Before the
Federal Communications Commission
Washington, DC 20554

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

REPLY COMMENTS OF THE TEXAS CITIES COALITION* TO THE COMMENTS OF THE ADVANCED COMMUNICATIONS LAW & POLICY INSTITUTE ("ACLP") AT NEW YORK LAW SCHOOL

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* Texas Municipal League, Texas Coalition of Cities for Utility Issues, Coalition of Texas Cities.

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COMES NOW the Texas Municipal League (TML), the Texas Coalition of Cities for Utility Issues (TCCFUI), the Coalition of Texas Cities (CTC) (Collectively, the "Texas Cities Coalition").[1] and files these Reply Comments in the Federal Communications Commission (hereinafter "FCC") *Petitions Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition, WCB Docket No. 14-115, Wilson, North Carolina, and WCB Docket No. 14-116, Electric Power Board of Chattanooga, Tennessee (*Collectively the "*Municipal Petitions for the FCC to Preempt State Municipal Broadband Restriction Laws.*").

[1] TML has over a 1,000 member cities; TCCFUI is an organization of over 100 cities focusing on the use of rights of way and utility issues; Member cities of CTC are: Addison, Allen, Austin, Bedford, Colleyville, Denton, El Paso, Farmers Branch, Galveston, Grapevine, Houston, Hurst, Keller, Marshall, Missouri City, New Braunfels, North Richland Hills, Pasadena, Round Rock, Tyler, Westlake, West University Place, and Wharton.

I. INTRODUCTION TO THE COALITION'S REPLY COMMENTS: ERRORS IN THE COMMENTS OF ACLP CONCERNING TEXAS LAW AND MUNICIPAL BROADBAND PROHIBITIONS.

On August 29, 2014, the Advanced Communications Law & Policy Institute ("ACLP") at New York Law School filed Comments in the *Municipal Petitions for the FCC to Preempt State Municipal Broadband Restriction Laws*.[2] ACLP is self-described in the first page of its Comments as:

> The ACLP is an interdisciplinary program that focuses on identifying and analyzing key legal, regulatory, and public policy issues impacting stakeholders throughout the advanced communications market.

As part of ACLP's Comments there was an attached report prepared by ACLP, entitled, "Understanding the Debate over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policymakers [June 2014]" ("GONs Report").[3]

According to ACLP, the GONs Report:

> examines the many facets of government-owned broadband networks (GONs) and seeks to provide state and local policymakers with numerous resources….*provides the essential context that should inform any discussion, debate, or deliberation regarding municipal broadband* [italics in original]….This includes in-depth, data-driven discussions…." (ACLP Comments, p.1).

The Texas Cities Coalition files these Reply Comments to the FCC to correct the erroneous references to Texas law in the "in-depth, data-driven" GONs Report, as submitted as part of ACLP Comments to the FCC.

Over a decade ago the FCC classified Internet access services as an "information service", not as a "telecommunications service", in its *2002 Cable Modem Declaratory Ruling*,[4]

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[2] ACLP, Comments (August 29, 2014).

[3] It is not insignificant that GON was defined by ACLP as "Government-owned broadband networks", broadly including "broadband" networks. ACLP Comments, p. 1, and in the title of the GONs Report.

[4] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C. Rcd. 4798, 4802-4803 [¶¶ 7, 33-59] (Mar. 15, 2002) ("*2002 Cable*

yet the ACLP Comments and its attached GONs Report intermingle the two federally classified services as if they are one in the same. Practitioners in this area of the law are well aware, as are those following the current, and contentious, FCC "net neutrality" proceeding are aware,[5] the issues raised by a Tile II (common-carrier) "telecommunications service" classification and a Title I "information service" classification are distinct and significantly different in the regulatory breadth and scope of obligations applicable to each—as separately classified services.[6]

In ACLP's intermingling of the two services of "telecommunications service" and "information service" ACLP also erroneously mischaracterizes Texas law as having an "outright" ban on Texas municipalities providing Internet broadband access (an information service).[7] This is not correct; Texas has no such restrictions, which will be discussed in detail below. And while others have published material having similar erroneous characterizations of Texas law, such erroneous characterizations in this instance, in this particular FCC proceeding -- a proceeding specifically concerning the FCC's preempting state laws that restrict municipal broadband, cannot stand uncorrected. The FCC must have a full and accurate record for any FCC order in this proceeding, *Municipal Petitions for the FCC to Preempt State Municipal Broadband Restriction Laws*.

These Reply Comments are filed to correct the FCC record as to ACLP Comments in erroneously mischaracterizing Texas law as having an "outright" ban on Texas municipalities

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Modem Declaratory Ruling"), *aff'd sub nom. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2702-10 (2005) ("*Brand X*").

[5] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 14-61 ("*Open Internet NPRM*").

[6] A classification distinction which ACLP's GONs Report clearly recognizes (GONs Report, p. 12, and in footnote 46, citing both the *2002 Cable Modem Declaratory Ruling* and *Brand X*), even in the face of its intermingling of a "telecommunications service" and an "information service" as if there were one in the same.

providing Internet broadband access, and to correct several other errors in the ACLP's Comments on Texas statutes and Texas municipal broadband. The FCC's record should accurately reflect there are no state statutory restrictions on municipal broadband in Texas.

II. ACLP ERRORS IN DETAIL CONCERNING TEXAS LAW AND MUNICIPAL BROADBAND PROHIBITIONS

ACLP's Comments state:

> … there was also a rising sentiment that local governments were especially well-positioned to enter the market as service providers and serve as ballast against private ISPs [Internet Service Providers]. [Footnote 50, omitted]…. But several *states acted to preempt their municipalities from becoming service providers* …." (Emphasis added)[Footnote 52] (GONs Report, p. 13)

GONs Report, Footnote 52, was cited as the authority for that last statement. Footnote 52 stated as fact that: "The first two states to do this [preempt municipalities] were Texas and Missouri." With the footnote citing to *In the Matter of the Missouri Municipal League, et al.*, Memorandum Opinion and Order, 16 FCC Rcd. 1157, 1158 (rel. Jan. 12, 2001) ("*In the Matter of the Missouri Municipal League*")." But even a cursory reading of *In the Matter of the Missouri Municipal League* in its discussion of what the FCC terms the *Texas Preemption Order*[8], only involved preemption under 47 U.S.C. § 253 (a) concerning a "telecommunications service", not an "information service". The ACLP Comments, GONs Report, at 13, footnote 52 mischaracterize the *Texas Preemption Order (*and by inference, its appeal, *Abilene*) as applying to an "information service" (Internet access provisioning) issues, not a "telecommunications

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[7] GONs Report, p. 106; See also, Appendix II, p. 164, GONs Report.

[8] *Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-13, 96-14, 96-16, 96-19, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3546, para. 184 (1997) (*Texas Preemption Order),* upheld on appeal, *City of Abilene, Texas, et al. v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) ("*Abilene"*).

service", which the *Abilene* Court itself clearly outlined that the issues of the case only concerned "telecommunications services".[9]

The ACLP Comments, GONs Report, at 13, footnote 53 also mischaracterize *Nixon v. Missouri Municipal League*, 541 U.S. 125, 124 S.Ct. 1555 (2004) ("*Missouri Municipal League")*, as applying to an "information service" (Internet access provisioning) issues, not a "telecommunications service". Both *Abilene* and *Missouri Municipal League* were limited to deciding whether 47 U.S.C. § 253 (a), prohibition of state laws that were "barriers to entry" in providing "telecommunications service", applied to political subdivisions of the State, such as municipalities. The FCC had determined that there was no preemption of these state laws, i.e., that they could be enforced. On appeal of that FCC determination, both the D.C. Circuit Court and the U.S. Supreme Court in *Missouri Municipal League* agreed with the FCC that there was no preemption of these state laws and held that 47 U.S.C. § 253 (a) did not apply to state laws prohibiting cities from providing "telecommunications service". The Court held states could restrict cities from providing competing "telecommunications service". Neither case addressed any state law restrictions on municipalities providing an "information service", let alone Internet access services.

Then the GONs Report erroneously re-iterated what others have erroneously said in lumping Texas in with other states that (may or may not) restrict municipal broadband by these two sentences:

> To date, 19 states have adopted laws impacting the ability of municipalities to deploy a GON. Appendix II provides a summary of these statutes. Only **a few**

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[9] The *Abilene* Court framed the issues at page 50: "The State of Texas has a law prohibiting its municipalities from providing telecommunications services. [Now codified as: Tex. Util. Code, § 54.202, "Prohibited Municipal Services"] The United States has a law [47 U.S.C. § 253 (a)] against state statutes that bar "any entity" from this line of business. ….". There is no mention of "information service", let alone Internet broadband access, in *Abilene.*

> **states** (e.g., Nebraska and **Texas**) **imposed outright bans**…..Others argue that these laws are ultimately inapplicable in the GONs context.[10] (GONs Report, p. 106, bold emphasis added, Footnote 882, cites authorities for this last statement, as set out below.)
>
> GONs Report, Footnote 882:
>
> See, e.g., id. [See John Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 Yale J. on Law & Tech. 87 (2010) ("*Death of the Revolution* ")] at p. 111-112 (discussing whether state statutes prohibiting the provision of "telecommunications services" apply in the GONs context); [*See, e.g.*, Olivier Sylvain, *Broadband Localism*, 73 Ohio St. L. J. 796 (2012) ("*Broadband Locali*sm")] *Broadband Localism* at p. 812-837 (analyzing the *Nixon* [*Missouri Municipal League*] case and evaluating alternative methods and legal justifications for deploying additional GONs).

A review of the GONs Report, Footnote 882 cited In *Death of the Revolution*, page 110-11, reveals that Professor John Blevins focuses on the reason there are no state law restrictions on municipal broadband in some states is due to the federal classification distinctions between a "telecommunications service" and an "information service", and several states only restricting "telecommunications service", as in Texas. He states, with some clarity, that:

> …the [state law] restrictions themselves are not as severe and widespread as the literature describes. …..In addition, scholars have generally overstated the scope of these legislative restrictions. Indeed, several of the state laws never applied to broadband, or stopped applying after the FCC reclassified broadband access as an "information service," which the Supreme Court upheld in the *Brand X* case. [Footnote 129, citing *Nat'l Cable & Telecommcn's Ass'n v. Brand X Internet Servs.*, 545 U.S.967 (2005)]…. because these access offerings are considered "information services" under the 1996 Act, some state statutes may no longer apply at all." Footnote 130, quoted in part below]
>
> This should have been a red-flag to ACLP, it was not.

Death of the Revolution, Footnote 129, also cited and quoted, *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14,853,

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[10] It is beyond the scope of these Reply Comments to examine the other 18 states claimed to have restrictions, but the Texas Cities Coalition would not assume that the only state listed in error was Texas, and neither should the FCC.

14,857 (2005) ("We . . . determine that . . . the transmission component of wireline broadband Internet access is not a telecommunications service")".

This should have been a red-flag to ACLP, it was not.

In fact, *Death of the Revolution*, Footnote 130, specifically discussed Texas's statute--and clearly stated:

> TEX. UTIL. CODE ANN. §§ 51.002, 54.201-.202 (2009) (phrasing restrictions on utilities defined in terms of "telecommunications service").

This should have been a flashing red-flag to ACLP, it was not.[11]

GONs Report, Footnote 882 also cited *Broadband Localism*, but a review of *Broadband Localism* shows it does not support the implied analysis given in GONs Footnote No. 882:

> ….*Missouri Municipal League* cannot be held out as supportive of contemporary municipal broadband restrictions. First, preemption analysis is a statute—and context—specific inquiry. The 2004 decision concerned telecommunications under Title II of the amended Communications Act. [Footnote No. 145, citing "*Cf. Mo. Mun. League*, 541 U.S. at 128.] Since 2005, federal policymakers have subjected broadband to regulation under Title I, not Title II." [Footnote No. 146 omitted]. (*Broadband Localism*, p. 820).

This also should have been a red-flag to ACLP, it was not.

Appendix II of the GONs Report, entitled "State Laws Impacting GONs",[12] continues the same errors when it states as fact: "Texas - Municipalities are prohibited from offering broadband service. (TX Util. Code § 54.201 et seq.)".[13] That is incorrect, as will be shown.

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[11] It is worth noting, in contrast to the analysis presented in ACLP's Comments that *economic fac*tors were, if not *the* cause, were *major contributors* to municipal broadband's "failure", Professor Blevins reached a very different conclusion: "I argue that law was the primary cause of municipal broadband's failure. Simply put, incumbent broadband providers used law to stifle municipal broadband in its infancy." *Death of the Revolution*, p.106.

[12] GON defined by ACLP to mean "broadband" networks. ACLP Comments, p.1, and in the title of the GONs Report.

[13] GONs Report, p. 164.

ACLP's Comments as to the erroneous characterizations of Texas law restricting municipal broadband should be corrected.[14]

III. TEXAS CITIES ARE NOT PROHIBITED FROM PROVIDING BROADBAND

While Texas cities are prohibited from providing directly or indirectly a "*telecommunications service*" to the public,[15] Texas cities are *not prohibited from providing*

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[14] ACLP also refers to municipal franchising to use the public-rights-of-way to provide broadband. And obliquely refers to Texas cities in a reference in a footnote to the *City of Arlington, Texas* FCC "shot clock"/FCC jurisdiction case. (GONs Report, p. 120-21, Footnote 965). GONs Report, in footnote 965, *again mixes differently regulated services as if there were regulated in the same way* by citing as an example *City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012), aff'd, 133 S.Ct. 1863 (2013). A case, which ACLP acknowledges in the same footnote, concerned not municipal broadband prohibitions, but "wireless tower siting process at the municipal level and implementing a "shot clock" to streamline review and approval processes". The *City of Arlington* case had nothing to do with municipal broadband prohibitions.

If municipal franchising to use the public-rights-of-way to provide broadband is relevant to this proceeding, the Texas Cities Coalition would refer the FCC to the [Texas] Coalition of Cities' Comments in the 2011 *Broadband NOI*, cited below, for a review of how municipal franchising works in Texas. Simply put, there is no Texas PUC certificated needed, nor is a municipal franchise required to use the public-rights-of-way to provide broadband or the provisioning of any Internet service by any Public Utility Commission of Texas certificated telecommunication providers (CTPs) or cable operator that has been issued a state wide franchise, both of which are issued, in a what can only be called, a brief, *pro forma* manner.

Coalition of Cities Comments (July 18, 2011), *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, FCC 11-51, WC Docket No. 11-59, Notice of Inquiry, 26 FCC Rcd. 5384 (April 7, 2011). ("*Broadband NOI*").

[15] Tex. Util. Code, § 54.202, "Prohibited Municipal Services". [Italics added]

(a) A municipality or municipal electric system may not offer for sale to the public:

(1) a service for which a certificate of convenience and necessity, a certificate of operating authority, or a service provider certificate of operating authority is required [*and no certificate is required for the providing of Internet connectivity*]; or

(2) a nonswitched *telecommunications service* used to connect a customer's premises with:

(A) another customer's premises within the exchange; or

(B) a long distance provider that serves the exchange.

(b) Subsection (a) applies to a service offered either directly or indirectly through a telecommunications provider.

(c) [This section omitted as not relevant, as it pertains to allowing a municipally owned utility to provide to its energy customers, energy related service information concerning the use, measurement, monitoring, or management of energy utility service, including load management or automated meter reading.]

Internet connectivity, as it is an "information service", not a "telecommunications service".[16] There are Texas cities that have provided Internet connectivity on a city-wide basis and Greenville, Texas currently provides both cable and Internet access service to the public for a fee. A substantial number of Texas cities provide wireless Wi-Fi Internet connectivity "hot spots" in city buildings, libraries and parks, not unlike a great number of cities in the nation.[17]

While there was legislation enacted in 2005 concerning municipal charges for use of the rights of way to provide Broadband over Power Lines ("BPL"), and legislation enacted in 2011 that disallowed the local permitting or regulation of "Internet Protocol enabled services", as a defined term, neither piece of legislation included any restrictions on municipalities providing Internet broadband connectivity.[18]

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[16] This may of course change in the event the FCC (or Congress) reclassifies broadband access as a "telecommunications service".

[17] It should also be noted that the Texas PUC, in 2003, followed the FCC's characterization of the provisioning of Internet access as not being a "telecommunications service" for purposes of calculating "access line" fees (a proxy for a street rental franchises fee) for use of the rights-of-way in providing "telecommunications service" by excluding DSL, and by extension, cable broadband as not being "access lines", if they were not independently configured to provide voice local exchange services. *PUC Dkt. No.* 26412, *Commission Order Approving Amendments to P.U.C. Subst. Rule § 26.465*, at 15-17 (Approved Feb. 13, 2003). However, while standalone Internet connectivity does not count as an access line, it is distinguished from a *voice service* provided over wireline, which does count as an access line. For instance, Voice over Internet protocol (VoIP) *service* provided over wireline in the rights-of-way constitutes a compensable "access line" in accordance with Tex. Loc. Gov. Code, Chapter 283, Sec. 283.002. Definitions (7) "'Voice service' means voice communications services provided through wireline facilities located at least in part in the public right-of-way, without regard to the delivery technology, including Internet protocol technology. The term does not include voice service provided by a commercial mobile service provider as defined by 47 U.S.C. Section 332(d)."; similarly, see P.U.C. Subst. Rule § 26.465 (c) (2) (E).

[18] Tex. Util. Code, § 43.101. …[2005, Italics added]

> (e) The state or a municipality may *impose a charge on the provision of BPL services, but the charge may not be greater than the lowest charge that the state or municipality imposes on other providers of broadband services* for use of the public rights-of-way in its respective jurisdiction.

Tex. Util. Code, § § 51.002 (3-a), (13) and 52.002 (d). [2011, Italics added]

> (3-a) "*Internet Protocol enabled service*" means a service, capability, functionality, or application that uses Internet Protocol or a successor protocol to allow an end user *to send or receive a data, video, or voice communication* in Internet Protocol or a successor protocol.
>
> (13) "*Voice over Internet Protocol service*" means a service that:

Under current law Texas municipalities may offer Internet broadband connectivity, and some currently do so.

IV. CONCLUSION

These Reply Comments seek to correct the FCC record as to the above mentioned errors in ACLP's Comments and its attached GONs Report where it inaccurately misstates Texas law that Texas municipalities are "banned" from providing broadband. As has been shown in these

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> (A) uses Internet Protocol or a successor protocol to enable a real-time, two-way voice communication that originates from or terminates to the user's location in Internet Protocol or a successor protocol;
>
> (B) requires a *broadband connection* from the user's location; and
>
> (C) permits a user generally to receive a call that originates on the public switched telephone network and to terminate a call to the public switched telephone network.

Tex. Util. Code, § 52.002. AUTHORITY TO REGULATE.…[Voice over Internet Protocol or other Internet Protocol enabled services, Italics added]

> (d) Notwithstanding any other law, a department, agency, or *political subdivision* of this state may not by rule, order, or other *means directly or indirectly regulate rates charged for, service or contract terms for, conditions for, or requirements for entry into the market* for Voice over Internet Protocol services or other Internet Protocol enabled services. *This subsection does not:*
>
> > *(1) affect requirements pertaining to use of a right-of-way or payment of right-of-way fees applicable to Voice over Internet Protocol services under Chapter 283, Local Government Code;*
> >
> > (2) affect any person's obligation to provide video or cable service, as defined under applicable state or federal law, the applicability of Chapter 66, or a requirement to make a payment under Chapter 66;
> >
> > (3) require or prohibit assessment of enhanced 9-1-1, relay access service, or universal service fund fees on Voice over Internet Protocol service;
> >
> > (4) affect any entity's obligations under Sections 251 and 252, Communications Act of 1934 (47 U.S.C. Sections 251 and 252), or a right granted to an entity by those sections;
> >
> > (5) affect any applicable wholesale tariff;
> >
> > (6) grant, modify, or affect the authority of the commission to implement, carry out, or enforce the rights or obligations provided by Sections 251 and 252, Communications Act of 1934 (47 U.S.C. Sections 251 and 252), or of an applicable wholesale tariff through arbitration proceedings or other available mechanisms and procedures;
> >
> > (7) require or prohibit payment of switched network access rates or other intercarrier compensation rates, as applicable;
> >
> > (8) limit any commission authority over the subjects listed in Subdivisions (1)-(7) or grant the commission any authority over those subjects; or

Reply Comments, that characterization of Texas law is inaccurate. Texas cities can -- and some do -- provide Internet broadband access. These Reply Comments are meant to assist the FCC in correcting the record in the *Municipal Petitions for the FCC to Preempt State Municipal Broadband Restriction Laws* as to Texas law that Texas municipalities are not "banned" from providing broadband, but may do so without restrictions.

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Respectfully submitted,

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(9) affect the assessment, administration, collection, or enforcement of any tax or fee over which the comptroller has authority.