

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Electric Power Board of Chattanooga, Tennessee	)	WCB Docket No. 14-116
	)	
City of Wilson, North Carolina	)	WCB Docket No. 14-115
	)	
Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks.	)	

**COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION**

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## SUMMARY

NTCA members serve rural and high cost areas of the country where the economic case for providing broadband services is challenging. The FCC should be circumspect in its decisions affecting such broadband coverage. Both Petitions in this case acknowledge that their respective state statutes permit municipal provision of broadband services, but they nevertheless ask the FCC to effectively amend the existing governing statutes to allow them to expand their services beyond city limits in a manner that would supersede the respective state laws. The FCC should not grant such requests. While entry into truly unserved areas could arguably present unique circumstances, a municipality's first-time foray into commercial ventures in areas that are *already served* by other operators is unwarranted and unjustified—particularly in rural communities where the “market” once again often barely justifies (or is unable to justify on its own) a single provider.

The FCC has no legal authority to preempt state municipal organization statutes, including the North Carolina and Tennessee statutes in question. The Tenth Amendment to the Constitution preserves to the States all sovereign power not specifically enumerated as powers of the federal government. The power to establish and administer the governance of municipalities within States' jurisdictions is uniquely a state function committed to their “absolute discretion.” Therefore, federal courts will not imply Congress intended to preempt such state laws unless they are “unmistakably clear,” which is also referred to as a *Gregory* “plain statement.”

Although the U.S. Constitution makes the federal commerce clause power supreme, States are free to adopt legislation that affects interstate commerce unless preempted. The ultimate question for consideration in a federal supremacy analysis is “whether Congress

intended that federal regulation supersede state law,” and a conclusion of “no preemption” is presumed.

Nor does Section 706 grant the FCC the power to preempt state municipal organization statutes. First, the text of Section 706 does not include the terms preemption, let alone a “plain statement” required by the Supreme Court. Second, the legislative history not only does not support preemption, but in fact precludes it. There is no reference to state preemption of municipal organization law in that history. Indeed, an earlier version of the statute containing the ability to preempt State *commissions* was amended in its final version to exclude such authority. Third, implying preemption authority from Section 706’s terms “measures” “other regulatory actions” and “action” would be inconsistent with the Communications Act and court interpretation of Section 706, because Section 253 constitutes the considered judgment of Congress in fashioning FCC preemption authority of general state and local laws. Section 253 not only applies solely to laws affecting “telecommunications services” (as opposed to unregulated broadband services), but also is not available to preempt state municipal organization laws under *Nixon v. Missouri Municipal League*.

In addition, there is no “conflict” preemption between Section 706 and state municipal organization laws because these state laws do not “stand as an obstacle” to promoting federal broadband statutes or policies. The State laws in question promote municipal provision of broadband services. Therefore, the Petitions should be denied.

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**COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA–The Rural Broadband Association (“NTCA”) hereby submits these comments with respect to the above-captioned Petitions, which ask the Federal Communications Commission (“FCC” or “Commission”) to preempt state laws governing the provision of broadband services by municipalities in their respective states.<sup>1</sup> The Electric Power Board of Chattanooga (“EPB”) objects to the laws of the State of Tennessee insofar as they restrict the ability of a municipality<sup>2</sup> to provide broadband services outside of the municipal-owned electric

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<sup>1</sup> Public Notice, *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, 14-116, DA 14-1072 (Wir. Comp. Bur., rel. Jul. 28, 2014).

<sup>2</sup> NTCA intends that its use in these comments of the terms “municipality” and “municipal” refer to all political subdivisions of a State and their operating units, but uses those terms for convenience sake.

utilities' service areas.<sup>3</sup> The City of Wilson objects to numerous regulatory provisions and requirements in the laws of the State of North Carolina which govern a municipality's provision of broadband services outside of the city limits.<sup>4</sup> For the reasons stated more fully herein, both Petitions should be denied because (1) State legislatures are more properly suited to evaluate and resolve certain of the difficult policy issues associated with municipal provision of broadband, and (2) the FCC lacks the legal authority to preempt the laws of the States of Tennessee or North Carolina insofar as they govern municipality administration and operation.

## **I. INTRODUCTION**

### **A. NTCA**

NTCA is a national association of more than 900 members. All of NTCA's members are rural incumbent local exchange carriers, many of whom also provide video, wireless and broadband services to their rural communities. Many NTCA members also act as competitive carriers in other rural towns and outlying areas, offering voice, video, broadband, and wireless to consumers and businesses.

### **B. EPB Petition**

In its Petition, EPB states that it has been providing cable TV and broadband services in the City of Chattanooga, Tennessee, in competition with other entities operating in the City.

State law does not impede its ability to do so.<sup>5</sup> Section 7-52-601 of the Tennessee Code Annotated permits City provision of broadband services "within its service area." EPB asks that

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<sup>3</sup> The Electric Power Board of Chattanooga, Tennessee, Petition for Preemption of a Portion of Section 7-52-601 of the Tennessee Code Annotated, WCB Docket No. 14-116 (filed Jul. 24, 2014) ("EPB Petition").

<sup>4</sup> City of Wilson, North Carolina, Petition For Preemption of North Carolina General Statutes § 160A-340 *et seq.*, WCB Docket No. 14-115 (filed Jul. 24, 2014) ("Wilson Petition").

<sup>5</sup> EPB Petition at 2.

the FCC preempt this in-service territory restriction to permit it to provide broadband anywhere in the State of Tennessee.<sup>6</sup> EPB argues that Section 706 of the Telecommunications Act of 1996<sup>7</sup> authorizes the FCC to preempt applicable Tennessee law in this manner.<sup>8</sup>

### **C. Wilson Petition**

In its Petition, the City of Wilson, North Carolina, indicates that it has been providing fiber-based broadband in the City in competition with other broadband providers; North Carolina General Statutes, § 160A-340 *et seq.*, permits it to do so.<sup>9</sup> Nevertheless, the City seeks to serve geographic areas outside its current service territory, which it concedes North Carolina law permits it to do, but free of a number of provisions of state law which would govern such provision of broadband services. The City alleges that these governance provisions are burdensome and make it unprofitable for the City to provide services beyond its current service territory.<sup>10</sup> The City argues that Section 706 authorizes the FCC to preempt applicable North Carolina law in this manner.<sup>11</sup>

### **D. The Scope of State Laws Governing Municipal Provision of Broadband Must be Left to the Sound Discretion of the States.**

NTCA members serve rural and high cost areas of the country where the economic case for providing broadband services is challenging. Nevertheless, due to NTCA members' extraordinary commitment to provide service, and often pursuant to state "carrier of last resort"

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<sup>6</sup> EPB Petition at 1.

<sup>7</sup> Telecommunications Act of 1996, § 706, *codified at* 47 U.S.C. § 157 note.

<sup>8</sup> EPB Petition at 38-56.

<sup>9</sup> Wilson Petition at 27.

<sup>10</sup> *Id.* at 27, *et seq.*

<sup>11</sup> *Id.* at 43-59. Because the Petition is authored by the same law firm as EPB's Petition, its Section 706 arguments are virtually identical to EPB's, and therefore these arguments will be addressed together in these comments.

(“COLR”) requirements,<sup>12</sup> NTCA members provide near-ubiquitous voice service, and continually expand the technical capacity and geographic coverage of their broadband services.<sup>13</sup> Some members rely, in part, on federal and state universal service support to enable them to provide such near-ubiquitous service. In order to allow rural providers to continue to expand broadband speed, quality, and geographic coverage in fulfillment of Congress’ and the FCC’s broadband policies, the FCC should be circumspect in its decisions affecting the availability, affordability, and quality of broadband in such hard-to-serve areas.

There are relatively few municipalities that provide broadband services in this country for a variety of public policy and legal reasons. NTCA, in fact, includes several municipality owned and operated entities within its membership; these are entities that sprung up decades ago—much like their privately-owned and cooperative telephone company counterparts—to serve the original “unserved” areas left behind by larger providers which could not identify a business case to deliver telephone service in such rural communities. While entry into truly unserved areas could arguably present unique circumstances, a municipality’s foray into commercial ventures in areas that are already served by other operators is unwarranted and unjustified—particularly in rural communities where the “market” once again often barely justifies (or is unable to justify on its own, without support) a single provider.<sup>14</sup>

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<sup>12</sup> Although COLR requirements technically apply to the provision of voice services, since the same network is used to provide voice and broadband, these COLR requirements often impose costs and obligations on NTCA members in their provision of broadband.

<sup>13</sup> NTCA 2013 Broadband/Internet Availability Survey Report (May 2014), *available at* <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2013ntcabroadbandsurveyreport.pdf> (last viewed on Aug. 28, 2014).

<sup>14</sup> This is of even greater concern where a municipality uses its authority and built-in advantages in matters such as rights-of-way not to serve as effective or actual COLRs like NTCA members, but instead are able to “cherry-pick” the more profitable areas to serve.



Expansion of municipal corporate powers and services, especially in the provision of commercial services such as telecommunications and broadband services, is a matter that should be left to the discretion of the citizens of the various States to address specific local economic circumstances. There are no valid policy reasons for the FCC to preemptively regulate municipal provision of broadband services. As explained in more detail below, the Petitioners' legal arguments fail to support their assertions that the FCC may utilize Section 706 of the Telecommunications Act of 1996 to preempt state law on municipal organization and powers.

**II. THERE MAY BE STRONG PUBLIC INTEREST REASONS FOR LIMITING MUNICIPAL PROVISION OF BROADBAND—AND THOSE ARE REASONS BEST EVALUATED BY THE STATES IN QUESTION.**

Municipalities are political subdivisions of State governments, and have existed primarily to provide governmental functions and services to their residents. These include, particularly, emergency services such as fire and police protection, as well as infrastructure services such as maintaining public streets and trash pick-up that private enterprise may not be economically motivated to provide. Our constitutional form of government recognizes cities as political subdivisions of States, and recognizes that there are some essential government functions that are provided by local elected governments and which are funded by taxpayers. Although some services are widely regarded as essential government functions, such as public safety and education, there is a gray area where the public engages in debate about the appropriate role of government. This public debate is especially vigorous when a city seeks to provide commercial services for a profit, particularly when that enterprise competes with private enterprise. Since municipalities are political subdivisions of States, state statutes often define the particular powers and functions of cities to address their proper functions and methods of financing. And, since the politics and economics of each State vary, these statutes are often different from State to State.

### **III. THE CONSTITUTION PROTECTS STATES FROM THE EXERCISE OF FEDERAL AUTHORITY UNLESS THE STATE STATUTE IS EXPLICITLY INCONSISTENT WITH FEDERAL ACTION.**

#### **A. The Tenth Amendment Reserves Power to the States Unless Specifically Granted to the Federal Government.**

The Tenth Amendment to the Constitution preserves to the States all sovereign power that is not specifically enumerated as powers of the federal government.<sup>15</sup> The power of States to establish and administer the governance of municipalities within their jurisdictions is uniquely a state function that is committed to their “absolute discretion.”<sup>16</sup> Municipal subdivisions

“ . . . are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.” *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-608, 115 L. Ed. 2d 532, 111 S. Ct. 2476 (1991) (internal quotation marks, citations, and alterations omitted); *Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 433, 153 L. Ed. 2d 430, 122 S. Ct. 2226 (2002). Hence the need to invoke our working assumption that federal 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.<sup>17</sup>

Since State power over its own organization and functions, including those of municipalities, is at its zenith, federal courts will not imply that Congress intended to preempt state laws governing the authority of its political subdivisions like municipalities. Rather, federal legislation that interferes with that relationship must be “unmistakably clear.”<sup>18</sup> The Court thus

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<sup>15</sup> U.S. Const., Amend. X.

<sup>16</sup> *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-608 (1991); *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 433 (2002).

<sup>17</sup> *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004).

<sup>18</sup> *Id.* at 14, citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

requires that federal legislation make a “plain statement” of its intent to preempt state municipality governance statutes.<sup>19</sup>

**B. Federal Law Preempts State Law Only in Three Specific Situations.**

The Constitution empowers Congress to regulate commerce “among the several States.”<sup>20</sup> When Congress has enacted laws pursuant to the Commerce Clause, States may not act inconsistently with those laws. Pursuant to the Tenth Amendment, however, States are free to adopt legislation which affects commerce with their respective states if Congress does not regulate in a particular area.<sup>21</sup> Given these constitutional underpinnings to our dual jurisdiction form of government, every federal agency, including the FCC, is limited in its ability to interfere with state legislation unless Congress authorized such federal preemptive action. Accordingly, federal law is “supreme” as long as constitutional principles are followed. The ultimate question for consideration in a federal supremacy analysis is “whether Congress intended that federal regulation supersede state law.”<sup>22</sup>

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<sup>19</sup> Because the integrity of state sovereignty is so important to our federal-state form of government, Congress is prohibited from forcing states to enact and enforce federal regulatory programs. *Printz v. United States*, 521 U.S. 898, 925 (1997); *New York v. United States*, 505 U.S. 144, 161 (1992).

<sup>20</sup> U.S. Const., Art. 1, § 8, cl. 3.

<sup>21</sup> *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983). Regulation of interstate commerce is permitted if the burdens on interstate commerce are incidental, and the putative local benefits of the legislation clearly outweigh its burden on interstate commerce. *Id.* at 394. An extended analysis of the impact of the Commerce Clause on this case is unnecessary because Petitioners do not argue that the state laws in question violate the Commerce Clause.

<sup>22</sup> *Louisiana Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 369 (1986), citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted); see *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963).

In evaluating questions of whether federal law is supreme, or whether a particular federal law “preempts” a state law, federal courts have recognized three types of preemption: (1) “express preemption,” where a federal law specifically prohibits state action in an area; (2) “field preemption” in which Congress or the agency has occupied the field of the substantive law in question and therefore has left no room for the state to regulate in an area; and (3) “conflict preemption,” in which federal law conflicts with state law so that the state law must give way under the doctrine of federal supremacy.<sup>23</sup> “Conflict preemption” can be proven either “when compliance with both federal and state regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>24</sup> One way to demonstrate that the state law “stands as an obstacle” to the implementation of federal law, is to find that the law “interferes with the methods by which the federal statute was designed to reach that goal.”<sup>25</sup>

Section 601(c) of the Telecommunications Act of 1996 reinforces the conclusion that Congress only intended to preempt state laws when it stated its specific intention to do so:

**No Implied Effect.** This Act and the amendments made by this Act . . . shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.<sup>26</sup>

A special rule exists when state governance of its political subdivisions such as municipalities is concerned. “In all pre-emption cases, and particularly in those in which

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<sup>23</sup> *Centennial P.R. License Corp. v. Telecomms. Regulatory Bd.*, 634 F.3d 17, 31 n.15 (1st Cir. 2011).

<sup>24</sup> *Fidelity Federal Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153 (1982), quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1962), and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>25</sup> *Gade v. Nat’l Solid Wastes Mgt. Ass’n*, 505 U.S. 88, 103 (1992), quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

<sup>26</sup> Section 601(c)(1) was codified at 47 U.S.C. § 152 note.

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.’”<sup>27</sup>

In analyzing the Petitions in this proceeding, the first two types of preemption are inapplicable. There is no “express preemption” contained in Section 706; indeed the word “preemption” appears nowhere in the statute.<sup>28</sup> Petitioners make no claim that there has been “field preemption,” an assertion that in any event would be highly difficult to claim since it would rely upon the false argument that the Communications Act has “occupied the field” with respect to municipal powers to provide commercial services such as broadband. There is no “conflict preemption” between the Communications Act and state municipality laws, which will be discussed more fully below.<sup>29</sup>

#### **IV. SECTION 706 DOES NOT PERMIT THE FCC TO PREEMPT STATE MUNICIPAL STATUTES.**

Utilizing the constitutional principles discussed above, including the requirement that federal preemption of state municipality law must be “unmistakably clear,” neither the text, nor the legislative history, nor any implications of Section 706, give the FCC power to preempt state municipal organization statutes.

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<sup>27</sup> *Medtronic v. Lohr*, 518 U.S. at 485, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *Accord*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

<sup>28</sup> As indicated in Section IV.B., *infra*, even the legislative history contains no language preempting state regulation of municipal organization, but only references preemption of State *commissions*.

<sup>29</sup> See Section IV.D., *infra*.

**A. The Text of Section 706 Does Not Authorize State Preemption.**

Although Petitioners claim that Section 706 clearly permits the FCC to preempt state laws governing limitations on municipal organizations’ power to provide broadband,<sup>30</sup> the text of that section contains no such authorization.

**1. The text and reach of Section 706(a) is limited.**

Section 706(a) provides that the Commission “shall encourage” broadband deployment 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.” Neither the statute nor the legislative history defines the terms “measures” or “other regulating methods.” That Section does not refer specifically to preemption of state laws affecting municipal organizations—indeed that sub-section does not contain the word preemption, unlike other provisions of the Communications Act.<sup>31</sup>

*Verizon v. FCC* concluded for the first time that Section 706(a) is an independent grant of authority to the FCC.<sup>32</sup> Although that court permitted the FCC to impose certain disclosure obligations on broadband service providers, it held that the Commission’s exercise of authority under Section 706 cannot contravene any “specific prohibition contained in the Communications Act.”<sup>33</sup> Therefore, it struck all of the remaining regulations because the nondiscrimination and no-blocking rules were common carrier obligations that, pursuant to Title II of the Communications Act, could be imposed only on common carriers, not information service

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<sup>30</sup> EPB Petition at 41; Wilson Petition at 55.

<sup>31</sup> *See, e.g.*, 47 U.S.C. §§ 252(e)(6), 253(d), 276(c), 621(b)(3) (codifying Section 303 of the Telecommunications Act of 1996); Section 602 of the Telecommunications Act of 1996, *codified at* 47 U.S.C. § 152 note.

<sup>32</sup> *Verizon v. FCC*, 740 F.3d 623, 639-40 (D.C. Cir. 2014).

<sup>33</sup> *Id.*, at 649.

providers.<sup>34</sup> Otherwise, *Verizon* does not identify the outer bounds of what “measures” or “other regulatory actions” the FCC is permitted to take under that sub-section. At base, the *Verizon* decision only holds that Congress intended that the Commission have authority to continue to “regulate this industry”<sup>35</sup> in its provision of broadband services.

## 2. The text and reach of Section 706(b) is limited.

Section 706(b) mandates that the FCC “take immediate action” to “accelerate deployment” by “removing barriers to infrastructure investment and by promoting competition” if it finds that “advanced telecommunications capability” is not being deployed “to all Americans” in a “reasonable and timely fashion.” The statute does not define the term “action.” And again, the text of the statute does not refer to preemption of state laws governing municipal organizations.

Both *Verizon* and *Direct Communications Cedar Valley v. FCC* held that Section 706(b) was an independent grant of authority that permitted the FCC to take action to remove barriers to infrastructure investment and to promote competition.<sup>36</sup> However, the courts did not indicate what “action” was permissible under that subsection. Rather, *Verizon* only upheld a limited transparency regulation imposed on broadband providers,<sup>37</sup> and the *Direct Communications* court found that Section 706 was “an additional source of support” for the FCC’s requirement that recipients of universal service funding provide broadband over dual-use networks.<sup>38</sup> Both

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<sup>34</sup> *Id.*, at 655-59.

<sup>35</sup> *Id.*, at 641.

<sup>36</sup> *Id.*; *Direct Communications Cedar Valley, LLC v. FCC (Universal Service Issues)*, 753 F.3d 1015, 1053-54 (10th Cir. 2014).

<sup>37</sup> *Verizon*, at 659.

<sup>38</sup> *Direct Communications*, at 1054.

courts required that any action taken be consistent with other provisions in the Communications Act.<sup>39</sup>

Moreover, although in recent years the FCC's broadband deployment reports have found that there is untimely broadband deployment<sup>40</sup> (a conclusion that has produced not inconsiderable controversy), these reports focus on aggregate nationwide statistics, rather than the specific broadband services provided in the geographic territories identified by Petitioners. Neither Petition contains data to support its assertion that deployment in the areas they seek to serve is "unreasonable or untimely," or whether adopting the preemption requested will eliminate infrastructure investment barriers or promote competition consistent with Section 706(b) in those geographic areas.<sup>41</sup> In fact, the Commission to date has not identified State regulation of municipal organizations as a reason for its conclusion that there is "untimely"

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<sup>39</sup> *Verizon*, at 649; *Direct Communications* at 1054. Petitioners' citation of a footnote in Judge Silberman's concurrence in part and dissent in part in *Verizon* (*Verizon*, at 660 n.2) for the proposition that limitations on municipal provision of broadband are an example of a barrier to infrastructure development is of no aid. EPB Petition at 43. The footnote does not state a belief that state municipal statutes may be preempted under Section 706, but rather is an unbriefed and unaddressed example of one single phrase contained in the statute. In fact, unbridled municipal provision of broadband in competition with pre-existing private enterprise risks inhibiting further investment by private enterprise, which itself would be inconsistent with the aims of Section 706.

<sup>40</sup> *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 11-121, Eighth Broadband Progress Report, 27 FCC Rcd 10342, ¶ 1 (2012) ("*2012 Eighth Broadband Progress Report*").

<sup>41</sup> The mere fact that there are some specific census blocks near the City of Wilson that are potentially classified as "unserved" by an unsubsidized competitor according to FCC maps does not justify preemption in this case because the FCC has already set in motion a process for providing universal service support to entities seeking to serve such areas. *Connect America Fund*, WC Docket No. 10-90, et al., Report & Order, Declaratory Ruling, Order, Memorandum Opinion & Order, Seventh Order on Reconsideration, & Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (rel. Jun. 10, 2014).



deployment of broadband.<sup>42</sup> Therefore, it is doubtful that petitioners have demonstrated Section 706(b)'s premise of untimely or unreasonable deployment and certainly there is no justification for concluding that a “fail-safe” mechanism must be adopted.<sup>43</sup>

**3. Section 706 does not contain a “plain statement” of congressional intent to preempt state municipal statutes.**

Section 706 does not contain a congressional authorization for the FCC to preempt state statutes governing municipal organizations because the section does not contain a “plain statement” of its intention to do so within the meaning of *Nixon* and *Gregory*. Although Petitioners claim that Section 706 does so because the terms “measures” and “action” in the statute can be read broadly enough to include such authority,<sup>44</sup> such wording is insufficient to qualify as a “plain statement” under these Court cases. The *Nixon* court specifically noted the potential breadth of the term “any entity” contained in Section 253, but nonetheless concluded that Section 253 contained no *Gregory* “plain statement.”<sup>45</sup> This conclusion is especially valid with respect to Section 706 given that Congress specifically authorized or prohibited “state preemption” in a number of other Communication Act provisions, but not in Section 706.<sup>46</sup>

Petitioners also argue that *Gregory v. Ashcroft*, the seminal Supreme Court case analyzing whether federal law preempts municipal statutes, does not apply here because *Gregory* only applied where state statutes regulate “traditional” or “fundamental” State functions.<sup>47</sup>

Petitioners’ asserted limitation is unsupported by the precedents, and the Supreme Court itself

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<sup>42</sup> 2012 Eighth Broadband Progress Report, ¶¶ 136-37, 139-56.

<sup>43</sup> See, e.g., *Verizon*, at 639.

<sup>44</sup> EPB Petition at 39-40; Wilson Petition at 44-45.

<sup>45</sup> *Nixon*, at 132-33.

<sup>46</sup> See note 33, *supra*. Section 601(c)'s “no implications” provision further reinforces that preemption should not be implied in Section 706. See text accompanying note 26, *supra*.

<sup>47</sup> EPB Petition at 51. *Gregory* involved the qualifications of state judges.

effectively rejected such an interpretation of *Gregory*'s "plain statement" requirement. In *Nixon v. Missouri Municipal League*, the Court held that state laws limiting municipalities from providing telecommunications services (clearly commercial services) were not included in the phrase "any entity" in Section 253 of the Communications Act because Congress' intent to preempt state regulation of municipalities was not "unmistakably clear."<sup>48</sup> Even Petitioners' alternative argument, that Section 706 includes a *Gregory* "plain statement,"<sup>49</sup> is false. As demonstrated previously,<sup>50</sup> Section 706 does not mention the word preemption, although other provisions of the Communications Act do.<sup>51</sup>

Although *Nixon* involved whether Section 253 of the Communications Act was intended to preempt state regulation of municipalities, the analysis conducted by the Supreme Court is very instructive to the case at hand. In analyzing Congressional intent behind section 253, the Court noted that municipal provision of commercial telecommunications services entailed a number of difficult issues not applicable to preemption of state laws applicable to private entities. The Court reasoned that with a private entity, if a legal restriction is lifted, for example, a prohibition against providing broadband in a territory outside its main operating base, the private entity is legally allowed to take any action in any territory.

In considering a legal preemption involving municipalities, on the other hand, a myriad of unique issues arise, such as how to obtain financing and whether other laws restrict the municipality's authority. Although Petitioners make light of these distinctions, they are the very

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<sup>48</sup> *Nixon*, at 140-41.

<sup>49</sup> EPB Petition at 53-55.

<sup>50</sup> See Sections IV.A.1 & 2, *supra*.

<sup>51</sup> *City of Arlington v. United States*, 133 S. Ct. 1863 (2013), relied on by EPB Petition at 51, does not save its argument, because in that case Congress explicitly adopted a statute requiring prompt zoning board action on tower siting applications, which arguably constituted a *Gregory* "plain statement."

same issues that naturally arise in analyzing both Tennessee and North Carolina statutes cited by Petitioners. Both Tennessee and North Carolina statutes permit provision of broadband, but they both establish specific governance requirements on municipal corporations, requirements that are consistent with the goals of protecting not only city residents, but also fair competition in the broadband marketplace.

Neither Petitioner argues that the FCC should remove all of its respective state law restrictions. Rather, each only asks the FCC to modify specific aspects of these laws. For example, EPB asks that the FCC excise the words “within its service area” from Section 7-52-601 of the Tennessee statute.<sup>52</sup> By doing so, the FCC would alter fundamentally the Tennessee legislature’s decision regarding the proper geographic scope of a municipality that functions within the boundaries of the city (just as occurs with traffic control and garbage pick-up services), and allow it to provide broadband and cable TV services freely throughout the state.<sup>53</sup>

The City of Wilson admits that North Carolina law permits it to provide broadband both inside and outside the confines of the city—it just does not like the statutory provisions that govern such conduct. For example, it complains about having to obtain government permission for extra-territorial operation; the state’s definition of broadband; compliance with all legal requirements imposed on private entities; public hearing requirements; requirements that are “vague and ambiguous;” imputation of costs; financing restrictions; and other requirements.<sup>54</sup>

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<sup>52</sup> EPB Petition at 33.

<sup>53</sup> One wonders why the preemption requested would be limited to provision of services within Tennessee, but rather anywhere in the country or the world. In addition, EPB claims that the legislature has already eliminated the territorial concerns it has with municipality operation by allowing municipalities to provide telecommunications services anywhere in the State. *Id.*, at 52-53. This is a leap of “logic” and would require the FCC to second-guess, and establish policies for, state municipal operations, a decision which *Gregory* reserves to the States.

<sup>54</sup> Wilson Petition at 28-39.

The City is effectively asking the FCC to alter some but not all of North Carolina’s authorizing legislation so that it can more easily provide broadband outside its service territory. This is not a typical preemption argument, but rather a request for the FCC to second-guess intricate state legislative decisions regarding the scope of municipal operations, funding sources, notice to city residents, and creation of a level playing field governing its competition with private entities; this is hardly an area into which the FCC should tread. These are precisely the same difficult issues raised by the *Nixon* Court and are therefore valid reasons why Congress cannot be presumed to have authorized state preemption of state laws affecting municipal operations when it enacted Section 706. A request for the FCC to pick and choose which portions of the state municipal law that may be enforced arguably crosses the constitutional line. In sum, this sort of action would effectively compel Tennessee and North Carolina to enforce federal regulatory programs, a federal power that the Supreme Court has rejected repeatedly in the past.<sup>55</sup>

**B. Nothing in the Legislative History to Section 706 Supports Preemption of Municipal Organization Statutes.**

Nothing in the sparse legislative history to Section 706 provides any further support for the preemption claims. Petitioners attempt to make much of a single instance of congressional hearing testimony, out of scores of other witnesses, by a manager of a city-owned electric utility that provided broadband to its residents. Senator Trent Lott, whom Petitioners describe as a “manager” (not a “sponsor”), was apparently impressed with that city’s operations and thought it was important to get the “right language” “to accomplish what we wish accomplished here.”<sup>56</sup>

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<sup>55</sup> See note 19, *supra*.

<sup>56</sup> EPB Petition at 50, *quoting* Remarks of Senator Trent Lott, Hearings on S.1822 before the Senate Committee on Commerce, Science, and Transportation, 103d Cong., 2d Sess. at 379, 1994 WL 232976 (May 11, 1994). It is also unclear that statements regarding S.1822, a different bill than S.652 (which formed the basis of the final law), is relevant to interpretation of the Telecommunications Act of 1996. It should be noted that Section 302(a) of S.1822, which

But, this general statement is so vague as to leave open the question of whether Congress intended within all the revisions to the 1996 Act in both Houses any language in the statute to implement Senator's Lott's statement. Indeed, we have no clue what the "right language" might have been or what "accomplishment" was intended by his statement. Normally, the Supreme Court is extremely skeptical of statements of a single legislator, even a bill sponsor, especially as here where the statements are vague and the authoritative legislative history does not corroborate or elucidate the statements.<sup>57</sup>

Ultimately, the only legislative history that federal courts normally will consider is the official congressional report published with the legislation.<sup>58</sup> The Joint Conference Report to the 1996 Telecommunications Act, under the heading "Senate bill" within Section 706's explanation, states only that "The Commission may preempt State *commissions* if they fail to act to ensure reasonable and timely access."<sup>59</sup> In fact, the quoted explanation was referring to the text of Section 304 of a previous version of the Senate Bill, S.652, which provided that the FCC

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proposed adding § 230(k)(3) to the Communications Act) (introduced September 14, 1994) contained specific language allowing the FCC to preempt state laws, a provision that does not appear in Section 706 of the Telecommunications Act. Such omission, if anything, would imply that Congress specifically did not intend to preempt state laws in enacting Section 706.

<sup>57</sup> *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 752 (2012); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

<sup>58</sup> *Garcia v. United States*, 469 U.S. 70, 76 (1984); *United States v. O'Brien*, 391 U.S. 367, 385 (1968).

<sup>59</sup> EPB Petition at 42 n.84 (quoting H.R. Conf. Rep. No. 104-458, 104th Cong, 2d Sess., 1996 U.S.C.C.A.N. 10, 224-25, 1996 WL 46795 (Jan. 31, 1996) ("Joint Conference Report") (emphasis added)). It is obvious that even Petitioners are desperately grasping to find support for their positions since they refer without explanation or disclosure to this statement as applicable to "states" rather than "state commissions." Petitioners also vaguely cite other Joint Conference Report passages in support of its claim that the FCC can preempt States that "drag their feet in fostering" broadband, *see, e.g.*, EPB Petition at 55 n.110; Wilson Petition at 58 n.97, but the cited history says nothing about preemption of state municipal statutes impacting the provision of broadband services, but rather precludes local franchising authorities from regulating the provision of telecommunications services provided by cable TV operators.

“may preempt State commissions that fail to act to ensure such availability.”<sup>60</sup> As the Joint Conference Report notes, Section 706 adopted the Senate bill “with a modification.”<sup>61</sup> The modification specifically *deleted* language that would have authorized the FCC to preempt State commissions. From this deletion, one can only logically conclude that Congress intended that FCC actions pursuant to Section 706 not include state preemption. Regardless, because Petitions challenge no action of a state commission this legislative history is not useful to their arguments.

None of the other subsequent legislative “support” for Petitioner’s expansive interpretation of Section 706, such as the federal stimulus legislation or the Broadband Data Improvement Act,<sup>62</sup> has any relation to the intent and language of Section 706 itself, and thus courts routinely reject subsequent legislative history as unreliable,<sup>63</sup> and “not a legitimate tool of statutory interpretation.”<sup>64</sup> And none of the cited FCC commissioner statements or FCC orders helps Petitioners because, without the legal authority to preempt, the ability to preempt must be addressed by Congress and/or the States, not the FCC.

### **C. Preemption of State Municipal Organization Statutes Pursuant to Section 706 Conflicts with the Communications Act.**

Preemption of state laws governing municipal provision of broadband also runs afoul of Section 706 because it is inconsistent with the Communications Act, a key holding of both *Verizon* and *Direct Communications*.<sup>65</sup> Section 253 of the Communications Act, which was adopted as part of the 1996 Telecommunications Act at the same time as Section 706, constitutes

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<sup>60</sup> S. 652, §304(b) (Jun. 25, 1995) available at [https://beta.congress.gov/bill/104th-congress/senate-bill/652/text/125851?q={%22search%22:\[%22S.652%22\]}](https://beta.congress.gov/bill/104th-congress/senate-bill/652/text/125851?q={%22search%22:[%22S.652%22]}).

<sup>61</sup> Joint Conference Report, at 225.

<sup>62</sup> See, e.g., EPB Petition at 7-10.

<sup>63</sup> See, e.g., *Chapman v. United States*, 500 U.S. 453, 464 n.4 (1991).

<sup>64</sup> *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081(2011).

<sup>65</sup> See Sections IV.A.1 & 2, *supra*.

the congressional framework for addressing preemption of general state and local laws such as the ones at issue in this case. Unlike Section 706, Section 253 specifically *mandates* that the FCC preempt *any* “State or Local law” that “may prohibit or has the effect of prohibiting” “any entity” from providing “telecommunications service.”<sup>66</sup> Given that Section 253 demonstrates congressional knowledge of how to give the FCC general preemption powers, the absence of state law preemption language in Section 706 can only properly be read to indicate that Section 253 constituted Congress’ framework for preempting general state and local laws.

Thus, in their reliance on Section 706, Petitioners are attempting to circumvent Section 253’s limitations. The *Nixon* Court agreed with the FCC that Section 253 did not permit preemption of State law governing the provision of telecommunications services by municipalities, not unregulated broadband services.<sup>67</sup> Section 253 contains congressionally defined standards and procedures necessary to ensure that state and local laws do not undermine Congress’ pro-competition policies adopted in the Act. There is a clear body of FCC and judicial precedent regarding the scope and reach of that section.<sup>68</sup> Since Congress did not include the term “advanced telecommunications service” within the scope of Section 253, the FCC may not effectively preempt state laws governing municipal provision of broadband.<sup>69</sup> Thus, the terms

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<sup>66</sup> 47 U.S.C. § 253.

<sup>67</sup> *Nixon*, at 140-41.

<sup>68</sup> *See, e.g., Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 2009); *Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460 (1997); *American Communications Service, Inc., et al., Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended*, Memorandum Opinion & Order, CC Docket No. 97-100, *et al.*, 14 FCC Rcd 21579 (1999).

<sup>69</sup> Although Petitioners admit that Section 253 does not apply to broadband, they assert without support that Section 706 mandated that the FCC be more aggressive with respect to broadband services than telecommunications services, thereby permitting more expansive

“measures,” “other regulatory actions,” and “action” cannot include the term preemption because that interpretation would be contrary to the Communications Act and the *Verizon* and *Direct Communications* precedents.

**D. Preemption of State Municipal Organization Law Would be Inconsistent with Federal Supremacy Preemption Principles.**

The previous analysis is reinforced through application of court traditional federal supremacy preemption principles. Just as Section 706 must be consistent with the rest of the Communications Act, Section 706’s terms “measures,” “other regulatory actions,” or “action” must be consistent with the court’s longstanding preemption principles.<sup>70</sup> Petitioners do not even address whether traditional preemption principles would render the Tennessee or North Carolina laws in question inconsistent with Section 706. Rather, they focus solely on Congressional and FCC policy that promotes deployment and adoption of broadband services in general, not municipal participation in that market.

As indicated previously, the only preemption principle potentially applicable to the circumstances raised by Petitioners is whether there is “conflict” preemption, and more specifically, whether the state law in question “is an obstacle” to achieving federal policy or “interferes with the methods” adopted by federal policy.<sup>71</sup> Although Congress and the FCC have established policies to promote broadband deployment and competition by private entities, they

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powers to include preemption of state laws governing municipal organizations. EPB Petition at 48-50. Nothing in the text or legislative history of the statute supports this theory given that the main focus of the statute was to foster telecommunications services competition. *E.g.*, 47 U.S.C. §§ 251-252. Indeed, broadband was still in its infancy in 1996, so it is at best unclear the relative level of importance that Congress placed on the provision of broadband services at that time.

<sup>70</sup> Although not raised in the *Verizon* or *Direct Communications* cases, consistency with constitutional principles must be at least as, if not more, important in analyzing the scope of Section 706 as statutory consistency because all legislative and agency actions must be consistent with the Constitution.

<sup>71</sup> See Section III.B., *supra*.



have not specified which entities must do so and in what geographic territories. Rather, such decisions are left to the sound economic choices of individual private entities. In the absence of federal policies that require entry on certain terms and in certain places, there can be no conflict between general federal policies and specific state regulation of municipal corporations.<sup>72</sup> In fact, both of the state laws in question permit municipal provision of broadband services in accordance with state governance principles.<sup>73</sup> As such, these laws are consistent, not inconsistent, with federal policy.

## V. CONCLUSION

For the foregoing reasons, the FCC should reject the Petitions.

Respectfully submitted,

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<sup>72</sup> For instance, although the City of Wilson states that it believes state regulations are so onerous to preclude its participation in those markets, Wilson Petition at 129, *et seq.*, this is a mere assertion, unsupported by any evidence.

<sup>73</sup> See Section I.B. & C., *supra*.