

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

---

<i>In the Matter of</i>	)	
	)	
	)	
<i>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</i>	)	<b>WCB Docket No. 14-115</b>
	)	
	)	
	)	<b>WCB Docket No. 14-116</b>
	)	

---

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (“NARUC”) respectfully submits these comments in response to comments filed on the Federal Communications Commission’s (“FCC” or “Commission”) July 28, 2014 released Public Notice<sup>1</sup> (“*Notice*”) seeking comment on the separate petitions<sup>2</sup> filed by the Electric Power Board of Chattanooga, Tennessee, and the City of Wilson, North Carolina (collectively, “Petitioners”) on July 24, 2014.

---

<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, DA 14-1072, WCB Docket Nos. 15-115 and 15-116 (rel. July 28, 2014) *available online at: <http://www.fcc.gov/document/petitions-preemption-state-restrictions-broadband-deployment>.*

<sup>2</sup> *See*, Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition, filed by Electric Power Board, Chattanooga, Tennessee, WC Docket No. 14-116 (filed July 24, 2014), available online at <http://apps.fcc.gov/ecfs/document/view?id=7521737334> (1-21), <http://apps.fcc.gov/ecfs/document/view?id=7521737335> (22-46); <http://apps.fcc.gov/ecfs/document/view?id=7521737336> (pp 47-56); Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition, filed by City of Wilson, NC, WC Docket No. 14-115 (filed July 24, 2014), at: <http://apps.fcc.gov/ecfs/document/view?id=7521737310> (1-24), <http://apps.fcc.gov/ecfs/document/view?id=7521737311> (25-49), and <http://apps.fcc.gov/ecfs/document/view?id=7521737312> (50–59). Most of the Appendices are available at: <http://apps.fcc.gov/ecfs/document/view?id=7521737314> and <http://apps.fcc.gov/ecfs/document/view?id=7521737315>.

NARUC respectfully agrees with comments opposing Petitioners' petitions on legal grounds, but only to the extent outlined in these comments. *The Association takes no position on the relative merits of State policy choices to allow or disallow municipal broadband services.* Neither Congress, nor its creation – the FCC, has the power under the U.S. Constitution to effectively grant power to a Municipality denied by the State.<sup>3</sup> As the Supreme Court noted in *Nixon v. Missouri Mun. League*, 541 U.S. 125, 135, 124 S. Ct. 1555, 1562, 158 L. Ed. 2d 291 (2004):

There is, after all, no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not.

And yet, that is precisely the impact of granting the petitions submitted for the FCC's consideration. In support of this position, NARUC states as follows:

---

<sup>3</sup> NARUC has a history with this issue. Michigan Supreme Court Judge, Thomas Cooley, challenged the so-called Dillon rule just a few years before he founded NARUC as Chair of the Interstate Commerce Commission. See, e.g., *Local Government Authority, National League of Cities*, Webpage – last accessed 9/26/14 at: <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority>, noting:

The Constitution of the United States does not mention local governments. Instead, the Tenth Amendment reserved authority-giving powers to the states. It is not surprising, then, that there is a great diversity in state-local relations between, as well as within, states . . . **Narrow Government Authority: Dillon's Rule** - Dillon's Rule is derived from the two court decisions issued by Judge John F. Dillon of Iowa in 1868. It affirms the previously held, narrow interpretation of a local government's authority, in which a substate government may engage in an activity only if it is specifically sanctioned by the state government. Dillon's Rule was challenged by Judge Thomas Cooley of the Michigan Supreme Court in 1871, with the ruling that municipalities possess some inherent rights of local self-government. Cooley's Rule was followed for a short time . . . until the U.S. Supreme Court upheld Dillon's Rule in 1903 and again in 1923. Since then, the following tenets have become a cornerstone of American municipal law and have been applied to municipal powers in most states: A municipal corporation can exercise only the powers explicitly granted to them. Those necessarily or fairly implied in or incident to the powers expressly granted. Those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. State constitutions vary in the level of power they grant to local governments. However, Dillon's Rule states that if there is a reasonable doubt whether a power has been conferred to a local government, then the power has not been conferred. **Dillon's Rule In Practice** Dillon's Rule allows a state legislature to control local government structure, methods of financing its activities, its procedures and the authority to undertake functions. (emphasis added).

## INTEREST OF NARUC

NARUC, a nonprofit organization founded in 1889, has members that include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,<sup>4</sup> energy, and water/wastewater utilities.

Congress and the courts<sup>5</sup> have consistently recognized NARUC as a proper entity to represent the collective interests of the State public utility commissions. In the Federal Telecommunications Act,<sup>6</sup> Congress references NARUC as “the national organization of the State commissions” responsible for economic and safety regulation of the intrastate operation of carriers and utilities.<sup>7</sup>

The Petitioners ask the FCC to, pursuant to section 706 of the Telecommunications Act of 1996,<sup>8</sup> preempt portions of Tennessee and North Carolina

---

<sup>4</sup> NARUC’s member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competing local exchange carriers (LECs). These commissions are obligated to ensure that local phone service supplied by the incumbent LECs is provided universally at just and reasonable rates. They have a further interest to encourage unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. See, e.g., 47 U.S.C. § 252 (1996).

<sup>5</sup> See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff’d 672 F.2d 469 (5th Cir. 1982), aff’d en banc on reh’g, 702 F.2d 532 (5th Cir. 1983), rev’d on other grounds, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

<sup>6</sup> *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq.*, Pub.L.No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) (“Act” or “1996 Act”).

<sup>7</sup> See 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the “bingo card” system.”)

<sup>8</sup> See, 47 U.S.C. § 1302 (1996), available online at: <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title47/html/USCODE-2011-title47-chap12-sec1302.htm>.

State statutes that restrict their ability to provide broadband services. The Electric Power Board is an independent board of the City of Chattanooga that provides electric and broadband service in the Chattanooga area. The City of Wilson provides electric service in six counties in eastern North Carolina and broadband service in Wilson County. Both Petitioners allege that State laws restrict their ability to expand their broadband service offerings to surrounding areas where customers have expressed interest in these services, and they request that the Commission preempt those laws.

NARUC has not taken a position on the relative merits of municipally-owned telecommunications and broadband access networks.<sup>9</sup>

---

<sup>9</sup> In any case, except for flawed legal analyses, the record in this proceeding appears inconclusive. It appears the majority (though certainly not all) of the roughly 200 comments filed in the 14-116 proceeding provide no objective evidence to support the petitions. Most are simple statements of opinion with no citations or analysis included. There is no evidence of any special qualifications of the bulk of the filers to offer an opinion (or any qualifications at all). Many do not even contain enough information to accurately identify the filers. Indeed, from the record, it is impossible to tell if some of the filers are actually different people. See, e.g., the identical comments filed by “Chaz Smith” August 1, 2014 [Link](#), “Ginger Smith” August 1, 2014 [Link](#), “Coty Smith” August 6, 2014 [Link](#) and “Anthony Fister” August 1, 2014 [Link](#). This is not “record evidence” upon which the FCC can rely. There are, of course, substantive filings on the merits of municipal entry both pro and con, but it does not appear that anyone would argue that every case of municipal entry was a success. See, e.g., WI Senator Farrow & Rep. Kuglitsch Comment filed Sept. 17, 2014 [Link](#) (“Were the Commission to grant all or parts of the petitioner’s requests it is clear that laws in other states could be subject to similar preemption petitions. It is our hope that the Commission will leave in place state laws that have been adopted related to municipal communications facility ownership in efforts to protect municipal taxpayers as well as preserve a competitive communications marketplace. Over a decade ago, the Wisconsin government adopted bi-partisan Act stipulating conditions for municipal video, telecommunications and data plant ownership. *2003 Wisconsin Act 278 does not prohibit municipally owned communications systems but rather prohibits local taxpayer subsidization of a municipally owned communications system* Additionally, the Wisconsin law requires a municipality to prepare a feasibility study and conduct public hearings prior to commencement of construction and operation of voice, video or broadband facilities in the state. These requirements may be suspended if the local voters approve the project in a referendum or if it can be demonstrated that the facilities will not be in competition to existing privately owned facilities. The purpose of the law is to ensure local voters and taxpayers are informed of municipal communication facility plans and to prevent government owned networks from crowding out private investment and innovation in Wisconsin. In the past decade there have several municipalities who were able to meet the criteria established in 2003 WI Act 278 and construct government owned voice, video or broadband Internet systems. Unfortunately for local taxpayers, most of these projects have failed to produce the anticipated revenues and have had to petition the Wisconsin Public Service Commission to disband their network and attempt to sell off remaining assets. The gross failures of these municipally owned systems are detailed in Commission filings from communities like Shawano, Jackson and Antigo Wisconsin. In 2003 a Democratically controlled State Senate joined with a Republican controlled State Assembly and a Democratic Governor to enact a “municipal overbuild” law which has helped Wisconsin citizens be more active and informed in instances where municipal governments seek to construct and operated communications facilities. It is our hope that the Federal Communication Commission of the United States does not intervene in our state in anyway which would leave all or parts of this law unenforceable.”); **Advanced Communications Law & Policy Institute at New York Law School Comment filed Sept. 05, 2014 [Link](#)** (This is a 165 page study of government-owned networks. The cover letter summarizes the study as follows: “The attached report, titled “Understanding the Debate over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policymakers,” examines the many facets of government-owned broadband networks (GONs) and seeks to provide state and local policymakers with numerous

We have however suggested to Congress that any revision of the current division of authority should (1) “[c]onsider the relative interests and abilities of the State and federal governments when assigning regulatory functions” and (2) “[p]reserve the States’ particular abilities to ensure their core public interests.”<sup>10</sup>

The preemption requested in this proceeding falls squarely within those interests.

---

resources for evaluating whether such systems are appropriate in their communities. . . . includes in-depth, data-driven discussions of: the path of pro-GONs advocacy in the United States. . . . a comprehensive examination of the U.S. broadband market. . . . the precarious state of local and state finances . . . and the crumbling nature of public infrastructure (roads, bridges, dams, etc.), infrastructure for which state and local officials are responsible for maintaining.”); **ITTA Comment filed Sept. 02, 2014** [Link](#) (“The Failures of Municipal Broadband Networks are well documented” citing, *inter alia*, Chairman Wheeler’s remarks and “The Hidden Problems with Government-Owned Networks,” at: <http://www.coalitionfortheneweconomy.org/wp-content/uploads/2012/01/1-6-12-Coalition-for-a-New-Economy-White-Paper.pdf>.); **Compare, The Benton Foundation Comment filed Sept. 02, 2014** [Link](#) [Link2](#) (“The report contains analysis of three examples of local communities building next-generation networks -- in Bristol, Virginia (pages 2-15), Lafayette, Louisiana (pages 16-30), and Chattanooga, Tennessee (pages 31-47). As detailed in the report, “the [three] community networks ... are either already successful or are *on track to be successful* by the narrow profitability measures of a private company. But when evaluated properly (?) as a community investment, there is no doubt as to their overwhelming success.”(emphasis added)); **See, also**, the virtually identical comments filed at <http://apps.fcc.gov/ecfs/comment/view?id=6018327009> (Comments of the City of Madison, WI), <http://apps.fcc.gov/ecfs/comment/view?id=6018325955> (Comments of the City of Fayetteville, NC), <http://apps.fcc.gov/ecfs/document/view?id=7521825524> (Comments of the Town of Ammon, Idaho), <http://apps.fcc.gov/ecfs/comment/view?id=6018326068> (Comments of Schools, Health & Libraries Broadband Coalition), <http://apps.fcc.gov/ecfs/comment/view?id=6018325821> (Comments of New Hampshire Fast Roads, LLC), <http://apps.fcc.gov/ecfs/comment/view?id=6018325512> (Comments of the Town of Mooresville), <http://apps.fcc.gov/ecfs/comment/view?id=6018325251> (Comments of Momentum Telecom, Inc), <http://apps.fcc.gov/ecfs/comment/view?id=6018325010> (Comments of Town of Davidson) and <http://apps.fcc.gov/ecfs/comment/view?id=6018253947> (Comments of the Town of Leverett Municipal Light Plant), cumulatively providing record evidence that these towns/entities are interested in expanding operations, but not much else. Ironically, all these comments argue strongly that *local* policy-makers make better choices as a basis for asking *national* policy makers to make the policy choice for their State. An internally inconsistent argument endorsing a massive expansion of authority for Congress (and unelected federal agency Commissioners) to overturn State (and also ultimately municipal) policy choices. **See, e.g.**, any of the comment links from Madison, Ammon and other, *supra*, **all arguing as a basis for federal preemption that**: (“Local elected officials live among their local constituents, and as such are on the pulse of local needs, local resources, local tolerance for risk, and are easily held accountable for their decisions, whether in the local grocery store, church, soccer field or voting booth. Local communities are best positioned to determine the best options for their citizens, businesses and institutions, whether this means working with willing incumbents, entering into public-private partnerships, developing their own networks, or being served by other local communities who have the capacity to provide Gigabit services.”) Assuming, agency counsel advise that the legal barriers to FCC action are not, as they appear to be, insurmountable, given the far reaching implications of any decision in this docket, the FCC, at a minimum needs to develop the limited evidence in the record further before acting.

<sup>10</sup> **See, e.g.**, the November 2013 “NARUC Federalism Task Force Report: Cooperative Federalism and Telecom in the 21<sup>st</sup> Century” at p. 5. Text available at: <http://www.naruc.org/Publications/Federalism-task-force-report-November-20131.pdf>.

## DISCUSSION

No one would suggest that the FCC could order a private business not currently engaged in jurisdictional utility operations (e.g., providing water, electricity service or non-utility services) to either directly provide broadband services or to require one of its business subsidiaries to do so.

Can the FCC order an electric company (or one of its subsidiaries) to roll out broadband services? What about Wal-Mart? Can the FCC order Wal-Mart or one of its subsidiaries to roll out broadband services? The answer seems obvious. But what if Wal-Mart has a subsidiary that WANTS to rollout broadband? Can the FCC bypass/preempt Wal-Mart's governing corporate bylaws to effectively require Wal-Mart to offer a service through its subsidiary? It certainly seems implausible. Yet, that's precisely what Petitioners suggest here, albeit with the added barrier to FCC action posed by the U.S. Constitution.

It is incontrovertible that one essential attribute of State sovereignty is the prerogative to decide how to allocate governmental authority. See, generally, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). As the Court noted in *Gregory*, “[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as sovereign.” *Id.*

Among the most fundamental decisions States make are those regarding allocations of governmental authority. In *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that local governments are suable as “persons” under 42 U.S.C. § 1983.

In doing so, the Court relied principally on the common law understanding that the corporation was an artificial person and the Dictionary Act's rule of construction that “the word ‘person’ may extend and be applied to bodies politic and corporate.” See Monell, 436 U.S. at 687-88 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). The common law understanding recognizes, however, that corporations possessed only those powers conferred on them by their charters. As the Court noted in *Railroad Co. v. Harris*, 79 U.S. (12 Wall.) 65, 81 (1870), “[t]he chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter.”

This principle applies as well to municipal corporations. It is hornbook law that a city or municipality is a subsidiary or “creature” of the State, just like NARUC’s member State Commissions. Such “creatures” quite simply have no authority to engage in activities unauthorized in their charter, e.g., *ultra vires* actions.<sup>11</sup>

---

<sup>11</sup> See, generally, John F. Dillon, *Treatise on the Law of Municipal Corporations* § 9, at 29 (1872). As Judge Dillon explained:

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. {emphasis added}

*Id.* § 55, at 101-02. See also Howard S. Abbott, *A Summary of the Law of Public Corporations* § 21, at 20-21 (1908) (A public corporation “takes nothing by its charter but what is plainly and unequivocally granted. This is especially true of all those powers, the exercise of which, if liberally considered, might lead to the placing of illegal, unjust or burdensome obligations upon the taxpayers of the community.”) (1872). Charters can be a part of the State’s Constitution or a separate legislative enactment. See, e.g., Charters, Municipal, Encyclopedia of Chicago, Webpage last accessed 9/26/2014, at: <http://www.encyclopedia.chicagohistory.org/pages/231.html>.

Through municipal charters, state governments grant powers of local government to cities. Such a legal conveyance of power is necessary because the U.S. Constitution specifies only two levels of government, national and state, and all municipalities are considered legal creatures of their states. Typically, municipal charters specify the municipality’s type of governing structure, its political offices, its financial powers including taxation, and the limits of its home rule powers. States invariably reserve to themselves certain powers over a city. This arrangement has caused power struggles between cities and states, especially when the growth of cities like Chicago far outstripped that of any other municipalities in their states in the late nineteenth and early twentieth centuries.... Chicago gained new home rule powers only with passage of a new state constitution in 1970. This

Neither Congress, nor its creation – the FCC, has the power under the U.S. Constitution to effectively grant power to a Municipality denied by the State. As the Supreme Court noted in *Nixon v. Missouri Municipal League*, 541 U.S. 125, 135, 124 S. Ct. 1555, 1562, 158 L. Ed. 2d 291 (2004):

There is, after all, no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not.

Other familiar examples may be illuminating. Under 47 U.S.C. § 214 NARUC's member commissions, are all, like municipalities, creatures of their respective States and are assigned *by Congress* the task of designating eligible telecommunications carriers(ETCs). However, a number of States do not designate ETCs for wireless carriers. Why? Because, in those States, the legislatures have specifically limited the authority those agencies have with respect to wireless carriers. In 47 U.S.C. § 254 Congress specifies that States are to create State Universal Service programs. Yet only 23 States have enacted such programs. Why? Many of the remaining State commissions lack statutory authority to do so from their legislature or constitution.

---

constitution gives municipalities with a population over 25,000 broader home rule powers, although Chicago (as the only municipality with a population of more than 500,000) is still subject to special restrictions and remains one of the very few special charter municipalities in the state, meaning that it retains the municipal governing structure established by a charter issued prior to 1870.

Compare, *Municipal Charters*, *National League of Cities*, Webpage – last accessed 9/26/14 at: <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-structures/municipal-charters>, noting:

A municipal charter is the basic document that defines the organization, *powers*, functions and essential procedures of the city government. It is comparable to the Constitution of the United States or a state's constitution. . . . Charters are granted either directly by a state legislature by way of local legislation, or indirectly under a general municipal corporation law following a referendum vote of the proposal by the affected population

NARUC also supports arguments that:

[] The Constitution protects States from the exercise of federal authority unless the State Statute is inconsistent with federal action, outlined in the August 29, 2014 *Comments of NTCA-The Rural Broadband Association (NTCA Comments)* filed in this proceeding, at 6-9, at: <http://apps.fcc.gov/ecfs/document/view?id=7521826212>

[] Section 706 does not provide sufficient authority for either conflict or field preemption, outlined in the September 2, 2014 Comments of the International Center for Law & Economics and Tech Freedom, at 5-10, filed in this proceeding, at: <http://apps.fcc.gov/ecfs/document/view?id=7521826212>, in the August 29 *NTCA Comment* at 9-20, the August 29, 2014 *Comments filed by ITTA-The Voice of Mid-Size Communications Companies*, at 3-6, filed in this proceeding, at: <http://apps.fcc.gov/ecfs/document/view?id=7521826049>, the August 28, 2014 *Comments of the National Conference of State Legislators*, at 1-3, filed in this proceeding at: <http://apps.fcc.gov/ecfs/document/view?id=7521825444>.

## CONCLUSION

We join the respectful request filed by other State government organizations - the National Governor's Association, the National Conference of State Legislators, and the National Council of State Governments – that the FCC “honor the established relationship between a State and its constitutionally and statutorily created political subdivisions, and deny the petitions from the Electric Power Board of Chattanooga, Tennessee, and the City of Wilson, North Carolina.”<sup>12</sup>

**Respectfully Submitted,**

*James Bradford Ramsay*  
**GENERAL COUNSEL**  
**National Association of Regulatory**  
**Utility Commissioners**  
**1101 Vermont Ave, NW Suite 200**  
**Washington, DC 20005**  
**Phone: 202.898.2207**  
**E-Mail: [jramsay@naruc.org](mailto:jramsay@naruc.org)**

**September 29, 2014**

---

<sup>12</sup> See, the August 29, 2014 *Letter to Ms. Marlene H. Dortch, FCC Secretary from Dan Crippen, Executive Director, National Governors Association, William Pound, Executive Director, National Conference of State Legislators, and David Adkins, Executive Director of State Governments*, in WCB Docket Nos. 14-115 & 14-116, available online at: <http://apps.fcc.gov/ecfs/document/view?id=7521826014>