

**REMARKS OF MATTHEW BERRY,
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AT THE NATIONAL CONFERENCE OF STATE LEGISLATURES'
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It's an honor to be with you this morning at the National Conference of State Legislatures' (NCSL's) 2014 Legislative Summit. The front page of NCSL's website says that "[t]he strength of NCSL is [its] bipartisanship and commitment to serving both Republicans and Democrats." As one who works in Washington, DC, that's a refreshing sentiment.

At a time when our nation's capital is plagued by partisanship and gridlock, it is often state legislators that are stepping up to the plate to tackle our nation's greatest challenges and doing so in a bipartisan manner. The work of NCSL's Communications, Financial Services, & Interstate Commerce Committee, led by Utah Senator Wayne Harper, a Republican, and Connecticut Representative Chris Perrone, a Democrat, exemplifies that spirit. NCSL understands that compromise doesn't have to be a dirty word and that the job of government is to serve the public interest rather than the interests of a single political party. These are principles that those in Washington, DC would be wise to keep in mind, and that's particularly true at the Federal Communications Commission where I work.

Just consider one amazing statistic dug up by POLITICO. Over the last nine months, there have been more party-line votes at FCC meetings than had been the case over the prior eight-and-a-half years. The Commission used to go the extra mile to reach bipartisan consensus. I witnessed that firsthand under both Republican and Democratic leadership. But unfortunately, the difficult work of finding common ground has been replaced too often by a bit of simple math. Three Democrats can always outvote two Republicans.

This "my way or the highway" approach is bad for the FCC. The lack of give and take produces bad policy and undermines our institutional legitimacy. Just look at the FCC's news coverage over the last few months; it hasn't been pretty. Indeed, one of the few silver linings is that I'm pretty sure the IRS remains more unpopular than we are.

The FCC's current predicament brings to mind what has been called the first law of holes and is sometimes attributed to Will Rogers: "If you find yourself in a hole, stop digging." This is sound advice. But will the Commission heed it? Or will we just continue digging ourselves a deeper hole? One good indication will be how the Commission handles the issue of municipal, taxpayer-funded broadband.

As you may know, the FCC recently sought comment on two petitions asking the Commission to preempt state laws regulating municipal broadband projects in Tennessee and North Carolina, two of twenty-one states that impose restrictions on municipal broadband. It's fair to say that these petitions didn't magically find their way to the Commission. Rather, the FCC pretty much rolled out the red carpet for their arrival.

Consistent with this hospitality, there are signs that the FCC could reach a decision on the issue by the end of this year. The upcoming debate will be important. So will be keeping in mind what the debate is about and what it's not about.

The real debate is *not* about whether it is a good idea for cities to get into the broadband business. *Nor* is it about whether states should restrict localities from getting into the broadband business. Those who work at the FCC, myself included, surely have opinions on those issues. But those are questions to be asked and answered in the fifty state capitals as well as other cities all across our country.

Rather, the debate at the Commission is going to be about a relatively narrow but critical question: Does the FCC have the legal authority to preempt state laws regulating municipal broadband? And the answer to that question is a resounding no.

In looking at any legal issue, it's always good to start with the basics, and here, that means something as fundamental as our nation's federal system of government. The U.S. Supreme Court has explained that "dual sovereignty is a defining feature of our Nation's constitutional blueprint." This means that sovereignty rests with both our national government and our fifty state governments. Or, to put it another way, the Constitution delegates certain powers to the national government and reserves other powers to the states, and the national government can't redistribute this division of authority willy-nilly. This is an inconvenient truth for many in Washington, DC. But it is a truth that the Supreme Court has reaffirmed repeatedly in recent decades.

The relationship between a state and its localities, on the other hand, is an entirely different animal. Sovereignty does not rest with American cities, towns, or counties. Rather, the Supreme Court has stated that local subdivisions merely "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in their absolute discretion." In short, under our constitutional framework, states are free to grant or take away powers from municipalities as they see fit. So the basic concept is this: City governments are appendages of state government, but state governments most definitely are not appendages of the national government.

What does this mean when it comes to the FCC's authority to preempt state laws regulating municipal broadband? The answer can be found in a 2004 case in which several Missouri municipalities challenged a state law forbidding any of the Show Me State's political subdivisions from providing telecommunications services to the public.

The argument set forth by the Missouri municipalities was simple: They asked the FCC to preempt the law under Section 253 of the Communications Act, which provides: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." By the municipalities' logic, cities and towns were "entities" prohibited by the state law from providing telecommunications service, so the Missouri statute plainly ran afoul of the prohibition.

They didn't get very far. A unanimous FCC, under Democratic Chairman (and, like me, a former FCC General Counsel) William Kennard, rejected the claim. So too did the Supreme Court by an 8-1 vote in a case called *Nixon v. Missouri Municipal League*. Why? Because Congress is presumed to legislate with federalism in mind, and so the FCC and the Supreme Court were bound by something called the clear statement rule.

The clear statement rule requires that Congress make its intent unmistakably clear if it wishes to alter the usual constitutional balance between the federal government and the states or preempt states' historic powers. As Justice O'Connor has explained, this rule "is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."

This clear statement rule applied in the Missouri case because federal preemption would have "interpos[ed] federal authority between a State and its municipal subdivisions." As Justice Souter wrote for the Court in *Nixon*: "[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen distribution of its own power, in the absence of" a clear statement to the contrary.

So did the Supreme Court find that Section 253 contained the necessary clear statement to preempt state prohibitions on municipalities providing telecommunications services? No. Even though Section 253 clearly contemplates *some* preemption and forbids a state from "prohibiting the ability of any

entity” to provide telecommunications services, the Court did not find a clear statement that Congress intended “any entity” to include local governments, in addition to private firms. Among other things, the Court noted that “neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms.”

The Supreme Court’s decision in *Nixon* provides a two-step test that courts will use to analyze any attempt by the Commission to preempt state laws restricting municipal broadband projects and to hold that the Commission lacks the authority to take such action.

First, must there be a clear statement that Congress intended to empower the FCC to preempt state restrictions on municipal broadband projects? The answer to this question is yes, because such an effort would “interpose[e] federal authority between a State and its municipal subdivisions” and disturb “a State’s distribution of its own power,” just as Missouri municipalities were asking the FCC to do in the *Nixon* case.

And *second*, is there such a clear statement that Congress intended to give the FCC the authority to preempt state restrictions on municipal broadband? The answer to this question is no, just as the Supreme Court concluded that Section 253 did not contain a clear statement.

To be sure, municipal broadband advocates are not asking the Commission to rely on Section 253. Rather, they are asking the Commission to use a different provision, Section 706 of the Telecommunications Act of 1996. But just as Section 253 failed the clear statement test, so will Section 706. Indeed, the case for preemption is even weaker under Section 706 than it was under Section 253.

Start with a basic difference: Unlike Section 253, the text of Section 706 doesn’t even mention preemption, let alone preemption of state laws that regulate municipalities. Instead, Section 706 embraces other means, like “price cap regulation” and “regulatory forbearance,” to accomplish its goals. And when it comes to the objectives set forth in Section 706(b)—removing barriers to infrastructure investment and promoting competition in the telecommunications market—the Tenth Circuit recently concluded that the provision gave the FCC authority to provide universal service support for broadband networks. In sum, Section 706 does not condone preemption of state laws either explicitly or implicitly, and so it hardly offers up the clear statement one would expect if Congress intended the FCC to “interpos[e] federal authority between a State and its municipal subdivisions.”

Next—and not that you need to, given the statutory text—consider the legislative history. In *Nixon*, the legislative history of Section 253 was silent on whether preemption could extend to a state’s control of its municipalities. In contrast, the history of Section 706 speaks right to the point of preemption. When the Senate passed in 1995 the bill that became the Telecommunications Act of 1996, that legislation contained a precursor to Section 706(b) that authorized the Commission to “preempt State commissions that fail to act to ensure [the] availability [of advanced telecommunications capability to all Americans].” The bill later contained, as the Conference Report put it, “a modification” to that section—specifically, the language authorizing preemption of State commissions was cut. In short, Congress contemplated giving the FCC preemption authority in Section 706 and expressly decided not to do so.

Lastly, the *Nixon* Court reaffirmed its diagnosis of Section 253 by pointing out that the provision “would not work like a normal preemptive statute if it applied to a governmental unit.” Specifically, the Court noted that it would lead to absurd results: “It would often accomplish nothing . . . and it would hold no promise of a national consistency.”

So too with Section 706(a), which empowers not only the FCC, but also state commissions. I doubt anyone would disagree that a federal statute empowering a state commission to preempt state laws regarding municipal broadband “would not work like a normal preemptive statute.” But it would be equally odd to say that a statutory provision that gives authority both to the FCC and to state commissions clearly and unmistakably enables the former, but not the latter, to preempt state law and thus limit state authority.

So for these reasons, Section 706 does not come close to containing the necessary clear statement that Congress intended to authorize the FCC to preempt state restrictions on municipal broadband projects. At best, any statement is as cloudy as the sky in Cold Bay, Alaska, the most overcast city in the United States. Consequently, any FCC attempt to preempt such state laws would be unlawful and sure to meet its end in court.

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The Commission is therefore confronted by a stark choice. We can respect the limits on our authority and focus together on actions that can produce real results for the American people, such as modernizing our regulations to remove barriers to private-sector infrastructure investment and broadband deployment. That is the option that the FCC chose under then-Chairman Kennard in 2001 when it refused to preempt Missouri's prohibition on municipalities providing telecommunications service. Even though the Commission's Democrats at the time made it clear that they opposed the Missouri law on policy grounds, they recognized that the Commission lacked the authority to preempt it. Indeed, Chairman Kennard and Commissioner Tristani specifically said at the time in a joint statement that the federal law did not meet the requirement that Congress "state clearly in a federal statute that the statute is intended to address the sovereign power of a state to regulate the activities of its municipalities."

Or we can reject the example set by the unanimous Kennard FCC and divert ourselves with a divisive and ultimately futile battle over trying to preempt state regulation of municipal broadband projects. Such an effort would not only divide the Commission. Absent clear statutory authority, five unelected individuals, or more likely fewer, should not nullify the wishes of the people's elected representatives in one state, let alone twenty-one states. Such an action would demonstrate contempt both for representative democracy as well as for our nation's federal system of government.

It would also provoke a court battle with state officials who should be our partners rather than our adversaries. For example, NCSL, in a bipartisan letter, has already informed the FCC that it would challenge in court any attempt by the Commission to preempt state regulation of taxpayer-funded broadband networks. In my view, the FCC should be *working with* you in advancing our common goals rather than *litigating against* you.

Moreover, preemption would bring us into conflict with Congress. The U.S. House of Representatives last month voted to deny the FCC funding to preempt state laws on municipal broadband. And eleven U.S. Senators, led by Deb Fischer of Nebraska and Ron Johnson of Wisconsin, have told the Commission that preempting states in this area is the "last thing" the Commission should be doing. When elected representatives at the national level are telling the Commission not to interfere with decisions made by elected representatives at the state level, unelected officials should pay attention.

And what would all of this Sturm und Drang produce? Nothing good. Pointless endeavors will distract the Commission from the critical tasks we have on our plate. We must hold a successful incentive auction. We must make more spectrum available for unlicensed use. We must continue the hard work of reforming the Universal Service Fund. We must complete the congressionally mandated review of our media ownership regulations. We must reduce our substantial backlog.

The point is this: We do not have the bandwidth to waste on a symbolic, feel-good effort that appears designed to appease a political constituency that is unhappy with where the FCC is headed on other issues. At the end of the day, nothing will come of it. That's why the Commission's work on this issue reminds me of the lyrics of a famous Beatles song. We will be "sitting in [our] nowhere land, making all [our] nowhere plans for nobody." The courts will see to that.

There's also another point that those who are inclined to favor FCC preemption of state regulations on municipal broadband should keep in mind. As the saying goes, what's good for the goose is good for the gander.

If the history of American politics teaches us anything, it is that one political party will not remain in power for perpetuity. At some point, to quote Sam Cooke, “a change is gonna come.” And that change could come a little more than two years from now. So those who are potential supporters of the current FCC interpreting Section 706 to give the Commission the authority to preempt state laws about municipal broadband should think long and hard about what a future FCC might do with that power.

For example, while today’s FCC might reach the conclusion that state laws restricting municipal broadband projects are barriers to infrastructure investment and thus should be preempted under Section 706, that’s not the only way to look at the issue. Most economists believe that municipal broadband projects deter private-sector infrastructure investment. As Professor Joseph P. Fuhr, Jr., who recently studied government-owned broadband networks, explains, “Government-owned networks often receive an unfair advantage over private networks because they do not operate under the same tax structures and regulatory rules. This makes private providers reluctant to make investments in an area where the deck is stacked against them.” Indeed, the FCC’s 2010 National Broadband Plan even acknowledged that this was a valid concern: “Municipal broadband has risks. Municipally financed service may discourage investment by private companies.”

Even more critically, aside from anecdotal successes, the evidence suggests that municipal broadband projects provide service that is inferior to and less advanced than the private-sector broadband networks that would have been constructed but for those municipal broadband projects. To quote Professor Fuhr again, “[g]overnment-owned networks have fared quite poorly because they have neither the resources nor the expertise necessary to provide consumers with reliable state-of-the-art broadband connections.”

It’s not hard, then, to imagine a future FCC concluding that taxpayer-funded, municipal broadband projects themselves are barriers to infrastructure investment. So if the current FCC were successful in preempting state and local laws under Section 706, what would stop a future FCC from using Section 706 to forbid states and localities from constructing any future broadband projects? Nothing that I can see.

What’s the lesson for municipal broadband advocates? In thinking about it, some profound words from President Gerald Ford first came to mind: “A government big enough to give you everything you want is a government big enough to take from you everything you have.” Or, in this instance, an FCC with the power to give you all the municipal broadband you want is an FCC with the authority to take from you all the municipal broadband you’d like to have.

But after thinking about it more, the reality for municipal broadband advocates is even worse than that. For if the FCC had the power to preempt under Section 706, it wouldn’t have the power to give them everything they want. That’s because the biggest barriers to municipal broadband aren’t state laws. Indeed, most states don’t even impose restrictions on municipal broadband. Rather, the biggest obstacles to municipal broadband are things that the FCC can do little or nothing about: the belief among many local officials that government-run broadband is bad policy; and, of course, money.

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In conclusion, President Teddy Roosevelt popularized the advice: “Speak softly and carry a big stick.” But when it comes to municipal broadband, the FCC has been embracing the opposite approach. Some at the Commission have been speaking loudly even though the agency has a small stick. Indeed, it probably has no stick at all. It is time for the Commission to recognize this reality and move on to more productive endeavors.

Thank you for the invitation to be with you this morning in the Twin Cities and thank you for all of the work you do each and every day on behalf of the people who have elected you to serve. I would be happy to take any questions you might have on municipal broadband or other issues before the FCC.