February 5, 2015

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: WC Docket Nos. 14-115 and 14-116

Dear Ms. Dortch:

The undersigned parties, USTelecom and NTCA, submit the attached white paper outlining the legal arguments against preemption of state laws limiting municipal authority to provide broadband services.

USTelecom and NTCA present a variety of legal arguments and the supporting case law demonstrating why Section 706 does not authorize the FCC to preempt a state's regulation of its own political subdivisions. The associations argue that the preeminent case law in this context clearly forecloses the petitioners' argument for preemption. The conclusions drawn herein indicate that a court will reverse any contrary conclusion by the Commission. These legal arguments should inform the Commission's decision on the two pending cases[1] before the Commission.

[1] *See Petition of the City of Wilson, North Carolina Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition*, WC Docket No. 14-115 (filed July 24, 2014); *Petition of the Electric Power Board of Chattanooga, Tennessee Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition*, WC Docket No. 14-116 (filed July 24, 2014).

Please contact the undersigned should you have any questions.

Respectfully submitted,

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The FCC Lacks Legal Authority To Preempt State Laws Limiting Municipal Authority To Provide Broadband Services

At issue in this proceeding are two state statutes that restrict the provision of broadband services by their respective municipalities. Tennessee allows a municipality to provide broadband service only "within its service area."[1] North Carolina allows its municipalities to provide communications services subject to a number of limitations, including, *inter alia*, restricting these services to the corporate limits of the city; not pricing below cost; and not subsidizing the communications services with other funds.[2] This white paper explains why the FCC lacks legal authority to preempt those state laws under section 706 of the Telecommunications Act of 1996 ("1996 Act"), codified at 47 U.S.C. § 1302.

1. The " 'unmistakably clear' " statement rule of *Nixon v. Missouri Municipal League*, 541 U.S. 125, 141 (2004) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)), applies here. The Court there held that section 253 of the Communications Act of 1934, which expressly authorizes the Commission to preempt state laws restricting *any entity* from entering the telecommunications services market, *does not* authorize the Commission to preempt state laws governing the provision of telecommunications services by municipalities. The Court explained 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." *Id.* at 140.

It has been suggested that *Nixon* is distinguishable because it involved a state statute that prohibited altogether the provision of services by political subdivisions, whereas the Tennessee and North Carolina statutes permit the provision of services subject to certain conditions (*e.g.*, only within municipal boundaries or without subsidy from other funds). As an initial matter, the purported distinction between a prohibition and a condition on the provision of services is not a meaningful one. For instance, a restriction on providing services outside a particular geographic area would still have the "the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," 47 U.S.C. § 253(a), and it would thus have been subject to the same analysis under *Nixon*. More generally, all conditions on the provision of services are prohibitions on the provision of services when the specified conditions are not satisfied. Even if one could somehow draw a line between the two, moreover, under this upside-down analysis, more severe state-law conditions (that amount to prohibitions) could not be preempted under *Nixon*, whereas less stringent conditions (that do not count as "prohibitions") could be preempted. That makes no sense.

Under any reasonable reading of *Nixon*, if states are permitted to prevent localities completely from offering a service, they must also be able to limit localities' authority to

[1] Tenn. Code § 7-52-601.

[2] N.C. Gen. Stat. § 160A-340.

offer that service. Nothing in *Nixon* indicates that it is limited to binary, on-or-off, decisions. Whether a state decides to forbid municipal broadband altogether or to permit it only in certain circumstances, federal preemption of such state decisions requires a clear statement of authority. As the Court in *Nixon* explained, in "familiar instances of regulatory preemption," the federal law preempts state regulation on the conduct of a private actor. 541 U.S. at 133. In such a scenario, absent the state regulation, the private entity is free to do as it wishes, consistent with prevailing federal law. *Id.* But preemption does not work the same way "when a government regulates itself (or the subdivision through which it acts)[,] [and] there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government itself (including its subdivisions) will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command." *Id.* at 134. The Court explained that the 1996 Act could not be treated as "a source of federal authority granting municipalities local power that state law does not." *Id.* at 135.

Under that test, it makes no difference whether the relevant state completely prohibits a municipality entity from providing a telecommunications service anywhere and under any conditions or whether it prohibits the municipality from providing a telecommunications service in some locations and under some conditions. In either case, preemption would act as a "source of federal authority granting municipalities local power that state law does not." *Id.* Put differently, the decision in *Nixon* turned not on the scope or nature of the prohibition, but on the nature of the *entity* being restricted. And what the Court concluded was that, where the entity in question is a political subdivision, Congress must make it "unmistakably clear" that it wants "to treat governmental telecommunications providers on par with private firms." *Id.* at 141. *See also Gregory*, 501 U.S. at 460 (" '[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." ' ") (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting in turn *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))).

The FCC itself recognized that the clear-statement rule applies when the question is whether a general preemption authority should be construed to treat governmental providers on a par with private firms. *See* Brief for Federal Petitioners at 9, *Nixon v. Missouri Mun. League*, Nos. 02-1238, 02-1386 & 02-1405 (U.S. filed Sept. 8, 2003), 2003 WL 22087499 ("If [a provision of the 1996 Act] were construed to preempt state laws that allocate authority to political subdivisions, it would interfere with a fundamental aspect of state sovereignty. . . . Accordingly, [a provision of the Act] cannot be construed to have that effect unless it can be concluded with certainty that Congress so intended."); Memorandum Opinion and Order, *Public Util. Comm'n of Texas*, 13 FCC Rcd 3460, ¶ 181 (1997) ("With regard to such fundamental state decisions, including, in our view, the delegation of power by a state to its political subdivisions, therefore, *Ashcroft* suggests states retain substantial sovereign powers with which Congress does not readily interfere absent a clear indication of intent."). *See also City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437 (2002) ("The principle is well settled that local governmental units 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. Whether and how to use that discretion is a question central to state self-government.") (internal quotation marks and citation omitted).

2. This is an easier case than *Nixon*. Petitioners here do not rely on section 253, which expressly preempts state law, but rather on section 706, which does not mention preemption at all. Thus, section 706 does not expressly preempt state restrictions even on private companies providing broadband, let alone state regulations governing municipal services. Certainly, nothing in section 706 expressly permits the FCC to preempt state laws governing the activities of political subdivisions. Instead, it includes only a general reference to "other regulating methods that remove barriers to infrastructure investment," 47 U.S.C. § 1302(a), and instructs the agency to "take immediate action to accelerate deployment," *id.* § 1302(b).

Such general language does not indicate that Congress intended to authorize preemption at all, much less does it speak with the extraordinary clarity necessary to interfere with state policy judgments as to the actions of political subdivisions or in other areas traditionally left to state discretion. That would not meet the "unmistakable clarity" requirement applicable to areas of traditional state authority, including here the regulation of state political subdivisions. *See, e.g.*, *Gregory*, 501 U.S. at 467 (the Age Discrimination in Employment Act of 1967, which prohibits a state employer from terminating an employee because of age, does not include a sufficiently clear statement to preempt state mandatory retirement ages for judges); *Ours Garage*, 536 U.S. at 428 (a federal law preempting regulation by "a State [or] political subdivision of a State . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property" was not a sufficiently clear statement of intent to preempt municipal laws relating to tow truck safety); *Hayden v. Pataki*, 449 F.3d 305, 325-26 (2d Cir. 2006) ("[b]road or general language" in the Voting Rights Act of 1965, which prohibits a state from adopting any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color," is not a clear statement of intent to preempt state felon disenfranchisement laws); *Rancho Lobo, Ltd. v. Devargas*, 303 F.3d 1195, 1202 (10th Cir. 2002) (federal law "authoriz[ing] the Forestry Division to enforce and administer all laws and regulations relating to timber harvesting" is not a clear statement of intent to preempt local regulation of timber harvesting).

3. The FCC would not get *Chevron* deference on this issue. Section 706 has been found to be ambiguous even on the threshold question whether it gives the FCC affirmative authority to regulate. *See Verizon v. FCC*, 740 F.3d 623, 641 (D.C. Cir. 2014). An ambiguous statutory provision necessarily fails the clear-statement requirement. *See INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) ("Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.") (citation omitted). *See also Martinez v. INS*, 523 F.3d 365, 372-73 (2d Cir. 2008) ("[A] statute that is silent with respect to retroactive application is construed under [the Supreme Court's] precedent to be unambiguously prospective in effect. Accordingly, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.") (internal quotation marks and citation omitted);

Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 734-35 (6th Cir. 2013) (Sutton, J., concurring) ("No one thinks that *Chevron*-triggering ambiguity satisfies a clear-statement requirement.").

City of Arlington v. FCC, 133 S. Ct. 1863 (2013), does not help the Commission on the question of deference. That case merely held that the FCC's interpretation of its regulatory jurisdiction is entitled to deference. *Arlington* was not about the FCC's authority to preempt, and it did not limit or overrule or even mention the "clear statement" rule in *Gregory* and *Nixon*. Indeed, there was no federalism issue of any kind in *Arlington* because the statute unquestionably "impose[d] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless] facilities." *Id*. at 1866 (internal quotation marks omitted). The question in that case was solely whether the FCC received deference in defining the scope of those limitations.

For similar reasons, legislative history cannot satisfy the clear statement rule. *See Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("[I]f Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the [clear-statement rule] will not be met."). Beyond that, if anything, the fact that Congress considered, but did not enact, a preemption provision[3] demonstrates that it decided not to grant such authority to the FCC. *See Tanner v. United States*, 483 U.S. 107, 125 (1987) (the fact that Congress considered but did not adopt a particular provision "demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected [that] version").

4. Reclassifying broadband as a telecommunications service under Title II would make no difference to this argument. If anything, reclassification would make it even clearer that preemption under section 706 would be impermissible, as the general language of section 706 should not be understood to grant a preemption power that Congress declined to give in the specific statutory preemption provision, 47 U.S.C. § 253. *See* Report and Order, *Preserving the Open Internet; Broadband Industry Practices*, 25 FCC Rcd 17905, ¶¶ 119-121 (2010) ("*Open Internet Order*") (the Commission has "disavow[ed] a reading of section 706(a) that would allow the agency to trump specific mandates of the Communications Act"; section 706(a) authorizes the Commission to take only actions that are "not inconsistent with other provisions of law"; and the Commission's "mandate under Section 706(a) must be read consistently with Sections 1 and 2 of the Act"), *aff'd in part, vacated and remanded in part, Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Verizon*, 740 F.3d at 637 (explaining that the FCC's authority under section 706 is limited by other provisions of the Communications Act, just as Congress's authority under Article I is limited by other provisions of the Constitution).

Nor does the fact that broadband access is inherently interstate in any way enhance the FCC's power to preempt absent an "unmistakably clear" statement of congressional intent. Section 253 too covered the provision of "*any* interstate or

[3] *See* Petition for City of Wilson, *Petition for Preemption of North Carolina General Statutes*, WCB 14-115, at 44 n.71 (FCC filed July 24, 2014).

intrastate telecommunications service," 47 U.S.C. § 253(a) (emphasis added), and the Supreme Court still found an "unmistakably clear" statement of preemption lacking in that section. Sections 1 and 2(a) of the Communications Act, which give the FCC authority with respect to "interstate and foreign commerce in wire and radio communication," likewise contain no unmistakably plain statement of the Commission's authority to override state restrictions on the activities of municipalities. 47 U.S.C. § 151. The general language of those provisions is subject to the more specific preemption authority in section 253 and, if it contains any implied preemption authority at all, section 706. *See Verizon*, 740 F.3d at 637.

Nor can the FCC claim that any restrictions on the provision of broadband by a municipality trench on the FCC's own authority to regulate interstate services. In setting conditions on a municipality's provision of broadband, a state is not regulating, it is exercising its core function in establishing the powers of its political subdivisions. *Nixon* establishes that federal authority to regulate private entities engaged in interstate activity—even with preemptive force—does not confer authority to preempt a state government decision on whether and in what conditions political subdivisions may engage in the same activity. *See Nixon*, 541 U.S. at 133 ("the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach" cannot be done without an " 'unmistakably clear' statement to that effect") (quoting *Gregory*, 501 U.S. at 460).

5. Finally, the constitutionally problematic results from prohibiting state restrictions on municipal services, identified in *Nixon*, are equally present here. The federal government cannot force the state to authorize or fund its own governmental services. *See National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. . . . That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes.") (internal quotation marks omitted); *Printz v. United States*, 521 U.S. 898, 924 (1997) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); *New York v. United States*, 505 U.S. 144, 166 (1992) ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."). The FCC cannot force the states to authorize their municipalities to provide broadband services. Neither can the FCC prevent a state from revoking or limiting that authorization. Such a "one-way ratchet" would raise a serious Tenth Amendment problem, which is why the courts will not interpret section 706 or any other statutory provision to allow it. *Nixon*, 541 U.S. at 141.