S. 1294, THE COMMUNITY BROADBAND ACT OF 2005 IS CONSTITUTIONAL

The United States Telecom Association has recently claimed, without substantiation, that the Community Broadband Act of 2005 introduced by Senators Frank Lautenberg and John McCain is unconstitutional under *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004). USTA is simply wrong. In fact, the bill was carefully drafted to meet the specific test articulated by the Supreme Court in the *Nixon* case. It is hard to fathom how USTA can read the plain language of the Supreme Court's opinion and the text of S. 1294 and conclude that the bill is unconstitutional. USTA's transparently incorrect legal analysis is part and parcel of its misinformation campaign aimed at slowing the deployment of community broadband systems offered by municipal governments.

In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Supreme Court made clear that the Commerce and Supremacy Clauses of the Constitution empower Congress to preempt traditional or fundamental state powers. To give principles of federalism their due, however, the Court required agencies and courts to assume that Congress did not intend to preempt such a traditional or fundamental state power unless it has made a "plain statement" to that effect. 501 U.S. at 467. The statement need not be express, but Congress's intent must be "plain to anyone reading the Act." *Id.* (citations omitted).

In *Nixon*, the Supreme Court declined to find that Section 253(a) of the Telecommunications Act preempts state barriers to municipal entry into telecommunications. Section 253(a) provides that "[n]o 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."

The Court did not say in *Nixon* that a federal law that preempted state barriers to public entry would be unconstitutional. It merely said that, as written, Section 253(a) "is hardly forthright enough to pass *Gregory*: 'ability of any entity' is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms." 541 U.S. at 140-41.

Notably, the Court stressed that its decision "[did] not turn on the merits of municipal telecommunications services" and that, as a matter of public policy, municipalities have "at the very least a respectable position, that fencing governmental entities out of the telecommunications business flouts the public interest." *Id.* at 131. In fact, the Court also noted that the FCC had "denounced the policy behind the Missouri statute." *Id.* at 130.

In short, the Supreme Court has made clear that Congress can preempt traditional state powers, but it must do so in clear and unmistakable language. That's exactly what the Lautenberg-McCain bill does. It provides in relevant part (emphasis added): "No State statute, regulation, or other State legal requirement may prohibit or have the effect of prohibiting any public provider from providing, **to any person or any public or private entity**, advanced telecommunications capability or any service that utilizes the advanced telecommunications capability provided by such provider." A clearer, more precise response to the Supreme Court's decision would be hard to imagine. There can be no doubt that the bill, when enacted, will survive constitutional challenge.