

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
City of Wilson, North Carolina)	WCB Docket No. 14-115
)	
Petition for Preemption of)	
North Carolina General Statutes)	
§ 160A-340, <i>et seq.</i>)	
)	
The Electric Power Board of)	WCB Docket No. 14-116
Chattanooga, Tennessee)	
)	
Petition for Preemption of a Portion of)	
Section 7-52-601 of the Tennessee Code)	
Annotated)	
)	
To: The Commission		

**REPLY COMMENTS OF THE
WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association (“WISPA”), pursuant to Sections 1.415 and 1.419 of the Commission’s Rules, hereby replies to certain of the initial Comments regarding the Petitions Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition (collectively, “Petitions”) filed on August 24, 2014 by the City of Wilson, North Carolina (“City of Wilson”) and the Electric Power Board of Chattanooga, Tennessee (“EPB”) (collectively, “Petitioners”).¹

¹ See *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,” WCB Docket Nos. 14-115 and 14-116, DA 14-1072 (July 28, 2014). WISPA filed initial Comments in this proceeding. See Comments of WISPA, WCB Docket Nos. 14-115 and 14-116 (filed Aug. 29, 2014) (“WISPA Comments”).

Discussion

I. IF THE COMMISSION HAS PREEMPTION AUTHORITY, IT SHOULD REMOVE BARRIERS TO ENCOURAGE PRIVATE INVESTMENT IN BROADBAND DEPLOYMENT.

In its Comments, WISPA explained that the Commission does not have authority to preempt state laws under Section 706 of the Telecommunications Act² because Congress did not provide any “plain statement” of an intent to preempt.³ Although Section 706(b) lists a number of regulatory devices the Commission can use to “encourage the deployment on a reasonable and time basis of advanced telecommunications capability to all Americans,” preemption of state law is not one of those stated regulatory tools.⁴ Other parties agreed with WISPA that the Commission lacks preemption authority.⁵

WISPA agrees with USTelecom and NTCA that, assuming *arguendo* the Commission has preemption authority, it should not exercise that authority in light of the essential role that states play in determining whether taxpayer funds should be used for broadband deployment.⁶ USTelecom emphasized that “it is not in the public interest for the federal government to substitute its judgment for those of state legislatures.”⁷ It pointed out that “with state taxpayers on the financial hook when a municipal broadband network goes under, it is eminently reasonable for state legislatures to take a cautious approach by limiting public participation in

² 47 U.S.C. § 1302.

³ WISPA Comments at 5, quoting *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004). See also *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

⁴ See 47 U.S.C. §§ 1302 (a) and (b).

⁵ See, e.g., Comments of the United States Telecom Association, WCB Docket Nos. 14-115 and 14-116 (filed Aug. 29, 2014) (“USTelecom Comments”), at 11-21; Comments of the International Center for Law and Economics and TechFreedom, WCB Docket Nos. 14-115 and 14-116 (filed Aug. 29, 2014) (“ICLE/TechFreedom Comments”), at 4-10; Comments of NTCA – The Rural Broadband Association, WCB Docket Nos. 14-115 and 14-116 (filed Aug. 29, 2014) (“NTCA Comments”), at 9-21.

⁶ See USTelecom Comments at 7; NTCA Comments at 5.

⁷ USTelecom Comments at 11.

broadband (or even prohibiting that activity entirely).”⁸ As NTCA stated, “[e]xpansion 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 citizens of the various states to address specific local economic circumstances.”⁹ That discretion includes encouraging broadband deployment service to unserved and underserved areas by assuring private parties that they will not face taxpayer-funded competition.¹⁰ Given that Section 706 applies to both the Commission and State commissions, a State’s decision to geographically restrict broadband service is entirely consistent with the statutory mandate.

As WISPA, USTelecom and ICLE/TechFreedom pointed out, however, the Commission and States can and should do more to encourage broadband deployment.¹¹ First, the Commission can improve access to infrastructure and rights-of-way by removing barriers to entry that some municipalities have established. At the federal level, this includes adopting rules pursuant to Section 6409(a) of the Spectrum Act to accelerate approval of collocation requests for wireless facilities,¹² and streamlining environmental and historic preservation review.¹³ At the State and local level, USTelecom noted that “municipal control of local rights-of-way often translates into onerous rules at the local level that additional expense and delay to broadband infrastructure projects,” and suggested that any preemption authority the Commission might have would be

⁸ *Id.* at 4.

⁹ NTCA Comments at 5.

¹⁰ See ICLE/TechFreedom Comments at 30 (“would be contrary to Section 706 for the Commission to support municipal broadband deployment where doing so would impede private providers’ incentives to build out in under-served and high-cost areas”).

¹¹ See WISPA Comments at 7-13. See also ICLE/TechFreedom Comments at 23 (Commission “should consider ways to encourage state and local governments to reduce regulatory barriers to expanding private provision of broadband at usefule speeds”).

¹² See Middle Class Tax Relief and Job Creation Act of 2012, Pub.L. 112-96, H.R. 3630, 126 Stat. 156 (enacted Feb. 22, 2012) (“Spectrum Act”).

¹³ See *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, WT Docket No. 13-238, *et al.*, 28 FCC Rcd 14238 (2013). WISPA understands that the adoption of a Report and Order is scheduled for the Commission’s October 17, 2014 meeting. See *News Release*, “FCC Announces Tentative Agenda for October Open Meeting” (rel. Sept. 26, 2014).

better targeted to removing these barriers.¹⁴ WISPA suggested that States could assert jurisdiction over utility pole attachments and grant Title I broadband providers the same access and pricing rights that telecommunications and cable providers enjoy.¹⁵

Second, the Commission can “fully implement” Phase II of the Connect America Fund,¹⁶ including the adoption of rules for competitive bidding for WISPs and others that are not traditional “telecommunications” carriers.¹⁷ However, as ICLE /TechFreedom stated, this does not mean that the Commission “should subsidize a technology picked because of an arbitrary, top-down decision that people should have a certain speed even if they don’t yet want it.”¹⁸ Rather, as WISPA has recently advocated in other Commission proceedings, the Commission’s efforts should be focused on ensuring that all Americans have reasonable and timely access to 4 Mbps downstream/1 Mbps upstream before supporting faster minimum speed thresholds,¹⁹ a principle that applies equally to the policy decision underlying the Petitions. States, too, can allocate additional funding to promote broadband deployment,²⁰ instead of borrowing money to fund municipal build-out²¹ with the potential for “serious long-term sustainability issues.”²²

Third, municipalities should take advantage of the experience and expertise of WISPs, and consider contracting with them to provide broadband service to unserved and underserved areas of their communities. Fixed wireless technology can be quickly and cost-effectively

¹⁴ USTelecom Comments at 2.

¹⁵ See WISPA Comments at 10-11. See also USTelecom Comments at 2; ICLE/TechFreedom Comments at 4.

¹⁶ See USTelecom Comments at 2.

¹⁷ See WISPA Comments at 11-12.

¹⁸ ICLE/TechFreedom Comments at 23.

¹⁹ See Comments of WISPA, WC Docket Nos. 10-90, *et al.* (filed Aug. 8, 2014); Reply Comments of WISPA, GN Docket No. 14-126 (filed Sept. 22, 2014).

²⁰ See WISPA Comments at 12-13.

²¹ See ICLE/TechFreedom Comments at 15-17 (noting that the City of Wilson’s existing network was largely funded by more than \$33 million in certificates of participation secured by an equipment lease and cross-subsidization).

²² *Id.* at 17. ICLE/TechFreedom also offers examples showing the “overwhelming failure” of municipal broadband networks. *Id.* at 19.

deployed, and WISPs welcome any opportunities to assist in meeting demand for broadband services.

As ICLE/TechFreedom succinctly stated, “[p]reemption will likely *reduce* private investment by crowding it out.”²³ To the contrary, the Commission should move forward with adoption of Commission rules and remove local infrastructure restrictions to increase private investment and advance the objectives of Section 706.

II. THE COMMISSION SHOULD REQUIRE NETWORK INTERCONNECTION AS A CONDITION OF ANY PREEMPTION APPROVAL.

In its Comments, WISPA recommended that, if the Commission has preemption authority and decides to approve the Petitions, its approval should include a condition that EPB and the City of Wilson allow other broadband providers to interconnect to their networks on reasonable wholesale rates and conditions.²⁴ WISPA also asked the Commission to “require the EPB and the City of Wilson to forego providing service to an area if (a) it is then being served by a non-public broadband provider that offers service in that area, and (b) the EPB and the City of Wilson do not at such time have facilities capable of providing service in such area.”²⁵ Notably, ICLE/TechFreedom agreed that any Commission approval should require that “government-owned networks be operated on an open-access basis, such that private companies can lease part or all of the government-owned network to provide their own service.”²⁶ WISPA reiterates its support for this position, and asks the Commission to adopt non-discriminatory access rights to private broadband providers or, at a minimum, adopt ICLE/TechFreedom’s suggestion that the Commission initiate a rulemaking decision to consider open access rights for government-owned broadband networks.

²³ *Id.* at 25 (emphasis in original).

²⁴ *See* WISPA Comments at 13-14.

²⁵ *Id.* at 14.

²⁶ ICLE/TechFreedom Comments at 31-32.

Conclusion

WISPA believes that the Commission lacks preemption authority. However, to the extent the Commission has such authority, it would be inconsistent with Section 706 for the Commission to exercise it here. Instead, the Commission should take action to promote private investment in broadband deployment and require EPB and the City of Wilson to grant network interconnection rights to private broadband providers.

Respectfully submitted,

WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

September 29, 2014

By: */s/ Chuck Hogg, President*
/s/ Alex Phillips, FCC Committee Chair

Stephen E. Coran
Lerman Senter PLLC
2000 K Street, NW, Suite 600
Washington, DC 20006-1809
(202) 416-6744
Counsel to the Wireless Internet Service Providers Association