

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 THE CITY OF PORTLAND, OREGON

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SUMMARY

The City of Portland, Oregon strongly supports and shares the Commission's goal of accelerating broadband deployment. We welcome the opportunity to share the significant insights the City has gained as a result of its decades of experience facilitating such deployments, and we will be interested in learning about other jurisdictions' experiences as well. The City has worked hard to develop innovative and flexible regulatory policies and practices in regard to the management of its rights-of-way and wireless deployments in order to spur investment by the private sector. And where the private sector has fallen short, the City has made its own investments to meet the community's needs. As a result Portland residents enjoy the most competitive broadband marketplace in Oregon – both wireline and wireless. And the City continues to look for ways to do more. Earlier this year, the City launched a strategic broadband planning initiative to develop a local broadband plan for the next decade. Unfortunately, the federal regulation contemplated by this Notice of Inquiry threatens to undermine the key attribute of the City's success – that is, the freedom to work with industry and the community to continue to experiment and develop local solutions to local deployment issues.

Through these comments, the City:

- 1) Expresses its strong support for the comments filed by the national associations representing local governments.
- 2) Provides information about current broadband deployment levels in the City.
- 3) Provides basic information regarding its local right-of-way and facility management practices and charges,
 - a. Applicable to wireline deployments; and
 - b. Applicable to wireless deployments.

- 4) Describes how the City has made significant broadband investment when providers would not meet the needs of the community schools, libraries and other public institutions.
- 5) Recommends actions the Commission could take to foster deployment, and cautions against imposing mandatory federal regulations that would be counterproductive or harmful.

The City develops and applies policies that protect public safety, public and private property and the environment, promote economic development, balance competing uses of public (and private property), and promote broadband deployment. The Commission should not interfere with the careful balancing of community interests that these local policies represent. 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 Commission's limited expertise on local land use matters all point to the same conclusion: this is no place for federal regulation.

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COMMENTS OF THE CITY OF PORTLAND, OREGON

The City of Portland, Oregon (the “City”), by its counsel, files these comments in response to the Notice of Inquiry (“NOI”), released April 7, 2011, in the above-entitled proceeding. Through these comments, the City expresses its strong support for the analysis and conclusions set out in the filing made by the national associations representing local governments, and the City provides a description of the City’s considerable experience and expertise in facilitating broadband deployment by wireline and wireless providers. These comments are an effort to educate the Commission and illustrate why mandatory Commission regulation in this area would be counterproductive or harmful. The City’s policies protect and further public safety, economic development, and other community interests, while actively encouraging broadband deployment. The Commission should not interfere with the careful balancing of community interests that these local policies represent. By adopting rules in this area, the Commission could disrupt this process at substantial cost to local taxpayers and to the local economy. The City believes that a basic respect for federalism, a fair reading of the Communications Act and the Constitution, and an honest assessment of the Commission’s

limited expertise on local land use matters all point to the same conclusion: this is no place for federal regulation.

I. THE CITY STRONGLY SUPPORTS THE FILING BY THE NATIONAL LOCAL GOVERNMENT ASSOCIATIONS URGING THE COMMISSION TO REFRAIN FROM IMPOSING MANDATORY FEDERAL REQUIREMENTS

The City strongly supports the 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, and the American Public Works Association and the International City/County Management Association (the “National Local Government Associations”). Based on our own experience, we know that the misperception promoted by the industry – that local practices with respect to wireless and wireline siting, and charges for use of public property deter broadband deployment or adoption – is incorrect. Federal regulatory intrusion will not “correct” the problem (there is none) but it would likely deter innovation that is helping to increase deployment.

The City is constantly working with industry and the community to improve its regulatory processes and has a longstanding commitment to competitive telecommunication and broadband deployment. In fact, the City is proud to say that it has the most competitive wireline and wireless broadband market in Oregon, and one that compares very favorably to other similarly sized communities. Most notably, this has been achieved even though – and we believe because - the City charges for use of the rights-of-way, and substantially regulates the use of rights-of-way and the placement of wireless facilities. The City also took on an active role as service provider in the broadband market when industry was not offering adequate broadband service to certain segments of the community. These activities are discussed further in the sections that follow.

Despite these accomplishments, the City is not about to rest on its laurels. Recognizing that there is always more work to be done to improve broadband deployment within the City, and following on the Commission's release of its National Broadband Plan, and the recent creation of the Oregon Broadband Advisory Council to engage in coordination efforts at the state level, the City decided to engage in a strategic planning process to develop a local broadband plan for the City for the period 2011 to 2020.¹ In January of this year, this City-wide effort was launched at an event that was streamed live by Portland Community Media and cablecast on Cable Channel CityNet 30.² The draft plan released in May 2011 is among the first ever prepared by a municipality in the United States.³ The goal is to have extensive stakeholder consultations completed and the plan approved by the City Council by this autumn, so that the City can then begin incorporating the plan and necessary funding into its programs and budgets.

The City is proud of these achievements. But because these efforts are designed to meet *local needs and conditions in the City*, it would be inappropriate for the Commission to conclude that the City's models would work elsewhere. The City is willing to share its lessons-learned with its sister jurisdictions. But those lessons cannot be applied without adjustment to specific local conditions, just as the City has adjusted these policies to meet specific community conditions. Nor is mandatory federal regulation of these local matters what our federal system envisions. Thus, the City strongly supports the National Local Government Associations in their call for the Commission to defer in these local deployment matters to the experts – the local

¹ The planning initiative was approved by the City Council by resolution dated September 26, 2010 which is available here: <http://www.portlandonline.com/fritz/?a=319774&c=49205> (last accessed July 17, 2011).

² The process is being led by the Office of Cable Communications and Franchise Management ("OCCFM"). Detailed information about the process, including meeting agendas and videos is available here: <http://www.portlandonline.com/cable/index.cfm?c=54013> (last accessed July 17, 2011).

³ The draft plan is available here: <http://www.portlandonline.com/shared/cfm/image.cfm?id=354243> (last accessed July 17, 2011).

governments – and to focus Commission efforts on other areas more appropriate for national policy action such as broadband literacy, barriers to broadband adoption, and broadband deployment in rural areas, to name a few.

Moreover, the City is concerned that federal regulation in this area may hamper cities like Portland who want to experiment with different models and approaches to spur broadband deployments. As mentioned above, the City is actively engaged in broadband planning – undoubtedly as are other communities – trying to determine the best ways to expand open networks, encourage increases in network speeds, and increase adoption. The City is investigating ways in which it can leverage its own assets to this end. Giving localities broad flexibility to try new arrangements – and to abandon them if they do not work – may be critical to the development of successful deployment and adoption strategies. An inflexible federal rule will stifle local innovation.

II. BROADBAND DEPLOYMENT IN THE CITY IS WIDESPREAD AS THE CITY HAS FACILITATED THE DEPLOYMENT OF MULTIPLE BROADBAND NETWORKS BY PRIVATE PROVIDERS

The City is expert at and has successfully managed its property to encourage City-wide deployment of several private sector broadband networks over the last three decades. Our policy goal is to have broadband service available to all households and businesses in our jurisdiction. According to the local cable operator, broadband is available to all households as required by our local cable television franchise. Ninety percent of the City has a choice of at least two broadband services, cable modem and DSL. All of our schools, libraries and public institutions have broadband service through a mixture of public and private service providers. However, there remain pockets of commercial areas that face exorbitant connection charges for broadband service. This is one of the issues we are planning to address in the City’s broadband strategic plan.

In terms of the number of wireline service providers of all types serving the City, over the past twenty years the number has grown from two incumbent communications providers to a peak of well over two dozen. That number has declined in part due to an increase in industry mergers. There are currently 14 private sector facilities-based wireline companies.

There are currently eight facilities-based wireless companies in Portland. We anticipate there may be a decline in the number of wireless competitors with industry consolidation.

III. THE CITY'S RIGHT-OF-WAY AND FACILITY MANAGEMENT PRACTICES AND CHARGES ARE NOT A BARRIER TO BROADBAND DEPLOYMENT

The City has the responsibility for managing the public rights-of-way recognizing that it is a finite resource that must serve many important but competing uses. These include various forms of transportation (e.g. automobiles, light rail and street cars), gas and electric utilities, water and sewer, as well as telecommunications and broadband. Pre-existing infrastructure must be accommodated and affects the shape and design of all new deployments, including non-communications utilities and uses. The City strives to referee and resolve all these competing demands for use of the rights-of-way in a manner that protects public health and safety.

The statistics demonstrate there is no evidence that the City's 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 and encourages* 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.

In response to the NOI, the City provides the following information to illustrate the City's approach with respect to the deployment of wireline and wireless facilities:

A. Wireline

The process described in this section is for wireline facilities work performed in the public streets and similar rights-of-way dedicated to transit which are regulated by the City. (We refer to these facilities collectively as rights-of-way although there are other types of rights-of-way, in parks and elsewhere, that are subject to different rules for obvious reasons.) The City also has extensive wireless facilities deployments in its rights-of-way and those processes are discussed in section III.B.

All entities, including telecom and utilities, who seek long term use of the rights-of-way must have authority from City Council for such use. Typically, this authority is in the form of a franchise; however other types of agreements are also available. The franchise requirement was included in the City Charter adopted in 1913.

Franchises and agreements are negotiated and administered through the Office of Cable Communications and Franchise Management (“OCCFM”).⁴ Normally, a company must first obtain a franchise before it can apply to the Portland Bureau of Transportation for individual construction permits.⁵ However, two decades ago the City introduced flexibility into the sequencing of franchise and permit approvals to accommodate the very high demand for wireline facilities deployments during the dot-com construction boom.⁶ That alternative remains available to new providers today.

⁴ OCCFM has information available on its website, which can be easily accessed by companies interested in obtaining a franchise. The website describes the franchise application process, along with standard franchise provisions and links to all current franchises to review. For more information see here: <http://www.portlandonline.com/cable/index.cfm?c=33150> (last accessed July 17, 2011).

⁵ Because of City charter requirements, franchises become effective several months after negotiations are completed.

⁶ During the dot-com boom, OCCFM developed a process by which companies who had negotiated franchises could begin construction almost immediately after the parties concluded their franchise negotiations. Under this process, the City granted franchisees a temporary revocable permit with substantially similar provisions to the negotiated

1) *Application Procedures, Forms, Substantive Requirements, and Permitting Charges.*

The Commission asks whether all necessary application procedures, forms, substantive requirements, and charges are readily available.⁷

In the City, the Bureau of Transportation (“BOT”) is responsible for managing the public rights-of-way and issuing encroachment permits for construction and maintenance of structures such as poles or conduit or vaults in the rights-of-way. Portland takes a different approach than many communities. The City provides information and standards online⁸ but requires the prospective applicant to contact the BOT and meet with staff to go over policies so City staff can guide the preparation of the application materials to encourage deployment consistent with location-specific issues and requirements such as zoning and design overlays, environmental overlays, historic and conservation requirements, and underground utility areas. This ensures that once an application is submitted, the permit can be processed relatively quickly. This is a City resource-intensive process and not all communities could undertake it – particularly if, for example, the community was limited to recovering the cost of processing permit applications.

franchise. The benefit to the telecommunications industry was that the temporary revocable permit could be approved by City Council in a matter of weeks rather than months for the franchise. Once the temporary revocable permit was approved, the company could seek construction permits and begin construction while the approval process for the franchise ran its course. In Portland, many wireline telecommunications companies originally received authority to build in city streets through this process.

⁷ NOI ¶ 14.

⁸ See the Bureau of Transportation website here: <http://www.portlandonline.com/transportation/> (last accessed July 17, 2011).

2) 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.⁹

In the City, final applications are typically processed very quickly, as the front-end consultative process ensures that applicants are meeting the City's requirements at each stage of the process. Processing time will vary according to complexity of the project and other factors.

Where there are delays, or plans are not accepted for review, these are most often due to the applicant having failed to follow the process, such as not participating in any pre-application meetings, or having failed to resolve issues identified and required to be settled prior to submittal, or having submitted inconsistent supporting information with its plan. These types of problems more commonly arise only with new or inexperienced applicants. It will typically take the applicant longer to prepare and plan for placement where installation is particularly challenging (our downtown urban core has no available space in many streets) or requires environmental or similar reviews.

3) Improvements.

The Commission asks whether there are particular practices that can improve processing.¹⁰ The City's franchising process described above has been in place since the City's Charter was adopted in 1913. It has been refined and improved over the years through various consultations with applicants and industry. As mentioned above, for example, the City created a

⁹ NOI ¶ 14.

¹⁰ NOI ¶¶ 14, 29.

“temporary revocable permit” process to accommodate the entry of competitive telecommunications providers two decades ago.

Our collaborative approach with regard to permitting has been in use for decades. We have not heard significant complaints. In fact, at an industry roundtable event held in June of this year by the City to consult on its draft broadband strategic plan, one of the telecommunications companies in attendance volunteered the comment that Portland is one of the best cities to work with in regard to permitting. We continue to modify our processes based on experience and new demands on the right-of-way resource.

4) *Local Policy Objectives.*

The Commission asks what “policy goals and other objectives” underlie the local practices and charges in this area.¹¹

In the City, our policies are designed to achieve 100% broadband coverage for all households, businesses and non-profits in the City. As embodied in the City’s Charter, we strongly favor competition among franchisees.¹² The policies are also designed to facilitate the responsible deployment of services; make the services broadly available; ensure public safety; avoid traffic disruption; maintain and repair roadways; prevent public disruption and damage to abutting property; minimize accelerated deterioration to roads that accompanies street cuts; satisfy aesthetic, environmental, and historic preservation concerns; and avoid damage to the property of others.

¹¹ NOI ¶ 22.

¹² The City Charter has prohibited exclusive franchises since its inception in 1913. *See* Section 10-206 Nonexclusiveness.

B. Wireless Facilities Siting

The City's wireless facilities siting process has evolved significantly over the years as a result of a conscious effort to develop processes and policies that meet the demands of the providers and the concerns of the community. Through the late 1990s, the City had a traditional land use process for wireless facilities siting. "By right" installations were allowed for collocations on existing towers, on rooftops of buildings in commercial, employment, and industrial zones and for new towers installed in industrial and heavily commercial areas. A discretionary review process with a public hearing was required for new cell tower installations in more sensitive commercial and residential areas.

In the year 2000, as the demand for new cell towers increased, and installations became more contentious, the City began exploring the need for an alternative process. The wireless carriers proposed that the City allow antennas on poles in the rights-of-way. The City expended considerable effort over a two-year period to work with industry and citizens to implement this industry idea by developing the new process and making the necessary zoning and code amendments. The resulting compromise was implemented in 2003. Wireless carriers would be allowed to collocate facilities on existing or taller replacement utility poles in the rights-of-way throughout the city (there are approximately 120,000 poles) but would be discouraged from building new cell towers in open space zones and in or near residential zones. The applicant under this new process enters into a right-of-way agreement with the City at the conclusion of the application process. While the traditional process continues to be required for certain facilities outside the rights-of-way,¹³ since 2003, the demand for new cell towers has declined

¹³ There are four potential levels of land use review in the City. These are described in detail on the City's Bureau of Development Services webpage dedicated to zoning and land use.

<http://www.portlandonline.com/bds/index.cfm?c=35881> (last accessed July 17, 2011).

sharply. Only two new cell towers have been installed in industrially zoned areas (by right), and there was only one other application for a new tower which was deemed incomplete.

Many times applicants seeking to build a new tower have been directed to the OCCFM to investigate opportunities in the rights-of-way, and frequently they are able to install their facilities there. Since 2003, more than 720 wireless attachments have been approved by the City, and installed in its rights-of-way. For example, the City facilitated the introduction of a new competitor that installed 656 wireless attachments to poles in the right-of-way over a two year period. That provider (MetroFi) has since withdrawn from the market and the City is today expending tens of thousands of dollars out of its General Fund to have those abandoned facilities removed from the poles – an illustration of the problems that are associated with placement of wireless in the rights-of-way that localities must have the flexibility to address. Nonetheless, today, there are a total of 67 antennas and wireless attachments in active use on utility poles in the City's streets.

1) *Application Procedures, Forms, Substantive Requirements, and Charges.*

The Commission asks whether all necessary application procedures, forms, substantive requirements, and charges are readily available.¹⁴

In this section we focus principally on the City's process for siting wireless facilities on poles in the rights-of-way. In addition to visiting the City's offices, applicants can obtain information about the siting process, the substantive requirements and the associated charges on the OCCFM's webpage on Wireless Antennas and Equipment on Utility Poles,¹⁵ which contains

¹⁴ NOI ¶ 14.

¹⁵ OCCFM's Wireless process webpage: <http://www.portlandonline.com/cable/index.cfm?c=46289> (last accessed July 17, 2011).

links to all the information an applicant or a citizen would need, including forms, maps, ordinances, the City’s Wireless Right-of-Way Agreement, and amendments. There is not an application “form” *per se* but rather an “Application Checklist” that lists all the steps and information required to complete the submittal.¹⁶

To apply for approval to install a wireless facility on a pole in the right-of-way, the applicant simply has to complete the information and steps listed in the Checklist and then submit it to OCCFM. Applicants are encouraged to call and/or meet with City staff prior to submittal, and there is no charge for these meetings. This process is also City resource-intensive, and may not be practical for communities that can only recover costs of processing the permit application.

Beginning in July 2009, a public consultation step was added to the Checklist. It requires an applicant to determine, with reference to maps provided by the City,¹⁷ whether any of the utility poles on which the new wireless facilities are intended to be placed are located on “Priority 4” residential streets or on a pole where the selected location is within 400 feet of a Priority 4 Street.¹⁸ Prospective applicants for placement on these poles must schedule a meeting to discuss the planned deployment, and notify local neighborhood and business associations, and property owners and residents. The results of the meeting are reported on the Checklist. The City works with the applicant to address any neighborhood concerns that come out of the

¹⁶ Wireless Facility Application Checklist <http://www.portlandonline.com/cable/index.cfm?c=46289&a=245404> (last accessed July 17, 2011).

¹⁷ Street Priority maps <http://www.portlandonline.com/cable/index.cfm?c=46289&a=242149> (last accessed July 17, 2011).

¹⁸ The maps show the streets which are assigned priority based on the following scale: Use poles on Priority 1 streets (generally freeways, highways and streets in industrial areas), before using poles on Priority 2 streets (generally high traffic volume streets), before using poles on Priority 3 streets (generally medium traffic volume streets or one way streets), before using poles on Priority 4 streets (generally low volume traffic streets in residential areas).

meeting. Applicants for placement on any other poles in the right-of-way do not have a meeting requirement.

In 2010, a more streamlined Checklist was introduced for carriers that already have a right-of-way agreement in place and simply want to swap out facilities or modify facilities on an existing pole.¹⁹ This does not have a public meeting requirement.

Once the Checklist and documents are submitted to OCCFM, they are reviewed for completeness and compliance with the right-of-way agreement requirements, and then forwarded to the City's Bureau of Transportation for technical review, and to issue necessary construction permits, such as for pole replacements.

In limited instances a minor land use approval is also required, and the applicant is directed to make application to the Bureau of Development Services ("BDS"). The applicant can find all the necessary process, timeline, and fee information on the Bureau of Development Services webpage devoted to zoning and land use.²⁰ For example, wireless facilities located within the public rights-of-way will often include associated equipment cabinetry. Sometimes that equipment can be located on the pole. If it cannot be located on a pole, it sometimes will be located on adjacent real property. In that case, a land use review will be required but only if the underlying zoning is residential, or if the equipment is within 50 feet of a residential or open space zone.

¹⁹ Wireless Facility Application Checklist—Adding or Swapping Out Facilities on Existing Poles <http://www.portlandonline.com/cable/index.cfm?c=46289&a=351836> (last accessed July 17, 2011).

²⁰ BDS's Zoning and Land Use webpage: <http://www.portlandonline.com/bds/index.cfm?c=35881> (last accessed July 17, 2011).

Once the facility is installed there is a form which must be filled out and submitted to OCCFM to register the facility.²¹

2) *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.²²

The general goal of the process is to assist industry by ensuring a timely review of applications and by providing a reliable process. We are generally able to process *completed* applications quickly.

The most common cause for delay in the approval of an application to OCCFM is when the requirements in the Checklist are not fulfilled, or information is missing. While the OCCFM does not require the applicant to start over when an incomplete application is submitted, the wireless carrier is required to go back and complete the missing requirement before processing can proceed. Similarly, BDS reviews the land use and building applications and informs the applicant, in writing, of any missing information and any other pertinent issues associated with their application by issuing a check sheet or an incompleteness letter. The processing of the application pauses until the applicant submits all the required information.²³ Oregon's land use laws allow an applicant up to 180 days to make a land use application complete; if the applicant does not complete the application within that time frame, the application is voided.

²¹ Radio Frequency Transmission Facilities Registration Form, <http://www.portlandonline.com/BDS/INDEX.CFM?a=119984&c=45476> (last accessed July 17, 2011).

²² NOI ¶ 14.

²³ The applicant can ask BDS in writing to continue processing their application without all the required information. This rarely, if ever, happens, as the applicants understand the City cannot issue building permits or administrative land use decisions that are missing critical information.

In the City's experience, incomplete applications typically get filed when carriers hire contractors to select sites and prepare and submit applications. These third-party contractors sometimes knowingly submit incomplete applications in order to meet company deadlines or quotas for incentive commissions. The City has heard anecdotally that installation delays are sometimes caused by the wait time for pole owner approvals.

3) *Improvements.*

The Commission asks whether there are particular practices that can improve processing.²⁴ Among the most important practices is to listen to industry and citizen concerns, and to maintain the ability to respond flexibly over time.

As mentioned earlier, the City worked with industry and the community to make wireless siting less contentious by introducing a right-of-way permitting process for wireless facilities on poles in 2003 as an alternative to a traditional land use siting process on towers.

In July 2009, the public meeting requirement for certain residential areas was added in response to industry and citizen concerns that siting remained contentious, particularly when taller replacement poles were installed in residential areas. The meeting component has smoothed the siting process for citizens and carriers.

In November 2010, the City, again responding to an industry request, introduced a streamlined application process for swapping out or modifying existing equipment. This has also improved the process, making those applications simpler and quicker. Since November 2010, the City has received 12 applications for modifications under the streamlined application process for swapping facilities and has approved all them.

²⁴ NOI ¶¶ 14, 29.

Recognizing that the flexibility to address new issues as needed – and to change over time – is critical, the City issues time-limited authorizations for placement of antennas in the rights-of-way. This allows the carrier and the City to revisit installations and to ensure that carriers continue to maintain facilities in a manner consistent with community development goals.

4) *Local Policy Objectives.*

The Commission asks what “policy goals and other objectives” underlie the local practices and charges in this area.²⁵ The City’s goal throughout the years has been to provide a good balance between protecting the character of the neighborhoods and accommodating the demand for wireless service in those neighborhoods.

5) *Impact of the Shot Clock Ruling.*

In general, the *Shot Clock Ruling* has done very little to affect timing of approvals. The City had already taken many steps over the years to streamline and improve its application processes. Those applications with issues still take time to work out, and the applicants generally work cooperatively with the City to resolve them. Those applications that are straightforward get processed in much the same time frame as before.

Despite having little by way of practical impact, the *Shot Clock Ruling* has imposed additional administrative burdens on the City and on applicants, and created complications in the implementation of existing streamlined permitting and land use review processes, and existing state level time frames and decision-making processes that may be interpreted as conflicting with shot clock time frames. It has also increased the City’s administrative costs by requiring it to

²⁵ NOI ¶ 22.

track applications with reference to the shot clock time frames in addition to state and local time frames.

C. Permitting Fees and Franchise Fees.

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.²⁶

The permitting fees for work in the right-of-way vary depending on what work in the right-of-way is involved in the project. For example, street opening permits are calculated on a per linear foot basis, poles are calculated per pole, and underground facility sites are charged by number of vaults.

Permitting fees for placement of wireless facilities in the rights-of-way include a one-time \$2000 application fee charged by BOT, and there can be additional fees for permits for related work such as street openings, poles, and underground facilities. For installations that

²⁶ NOI ¶ 17.

involve a pole replacement, there is \$1,000 charge to either plant a street tree adjacent the pole, or for deposit into the Park Bureau's Tree Damage Fund (unless a street tree is not allowed). If the application is for a placement on a Priority 4 residential street, a \$2000 fee is charged by OCCFM for application processing.

Fees for land use approvals for wireless facilities in the rights-of-way depend on the type of approval required. Type I reviews are currently \$ 3,338.²⁷

By state law, land use approval fees are required to be set at levels designed only to recover costs, and are reviewed by the state. Permitting fees are used to cover staffing costs and allow staff to work with the applicants, but they can be insufficient to cover all of these costs. To compensate the City for use of its rights-of-ways for placement of wireless facilities, each carrier is required to pay the City the amount of \$10,000 per year or \$5000 per pole per year, whichever is greater. For wireline facilities in the rights-of-way, franchise fees are calculated in different ways depending on the type of facilities or the type of provider, but typically they are a percentage of gross revenues.

The total franchise fees anticipated to be collected in FY 2012 from all franchised and licensed utilities using the rights-of-way in Portland (including other non-communications service providers such as gas and electric, and City water and environmental bureaus) is in excess of \$68 million. Communications providers represent about 15% of those revenues. This compensation for use of the rights-of-way goes into the General Fund to support all the City's budgeted operations and services. If these franchise fee revenues were reduced and providers allowed to avoid paying reasonable compensation for the value they receive from use of the

²⁷ Fees are published on the City's website. <http://www.portlandonline.com/bds/index.cfm?a=67127&c=34184> (last accessed July 17, 2011).

rights-of-way, the impact on the City budget would be serious. Such a policy would force the City and its residents to further subsidize providers' use of the rights-of-way by paying more as the providers pay less, either in the form of further budget cuts to critical municipal services such as police and fire, or by increasing taxes.

IV. THE CITY DEPLOYED ITS OWN BROADBAND NETWORK TO MEET BROADBAND NEEDS THAT THE PRIVATE SECTOR WOULD NOT MEET

The Commission's Seventh Broadband Progress Report and Order on Reconsideration ("7th Report") pointed to the discouraging fact that "as many as 80 percent of E-rate funded schools and libraries say their broadband connections do not fully meet their needs."²⁸ The City agrees with the statement, and it recognized this issue years ago.

The City, like other local jurisdictions, has seen its own communications needs grow tremendously and has sought ways to manage these costs while meeting the demand for broadband capacity and advanced services. The City spent millions of dollars annually for basic phone service and limited internet capabilities. The commercial providers' prices and conditions of service were so high that many public institutions were not able to afford sufficient broadband. The unwillingness of providers to offer true broadband was obviously not affected by the charges for use of the rights-of-way – since those costs could have been charged back to the City. The problem was that there was no incentive to depart from existing service models.²⁹

In response to these growing unmet needs - and limited resources - the City launched the Integrated Regional Network Enterprise (IRNE) in 2002. IRNE is a collaborative effort that

²⁸ *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. 10-159) Seventh Broadband Progress Report And Order On Reconsideration, FCC 11-78 (rel. May 11, 2011), ¶ 2.

²⁹ Similar problems have been recounted by other jurisdictions around the state. *See Oregon Municipal Broadband Report* published by the League of Oregon Cities July 2011.

capitalizes on the City's varied telecommunications projects. It brought together municipal, county and State ITS fiber investments to create a redundant loop fiber system around the City that can be used for many purposes. By establishing a public sector-owned shared communications backbone, IRNE leveraged funds, expertise and infrastructure. In this way, the initial \$14 million dollar IRNE project immediately reduced costs for both phone lines and high-speed Internet connections. The IRNE system currently allows governmental agencies to communicate at speeds up to 155 megabits per second (Mbps) and has the capacity to serve full gigabit (1000 Mbps) per second. A typical fast DS-1 line, often used for Internet connections, runs at 1.5 mbps. The users all attest to the high quality and cost effectiveness of the IRNE system.

The IRNE system solved some of the City's broadband needs, but the same high cost and limited service options remained for other public institutions such as the public schools and libraries which were not part of IRNE. These institutions were on another network, an I-Net owned and operated by Comcast Corporation pursuant to its local cable franchise. The I-Net provided communications for local governmental and educational institutions, but the I-Net itself only connected I-Net users – that is, it connected one school to another school or one governmental office to another governmental office. To enhance service to all users of IRNE and the I-Net, Comcast and the City agreed to interconnect the two networks. The interconnection allows transmissions to originate on one network and terminate on another, in effect extending the reach of both.

As these examples demonstrate, in the City's experience, a significant barrier to deployment and adoption in the city has not been right-of-way management, or fees. What can prevent broadband deployment is the unwillingness of providers to offer broadband capabilities

that might undermine the marketing of services that the companies find more profitable. Now, in response to services introduced by IRNE, the City is actually starting to see competition in the provision of broadband services to the schools. We view that as a positive development and welcome the competition.

Hence, if the Commission wants to address the issues that it has identified as significant in the 7th Report, it should not look at ways to cut fees paid to local governments or regulate rights-of-way management. Rather it should begin to ask how it can use its authority over carriers to obtain reasonable pricing for broadband services, and to spur carriers to modify existing inadequate service models.

V. RECOMMENDATIONS REGARDING POSSIBLE COMMISSION ACTIONS

Finally, the Commission asks what actions the Commission might take in this area.³⁰

As noted above, the City strongly urges the Commission to refrain from regulating local right-of-way management and facility placement processes. These matters are managed by local staffs with considerable expertise to meet goals and processes established after careful consultation with the local community and industry. The success of local policies depends on flexibility – a flexibility that would be diminished if the City were subject to a new federal regulatory regime. 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 City, as outlined in the previous section, 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 working

³⁰ NOI ¶ 36.

cooperatively with local governments, including by implementing its own recommendations in the National Broadband Plan for working cooperatively with state and local governments.

VI. CONCLUSIONS

The City urges the Commission to conclude that right-of-way and facility management processes and charges are not impeding broadband deployment. As indicated above, in the City, our policies and procedures are designed to protect important local interests, and have done so for many years. The City’s overall approach is to work closely with industry and the community to develop successful and timely procedures, to put as much information as possible online for prospective applicants, and to encourage applicants to meet with the knowledgeable City staff who can guide them through the application process. 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, and stifle our efforts to develop innovative and flexible processes.

Respectfully submitted,

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