**ORAL STATEMENT OF COMMISSIONER AJIT PAI ON FCC'S UNLAWFUL ATTEMPT TO OVERRIDE TENNESSEE AND NORTH CAROLINA LAW**

Re: *City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et. seq.*, WC Docket No. 14-115; *The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, WC Docket No. 14-116.

In 1999, Tennessee authorized municipal electric systems to provide Internet service within the boundaries of their service areas. The legislation passed the Tennessee General Assembly 96-0 and the Tennessee Senate 32-0. Each body was under the control of the Democratic Party. Tennessee's Republican Governor then signed the bill into law.

Today, however, three unelected officials in Washington, DC, purport to rewrite Tennessee law on a party-line vote. Specifically, this *Order* attempts to empower Tennessee municipal electric systems to offer broadband service outside of their service areas—authority which those systems have *never* possessed. The *Order* doesn't contest that Tennessee may prohibit municipal electric systems from offering Internet service *altogether*. Instead, it claims that Tennessee may not condition such authority on electric systems only serving customers within their service areas. In other words, once the people's elected representatives allow municipalities to offer any Internet service at all, the camel's nose owns the tent.

This decision, along with the decision to preempt a similar North Carolina law, is odd—and unlawful. Judicial precedent makes clear that the FCC simply does not have the power to do this. In taking this step, the FCC usurps fundamental aspects of state sovereignty. And it disrupts the balance of power between the federal government and state governments that lies at the core of our constitutional system of government. Whatever the merits of any particular municipal broadband project—and to be clear, on this question I take no position, deferring to affected voters and elected officials—I do not believe this agency has the power to preempt. I therefore dissent.

I.

Let's begin with the one key point that today's *Order* does not dispute: The Commission cannot preempt state laws that flat-out prohibit municipalities from offering broadband service. Why? The answer begins with Constitutional Law 101.

Our Constitution establishes a system of dual sovereignty between the States and the federal government. States are not creations of the central government. They are separate sovereigns. This distribution of sovereignty, otherwise known as federalism, is the defining feature of the relationship between the federal and state governments.

The relationship between a State and its political subdivisions (counties and cities), however, is an entirely different animal. Legally speaking, municipalities exist as arms of the State. As the Supreme Court has explained, municipalities are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . in [the State's] absolute discretion." Because a municipality is merely a department of the state, the state may withhold, grant, or withdraw powers and privileges to a municipality as it sees fit.

What does all of this mean for purposes of today's *Order*? *First*, as a result of our system of dual sovereignty, the Supreme Court has advised that any "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism." Specifically, in *Gregory v. Ashcroft*, the Court held that if Congress wishes to allow the federal government to preempt the States' historic powers, it must make its intent "unmistakably clear." This has come to be known as the clear statement rule.

And *second*, because localities are merely creations of the State, any federal attempt to interfere with a State's governance of its own municipalities necessarily "constrains traditional state authority to order its government." Indeed, the D.C. Circuit has held that "interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty."

Each of these points applies to this *Order*. First, any attempt by the FCC to preempt a state statute prohibiting municipalities from offering broadband service would trigger the clear statement rule. The Supreme Court case of *Nixon v. Missouri Municipal League* is squarely on point. In that case, the Court confronted the question of whether the FCC could use section 253 of the Communications Act to preempt a Missouri law that prohibited municipalities from providing telecommunications services. The Court concluded that Missouri's ability to determine whether its municipalities could provide such services was part and parcel of the "traditional state authority to order its government." It therefore decided that the clear statement rule applied.

And second, any Commission attempt at preemption would not satisfy the clear statement rule. The *Nixon* case is again instructive. There, Missouri municipalities argued that section 253 empowered the Commission to preempt the Missouri statute at issue.

But despite the fact that section 253(a) *specifically contemplates the preemption of state laws* and section 253(d) *specifically directs the Commission to preempt state laws* that have the effect of prohibiting the offering of telecommunications services, the Supreme Court, in an opinion written by Justice Souter, *still* concluded that section 253 did not contain the requisite clear statement necessary for the Commission to preempt.

Here, the Commission relies on section 706 of the Telecommunications Act of 1996, not section 253 of the Communications Act, for its authority to preempt. But if section 253 could not clear the high hurdle presented by *Gregory*, section 706 falls even further short of the mark.

For while section 253 at least expressly mentions preemption, the text of section 706 makes no reference to it whatsoever.

II.

Notwithstanding all of this, the Commission nonetheless maintains that it can preempt the Tennessee and North Carolina laws at issue here. Why? According to the *Order*, the clear statement rule doesn't apply because those states have only imposed restrictions on municipal broadband—not banned it altogether.

What difference does this make? A state doesn't forfeit its core sovereign power to govern its political subdivisions merely because it grants them certain powers and not others. As the U.S. Supreme Court has held, "*[t]he number, nature, and duration* of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rest[] in the absolute discretion of the state." And a state doesn't lose that "absolute discretion" simply by giving a municipality some authority, rather than all, to offer broadband service. Unfortunately for the Commission, all the lipstick in the world cannot disguise this pig.

A.

Take, for example, the geographic restrictions set forth in the Tennessee and North Carolina laws at issue here.

These geographic 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. The very essence of a *sub*division is the idea that a locality will govern a limited geographic area within a State.

Thus, when the Commission tries to preempt Tennessee and North Carolina laws in this context, it is directly interfering with a core aspect of state sovereignty—namely the ability of those states to organize their own governments and to determine "the territory over which [municipalities' powers] shall be exercised."

This hypothetical illustrates why. Suppose that the federal government attempted to tell Tennessee that it could not limit the City of Chattanooga's Police Department to enforcing the law in Chattanooga. Instead, once the State of Tennessee authorized the City of Chattanooga to have a police department, it was required to let Chattanooga's police officers have free rein to patrol from Memphis to Knoxville. Would anyone seriously contend that such an edict from the federal government wouldn't interfere with Tennessee's ability to order its political subdivisions? Of course not.

B.

There are other problems with the Commission's contention that it can preempt state restrictions on municipal broadband projects. To begin with, this yields an exceptionally strange result. While a state would be free to ban municipal broadband projects outright, it would be forbidden from imposing more modest restrictions on such projects. Or, in other words, the most severe state law restrictions on municipal broadband projects (prohibitions) *could not* be preempted, whereas less stringent restrictions (those that purportedly do not amount to prohibitions) *could* be preempted. I doubt that Congress adopted, much less intended, such a convoluted framework when it enacted the Telecommunications Act of 1996.

And it could lead to perverse consequences. For example, if a state can't authorize municipalities to offer broadband service with conditions, it might well be less likely to authorize them to do so at all, an outcome that I doubt the *Order*'s supporters would welcome.

C.

Moreover, the Commission draws an artificial and untenable line between state prohibitions of municipal broadband projects and state restrictions on such projects.

Consider a state law providing that municipalities were authorized to operate municipal broadband projects beginning January 1, 2020. Would that condition as to timing be a restriction that the FCC could preempt using section 706? Or would the law be a prohibition on municipal broadband projects through the end of 2019 that it could not preempt?

In short, the heart of the Commission's analysis rests not on a principled distinction but semantics. And no matter what wordplay the Commission employs, it cannot escape one basic fact: Through preemption, the Commission is attempting to provide municipalities in Tennessee and North Carolina with authority that their state governments have not given them.

III.

But it even gets worse for the Commission's position. I very much doubt that section 706 gives the Commission the authority to preempt *any* state laws, even those governing private actors. There are many reasons for this that I discuss in my written statement. Here I will only mention the statutory history, which is reviewed in the *Order*.

That history demonstrates that Congress did not intend to give the Commission the authority to preempt state laws. 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 precursor 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*.

The *Order*'s response to this inconvenient truth is to claim that this language regarding preemption was simply moved to the legislative history. This argument is remarkably misleading. To be sure, the Conference Report does describe the Senate provision as stating that "The Commission may preempt State commissions if they fail to act to ensure reasonable and timely access." And that was certainly an accurate statement of fact. But that Conference Report goes on to say that the Senate provision was adopted "with a modification." And what was that modification? The Senate language regarding preemption was removed! As such, there can be no doubt that neither the text of the statute nor the legislative history discussing the final version of statutory text provides support for the argument that section 706 gives the Commission the power to preempt state law.

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In conclusion, the elected representatives of the people of Tennessee and North Carolina have chosen to grant municipalities in their respective states limited abilities to offer broadband services. Most notably, they have allowed municipalities to provide service only within a specified geographic area. Reasonable people can disagree about the wisdom of such policies. Some believe that the conditions imposed by Tennessee and North Carolina are too restrictive. Others believe that municipal governments shouldn't be in the broadband business at all. As I said earlier, I will leave that debate to others.

What is clear, however, is that the FCC does not have the legal authority to override the decisions made by Tennessee and North Carolina. Under the law, it is up to the people of those two states and their elected representatives—not the Commission—to decide whether and to what extent to allow municipalities to operate broadband projects. Today's *Order* is therefore unlawful.

During the Clinton Administration, the FCC called one city's request for preemption an "extraordinary step" that infringed "a State's sovereign power to regulate its own municipalities." In 1997, the Commission stayed within its legal bounds and refused to take that "extraordinary step." Unfortunately, the agency does not show the same restraint today.

This decision violates the constitutional principles that lie at the heart of our system of government. The FCC is treating Tennessee and North Carolina as mere appendages of the federal government rather than the separate sovereigns that they are. For all of these reasons, I dissent.