Nos. 15-3291 & 15-3555

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE STATE OF TENNESSEE,
THE STATE OF NORTH CAROLINA,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order
of the Federal Communications Commission

BRIEF OF *AMICUS CURIAE* SENATOR EDWARD J. MARKEY IN SUPPORT OF RESPONDENTS

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November 12, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* states that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

Amicus Curiae Edward J. Markey is a Senator from Massachusetts who has been a Congressional leader on technology policy. Before becoming Senator in 2013, Senator Markey was a member of the House of Representatives for thirty-seven years. From 1987 to 2008 in the House of Representatives, Senator Markey served either as the Chairman or the top Democrat on the House Energy and Commerce Committee's Subcommittee on Telecommunications. Senator Markey is the House author of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 (1996) ("1996 Act").

Senator Markey now serves on the Senate Committee on Commerce, Science, and Transportation, and the Subcommittee on Communications, Technology, Innovation, and the Internet, both of which have jurisdiction over communications issues and the Federal Communications Commission ("FCC"). Thus, Senator Markey has unique knowledge of the issues in this case, including whether Section 706 of the 1996 Act is an independent grant of authority, and if so, whether it grants the FCC authority to preempt state laws inhibiting the

[1] All parties have consented to the filing of this brief. Pursuant to FRAP 29(c)(5), *Amicus Curiae* states that no counsel for any party, other than *Amicus Curiae* and its counsel, has authored this brief in whole or in part, and no other party or person has made a monetary contribution for the preparation or submission of this brief.

deployment of advanced telecommunications networks such as broadband. In both cases, the answer is yes.

Amicus Curiae has an interest in ensuring the 1996 Act is interpreted accurately by the courts and the FCC with appropriate reference to the text, structure, and history of the statute and the manner in which it was intended to operate. He submits this brief to ensure the Court understands that, in the view of the House author of the 1996 Act, Section 706 provides the FCC independent authority to achieve its statutory goals and includes preemption authority as one potential regulating method. This interpretation is supported by the plain language and structure of the text and the history of FCC preemption decisions against which Congress originally passed the 1996 Act.

SUMMARY OF ARGUMENT

Congress gave the FCC plenary authority over all interstate communications by wire and radio and gave it the necessary authority to create a nation-wide and efficient wire and radio communications service. Congress has repeatedly found that it is in America's best interest to have ubiquitous and reliable interconnected telecommunications networks, and has consistently established federal policy to encourage the rapid deployment of high-speed networks and to encourage local Internet access competition.

Since 1934, Congress has remained sensitive to the role states and municipalities have played in communications network deployment and incorporated into the communications regulatory scheme an important role for local authorities, especially when those decisions were local in nature. However, the federal interest in developing a national, interconnected advanced telecommunications network will in some cases override local and state policy preferences, as in the case of municipal communications network deployment. In such instances, the FCC must use its Section 706 authority to preempt state laws that inhibit those networks.

Section 706 of the 1996 Act is an independent grant of authority. The plain language of the statute shows that Congress intended to give the FCC broad authority to encourage deployment of advanced telecommunications networks when the FCC finds that deployment is not occurring in a "reasonably and timely fashion." 47 USC §1302(b). Not only has the FCC repeatedly interpreted Section 706 as an independent grant of authority, FCC Br. 28-29, but two circuits have reaffirmed this interpretation. *In Re FCC 11-161*, 753 F.3d 1015, 1053-54 (10th Cir. 2014) (affirming that Section 706 is an independent grant of authority); *Verizon v. FCC*, 740 F.3d 623, 637, 641 (D.C. Cir. 2014) (same). Having found that advanced telecommunications capability is not being deployed to all

Americans in a reasonable and timely fashion, the FCC has properly invoked its powers under Section 706 to preempt laws that impede such deployment.

Section 706 provides the FCC the authority to preempt state laws that inhibit the federal policy favoring deployment of a nationwide advanced telecommunications network, including laws preventing or burdening municipal communications networks. Congress enacted Section 706 knowing the FCC's long and extensive history with using preemption as one of its regulating methods. It understood that when it included the language "other regulating methods that remove barriers to infrastructure investment" in Section 706, the statute would extend the FCC's preexisting preemption authority. Further, interpreting Section 706 otherwise would lead to absurd results. If the FCC had no preemption authority, states would be supreme in matters of communications policy and could displace important federal priorities. Congress did not create such a loophole in the federal communications regulatory scheme. Thus, Section 706 provides the authority to preempt state laws.

ARGUMENT

In Section 1 of the Communications Act of 1934, Congress gave the FCC expansive power to create "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 USC §151. Congress further gave the FCC authority over "all interstate and

foreign communication by wire or radio." 47 USC §152(a). The 1996 Act was the first major update to the Communications Act. Section 706 of the 1996 Act was a central element of this modernization. Section 706 was drafted to give the FCC the necessary flexibility to address rapidly-changing telecommunications technologies and markets on a technologically-neutral and forward-looking basis. For instance, Congress used terms such as "advanced telecommunications capability" and "infrastructure" in Section 706 to ensure the 1996 Act would apply to future telecommunications technologies, such as broadband. This broad language allowed the FCC to have flexible tools to respond to technological change in fulfilling the original mission of bringing about the rapid, efficient nation-wide network.

Congress has acted with full recognition of the delicate balance between federal, state, and local authority in communications regulation, and many provisions of the Communications Act empower states and localities to meet the needs of their citizens. However, there are some instances where the federal interest in building a ubiquitous, state-of-the-art interstate telecommunications network overrides state-imposed policy preferences. In those cases, the FCC has

the authority to preempt state efforts to subvert that federal interest. The FCC's *Order* should be upheld.[2]

I. CONGRESS RECOGNIZES THE DELICATE BALANCE BETWEEN FEDERAL, STATE, AND LOCAL AUTHORITY IN COMMUNICATIONS REGULATION, BUT IN SOME INSTANCES, FEDERAL INTERESTS OVERRIDE STATE AND LOCAL POLICY.

Petitioners and their *amici* argue the FCC's *Order* preempting North Carolina and Tennessee laws restricting deployment of municipal communications networks has overridden state sovereignty and that the *Order* goes beyond regulating mere interstate commerce. Tennessee Br. 12-15; *see* Former FCC Commissioner Harold Furchtgott-Roth Br. 11-13. Petitioners also claim Congress could not have given the FCC the authority to preempt because Congress itself lacked that authority. Tennessee Br. 14. To the contrary, Congress, while establishing overriding federal interests in communications policy, has created a comprehensive communications landscape where both states and the federal government have authority over key issues. Petitioners' arguments should be rejected.

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[2] *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*, 30 FCCRcd 2408 (2015) (PA 1-116) ("*Order*").

Congress has repeatedly found that it is in America's best interest to have ubiquitous and reliable interconnected telecommunications networks. As digital technology has developed, Congress has acted to apply these principles to broadband networks. It understands that significant economic prosperity and social benefits occur when Americans have access to advanced telecommunications networks such as broadband and therefore can communicate with each other, engage in society and e-commerce, and benefit from substantial online innovation. For example, in 1996 Congress found that "[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens." 47 USC §230(a)(1). Congress also established national policy to promote

> the continued development of the Internet and other interactive computer services and other interactive media, [and] the policies and purposes of this chapter favoring...vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

47 USC §§230(b)(1), 257(b). Congress reiterated and reinforced these notions in the 2008 Broadband Data Improvement Act, which stated

> [t]he 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,

and

> [c]ontinued 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.

47 USC §1301(a)(1)-(2). The existence and ubiquity of broadband networks has a direct effect on the prosperity of American citizens and the competitiveness of our country as a whole. For these reasons and others, Congress has long established a federal priority to encourage the deployment of a nation-wide advanced telecommunications network for the economic and social benefit of all Americans.

In enacting the 1996 Act, Congress was well aware of how municipalities played a role in communications network deployment. Indeed, as discussed at pages 4-5 of the Brief of Intervenor City of Wilson, Billy Ray, General Manager of the Electric Plant Board of Glasgow, Kentucky, testified about his municipality's successful high-speed network. Testimony of William J. Ray, Superintendent, Glasgow Electric Plant Board, Glasgow, KY, Hearings on S.1822 Before the Senate Committee on Commerce, Science, and Transportation, 103d Cong., 2d Sess. at 355-56, 1994 WL 232976 (May 11, 1994). Senator Trent Lott (R-MS), a prominent Congressional leader, later remarked "I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here." *Id*. at 379; *see* City of Wilson Br. 4-5.

In setting federal priorities, Congress did not ignore states and localities; rather, Congress' emphasis on the deployment of a nation-wide telecommunications network incorporated an important role for local authorities. Congress has repeatedly recognized and understood that state and local authorities are the preferred decision-makers in several areas of communications regulation. For instance, Congress created a joint federal/state board for universal service, 47 USC §254(a)(1), and established a cooperative federalism scheme for universal service that encouraged states to regulate beyond what the FCC required. 47 USC §254(f) ("A state may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."). Congress also left decisions over wireless tower siting and cable franchises to local authorities. 47 USC §§332(c)(7), 552, 531. State commissions are also responsible for reviewing and approving interconnection agreements between telephone providers. 47 USC §252(e)(1). Even Section 706 provides authority to the FCC *and state commissions* to encourage deployment of advanced telecommunications capability to all Americans, 47 USC §1302(a), recognizing the role that state commissions can play in establishing incentives to invest in and deploy broadband infrastructure.

There is, however, an overriding federal interest in developing a national, interconnected telecommunications network. While some states may prefer to

preclude their municipalities from building communications networks, federal policy should not be inhibited by the policy preferences of those states.[3] Preemption of such state laws aligns with Congress' foundational goal of ensuring a nation-wide, interconnected network, and Section 706 provides that authority.

II. SECTION 706 OF THE TELECOMMUNICATIONS ACT OF 1996 IS AN INDEPENDENT GRANT OF AUTHORITY.

Petitioners argue that Section 706 is purely hortatory and does not provide the FCC an independent grant of authority. Tennessee Br. 49; *see* Former FCC Commissioner Harold Furchtgott-Roth Br. 23. This is simply an attempt to restyle old arguments that have been decisively rejected by two other circuit courts. *In Re FCC 11-161*, 753 F.3d 1015, 1053-54 (10th Cir. 2014) (affirming that Section 706 is an independent grant of authority); *Verizon v. FCC*, 740 F.3d 623, 637, 641 (D.C. Cir. 2014) (same). Rather, the FCC has "repeatedly conclude[ed] that Section 706 grants affirmative regulatory authority," and that interpretation should be given deference. FCC Br. 28-29. Petitioners' arguments should be rejected.

[3] Courts have noted "the practical difficulties inhering in state by state regulation of parts of an organic whole." *North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 795-96 (4th Cir. 1976) (quoting *General Telephone Company of California v. FCC*, 413 F.2d 390, 398 (D.C. Cir. 1969)).

Congress enacted Section 706 to provide the FCC broad authority to pursue the federal priority of encouraging the deployment of advanced telecommunications services. Section 706(a) states the following:

> 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.

47 USC §1302(a). Section 706(b) further requires the FCC (not state commissions) to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion," and if the answer is negative, "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 USC §1302(b).

The plain language of Section 706 shows that Congress intended to give the FCC broad authority to encourage deployment of advanced telecommunications networks. The FCC has substantial latitude in interpreting and defining Section 706's terms, such as "advanced telecommunications capability," "reasonable and timely fashion," and "barriers to infrastructure investment." However, the statute states the FCC "*shall* encourage" infrastructure deployment and "*shall*" conduct regular inquiries to stay informed about that deployment. 47 USC §1302(a)-(b)

(emphasis added). When it determines that advanced telecommunications networks are not being deployed in a reasonable and timely fashion "*to all Americans*," the FCC "*shall* take immediate action" to "remov[e] barriers to infrastructure investment" and "promot[e] competition in the telecommunications market." *Id.* (emphasis added). Since 2010, on three successive occasions, the FCC has concluded that broadband is not being deployed in a "reasonable and timely fashion." *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 30 FCCRcd 1375, 1382-83 (2015).[4]

Given the powerful tools conferred under Section 706, it is illogical and anti-textual to argue that Section 706 does not provide the FCC with the authority to employ them. As Judge Silberman said,

> [i]n directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing...price cap regulation, regulatory forbearance, measures that promote competition in the *local telecommunications market*, or other regulating methods that remove barriers to infrastructure investment," Congress necessarily

[4] *See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 27 FCCRcd 10342, 10344, 10350 (2012); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 26 FCCRcd 8008, 8009 (2011); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 25 FCCRcd 9556, 9558 (2010).

> invested the Commission with the statutory authority to carry out those acts.

Verizon v. FCC, 740 F.3d 623, 661 n.5 (Silberman, J., concurring in part).

This is not to say that Section 706 gives unbridled power to the FCC. The statute's primary limiting principle is that the FCC must act consistent with the public interest, convenience, and necessity—a standard used in several other areas of communications law when addressing FCC authority. *See*, *e.g.*, 47 USC §257(b)-(c) (market entry barriers proceedings); §307(c)(1) & (e)(1) (licenses); §309(a) (license applications); §310(d) (license ownership); §318 (transmitter apparatus licenses); §319(d) (construction permits). The statute also limits the FCC's actions in that they must be designed to accelerate deployment of advanced telecommunications capabilities. *Order*, 30 FCCRcd at 2466 (PA 59). The statute contains no other limits because Congress imposed none.

Some opponents further claim that Section 706 merely references the authority provided to the FCC through other sections of the Communications Act. *E.g.*, Scholars of Law and Economics Br. 20-21. These arguments are unpersuasive. Had Congress intended Section 706 to be implemented only by use of authority found elsewhere in the 1996 Act or the Communications Act, it could have easily added language to that effect. By contrast, Congress *did* use similar language elsewhere in the 1996 Act. In Section 257, Congress stated "the Commission shall complete a proceeding for the purpose of identifying and

eliminating, by regulations *pursuant to its authority under this chapter (other than this section)*, market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services...." 47 USC §257 (emphasis added). Congress would not have imposed a similar limitation in Section 706 by implication. Thus, arguments to the contrary should be dismissed.

Section 706 is an independent grant of authority to the FCC. Congress intended the section to provide the FCC the tools necessary to encourage deployment of advanced telecommunications networks. When states impose barriers to that very deployment, the FCC has no choice but to act pursuant to Section 706.

III. SECTION 706 PROVIDES THE FCC THE AUTHORITY TO PREEMPT STATE LAWS THAT ARE CONTRARY TO THE GOALS OF THE ACT.

Petitioners and their intervenors and *amici* argue that the FCC lacks preemption authority under Section 706 because it does not contain a "clear statement" under *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *E.g.*, Tennessee Br. 42-43; NARUC Br. 26-27; Former FCC Commissioner Harold Furchtgott-Roth Br. 23-29. This argument should similarly be rejected.

Section 706 provides the FCC the authority to preempt state laws that inhibit the federal policy favoring deployment of advanced telecommunications networks,

including laws preventing or burdening municipal communications networks. First, Congress enacted Section 706 knowing the FCC's long and extensive history with using preemption as one of its regulating methods.[5] Congress understood that the FCC regulated, in some cases, by preempting state rules and laws that conflict with federal priorities and policies because states should not counteract federal policy simply because they have a different view on what the proper policy should be.

Second, to interpret Section 706 as anything other than a grant of authority to preempt state laws would lead to absurd results. Congress granted the FCC plenary authority over all interstate and foreign communications. 47 USC §151. As discussed above, rapid deployment of a nation-wide communications network

[5] *E.g.*, *People of California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (upholding FCC preemption of state requirements regarding, among other things, structural separation of companies and consumer proprietary network information); *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990) (upholding FCC preemption of "states' authority to regulate the rates of a particular service local exchange carriers provide to interexchange carriers"); *Public Utility Commission of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) (upholding FCC preemption of Texas PUC order disallowing Southwestern Bell from providing a Texas company with additional interconnections); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989) (upholding FCC preemption of states imposing their own forms of structural separation on telephone companies); *Computer & Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976); *see also* Jonathan Jacob Nadler, *Give Peace a Change: FCC-State Relations After* California III, 47 Fed. Comm. L.J. 457 (1995).

is paramount for Congress. To allow states to subvert that goal without any ability for the FCC to take action would create a sizeable loophole that would directly undermine the FCC's statutory objectives and would give the FCC illusory, rather than plenary, authority.

Without the FCC's ability to preempt, states would be supreme in matters pertaining to communications policy and could displace important federal priorities. Already, twenty states have passed laws substantially inhibiting municipal communications networks, which have likely curbed their expansion. Should all fifty states pass similar laws, deployment of advanced telecommunications networks would be even more substantially curtailed. However, municipal networks have largely proven to be successful endeavors that provide substantial benefits to Americans in areas where there is little-to-no private investment in broadband and areas where the localities are not being adequately served by private providers.[6] In many cases, municipal broadband presents a locality's only hope for a high-speed advanced telecommunications network.[7] States that seek to preclude municipalities from building these networks

[6] Community Broadband Networks, Institute for Local Self-Reliance, http://ilsr.org/wp-content/uploads/2015/02/cbbmap-fact-sheet.pdf; Community Network Map, Muninetworks.org, http://muninetworks.org/communitymap.

[7] *See* Eric Null, *Municipal Broadband: History's Guide*, 9 ISJLP 21, 23-24 (2013).

necessarily place barriers to infrastructure investment and limit local competition. Section 706 was designed to prevent such action.

Thus, Congress' understanding of the FCC's preemption history, and its prior knowledge of municipal networks (e.g., Glasgow, KY, as discussed at page 8, *supra*), indicates that it intended the phrase "other regulating methods that remove barriers to infrastructure investment" in Section 706 to extend the FCC's preexisting preemption authority.

CONCLUSION

Section 706 provides the FCC independent authority to preempt state laws when those laws are contrary to the federal policy of broadband network deployment. The FCC's actions in this case align with the text, purposes, and goals of the Telecommunications Act of 1996 and of Section 706. Therefore, the Court should uphold the FCC's *Order*.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

The undersigned hereby certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3626 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman size 14.

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November 12, 2015

CERTIFICATE OF SERVICE

I, Eric Null, hereby certify that on November 12, 2015, I filed the foregoing Brief of *Amicus Curiae* Senator Edward J. Markey with the Clerk of the Court of Appeals for the Sixth Circuit through the CM/ECF system and it was served electronically through that system.

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