



N A R U C
National Association of Regulatory Utility Commissioners

NOTICE VIA ELECTRONIC FILING

February 13, 2015

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: Notice of Written Ex Parte filed in the proceedings captioned: *In the Matter(s) of 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 No. 14-116 , WCB Docket No. 14-115

Secretary Dortch:

On February 13, 2014 the undersigned forwarded this letter to the five FCC Commissioner legal advisors listed below. NARUC already filed comments, available online, generally agreeing with comments opposing Petitioners' petitions on legal grounds. See, September 29, 2014 *Reply Comments of the National Association of Regulatory Utility Commissioners*, available online at: <http://apps.fcc.gov/ecfs/comment/view?id=60000869485>. See also, NARUC's December 4, 2014 *ex parte*, available online at: <http://apps.fcc.gov/ecfs/comment/view?id=60000990705>.

Those comments also note specifically that NARUC *takes no position on the relative merits of State policy choices to allow or disallow municipal broadband services.*

This supplement is being filed to assure that the FCC uses the correct legal framework for analyzing these two petitions.

If, as is currently expected, the FCC does reclassify broadband internet access as a Title II "telecommunications service," then the agency is required to use the more specific statutory provision,¹ applicable by its own terms, as the basis for analyzing these two petitions.

That provision is 47 U.S.C. § 253, which was enacted at the same time as Section 706 and is the specified procedure for preempting State laws that "prohibit or have the effect of prohibiting" any telecommunications service provider from providing any telecommunications service.

As discussed in NARUC's reply comments, there is already clear and applicable Supreme Court precedent indicating that the class of entities contemplated by §253 does not include the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of telecommunications services.

¹ See *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 317 (1999); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-26 (1989); *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 444-45 (1987).

Specifically, the Supreme Court has said:

Section 101(a) of the Telecommunications Act of 1996, 110 Stat. 70, 47 U.S.C. § 253, authorizes preemption of state and local laws and regulations expressly or effectively “prohibiting the ability of any entity” to provide telecommunications services. The question is whether the class of entities includes *129 the State’s own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors’) delivery of such services. We hold it does not.

Nixon v. Missouri Mun. League, 541 U.S. 125, 128-29 (2004)

Everyone with access to a newspaper, e-mail, twitter, television, or radio has been bombarded with stories about the FCC’s plans at least since February 4th, and arguably for quite some time before that date.

It would be disingenuous for the FCC to claim ignorance of these plans.

The drafters of an order responding to these petitions, must carefully consider what impact the FCC’s reclassification has on the FCC’s analysis in this proceeding.

It is clear that any similar subsequent applications will necessarily be required to follow this procedure and be bound by the current Supreme Court precedent.

At a minimum, any FCC order NOT based on Section 253 should explain why not and why – going forward – the FCC is not bound by the cited Supreme Court precedent.

NOTE – I AM SENDING A COPY OF THIS NOTICE OF THIS WRITTEN EX PARTE VIA E-MAIL TO KEY STAFF ON THE EIGHTH FLOOR as listed in the “cc” line *infra*.

If you have questions about this or any other NARUC advocacy, please do not hesitate to contact me at 202.898.2207 (w), 202.257.0568(c) or at jramsay@naruc.org.

Respectfully Submitted,

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cc *Gigi Sohn, Office of the Chairman*
Daniel Alvarez, Office of the Chairman
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Priscilla Argeris, Office of Commissioner Rosenworcel
Nick Degani, Office of Commissioner Pai
Amy Bender, Office of Commissioner O’Reilly