

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC**

In the Matter of	)	
	)	
Petition of City of Wilson, North Carolina, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks	)	WCB Docket No. 14-115
	)	
Petition of Electric Power Board of Chattanooga, Tennessee, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks	)	WCB Docket No 14-116
	)	
	)	

**COMMENTS OF THE  
UNITED STATES TELECOM ASSOCIATION**

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UNITED STATES TELECOM ASSOCIATION**

Pursuant to the Wireline Competition Bureau’s Public Notice,<sup>1</sup> the United States Telecom Association (“USTelecom”) respectfully submits these comments in opposition to the Petitions filed by the City of Wilson, North Carolina (“Wilson”) and the Electric Power Board of Chattanooga, Tennessee (“EPB”) (collectively, “Petitioners”) seeking preemption of statutes in North Carolina and Tennessee, respectively, which govern broadband services offered by public entities.<sup>2</sup>

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<sup>1</sup> See Public Notice, “Pleading Cycle Established for Comments on Electric Power Board and City of Wilson Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks,” WCB Docket Nos. 14-115, 14-116 (rel. July 28, 2014).

<sup>2</sup> Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition filed by Electric Power Board, Chattanooga, Tennessee, WC Docket No. 14-116 (filed July 24, 2014) (“EPB Petition”); Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition filed by City of Wilson, North Carolina, WC Docket No. 14-115 (filed July 24, 2014) (“Wilson Petition”) (collectively, “Petitions”).

## I. INTRODUCTION AND SUMMARY

USTelecom is the nation's oldest and largest association for providers of wired communications, and the overwhelming majority of its members offer broadband communications in rural and urban areas across the United States. USTelecom and its members strongly support policies that promote continued broadband deployment so that broadband services are accessible to all Americans. In this regard, the best place for the Commission to focus its efforts is on removing the regulatory hurdles to a smooth transition to IP networks, fully implementing Phase II of the Connect America Fund ("CAF"), updating the rural Universal Service Fund for broadband, and taking additional steps to lower the costs of access to local rights-of-way and pole attachments that can make up 20 percent of the cost of deploying fiber.<sup>3</sup> More than anything else, it is success in these initiatives that will accelerate broadband deployment.

USTelecom and its members also believe that preemption can be a powerful tool that the Commission can and should use in appropriate circumstances to harmonize regulation and facilitate broadband deployment. When considering preemption, however, the Commission should look first at the removal of barriers to entry erected by municipalities that currently impede the ability of private operators to extend or expand their broadband networks on a timely and cost effective basis. For example, municipal control of local rights-of-way often translates into onerous rules at the local level that add additional expense and delay to broadband infrastructure projects—rules that are ripe for Commission preemption.

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<sup>3</sup> See *Connecting America: The National Broadband Plan* at 109, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296935A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf) ("The National Broadband Plan").

Rather than focusing on these true impediments to broadband deployment, Wilson and EPB challenge statutes that represent policy judgments by state legislatures about the best way to promote broadband in their respective states. North Carolina and Tennessee—as well as many other states throughout the country—have sensibly determined that competition spurs broadband deployment and reasonably concluded that the unrestricted ability of public entities to offer broadband services may impede competition. In doing so, these states have exercised their fundamental and traditional power to order and control the activities of the states’ own political subdivisions. Some states require local governments to hold hearings or a public vote as a prerequisite to providing broadband services. Other states require local governments to develop a public business plan that citizens may inspect or solicit private bids. The FCC should respect—and thus decline to preempt—the policy judgments of states generally as to how they believe their political subdivisions should participate, if at all, in the broadband market and of the exercise of state authority by the North Carolina and Tennessee legislatures in particular.

According to Petitioners, the Commission is not only authorized but compelled by the language of Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, to preempt at least portions of the statutes at issue because they allegedly represent barriers to broadband deployment. But Section 706 cannot bear the weight Petitioners place upon it. Although Petitioners’ policy arguments regarding the benefits of municipal broadband would fail to warrant preemption even if the Commission had the legal authority to grant the Petitions, Section 706 simply does not give the Commission the power to insert itself between the respective states and their subdivisions in deciding how to conduct their internal affairs.

Petitioners devote a substantial portion of their filings to describing their purported success in offering broadband. Even if true, such success does not entitle Petitioners to relief.

Considering the detrimental impact public broadband networks can have on private broadband investment—as well as the myriad examples of failed municipal broadband networks—questions regarding the general efficacy of public broadband are far from settled. In the face of such uncertainty, and with state taxpayers on the financial hook when a municipal broadband network goes under, it is eminently reasonable for state legislatures to take a cautious approach by limiting public participation in broadband (or even prohibiting that activity entirely).

The Petitions also are fatally flawed from a legal standpoint. While the Commission possesses the power to preempt state laws under appropriate circumstances, established Supreme Court precedent requires a clear and unambiguous statement of Congressional intent in order for a federal agency to interfere with the relationship between states and their political subdivisions. Because Section 706 lacks the plain language required by Supreme Court precedent to interfere with state legislative judgments about how best to manage their subdivisions, the Commission lacks the authority to preempt the North Carolina and Tennessee statutes in question. The Petitions offer a number of potential justifications for treating Section 706 differently, but none of these arguments is persuasive. The Petitions present precisely the same legal questions the Supreme Court settled in *Nixon v. Municipal League*,<sup>4</sup> and indeed the statutes the Petitions seek to preempt underscore plainly the concerns articulated by the *Nixon* Court that preclude preemption.

For these reasons, the Petitions should be denied.

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<sup>4</sup> See *Nixon v. Missouri Municipal League*, 541 U.S. 125, 130 (2004) (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

**II. THE COMMISSION SHOULD FOCUS ITS EFFORTS ON ELIMINATING TRUE IMPEDIMENTS TO BROADBAND DEPLOYMENT RATHER THAN DISTURBING POLICY JUDGMENTS OF STATE LEGISLATURES ABOUT PROMOTING BROADBAND COMPETITION.**

**A. The Commission Should Use its 706 Authority to Eliminate Local Barriers To Entry by Private Network Operators, Which are the True Impediments to Broadband Deployment.**

In contrast to state laws governing municipal broadband networks that are the subject of the Petitions, there are a wide range of local rules and regulations that unequivocally hamper the roll-out of broadband services. These barriers to investment should be the first target of any preemptive action the Commission may choose to take. As Commissioner Pai pointed out when discussing Google Fiber’s deployment in Kansas City, “too many providers who try to obtain [rights of way] are confronted with daunting sets of federal, state, and/or municipal regulations that often delay and sometimes deter infrastructure investment and broadband deployment.”<sup>5</sup> According to the National Broadband Plan, “the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment.”<sup>6</sup>

The negative effect of these local barriers is well documented. For example, providers have encountered substantial hurdles in their efforts to expand the availability of broadband in their service territories. AT&T, for one, experienced considerable regulatory interference with the roll-out of its U-Verse service at the hands of localities in California and Connecticut—among others.<sup>7</sup> Focusing on the elimination of barriers to the deployment of private broadband

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<sup>5</sup> Ajit Pai, Commissioner, FCC, Statement of Commissioner Ajit Pai on His Visit to Kansas City’s Google Fiber Project (Sept. 5, 2012), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0905/DOC-316114A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0905/DOC-316114A1.pdf).

<sup>6</sup> The National Broadband Plan at 109.

<sup>7</sup> See Comments of AT&T, WT Docket No. 11-59, at 5-7 (filed July 18, 2011) (noting that “[t]he practices of many local jurisdictions continue to hinder and delay carrier access to rights of way, and other sites needed to expand broadband capacity and coverage”); see also Comments

imposed at the local level would be a substantially more productive use of the Commission's time.

The distinct advantages municipalities enjoy in offering broadband services represent an additional barrier to private broadband investment. For instance, the municipal exemption from federal regulation of pole attachment rates found in Section 224 effectively permits municipalities to charge inflated attachment fees to private broadband providers, which increases the cost of private broadband service.<sup>8</sup> When a municipality that owns network infrastructure also offers broadband services, the assessment of excessive attachment fees provides the municipality with a competitive advantage over private providers. Combined with cross-subsidization practices and various advantages inherent when a regulator competes in the very industry it regulates, municipal broadband networks can undermine private efforts to expand broadband and discourage private broadband investment.

Furthermore, although Petitioners present the expansion of municipal broadband service to currently under-served or unserved areas as a justification for the relief they seek, municipal broadband is neither the only nor the most efficient way of achieving this goal. The Commission has expended substantial time and resources in promoting efficient and carefully targeted broadband deployment in rural areas through the CAF.<sup>9</sup> These efforts, which are only now beginning to bear fruit, are properly focused on stimulating investment by making available

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*(footnote cont'd.)*

of Verizon & Verizon Wireless, WC Docket No. 11-59, at 16-25 (filed July 18, 2011) (detailing localities' "abuse [of] their authority over public rights-of-way" and other onerous regulations that "result in unreasonably high compliance costs").

<sup>8</sup> 47 U.S.C.A. § 224; *see also* The National Broadband Plan at 112-13 (calling on Congress to consider amending Section 224 to remove the municipal exemption).

<sup>9</sup> *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) ("*USF/ICC Transformation Order*"); *Connect America Fund; ETC Annual Reports and Certifications*, WC Docket Nos. 10-90, 14-58, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-98 (rel. July 14, 2014).

public funds necessary to deploy broadband in areas that would be otherwise uneconomic to serve. In contrast to municipal broadband networks that can undermine competition and saddle local communities with significant debt if such networks fail, the CAF offers an efficient, rational means of helping to expand broadband access to all Americans.

**B. State Decisions Regarding Their Relationships with Municipalities Must be Respected.**

As a matter of public policy, the Commission should proceed cautiously when it comes to state statutes governing municipal broadband for at least two reasons.

First, consistent with Section 706, the Commission must recognize that states also play a role in promoting broadband deployment, which includes addressing the utility of municipal broadband networks. States have adopted a variety of approaches to this topic, which are summarized in an appendix to these comments.<sup>10</sup> As Appendix 1 demonstrates, while some states have elected to allow their public subdivisions to offer broadband services, many other states have rationally concluded that municipal entry into the broadband sector will have a deleterious effect on broadband deployment and competition without safeguards such as public hearings, elections, or solicitation of bids from the private sector. Other states have chosen to prohibit municipalities from providing communications services. Still other states (including Tennessee) have struck a middle ground, authorizing limited pilot projects in an effort to assess the impact of municipal broadband networks on the competitive landscape.<sup>11</sup>

The states that either prescribe municipal broadband networks or only authorize the deployment of such networks under certain circumstances have acted, in part, out of a concern

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<sup>10</sup> See Appendix 1.

<sup>11</sup> EPB Petition at 33. That the Tennessee General Assembly considered and rejected expansion of these “pilot projects” in “several bills” since 1999 demonstrates that the legislature remains unconvinced that such expansion would be in the public interest in Tennessee. *Id.* at 33-34.

that public entry into the market will crowd out private investment and ultimately harm both competition and deployment of advanced services.<sup>12</sup> This is a legitimate concern, as the Commission itself has acknowledged.<sup>13</sup>

Unrestricted public involvement in the broadband marketplace threatens to create perverse incentives by placing municipalities (which have control over public rights-of-way) into direct economic competition with private broadband providers. Public investment also carries with it the threat of cross-subsidization from existing, taxpayer supported activities, as the EPB Petition makes plain.<sup>14</sup> Public entities also may have a cost of capital far lower than that of private broadband providers and may enjoy access to funding sources with which private providers simply cannot compete.<sup>15</sup> As a result of these government advantages, municipalities

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<sup>12</sup> See, e.g., H. 129, 2011 N.C. Sess. Laws (codified at N.C. Gen. Stat. § 160A-340 *et. seq.*) (“to protect jobs and to promote investment, it is necessary to ensure that the State does not indirectly subsidize competition with private industry through actions by cities and to ensure that where there is competition between the private sector and the State, directly or through its subdivisions, it exists under a framework that does not discourage private investment and job creation”).

<sup>13</sup> See The National Broadband Plan at 153 (noting that “[m]unicipally financed service may discourage investment by private companies”).

<sup>14</sup> See, e.g., EPB Petition at 37 (broadband system financed by bonds covering both communication services and “Smart Grid” technology); *id.* at 38 (noting the concerns raised about the use of EPB’s publically financed trademarks in promoting its broadband services); see also Charles M. Davidson & Michael J. Santorelli, *Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers*, The Advanced Communications Law & Policy Institute: New York Law School, at 48-91 (2014) (pointing to cross-subsidization of networks in Provo, Utah and Monticello, Minnesota, among others).

<sup>15</sup> See Charles M. Davidson & Michael J. Santorelli, *Evaluating the Rationales for Government-Owned Broadband Networks*, The Advanced Communications Law & Policy Institute: New York Law School, at 12 (2013) (“Introducing a ‘competitor’ that has a perceived (unfair) competitive advantage because of its affiliation with government could chill or drive away investment, slow innovation, and undermine the very market forces that have fostered a vibrantly competitive ecosystem in this space.”); see also Kathryn A. Tongue, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers*, 95 Nw. U. L. Rev. 1099-

or other public entities may have the ability to set artificially low broadband prices, which create disincentives to private sector investment and competition.

Second, the Commission should be particularly reluctant to grant preemption here because states are the sovereign ultimately responsible for municipal broadband ventures gone awry. To the extent that EPB or the City of Wilson cannot recover the cost of their investment, it is not the FCC that will bear the cost of such failure—rather, it would be the taxpayers of Tennessee and North Carolina, respectively. The same is true for every other state subdivision that seeks to invest public money in an inherently risky and capital-intensive venture like a broadband network. Because the states bear the ultimate cost of failure, state legislatures must be allowed to determine for themselves how much risk they will tolerate and to take action to limit such risk in the event a broadband venture proves unsuccessful. This is a perfectly legitimate concern of any prudent state legislature. Contrary to the optimistic picture painted in the Petitions, there are numerous examples of failed public broadband networks. From St. Cloud, Florida and Groton City, Connecticut to Philadelphia and the Utah Telecommunications Open Infrastructure Agency (“UTOPIA”), municipal networks pose a real danger that taxpayers will be left holding the bag when a public broadband network fails.<sup>16</sup>

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*(footnote cont'd.)*

1139 (2001) (noting that practices such as cross-subsidization “allow municipalities to charge artificially low prices, to undercut competition, and thereby to limit materially the ability of private providers to compete in a fair and balanced legal and regulatory environment”) (internal citations omitted).

<sup>16</sup> See Eric Null, *Municipal Broadband: History's Guide*, 9 ISJLP 21, 40-44 (2013) (discussing failures experienced in St. Cloud and Philadelphia); *supra* Davidson & Santorelli at 80-82 (describing problems with the Groton, Connecticut program); Thomas A. Schatz and Royce Van Tassell, *Municipal Broadband is No Utopia*, *The Wall Street Journal*, June 19, 2014, <http://online.wsj.com/articles/municipal-broadband-is-no-utopia-1403220660> (discussing the UTOPIA project).

While there are examples of successful public broadband networks, the efficacy of public broadband remains an open question, and state legislatures are in the best position to address the issue. Each state legislature should be able to assess the particular circumstances in its jurisdiction and determine whether public broadband will ultimately advance or undermine the goal of expanded broadband deployment. The Commission should not interfere with state decisions on how best to promote broadband merely to advance an unproven business model that may arguably cause more harm than good.

Because of the competing considerations associated with public broadband networks, state legislatures have approached the issue in different ways. Some states have chosen to permit relatively unfettered activity by local municipalities in the broadband marketplace, while others have determined that the risks justify state involvement in public broadband services.

For instance, Colorado, Louisiana, and Minnesota have decided to put the question of public broadband to the voters in towns seeking to establish broadband networks.<sup>17</sup> By contrast, California, Michigan, and Pennsylvania have taken a different approach, electing to permit municipal broadband operations but only in the absence of active or willing private broadband providers.<sup>18</sup> Finally, on other end of the spectrum, Missouri, Nebraska, and Texas have essentially prohibited public broadband, concluding that the risks of such ventures outweigh any potential benefits.<sup>19</sup>

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<sup>17</sup> See C.R.S. § 29-27-201 *et. seq.*; La. Rev. Stat. § 45:841 *et. seq.*; Minn. Stat. Ann. § 237.19.

<sup>18</sup> See Cal. Gov. Code § 61100(af); Mich. Comp. Laws Ann. § 484.2252; 66 Pa. Cons. Stat. Ann. § 3014(h).

<sup>19</sup> See Mo. Rev. Stat. § 392.410(7); Neb. Rev. Stat. § 86-594 *et. seq.*; Tex. Util. Code Ann. § 54.201 *et. seq.*

Each of these state approaches to regulating municipal broadband represents the state legislature's best judgment in balancing the respective benefits and detriments associated with municipal broadband networks. And, states may very well choose to alter their approaches as the role of public broadband continues to develop under these varying regulatory regimes. Beyond the legal impediments to FCC preemption (which are addressed below), it is not in the public interest for the federal government to substitute its judgment for those of state legislatures in determining the most effective way to address public broadband for the benefit of their respective citizens.

### **III. SECTION 706 DOES NOT GRANT THE COMMISSION AUTHORITY TO PREEMPT STATE RULES LIMITING MUNICIPAL BROADBAND.**

Even if granting the Petitions made sense from a public policy standpoint, which is not the case, the FCC lacks the legal authority to grant the relief Petitioners seek. While the FCC possesses preemptive authority to remove barriers to entry, this power is not without limits. In this context, where the agency is asked to confront the essential power of states to order and control their local subdivisions, there must be clear congressional language authorizing preemption. Such language is utterly lacking in Section 706.

Petitioners here are asking the Commission to do far more than simply preempt local laws or interpret an existing federal statute as preempting those laws.<sup>20</sup> The Petitions instead ask the Commission to take the extraordinary step of interposing itself between the state legislature and the political subdivisions that the legislature controls. The Supreme Court's decision in *Nixon v. Municipal League* is controlling on this point, and clearly holds that this level of federal

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<sup>20</sup> Cf. *Direct Communs. Cedar Valley, LLC v. FCC*, 753 F.3d 1015, 1120-21 (10th Cir. 2014) (affirming FCC's interpretation that intrastate traffic is subject to section 251(b)(5) and upholding agency's finding that intrastate access charges are an obstacle to reform, which is sufficient "for the FCC to exercise its authority to preempt intrastate access charges under § 251(d)(3)").

interference with state affairs must pass a bar higher than that for ordinary preemption.<sup>21</sup> While Petitioners attempt to cabin that decision to apply only to Section 253, the fundamental principles of federalism addressed in *Nixon* do not lend themselves to such a constrained reading. Section 706 contains no more of a “plain statement” of Congressional intent to allow the FCC to preempt here than does Section 253. In fact, not only is the Court’s decision in *Nixon* directly applicable, the state regulatory regimes at issue here are almost perfect illustrations of the concerns that the *Nixon* Court articulated about the “strange and indeterminate results” stemming from federal preemption of state restrictions on municipal broadband.<sup>22</sup> As a result, the Commission must deny the Petitions.

**A. To Intrude on the Traditional and Fundamental Power of States Over Matters Regarding Their Own Sovereignty Requires a “Plain Statement” of Congressional Intent.**

In *Gregory v. Ashcroft*, the Supreme Court explained that the power to preempt state regulation of its own internal affairs should not be lightly presumed. Such authority, the Court held, could only be found if Congress made its intention “unmistakably clear in the language of the statute.”<sup>23</sup> In *Nixon*, the Court applied this standard to a question identical in substance to the one presented by Petitioners here: whether the Communications Act provided the FCC with the authority to preempt state statutes that restricted municipal entry into the broadband marketplace. Interpreting Section 253 of the Act, the Court declared that “federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with

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<sup>21</sup> *Nixon*, 541 U.S. at 140-41.

<sup>22</sup> *Id.* at 133.

<sup>23</sup> *Gregory*, 501 U.S. at 460-61 (internal quotations omitted).

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.”<sup>24</sup>

Just as with Section 253, relying upon Section 706 as the basis for preemption would strike “near the heart of State sovereignty” by directly “interfering with the relationship between a State and its political subdivisions.”<sup>25</sup> *Nixon* and *Gregory* clearly require unambiguous language of congressional intent to engage in such significant interference—language to which Petitioners are unable to point.

Despite this directly applicable Supreme Court precedent, Petitioners assert that the *Gregory* “plain statement” rule does not apply here because “preemption in this case would not affect any traditional or fundamental state power.”<sup>26</sup> Petitioners argue that Section 706 envisions a role for both the state and federal government and analogize this dual role to Section 332’s restrictions on municipal zoning authority.<sup>27</sup> But this argument misses the mark. While Section 706 may contemplate some role for both the state and federal governments in encouraging broadband deployment, it is silent about whether Congress also intended to authorize the FCC to “interfer[e] with the relationship between a State and its political subdivisions,”<sup>28</sup> which is the “traditional state authority” at issue in *Nixon*.<sup>29</sup>

Petitioners’ claim that these state statutes do not trench on traditional authority because they involve “commercial” rather than “governmental” acts fares no better.<sup>30</sup> There is no basis

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<sup>24</sup> *Nixon*, 541 U.S. at 140.

<sup>25</sup> *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999).

<sup>26</sup> Wilson Petition at 54.

<sup>27</sup> *Id.* at 55.

<sup>28</sup> *City of Abilene*, 164 F.3d at 52.

<sup>29</sup> *Nixon*, 541 U.S. at 130.

<sup>30</sup> Wilson Petition at 55-56; EPB Petition at 52-53.

in law or fact for asserting that regulation of the commercial activity of its subdivisions is not part of a state's traditional authority over those subdivisions. Indeed, as explained above, because these types of commercial activity can ultimately result in financial harm to state taxpayers, the opposite is true. Moreover, neither Petition explains why this commercial distinction should be meaningful in this case when it was not in *Nixon*. That the state statutes at issue in *Nixon* regulated *precisely the same* activity as those at issue is fatal to Petitioners' legal theory.

**B. The Language of Section 706 Does Not Unambiguously Manifest Congress' Intent to Interpose Itself Between the States and Their Municipal Subdivisions.**

Petitioners argue that even if the *Gregory* plain statement standard applies, Section 706 meets this test based on the provision's broad language concerning the Commission's role in encouraging broadband deployment to "all Americans."<sup>31</sup> According to Petitioners, this language represents a plain statement because it signifies "that Congress meant Section 706 to cover each and every American."<sup>32</sup>

This argument misconstrues the plain statement standard. As courts have recognized, "broad or general language...does not necessarily constitute an unambiguous statement."<sup>33</sup> What *Gregory* requires is a plain statement specifically demonstrating Congress's intent to intrude on an area of fundamental state sovereignty. In this case, that means the relationship between states and their political subdivisions.<sup>34</sup> None of the language in Section 706 satisfies this standard.

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<sup>31</sup> Wilson Petition at 56; EPB Petition at 53.

<sup>32</sup> *Id.*

<sup>33</sup> *Hayden v. Pataki*, 449 F.3d 305, 325 (2d Cir. 2006).

<sup>34</sup> *City of Abilene*, 164 F.3d at 53 ("The question *Gregory* addresses is what to do when the text fails to indicate whether Congress focused on the effect on State sovereignty. *Gregory*'s answer is—do not construe the statute to reach so far").

Petitioners point to *Verizon v. FCC* as validation of the Commission’s general authority to act pursuant to Section 706, but the court’s reasoning in *Verizon* demonstrates precisely why Section 706 does not empower the Commission to preempt the state statutes in question here. In *Verizon*, the court engaged in a *Chevron* analysis to determine whether the Commission’s asserted authority under Section 706 was valid.<sup>35</sup> Applying the first step of *Chevron*, the court held that “Congress has not ‘directly spoken’ to the question of whether section 706(a) is a grant of regulatory authority.”<sup>36</sup> Having determined that the statute was ambiguous, the court proceeded to the second *Chevron* step, affording deference to the Commission’s interpretation of the statute and analyzing whether the interpretation was reasonable—eventually concluding it was.<sup>37</sup>

In finding Section 706 is ambiguous—thus permitting the Commission to adopt its own interpretation of the statute—the *Verizon* court essentially resolved the question presented here. If the underlying grant of regulatory authority in Section 706 is “ambiguous,” the statute by definition does not contain a “plain statement” of Congressional intent to grant the Commission regulatory authority to interfere with areas of traditional state sovereignty; if Section 706 does not contain a plain statement of congressional intent, it fails to satisfy the *Gregory* standard. Like Section 253 at issue in *Nixon*, Section 706 is “not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress” to achieve the statutory objective by infringing on powers rooted at the heart of state sovereignty.<sup>38</sup>

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<sup>35</sup> *Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014).

<sup>36</sup> *Id.* at 638 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, (1984)).

<sup>37</sup> *Id.* at 639.

<sup>38</sup> *Nixon*, 541 U.S. at 141.

As a result, Section 706 does not empower the Commission to preempt the North Carolina and Tennessee statutes.

Finally, while the FCC may be responsible for “defining the relevant terms and standards” in Section 706 to the extent they are ambiguous, this power is far from absolute. With respect to preemption, it is “the purpose of Congress that is the ultimate touchstone.”<sup>39</sup> The FCC cannot use its interpretive power to conjure preemptive authority where Congress has not granted it. “[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”<sup>40</sup>

**C. The Statutes at Issue in the Petitions Exemplify Precisely the Concerns Raised in *Nixon*.**

While the Court in *Nixon* rested its conclusion on the lack of a clear statement of preemption in Section 253, it also articulated a series of concerns about the implications of federal interference with state prohibitions on municipal broadband. The Court presented a number of hypotheticals that it concluded served to demonstrate that federal preemption of these restrictions would be neither easy nor simple.

Perhaps ironically, the two state statutes Petitioners seek to preempt reflect precisely the concerns the *Nixon* Court identified in its hypotheticals. The practical implications of preempting Section 160A-340 (the North Carolina statute) and portions of Section 601 (the Tennessee statute) underscore why the *Nixon* Court was appropriately wary of federal preemption in this area.

For example, the Tennessee statute that is the subject of EPB’s Petition represents that state’s initial grant of authority to municipalities to operate Internet and video services within

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<sup>39</sup> *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

<sup>40</sup> *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

their respective service areas.<sup>41</sup> The EPB Petition thus calls on the Commission not to preempt a separate restriction on offering public broadband, but rather *to rewrite the state’s grant of authority* in order to broaden the scope of that authority to encompass the entire state. This broad authority was never approved by the Tennessee General Assembly. Even if the FCC had the power to preempt restrictions on municipal broadband, this is not the same thing as having the power to *grant* authorization where the state has chosen to withhold it. As the Court in *Nixon* plainly stated, “[t]here 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.”<sup>42</sup> Indeed, any such attempt to use federal authority to stand in the shoes of state legislators would raise serious Constitutional concerns.<sup>43</sup>

Furthermore, the statutes at issue here directly illustrate the *Nixon* Court’s concerns over “federal creation of a one-way ratchet.”<sup>44</sup> For instance, the North Carolina statute involves a limitation placed on preexisting authority, under N.C. Gen. Stat. § 160A-312, for municipalities to operate a broadband network.<sup>45</sup> Preemption of the North Carolina statute limiting that pre-existing authority has the practical effect of telling states that once they authorize a particular activity, they can never de-authorize—or even limit—that activity. Similarly, once preemption of the geographic limitation in the Tennessee statute provides authority for state-wide municipal broadband (something the Tennessee legislature never approved), the state will be prohibited from ever revoking—or limiting—that authority.

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<sup>41</sup> Tenn. Code Ann. § 7-52-601.

<sup>42</sup> *Nixon*, 541 U.S. at 135.

<sup>43</sup> See *New York v. United States*, 505 U.S. 144, 188 (1992) (noting that the “Federal Government may not compel the States to enact or administer a federal regulatory program”).

<sup>44</sup> *Nixon*, 541 U.S. at 137.

<sup>45</sup> Wilson Petition at 19.

**D. While Section 706 May Provide the Commission with Authority to Take Steps to Encourage Broadband Development, Such Authority is Not Limitless.**

While the *Verizon* decision construed Section 706 to provide the Commission with independent regulatory authority, the *Verizon* court was careful to note that this authority is not unlimited.<sup>46</sup> In determining the scope of the Commission’s authority, the court recognized two non-exclusive limiting principles for Section 706. First, as the court noted, Section 706 is limited by its interaction with other provisions of the Communications Act.<sup>47</sup> Second, the Commission’s power is restricted to the pursuit of the “specific statutory goal” set forth in Section 706.<sup>48</sup>

Just as separate statutory provisions work to limit the Commission’s powers under Section 706, so too do the principles of federalism that the Court articulated in the *Gregory* and *Nixon* decisions. Acceptance of Petitioners’ invitation to expand Section 706’s power would “virtually free the Commission from its congressional tether” by encroaching on delicate issues of federalism without any indication of congressional intent to do so.<sup>49</sup>

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<sup>46</sup> *Verizon*, 740 F.3d at 639 (“Of course, we might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle”).

<sup>47</sup> For instance, Section 706 “must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the Commission’s subject matter jurisdiction to interstate and foreign communication by wire and radio.” *Id.* at 640 (internal quotations omitted).

<sup>48</sup> *Id.*

<sup>49</sup> *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 655 (D.C. Cir. 2010). As discussed above, the Commission does not enjoy the same deference it was afforded in *Verizon* when determining the preemptive scope of Section 706 as it relates to the state statutes at issue here. This lack of traditional deference demonstrates why Petitioners’ reliance upon Judge Silberman’s dissent in *Verizon* is misplaced. While Judge Silberman mentioned state laws prohibiting municipal broadband as an example of the “barriers to infrastructure investment” Section 706 could be interpreted to address, this example was discussed in the context of considering the Commission’s discretion under *Chevron* step-two. *Verizon*, 740 F.3d at 660 (Silberman, J.

**E. The Petitioners' Attempts to Distinguish Section 706 and Section 253 Are Baseless.**

Petitioners' claim that *Nixon* is inapplicable because Section 706 is distinguishable from Section 253 is flawed for a number of reasons. First, Petitioners' argument that the difference between telecommunications services and information services renders *Nixon* inapplicable has no foundation at all.<sup>50</sup> The fundamental issues of state sovereignty addressed in *Nixon* are self-evidently applicable beyond the specific services at issue in that case. The fact that Section 706 applies in the context of information services while Section 253 governs telecommunications services has no bearing on the question of whether the Commission has the authority to preempt state statutes designed to control political subdivisions. And beyond the bare identification of this difference, Petitioners offer no rationale for why the distinction is legally meaningful.

Second, Petitioners' argument that *Nixon* is distinguishable because "Congress was attempting to achieve fundamentally different purposes in enacting Sections 253 and 706" is unpersuasive.<sup>51</sup> According to Petitioners, the promotion of broadband in the Telecommunications Act was a more urgent national priority than the removal of barriers to entry in the telecommunications market.<sup>52</sup> But *Nixon* turned on the lack of a plain statement from Congress and the issues endemic in interfering with state control of municipalities, not the purported strength of the federal interests involved. As a result, Petitioners' reliance on any purported differing federal interests is irrelevant.

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(footnote cont'd.)

dissenting). Judge Silberman's passing reference to these statutes cannot substitute for the rigorous analysis of congressional intent required under *Gregory*.

<sup>50</sup> EPB Petition at 45.

<sup>51</sup> Wilson Petition at 49.

<sup>52</sup> *Id.* at 46-47.

Even if Petitioners' arguments were plausibly relevant, however, there is simply no basis for claiming that promoting telecommunications competition was somehow less important under the 1996 Act than promoting broadband development. Such an interpretation stands the 1996 Act on its head because the fundamental purpose of the legislation was to open telecommunications markets to competition, an objective that permeates nearly all of its provisions. Indeed, because opening a market to competition is arguably the most effective way to promote investment in broadband infrastructure, Section 706's mandate to advance the deployment of broadband is rooted in the same general purposes as Section 253—the Telecommunications Act's broad intent to promote competition.<sup>53</sup>

Third, equally unpersuasive is Petitioners further attempt to distinguish Section 253 from Section 706 by arguing that the former represents a reactionary provision, while the latter is proactive.<sup>54</sup> As with their arguments regarding the federal interests underpinning Sections 253 and 706, Petitioners' focus on the "proactive" or "reactive" nature of the provisions has no bearing on the controlling legal issues set out in *Nixon*. Even assuming Petitioners' point was relevant, however, they are simply mistaken about the nature of the two provisions of the Act. If anything, Section 253 sweeps with a broader and more immediate reach than Section 706,

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<sup>53</sup> See, e.g., Telecommunications Act of 1996, PL 104-104, 110 Stat. 56 ("[a]n Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); H.R. Rep. No. 104-458, at 1 (1996) (noting the purpose of the Act was to "provide for a pro-competitive, de-regulatory national policy framework"); Statement by President William J. Clinton upon Signing S. 652, the "Telecommunications Act of 1996" (Feb. 8 1996) ("[t]his landmark legislation fulfills my Administration's promise to reform our telecommunications laws in a manner that leads to competition and private investment, promotes universal service and open access to information networks, and provides for flexible government regulation").

<sup>54</sup> Wilson Petition at 51.

because by its plain terms it actively prohibits a broad range of activity by the states, and requires no action by the Commission to do so.

Finally, Petitioners ignore a key difference between Section 253 and Section 706 that eviscerates their legal theory. The statutory text of Section 253 clearly and unambiguously *does* mention preemption, and undoubtedly gives the FCC some measure of preemptive authority.<sup>55</sup> In *Nixon*, the Supreme Court held that even this preemptive language was insufficient to give the Commission authority to intrude on state government operations. By contrast, Section 706 does not contain any mention of preemption.<sup>56</sup> Whether or not Section 706 can be interpreted to provide the Commission with some preemptive power in other contexts, there is no plausible way to interpret it as giving the agency more preemption authority than does Section 253 when it comes to inserting itself between the state and its subdivisions.

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<sup>55</sup> See 47 U.S.C. § 253(d) (“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”).

<sup>56</sup> In fact, the legislative history reveals that early versions of Section 706 did mention preemption, but that this reference was stricken. See H.R. Rep. No. 104-458, at 210 (1996) (Conf. Rep.).

**IV. CONCLUSION**

For the foregoing reasons, the Commission must deny the Petitions.

Respectfully submitted,

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**APPENDIX 1**

***(Inventory of State Statutes Governing Municipal Broadband)***

<b><u>State</u></b>	<b><u>Cite</u></b>	<b><u>Nature</u></b>
AR	A.C.A. § 23-17-409	<p>Prohibits governmental entities from providing, directly or indirectly, basic local exchange, voice, data, broadband, video, or wireless telecommunication service.</p> <p>However, municipalities owning an electric utility system or television signal distribution system may provide, directly or indirectly, voice, data, broadband, video, or wireless telecommunications service upon reasonable notice to the public and a public hearing.</p>
CA	Cal. Gov. Code § 61100(af)	<p>Provides that a Community Service District (CSD) may provide broadband service if a private person or entity is unable or unwilling to deploy broadband service, construct, own, improve, maintain, and operate broadband facilities and to provide broadband services. The CSD must make a reasonable effort to identify a private person or entity willing to deploy service.</p> <p>The CSD’s authority shall expire when a private person or entity is ready, willing, and able to acquire, construct, improve, maintain, and operate broadband facilities and to provide broadband services, and to sell those services at a comparable cost and quality of service as provided by the CSD.</p>
CO	C.R.S. § 29-27-201 <i>et. seq.</i>	<p>Requires local governments to hold an election before providing cable, telecommunications or advanced services.</p> <p>The legislation has several exceptions, including a provision that allows local governments to provide cable, telecommunications or advanced services. In addition, local governments may sell or lease insubstantial amounts of excess capacity that the local government uses for internal or intergovernmental purposes.</p>
FL	Florida Statutes § 350.81	<p>Requires governmental entities to hold two public hearings prior to providing any communications service (<i>i.e.</i> “any ‘advanced service,’ ‘cable service,’ or ‘telecommunications service’”). At these public hearings, the governmental entity must consider specific factors, including whether the proposed service is provided in the community and whether a similar service is offered in the community. It also must evaluate the private and public costs and benefits of government versus private providers and the capital investment required by the government entity. Finally, the governmental entity must make publicly available a written business plan containing specific findings.</p>

LA	La. Rev. Stat. Ann. § 45:841 <i>et seq.</i>	<p>Requires local governing authorities to call an election regarding whether or not the local governing authority should provide “covered services,” <i>i.e.</i> telecommunications services, advanced services and cable television services.</p> <p>In addition, it requires certain due diligence activities prior to providing covered services, including holding public hearings and conducting a feasibility study.</p>
MI	Mich. Comp. Laws Ann. § 484.2252	Provides that public entities may provide telecommunications services within its boundaries. Before doing so, however, the public entity must issue a request for competitive bids to provide telecommunications services. If the public entity receives less than 3 qualified bids within 60 days, then the public entity may provide telecommunications service under the same terms and conditions required under the request for bids.
MN	Minn. Stat. Ann. § 237.19	Provides that a municipality may provide telecommunications services (broadly defined to include broadband services) if voters approve the proposition. If the proposal is to provide services where services already exist, then a supermajority of 65% is required in favor of the undertaking.
MO	Mo. Rev. Stat. § 392.410(7)	Provides that any political subdivision, <i>i.e.</i> any governmental subdivision created pursuant to Missouri state law and having the power to tax, may provide telecommunications services. <i>However, political subdivisions may provide “Internet-type services” and therefore municipal broadband deployment appears permissible.</i>
NC	NC Statutes Chapter 160A, Article 16A	Permits city-owned communication services (cable, video programming, telecommunications, broadband, or high-speed Internet access service) subject to several requirements: (1) compliance with all local, State, and federal laws; (2) establishment of one or more separate enterprise funds for the provision of communications service; (3) limiting the provision of communications service to within the corporate limits of the city; (4) not requiring any person to use or subscribe to any communications service provided by the city; (5) providing nondiscriminatory access to private communications service providers on a first-come, first-served basis to rights-of-way, poles, or conduits owned, leased, or operated by the city unless the facilities have insufficient capacity for the access and additional capacity cannot reasonably be added to the facilities; (6) not airing advertisements or other promotions for the city-owned communications service on a public, educational, or governmental access channel if the city requires another communications service provider to carry the channel; (7) not subsidizing the provision of communications service with other

		<p>specific funds; (8) not pricing any communications service below the cost of providing the service, including any direct or indirect subsidies received by the city-owned communications service provider and allocation of costs associated with any shared use of buildings, equipment, vehicles, and personnel with other city departments; and (9) annually remitting to the general fund of the city an amount equivalent to all taxes or fees a private communications service provider would be required to pay the city or county in which the city is located and a sum equal to the amount of property tax that would have been due if the city-owned communications service provider were a private communications service provider.</p>
NE	Neb. Rev. Stat. §§ 86-594, 86-595, 86-575-77	<p>Provides that subject to certain exceptions, predominately involving broadband used for educational and internal purposes, an agency or political subdivision that is not a public power supplier shall not provide on a retail or wholesale basis any broadband services, Internet services, telecommunications services, or video services.</p> <p>The agency or political subdivision may own dark fiber, however, and sell or lease it under certain conditions. For leased dark fiber, requirements include that the lessee must be a certified telecommunications common carrier and the lease price and profit distribution be approved by the Public Service Commission.</p> <p>Finally, a public power supplier shall not provide on a retail basis any broadband services, Internet services, telecommunications services, or video services.</p> <p>A previous statutory provision outlawed wholesale transactions but this provision is terminated.</p>
NV	N.R.S. §§ 268.086, 710.147	<p>Restricts governing bodies of cities with populations of 25,000 or more and counties with populations of 55,000 or more from selling “telecommunications service to the general public.” These governing bodies may purchase or construct facilities for providing telecommunications that intersect with public rights-of-way if the governing body conducts a study to evaluate the costs and benefits associated with purchasing or constructing the facilities and determines from the results of the study that the purchase or construction is in the public interest.</p> <p>“Telecommunications service” is broadly defined and it is unclear whether this would encompass broadband services. Arguments exist on both sides.</p>
PA	66 Pa.C.S. § 3014(h)	Restricts a political subdivision (“any county, city, borough,

		<p>incorporated town, township, school district, vocational school district and county institution district”) or any entity established by a political subdivision from providing to the public for compensation any telecommunications services, including advanced and broadband services, within the service territory of a local exchange telecommunications company operating under a network modernization plan.</p> <p>A political subdivision may offer advanced or broadband services if the political subdivision has submitted a written request for the deployment of such service to the local exchange telecommunications company serving the area and, within two months of receipt of the request, the local exchange telecommunications company or one of its affiliates has not agreed to provide the data speeds requested. If the local exchange telecommunications company or one of its affiliates agrees to provide the data speeds requested, then it must do so within 14 months of receipt of the request.</p>
SC	S.C. Code Ann. § 58-9-2600 <i>et seq.</i>	<p>Permits government-owned communications service providers to deploy telecommunications service and broadband service. These service providers, however, are subject to the same regulatory requirements as private service providers; cannot receive any financial benefit not available to private service providers; cannot subsidize the costs of providing service with funds from any noncommunications service; must impute specific costs into rates; must keep separate accounting records; and must publish an independent annual audit that reflects the full cost of providing the service, including direct and indirect costs.</p>
TN	Tennessee Code Ann. §§ 7-52-601 <i>et. seq.</i> , 7-59-316	<p>Allows municipalities operating electric utilities to provide cable service, two-way video transmission, video programming, Internet services, or any other like system, plant, or equipment within or without the corporate or county limits of such municipality, and, with the consent of such other municipality, within the corporate or county limits of any other municipality.</p> <p>However, any other county or municipality may not provide broadband services unless the area is under its jurisdiction and is “historically unserved.” In addition, it must involve a joint venture or business relationship with one or more third parties to provide broadband services that may include broadband Internet services, voice over Internet protocol telephonic services, video over Internet protocol services and similar services provided over broadband facilities.</p> <p><b>NOTE:</b> This latter component was enacted in 2008 and signed</p>

		by Democratic Governor Bredesen.
TX	Texas Utilities Code § 54.201 <i>et. seq.</i>	<p>Prohibits municipalities from providing local exchange telephone service, basic local telecommunications service, or switched access service. This broad prohibition is construed to include broadband.</p> <p>However, a municipality or a municipal electric system is not prevented “from leasing any of the excess capacity of its fiber optic cable facilities (dark fiber), so long as the rental of the fiber facilities is done on a nondiscriminatory, nonpreferential basis.”</p>
UT	Utah Code Ann. § 10-18-101 <i>et. seq.</i>	<p>Provides that municipalities may provide cable television or “public telecommunications service” (broadly defined to include broadband services) on a wholesale basis.</p> <p>However, municipalities may not provide retail cable television or public telecommunications services unless the municipality holds a public hearing and, if it elects to proceed after the public hearing, approves the hiring of a feasibility consultant to conduct a feasibility study with specific requirements. The feasibility study must show that average annual revenues will exceed average annual costs by the amount necessary to meet the bond obligations associated with the project.</p> <p>Finally, a municipal legislative body may call an election as to whether the municipality shall provide cable television services or public telecommunications services.</p>
WA	Wash. Rev. Code Ann. § 54.16.330	<p>Public utility districts (PUD) are restricted from providing telecommunications services to end users. Telecommunications is defined as “the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. As used in this definition, ‘information’ means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.”</p> <p>PUDs may, however, provide wholesale telecommunications services within the district and by contract with another public utility district.</p>
WI	Wis. Stat. Ann. § 66.0422	<p>Local governments are prohibited from providing video service, telecommunications service, or broadband service, directly or indirectly, to the public unless: (1) the local government holds a public hearing and makes available a cost-benefit analysis; (2) the local government submits the question to voters and a majority of the voters in the local government voting at the advisory referendum vote to support operation; or (3) the local</p>

		government asks each person that provides broadband service within the boundaries of the local government whether the person currently provides broadband service to the area or intends to provide broadband service within 9 months to the area and within 60 days after receiving the written request no person responds in writing to the local government confirming that it will.
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