October 30, 2015

Ms. Angela Liotta, Deputy Director  
NYS Broadband Program Office  
625 Broadway, 8th Floor  
Albany, NY 12245

Re: New NY Broadband Program – Request for Information

Dear Ms. Liotta,

The Advanced Communications Law & Policy Institute (ACLP) at New York Law School respectfully submits the following comments in response to the Request for Information issued by the New York State Broadband Program Office. Should you have any questions, please do not hesitate to contact us.

Respectfully submitted,

/s/ Charles M. Davidson  
CHARLES M. DAVIDSON, DIRECTOR

/s/ Michael J. Santorelli  
MICHAEL J. SANTORELLI, DIRECTOR
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1. INTRODUCTION

Under the leadership of Governor Cuomo, New York State has become a national leader in setting policies to help spur the deployment of next-generation broadband platforms and harnessing the transformative power of the cutting-edge services that they enable.¹ Broadband in many different forms – cable, DSL, mobile, fixed, satellite, and fiber – is robust and thriving in competitive markets across the state, providing millions of consumers and businesses with a high-speed on-ramp to the Internet at affordable prices. The state has accomplished this by fostering a regulatory and policy environment that generally supports and furthers private investment, intermodal competition, and vibrant innovation across the advanced communications space. This approach has delivered, and continues to deliver, significant consumer and social welfare gains.²


These outcomes are made clear in recent data analyses released by the state’s Public Service Commission\(^3\) and the Broadband Program Office.\(^4\) These analyses also highlight, however, key broadband challenges facing policymakers, service providers, and other stakeholders in New York, foremost among which is a lack of broadband in certain small pockets of the state. These difficult to serve places tend to be in rural areas with low population densities or with difficult terrains, rendering them “uneconomic” to serve in the absence of some sort of public subsidy. Major challenges remain on the demand side as well – millions of New Yorkers remain unconnected to broadband despite a connection being readily available. The Governor is to be applauded for recognizing these challenges and launching the New NY Broadband Program (Program) to overcome them.

The manner in which these challenges are addressed will be critical to ensuring that the significant public funds seeding the Program are spent wisely. To date, the state has sought to address these problems via public-private partnerships (PPPs), which leverage limited public funding and private-sector expertise to address these issues in the most cost-effective way possible.\(^5\) Governor Cuomo’s Connect NY program, the predecessor of the New NY Broadband Program, was by far the nation’s largest state-level PPP focused on bringing broadband to unserved areas, leveraging $70 million in public funding. Since its inception, Connect NY has proven to be incredibly successful, bringing broadband to tens of thousands of previously unserved households.\(^6\) Consequently, the New NY Broadband Program should adhere to the general PPP framework used by the state in Connect NY in an effort to ensure that the public funding available for bolstering broadband connectivity will be put to its most productive uses. Best practices along these lines are articulated in section 2.

Section 3 addresses specific aspects of the new broadband Program identified in the Request for Information (RFI).\(^7\) These include:

- **Speed and technology requirements** – the program should avoid prescriptive speed requirements and embrace technological neutrality when it comes to bringing broadband to unserved areas.

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\(^3\) *In the Matter of a Study on the State of Telecommunications in New York State, Staff Assessment of Telecommunications Services, Case 14-C-0370 (June 23, 2015)* (“Assessment”).


\(^5\) See, e.g., *Broadband & The Empire State* (discussing the benefits of this kind of approach).


\(^7\) *See New NY Broadband Program – Request for Information*, New York State Broadband Program Office (Sept. 24, 2015) ("RFI").
- Elements related to pricing – the program must avoid any semblance of price regulation. Concerns about pricing are rooted in misconceptions about the relationship between the cost of service and adoption. Affordability is tied to whether a non-adopter sees broadband as relevant, not whether it is “cheap,” underscoring the need for a robust commitment of resources to demand-side efforts (e.g., outreach and digital literacy training).

- The role of municipalities in the broadband space – the program should make clear that it will consider supporting municipal broadband projects only as a last resort, i.e., after the state has exhausted efforts to engage private service providers. Failure to make this clarification would be contrary to the state’s clear preference for forging PPPs to address these issues and would likely open the door to risky municipal broadband endeavors.

- The importance of wireless – the program – and the state generally – must ensure that its policies and programs do not inadvertently dismiss wireless broadband service (mobile and fixed) as nothing more than a complement to wireline broadband. Doing so would artificially limit the options available for plugging connectivity gaps in the state. It would also contradict clear consumer preferences for all things wireless.

- Optimizing the efficiency with which funds are invested – the program must avoid investing in unnecessarily duplicative projects, especially in the middle-mile, and should focus instead on bringing service to unserved areas first.

2. BEST PRACTICES FOR STRUCTURING EFFECTIVE PUBLIC-PRIVATE PARTNERSHIPS FOR BOLSTERING BROADBAND CONNECTIVITY

As the success of Connect NY has demonstrated, PPPs, when properly structured and executed, can be extremely effective in addressing broadband connectivity challenges. As the state moves forward with the New NY Broadband Program, it would be wise to use the Connect NY template as a starting point for developing program criteria. Doing so will help to ensure that any public funding invested in improving broadband connectivity on both the supply side and demand side will be invested in a manner that reduces as much as possible the risks and costs for all involved. To these ends, the following identifies key best practices evident in successful broadband-focused PPPs, including Connect NY.

When addressing supply side issues:

- Grant awards should be prioritized for broadband deployment to areas that remain unserved in an effort to maximize the number of homes and businesses these new networks reach while also reducing private and public sector investment risk. Past experiences with funding network deployment to rural areas demonstrate that, in the absence of safeguards, clear selection criteria and carefully structured PPPs, there is a risk that taxpayer funds will
be used to construct duplicative network infrastructure. The practical impacts of this outcome are a waste of taxpayer funds, missed opportunities to advance deployment goals, and the creation of disincentives for service providers to continue investing in these areas.

- The optimal role for local and state governments vis-à-vis enhancing broadband connectivity are as hubs for channeling funding and forging PPPs with experts in the private and nonprofit sectors.

- Objective data is essential to better informing policies and targeting efforts. Data provides stakeholders with a clearer picture of the state of broadband connectivity in a given community and with a more expedient means of identifying areas of unmet demand (e.g., specific areas that remain without any form of broadband connection).

- Studying unserved areas and assuring that sufficient levels of demand exist to support new networks should be a prerequisite for any PPP aimed at extending broadband networks to unserved areas.

- Agreements at the heart of these PPPs, along with any related policymaking activities, work best when they accommodate and facilitate rather than hinder business model experimentation and the implementation of network expertise on the part of service providers.

When addressing demand side issues, something that the New NY Broadband Program should also focus on (see below for additional discussion):

- Stimulating and aggregating demand for broadband is a critical aspect of reducing the risk inherent in deploying new networks to unserved areas.

- Whenever possible, outreach and training efforts should be devolved to the local level in order to assure more targeted programming.

- Appreciate that effective programmatic responses to under-adoption will differ from state to state, from city to city, and oftentimes from neighborhood to neighborhood, and that programs should be designed accordingly.

- Recognize that local social infrastructures are essential inputs to any PPP developed for the purpose of improving adoption and informed use.

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8 For examples, see Broadband & The Empire State. See also infra, section 3.

• Tying outreach and training initiatives to social service delivery can result in clearer, more compelling value propositions and, eventually, more meaningful uses of the technology.

In sum, carefully structuring PPPs, leveraging private sector expertise, and seeding partnerships with targeted public resources represents the most viable means of yielding near term gains in broadband availability and adoption that will persist over the long term. Incorporating these best practices into the design of the Program will help ensure that the state will see positive returns on its investments.

3. RECOMMENDATIONS REGARDING KEY ELEMENTS OF THE NEW NY BROADBAND PROGRAM

The following sections offer responses to specific Program components referenced in the RFI. As an overview, these responses underscore the importance of positioning actual consumer demand and the expertise of private service providers as primary forces shaping the contours of the Program. Moreover, the Program and its administrators should avoid using the Program as a vehicle for influencing public policy or realizing outcomes that do not reflect the realities of the modern advanced communications marketplace and its consumers.

3.1 Avoid Rigid Speed Requirements & Embrace Technology Neutrality

The Program must evaluate whether the benefits of articulating prescriptive speed thresholds\(^\text{11}\) outweigh the costs to consumer welfare and to the number and type of firms that will be eligible to apply for grant funding. Setting aspirational goals for broadband connectivity is generally laudable, but tying grant funding to achieving those goals might very well prove counterproductive in practice.

There is significant evidence to suggest that consumer demand has driven the development of myriad broadband service offerings, meaning that, by and large, the vast majority of consumers are able to access the speeds they want and need.\(^\text{12}\) As a result, consumers across New York have a menu of speed tiers to choose from to meet their particular needs. In many cases, consumers are choosing “slower” speeds – in the 10Mbps-20Mbps range – even though connections of 50Mbps are almost universally available across the state. More specifically, the FCC has found that only 3% of the New York population lives in areas without access to a 25Mbps/3Mbps connection.\(^\text{13}\) As noted in the PSC Assessment, 50Mbps

\(^{10}\) Id.

\(^{11}\) See generally RFI.

\(^{12}\) For further discussion, see Understanding the Debate at sections 3 and 5. See also Assessment at 61-64 (finding that available broadband speeds in New York are among the fastest in the U.S.).

\(^{13}\) 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, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, at
connections are available to about the same number of New Yorkers (95% percent of the population). Even so, the FCC reports that only 18% of the state’s population has adopted a 25Mbps connection; the vast majority – 71% – have a 10Mbps connection at home. This suggests that the Program’s preference for connections that can deliver speeds of 100Mbps conflicts with data regarding actual and historical usage patterns.

Operationalizing a “preference” for providers that can deliver speeds of at least 25Mbps, as proposed in the RFI, will artificially narrow the field of eligible ISPs. A better and more inclusive approach might be to articulate a preference for bringing some level of broadband connectivity to truly unserved areas as a meaningful first step in achieving the state’s goal of plugging connectivity gaps. Doing so would be beneficial for several reasons. First and foremost, it will hasten the process of connecting unserved areas to broadband. Whether a person gets online for the first time via a cable, satellite, WISP, or mobile connection should not matter – connection by any means should be the priority. Second and related, an approach that yields additional new connections in the near-term will help to generate useful data about actual consumer demand for and usage of broadband in these hard-to-serve areas. Such real-world data will be essential to signaling to other private firms that there is sufficient demand in a given area and to calibrating any additional government responses (e.g., federal or state subsidies) that might be warranted. This approach will also help prevent inefficient overbuild in areas that are deemed “under-served” according to the state’s speed benchmark. By focusing only on unserved areas, the Program can ensure that funds are allocated in as efficient and impactful a manner as possible (see section 3.5 for additional discussion).

3.2 Avoid Any Semblance of Price Regulation

The RFI asks whether “recipients of funding from the...Program [should] be required to institute pricing requirements for consumers, businesses, and/or anchor institutions.” The Program should not engage in this type of behavior. Doing so would be in clear violation of federal law and would contradict reams of data demonstrating that consumers are paying less for more when it comes to their broadband subscription. Moreover, it would also lend credence to a theory of broadband adoption that frames price as a primary impediment to connectivity. This is not the case, and the Program should avoid any action that might be viewed as an endorsement of it.


14 Assessment at 51.
15 706 Report at Appendix H.
16 See In the Matter of Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶37 (2015) (explicitly stating that rate regulation of broadband Internet access providers is not permitted under the FCC’s new regulatory framework for these services).
17 See, e.g., Assessment at 60. For an analysis of national trends, see Understanding the Debate at section 3.
This recommendation was raised in the context of a discussion regarding “pricing and affordability.”\textsuperscript{18} The Program – and, by extension, the state – seems to be focused on defining “affordable” to mean that the cost of service is a primary barrier to broadband connectivity. This is a common misconception, one that the PSC also embraced in its study of the state’s telecommunications market.\textsuperscript{19} This line of thinking fails to acknowledge the relationship between price and “not wanting” broadband service, a barrier that is referred to as relevance.\textsuperscript{20} In short, relevance refers to whether non-adopters perceive broadband to be useful to their lives – if they do not see it as a relevant and important tool, then they will be less likely to invest scarce resources in it.\textsuperscript{21} This holds true in many cases even at a price point of zero.\textsuperscript{22}

Training groups and others involved in helping to close the digital divide have focused a great deal of resources on crafting attractive “value propositions” for the unconnected in an effort to demonstrate how and why broadband is relevant to their lives.\textsuperscript{23} The Program Office has recognized the value and sought to bolster the impact of these kinds of demand side approaches to broadband adoption, ones that are tied to enhancing value propositions.\textsuperscript{24} It is thus respectfully submitted that grant awards made via the Program should support additional demand side partnerships. Doing so would assure a more comprehensive approach to bolstering broadband connectivity, one that can help demonstrate the relevance of this technology to wary non-adopters and equip users with vital digital literacy skills.

3.3 Clarify the Role of Municipalities

In its criteria, the Program should make clear that funding allocations to municipalities in support of government-owned broadband networks will only be made as an absolute last resort – \textit{i.e.}, after exhausting all other options for engaging private providers in the

\textsuperscript{18} RFI at 11-12.
\textsuperscript{19} Assessment at 59.
\textsuperscript{20} For an overview of this issue, see \textit{Understanding the Debate} at 31-34.
\textsuperscript{24} For an example of such a partnership, see Press Release, \textit{OATS Launches Program to Increase Broadband Technology Adoption Among Senior Citizens in New York's North Country Region}, July 15, 2015, Business Wire, \url{http://www.businesswire.com/news/home/20150715005199/en/OATS-Launches-Program-Increase-Broadband-Technology-Adoption}.  

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provision of service to a clearly unserved area. Failure to do so would not only undermine the public-private dynamic at the heart of the Program – it would also likely open the door to risky municipal broadband ventures. This would be contrary to the core intent of the Program – the responsible allocation of public funds by sharing the risk of deploying networks to expensive-to-serve areas with private providers – and the state’s general policy for leveraging PPPs when addressing well defined broadband problems.

Municipal broadband networks are expensive and risky undertakings. Indeed, there is a long history of failed GONs in the United States. Not every system fails, but few survive and prosper over the long term. In many instances, local governments have acted to bail out failed and failing networks (e.g., by redirecting tax dollars to prop up a dying system or by assuming even more debt) often to no avail. When these networks fail, the damage is rarely contained – for example, many towns with failed or failing systems see their credit ratings downgraded. And even when these networks survive, the enormous costs of building the system rarely outweigh the benefits arising from it.

These are worrying dynamics for state governments, which bear ultimate responsibility for the activities of their political subdivisions. Accordingly, the Program should not encourage such risky behavior unless a particular area is left with no other choice for broadband service. Only in those very rare and very extreme circumstances should the state support municipal broadband deployment.

3.4 Recognize & Embrace the Importance of Wireless

Even though the Program asserts that it will be “technology-agnostic,” there is significant evidence to suggest that wireline broadband service provided via fiber or cable will be given preference. Indeed, the Program Office does not consider wireless (fixed or mobile) when evaluating broadband availability in the state. This makes little sense given the

25 See generally Understanding the Debate.


27 See, e.g., Understanding the Debate at 47-91 (providing examples).

28 Id.

29 Id.


31 RFI at 12.
significant capabilities of both mobile broadband and fixed. In addition, FCC data indicates that 99% of the state’s population has access to multiple mobile broadband service providers capable of offering service that meets its definition of broadband.32 As such, if the Program operationalizes this anti-wireless preference, then the state will be artificially limiting its options for bringing broadband to unserved areas. Moreover, it would overlook clear consumer preferences for all things wireless.

The PSC’s recent assessment of telecommunications service in New York highlighted how robust, competitive, and innovative the state’s mobile broadband space has become over the last few years. Overall, the total number of mobile broadband subscribers in the state has increased nearly fourfold since 2009, rising to a total of 12.7 million in 2013.33 Investment in mobile broadband networks has been robust, exceeding, by one estimate, $1.5 billion annually in the state over the last few years.34 The result is widespread availability of 4G networks that deliver speeds that are “on par or better than the national average, and [that] far exceed the global averages.”35

Despite such robust growth – in the subscriber base and in technical capability – the PSC and the Program casually dismiss mobile broadband as a complement to, rather than a substitute for, wireline broadband – a conclusion that contradicts actual consumer demand and usage.36 Persisting in this view would also contravene the Program’s stated commitment to technology neutrality by eschewing otherwise viable platforms that currently serve as primary broadband service providers in many areas.

3.5 Assure That the Program Optimizes the Efficiency with Which Funds are Invested

As noted above, one of the most effective ways for optimizing the efficiency with which funds are invested via the Program is to focus supply side allocations on helping to bring broadband to unserved areas in partnership with private service providers. Prioritizing funding in this way will help to avoid investments in unnecessarily duplicative middle-mile networks, something that the RFI specifically contemplates.37 Indeed, the RFI rationalizes that such overbuild might be necessary to “enable heightened competition, innovation, and affordability.”38 There is significant evidence that argues against such an approach, further

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33 Assessment at 56.
35 Assessment at 63.
36 See, e.g., id. at 56.
37 RFI at 13.
38 Id.
underscoring the need for the Program to focus first and foremost on supporting broadband deployment to truly unserved areas.

The primary consequence of overbuild is that it will discourage much-needed private investment. The U.S. Government Accountability Office has observed that “funding projects in low-density areas where there may already be existing providers could potentially discourage further private investment in the area.” Others have noted that using public funds to encourage overbuild sends the wrong signal to incumbents and potential new entrants, creating “strong disincentives to private broadband investment in the long run, as potential future investors will discount expected returns for the possibility that the government may step in, ex post, to subsidize a competitor.”

Ultimately, this kind of approach to network deployment is not an optimal way of spurring broadband build-out to unserved parts of New York. Economic concerns about the impact of network overbuild and the creation of investment disincentives must be taken seriously in New York because the overall broadband market remains vigorous and vibrantly competitive. Destabilizing the organic market forces that have pushed broadband to nearly every part of the state could negatively impact every community and sector.
