



NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

August 28, 2014

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Debbie Smith
*Senate Assistant Majority Floor Leader
Nevada
President, NCSL*

Margaret 'Peggy' Piety
*Senior Staff Attorney
Legislative Services Agency
Indiana
Staff Chair, NCSL*

William T. Pound
Executive Director

RE: WCB Docket Nos. 14-115 and 14-116

Dear Ms. Dortch:

The National Conference of State Legislatures (NCSL) submits the following comments in opposition to the above-referenced petitions and hereby requests the Federal Communications Commission (Commission) to deny the Petitioners' request to preempt state law for the following reasons:

1. There is no express or implied congressional authority for the Commission to preempt state law under section 706(a) of the Telecommunications Act of 1996 (Act);
2. In the absence of express congressional intent to preempt state law, the U.S. Supreme Court has held that there is a presumption against preemption, *Altria Group v. Good*, 555 U.S. 70 (2008);
3. Preemption ignores the important relationship between states and localities and states and federal government; and
4. The question of whether a federal agency can, without an express grant of authority to preempt from Congress, dictate preemption as a matter of agency policy has significant fiscal implications for state governments, and threatens our federalist system of government.

Congress Did Not Intend to Preempt State Law With Section 706(a) of the Act.

Petitioners Chattanooga, Tennessee and Wilson, North Carolina (Petitioners) allege that Section 706(a) of the Act preempts state laws governing the ability of localities to offer municipal broadband deployment. This is simply not the case. The plain language of section 706(a) states that:

“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 ... 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.”



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Nowhere in this section is any form of the word “preempt” used nor can it be implied from the plain text of section 706(a). Petitioners seek to convince the Commission that the word “forbearance” is synonymous with the word “preemption.” This proposition is weak at best and completely erroneous at worst. The U.S. Supreme Court spoke to statutory ambiguity and stated that, “Congress needs to be clear before it constrains traditional state authority to order its government.” (*Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004)).

The legal concept of forbearance means to “refrain from action” (*See, Black’s Law Dictionary*) and is used specifically in cases of usury or contract law, which does not apply here. The legal concept of preemption stems from the Supremacy Clause of the U.S. Constitution and requires a much more involved analysis and a higher legal standard. In fact, Supreme Court precedent is clear, “Congress may indicate preemptive intent in two ways – through a statute’s express language, or through its structure and purpose.” (*See, Altria citing Jones v. Rath Packing Company*, 430 U.S. 519, 525 (1977)). As previously stated, there is no express preemption contained in Section 706(a); therefore, the next question to be answered is whether preemption of state law is implied from the structure and purpose of the statute. The answer to this is a definitive “no.”

Implied preemption can occur in two ways – field preemption or conflict preemption. Field preemption occurs when the federal regulatory scheme is so pervasive as to “occupy the field” in that area of the law. (*See, Gade v. Nat’l Solid Wastes Mgmt. Ass’n.*, 505 U.S. 88, 98 (1992) and *Rice v. Santa Fe Elevator Corp.* 331 U.S. 313 (1947)). Under this analysis, it is clear that field preemption does not apply to the current petition. Section 706(a) never intended for the Commission to “occupy the field” of municipal broadband. The plain language of Section 706(a) expressly states that the “Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage...” This language is unambiguous and clearly intends for regulation in this area to be a complementary combination of federal and state law as articulated by the *Nixon* Court. The federal government has not occupied the field of regulation under this statutory framework and thus, field preemption is inapplicable in this case.

The Presumption Against Preemption Applies to this Petition

The last type of preemption is conflict preemption. Conflict preemption can be an actual conflict - when state law prohibits something federal law requires making it impossible to comply with state and federal law, or when state law frustrates the purpose and intent of Congress thereby placing an obstacle in the way of Congress’ objectives. There is no actual conflict between state law and the Act because they are not at odds. Both seek to provide advanced telecommunications services to the citizens of Tennessee and North Carolina. Tennessee, North Carolina, and other states, must ensure that these services be based on fiscally sound business models and have the ability to be sustainable over time. The Commission most certainly shares these same goals, as does Congress. These ideals are shared between levels of governments, are expressly laid out in the plain language of Section 706(a) as a joint goal of the Commission and its state counterparts, and are therefore not in conflict with the Act.

When addressing the question of obstacle preemption, the U.S. Supreme Court has routinely looked to see whether the state law regulates an area traditionally within the purview of the state and if so, judicial precedent dictates that the Court defer to state law. This is called the presumption against

preemption and is contained in a long line of Supreme Court cases. The U.S. Supreme Court, in *Altria*, has opined that, “when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.” (*Altria*, citing *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005)). (See also, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and *Wyeth v. Levine*, 555 U.S. 555 (2009)). Buttressing this position is the “clear statement rule.” This means that although sometimes Congress can abrogate the states' sovereign immunity, it cannot do so unreservedly. It must “mak[e] its intention unmistakably clear in the language of the statute.” *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

With respect to the instant petitions, there can be no question that consumer protection and sound fiscal use of taxpayer dollars affect the health, safety and welfare of the American people and are squarely within the police powers authority of state government. Therefore, a Commission ruling of preemption would infringe upon the state’s control of these important areas and if brought before a court, the presumption against preemption must surely apply. In fact, as the *Wyeth* Court held, “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.” *Wyeth* at 565.

As previously stated, there is no express congressional intent to preempt state law contained in Section 706(a) of the Act. While Congress may have intended the FCC to have the authority to preempt in certain areas, there is no reading of the Act that grants the FCC unfettered agency authority to preempt states in all areas it covers. Conversely, there is express congressional intent for the Commission and its companion state regulatory commissions to maintain co-jurisdiction over municipal broadband expansion. With no express or implied congressional authority for the Commission to preempt state laws in the area of advanced telecommunications capability, the petitions must fail.

The idea of respecting state sovereignty has also resonated with our president and his administration. In the wake of blatant and unwarranted attempts to preempt state law by many federal agencies in recent years, President Obama met with state representatives and issued a Preemption Memorandum for the Heads of Executive Departments and Agencies, 74 FR 24693 (May 20, 2009). This memorandum, from its very first sentence recognized the important role that state government plays in our democracy, acknowledged that sometimes state regulations and laws are more aggressive than federal ones, and that despite the existence of a federalism executive order (E.O. 13132, *Federalism*, August 4, 1999), “executive departments and agencies have sometimes announced that their regulations preempt state law ... without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles.” (*Id.*). This presidential memorandum called for agency restraint in the area of preemption of state laws and cautioned that, “preemption of state law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the states and with a sufficient legal basis for preemption.” (*Id.*) As previously stated, there is no express congressional preemption contained in section 706 of the Act; therefore, if the Commission accepts the petitions, it would overstep its legal authority and therefore, it should reject Petitioners’ requests.

If the Commission Opts to Preempt, the Fundamental State-Local Relationship Will Be Altered to the Detriment of Our Citizens.

NCSL urges the Commission to consider the impact of federal preemption on the state-local relationship and the state-federal relationship. With respect to the former, states are responsible for delegating various levels and types of authority to its localities. Cities, counties and towns are created by state law and ultimately responsible to the states. Thirty-nine states are known as “Dillon’s Rule” states. This means that the state legislature controls “local government structure, methods of financing its activities, its procedures and the authority to undertake functions.” (See, National League of Cities, *Local Government Authority*, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority>). Eight states apply Dillon’s Rule for select localities and the remaining ten states have granted their localities autonomy through their constitutions or by state statute and are called “home rule” states (*Id.*). This means that states have devolved down to their localities significant autonomy to regulate their own governmental affairs that pertain to purely local concerns such as zoning and sanitation, as opposed to statewide issues such as the age for consumption of alcoholic beverages or income tax. Home rule states are also subject to significant judicial review. (See, Davidson, Charles and Santorelli, Michael, *Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers*, <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Government-Owned-Broadband-Networks-FINAL-June-2014.pdf>).

Regardless of whether a municipality exists in a Dillon’s Rule, home rule, or a hybrid of the two, one basic fact holds true- all municipalities are governed by all or some state laws. Municipalities and other types of political subdivisions are creatures of the state – they are created by the state and they are bound by state and federal laws. They are tied to the state fiscally, and are subject to varying degrees of state regulation. In fact, the U.S. Supreme Court reaffirmed state authority over local governments in the case of *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004). In *Nixon*, the Court opined that allowing federal preemption of state laws as applied to localities would have “strange and indeterminate results,” and that Congress did not intend to “cast the preemption net” that wide. (*Id.*) The *Nixon* Court went on to reason that federal preemption of state law impacts private entities much differently than public ones. If a private entity is no longer bound by state economic regulation because that state regulation or law is preempted, the private entity is, “free to do anything it chooses consistent with the prevailing federal law.” (*Id.*) However, the Court continued:

“No such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations. The trouble is a local government’s capacity to enter an economic market turns not only on the effect of straightforward economic regulation below the national level... but on the authority and potential will of governments at the state or local level to support entry into the market. **In other words, when a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government itself will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it**

can command...We think it highly unlikely that Congress intended to set off on such uncertain adventures.” (*Id.*, *emphasis added*).

In sum, the U.S. Supreme Court believes that state regulation in the area of telecommunications is a necessary component to the regulatory scheme. In fact, the *Nixon* Court went on to state that if preemption of state law were to occur in the telecommunications field, it “would come only by interposing federal authority **between** a state and its municipal subdivisions which our precedents teach, ‘are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its governmental discretion.’” (*Nixon*, quoting *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-608, (1991) and *Columbus v. Ours Garage Wrecker Service*, 536 U.S. 424, 433 (2002)). The Court was correct in concluding that not only did Congress not intend to preempt states in this area, to do so would alter the balance of federalism and produce absurd results. Thus the Commission should not discount the overarching state-local relationship. If the Commission adversely rules against states in these petitions, it will fundamentally alter our notions of federalism that were born with the founding of our country and will undo decades of state regulatory authority.

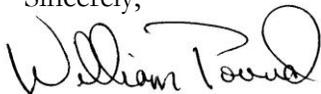
Preemption of state laws ignores the state prerogatives and may create adverse fiscal implications for states.

Municipal broadband has had a checkered past. It is unstable and success stories are few and far between. When municipalities fail, states are left holding a very large fiscal bag. This fiscal bag is essentially taxpayer dollars that are lost when costs cannot be recouped. States have therefore chosen to regulate in this area to ensure that the benefits to their citizens outweigh the risks involved. If the Commission grants these petitions, it could place state funds at severe risk because states will no longer be able to regulate the municipalities engaging in broadband expansion within their own borders. This foolhardy move places taxpayer dollars at risk at a time when many states are just emerging from the worst recession our country has seen in over 50 years.

For all of these reasons, NCSL respectfully requests that the Commission deny the petitions and preserve state authority in the area of municipal broadband.

I appreciate the opportunity to express our concerns. Should you have any questions regarding this matter, please contact Susan Parnas Frederick (202-624-3566 or susan.frederick@ncsl.org) and James Ward (202-624-8683 or james.ward@ncsl.org) in our Washington, D.C. office

Sincerely,



William T. Pound
Executive Director
National Conference of State Legislatures