

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

In the Matter of	)	
	)	
Petitions Pursuant to Section 706 of the	)	WCB Docket Nos. 14-115 and 14-116
Telecommunications Act of 1996 for Removal	)	
of State Barriers to Broadband Investment and	)	
Competition	)	

**REPLY COMMENTS OF THE UTILITIES TELECOM COUNCIL**

Pursuant to Section 1.405 of the Commission’s Rules, the Utilities Telecom Council (“UTC”) hereby files its reply comments in support of the petitions by the Electric Power Board of Chattanooga, Tennessee, and the City of Wilson, North Carolina (collectively, Petitioners) in the above-referenced proceedings.<sup>1</sup> UTC reiterates its support for the Commission to preempt state restrictions on municipal broadband, because doing so would promote the public interest in broadband access and competition. Further, the Commission has authority under Section 706 to preempt these restrictions because they clearly are a barrier to broadband deployment and Section 706 mandates that the Commission take immediate action to remove such barriers.

UTC agrees with Chairman Wheeler that “[a]round the country, communities have focused on the importance of ensuring that their citizens receive the benefits of broadband, and some have concluded that investing in their own broadband efforts - or authorizing others to invest in their behalf- will provide more competition and the economic and social benefits that

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<sup>1</sup> *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*, Public Notice, WCB Docket Nos. 14-115 and 14-116 (rel. Jul. 28, 2014).

accompany competition for their residents.”<sup>2</sup> Further, “Section 706 of the Communications Act charges the Federal Communications Commission with ensuring that broadband is being deployed to all Americans in a reasonable and timely fashion,” and UTC agrees with Chairman Wheeler that “competition is a strong means to that critical goal.”<sup>3</sup> Preempting state laws that restrict broadband competition by municipalities, including municipal utilities, will remove barriers to broadband deployment and help to ensure that broadband is being deployed to all Americans in a reasonable and timely basis.

As UTC explained in its initial comments in this proceeding, utilities can play an important part in promoting broadband access, but unfortunately many utilities -- including municipal utilities and cooperative utilities -- are restricted from doing so by state laws that were written and enacted at the behest of incumbent providers for the express purpose of preventing broadband competition and access from utilities and others that would threaten the status quo of poor service and fat profit margins.<sup>4</sup> The comments on the record that oppose preemption of these laws are testament to the worn-out, empty arguments of the incumbent operators, which were used successfully at the state level to enact these laws in the first place. The Commission must remain steadfast in its goal of promoting broadband access and competition and preempt these laws now, before future generations are held back anymore.

**I. The Commission Has the Authority to Preempt State Laws that Restrict Municipal Broadband and the Public Interest Would Be Served by Doing So.**

Opponents of preemption argue that the Commission lacks authority and alternatively that the public interest would not be served by preempting these state restrictions. These

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<sup>2</sup> See Letter from The Honorable Tom Wheeler to The Honorable Marsha Blackburn dated July 22, 2014 at 4 (available at <http://apps.fcc.gov/ecfs/document/view?id=7521752102> (visited Aug. 27, 2014)).

<sup>3</sup> *Id.*

<sup>4</sup> Comments of the Utilities Telecom Council in WCB Docket Nos. 14-115 and 14-116 at 4 (filed Aug. 29, 2014).

arguments ring hollow and are plainly attempts to throw up road blocks to competition and broadband access. The Commission's authority is not circumscribed by the decisions in *Nixon*<sup>5</sup> and *Gregory*<sup>6</sup> or by Section 253, as some have commented.<sup>7</sup> Instead, as the Court found in *Verizon*, the Commission's authority under Section 706 is independent and expansive, such that the Commission may act except where such action would conflict with other provisions in the Communications Act.<sup>8</sup> Opponents of preemption claim that the Commission's preemption authority in Section 253 conflicts with the Commission's exercise of preemption under Section 706, as if Section 253 was the exclusive source of the Commission's preemption authority. Again, these arguments are unavailing and attempt to find conflict by negative implication, where no such conflict exists.

The simple fact is that the Commission may preempt state restrictions on municipal broadband pursuant to its authority in Section 706, where it finds that broadband deployment to all Americans is not occurring on a reasonable and timely basis, because Section 706 mandates that the Commission take immediate action to remove barriers to broadband deployment, such as the state laws at issue here.<sup>9</sup> Having previously found that broadband access is not being achieved on a reasonable and timely basis, the Commission is free to preempt the state

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<sup>5</sup> *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004).

<sup>6</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

<sup>7</sup> See e.g. Comments of NTCA—The Rural Broadband Association in WCB Docket Nos. 14-115 and 14-116 at 9-20 (filed Aug. 29, 2014). See also Comments of CenturyLink in WCB Docket Nos. 14-115 and 14-116 at 10-24 (filed Aug. 29, 2014).

<sup>8</sup> *Verizon v. FCC*, 740 F.3d 623, 639-40 (D.C. Cir. 2014).

<sup>9</sup> 47 U.S.C. §706 (2013)(stating that “The Commission shall . . . initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) . . . [and] . . . shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”)

restrictions on municipal broadband, the same way that it could remove any other barrier to broadband deployment under Section 706.<sup>10</sup>

To interpret the statute narrowly would stand Section 706 on its head – allowing states to frustrate the overriding purpose of promoting broadband access and competition to all Americans. Moreover, to limit the Commission’s authority under Section 706 would certainly deprive consumers from obtaining access to truly affordable, robust and reliable broadband service for the foreseeable future. This is evident by the fact that there is a gaping digital divide that exists outside the city limits of Chattanooga compared to the gigabit services that are available within the city limits where the city is permitted to offer service under the state law.<sup>11</sup> This goes back to what Chairman Wheeler observed: that Chattanooga built its network out of necessity because incumbents were failing to invest in upgrading the networks to provide advanced services in the area.<sup>12</sup> Consumers in unserved and underserved areas are being prevented from getting the kind of robust, affordable and reliable broadband that literally exists on the other side of the border of the city limit from them. And there is nothing on the record to suggest let alone show that private entrants or incumbents are going to invest in their networks to provide broadband to these unserved and underserved areas anytime soon. Consumers shouldn’t

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<sup>10</sup> See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 11-121, *Eighth Broadband Progress Report*, 27 FCC Rcd 10342, 10344, para. 3 (2012) (*2012 Eighth Broadband Progress Report*)(finding that broadband deployment was not occurring on a reasonable and timely basis).

<sup>11</sup> In Chattanooga, customers are able to get access to symmetrical speeds of 1 Gigabit per second, but in areas where the utility is restricted from providing broadband service, customers can’t get access to even minimal broadband speeds. Similarly in the case of Wilson, customers can get gigabit Internet services in Wilson County, but not in the other five counties where the utility is allowed to provide electric service but is restricted from offering broadband services. See Petition of Wilson at 23, Figure A (showing eligible census block (i.e. unserved) in areas where Wilson electric lines extend).

<sup>12</sup> See also Tom Wheeler, FCC Chairman “Removing Barriers to Competitive Community Broadband,” visited at <http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband> (stating that “the network was partly built out of necessity. Local phone and cable companies chose to delay improvements in broadband service to the Chattanooga area market. Without faster networks, Chattanooga residents were at risk of finding themselves on the wrong side of the digital divide, bypassed by the opportunities high-speed connectivity enables.”)

have to wait forever for broadband, just to serve some wrongheaded state restriction against municipal broadband. The time for the Commission to preempt these laws has come.

The public interest in promoting broadband access is compelling, given the overwhelming evidence on the record that broadband access is a necessary element in today's society for economic growth and political discourse; public health, safety and welfare; and social, educational and cultural development. The public interest clearly outweighs any contravening false, feeble and misleading arguments that are made by opponents of preemption in the name of state sovereignty. These are protectionist laws -- pure and simple -- and they are holding Americans back from the benefits of broadband. Therefore, not only may the Commission preempt these laws – it *must* preempt them to promote the public interest and to carry out the mandate of Section 706 to remove barriers and promote the reasonable and timely deployment of broadband access to all Americans.

## **CONCLUSION**

For all of these reasons, UTC supports the petitions for preemption filed by the Electric Power Board of Chattanooga, Tennessee and the City of Wilson, North Carolina – and it urges the Commission to take immediate action to promote the reasonable and timely deployment of truly robust, affordable and reliable broadband to unserved and underserved Americans by preempting the laws in Tennessee and North Carolina that restrict municipalities – including the municipal utility members of UTC – from providing broadband outside of their city limits.

Respectfully submitted,

### **Utilities Telecom Council**

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Brett Kilbourne  
Vice President and Deputy General Counsel  
Utilities Telecom Council  
1129 20<sup>th</sup> Street, NW, Suite 350  
Washington, DC 20036  
202-872-0030

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