

## CITY OF GLENDALE CALIFORNIA REPORT TO CITY COUNCIL

June 2, 2009

#### **AGENDA ITEM**

City Attorney: Report Regarding Development of a National Broadband Plan by the Federal Communications Commission and its Call for Comments.

Public Hearing [ ] Ordinance [ ] Consent Calendar [ ] Action Item [ X ] Report Only [ ]

(1) Motion directing staff.

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Approved for June 2, 2009 calendar
ADMINISTRATIVE ACTION
Signature
Submitted Scott H. Howard, City Attorney
Prepared Christina R. Sansone, General Counsel—Public Works
Reviewed James E. Starbird, City Manager.
PECOMMENDATION

#### RECOMMENDATION

In the event Council wishes to provide direction to staff, a motion to that effect is attached. Council may either: (1) direct staff to provide comments to the FCC, or (2) direct staff to prepare a letter for the mayor's signature providing comments to the FCC.

### SUMMARY

The Federal Communications Commission ("FCC") recently released a Notice of Inquiry seeking comments from the public and other governmental agencies with regard to the FCC's development of a National Broadband Plan. Among many other goals, the FCC stated that it plans to address the following issues in the plan:

- universal service reform,
- network openness,
- spectrum access,

- maximum utilization of broadband networks,
- · rural broadband strategy,
- access to poles and rights of way, and
- tower siting.

It is the last two items, "access to poles and rights-of-way" and "tower siting" that are of concern in this report. On May 26, 2009, a community group, Glendale Organized Against Cell Towers ("GOACT") requested Council to consider submitting comments to the FCC advocating certain changes in Section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332 ("Section 332") which restrict local control over the placement of cellular antennas. Section 332(c)(7)(B).

GOACT's request that the City advocate for a change in the law deserves serious consideration. The need to preserve local zoning authority becomes all the more challenging as we have seen lawsuits and administrative challenges raised in many local communities throughout the nation regarding these Congressional limitations to local controls. However, such a request should be directed to Congress rather than the FCC. This is because only Congress has the authority to change this law.

As the FCC is in the process of developing a plan to upgrade the nation's communications infrastructure, Council may wish to submit comments that effectively remind the FCC that, with the exception of cases involving regulation based on the health effects of RF emissions which are within the FCC authority, the FCC is without authority to act in matters addressing the local regulation of zoning and rights-of-way.

#### FISCAL IMPACT

At this juncture, there is no foreseeable direct fiscal impact to the FCC's development of a National Broadband Plan nor to the City's comments thereto.

### BACKGROUND

- A. <u>Section 332 of the Telecommunications Act</u>. In the 1996 Telecommunications Act, 47 U.S.C. § 332(c)(7) ("Section 332"), Congress authorized local jurisdictions to regulate the placement, construction and modification of wireless facilities provided that such regulations do not "unreasonably discriminate among providers of functionally equivalent services; and shall not prohibit or have the effect of prohibiting the provision of personal wireless services." Section 332 also provides a remedy for any person or entity adversely affected by a final action of a state or local government that is inconsistent with Section 332 (with the exception of radio frequency emissions cases); to commence an action in any court of competent jurisdiction. This congressional assignment of responsibility leaves the FCC with little or no involvement in appeals of decisions made by local zoning authorities.
- B. <u>ARRA and the National Broadband Plan</u>. In the American Recovery and Reinvestment Act of 2009 ("ARRA") Congress charged the FCC with creating a National Broadband Plan which would develop the most effective and efficient ways to ensure broadband access for all Americans. The ARRA requires the plan to explore several key elements of broadband deployment and use, and the Commission seeks comment on these elements, including:
- strategies for achieving affordability and maximum utilization of broadband infrastructure and services;
- (2) the evaluation of the status of broadband deployment, including the progress of related grant programs; and
- (3) how to use broadband to advance consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and

efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation, economic growth, and other national purposes.

C. <u>FCC Notice of Inquiry</u>. On April 8, 2009, the Federal Communications Commission ("FCC") adopted a Notice of Inquiry (FCC 09-31) for the FCC's development of the National Broadband Plan. It seeks input from all stakeholders including consumers, industry, large and small businesses, non-profits, the disabilities community, governments at the federal, state, local and tribal levels, and all other interested parties. The FCC must deliver the plan to Congress by Feb. 17, 2010 at which time it is anticipated that the plan will provide a roadmap toward achieving the goal of ensuring that all Americans reap the benefits of broadband.

The FCC is notably interested in developing a "coordinated effort among federal departments and agencies and others including local governments and interested groups and individuals," as to how the FCC may enable the nation to achieve Congress's goal that all Americans have access to broadband. It seeks comment on "what specific steps each of these parties should take to ensure that all stakeholders work cooperatively toward that goal and, in particular, provide suggestions as to formal and informal means of coordination, and describe the information and other systems they believe may be needed to make the coordination seamless and effective." The starting point, according to FCC Commissioner Jonathan S. Adelstein, is "to make [the FCC's] plan more than just words, we must start by upgrading our communications infrastructure in every corner of this country." [Emphasis added.]

- D. <u>Comments of Community Group "GOACT</u>." On May 26, 2009, GOACT came before Council in oral communications to inform Council of the FCC's request for comments. GOACT urged Council to submit comments to the effect that Section 332(c)(7)(B) should be <u>changed</u> to allow local municipalities to "reasonably discriminate in favor of less intrusive and more efficient technologies." GOACT's concerns are well taken. Section 332 has been broadly litigated throughout the country by telecommunications carriers seeking to limit or obliterate local controls over zoning matters. In fact, the telecommunications industry has recently petitioned the FCC to do just that—change the law to preempt all local ordinances and regulations that effectively require a variance in most circumstances for wireless antennas. (CITA Petition to FCC for Declaratory Ruling to Clarify Provisions of Section 332(c)(7), et al. WT Docket 08-165.) A coalition for local zoning authority has vigorously opposed the telecommunications industry's petition and urged the FCC to declare the petition to be misplaced because it does not have the authority to legislate changes to Section 332, only Congress can do that.
- E. <u>Council Option: Submit Comments to the FCC</u>. Although the FCC does not have the authority to change Section 332, we believe the underlying concerns expressed by GOACT could be recognized in comments to the FCC. Council may wish to submit comments to remind the FCC of its limited jurisdiction in the area of antenna siting and regulation of public rights-of-way and to seek assurance that nothing in the National Broadband Plan be used to undercut local government's zoning authority. The National Broadband Plan should not become a vehicle whereby local jurisdictions are restricted from exercising their rights under Section 332 to regulate the placement, construction and modification of cell towers. With zoning challenges occurring in every corner of this country, it is important that the FCC be reminded of the congressional authorization given to local jurisdictions to regulate the placement, construction and modification of cell towers and govern its rights-of-ways.

A motion is attached which, if Council desires, would either direct staff to provide comments to the FCC, or direct staff to prepare a letter for the mayor's signature providing comments to the FCC.

#### **EXHIBITS**

None.

# **MOTION**

Moved by Council Member	, seconded by
Council Member	, that Council has considered the
report from the City Attorney dated June 1, 2009 regarding the	ne request by the Federal
Communications Commission ("FCC") for comments on its	development of the National
Broadband Plan and heard from members of the public. Cou	ncil hereby directs staff [to prepare
and send comments to the FCC] [to prepare comments to the	FCC for the Mayor's signature].
Vote as follows:	
Ayes:	
Noes:	
Absent:	
Abstain:	

APPROVED AS TO FORM

Cheidin Source

General Counsel - Public Works

Date: 5-28-09