

**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)	

COMMENTS OF THE UTILITIES TELECOM COUNCIL

Pursuant to Section 1.405 of the Commission’s Rules, the Utilities Telecom Council (“UTC”) hereby files its 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.¹ UTC supports the Petitioners in order to promote the reasonable and timely deployment of broadband services, consistent with the provisions of Section 706 of the Telecommunications Act of 1996. Section 706 speaks in clear and unmistakable terms that the Commission shall take immediate action “by removing barriers to infrastructure investment and by promoting competition in the telecommunications market” where it finds that broadband is not is being deployed to all Americans in a reasonable and timely fashion.²

As described by the Petitioners, the state laws in Tennessee and North Carolina clearly

¹ *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).

² 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.”)

represent the kind of barriers to investment and competition that Congress sought to remove when it enacted Section 706.³ These laws prohibit or have the effect of prohibiting municipalities, including municipal utilities, from providing broadband to certain areas in the state that lack broadband access.⁴ As the Petitioners describe, these laws prevent consumers from receiving the benefits that broadband access provide, including economic growth and better services through smart grid, telehealth and e-learning. Accordingly, UTC submits that the public interest would be served by the Commission granting the petitions and exercising its authority under Section 706 to preempt these state barriers to broadband deployment.

I. Introduction

UTC is the international trade association for the telecom and information technology interests of electric, gas and water utilities, pipeline companies and other critical infrastructure industries. Its members include large investor-owned utilities that may serve millions of customers across multi-state service territories, as well as municipal and cooperatively organized utilities that may serve only a few thousand customers in isolated communities or in rural areas of the country. Large or small, these members all own, manage or control extensive communications networks that they use in support of their core energy and water businesses. Some of these members also use their communications networks to provide broadband to the customers that they serve. In recognition of this, UTC created its Rural Broadband Council to

³ Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for the Removal of State Barriers to Broadband Investment and Competition, WCB Docket No. 14-116 (filed Jul. 24, 2014)(hereinafter “Petition of Chattanooga”). *See also* Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for the Removal of State Barriers to Broadband Investment and Competition, WCB Docket No. 14-115 (filed Jul. 24, 2014)(hereinafter “Petition of Wilson”).

⁴Tennessee law also restricts electric cooperative utilities from providing broadband Internet services, and the Commission should consider preempting such laws as well, if it preempts Tennessee restrictions on municipal broadband. *See* “Authority of Electric Cooperative to Provide Broadband Internet Service,” Opinion No. 14-33, Letter from Robert E. Cooper, Attorney General and Reporter to the Honorable Ferrell Haile, State Senator (Mar. 18, 2014), visited at <http://www.tn.gov/attorneygeneral/op/2014/op14-33.pdf> (stating the legal opinion that cooperative utilities are restricted from offering Internet services, except in the case of a cable joint venture with a cable television provider.)

help utilities provide broadband to rural America.⁵

The utility members of UTC are directly affected by state barriers that prohibit them from deploying broadband to their customers. In addition to the laws in North Carolina and Tennessee, there are laws in other states across the country that also prohibit municipal utilities, public utility districts, and cooperative utilities from providing broadband on a retail or wholesale basis. This frustrates the purpose of Section 706 and stands as an obstacle to the goal of providing broadband access to unserved and underserved areas. As such, UTC and its members are directly and significantly affected by these state restrictions, and UTC believes that the Commission should preempt these restrictions, consistent with its authority under Section 706.

The reality is that many of the areas that are served by utilities need broadband today and utilities can provide it. In fact, there are many utilities that are providing broadband today, and they are doing so mainly because their customers are demanding it and commercial communications service providers are not offering affordable, robust and reliable broadband service in these areas. Unfortunately, many utilities are located in the 20 states that have laws that restrict them from providing broadband services. The Electric Power Board of Chattanooga, Tennessee and the City of Wilson, North Carolina are just some of those utilities. Therefore, in order to enable utilities to provide broadband to their customers, UTC is pleased to provide its comments in support of the Petitioners.

II. State Broadband Restrictions on Utilities Clearly Stand as a Barrier to Infrastructure Investment and May be Preempted by the Commission, Consistent with Section 706 of the Telecommunications Act.

UTC agrees with the Petitioners that the state laws at issue are a barrier to broadband infrastructure investment, and that the Commission should remove these barriers by preempting

⁵ For more information, see www.utc.org and www.ruralbroadbandcouncil.org.

them, consistent with Section 706 of the Telecommunications Act of 1996. While the laws impose restrictions of different forms, the practical effect is the same – there is a dramatic digital divide that exists as a result of these restrictions. 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.⁶ 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.⁷ Unless the Commission preempts these laws, the areas surrounding Chattanooga and Wilson will likely to continue to be unserved and underserved by affordable, robust and reliable broadband.

UTC agrees with Petitioners that the Commission should find that the purpose and effect of these provisions is to thwart or unreasonably delay broadband investment and competition, and that preemption of these laws would accelerate broadband investment and competition in these areas.⁸ UTC also agrees with Chairman Wheeler that "[i]f municipal governments want to pursue [municipally-owned broadband systems] they shouldn't be inhibited by state laws that have been adopted at the behest of incumbent providers looking to limit competition."⁹ UTC

⁶ See Petition of Chattanooga at 1 (describing the areas outside of Chattanooga's network as a "digital desert" which businesses and residents are unable to access broadband Internet service or must make do with very limited speeds.)

⁷ See Petition of Wilson at 23, Figure A (showing eligible census block (i.e. unserved) in areas where Wilson electric lines extend).

⁸ See Petition of Wilson at 2-3 (explaining how incumbent providers attempted on numerous times to support legislation to restrict municipal broadband until the law in North Carolina was finally passed in 2011).

⁹ Statement of Tom Wheeler, Chairman, Federal Communications Commission Before the Subcommittee on Communications and Technology Committee on Energy and Commerce U.S. House of Representatives Hearing on "Oversight of the Federal Communications Commission" May 20, 2014, *visited at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327165A1.doc). 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 "If the people, acting through their elected local governments, want to pursue competitive community broadband, they shouldn't be stopped by state laws promoted by cable and

agrees with Chairman Wheeler’s observation that where utilities have deployed broadband, competitive forces have driven prices down and broadband speeds up, and that laws like those in North Carolina and Tennessee are attempts by incumbent broadband providers to legislate rather than innovate.¹⁰ “Removing restrictions on community broadband can expand high-speed Internet access in underserved areas, spurring economic growth and improvements in government services, while enhancing competition.”¹¹ Therefore, UTC agrees that the public interest would be served by preempting these laws, consistent with Section 706.¹²

Immediate action is necessary. Incumbent service providers continue to push legislation to thwart competition. Recently, the state of Kansas introduced Senate Bill 303, which would restrict municipalities from offering or providing voice, data or video services directly or through partnership with a private business. Similarly, Utah introduced HB 60, which was aimed to limit the growth of Project Utopia by prohibiting it from any new builds, including laterals from its existing backbone that weren’t already contracted by the effective date of the law. Finally, Georgia introduced HB282, which would have prohibited municipalities from providing broadband, except for areas where the public utility commission found that there was no broadband access. No wonder the U.S. Conference of Mayors recently adopted a resolution in favor of preempting state laws that restrict municipal broadband.¹³ While these bills were all

telephone companies that don’t want that competition.”)

¹⁰ Tom Wheeler, FCC Chairman “Removing Barriers to Competitive Community Broadband,” *visited at* <http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband>.

¹¹ *Id.*

¹² *Id.* (stating that “I believe that it is in the best interests of consumers and competition that the FCC exercises its power to preempt state laws that ban or restrict competition from community broadband.”)

¹³ Resolution on Preserving a Free and Open Internet at 287, *visited at* <http://www.usmayors.org/82ndAnnualMeeting/media/resolutions-final.pdf> (Stating that the “US Conference of Mayors recommends that the FCC preempt state barriers to municipal broadband service as a significant limitation to competition in the provision of Internet access.”)

stopped from passage, the incumbent service providers will likely push similar state legislation in the future, unless the Commission takes immediate action to prevent it.

III. The Commission Has Authority to Preempt State Broadband Restrictions.

Section 706 directs the Commission in clear and unmistakable terms to assess whether broadband is being deployed on a reasonable and timely basis and if it's not, to take immediate action to accelerate deployment, "by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."¹⁴ As the D.C. Circuit Court has recently held, this is an independent source of authority and it gives the Commission authority to remove barriers, such as restrictions on municipal broadband, which Judge Silberman described as an example of a paradigmatic barrier to infrastructure investment and competition.¹⁵

UTC agrees with Petitioners that the Commission's authority under Section 706 is not limited by the Supreme Court's decision in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004). As Petitioners observe, there are a variety of distinctions here that merit a different analysis from the one used in *Nixon*, not the least of which is that Section 706 mandates immediate action to remove barriers to infrastructure investment.¹⁶ This is an important point,

¹⁴ 47 U.S.C. §706.

¹⁵ *Verizon Corp. v. Federal Communications Commission*, 740 F.3d 623, 660 (D.C. Cir. 2014) (Silberman, J., dissenting).

¹⁶ See Petition of Chattanooga at 44-56. See also Petition of Wilson at 43-58 (distinguishing the Court's decision in *Nixon* from the present petition, because 1) the issues addressed in Section 706 differ fundamentally from those addressed in Section 253 such that the holding in *Nixon* does not apply; 2) the Commission's pro-active role under Section 706 is fundamentally different from its reactive role under Section 253; 3) Congress addressed the relationship between the Commission and the States in substantially greater detail in Section 706 than it did in Section 253; 4) *Gregory* does not apply here because this matter does not involve any traditional or fundamental State powers; 5) if *Gregory* were applied here, Section 706 would meet its "plain statement" standard; and 6) the *Nixon* Court's hypotheticals are irrelevant in this matter.)

because the Supreme Court in *Nixon* was forced to resort to hypothetical possibilities, because it concluded that an analysis based upon policy arguments or the terms of the statute itself “fell short” of answering the issue of whether the Commission’s preemption authority under Section 253 applied to state restrictions on municipal entities.¹⁷ By contrast, no such hypotheticals are needed to determine the Commission’s preemption authority under Section 706.

As Petitioners emphasize, there is a clear policy mandate here to promote broadband access under Section 706 that is distinctly different from the issue in *Nixon*, whether the Commission’s preemption authority extended to restrictions on either public or private entities from providing *telecommunications* services. In addition, UTC submits that the text of Section 706 is unmistakably clear and that the Commission is mandated to remove barriers to broadband deployment, if it finds that broadband deployment is not reasonable and timely. Moreover, the Commission has already determined that broadband deployment is not occurring on a reasonable and timely basis.¹⁸ Therefore, the Commission has the authority under Section 706 to preempt state restrictions on municipal broadband in order to take immediate action to promote the reasonable and timely deployment of broadband services to all Americans.

¹⁷ See *Nixon v. Federal Communications Commission*, 541 U.S. at 132 (stating that it could not make a determination by considering either public policy or the text of the statute.) *But see Id.*, 541 U.S. at 150 (Stevens, J, *dissenting*)(stating that the Court should not “stretch its imagination to identify possible problems” but instead “should confront the problem presented by the cases at hand and endorse the most reasonable interpretation of the statute that both fulfills Congress’ purpose and avoids unnecessary infringement on state prerogatives.”) UTC believes that Justice Stevens got it right and that the Court in *Nixon* erred by engaging in hypotheticals that could have been avoided.

¹⁸ 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*).

CONCLUSION

UTC supports the Petitioners and urges the Commission to take immediate action under its Section 706 authority to preempt state broadband restrictions, including those in Tennessee and North Carolina, which prevent utilities from providing broadband to unserved and underserved areas. These restrictions clearly represent a barrier to the reasonable and timely deployment of broadband, which is evident by the digital divide that exists between those areas where Chattanooga and Wilson are permitted to provide service and those areas where they are not. Where they are able to provide broadband under state law, consumers are able to get symmetrical gigabit services; where they are prohibited from providing broadband, there is a digital desert in which consumers are lucky if they can get minimal broadband speeds.

Many utilities like Chattanooga and Wilson are deploying broadband to unserved areas and are uniquely positioned and committed to do so. Consumers should not be forced to wait forever for commercial communications service providers to deploy affordable, robust and reliable broadband services in their areas. By preempting state broadband restrictions on utilities, the Commission will enable utilities like Chattanooga and Wilson to meet consumer demand, and thereby promote the reasonable and timely deployment of broadband services to all Americans, consistent with Section 706.

The Commission has the authority under Section 706 to preempt these state restrictions, because Section 706 operates as an independent source of authority and the text, structure and legislative history of the provision are unmistakably clear that the Commission must take immediate action to remove barriers to broadband infrastructure investment where it finds that broadband is not reasonable and timely. In addition, state broadband restrictions frustrate the purpose of Section 706 and stand as an obstacle to its goal of promoting reasonable and timely

broadband access for all Americans. For all of these reasons, UTC urges the Commission to take immediate action to grant the relief sought by the Petitioners.

Respectfully submitted,

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