

III. MOBILE BROADBAND DEPLOYMENT HAS BEEN RAPID; LOCAL GOVERNMENTS HAVE NOT BEEN A BARRIER

The wireless industry participated in force in the opening round of this proceeding and their conclusions about wireless broadband deployment could not be more clear; mobile wireless deployment is proceeding rapidly. According to Verizon, the largest wireless carrier in the country, "the availability of broadband is continuing to expand at a rapid pace, particularly with the widespread rollout of the next generation of wireless broadband service."[25] Verizon also remarks that its 4G LTE service, launched in 39 markets in December 2010, is serving more than 110 million Americans, will cover approximately 95 percent of the U.S. population (more than 230 million Americans) by mid-2013.[26] Others in the industry are equally enthusiastic. According to CTIA, the leading trade association for wireless service providers, the speed of deployment of wireless broadband in this nation has proceeded at a "remarkable pace."[27] MetroPCS adds that deployment has been "dramatically increasing" making the United States a "global leader."[28] Chairman Genachowski echoed these sentiments in a recent speech in which he said: "American progress in mobile over the past four years is the fastest we've ever seen."[29]

The experience in Montgomery County mirrors the industry-wide data. As reported in its Reply Comments in the Rights-of-Way NOI, since 1996, the County has approved deployment of 1,592 total wireless facilities (*i.e.*, antennas, monopoles, and towers) by 32 companies, and this includes multiple generations of wireless technology.[30]

The inescapable conclusion the Commission must draw from wireless industry's own evidence is that local governments have not been a barrier to wireless broadband deployment. The Commission's often stated goal of fair, transparent, fact-based and data-driven policy development demands that the Commission consider the industry evidence as a whole when

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[25] Verizon Comments at 5.

[26] *Id.*

[27] CTIA Comments at 4.

[28] MetroPCS Comments at 11-12.

[29] "Winning The Global Bandwidth Race: Opportunities And Challenges For Mobile Broadband" Prepared Remarks Of FCC Chairman Julius Genachowski, University Of Pennsylvania – Wharton, Philadelphia, PA, October 4, 2012. Available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db1005/DOC-316661A1.pdf (last accessed October 17, 2012).

[30] The figures are as of the end of the County's 2011 Fiscal Year which ended June 30, 2011. Rights-of-Way NOI, Montgomery County Reply Comments at 5*ff*, attached hereto as Attachment 2.

evaluating industry demands for further preemption of local zoning or regulatory authority.[31] There is no statistical evidentiary basis for such deregulation demands.

IV. DEREGULATION HAS NOT SERVED THE PUBLIC INTEREST

A. DEREGULATION HAS PERMITTED FIXED BROADBAND DEPLOYMENT TO STALL AND NEAR MONOPOLY MARKET CONDITIONS TO PERSIST, KEEPING PRICES HIGH AND HINDERING ADOPTION

Commission efforts over the years have allowed *de facto* monopoly fixed broadband networks to develop and flourish. The following are examples of Commission actions that have facilitated consolidation and *de facto* monopolization of fixed broadband networks:

- The Commission determined that cable, and telephone companies do not have to provide nondiscriminatory access to their networks to competitors.[32]
- The Commission allowed clustering of cable systems, even though substantial objections were on the record that clustering would produce significant harms.[33]

[31] "Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity," Prepared Remarks of Chairman Julius Genachowski, The Brookings Institution, Washington DC, September 21, 2009 at 7; *see* also, GigaOM.com, "The GigaOM Interview: FCC Chairman Julius Genachowski on Mobile, Broadband, iPhone and Innovation" August 3, 2009 ("[W]e want to be fact-based and data-driven."), available at http://gigaom.com/2009/08/03/the-gigaom-interview-fcc-chair-julius-genachowski/ (last accessed October 22, 2012).

[32] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002); upheld in *Cable & Telecomm. Ass'n v. Brand X Internet Svcs*, 545 U.S. 967 (2005); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005); upheld in *Time Warner Telecom v. FCC, et al.*, 507 F.3d 205 (3rd Cir. 2007).

[33] *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corp to Time Warner Cable and Comcast Corporation, etc.*, MB Docket No. 05-192, Memorandum Opinion and Order (Rel. July 21, 2006) at ¶ 242 (Commission notes "…while increased clustering may result in certain efficiencies and cost savings, we find that Applicants have failed to sufficiently quantify the cost savings or adequately explain how the cost savings will flow through to consumers. We also find that the Applicants have not demonstrated that increased clustering will enhance competition with DBS providers and LECs to the benefit of consumers. Therefore, we do not give weight to these claims." Commenters in that proceeding raised numerous concerns about the negative impacts of clustering.)

- The Commission and state legislatures in some major states have severely cut back on the single most important local franchising requirement that spurred widespread broadband deployment, namely build out requirements.[34]

These deregulatory efforts have led to absurd results. Major population centers such as Boston and Baltimore have been left without a major competitor in fixed broadband (Verizon FiOS) whereas neighboring suburban areas have been built out. Many areas of the country are not seeing competitive innovations offered in their markets.

B. WIRELESS MARKET DEREGULATION HAS ALLOWED DUOPOLY CONDITIONS TO DEVELOP

Wireless providers other than the "Two Bells" (Verizon and AT&T) illustrate some of the problems that have been created in a wireless marketplace that has been allowed to develop into an effective duopoly that hinders competition. For example, MetroPCS outlines how it has become difficult to obtain reasonable roaming agreements.[35] Likewise, the Competitive Carriers Association stresses its concerns that Commission approval of proposed acquisitions of spectrum by Verizon and AT&T will further solidify the Twin Bells' status as "megacarriers" and urges the Commission to take pro-competitive *regulatory* actions such as working to ensure that "critical inputs, such as roaming arrangements and special access services, are made available to competitive carriers on commercially reasonable terms and conditions and at just and reasonable prices."[36]

And the recent Commission approval and US Department of Justice settlement regarding the Verizon Wireless spectrum acquisition and market collaboration with the dominant players in

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[34] Local Franchising Order; see also, *In re Implementation of Section 621(a)(1) of the Cable Communs Act,* 22 FCC Rcd. 19633 (rel. Nov. 6, 2007). State video franchising laws were adopted in Texas, California, Michigan, North Carolina, among others.

[35] MetroPCS Comments at 16-17.

[36] Competitive Carriers Association Comments at 4-5.

the cable industry, will facilitate further actions by the dominant fixed and wireless broadband providers to divide up the broadband market and maximize revenues on their existing footprints with impunity.[37]

C. **FURTHER DEREGULATION IS NOT THE SOLUTION**

In this proceeding, industry commenters contend that the Commission must find that broadband is being deployed to all Americans in a reasonable and timely fashion, and that prior reports with contrary findings were wrong.[38] The inescapable conclusion should be that regulation is not hindering broadband deployment. Yet, industry commenters do not hesitate to demand further deregulatory action allegedly needed to accelerate broadband deployment. While it is not surprising that industry would continue to push for deregulation, the Commission should reject calls to deregulate simply for deregulation's sake.

Concerning fixed broadband, AT&T asks, for example, that the Commission establish a date certain to sunset the public switched network (PSTN) and its interconnection requirements.[39] Verizon urges the Commission to "eliminate regulatory uncertainty" by asserting that all IP-based services may only be subject to federal rules, rather than "a piecemeal, localized approach of state or local regulation [that] would eliminate those efficiencies and increase costs and would undermine widespread deployment and adoption of broadband."[40] The United States Telecom Association calls for its forbearance application, seeking forbearance of a lengthy list of rules it deems to be legacy regulation, to be granted.[41] The Fiber-To-The-Home

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[37] *In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses; Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent To Assign Licenses* (WT Docket No. 12-4), Memorandum Opinion and Order and Declaratory Ruling, FCC 12-95 (rel. August 23, 2012).

[38] *See* for example, Verizon Comments at 1; NCTA Comments at 3-6; AT&T Comments at 2-3.

[39] AT&T Comments at 8-10.

[40] Verizon Comments at 24-25.

[41] USTA Comments at 27-28.

Council asks the Commission to do more to improve access to federal, state and local laws and regulations, as well as private rights-of-way such as railroad crossings.[42]

Before the Commission takes any action in response to any of these requests, the County urges the Commission to take a close look at the facts available in the record of this proceeding and others, notably the Rights-of-Way NOI.[43] The *fact* is that wireline deployment has succeeded to date largely due to local regulation, not deregulation. Deregulation has not only allowed deployment to slow, but there is little evidence, at least in the related video services market, that it can be expected to bring about lower prices.[44] As importantly, the Commission has detailed economic analyses submitted in response to its Rights-of-Way NOI, that presented a technical analysis, an econometric study, and local experiences all confirming that local government wireless siting and right-of-way management practices ***are not*** delaying broadband deployment, and further, that additional deregulation of these practices would discourage critical adoption efforts and cause other problems.[45]

Wireless providers demand further deregulation to spur mobile broadband deployment, despite having declared, as noted earlier, that wireless broadband deployment is proceeding at a remarkable pace.[46] For example, PCIA claims wireless providers "face myriad barriers to deployment from state and local jurisdictions" and urges the Commission to eliminate these barriers, to perform educational outreach to state and local governments on how to apply federal

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[42] Fiber-To-The-Home Council Comments at 14-16.

[43] *See* Rights-of-Way NOI.

[44] *See* generally, *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* MM Docket No. 92-266, Report on Cable Industry Prices (rel. Aug. 13, 2012).

[45] *See* National Associations' Rights-of-Way NOI Comments and in particular the studies in Exhibits E through I.

[46] *See supra* Section III.

law, and to promote wireless deployment on and around schools.[47] Verizon asks the Commission to establish standards for interpreting the new federal collocation statute,[48] and seeks to "remove impediments" by action on the Commission's 2011 NOI on rights of way and wireless siting.[49] There is no factual basis to support a need for any of these actions, nor more importantly, any factual basis to suggest that any of these actions would benefit consumers.

Further, providers complain that the Commission has taken *actions* to regulate them. For example, Verizon urges the Commission to "forego unnecessary and intrusive regulation of broadband" including efforts to establish net neutrality rules, data roaming rules, and outage reporting requirements.[50] Broadband providers have repeatedly challenged the validity of any Commission rules intended to ensure fair and open access to the Internet.[51]

Providers do not justify requests for deregulation with hard data or evidence. Moreover, the broad brush deregulatory approach advocated by industry completely disregards the admonitions earlier in Verizon's same comments, that the Commission should limit negative Section 706 findings "to those few areas…that remain unserved today and are unlikely to be reached by private investment in the near future" and it should limit broadband reporting requirements on broadband availability because "more tailored efforts – such as reporting requirements focused on any continuing gaps in availability or targeted to providers receiving funding to address those gaps – would be more appropriate than broad, industry-wide and nationwide reporting obligations."[52] In short, what Verizon advocates is that providers'

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[47] PCIA Comments at 4-7.

[48] Section 6409, 47 U.S.C. § 1455.

[49] Verizon Comments at 27-28.

[50] Verizon Comments at 27-29; MetroPCS Comments at 18-20.

[51] *Comcast Corp. v. Federal Communications Commission*, 600 F.3d 642 (DC Cir. 2010); *Verizon et al. v. Federal Communications Commission,* D.C. Circuit, Case No. 11-1355.

[52] Verizon Comments at 19-20.

obligations should be limited to areas that are not served or are receiving funding, yet *deregulation* should be across the board. This is hardly a balanced approach.

V. THE COMMISSION CAN AND SHOULD TAKE REGULATORY ACTION FOCUSED ON BOTH DEPLOYMENT AND ADOPTION

Adoption is the key to expanding the capital available for investment in unserved or underserved areas. If a larger number of households that (1) could afford broadband where it already is available and (2) saw the relevancy of purchasing broadband, then there might be additional funding available to subsidize deployment in places where construction factors or low-density make it more expensive to deploy,[53] as well as funding to subsidize low cost broadband for low income people. With those principles in mind, the County makes the following recommendations.

A. THE COMMISSION SHOULD ENCOURAGE PROVIDERS AND LOCAL GOVERNMENTS ENGAGED IN FRANCHISE RENEWAL NEGOTIATIONS TO COMMIT TO 100 PERCENT BUILD OUT IN FRANCHISE AREAS

As discussed earlier, the Commission's Local Franchising Orders failed to recognize the positive role buildout requirements have played in promoting and expanding fixed broadband deployment. The County urges the Commission to rethink this view, particularly as it is applied to incumbent providers.

At present there are numerous communities throughout the country, including Montgomery County, facing franchise renewal negotiations with incumbent cable operators who have largely built out their systems under prior franchises. Incumbents state that they are more likely to deploy networks to unserved areas if they can price their services to allow them to recover the investment associated with such deployment.[54] Yet incumbents have largely been

[53] National Associations' Rights-of-Way NOI Comments and in particular Exhibit F, Section 2 and 3.

[54] Comcast Comments at 20.

reluctant to agree to any requirements to which competitive entrants had not already agreed to meet. Moreover, competitive entrants have generally sought fewer, or nor more than the same conditions, as previously agreed to by incumbents. The County believes that it is economically feasible for incumbent cable operators to "fill in the holes" and complete build out of their systems to all franchise areas. These incumbents have mature systems that are largely constructed, generate significant free cash flow, and have managable ongoing capital requirements (compared to initial build capital requirements). Limited additional expansions would serve remaining residents in the franchise area and should not be considered unreasonable build out requirements in exchange for a renewal franchise. Likewise, for new entrants that have become well established[55] it would be reasonable to encourage further build out requirements.

Thus, to expand deployment, the County urges the Commission to both find it reasonable for local governments to require, and to openly encourage incumbents and successful entrants to commit to 100 percent build out in all franchise areas as part of their renewal or mid-term franchise commitments.

B. THE COMMISSION SHOULD ENSURE THAT THE CONNECT AMERICA FUND AND OTHER FUNDING MECHANISMS ARE USED ONLY FOR REMOTE AREAS AND NOT TO SUBSIDIZE BUILD OUT THAT MARKET FORCES WILL SUPPORT

To expand deployment in truly remote areas, outside of the reach of existing wireline franchises and systems, the Connect America Fund and other funding mechanisms should be used to subsidize deployment in rural areas, including using mobile technologies. However, as a corollary to the previous recommendation and recognizing that these funds are scarce, the Commission should ensure that these funds are not used to subsidize broadband deployment that

[55] Verizon Comments at 8 (Verizon reports an Internet penetration rate in its FiOS footprint of nearly 37 percent up from nearly 34 percent the prior year), and the company anticipates this rate will climb in the future once its build out ceases. Verizon Transcript at 13 ("And at this point we won't build beyond that, because at this point we have to capitalize on what we have invested.").

market forces will support. In addition, the Commission should recognize that limiting local government rights-of-way fees does not provide a subsidy for broadband deployment unless reductions are tied to specific broadband deployment requirements. The record is replete with examples that reducing regulation does not result in industry offering either more lower priced services or more services to a broader area of underserved people.

C. <u>THE COMMISSION SHOULD SEEK FURTHER COMMITMENTS FROM ALL MAJOR BROADBAND PROVIDERS TO OFFER LOW PRICED SERVICES, EQUIPMENT AND DIGITAL LITERACY TRAINING TO LOW INCOME HOUSEHOLDS</u>

To expand adoption, the Commission should build on efforts, both voluntary and mandatory, to encourage all the major broadband providers to make commitments to spur adoption, particularly among the groups that have the lowest levels of broadband adoption. The County supports the voluntary commitments in the Connect2Compete initiative launched last year,[56] as well as the binding commitments applied to Comcast to make available to low income households: (i) high-speed Internet access service for less than $10 per month; (ii) personal computers, netbooks, or other computer equipment at a purchase price below $150; and (iii) an array of digital literacy education opportunities, and to provide free video and high-speed Internet service to 600 new anchor institutions, such as schools and libraries, in underserved, low-income areas.[57]

However, the Commission must do more to evaluate the results of these various initiatives and find ways to improve upon them. For example, Comcast's Internet Essentials program is available to families with school-aged children eligible for free or reduced meals,

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[56] Connect2Compete, http://www.connect2compete.org (last accessed October 22, 2012).

[57] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Option and Order (FCC 11-4) (rel. January 20, 2011) at 141*ff*. (merger conditions XVI 1(c) and 2).

whereas the Connect2Compete program is only available to families with school-aged children eligible for free meals. The Connect2Compete program does not offer low cost computers. Comcast loosened its eligiblity requirements, enhanced its service offerings, and increased its educational outreach campaigns after data from the first six months of the program showed that only about 2 percent of eligible households enrolled in the Comcast program. The County also has been actively assisting Comcast in approving its program results in the community, engaging in partnerships with public schools and low income housing providers.

Comcast is now in the second year of the program and last month announced that it has enrolled 91,000 households and anticipates reaching 100,000 households very soon. However, the 100,000 milestone would represent only 4 percent of the 2.3 million households that Comcast states are eligible for its program.[58] Prior to the start of 2012-2013 school year, Comcast had enrolled fewer than 200 families out of a potential 47,000 children eligible for free or reduced meals in the County. Comcast announced that any child who attends a "Title I" school (in which 75 percent or more of the students are eligible for free or reduced meals) would automatically be deem to have met the income qualification without providing further verification. In Montgomery County, only 6 elementary schools out of almost 200 elementary, middle, and high schools meet the Title I criteria, while 32 percent of children in the Counties' public schools were eligible for free or reduced-price meals (FARMs) in the 2011-2012 school year.

Comcast and County will review the results of the start-of-school-year efforts in November to determine whether the additional community partnerships are effective. Comcast has informed the County that program enrollment in Montgomery County is higher than in other parts of the region. But the Commission only required Comcast to enrolled families for 3 years.

[58] T. Spangler, "Comcast Hooks Up Nearly 100,000 Low-Income Homes to Broadband," Multichannel News, August 15, 2012. Available online at: http://www.multichannel.com/content/comcast-hooks-nearly-100000-low-income-homes-broadband (last accessed on October 22, 2012).

At the present rate, it is unlikely that more than 6 or 8 percent of eligible households will become enrolled in the Comcast program. Moreover, the Commission has not secured agreement from the Connect2Compete companies to expand their programs as Comcast has voluntarily done. Conquering low broadband adoption is a difficult task, but it is more difficult if the Commission does not factually evaluate its own policy and program initiatives, and even more difficult if the Commission persists in promoting deregulatory agendas that distract and deter local government efforts to solve the problem of low broadband deployment and adoption.

VI. CONCLUSIONS

To achieve ubiquitous broadband deployment and adoption the Commission should focus on factual evaluation of the state of broadband deployment. The factual record before the Commission does not support further deregulation. The County urges the Commission to take action in the areas identified.

Respectfully submitted,

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