N A R U C

National Association of Regulatory Utility Commissioners

VIA ELECTRONIC FILING

December 4, 2014

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: Notice of Ex Parte Communication: ***In the Matter(s) of 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*** **WCB Docket No. 14-115, WCB Docket No. 14-116.**

Secretary Dortch:

On December 2, 2014, **Brad Ramsay**, NARUC General Counsel, **Genny Morelli**, President – ITTA, **Micah Caldwell**, Vice President – ITTA, and **Jeb Benedict**, Vice President for Federal Regulatory Affairs and Regulatory Counsel – CenturyLink met with **Jonathan Sallet**, FCC General Counsel, **Madeleine Findley**, Associate General Counsel and **Deena Shetler**, Associate Chief, Wireline Competition Bureau to discuss the above-captioned proceeding.

During the meeting, the group emphasized that the FCC does not have authority to preempt State laws that limit or deny municipal or other state organizations' authority to provide broadband or other services. In response to hypotheticals outlined by Mr. Sallet, Mr. Ramsay led a discussion of the following legal points to the FCC staff:

- *It is hornbook law that States derive their authority from the State constitution and via State constitution-authorized State legislation. No federal statute can grant an organ of a State authority. At most, federal law can take authority away (or grant the State agency or political subdivision permission to do something the State constitution or State legislature already allows the State to do). If the State law in question denies authority or simply does not grant it to a municipality, and the State law is constitutional under State law, the result is the same. As a matter of State law, the particular political subdivision of the State – i.e., the public service commission, the attorney general, counties, parishes, towns, cities, or municipalities – will have no authority to act.*

- *Several examples of the principle outlined above were discussed at the meeting. Mr. Ramsay cited to the fact that NARUC's member commissions, ordered by Congress in Section 254 to create State universal service funds (which of course could be used to fund broadband deployment), have no authority to create such State USF programs without a specific grant from their State Constitution or their State legislature. Even if such programs directly promote deployment of advanced services, Section 706 of the federal Telecom Act cannot change that.*

- *Even if Section 706 did suggest the FCC could ignore the constitutional barriers to State action, it does not give the FCC power to order actions not sanctioned by the "owners" of the municipal "corporation". If the Board of Walmart freely chooses not to invest its money in the broadband business, but an individual store manager really wants to get in the business, the FCC cannot order Walmart to allow that store manager to do so on the basis of Section 706 or any other provision of the Telecom Act.*[1] *Similarly, if the citizens of a State – through their constitution or legislature – decide democratically that they do not want State tax dollars to be invested in State or municipally-run businesses, that should end the inquiry.*

- *The statutory and constitutional barriers to the FCC granting the two preemption petitions in this proceeding are legally insurmountable. No provision of the Telecom Act – including Section 706 - authorizes the FCC to grant authority to State agency or political subdivision.* ***No provision of the U.S. Constitution authorizes the FCC to grant authority to a State agency or political subdivision where the State has not provided it.***

- *The U.S. Supreme Court upheld Dillon's Rule in 1903 and again in 1923. Since then, the following tenets have become a cornerstone of American municipal law and have been applied to municipal powers in most States: [1] Municipal corporations can exercise only the powers explicitly granted to them by the State. [2] If there is reasonable doubt whether a power has been conferred to a local government, then the power has not been conferred.*

- *If a municipal corporation attempts to operate outside the bounds of its chartered territory, as in the Tennessee petition, there can be no reasonable doubt.*

- *Both North Carolina and Tennessee – the States at issue in the petitions - are Dillon's Rule jurisdictions.*[2] *But that is irrelevant to a proper construction of the law. Whether or not a municipality is located in a Dillion's Rule State (or in a home rule State), the question of whether the municipality actually has delegated authority is a question of State constitutional law. Even in a home rule State, if the legislature has enacted a law that limits municipal authority – for that to make a difference in any FCC legal analysis – would mean that the Constitution of that State did not envision the legislature could make lawful changes in authority delegated to the municipal corporations. That is a State law determination. The FCC was not granted by Congress – and Congress was not granted by the Constitution – the authority to decide that a State has granted authority to a municipality when the State says clearly by constitutional provision or valid legislative enactment that it has not. NARUC is unaware of any examples where a federal administrative agency has taken upon itself the State constitutional law question of how authority is allocated by the State (in a circumstance, like this, that does not involve any violation of any federal constitutional rights). The only possible analogy that was raised at this meeting – and it is certainly far from on point with the current circumstance - is*

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[1] Analogies to federal civil rights cases (such as actions under 42 U.S.C. § 1983 to address deprivation of civil rights guaranteed under the U.S. Constitution) are wholly inapplicable. The only provision of the U.S. Constitution implicated by the petitions before the FCC here is the 10th Amendment. It expressly limits federal authority.

[2] *See County Authority: A State by State Report* compiled by NACO (Dec. 10, 2010) at p. 205, online at: http://www.naco.org/newsroom/pubs/Documents/County%20Management%20and%20Structure/County%20Authority%20a%20State%20by%20State%20Report.pdf.

so-called Pullman Abstention. In Pullman, unlike here, the petitioners based their petition for relief explicitly on federal Constitutional law violations not a generally worded provision like Section 706. There, the Supreme Court, noting that the meaning of the Texas statute was "far from clear", ordered the federal court to abstain until the parties could obtain a definitive interpretation of the State law from State courts. When and only when such a determination was made could the petitioners return to federal court to have their constitutional claims adjudicated – if they were still relevant. In other words, until any State law issues were decided by the State there was no case or controversy.

- *Setting aside the 10th Amendment of the U.S. Constitution's express limits on federal authority, from a pure statutory construction perspective, the circumstances of the Nixon case present a more plausible rationale for preemption – but even there the Supreme Court rejected preemption as an option. There is a long line of cases detailing the presumption against federal preemption of State law.[3] Section 253 of the Telecom Act, at issue in Nixon, contains a specific directive from Congress to preempt any State law that prohibits any carrier from providing a telecommunications service yet the Supreme court still found preemption to be unlawful in that case. In contrast, Section 706 says nothing about preempting any State law or policy. Indeed, according to the D.C. Circuit's analysis in Verizon v. FCC – it is an independent grant of authority to the States.*

- *The record in this proceeding details instances where municipal corporations have failed, and where municipal broadband systems have undermined commercial broadband investment to the possible detriment of the public. States have legitimate bases for limiting or prohibiting municipal broadband if they choose, but the policy decision is for States, not the FCC, to make.*

Pursuant to Section 1.1206(b) of the Commission's Rules, a copy of this notice is being filed in the appropriate docket.[4]

Respectfully Submitted,

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cc: by Electronic Mail

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[3] *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218 (1947), held that when a federal law regulates a field traditionally occupied by the States, the police powers of the States in that area are not necessarily preempted. The State will not be preempted by federal law unless it is the clear and manifest purpose of Congress. It's a safe bet that a States decisions about internal allocations of authority are a field traditionally occupied exclusively by the States. *Cf. Cipollone v Liggett*, 505 U.S. 504 (1992).

[4] Mr. Ramsay provided the FCC staff present with copies of NARUC's comments already filed in the captioned proceedings, available online at: http://apps.fcc.gov/ecfs/document/view?id=60000869606.