

Concurring Statement of Commissioner Jon Leibowitz Regarding the Staff Report: “Municipal Provision of Wireless Internet”

Let me begin by commending the staff for this Report. It begins the process of identifying guiding principles for our growing Internet competition mission. At least as importantly, to my mind the Report provides a powerful basis for the Commission to oppose, as part of our advocacy program, future attempts by states to limit or prohibit municipalities from offering broadband to their own residents. Some of these proposed laws address legitimate questions, but others are simply unconscionable.

It is by now clear to everyone that access to broadband needs to improve in this country. In cities where there is broadband, consumers still have little choice between providers. Nearly all homes that can get broadband get it either from their cable or telephone company although, to their credit, in those communities the telephone and cable companies often compete intensely for subscribers.¹ In other communities, especially rural America, where deployment has lagged behind more densely populated urban areas,² many cannot get broadband at all. Among those who have access, many have no choice between providers because only one firm offers broadband to their community.³

Clearly, although there is real competition to sign up new broadband subscribers in some communities, broadband competition in many local markets remains all too limited.⁴ Not surprisingly, municipalities have begun to consider policies designed to

¹ See FCC, *High-Speed Services for Internet Access: Status as of December 31, 2005*, Report by the Industry Analysis and Technology Division Wireline Competition Bureau 3 (July 2006) (“FCC Status Report”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266596A1.pdf (98 percent of residential lines where speed exceeds 200 kbps in at least one direction either provided by cable modem or by ADSL high speed line from the telephone company); see also *id.* (over 96 percent of ADSL connections provided by incumbent LECs). These percentages only get higher as the level of service increases. *Id.* (98.6 percent of residential lines where speed exceeds 200 kbps in both directions either provided by cable modem or by ADSL).

² See, e.g., Ken Belson, *Rural Areas Left in Slow Lane of High-Speed Data Highway*, N.Y. Times, September 28, 2006, at A1.

³ FCC Status Report, Table 16 (consumers in 13.5 percent of zip codes have no access to either ADSL or cable broadband, while consumers in 40.5 percent of zip codes have access to at most one high-speed ADSL or cable modem line, and 62.1 percent of zip codes have at most a choice between only two providers); see also Pew Internet & American Life Project, *Home Broadband Adoption 2006* (May 28, 2006) 7-8, available at http://www.pewinternet.org/pdfs/PIP_Broadband_trends2006.pdf (25 percent report that they do not have access to more than one provider of high speed Internet).

⁴ As an agency charged with enforcing the antitrust laws, we know the importance of competition well. Increased competition means lower prices and higher quality for consumers. But the lack of competition along the “last mile” of the Internet to consumers can have an even more profound effect than high prices in local markets. It can interfere with the growth and development of the Internet everywhere. Improving competition for everyone in that last mile is the key to ensuring that, even if the Internet moves away from “best efforts” towards something else – a change that many believe would be very problematic, consumer harm will be limited. Consequently, it is appropriate that the Commission’s Internet Access Task Force’s next topic is Net Neutrality. A report on that topic, I am confident, will have the same scrupulous evenhandedness that characterizes this one.

solve this problem.⁵ The municipal broadband movement is a grassroots effort by this country's local officials – many of whom recognize that broadband Internet access is increasingly essential to economic growth – to respond to real needs on the part of their constituents to make broadband more available and affordable.⁶ As the Report notes, municipalities are adopting a variety of models to improve residents' access to broadband, many of which do not involve the municipality providing the services themselves, but instead involve pairing with private sector partners like Google or EarthLink to implement the technology.⁷

When I asked for this Report last year, telephone and cable companies were furiously lobbying state legislatures around the country to prohibit municipalities from offering broadband.⁸ Underlying their position was the view that regulation – in this case, in the form of state prohibitions or restrictions on municipal broadband – is necessary to *protect* the market. It was a somewhat surprising argument coming from the incumbents who, while appropriately seeking deregulation for themselves elsewhere, were asking states to raise insurmountable barriers against those who wanted to compete with them for broadband customers.

Put differently, imagine if Barnes & Noble and Borders, claiming it was “killing” their book sales, asked state lawmakers to ban cities from building new libraries. The legislators would laugh them out of the State House. Yet the same thing was happening with respect to wireless high speed Internet services; and elected state officials were taking the argument all too seriously.

Now the debate is different. Activity in state legislatures has died down – perhaps because the most enlightened cable and telephone providers recognize the legitimacy of the public-private partnership approach that seems to be used most often; perhaps because so many cities are doing this means that municipal broadband is here to stay. At the same time, this issue has been taken up by Congress. Bills have been proposed in both the Senate and the House – one has passed the Senate Commerce Committee,⁹ another has been approved by the House itself¹⁰ – to ensure that local governments can

⁵ See FTC, *Municipal Provision of Wireless Internet* 2-3 (September 2006) (“Report”).

⁶ See, e.g., David Haskin, *Philly CIO: Public Wi-Fi Needed to Close Digital Divide*, InformationWeek, January 25, 2005, available at <http://informationweek.com/shared/printableArticle.jhtml?articleID=57703696> (“One goal of the project [in Philadelphia] is to overcome the digital divide, to train small businesses and disadvantaged people.”).

⁷ Report at 13-18.

⁸ Jon Leibowitz, Commissioner, Federal Trade Commission, *Municipal Broadband: Should Cities Have a Voice?* remarks before the National Association of Telecommunications Officers and Advisors (NATOA) Annual Conference, Washington, D.C. 4-7 (September 22, 2005), available at <http://www.ftc.gov/speeches/leibowitz/050922municipalbroadband.pdf>.

⁹ See S. Res. 2686, 109th Cong., 2nd Sess. § 502 (2006) (Stevens “Communications, Consumer’s Choice, and Broadband Deployment Act of 2006”).

¹⁰ See H.R. 5252, 109th Cong., 2nd Sess. § 401 (2006) (Barton “Communications Opportunity, Promotion, and Enhancement Act of 2006,” as passed out of the House of Representatives on June 8, 2006 and referred to the Senate).

provide wireless broadband to their residents. The Report does a good job of describing the various proposals and what their effect would be on local attempts to improve access to broadband.¹¹

Hopefully, next year federal action will resolve this issue permanently – that is, Congress will pass a telecom law that includes a provision preempting states from prohibiting their cities and towns from developing a “third pipe” to the home. But if there is no federal telecom statute – or if a final telecom measure fails to include this crucial provision – then the danger remains that the telephone and cable companies will renew their efforts at restricting the ability of local governments to improve their residents’ access to broadband Internet. If that happens, in my view the Commission is now poised to adopt a vigorous advocacy program that opposes these attempts to stifle competition.¹²

¹¹ See Report at 35-38.

¹² The Commission has a long history of defending new business methods and technologies when they are attacked by entrenched industries in state legislatures or elsewhere in state governments. See generally Deborah Platt Majoras, Chairman, Federal Trade Commission, *A Dose of Our Own Medicine: Applying a Cost/Benefit Analysis to the FTC’s Advocacy Program*, remarks before the Charles River Associates “Current Topics in Antitrust Economics and Competition Policy” Conference, Washington, D.C. (February 8, 2005), available at www.ftc.gov/speeches/majoras/050208currebttopics.pdf. As the Report notes, the Commission has engaged in advocacy relating to competition in various telecommunications industries, both before states and before the FCC. See Report at 4-5.