

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	}	
	}	
Electric Power Board and	}	
City of Wilson Petitions Pursuant to Section 706	}	WCB Docket Nos. 14-115
of the Telecommunications Act of 1996,	}	and 14-116
Seeking Preemption of State Laws Restricting the	}	
Deployment of Certain Broadband Networks	}	
_____	}	

**COMMENTS OF  
AMERICAN COMMITMENT<sup>1</sup>**

While we strongly oppose municipalities getting into the broadband business, the decision before the Commission need not even assess the merits of that issue. It is a simple question, rather, of whether the Federal Communications Commission, a federal agency, has the legal or constitutional authority to deny state and local elected officials of the authority to decide this issue in the interests of their constituents.

*Nixon v. Missouri Municipal League* (2004) lays out the standard for Commission jurisdiction to preempt state laws. Because the Commission would “interpose[e] federal authority between a State and its municipal subdivisions” and alter “a State’s distribution of its own power,” the Commission needs express statutory authority from Congress. The proposed preemption of restrictions on municipal broadband clearly fails this standard. Section 706 makes no mention of preemption.

Moreover, pre-emption language was included in section parallel to what would become Section 706 an earlier Senate-passed version of the Act: “If the Commission’s determination is negative, it shall take immediate action under this section, and it may preempt State commissions that fail to act to ensure such availability.”<sup>2</sup>

That language was removed in the final, enacted legislation.

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<sup>11</sup> Comments prepared by Phil Kerpen on behalf of American Commitment. American Commitment engages in critical public policy fights over the size and intrusiveness of government through direct advocacy, strategic policy analysis, and grassroots mobilization. Working with key partners, American Commitment delivers timely, effective public policy research to the broader free-market movement.

<sup>2</sup> 104<sup>th</sup> Congress, First Session, S. 652. <https://beta.congress.gov/104/bills/s652/BILLS-104s652es.pdf>

It is a well-established canon of statutory construction that a provision removed from a draft of legislation before final passage was removed intentionally. In *INS v. Cardoza-Fonseca* (1987), Justice John Paul Stevens wrote: “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.”

Moreover, even if the courts allowed an overly broad reading of the Section 706 to include a preemption power, the stated purpose of “promot[ing] competition in the local telecommunications market” would not, based on the clear historical record of municipal broadband, be achieved by preempting the specific state laws in question.

There is a long and nearly unbroken record of municipal broadband systems failing at enormous expense to taxpayers. Indeed, it was precisely this record of failure that motivated the North Carolina General Assembly to adopt the current law as a taxpayer protection measure.

One of the stated purposes of the legislation was: “Whereas, to protect jobs and to promote investment, it is necessary to ensure that the State does not indirectly subsidize competition with private industry through actions by cities and to ensure that where there is competition between the private sector and the State, directly or through its subdivisions, it exists under a framework that does not discourage private investment and job creation.”<sup>3</sup>

A summary of the disastrous performance of North Carolina municipal broadband systems prior to the enactment of this measure was included in a report on the broader record of municipal broadband failure by Widener University Professor Joseph P. Fuhr, Jr. for the Coalition for the New Economy. Based on contemporaneous newspaper accounts, Fuhr explained the context in which North Carolina enacted its law:

“[Government-Owned Networks, or] GONs serving five cities in North Carolina – Wilson, Salisbury, Morganton, Davidson and Mooresville – had a combined 43,000 household subscribers and debt of \$148 million. This is a debt of more than \$3,000 per subscriber

“In 2007, the cities of Mooresville and Davidson took over the former Adelpia Communications cable company, preempting a private offer from Time Warner Communications. The GON that resulted, MI-Connection, was shared by both towns, which agreed that their financial interest would be based on the system’s subscribership percentage. As of July 28, 2011, Davidson had 35.21 percent subscribership, and Mooresville 64.79 percent, with Davidson’s share increasing by two percentage points since June 30, 2010.

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<sup>3</sup> General Assembly of North Carolina, Session 2011, Session Law 2011-84, House Bill 129. <http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H129v7.pdf>

“Local officials believed that MI-Connection was nearly a risk-free investment. Leamon Brice, Davidson’s town manager, declared in 2007, “The potential growth of customers, and therefore profits, is astronomical.” However, four years later the system has yet to turn a profit. Gross revenues increased by just three percent in the fiscal year ending June 30, 2010 - when they were projected to increase by 20 percent. Losses for the same period were \$5.7 million. As a result, for a second year in a row MI-Connection has received a warning letter from state officials concerning its financial conditions and outlook.

“MI-Connection’s debt is \$89.9 million. Davidson’s 2011-2012 debt payment is \$1.94 million, about 21 percent of the town’s budget. Some local critics of the system have suggested that residents should not subscribe so the city will have a lower percentage of the ownership and thus less debt. In 2011, Davidson has 44 percent of the penetration rate whereas Mooresville only 34 percent. The chairman of MI-Connection, John Venzon, took note of the program’s unintended consequences, remarking that the more successful the program, the bigger portion of the debt a participating town carries.”<sup>4</sup>

It would be inconsistent with the purpose and structure of Section 706 to preempt a state law borne out of such an experience.

Moreover, Congress has not granted the commission such a preemption power, and therefore attempting to disrupt the balance between state and local governments on this issue would not only be ill-advised, but very likely illegal as well. We urge you, therefore, to reject the Electric Power Board and City of Wilson Petitions.

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<sup>4</sup> Joseph P. Fuhr Jr., “The Hidden Problems with Government-Owned Networks,” 2012, *Coalition for the New American Future*. <http://www.coalitionfortheneweconomy.org/wp-content/uploads/2012/01/1-6-12-Coalition-for-a-New-Economy-White-Paper.pdf>