

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
City of Wilson, North Carolina)	WCB Docket No. 14-115
)	
Petition for Preemption of)	
North Carolina General Statutes)	
§ 160A-340, <i>et seq.</i>)	
)	
The Electric Power Board of)	WCB Docket No. 14-116
Chattanooga, Tennessee)	
)	
Petition for Preemption of a Portion of)	
Section 7-52-601 of the Tennessee Code)	
Annotated)	
To: The Commission		

**COMMENTS OF THE
WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

Chuck Hogg, President
Alex Phillips, FCC Committee Chair
Jack Unger, Technical Consultant

Stephen E. Coran
Lerman Senter PLLC
2000 K Street, NW, Suite 600
Washington, DC 20006-1809
(202) 416-6744
Counsel to the Wireless Internet Service Providers Association

August 29, 2014

TABLE OF CONTENTS

Summary	iii
Introduction.....	2
Discussion.....	3
I. THE COMMISSION LACKS AUTHORITY UNDER SECTION 706 TO PREEMPT STATE LAW.....	3
II. THE COMMISSION SHOULD IMPLEMENT POLICIES TO ENCOURAGE PRIVATE INVESTMENT IN UNSERVED AREAS.	7
III. IF THE COMMISSION GRANTS THE PETITIONS, IT SHOULD IMPOSE CONDITIONS DESIGNED TO PROMOTE PRIVATE INVESTMENT AND BROADBAND DEPLOYMENT.	13
Conclusion	15

Summary

The Wireless Internet Service Providers Association (“WISPA”) submits these comments regarding the Petitions Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition (collectively, “Petitions”) filed by the City of Wilson, North Carolina and the Electric Power Board of Chattanooga, Tennessee (collectively, “Petitioners”).

WISPA believes that the Commission lacks authority under Section 706 to preempt state law. Both the plain language of the statute and its legislative history support this view. Although Section 706 authorizes the Commission to utilize “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,” such generic “catch-all” language falls far short of being a “clear statement” as required by prevailing Supreme Court decisions. The legislative history further indicates that Congress expressly declined to provide the Commission with preemption authority under Section 706.

To the extent the Commission concludes that it has preemption authority and decides to approve the Petitions, the Commission must also be mindful of efforts it can take to promote *private* investment in broadband. The Commission should consider changes to its rules that would promote access to infrastructure and access to federal universal support to address two of the many reasons why the areas that the Petitioners seek to cover may be unserved. States, too, could do more to stimulate private investment. Preemption, if exercised at all, should be just one of the many things the Commission and states can and should do to encourage ubiquitous broadband deployment.

If it approves the Petitions, the Commission should adopt two conditions that will also advance the objectives of Section 706 by encouraging private investment. First, the Commission

should require the Petitioners to allow other broadband providers to interconnect to their broadband networks on reasonable wholesale rates and conditions. This will require the Petitioners to leverage their infrastructure – constructed as a result of the Commission’s approval – to facilitate deployment to areas the Petitioners may not serve and may not desire to serve.

Second, the Commission should require the Petitioners to forego providing service to an area if

- (a) it is then being served by a non-public broadband provider that offers service in that area, and
- (b) the Petitioners do not at such time have facilities capable of providing service in such area.

Under this condition, privately funded broadband providers that desire to serve unserved areas will not be subject to competition from a publicly funded entity, thereby stimulating investment in the private network and deployment of service to unserved areas.

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
City of Wilson, North Carolina)	WCB Docket No. 14-115
)	
Petition for Preemption of)	
North Carolina General Statutes)	
§ 160A-340, <i>et seq.</i>)	
)	
The Electric Power Board of)	WCB Docket No. 14-116
Chattanooga, Tennessee)	
)	
Petition for Preemption of a Portion of)	
Section 7-52-601 of the Tennessee Code)	
Annotated)	
)	
To: The Commission		

**COMMENTS OF THE
WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association (“WISPA”), pursuant to Sections 1.415 and 1.419 of the Commission’s Rules, hereby comments on the Petitions Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition (collectively, “Petitions”) filed on August 24, 2014 by the City of Wilson, North Carolina (“City of Wilson”) and the Electric Power Board of Chattanooga, Tennessee (“EPB”) (collectively, “Petitioners”).¹ WISPA believes that the Commission lacks authority under Section 706 of the Telecommunications Act of 1996 (“Telecom Act”)² to preempt state laws that limit the areas where publicly funded municipalities can provide fixed broadband services. In determining whether to exercise preemption authority, the Commission

¹ See *Public Notice*, “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,” WCB Docket Nos. 14-115 and 14-116, DA 14-1072 (rel. July 28, 2014).

² 47 U.S.C. § 1302.

also should implement policies designed to stimulate *private* investment in broadband services, consistent with the Section 706 mandate to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . regulatory methods that remove barriers to infrastructure investment.” Assuming the Commission decides to approve the Petitions, it should condition such relief on the requirement that the EPB and the City of Wilson allow private parties to interconnect to their broadband networks on reasonable and non-discriminatory terms and conditions and to forego from offering broadband in areas where private companies offer broadband service.

Introduction

WISPA is the trade association that represents the interests of wireless Internet service providers (“WISPs”) that provide IP-based fixed wireless broadband services to consumers, businesses and anchor institutions across the country. WISPA estimates that WISPs serve more than 3,000,000 people, many of whom reside in rural, unserved and underserved areas where wired technologies like FTTH, DSL and cable Internet access services may not be available. In some of these areas, WISPs provide the only terrestrial source of fixed broadband access. In areas where other broadband options are available, WISPs provide a local access alternative that fosters competition in service, cost and features. Many WISPs have begun to deploy fiber for middle-mile or last-mile service, often in combination with fixed wireless technology.

As a general matter, WISPs that provide fixed broadband service have not been eligible for federal Universal Service Fund support because they are classified as “information” service providers and not as providers of “telecommunications.” As a result, and unlike the telephone companies that have relied on taxpayer-supported federal subsidies for years, WISPs have funded construction and operation of their fixed wireless networks with private financing. This

is due in large part to the cost-effective and scalable fixed wireless technology that enables WISPs to establish access points to meet the demand for service sought by only a few customers in a given area – a far different cost model than the subsidy model on which wireline carriers must rely in order to extend their service.

WISPA has a keen interest in this proceeding. WISPA has opposed efforts to have Connect America Fund (“CAF”) support used to subsidize broadband in areas where WISPs, cable companies or other privately funded service providers already make their services available to the public, and is concerned that preemption to enable public bodies to provide broadband will come at the expense of efforts to encourage private investment. Rather, WISPA supports policies that encourage the availability of fixed broadband services by public and private entities. In contrast to the Petitioners’ views that the objectives of Section 706 are not being met “because of”³ territorial restrictions, or that such territorial restrictions are the “primary reason” for a lack of timely broadband deployment,⁴ WISPA believes that the lack of broadband availability in the areas Petitioners seek to serve stem in large part from failed policies that have not encouraged private investment in the unserved and underserved areas of Tennessee and North Carolina where the EPB and the City of Wilson may decide to deploy their services. In addition to any preemption authority the Commission may choose to assert, the Commission also must lower barriers to enable private entities to successfully enter the market to deploy broadband services.

Discussion

I. THE COMMISSION LACKS AUTHORITY UNDER SECTION 706 TO PREEMPT STATE LAW.

Providing access to affordable broadband service to all Americans, regardless of where they live, is a national priority, and WISPA applauds the Commission for the work it has done

³ EPB Petition at 3.

⁴ City of Wilson Petition at 2.

over the years to advance this important policy goal. Among other things, the Commission has made TV band and additional 5 GHz spectrum available for fixed broadband services, and has initiated proceedings to make additional spectrum available and to accelerate broadband deployment by streamlining approval processes. These decisions and initiatives have allowed WISPs and others to expand into new areas and to increase available unlicensed spectrum for additional services. A good start, with much unfinished business.

WISPA recognizes, however, that there are limits on the scope of the Commission's legal authority to act in furtherance of its policy goals. Significantly, the Commission lacks authority under Section 706 to preempt state laws that limit the locations where publicly-funded municipalities can provide broadband services. In particular, the scope of the Commission's authority is restricted by the Supreme Court's decision in *Nixon v. Missouri Municipal League*, the facts of which are virtually indistinguishable from those presented in the Petitions.⁵

In *Nixon*, the Court held that the Commission did not have the authority to preempt a state law prohibiting political subdivisions of the state – including municipalities – from providing telecommunications services or telecommunications facilities to the public, despite the fact that preemption was a power expressly granted to the Commission in the statutory language of Section 253 of the Communications Act of 1934, as amended (“Act”). The Court stated that the preemption of state law requested by the municipal entities in *Nixon* “would come only by interposing federal authority between a State and its municipal subdivisions.”⁶ Accordingly, the Court found it necessary “to invoke our working assumption that federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own

⁵ *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004) (“*Nixon*”).

⁶ *Id.* at 140.

power, in the absence of the plain statement *Gregory* requires.”⁷ Because the Court could find no such “unmistakably clear statement” in the statute or its history, the Court held that the Commission does not have the authority to preempt state laws restricting the provision of telecommunications services by its political subdivisions.

Although Petitioners go to great lengths to distinguish their preemption requests from the preemption request at issue in *Nixon*, these are ultimately distinctions without a difference.⁸ If anything, the Petitioners’ efforts to distinguish their requests only highlight how much weaker their case for preemption is than the one rejected by the *Nixon* Court. Above all, the Petitioners’ arguments demonstrate that there is no “clear statement” in either the statute or the legislative history of Section 706 that Congress intended to give the Commission the authority to preempt state laws restricting municipal broadband projects.

As Petitioners note, *Nixon* addressed the Commission’s preemption authority under Section 253, rather than under Section 706. However, unlike Section 253, the statutory language of Section 706 does not even mention preemption as one of the actions that the Commission may undertake. Although Section 706 does authorize the Commission to utilize “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,” such generic “catch-all” language falls far short of being a “clear statement” as required by *Nixon* and *Gregory* authorizing the Commission to preempt state law.

Given the absence of clear statutory language authorizing preemption, Petitioners turn to the legislative history, relying heavily on the following passage from the Joint Conference Report on the Telecom Act regarding Section 706: “The Commission may preempt State

⁷ *Id.*, citing *v. Gregory v. Ashcroft*, 501 U.S. 452 (1991).

⁸ See *City of Wilson* Petition at 47-59; *EPB* Petition at 44-56.

commissions if they fail to act to ensure reasonable and timely access.”⁹ However, this language in fact describes a precursor version of Section 706 adopted by the Senate, but not by the House. Significantly, the Conference Report notes that the Senate version was adopted by Congress “with a modification,”¹⁰ and while all other aspects of the initial Senate provision were adopted into the final statutory language of Section 706, the language on preemption was not. The legislative history therefore indicates that Congress in fact expressly declined to provide the Commission with preemption authority under Section 706.

Moreover, even if the language of the Conference Report were to be viewed as a “clear statement,” this precursor language states that the Commission “may preempt State *commissions*,” not state legislatures.¹¹ Thus, while the Commission may arguably have the authority to preempt a state commission that “fail[s] to act to ensure reasonable and timely access,” it does not have the authority to preempt state laws enacted by a state legislature.

Finally, Petitioners base much of their legal arguments on the policy and purpose of the Telecom Act in general and of Section 706 in particular. However, as the Supreme Court held in *Nixon* – and as the Commission itself held in 2001 – the merits of these policy arguments are irrelevant to the fundamental issue of the Commission’s authority to preempt state law.¹²

Accordingly, WISPA believes that the law does not grant the Commission the necessary authority to preempt the Tennessee and North Carolina laws that are the subject of the Petitions.

⁹ H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., 1996 U.S.C.C.A.N. 10, 182-183 (Jan. 31, 1996).

¹⁰ *Id.*

¹¹ *Id.* (emphasis added).

¹² *Nixon*, 541 U.S. at 132 (“in any event the issue here does not turn on the merits of municipal telecommunications services”).

II. THE COMMISSION SHOULD IMPLEMENT POLICIES TO ENCOURAGE PRIVATE INVESTMENT IN UNSERVED AREAS.

Aside from the question of whether the Commission has preemption authority is the question of whether the Commission should exercise that authority. WISPA believes that the Commission, assuming *arguendo* it has authority under Section 706 to preempt the subject state laws, would be acting contrary to public policy if it granted the Petitions unconditionally and without taking steps to encourage private investment. Regardless of whether the Commission grants the relief the Petitioners seek, the Commission also must continue its efforts to promote private investment in fixed broadband and, in particular, fixed wireless deployment.

The Petitions wrongly blame state law for the lack of broadband service in the areas outside of municipal boundaries that they desire to serve.¹³ The Petitions simply assume that the Section 706 objectives are not being met “because of”¹⁴ North Carolina state law, or that territorial restrictions under Tennessee state law are the “primary reason” for the lack of broadband deployment.¹⁵ This narrow view conveniently ignores the myriad of other reasons why fixed broadband may not be available in certain areas. For example, in some cases, providers using wired technologies such as FTTH, DSL and cable have not extended service to certain areas because they cannot realize a return on their investment. Population densities may be too low or the terrain may be too rugged to support hard-wiring some areas of the country. In some cases, there may be a lack of vertical infrastructure for the placement of wireless transmission equipment, or the land or tower may be subject to costly and time-consuming lease

¹³ It also should be noted that neither Petitioner precisely describes the areas where it intends to deploy. EPB refers to an unidentified “digital desert” surrounding its service area and the City of Wilson refers to “portions of the five counties immediately adjacent to Wilson County.” See EPB Petition at 1; City of Wilson Petition at 2. Given the granularity and detail with which the Commission has attempted to define by census blocks those areas that are unserved by “unsubsidized competitors” in the universal service context, the Petitioners should be required to specifically define, by census block, the areas that are the subject of their Petitions, in addition to the conditions recommended in Section III, *infra*.

¹⁴ EPB Petition at 3.

¹⁵ City of Wilson Petition at 2.

approval processes. In other cases, there may be no price cap carrier eligible to receive federal CAF subsidies that would help fund broadband build-out, or perhaps the state has not made broadband funding available. Two points emerge from this discussion. First, state laws restricting municipal broadband deployment are not the only reason why broadband deployment may be lacking in certain geographic areas. Second, restricting municipalities from deploying broadband is, standing alone, insufficient to promote private investment, at least in the two cases at issue here. Rather, state and federal governments must do more to ensure that the objectives of Section 706 can be met as an alternative to handing over a broadband service to a public entity. Following are several examples of what states and the Commission can and should do.

Access to Infrastructure

States and the Commission can accelerate broadband deployment by making it easier for broadband providers to obtain access to towers, water tanks, utility poles and other infrastructure necessary for fixed wireless broadband deployment. In 2012, President Obama signed the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”).¹⁶ Section 6409(a) affords wireless providers – including WISPs – with accelerated access to vertical infrastructure for the collocation of certain equipment. Although Section 6409(a) does not require the Commission to adopt rules, the Commission has initiated a rulemaking proceeding to implement and provide clarity to the statute and to adopt timelines and dispute resolution processes.¹⁷

WISPA has supported adoption of rules that streamline the collocation approval, historic preservation and environmental processes to facilitate the provision of wireless broadband

¹⁶ Middle Class Tax Relief and Job Creation Act of 2012, Pub.L. 112-96, H.R. 3630, 126 Stat. 156 (enacted Feb. 22, 2012) (“Spectrum Act”).

¹⁷ See *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, WT Docket No. 13-238, *et al.*, 28 FCC Rcd 14238 (2013). WISPA also filed comments in response to a Notice of Inquiry in *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, 26 FCC Rcd 5384 (2011). See Comments of WISPA, WC Docket No. 11-49 (July 18, 2011).

services.¹⁸ Notably, the record demonstrates that municipalities have opposed many of the Commission’s efforts.¹⁹ While the EPB and the City of Wilson are to be commended for their desire to provide broadband services, many municipalities have taken the opposite approach by continuing to resist proposed rules that would expedite local collocation approvals.²⁰ Adopting and enforcing final rules to implement Section 6409(a) of the Spectrum Act will be an important step in the promotion of policies that will encourage broadband deployment to unserved areas.

With respect to “personal wireless service facilities,” the Act provides that the “regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof ... shall not unreasonably discriminate among providers of functionally equivalent services [and] shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”²¹ However, the Act defines “personal wireless service facilities” as “facilities for the provision of personal wireless services,” which in turn the Act defines as “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.” In this context, “unlicensed wireless services” does not apply to WISPs and other providers of wireless services, but rather is

¹⁸ See Comments of WISPA, WT Docket No. 13-238, *et al.* (Feb. 3, 2014); Reply Comments of WISPA, WT Docket No. 13-238, *et al.* (March 5, 2014).

¹⁹ See, e.g., Comments of the City of Alexandria, Virginia, *et al.*, WT Docket No. 13-238, *et al.* (Feb. 3, 2014) (urging narrow interpretations of statutory terms and “best practices” instead of Commission rules); Comments of the District of Columbia, WT Docket No. 13-238, *et al.* (Feb. 3, 2014) (same); Comments of the Intergovernmental Advisory Committee, WT Docket No. 13-238, *et al.* (Feb. 3, 2014) (proposing limitations on structures covered by collocation rules); Comments of the National Association of Telecommunications Officers and Advisors, *et al.*, WT Docket No. 13-238, *et al.*, (Feb. 3, 2014) (same); Comments of the Colorado Communications and Utilities Alliance, *et al.* WT Docket No. 13-238, *et al.*, (Feb. 3, 2014) (same); Comments of The Piedmont Environmental Council, WT Docket No. 13-238, *et al.* (Feb. 3, 2014) (same); Comments of the City of Minneapolis, Minnesota, WT Docket No. 13-238, *et al.*, (Jan. 31, 2014) (same); Comments of the City of San Antonio, Texas, WT Docket No. 13-238, *et al.*, (Feb. 3, 2014) (same); Comments of the City of Salem, WT Docket No. 13-238, *et al.*, (Feb. 3, 2014) (same).

²⁰ See Comments of Crown Castle, WT Docket No. 13-238, *et al.* (Feb. 3, 2014), at 9 (describing San Francisco ordinance that would exclude DAS facilities from consideration under Section 6409(a)); Comments of PCIA – The Wireless Infrastructure Association and the HetNet Forum, WT Docket No. 13-238, *et al.* (Feb. 3, 2014), at 26-27 (noting efforts of local jurisdictions to limit protections afforded by Section 6409(a)).

²¹ 47 U.S.C. § 332(c)(7)(B)(i-ii).

limited to the “offering of telecommunications services using duly authorized devices which do not require individual licenses.”²² WISPs provide services that are fixed, not mobile, that are not “unlicensed wireless services” (which require the offering of a “telecommunications service”) and that are not provided on a “common carrier” basis. As a result, Section 332(c)(7) does not benefit WISPs. In WISPA’s view, Section 706 provides the Commission with authority to level the playing field and make the benefits of Section 332(c)(7) available to WISPs that rely on unlicensed spectrum to provide fixed broadband services.

Where a utility controls a pole attachment or right-of-way, Section 224 the Act provides that the utility “shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it.”²³ This benefit does not apply to broadband providers classified as “information service” providers, creating a regulatory disadvantage for WISPs that may wish to access utility poles for transmitters or aerial fiber to either serve unserved areas or offer competition to those covered by Section 224. Section 224 does, however, allow states to “reverse preempt” pole attachment regulation,²⁴ and more than 20 states have certified to the Commission that they have jurisdiction over pole attachments.²⁵ As one example, the State of Vermont extended pole attachment rights to broadband providers, an example of a state law that can be implemented to accelerate broadband deployment.²⁶ If Section 706 cannot be interpreted to extend Section 224 to

²² 47 U.S.C. § 332(c)(7)(C)(i-ii).

²³ Section 224(a)(4) of the Act defines “pole attachment” as “[a]ny attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility.”

²⁴ 47 U.S.C. § 224(c).

²⁵ See *Public Notice*, “States That Have Certified That They Regulate Pole Attachments,” DA 10-893 (rel. May 19, 2010).

²⁶ See 30 Vermont Statutes Annotated § 209(i), which states that “[f]or the purposes of Board rules on attachments to poles owned by companies subject to regulation under this title, broadband service providers shall be considered ‘attaching entities’ with equivalent rights to attach facilities as those provided to ‘attaching entities’ in the rules, regardless of whether such broadband providers offer a service subject to the jurisdiction of the Board.... The rules

broadband providers under federal law, then other states can and should assert jurisdiction and apply its pole attachment rights to broadband providers consistent with state law.

Statutory limitations based on regulatory classifications and other arcane rules result in competitive imbalance and unduly burden WISPs that seek access to poles, rights of way, towers and other infrastructure. The Act, the Commission and state law simply have not kept pace with the realities of emerging broadband infrastructure, and private investment has suffered. The few examples discussed above demonstrate some of the challenges to broadband deployment created by the existing regulatory environment, and ways in which those shortcomings can be addressed alongside any relief the Commission may grant the Petitioners consistent with its statutory authority.

Connect America Fund and State Financial Support

In 2011, the Commission overhauled its intercarrier compensation and universal service programs.²⁷ Among other things, the rules provided for federal financial support only to price cap carriers in two rounds of funding for Phase I and for Phase II. The Commission reasoned that the majority of locations unserved by broadband were in price cap areas.²⁸ The Commission did not establish any new funding mechanism for rate-of-return carriers, cable companies or WISPs that would have benefited from CAF support, and has not adopted rules for the Remote Areas Fund (“RAF”). In fact, the only time a non-price cap carrier can obtain support is through Phase II competitive bidding if the price cap carrier declines its statewide commitment,²⁹ the

shall be aimed at furthering the State’s interest in ubiquitous deployment of mobile telecommunications and broadband services within the State.”

²⁷ *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011).

²⁸ *See id.* at 17712.

²⁹ *See Connect America Fund, et al.*, Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90, *et al.*, FCC 14-54 (rel. June 10, 2014).

rural broadband experiment program³⁰ and, potentially, the RAF. Moreover, WISPs and other providers have had to spend a significant amount of time and effort to fend off price cap carriers seeking to apply CAF funding in areas where they already offer unsubsidized broadband and voice service.

The Commission could have done things differently by expanding eligibility to include any eligible telecommunications carrier willing to accept the Commission's build-out and public interest obligations. It made the policy choice in 2011 to limit eligibility to price cap carriers, and it has only been in the last year that the Commission has considered rules that will allow WISPs and others to obtain support for broadband services.

Further, states can do more to provide financial support broadband deployment. According to the National Conference of State Legislatures ("NCSL"), all 50 states have established a broadband task force, commission or project,³¹ with varying degrees of activity. Significantly, NCSL reports that the State of Tennessee established a broadband Task Force in 2005, *but it "has not been active since 2009."*³² It is little wonder that rural areas of Tennessee remain unserved when the state itself provides no financial or other support to broadband providers. In 2011, North Carolina established a division within the state Department of Commerce to encourage adoption and use of broadband, identify unserved and underserved areas and promote greater broadband availability across the state.³³ It is unknown how much support the State of North Carolina has made available to private entities for broadband deployment, but one can question the state's commitment given the modest mandate of the broadband division. If

³⁰ See *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90, *et al.*, FCC 14-98 (rel. July 14, 2014).

³¹ See <http://www.ncsl.org/research/telecommunications-and-information-technology/state-broadband-task-forces-commissions.aspx> (last visited Aug. 27, 2014).

³² *Id.* (emphasis added).

³³ *Id.*

the States of Tennessee and North Carolina had made support available to private broadband providers, it is possible that the areas that the EPB and the City of Wilson propose to serve would already be served.

III. IF THE COMMISSION GRANTS THE PETITIONS, IT SHOULD IMPOSE CONDITIONS DESIGNED TO PROMOTE PRIVATE INVESTMENT AND BROADBAND DEPLOYMENT.

WISPA appreciates that consumers and businesses in unserved areas demand access to broadband service, and its members work hard each day to expand coverage, increase speeds and provide high-quality customer service. It is unfortunate that, for a variety of reasons – not only, as the above discussion demonstrates, state laws that limit municipalities to providing broadband within city boundaries – the EPB and the City of Wilson have found it necessary to seek the extraordinary relief requested in their Petitions. What is missing from the Petitions, however, is any discussion of the efforts the Petitioners have taken to work with existing broadband provider businesses that could use private funds to serve the subject geographic areas.

This opportunity should not be foreclosed by unconditional approval of the Petitions, assuming the Commission has preemption authority and elects to apply it. Rather, the Commission should condition any approval on the Petitioners' acceptance of two specific conditions intended to encourage private investment.

First, the Commission should require the EPB and the City of Wilson to allow other broadband providers to interconnect to their broadband networks on reasonable wholesale rates and conditions. In this way, the Commission would encourage private investment by leveraging the then-existing EPB and City of Wilson infrastructure as consideration for the regulatory relief they would obtain. Further, by enabling access to middle-mile facilities that the Petitioners may construct, the Commission would incent private entities to deploy to areas that even EPB and the City of Wilson may not wish to serve, and promote competition in other areas. All of these

benefits advance the public interest in receiving broadband services and are fully consistent with Section 706 objectives.

Conditioning waiver on interconnection also would be consistent with rules adopted for American Recovery and Reinvestment Act broadband stimulus projects,³⁴ which required all recipients of federal Broadband Initiatives Program (“BIP”) and Broadband Technology Opportunities Program (“BTOP”) recipients to “offer interconnection, where technically feasible without exceeding current or reasonably anticipated capacity limitations, *on reasonable rates and conditions to be negotiated with requesting parties*. This includes both the ability to connect to the public Internet and physical interconnection for the exchange of traffic.”³⁵ The *NOFA* further explained that a funding recipient “may satisfy the requirement for interconnection by *negotiating in good faith* with all parties making a bona fide request. The awardee and the requesting party may negotiate terms such as business arrangements, capacity limits, financial terms, and technical conditions for interconnection.”³⁶ Rates should be reasonable based on comparable wholesale rates for bandwidth in the area.

Second, the Commission should require the EPB and the City of Wilson to forego providing service to an area if (a) it is then being served by a non-public broadband provider that offers service in that area, and (b) the EPB and the City of Wilson do not at such time have facilities capable of providing service in such area. Under this condition, privately funded broadband providers that desire to serve unserved areas will not be subject to competition from a publicly funded entity (but could be subject to competition from another privately funded entity), thereby stimulating investment in the private network and deployment of service to unserved

³⁴ See American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (2009).

³⁵ Broadband Initiatives Program; Broadband Technologies Opportunities Program; Notice of Funds Availability, 74 Fed. Reg. 130 at 33111 (2009) (“*NOFA*”) (emphasis added).

³⁶ *Id.*

areas. Moreover, the condition would not result in stranded investment for the Petitioners, which would still be able to provide service to unserved areas if they had physical assets deployed that would enable broadband service to a given area.

By conditioning Commission preemption approval on requirements that will leverage infrastructure build as a consequence of the Commission's approval and stimulate private investment, the Commission would encourage the more rapid deployment of broadband services. To the extent the Commission has preemption authority and elects to exercise it, the Commission should condition its approval on the interconnection and service obligations discussed above.

Conclusion

WISPA believes that the Commission lacks authority to preempt the Tennessee and North Carolina laws that are the subject of the Petitions. Regardless of whether the Commission concludes that it has such authority and decides to exercise it, the Commission and states should implement policies and rules to promote private investment for broadband deployment, consistent with the objectives of Section 706. Commission approval of the Petitions should be conditioned on interconnection and service obligations that would foster investment and expansion of broadband services to unserved and underserved areas.

Respectfully submitted,

WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

August 29, 2014

By: */s/ Chuck Hogg, President*
/s/ Alex Phillips, FCC Committee Chair
/s/ Jack Unger, Technical Consultant

Stephen E. Coran
Lerman Senter PLLC
2000 K Street, NW, Suite 600
Washington, DC 20006-1809
(202) 416-6744
Counsel to the Wireless Internet Service Providers Association