

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
City of Wilson, North Carolina)	WB Docket No. 14-115
)	
Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition)	
)	
Electric Power Board of Chattanooga, Tennessee)	WB Docket No. 14-116
)	
Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition)	
)	

COMMENTS OF ITTA

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 2

II. THE COMMISSION LACKS AUTHORITY TO PREEMPT STATE LAWS ON MUNICIPAL BROADBAND ENTRY UNDER SECTION 706 3

III. EXCEEDING THE COMMISSION’S AUTHORITY TO PREEMPT STATE LAWS ON MUNICIPAL ENTRY WOULD CONSTITUTE BAD PUBLIC POLICY 6

 A. The Failures of Municipal Broadband Networks Are Well Documented 6

 B. States Are in the Best Position to Mitigate the Risks of Municipal Entry 9

VI. CONCLUSION..... 11

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COMMENTS OF ITTA

ITTA – The Voice of Mid-Size Communications Companies hereby respectfully submits its comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) July 28, 2014 Public Notice¹ seeking comment on separate petitions filed by the City of Wilson, North Carolina (the “City of Wilson”) and the Electric Power Board of Chattanooga, Tennessee (“EPB”) asking the FCC to act pursuant to Section 706 of the

¹ “Pleading Cycle Established for Comments on Electric Power Board and City of Wilson Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks,” WB Docket Nos. 14-115 and 14-116, Public Notice, DA 14-1072 (rel. July 28, 2014) (“Public Notice”).

Telecommunications Act of 1996² to preempt portions of North Carolina and Tennessee state statutes that restrict their ability to provide broadband services.³

I. INTRODUCTION AND SUMMARY

The City of Wilson and EPB both operate broadband networks in some or all of their respective territories. However, they claim in their Petitions that they cannot expand into areas outside their territories where they desire to offer broadband service as a result of North Carolina and Tennessee state laws limiting municipal entry.⁴ They contend that the Tennessee and North Carolina municipal entry laws are “impermissible barrier[s] to broadband deployment and competition”⁵ that the Commission “has clear and explicit authority under Section 706 to remove” in order to promote the widespread availability of broadband capabilities in a reasonable and timely fashion.⁶ They request the Commission to take the extraordinary and unprecedented step of preempting the Tennessee and North Carolina laws and declaring them to be unenforceable.⁷

² Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), as amended by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), is now codified in Title 47, Chapter 12 of the United States Code, at 47 U.S.C. § 1302.

³ See Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition filed by the City of Wilson, North Carolina, WB Docket No. 14-115 (filed July 24, 2014) (“Wilson Petition”); Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition filed by the Electric Power Board of Chattanooga, Tennessee, WB Docket No. 14-116 (filed July 24, 2014) (“EPB Petition”) (collectively, “Petitions”).

⁴ See Wilson Petition at 2; EPB Petition at 1.

⁵ Wilson Petition at 2.

⁶ EPB Petition at 4.

⁷ Wilson Petition at 3; EPB Petition at 3.

As explained below, the Commission must deny both petitions. As a threshold matter, the FCC has no authority to preempt state laws on municipal entry under Section 706 of the Telecommunications Act. Furthermore, taking such action would constitute bad public policy. The numerous failures of municipal broadband networks are well documented, which is why nearly half of the states have adopted laws limiting or prohibiting municipal entry. The states fully understand and appreciate the serious consequences that stem from using taxpayer dollars to bring local municipalities into direct competition with private sector companies and are in the best position to govern municipal entry to prevent the disastrous outcomes we have seen time and time again.

II. THE COMMISSION LACKS AUTHORITY TO PREEMPT STATE LAWS ON MUNICIPAL BROADBAND ENTRY UNDER SECTION 706

Supreme Court precedent requires that Congress make its intent unmistakably clear if it wishes to upset the constitutional balance between the federal government and the states or preempt states' historic powers. Dual sovereignty and the right of the states, not the federal government, to use the powers reserved to them to govern municipalities within their borders as they see fit is a fundamental tenet of our system of government. Because of this, as was noted recently by a former FCC General Counsel, "Congress is presumed to legislate with federalism in mind," and the FCC and the courts are bound by the "clear statement rule" in interpreting whether Congress intended for the federal government to override powers entrusted to the states in their absolute discretion.⁸

⁸ Remarks of Matthew Berry, Chief of Staff to FCC Commissioner Ajit Pai before the National Conference of State Legislatures' 2014 Legislative Summit, Minneapolis, MN (Aug. 20, 2014), at 2, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0820/DOC-328916A1.pdf (last visited: Aug. 26, 2014).

At its core, this rule requires that there be a clear statement that Congress intended to empower the FCC to preempt the state law at issue. As Justice Souter wrote for the Court in *Nixon v. Missouri Municipal League*, “federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen distribution of its own power, in the absence of” a clear statement to the contrary.⁹ The text of Section 706 does not even mention preemption, let alone preemption of state laws that regulate municipalities. Section 706 does not condone preemption of state laws either explicitly or implicitly, and therefore does not constitute the clear statement from Congress necessary for the FCC to “interpose[e] federal authority between a State and its municipal subdivisions.”¹⁰

Moreover, the legislative history underlying Section 706 makes clear that Congress had no intent to confer on the FCC the authority to preempt state laws on municipal broadband networks. The Senate version of the Telecommunications Act of 1996 contained a precursor to Section 706(b) that expressly authorized the Commission to “preempt State commissions that fail to act to ensure [the] availability [of advanced telecommunications capability to all Americans].”¹¹ When the final bill was enacted, however, the language authorizing preemption of state commissions was cut.¹² In other words, Congress contemplated giving the FCC preemption authority in Section 706 and expressly decided not to do so.

⁹ *Nixon v. Missouri Municipal League*, 541 U.S. 124, 140 (2004).

¹⁰ *Id.*

¹¹ S. Rep. No. 104-23, 104th Cong., 1st Sess., 120 (1995).

¹² See H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., 102 (1996).

It is no surprise, then, that 60 members of the House recently wrote a letter¹³ to Chairman Wheeler expressing their concern regarding his statements that he “believe[s] the FCC has the power – and [he intends] to ask the Commission to exercise that power – to preempt state laws that ban competition from community broadband.”¹⁴ As the letter explained, “[i]nserting the Commission into the states’ economic and fiscal affairs as [Chairman Wheeler has] suggested sets a dangerous precedent and violates state sovereignty in a manner that warrants deeper examination.”¹⁵ They urged him to reevaluate the Commission’s role with respect to state municipal entry and to not interfere with state processes and decision making.¹⁶ Shortly thereafter, the House passed an amendment to the FY 2015 Financial Services Appropriations Bill denying the FCC funding to preempt state laws on municipal broadband.¹⁷ Representative Marsha Blackburn, a former Tennessee state senator who sponsored the amendment, described Chairman Wheeler’s statements as “deeply troubling” and said that any FCC efforts to preempt state municipal entry laws “pose a direct challenge on the constitutionality of states’ sovereign functions.”¹⁸

¹³ See Letter from the Honorable Marsha Blackburn, Committee on Energy and Commerce Vice-Chairman, *et al.*, to the Honorable Tom Wheeler, FCC Chairman, June 12, 2014, *available at*: http://tipton.house.gov/sites/tipton.house.gov/files/FCC_Municipal_Broadband_Letter.pdf (last visited: Aug. 26, 2014) (“Blackburn, *et al.* Letter).

¹⁴ Remarks of Tom Wheeler, Chairman, Federal Communications Commission, National Cable & Telecommunications Association, Apr. 30, 2014, *available at*: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0430/DOC-326852A1.pdf (last visited: Aug. 26, 2014) (“Wheeler Remarks”), at 5.

¹⁵ Blackburn, *et al.* Letter at 1.

¹⁶ *See id.* at 2.

¹⁷ “Blackburn Acts to Prevent FCC from Trampling on States’ Rights,” Press Release, July 16, 2014, *available at*: <http://blackburn.house.gov/news/documentsingle.aspx?DocumentID=388226> (last visited: Aug. 29, 2014).

¹⁸ *Id.*

In sum, the plain language of the statute, its legislative history, and how Congress views it in the present day demonstrate that Section 706 cannot reasonably be interpreted to provide the Commission with authority to preempt state municipal entry laws. Consequently, any attempt to preempt such state laws would be unlawful and the Petitions must be denied.

III. EXCEEDING THE COMMISSION’S AUTHORITY TO PREEMPT STATE LAWS ON MUNICIPAL ENTRY WOULD CONSTITUTE BAD PUBLIC POLICY

A. The Failures of Municipal Broadband Networks Are Well Documented

As Chairman Wheeler has described it, “the experience with community broadband is mixed” and “there have been both successes and failures.”¹⁹ This statement offers a rosy outlook, at best. In reality, municipal broadband projects routinely run deep in the red, forcing taxpayers to bail them out on a consistent basis. Studies conducted in the past few years have shown that almost all government-owned networks are losing money and that virtually all of them have a negative net present value.²⁰

Municipal broadband projects fail for a variety of reasons. Often, they lack a sustainable, long-term business plan and resources to invest in maintenance and necessary upgrades as technology evolves. While private sector companies expect to operate at a deficit for the first few years before turning a profit, local governments tend to dramatically underestimate the financial resources necessary to make municipal broadband projects feasible on an ongoing

¹⁹ Wheeler Remarks at 5.

²⁰ See Joseph P. Fuhr, “The Hidden Problems with Government-Owned Networks,” Coalition for the New Economy, Jan. 9, 2012, *available at*: <http://www.coalitionfortheneweconomy.org/wp-content/uploads/2012/01/1-6-12-Coalition-for-a-New-Economy-White-Paper.pdf> (last visited: Aug. 26, 2014), at 4.

basis. Such projects “generally run over budget for construction, are not financially sustainable and require subsidies to survive.”²¹

Municipalities also lack the scale to adapt to technological changes and provide new services desired by consumers as the marketplace evolves. As a result, municipal broadband projects provide service that is inferior to and less advanced than the private sector. As one economics professor puts it, “government-owned networks have fared quite poorly because they have neither the resources nor the expertise necessary to provide consumers with reliable state-of-the-art broadband connections.”²² In addition, municipalities that decide to enter the broadband market are unprepared for the competitive response they receive from the private sector. It “come[s] as a shock. Governments are not accustomed to competition.”²³

Muni-broadband projects also use taxpayer funds to overbuild existing private sector networks that already make broadband service available. This presents a two-fold problem. First, because funding a municipal network requires taxpayers to subsidize a network that duplicates an existing network, they are an inefficient use of taxpayer funds. Consumers not only lose tax revenue that would have been generated by the private network provider, they also pay more in taxes to subsidize the government-owned network. Second, municipal broadband projects impede competition from other providers because they operate at an unfair competitive advantage compared to private sector broadband providers. Consumers not only lose the benefits of competition and choice, but also the benefits of innovation. When a municipality drives out

²¹ *See id.*

²² *Id.* at 9.

²³ *Id.* at 3 (citing R. Bell, J. Jung, and L. Zacharilla, *Broadband Economies, Creating the Community of the 21st Century* (2009)).

competition from the private sector by creating a government-sanctioned monopoly, it removes incentives for future advances in technology that can be gained by competition.

There are numerous examples of failed municipal broadband projects. At the end of fiscal year 2013, Utah's UTOPIA project had net assets totaling negative \$146 million, with a total debt exceeding \$500 million.²⁴ After only six years in operation, the LUS Fiber project in Lafayette, Louisiana exceeded \$160 million in debt, with revenues falling 30 percent below its business plan projections.²⁵ Eight years after Marietta, Georgia constructed its FiberNet system, it sold it for \$11.2 million, a fraction of the \$35 million it cost to build and maintain the network.²⁶ Burlington Telephone in Burlington, Vermont accumulated so much debt (nearly \$50 million, of which almost \$17 million was improperly borrowed from taxpayers) that a state audit revealed there was no feasible way for the provider to repay.²⁷ After making a lot of noise about its ability to help cities improve penetration of 1 Gbps connections, Gigabit Squared has been sued by the city of Seattle for thousands in unpaid bills and legal fees.²⁸ Similar problems plagued the organization in Chicago, and the firm has now dissolved.²⁹ The Ashland Fiber network launched in Ashland, Oregon in the late 1990s encountered numerous obstacles.

²⁴ See Kuper Jones, "For Taxpayers, Broadband 'Utopia' Anything But," *Forbes*, July 1, 2014, available at: <http://www.forbes.com/sites/realspin/2014/07/01/for-taxpayers-broadband-utopia-anything-but/> (last visited: Aug. 29, 2014).

²⁵ See Steven Titch, "Lessons in Municipal Broadband from Lafayette, Louisiana," Reason Foundation Policy Study 424, November 2013, available at: http://reason.org/files/municipal_broadband_lafayette.pdf (last visited: Aug. 29, 2014).

²⁶ See Fuhr, *supra* n. 20, at 8.

²⁷ See *id.* at 7.

²⁸ Kari Bode, "Gigabit Squared No Longer Exists, Faces Seattle Suit," DSLReports.com, Aug. 4, 2014, available at: <http://www.dslreports.com/shownews/Gigabit-Squared-No-Longer-Exists-Faces-Seattle-Suit-129939> (last visited: Aug. 29, 2014).

²⁹ See *id.*

Because the city significantly underestimated the cost of deployment, it was unable to build out infrastructure to areas that were cost prohibitive due to terrain and population density.³⁰ Local residents who could not access the service nonetheless had to pay taxes to subsidize the network's operations in other parts of the intended service area.³¹

In sum, municipal broadband networks frequently are less efficient, more expensive, and less cost effective than private entities' delivery of broadband services. They often involve an ineffective use of scarce government resources and lead to failure. Most importantly, they fail to achieve universal service in the areas they serve. The Commission's grant of the Petitions would thus constitute a bad public policy decision.

B. States Are in the Best Position to Mitigate the Risks of Municipal Entry

States, and not the federal government, are responsible for overseeing local governments. Federal preemption would sever this relationship between local and state government and prevent states from exercising authority over their own agents. The Commission should not strip away the power of state lawmakers to make decisions as to the proper use of taxpayer funds. As one commenter observes, "[s]tates are well aware that the vast majority of hundreds of muni-broadband efforts to date have failed and stuck taxpayers with the burden of paying off the bill for this incompetence, waste, fraud and abuse."³² Their interest in preventing failure of additional community broadband projects is precisely why so many states have laws regarding municipal entry on the books.

³⁰ See Fuhr, *supra* n. 20, at 2-3.

³¹ See *id.*

³² Scott Cleland, "FCC's Next Overreach of Authority: Preempting States on Muni-Broadband," The Heartland Institute, May 7, 2014, *available at*: <http://news.heartland.org/editorial/2014/05/07/fccs-next-overreach-authority-preempting-states-muni-broadband> (last visited: Aug. 26, 2014).

For example, North Carolina requires voter approval before local governments can incur public debts to fund municipal broadband projects.³³ It also prohibits local governments from using revenue from general budgets or other public services in order to subsidize municipal broadband projects.³⁴ Although the City of Wilson may have achieved some success in rolling out broadband service with Project Greenlight, state lawmakers nonetheless prohibited the city from expanding beyond the borders of its home county in 2011. This decision was spurred by the state's desire to avoid situations where municipalities are competing with private companies that pay state taxes.³⁵ State lawmakers also were concerned that taxpayers would end up footing the bill if municipal systems ultimately fail, as has been the case with so many other municipal broadband projects.³⁶

EPB has enjoyed some favorable publicity because it made Chattanooga the first city in the U.S. to offer broadband speeds of up to one gigabit per second. However, “what is often ignored in press accounts is the price of the service, \$350 per month, and the dire financial situation of the fiber optic system.”³⁷ At the end of 2010, EPB's net assets were a negative \$16.7 million, suggesting that Tennessee municipal entry laws remain essential to protect consumers from the financial risks associated with municipal broadband projects.

³³ North Carolina General Statutes, Article 16A, §160A-340.4(b).

³⁴ *Id.* at § 160A-340.1(a)(7).

³⁵ “Cities and States Squaring Off Over Municipal Broadband,” *StateNet Capitol Journal*, Aug. 18, 2014, available at: http://www.statenet.com/capitol_journal/#archive2014 (last visited: Aug. 26, 2014), at 8.

³⁶ *See id.* Indeed, such financial struggles have beleaguered the municipal broadband network in other cities in North Carolina. Mi-Connection, a joint muni-broadband project of Mooresville and Davidson, North Carolina, had yet to turn a profit four years into operation. *See Fuhr, supra* n. 20, at 5. With debt at nearly \$90 million a few years ago, local officials were looking for an exit strategy and faced either repaying the system's debt with general funds or default. *Id.*

³⁷ *See Fuhr, supra* n. 20, at 4.

States have clear sovereign economic and fiscal responsibilities to the citizens and taxpayers of their state. The construction and operation of broadband networks in a local community properly rests within the states' jurisdiction. It is without doubt that "state governments across the country understand and are more attentive to the needs of the American people than unelected federal bureaucrats in Washington, D.C."³⁸ The Commission must not usurp the powers of North Carolina, Tennessee, or other states to advance their own agenda.

VI. CONCLUSION

For the foregoing reasons, the Petitions filed by the City of Wilson and EPB should be denied.

Respectfully submitted,

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³⁸ Blackburn, *et al.* Letter at 1.