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Muni Broadband

Officials in Chattanooga, Tenn. have petitioned the Federal Communications Commission to use the agency's authority under Section 706 of the Communications Act to preempt a Tennessee law seen as anti-municipal broadband. They will certainly have receptive ears in FCC Chairman Tom Wheeler, who last April said he believes that the commission has the power to ''preempt states laws that ban competition from community broadband.'' But a closer look at the case law reveals that the FCC has no legal authority to preempt state laws limiting municipal entry in the broadband marketplace under Section 706—or its traditional authority under Section 253—writes Lawrence J. Spiwak, president of the Phoenix Center for Advanced Legal & Economic Public Policy Studies.

FCC Has No Authority to Preempt State Municipal Broadband Laws

By Lawrence J. Spiwak

One of the more contentious issues in the telecommunications world today is municipal broadband. Proponents of municipal broadband argue that such networks lead to community development by poaching businesses from other cities without such networks[1] and provide lower prices and better services than do their private sector competitors.[2] Critics, on the other hand, point out that municipal networks often use public financing and cross-subsidization from municipal electric networks to fund their operations and ''compete'' against the private sector.[3] And, unlike the private sector, when a municipal network goes bust, it is the captive taxpayer or electric ratepayer, not the willing shareholder, who bears the brunt.[4] Most importantly, as the Federal Communications Commission ob-

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[1] Economic *migration* is not the same as economic *growth*, however.

[2] As it turns out, this claim is not necessarily true. When prices for like services are compared, municipal offerings often offer higher prices and more limited service offerings than do private sector providers. *See* G.S. Ford, *Do Municipal Networks Offer More Attractive Service Offerings than Private Sector Providers? A Review and Expansion of the Evidence* Phoenix Center Policy Perspective No. 14-01: (January 27, 2014) (available at: http://www.phoenix-center.org/perspectives/Perspective14-01Final.pdf).

[3] *See, e.g.*, EPB Financial Statement (2013) (available at: https://www.epb.net/flash/annual-reports/2013/downloads/EPB_Financials_2013.pdf).

[4] For example, one need only look to the failed experiments in Utah (*see* T.A. Schatz and R. Van Tassell, *Municipal Broadband Is No Utopia*, The Wall Street Journal (June 19, 2014) (available at: http://online.wsj.com/articles/municipal-broadband-is-no-utopia-1403220660) or in Groton, Connecticut (*see* G. Smith, *Groton's Deal to Shed TVC Finalized as New Owners Take the Reins*, Theday.com Connecticut (February 1, 2013) (available at: http://www.theday.com/article/20130201/NWS01/130209982/-1/zip06&town=Norwich&template=zip06art); D. Straszheim, *How a Promising Idea Went Terribly Wrong in Groton*, Groton Patch (January 6, 2013) (available at: http://groton.patch.com/groups/politics-and-elections/p/how-a-promising-idea-went-

served in its *National Broadband Plan:* ''Municipal broadband has risks. Municipally financed service may discourage investment by private companies.''[5]

Given the complexity of the problem, many state legislatures have stepped in to govern the extent to which such municipal networks may be deployed and operated.[6] As to be expected, proponents of municipal networks do not like these laws and, having failed in the state legislature, tried to have the Federal Communications Commission use its narrow preemption authority contained in Section 253 of the Communications Act to preempt such laws.[7] To date, these efforts have not met with success in the courts. Now, proponents of municipal broadband contend that the FCC may preempt under Section 706 of the Communications Act.[8] As explained below, however, it is unlikely the courts will reach a different result.

The First Attempt: Section 253. One of the boldest provisions in the Telecommunications Act of 1996 was Section 253, which provided the FCC with the then-new and narrow authority to preempt state laws and regulations. Under Section 253(a), ''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 telecommunications service.''[9] (Emphasis supplied.) If the FCC determines that a ''State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)'' then the ''Commission shall preempt .. to the extent necessary. . . .''[10] Using this authority, the FCC has a successful track record of preempting state laws and regulations which have deterred entry for network deployment.[11]

Seizing upon the language of Section 253(a), proponents of municipal broadband argued that because municipal providers are an ''entity'', the FCC should forbear from laws that restrict municipal broadband deployment. When this argument came up in the case of *Nixon v. Missouri Municipal League,*[12], however, the United States Supreme Court flatly disagreed.

The Supreme Court's rationale for rejection was straightforward: ''[F]ederal 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. . .''[13] Indeed, reasoned the Court, granting forbearance in this circumstance ''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.' ''[14]

A New Theory: Section 706. Despite this defeat in *Nixon*, proponents of municipal broadband have spent the last decade trying to find an alternative legal theory of preemption and, with the D.C. Circuit's recent ruling in *Verizon v. FCC*,[15] believe they now may have finally found one—namely, the FCC's authority in Section 706(a) of the Communications Act.[16] Section 706(a) states that the agency may use, ''in a manner consistent with the public interest, convenience and necessity, . . . regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.'' Given the court's ruling, FCC Chairman Tom Wheeler, a vocal proponent of municipal broadband,[17] boldly stated last April that ''I believe the FCC has the power—and I intend to exercise that power—to preempt state laws that ban competition from community broadband.''[18]

Taking up Chairman Wheeler's invitation, the municipal provider in Chattanooga, Tennessee recently filed a petition with the FCC urging the agency to use its authority under Section 706 to preempt a Tennessee state law which, it claims, prevents it from expanding beyond its existing franchise territory.[19] While the

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[5] Connecting America: The National Broadband Plan, Federal Communications Commission (March 16, 2010) at p. 153 (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf) (hereinafter the *National Broadband Plan*).

[6] For a brief description of such laws, *see National Broadband Plan, id.* at p. 113; *see also* J. Stricker, *Casting a Wider 'Net: How and Why State Laws Restricting Municipal Broadband Networks Must be Modified,* 81 George Wash. L. Rev. 589 (2013) and citations therein. Needless to say, state legislators are very concerned about the FCC attempting to use Section 706 to preempt state laws restricting municipal broadband. *See, e.g.,* July 22 2014 Letter from National Conference of State Legislatures (NCSL) to FCC Chairman Tom Wheeler (available at: http://www.ncsl.org/documents/standcomm/sccomfc/FCC_Preemption_LTR_072214.pdf).

[7] 47 U.S.C. § 253.

[8] 47 U.S.C. § 1302.

[9] 47 U.S.C. § 253(a).

[10] 47 U.S.C. § 253(b).

[11] *See, e.g., In the Matter of the Public Utility Commission of Texas,* FCC 97-346, 13 FCC Rcd 3460, Memorandum Opinion and Order (rel. Oct. 2007).

[12] *Nixon v. Missouri Municipal League,* 541 U.S. 124 (2004).

[13] *Id.* at 140.

[14] *Id.*

[15] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[16] 47 U.S.C. § 1302(a).

[17] T. Wheeler, *Removing Barriers to Competitive Community Broadband*, Official FCC Blog, (June 10, 2014) (available at: http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband).

[18] Remarks of Tom Wheeler, Chairman, Federal Communications Commission, before the National Cable & Telecommunications Association (April 30, 2014) (available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0430/DOC-326852A1.pdf).

[19] *In the Matter of The Electric Power Board of Chattanooga, Tennessee* (filed July 24, 2014) (available at https://www.epb.net/downloads/legal/EPB-FCCPetition.pdf). With a speed generally unheard of for the FCC, four days later the agency established its pleading cycle. *See* 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 And 14-116 (July 28, 2014) (available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0728/DA-14-1072A1.pdf).

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FCC's authority under Section 706 is certainly broad[20] (indeed, it is the heart of the FCC's legal theory for drafting new *Open Internet* rules[21]), some basic lawyering reveals three glaring infirmities in the argument that Section 706 gives the FCC the legal authority to preempt state laws regarding municipal broadband.

Forbearance Does Not Equal Preemption. First, it is important to note that nowhere in Section 706 does any derivation of the word ''preemption'' appear—only the word ''forbearance''—and there is a big legal difference between the two concepts.

To wit, Black's Law Dictionary defines the concept of forbearance simply as ''refraining from action.'' In contrast, Black's defines preemption as the ''doctrine adopted by the U.S. Supreme Court holding that certain matters are of such a national, as opposed to local character that federal laws pre-empt or take precedence over state laws.'' Given the Constitutional implications of preemption, therefore, there is a much higher legal standard to meet if an agency of the federal government would like to preempt a state law. Indeed, as the Supreme Court observed in *Wyeth v. Levine,* there are

> two cornerstones of our pre-emption jurisprudence. First, ''the purpose of Congress is the ultimate touchstone in every pre-emption case.'' Second, ''[i]n all pre-emption cases, and particularly in those in which 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.' '' [22]

So, given that Congress deliberately chose to exclude the term ''preemption'' from Section 706(a), it is difficult to see how the FCC's use of Section 706 to preempt state laws would reflect a ''clear and manifest purpose of Congress.''

In its pleading, Chattanooga seeks to side-step this point by arguing that ''forbearance'' falls under the vague language in Section 706, which permits the FCC to use ''other regulatory methods that remove barriers to infrastructure investment.'' Again, however, Chattanooga glosses over the key finding of Constitutional law in *Nixon*. As the Supreme Court observed, while the FCC has ample authority to preempt state laws and regulations that create barriers to entry for *private* entities, the court in *Nixon* specifically held that ''neither statutory structure nor legislative history [of Telecommunications Act of 1996] points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms.'' Thus, reasoned the court, the ''want of any 'unmistakably clear' statement to that effect is fatal'' to any argument that Congress intended the FCC to have any authority to preempt state laws which restrict municipal broadband.[23]

Any Use of Section 706 Must be Tied to a Specific Delegation of Authority. Another infirmity with the use of Section 706 to try to preempt state laws regarding municipal broadband results from the D.C. Circuit's holding in *Verizon* that ''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.*''[24] According to the D.C. Circuit's holding in *Comcast v. FCC*, this means that any use of Section 706 must be tied directly to a specific delegation of authority in ''Title II, Title III, or Title VI. . .''[25] As Section 706 focuses on forbearance (and not preemption), we need to look at where Congress specifically delegated to the FCC its forbearance authority—namely, Section 10 of the Communications Act.[26]

Well guess what? *There is absolutely nothing in Section 10 which permits the FCC to preempt any state law or regulation.* To the contrary, Section 10 is limited to the FCC exercising forbearance only over its own implementation of certain portions of the Communications Act.[27]

To the extent the FCC does have any direct preemption authority over state laws and regulations, *that authority rests exclusively in Section 253*. So, while the FCC has legitimately (and effectively) used this preemption authority to strike down state laws and regulations to promote competition, as noted above the Supreme Court in *Nixon* has conclusively held that the agency's Section 253 preemption authority does not extend to state laws that limit or prohibit municipal broadband. Thus, if—as *Verizon* and *Comcast* instruct—the FCC's use of Section 706 must be tied to a direct delegation of authority under Title II, Title II and Title VI, then it is unclear how the FCC may use Section 706 to preempt state laws which restrict or prohibit municipal broadband.

Section 706 Gives Co-Equal Jurisdiction to the FCC and State PUCs. Finally, proponents of the Section 706 preemption authority argument fail to grasp the most salient point about the way the statute is written: that is, *Section 706(a)provides co-equal jurisdiction to both the FCC and state commissions ''with regulatory jurisdiction over telecommunications services'' to encourage the deployment broadband on a ''reasonable and*

[20] *See* L.J. Spiwak, *What Are the Bounds of the FCC's Authority Over Broadband Service Providers? A Review of the Recent Case Law,* Phoenix Center Policy Perspective No. 35 (June 2014) (available at: http://www.phoenix-center.org/PolicyBulletin/PCPB35Final.pdf); L.J. Spiwak, *Understanding the Net Neutrality Debate: A Basic Legal Primer,Bloomberg BNA* (July 23, 2014) (available at: http://www.phoenix-center.org/BloombergBNA23July2014.pdf).

[21] *In the Matter of Protecting and Promoting the Open Internet,* FCC 14-61, 29 FCC Rcd 5561, Notice Of Proposed Rulemaking (rel. May 15, 2014) (hereinafter ''*New Open Internet NPRM*'') (available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1.pdf).

[22] *Wyeth v. Levine,* 555 U.S. 555, 565 (2009) (citations omitted).

[23] *Nixon, supra* n. 12, 541 U.S. at 141.

[24] 740 F.3d 623 at 639-40 (emphasis supplied).

[25] *Comcast v. FCC,* 600 F.3d 642, 654 (D.C. Cir. 2010).

[26] 47 U.S.C. § 160. *See also Ad Hoc Telecommunications Users Committee v. FCC*, 572 F. 3d 903, 907 (D.C. Cir. 2009) (''As contemplated by § 706 . . . [f]orbearance decisions are governed by the Communications Act's § 10.. . .'').

[27] Unfortunately, the FCC's use of its Section 10 authority has a rather sordid past. *See, e.g.,* G.S. Ford and L.J. Spiwak, *The Impossible Dream: Forbearance After the Phoenix Order* Phoenix Center Policy Perspective No. 10-08 (December 16, 2010) (available at: http://www.phoenix-center.org/perspectives/Perspective10-08Final.pdf).

timely basis. . .''[28] (While one could argue that many states have legislated that their respective public utility commissions (PUCs) may not impose price regulation, the fact that residual consumer protection and public safety regulations remain counts in my book as ''regulatory authority.'') Thus, because *Verizon* now gives the FCC the power to oversee broadband service providers under Section 706, then by extension *Verizon* also provides state PUCs with the same ability to regulate broadband service providers.[29]

This co-equal authority under Section 706 raises a host of complicated questions with regard to preemption. Here are two hypothetical examples:

■ In the first scenario, let's assume *arguendo* the FCC attempts to use Section 706 to preempt a state law restricting municipal broadband but the local state PUC (exercising the same authority) disagrees. Who wins? My money is on the state PUC: if the FCC can't preempt using its direct authority under Section 253, then the chances of preemption using Section 706 against a state entity with co-equal jurisdiction are slim to none.

■ But there is more: Because *Verizon* gives state PUCs the same authority under Section 706 as the FCC, under Chattanooga's theory a state PUC now has the ability to preempt a law passed by its *own legislature* if it determines that such a law deters broadband deployment.

Clearly, when it comes to preemption, Section 706 presents a Pandora's Box of unintended consequences.

Conclusion. However one feels about municipal broadband as a matter of public policy,[30] as a matter of law the FCC has no authority to preempt state laws limiting municipal entry into the broadband marketplace under Section 706. Indeed, when the Supreme Court first looked at the issue of preemption in municipal broadband in *Nixon*, the Supreme Court went out of its way to note that ''it is well to put aside'' the public policy arguments favoring municipal broadband to support any ''generous conception of preemption.'' Why? Because the issue of preemption is one of statutory interpretation and, as such, ''the issue does not turn on the merits of municipal telecommunications services.''[31] Nothing has changed over the last ten years. The FCC has no more legal authority to preempt state laws limiting municipalities from offering broadband under Section 706 than it did under Section 253. Accordingly, not only will granting Chattanooga's request ultimately end in a rebuke from the courts, but such litigation could bring the FCC's broader authority under Section 706 crashing down with it.

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[28] For a full examination of this topic, *see* L.J. Spiwak, *Federalist Implications of the FCC's Open Internet Order* Phoenix Center Policy Perspective No. 11-01 (February 8, 2011) (available at: http://www.phoenix-center.org/perspectives/Perspective11-01Final.pdf). Chattanooga attempts to counter this argument by citing to an earlier draft of Section 706 which states that ''Measures to be used include: price cap regulation, regulatory forbearance, and other methods that remove barriers and provide the proper incentives for infrastructure investment. *The FCC may preempt State commissions if they fail to act to ensure reasonable and timely access.*'' Chattanooga Pleading at p. 42, citing H.R. Conf. Rep. No. 104-458, 104th Cong, 2d Sess., 1996 U.S.C.C.A.N. 10, 224-225, 1996 WL 46795 (Jan. 31, 1996) (emphasis supplied). However, the fact that this highlighted language was deliberately not included in the final draft, coupled with the fact that Section 706(a) clearly gives jurisdiction to both the ''Commission *and* each State commission with regulatory jurisdiction over telecommunications services'' (emphasis supplied) speaks volumes to the validity of Chattanooga's argument.

[29] A point already recognized widely among state commissioners. *See* L.J. Spiwak, *NARUC Recap: Federalist Implications of Verizon v. FCC,* @Lawandeconomics (February 20th, 2014) (available at: http://phoenix-center.org/blog/archives/1825).

[30] According to the Progressive Policy Institute, private sector telecom and cable companies invested over $50.5 billion dollars in capital expenditures in 2012. *See* D.G. Carew and M. Mandel, *U.S. Investment Heroes of 2013: The Companies Betting on America's Future,* Progressive Policy Institute (September 2013) (available at: http://www.progressivepolicy.org/wp-content/uploads/2013/09/2013.09-Carew-Mandel_US-Investment-Heroes-of-2013.pdf). Given that the *raison d'être* of Section 706 is to promote broadband deployment, some might think it a odd policy choice to attempt to use that same statute to permit government to crowd-out private sector investment.

[31] *Nixon, supra* n. 12, 541 U.S. 131-32.

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