Case Nos. 15-3291 & 15-3555

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE STATE OF TENNESSEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
Respondents.

THE STATE OF NORTH CAROLINA,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

Brief of Intervenor Supporting Petitioners National Association of Regulatory Utility Commissioners

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September 18, 2015

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit **Case Name:** *State of Tennessee v. FCC &*
Case Number: 15-3291 & 15-3555 *State of North Carolina v. FCC*

Name of counsel: James Bradford Ramsay

Pursuant to 6th Cir. R. 26.1, the National Association of Regulatory Utility Commissioners (NARUC) makes the following disclosure:

1. **Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:** NO. NARUC is a quasi-governmental nonprofit organization founded in 1889 and incorporated in the District of Columbia. NARUC has no parent company.

2. **Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:** NO. No publicly held company has any ownership interest in NARUC. NARUC represents those government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the regulated telecommunications and electric utilities within their respective borders.

CERTIFICATE OF SERVICE

I certify that on September 18, 2015, the foregoing was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over both the Tennessee and North Carolina challenges to In the Matter of City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, Memorandum Opinion and Order, FCC 15-25, 30 F.C.C. Rcd. 2408 (2015) (rel. Mar. 12, 2015) (P.A. 1-116), (Order) under Section 402(a) of the Communications Act of 1934, 47 U.S.C. § 402(a), and 28 U.S.C. §§2342(1) and 2344. The Order became effective upon release. Id. ¶185 (P.A. 76). Tennessee timely filed its petition in this Court on March 20, 2015. North Carolina filed a petition in the Fourth Circuit, which was transferred to this Court May 19, 2015, and subsequently, on August 3, 2015, consolidated with the Tennessee appeal.

STATEMENT OF THE ISSUES

1. Under the Constitution, does the federal government have the power to rewrite Tennessee and North Carolina law to redefine the geographical area within which its units of local government may provide services?

(a) Does re-drawing territorial boundaries for local government violate State sovereignty?

(b) Can Congress authorize a unit of local government created by the State to exercise powers not vested in that unit by the State?

2. If Congress possesses the power to redefine the territory within which a State-created unit of local government may operate, does Section 706 of the Telecommunications Act of 1996 constitute the requisite "plain statement" of its intent to exercise that authority?

STATEMENT OF THE CASE

Tennessee and North Carolina laws grant State municipal utilities limited authority to provide broadband service. Tenn. Code Ann. §7-52-601; N.C. Gen. Stat. §160A-340 *et seq*. Tennessee municipal electric plants may provide such service, but only "within its [electric] service area." Tenn. Code Ann. §7-52-601. North Carolina allows municipalities to provide broadband services, subject to conditions. N.C. Gen. Stat. §§160a-340 *et seq*.

On July 24, 2015, two municipal broadband providers, the Electric Power Board of Chattanooga, Tennessee ("EPB") and the City of Wilson, North Carolina ("Wilson") petitioned the Federal Communications Commission ("FCC" or "Commission") to preempt laws that restrict their authority to offer broadband. Order ¶ 17 (P.A. 6-7). To be more accurate, those States did not grant either entity authority to expand operations outside specified limits.

The EPB and Wilson petitions assert the geographic limits and other required procedures that limit each State's grant of authority constitute "barriers" to broadband deployment that should be preempted. EPB Petition at 1 (P.A. 400); Wilson Petition at 2 (P.A. 637).

The subsequent March 12, 2015 FCC Order agrees both States' laws constitute "barriers" to broadband deployment. Order ¶ 5 (P.A. 4). The Order asserts Section 706 of the Telecommunications Act of 1996, 47 U.S.C. §1302 (1996), gives the agency both the authority and the duty to preempt such "barriers." Id. ¶ 10 (P.A. 5).

The Order purports to excise from the Tennessee Code the phrase "within its [electric] service area," and claims this change provides authority for EPB to offer broadband services Statewide. Id. ¶¶ 1, 77 (P.A. 2-3, 38).

The Order also purports to eliminate the territorial restriction in N.C. Gen. Stat. §160a-340.1(3). Id. ¶¶ 1, 97 (P.A. 2-3, 45).

Moreover, it preempts, inter alia, North Carolina required public disclosures of business plans/feasibility studies, public hearings and special elections by the citizens of the municipality. Id. ¶¶ 115-118 (P.A. 51-53).

In support of its action, the FCC points to five sources of authority: (1) "Article I, section 8 of the Constitution gives Congress the power to regulate interstate commerce"; (2) "Internet access unquestionably involves interstate

communications, and thus interstate commerce"; (3) "Congress has given the Federal Communications Commission the authority to regulate interstate communications"; (4) "The Commission has previously exercised its authority to preempt State laws that conflict with federal regulation of interstate commerce"; and (5) "§ 706 of the 1996 Act directs the Commission to take action to remove barriers to broadband investment, deployment and competition." Id. ¶ 6(P.A. 4).

In particular, the FCC creates a brand new catch phrase: "State's preferred communications policy objectives," which – according to a September 16, 2015 Westlaw search of all FCC decisions and federal court cases – makes its only and inaugural debut in this Order.[1] The FCC created the concept as a basis for determining which State rules, i.e., the ones the FCC wished to preempt, are not really "State core functions." This is in spite of the fact that the targeted State rules unquestionably control the State's political subdivision.

[1] Order, ¶¶ 11, 147, 167, 178 (P.A. 5, 62-63, 70, 74-75). The undersigned searched in *WestlawNext* the phrase "State preferred communications policy objectives" in the all State and Federal database. The search raised no Court citations and only one FCC citation – which was to the Order on review.

According to the FCC, if these were actually "State core functions," the plain statement rule of Gregory v. Ashcroft, 501 U.S. 452, 460 (1991), would apply to its reliance on § 706.[2] Id. ¶ 11 (P.A. 5). The agency asserts that the general language of "[S]ection 706 authorizes the Commission to preempt State laws that specifically regulate the provision of broadband by the State's political subdivision, where those laws stand as barriers to broadband investment and competition." Id. The FCC contends it has authority to preempt "where a State has authorized municipalities to provide broadband, and then chooses to impose regulations on that municipal provider in order to effectuate the State's preferred communications policy objectives." Id. The Order characterized the Tennessee and North Carolina statutory provisions as merely "State-law communications policy regulations, as opposed to a State core function in controlling political subdivisions." Id. ¶ 13 (P.A. 6).

Two of the five FCC commissioners dissented.

Commissioner Pai concludes that the Order "usurp[s] fundamental aspects of State sovereignty," ignores Supreme Court precedent, and exceeds FCC's authority. Pai Dissent at 100-113 (P.A. 100-113).

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[2] The Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), as amended by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), codified at 47 U.S.C. §§ 1302, 1303 (Section 706).

Commissioner O'Rielly finds the Order relied on an "illogical and tortured" reading of § 706 that would vest the FCC with "carte blanche" to take almost any action to regulate broadband. O'Rielly Dissent at 114 (P.A. 114).

Subsequently, the States of Tennessee and North Carolina timely filed petitions for review ultimately consolidated in this Court. NARUC respectfully requests this Court vacate the entire FCC Order and confirm State sovereignty over subordinate units of government.

SUMMARY OF THE ARGUMENT

The FCC's February 2015 Order preempting State law restrictions on local government ownership of broadband networks is severely flawed. The FCC's claims of preemptive authority to interfere with the exercise of States' discretion over their political subdivisions clash with fundamental principles of constitutional federalism. The Supreme Court has long recognized that States have broad discretion to delineate the powers local governments may exercise. The FCC is preempting State enabling statutes. These are the vehicles for States to structure operations, delegate power, and specify processes for all types of subordinate political subdivisions of State government – from municipalities to counties to State public service commissions – like NARUC's members.

The FCC persists in treating the municipalities as private entities rather than subordinate political subdivisions.

The FCC cites the fact that Congress regulates interstate commerce, that the FCC has authority over interstate communications, and that the Commission has preempted State laws that conflict with its regulations. Order ¶ 6 (P.A. 4). These statements are generally true, but completely irrelevant and inapplicable to a State's internal process and procedures for determining if, where, and how the State (or one of its political subdivisions chartered/authorized to serve a discrete geographic area) will get in the business of providing broadband service.

The Order claims that § 706 grants the FCC authority to preempt these internal State processes. Id. ¶ 146 (P.A. 62). It does not. The structure, plain text and legislative history of that section demonstrate the frailty of the FCC's adopted construction. Moreover, the Order cites to cases that are not on point or relevant,[3] purports to distinguish cases that are precisely on point,[4] and presents illogical and counter-intuitive explanations for the actions taken.

If this Court chooses to uphold the FCC, it will break new ground. To do so, the Court must endorse the FCC's new framework for determining when the Gregory v. Ashcroft, 501 U.S. 452 (Gregory) (1991) "plain statement" rule must be applied. That new framework divides State enabling legislation for an agency,

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[3] See footnote 8 infra and the accompanying discussion at pages 11-13.

[4] See the discussions of Nixon v. Missouri Mun. League, 541 U.S. 125, 135 (2004), City of Abilene, Texas v. F.C.C., 164 F.3d 49, 52 (Abilene) (D.C. Cir. 1999), and Gregory, infra.

municipality or other subordinate political unit into "State preferred communications policy objectives" and "core State functions." Prior FCC (and Court cases) have not done so when dealing with similar enabling statutes. Moreover, that FCC analysis is inconsistent on its face with the Supreme Court's decisions in both Gregory and Nixon v. Missouri Municipal League, 541 U.S. 125, 135 (Nixon) (2004). If upheld, this Court will also sanction the FCC counter-intuitive "preemptive editing" of State legislation. This new power allows a federal agency to delete restrictions in a State statute and thereby effectively grant municipalities "State" authority, in States where the legislature, via the democratic processes, has unequivocally voted against granting said authority.

Assuming, for the sake of argument, this Court can find that neither Nixon nor Gregory are relevant and that § 706 does provide sufficient authority for the FCC to act, the agency's exegesis of § 706, its treatment of the record below, and its sharp and unexplained departure from prior agency precedent is arbitrary and capricious.

STANDARD OF REVIEW

Pursuant to FRAP 28(i), NARUC adopts by reference the STANDARD OF REVIEW, in the September 18, 2015 *Brief of Petitioner, The State of Tennessee*, filed in Case No. 15-3291, at page 8.

ARGUMENT[5]

I. FCC lacks authority to grant or expand authority to a municipality by preempting State legislation limiting or denying that authority.

A. Constitutional Federalism Principles are inconsistent with FCC Preemption of State restrictions on State government networks.

No one would suggest that the FCC could order a private business not currently engaged in jurisdictional utility operations to either directly provide broadband services or *to require one of its business subsidiaries to do so*.

Can the FCC order an electric company (or one of its subsidiaries) to rollout broadband services? What about Wal-Mart? Can the FCC order Wal-Mart or Google or one their subsidiaries to roll out broadband services?

The answer seems obvious.

But, what if Wal-Mart has a subsidiary that *wants* to rollout broadband? What if Google Fiber has a city-based broadband subsidiary that *wants* to expand an existing city-wide Gigabyte network into adjacent areas? And what if, in each case, the company's Board of Directors (like the democratically-elected State legislators in this case) does not deem it prudent. Or perhaps the Board wants the

[5] For over 120 years, the National Association of Regulatory Utility Commissioners ("NARUC") has represented the interests of public utility commissioners in all States, the District of Columbia, and U.S. Territories charged with, *inter alia*, overseeing certain operations of electric and telecommunications utilities. NARUC's member commissions are, like municipalities, creatures of the State. As creatures of the State, they too *have only the authority and jurisdiction specified by the State.*

subsidiary to hold listening sessions disclosing their plans to get more information or wants to structure financing in a particular way.

Can the FCC bypass/preempt Wal-Mart or Google's governing corporate bylaws to effectively require Wal-Mart or Google to offer a service through its subsidiary that its' Board of Directors opposes or wants to delay pending listening sessions?

Certainly that seems implausible.

Yet, that's precisely what the FCC does to Tennessee and North Carolina in the Order, albeit while ignoring the additional barriers to its actions posed by the U.S. Constitution and controlling Supreme Court precedent.

Indeed, the entire framework the FCC adopted for analyzing the issues necessarily treats EBP and Wilson as if they were *separate* and *private* companies instead of what they are: *political subdivisions of the State subordinate to its democratically-elected legislators – subdivisions that lack any authority to act without specific authorization from those legislators or the State constitution*. Reynolds v. Sims, 377 U.S. 533, 575 (1964) ("Political subdivisions of States— counties, cities, or whatever— never were and never have been considered as sovereign entities").

This skewed approach infects the FCC's entire analysis.

It is reflected clearly in the FCC's (i) discovery of a brand new category of State enabling laws it characterizes as "State's preferred communications policy objectives,"[6] (ii) its refusal to respect prior agency[7] and Court precedent, and (iii) its serial citations to irrelevant cases dealing with FCC preemption of State agency oversight of *private* carriers.

Most of the cited FCC cases involve *State agencies or political subdivisions* that the FCC suggests support its novel theories that (1) the FCC can interfere with core State grants/limitations of authority to its political subdivisions and (2) that the FCC can provide a municipality with authority though preemption that it does not currently possess.[8]

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[6] See Footnote 1, supra, and the discussion infra at pages 4, 18-26.

[7] See discussion infra beginning at 18.

[8] The FCC cites cases, at ¶ 144 note 392 (P.A. 61) preempting NARUC's member State Commissions' (i) CPE rules, in Computer & Communications Industry Association v. F.C.C., 693 F.2d 198 (D.C. Cir. 1982), nomadic Voice over Internet Protocol Services rules in Minnesota Public Utilities Commission v. F.C.C., 483 F.3d 570 (8th Cir. 2007), orders stopping a private carrier from providing interconnection, in Public Utility Commission of Texas v. F.C.C., 886 F.2d 1325 (D.C. Cir. 1989), and, at ¶ 145 note 396 & ¶ 147 note 400 (P.A. 61 & 62), oversight of an intrastate service that could be used to complete interstate calls in National Association of Regulatory Utility Commissioners v. F.C.C., 746 F.2d 1492 (D.C. Cir. 1984). At ¶ 147 note 400, (P.A. 62), the FCC cites City of Arlington, Texas v. F.C.C., 133 S. Ct. 1863 (City of Arlington) (2013), where the Court's upheld the FCC's interpretation of 47 U.S.C. § 332(c)(7)(B)(ii) as requiring local governments to act on siting applications for wireless facilities "within a reasonable period of time after the request is duly filed" as presumptively 90 days, and finally, they cite City of New York v. F.C.C., 486 U.S. 57, 66 (1988),

Indeed, not one of these cases[9] the FCC cites as *support* involve directions or grants of authority from the State to a subordinate political subdivision.

Instead, in each, the FCC preempts the subordinate political subdivision's application/exercise of that power to prevent perceived negative impacts on private parties – usually privately held regulated telecommunications companies.

Nor did a single case involve the circumstance presented for this Court's review: *FCC preemption - based on authority granted in the Telecommunications Act of 1996 – of a State's failure to give a municipality or other political subdivision authority – preemption that results in the municipality having authority it did not have before,* including, e.g., authority to provide service in areas it could not before and authority to start new services without giving the citizens of the municipality the opportunity to examine or vote on the proposed municipal expansion.

For example, in City of Arlington – no one questioned whether States had properly provided Arlington or other Texas cities with authority to regulate rights-of-way. The FCC preemption was directed instead at municipalities' and other political subdivisions' exercise of that affirmatively granted authority in ways that

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at ¶ 142 note 384 (P.A. 60) , where the FCC's preemption of state and local technical standards governing the quality of cable TV signals was upheld.).

[9] See footnote 8, supra.

the FCC found disadvantaged third party *private* carriers because it was inconsistent with very specific language in § 332 if the Telecommunications Act of 1996.[10]

The FCC does cite two cases that apply to the circumstances presented here – preemption of State laws limiting a subordinate political subdivision's authority. However, the cases were not cited to support the FCC's actions. Rather Nixon and Abilene inspired the FCC to create a new analytical framework to explain why neither case bars the intrusion in to core State functions the Order permits. Order ¶¶ 159–166 (P.A. 67-69).

This persistent and inappropriate treatment of municipalities as *private parties* rather than *a subset of the sovereign State* is also inherent in the Order's discussion of the "interstate" character of broadband service. Order ¶¶ 146-150, 155-158 (P.A. 62-63, 65-67). To go back to the Google Fiber example – nothing about the "interstate" character of the service to be offered, or the federal government's authority over interstate commerce, changes either Google Board's

[10] Indeed, in City of Arlington – there were no federalism concerns. Even if there had been – the controlling statutory text was explicit and would have easily met the Gregory clear statement rule. The argument was over the correct interpretation of the term "reasonable time" in 47 U.S.C. §332(c)(7)(B)(ii): "[T]his case has nothing to do with federalism. Section 332(c)(7)(B)(ii) *explicitly supplants* state authority by *requiring* zoning authorities to render a decision "within a reasonable period of time," and the meaning of that phrase is indisputably a question of federal law. City of Arlington, 133 S. Ct. at 1873. {emphasis added}.

interest or its ability to [1] control where, when, and how a Google subsidiary rolls out gigabyte broadband service to a new city or adjoining town or county or [2] require a subsidiary to make certain showing and comply with internal procedures before proceeding.

If Google Fiber's Board wants to require a subsidiary or division to hold listening sessions and outline its proposals to a community before deciding to invest in deployments, the FCC can do nothing to stop them.

If that board chooses to instruct its subsidiary that it will not expand operations or begin construction of new broadband facilities in a new city, even though the city certainly wants the service, and the subsidiary may want to expand its operations - the FCC can do nothing to require them to do so.

The FCC attempts to bootstrap its generic authority over interstate telecommunications into a weapon to interfere with the democratic process at the State level. This Court should not allow them to do so. "[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

States and the federal government exercise separate powers within their own spheres of authority.

It is incontrovertible that one essential attribute of State sovereignty is the prerogative to decide how to allocate governmental authority. As the Supreme Court noted in Gregory, 501 U.S. at 460, "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as sovereign." Id.

While the scope of State and federal authority is outlined by the U.S. Constitution,[11] local governments are not mentioned. Thus it is no surprise that the Supreme Court points out, repeatedly, that

> [*local governments] are the creatures- mere political subdivisions- of the state, for purpose of exercising a part of its power.*
>
> *They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted.*[12]

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[11] U.S. Constitution, Amendment 10. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

[12] Atkin v. State of Kansas, 191 U.S. 207, 220(1903) See also, Ysursa v. Pocatello Education Association, 555 U.S. 353, 362(2009) (quoting Trenton v. New Jersey, 262 U.S. 182, 187 (1923); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 607-08(1991); Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907), "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them…The number, nature and duration of the powers conferred upon these corporations *and the territory over which they shall be exercised rests in the absolute discretion of the State*." {emphasis added} 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*") {emphasis added}

The citizens of Tennessee and of North Carolina have spoken through their elected State representatives to adopt laws that limit the activities of municipalities operating in their respective jurisdictions.[13] As Commissioner Pai points out in his dissent, the Tennessee law at issue passed both Democrat-controlled State houses unanimously and was signed into law by a Republican governor. The Order purports to grant Tennessee municipal electric systems, including EPB, and North Carolina cities "authority to offer broadband services outside their service territories – authority which those systems have *never* possessed." Pai Dissent at 100 (P.A. 100).

The Supreme Court has indicated that federal interference is generally impermissible into precisely this type of State-as-sovereign democratic process, i.e., a State's determinations through the democratic process of whether or to what extent to grant authority to local governments.

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[13] The unanimous Clinton-era FCC decision that was confirmed by Nixon explains: "[Municipalities] may not undertake any activities which are . . . limited by statute.[] HB 620 is a statute the Missouri legislature has adopted to limit the powers of its political subdivisions . . .it prohibits Missouri's municipalities, as political subdivisions of the state, from providing telecommunications service. . . .preempting the enforcement of HB 620 . . . would insert the Commission into the relationship between the state of Missouri and its political subdivisions in a manner that was not intended by section 253." In Re Missouri Municipal League, Memorandum Opinion and Order, 16 F.C.C. Rcd. 1157, 1164 (2001).

A federal agency cannot suborn the democratic process by granting subordinate political subdivisions authority that their respective States *never delegated in the first place*. "Federal law, in short, may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion." Abilene, 164 F.3d at 52.

B. The 1996 Act Contains No "Clear Statement" that permits the FCC to intrude in core State functions by preempting State Control of subordinate political subdivisions.

1. The FCC's Order interprets federal law to infringe on State Sovereignty and requires application of the Gregory clear statement rule.

The standard articulation of so-called "clear statement rule" is found in Gregory, 501 U.S. at 460-1. There the United States Supreme Court re-affirmed a long line of cases requiring 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." Id.

In spite of the fact that the Order intrudes in internal State business to give a subordinate political subdivision authority the State legislature chose not to provide, the Order finds there is no reason to apply the "clear statement rule" to its claimed source of preemptive authority - § 706. Order ¶¶ 154-158 (P.A. 65-67). Several parties below pointed out the Supreme Court's decision in Nixon v.

Missouri Municipal League, which does apply Gregory, is controlling. Order ¶ 159 note 426 (P.A. 67).

In Nixon, the Court upheld an FCC ruling that the Act did not preempt a State-law flat ban on municipal telecommunications based on 47 USC § 253 (1996) (§ 253). Missouri had passed a flat ban under which no political subdivision of the State could provide telecommunications service. Order ¶ 159 (P.A. 67).

The Order does not dispute that Nixon was correctly decided or that the underlying unanimous FCC decision – which reached the same conclusions – is sound precedent. Order ¶¶ 156-157 (P.A. 66).

Instead, it attempts to distinguish the case, along with related prior FCC and D.C. Circuit decisions[14] that apply the Gregory clear statement rule under the same circumstances with the same result – preemption is not permitted.

Neither Nixon nor Abilene Courts ever reach the issue this Court must decide to uphold the FCC's Order: the "question of whether Congress acting within its constitutional authority, may—through the Supremacy Clause—supersede a State law limiting the powers of the State's political subdivisions." Abilene 164 F.3d at 51-52.

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[14] In re Missouri Municipal League 16 FCC Rcd. 1157 (2001); Abilene, 164 F.3d 49 (D.C. Cir. 1999).

Instead, invoking the Supreme Court's "clear statement rule"[15] – both Courts (along with the prior unanimous FCC decision) found that the proposed FCC action would infringe on State sovereignty. Both also found the text of § 253 does not authorize the FCC to interfere with the relationship between a State and its municipalities.

Why did the FCC, the Supreme Court, and the D.C. Circuit invoke the "clear statement" rule? Well according to the Abilene Court, 164 F.3d at 51-52:

> Whatever the scope of congressional authority in this regard, interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty. Local governmental units within a State have long been treated as mere "convenient agencies" for exercising State powers. *See Sailors v. Board of Educ.,* 387 U.S. 105, 107–08 . . . (1967); *see also Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 607–08 . . . (1991). And the relationship between a State and its municipalities, including what limits a State places on the powers it delegates, has been described as within the State's "absolute discretion." *Sailors,* 387 U.S. at 107–08.
>
> For these reasons, we [agree] that § 253(a) must be construed in compliance with the precepts laid down in *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).
>
> To claim, as the city of Abilene does, that § 253(a) bars Texas from limiting the entry of its municipalities into the telecommunications business is to claim that Congress altered the State's governmental structure.

[15] Gregory, 501 U.S. at 452.

> *Gregory* held that courts should not simply infer this sort of congressional intrusion: "States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." 501 U.S. at 461, 111 S.Ct. 2395.
>
> Like the Commission, we therefore must be certain that Congress intended § 253(a) to govern State-local relationships regarding the provision of telecommunications services. This level of confidence may arise, *Gregory* instructs us, only when Congress has manifested its intention with unmistakable clarity. *See* 501 U.S. at 460, 111 S.Ct. 2395. Federal law, in short, may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion. {emphasis added}.

Five years later, the Supreme Court drew the same conclusion, Nixon, 541 U.S. at 140:

> [L]iberating 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.". . . Hence the need to invoke our 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, in the absence of the plain statement *Gregory* requires.

Fast forward to 2015.

The three FCC Commissioner majority contends it has not interposed federal authority between a State and its subdivisions. This means the clear statement rule is not applicable.

If they are correct, then this Court must also find as a matter of law, among other things, that the FCC actions do not "trench on the State's arrangements for conducting their own governments" when it

[] preemptively edits specific phrases out of a State municipal code that prohibit or specifically deny municipal authority unless certain conditions are met – and

[] proclaims that revised statute – which was never subject to a vote by any democratically elected State legislator – now magically provides State authority for the municipality to act.[16]

According to the Supreme Court in Nixon – The Telecommunications Act of 1996 does not give the FCC authority to grant power to a municipality denied by a State. "There 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." Nixon, 541 U.S. at 135.

[16] "It is therefore our understanding that if North Carolina's statute is preempted, the existing background law will provide authority for cities to provide broadband, as well as mechanisms to finance those operations." Order, ¶ 163 (P.A. 69). The "background law" the FCC references in ¶ 163 means the current law which denies the authority – but as amended (preemptively edited) by the FCC to grant it.

There is no question that before the FCC acted, the State legislation did not provide either EPB or Wilson with the authority they have in the wake of the Order's release.

Can the FCC through its preemption power affirmatively grant authority to act in areas where the legislature has not sanctioned the change? Nixon suggests the answer to that question is no.

The FCC's "analysis" does not soften the intrusion, but an examination only confirms the arbitrariness of the Order's reasoning.

It is difficult to discern from the Order any cogent rationale that supports the FCC claim that Nixon does not foreclose the actions taken here. The FCC's strategy is obvious.

It wants to present a cognizable claim that the Order is not interfering with core State functions. It certainly does not want the Supreme Court's clear ruling, based on Gregory and the much more specific statutory text of § 253, to undermine its proposed use of § 706 as authority to preempt. To do so, the FCC creates a brand new catch phrase "State's preferred communications policy objectives" – which according to a September 16, 2015 Westlaw search of FCC decisions and federal court cases – makes its only and inaugural debut in the Order on review. No other FCC or federal court decision came up during the search.

Tennessee and North Carolina, unlike the States in Nixon and Abilene, did not flatly prohibit municipalities from offering service. Instead they imposed restrictions. Order ¶ 162 (P.A. 68-69). The FCC claims that since the preempted Tennessee and North Carolina laws are not "flat prohibitions," they do not implicate "core attributes of State sovereignty." Id. 157 (P.A. 66).

The FCC created the concept to suggest there is valid analysis for determining when State rules, i.e., mostly the ones the FCC wishes to preempt, are not really "State core functions".[17]

This is apparently true, even though on their face all these "preferred communications policy objectives" directly impact the State's decisions about how and when the State will get involved in telecommunications via municipalities.

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[17] How does the FCC identify "state preferred" policy objectives? The order creates three categories and discusses why each is a barrier to infrastructure or service rollout. Indeed, the Order focuses the bulk of the discussion on how municipal broadband is good public policy that will "promote overall broadband competition" and rejecting contrary arguments. Order ¶¶ 4, 7, 22-55, 57-120 (P.A. 4, 4, 9-28, 29-53). However, the Nixon court disposes of such discussions "at the outset" of its analysis, finding the relative public policy benefits of municipal entry into the market to be irrelevant to the issue before the Court:

> At the outset, it is well to put aside two considerations that. . . fall short of supporting the municipal respondents' hopes . . . The first is public policy . . . [FCC Commissioners] minced no words in saying that participation of municipally owned entities . . .would "further the goal of the 1996 Act to bring the benefits of competition to all Americans . . .[but] the issue here does not turn on the merits of municipal telecommunications services. Nixon, 541 U.S. 125, 131-32.

Indeed, *even the Order acknowledges*, ¶ 179 (P.A. 75), in discussing "measures to impose delay," that "any one of these restrictions, standing alone, could conceivably be characterized as core State control of the manner of local government." Indeed.

The underlying proffered core distinction seems specious. For example, a logical person might have difficulty discovering discernible difference between

[1] a prohibition against providing any service within the geographic boundaries of the municipality (as in Nixon and Abilene) and

[2] a prohibition against providing any service outside the geographic boundaries of the municipality (as in the Order).

Commissioner Pai certainly did, arguing, inter alia, "[t]he line the Commission draws between State prohibitions of municipal broadband projects (which it claims present "a different question") and State restrictions on such projects is artificial and thus untenable. This is because all conditions on the provision of services are effectively prohibitions when those specified conditions are not satisfied." Pai Dissent at 105 (P.A. 105).

Given the characteristic boundaries associated with municipal charters/authorizations, Id. at 103-104 (P.A. 103-104), it can at least be argued that tampering with provisions prohibiting service outside those geographic boundaries - perhaps within the boundaries of another municipality or county - is a bigger

intrusion on State sovereignty than tampering with a "flat prohibition" within the municipal boundaries.

Whatever the relative merits of the FCC "analysis" explaining why Nixon, though valid precedent, should not be followed, it is clear that this Court should apply Gregory's clear statement rule when it examines the text of the putative source of the FCC's authority – § 706.

The statutes targeted for preemption go to the heart of State sovereignty.[18]

As Commissioner Pai notes in his dissent at 104 (P.A. 104)

> [G]eographic restrictions go to the heart of a state's "traditional [] authority to order its government."[] Indeed, the Commission's claim to the contrary is absurd. A critical component of a state's ability to order its government is the ability to organize its own municipal subdivisions. And a critical component of organizing municipalities is the power to define each subdivision's geographic reach. For inherent in the concept of a subdivision is the idea that a locality will exercise authority over a limited geographic area within a State. For example, the definition of a "city" under North Carolina law is "a municipal corporation organized under the laws of this State for the better government of the people within its jurisdiction."[] Indeed, if a State could

[18] In terms of infringing on State sovereignty, among the most egregious of the FCC's many intrusions on democratic process, is its preemption abolishing the North Carolina legislature's requirement that before entering new services, the city have at least two hearings "for the purpose of gathering information and comment" from its citizens. The FCC also purports to abolish a separate North Carolina provision requiring a city to hold a special election "on the question of whether the city may provide communications service" before incurring debt relating to communications service facilities. Order ¶¶ 88, 116, 181 (P.A. 42, 51, 75).

> not confine a municipality's activities to a specified geographic area, then there would be little point in maintaining local governments at all; it would be more efficient to do everything at the state level. This is why the U.S. Supreme Court has made clear: "[T]he territory over which [a municipality's powers] shall be exercised rests in the absolute discretion of the state." [] {footnotes omitted}

Every single provision targeted by this FCC order is part of the State enabling statutes for the municipality. NARUC's member State commissions are, like Wilson and EPB, creatures of the State and have similar enabling legislation that specify procedures and carefully define the limited scope of the particular commission's authority. All these types of statutes do is parcel out slices of authority and require procedures for political subunits of State government. They have no purpose other than to structure the inner operations of State government.

It is difficult to conceive how the FCC action could be more intrusive on State sovereignty and the democratic process - or to come up with circumstances more compelling for application of the Gregory clear statement rule.

2. Section 706 fails the Gregory test.

There is only one relevant remaining difference between the Nixon case and the FCC's action in this proceeding. In Nixon, the municipal petitioners seeking freedom from the State legislature's limitations on their ability to provide telecommunications services relied on § 253. This is not a surprise. It is without

question – on its face – the most pointed and strongly worded tool to preempt State authority in the entire Telecommunications Act of 1996.

In the case at bar, the FCC instead relies on § 706.

But Nixon found the FCC had no authority to act.

As discussed, supra, the FCC's actions clearly require the application of the clear statement rule to § 706.

It is instructive to examine how the Supreme Court applied Gregory to § 253 under almost identical circumstances.

To recap, in Nixon, 541 U.S. at 129, Missouri municipalities argued that § 253 gave the FCC authority to preempt a Missouri statute limiting municipalities ability to provide any telecommunications services.

47 U.S.C. § 253 states:

> 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.
> ...
> (d) Preemption - If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, *the Commission shall preempt the enforcement of such statute*, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

This section *specifically contemplates the preemption of State laws* and subsection (d) mandates that the FCC "shall" *preempt State laws* that have the effect of prohibiting the offering of telecommunications services.

However, in Nixon, the Supreme Court *still* concluded that the section did not contain the requisite clear statement necessary for the Commission to preempt. The Court found it was ambiguous whether Congress intended the phrase "any entity" in § 253(a) to include State and municipal entities. The reason was clear.

> [Preempting] would come only by interposing federal authority between a State and its municipal subdivisions….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. . . .§ 253(a) is hardly forthright enough . . . "ability of any entity" is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress *to treat governmental telecommunications providers on par with private firms*. {emphasis added}
>
> Nixon 541 U.S. at 140-1.

Here, the Commission relies on § 706, not § 253, for its authority to preempt State laws governing municipal broadband. But if § 253 cannot satisfy *Gregory*, § 706 does not even come close. Unlike § 253, § 706 never even mentions the word preemption – with respect to States or otherwise. When it does mention States – it

is to give them a co-equal role under the section to promote infrastructure deployment. Specifically § 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. {emphasis added}

Preemption is *not* one of the enumerated methods. Inferring preemption of States seems counter-intuitive as § 706(a) explicitly recognizes a co-equal role both for "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services." Earlier, this brief referenced the FCC's misplaced reliance on the "interstate character" of broadband services. Assuming for the sake of argument, those FCC contentions are actually relevant to any examination of FCC jurisdiction to interfere with internal State allocations of authority/enabling legislation, the FCC's reliance on this provision is somewhat ironic. After all, Congress in § 706(a) has specified that States "shall" encourage deployment of advanced telecommunications capability. Federal preemption of State laws imposing geographic or other limits on government ownership of broadband networks disregards the State role the statute explicitly acknowledges.

As Commissioner Pai points out in his dissent:

> In short, section 706 does not "point unequivocally to a commitment by Congress" to permit the FCC to preempt state laws governing their own municipalities. Section 706 therefore does not satisfy the clear statement rule and does not permit the Commission to preempt state prohibitions on municipal broadband projects."
>
> Pai Dissent at 103 (P.A. 103).[23]

Section 706(b) also requires the FCC to conduct regular inquiries to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." According to this section, if "the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

The most recent FCC 706 report concludes advanced telecommunications services are not being deployed on a reasonable and timely basis.[19] Commissioner Pai pointed out in his dissent that even under the majority's analysis, the FCC authority under § 706(b) exists only as long as FCC negative findings persist. Pai Dissent at 107 (P.A. 107). Preemptive power would vanish when the FCC makes a subsequent finding that broadband is being deployed on a reasonable and timely

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[19] In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act, Order, 30 F.C.C. Rcd. 1567 (2015).

basis. That makes it unlikely Congress expected the FCC to preempt State enabling legislation based on § 706(b). Notwithstanding the Order's contrary explanations at ¶ 145 (P.A. 61), the legislative history supports this view.

As Commissioner Pai explains:

> [T]he statutory history underlying section 706(b) also points in the same direction. When the Senate in 1995 passed the bill that became the Telecommunications Act of 1996, that legislation contained a precursor to section 706(b) that authorized the FCC, if it determined that broadband was not being deployed in a reasonable and timely fashion, to "preempt State commissions that fail to act to ensure [the] availability [of advanced telecommunications capability to all Americans]." But Congress ultimately decided not to grant this preemptory power to the Commission and *eliminated that language from the final version of the bill*.
>
> Pai Dissent at 109 (P.A. 109). {emphasis in the original}

Section 601(c)(1)[20] of the Telecommunications Act of 1996 also renders implausible the Order's interpretation of § 706.

That section reads:

> NO IMPLIED EFFECT- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

[20] 47. U.S.C. § 152 Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c), 110 Stat. 56 (codified at 47 U.S.C. § 152).

Curiously, though the Order concedes that by "its terms, § 601(c) prevents 'implied' preemption," it interprets the provision to implicitly give such preemptive powers to the FCC. Order ¶ 153 (P.A. 64). Such a reading makes little sense. As Commissioner Pai wrote:

> It is difficult to believe that Congress would have been concerned about implicitly superseding State law in the text of the Act yet would implicitly give the Commission the authority to do the exact same thing."
>
> Pai Dissent at 106 (P.A. 106).

Even if § 706 could get by a Gregory plain statement analysis, and it cannot, a simple textual analysis of the section does not support the FCC's assertion of preemption. The section does not mention preemption. The section grants co-equal status and responsibility to States. The FCC's proposed interpretation leads to perverse results. That text, viewed in light of both the legislative history of the provision and the fact that Congress provided an explicit and powerful tool for preemption in §253, make clear the FCC's strained construction cannot be upheld.

II. The FCC's Order is Arbitrary and Capricious.

The FCC's action violates settled principles of administrative law. The agency has made clear, that although the Order only addresses the EPB and Wilson petitions "the Commission will not hesitate to preempt similar statutory provisions…where they function as barriers to broadband investment." Order at

¶16 (P.A. 6). In its zeal to reach its desired policy outcome, the FCC has overlooked baseline legal requirements. The Order is arbitrary and capricious for several reasons.

First, the Order is contrary to substantial record evidence. See National Fuel Gas Supply Corp. v. FERC, 468 F.3d 831, 839 (D.C. Cir. 2006) (vacating agency Order where there was "no evidence of a real problem" to support expanded regulatory regime). The record below contains no evidence of a problem sufficient to justify the FCC running roughshod over an approach to municipal broadband passed into law by democratically-elected State legislators.

In addition, the record below reveals a sharp dispute over the wisdom of local government bodies taking on such ventures.[21] See, e.g., Comments of Citizens Against Government Waste at 3 (P.A. 752). It is replete with evidence of municipal broadband project failures—efforts that drained scarce State resources with taxpayers left holding the bag. See, e.g., Comments of CenturyLink at 5-7 (P.A. 947-949); Reply Comments of NARUC at 4, n.9 (P.A. 1001) ("It appears the majority . . . of the roughly 200 comments filed in the 14-116 proceeding provide no objective evidence to support the petitions."), Charles M. Davidson & Michael J. Santorelli, *Understanding the Debate Over Government-Owned Broadband*

[21] Note: NARUC does not take a position on whether municipal broadband systems are good or bad public policy. That is, as argued throughout this brief, a decision for State Legislatures.

Networks: Context, Lessons Learned, And A Way Forward For Policymakers, Advanced Communications Law & Policy Institute at N.Y. Law School at 80 (Jun. 2014)(P.A. 758-940) (describing the $30 million taxpayers lost with the failure of Groton, Connecticut's municipal broadband network); id. at 83 (noting sale of iProvo, a government-owned network in Utah that left the city with $40 million in debt). Tennessee's own Memphis Light Gas and Water, for example, lost over $28 million in taxpayer dollars when its Memphis Networx telecommunications venture failed. See, Meek, Andy, *Memphis Networx: From Smart Money to Risky Business,* MEMPHIS DAILY NEWS (Jun. 22, 2007), http://www.memphisdailynews.com/editorial/Article.aspx?id=33060.[22]

The FCC ignored all of this evidence, dismissing without explanation the risks associated with municipal broadband as mere "generalized objections." Order

[22] Risks associated with municipal broadband service have increased since the FCC reclassified broadband internet access. See, In the Matter of Protecting & Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 F.C.C. Rcd. 5601 (2015). Many municipal broadband operators opposed reclassification, and pointed out the risks that would flow from it, including "significant new common carrier compliance and reporting obligations," and the "potential for liability for violations of" various provisions of federal law. Letter from Josh Callihan on behalf of Municipal Broadband Operators to Marlene Dortch, GN Docket No. 14- 28, GN Docket No. 10-127 (Feb. 10, 2015). It is entirely reasonable for States to proceed with caution in letting their subdivisions enter activities facing unquantified additional federal oversight.

¶ 56 (P.A. 28-29). The FCC also failed to assess the practical effects of its expansive preemptive approach to State municipal broadband regulation.

It was plainly arbitrary and capricious for the FCC to refuse to consider numerous substantive comments and to fail to "tak[e] into account whatever in the record fairly detracts from its weight." Telespectrum, Inc. v. Public Service Commission of Kentucky, 227 F.3d 414, 423 (6th Cir. 2000) (holding Order failed to meet the substantial evidence standard where agency relied on "no more than unsupported opinion"); see also Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1578 (10th Cir. 1994) ("Isolated bits of evidence, taken out of context and overwhelmed by other evidence, will not support an affirmance of agency action."). Moreover, the agency failed to consider the practical consequences of its remarkable action. See ITT World Commc'ns, Inc. v. FCC, 725 F.2d 732, 751 (D.C. Cir. 1984) ("[T]he FCC is responsible for weighing the potential benefits against the detriments of a proposed policy"). Lacking "awareness of the practical ramifications" of its decision, the Order is "fundamentally flawed." ACLU v. FCC, 823 F.2d 1554, 1573 (D.C. Cir. 1987). The FCC's refusal to consider the robust record evidence documenting municipal broadband failures and the practical consequences of the Order's approach is particularly capricious where, as here, the FCC's action intrudes upon a fundamental State power and deprives the States of the ability to weigh the very issues with municipal broadband failures that the FCC

ignores.[23] See generally Michigan v. E.P.A., 135 S. Ct. 2699, 2711 (2015) (requiring agencies to consider cost before deciding whether regulation is appropriate and necessary).

Second, the FCC failed to consider reasonable alternatives to boldly preempting State law. The record identifies countless alternative approaches that the FCC could have taken to address the purported "problem" that broadband is not being deployed on a "reasonable and timely basis to all Americans." Order ¶ 19 (P.A. 7). The FCC could have dedicated additional funds to broadband deployment efforts, focused on removing barriers to *private* broadband deployment, or explored public-private partnerships to expand broadband deployment. See, e.g., Comments of USTelecom at 2, 5 (P.A. 971, 974). But the FCC ignored its duty to consider these reasonable—and more efficient—solutions to "promote competition" and "remove barriers" to broadband deployment. It did so in the most cursory way possible, by noting in a single sentence that these "objections…mistakenly assume that these options are mutually exclusive." Order ¶ 72 (P.A. 37). But it is the Commission that is mistaken, for these options clearly

[23] The FCC declined to consider how its preemptive approach will impact States still considering whether to authorize any municipal broadband. Nor did it grapple with the regulatory burdens that would saddle such ventures given the new obligations imposed by the FCC's recent reclassification of broadband. See supra, n.22. It also ignored the Order's impact on State governance, maintaining that its concern was only with "enhance[ing] broadband deployment." Order ¶ 71 (P.A. 37).

constitute less intrusive alternatives than the type of intrusion into State sovereignty the Order authorizes. "The failure of an agency to consider obvious alternatives has led uniformly to reversal." City of Brookings Municipal Telephone Company v. F.C.C., 822 F.2d 1153, 1169 (D.C. Cir. 1987).

Third, the FCC has failed to justify its reversal of course in its approach to municipal communications services. It is well-settled that when an agency changes course, it is obligated to supply a "reasoned explanation" for the change. F.C.C. v. Fox, 556 U.S. 502, 514 (2009). Here, the FCC made a sharp and unexplained departure from its previous policy of preserving the States' sovereign right to regulate municipal communications offerings. See, e.g., In the Matter of Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997). Reversing its policy for the past fifteen years *sub silentio* impermissibly disregards the FCC's obligation to provide a "reasoned explanation." Fox, 556 U.S. at 514.

Finally, the Order rests on a number of conclusory assertions. The FCC arbitrarily concludes that the Tennessee regime "serve[s] as state-law communications policy regulation[]" rather than "a core State function in controlling political subdivisions." Order ¶ 13 (P.A. 6). The Order offers no support for this theory, other than the terse observation that it does "not limit[] the expenditures of a city" and so could not "further any core State function." Id. The

Commission's rationale for this proposition is "conclusory [and] unsupported." McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1187 (D.C. Cir. 2004). Indeed, the Order points to no evidence that Tennessee's legislature enacted the geographic restriction as a communications policy initiative. To the contrary, the regime delineates the powers of Tennessee's municipal subdivisions within the context of Tennessee's State-wide governance objectives. The Communications Act does not give the FCC free rein to upend this deliberate governmental ordering.

The Order's flawed reasoning leads to anomalous results. Agencies may not "construe a statute in a manner that leads to absurd or futile results." Nixon, 541 U.S. at 138. Under the FCC's novel theory of preemption, States are free to enact the most severe prohibition on entering the municipal broadband market—a flat ban—while modest conditions on a municipality's provision of broadband service are impermissible "barrier[s]" to broadband deployment. Order ¶ 16 (P.A. 6).

It is only after the State has granted the municipality *some* authority to provide broadband in the State that the FCC's preemptive power springs to life, tying the State's hands to the extent it wishes to place modest limits on a locality's authority. But this yields an absurd result: States are incentivized to decline to

authorize municipal broadband entry at all, which would undermine the FCC's purported goal of encouraging broadband deployment under § 706.[24]

Deprived of the ability to effectively manage municipal broadband service once authorized, States may well balk at granting such authorization in the first place. Not only is such an outcome absurd and futile; it is the *sine qua non* of arbitrary and capricious agency action. The FCC does not seriously grapple with this issue. Instead, the Commission considers only whether the Order will result in the two particular petitioners here expanding their service areas, Order ¶ 76 (P.A. 38), and whether the Order will promote overall deployment *in Tennessee and North Carolina* alone. Id. ¶ 4 (P.A. 4). But the agency cannot blind itself to the broader impact that the Order will have in other States that are still considering whether and how to authorize trial broadband programs by their municipalities. Under any reading of § 706, the FCC's responsibility is to promote broadband for "all Americans" on a nationwide scale, not to take individual actions that promote broadband in particular regions without regard to their impact on overall broadband deployment. 47 U.S.C. §§1302(a),(b). It is arbitrary and capricious for the Commission to ignore the broader effects of the precedent it establishes here, which may well run afoul of § 706's overarching purpose.

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[24] Though its effect is ostensibly limited to North Carolina and Tennessee, the Order makes clear that the agency "will not hesitate to preempt similar statutory provisions" in other states. Order ¶ 16 (P.A. 6).

CONCLUSION

For the foregoing reasons, NARUC requests that the Court vacate the entire FCC Order and confirm State sovereignty over subordinate units of government.

Respectfully submitted,

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DATED: September 18, 2015

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with 00the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e) because it contains 11,868 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

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DATED: September 18, 2015

CERTIFICATE OF SERVICE

I certify that on August 21, 2015, I caused two copies of the foregoing brief motion to be served upon the parties listed through the Court's electronic filing system. Pursuant to Sixth Circuit FRAP 25(f) a copy of the motion has been sent this same day by U.S. Mail, postage paid, to the following party not represented by counsel.

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Statutory Addendum Pursuant to FRAP 28(f)

CONTENTS

UNITED STATES CONSTITUTION

U.S. Const, Amendment X The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

COMMUNICATIONS ACT OF 1934 As Amended

47 U.S.C. §152 note (Pub. L. No. 104-104, § 601(c)(1)).
Sec. 601 Applicability of Consent Decree and other laws
* * * * *
(c) Federal State, and Local Law.-
(1) No Implied Effect.- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

47 U.S.C. § 253
(a) In general
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.
(b) State regulatory authority
Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
(c) State and local government authority
Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
(d) Preemption
If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.
(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.
(f) Rural markets
It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply--
(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and
(2) to a provider of commercial mobile services.

47 U.S.C.§ 1301. Findings
The Congress finds the following:
(1) The deployment and adoption of broadband technology has resulted in enhanced economic development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans.
(2) Continued progress in the deployment and adoption of broadband technology is vital to ensuring that our Nation remains competitive and continues to create business and job growth.
(3) Improving Federal data on the deployment and adoption of broadband service will assist in the development of broadband technology across all regions of the Nation.
(4) The Federal Government should also recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data and should encourage and support the partnership of the public and private sectors in the continued growth of broadband services and information technology for the residents and businesses of the Nation.

47 U.S.C.§ 1302. Advanced telecommunications incentives
(a) In general - 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 (including, in particular, elementary and secondary schools and classrooms) 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.
(b) Inquiry - The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.
(c) Demographic information for unserved areas - As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) 1 and to the extent that data from the Census Bureau is available, determine, for each such unserved area- **(1)** the population; **(2)** the population density; and **(3)** the average per capita income.
(d) Definitions For purposes of this subsection:
(1) Advanced telecommunications capability - The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommuni-cations capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.
(2) Elementary and secondary schools - The term "elementary and secondary schools" means elementary and secondary schools, as defined in section 7801 of title 20.