Case No. 15-3291

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

THE STATE OF TENNESSEE
Petitioner,

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Intervenor,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA
Respondents,

ELECTRIC POWER BOARD OF CHATTANOOGA CITY OF WILSON, NORTH CAROLINA,
Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR ELECTRIC POWER BOARD OF CHATTANOOGA SUPPORTING FEDERAL COMMUNICATIONS COMMISSION

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Continued on next page

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure Of Corporate Affiliations And Financial Interest

Sixth Circuit
Case Number: 15-3291

Case Name: State of Tennessee v. Federal Communications Commission and United States of America

Name of counsel: Frederick L. Hitchcock

Pursuant to Sixth Circuit Rule 26.1, the Intervenor, Electric Power Board of Chattanooga, makes the following disclosure:

1. Are any said parties a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

NO.

CERTIFICATE OF SERVICE

I certify that on November 5, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Frederick L. Hitchcock
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REQUEST FOR ORAL ARGUMENT

Intervenor, the Electric Power Board of Chattanooga, an independent board of the City of Chattanooga ("EPB"), respectfully requests oral argument. This case involves the application of federal and state constitutional provisions, federal and state statutes, and home rule charter provisions. The parties disagree concerning the interpretation and interplay of these legal authorities, and oral argument will provide an opportunity to further address such questions.

STATEMENT OF THE ISSUES

1. Where Petitioner, the State of Tennessee ("Tennessee"), has granted EPB broad authority to offer communications services, both through general law and under Tennessee's Home Rule Amendment, does Section 706 of the Telecommunications Act authorize the Federal Communications Commission ("FCC") to preempt a four-word territorial restriction that the FCC found to constitute a barrier to broadband investment and competition?

2. Did the FCC's limited preemption, where Tennessee has granted broad underlying authority to EPB, interfere with Tennessee's core sovereignty in violation of the Tenth Amendment to the United States Constitution?

COUNTERSTATEMENT OF THE CASE

This appeal involves the efforts of Tennessee to sustain a competitive barrier that deprives many of its citizens of access to Internet service meeting or exceeding the FCC's standards for broadband while protecting from competition existing communications companies that have refused to offer such services. The competitive barrier was preempted by the FCC in its Memorandum Opinion and Order issued in *In Re The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated 7-52-601, WC*

Docket No. 14-116 and in the companion petition brought by Wilson, North Carolina, FCC 15-25 (Released March 12, 2015) (the "Order") (P.A. 1).

As explained in its Order, the FCC carefully limited its preemption action to avoid intruding upon the core sovereignty of Tennessee. The FCC determined that Section 706 permitted it to preempt State laws that primarily serve to regulate competition in the broadband market. The FCC found that the four-word territorial restriction, "within its service area," in Tenn. Code Ann. § 7-52-601 constituted a barrier to broadband investment and competition, a finding that Tennessee does not challenge. The FCC also determined that Tennessee had not withheld from EPB authority to provide broadband Internet and other communications services, but that the State had, instead, broadly granted EPB such underlying authority.

The FCC carefully considered the possible impact of preemption of the territorial restriction upon the sovereign interests of the State. It properly concluded that where the State had granted underlying authority for a municipal provider such as EPB to provide broadband services, preemption of an anti-competitive policy restriction did not intrude upon the core sovereignty of the State.

On March 20, 2015, the State of Tennessee filed a petition for review of the Order. Tennessee has not challenged the FCC's findings in its Order that the four-word competitive barrier in Tenn. Code Ann. § 7-52-601 constituted a barrier to

broadband investment and competition. Nor has Tennessee challenged the FCC's findings that, were it not for the competitive barrier which Tennessee seeks to preserve, EPB would exercise authority granted to it by Tennessee general law and Article XI, Section 9 of the Tennessee Constitution (the "Home Rule Amendment") to provide advanced telecommunications services to provide residents and businesses in areas adjacent to EPB's electric service territory access to modern communications services.

Instead, Tennessee's challenge focuses upon its claim that it has an absolute right to at its pleasure, create, alter, or revoke municipal authority. Tennessee's argument overlooks the State's broad grant of general law authority to EPB, EPB's authority as part of a city that has adopted home rule under the Tennessee Constitution, and the constitutional and statutory policies that limit the State's ability to revoke such authority.

On April 20, 2015, EPB provided notice of its intention to intervene as a party Respondent in this matter.

STATEMENT OF FACTS

A. EPB's Communications Authority.

EPB is an independent board that is part of the City of Chattanooga, Tennessee, a municipal corporation.

In 1997, the Tennessee legislature authorized municipalities, through their electric systems such as EPB, to acquire facilities for the provision of telecommunications services.[1] The 1997 legislation also granted municipalities providing telecommunications services "all the powers, obligations and authority granted entities providing telecommunications services under applicable laws of the United States or the State of Tennessee."[2] The 1997 legislation contained no territorial restriction. After EPB demonstrated its technical, financial, and administrative capability, it was authorized by the Tennessee Regulatory Authority to offer telecommunications services anywhere in the State.[3]

In 1999, the legislature enacted a similar law that authorized municipalities, through their electric systems, to acquire facilities to provide cable TV, Internet, and similar services.[4] The 1999 legislation also provided municipalities providing any of these services "all of the powers, obligations, and authority granted entities providing similar services under applicable laws of the United States, the State of

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1 Tenn. Code Ann. § 7-52-401, *et seq*.

2 Tenn. Code Ann. § 7-52-403(a).

3 *See* Tennessee Regulatory Authority, Order Approving Application for Certificate of Public Convenience and Necessity, Docket No. 97-07488, 1999 WL 35495760 (May 10, 1999); Tennessee Regulatory Authority, Order, Docket No. 06-00193, 2007 WL 8451678 (August 23, 2007).

4 Tenn. Code Ann. § 7-52-601, *et seq*.

Tennessee or applicable municipal ordinances."[5] The language of § 7-52-601, authorizing acquisition of facilities to provide Internet and other communications services, is almost identical to that of § 7-52-401, except for the addition of four words, "within its service area."[6] By these four words, the State of Tennessee erected a barrier precluding competition and the expansion of broadband services to areas outside EPB's electric service area, including areas where incumbent communications companies refuse to provide such services.

Since the time, nearly two decades ago, when the legislature separately authorized EPB's acquisition of facilities to provide telecommunications services and of facilities to provide video and Internet services, technological advances have permitted the same facilities to be used for provision of all of these services. Thus, EPB has the authority under Tenn. Code Ann. § 7-52-401 to acquire or construct a fiber optic cable to deliver telephone calls, using the voice over Internet protocol ("VOIP") employed by EPB, 400 miles away to customers in west Tennessee. The same connection can be used to deliver a vast range of Internet contact other than telephone calls. However, the State contends that the four-word competitive barrier contained in Section 601 prevents EPB from using an Internet

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5 Tenn. Code Ann. § 7-52-605.

6 *See* Order at ¶ 169 (P.A. 71-72); EPB Petition 32-33 (P.A. 431-32).

connection authorized by Section 401 to deliver over the Internet a transcript of the telephone call or an image of the front page of the local newspaper.

B. **Benefits of EPB's Fiber Communications System.**

EPB provides electric service to more than 170,000 customers in a 600 square mile service area. EPB's electric service area includes all of the City of Chattanooga, most of Hamilton County in which Chattanooga lies, and portions of five (5) other counties in Tennessee and three (3) counties in North Georgia.

EPB has deployed an optical fiber communications network throughout its electric service area, passing every home and business. The fiber network provides the communications platform for EPB's advanced electric system smart grid, and excess capacity on the fiber network is used by EPB to make available the fastest broadband Internet service in the world to every residential and commercial customer. In addition to broadband Internet, EPB also offers voice over Internet protocol telecommunications services and Internet protocol television. EPB's communications services had about 63,000 customers when EPB's Petition was filed in July, 2014.[7] Today, EPB serves more than 75,000 communications customers.

The competition provided by EPB's world-class communications services has prompted private communications providers within EPB's electric service

[7] *See* Order ¶ 22 (P.A. 9).

territory to respond with infrastructure investments that have provided successively higher Internet speeds. In 2008, Comcast offered residential Internet download speed tiers of 0.77 Mbps, 6 Mbps, and 8 Mbps.[8] When EPB entered the market in 2009 with symmetrical speeds of 15 to 100 Mbps, Comcast increased its download speeds to up to 12 Mbps and 22 Mbps. By 2013, Comcast had increased its download speed offerings to 3 Mbps, 25 Mbps, and 105 Mbps. In the meantime, EPB increased its minimum symmetrical speeds first to 30 Mbps, then to 50 Mbps, and then to 100 Mbps. When EPB filed its Petition, EPB offered residential customers a choice between 100 Mbps or, for $12.00 a month more, 1,000 Mbps (or 1 Gigabit per second). Since EPB filed its Petition, Comcast announced plans to offer 2 Gigabit download speeds in limited areas within EPB's service area, and EPB announced the availability of 10 Gigabit service to all of its residential and commercial customers.

While residents and businesses within EPB's electric service area have access to the fastest broadband Internet in the world, as well as broadband choices offered by EPB's competitors, their neighbors in areas adjacent to EPB's electric service area live in a digital desert. Because of the territorial restriction in Section 601, private companies serving surrounding areas have faced no competition, and

[8] Comcast's service is asymmetrical, with slower upload speeds.

the private companies have not made adequate investments in broadband infrastructure.

The FCC determined that 28% of the housing units in the counties surrounding EPB's electric service area do not have ***even a single*** provider of broadband Internet meeting the FCC's standard, compared to 16% nationwide.[9]

The FCC found that EPB's broadband network has produced significant economic, educational, and social benefits within EPB's electric service area.[10] EPB's communications services have resulted in large savings for EPB and benefits for taxpayers, producing net revenue that has permitted EPB to avoid electric rate increases.[11] The economic benefits of EPB's fiber communications services were among the factors that led Standard and Poor's in 2012 to upgrade EPB's bond rating to AA+.[12]

C. Competitors' Efforts to Block EPB's Communication Services.

Other communications providers have repeatedly sought to block EPB's provision of communications services. The four-word competitive restriction contained Section 601 was one of the products of those efforts. Other provisions inserted into Tenn. Code Ann. § 7-52-601, *et seq.*, require municipal electric

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9 Order, ¶¶ 29-31 (P.A. 12-14).

10 Order, ¶¶ 22-26 (P.A. 9-12).

11 Order, ¶ 24 (P.A. 10-11).

12 *Id.*

systems seeking to offer Internet and video services to go through a lengthy, multi-step approval process. EPB fulfilled the process, even though it faced at each step intense lobbying from incumbents to halt the competition that EPB's fiber system would offer.

In September, as EPB was preparing to issue revenue bonds to finance its fiber network, the Tennessee Cable and Telecommunications Association (TCTA) sued EPB in Nashville seeking to enjoin it from proceeding with financing and construction of its fiber network. The suit was dismissed and the dismissal was affirmed by the Tennessee Court of Appeals.[13]

Eight days after the TCTA lawsuit was dismissed and one day before the underwriters issued their final offering statement for EPB's revenue bonds, Comcast filed a second suit in Chattanooga. In spite of these efforts, EPB successfully completed its planned bond offering. The Comcast complaint was dismissed and the dismissal was affirmed by the Tennessee Court of Appeals.[14] EPB's successful defense of both lawsuits cost nearly $500,000 in legal fees.

The TCTA and Comcast lawsuits followed earlier efforts to block entry by EPB into the telecommunications market. On October 21, 1997, EPB filed its

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[13] *Tennessee Cable Telecomms. Assoc. v. Electric Power Bd.*, No. M2008-01692-COA-R3-CV, 2009 WL 2632760 (Tenn. Ct. App. Aug. 26, 2009).

[14] *Comcast of the South v. Electric Power Bd.*, No. E2008-01788-COA-R3-CV, 2009 WL 1328336 (Tenn. Ct. App. May 13, 2009).

petition with the Tennessee Regulatory Authority ("TRA") seeking a certificate of convenience and necessity permitting it to provide telecommunication services as a competitive local exchange company ("CLEC") in the counties in which it supplied electric service. EPB's petition was opposed by TCTA and a half-dozen telecommunications providers.[15] The TRA did not grant EPB the requested authority until May, 1999, eighteen months later. Even then, EPB was forced to accept a broad range of conditions that placed further restrictions on EPB – restrictions that have never been applied to privately-owned telecommunications providers.[16]

The special conditions were later cited by a telecommunications supplier that tried to prohibit EPB ***from using EPB's own name*** in connection with its telecommunications services. US LEC contended that because EPB had built a very good reputation, EPB's telecommunications operation was being subsidized by the use of EPB's own name. Both the TRA and the Tennessee Court of

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[15] *See In Re: Application of Electric Power Board of Chattanooga For a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Service*, Tenn. Reg. Auth. Docket No. 97-7488. Filings in the Docket are available at http://www.state.tn.us/tra/dockets/9707488.htm.

[16] *See* Tennessee Regulatory Authority, Order Approving Application for Certificate of Public Convenience and Necessity, Docket No. 97-07488, 1999 WL 35495760 (May 10, 1999). Similar conditions were subsequently required for other municipal electric systems that sought authority to enter the telecommunications market.

Appeals rejected US LEC's claims in litigation that extended for nearly four years.[17]

D. The Harm Caused By the Territorial Restriction

More than 200 comments were filed in EPB Docket No. 14-116, the overwhelming majority of which (over 80%) expressed strong support for removal of the competitive barrier restricting EPB's expansion outside its electric service area.[18] These comments described the necessity of broadband Internet and digital inclusion in the modern world, the benefits realized by Chattanooga and other communities with access to EPB broadband Internet, and the stark contrast of service options and the lack of broadband access in areas right outside EPB's service area. The commenters broadly supported the notion that local communities should have control over such a vital resource. The numerous comments from residents outside EPB's service area with limited or no access to broadband Internet demonstrated the effect of Tennessee's barrier to restrict competition and discourage investment in broadband infrastructure in rural communities outside EPB's service area.

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[17] *See US LEC of Tenn., Inc. v. Tennessee Reg. Auth.*, 2006 WL 1005134 (Tenn. Ct. App. 2006).

[18] *See generally* selection of comments filed in Docket No. 14-116 (I.A. 1024 – 1524).

EPB's services have improved education through fiber in the public schools and libraries, encouraging innovative and unique learning opportunities. As the American Library Association ("ALA") noted in its comment to the FCC, "only 11 percent of our nation's public libraries have broadband connection speeds of 100Mbps or faster."[19] Chattanooga's public library, with its "14,000 square foot maker space containing computers, 3-D printers and workspaces with Gigabit connections . . . is the vision ALA has for all of the communities [that the ALA's] libraries serve."[20] Broadband Internet is widely recognized as "essential to advancing digital inclusion and innovation—enhancing economic development and educational opportunities." [21] EPB's Internet services allow Chattanooga residents to excel in an increasingly digital world, enabling them to work from home, complete school assignments, grow businesses, access online news media, stream entertainment, and engage with their communities in new and meaningful ways. High-speed Internet allows businesses to work more efficiently and empowers individuals to pursue work and education on their own terms.[22]

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[19] Comment of American Library Association at 2 (filed Sept. 29, 2014). (I.A. 1488)

[20] *Id*.

[21] *See Id*.

[22] *See* Comment of David Campano (filed Sept. 4, 2014) (Mr. Campano, as a small business owner, shared that his residential connection one mile outside EPB's service area loses connectivity several times per week in contrast to EPB's reliable service at his office) (I.A. 1456).

The positive benefits that Chattanooga has experienced because of EPB's broadband network, have not been realized by those who live outside EPB's service area. Many of the commenters reside in "digital deserts"—short distances from EPB's network, yet unable to get service from private Internet providers that meets the FCC's definition of broadband. These commenters urged the FCC to remove the territorial restriction and allow EPB to serve their neighboring rural communities. The inability to access reliable internet at home impacts these residents in a myriad of ways in the modern world. For many Americans, the Internet is their primary source for continuing education, purchasing or selling goods, paying bills, and accessing news and entertainment. Those with slow or non-existent Internet service cannot access the information, fundamental conveniences, and opportunities that the Internet affords.[23]

Residents in many rural Tennessee communities rely on dial-up, satellite, air cards, hot spots or cellular data for slow, unreliable and often-expensive Internet connectivity.[24] Students in these rural areas face particular challenges completing school assignments.

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[23] Comment of Kimberly Rowlett (filed Aug. 29, 2014) (I.A. 1246); Comment of Thomas Kelly (filed Aug. 28, 2014) (I.A. 1138).

[24] *See* Comment of Herb and Mary Anne Poulson (filed Aug. 29, 2014) stating that for the past four (4) years the best Internet connection available to them in Bradley County was through Verizon's cellular Jetpack (I.A. 1327).

- Katelyn Coltrin, a student at University of Tennessee, commented that her home in rural Bradley County, just outside of EPB's service area, has no Internet access. She completed high school assignments at a nearby McDonalds or Starbucks along with her similarly-situated peers.[25] She wrote, "While I go to the University of Tennessee and have access to Internet, my concern has shifted to my younger siblings who still live in our rural Bradley County home, without Internet."
- Jim Coltrin, echoed this sentiment that his daughter must go to friends' homes to use their broadband or sit in her car in the parking lot of McDonalds to access Wi-Fi. He added that his wife, a teacher, has difficulties planning her lessons from home, which require online research.[26]
- Peyton VanHook, a high school student in Bradley County, uses the Internet for schoolwork, college and scholarship applications. She wrote that her Internet connection averaged 20 kilobits per second, costing her family $90 per month. Loading her school's website can take up to six minutes, and a Google search can take one to two minutes. Her school regularly requires her to watch videos to prepare

[25] Comment of Katelyn Coltrin, WC Docket Nos. 14-116 (filed Aug. 29, 2014) (I.A. 1353).

[26] Comment of Jim Coltrin (filed Aug. 28, 2014) (I.A. 1187).

for class, which necessitates a twenty-minute drive to downtown Cleveland for faster Internet speeds.[27]

- Vonn Williams commented on the difficulties homeschooling three children and accessing online video tutorials and lessons using a mobile hot spot.[28]
- Barbara-Ann Hughes wrote that her children have no way of using computers for their education at home because they have no Internet access on their family farm in South Meigs County, north of Chattanooga and Hamilton County.[29]
- Rebecca Levings wrote that her family pays for a limited data plan through a wireless carrier as no private broadband provider will serve their home, despite being only 2-3 miles from the Hamilton County line. Her son needs access to online high-bandwidth videos for his studies at Chattanooga State Community College and is limited by their monthly data plan.[30]

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27 Comment of Peyton VanHook (filed Aug. 28, 2014) (I.A. 1191).

28 Comment of Vonn Williams (filed Aug. 28, 2014) (also noting Internet requirements for working from home) (I.A. 1139).

29 Comment of Barbara-Ann Hughes (filed Aug. 27, 2014) (I.A. 1136).

30 Comment of Rebecca Levings (filed Aug. 5, 2014) (I.A. 1070 - 71).

It is not only students who suffer from lack of broadband, but also those who need the Internet to work from home.

- Eva VanHook wrote of her husband's difficulty as an IT specialist working from home to address work-related emergencies during off-hours and her experiences responding to work matters from home when she needs to access to her organization's database through the Internet.[31]
- Mark Sweitzer of Bradley County wrote that he (small business owner) and his wife (Nurse Practitioner) both need high speed Internet to work from home, but must rely on a mobile hot spot, which is expensive and subject to data limitations.[32]
- Glenda Sink wrote of her difficulty maintaining work as an at-home medical transcriptionist because the satellite Internet available to her was too slow.[33]
- Chaz, Coty and Ginger Smith told a similar story of people in the community who have lost their jobs as medical transcriptionists

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31 Comment of Eva VanHook (filed Aug. 28, 2014) (I.A. 1188 - 89).

32 Comment of Mark Sweitzer (filed Aug. 26, 2014) (I.A. 1103).

33 Comment of Glenda Sink (filed Aug. 18, 2014) (I.A. 1090).

because they did not have access to minimum Internet speeds required by the profession.[34]

- Dale Jobe, an IT technician for Galen Medical Group, commented on how he is often required to log in remotely from home to address IT needs during non-working hours. His son, a freelance photographer, depends on the Internet to upload photos to his website and maintain customer relationships. His wife, a Financial Controller, also needs the Internet to work from home. Although they are only two miles outside of EPB's service area, they have limited service options and pay high monthly rates for slow and limited data service.[35]
- Lois Crawford, a retiree in rural Bradley County, cannot watch online tutorial videos, video-chat with her grandchildren, or download audio books from the public library due to slow connections and limited data.[36]

Commenters also responded that limited access to broadband Internet has slowed development in their communities and impacted business operations.

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[34] Comment of Chaz Smith (filed Aug. 1, 2014) (I.A. 1051), Coty Smith (filed Aug. 4, 2014) (I.A. 1073) and Ginger Smith (filed Aug, 1, 2014) (I.A. 1050).

[35] Comment of Dale A. Jobe (filed Aug. 11, 2014) (I.A. 1084).

[36] Comment of Lois Crawford (filed Aug. 28, 2014) (I.A. 1190).

- Residential developer John Thornton wrote that he has been unable to find a private Internet provider who will affordably serve his planned 2,000-homesite development in Marion County, only a twenty-five minute drive from downtown Chattanooga. Although EPB is capable of providing broadband Internet to Marion County, it is prohibited by the State's barrier from doing so. John Thornton identifies the lack of such fundamental resources as broadband Internet as a hindrance to Marion County's growth compared to neighboring Hamilton County.[37]
- Mike Rymer, the owner of a poultry farm, commented that he cannot install the latest technology and alarm monitoring systems, which would reduce operating costs, because he does not have access to high-speed broadband Internet.[38]

The numerous commenters who live in unserved or underserved areas support preemption because there is no competition to provide service comparable to EPB's fiber network. Areas immediately outside of EPB's service area, in portions of Hamilton, Marion, Bradley and Meigs County, have no providers, or limited private providers, of Internet that meets the FCC's definition of broadband.

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[37] Comment of John C. Thornton (filed Aug. 29, 2014) (I.A. 1334 - 35).

[38] Comment of Mike Rymer (filed Aug. 27, 2014) (I.A. 1124).

Community leaders have recognized the significant positive impacts of EPB's broadband network on Chattanooga.

- Chattanooga Mayor Andy Berke described in his letter to the FCC how EPB's infrastructure has led Chattanooga to "promote digital inclusion, support existing and new businesses, and promote entrepreneurship."[39] Mayor Berke's letter detailed the City's efforts to develop innovative ways to utilize EPB's broadband Internet through the creation of an Innovation District, among other initiatives. Mayor Berke noted, "It is not enough for Chattanooga and much of Hamilton County to have access to 21st Century broadband infrastructure. It is important that this critical infrastructure be available to other areas of the region, regardless of artificial boundaries. The economic success of adjoining areas enriches all of us."[40]
- Hamilton County Mayor Jim Coppinger expressed a similar sentiment, stating, "EPB's gigabit fiber system is important to our attraction and retention of business and provides an important

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39 Comment of Mayor Andy Berke (filed Sept. 29, 2014) (I.A. 1471).

40 *Id*.

resource for entrepreneurial growth in Hamilton County."[41] He noted that EPB "provides electric service to most, but not all, of Hamilton County. . . Under present State law, EPB cannot provide its broadband services [in two areas], which total about 15% of Hamilton County's land area. High-speed broadband is important to the continued growth of all areas of Hamilton County. . . . [T]he northeast corner of County, which EPB cannot serve under present law, is only a few miles away from multi-billion dollar investments in Hamilton County by Volkswagen and in adjacent Bradley County by Wacker Chemical Corporation. This area is poised for significant growth, and high-speed broadband is an important infrastructure needed to support that growth."[42]

- Charlie Brock, CEO and President of Launch TN and Mike Bradshaw, Executive Director of CoLab, wrote of the benefits Chattanooga has seen from homes and businesses accessing Internet speeds of at least 100 Mbps, including recruiting new businesses, improving access to online resources for education, enabling doctors to consult on large

41 Comment of Mayor Jim M. Coppinger (filed Aug. 29, 2014) (I.A. 1279).

42 *Id*.

medical files and provide faster diagnoses, and providing people with flexibility in how and where they work.[43]

As EPB has demonstrated, municipalities are capable of providing high-quality broadband Internet, and private and public sectors benefit from local government involvement in broadband initiates. Many organizations, local governments, municipalities, and cities supported EPB in its petition to remove the territorial barrier to broadband Internet and gave examples of how local government involvement in broadband initiatives enriches communities and how artificial State barriers restrict innovation.[44]

- As the Intergovernmental Advisory Committee to the FCC noted, "Historically, local governments have ensured access to essential services that were not offered by the private sector at a reasonable and competitive cost. This involvement has included electrification, public libraries, and other important services. Processes are already in place for local decision making to be open, transparent, and provide public input. Local government follow these public processes prior to

[43] Comment of Mike Bradshaw (filed Aug. 15, 2014) (I.A. 1087 - 88) and Comment of Charlie Brock (filed Aug. 25, 2014) (I.A. 1095 - 99).

[44] *See e.g.* Comment of City of Carl Junction, MO (filed Feb. 11, 2015) (I.A. 1524); Comments of the Town of Wendell (filed Aug. 26, 2014) (I.A. 1099); Comment of the City of Madison Wisconsin (filed Sept. 2, 2014) (I.A. 1447); Comment of the City of Portland (filed Aug. 29, 2014) (I.A. 1348).

building parks, recreational facilities[,] roads, public safety facilities, water and sewer facilities and other local assets to enhance the quality of life of their citizens. Building community broadband access should not be more or less restrictive than this. . . . The economy and public benefit from competitive markets. When only one service provider serves a market, the quality of service, rates for service, and customer satisfaction frequently suffer in comparison with customers living in a competitive market area. When the private sector does not create a competitive market, local governments, on behalf of their residents, should have the option to . . . develop a broadband system that will create a competitive marketplace."[45]

- The Town of Wendell and City of Madison stated in their comments of support, "In today's global, knowledge-based economy, all local communities – rural, tribal, and urban – recognize that access to modern broadband Internet infrastructure is essential to enable economic and democratic activity. Modern broadband Internet infrastructure is the lifeblood of our 21st century global knowledge economy. . . . Local communities are best positioned to determine the

[45] Comment of Intergovernmental Advisory Committee at 2 (filed February 2, 2015) (I.A. 1022).

best options for their citizens, businesses and institutions, whether this means working with willing incumbents, entering into public-private partnerships, developing their own networks, or being served by other local communities who have the capacity to provide Gigabit services."[46]

- The City of Portland explained, "affordable broadband is tantamount to and should be treated as a utility in today's digital economy, providing residences, businesses, and government institutions equal access to the information highway. . . . We support removal of artificial State barriers to broadband infrastructure investment, deployment, competition, and innovation by cities and other local government authorities. . . . Local governments should be trusted to make decisions regarding local broadband needs."[47]
- The Coalition for Local Internet Choice wrote: "Local communities, through their elected local officials, have deep experience in evaluating and making significant capital investments in infrastructure projects of all kinds and they have a 20-year record of using advanced

[46] *See* Comment of Town of Wendell at 3 (filed Aug. 26, 2014) (I.A. 1101); Comment of the City of Madison Wisconsin at 3 (filed Sept. 2, 2014) (I.A. 1449).

[47] Comment of the City of Portland at 2, 5 (filed Aug. 29, 2014) (I.A. 1349, 1352).

communications infrastructure to stimulate local innovation and economic development. Local government entities such as Grant County, Washington; Kutztown, Pennsylvania; and Bristol, Virginia, pioneered the provision of fiber-to-the-home on a major scale before any major private sector company began building comparable infrastructure. Public entities were also the first entities to invest in fiber infrastructure to serve schools and libraries with gigabit speeds. . . . Local governments also have vast experience in operating communications networks that support public safety first responders, and they have been leaders for two decades in identifying and prioritizing digital inclusion and ensuring that no one in the community goes without Internet access."[48]

- New America Foundation's Open Technology Institute's comments to the FCC provided examples of how local governments impact competition and spur other providers to respond with improved services.[49]

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[48] Comment of the Coalition for Local Internet Choice at 4 (filed Aug. 29, 2014) (I.A. 1392).

[49] Comment of New America Foundation (filed Aug. 29, 2014) (I.A. 1368 - 84).

Commenters also explained that expanding broadband access to all Americans is important to ensure future progress. Professor Jonathan Taplin, Director of the Annenberg Innovation Lab at the University of Southern California, commented that "high capacity fiber networks will be increasingly important to the new media and content industries that are just being imagined. . . We have observed how the EPB network has contributed to a revitalized technology scene in Chattanooga and we see no reason why the surrounding towns shouldn't also have access to this wonderful tool."[50] Netflix described the power of fiber internet in its comments to the FCC stating, "As Netflix CEO Reed Hastings recently noted, '[a] single fiber-optic strand the diameter of a human hair can carry 101.7 terabits of data per second, enough to support nearly every subscriber watching content in HD at the same time.' When municipalities harness that technology to extend opportunities to new communities, federal and State laws should encourage the initiative, or at the very least, get out of the way."[51]

SUMMARY OF THE ARGUMENT

In its Petition, EPB pointed out to the FCC that the otherwise broad communication services authority granted by Tennessee was restricted by a four-word, anti-competitive restriction that denied access to broadband Internet by

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50 Comment of Jonathan Taplin (filed Aug. 27, 2014) (I.A. 1137).

51 Comment of Netflix, Inc. (filed Aug. 29, 2014) (I.A. 1356 - 57).

residents and businesses living near EPB's electric service territory. EPB asked the FCC to preempt those four words, so that EPB could meet the needs of its neighbors for access to modern communications infrastructure.

In response, the FCC carefully analyzed the responsibilities and authority assigned to it by Congress in Section 706 of the Telecommunications Act and considered how it could fulfill its responsibilities without improperly intruding upon Tennessee's sovereignty. The FCC noted that this was not a case where a State had chosen to withhold authority from municipalities to offer broadband Internet services. Instead, the FCC found that Tennessee had offered broad authority to EPB, but had imposed an anti-competitive policy that contradicted federal policies promoting broadband investment and competition. The FCC concluded that, while a State's decision whether or not to grant communications services authority may implicate the State's fundamental sovereignty, a State's imposition of regulation upon interstate communications services does not implicate core attributes of sovereignty. Instead, such State regulation conflicts with Congress' direction that the FCC is to have comprehensive, if not exclusive, jurisdiction over interstate communications services.

Tennessee has argued vigorously that the FCC action has invaded its fundamental sovereign rights and violated the Tenth Amendment, asserting that the State has a plenary right at its pleasure to alter or revoke municipal EPB's

authority. Respectfully, this position overlooks the communications authority that Tennessee has broadly granted to EPB by general law, the fact that EPB is a part of a City that has adopted home rule under Tennessee's Home Rule Amendment, and the Constitutional and statutory limits that specify that accrued rights cannot be affected by repeal of a statute.

As a home rule municipality, Chattanooga of which EPB is a part is authorized by the Tennessee Constitution to amend its charter to provide for its governmental and proprietary powers, duties, and functions. The powers and authority of home rule municipalities are not subject to narrow interpretation. In particular, the Tennessee Supreme Court has held that Dillon's Rule does not apply to home rule municipalities. Tennessee does not have the right to exercise broad control over home rule municipalities.

The legislature may only deal with home rule municipalities through general laws, just as it can only deal with individuals and private businesses through general laws. Tennessee's Attorney General has previously recognized that the FCC had the right to preempt a Tennessee general law that imposed a competitive prohibition applicable to both private and municipal communications providers. No concern was expressed that FCC preemption of the competitive prohibition violated the State's sovereignty.

The FCC's carefully limited preemption action did not raise Tenth Amendment concerns. The FCC only addressed four words in a Tennessee general law that the FCC found to be "an explicit barrier to broadband infrastructure investment and competition under Section 706." The FCC did not grant new authority to EPB – it had no need to do so because Tennessee had already granted EPB broad authority to provide Telecommunications, broadband Internet, and video services. Instead, the FCC narrowly acted to remove a restriction that conflicted with clearly-stated federal policy promoting competition and investment in the expansion of broadband Internet services.

Gregory v Ashcroft, 501 U.S. 452, 111 S.Ct. 2395 (1991), has no application, because the FCC's action did not affect Tennessee's core sovereignty. Tennessee exercised its core sovereignty when it granted municipal utilities such as EPB broad statutory authority to provide communications services and when the people of the State adopted Article XI, § 9 of the Tennessee Constitution, granting to home rule municipalities, such as Chattanooga of which EPB is part, broad authority to define their own governmental and proprietary powers, duties and functions. The FCC action addressed something much different – a State policy that sought to dictate the manner in which interstate commerce is conducted in contradiction to federal policy. Preemption of such a conflicting State policy did not harm Tennessee's fundamental sovereignty.

For similar reasons, *Nixon v. Missouri Municipal League*, 541 U.S. 125, 124 S.Ct. 1555 (2004), has no application. The FCC, carefully respecting principles of federalism explained in *Nixon*, emphasized that this was not a case where exercise of its preemption authority would grant authority that a State had chosen to withhold. Instead, the FCC granted the limited preemption sought by EPB only after finding that Tennessee had granted EPB underlying authorization to provide the communications services. A review of the four hypotheticals set forth by the Court in *Nixon* clearly demonstrates the inapplicability of that decision to the FCC action.

STANDARD OF REVIEW

Courts review questions of preemption as questions of law, subject to de novo review. *E.g., GTE Mobilnet of Ohio v. Johnson*, 111 F.3d. 469, 475 (6th Cir. 1997). The heightened standard of review described in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395 (1991) does not apply to the Court's review of the FCC's Order.

No party has challenged the findings of fact made by the FCC in support of its action.

LAW AND ARGUMENT

I. THE FCC DECISION DOES NOT INTRUDE INTO FUNDAMENTAL AREAS OF TENNESSEE'S SOVEREIGNTY.

Neither the FCC nor EPB question the principles of federalism that limit the ability of the federal government to take actions that intrude upon powers reserved to the States or to the people. However, in arguing that the FCC has exceeded these limits, Tennessee incorrectly characterizes the scope of the carefully-limited action taken by the FCC. More significantly, Tennessee incorrectly states the scope of the sovereign powers it has retained over municipalities that the State has authorized to provide communications services and, particularly, over home rule municipalities, such as the City of Chattanooga and its board EPB.

The FCC took care to structure its decision so that it did not intrude into fundamental areas of Tennessee's sovereignty. Carefully analyzing its proper role, the FCC held only that where the State has authorized a political subdivision to offer broadband services the State may not impose restrictions upon that authority that conflict with established federal policies.[52] In this case, the Tennessee legislature has granted broad authority to the City of Chattanooga, acting through its board EPB, to offer a range of communications services, including telecommunications, broadband, and video services.[53] As codified in a statute that has existed in the Tennessee Code since at least 1858, Tennessee may not take

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[52] Order ¶¶ 3-5 (P.A. 3 - 4).

[53] Both Tenn. Code Ann. § 7-52-401, *et seq*., and § 7-52-601, *et seq*., authorize municipalities, acting through their municipal electric systems, to offer the communications services. The City of Chattanooga elected to offer the communications services and does so through its municipal electric system, EPB.

away rights of municipal utilities, such as EPB, that have accrued under the statutory communications authority granted by the State.[54]

The Tennessee legislature imposed no territorial restrictions upon the areas in which EPB offers telecommunications services, but the legislature did impose a territorial restriction upon the areas in which EPB offers broadband and video services.[55] It was this restriction that the FCC found to conflict with the policies that Congress established in Section 706 of the Telecommunications Act[56] ("Section 706").[57] The FCC correctly found that preemption of only the four-word territorial restriction contained in one section of the authorizing statute left EPB with broad authority to offer broadband Internet and video services.[58] By preempting only these four words that conflicted with clear federal policy, the FCC carefully avoided intruding upon Tennessee's sovereignty.

Tennessee claims a vast scope of sovereign power over EPB. However, not only has Tennessee overlooked the broad authority that it has transferred by statute to Tennessee municipalities to offer communication services, but it has also

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54 Tenn. Code Ann. § 1-3-101. *See* Tenn. Op. Atty. Gen. No. 97-027, 1997 WL 188448, at *3 (March 31, 1997).

55 *Compare* Tenn. Code Ann. § 7-52-401 and § 7-52-601. Order ¶ 169 (P.A. 71).

56 47 U.S.C.A. § 1302.

57 *See* Order ¶¶ 3-15 (P.A. 3 - 6).

58 Order ¶ 163 (P.A. 69).

overlooked the fact that EPB is a part of, and is acting on behalf of, a municipality that has adopted home rule under Article XI, Section 9 of the Tennessee Constitution (the "Home Rule Amendment"). The Home Rule Amendment was approved by the people of Tennessee in 1953, and authorizes citizens of municipalities to choose to govern themselves by adopting home rule.[59] The citizens of Chattanooga, of which EPB is a part, voted in 1972 to adopt home rule.[60] Thus, while Tennessee may have the "plenary right to define and change the authority of"[61] some municipalities, the Home Rule Amendment reassigns that right to home rule municipalities, each of which is given the right to adopt charter provisions "to provide for its governmental and proprietary powers, duties and functions, and the form, structure, personnel and organization of its government . . . ."[62] Since Chattanooga adopted home rule, Tennessee may act with respect to

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59 Tenn. Const. Art. XI, § 9.

60 *See* City of Chattanooga Charter, *available at* www.chattanooga.gov/city-council/city-charter. The adoption of Home Rule was submitted to voters on November 7, 1972 to ratify Ordinance No. 6489, pursuant to Article XI, Section 9 of the Tennessee Constitution. *See Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga,* 580 S.W.2d 322, at 324, n.1 (Tenn. 1979).

61 *See* Brief of Petitioner State of Tennessee, at 24.

62 *See* Tenn. Const. Art. XI, § 9.

Chattanooga and its board EPB only through general laws, in the same manner as it must act with respect to individuals and private corporations.[63]

Tennessee also overlooks its prior acknowledgement that the FCC had the authority to preempt a Tennessee general law embodying a State policy prohibiting communications competition that was in conflict with federal policy promoting communications competition. In Tenn. Op. Atty. Gen. No. 01-036, the Tennessee Attorney General reported that the FCC had acted within its power when it preempted Tenn. Code Ann. § 65-4-201(d), which prevented competitive local exchange carriers ("CLECs") from competing with incumbent telephone carriers with fewer than 100,000 lines.[64] The 1998 petition that led to the FCC preemption action was filed by a privately-owned CLEC, but the FCC preemption also benefitted municipal electric systems such as EPB, which have been authorized since 1997 to become CLECs.[65] The Attorney General held that, because of the FCC preemption, Tenn. Code Ann. § 65-4-201(d) was no longer enforceable. The

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[63] *See* Tenn. Const. Art. XI, § 9 (may only act by general laws as to home rule municipalities); Tenn. Const. Art. XI, § 8 (may only act by general laws as to individuals and private corporations).

[64] *See* Tenn. Op. Atty. Gen. No. 01-036 (March 19, 2001) acknowledging the proprietary of the FCC's grant of the preemption petition in *AVR, L.P., d/b/a Hyperion of Tennessee*, 14 FCC Rcd 11064 (1999) ("Hyperion Preemption Order").

[65] Tenn. Code Ann. § 7-52-401, *et seq.*, became effective June 19, 1997. The *Hyperion* petition was filed in 1998 and decided in 1999. *Hyperion Preemption Order, supra*.

Attorney General did not suggest that the FCC preemption action in any way offended Tennessee's sovereignty.

A. Tennessee Granted Municipal Electric Systems Broad Authority to Offer Communications Services, Which Is Unaffected by the FCC's Preemption of the Territorial Restriction in Section 601

Tennessee has granted municipalities, acting through their electric systems such as EPB, broad authority to provide communications services. The authority was granted in two separate enactments, one in 1997 and a second in 1999. The 1997 enactment authorized EPB to provide telecommunications services.[66] The 1999 enactment added authority to provide video and Internet services.[67] Both enactments are similarly structured. In almost identical language, the initial section of each enactment grants authority for municipalities, acting through their municipal electric systems, to acquire and operate the facilities for the communications services.[68] In almost identical language in later sections of each enactment, the legislature granted municipal electric systems providing communications services "all the powers, obligations, and authority granted entities providing telecommunications [*similar*] services under applicable laws of

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66 Tenn. Code Ann. § 7-52-401, *et seq*.

67 Tenn. Code Ann. § 7-52-601, *et seq*.

68 *See* Tenn. Code Ann. § 7-52-401; § 7-52-601.

the United States or the State of Tennessee [*or applicable municipal ordinances*]."[69]

In two separate opinions, Tennessee's Attorney General has affirmed the broad scope of these grants of authority relating to communications services. In the first opinion, relating to telecommunications services, the Attorney General stated, "[t]hus, it is clear these statutes grant a 'municipality' the broad authority to provide telecommunications services."[70] Once the municipality has made the decision to offer telecommunications services, he stated, "an electric power board may exercise any of the powers with regard to telecommunications services . . . if the legislative body of the city, county, or metropolitan government on whose behalf it was created has authorized it to do so . . . ."[71]

In the second of the opinions, relating to video and Internet services, the Attorney General again affirmed the breadth of these grants of authority. "Once the legislative body [of the municipality] approves the additional services, the municipal electric system may, independently, exercise 'all the powers, obligations, and authority granted entities providing similar services under applicable laws of the United States, the State of Tennessee or applicable

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[69] *See* Tenn. Code Ann. § 7-52-403(a); § 7-52-605. The differences in Section 605 are shown in bracketed italics.

[70] Tenn. Op. Atty. Gen. No. 12-34, 2012 WL 907241, at *2 (March 12, 2012.

[71] *Id.* at *4. The opinion specifically approved the authority of an electric power board, such as EPB, to borrow money and pledge assets as security.

municipal ordinances . . . ."[72] The opinion specifically approved the authority of electric systems, such as EPB, to "enter into contracts with financial institutions to borrow money to acquire, construct, and provide working capital for Internet and video programming systems and services and pledging non-electric assets to secure such loans, as may be done by private entities providing such services."[73]

Tennessee has confirmed the breadth of EPB's statutory telecommunications authority through the grant by the Tennessee Regulatory Authority (the "TRA") of successive operating certifications. EPB first was granted a certificate of convenience and necessity from the TRA in 1999 to provide telecommunications services within the counties in which it provides electric service.[74] In 2007, the TRA granted EPB authorization to provide telecommunications services throughout the State of Tennessee.[75] To obtain the 2007 certificate, EPB had to demonstrate that it possessed "sufficient managerial, financial and technical abilities to provide the applied for services" on a statewide basis.[76]

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72 Tenn. Op. Atty. Gen. No. 12-70, 2012 WL 2952470, at *2 (July 11, 2012).

73 *Id.*

74 *See* Tennessee Regulatory Authority, Order Approving Application for Certificate of Public Convenience and Necessity, Docket No. 97-07488, 1999 WL 35495760 (May 10, 1999).

75 *See* Tennessee Regulatory Authority, Order, Docket No. 06-00193, 2007 WL 8451678 (August 23, 2007).

76 *See* Tenn. Code Ann. § 65-4-201(c).

Since 2007, EPB has had the authority to acquire and operate facilities, borrow money for financing, and exercise all of the powers and authority of a private telecommunications provider *anywhere in the State of Tennessee*. EPB provides telecommunications services using voice over Internet protocol ("VOIP"), delivering voice communications over the Internet.[77] EPB can use its statewide authority under Tenn. Code Ann. § 7-52-401, et seq., to, for example, build or acquire access to a broadband Internet connection from Chattanooga nearly 400 miles to a customer in West Tennessee, and EPB can use that broadband Internet connection to transmit voice communications or deliver other telecommunications services.[78] However, it is Tennessee's position that the four-word territorial restriction contained in Tenn. Code Ann. § 7-52-601 prevents EPB from using that same broadband Internet connection to deliver a written transcript of the voice communication or an image of the front page of the local newspaper.

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[77] Petition of EPB at 2, n.6 (P.A. 401).

[78] The FCC noted that it has reclassified broadband Internet as a telecommunications service and that its reclassification decision could authorize EPB to provide broadband Internet statewide as a "telecommunications service" under Section 401. The FCC did not express an opinion on the issue, noting that it depends upon the definition of "telecommunications" in Section 401. *See* Order at ¶¶ 168-169, n. 456 (P.A. 71). The FCC reclassified broadband Internet services under Title II of the Communications Act of 1934. *In the Matter of Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601 at ¶ 59 (2015), petitions for review filed, *United States Telecom Ass'n v. FCC*, No. 15-1063 (D.C. Cir. Mar. 23, 2015).

B. Tennessee's Argument Overlooks Chattanooga's Home Rule Status.

1. EPB Is Part of the City of Chattanooga. EPB is a municipal electric system that is part of the City of Chattanooga, created by a 1935 amendment to the City's Charter.[79] EPB's status as part of the City of Chattanooga was first recognized in a 1937 decision of the Tennessee Supreme Court that illustrates that the efforts of private utilities to protect their monopolies from competition by municipalities are nothing new. In *Tennessee Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 144 S.W.2d 441 (1937), a holder of a nonexclusive franchise to provide electric power challenged the right of EPB to construct and finance a municipally-owned electric system. Among the arguments advanced was that EPB had been unlawfully delegated authority that could only be exercised by the City. The Court rejected the argument, holding that in the construction or acquisition of the facilities necessary to provide the services it supplies, "[t]he Power Board is the mere agency of the city . . . ."[80] Every Tennessee, Georgia, and federal court that has subsequently had the occasion to

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[79] Chapter 455, Tennessee Private Acts of 1935. The 1935 Private Act, as subsequently amended by private act and home rule referendum, is codified in Title 10 of the City of Chattanooga Charter (P.A. 589).

[80] *Tennessee Elec. Power Co, supra,* 114 S.W.2d 441, 444 (Tenn. 1937).

consider the issue has reached the same conclusion.[81] So has the Tennessee Attorney General[82] and the Tennessee Regulatory Authority.[83] Petitioner agrees.[84]

2. Tennessee's Claim of "Inviolable Sovereignty" Ignores the State's Voluntary Grants of Communications Authority and Chattanooga's Home Rule Status. Tennessee vigorously contends that it has, as part of its "inviolable sovereignty" the "plenary right" to define and change the authority of municipalities. Indeed, it claims that it "may 'at its pleasure' alter or revoke municipal authority."[85]

Tennessee's assertions overlook the fact that the legislature has granted broad statutory authority to Tennessee municipalities, acting through their municipal electric systems, to offer a range of communications services, including

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81 *See, e.g., City of Chattanooga v. Marion Cnty.*, 315 S.W.2d 407, 408 (Tenn. 1958); *Cline v. City of Chattanooga*, No. 976, 1991 WL 25941, *2, *4 (Tenn. Ct. App. Mar. 4, 1991), *perm. app. denied* (Aug. 5, 1991); *City of Chattanooga v. State of Georgia*, 246 Ga. 99, 269 S.E.2d 5 (1980); *Harris v. City of Chattanooga*, 507 F. Supp. 374, 375 (N.D. Ga. 1981); *Bituminous Cas. Corp. v. R. D. C., Inc.*, 334 F. Supp. 1163 (N.D. Ga. 1971).

82 *See, e.g.,* Tenn. Op. Atty. Gen. No. 84-321 (Nov 30, 1984).

83 *See In re: Application of Electric Power Board of Chattanooga for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Service*, Docket No. 97-07488, , 1999 WL 35495760 (May 10, 1999), Order Approving Application for Certificate of Convenience and Necessity, ¶ 1 ("Applicant's Qualifications").

84 *See* Brief of Petitioner State of Tennessee, at 17 (citing *Harris v. City of Chattanooga, supra*).

85 *See* Brief of Petitioner State of Tennessee, *passim.*

telecommunications, broadband, and video services.[86] And, as codified in a statute that has existed in the Tennessee Code since at least 1858, Tennessee may not take away rights of municipal utilities, such as EPB, that have accrued, even if the State repealed the statutory authority it has previously granted.[87]

As to municipalities that have adopted home rule, such as Chattanooga of which EPB is a part, the State's urgently-asserted plenary right of control simply does not exist. As the Tennessee Supreme Court has explained:

> In Tennessee, as in most other American jurisdictions, the right of municipalities to autonomous self-government has never been considered inherent, but has always been interpreted as a matter of constitutional entitlement or legislative delegation of authority. Laska, *The Tennessee State Constitution*, 151 (1990); McQuillen, *Municipal Corporations* § 1.42 (3d ed. 1987). The possibility of truly independent municipal self-government, free from continuing legislative intervention and control, did not come into existence in this State until the constitution was amended in 1953 to establish the right to home rule.[88]

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[86] Both Tenn. Code Ann. § 7-52-401, *et seq*., and § 7-52-601, *et seq*., authorize municipalities, acting through their municipal electric systems, to offer the communications services. The City of Chattanooga elected to offer the communications services and does so through its municipal electric system, EPB.

[87] Tenn. Code Ann. § 1-3-101. *See* Tenn. Op. Atty. Gen. No. 97-027, 1997 WL 188448, at *3 (March 31, 1997).

[88] *Civil Service Merit Board of the City of Knoxville v. Burson*, 816 S.W.2d 725, 727 (Tenn. 1991).

Tennessee's Constitution establishes in its opening section that "[t]he people are possessed with ultimate sovereignty and are the source of all State authority."[89] The people's reservation of ultimate sovereignty is recognized as a fundamental aspect of federalism by the United States Constitution, as recognized in the Tenth Amendment which states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, ***or to the people***."[90] As the Supreme Court has recently explained, "[t]he limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism."[91] As the Court explained:

> Federalism has more than one dynamic. It is true that the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another.
>
> . . .
>
> But that is not its exclusive sphere of operation. Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. 'State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."'

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89 *See Cummings v. Beeler,* 189 Tenn. 151, 176, 223 S.W.2d 913, 923 (1949); Tenn. Const. Art. I, § 1.

90 U.S. Const. Amend. X (emphasis supplied).

91 *Bond v. U.S.*, 131 S.Ct. 2355, 2364 (2011) (citation omitted).

> Some of these liberties are of a political character. The federal structure allows local policies "more sensitive to the diverse needs of a heterogeneous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.[92]

In 1953, the people of Tennessee chose to exercise their sovereignty to amend their Constitution to reallocate most of the authority for municipal governance from the legislature to the people of municipalities who chose local self-government. The people's concern over the legislature's historic abuse of that authority "seems to have played at least some role in precipitating the 1953 Constitutional Convention that radically overhauled the constitutional underpinnings of local government within the State."[93] The legislature had, for

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[92] *Id.*

[93] *See* Swiney, *John Forrest Dillon Goes to School: Dillon's Rule in Tennessee Ten Years After Southern Constructors,* 79 TENN. L. REV. 103, 119 (2011).

example, abolished the municipal government of Memphis and replaced it "due to political conflict."[94]

The people's response was to pass the 1953 amendment. As the Tennessee Supreme Court has explained, "[t]he whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments, or in the people, to the maximum possible extent."[95]

The voters of Chattanooga accepted the opportunity to adopt home rule in 1972.[96] The Tennessee Attorney General has repeatedly acknowledged Chattanooga's home rule status in more than a dozen opinions addressing a broad range of subjects.[97]

Following adoption of home rule, Article XI, Section 9 of the Constitution authorized Chattanooga to:

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94 *Id.*

95 *See Farris v. Blanton,* 528 S.W.2d 549, 551 (Tenn. 1975).

96 *See Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga,* 580 S.W.2d 322, 324, n.1 (Tenn. 1979).

97 *See, e.g.,* Tenn. Op. Atty. Gen. No. 98-172, 1998 WL 661341; Tenn. Op. Atty. Gen. No. 98-029, 1998 WL 49404; Tenn. Op. Atty. Gen. No. 97-151, 1997 WL 783071; Tenn. Op. Atty. Gen. No. 97-027, 1997 WL 188448; Tenn. Op. Atty. Gen. No. 93-48, 1993 WL 475432; Tenn. Op. Atty. Gen. No. 88-108, 1988 WL 410287; Tenn. Op. Atty. Gen. No. 82-200, 1982 WL 177783; Tenn. Op. Atty. Gen. No. 82-51, 1982 WL 177901; Tenn. Op. Atty. Gen. No. 80-440, 1980 WL 103858; Tenn. Op. Atty. Gen. No. 77-373, 1977 WL 28497; Tenn. Op. Atty. Gen. No. 77-250, 1977 WL 28374; Tenn. Op. Atty. Gen. No. 77-216, 1977 WL 28340; Tenn. Op. Atty. Gen. No. 77-20, 1977 WL 28653.

> continue to operate under its existing charter, or amend the same, or adopt and thereafter amend a new charter ***to provide for its governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of its government***, provided that no charter provision except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly and provided further that the power of taxation of such municipality shall not be enlarged or increased except by general act of the General Assembly. The General Assembly shall by general law provide the exclusive methods by which municipalities may be created, merged, consolidated and dissolved and by which municipal boundaries may be altered.[98]

Chattanooga's Charter contains broad authority for the exercise by its component parts of a broad range of governmental and proprietary powers. For example, it may acquire land beyond its corporate limits by condemnation.[99] It may pass all ordinances not contrary to the Constitution and laws of the State.[100] And, the Charter provides that Chattanooga "shall have and exercise all powers which now or hereafter would be competent for this charter specifically to enumerate, as fully and completely as though said powers were specifically enumerated herein . . . ."[101] Significantly, this final broad statement of authority

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98 Emphasis supplied.

99 Chattanooga City Charter § 2.1(27); *see* Tenn. Op. Atty. Gen. No. 97-027, 1997 WL 188448 (March 31, 1997) (affirming condemnation authority).

100 Chattanooga City Charter § 2.1(65).

101 Chattanooga City Charter § 2.1(66). Significantly, all of these this provision was added in 2012 by a charter amendment approved by the voters of Chattanooga pursuant to the Home Rule Amendment. Chattanooga, Tenn. Ordinance 12677 (2012).

was added, and the other powers of the City were reaffirmed, by a charter amendment approved in March, 2013 by 78% of the voters of Chattanooga.[102]

3. Tennessee May Not Exercise Broad Control Over the Structure and Authority of Home Rule Cities. Tennessee cites older cases and authorities from other States for the proposition that it may exercise broad control over Chattanooga and its board EPB.[103] However, the State's authority over Tennessee home rule cities and their boards is determined by current Tennessee law, not by outdated statements of former legal principles, and not by the laws of other States. Article XI, Section 9 does not permit the Tennessee to exercise "broad control over the structure and authority of home rule cities."

Tennessee law does not require that the authority of Tennessee home rule municipalities is to be narrowly construed. While old rules suggesting narrow interpretation of the authority of municipalities, such as "Dillon's Rule," may be applied in other States and contexts, the Tennessee Supreme Court has held that

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[102] Chattanooga, Tenn. Ordinance 12677, adopted December 12, 2012 and approved by the voters on March 6, 2013. The Ordinance is available at http://www.chattanooga.gov/city-council-files/OrdinancesAndResolutions/Ordinances/Ordinances%202012/12677_Charter_archaic_provisions.pdf. The referendum results are reported at page 6 of the election results found at http://elect.hamiltontn.gov/Portals/12/Archives/2013/Chattanooga%20March%202013.pdf.

[103] *E.g.* Brief of Petitioner State of Tennessee, at 28 - 32.

Dillon's Rule does not apply to Tennessee home rule municipalities.[104] The North Carolina legislature has legislatively decreed that Dillon's Rule does not apply to any municipalities in North Carolina.[105]

4. Cases Cited by Tennessee Do Not Support Its Claim of Improper FCC Preemption. The cases cited by Tennessee do not provide support for its claim that the FCC's limited preemption violated principles of federalism set forth in the Tenth Amendment. Several of the Supreme Court cases upon which Tennessee places reliance describe relationships between States and municipalities as they existed in the early 1800's and 1900's, long before Tennessee chose to confer broad communications authority upon Tennessee municipalities and long before the people of Tennessee adopted the Home Rule Amendment.[106] Other cases involve Tennessee law prior to the Home Rule Amendment or rely upon the law of other States, which have no application to this

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104 *Southern Constructors, Inc. v. Loudon County Bd. Of Educ*., 58 S.W.3d 706, 713-14 (Tenn. 2001).

105 *Id.* at 713, n.4 (N.C. Gen Stat. § 160A-4 specifies that powers of North Carolina cities are to be broadly construed).

106 *See, e.g., City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), Trs. *Of Dartmouth Coll. V. Woodward*, 17 U.S. 518 (1819). *See also* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2326 (2003) (describing the "second wave of home rule reform"). The American Municipal Association's 1953 model home rule provision became the template for home rule provisions adopted by several States in this period. *Id.*

case.[107] And, other key Supreme Court decisions cited by Tennessee provide no support for the positions asserted by Tennessee. For example:

- *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002) recognized the right of State governments to confer authority upon political subdivisions, a right that Tennessee has exercised by delegating broad communications authority to municipal electric systems and that the people exercised in adoption of the Home Rule Amendment;

- *Fed. Maritime Com'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) involved the much different question of whether a State's sovereign immunity from suit protected it from litigation before the Federal Maritime Agency;

- *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982) held that Congress under the Commerce Clause could constitutionally require States to evaluate their utility policies in light of federal energy policies, and that the requirement did not violate the Tenth Amendment;

- *Printz v. United States*, 521 U. S. 898 (1997) involved the much different question of whether Congress could impress into federal service Montana and Arizona sheriffs to complete firearms purchase background checks;

- *New York v U.S.*, 505 U.S. 144 (1992) held that Congress could completely preempt State laws contrary to federal policies concerning

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[107] *E.g., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (quoted the 1907 decision in *Holt, supra*, in a case involving Alabama, which is not a home rule State); *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998) (involved the validity of a Michigan constitutional amendment addressing term limits for State legislators); *S. Malcomb Disposal Auth. V. Washington Twp.*, 790 F. 2d 500 (6th Cir. 1986)(involved dispute between two Michigan political subdivisions and the application of the Fourteenth Amendment); *City of Knoxville v. Bailey*, 222 F.2d 520 (6th Cir. 1955)(personal injury case applying distinctions between governmental and proprietary powers long abandoned in Tennessee and describing State/municipal relationship prior to adoption of the Home Rule Amendment).

low level radioactive waste, but that Congress could not commandeer the State's legislative process by directly compelling the State to enact laws embodying the federal policies;

- *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) provides no support for Tennessee's Tenth Amendment positions, as it held that the Commerce Clause authorized Congress to overrule local employment policies and to apply the Fair Labor Standards Act to transit employees, overruling the earlier decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

II. THE FCC'S CAREFULLY LIMITED PREEMPTION DOES NOT RAISE TENTH AMENDMENT CONCERNS.

The FCC carefully limited the preemption action it took in response to EPB's request so that its action did not raise Tenth Amendment concerns. The FCC's action only addressed four words in a Tennessee general statute that the FCC correctly found to be "an explicit barrier to broadband infrastructure investment and competition under Section 706."[108] The FCC found that those four words, "*within its service area*," prevented EPB from responding to the consumer demand for broadband in areas adjacent to its service area, where residents and businesses have few or no options for access to advanced telecommunications services.[109] The FCC did not grant new authority to EPB; it had no need to do so, because, as Tennessee's Attorney General has found, Tennessee has granted EPB broad authority to provide Internet and video services: "Once the legislative body [of the municipality] approves the additional services, the municipal electric

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108 Order at ¶ 77 (P.A. 38).

109 *See* Order at 80 (P.A. 40).

system may, independently, exercise 'all the powers, obligations, and authority granted entities providing similar services under applicable laws of the United States, the State of Tennessee or applicable municipal ordinances . . . ."[110] The FCC recognized the State's broad grant of communications authority and narrowly limited its action to removal of a restriction that imposed a Tennessee policy preventing competition, finding that the restrictive State policy conflicted with a clearly-stated federal policy promoting competition and investment in the expansion of broadband Internet services.[111]

A. The FCC Properly Exercised Authority Granted To It By Congress In Section 706.

As the FCC explained in its Preemption Order, and as it has ably explained in its Brief in this proceeding, the FCC correctly exercised authority granted to it by Congress in Section 706 to conclude that the restriction imposed by Tennessee is a barrier to broadband deployment and infrastructure investment and limits competition.[112] The FCC also correctly concluded that Section 706 authorized it to narrowly preempt the four words that imposed the restriction.[113] EPB endorses the reasoning and adopts the arguments concerning the FCC's authority under Section 706, as set forth in the Preemption Order and in the FCC's Brief in this proceeding.

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110 Tenn. Op. Atty. Gen. No. 12-70, 2012 WL 2952470, at *2.

111 *See* Order at ¶ 147 (P.A. 62 - 63).

112 *See* Order at Section III (P.A. 38).

113 *See* Order at Section IV (P.A. 56).

B. Tennessee Did Not Consider FCC Preemption of Other Tennessee Communications Policy To Offend State Sovereignty Protected By the Tenth Amendment.

The Tennessee Attorney General has recognized that the FCC could preempt Tennessee law that imposed an anti-competitive communications policy inconsistent with federal policy promoting competition.[114] In its *Hyperion Preemption Order*, the FCC preempted Tenn. Code Ann. § 65-4-201(d), which prohibited CLECs from competing within the territories of incumbent communications providers that had fewer than 100,000 access lines.[115] The *Hyperion* petition was filed in May, 1998.[116] In 1997, the legislature had permitted municipal electric systems such as EPB to be certified as CLECs and made them subject to the same requirements, and limitations, as applied to privately-owned CLECs.[117] In response to a request by two Chattanooga legislators concerning the

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[114] *See* Tenn. Op. Atty. Gen. No. 01-036 (March 19, 2001) acknowledging the proprietary of the FCC's grant of the preemption petition in *AVR, L.P., d/b/a Hyperion of Tennessee*, 14 FCC Rcd 11064 (1999) ("*Hyperion Preemption Order*").

[115] Tenn. Code Ann. § 65-4-201(d).

[116] By the time the *Hyperion Preemption Order* was adopted on May 14, 1999, EPB had been granted a certificate of convenience and necessity as a CLEC and, thus, had become subject to the restrictions set out in Tenn. Code Ann. § 65-4-201(d). *See* Tennessee Regulatory Authority, Order Approving Application for Certificate of Public Convenience and Necessity, Docket No. 97-07488 (May 10, 1999).

[117] Tenn. Code Ann. § 7-52-401 ("such municipality shall be subject to regulation by the Tennessee regulatory authority in the same manner and to the

status of Tenn. Code Ann. § 65-4-201, the Attorney General stated that "this Office finds that the FCC has expressly preempted enforcement of Tenn. Code Ann. § 65-4-201(d) pursuant to authority granted thereto under 47 U.S.C. § 253(d). Accordingly, this Office is of the opinion that Tenn. Code Ann. § 65-4-201(d) is no longer valid or enforceable."[118]

Although the preempted anti-competitive provision applied both to privately-owned and municipally-owned CLECs, the Attorney General raised no concern that the FCC preemption raised any issues of State sovereignty.

C. *Gregory's* Plain Statement Rule Does Not Apply to the FCC's Grant of EPB's Petition.

The Supreme Court in *Gregory v. Ashcroft*[119] addressed the question of whether federal law prohibiting age discrimination preempted a Missouri constitutional provision that required the State's judges to retire at the age of 70. The Court held that the "decision of the people of Missouri, defining their constitutional officers" was "a decision of the most fundamental sort for a

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same extent as other certificated providers of telecommunications services . . . ."). Tenn. Code Ann. § 7-52-403(b) contains a more narrow prohibition that purports to prohibit municipal CLECs from offering services within the service area of telephone cooperatives with fewer than 100,000 lines. The legality of this prohibition has not, to EPB's knowledge, been tested.

[118] Tenn. Op. Atty. Gen. No. 01-036, 2001 WL 435664, at *4 (March 19, 2001).

[119] *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395 (1991).

sovereign entity."[120] The Court further held that "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides'" the ordinary constitutional balance of federal and State powers.[121] In such cases "'that go to the heart of representative government,'" the Court explained, Congress must make a "plain statement" of its intent to preempt the State exercise of that sovereign interest.[122]

Tennessee urges that its erection of a barrier that protects from competition incumbent communications carriers, who have refused to provide modern broadband infrastructure, involves the kind of State decision involved in *Gregory*, a State "decision of the most fundamental sort for a sovereign entity" "that goes to the heart of representative government." To the contrary, Tennessee's core sovereignty was exercised voluntarily by the State when it granted municipal utilities such as EPB broad statutory authority to provide communications services and when the people of the State granted home rule municipalities, such as the City of Chattanooga of which EPB is part, broad authority to define their own "governmental and proprietary powers, duties and functions".[123]

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120 *Id.* at 460.

121 *Id.*

122 *Id.* at 461.

123 Tenn. Const. Art. XI, § 9.

As the FCC correctly found, Tennessee's anti-competitive restriction constituted something quite different from Missouri's decision in *Gregory*. Instead, Tennessee's four-word restriction involved a policy by which the State sought to "dictate the manner in which interstate commerce is conducted and the nature of competition that should exist for interstate communications" in contradiction of federal policy.[124] Because Tennessee's core sovereignty was exercised by the State's choice to provide underlying authority to municipal electric systems such as EPB to provide broadband Internet services, the FCC correctly found that Section 706 permitted its limited preemption of Tennessee's four-word restriction.[125]

Because the FCC preemption did not affect Tennessee's core sovereignty, *Gregory's* "plain statement" requirement has no application.

D. Because Tennessee Had Provided EPB Ample Underlying Authority to Provide Communications Services, *Nixon v. Missouri Municipal League* Has No Application.

In *Nixon v. Missouri Municipal League*,[126] the Supreme Court upheld the FCC's refusal to use its preemption authority to overrule a decision by Missouri to prohibit municipalities from offering telecommunications services. The FCC

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124 *See* Order at ¶¶ 12-13 (P.A. 5-6)

125 *Id.*

126 *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004).

concluded that principles of federalism required deference to Missouri's traditional State authority to define the structure of its government.[127]

In this matter, the FCC has continued to respect the same principles of federalism, finding that it would exercise its preemption authority only where there was underlying authorization.[128] This is not a case where preemption of a ban on municipal communications authority would leave the municipality without authority to provide such services. Instead, removal of the four-word restriction on competition leaves EPB with all of its broad authority under general State law and under Tennessee's Home Rule Amendment to provide communications services. Accordingly, *Nixon* has no application to the evaluation of the FCC's action in this case.

The inapplicability of *Nixon* is illustrated by consideration of the four hypotheticals that the Supreme Court included in its opinion to illustrate the anomalous results that would follow preemption of a State ban on government utilities "if the government could not point to some law authorizing it to run a utility in the first place."[129]

The first hypothetical addressed a situation in which a municipal utility was authorized to provide water and electricity services, but no other services. If

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127 *Id.* at 128.

128 Order at ¶ 12 (P.A. 5).

129 *Nixon*, 541 U.S. at 134.

the FCC removed the implied prohibition from offering telecommunication services, the Supreme Court observed that the "municipality would be free of the statute, but freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business."[130] As the Court noted, this first hypothetical only applied to non-home rule cities. "The hypothetical city, in other words, is 'general law' rather than 'home rule.'"[131] Unlike a general law city, the Court explained, "a home rule city has State constitutional authority to do whatever is not specifically prohibited by State legislation."[132]

- *Of course, as it did in the Order challenged in Nixon, the FCC continues to refrain from exercising preemption authority where underlying authorization to offer communication services does not exist.*[133] *And, unlike the first hypothetical, EPB has broad authority to provide a range of communications services including broadband*

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130 *Id.* at 135.

131 *Id.* at 135, n.3.

132 *Id.*, citing *City of Lockhart v. United States*, 460 U.S. 125, 127, 103 S.Ct. 998 (1983).

133 *E.g.* Order ¶ 12 (P.A. 6).

Internet and video services under both general law and under its authority as part of a home rule municipality.[134]

The second hypothetical addressed a situation in which general authority would exist for a governmental utility to offer utility services and an FCC preemption removed a prohibition on offering telecommunications services. The hypothetical assumed that the utility would have no authority to access appropriated funds or to borrow money for the telecommunications services it had been prohibited from providing and asked how the Telecommunications Act could create such financing authority.[135]

- *Of course, the FCC did not in this case preempt a prohibition on offering communications services, it only removed a four-word, restriction preventing EPB from competing with private service providers outside EPB's electric service territory. And, unlike the second hypothetical governmental utility, EPB has broad authority to finance delivery of communication services, including Internet and*

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134 *See, e.g.,* Tenn. Code Ann. § 7-52-401, *et seq.*; Tenn. Code Ann. § 7-52-601, *et seq.*; Tenn. Const. Art. XI, § 9 (the Home Rule Amendment); Chattanooga City Charter; Tenn. Op. Atty. Gen. No. 12-34, 2012 WL 907241, at *2 (March 12, 2012) ; Tenn. Op. Atty. Gen. No. 12-70, 2012 WL 2952470, at *2 (July 11, 2012).

135 *See Nixon*, 541 U.S. at 135-136.

video programming services, anywhere private communications providers could do so.[136]

The third hypothetical addressed a situation in which a municipality was generally empowered by State law to furnish services generally, but was prohibited by a "special statute" from exercising that power for the purpose of providing telecommunications services. If the special statute were preempted, the Court said "the result would be a national crazy quilt" produced not by State and local political choices, but by federal preemption.[137]

- *Of course, the FCC did not preempt any special statute prohibiting EPB from offering communications services, and it has continued to decline to exercise its preemption authority where there is not underlying authority. Thus, in Tennessee, any differences in the underlying authority of municipalities to offer communications services, whether characterized as a "crazy quilt" or otherwise, are consequences of freely made State and local choices, not the result of preemption. For example, municipalities may only offer communications services if they have created municipal electric*

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[136] *See, e.g.,* Tenn. Code Ann. § 7-52-401, *et seq.*; Tenn. Code Ann. § 7-52-601, *et seq.*; Tenn. Op. Atty. Gen. No. 12-34, 2012 WL 907241, at *2 (March 12, 2012); Tenn. Op. Atty. Gen. No. 12-70, 2012 WL 2952470, at *2 (July 11, 2012).

[137] *See Nixon*, 541 U.S. at 136.

systems.[138] *Municipalities where citizens have adopted home rule have broader authority as a result of their home rule status, and the legislature may not act by special statutes as to them.*[139] *But, in each case, these differences are the result of State and local choices, not federal preemption.*

The fourth hypothetical addressed a situation in which a State that previously authorized municipalities to offer telecommunications changed its law to prohibit such activity. If the FCC preempted the State's decision to withdraw previously granted authority, the Court observed that the preemption "would be the creation of a one-way ratchet. A State or municipality could give the power, but it could not take it away later."[140]

- *Of course, the FCC has continued to decline to exercise preemption authority in the absence of underlying authorization. And, in Tennessee, the State itself has put in place constitutional and statutory restrictions on its ability to withdraw previously-granted local authority. Since at least the enactment of the Code of 1858, Tennessee law has specified that "[t]he repeal of any statute does not affect any right which accrued, any duty imposed, any penalty*

138 *See* Tenn. Code Ann. § 7-52-401; Tenn. Code Ann. § 7-52-601.

139 *See* Tenn. Const. Art. XI, § 9.

140 *Nixon*, 541 U.S. at 136-137.

> *incurred, nor any proceeding commenced, under or by virtue of the statute repealed."*[141] *As to EPB, which is part of a home rule city, no repeal of authority could be effected except by general law.*[142] *The Tennessee Attorney General has opined that while a general law applying to all municipalities could repeal a provision in Chattanooga's home rule charter, "the Legislature could still not constitutionally deprive a municipality of any rights that had already accrued.*[143]

As illustrated by the four hypotheticals set forth in the *Nixon* opinion, the FCC narrowly applied its preemption authority to avoid conflict with the federalism principles set forth in *Nixon*. *Nixon* has no application to this case.

CONCLUSION

For the foregoing reasons, the Court should affirm and uphold the FCC's Order in its entirety.

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141 Tenn. Code Ann. § 1-3-101.

142 *See* Tenn. Const. Art. XI, § 9.

143 Tenn. Op. Atty. Gen. No. 97-027, 1997 WL 188448, at *3 (March 31, 1997).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned hereby certifies as follows:

1. This brief complies with the type-volume limitations of Fed. R. App. P 32(a)(7)(B) because this brief contains 13,147 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Respectfully submitted, this 5th day of November, 2015.

CHAMBLISS, BAHNER & STOPHEL, P.C.

By: s/Frederick L. Hitchcock

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2015, a copy of the foregoing Brief of Intervenor was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

CHAMBLISS, BAHNER & STOPHEL, P.C.

By: s/Frederick L. Hitchcock

STATUTORY ADDENDUM

TABLE OF CONTENTS

UNITED STATES CONSTITUTION

U.S. Const. amend X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

CONSTITUTION OF THE STATE OF TENNESSEE

Tenn. Const. art. I, § 1

That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.

Tenn. Const. art. XI, § 8

The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested.

Tenn. Const. art. XI, § 9

The Legislature shall have the right to vest such powers in the Courts of Justice, with regard to private and local affairs, as may be expedient.

The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the

act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

Any municipality may by ordinance submit to its qualified voters in a general or special election the question: "Shall this municipality adopt home rule?"

In the event of an affirmative vote by a majority of the qualified voters voting thereon, and until the repeal thereof by the same procedure, such municipality shall be a home rule municipality, and the General Assembly shall act with respect to such home rule municipality only by laws which are general in terms and effect.

Any municipality after adopting home rule may continue to operate under its existing charter, or amend the same, or adopt and thereafter amend a new charter to provide for its governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of its government, provided that no charter provision except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly and provided further that the power of taxation of such municipality shall not be enlarged or increased except by general act of the General Assembly. The General Assembly shall by general law provide the exclusive methods by which municipalities may be created, merged, consolidated and dissolved and by which municipal boundaries may be altered.

A charter or amendment may be proposed by ordinance of any home rule municipality, by a charter commission provided for by act of the General Assembly and elected by the qualified voters of a home rule municipality voting thereon or, in the absence of such act of the General Assembly, by a charter commission of seven (7) members, chosen at large not more often than once in two (2) years, in a municipal election pursuant to petition for such election signed by qualified voters of a home rule municipality not less in number than ten (10%) percent of those voting in the then most recent general municipal election.

It shall be the duty of the legislative body of such municipality to publish any proposal so made and to submit the same to its qualified voters at the first general state election which shall be held at least sixty (60) days after such publication and such proposal shall become effective sixty (60) days after approval by a majority of the qualified voters voting thereon.

The General Assembly shall not authorize any municipality to tax incomes, estates, or inheritances, or to impose any other tax not authorized by Sections 28 or 29 of Article II of this Constitution. Nothing herein shall be construed as invalidating the provisions of any municipal charter in existence at the time of the adoption of this amendment.

The General Assembly may provide for the consolidation of any or all of the governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located; provided, such consolidations shall not become effective until submitted to the qualified voters residing within the municipal corporation and in the county outside thereof, and approved by a majority of those voting within the municipal corporation and by a majority of those voting in the county outside the municipal corporation.

COMMUNICATIONS ACT OF 1934 As Amended

47 U.S.C.A. § 1302

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing

barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) and to the extent that data from the Census Bureau is available, determine, for each such unserved area--

(1) the population;

(2) the population density; and

(3) the average per capita income.

(d) Definitions

For purposes of this subsection:

(1) Advanced telecommunications capability

The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

The term "elementary and secondary schools" means elementary and secondary schools, as defined in section 7801 of Title 20.

TENNESSEE CODE ANNOTATED

Tenn. Code Ann. § 1-3-101

The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed.

Tenn. Code Ann. § 7-52-401

Every municipality operating an electric plant, whether pursuant to this chapter, any other public or private act or the provisions of the charter of the municipality, county or metropolitan government, has the power and is authorized, on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant, to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant or equipment for the provision of telephone, telegraph, telecommunications 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, in compliance with title 65, chapters 4 and 5, and all other applicable state and federal laws, rules and regulations. A municipality shall only be authorized to provide telephone, telegraph or telecommunications services through its board or supervisory body having responsibility for the municipality's electric plant. A municipality providing any of the services authorized by this section may not dispose of all or substantially all of the system, plant and equipment used to provide such services except upon compliance with the procedures set forth in § 7-52-132. Notwithstanding § 65-4-101(6)(B) or any other provision of this code or of any private act, to the extent that any municipality provides any of the services authorized by this section, such municipality shall be subject to regulation by the Tennessee regulatory authority in the same manner and to the same extent as other certificated providers of telecommunications services, including, but not limited to, rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility, as defined in § 65-4-101, but only to the extent necessary to effect such regulation and only with respect to such municipality's provision of telephone, telegraph and communication services.

Tenn. Code Ann. § 7-52-402

A municipality providing any of the services authorized by § 7-52-401 shall not provide subsidies for such services. Notwithstanding that limitation, a municipality providing such services shall be authorized to:

(1) Dedicate a reasonable portion of the electric plant to the provision of such services, the costs of which shall be allocated to such services for regulatory purposes; and

(2) Lend funds, at a rate of interest not less than the highest rate then earned by the municipality on invested electric plant funds, to acquire, construct, and provide working capital for the system, plant, and equipment necessary to provide any of the services authorized under § 7-52-401; provided, that such interest costs shall be allocated to the cost of such services for regulatory purposes. Any loan of funds made pursuant to this section shall be approved in advance by the comptroller of the treasury or the comptroller's designee and shall contain such provisions as are required by the comptroller of the treasury or the comptroller's designee.

Tenn. Code Ann. § 7-52-403

(a) To the extent that it provides any of the services authorized by § 7-52-401, a municipality has all the powers, obligations and authority granted entities providing telecommunications services under applicable laws of the United States or the state of Tennessee. To the extent that such authority and powers do not conflict with title 65, chapter 4 or 5, and any rules, regulations, or orders issued under title 65, chapter 4 or 5, a municipality providing any of the services authorized by § 7-52-401 has all the authority and powers with respect to such services as are enumerated in this chapter.

(b) Notwithstanding the authorization granted in subsection (a), a municipal electric system shall not provide any of the services authorized by § 7-52-401 unrelated to its electric services within the service area of an existing telephone cooperative with fewer than one hundred thousand (100,000) total lines organized and operating under title 65, chapter 29, and therefore shall adhere to those regulations of the 1995 Tennessee Telecommunications Act and rules of the Tennessee regulatory authority that are applicable to the telephone cooperatives, and specifically §§ 65-4-101 and 65-29-130.

Tenn. Code Ann. § 7-52-404

A municipality providing any of the services authorized by § 7-52-401 shall make tax equivalent payments with respect to such services in the manner established for electric systems under part 3 of this chapter. For purposes of the calculation of such tax equivalent payments only, the system, plant, and equipment used to provide such services, shall be considered an electric plant, and the revenues received from such services shall be considered operating revenues. For regulatory purposes, a municipality shall allocate to the costs of any services authorized by § 7-52-401 an amount equal to a reasonable determination of the state, local, and

federal taxes that would be required to be paid for each fiscal year by a nongovernmental corporation that provides the identical services.

Tenn. Code Ann. § 7-52-405

For regulatory purposes, a municipality shall allocate to the costs of providing any of the services authorized by § 7-52-401:

(1) An amount for attachments to poles owned by the municipality equal to the highest rate charged by the municipality to any other person or entity for comparable pole attachments; and

(2) Any applicable rights-of-way fees, rentals, charges, or payments required by state or local law of a nongovernmental corporation that provides the identical services.

Tenn. Code Ann. § 7-52-406

(a) Nothing in this part or in § 7-52-102(10) or § 7-52-117(d), as amended by chapter 531 of the Public Acts of 1997, shall be construed to allow a municipality to provide any service for which a license, certification, or registration is required under title 62, chapter 32, part 3.

(b) Nothing in this part and § 7-52-102(10) or § 7-52-117(d), as amended by chapter 531 of the Public Acts of 1997, or any private act, charter, metropolitan charter, or amendments to any private act, charter or metropolitan charter, shall allow a municipality, county, metropolitan government, department, board or other entity of local government to provide any service for which a license, certification, or registration is required under title 62, chapter 32, part 3 or to provide pager service.

Tenn. Code Ann. § 7-52-407

This part and § 7-52-102(10) or § 7-52-117(d), as amended by chapter 531 of the Public Acts of 1997, supersede any conflicting provisions of general law, private act, charter or metropolitan charter provisions.

Tenn. Code Ann. § 7-52-601

(a) Each municipality operating an electric plant described in § 7-52-401 has the power and is authorized within its service area, under this part and on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant,

sometimes referred to as "governing board" in this part, to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant, or equipment for the provision of 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. A municipality may only provide cable service, two-way video transmission, video programming, Internet services or other like service through its board or supervisory body having responsibility for the municipality's electric plant. A municipality providing any of the services authorized by this section may not dispose of all or substantially all of the system, plant, and equipment used to provide such services, except upon compliance with the procedures set forth in § 7-52-132.

(b) The services permitted by this part do not include telephone, telegraph, and telecommunications services permitted under part 4 of this chapter.

(c) Notwithstanding subsection (a), a municipality shall not have any power or authority under subsection (a) in any area where a privately-held cable television operator is providing cable service over a cable system and in total serves six thousand (6,000) or fewer subscribers over one (1) or more cable systems.

(d) Notwithstanding subsection (a), a municipality shall not have any power or authority under subsection (a) in any area of any existing telephone cooperative that has been providing cable service for not less than ten (10) years under the authority of the federal communications commission.

(e) (1) Notwithstanding this section, the comptroller of the treasury shall select, not later than August 1, 2003, a municipal electric system providing services in accordance with this part to provide, as a pilot project, the services permitted under this section beyond its service area but not beyond the boundaries of the county in which such municipal electric system is principally located; provided, that:

(A) The municipal electric system receives a resolution from the legislative body of the county regarding service in unincorporated areas of the county, or any other municipality within such county regarding service within such municipality,

requesting the municipal electric system to provide such services to its residents; and

(B) The municipal electric system obtains the consent of each electric cooperative or other municipal electric system in whose territory the municipal electric system will provide such services.

(2) The comptroller shall expand the pilot project established in subdivision (e)(1) to include one (1) municipal electric system located in the eastern grand division of the state that proposes to provide services in accordance with this part. Not later than August 1, 2004, the comptroller shall select the municipal electric system pilot project pursuant to this subdivision (e)(2), subject to the requirements of subdivisions (e)(1)(A) and (e)(1)(B).

(3) The comptroller shall report to the general assembly, not later than January 31, 2008, with recommendations regarding whether the pilot projects permitted by this part should be continued or expanded to other systems. The comptroller shall evaluate the efficiency and profitability of the pilot project services of the municipal electric system in making such recommendation; provided, that the comptroller shall not so evaluate a pilot project system that is not providing service in competition with another cable service provider.

(4) There shall be no other municipal electric system selected to provide pilot project services until the comptroller issues the recommendation required by subdivision (e)(3).

Tenn. Code Ann. § 7-52-602

To provide the services authorized under this part, the governing board of the municipal electric system shall comply with the following procedure:

(1) Upon the approval and at the direction of the governing board, the municipal electric system shall file a detailed business plan with the office of the comptroller of the treasury that includes a three-year cost benefit analysis and that identifies and discloses the total projected direct cost and indirect cost of and revenues to be derived from providing the proposed services. The plan shall also include a description of the quality and level of services to be provided, pro forma financial statements, a detailed financing plan, marketing plan,

rate structure and any other information requested by the comptroller of the treasury or the comptroller's designee;

(2) After review of the plan, the comptroller of the treasury shall provide a written analysis of the feasibility of the proposed business plan to the chief legislative body of the municipality in which the municipal electric system is located and the governing board within sixty (60) days; provided, that the calculation of the time to file the comptroller's written analysis shall not commence until the business plan is complete. Upon expiration of the sixty-day period, the governing board may proceed without the written analysis of the comptroller;

(3) If the governing board determines to proceed, it shall publish, in a newspaper of general circulation within that area, a notice of its intent to proceed with the offering of additional services. The notice shall include a general description of the business plan and a summary of the governing board's findings on such plan. The notice shall also specify a date on which the governing board shall conduct a public hearing on the provision of such services;

(4) The governing board shall conduct a public hearing on the provision of such services. No sooner than fourteen (14) days after such public hearing, the governing board may consider authorizing the provision of additional services. A municipal electric system may provide additional services only after approval by a two-thirds (⅔) majority vote of the chief legislative body of the municipality in which the municipal electric system is located or by a public referendum held pursuant to subdivision (5); and

(5) Upon a majority vote by the chief legislative body of the municipality in which the municipal electric system is located that a public referendum should be held on the question of whether the municipal electric system may provide additional services, the chief legislative body of such municipality may direct the county election commission to hold a referendum on such question. In order for the question to be placed on the ballot, the chief legislative body shall so direct not less than sixty (60) days before a regular general election. Upon receipt of such direction from the chief legislative body, the county election commission shall place the question on the ballot. The referendum shall only be held in conjunction with a regular general election being held in the municipality and only registered voters of such

municipality may participate in the referendum. The question to appear on the ballot shall be:

> "FOR THE MUNICIPAL ELECTRIC SYSTEM PROVIDING ADDITIONAL SERVICES" and "AGAINST THE MUNICIPAL ELECTRIC SYSTEM PROVIDING ADDITIONAL SERVICES."

Tenn. Code Ann. § 7-52-603

(a)(1) (A) A municipal electric system shall establish a separate division to deliver any of the services authorized by this part. The division shall maintain its own accounting and record-keeping system. A municipal electric system may not subsidize the operation of the division with revenues from its power or other utility operations.

(B) A municipal electric system may lend funds, at a rate of interest not less than the highest rate then earned by the municipal electric system on invested electric plant funds, to acquire, construct, and provide working capital for the system, plant, and equipment necessary to provide any of the services authorized by this part; provided, that such interest costs shall be allocated to the cost of such services.

(2) The division shall be subject to the terms and conditions of those types of provisions generally provided in existing or future pole attachment agreements, including without limitation, allocation of costs for rates, insurance, and other related costs, and the responsibility for make-ready provisions, that are applicable to private providers of services provided by the division under this part.

(3) In response to facility installation, maintenance, or relocation requests made under a pole attachment agreement by a private provider of services provided by the division under this part, the municipal electric system shall provide the same response times and service quality as the municipal electric system provides for requests of the division for such services and shall provide nondiscriminatory access to these facilities. Nothing in this subsection (a) shall impair the rights of a municipal electric system under its pole attachment agreement with the private provider of services.

(b) A municipal electric system providing any of the services authorized by this part shall fully allocate any costs associated with the services provided under this part to the rates for those services.

(c) A municipal electric system providing any of the services authorized by this part shall establish and charge rates that cover all costs related to the provision of such services.

(d) A municipal electric system shall charge or allocate as costs to the division the same pole rate attachment fee as it charges any other franchise holder providing the same service.

(e) Any fee imposed by the municipality on a private provider of cable services, shall also be allocated to the division.

Tenn. Code Ann. § 7-52-604

(a) The comptroller of the treasury shall adopt, after consideration of written comments submitted by any interested party, guidelines or procedures to establish appropriate accounting principles applicable to the division's affiliated transactions and cost allocation. The development of such guidelines or procedures shall not be deemed a rule-making proceeding under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(b) A municipal division providing the services authorized by this part is subject to a finance and compliance audit under § 6-56-105, which audit shall be conducted in accordance with enterprise fund accounting principles under generally accepted accounting principles.

(c) On or before June 30, 2005, the office of the comptroller of the treasury shall prepare a report to the general assembly evaluating the operations of municipal electric systems offering services permitted by this part, which shall include a recommendation as to whether the authority to provide such services should be expanded, restricted or terminated.

(d) Except for two (2) municipal electric systems located in the middle grand division of the state, no additional municipal electric system shall apply or be granted authorization to provide the services described in § 7-52-601 until February 1, 2006, at which time the general assembly shall receive and consider the comptroller's report described in subsection (c); provided, however, that municipal electric systems presently operating pursuant to § 7-

52-601 on June 7, 2005, or having received approval pursuant to § 7-52-602 as of June 7, 2005, shall not be subject to the requirements of this subsection (d).

Tenn. Code Ann. § 7-52-605

To the extent that it provides any of the services authorized by this part, a municipal electric system shall have all the powers, obligations, and authority granted entities providing similar services under applicable laws of the United States, the state of Tennessee or applicable municipal ordinances.

Tenn. Code Ann. § 7-52-606

(a) A municipal electric system providing any of the services authorized by this part shall make tax equivalent payments with respect to such services in the manner established for electric systems under part 3 of this chapter; provided, that such payments shall not include amounts based on net system revenues as provided in § 7-52-304(1)(B). For purposes of the calculation of such tax equivalent payments only, the system, plant, and equipment used to provide such services shall be considered an electric plant, and the revenues received from such services shall be considered operating revenues. The amount payable pursuant to this subsection (a) shall not exceed the amount that would otherwise be due from a municipality were it a private provider of such services paying ad valorem taxes.

(b) In addition to the requirement of subsection (a), and notwithstanding any other provision of law to the contrary, a division of the municipal electric system providing the cable services, Internet services, two-way video transmission or video programming services authorized by this part, is subject to payment to the appropriate units of government of an amount in lieu of the following taxes on that part of its revenues, plant and facilities dedicated or allocated to those services described in § 7-52-601(a), to the same extent as if it were a private provider of such services:

(1) Excise and franchise tax law under title 67, chapter 4, parts 20 and 21;

(2) Sales tax law under title 67, chapter 6; and

(3) Local privilege tax law under title 67, chapter 4, part 7.

Tenn. Code Ann. § 7-52-607

Any municipality authorized by this part to provide any of the services described in this part shall have the power and is hereby authorized to borrow money, contract debts and issue its bonds or notes to finance in whole or in part the cost of the acquisition, purchase, construction, reconstruction, improvement, betterment or extension of a system or systems, or any part of the system or systems, to provide any of such services, including the acquisition of land or rights in land and the acquisition and installation of all equipment necessarily incident to the provision of such services. Any bonds or notes authorized to be issued pursuant to this section shall be issued only in accordance with the procedures, requirements and limitations set forth in chapter 34 of this title, or title 9, chapter 21, as elected by the municipality issuing the bonds or notes. All provisions of chapter 34 of this title, or title 9, chapter 21, relating to the authorization, issuance and sale of bonds or notes, the use and application of revenues of the system or systems being financed, powers to secure such bonds and notes, covenants and remedies for the benefit of bond or note holders with respect to such bonds or notes, validity and tax exemption with respect to such bonds or notes, and powers to refund and refinance such bonds or notes shall apply to any bonds or notes authorized hereunder and the system or systems financed thereby with the same effect as if such system or systems were a "public works" if proceeding under chapter 34 of this title, or a "public works project" if proceeding under title 9, chapter 21.

Tenn. Code Ann. § 7-52-608

This part supersedes any conflicting provisions of general law, private act, charter or metropolitan charter provisions.

Tenn. Code Ann. § 7-52-609

A franchisee under chapter 59 of this title operating in the service area of the municipal electric division providing services under this part may bring a civil action for injunctive or declaratory relief for a violation under this part, and may recover actual damages upon a showing of a willful violation under this part. Jurisdiction and venue for such action shall be in the chancery court in the county where the alleged violation is occurring or will occur. Such actions shall be scheduled for hearing as a priority by the court.

Tenn. Code Ann. § 7-52-610

A division established by a municipal electric system to deliver any of the services authorized by this part shall not be considered a governmental entity for the

purposes of the Tennessee Governmental Tort Liability Act, compiled in title 29, chapter 20.

Tenn. Code Ann. § 7-52-611

A customer of a municipal electric system shall have a right of action to recover damages against such system pursuant to this part.

Tenn. Code Ann. § 65-4-201

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system, or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate; provided, however, that this section shall not be construed to require any public utility to obtain a certificate for an extension in or about a municipality or territory where it shall theretofore have lawfully commenced operations, or for an extension into territory, whether within or without a municipality, contiguous to its route, plant, line, or system, and not theretofore receiving service of a like character from another public utility, or for substitute or additional facilities in or to territory already served by it.

(b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the Tennessee regulatory authority a certificate of convenience and necessity for such service or territory; provided, however, that no telecommunications services provider offering and providing a telecommunications service under the authority of the authority on June 6, 1995, is required to obtain additional authority in order to continue to offer and provide such telecommunications services as it offers and provides as of June 6, 1995.

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable authority policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

An authority order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a competing telecommunications service provider shall be entered no more than sixty (60) days from the filing of the application.

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.

(e) The authority shall direct the posting of a bond or other security by a public utility providing wastewater service or for a particular project proposed by a public utility providing wastewater service. The purpose of the bond or other security shall be to ensure the proper operation and maintenance of the public utility or project. The authority shall establish by rule the form of such bond or other security, the circumstances under which a bond or other security may be required, and the manner and circumstances under which the bond or other security may be forfeited.

(1) The requirement under this subsection (e) to post a bond or other security by a public utility providing wastewater service shall also satisfy the requirement on such a public utility to provide a bond or other financial security to the department of environment and conservation as required by § 69-3-122.

(2) The authority shall establish by rule the amount of such bond or other security for various sizes and types of facilities.

(3) Notwithstanding any other provisions of the law, posting a bond or other security under this subsection (e) or § 69-3-122, shall not be required until January 1, 2006, or until the authority's rules become effective, whichever occurs first. Such rules may be promulgated as emergency rules.