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NTIA Lacks Authority to Cut Broadband Funds From States That Limit Municipal Networks

by

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The National Telecommunications and Information Administration (NTIA) is implementing the Broadband Equity, Access and Deployment (BEAD) Program, which will grant billions of dollars to states that will then make subgrants to support broadband deployments. In comments submitted to NTIA on February 3, the National Association of Telecommunications Officers and Advisors (NATOA) urged the agency to require states that participate in the program to waive enforcement of state limitations on municipal broadband networks. This position must be rejected.

No spending condition on waiving municipal network limits exists in the Infrastructure Act. Section 60102(h)(1)(A)(iii), the provision cited by NATOA, requires states to award subgrants based on priorities in the Act and to not exclude recipients just because they are a private company, a utility, or a local government. But Congress never conditioned – and certainly not clearly – federal money on non-enforcement of state laws concerning municipal networks, a core sovereign matter involving states' organization of their local governments. Supreme Court precedent requires that any spending condition be articulated unambiguously by Congress. At most, Section 60102(h)(1)(A)(iii) is ambiguous. Consequently, NTIA lacks authority to make suspension of state law limits on muni networks a requirement for the BEAD Program.

In November 2021, President Joe Biden signed into law a $1.2 trillion spending bill called the Infrastructure Investment and Jobs Act.[1] The Act allocates a whopping $65 billion for broadband-related programs. Much of that spending will be administered by NTIA, including more than $42 billion through the BEAD Program supporting broadband deployment in unserved and high-cost locations.[2] Under Section 60102(f) of the Act, states that receive allocations through the BEAD program are authorized to award subgrants competitively to broadband providers for purposes such as connecting unserved locations, connecting community anchor institutions, mapping, promoting adoption, and installing Wi-Fi infrastructure in multi-residential buildings with unserved low-income residents.

Section 60102(h) of the Act bars states that participate in the BEAD program from denying subgrants to applicants within their jurisdictions on account of their institutional makeup. According to 60102(h)(1)(A)(iii), states "may not exclude cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments from eligibility for such grant funds." As Free State Foundation President Randolph May and Senior Fellow Andrew Long wrote in comments submitted to NTIA on February 3 of this year, this provision "expresses a clear expectation that all proposals are to be judged solely on the merits, without regard to the identity – public or private – of the applicant."[3]

In its February 3 comments, NATOA urged NTIA to interpret Section 60102(h)(1)(A)(iii) to "make clear that the Infrastructure Act imposes a condition" on states that accept BEAD funds that they may not enforce "any state law that limits, precludes or interferes with local governments' ability… to deploy broadband networks, provide broadband services or to comply with any subgrantee requirements provided in the Act, including subsection (h)."[4] And NATOA called on NTIA to require states to affirm that they will accept that proposed condition.[5] Furthermore, NATOA insisted that "NTIA should set clear consequences" for states that refuse affirmatively to accept the condition and "withhold all or a portion of the state's allocation to allow local governments to directly apply for such funds."[6]

NATOA's proposal takes aim at duly-enacted laws in about twenty states that condition, restrict, or prohibit muni broadband networks. Those state laws range from local voter approval requirements, to protections against taxpayer funds being used to finance muni broadband networks, to geographic boundary limits, to outright bans. Such limits on muni networks reflect a sensible policy judgment that government should be a neutral enforcer of laws, including laws of the marketplace, rather than a competitor with private market providers.

Congress does have constitutional authority to place conditions on states that opt to accept federal money. Yet that authority is not unbridled. The Supreme Court's jurisprudence recognizes limits on the power of Congress to place conditions on the receipt of federal funds by states pursuant to its spending power contained in Article I, Section 8, Clause 1 – also known as the "General Welfare Clause."

In *South Dakota v. Dole* (1987), the Court distilled years of case law into a set of limits on Congress's exercise of its spending power: (1) the exercise of that power must be in pursuit of "the general welfare"; (2) when Congress puts conditions on states' receipt of federal funds, it must do so "unambiguously"; (3) conditions on federal grants must not be unrelated "to the federal interest in particular national projects or programs"; and (4) other constitutional

provisions may bar particular conditional grants of federal funds.[7] In addition to those four basic limits, *Dole* recognized that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[8]

The primary legal issue posed by any attempt by NTIA to require states to waive their laws limiting muni broadband networks has to do with the second limit on federal spending power identified in *Dole*: Congress must make any spending condition unambiguous.

The requirement that Congress must make any spending condition unambiguous follows from the contractual nature of congressional exercise of the spending power. As the Court observed in *Pennhurst State School & Hospital v. Halderman* (1981), "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."[9] In *Pennhurst*, the Court explained that "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"[10] Citing several previous decisions, the Court added: "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."[11] And in *Dole*, the Court cited *Pennhurst* in stating that "we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously."[12]

In Section 60102(h)(1)(A)(iii), Congress did not unambiguously condition states' participation in the BEAD program upon their agreeing to waive enforcement of state law limits on muni networks. Had Congress done so, it is all but certain that NATOA would not have requested that NTIA clarify the meaning of the statutory provision by articulating a specific condition for receipt of federal funds.

NATOA's comments filed in NTIA's proceeding for implementing the Infrastructure Act call on the agency to interpret and apply Section 60102(h)(1)(A)(iii) in a manner that appears to be beyond what the statute requires. But at most, Section 60102(h)(1)(A)(iii) is ambiguous. Even assuming for the sake of argument that NATOA's suggested interpretation is reasonable, it's not the only possible interpretation of the statute.

Another possible interpretation of Section 60102(h)(1)(A)(iii) is that states are prohibited from denying eligibility to existing entities that seek subgrants on account of the institutional makeup of those entities. By this reading, the statutory provision functions as a type of non-discrimination standard to ensure that states do not disregard statutory criteria for awarding subgrants for the deployment of broadband networks. For instance, Section 60102 (h)(1)(A)(i) authorizes states to make subgrant awards in a manner that "prioritizes unserved service projects" and that will "ensure coverage of broadband service to all locations within the eligible entity." Thus, Section 60102(h)(1)(A)(iii) ensures that broadband network deployments by private companies, public and private utilities, co-ops, and local governments that would connect the unserved and provide coverage for all within the provider's footprint would not be denied eligibility for the grant on account of its institutional makeup. This interpretation does not require states to waive enforcement of laws or to create startup muni broadband networks.

This less expansive interpretation of Section 60102 (h)(1)(A)(i) is supported by the Supreme Court's analogous application of the clear statement rule in the non-spending power case of *Nixon v. Missouri Municipal League* (2004). In *Nixon*, the Court rejected claims by local

governments that Section 253(a) of the Communications Act's bar against state or local laws or regulations that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service" preempted a Missouri statute that prohibited its localities and counties from offering telecommunications services.[13] But the Court concluded that the provision was subject to more than one possible reading and that it was not supported by any clear statement that Congress sought to constrain traditional state authority to order its government.[14]

The Court's resort to a narrower statutory interpretation in *Nixon* was driven by the "strange and indeterminate results of using federal preemption to free public entities from state or local limitations."[15] In typical instances of regulatory preemption, a state law is removed and a private party is free to pursue economic activity as it chooses, consistent with federal law. But preemption operates differently when it seeks to remove limits on local governments from becoming a market competitor. The Court hypothesized that even if the FCC had tried to preempt state law limits on local government entry into the market that "freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business."[16]

Furthermore, the Court in *Nixon* observed that a hypothetical federal preemption providing "genuine choice to enter the telecommunications business when state law provided general authority and a newly unfettered municipality wished to fund the effort… 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.'"[17] For that reason, the Court invoked its "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" absent a plain statement by Congress.[18]

Any attempt by NTIA to grant BEAD Program money only so long as states waive enforcement of their laws limiting muni broadband networks likely would pose strange and indeterminate results because of the unusual nature of federal spending conditions effectively suspending state law limits on their own local governments, which may not otherwise have received any affirmative power to operate muni broadband networks in the first place. And far more unmistakable is the fact that such a spending condition would insert the federal government between the states and their own governments, potentially altering states' structural, functional, and fiscal, and personnel arrangements of their own local governments. For those reasons, the lack of a clear and unambiguously stated spending condition by Congress prevents NTIA from imposing any requirement that states waive enforcement of their laws limiting muni broadband. NTIA should not attempt it.

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[1] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 (2021).
[2] *See* NTIA, Notice, Request for Comment, Infrastructure Investment and Jobs Implementation Act, Docket No. 220105-0002 (January 10, 2022), at 10.
[3] Comments of the Free State Foundation, Infrastructure Investment and Jobs Act Implementation, Docket No. NTIA-2021-0002, Regs.gov NTIA-2021-0002 (February 3, 2022), at 10, available at: https://freestatefoundation.org/wp-content/uploads/2022/02/NTIA-BEAD-Program-comments.FINAL_.020322.pdf
[4] Comments of NATOA, Infrastructure Investment and Jobs Act Implementation, Docket No. NTIA-2021-0002, Regs.gov NTIA-2021-0002, at 6 (February 3, 2022), available at: https://assets.noviams.com/novi-file-uploads/natoa/NATOA_Comments_on_NTIA_RFC_IIJA_Grants.pdf.
[5] Comments of NATOA, at 6.
[6] Comments of NATOA, at 6.
[7] 483 U.S. 203, 207-208.
[8] 483 U.S. at 211.
[9] 451 U.S. 1, 17.
[10] 451 U.S. at 17.
[11] 451 U.S. at 17 (internal cites omitted).
[12] 483 U.S. at 207 (citing 451 U.S. at 17).
[13] *See* 541 U.S. 125, 141; 47 U.S.C. § 253.
[14] 541 U.S. at 130, 141.
[15] 541 U.S. at 132.
[16] 541 U.S. at 135.
[17] 541 U.S. at 140 (citing *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-608 (1991) and *Columbus v. Ours Garage & Wrecker Service, Inc*. 536 U.S. 424, 433 (2002)).
[18] 541 U.S. at 141. Additionally, in *Tennessee v. FCC*, 832 F.3d 597, 600 (6th Cir. 2016), the U.S. Court of Appeals for the Sixth Circuit relied on *Nixon* when it vacated the Commission's 2015 order that sought to preempt state laws prescribing jurisdictional limits to where government-owned broadband networks can operate. The court determined that Section 706 of the 1996 Act's directive to "promote competition in the telecommunications market" fell "far short" of a clear statement of intent by Congress to make such a reallocation of power.