September 29, 2014

Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Petitions Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, WCB Docket Nos. 14-115 and 14-116

Introduction and Summary

The American Legislative Exchange Council offers this reply to comments by state and local government officials and organizations. ALEC reiterates its steadfast support for the principles of constitutional federalism. In the strongest terms, ALEC opposes federal preemption of state laws restricting local governments from owning and operating broadband networks.

Federal preemption of states' control over their own political subdivisions is constitutionally wrongheaded. Yet none of the comments offered by several local governments or local government organizations address the constitutional implications of preemption.

Serious statutory and public policy problems would result from federal preemption. Congress never provided a clear statement of preemptive intent, but yet none of the comments offered by several local governments or local government organizations addressed this problem.

Meanwhile, it is important for states to have the power to prevent their local governments from creating programs that pose new risks to consumers and taxpayers. Furthermore, states should have the ability to prevent conflicts of

interests that result when government competes against private industry. Regrettably, none of the comments offered by several local governments or local government organizations even acknowledged these policy imperatives.

Perhaps this lack of engagement with the critical constitutional, statutory, and policy implications of federal preemption is explained by the fact that several local government comments are nearly identical in content, and appear to be largely carbon copies.

ALEC is in agreement with those state government organizations and state officials who oppose the preemption petitions now before the Commission.

Analysis

Constitution Principles Prohibit Preemption

Federally preempting the control states have over their own political subdivisions is constitutionally wrongheaded. As ALEC explained in its initial comments signed by twenty legislators, states create local governments and define their powers.[1] Commonsense principles of constitutional federalism prohibit the Commission from preempting state restrictions on local government-owned broadband networks.

The U.S. Constitution recognizes state sovereignty, not local government sovereignty.[2] State sovereignty implies certain immunities from federal interference. For example, Congress cannot commandeer the legislative or agency regulatory process.[3] Likewise, Congress cannot commandeer state officials to carry out broad federal mandates.[4] States have discretion in deciding who are qualified to govern them.[5] States may grant, withhold, or withdraw powers from their political subdivisions as they see fit.[6]

None of the public comments offered in this proceeding, by several pro-preemption local governments or local government organizations, address the constitutional implications of the petitions. Federalism is the elephant in the room

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[1] ALEC Letter, WCB Docket Nos. 14-115 and 14-116 (August 29, 2011), at http://apps.fcc.gov/ecfs/document/view?id=7521826040.
[2] U.S. Constitution, Amendment X; Reynolds v. Sims, 377 U.S. 533 (1964); ALEC Resolution on State Jurisdiction and Supremacy (2013), at http://www.alec.org/model-legislation/resolution-state-jurisdiction-supremacy/.
[3] New York v. United States, 505 U.S. 144 (1992); ALEC Resolution Reaffirming Tenth Amendment Rights (2010), at http://www.alec.org/model-legislation/resolution-reaffirming-tenth-amendment-rights-2/.
[4] Printz v. United States, 521 U.S. 898 (1997).
[5] Gregory v. Ashcroft, 501 U.S. 542 (1991).
[6] Trenton v. New Jersey, 262 U.S. 182 (1923).

that proponents refuse to address.[7] The Commission cannot similarly ignore constitutional principles.

Lack of Necessary Clear Statement by Congress to Preempt States

Notwithstanding the Constitutional impediments to federal preemption, Congress never provided any clear statement of intent to preempt state laws restricting local government-owned networks. The U.S. Supreme Court does not infer federal authority to preempt traditional state responsibility, absent a clear and unmistakable statement of intent by Congress.[8] It is unquestionably a traditional state responsibility to legislatively exercise control over political subdivisions. The U.S. Supreme Court has long respected that tradition.[9]

Yet none of the comments offered by several local governments or local government organizations made any argument of their own regarding the lack of clear statement.[10] At best, a handful of comments merely offered footnote citations to the petitions.[11]

The petitions offered a single, shared legal analysis. That analysis fails to show any clear statement of congressional intent to preempt states under Section 706. Instead, the petitions offer hand waving and red herring references to unrelated federal statutes. The proponents' petitions cobble together an unpersuasive legislative intent argument in an attempt to overcome the plain reading of Section

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[7] Comments of Broadband Alliance of Mendocino County, at http://apps.fcc.gov/ecfs/document/view?id=7521777303; Comments of City of Portland, OR, at http://apps.fcc.gov/ecfs/document/view?id=7521826075; Comments of Davidson (NC), at http://apps.fcc.gov/ecfs/document/view?id=7521824857; City of Madison, WI, at http://apps.fcc.gov/ecfs/document/view?id=7521827136; Comments of Leverett Municipal Light Plant (MA), at http://apps.fcc.gov/ecfs/document/view?id=7521751826; Comments of Comments of Colorado Communications and Utility Alliance, at http://apps.fcc.gov/ecfs/document/view?id=7521825627; Comments of Harford County, Maryland, at http://apps.fcc.gov/ecfs/document/view?id=7521826054; Comments of Nat'l League of Cities, Nat'l Assoc. of Counties, U.S. Conf. of Mayors, and NATOA, at http://apps.fcc.gov/ecfs/document/view?id=7521825409; Comments of NC League of Municipalities, at http://apps.fcc.gov/ecfs/document/view?id=7521825812; Comments of SEATOA, at http://apps.fcc.gov/ecfs/document/view?id=7521824804; Comments of Town of Holly Springs, NC, at http://apps.fcc.gov/ecfs/document/view?id=7521825037.

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

[9] Folsom v. Mayor and Administrators of New Orleans, 109 U.S. 285 (1883).

[10] Comments of Broadband Alliance of Mendocino County; Comments of City of Portland, OR; Comments of Davidson (NC); City of Madison, WI; Comments of Leverett Municipal Light Plant; Comments of Comments of Colorado Communications and Utility Alliance; Comments of Harford County, Maryland; Comments of Nat'l League of Cities, Nat'l Assoc. of Counties, U.S. Conf. of Mayors, and NATOA; Comments of NC League of Municipalities; Comments of SEATOA; Comments of Town of Holly Springs, NC.

[11] Comments of Davidson (NC); Comments of City of Madison, WI; Comments of Leverett Municipal Light Plant (MA); and Comments of SEATOA.

706. The petitions also failed to mention the traditional state responsibility of exercising legislative control over political subdivisions.

Taxpayer Protection & Avoidance of Conflicts are Policy Imperatives

States have important public policy interests in restricting local governments from owning or operating broadband networks. One such interest is to prevent risk to taxpayers, in the event of mismanagement or other financial turmoil involving government-owned broadband networks. Taxpayers should not be compelled to subsidize bailouts of failed government-owned networks through taxes, fees, or higher utility rates.

States also have important interests in avoiding conflicts of interest that result when government competes against private industry. Conflicts exist when local governments engage in direct business competition with private market providers, over whom the same local governments exercise regulatory authority. Such conflicts create temptations for local governments to misuse their powers to favor themselves over private competitors.

Regrettably, none of the comments offered by several local governments or local government organizations even acknowledged these public policy imperatives.[12]

Form Comments Offer No Useful Insight Into Critical Issues at Stake

Perhaps this lack of engagement with the critical constitutional, statutory, and policy implications of federal preemption is explained by the fact that several local government comments are nearly identical in content. They appear to be largely copies.[13] While there is nothing wrong in itself for an organization to subscribe to and echo the views of others, Commission members should not attach undue weight to form responses. As previously indicated, the comments do not even engage the critical fundamental constitutional, legal, and policy issues implicated by the petitions. Again, those comments merely make footnote citations to the empty shared legal analysis common to the petitions.

State Legislators Offer Compelling Reasons for Rejecting Preemption

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[12] Comments of Broadband Alliance of Mendocino County; Comments of City of Portland, OR; Comments of Davidson (NC); City of Madison, WI; Comments of Leverett Municipal Light Plant; Comments of Comments of Colorado Communications and Utility Alliance; Comments of Harford County, Maryland; Comments of Nat'l League of Cities, Nat'l Assoc. of Counties, U.S. Conf. of Mayors, and NATOA; Comments of NC League of Municipalities; Comments of SEATOA; Comments of Town of Holly Springs, NC.

[13] Compare Comments of Davidson (NC); Comments of City of Madison, WI; Comments of Leverett Municipal Light Plant (MA); and Comments of SEATOA.

ALEC is pleased to find itself in agreement with other state government organizations and state legislators that oppose the preemption petitions now before the Commission. The joint comments of three state government organizations rightly urge the Commission to *"honor the established relationship between a state and its constitutionally and statutorily created political subdivisions, and deny the petitions.*"[14]

NGA makes several sensible points, including the role of states as sovereign entities and the petitioners gross twisting of Section 706 and the legislative history of the Telecommunications Act of 1996.[15]

Furthermore, ALEC commends the comments offered by the Honorable Thom R. Tillis, Speaker of the North Carolina House of Representatives.[16] Speaker Tillis identified protection of taxpayers and the problems resulting from government competing with private industry as compelling policy reasons behind his state's laws restricting local government-owned broadband networks.

ALEC is in particular agreement with Speaker Tillis's assessment of the constitutional issues at stake:

> *Perhaps the most astounding result that would obtain from preemption of the Level Playing Field Law is that municipalities here – creatures of state statutes enacted by the General Assembly – would somehow be deemed to derive independent authority from the federal government to engage in inherently risky and politically controversial endeavors which threaten greater job creation and economic development across our state.*

ALEC also commends the comment submitted to the Commission by Senator Paul Farrow and Representative Mike Kuglitsch – both from Wisconsin.[17] Their comment addresses the importance of protecting taxpayers from subsidizing government-owned networks, ensuring taxpayers and voters are informed, and avoiding any crowding out private investment and innovation. They also call attention to the unfortunate history of government-owned broadband network failures in their state.

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[14] Comments of NGA, NCSL, and CSG, at http://apps.fcc.gov/ecfs/document/view?id=7521826012.

[15] Comments of NGA, at http://apps.fcc.gov/ecfs/document/view?id=7521825865.

[16] Comments of Speaker Thom R. Tillis, at http://apps.fcc.gov/ecfs/document/view?id=7521825874.

[17] Comments of Sen. Farrow and Rep. Kuglitsch, athttp://apps.fcc.gov/ecfs/document/view?id=7522900743.

Conclusion

For the foregoing constitutional, statutory, and public policy reasons, the American Legislative Exchange Council urges the Commission to reject federal preemption of state laws restricting local government-owned networks.