

March 28, 2022

Mayor John Hamilton
401 N. Morton Street
Suite 210
Bloomington, IN 47404

Mr. Michael Rouker
Bloomington City Attorney
401 N. Morton Street
Suite 220
Bloomington, IN 47404

Re: City of Bloomington's Letter of Intent and Proposed Arrangement with Meridiam

Dear Mayor Hamilton and Mr. Rouker:

On behalf of the members of the Indiana Cable and Broadband Association and the Indiana Broadband and Technology Association, we write to express serious objections to the Letter of Intent ("LOI") between the City of Bloomington ("City") and Meridiam Infrastructure North America Corp. ("Meridiam"). The LOI was signed on August 27, 2021, but was not publicly announced until November 16, 2021.¹ As detailed below, the LOI and lack of transparency surrounding its execution conflict with federal and state laws, and disregard important public policies and practices that both the Mayor and the General Assembly have committed to follow.

I. The LOI's Exclusivity Provisions Conflict with Federal and State Law.

Section 253 of the federal Telecommunications Act of 1996 preempts exclusivity arrangements that inhibit competition by unfairly favoring one provider over others.² This includes a local government granting a provider exclusive access to public assets that give it an undue preference or advantage over other providers.³ Indiana law similarly voids any contract granting a

¹ Press Release, City of Bloomington, *City Signs Letter of Intent with Meridiam for City-Wide, High-Speed Fiber* (Nov. 16, 2021), <https://bloomington.in.gov/news/2021/11/16/5019> ("Meridiam LOI Press Release").

² 47 U.S.C. § 253; see, e.g., *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Red. 21697 (1999) ("*Minnesota Order*").

³ *Minnesota Order* ¶ 35 (holding that such exclusive deals violate section 253 and are "fundamentally inconsistent with the [Telecommunications] Act").

communications service provider or property owner exclusive rights for access to install communications service facilities.⁴

The LOI runs afoul of these statutory mandates. For example, the LOI provides Meridiam alone with free access to City-owned conduit located in the public rights-of-way (“ROW”).⁵ Competing providers have not been granted such access to this public asset, let alone without any charge. Such unfair and discriminatory preferences as differing conditions for access and differing compensation requirements are unlawful.

The LOI also specifically authorizes Meridiam to limit access to the new fiber network to a single favored provider for *any* defined period of time at Meridiam’s sole discretion.⁶ This likewise contradicts the City’s press release, which suggests Meridiam’s network will be available for use by multiple providers. The City’s Director of Information Technology Services has confirmed that the new network is being built primarily for a single provider’s exclusive use.⁷

II. The LOI Grants Meridiam Other Unfair Advantages That Unreasonably Discriminate Against Other Providers.

More broadly, both the Federal Communications Commission (“FCC”) and courts have made clear that local legal requirements violate section 253 where they create a “competitive disparity” that results in “a competitor being treated materially differently than similarly situated providers.”⁸ The LOI contravenes this important principle in numerous respects:

⁴ Ind. Code § 8-32.6-7(a) (prohibiting communications service providers from entering into “any contract, agreement, or other arrangement” that either: (1) limits the ability of another provider to access easements, rights-of-way, or other real property; or (2) grants incentives to a real property owner that are contingent upon the property owner’s agreement to restrict another provider’s access to the property owner’s easements, rights-of-way, or other real property).

⁵ LOI Art. II, § 2.2(D), (F).

⁶ LOI Art II, § 2.2(B)(vii).

⁷ Dave Askins, *Bloomington Unveils Plan to Work with International Player on High-Speed Citywide Fiber Network*, B Square Bulletin (Nov. 16, 2021), <https://bsquarebulletin.com/2021/11/16/bloomington-unveils-plan-to-work-with-international-player-on-high-speed-citywide-fiber-network/> (reporting on the Director’s statement that “Meridiam is looking to partner with a capable, nationally recognized internet service *provider* (ISP) that would be the *primary residential provider* on the network” (emphasis added)).

⁸ See, e.g., *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, Declaratory Ruling and Third Report and Order, 33 FCC Red. 9088 ¶ 39 & n.93 (citing and discussing precedent and clarifying that “the greater the discriminatory effect, the more certain it is that” section 253(a) has been violated), *aff’d*, *City of Portland v. United States*, 969 F.3d 1020, 1035 (9th Cir. 2020); *Zayo Group, LLC v. Mayor and City Council of Baltimore*, Civ. No. JFM-16-592, 2016 WL 3448261 *4-7 (D. Md. June 14, 2016) (holding that the plaintiffs had adequately pled that the city violated section 253 by granting a single provider access to conduit at a lower monthly lease rate).

- *First*, the LOI commits the City to “assist[ing]” Meridiam in obtaining permits and access to public infrastructure.⁹ Other providers must proceed through the normal permitting and associated processes without such preferential treatment.
- *Second*, the LOI grants Meridiam “priority consideration” for “telecommunication and internet service” contracts with the City.¹⁰ Every other provider would be denied the ability to compete for such contracts in a fair and balanced regulatory environment.
- *Third*, the LOI gives Meridiam an inside track by requiring the City to “use all commercially reasonable efforts to notify [Meridiam] of any open trench projects.”¹¹ Other providers must expend their own resources and due diligence to identify and avail themselves of such opportunities, which can substantially reduce the cost of deploying infrastructure to new areas.
- *Fourth*, the LOI obliges the City to “publiciz[e] [Meridiam’s] network and increas[e] community awareness of the Project and any potential subsidies, vouchers or other incentives available to residents.”¹² No other provider receives such advertising and marketing support from the City, which also implies a governmental “stamp of approval” that no other provider enjoys. And committing other City resources to provide “vouchers or other incentives” to residents for just one favored provider’s services is blatantly unfair and discriminatory.

III. The City’s Exclusive Deal with Meridiam Contravenes Established Norms for Government Fairness and Transparency.

The LOI between the City and Meridiam was made without public process, in disregard of this administration’s stated goal of “opening the doors of government with improved transparency and access to information.”¹³ Although the press release references “several explorations of prospective partnerships with fiber network providers,”¹⁴ the LOI’s public announcement took other providers by surprise, including those with a long track record of continuous investments in building and improving broadband infrastructure and services for the City’s residents.

The process that led to this LOI stands in stark contrast with the open and public process the City used in 2016 when exploring a very similar city-wide broadband project. For that initiative, the City held a symposium featuring national leaders in high-speed networking and local stakeholders. The City also issued a Request for Information. The City received 12 responses, and only after months of presentations, meetings, and negotiations with these providers was a

⁹ LOI Art. II, § 2.2(D).

¹⁰ *Id.*, § 2.2(I).

¹¹ *Id.*, § 2.2(J).

¹² *Id.*, § 2.2(L).

¹³ *Mayor John Hamilton – About*, City of Bloomington, <https://bloomington.in.gov/mayor> (last visited Feb. 2, 2022).

¹⁴ Meridiam LOI Press Release.

specific provider selected.¹⁵ The City appears to have bypassed any kind of public process whatsoever this time around, denying our members the opportunity to participate.

Such an opaque and unfair process is inconsistent with Indiana law. The General Assembly has required that comparable public-private agreements be preceded by public solicitation for proposals,¹⁶ and that all participants “be accorded fair and equal treatment” in discussing and revising their proposals, before “best and final offers” are negotiated.¹⁷ The local government must then hold a public hearing on the proposal whose adoption it recommends.¹⁸ No such procedures were undertaken here. Other providers and the taxpaying public only learned about this project months after the LOI with Meridiam had already been executed.

IV. The LOI Does Not Ensure Expanded Broadband Access in Bloomington.

The City has publicly committed to a “city-wide, leave-no-household-behind model.”¹⁹ And the City’s recent Digital Equity survey concluded that “[l]ow income households are much more likely to lack internet access or only have internet access through smart phones.”²⁰ In promoting its exclusive arrangement with Meridiam to the public, the City has touted that it will bring Internet access to those who currently lack it.²¹ But this ignores the fine print. In fact, the LOI does *not* obligate Meridiam to bring high-speed Internet to even a single Bloomington resident who currently lacks such access. To the contrary, while the LOI states that Meridiam must deploy to “85% of all Bloomington premises,” it goes on to *exclude* from the definition of “premises” “any premise that [Meridiam] considers unreasonably expensive and commercially impracticable to connect” in its sole discretion.²² Authorizing Meridiam to serve only the areas it

¹⁵ See Press Release, City of Bloomington, Indiana, *Bloomington Fiber Initiative and AXIA FAQ*, <https://bloomington.in.gov/news/2016/12/28/1259> (Dec. 28, 2016).

¹⁶ Ind. Code § 5-23-5-1.

¹⁷ *Id.* §§ 5-23-5-5, 5-23-5-7.

¹⁸ *Id.* § 5-23-5-9.

¹⁹ Press Release, City of Bloomington, Indiana, *Mayor John Hamilton Seeks Citywide Fiber Network*, <https://bloomington.in.gov/news/2016/09/20/2416> (Sept. 20, 2016) (“2016 Citywide Fiber Network Press Release”).

²⁰ City of Bloomington, Indiana, *Digital Equity*, <https://bloomington.in.gov/digital-equity> (last visited Feb. 3, 2022) (explaining that a Digital Equity survey was sent to a randomized sample of 6,500 Bloomington residents in April 2020, and 1,080 of those sampled responded); see also City of Bloomington, *Digital Equity Strategic Plan* at 4 (Dec. 2020), available at <https://bloomington.in.gov/sites/default/files/2020-12/City%20of%20Bloomington%20Digital%20Equity%20Strategic%20Plan%2020201220.pdf> (“Seventeen percent of low-income respondents (with household income below \$25,000 per year) report not having internet access at home. . . . This is more than double the 8 percent of the respondents in the \$25,000-\$49,000 category and far higher than the low-single-digit percentages of households in higher income categories.”).

²¹ See Meridiam LOI Press Release (stating that the arrangement will “[e]stablish[] the opportunity for households across the community to access high-speed internet,” and that the LOI is “a major step to equip Bloomingtonians with the tools they need to learn, work, and fully participate in contemporary life”).

²² LOI Art. II, § 2.2(1) (emphasis added).

unilaterally determines to be most profitable or otherwise worth the effort invites the very kind of “cherry-picking” that the Mayor has elsewhere condemned.²³

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We and our members strongly support federal, state, and local efforts to expand and improve broadband access. The City’s exclusive deal with Meridium lacks any enforceable commitments to achieve these objectives and is subject to legal challenge on multiple grounds. The LOI also contravenes good governmental policies and practices that the State of Indiana and the City of Bloomington, including this administration, have customarily embraced. An exclusive deal that discriminates against other providers, undermines fair competition for consumers, and fails to assure broadband deployment to unserved households is not a valid or viable path for the City to meet its digital equity goals.

Thank you for your attention to our concerns. We and our members would welcome discussions with the City about returning to fair and open processes to expand broadband access in ways that best serve the City’s residents and businesses.

Very truly yours,

Tom Havens



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²³ See 2016 Citywide Fiber Network Press Release (expressing concerns about “cherry picking” in the deployment of a community-wide fiber network and opining that “[w]e shouldn’t make the 21st century equivalent to electricity available only to some of our residents”).