



ALAN WILSON
ATTORNEY GENERAL

February 4, 2015

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

Dear Chairman Wheeler,

We write to express deep concern regarding President Obama's overreach in seeking FCC preemption of state laws governing South Carolina's political subdivision's ability to provide broadband services. This proposal has no basis, either expressed or implied, in federal statutory law. It is, moreover, most likely unconstitutional as an infringement upon the State's police powers, reserved under the Tenth Amendment of the United States Constitution.

The proposal's lack of respect for states' rights is especially disturbing. The intrusion of the FCC into State economic affairs and into its legal structure governing political subdivisions, without any authorization by Congress, intrudes upon our system of Federalism. As our Founding Fathers in authoring our Constitution realized, the State is much closer to its citizens and can serve the people far better than can any federal bureaucracy.

It is well established that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" the "usual constitutional balance of federal and state powers." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985)). Congressional purpose is the touchstone in every preemption case. Wyeth v. Levine, 555 U.S. 555, 565 (2005). Thus an agency, such as the FCC, must clearly identify congressional authorization before any preemption can occur. Here, there is no such congressional authority, either expressed or even implied, to preempt state laws regulating their political subdivisions in the provision of broadband services. In this instance, South Carolina has enacted carefully crafted statutes, codified at S.C. Code Ann. §58-9-2620, which allow political subdivisions to provide these services, but to do so on a level playing field with private enterprise. For these provisions to be swept aside by the action of a federal agency, lacking any congressional authority to do so, is untenable and unwarranted.



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Further, such action by the FCC would likely violate the Tenth Amendment. In Nixon v. Missouri Municipal League, 541 U.S. 125 (2004), the United States Supreme Court concluded that a provision of the Telecommunications Act did not preempt the State's statutes prohibiting political subdivisions from providing telecommunications services. In Nixon, the FCC had been petitioned for an order of preemption of state statutes barring such services. However, the Court not only concluded that there was no preemption authorized, but in doing so, it warned of serious Tenth Amendment concerns. The Supreme Court noted that "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism..." 541 U.S. at 140.

In South Carolina, it is longstanding and well-established law that "[c]ities, towns, and counties... are at all times subject to legislative control..." Walker v. Bennett, 125 S.C. 389, 118 S.E. 2nd 779, 781 (1923). Even after Home Rule in South Carolina, the General Assembly may, by general law, regulate its political subdivisions. See, Hosp. Assn. of South Carolina v. County of Charleston, 320 S.C. 219, 464 S.E. 2nd 113 (1995). It is part of the state's self-governance to permit political subdivisions to perform certain acts. Thus, consistent with Nixon, any action by the FCC purporting to preempt state law with respect to the provision of broadband services by South Carolina political subdivisions would violate the Tenth Amendment. This interference would constitute an intrusion of those powers reserved to the State to govern itself.

We thus strongly urge you to reconsider this proposed action. We ask the FCC to honor the Constitution and to respect the State in carrying out those functions which the Constitution has reserved to it.

Sincerely,



Alan Wilson

CC: Commissioner Mignon Clyburn, FCC
Commissioner Jessica Rosenworcel, FCC
Commissioner Ajit Pai, FCC
Commissioner Michael O'Rielly, FCC
Chairman John Thune, Senate Committee on Commerce, Science, and Transportation
Chairman Roger Wicker, Senate Subcommittee on Communications, Technology, and the Internet
Chairman Fred Upton, House Committee on Energy and Commerce
Chairman Greg Walden, House Subcommittee on Communications and Technology
Senator Lindsey Graham
Senator Tim Scott
Representative Mark Sanford
Representative Joe Wilson
Representative Jeff Duncan
Representative Trey Gowdy
Representative James Clyburn
Representative Tom Rice