

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters of)	
)	
Petition of the City of Wilson, North Carolina)	WCB Docket No. 14-115
for Preemption of North Carolina)	
General Statutes § 160A-340 <i>et seq</i>)	
)	
and		
Petition of Electric Power Board of)	
Chattanooga, Tennessee for Preemption of a)	WCB Docket No. 14-116
Portion of Section 7-53-601 of the)	
Tennessee Code Annotated)	

COMMENTS OF CENTURYLINK

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COMMENTS OF CENTURYLINK

CenturyLink files these comments in response to the Commission’s July 28, 2014 Public Notice¹ inviting comments on the Petitions for Preemption filed by the Electric Power Board of Chattanooga, Tennessee (“EPB”) and the City of Wilson, North Carolina (“City of Wilson”) of state municipal entry laws in Tennessee and North Carolina, respectively.²

¹ *In re: Pleading Cycle Established for Comments on 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, Public Notice, DA 14-1072 (rel. July 28, 2014) (“Public Notice”).

² *See* Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition filed by the Electric Power Board of Chattanooga, Tennessee on July 24, 2014 (“EPB Petition”) and Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition filed by the City of Wilson on July 24, 2014 (“Wilson Petition”) (collectively, “Petitions”). EPB seeks to have portions of Tenn. Code Ann. § 7-52-601 preempted and the City of Wilson seeks to have N.C.G.S. §160A-340 *et seq.* preempted.

I. INTRODUCTION AND SUMMARY

EPB and the City of Wilson both presently operate broadband networks in some or all of their respective territories, but as a result of state municipal entry laws, they assert they cannot expand into new areas outside their territories where they desire to offer broadband service.³ As such, EPB and the City of Wilson contend that the Tennessee and North Carolina municipal entry laws are “impermissible barrier[s] to broadband deployment and competition”⁴ and request the Commission to take the extraordinary and unprecedented step of preempting the Tennessee and North Carolina laws and declaring them to be unenforceable.⁵

CenturyLink shares the objective articulated by the Commission – and as set forth by Congress – of ensuring “that residents in all parts of the country, including rural and high-cost areas, have access to advanced telecommunications and information services.”⁶ CenturyLink has invested billions in the critical infrastructure needed to bring advanced services to consumers across the country. From an economic development, education, healthcare and public safety standpoint, fiber-based broadband is certainly in the best interest of the nation. CenturyLink

³ EPB Petition at 2, Wilson Petition at 27. The City of Wilson also argues that the North Carolina law effectively prohibits other communities in North Carolina from investing in broadband infrastructure and providing competitive services within their respective communities because of the law’s requirements applying to new systems. Wilson Petition at 27. The law, however, explicitly exempts the City of Wilson from these requirements for services provided by it in Wilson County, North Carolina. N.C. Gen. Stat. § 160A-340.2(c)(3)c. Thus, it is questionable on what basis and what standing the City of Wilson has to raise such claims related to other communities.

⁴ Wilson Petition at 2.

⁵ EPB Petition at 3, Wilson Petition at 3.

⁶ *Connect America Fund et al.*, Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90 *et al.*, FCC 14-54, at ¶ 138 (rel. June 10, 2014) (citing 47 U.S.C. § 254(b)) (“*CAF II Omnibus*”).

appreciates and supports the Commission's interests in promoting rapid broadband deployment and bringing service to unserved and underserved areas for the benefit of all Americans.

However, the state municipal entry laws addressed in the Petitions constitute legitimate exercises of state power over state instrumentalities and intervention by the Commission via preemption would be bad policy. There are considerable risks entailed with municipal broadband entry and the record is rife with examples of past municipal entry failures. It is also questionable whether municipal entry contributes to broadband deployment and competition in any meaningful way. Moreover, municipal entry can have a chilling effect on competition because of preferences and other benefits municipalities can confer upon themselves which render private investment uneconomic as a result of a skewed competitive playing field.⁷ Given these concerns, states, not the Commission, are the best arbiters of the wisdom of municipal entry and are the best stewards of the potential financial consequences to their citizens should such ventures fail.

In addition to the fact that the requested preemption is a bad idea from a policy standpoint, it is also unlawful. "Regardless of how serious the problem an administrative agency seeks to address. . . . it may not exercise its authority in a manner that is inconsistent with the

⁷ These advantages can include, but are not limited to, public financing, cross-subsidization, and favorable rights-of-way access. *See, e.g.,* Lawrence J. Spiwak, *FCC Has No Authority to Preempt Municipal Broadband Laws*, Bloomberg Law, Aug. 6, 2014 at 1 (available at <http://www.bna.com/fcc-no-authority-n17179893367/> (visited Aug. 27, 2014)). The preamble to the North Carolina municipal entry legislation recognizes how these benefits can discourage competition from private entities: "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." *See*, H.B. 129, 2011 Gen. Assembly, Reg. Session. (N.C. 2011).

administrative structure that Congress enacted into law.”⁸ Thus, the Petitions demand that the Commission have a legally sustainable basis to preempt these laws and substitute its judgment for that of the states over the states’ own instrumentalities. This is a matter of state sovereignty: “[T]he relationship between a State and its municipalities, including what limits a State places on the powers it delegates, has been described as within the State’s ‘absolute discretion.’”⁹ “Federal law, in short, may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion.”¹⁰ The EPB and the City of Wilson argue that Section 706 compels this intrusion, and that past Supreme Court precedent on the preemptive reach of the Telecommunications Act of 1996 specific to municipal entry is somehow inapplicable. However, with respect to Section 706, “there is no there there” and the Petitioners’ legal arguments fall flat. The plain language of Section 706 demonstrates that it cannot be reasonably interpreted to provide the Commission authority to preempt state municipal entry laws. Moreover, examining preemption in other sections of the Telecommunications Act of 1996 only reinforces Section 706’s infirmities. This conclusion also comports with the Supreme Court’s decision in *Nixon v. Missouri Municipal League*,¹¹ which is particularly instructive here for its preemption analysis concerning the unique role of municipalities as service providers: “federal legislation threatening to trench on the States’ arrangements for conducting their own

⁸ *Verizon Corp. v. Federal Communications Commission*, 740 F.3d 623, 634 (D.C. Cir. 2014) (citing *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (internal quotation marks omitted)).

⁹ *City of Abilene v. Federal Communications Commission*, 164 F.3d 49, 51 (D.C. Cir. 1999).

¹⁰ *City of Abilene*, 164 F.3d at 51 (citations omitted).

¹¹ *Nixon v. Missouri Municipal League*, 541 U.S. 124 (2004).

governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power...."¹²

For all these reasons, the Petitions must be denied.

II. THE TENNESSEE AND NORTH CAROLINA LAWS ARE REASONABLE AND VALID EXERCISES OF EACH STATE'S RESPECTIVE POWER AND INTERVENTION BY THE COMMISSION WOULD BE BAD POLICY

The Petitioners spend considerable time in their respective Petitions lauding the merits of their services and the public benefits that would be realized if they were each permitted to ignore the wills of their respective state legislatures and expand unfettered beyond their communities. However, in addition to the legal deficiencies in the Petitions, discussed below, the requested intervention via preemption by the Commission would be bad policy. Municipal entry is a contested issue that implicates social, economic and fiscal considerations as well as the proper role of government in private markets. Because of these wide-ranging implications, it is not only proper but appropriate for the states to define the role their respective municipalities play in this arena.

A. There Are Risks Associated With Municipal Entry

Failures by municipal broadband networks are well-documented and serve as cautionary tales to the states whose instrumentalities may wish to enter the market.¹³

¹² *Nixon*, 541 U.S. at 140.

¹³ See e.g., Thomas Schatz and Royce Van Tassell, *Municipal Broadband in No Utopia*, The Wall Street Journal (June 19, 2014) available at <http://online.wsj.com/articles/municipal-broadband-is-no-utopia-1403220660> (outlining how participating Utah municipalities are \$355 million in debt and considering costly bailout plans which would impose substantial costs on citizens); Lawrence J. Charles M. Davidson and Michael J. Santorelli, *Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers*, The Advanced Communications Law & Policy Institute: New York Law School (2014) at 80 (describing failure of the Groton, Connecticut municipal network and its sale to private investors for a loss of over \$30 million, of which the city and its taxpayers remain

[Government-owned networks] are expensive undertakings, costing anywhere from a few million dollars, as in Groton, to several hundreds of millions of dollars, as in Chattanooga, to nearly half a billion dollars in UTOPIA. In some cases where a network faltered (e.g., Monticello) local government stepped in with funding support to help steady the municipal system. Other failed and failing systems (e.g., Burlington) negatively impacted local credit ratings, which increase borrowing costs and strain local finances even more. As these systems become more complex and ambitious, the costs associated with building and maintaining them rise inexorably, which raises the risk of costly – and potentially devastating – default by local government.¹⁴

“[U]nlike the private sector, when a municipal network goes bust, it is the captive taxpayer or electric ratepayer, not the willing shareholder, who bears the brunt.”¹⁵ One North Carolina municipality grandfathered under the law challenged here by the City of Wilson risks junk bond status due to a failed municipal entry venture.¹⁶

responsible for repaying \$27 million) (citations omitted); *id.*, at 83 (describing sale of municipal broadband network in Provo, Utah to Google for \$1, leaving city responsible for paying off \$40 million in debt over the next 12 years) (citations omitted).

¹⁴ Charles M. Davidson and Michael J. Santorelli, *Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers*, The Advanced Communications Law & Policy Institute: New York Law School (2014) at 105.

¹⁵ Lawrence J. Spiwak, *FCC Has No Authority to Preempt Municipal Broadband Laws*, Bloomberg Law, Aug. 6, 2014 at 1 (available at <http://www.bna.com/fcc-no-authority-n17179893367/> (visited Aug. 27, 2014)).

¹⁶ <http://rowanfreepress.com/2014/08/14/why-fibrant-will-continue-to-fail-and-fail-badly-why-salisbury-needs-to-find-a-way-to-unload-fibrant-to-survive/> (visited Aug. 27, 2014) (describing the City of Salisbury, N.C. as a “financial wreck” with little future over the next 7 to 10 years due to their municipally-owned broadband network and poor leadership: “Moody’s sagely downgraded the City of Salisbury’s Bond Rating due to Fibrant gorging themselves to the tune of 7.6 million dollars on the city’s water and sewer funds. To date Fibrant has only paid back 1% interest on the certificates of participation and drew a warning from Moody’s that if the Salisbury did not pay back that 7.6 million dollar debt to the water and sewer funds, Salisbury would transform to junk-bond status at the next Moody’s Review. Junk Bond status is a lock for Salisbury which will have a further devastating affect [sic] on the city and its ability to borrow.”).

The risks of municipal entry have also been recognized by the Commission itself in the National Broadband Plan. “Municipal broadband has risks. Municipally financed service may discourage investment by private companies.”¹⁷ States have the power and the obligation to manage these risks in the manner they see fit to protect their citizenry.

B. It Is Also Questionable Whether Municipal Broadband Contributes to Broadband Deployment and Competition

It is also questionable, to say the least, as to whether municipal broadband contributes to broadband deployment and contribution in any meaningful way. Justice Stevens, in his *Nixon* dissent, aptly described the debate surrounding municipal entry into the telecommunications market in light of the new pro-competitive regime established by the Telecommunications Act of 1996:

Reasonable minds have differed as to whether municipalities’ participation in telecommunications markets serves or disservices the statute’s procompetitive goals. On the one hand, some have argued that municipally owned utilities enjoy unfair competitive advantages that will deter entry by private firms and impair the normal development of healthy, competitive markets.

On the other hand, members of the [FCC] have taken the view that municipal entry would further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential.¹⁸

Despite Petitioners’ lofty aspirations about planned expansion, it is impossible to know how meaningfully they and other municipalities will contribute to universal broadband deployment. Because of the significant hurdles associated with serving those areas that remain unserved, it is reasonable to expect that substantial overbuilding of existing networks will

¹⁷ National Broadband Plan at 153.

¹⁸ *Nixon*, 541 U.S. at 142 (Stevens’ dissent, citations omitted). Interestingly, similar to Chairman Wheeler’s recent statement advocating as with the Section 253 preemption case, FCC commissioners participated in the *Nixon* case in favor of preemption. *Id.*, at 142 n.2.

continue because served or even underserved areas are less expensive. Overbuilding does not remedy the most compelling deficiency in deployment to date, which is to bring service to those areas that are truly unserved. Indeed, based on NTIA data, the City of Wilson provides service to just over 68% of Wilson County, leaving just under 32% unserved by it. Of those, only 2% are unserved by any carrier.¹⁹ Further, a comparison of U.S. Census block data from NTIA shows that all Census blocks served by the City of Wilson are also served by at least one other provider. In fact, only five (5) Census blocks served by the City of Wilson are not served by two major providers.²⁰ Moreover, as was also recognized in the *Nixon* decision, “[i]t does not follow that preempting state or local barriers to governmental entry into the market would be an effective way to draw municipalities into the business...”²¹ making even more tenuous Petitioners’ attempted linkage between preemption and meaningful broadband deployment.

C. It Is Reasonable For States to Take Steps to Mitigate Risk

In light of the concerns detailed above, it is reasonable for states to take steps to mitigate risks in this area and intervention by the Commission in the valid exercise of state power by North Carolina and Tennessee would be bad policy. Municipal entry laws “represent duly considered interventions by state-level policy makers interested in protecting citizens from

¹⁹ <http://www.broadbandmap.gov/about-provider/city-of-wilson/serving-wilson-county-in-north-carolina/> (visited Aug. 26, 2014).

²⁰ CenturyLink used data from the National Broadband Map available at <http://www.broadbandmap.gov/data-download> as well as U.S. Census block data available at <ftp://ftp2.census.gov/geo/tiger/TIGER2010BLKPOPHU/> to reach this conclusion.

²¹ EPB Petition at 2 and n.4: “Under current Tennessee law, Tennessee municipal electric systems, including EPB are authorized to provide telecommunications services anywhere in the state.” However, of the 61 municipal electric systems in Tennessee, only nine – or less than 15% -- currently provide telecommunications and advanced telecommunications services.

waste, fraud, and abuse of public funds.”²² “States, which maintain ultimate responsibility for the financial health of the cities and towns in their borders, have strong interests in overseeing the process by which [government-owned network] proposals are vetted and approved.”²³

Municipal entry laws are the product of the considered judgment of the State legislatures that passed them, whom the citizens of the State elected to represent and protect their interests.

“Without any doubt, state governments across the country understand more and are more attentive to the needs of the American people than unelected federal bureaucrats in Washington, D.C.”²⁴ These types of policy considerations were precisely the issues considered by the North Carolina General Assembly in passing the North Carolina at issue.²⁵

If the States were preempted from mitigating these risks, would there be anyone to protect taxpayers from the potential for failure? This question was one of several recently posed

²² Charles M. Davidson and Michael J. Santorelli, *Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers*, The Advanced Communications Law & Policy Institute: New York Law School (2014) at 106 (citations omitted).

²³ *Id.*, at xiv.

²⁴ See Letter from The Honorable Marsha Blackburn *et al.* to The Honorable Tom Wheeler dated June 12, 2014 (available at <http://apps.fcc.gov/ecfs/document/view?id=7521752102> (visited Aug. 27, 2014)).

²⁵ See H.B. 129, 2011 Gen. Assembly, Reg. Session. (N.C. 2011), where the challenged North Carolina municipal entry legislation opens with this statement of purpose: “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.”

to Chairman Wheeler by a delegation of Congressmen concerned about his position to preempt municipal entry laws,²⁶ and his response was very telling:

8. Will the FCC or the federal government bailout states or municipalities of their muni broadband projects fail? How much does the FCC estimate such bailouts would cost taxpayers?

Response: Some community broadband initiatives have been less successful than hoped, while others have been very successful. *I expect that communities will decide for themselves the appropriate type and level of financial risk to take on in light of their needs in the normal course of local self-governance.*²⁷

Even Chairman Wheeler – a vocal champion of this preemption movement – points directly to the appropriateness of a local solution to manage financial risk. Fortunately we already have a local solution – the municipal entry laws that have been passed by the States. Those laws must be preserved.

III. PREEMPTION IN THIS CONTEXT WOULD ALSO BE UNLAWFUL

In addition to being bad policy, the preemption requested in the Petitions would be unlawful. Modern preemption doctrine includes three general types of preemption: express preemption, where Congress expressly states in the text of a statute its intention to displace state authority; field preemption, where preemptive Congressional intent is inferred from comprehensive federal regulation leaving no room for supplementary regulation from the States; and conflict preemption, where there is an actual conflict between State and federal law.²⁸

²⁶ See Letter from The Honorable Marsha Blackburn *et al.* to The Honorable Tom Wheeler dated June 12, 2014 (available at <http://apps.fcc.gov/ecfs/document/view?id=7521752102> (visited Aug. 27, 2014)).

²⁷ See Letter from The Honorable Tom Wheeler to The Honorable Marsha Blackburn dated July 22, 2014 at 4 (available at <http://apps.fcc.gov/ecfs/document/view?id=7521752102> (visited Aug. 27, 2014)).

²⁸ See *e.g.*, <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Gardbaum.pdf> visited Aug. 25, 2014.

Petitioners are relying on an express preemption legal argument, asserting that the Commission has “clear and explicit authority under Section 706” to carry out the Congressional objective of advancing the widespread availability of broadband capabilities in a reasonable and timely manner.²⁹ Petitioners have failed to make a legal argument that there is implied preemption, which would have required a showing of how federal law occupies the field of broadband deployment leaving no room for supplemental State regulation, or how compliance with both the State and federal laws is impossible or an obstacle to a federal purpose.³⁰ However, regardless of Petitioners’ specific legal theory of preemption, the intent of Congress is critical to determine whether there is a basis on which to supersede historic police powers of the State.

A. Section 706 Provides No Legal Basis for Preemption

In a traditional preemption analysis, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” Further, “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated ... in a field which the States have traditionally occupied,’ ... we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”³¹ The Supreme Court requires that “[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear* in the language of the statute.”³² These are the applicable standards by which to analyze Section 706,

²⁹ EPB Petition at 4.

³⁰ Given the recognized chilling effect municipal entry can have on private investment, it is at best highly questionable whether such entry would, on net, result in increased competition in the marketplace in furtherance of Section 706.

³¹ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

³² *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

as the Petitioners assert this section supplants States' authority over their instrumentalities. The plain language of Section 706, however, utterly fails to provide the requisite clarity.

1. Section 706 contains no grant of Commission authority.

To begin with, Sections 706(a) and 706(b) clearly do not confer independent authority to regulate. Section 706(a) contains no grant of independent regulatory authority of any kind. It directs the FCC to take action “by utilizing ... price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”³³ In other words, it directs the Commission to utilize its existing authority found in other statutory grants of authority to pursue certain policies. Indeed, based on this text, the Commission, in 1998 concluded that “section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods,” but rather “directs the Commission to use the authority granted in other provisions.”³⁴ The Commission, in its *2010 Open Internet Order* sought to disavow this reading. But, its prior interpretation is correct. And, CenturyLink respectfully disagrees with these assertions and with the conclusions of the D.C. Circuit in *Verizon* that Section 706 contains any independent grant of authority that can support adoption of affirmative regulatory obligations. Similarly, Section 706(b) does not grant the FCC independent authority to regulate. That provision authorizes the FCC to act only “by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”³⁵

³³ 47 U.S.C. § 1302(a).

³⁴ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044 (1998) (*Advanced Services Order*).

³⁵ 47 U.S.C. § 1302(b).

2. Neither the Plain Language Nor the Structure of Section 706 Supports Preemption

Even assuming Section 706 conveyed legal authority to the Commission to regulate, neither the plain language nor the structure of Section 706 supports preemption. Section 706 reads as follows:

- (a) In general. The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment 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.³⁶
- (b) Inquiry. The Commission shall, within 30 months after the date of enactment of this Act, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.³⁷

No form of the word “preemption” appears in either provision. Neither provision references state statutes, state laws, or state government. There is no reservation of certain powers to the States. Simply put, there is no there there. Silence cannot substitute for the “unmistakably

³⁶ 47 U.S.C. § 1302(a). The statute defines “advanced telecommunications capability” to include “broadband telecommunications capability.” *Id.* § 1302(d)(1).

³⁷ 47 U.S.C. § 1302(b).

clear” expression of intent by Congress required by the Supreme Court to displace traditional state authority.

Indeed, other sections of the Telecommunications Act of 1996 demonstrate that Congress knows quite well how to make its intent clear regarding federal preemption of state law. In stark contrast to Section 706, consider the examples of Sections 253 and 332(c)(3). Section 253 addresses preemption of state laws prohibiting provision of telecommunications service:

- (a) IN GENERAL. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service.
- (b) STATE REGULATORY AUTHORITY. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
- (c) STATE AND LOCAL GOVERNMENT AUTHORITY. Nothing in this section affects the authority of a State or local government to manage the public rights-of- way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
- (d) PREEMPTION. If, after notice and opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation or legal requirement that violates subsection (a) or (b) of this section, *the Commission shall preempt the enforcement of such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency.*³⁸

Similarly, Section 332(c)(3) discusses preemption of state laws concerning the rates and market entry of commercial mobile radio service providers:

³⁸ 47 U.S.C. § 253 (emphasis added).

- (3) STATE PREEMPTION. (A) Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates....³⁹

In Sections 253 and 332(c)(3), Congress’s intent to preempt state law is explicit and unmistakably clear. In each case, there is a provision titled “Preemption.” In each case, state and local governments are divested of certain authority. And in each case, Congress included a reservation of State rights to delineate the scope of federal versus state authority.⁴⁰ When comparing the language in these sections to Section 706, it is apparent that Section 706 cannot be reasonably construed on its face to preempt state municipal entry laws.

3. Petitioners’ Arguments Regarding Section 706’s Preemptive Reach Fail

Petitioners, however, are undeterred by the plain language of Section 706 and attempt to overcome its deficiencies by arguing that there are three ways Congress expressed its intent in Section 706 to supersede state action (other than using any form of the word “preemption”). Petitioners assert that Section 706(a)’s broad language permitting the FCC to use “other regulating methods that remove barriers to infrastructure investment” clearly expresses

³⁹ 47 U.S.C. § 332(c)(3).

⁴⁰ For example, in Section 253 Congress reserved State authority over universal service, consumer protection, and public rights-of-way management. In Section 332(c)(3), Congress again reserved State authority over universal service.

Congress's intent that federal regulation supersede any contrary regulation.⁴¹ But Section 706(a) does not elevate the FCC over the States; rather, Section 706(a) puts the States on equal footing with the FCC for encouraging broadband deployment and removing barriers.⁴² Without a Congressional expression of intent for federal supremacy, there can be no preemption.

Petitioners' second argument is that Section 706(b) constitutes an independent grant of authority compelling the FCC to take immediate steps to fulfill Congress's broadband deployment objectives, with the statute's use of the term "immediate" bolstering the case for preemption.⁴³ But, there is no other source of authority in the Act evincing Congressional intent for the Commission to preempt state law over municipalities' provision of service.

Even assuming that Section 706 were to be construed as a grant of independent Commission regulatory authority, and further assuming that such authority included preemption, the relief requested by the Petitioners is still out-of-bounds. At most, any authority in Section 706 must be read in conjunction with other provisions of the Communications Act.⁴⁴ This includes Section 253. Despite clear intent there to preempt state and local laws prohibiting private entities from entering the telecommunications market, the Supreme Court determined this expression of intent was not clear enough to extend to municipalities given the heightened state sovereignty issues involved.⁴⁵ It is not reasonable to construe the general statements in Section 706 about removing barriers to infrastructure investment as being the "unmistakably clear"

⁴¹ EPB Petition at 41.

⁴² Section 706(a) begins "The Commission *and each State commission with regulatory jurisdiction over telecommunications services shall...*" (emphasis added).

⁴³ EPB Petition at 41-42.

⁴⁴ *See Verizon*, 740 F.3d 623, 640.

⁴⁵ *Nixon*, 541 U.S. at 143.

expression of Congressional intent required to preempt State law over municipalities, when Section 253 failed to meet that standard.

The third argument Petitioners make to support Congressional intent to preempt state municipal entry laws by Section 706 comes from the House Conference Report accompanying the Telecommunications Act of 1996.⁴⁶ That report states “[t]he [FCC] may preempt State commissions if they fail to act to ensure reasonable and timely access,”⁴⁷ but it is insufficient to constitute the “unmistakably clear” standard. First, this report lacks the force of law. Second, the scope of the preemption set forth in the report is too narrow to support Petitioners’ requested relief. The report references preemption of only “state commissions” and is devoid of any language concerning intent to preempt state laws, state statutes, or other instrumentalities of state government besides commissions. Given the presence of this type of language in other provisions such as Section 253 and 332(c)(3), Congress presumably would have said so in Section 706 (or at a minimum in the House Conference Report) if it intended to grant the FCC that type of sweeping authority to displace the States. Petitioners again fall short of meeting the “unmistakably clear” standard required by the Supreme Court to justify their requested relief.⁴⁸

⁴⁶EPB Petition at 42.

⁴⁷H.R. Conf. Rep. No. 104-458, 104th Cong, 2d Sess., at 210.

⁴⁸ Petitioners also make much of Senator Lott’s statement during a 1994 hearing where testimony was offered about the Electric Power Board of Glasgow, Kentucky’s high-speed network. EPB Petition at 5-6. As set forth in the EPB Petition, after hearing the testimony, Senator Lott stated “I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it important that we make sure we have got the right language to accomplish what we wish accomplished here.” Neither Section 706, nor the North Carolina or Tennessee municipal entry laws at issue, prohibits EPB or the City of Wilson from operating a municipal network in their respective communities, just as the Electric Power Board of Glasgow, Kentucky was doing in 1994.

B. The Supreme Court’s *Nixon* and *Gregory* Decisions are Instructive and Petitioners’ Attempt to Distinguish Them is Without Merit

The Petitioners’ blithely assert that neither of the Supreme Court’s decisions in *Nixon* nor *Gregory* affects the Commission’s authority to preempt state municipal entry laws in North Carolina and Tennessee for two primary reasons: the language and goals of Section 253 differ from Section 706; and the preemption Petitioners’ seek would not usurp any traditional or fundamental State powers.⁴⁹ As discussed below, while the language and goals of Section 253 and Section 706 may differ from each other, those differences are not material and reinforce, rather than negate, the import of these cases. Additionally, contrary to Petitioners’ position, it is hard to imagine any power more traditional or fundamental to a State than the power it exercises over its instrumentalities.

1. The Differences Between Sections 253 and 706 Reinforce, Rather Than Negate, *Nixon*’s Applicability

In *Nixon*, the Supreme Court addressed the preemptive effect of Section 253, which provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁵⁰ A Missouri law barred state political subdivisions from providing or offering telecommunications service and Missouri municipalities petitioned the FCC for preemption. At issue was whether the phrase “any entity” included state political subdivisions along with private entities. The FCC and ultimately the Supreme Court found that “the class of entities contemplated by Section 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’)

⁴⁹ See generally, EPB Petition at 44-54.

⁵⁰ 47 U.S.C. § 253(a).

delivery of telecommunications services.”⁵¹ The unique nature of municipalities was central to the Court’s analysis.⁵² Notwithstanding comprehensive and explicit preemption language in Section 253, combined with the over-arching goals of the Telecommunications Act of 1996 to open markets to competition, when the Court considered some hypotheticals to see how the statute would work under preemption, the Court concluded that “strange and indeterminate results” would come from “using federal preemption to free public entities from state or local limitations.”⁵³ The Court found that Section 253(a) “is not limited to one reading, and that neither the statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms.”⁵⁴ The absence of any “unmistakably clear” statement to that effect was fatal to the municipalities.⁵⁵

Petitioners argue that *Nixon* is inapplicable here for a variety of reasons. They note that Section 253 addresses telecommunications services, not the broadband services at issue here. Similarly, Petitioners also assert that the broadband deployment goals of Section 706 are somehow more urgent than the landmark, market-opening goals of Section 253 and thereby justify preemption.⁵⁶ Further, because Section 253 requires the FCC to wait until a petition for preemption is filed, and thus according to Petitioners is reactive rather than proactive, Petitioners’ construe the scope of preemption in Section 253 to be different and narrower than

⁵¹ *Nixon*, 541 U.S. at 128 (2004).

⁵² *Id.*, at 143.

⁵³ *Id.*, at 132.

⁵⁴ *Id.*, at 140.

⁵⁵ *Id.*, at 141.

⁵⁶ “[E]nabling municipalities to compete with providers of telecommunications services would have been desirable, but it was not essential or urgent national priority.” EPB Petition at 47.

the preemption Petitioners are reading into Section 706.⁵⁷ These arguments are of no consequence – neither the type of service at issue nor the goal being furthered changes or overrules the *Nixon* analysis. In addition, the manner in which preemption is conferred has no absolutely bearing on its scope. The scope of preemption is defined by Congress. As discussed below, the same “strange and indeterminate results” stem from municipal provision of either telecommunications or broadband. Although Petitioners attempt to make much of these inconsequential differences between Section 253 and 706, it is what Section 253 and Section 706 have in common that is fatal to Petitioners’ argument: neither contains an unequivocal commitment by Congress to treat governmental telecommunications providers on par with private firms.⁵⁸

2. The *Nixon* Hypotheticals Hold True for Municipal Broadband Service, Further Securing Its Import Here

The *Nixon* Court engaged in some hypothetical examples to determine how preemption would work in the unique context of municipalities.⁵⁹ In the case of preemption involving private entities, preemption leaves that private party “free to do anything it chooses consistent with the prevailing federal law. But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations.”⁶⁰ Petitioners assert that resorting to the *Nixon* hypotheticals would be inappropriate here, and they ignore them

⁵⁷ EPB Petition at 48-49.

⁵⁸ *Nixon*, 541 U.S. at 141.

⁵⁹ *Id.*, at 134 (“preempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that we think it highly unlikely that Congress intended to set off on such uncertain adventures”).

⁶⁰ *Id.*, at 133.

completely.⁶¹ Those hypotheticals are not only useful to analyzing how the preemption the Petitioners seek would work -- both in North Carolina and Tennessee, and nationwide -- but they are also important to highlighting *Nixon*'s significance in the municipal broadband context at issue here.

The *Nixon* court recognized the paradox that even if a state law prohibiting municipal entry were preempted, "in the absence of some further, authorizing legislation [from the State] the municipality would still be powerless to enter the telecommunications business," as the Telecommunications Act of 1996 is not a source of federal authority granting municipalities local power that State law has not.⁶² Further, "preemption would make no difference to anyone if the state regulator were left with control over funding needed for any utility operation and declined to pay for it."⁶³

[W]here would the necessary capital come from? Surely there is no contention that the Telecommunications Act of 1996 by its own force entails a state agency's entitlement to unappropriated funds from the state treasury, or to the exercise of state bonding authority.⁶⁴

In addition to funding challenges, the *Nixon* Court recognized that broad preemption would create an undesirable "national crazy quilt" of municipal market entry varying state-to-state.⁶⁵ While the Court recognized this condition may exist organically based on the free exercise of state and local political choices, it preferred that to an inorganic result driven by federal

⁶¹ EPB Petition at 55-56.

⁶² *Nixon*, 541 U.S. at 135.

⁶³ *Id.*, at 134.

⁶⁴ *Id.*, at 136.

⁶⁵ *Id.*

preemption.⁶⁶ Finally, the Court acknowledged that broad preemption could create the anomalous situation where “a State that once chose to provide broad municipal authority could not reverse course.” Private counterparts could come and go at will but governmental providers could never exit “for the law expressing the government’s decision to get out would be preempted.”⁶⁷ The Nixon court found these “strange and indeterminate results” combined to prevent Section 253 from working like a normal preemptive statute if it applied to a governmental entity.⁶⁸ The Court stated that “it would often accomplish nothing, it would treat States differently depending on the formal structures of their laws authorizing municipalities to function, and it would hold out no promise of national consistency.” Accordingly, the *Nixon* Court found it “farfetched that Congress meant Section 253 to start down such a road in the absence of any clearer signal....”⁶⁹

Strikingly, the same “strange and indeterminate results” occur with respect to the Petitioners’ requested preemption of municipal broadband laws under Section 706. Preemption would not assure broadband market entry by municipalities because, as noted in *Nixon*, that depends on the existence of other authorizing legislation by the State. Even if a favorable statutory scheme exists to permit market entry, funding remains a separate challenge within the purview of the State. The same risk of a “national crazy quilt” exists that would be the product

⁶⁶ *Id.*, at 136 (“We will presumably get a crazy quilt, of course, as a consequence of state and local political choices arrived at in the absence of any preemption under Section 253, but the crazy quilt of this hypothetical would result not from free political choices but from the fortuitous interaction of a federal preemption law with the forms of municipal authorization law.”).

⁶⁷ *Id.*, at 135.

⁶⁸ *Id.*, at 133.

⁶⁹ *Id.*, at 138.

of FCC preemption rather than free political choice by the States, subverting the goal of national uniformity that is preemption's *raison d'être*. And the same anomaly exists with respect to preemption constraining the States from later exiting the market. The undeniable conclusion is that *Nixon* dictates the outcome for municipal broadband preemption as well and the Petitions must be denied.

3. Traditional and Fundamental State Power Encompasses a State's Authority over Its Instrumentalities

In an attempt to escape the inescapable conclusion that *Nixon* applies to the Petitions, along with the “unmistakably clear” standard of Congressional intent the *Nixon* court applied from the *Gregory* decision,⁷⁰ Petitioners' proffer that the instant case does not “involve ‘federal legislation threatening to trench on the States' arrangements for conducting their own governments.’”⁷¹ Petitioners' rely on the *City of Arlington* in support, trying to liken the preemption upheld in that case to the preemption they request here.⁷² Petitioners, however, misconstrue the *City of Arlington* and make assertions contrary to precedent and fundamental governmental principles.

The preemption issues in *City of Arlington* are easily distinguishable from Petitioners' request here. There, Section 332(c)(7)(B)(ii) of the Telecommunications Act of 1996 required state and local governments to act on wireless siting applications “within a reasonable period of time” and the FCC defined presumptively reasonable timeframes. The timeframes were

⁷⁰ [F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires. ... The want of any ‘unmistakably clear statement ... would be fatal.’ *Id.*, at 138.

⁷¹ EPB Petition at 52, citing *Nixon* at 140.

⁷² *City of Arlington v. Federal Communications Commission*, 133 S. Ct. 1863 (2013).

challenged and the Supreme Court upheld the FCC’s determination finding that the Telecommunications Act of 1996 supplanted state authority.⁷³ Importantly, the Act supplanted state authority only on the extremely narrow issue of timeframes for action on siting requests, and Section 332(c)(7) expressly preserved most other traditional state and local zoning authority at that level. Here, the Petitioners’ seek preemption on a much larger scale on an issue at the core of State sovereignty.

“States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”⁷⁴ “[I]nterfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty.”⁷⁵ Municipal subdivisions are created as convenient agencies for such of the governmental powers of the State as may be entrusted to them by the State.⁷⁶ “[T]he relationship between a State and its municipalities, including what limits a State places on the powers it delegates, has been described as within the State’s ‘absolute discretion.’”⁷⁷ This discretion encompasses the powers States delegate to their instrumentalities to engage or not engage in various enterprises – including telecommunications or broadband service provision -- and on what terms and conditions those instrumentalities may do so. As such, the Tennessee and North Carolina municipal entry laws are valid and proper exercises of each State’s authority over its instrumentalities.

⁷³ *City of Arlington*, 133 S. Ct. at 1863.

⁷⁴ *City of Abilene v. Federal Communications Commission*, 164 F.3d 49, 52 (D.C. Cir 1999).

⁷⁵ *Id.*, at 51.

⁷⁶ *Nixon*, 541 U.S. at 140.

⁷⁷ *City of Abilene*, 164 F.3d at 51.

IV. CONCLUSION

For the reasons stated above, the Commission should take the action described herein.

Respectfully submitted,

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