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August 25, 2014

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

RE: Docket 14-115, Petition of the City of Wilson, North Carolina, Pursuant to Section 706

Dear Commissioners:

We write to you to respond to the Electric Power Board of Chattanooga, Tennessee, and the City of Wilson, North Carolina asking that the Commission act pursuant to section 706 of the Telecommunications Act of 1996 to preempt portions of Tennessee and North Carolina state statutes regarding the municipal provision of broadband services.

Both entities complain that state laws constrain them regarding provision of municipal broadband, and so are asking the federal government, via the FCC, to preempt state law in order to empower municipalities in ways that violate the political structure of the United States.

The evidence shows, however, that the concerns of the states in limiting and regulating municipal entry into broadband provision are just and legitimate, and that it is a violation of the federalist structure of the U.S. Constitution for the FCC to attempt to indenture the states into the FCC's scheme to expand municipal broadband.

Municipalities are Creations of the State

While models of municipality creation vary widely around the world, in the United States how they are created is fairly clear. The U.S. Constitution empowers states as the primary political entity. The federal government itself is a creation of the states, with the Constitution placing restraints on the federal government. States retain the power to create subdivisions at their discretion, generically referred to as municipalities. Ultimately then, responsibility for the municipalities generally falls to the states.

It is a characteristic of the federal government to, like an unruly teenager, constantly test the boundaries and push the limits of its authority. That's why federal authority is frequently a subject of Supreme Court decisions, such as *Printz v. United States* (1997), in which the Court said "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." It would be a violation of the Constitution for the federal government to assert the power to sweep aside state law because it runs afoul of one of the current FCC chairman's pet ideas.

Conversely, it is an appropriate use of state power (as expressed through those elected by the people of the state) to protect its citizens. A long history of spectacular failures of municipal broadband projects makes it clear that it is not unreasonable that many states have stepped in and placed prudent restrictions on whether and how municipalities can operate broadband networks. Such restrictions are entirely supportable and defensible as a proper exercise of state authority to protect its taxpayers from bad deals.

FCC intervention into this relationship would have profound negative effects. Municipalities, untethered from responsibility to the state, could partake in risky schemes of tax funded adventurism. But when inevitably the bill comes due who will pay? Will the FCC bear the responsibility for cost overruns, upgrades, the syphoning of resources from other budget priorities to support the broadband system? Who will pay for abject failures? Is the FCC prepared to be responsible or will it instead merely set up a predictably disastrous situation and then walk away, leaving a mess for the future?

An excellent analysis by Lawrence Spiwak has outlined that the FCC has no legal authority to act to preempt state laws limiting municipal broadband.

> However one feels about municipal broadband as a matter of public policy, as a matter of law the FCC has no authority to preempt state laws limiting municipal entry into the broadband marketplace under Section 706. Indeed, when the Supreme Court first looked at the issue of preemption in municipal broadband in *Nixon v. Missouri Municipal League* (2004), the Court went out of its way to note that "it is well to put aside" the public policy arguments favoring municipal broadband to support any "generous conception of preemption." Why? Because the issue of preemption is one of statutory interpretation and, as such, "the issue does not turn on the merits of municipal telecommunications services." Nothing has changed over the last ten years. The FCC has no more legal authority to preempt state laws limiting municipalities from offering broadband under Section 706 than it did under Section 253. Accordingly, not only will granting Chattanooga's request ultimately end in a rebuke from the courts, but such litigation could bring the FCC's broader authority under Section 706 crashing down with it.[1]

That should put an end to the matter, especially since several states and state organizations have already made it clear that they will bring a lawsuit if the FCC attempts to sweep aside laws properly debated and passed by the people's duly elected state representatives. Regardless of the outcome of those lawsuits, communications policy will once again be plunged into uncertainty. The one thing that will be certain, however, is that citizens will lose again as their federal and state tax dollars are funneled into unproductive litigation where the outcome is all but certain. State law will stand as policies determined through legislation should always trump rulemaking. In other words, rulemaking should always be subordinate to legislation, with greater power resting in the hands of elected officials.

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[1] Lawrence J. Spiwak., Bloomberg Law, "FCC Has No Authority to Preempt State Municipal Broadband Laws." Wednesday, August 6, 2014. http://www.bna.com/fcc-no-authority-n17179893367/?utm_source=Twitter&utm_medium=compcontent&utm_campaign=BloombergLaw

The Power to Regulate State Affairs Belongs to the State

No constitutional provision can anticipate or foresee every emergency, crisis, power conflict or advance of technology. But the Tenth Amendment lays down a principle in general terms: namely, that states could follow their best judgment in matters the Constitution had neither given to the national government nor prohibited the states from undertaking. Although the Constitution prohibits the states from declaring war or coining money, they were left a considerable scope for state activity such as building and operating their own infrastructure, regulating their own affairs and impose their own taxes for their own purposes.

Their legislatures were in no sense puppets of Congress. State lawmakers could meet whenever they wanted for as long as they wanted, and address issues peculiar to the needs of those who had chosen them. No national "permission" was needed; the Tenth Amendment, in a sense, constituted permission, because the amendment asserts that those powers not delegated to the federal government don't belong to it. That power belongs to the states or the people.

The Tenth Amendment creates a balance of power between the states and the federal government, which is what is meant by "federalism." As Supreme Court Justice Antonin Scalia wrote in *Printz v. New York*, "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."

Simply stated then, states are imbued with the power to regulate their internal matters, including that of whether the state will allow municipalities to build broadband systems subjecting all citizens of the state to the risk of failure.

The States' Concerns Are Legitimate: Municipal Broadband History of Failure

For years, municipalities around the country have tried, and ultimately failed, to either set up their own communications networks or to partner with private companies to get into the business of broadband. The track record of municipal broadband projects is woeful. The reasons for the failures are numerous, including bankruptcy of a private "partner," often resulting in taxpayer funds being wasted. And while some would nit-pick the details of the failures, the fact remains that taxpayer money was put at risk, often without approval of taxpayers, and most often squandered.

In 2012, the National Taxpayers Union detailed the history of a number of failed municipal broadband projects and the effects of these failures upon taxpayers.[2] More recently, the Wall Street Journal editorialized on the dystopian results of Utah's "Utopia" municipal broadband project.[3]

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[2] http://www.ntu.org/news-and-issues/telecom/49municipal-broadband-wired-to.html
[3] http://online.wsj.com/articles/municipal-broadband-is-no-utopia-1403220660

IPI has a long history of warning about municipal broadband, warning in 2004 that municipalities should "just say no" to such projects[4], which we reviewed and updated in 2009.[5] We provided input as North Carolina was considering legislation designed to force municipal broadband projects to compete fairly and honestly with private sector providers.[6]

Unfortunately, the history of municipal network projects is a history rich in municipal hubris, naiveté, debt, bankruptcy and failure.

Nonetheless, some municipalities still want to plow forward, heedless of the lessons, believing that they are somehow different. Some have been frustrated by state laws designed to prevent fiscal folly on behalf of the localities, laws that shield all citizens of the state from financial risk. Adopting the failed model of municipal provision of communications services is the wrong idea, as many municipalities across the country can attest.

As IPI has cautioned for years, municipalities face many risks in building and operating broadband networks. As has been seen in the routine failures, governments chronically underestimate the cost of building out and maintaining networks, and chronically overestimate adoption rates.

Technology infrastructure investment is not for the faint of heart or the partially committed. One must jump in with both feet, update and innovate both the technology and the business models. As online services grow more sophisticated, customers have become accustomed to regular upgrades, challenging the ability of governments to keep up with demand. Those challenges are multiplied a hundred fold when the complications of delivering video and voice are added. Video services alone are in a constant state of upgrade, either in providing more channels, more programming, or providing services to customers to allow them to customize their own video experience, such as video on demand.

Of course as a greater variety of more complicated technology and services is offered, the more expensive the building of the system and overall operations becomes. In turn even more taxpayer money is placed at risk, because when these systems fail it is not private investors who lose money but taxpayers across the state. When local and state coffers are depleted because of these sorts of risky government bets, the cry is for more tax revenue or for an outright bailout.

Also, technological innovation continues to far outpace the speed of government, which simply cannot compete with the market. So, in the case where a municipal system is competing against a private system, about the time the municipal system is up and running, private networks will offer something better, cheaper, and faster. Government operated networks will never keep pace with public expectations. Broadband systems

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[4] http://www.ipi.org/ipi_issues/detail/just-say-no-to-municipal-broadband-networks

[5] http://www.ipi.org/ipi_issues/detail/we-told-you-so-continue-to-say-no-to-municipal-broadband-networks

[6] http://www.ipi.org/ipi_issues/detail/why-north-carolina-should-restrict-municipal-broadband-schemes

are not like a water public utility where the same pipes are used for one hundred years to deliver the same product in a different way.

These are among the reasons why, in a market-oriented economy, *such massive risks are undertaken by private entities using private risk capital rather than taxpayer dollars.* Much folly has resulted, especially recently, from government acting as risk-taker and venture capitalist with taxpayer dollars. A strange doctrine has arisen that government is in a better position than the private sector to undertake massive risks. In reality, the opposite is true: Government operates best when it stays within its authorized sphere, and leaves risk-taking to the private sector. And in our system, it is a settled matter where the limits on the authorized sphere of government are.

There are additional serious public policy concerns about municipal broadband networks. For a long time many had warned, including IPI, about the challenges of government owned networks and the preservation of free speech.[7] The theoretical became real in San Francisco, a city that often brags of its rich tradition of civil liberties. There, a municipal communications system was purposely shut down to prevent people from engaging in specific, legal, communications. In a chilling statement, city officials got directly to the point, "Cellphone users may not have liked being incommunicado, but BART officials told the SF Appeal, an online paper, that it was well within its rights. After all, since it pays for the cell service underground, it can cut it off."

Whether San Francisco should be paying for municipal communications systems at all is a question for San Francisco and for California—not for the FCC. The more pressing concern is one first raised by IPI in 2004 – the freedom of speech problems that arise when a municipality owns a communications system.

A common argument from those who support and prefer government built communications systems is that they trust government more than the private sector to protect their interests. We have pointed out again and again that any entity, regardless of how it is organized, that uses its power to restrict our Constitutional freedoms should be anathema to all. Unfortunately, in San Francisco, we have an example of the government using its power to stop speech, and arguing that since it owns the communications system it can do as it likes.

If this were a private entity acting improperly then law enforcement, courts and regulatory bodies would still exist as a monitor, but when government owns the system they do as they want.

Far Better Solutions Are Available

Better options do exist if the goal is really to encourage the provision of broadband. The state, county, town, or even federal government could incentivize the private sector in particular geographic areas at lower costs and certainly with less exposure to taxpayer liability. IPI has suggested a market-friendly idea for encouraging broadband build out to unserved areas based on the proven success of enterprise zones over the

[7] http://www.ipi.org/ipi_issues/detail/just-say-no-to-municipal-broadband-networks

past thirty years.[8] In areas designated as "Broadband Enterprise Zones," broadband providers would receive state tax credits which could be used to offset the company's overall state tax burden, or other incentives to build networks in unserved areas. Vouchers could be issued to homeowners to pay for installation and setup costs within the Broadband Enterprise Zone.

There are other things the FCC can do to promote more broadband rollout, such as reforming the franchise process and streamlining the process for wireless broadband tower siting.

North Carolina's Law Should be Emulated, not Vacated

North Carolina has already addressed municipal involvement in broadband provision by passing a law that safeguards its citizens. The law does not create an outright ban, which might be preferable, but rather imposes certain requirements intended to provide a level playing field with any competing private sector participant and also provides transparency for taxpayers. This would seem to be a minimum standard. At the very least, governments should have to be open and play by the same rules, not rigging the game in government's favor.

So what does the level playing field look like? The law allows communities in North Carolina to provide phone, cable and broadband services, even in competition with private providers, but they must:

- Comply with laws and regulations applicable to private providers—including the payment of taxes;
- Not cross-subsidize their competitive activity using taxpayer or other public monies;
- Not price below cost, after imputing costs that would be incurred by a private provider;
- Not discriminate against private providers in access to rights-of-way;
- Those funding the venture, the citizens, must be allowed a vote before incurring debt, when the venture competes against a private sector company;
- Have a local government commission evaluate the competitive environment before approving loans for a competitive purpose, as a further taxpayer protection.

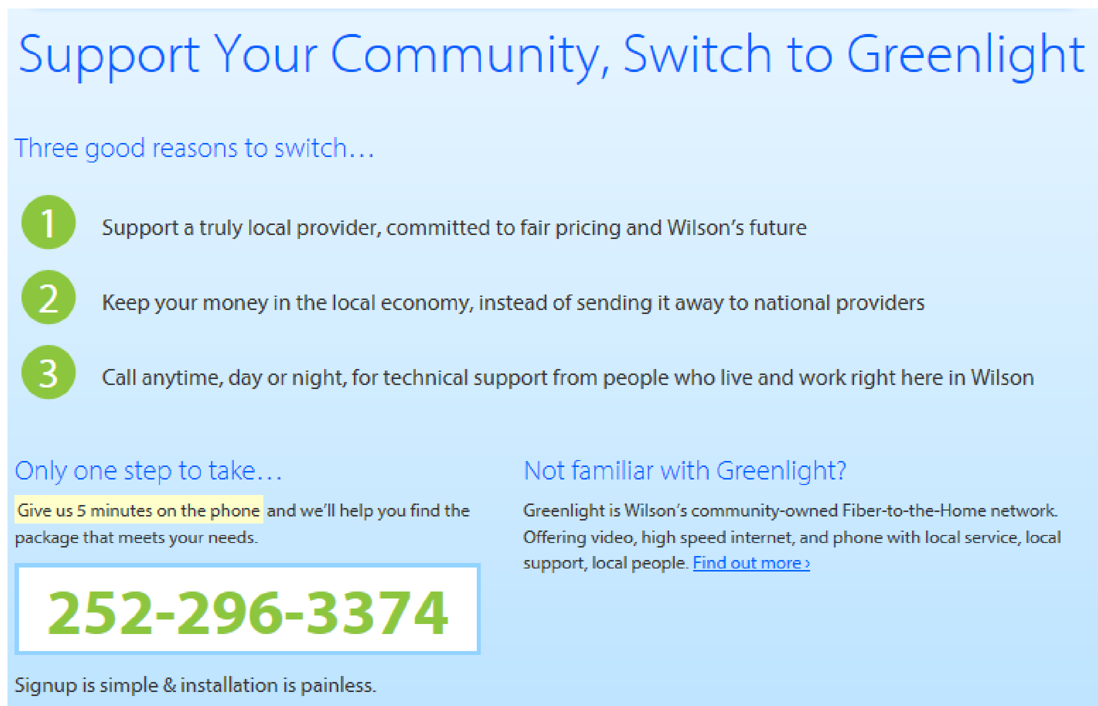
But ultimately, if policymakers must sponsor any initiative to encourage broadband deployment, they should instead support the expansion of broadband into unserved areas using incentives for private sector companies that risk private capital.

[8] http://www.ipi.org/ipi_issues/detail/comments-to-the-fcc-regarding-broadband-plan-notice-of-inquiry

It's Not Always About the Unserved

Proponents of municipal broadband networks often argue that they need to exist in order to serve unserved or underserved areas. But in many cases, the municipal networks are very upfront about intentionally competing against private sector providers.

On the home page of Wilson NC's "Greenlight Community Broadband" municipal network, the majority of the space is devoted to arguments encouraging customers to switch from commercial providers to Greenlight.



Greenlight's primary concern doesn't seem to be serving unserved customers—rather it seems primarily interested in drawing its customer base from the customer bases of private sector providers. In other words, from those who are already providing broadband service with private risk capital instead of putting taxpayers on the hook.

It's pretty weak tea for the FCC to violate the Constitution and incur years of litigation simply to assist projects like Greenlight in their attempt to supplant with taxpayer dollars a service that is already being provided with private risk capital.

Conclusion

Where state officials are calling for FCC action, their arguments are merely an attempt to end run the state's political process and the will of the people. They seek to create public policy that serves their interests where they failed to do so within their own state through proper channels. This is policymaking by the ruling class rather than by will of the people and is, frankly, a despicable way to proceed. State policies should be determined through state legislation or at least through state rulemaking.

Further, it is ironic to see the federal government, awash in debt, attempting to undo prudent state-level taxpayer protections, given that the states usually do a far better job of balancing their budgets and looking after taxpayer interests.

We hope the FCC will stand on the side of the law and operate within the limits of its power, rather than contravening state law and violating the Constitution. The FCC has core competencies and important missions, but in recent times incurring years of pointless and expensive litigation seems to be becoming a core competency of the Commission. We hope that is not the case in this proceeding.

We thank you for the opportunity to submit our thoughts on this proceeding, and would be happy to answer any questions or discuss this matter further with FCC personnel at your request.

Sincerely,

Tom Giovanetti
President