Fair Competition Alliance

August 29, 2014

Ms. Marlene Dortsch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *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.

Dear Ms. Dortsch:

Thank you for the opportunity to submit comments in the captioned proceeding with respect to the petitions seeking federal preemption of state law relating to government-owned broadband networks.

The Fair Competition Alliance (FCA) is an association of private companies providing telecommunications, cable, refuse/recycling and energy services to households, businesses, and government in Washington State. FCA has a narrow mission: We conduct research and provide public education on municipalization issues where publicly subsidized governmental entities attempt to compete in lines of business that have traditionally been delivered by private industry. Nothing included in the public comments which follow should be construed to reflect an opinion or an organizational position on the competitiveness issues that exist for or between private providers.

Washington State has limits on the ability of different types of municipal governments to provide broadband services. These limits include restricting some municipal corporations to providing only wholesale broadband services. Others require that these same entities separate their financial accounting so their constituents may understand the financial commitments being made on their behalf. Certain sized cities do not have the authority to provide services, while larger jurisdictions have fuller, more open authorities. The issues, just within our state, are necessarily complex.

Washington's private broadband providers along with state and local policymakers have worked hard over the last decade and a half to craft policies that address everyone's concerns. Our work isn't done and our debates will continue into the foreseeable future, but stakeholders here are tailoring this state's broadband networks to utilize fully the unusual resources available in Washington to address the specific needs facing our state.

We are, therefore, very concerned with suggestions that over-simplify the issue of 'broadband for all Americans' or that ignore the complexities that exist by recommending a one-size-fits-all federal solution. This approach will not only *not* resolve the challenges we face, but could disrupt the efforts made to date to strike a balance between promoting

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broadband deployment to un- and under-served communities and preserving an environment conducive to private investment and service delivery.

Risky, heavily and disparately regulated, yet highly competitive, the communications industry in the U.S. today relies on technologies that will continue to evolve. These technologies have experienced periods of construction followed by deconstruction and replacement. Hugely expensive, the tale of the last two decades has been one of extraordinary capital investment and a dramatic extension of broadband service. Private industry has spent hundreds of *billions* of dollars in just the last decade. The result: By 2011, 98 percent of the nation had broadband services, according to the FCC. Additional progress has been made over the last three years, but much of the remaining two percent will require creative solutions. These solutions should not be allowed to disrupt the progress made for the vast majority of the country.

The following paragraphs outline some pertinent experience in local broadband in Washington State and offer suggestions for going forward.

Financial Risks, Debt Burden, and Bond Defaults

Legislation passed in our state in 2000 allows public utility districts (PUDs, local special purpose municipal corporations) to build and deliver *wholesale* telecommunications services. Most of the PUDs that were early adopters of this wholesale model cover rural areas of the state and are the monopoly energy providers for their respective counties. Several own hydro-electric dams, which produce substantial excess revenues. It was with these excess energy revenues that our local PUDs funded most of their fiber programs.

Two of these rural PUDs spent more than $300 million on their initial fiber build. Instead of serving the most remote, un- or under-served parts of their counties, as they promised at the outset, these PUDs duplicated private facilities and established sham retailers (these retailers have little or none of their own investment at stake; they act mostly as bill collectors for the PUDs) through which to provide retail internet services to their communities' largest business and government customers.

One PUD's own consultants noted in a 2012 program review that:

> *"The current system serves customers that might otherwise have fiber network services through private providers;" and*
>
> *"Schools, hospitals, and most businesses would have had [private] fiber network connections in absence of the PUD's investments."*

After more than a decade of operations, these two PUDs still operate in the red with nearly $9 million in 2011 alone subsidized by their electric utility ratepayers.

These local utilities made promises to their citizens to repay the electric utility reserves for the capital "borrowed" to build their fiber systems. Instead, their locally elected commissioners have since chosen to forgive hundreds of millions of dollars in internal debt, recognizing publicly that their fiber operations will never be in a position to repay electric ratepayers.

Washington State's auditor said in a 2010 performance audit of one of these fiber programs:

> *The revenue this [broadband] service generates does not and will not cover the District's investment or cover ongoing operational costs. …[T]he original investment [in the PUD's fiber program] was not financially viable and results in ongoing losses. This table further demonstrates that expanding the fiber optics program will increase the District's financial losses.*

Most PUDs with fiber programs have had to raise their electric rates in order to maintain their bond ratings, moves that could have been avoided or at least minimized had they not spent their cash reserves to build fiber systems. In one case the PUD's bond ratings were lowered to near junk-bond status, as the cash-strapped PUD struggled to avoid bond defaults.

The financial condition of the PUD fiber operations, bad as it is, could be worse. Because the utilities basically borrowed their venture capital from their own energy ratepayers, they were able to finesse their debt obligations. Had they instead gone to the private marketplace with sales of municipal bonds to finance their initial capital investment, we could easily be telling the story here of sizeable public bond defaults. And it can't be forgotten that the public utilities in Washington currently venturing into these very risky fiber programs are the same ones which, for decades, had the dubious distinction of committing the largest public bond default in our nation's history - the $2.25 billion WPPSS (or "whoops") debacle in the 1970's.

Municipal regulation and permitting

Beyond the tremendous financial risks associated with small rural governments venturing into competition with private, taxpaying broadband providers, there are issues of which entity will sort the competing interests associated with charges for and access to public rights-of-way and utility poles, land use permitting, and franchise agreements that are fraught with potential conflicts of interest. Cities and public utility districts like ours in Washington have responsibilities and authorities under current state laws to establish standards for these activities. As such, they act as referees representing the public interests in their areas. If they move from the role of regulator/referee between provider and consumer to the role of an active participant in competition for customers, their ability and desire to self-deal would be difficult to resist.

Monopoly public power versus competitive municipal broadband

Many observers compare our current debate over municipal broadband with the public power debate in the 1930's. Notwithstanding the fact that 75 percent of the country is served by private energy companies, there is nonetheless a critically important difference between government-owned energy utilities and the municipal broadband utilities being proposed. It is this:

> *Energy utilities in the U.S. operate as monopolies. Municipal broadband providers, however, are attempting to compete with established private broadband providers.*

In the energy industry, local government utilities dictate their own standards and prices for the various services they offer. They do so without outside oversight. They are "locally controlled," as advocates like to say. Private energy utilities, on the other hand, also operate as monopolies, but do so under heavy regulations set by state government for both rates and standards of service.

Private broadband providers operate in a competitive environment. Like their private energy counterparts, they are regulated either by a state utility commission or by local government entities.

By advocating local government control of broadband services, we are asking small rural communities and their locally elected officials to manage the complexities of building, operating, pricing and maintaining standards of services involved with emerging and rapidly changing technologies. In the case of the traditional wireline telecommunications companies, private companies have an 'obligation to serve' anyone in their territory and to be the 'carrier of last resort' – concepts that have all but been lost in the current municipal broadband debate when advocates espouse the benefits of "local control."

Local control would require citizens to be their own advocates in a political environment, one susceptible to special interest manipulation. To protect their interests, local residents can anticipate having to routinely attend local town council or public utility commission meetings or invest in lobbyists to represent them. In practice, most will be unrepresented and vulnerable to disparate treatment. There won't be any state agency responsible to consumers for assuring that standards of service are met or that bad actors are penalized.

And what happens when a local government finds that it has over-committed local financial resources and cannot meet its obligations? Cities can raise taxes. PUDs can raise rates or even levy property taxes up to a point. But at some point local resources can be exhausted.

In Washington we have the rights of initiative and referendum. Our voters have more than once demonstrated a willingness to say 'no' to elected officials who attempted to raise their taxes, both by exercising their power of referendum and by voting them out of office. But who pays for the mistake? If a local government defaults on its financial obligations associated with broadband deployment, will the FCC be there to pay the bill?

State government role

After working with the complex issues associated with advanced telecommunications and broadband for nearly two decades, we continue to believe that state governments have an important role to play. State authority is crucial for general oversight of local authorities as well as, where necessary, for regulation of the deployment, operation and delivery of services by those local governments or special districts that want to enter the broadband business.

Federal preemption will inhibit, if not effectively prohibit, state government actions to insure, for example, that private wireline and wireless providers have access to rights of way, poles, and conduit at reasonable rents, especially those which are owned by public entities that provide broadband services. As well, state government must be able to

enact financial policies to protect ratepayers and taxpayers and that are compatible with that state's constitution, laws, and regulations. Such state authorities, whether currently enacted or proposed, would be threatened under an FCC preemption order.

In summary state legislators and utility commissioners in states across the country have spent hundreds – probably thousands – of hours deliberating the ways best suited to their states to fulfill their responsibilities under Section 706 of the Telecommunications Act of 1996 which states that the FCC and states shall:

> *"encourage the deployment of telecommunications services on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) 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."*

I urge you to continue the FCC's work to *encourage* broadband deployment in a spirit of collaboration with the states. There is work left to be done. But this should not minimize all that has been accomplished in a relatively short time. Nor should our solutions for serving the remaining two percent destabilize state-local relationships across the country and encourage local communities to place at risk the economic and financial futures of their constituents.

We look forward to answering any questions these comments may prompt,

Sincere regards,

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