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

In the Matter of	)	
Petitions of Electric Power Board and City of Wilson, 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

COMMENTS OF
THE FREE STATE FOUNDATION*

I. Introduction and Summary

These comments are filed in response to the Commission's request for comments on petitions filed seeking preemption of certain state restrictions on municipal broadband networks. For state policy imperatives such as local taxpayer financial protection and avoidance of conflicts of interest, as well as for serious legal and constitutional reasons, we urge the Commission to reject the Petitioners' requests for federal preemption.

States are entrusted with ensuring that their political subdivisions, which are created by the states, act in a financially responsible manner. To protect local taxpayers, several states have adopted safeguards related to local government financial practices. In many cases, these safeguards prohibit local governments from going into the broadband Internet business or impose safeguards that make it more difficult for the municipalities to do so. And in other cases, local voter approval is required before municipal broadband

* These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow at the Free State Foundation. We gratefully acknowledge the assistance of FSF Research Associate Michael J. Horney in the preparation of these comments. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, free market-oriented think tank.

networks may be established. These state laws protecting local taxpayers from financial fiascoes related to municipal broadband networks are backed by experience. The track record of municipal broadband networks includes a significant number of highly-publicized, debt-ridden failures.

Preemption of these state laws would eliminate important financial safeguards. For those states that prohibit municipal broadband networks, preemption would result in a bizarre grant of power by a federal agency to local governments. And in some states preemption would result in an illiberal scenario whereby a federal bureaucracy eliminates requirements provided under state law for local voting by municipal residents.

States also have legitimate interests in avoiding conflicts of interest posed by local governments going into direct competition with the private sector broadband providers that they regulate. Municipal broadband networks are often subsidized directly by the taxpayers or backed by government bond issues. They are granted special privileges, such as favored rights-of-way treatment. There is also the risk of local governments excusing municipal broadband networks from running the bureaucratic gantlet of permitting and licensing processes through which private providers must pass.

Preemption would remove protections against local government conflicts -of interest and thereby make them more likely. It would undermine the policy choices of many states that prefer to keep the role of government as a neutral enforcer of laws and regulations distinct from the highly problematic role of government as a marketplace competitor.

A plain reading Section 706 of the Communications Act reveals no delegation of preemption power by Congress. It is a statutory provision completely devoid of a clear

statement of intent to authorize preemption of such an important and historic state interest. Under the structure of our federalist system, states have authority over the policies of the local governments they create. The Constitution does not recognize county or city sovereignty.

The Commission's precedents recognize the role of states in creating and overseeing their local governments. Those precedents also recognize the limits of the Commission's power to interfere with state-local governing relationships. As the Commission's 1997 Order rejecting preemption of state law restrictions on municipal telecommunications networks said: "[S]tates maintain authority to determine, as an initial matter, whether or to what extent their political subdivisions may engage in proprietary activities."

The U.S. Supreme Court upheld the Commission's own rejection of preemption in 1997. In *Nixon v. Missouri Municipal League* (2004), the Court found that Section 253 of the Communications Act contains no clear statement of intention to preempt state law restrictions on municipal telecommunications networks. *Nixon* recognized that state control over their political subdivisions is a matter of traditional state concern requiring a clear statement of Congressional intent to preempt. That recognition applies equally in the case of municipal broadband networks. Preemption of state law restrictions on municipal broadband networks would run afoul of the Court's decision in *Nixon*.

Further, structural federalism principles contained in the U.S. Constitution prohibit the Commission from preempting states' authority to decide "whether or to what extent their political subdivisions may engage in proprietary activities," such as municipal broadband services. As the Supreme Court stated in *Printz v. United States*

(1997), "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." It would be constitutionally improper for a federal agency to turn counties or cities into separatist enclaves by granting them powers that their respective states never delegated to them in the first place or later chose to withdraw. Likewise, the Court in *Nixon* recognized that "preemption 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 absolute discretion.'"

Rather than restrict states' ability to ensure the financial soundness of their local governments, the Commission should look to promote successful private sector-led investment in faster and better broadband networks. When it comes to local barriers to broadband investment, the Commission should seek ways to end rights-of-way discrimination, streamline tower siting rules, reform franchising processes and fees, and clear away other red tape.

II. Federal Preemption of State Restriction on Municipal Broadband Networks Poses Serious Public Policy Problems

Approximately twenty states have laws placing restrictions of some kind on local government entry into the broadband business. Several states outright prohibit municipal broadband networks.[1] Other states impose certain procedural safeguards, such as requiring a local vote of the people for approval.[2]

[1] *See, e.g.*, Mo. Rev. Stat. § 392.410(7); Nevada Statutes § 268.086, § 710.147; Texas Utilities Code, § 54.201 *et seq.*

[2] *See, e.g.* Colo. Rev. Stat. Ann. § 29-27-201 *et seq*; Minn. Stat. Ann. § 237.19; *NC Statutes Chapter 160A, Article 16A.*

Petitioners baselessly claim that state laws restricting municipal broadband networks are merely protectionist measures. In fact, serious and legitimate concerns about governmental responsibility and propriety are embodied in such state laws.

First, states are entrusted with ensuring that their political subdivisions act in a financially responsible manner. States have adopted safeguards related to local government financial practices in order to ensure the protection of local taxpayers.

In addition, many states consider it improper to put local governments in direct competition with private sector providers of broadband Internet services. Such states conceive of government primarily as a neutral enforcer of laws, not as a competitor in a product or services market that does not involve an inherently governmental function. Assuming a dual role as public authority and as competing business poses inherent conflicts of interest for local governments.

Such conflicts lend themselves to abuses of government power. Government networks generally are subsidized directly by the taxpayers or are backed by government bonds carrying below-market interest rates. They are granted special privileges, such as favored rights-of-way treatment, which are unavailable to their private-sector competitors. Local governments may excuse their affiliated municipal broadband networks from running the bureaucratic gantlet of permitting and licensing processes through which private firms must pass. Indeed, this is often the case.

Furthermore, municipal broadband networks pose a conundrum when it comes to government transparency. Open public records laws are important for ensuring the accountability of government entities to citizens and taxpayers. It’s in the public interest for local citizens and taxpayers to know whether publicly-funded government enterprises

are fiscally sound or being mismanaged. But treating municipal broadband networks like private business competitors may mean exempting those networks – and the government officials who support them – from public scrutiny and accountability. Municipal broadband networks have an incentive to keep their proprietary information confidential from competitors and seek exemption from open public records mandates. State restrictions on municipal broadband networks accordingly further an interest in preserving open public records policies and the values of transparency and accountability such policies embody.

III. Municipal Broadband Networks Have a Poor History of Financial Responsibility

State laws restricting or banning municipal broadband networks in order to protect local taxpayers from unanticipated financial shortfalls and systemic financial bail-outs are born of real-world experience. In general, local governments that have ventured into the communications business have compiled a pretty dismal record of failure. In recent years, and by way of illustration, some of the most publicized failures in government-run networks include the following case studies:

LUS Fiber

> Lafayette Utilities Service (LUS) was started in 2005 in Lafayette, Louisiana, as one of the largest municipal broadband projects in the U.S.[3] Since then, the fiber-to-the-home network has struggled to compete with cable, telephone, wireless, and satellite service providers in terms of price, performance, and service options. LUS Fiber's struggle can be summed up by its $47 million deficit, which has increased each year since its launch. LUS Fiber has tried to downplay that number by publicizing that the network is "cash positive," meaning it is taking in more than it is spending on a day-to-day basis. However, one study suggests that it was actually losing approximately $45,000 a day, most likely because its revenues were 30 percent less than what was initially projected. The failure to produce

[3] Steve Titch, "Lessons in Municipal Broadband From Lafayette, Louisiana" Policy Study 424 (Reason Foundation) (November 2013), available at: http://reason.org/files/municipal_broadband_lafayette.pdf.

promised profitability puts the burden of LUS Fiber's debt, which now sits at over $160 million, on Lafayette taxpayers.

UTOPIA

The Utah Telecommunication Open Infrastructure Agency, UTOPIA, is a government-run fiber-optic project that is supposed to provide broadband services to eleven cities in Utah.[4] Since UTOPIA's creation in 2002, annual revenues have never been able to cover annual operating costs, much less the debt obligations for building the network.[5] The entire UTOPIA project has a negative net value of $120 million and owes interest totaling $500 million until 2040. In fiscal year 2013, residents of the eleven UTOPIA cities were scheduled to pay nearly $13 million for debt services.

iProvo

Provo, a city south of Salt Lake, Utah, but not a member of the UTOPIA network, started and ultimately failed to provide a financially sustainable municipal network. Despite spending $40 million to build a fiber-optic system called iProvo, the network was so financially troubled and problematic for Provo residents that it ended up being sold to Google for only $1.[6] The initial $40 million that went into building the system will have to be paid off by Provo taxpayers over the next several years.

MI-Connection

The towns of Mooresville and Davidson, located in North Carolina, face looming multi-million dollar debts due to their joint purchase and operation of MI-Connection Communications System. Acquired by the towns from the bankrupt Adelphia Communications cable systems in December 2007, MI-Connection provides cable, voice, and broadband Internet services to businesses and residences. The system required a massive start-up investment of approximately $80 million by Mooresville and Davidson and the towns poured an additional $12.5 million into the system in 2008 to provide system upgrades.

After attempts to cover the debt by tapping into both towns' savings, MI-Connection still faced massive debts and annual losses. As of fiscal year 2011,

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[4] For further background, *see* Randolph J. May, "A Dystopian UTOPIA," *FSF Blog* (August 17, 2012), available at: http://freestatefoundation.blogspot.com/2012/08/a-dystopian-utopia.html; Seth L. Cooper, "UTOPIA: A Costly Lesson on the Failure of Government-Owned Networks," *FSF Blog* (October 31, 2010), available at: http://freestatefoundation.blogspot.com/2010/10/utopia-costly-lesson-on-how-government.html.

[5] Joseph P. Fuhr, Jr., "UTOPIA, a Failing Government-Owned Network in Utah" (December 5, 2012), available at: http://www.coalitionfortheneweconomy.org/wp-content/uploads/2012/12/12.5.12-UTOPIA-Final1.pdf.

[6] For further background, *see* Randolph J. May, "Google Goes to a Dollar Store," *FSF Blog* (April 22, 2013), available at: http://freestatefoundation.blogspot.com/2013/04/google-goes-to-dollar-store.html.

more than $145 million was owed in principal and interest payments, a burden that will ultimately be levied onto the towns' taxpayers if not for some state-level bailout.[7]

An unfortunate, unintended consequence is the mounting debt taxpayers in Mooresville and Davidson will incur for years to come.[8] Mac Herring, a Mooresville commissioner who voted for the initial project told a local newspaper that he regrets his vote because "there were financial details that I did not know all the ins and outs of."[9]

Burlington Telecom

Initiated in 2001, Burlington Telecom (BT) provided broadband and voice services to schools and city departments over city-owned fiber-optic lines in Burlington, Vermont.[10] In 2005, BT started expanding the network to residents and business. BT was able to increase its popularity to the public by announcing that it was "operationally cash flow positive," which was true, but misleading to the taxpayers. While the municipal system did have enough incoming revenues to pay for its daily operating expenses, it could not come close to paying off the debt that it had accumulated from building the network. Eventually in 2009, BT's problems became public. It owed $33.5 million to Citibank and $17 million to the Burlington city cash pool from which it borrowed without permission from the Board of Finance, City Council, State of Vermont, or the city taxpayers.[11] Despite being $50 million in debt, BT did not even reached its stated goal of providing access to every resident in the city by September 2009. BT made news in February 2013 when the Mayor of Burlington and Citibank had reached a $10.5 million settlement over the loans the municipal system had failed to pay back.[12]

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[7] *See* "MI Connect Debt Payment Schedule," available at: http://davidsonnews.net/files/2010/11/111910DebtChart.jpg.

[8] John Stephenson, "Government Broadband Buildout Needs More Oversight," InfoTech and Telecom News, available at: http://news.heartland.org/newspaper-article/government-broadband-buildout-needs-more-oversight.

[9] For additional background, *see* Seth L. Cooper, "Government-Owned Broadband Networks Make a Bad Budget Worse," FSF Blog (January 6, 2011), available at: http://freestatefoundation.blogspot.com/2011/01/government-owned-broadband-networks.html.

[10] Christopher Mitchell, "Learning From Burlington Telecom: Some Lessons For Community Networks" (August 2011), available at: http://www.muninetworks.org/sites/www.muninetworks.org/files/bt-lessons-learned.pdf.

[11] Mike Dooghue, "Citibank, Burlington reach settlement in $33M lawsuit," Burlington Free Press (February 3, 2014), available at: http://www.burlingtonfreepress.com/article/20140203/NEWS02/302030019/Burlington-Telecom-announcement.

[12] For further background, *see* Sarah Leggin, "Another One Bites the Dust: Burlington Telecom's Failure Shows, Again, That Government-Operated Broadband Networks Are Not the Solution," FSF Blog (March 3, 2014), available at: http://freestatefoundation.blogspot.com/2014/03/another-one-bites-dust-burlington.html.

These government-owned networks and others have fallen short of meeting their rosy financial projections. Such shortfalls have left local taxpayers and bondholders on the hook to make up the financial shortfall. This well-documented history constitutes strong support for the states' legitimate interests in adopting laws to ensure their local governments do not undertake substantial financial risks – or to require that they do so only under circumscribed conditions. The Commission should *not* seek to preempt state laws that act to mitigate those risks and that protect taxpayers from the financial perils posed by municipal broadband networks.

IV. Commission Precedent Recognizes States Authority Over Their Respective Political Subdivisions

The preemption sought by Petitioners is contrary to agency precedent. In particular, federalism principles recognized in the Commission's 1997 order prohibit preemption of state law restrictions on municipal broadband networks.[13] There the Commission rejected a petition requesting it to preempt state law restrictions on municipal telecommunications networks based on Section 253(a) of the Communications Act, which provides: "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 any interstate or intrastate telecommunication service."[14]

In rejecting preemption, the Commission's 1997 order declared "states maintain authority to determine, as an initial matter, whether or to what extent their political subdivisions may engage in proprietary activities."[15] It also observed that preemption

[13] *See Memorandum Opinion and Order* ("1997 Order"), In re Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, 13 FCC Rcd 3360, 3467 § 16, 3543-3548 §§ 179-188 (2007).
[14] 47 U.S.C. § 253(a).
[15] 1997 Order, 13 FCC Rcd at 3548 § 186.

under Section 253 "effectively would prevent states from prohibiting their political subdivisions from providing telecommunications services, despite the fact that states could limit the authority of their political subdivisions in all other respects."[16] The reasoning in this agency precedent cannot be avoided simply because a different statutory section is being invoked – here, Section 706 as opposed to Section 253. The Commission's prior recognition of state authority is grounded in considerations of constitutional federalism. The states' authority to decide "whether or to what extent their political subdivisions may engage in proprietary activities" is not alternated just because a particular FCC majority may wish that municipalities could offer broadband services.

Prior to its 1997 order rejecting preemption of state restrictions on municipal telecom systems, the Commission likewise recognized the authority of states over their respective political subdivisions. For instance, in its *Cable Television Report & Order* (1975), the Commission rejected calls to preempt state regulation of cable franchises while simultaneously delegating such regulatory authority to local governments.[17] The Commission concluded then that "internal regulatory allocations within a state … [are] not subject to our jurisdiction."[18]

Again, the Commission's recognition of federalism principles, grounded in the U.S. Constitution, do not lend themselves to dismissals based on "reasonable explanations" about current Commission policy objectives. After all, constitutional principles about the powers and limits of federal and state authority remain as true today

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[16] 1997 Order, 13 FCC Rcd at 3547 § 184.
[17] For background, see Steve Effros, "Learning from History," *Cablefax* (July 31, 2014), available at: http://www.cablefax.com/regulation/learning-history; Erwin G. Krasnow & John C. Quale, "Developing Legal Issues in Cable Communications," 24 *Catholic. U. L. Rev*. 677, 686-691 (1975), available at: http://scholarship.law.edu/cgi/viewcontent.cgi?article=2523&context=lawreview.
[18] 40 Fed. Reg. 34608, 34609 (1975). *See* Effros, "Learning from History." *See also* 24. *Cath. U. L. Rev*. at 691.

as they did in 1997 or 1975. The Commission cannot reasonably explain them away. Those constitutional principles will be discussed further below.

V. Section 706 Is Not a Grant of Preemptive Power

The most obvious difficulty with basing alleged preemptive authority on Section 706 is that the statute's language nowhere authorizes it. Section 706(a) provides:

> 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.[19]

Had Congress intended to confer on the Commission the power to preempt states – never a power lightly conferred – it could and would have said so.

Moreover, as the D.C. Circuit reiterated in *Verizon v. FCC* (2014), "any regulatory action authorized by Section 706(a) [must] fall within the FCC's subject matter jurisdiction over such communications – a limitation whose importance this court has recognized in delineating the reach of the FCC's ancillary jurisdiction."[20] But there is no Title II, Title III, or Title VI hook for the Commission to base Section 706(a) authority on. Section 253 comes much closer to providing the Commission with a means of achieving what Petitioners seek. [21] But as pointed out above, the Supreme Court, with the

[19] 47 U.S.C. § 1302(a).
[20] 740 F.3d 623, 639-40 (D.C. Cir. 2014).
[21] "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 any interstate or intrastate telecommunication service." 47 U.S.C. § 253(a).

Commission's support, already has rejected arguments that Section 253 grants the agency such authority.[22]

Furthermore, federal preemption doesn't coherently fit into the statutory provision's structure. Section 706 recognizes a role both for "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services." If anything should be implied by a Commission finding under Section 706(b) that advanced telecommunications have not been deployed in a reasonable and timely fashion to all Americans, it should *not* be preemption. Rather, the implication of a negative finding under Section 706(b) is this: both "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services" shall "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[23] The plain terms of Section 706 assign federal and state regulatory responsibilities, respectively. But by its terms, Section 706 does not authorize federal preemption.

Contrary to the Petitioners' claims, Section 706 is not the source of a stand-alone grant of preemptive authority. And as will be discussed next, Section 706 gives the Commission no power to preempt states' decisions over whether and to what extent to authorize their political subdivisions to engage in proprietary activities.

VI. Section 706 Lacks a Clear Statement of Congressional Intent to Preempt State Laws Restricting Municipal Broadband Networks

Absolutely fatal to the petitioners' legal arguments is the fact that Section 706 contains *no* clear statement authorizing preemption of state restrictions on their cities and counties going into the telecommunications or broadband Internet business. No matter

[22] *See Nixon v. Missouri Municipal League*, 541 U.S. 124 (2004).
[23] 47 U.S.C. § 1302(b).

how broad the Commission's power to regulate broadband Internet access may be following the D.C. Circuit's January decision in *Verizon v. FCC* (2014) – and we do not concede its breadth here – the FCC cannot interfere with state control over cities and counties in the manner urged by Petitioners absent a clear statement of intent by Congress authorizing such interference.

U.S. Supreme Court decisions – such as *Gregory v. Ashcroft* (1991) – require that Congress speak with unmistakable clarity before federal preemption of "a decision of the most fundamental sort for a sovereign entity" will be considered.[24] The clear statement rule is grounded in a need for assurance that Congress "has, in fact, faced, and intended to bring into issue, the critical matters involved in the judicial system."[25] And the rule is in an "acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[26] In *Ashcroft*, the Court reiterated its longstanding jurisprudential requirement 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,'"[27] and that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States."[28]

Petitioners pound the table in insisting that Section 706 is clear in authorizing preemption. But this is completely false. Petitioners' overstatements cannot compensate

[24] 501 U.S. 452, 460.
[25] 501 U.S. at 461 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971) and citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)).
[26] 501 U.S. at 461.
[27] 501 U.S. at 460-461 (quoting *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985) and citing *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89, 99 (1984)).
[28] 501 U.S. at 461 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

for the plain text's lack of clear statement. Consider again Section 706(a)'s provision that:

> The Commission … 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.[29]

No fair reading of Section 706 permits the finding of any clear statement of congressional intent that the Commission should interpose itself between states and their political subdivisions. And no fair reader can read Section 706 to clearly state that Congress intended to preempt state authority over decisions about whether and to what extent to allow its political subdivisions to offer proprietary services such as broadband Internet access services.

VII. The Supreme Court's Decision *Nixon* Precludes Preemption

The straightforward conclusion that Section 706 lacks a clear statement and the Commission's corresponding lack of preemptive authority is bolstered by the Supreme Court's decision in *Nixon v. Missouri Municipal League*, (2004).[30] Petitioners' requests for preemption should also be rejected because they run completely contrary to Court's decision in *Nixon*.

In *Nixon*, the Court rejected federal preemption of Missouri's statute prohibiting its cities and counties from offering telecommunications services. More particularly, the Court expressly rejected claims that a clear statement of Congressional intent to delegate preemptive authority on the Commission was contained in Section 253(a)'s provision that

[29] 47 U.S.C. § 1302(a).
[30] 541 U.S. 124.

"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 any interstate or intrastate telecommunication service."[31]

Unlike Section 706(a), Section 253(a) at least contains language that prohibits certain kinds of state or local laws or regulations. But the arguments for a clear statement residing in Section 706(a) are far weaker. Even in light of Section 253(a)'s language expressly prohibiting certain state and local laws and regulations, the Court nonetheless declined to find a clear statement in light of the traditional state power implicated by preemption in that case, namely states' control over their own political subdivisions.

Relying on a long string of decisions, *Nixon* squarely recognized the problem that "preemption would come only by imposing interposing federal authority between a State and its municipal subdivisions, which our precedents teach 'are created as convenient agencies for exercising such of the governments powers of the states as may be entrusted to them in its absolute discretion.'"[32] In the Court's view, this traditional interest of states over their political subdivisions required application of the clear statement rule. And on the basis of that historic and important state interest, the Court rejected preemption under Section 253(a). According to the Court's majority, "[t]here is, after all, no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not."[33]

In *Nixon*, the Supreme Court also expressed concern over the federal "one-way ratchet" resulting from local governments being able to provide services in perpetuity,

[31] 47 U.S.C. § 253(a).
[32] 541 U.S. at 140 (quoting *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-608 (1991) and citing *Columbus v. Ours Garage & Wrecker Service, Inc*., 536 U.S. 424, 433 (2002)).
[33] 541 U.S. at 135.

unaccountable to state legislative control.[34] For instance, suppose a state's local governments failed to operate broadband networks in a financially responsible manner or abused their powers to give their networks an unfair competitive advantage. If preempted, such a state would be forbidden from ever changing its policy by withdrawing its local governments from the broadband Internet business.[35] The "one-way ratchet" concern identified in *Nixon* with respect to municipal telecommunications networks is equally present when it comes to municipal broadband networks.

VIII. Constitutional Principles Prohibit Preemption Sought by Petitioners

Even assuming Congress spoke with unmistakably clear language, FCC preemption of state restrictions on government-owned broadband projects would violate structural federalism principles of the U.S. Constitution.

"It is incontestable that the Constitution established a system of 'dual sovereignty.'"[36] As the Supreme Court explained in *Printz v. United States* (1997):

> Preservation of the States as independent political entities being the price of union, and '[t]he practicality of making laws, with coercive sanctions, for the States as political bodies' having been, in [James] Madison's words, 'exploded on all hands,' … the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people.[37]

That is, "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[38] The Constitution thereby established "two orders of government, each with its own direct relationship, its own privity, its own

[34] *See* 541 U.S. at 135-137.
[35] *See* 541 U.S. at 135-137.
[36] *Printz v. United States*, 521 U.S. 898, 918 (1997) (citing *Gregory*, 510 U.S., at 457; *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).
[37] 521 U.S. at 919-920 (quoting 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911)).
[38] 521 U.S. at 920 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

set of mutual rights and obligations to the people who sustain it and are governed by it."[39] Indeed, "[t]he Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."[40]

Local governments are created by state constitutions through state legislation. They are rightly accountable to the people of the respective states in which they exist. Quoting early 20th Century precedent, the Supreme Court reaffirmed in *Ysursa v. Pocatello Education Association* (2009) that "[s]tate political subdivisions are 'merely … department[s] of the State, and the State may withhold, grant, or withdraw powers and privileges as it sees fit.'"[41] Preempting states' decision-making about whether or to what extent to grant powers to local governments would constitute an impermissible means of regulating the states as states.

It would be constitutionally improper for a federal agency to turn counties or cities into separatist enclaves by granting them powers that their respective states never delegated to them in the first place. And it would create bizarre results to grant counties or cities a special federal right against their respective states to enter the broadband Internet business but otherwise leave states free to restrict them as they see fit.[42]

In any proper conception of our federalist system, it is not enough simply to suggest that the wishes of municipalities should prevail over the state sovereigns under which they are created. After all, in our constitutional regime, we do not recognize, as a

[39] 521 U.S. at 920 (quoting *U. S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).
[40] 521 U.S. at 920 (citing New York, 505 U.S. at 168-169) (additional cites omitted).
[41] *Ysursa v. Pocatello Education Association*, 555 U.S. 353, 362 (2009) (quoting *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). See also see also *Louisiana ex rel. Folsom v. Mayor and Administrators of New Orleans*, 109 U.S. 285**,** 287, (1883) ("Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits") (quoted in *Ysursa*, 555 U.S. at 362).
[42] *See* 1997 Order, 13 FCC Rcd at 3547 § 184.

matter of legal status, "citizens" of Provo or Lafayette,[43] but we do recognize citizens of Utah and Louisiana. And the Constitution confers upon these citizens of states the authority to exert their will through their elected representatives to adopt laws that restrict municipal activities. In essence, this is what the Supreme Court reaffirmed in *Nixon*, declaring that "preemption 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 absolute discretion.'"[44]

IX. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

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[43] *See, e.g., Ysursa*, 555 U.S. at 362 ("Political subdivisions of States – counties cities, or whatever – never were and never have been considered as sovereign entities") (quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964)).
[44] 541 U.S. at 140 (quoting *Mortier*, 501 U.S. at 607-608).