Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Electric Power Board of Chattanooga, Tennessee	)	WCB Docket No. 14-116
	)	
City of Wilson, North Carolina	)	WCB Docket No. 14-115
	)	
Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks.	)	

REPLY COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION

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I. INTRODUCTION AND SUMMARY

NTCA–The Rural Broadband Association ("NTCA") hereby submits these reply comments in response to comments filed on the above-captioned Petitions, which ask the Federal Communications Commission ("FCC" or "Commission") to preempt state laws governing the provision of broadband services by municipalities in their respective states.[1] The Electric Power Board of Chattanooga ("EPB") objects to the laws of the State of Tennessee insofar as they restrict the ability of a municipality[2] to provide broadband services outside of the municipal-

[1] Public Notice, 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, DA 14-1072 (Wir. Comp. Bur. Jul. 28, 2014).

[2] NTCA intends that its use in these reply comments of the terms "municipality" and "municipal" refer to all political subdivisions of a State and their operating units, but uses those terms for convenience sake.

owned electric utilities' service areas.[3] The City of Wilson objects to numerous regulatory provisions and requirements in the laws of the State of North Carolina which govern a municipalities' provision of broadband services outside of the city limits.[4]

As stated in NTCA's initial comments, both Petitions should be denied because (1) State legislatures should evaluate and resolve the difficult policy issues associated with municipal provision of broadband, and (2) the FCC lacks the legal authority to preempt the laws of the States of Tennessee or North Carolina insofar as they govern municipality administration and operation. A number of parties in the record advance similar arguments and support denial of the petitions as well.

II. THE RECORD IN THIS PROCEEDING DOES NOT SUPPORT GRANT OF THE PETITIONS

A. Commenters Agree that the Scope of State Laws Governing Municipal Provision of Broadband Must be Left to the Sound Discretion of the States

As NTCA stated in initial comments, the expansion of municipal corporate powers and services, especially in the provision of commercial services such as telecommunications and broadband services, is a matter that should be left to the discretion of the various states to address state-specific economic circumstances. A number of commenters agree that the issue of municipal entry and the scope of such entry into the broadband market carries risks and benefits, the balancing of which falls appropriately within the purview of the state legislatures that would bear much of the burden of any failures.

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[3] Electric Power Board of Chattanooga, Tennessee, Petition for Preemption of a Portion of Section 7-52-601 of the Tennessee Code Annotated, WCB Docket No. 14-116 (filed Jul. 24, 2014) ("EPB Petition").

[4] City of Wilson, North Carolina, Petition For Preemption of North Carolina General Statutes § 160A-340 *et seq*., WCB Docket No. 14-115 (filed Jul. 24, 2014) ("Wilson Petition").

Commenters agree that states' consideration and mitigation of the risks associated with municipal entry falls squarely within their responsibilities and the expectations of the citizens that elect them.[5] As one commenter states, "unlike the private sector, when a municipal network goes bust, it is the captive taxpayer or electric ratepayer, not the willing shareholder, who bears the brunt."[6] Providing the perspective of the very executives that must weigh these risks, the National Governors Association is correct when it argues that, "states have a strong interest in overseeing the process by which municipal broadband networks are designed and approved because states maintain ultimate responsibility for the financial health of the cities and towns within their borders."[7] States are not only in the best position to consider these risks – as they are closer to and more aware of the local conditions that can impact the success of a municipal provider – they owe it to the citizens that elected them to weigh those risks and act accordingly. Or as one party points out, "[m]unicipal entry laws are the product of the considered judgment of the state legislatures that passed them, *whom the citizens of the State elected to represent and protect their interests*."[8]

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[5] *See*, Comments of the National Governors Association, WCB Docket No. 14-115, WCB Docket No. 14-116 (fil. Aug. 29, 2014) ("NGA"), p. 3; Comments of the Fair Competition Alliance, WCB Docket No. 14-115, WCB Docket No. 14-116 (fil. Aug. 29, 2014), pp. 4-5; Comments of the Free State Foundation, WCB Docket No. 14-115, WCB Docket No. 14-116 (fil. Aug. 29, 2014), p. 1; Comments of the United States Telecom Association, WCB Docket No. 14-115, WCB Docket No. 14-116 (fil. Aug. 29, 2014) ("USTelecom"), p. 9; Comments of ITTA, WCB Docket No. 14-115, WCB Docket No. 14-116 (fil. Aug. 29, 2014), pp. 9-11.

[6] Comments of CenturyLink, WCB Docket No. 14-115, WCB Docket No. 14-116 (fil. Aug. 29, 2014), p. 6. (citing Lawrence J. Spiwak, *FCC Has No Authority to Preempt Municipal Broadband Laws*, Bloomberg Law, Aug. 6, 2014 at 1 (available at http://www.bna.com/fcc-no-authorityn17179893367/ (visited Aug. 27, 2014)) (internal quotations omitted).

[7] NGA, p. 3.

[8] CenturyLink, p. 9 (emphasis added). *See also*, NGA, p. 3 (stating that "[t]here is a legal distinction between laws that are unconstitutional from those that some factions do not support. The tool to address the latter is the ballot box").

In its initial comments, USTelecom provides an informative inventory of state statutes governing municipal-owned broadband networks.[9] As the inventory shows, a number of states have chosen to allow municipalities to enter the broadband market, and the safeguards adopted and conditions under which such networks can be built and operate vary from state to state. Of course, a number of states have chosen to prohibit such municipal networks altogether. Most importantly, what the USTelecom inventory of state statutes demonstrates is that the states have been able to weigh the risks and benefits of such networks, taking into account the needs of their citizenry, existing private providers, and the risks to taxpayers should municipal networks fail. These reasoned judgments of elected officials that must answer to the taxpayers that bear those risks should not be set aside.

B. Commenters Agree that the Commission Lacks the Legal Authority to Preempt State Laws Governing Municipal Provision of Broadband

Beyond urging the Commission to respect the policy considerations of the states as to whether to allow municipal entry into the broadband market, commenters also agree that the Commission lacks the legal authority to override such judgments. As commenters note, Petitioners have failed to demonstrate that the text of Section 706 of the Telecommunications Act of 1996 ("1996 Act"), or congressional intent in enacting that provision, contemplates such a use of that provision.

To begin with, as NTCA noted in initial comments, federal law preempts state law in only three specific situations. In evaluating questions of whether federal law is supreme, or whether a particular federal law "preempts" a state law, federal courts have recognized three types of preemption; (1) "express preemption", where a federal law specifically prohibits state action in an area; (2) "field preemption," in which Congress or the agency has occupied the field

[9] USTelecom, App. 1.

of the substantive law in question and therefore has left no room for the state to regulate in an area; and (3) "conflict preemption," in which federal law conflicts with state law so that the state law must give way under the doctrine of federal supremacy.[10] In all cases of preemption, there must be a clear legislative indication of intent to preempt.

Petitioners assert that Section 706 gives the FCC the power to preempt state municipal organization statutes. To prevail on this argument, Petitioners must demonstrate that federal preemption of such state laws is "unmistakably clear" in the text of the provision at issue. Or, in the words of the *Nixon*[11] and *Gregory*[12] courts, petitioners must show that Section 706 contains a "plain statement" of its intention to do so within the meaning of those two federal court decisions. As NTCA stated in initial comments, and USTelecom also notes, the level of interference with state affairs at issue here requires the Commission to meet a higher standard than a most preemption situations.[13] Petitioners fail to meet this standard, as they are unable to point to any "plain statement" of intent.

In addition, there is agreement in the record that Petitioners fail in their attempt to argue that the "plain statement" standard is inapplicable to their Petitions or that the facts of those Petitions are distinguishable from the facts at issue in *Nixon*.[14] As USTelecom correctly notes,

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[10] *Centennial P.R. License Corp. v. Telecomms. Regulatory Bd.*, 634 F.3d 17, 33 n.15 (1st Cir. 2011).

[11] *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004).

[12] *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

[13] USTelecom, pp. 11-12. *See also*, NTCA comments, p. 6 (citing *Nixon* for the proposition that "the need to invoke our working assumption that 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 disposition of its own power, in the absence of the plain statement *Gregory* requires." *Nixon*, 541 U.S. 140).

[14] USTelecom, p. 13. *See also*, CenturyLink, pp. 19-20.

"[j]ust as with Section 253, relying upon Section 706 as the basis for preemption would strike 'near the heart of State sovereignty' by directly 'interfering with the relationship between a State and its political subdivisions.'"[15] Indeed, as USTelecom goes on to point out, the substance of the preemption issues at issue herein are nearly identical to those in *Nixon*.[16] As such, again, both *Nixon* and *Gregory* require clear and unambiguous statements of congressional intent that simply cannot be found in Section 706.

Indeed, when looking at Section 706, CenturyLink perhaps states it best by stating that:

> [n]o form of the word 'preemption' appears in either [706(a) or (b)]. Neither provision references state statutes, state laws, or state government. There is no reservation of certain powers to the States. Simply put, there is no there there. Silence cannot substitute for the "unmistakably clear" expression of intent by Congress required by the Supreme Court to displace traditional state authority.[17]

This silence speaks volumes when one considers that Section 253 of the Communications Act specifically *mandates* that the FCC preempt any "State or Local law" that "may prohibit or has the effect of prohibiting" "any entity" from providing "telecommunications service."[18] Section 332(c)(3) contains similar language in which Congress' intent to preempt state law is unmistakably clear.[19] For one, this demonstrates that if Congress wishes to grant the Commission preemption authority, it is capable of and will do so in an *unmistakably clear* manner. Moreover, as NTCA stated in initial comments, because Section 706 does not contain any reference to preemption – while other sections of the Communications Act do, expressly –

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15 USTelecom, p. 13.

16 *Id*., p. 14.

17 CenturyLink, pp. 13-14.

18 47 U.S.C. § 253.

19 *See*, CenturyLink, p. 15.

the use of Section 706 to engage in preemption would be entirely inconsistent with the Communications Act. In both the *Verizon*[20] and *Direct Communications*[21] decisions, federal courts have made clear that any and all action taken under the guise of Section 706 must be consistent with the Act.

Commenters also agree that petitioners fail to identify any legislative history that would indicate congressional intent to infuse Section 706 with any preemption power for the Commission's use. As ITTA correctly points out, a US Senate version of Section 706 at one point in time contained preemption language. That language was struck from the final version of Section 706 before final passage of the 1996 Act.[22] This indicates a considered decision by Congress that preemption language in Section 706 was either unnecessary or unwise. Despite Petitioners' ardent wishes that it were so, Section 706 contains no preemption power for the Commission to rely upon here, and thus the Petitions should be denied.

III. IF THE COMMISSION IS GOING TO PREEMPT CERTAIN BARRIERS TO BROADBAND INVESTMENT, IT SHOULD CONSIDER SUCH MATTERS HOLISTICALLY AND COMPREHENSIVELY

The Petitions at issue herein are based on the assertion that state laws to which Petitioners are subject serve as barriers to broadband deployment. While NTCA questions the very authority by which the Commission would do so for reasons noted above and in its initial comments, should the Commission choose to preempt State laws under the guise of "removing barriers to broadband deployment," it should consider and then do so in a comprehensive and

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20 *Verizon v. FCC,* 740 F.3d 623, 639 (D.C. Cir. 2014).

21 *Direct Communications Cedar Valley v. FCC (Universal Service Issues),* 753 F.3d 1015, 1054 (10th Cir. 2014).

22 ITTA, p. 4.

competitively neutral manner that places private broadband providers "on a more level playing field" in other respects.

For example, private broadband providers face several significant obstacles to broadband deployment. As the National Broadband Plan ("NBP") recognized in 2009, "[t]he cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands…[and]…obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment."[23] Indeed, Commissioner Ajit Pai said it best in 2012, when remarking upon a Google Fiber project in Kansas City, Missouri:

> It is critically important that states and local communities adopt broadband-friendly policies when it comes to rights-of-way management. When broadband service providers seek to construct next-generation networks, they need to access government-controlled land, poles, and conduits in order to lay fiber and install other infrastructure. Currently, too many providers who try to obtain such access are confronted with daunting sets of federal, state, and/or municipal regulations that often delay and sometimes deter infrastructure investment and broadband deployment.[24]

Unfortunately, these "broadband-friendly policies" have not materialized in many cases. Inflated costs of broadband deployment, some generated by regulations promulgated by or special protections enjoyed by the very kinds of entities that now seek to compete in the provision of broadband, can significantly drive up the cost to others of deploying broadband service, leading broadband providers to either pass on these costs to end-users or decline to extend their networks in the first place. Five years after the NBP was adopted, the Commission

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[23] NBP, p. 109.

[24] Statement of Commissioner Ajit Pai on His Visit to Kansas City's Google Fiber Project (Sept. 5, 2012), available at: http://transition.fcc.gov/ Daily_Releases/Daily_Business /2012/db0905/ DOC-316114A1.pdf.

has made little progress in adopting recommendations that would have involved identifying state and local rights-of-way policies that are inconsistent with the Commission's broadband deployment goals or even defining the outer limits of what fees are competitively neutral, nondiscriminatory, or fair and reasonable.[25]

Instead of wading into the legal quagmire of preemption – in light of the thin, indeed nearly nonexistent, legal basis for such action pursuant to Section 706, as noted above and by several commenters in the record – the Commission and consumers would be better served by continued progress toward completion of the Connect America Fund ("CAF") Phase II mechanism and the creation of an updated CAF for RLECs. NTCA's RLEC members have made substantial progress in delivering high-speed broadband service to most of the consumers in their rural service areas. Additional work – and additional high cost universal service support and private investment – are needed to complete the job, and NTCA therefore urges the Commission to continue its progress in the CAF proceedings mentioned above.

IV. CONCLUSION

For the foregoing reasons, the FCC should reject the Petitions.

Respectfully submitted,

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[25] NBP, p. 113. In this portion of the NBP, several recommendations were provided to enable the Commission to begin get a handle on the myriad rights-of-way and similar state and local rules and fees that can have an impact on broadband providers' cost of deployment.