NATIONAL GOVERNORS ASSOCIATION

John Hickenlooper
Governor of Colorado
Chair

Gary Herbert
Governor of Utah
Vice Chair

Dan Crippen
Executive Director

August 29, 2014

Ms. Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

RE: WCB Docket Nos. 14-115 and 14-116 (*Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks*)

Dear Secretary Dortch:

The National Governors Association (NGA) is pleased to submit the following comments in opposition to the above-captioned matters seeking preemption of state laws restricting the deployment of certain broadband networks. NGA urges the Federal Communications Commission ("FCC") to reject Petitioners' request for the following reasons.

Presumption against Preemption

The Commission must reject the petitions because the Telecommunications Act of 1996 (the "Act,") Pub. L. No. 104-104, 47 U.S.C. §1301 *et seq*. prohibits the Commission from preempting state laws absent express authority.

Congress affirmed the presumption against preemption in clear language that the Act and its amendments "shall not be construed to modify, impair, or supersede federal, state, or local law unless expressly so provided" in the Act. 47 U.S.C. §152 Notes. The Act's conferees further explained that "[t]his provision prevents affected parties from asserting that the [Act] impliedly preempts other laws." H.R. Conf. Rep. No. 104-458, 104th Cong, 2d Sess., 1996 U.S.C.C.A.N. 10, 201 (Jan. 31, 1996). Petitioners' statutory interpretation and legal legerdemain fail to identify the necessary language in Section 706 that would authorize the Commission to preempt state law because it just does not exist.

Should the Commission accept the petitions, it would also run afoul of President Obama's preemption memorandum to Executive Branch department and agency heads issued on May 20, 2009. Preemption Memorandum for the Heads of Executive Departments and Agencies, 74 FR 24693 (May 22, 2009). The Memorandum outlined the Administration's policy that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." Id.

Petitioners fail both requirements. NGA urges that the Commission give careful and objective consideration to the comments submitted during this notice-and-comment period in support of the legitimate prerogatives of the States to engage in their fundamental authority to legislate. The fact remains, however, that the petitions must be denied absent sufficient legal basis for preemption, which much be express. In this particular matter, such authority does not exist and the petitions must be denied.

Treatment of States under Section 706

Petitioners' misinterpretation of the Commission's breadth of authority under Section 706 also ignores congressional intent to treat state authority coequally with the Commission. Petitioners' selective reading of the Act overlooks critical terms and misinterprets clauses in Section 706.

Ignoring the plain words of the Act is a fatal flaw in Petitioners' argument because congressional intent is the "ultimate touchstone" of preemption analysis by the courts. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The use of the conjunction "and" between "Commission" and "each State [public utility] commission" at Section 706(a) in the Act signals congressional intent for *shared* jurisdiction over regulatory matters involving advanced telecommunications services.

Petitioners' preemption argument depends upon ignoring the word "and" because with this simple conjunction Congress established the States as regulatory partners with the Commission to encourage deployment of advanced communications services. Only by reading it out of Section 706(a) can Petitioners claim that the tools "that remove barriers to infrastructure investment," which Petitioners argue by inference include federal preemption, are only available to the Commission. FCC Pet. by City of Wilson, N.C. at 44 (July 24, 2014).

Petitioners also argue that in these petition matters, federal preemption does not affect any traditional or fundamental State power. N.C. Pet. at 54. The U.S. Supreme Court has established the relevant standard for determining whether Congress intended to preempt state laws involving "traditional" or "fundamental" State functions. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The *Gregory* Court said that an agency or court must find that Congress made a "plain statement" to that effect. 501 U.S. at 467. That statement, moreover, need not be explicit, but only "be plain to anyone reading the Act that it covers [the issue]." Id.

The only plain statement in the Act on point here is the presumption against preemption. 47 U.S.C. §152 Notes. Since state regulatory agencies derive authority under state laws, then by inference, Section 706 acknowledges the authority of underlying state statutes such as the ones at issue in the petitions. It is not in "the public interest, convenience, and necessity" under Section 706 for the Commission to disregard congressional intent against preempting state laws absent express authority in the Act. Despite Petitioners' protestations, *Gregory* does in fact apply in these petitions because Petitioners are asking the Commission to preempt state statues.

Legislating is a fundamental and traditional state function.

Governing Policies for Advanced Telecommunications Services

The public elects representatives to govern them. Those duly-elected legislative and executive branch officials represent the interests of the public through the laws they pass and execute. Those laws and policies, moreover,

are the result of choices made. Factors affecting those choices include, for instance, budgetary, social, and economic.

States as sovereign entities have a significant and material role to play in setting policies for advanced telecommunications services. According to a recent report on municipal broadband networks, states have a strong interest in overseeing the process by which municipal broadband networks are designed and approved because states maintain ultimate responsibility for the financial health of the cities and towns within their borders. Davidson and Santorelli, *Understanding the Debate over Government-Owned Broadband Networks*, Advanced Communications Law & Policy Institute, New York Law School (2014). Building those networks and maintaining them are expensive, and those costs raise the risk of financial default by local government, the diversion of resources from other priorities, or other negative outcomes such as credit downgrades. Id. at xiv.

Here, neither the North Carolina nor Tennessee legislative and executive branches enacted laws that prohibited either petitioner municipality from establishing broadband capacity to serve their residents within the city limits. There is a legal distinction between laws that are unconstitutional from those that some factions do not support. The tool to address the latter is the ballot box.

NGA believes that the Commission should honor the longstanding partnership between states and the federal government by rejecting the pending petitions and avoid triggering unintended consequences through federal preemption of state authority.

Sincerely,

Dan Crippen
Executive Director
National Governors Association