

Before the
Federal Communications Commission
Washington, D.C. 20554

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

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 2015

Released: March 12, 2015

By the Commission: Chairman Wheeler and Commissioners Clyburn and Rosenworcel issuing separate
statements; Commissioners Pai and O’Rielly dissenting and issuing separate
statements.

TABLE OF CONTENTS

Para.
I. INTRODUCTION..... 1
A. Executive Summary..... 1
B. Background..... 17
1. The Commission’s Mandate Under Section 706 of the Telecommunications Act ..... 18
2. The EPB Petition and Territorial Restriction in Section 601 ..... 22
3. The Wilson Petition and H.B.129 ..... 33
II. PREEMPTION OF PROHIBITIONS ON MUNICIPAL PROVISION OF BROADBAND
WILL LIKELY LEAD TO INCREASED OVERALL BROADBAND INFRASTRUCTURE
INVESTMENT AND PROMOTE OVERALL BROADBAND COMPETITION IN
TENNESSEE AND NORTH CAROLINA, CONSISTENT WITH SECTION 706 ..... 42
A. EPB and Wilson Provide Service Because Pre-Existing Service Did Not Meet
Community Needs ..... 43
B. The Private Sector in Wilson and Chattanooga Improved Services and Reduced Rates or
Halted Rate Increases in Response to Municipal Entry ..... 49
C. Objections Raised in the Record Fail to Support a Different Outcome ..... 56
1. So-Called “Level Playing Field” and “Crowding Out” Arguments Do Not Justify
Denying the Petitions ..... 57
2. Claims That There Is a High Rate of Municipal Broadband Failure Are Misplaced ..... 61
3. Other Objections..... 71
III. THE TENNESSEE AND NORTH CAROLINA STATUTORY PROVISIONS ARE
BARRIERS TO BROADBAND INVESTMENT AND COMPETITION FOR EPB AND
WILSON ..... 75
A. The Tennessee Statutory Provision, Section 7-52-601 ..... 77
1. The Territorial Restriction in Section 601 is a Barrier to Broadband Investment and
Competition ..... 77

2. EPB Would Deploy Additional Facilities and Expand Competitive Entry Absent the Territorial Restriction in Section 601 ..... 80

B. North Carolina Statutory Provisions..... 81

1. Background ..... 81

    a. Measures to Raise Economic Costs ..... 82

    b. “Level Playing Field” Obligations..... 85

    c. Measures to Impose Delay..... 88

2. The North Carolina General Statute, H.B. 129, is a Barrier to Broadband Investment and Competition ..... 93

    a. Measures to Raise Economic Costs ..... 96

    b. “Level Playing Field” Obligations..... 108

    c. Measures to Impose Delay..... 114

3. Wilson Would Deploy Additional Facilities and Expand Competitive Entry Absent H.B.129 ..... 120

4. Statutory Provisions That Do Not Constitute Barriers ..... 123

IV. COMMISSION AUTHORITY TO PREEMPT THESE LAWS ..... 130

A. The Mandate of Section 706 ..... 131

B. General Authority to Preempt under Section 706 ..... 140

C. Authority to Preempt Certain State Regulations of Community Broadband Providers..... 146

D. Counterarguments..... 151

    1. Arguments Based on the Act..... 151

    2. *Gregory v. Ashcroft* ..... 154

    3. *Nixon v. Missouri Municipal League* ..... 159

    4. The 10<sup>th</sup> Amendment ..... 167

E. Application to Tennessee’s Section 601 ..... 168

F. Application to North Carolina’s H.B. 129 ..... 170

    1. “Level Playing Field” Obligations ..... 173

    2. Measures to Raise Economic Costs..... 175

    3. Measures to Impose Delay ..... 179

    4. Not Preempted..... 182

V. ORDERING CLAUSES..... 183

ATTACHMENT A: EPB / TENNESSEE MAP

ATTACHMENT B: WILSON / NORTH CAROLINA MAP

ATTACHMENT C: TENNESSEE LAW SUBJECT TO PETITION

ATTACHMENT D: NORTH CAROLINA LAW SUBJECT TO PETITION

**I. INTRODUCTION**

**A. Executive Summary**

1. In this proceeding, we grant the petition of the Electric Power Board of Chattanooga, Tennessee (EPB), and grant to the extent described herein and otherwise deny the petition of the City of Wilson, North Carolina (Wilson),<sup>1</sup> and preempt certain challenged provisions of Tennessee and North Carolina law restricting municipal provision of broadband service pursuant to section 706 of the

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<sup>1</sup> Petition of the Electric Power Board of Chattanooga, Tennessee, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition, WC Docket No. 14-116 (filed July 24, 2014) (EPB Petition); Petition of the City of Wilson, North Carolina, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition, WC Docket No. 14-115 (filed July 24, 2014) (Wilson Petition).

Telecommunications Act of 1996<sup>2</sup> because we find that they are barriers to broadband infrastructure investment and thwart competition.

2. Americans recognize the critical importance of high quality broadband internet access as necessary infrastructure in today's world.<sup>3</sup> As we recently found in our *2015 Broadband Progress Report*:

Today, Americans turn to broadband Internet access service for every facet of daily life, from finding a job to finding a doctor, from connecting with family to making new friends, from becoming educated to being entertained. The availability of sufficient broadband capability can erase the distance to high-quality health care and education, bring the world into homes and schools, drive American economic growth, and improve the nation's global competitiveness. New technologies and services such as real-time distance learning, telemedicine, and higher quality video services are being offered in the market today and are pushing demand for higher broadband speeds.<sup>4</sup>

3. The private sector has invested billions of dollars upgrading their broadband networks throughout the United States, and current deployment data indicate that 92% of Americans in urban areas, and 47% in rural areas, have access to fixed broadband with speeds of at least 25/3 Mbps.<sup>5</sup> But those actions, while vital, do not address the needs of all Americans because financial incentives for private deployment of competitive networks are sometimes insufficient. As recognized by Congress in section 706, the need for broadband is everywhere, even if the business case is not. The actions that communities are taking to make certain their citizens have access to this infrastructure are varied, ranging from negotiating with private sector providers to engaging in public-private partnerships, and, in some instances, building municipal networks. No one solution works for all communities. Both the EPB and Wilson networks provide 1 Gbps broadband to their communities today and were constructed in significant part because of the economic, educational, healthcare, public safety and other community benefits they would bring. These communities are seeing those benefits now, particularly in the form of greater competition, economic development and increased educational opportunities. EPB and Wilson filed their preemption requests because communities neighboring their service territories that have limited or no broadband availability or competition have requested expansion in order to garner the benefits such state-of-the-art networks can deliver. Both EPB and Wilson want to expand to serve their neighbors but are precluded by the state laws at issue here.<sup>6</sup> In Tennessee, state law imposes a flat limitation on municipal electric service providers providing broadband and video outside their electric service territory, despite the fact that they are authorized to provide telecommunications services beyond their territory, and the services likely would be provided over the same infrastructure. In North Carolina, the restriction takes the form of a series of costly hoops through which a service provider must jump. Although characterized as intended to "level the playing field" with private providers when passed, it is clear that

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<sup>2</sup> Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996) (1996 Act), as amended by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), is now codified in Title 47, Chapter 12 of the United States Code. See 47 U.S.C. §§ 1302, 1303.

<sup>3</sup> See, e.g., Letter from Dana Kirkham, Mayor, Ammon, Idaho, et al., Next Century Cities, to Chairman and Commissioners, Federal Communications Commission, WC Docket Nos. 14-115 and 14-116, at 1-2 (filed Jan. 29, 2015).

<sup>4</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, FCC 15-10, para. 2 (rel. Feb. 4, 2015) (*2015 Broadband Progress Report*).

<sup>5</sup> *Id.* at paras. 15, 79.

<sup>6</sup> EPB Petition at 16; Wilson Petition at 23.

the combination of requirements effectively raises the cost of market entry so high as to effectively block entry and protect the private providers that advocated for such legislation from competition.

4. We conclude, contrary to the thrust of some commenter claims, that preemption will remove barriers to *overall* broadband investment and promote *overall* competition in Tennessee and North Carolina. Wilson and Chattanooga considered a wide range of options and decided to initiate municipal broadband deployment when they concluded that doing so would serve important community goals. For example, Wilson requested improved broadband services from the private sector and was turned down before starting to examine whether a municipal broadband network was a viable option for its community. And rather than driving out competitors, Wilson and EPB are delivering the benefits of competition to citizens, not only through their own product offerings but also as evidenced by the competitive responses to their services.

5. Accordingly, we conclude that the Tennessee and North Carolina laws are barriers to broadband infrastructure investment and that preemption will promote competition in the telecommunications market by removing statutory barriers to such competition. In other words, we find that removal of such barriers would likely result in more overall broadband investment and competition. We next turn to considering our statutory authority to act.

6. We find that the Commission has authority under section 706 of the Telecommunications Act of 1996 to preempt the laws at issue in these petitions. Five principles undergird the Commission's authority.

- Article I, section 8 of the Constitution gives Congress the power to regulate interstate commerce.
- Internet access unquestionably involves interstate communications, and thus interstate commerce. Broadband subscribers pay for the right to go to any lawful destination on the Internet, wherever located.
- Congress has given the Federal Communications Commission the authority to regulate interstate communications. Indeed, section 1 of the Communications Act of 1934, as amended (Act), specifically gives the Commission jurisdiction over “interstate and foreign commerce in communication by wire and radio.”
- The Commission has previously exercised its authority to preempt state laws that conflict with federal regulation of interstate commerce, for example with respect to state regulation of VoIP, the deployment of wireless facilities, and its order prohibiting local franchising authorities from unreasonably refusing to grant competitive cable franchises. These preemption decisions all further competition.
- Finally, section 706 of the 1996 Act directs the Commission to take action to remove barriers to broadband investment, deployment and competition. There is no question that provisions of the state laws in question do limit broadband deployment — they expressly prohibit Wilson and Chattanooga from providing broadband services to more people in more places, even places where there is no broadband currently available.

7. Granting these petitions as described above would both remove barriers to deployment and promote competition by bringing additional choices to the marketplace so that consumers are served with more choices, lower prices, and higher quality.

8. Against this, it is said that because the petitioners are municipalities, these state laws are rendered immune from the normal application of federal law. But neither the statute nor the case law supports that proposition.

9. Section 706 does not contain an exception for state laws regarding how municipalities may provide interstate communications. Rather, section 706(a) broadly authorizes the Commission to use

“regulating methods that remove barriers to infrastructure investment,”<sup>7</sup> of which preemption is undoubtedly one. Section 706(b) equally plainly directs that, upon a finding that broadband is not being adequately deployed to all Americans, the Commission shall take “immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>8</sup> We have made such a negative finding in the *2015 Broadband Progress Report*.<sup>9</sup>

10. We therefore read section 706 to permit the Commission to preempt state laws that primarily serve to regulate competition in the broadband market. We reach this conclusion because we read Section 706 to authorize the Commission to displace state laws that effectuate choices about the substance of communications policy that conflict with the federal communications policy of ensuring “reasonable and timely”<sup>10</sup> deployment of broadband. To be clear, we do not assert that state policy preferences about the competitive landscape for broadband are inherently illegitimate. We find only that where, as here, they conflict with the federal policy set out in section 706 they must be preempted.

11. Moreover, a state law that effectuates a policy preference regarding the provision of broadband is not shielded from all scrutiny, simply because it is cast in terms that affect only municipal providers. We find that section 706 authorizes the Commission to preempt state laws that specifically regulate the provision of broadband by the state’s political subdivision, where those laws stand as barriers to broadband investment and competition. A different question would be presented were we asked to preempt state laws that withhold authority to provide broadband altogether. But where a state has authorized municipalities to provide broadband, and then chooses to impose regulations on that municipal provider in order to effectuate the state’s preferred communications policy objectives, such as the protection of incumbent ISPs, such laws fall within our authority to preempt.

12. This reading of section 706 is fully consistent with Supreme Court and Commission precedent. Unlike *Gregory v. Ashcroft*,<sup>11</sup> the issue before us concerns federal oversight of interstate commerce — “an area where there has been a history of significant federal presence”<sup>12</sup> — not the inherent structure of state government itself. We therefore find that the “clear statement rule”<sup>13</sup> from *Gregory* does not apply here. And unlike *Nixon v. Missouri Municipal League*, the question here is not whether the municipal systems can provide broadband at all, but rather whether the states may dictate the manner in which interstate commerce is conducted and the nature of competition that should exist for interstate communications.<sup>14</sup> The *Nixon* Court was concerned that, if Missouri’s flat ban on municipal telecommunications were preempted, “the municipality would still be powerless to enter the telecommunications business” in the “absence of some further, authorizing legislation.”<sup>15</sup> However, that is not a concern for our interpretation of section 706, which would allow preemption only in cases of underlying authorization.<sup>16</sup>

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<sup>7</sup> 47 U.S.C. § 1302(a).

<sup>8</sup> 47 U.S.C. § 1302(b).

<sup>9</sup> *2015 Broadband Progress Report* at para. 4.

<sup>10</sup> 47 U.S.C. § 1302.

<sup>11</sup> *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>12</sup> *United States v. Locke*, 529 U.S. 89, 107-08 (2000).

<sup>13</sup> *Gregory*, 501 U.S. at 460.

<sup>14</sup> *Nixon v. Missouri Mun. League*, 541 U.S. 125 (2004).

<sup>15</sup> *Id.* at 135.

<sup>16</sup> Our conclusion regarding *Nixon* would remain the same regardless of whether broadband Internet access service were classified as an information service or as a telecommunications service. Here, we act under section 706, which

13. We further find that the laws at issue in these petitions fall within our preemptive authority because they serve as state-law communications policy regulations, as opposed to a core state function in controlling political subdivisions. The territorial restriction in Tennessee Code Section 601 serves only to restrict municipal electric providers from providing broadband service on fiber networks that they are already authorized to build *statewide*. Such a statutory scheme does not further any core state function of ordering its political subdivisions, such as limiting the expenditures of a city. It serves only to effectuate state communications policy preferences by enforcing inefficiency and protecting incumbents from competition.

14. We also find that North Carolina's H.B. 129 falls within our authority to preempt under section 706. H.B. 129 does not prohibit service by municipal entities — indeed it explicitly permits service. Instead, certain provisions of the statute, especially when taken together and viewed in context, serve to regulate the operation and pricing of municipally-owned broadband providers as a means to shape the competitive landscape for broadband, again with the effect of protecting incumbent ISPs. The formal title of the statute — “An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business” — underscores this. Any one of the law's provisions, taken separately, might seem to be cast in terms of state limitations on municipal authority. But viewed as a whole and in context, each of the statutory provisions are actually sector-specific regulatory limitations that single out a specific service — broadband communications — and impose burdens on municipal providers of such services. The clear effect of H.B. 129 is to protect private competitors from “unfair” competition, but the question of whether competition will or will not serve the public interest with respect to interstate communications is one quintessentially reserved to this Commission.

15. To put it plainly, the Commission has concluded that preemption of these restrictions will expand broadband investment and deployment, increase competition, and serve the public interest, as Section 706 intended.

16. While the present Memorandum Opinion and Order (Order) only addresses the EPB and Wilson Petitions, the Commission will not hesitate to preempt similar statutory provisions in factual situations where they function as barriers to broadband investment and competition.

## **B. Background**

17. On July 24, 2014, two municipal broadband providers, EPB and Wilson, filed separate petitions requesting that the Commission preempt statutory provisions in Tennessee and North Carolina, respectively, which the petitioners contend constitute barriers to broadband investment and competition. Both EPB and Wilson currently and for some period of time have operated broadband networks with 1 Gbps offerings, and both provide electric service in addition to broadband. EPB and Wilson each state that they have received a significant number of requests to expand their current broadband service areas but are unable to meet this demand because of the state statutory provisions at issue in this proceeding.<sup>17</sup> EPB requests that the Commission preempt Tennessee statutory language restricting it to providing broadband and video service “within its [electric] service area.”<sup>18</sup> Wilson seeks preemption of a bill enacted in 2011 that imposes geographic restrictions and other limitations on municipal broadband in

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we find is an alternate, often complementary source of authority to section 253, the provision at issue in *Nixon*. Because section 706 specifically addresses barriers to *advanced* telecommunications, which are the services at issue in these petitions, we conclude that section 706 is available as a source of authority, regardless of whether section 253 would or would not also apply here.

<sup>17</sup> EPB Petition at 16; Wilson Petition at 23.

<sup>18</sup> EPB Petition at 56.



North Carolina.<sup>19</sup> Wilson asserts that the North Carolina statute, as a whole, is a barrier to broadband infrastructure investment and competition.<sup>20</sup>

### 1. The Commission's Mandate Under Section 706 of the Telecommunications Act

18. Congress recognized the critical importance of broadband deployment to “all Americans”<sup>21</sup> and specifically required the Commission to encourage broadband infrastructure investment and promote competition in section 706 and through other provisions of the Act. Pursuant to Congress’s clear direction, the Commission has taken action in numerous proceedings to facilitate broadband deployment and competition.<sup>22</sup>

19. In section 706(a), Congress directed the Commission to encourage the deployment of advanced telecommunications capabilities on a reasonable and timely basis to all Americans, “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.”<sup>23</sup> Section 706(b) requires that the Commission “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market,” if it finds after inquiry that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion.<sup>24</sup>

20. As required by section 706(b), the Commission issues Broadband Progress Reports determining whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.<sup>25</sup> To date, each of the Commission’s Broadband Progress Reports issued pursuant to section 706(b) established a speed benchmark — encompassing a download speed and an

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<sup>19</sup> See Wilson Petition at 59. In particular, Wilson seeks preemption of Section 1.(a), Chapter 160A of the North Carolina General Statutes (including 160A-340 through 160A-340.6), and corresponding amendments contained in Section 2.(a) and Section 3, Subchapter IV of Chapter 159 of the North Carolina General Statutes.

<sup>20</sup> Wilson Petition at 2.

<sup>21</sup> 47 U.S.C. § 1302.

<sup>22</sup> See, e.g., *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8873, para. 4 (2014) (recognizing the critical role the E-rate program plays as “a crucial part of the Commission’s broader mandate to further broadband deployment and adoption across our nation”); *Technology Transitions et al.*, GN Docket No. 13-5 et al., Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd 1433, 1461, para. 78 (2014) (stating that “we find that soliciting the type of experiments described in this Order will accelerate broadband deployment and therefore advances the goals of section 706”); *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17668, para. 5 (2011) (*USF/ICC Transformation Order*) (stating that “extending and accelerating fixed and mobile broadband deployment has been one of the Commission’s top priorities over the past few years”), *aff’d* 753 F.3d 1015 (10<sup>th</sup> Cir. 2014); see also, e.g., Tom Wheeler, Chairman, FCC, *The Facts and Future of Broadband Competition*, at 1 (Sept. 4, 2014), <http://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition> (“The underpinning of broadband policy today is that competition is the most effective tool for driving innovation, investment, and consumer and economic benefits.”).

<sup>23</sup> 47 U.S.C. § 1302(a).

<sup>24</sup> 47 U.S.C. § 1302(b).

<sup>25</sup> *Id.* Section 706(b) requires the Commission to annually assess the availability of “advanced telecommunications capability,” or broadband, and mandates the Commission to take action if it finds that broadband is not being deployed to all Americans in a reasonable and timely fashion. *Id.*; see also *2015 Broadband Progress Report* at paras. 13, 49.

upload speed — to determine whether a service satisfies the statutory definition of advanced telecommunications capability.<sup>26</sup> The Commission recognizes that the speed benchmark should change over time to reflect evolving conditions and therefore “must be periodically reassessed in light of market offerings and consumer demand,”<sup>27</sup> and in doing so, the Commission in the recent *2015 Broadband Progress Report* indicated we should examine the “[t]rends in deployment and adoption, the speeds that providers are offering today, and the speeds required to use high-quality video, data, voice, and other broadband applications.”<sup>28</sup> Thus, the Commission’s Broadband Progress Reports are pertinent to this proceeding not only as a threshold to action under section 706(b) but as our most thorough and up-to-date analysis of what constitutes “advanced telecommunications capability.”<sup>29</sup>

21. In our *2015 Broadband Progress Report*, adopted on January 29, 2015, we revised the 4 Mbps download/1 Mbps upload speed (4 Mbps/1 Mbps) benchmark established in 2010 and relied on in the prior three Reports.<sup>30</sup> We found that 4 Mbps/1 Mbps no longer “supports the ‘advanced’ functions Congress identified” in section 706(d).<sup>31</sup> In updating the speed benchmark, we took into account trends in the market, factors such as the need for multiple members of a household to use broadband services simultaneously, and that “[v]ideo continues to drive demand for faster broadband.”<sup>32</sup> Based on these and other reasons, we found that “‘advanced telecommunications capability’ requires access to actual download speeds of at least 25 Mbps and actual upload speeds of at least 3 Mbps (25 Mbps/3 Mbps).”<sup>33</sup> Our analysis indicated that “approximately 55 million Americans (17 percent) live in areas unserved by fixed 25 Mbps/3 Mbps broadband or higher service, and that gap closed only by three percentage points in the last year.”<sup>34</sup> Our analysis also indicated that there is a disparity between urban and rural areas at all

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<sup>26</sup> See 47 U.S.C. § 1302(d)(1), which states that 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.” Municipal broadband services at issue in this Order fall within the statutory definition of advanced telecommunications capability, and the record does not contain anything disputing this fact.

<sup>27</sup> *2015 Broadband Progress Report* at para. 26.

<sup>28</sup> *Id.* at para. 3.

<sup>29</sup> 47 U.S.C. § 1302.

<sup>30</sup> See *2015 Broadband Progress Report*; see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 11-121, Eighth Broadband Progress Report, 27 FCC Rcd 10342, 10347, para. 6 (2012) (*Eighth Broadband Progress Report*); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008, 8019, para. 14 (2011) (*Seventh Broadband Progress Report*); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket Nos. 09-137 and 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9563, para. 11 (2010) (*Sixth Broadband Progress Report*).

<sup>31</sup> *2015 Broadband Progress Report* at para. 3.

<sup>32</sup> *Id.* at para. 30.

<sup>33</sup> *Id.* at para. 3.

<sup>34</sup> *Id.* at para. 4. We reported that the existence of “unserved” areas “may be attributable, at least partially, to the cost of building infrastructure over long distances in areas with low population density.” *Id.* at para. 143.



speeds, not just at 25 Mbps/3 Mbps.<sup>35</sup> For this and other reasons, we concluded that broadband is not being deployed to all Americans in a reasonable and timely fashion.<sup>36</sup> As we discuss further in Section III, consumers' growing broadband needs, as quantified by our *2015 Broadband Progress Report*, demonstrate how the state statutes at issue here are barriers to broadband investment and competition.<sup>37</sup> We agree with USTelecom that the Commission's decision to "raise the standard for broadband to a significantly higher speed level underscores the need for increased investment across the industry" and that "[i]f that is the goal, the FCC should adopt policies that strongly favor investment in local broadband networks."<sup>38</sup> In Section IV of this Order, we discuss in more detail the mandate of section 706 and the authority it affords the Commission to preempt the state laws at issue in this proceeding.

## 2. The EPB Petition and Territorial Restriction in Section 601

22. EPB, an independent board of the City of Chattanooga, Tennessee, offers voice, video, and high speed broadband service with speeds up to 1 Gbps to the 170,000 residential and commercial customers throughout its 600 square mile service area. Almost two decades ago, EPB "recognized the need to enhance its electric system by the addition of [a] high-capacity, dedicated communications network."<sup>39</sup> In 1996, EPB's Board began developing a high-capacity fiber optic communications system for EPB's communications infrastructure so that it could meet future EPB electric system needs and offer additional services to its customers.<sup>40</sup> EPB deployed broadband in order to offer additional, faster broadband services and to take advantage of benefits inherent in deploying broadband in conjunction with deploying an electric smart grid, including efficiency gains and the ability to share costs and generate additional revenues.<sup>41</sup> In 2009, EPB made fiber-based communications services available to residential customers and, in 2010, EPB became the first broadband provider in the nation to offer Gigabit services to all its customers.<sup>42</sup> EPB describes several key advantages of this fiber network, including "its symmetrical capacity, its low latency, and its consistent reliability."<sup>43</sup> According to EPB, about 63,000 of its electric service customers "subscribe to EPB's fiber services."<sup>44</sup> EPB's provision of broadband appears to provide numerous benefits to Chattanooga and surrounding communities in its existing service area:

23. *Economic Benefits.* EPB's broadband network has had a positive impact on job creation and retention. As early as 2006, a study demonstrated the benefits of EPB's broadband service to the

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<sup>35</sup> *Id.* at paras. 133, 136; *see also id.* at para. 133 ("The overall percentage of Americans without access to 25 Mbps/3 Mbps dropped only three percentage points between 2012 and 2013, and the percentage of Americans in rural areas without such access dropped by a mere two percentage points over the same span of time.")

<sup>36</sup> *Id.* at paras. 133-40.

<sup>37</sup> *See infra* paras. 75-122; *2015 Broadband Progress Report* at paras. 2-3, 6.

<sup>38</sup> Kery Murakami, *Wheeler Proposes Upping Broadband Speed Standard to 25/3*, Communications Daily, Jan. 8, 2015, at 10; *see also* Letter from Walter B. McCormick, Jr., President and Chief Executive Officer, USTelecom, to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28, at 2 (filed Oct. 24, 2014) (stating that to accommodate projected two-and-a-half times growth in Internet traffic over the next five years, "wireline investment will be critical").

<sup>39</sup> EPB Petition at 19.

<sup>40</sup> *See id.* at 19-20; *see also id.*, Exh. 3, EPB Board Resolution No. 96-08 (Apr. 29, 1996).

<sup>41</sup> *See* EPB Petition at 19-23, 28.

<sup>42</sup> *Id.* at 20.

<sup>43</sup> *Id.* at 28.

<sup>44</sup> *Id.* at 1 n.2. EPB provides all its residential Internet customers at least 100 Mbps symmetrical service. These customers may choose to upgrade, for \$12.00 extra per month, to 1 Gbps symmetrical service. *Id.*

success of core business sectors of Hamilton County, in which Chattanooga is located.<sup>45</sup> And that study, along with two additional studies conducted in 2009 and 2011, show EPB's increasing positive impact on the local economy, including through job growth; the most recent study shows 3,716 net jobs produced as of 2011.<sup>46</sup> Chattanooga's Chamber of Commerce "identified more than 1,000 new jobs created since 2010 that have a direct connection to EPB's Gigabit fiber network and the entrepreneurial culture that has been catalyzed by the network."<sup>47</sup> For instance, commenters state that EPB's all-fiber network has attracted businesses such as Amazon and Volkswagen to Chattanooga, creating numerous jobs and increasing capital investment.<sup>48</sup> And EPB's positive impact on employment appears likely to continue to grow: Chattanooga currently has several entrepreneurial initiatives focused on businesses that will use and benefit from extremely high-speed, low-latency fiber, including a "GIGTANK" non-profit summer accelerator program that included eight startup companies last year,<sup>49</sup> a new venture capital firm, and firms that invest in early stage startup companies.<sup>50</sup>

24. EPB asserts that residents of Chattanooga and surrounding areas have also enjoyed significant economic benefits from EPB's broadband service.<sup>51</sup> Members of these communities who have

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<sup>45</sup> See EPB Petition, Exh. 7, Bento J. Lobo et al., *The Impact of Broadband in Hamilton County, TN* at 12 (2006) (2006 Hamilton County Study) (noting that these sectors include professional, scientific and technical services; educational services; health care and social assistance; and other services). EPB began providing business service in 2003. See EPB Petition, Exh. 5, *Timeline of EPB's Development and Deployment of Gigabit Fiber Network* at 2 (EPB Timeline). It did not, however, provide residential service until 2009. See EPB Petition at 20.

<sup>46</sup> EPB Petition at 24 (citing the 2006 Hamilton County Study; EPB Petition, Exh. 8, Bento J. Lobo & Soumen Ghosh, *The Economic Impact of Smart Grid Deployment in Hamilton County, Tennessee* (2009); EPB Petition, Exh. 9, Bento J. Lobo, *The Economic and Social Value of EPB's Fiber Optic Infrastructure in Hamilton County* (2011) (2011 Hamilton County Study)). *But cf.* Advanced Communications Law & Policy Institute at New York Law School Comments, WC Docket Nos. 14-115 and 14-116 (filed Aug. 29, 2014), Attach., Charles M. Davidson & Michael J. Santorelli, *Understanding the Debate over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers*, Advanced Communications Law & Policy Institute at New York Law School, June 2014, at iv, 38-39 (ACLP Report) (stating that the direct economic impact of government-owned networks, especially in job creation, can be difficult to attribute and that, while substantial empirical evidence indicates broadband and broadband-enabled services create jobs and spur economic development in the United States, there is little, if any, direct empirical evidence that government-owned networks specifically have similar impacts on employment); Taxpayers Protection Alliance Reply, WC Docket No. 14-116, at 2, 7 (filed Sept. 29, 2014) (Taxpayers Protection Alliance Reply) (asserting that "[d]espite promises of massive economic development as a result of Chattanooga government-owned fiber scheme, no new jobs have been created").

<sup>47</sup> EPB Petition at 25; *see also id.*, Exh. 6, Standard & Poor's Rating Services, Ratings Direct, Summary: Chattanooga, Tennessee; Retail Electric, at 2 ("The [improved] rating on the electric utility incorporates other factors that we believe will help EPB maintain its strong financial risk profile. These include: The city's role as a regional economic center for a six-county area in southern Tennessee, as well as a three-county area in northern Georgia, and Chattanooga's ability to attract new business.") (S&P EPB Report).

<sup>48</sup> *See, e.g.*, Fiber To The Home Council (FTTH) Comments, WC Docket Nos. 14-115 and 14-116, at 7 (filed Aug. 29, 2014) (FTTH Comments) (noting that "the EPB all-fiber network in Chattanooga has attracted Alstom, Amazon, and Volkswagen to the city, creating over 7,000 jobs and attracting billions of dollars in capital investment"); Netflix, Inc. Comments, WC Docket Nos. 14-115 and 14-116, at 3-4 (filed Aug. 29, 2014) (Netflix Comments).

<sup>49</sup> GIGTANK helps seed-stage startup companies developing ultra high-bandwidth business applications by "connect[ing] high-speed entrepreneurs with the tools, capital, and connections to go to market." GIGTANK, About GIGTANK, <http://www.thegigtank.com/gigtank/> (last visited Jan. 28, 2015). GIGTANK is held annually each summer and provides "a fast-paced, 100-day experience packed with on-the-ground guidance from industry experts, business mentors, and national thought leaders in broadband and entrepreneurship." *Id.*

<sup>50</sup> EPB Petition at 25-26.

<sup>51</sup> *See id.* at 24-25; *see also* Tennessee Municipal Electric Power Association Comments, WC Docket Nos. 14-115 and 14-116, at 1 (filed Aug. 29, 2014) (TMEPA Comments) (asserting that "Tennessee has been very successful in

(continued...)

access to EPB service are now able to subscribe to services that were previously not available (including services with higher speeds), enjoy lower prices, and receive improved service reliability.<sup>52</sup> Moreover, in response to EPB's entry, established providers improved their own services and stabilized rates.<sup>53</sup> EPB's deployment of broadband service has also resulted in significant savings for the municipality and ultimately taxpayers. EPB specifically deployed broadband in conjunction with its deployment of its smart grid in order to take advantage of efficiencies from joint use of fiber facilities.<sup>54</sup> EPB's efficient provision of broadband service using fiber deployed for smart grid service has generated substantial revenue for the city, enabling it to, for example, avoid electric rate increases.<sup>55</sup> In 2012, Standard and Poor's upgraded EPB's bond rating to AA+, stating that "[t]he higher rating reflects both our assessment of the utility's strong credit metrics in fiscal 2012 and our view that the stronger metrics are sustainable, based on our opinion that management's forecast assumptions are reasonable."<sup>56</sup> EPB states that its upgraded rating further benefits taxpayers by reducing the cost of borrowing.<sup>57</sup>

25. *Education and Libraries.* EPB's municipal broadband services have created new opportunities for schools and libraries in Chattanooga.<sup>58</sup> As of 2012, EPB provided Chattanooga schools with at least 100 Mbps connections.<sup>59</sup> The high-speed service available to schools and libraries served by EPB enables them to offer innovative services not available in most of the Nation. For instance, Chattanooga's public libraries have emerged as a center for technology education, experimentation, and engagement and include a "14,000 square foot maker" space with 1 Gbps wireless service that contains computers, 3-D printers, and workspaces with Gigabit connections.<sup>60</sup> Thanks to EPB, cities and libraries around the country and the world recognize Chattanooga's Public Library as a leader. For instance, the Mozilla Foundation just awarded the library a grant for creation of an enhanced Gigabit Lab, and the New York Public Library recently announced that it is looking to Chattanooga's Public Library as a model for renovation of its library facilities with high-tech, collaborative spaces.<sup>61</sup>

26. *Other Benefits.* EPB also has identified benefits its broadband services have provided in the areas of healthcare and improved network reliability. In Chattanooga, startup companies worked in the area of health care during the annual "GIGTANK" program at CoLab, Chattanooga's non-profit entrepreneurial accelerator.<sup>62</sup> Telehealth businesses can also use EPB's 1 Gbps service to provide cutting

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bringing new industrial and commercial businesses to [its] state in large part because of access to municipal broadband").

<sup>52</sup> See EPB Petition at 27-29.

<sup>53</sup> See *infra* Section II.B., paras. 49-55.

<sup>54</sup> See EPB Petition at 19-23, 28.

<sup>55</sup> *Id.* at 22-23.

<sup>56</sup> S&P EPB Report at 2, 4.

<sup>57</sup> EPB Petition at 23; *see also* S&P EPB Report at 2.

<sup>58</sup> See, e.g., EPB Petition at 26, 43; American Library Association Reply, WC Docket Nos. 14-115 and 14-116, at 1-2 (filed Sept. 29, 2014) (American Library Association Reply); Netflix Comments at 3-4.

<sup>59</sup> See New America Foundation Comments, WC Docket Nos. 14-115 and 14-116, at 10 (filed Aug. 29, 2014) (New America Foundation Comments).

<sup>60</sup> EPB Petition at 26; *see also* Chattanooga Public Library, *Inclusive Gigabit Libraries*, <http://chattlibrary.org/content/inclusive-gigabit-libraries> (last visited Jan. 30, 2015).

<sup>61</sup> EPB Petition at 26.

<sup>62</sup> *Id.* at 25.

edge services.<sup>63</sup> EPB states that municipal investment in broadband has improved the reliability of communications in its community.<sup>64</sup>

27. *Tennessee Law.* Under current Tennessee law, municipal electric systems, like EPB, are authorized to provide telecommunications services anywhere in the state,<sup>65</sup> and are also authorized to offer Internet services and cable services (including two-way video transmission and video programming), but are restricted from offering those services outside their respective electric service territories. This restriction, from section 601 of the relevant code, reads as follows:

Each municipality operating an electric plant . . . has the power and is authorized within its service area . . . 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.<sup>66</sup>

28. Since 1999, several bills have been introduced to modify the territorial limitation but none has been enacted.<sup>67</sup> Although on two occasions the Tennessee General Assembly permitted municipal electric systems to offer Internet and cable services outside their electric footprint through “pilot projects,” these services were not permitted beyond the county in which the municipal electric system was located.<sup>68</sup> Municipalities that do not operate electric utilities can provide services only in “historically unserved areas,” and only through joint ventures with the private sector.<sup>69</sup>

29. *Comparative Data.* EPB states that it seeks preemption because it wants to expand the territory in which it provides broadband and video in response to “regular requests” for service from residents of neighboring communities that it cannot fulfill because of section 601’s territorial restriction.<sup>70</sup> EPB asserts that its electric service area is surrounded by “a digital desert” in which businesses and residents are unable to access broadband Internet service or must make do with very limited speeds.<sup>71</sup>

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<sup>63</sup> 2011 Hamilton County Study at 16.

<sup>64</sup> See EPB Petition at 28.

<sup>65</sup> The authority for municipal electric systems, like EPB, to own and operate telecommunications systems is contained in Tenn. Code Ann. § 7-52-401 *et seq.*

<sup>66</sup> Tenn. Code Ann. § 7-52-601(a).

<sup>67</sup> EPB Petition at 34.

<sup>68</sup> *Id.* at 33. The authority for the “pilot projects” is contained in Tenn. Code Ann. § 7-52-601(e). EPB further asserts that such pilot projects do not seem to be “an effective way to evaluate capital intensive communications services.” *Id.*

<sup>69</sup> See Tenn. Code Ann. § 7-59-316.

<sup>70</sup> See EPB Petition at 16. EPB’s electrical service territory includes three counties in Georgia. *Id.* We do not address the question of whether Georgia state law permits EPB to provide broadband and video service in that state as the issue is not before us in this proceeding.

<sup>71</sup> EPB Petition at 1; see also Utilities Telecom Council Reply Comments, WC Docket Nos. 14-115 and 14-116, at 4 (filed Sept. 29, 2014) (stating that “there is a gaping digital divide that exists outside the city limits of Chattanooga compared to the gigabit services that are available within the city limits where the city is permitted to offer service under the state law”); FTTH Comments at 10 (stating that “large areas surrounding EPB are in a digital desert”) (quoting EPB Petition at 1); Shelly Bradbury, *Digital Divide: Just an Hour from Gig City, Rural Residents Live in Broadband Desert*, Chattanooga Times Free Press, Apr. 20, 2014, <http://www.timesfreepress.com/news/local/story/2014/apr/20/the-digital-divide-just-an-hour-from-gig-city/137793/> (“In the shadow of the gig, there are hundreds of people — nearly all in rural areas — who can’t access even basic broadband Internet.”).

EPB states that businesses, institutions, and residents in large areas neighboring its electric service territory have requested EPB to “provide service in at least some areas that are unserved today, and to provide robust competition in other areas that are currently underserved.”<sup>72</sup>

30. National Broadband Map data, commonly called SBI Data,<sup>73</sup> show that neighboring communities to which EPB does not provide broadband service have a significantly more limited range of advanced telecommunications capability choices than the national average. As noted above, in the *2015 Broadband Progress Report* we “conclude[d] that broadband is not being deployed to all Americans in a reasonable and timely fashion” based on an evaluation of national-level data.<sup>74</sup> Below, we provide charts created using SBI Data as of December 31, 2013, illustrating the number of providers of residential and/or business fixed terrestrial advanced communications capability available to (a) the Nation as a whole; and (b) housing units in Hamilton County (in which Chattanooga is located) and surrounding counties in Tennessee, but excluding census blocks in which EPB provides broadband service.<sup>75</sup> The charts illustrate this information at both our new standard for advanced telecommunications capability, 25 Mbps / 3 Mbps, and at 3 Mbps / 768 kbps, which the Commission used as a proxy for the previous 4 Mbps / 1 Mbps speed benchmark due to limitations of SBI Data.<sup>76</sup> The first chart shows that three times as many

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<sup>72</sup> EPB Petition at 43. Numerous comments in the record from individual residents in Tennessee state that existing broadband services are inadequate to meet their needs. *See, e.g.*, Chaz Smith Comments, WC Docket Nos. 14-115 and 14-116, at 1 (filed Aug. 1, 2014) (“In my area of TN there are people who are unable to obtain suitable internet coverage . . . or have no option for coverage at all.”); Jason Kirk Comments, WC Docket Nos. 14-115 and 14-116, at 1 (filed Aug. 4, 2014) (“EPB has provided what COMCAST won’t, EPB has brought broadband to some of the underserved areas in Hamilton and [s]urrounding areas. Comcast tells people in the same remote areas [as] EPB, they must pay (Comcast) to install cable routes to the locations to provide High Speed Internet.”); Leann Old Comments, WC Docket Nos. 14-115 and 14-116, at 1 (filed July 30, 2014) (“I was disappointed to find out that Charter is the only game in town for cable, and AT&T offers extremely slow DSL service. . . . How nice it would be if there were some competition in the area. It would be even more nice if Spring Hill had municipal broadband.”); Letter from Joyce Coltrin, J&J Nursery, to Tom Wheeler, Chairman, FCC, WC Docket No. 14-116, at 1 (filed July 29, 2014) (stating that a small business owner who “for a year has been requesting Chattanooga’s EPB to provide me and others service . . . formed a group in our neighborhood of about 200 households” seeking EPB’s service); *cf.* Dewayne Siddon Comments, WC Docket Nos. 14-115 and 14-116, at 1 (filed Aug. 4, 2014) (“Since we cannot get adequate high speed internet VOIP services, we are locked into few choices for telephone service. We find ourselves limited to expensive wireline telephone services and often poorly performing cellular services at [our] home in southeast Bradley County [Tennessee].”); Josh Rogers Comments, WC Docket Nos. 14-115 and 14-116, at 1 (filed July 31, 2014) (“I live in Spring Hill, TN and our internet selection is poor at best. I pay \$115 per month for 100Mb down and 10Mb up. I have to pay my bill in full monthly, but I consistently have speeds at half what I am paying for.”).

<sup>73</sup> *See 2015 Broadband Progress Report* at paras. 14, 67-70 (explaining SBI Data and finding that the fixed SBI Data, although imperfect, are sufficiently reliable to serve as the basis of our finding in the *2015 Broadband Progress Report* that advanced telecommunications capabilities are not being deployed to all Americans in a reasonable and timely fashion). Consistent with the *2015 Broadband Progress Report*, the SBI Data used here include fixed terrestrial technologies: fiber to the home, digital subscriber line, all other copper based technologies, cable modem, fixed wireless and electric power line; but do not include satellite or mobile technologies. *See id.* at paras. 9-11, 71-76. Accordingly, our discussion in this Order based on the SBI Data reflects information on fixed terrestrial technologies and does not include satellite or mobile technologies.

<sup>74</sup> *2015 Broadband Progress Report* at para. 4.

<sup>75</sup> We exclude mobile and satellite data from the charts and maps herein for the same reasons as are articulated in our recent *2015 Broadband Progress Report*. *See id.* at para. 9. We believe that Hamilton and surrounding counties in Tennessee are an appropriate geographic scope because EPB’s electric service territory encompasses much but not all of Hamilton County and extends only partially into some immediately neighboring Tennessee counties, so that any EPB expansion likely would occur within Hamilton and/or into these other surrounding counties in Tennessee. The specific counties included are Bledsoe, Bradley, Hamilton, Marion, Meigs, Rhea, and Sequatchie counties.

<sup>76</sup> *See Eighth Broadband Progress Report*, 27 FCC Rcd at 10364, para. 29.



housing units in the area in question in Tennessee lack access to even one broadband provider at 3 Mbps / 768 kbps compared to the national average. It also shows that almost half of the housing units in the area in question in Tennessee lack access to two or more providers at 3 Mbps / 768 kbps, compared to a national average of just 12 percent. The second chart shows that in the area in question in Tennessee 28 percent of housing units lack access to 25 Mbps / 3 Mbps, compared to a national average of 16 percent; and 95 percent of housing units in the portion of Tennessee in question lack access to two or more 25 Mbps / 3 Mbps broadband providers, compared to a national average of just 61 percent. We also attach a map created using these same underlying SBI data to illustrate the number of advanced telecommunications capability options at our present standard of 25 Mbps / 3 Mbps available in Hamilton and surrounding counties.<sup>77</sup> Unlike the charts below, the map includes EPB's service territory and shows the sharp contrast in access to modern advanced telecommunications capability in areas with and without EPB service. We note that EPB's 1 Gbps symmetrical service is vastly faster than the speed threshold illustrated by the map.

31. These charts and map likely slightly overstate available service for several reasons. First, the data report whether service is available in a census block and indicate that broadband service is available if a broadband service provider does, or could, provide broadband service to an end user within a typical service interval (7 to 10 business days) without an extraordinary commitment of resources.<sup>78</sup> Thus, the data will indicate that broadband service is available in a census block even when broadband may be unavailable at some units within the census block.<sup>79</sup> Second, the SBI Data include broadband deployment estimates to both residential and business locations even though some providers, for some states, indicate that they provide service only to businesses.<sup>80</sup> Finally, these charts reflect data for areas neighboring EPB's service area, and provide guidance regarding the number of providers outside EPB's service area.

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<sup>77</sup> See *infra* Attach. A (EPB/Tennessee Map). EPB also submitted a map showing that there are a significant number of areas neighboring its electric service territory in Tennessee that do not have access to advanced telecommunications capabilities under both our current and our most recent prior benchmarks. See EPB Petition Exh. 1, Areas Served and Unserved by Broadband: Eastern Tennessee (Apr. 1, 2014).

<sup>78</sup> See *Seventh Broadband Progress Report*, 26 FCC Rcd at 8083, Appx. F (Technical Appendix) at para. 14.

<sup>79</sup> See *id.*

<sup>80</sup> See *2015 Broadband Progress Report* at paras. 69, 79.

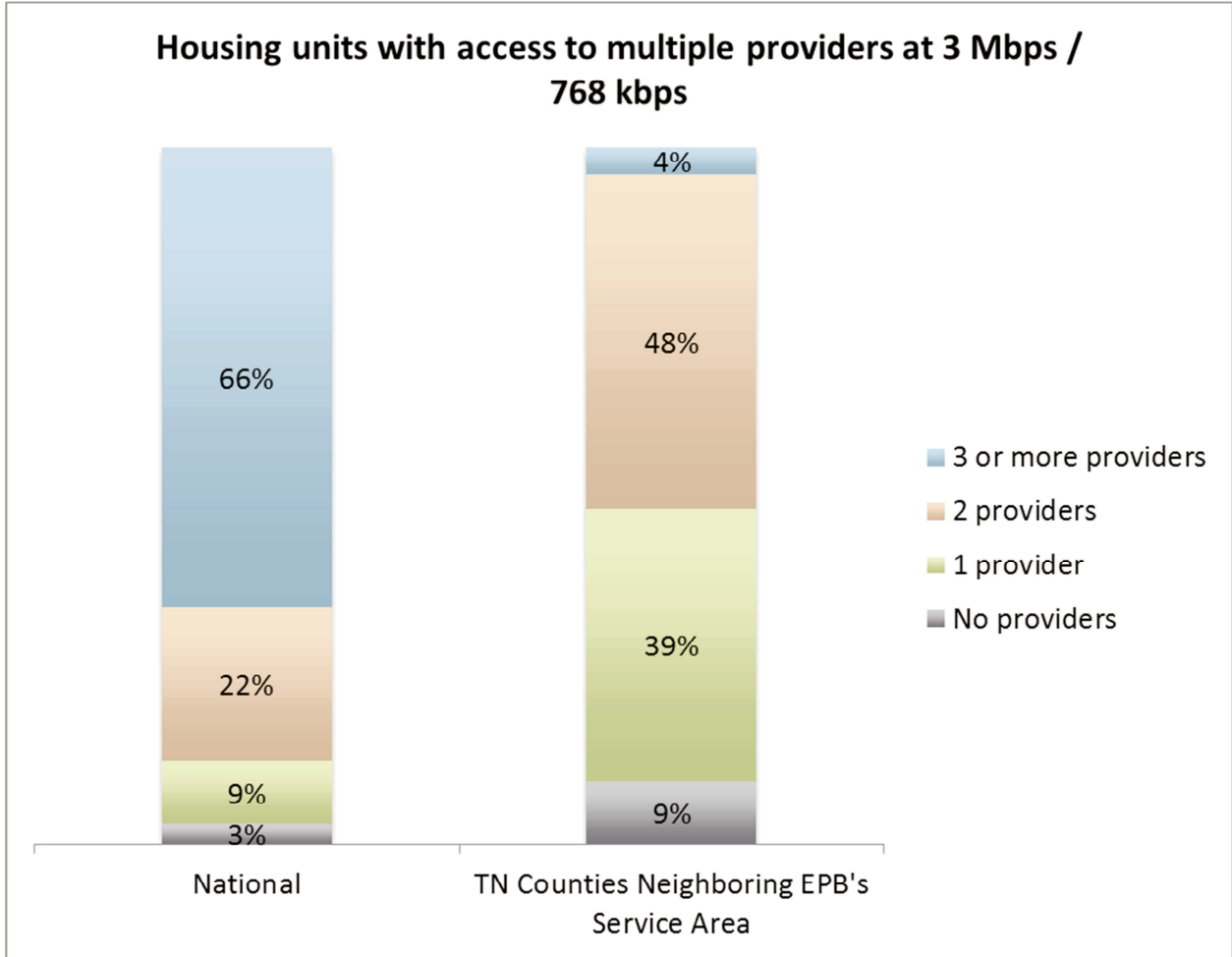


Chart indicates providers of fixed terrestrial technologies.

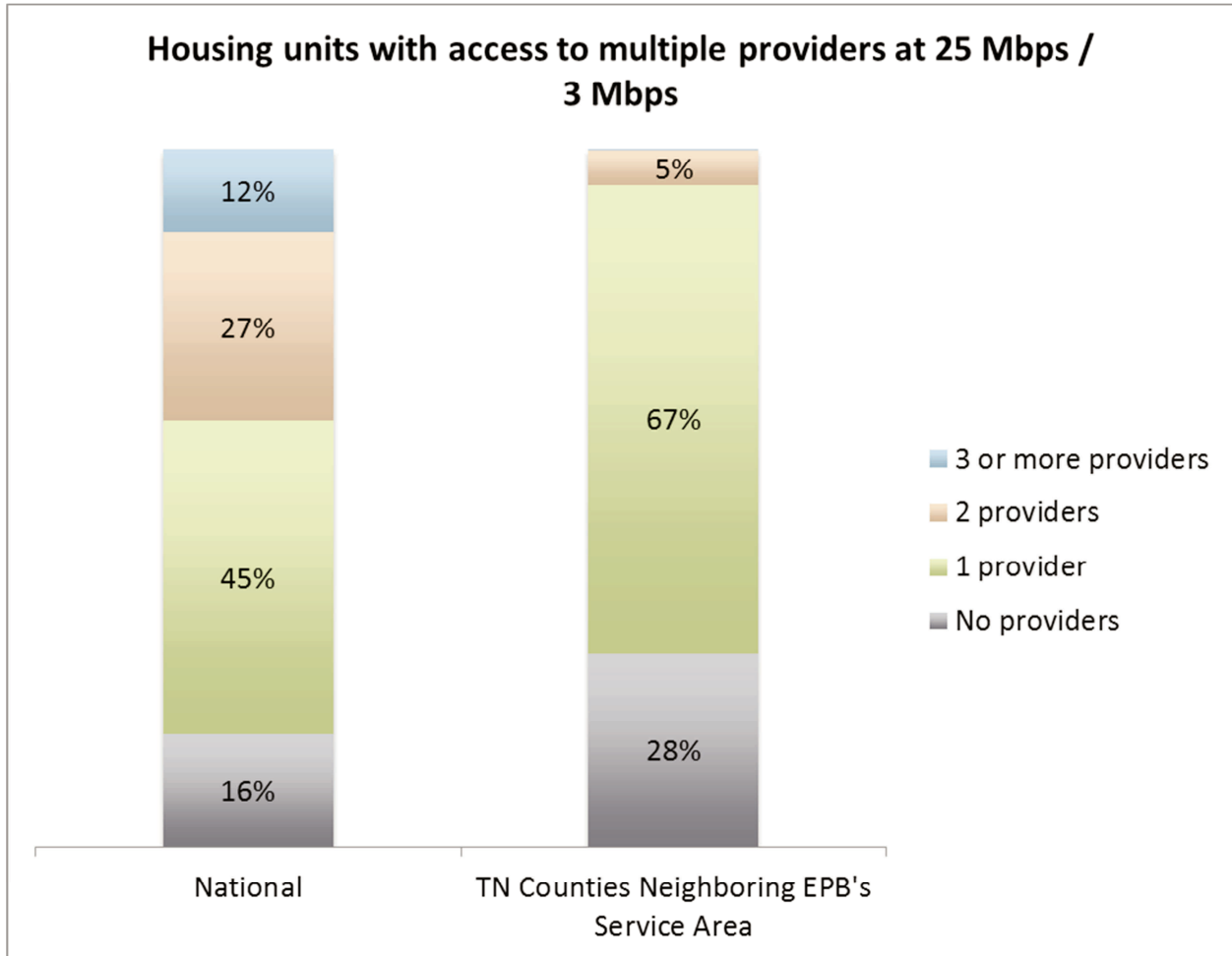


Chart indicates providers of fixed terrestrial technologies.

32. *Preemption Request.* EPB asks the Commission to find that advanced telecommunications capabilities are not being deployed on a reasonable and timely basis in communities near EPB's electric service area because the territorial restriction contained in section 601 is a barrier to its expansion to serve these areas.<sup>81</sup> EPB also asserts that, in order for any relief granted by the Commission to be meaningful, it must allow EPB to offer triple play service. In the event the Commission preempts the restriction on "Internet services," EPB also requests that we preempt the restriction on "cable service, two-way video transmission, and video programming."<sup>82</sup> Accordingly, EPB requests that the Commission preempt the phrase "within its service area" contained in section 601.<sup>83</sup>

### 3. The Wilson Petition and H.B.129

33. Wilson provides electric service in six counties in Eastern North Carolina. In one of these counties, Wilson County, it also deployed its own broadband network providing Gigabit Internet access and cable services over its fiber-optic communications network under the trade name "Greenlight." Wilson states that it began providing broadband services in response to demand from citizens and businesses that were dissatisfied with the private sector's broadband offerings.<sup>84</sup> In 1990, Wilson's City

<sup>81</sup> See EPB Petition at 3.

<sup>82</sup> See *id.* at 1-4, 33.

<sup>83</sup> See *id.* at 16.

<sup>84</sup> See Wilson Petition at 17-18.

Council began to study the possibility of building a municipally-owned cable system in response to citizen complaints about the high cost and low quality of available voice and video services.<sup>85</sup> At that time, Wilson reports, the incumbent cable operator — Alert Cable Television of Wilson, a division of Cablevision Industries — promised to upgrade its system with fiber optic facilities.<sup>86</sup> The provider, however, failed to follow through on this promise.<sup>87</sup> A feasibility study in 2003 concluded that a city-owned fiber optic system was financially viable and that there were “high levels of customer dissatisfaction with the services, pricing, reliability, and technological capabilities available from the current communications service providers.”<sup>88</sup> In 2005, Wilson built a fiber optic backbone connecting all City-owned facilities and “numerous [c]ity residents, businesses, schools, colleges, [and] medical facilities” contacted Wilson and requested access to and expansion of the network.<sup>89</sup> In 2006, the Wilson City Council unanimously voted to build a municipal broadband network that would become Greenlight.<sup>90</sup> In 2008, the City began signing up customers for broadband services.<sup>91</sup> According to Wilson, “initial trials found that 86 percent of customers preferred Greenlight services to those previously available.”<sup>92</sup> Wilson began providing Gigabit residential Internet service in July 2013.<sup>93</sup> Wilson’s provision of broadband appears to provide numerous benefits to the city and surrounding communities within its broadband service area:

34. *Economic Benefits.* Wilson’s deployment of a municipal broadband network has led to significant economic benefits for individuals in its community. Wilson reports that it offers triple play services at prices lower than its competitors and that it offers Gigabit Internet service all while maintaining a positive cash flow, thereby benefitting taxpayers.<sup>94</sup> As discussed further below, Wilson’s entry has “forced the established providers to offer better services and rates to their customers,” providing further economic benefits.<sup>95</sup> The fiber network also makes other municipal utilities more effective and efficient, further benefitting the public.<sup>96</sup> Wilson provides free Wi-Fi to its entire downtown area,<sup>97</sup> thereby saving money for businesses and residents and encouraging economically beneficial use of its broadband network. Wilson and commenters assert that Wilson’s broadband system has had a positive impact on jobs.<sup>98</sup> Each of the top seven employers in the community utilizes Wilson’s fiber network.<sup>99</sup>

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<sup>85</sup> See *id.* at 17.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 18.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 19 (acting under the trade name “Greenlight”).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 20.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*; see also *infra* paras. 49-55.

<sup>96</sup> Wilson Petition at 21.

<sup>97</sup> *Id.* at 22.

<sup>98</sup> See *id.* at 21; Institute for Local Self-Reliance and Rural Broadband Policy Group Reply Comments, WC Docket Nos. 14-115 and 14-116, at 20 (filed Sept. 29, 2014) (Institute for Local Self-Reliance Reply) (“If you are the mayor of Wilson and want to diversity [sic] the local economy with high tech jobs, how can you do that without building a fiber network? Many of the firms that have moved to Wilson since Greenlight was launched would not have moved there without the network.”); Netflix Comments at 3-4 (“The petitions demonstrate the many benefits that accrue to communities that have access to truly high-speed broadband. Both Wilson and Chattanooga attracted new businesses after deploying gigabit fiber broadband networks.”); New America Foundation Comments at 11

(continued...)

Wilson and others report that new residents and new businesses are moving to Wilson in part to take advantage of its fiber network.<sup>100</sup>

35. *Education and Libraries.* Wilson’s municipal broadband network also provides substantial benefits to schools and libraries, including access to advanced telecommunications capabilities “at levels they would not otherwise be able to obtain, or perhaps even afford.”<sup>101</sup> Of note, Wilson’s Greenlight network provides all Wilson County school sites with 1 Gbps symmetrical service.<sup>102</sup> Wilson’s main public library is also one of the nation’s limited number of public libraries that has broadband connection speeds of 100 Mbps or faster.<sup>103</sup>

36. *Other Benefits.* Wilson also has identified benefits its broadband services have provided in the areas of healthcare, public safety and improved network reliability. Wilson states that, after it built the fiber optic backbone connecting all city-owned facilities in 2005, medical facilities were among the entities that contacted the city and requested access to the network because the services being offered by the current providers were inadequate, overpriced, and lacked satisfactory customer service.<sup>104</sup> By responding to this demand, Wilson now provides those medical facilities with superior, affordable services.<sup>105</sup> Wilson’s fiber network also has facilitated the deployment of more than 30 public safety cameras in the city, and the city’s broadband division works in close partnership with its police department to deploy cameras as needs change.<sup>106</sup> Wilson additionally states that municipal investment in broadband has improved the reliability of communications in its community.<sup>107</sup>

37. *North Carolina Law.* The record suggests that Chapter 160A-340 of the North Carolina General Statutes (H.B. 129) was largely sponsored and lobbied for by incumbent providers.<sup>108</sup> In 2011,

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(“Wilson’s network has been instrumental in attracting new residents and new businesses to the area, which in turn has spurred additional economic activity in the community.”).

<sup>99</sup> Wilson Petition at 21.

<sup>100</sup> *Id.* at 21-22 & nn.45-46 (citing Kate Murphy, *For the Tech-Savvy With a Need for Speed, a Limited Choice of Towns with Fiber*, N.Y. Times (Apr. 2, 2014), <http://www.nytimes.com/2014/04/03/technology/personaltech/for-the-tech-savvy-with-a-need-for-speed-a-limited-choice-of-towns-with-fiber.html>; Rochelle Moore, *Wilson’s Greenlight Sees National Attention*, Wilson Daily Times (Apr. 4, 2014), <http://www.wilsonsontimes.com/News/Feature/Story/30933094---Wilson-s-Greenlight-attracts-national-attention>; Institute for Local Self-Reliance, *Being a Gig City: It’s All About the Upload*, Community Broadband Networks Initiative of the Institute for Local Self-Reliance (Mar. 20, 2014), <http://www.muninetworks.org/content/being-gig-city-its-all-about-upload>).

<sup>101</sup> Wilson Petition at 21 & n.43 (“The City of Wilson provides free broadband service, at 100 Mbps download/100 Mbps upload, to the library computer center and the Wilson Housing Authority computer labs. The City also won the competitive bidding process and now provides 1 Gbps symmetrical service to all Wilson County school facilities.”).

<sup>102</sup> See New America Foundation Comments at 10.

<sup>103</sup> See American Library Association Reply at 2.

<sup>104</sup> Wilson Petition at 17-18.

<sup>105</sup> See *id.* at 3, 46.

<sup>106</sup> *Id.* at 21 & n.44 (citing Christopher Mitchell and Todd O’Boyle, *Carolina’s Connected Community: Wilson Gives Greenlight to Fast Internet at 13-14* (Dec. 2012), <http://ilsr.org/wp-content/uploads/2012/12/wilson-greenlight.pdf> (Carolina’s Connected Community)).

<sup>107</sup> See Wilson Petition at 17-18.

<sup>108</sup> See, e.g., Town of Mooresville Comments, WC Docket Nos. 14-115 and 14-116, at 1 (filed Aug. 28, 2014) (“[H.B. 129] was a bill sponsored by the incumbent providers.”); Utilities Telecom Council Comments, WC Docket Nos. 14-115 and 14-116, at 4 (filed Aug. 29, 2014); CCG Consulting Reply Comments, WC Docket Nos. 14-115

(continued...)



North Carolina joined a number of other states that have adopted laws restricting or banning the ability of municipalities to build broadband networks.<sup>109</sup> H.B. 129 was enacted following several failed efforts between 2007 and 2010 to pass similar legislation that would have imposed impediments on the ability of a municipality to provide communications services.<sup>110</sup> These legislative efforts were sponsored by “[l]arge cable and telephone corporations led by [Time Warner Cable].”<sup>111</sup> Among other restrictions, the predecessor bills would have required municipalities to be profitable within 4 years, would have restricted financing methods, and required referenda for routine repairs.<sup>112</sup> According to one January 2013 report, many of the states with laws restricting or barring the ability of municipalities to build broadband networks passed similar laws between 2004 and 2006 “under pressure from national cable companies, telephone companies, and the American Legislative Exchange Council (ALEC).”<sup>113</sup> According to the report, ALEC members have included Time Warner Cable, AT&T, corporate executives, and over 2,000 state legislators who “sit side-by-side and collaborate to draft ‘model’ bills.”<sup>114</sup> With regard to North Carolina, it is reported that “[t]ogether, [Time Warner Cable], CenturyLink, and AT&T spent over \$1 million over a period of five years to push through [H.B. 129].”<sup>115</sup>

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and 14-116, at 1 (filed Sept. 26, 2014); *see also* Wilson Petition at 26 n.54 (“Throughout the legislative process, the City of Wilson and its public and private allies had to contend with massive campaigns of misinformation conducted by the cable and telecommunications companies in support of bills sponsored by legislators who openly admitted that they were acting at the behest of the cable and telecommunications companies.”); Christopher Mitchell and Todd O’Boyle, *The Empire Lobbies Back: How National Cable and DSL Companies Banned The Competition in North Carolina* at 14 (Jan. 2013), <http://ilsr.org/wp-content/uploads/2013/01/nc-killing-competition.pdf> (The Empire Lobbies Back) (“After several unsuccessful attempts, Time Warner Cable, CenturyLink, and AT&T finally succeeded in their quest to stifle municipal broadband.”); Carolina’s Connected Community at 16 (“The Legislature, under pressure from Time Warner Cable, CenturyLink, and others, passed a bill to restrict publicly owned networks.”); Christopher Mitchell, Director of the Community Broadband Networks Initiative with the Institute for Local Self-Reliance, *Digging into H129: Another Bill in NC to Limit Local Authority and Broadband Competition*, Community Broadband Networks, Institute for Local Self-Reliance (Feb. 17, 2011), <http://www.muninetworks.org/content/digging-h129-another-bill-nc-limit-local-authority-and-broadband-competition> (“Time Warner Cable is pushing a new bill in North Carolina to limit competition and local authority to build broadband networks.”); Fiona Morgan, *Mighty, Mighty Broadband: The Small City of Wilson is Leading the Way in Providing Faster, Cheaper Internet Service*, *Indy Week* (June 18, 2008), <http://www.indyweek.com/indyweek/mighty-mighty-broadband/Content?oid=1209049> (Mighty, Mighty Broadband); Allan Holmes, *How Big Telecom Smothers City-Run Broadband, AT&T, Comcast, Time Warner Cable Use Statehouses to Curb Public Internet Service*, *The Center for Public Integrity* (Aug. 28, 2014, updated Jan. 15, 2015, 3:00 PM), <http://www.publicintegrity.org/2014/08/26/15404/att-and-charter-battle-tennessee-grandmother-fight-competition-municipal-broadband> (“For more than a decade, AT&T, Comcast, Time Warner Cable Inc., and CenturyLink Inc. have spent millions of dollars to lobby state legislatures, influence state elections and buy research to try to stop the spread of public Internet services that often offer faster speeds at cheaper rates.”).

<sup>109</sup> *See* The Empire Lobbies Back at 1. Counts of the number of states with restrictive laws vary based on characterization of certain laws, but generally include roughly two-fifths of states. *See, e.g.*, Letter from Lisa B. Nelson et al., CEO, American Legislative Exchange Council, to Tom Wheeler, Chairman, FCC, WC Docket Nos. 14-115 and 14-116, at 1 (filed Aug. 29, 2014) (ALEC Comments); Craig J. Settles, *Community Broadband Snapshot Report: How to Navigate, Mitigate or Eliminate the Impacts of State Restrictions on Public Broadband* at 3 (Jan. 2015), <http://cjspeaks.com/wp/wp-content/uploads/2015/01/Snapshot-1-15.pdf>.

<sup>110</sup> *See* Wilson Petition at 26 & nn.51-54 (citing unsuccessful bills).

<sup>111</sup> *See* The Empire Lobbies Back at 6-8.

<sup>112</sup> Wilson Petition at 26 n.54.

<sup>113</sup> The Empire Lobbies Back at 1.

<sup>114</sup> *Id.* at 2. AT&T was reported as one of ALEC’s largest funders in 2010. *Id.*

<sup>115</sup> The Empire Lobbies Back at 1-2; *see also id.* at 1 (stating that after 2006, “Time Warner Cable, CenturyLink, and AT&T kept the issue alive in North Carolina, lobbying for a bill nearly every year”). The SouthEast Association of

(continued...)

38. Following these lobbying efforts, in 2011 the North Carolina General Assembly enacted H.B. 129, which places numerous restrictions on municipalities wishing to provide “communications services” in the state of North Carolina.<sup>116</sup> Wilson County qualifies for a limited “grandfathering” exemption under H.B. 129 because its service predates the passage of H.B. 129.<sup>117</sup> This exemption allows Wilson to provide communications services in Wilson County free from many of H.B.129’s restrictions.<sup>118</sup> However, the “grandfathering” exemption does not permit Wilson to provide communications services in the five other immediately adjacent counties that comprise the remainder of its electric service territory.<sup>119</sup>

39. *Comparative Data.* As with EPB, SBI Data show that the portions of the counties within Wilson’s electrical service area that do not obtain broadband service from Wilson have a significantly worse range of advanced telecommunications capability choices than the national average, having few or no advanced telecommunications capability choices. Below, we provide charts created using SBI Data as of December 31, 2013, illustrating the number of providers of residential and/or business fixed terrestrial advanced telecommunications capability available to individuals in the five non-Wilson counties within Wilson’s electrical service area at 25 Mbps/3 Mbps and at 3 Mbps/768 kbps.<sup>120</sup> The first chart shows that 30 percent of the housing units in the area in question in North Carolina lack access to two or more providers at 3 Mbps/768 kbps, compared to a national average of just 12 percent. The second chart shows that in the area in question in North Carolina, 33 percent of housing units lack access to 25 Mbps/3 Mbps, compared to a national average of 16 percent; and 97 percent of housing units in the area in question in North Carolina lack access to two or more 25 Mbps/3 Mbps broadband providers, compared to a national average of just 61 percent. We also attach a map created using these same underlying SBI Data to illustrate the number of advanced telecommunications capability options at our present standard of 25

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Telecommunications Officers and Advisors (SEATO) states that “proponents of [H.B. 129] included the companies who would be, and were, competing with [the] City of Wilson’s and other municipal fiber networks,” including Time Warner Cable, the North Carolina Cable and Telecommunications Association (NCCTA), and CenturyLink. SEATO Comments, WC Docket Nos. 14-115 and 14-116, at 2 & n.3 (filed Aug. 27, 2014) (SEATO Comments).

<sup>116</sup> Act of May 21, 2011, 2011 N.C. Sess. Laws 84 (N.C. 2011), <http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H129v7.pdf> (H.B. 129). The term “[c]ommunications service” is defined in Section 160A-340 as “[t]he provision of cable, video programming, telecommunications, broadband, or high-speed Internet access service to the public, or any sector of the public, for a fee, regardless of the technology used to deliver the service.” N.C. Gen. Stat. § 160A-340(3).

<sup>117</sup> Although H.B.129 contains two other exemptions, in Sections 160A-340.2(a)-(b), we discuss more fully below our conclusion that neither of these exemptions provide meaningful relief from the restrictions contained in H.B.129. *See infra* paras. 92, 101-105.

<sup>118</sup> *See* N.C. Gen. Stat. § 160A-340.2(c)(3)(c).

<sup>119</sup> *See id.* At the time that Wilson financed and constructed its fiber optic broadband network in 2008, it had clear authority to do so under then-existing North Carolina Law, N.C. Gen. Stat. § 160A-311. In 2005, the North Carolina Court of Appeals and Supreme Court confirmed that the authorization to operate cable television systems in that statute included the authority to operate a broadband system providing broadband Internet access service, whether or not the network was also used to provide cable television. *See BellSouth Telecomm., Inc. v. City of Laurinburg*, 606 S.E.2d 721, 726-28 (N.C. Ct. App. 2005); *see also* Wilson Petition at 19. Below, we discuss in further detail how H.B. 129 is a barrier to broadband investment and competition because it forces inefficiencies onto Wilson by artificially limiting Wilson from providing communications services in the five immediately adjacent counties that comprise the remainder of its electric service territory. *See infra* Section III.B.

<sup>120</sup> The specific counties included are Edgecombe, Johnston, Nash, Pitt, Wayne, and Wilson. *See* Rochelle Moore, *Wilson Deals With 40 Million Gallons of Water*, *The Wilson Daily Times*, N.C., May 1, 2014, at 2 (2014 WLNR 11696871) (identifying counties in Wilson’s electric service territory).

Mbps/3 Mbps available in the six counties in which Wilson provides electrical service.<sup>121</sup> Unlike the charts below, the map includes Wilson’s broadband service and shows the sharp contrast in access to modern advanced telecommunications capability in areas with and without service from Wilson. Just as for EPB, Wilson’s 1 Gbps symmetrical service is vastly faster than the speed threshold illustrated by the map.<sup>122</sup> We also note that for the same reasons discussed above with respect to EPB, these charts and map likely slightly overstate available service.<sup>123</sup>

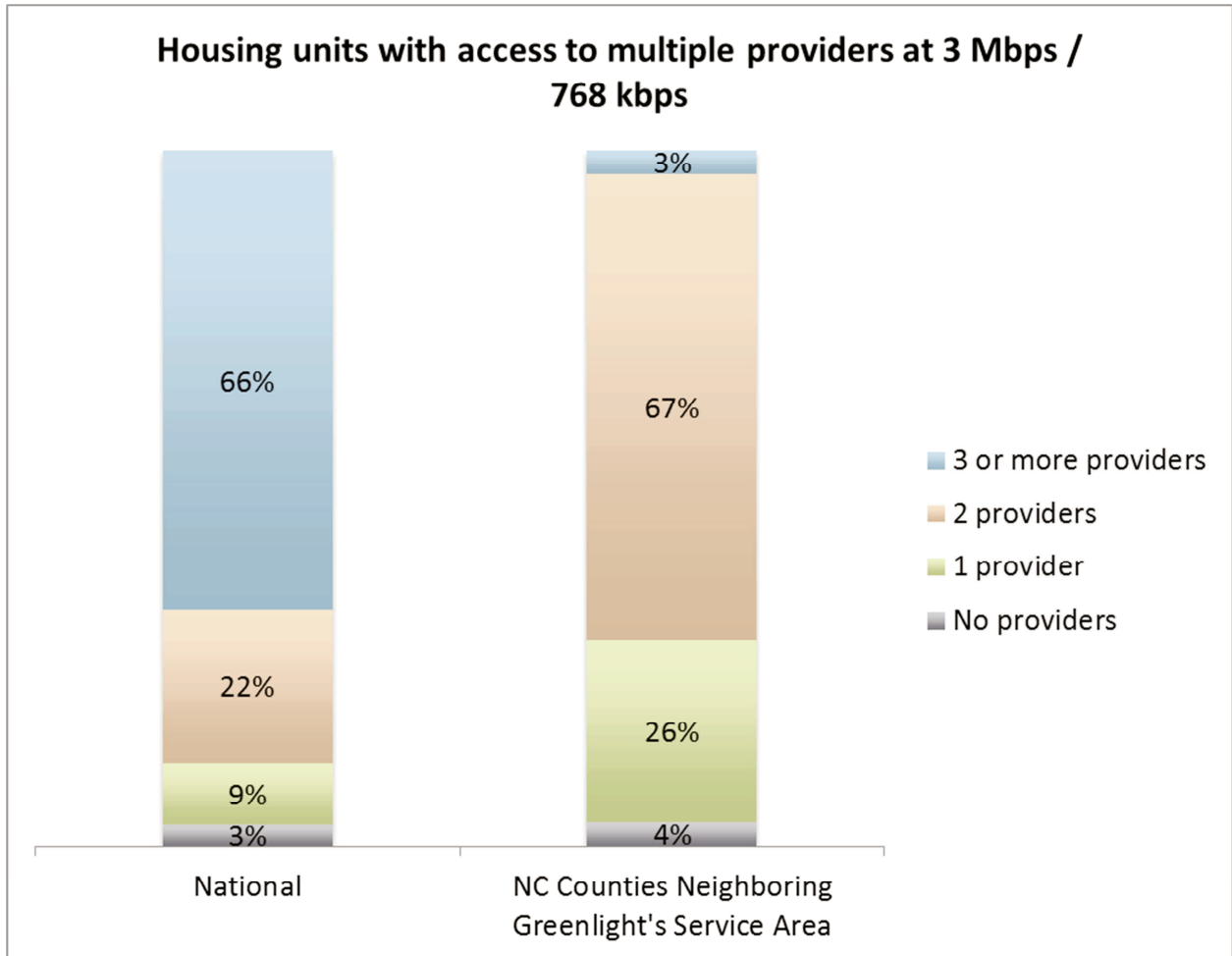


Chart indicates providers of fixed terrestrial technologies.

<sup>121</sup> See *infra* Attach. B (Wilson/North Carolina Map).

<sup>122</sup> See *id.* The Wilson/North Carolina Map in Attachment B shows that Greenlight’s service territory encompasses a small portion of Nash County, reflecting Greenlight’s service to Zackly-Right Farms, a local business that crosses the Wilson and Nash borders. Wilson’s service to this location predates the passage of H.B. 129.

<sup>123</sup> See *supra* para.31.

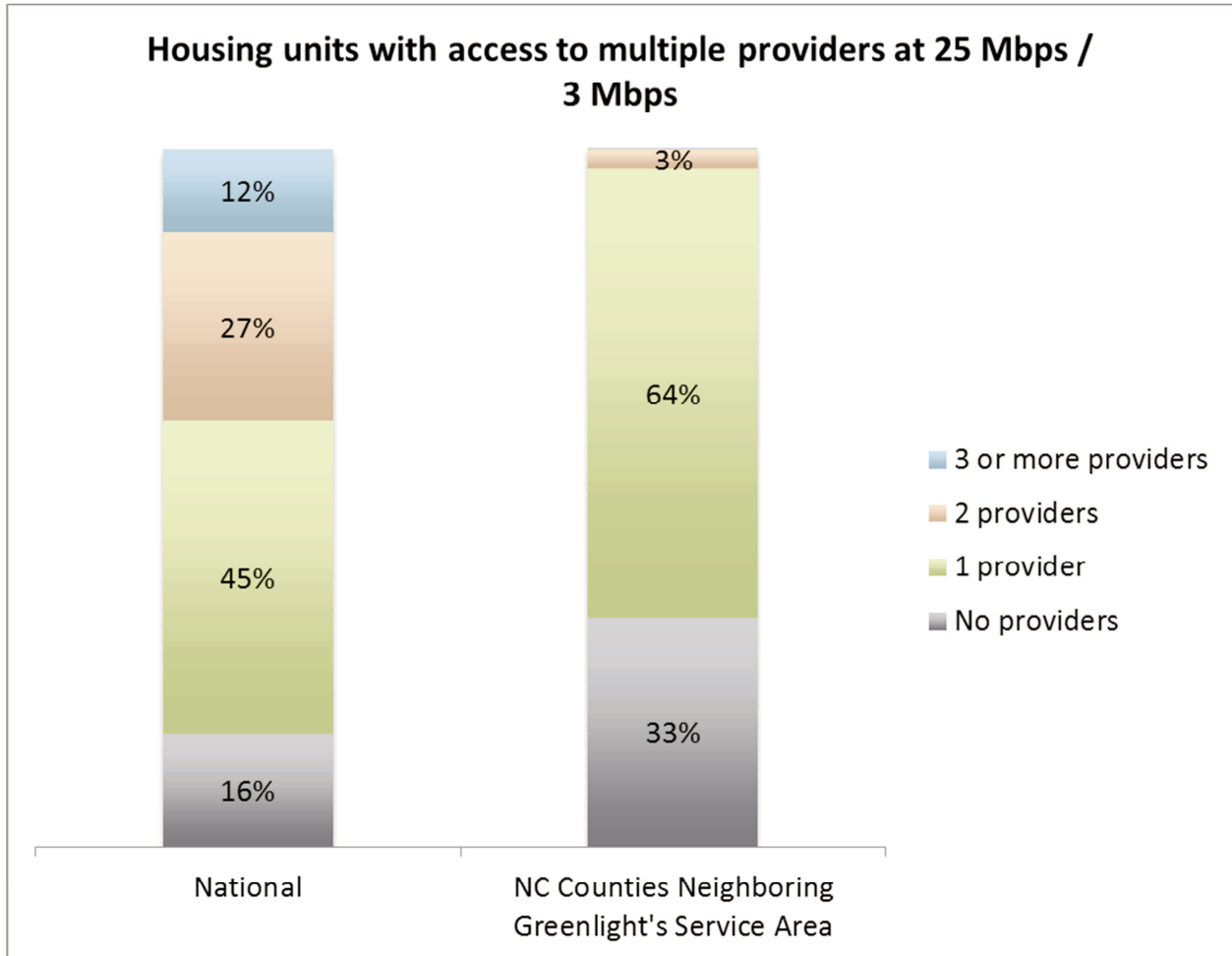


Chart indicates providers of fixed terrestrial technologies.

40. *Preemption Request.* Wilson asserts that it has been unable to expand into these five adjacent counties since the enactment of H.B.129, despite “numerous requests” for communications services from residents and businesses in these counties where Wilson provides electric service,<sup>124</sup> and

<sup>124</sup> See Wilson Petition at 2. The record contains many comments filed by individual commenters who are dissatisfied with existing broadband service in North Carolina. See e.g., Benjamin Jacob Downey Comments, WC Docket No. 14-115, at 1 (filed Aug. 6, 2014) (“Please preempt [sic] North Carolinas [sic] State Law 160A-340. This law is stifling, especially in rural communities residents ability to advance in education, nurture economic opportunities, engage in the democratic process, and restricts the diffusion of both new and innovative ideas.”); Kevin Flanagan Comments, WC Docket No. 14-115, at 1 (filed July 30, 2014) (“We need more options that provide greater than [sic] 10MB/Sec access to the [sic] internet, not fewer.”); Marian Norton Comments, WC Docket No. 14-115, at 1 (filed Aug. 1, 2014) (“Many rural areas of North Carolina still lack adequate access to the internet. Wilson NC has demonstrated that they can serve areas with futuristic speeds. Perhaps if this state legislation had not deterred expansion my home would have broadband by now.”); cf. Michael Keller Comments, WC Docket No. 14-115, at 1 (filed July 29, 2014) (“Municipal broadband will tend to have the effect of forcing other incumbent providers to compete not only on price, but also on quality of service delivered and on quality of customer service.”); Patrick Seymour Comments, WC Docket No. 14-115, at 1 (filed July 29, 2014) (“In particular, I find it troubling that there exists regulations against the expansion of publicly owned broadband services backed almost entirely by cable industry companies and lobbyists, and brought into legislative sessions by public officials being sponsored by the cable industry.”).

that H.B. 129 is therefore an impermissible barrier to broadband infrastructure investment and competition contrary to section 706.<sup>125</sup> According to Wilson, the purpose and effect of H.B.129 is to

require[] the municipality to run a gauntlet of barriers that have no purpose other than to make it as difficult as possible for the municipality to meet these goals [of providing advanced telecommunications capabilities]. Should the municipality somehow survive this regulatory minefield, Section 160A-340 then imposes limitations on its day-to-day activities that make successful operations all but impossible to achieve.<sup>126</sup>

41. Wilson requests that we find that H.B.129 serves to “thwart or unreasonably delay” broadband investment and competition contrary to section 706 and preempt H.B.129.<sup>127</sup>

## **II. PREEMPTION OF PROHIBITIONS ON MUNICIPAL PROVISION OF BROADBAND WILL LIKELY LEAD TO INCREASED OVERALL BROADBAND INFRASTRUCTURE INVESTMENT AND PROMOTE OVERALL BROADBAND COMPETITION IN TENNESSEE AND NORTH CAROLINA, CONSISTENT WITH SECTION 706**

42. In this section, we conclude that preemption meets the standard for action under section 706 because it will remove barriers to overall broadband infrastructure investment and promote overall competition in the telecommunications market in Tennessee and North Carolina.<sup>128</sup> The record contains a number of generalized commenter claims purporting to show shortcomings of municipal broadband.<sup>129</sup> Many of these are irrelevant to the inquiry before us today. To the extent these arguments attempt to show that the laws in question actually protect and promote broadband competition and deployment by restraining various purportedly harmful effects of municipal broadband, we find the comments unconvincing and unsupported by the record.

### **A. EPB and Wilson Provide Service Because Pre-Existing Service Did Not Meet Community Needs**

43. Numerous commenters favor preemption because they wish to obtain service from EPB or Wilson but are unable to do so,<sup>130</sup> and the maps and data discussed above illustrate that communities

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<sup>125</sup> See Wilson Petition at 2-3.

<sup>126</sup> *Id.* at 27.

<sup>127</sup> *Id.* at 2-3; see also Letter from James Baller to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-115 (filed Mar. 6, 2015), Attach., Letter from James Baller to Commissioner Michael O’Rielly, FCC, WC Docket No. 14-115 (Feb. 27, 2015) (“The City of Wilson would like to clarify the record on [what the City of Wilson said during a meeting with Commissioner O’Rielly]. During our visit with you on January 20, 2015, representatives of the City did not say that the City could live [with] any of the restrictions in S.L. 2011-84, which the City was challenging in its entirety. Rather, we stated that removing S.L. 2011-84 would not leave the City free of regulation, as it would still have to comply with the substantial body of requirements that existed before S.L. 2011-84 was enacted. Those are the requirements that the City said it could live with, not the barriers imposed by S.L. 2011-84.”). *But see* Letter from Michael P. O’Rielly, Commissioner, FCC, to Marlene Dortch, Secretary, FCC, WC Docket No. 14-115 (filed Mar. 2, 2015) (stating that during his meeting with Wilson Commissioner O’Rielly noted that many state restrictions on municipal broadband, “such as public hearing and voting requirements, seemed like common sense practices,” and that “[d]uring the course of that discussion, the City of Wilson said that they could live with such requirements”); Dissenting Statement of Commissioner Michael O’Rielly at 125 (stating that “the overly broad extension of this item would overrule certain sound restrictions justified by the use of taxpayer funding, such as public hearings and voting requirements even though, when I met with the City of Wilson, they said that they could live with them”).

<sup>128</sup> Our decision in this Order allows for greater local choice in Tennessee and North Carolina. This Order does not require any community to deploy anything.

<sup>129</sup> See *infra* Section II.C.

<sup>130</sup> See *supra* paras. 29 & n. 72, 40 & n. 124.



surrounding EPB's and Wilson's current areas of broadband service have far fewer choices for advanced telecommunications capability than the national average.<sup>131</sup> This suggests that further expansion could generate improved levels of investment and competition in these locations.

44. Wilson's existing deployment and the proposed expansion by EPB and Wilson reflect patterns of deployment in areas where existing private sector service is not meeting policy goals and community needs:

- *Wilson*: Prior to Wilson's initial construction of fiber between municipal buildings, the incumbent cable operator, a Cablevision subsidiary, promised to upgrade its system with fiber optic facilities, but failed to follow through on this promise.<sup>132</sup> After Wilson built a fiber optic network that connected all city-owned facilities in 2005, residents, businesses, and other organizations expressed significant demand for access to and expansion of that network because "the services being offered by the current providers were inadequate and overpriced, and customer service was unsatisfactory."<sup>133</sup> The incumbent wireline communications service providers, Time Warner Cable and Embarq, were unwilling to build or partner with the city in building a fiber to the home network in Wilson.<sup>134</sup> Wilson states that it had strong support from the community and businesses when it constructed its fiber optic broadband network in 2008 and the community has reacted very favorably.<sup>135</sup>
- *EPB/Wilson Expansion*: EPB and Wilson assert that they seek preemption because residents and businesses located outside the areas they are currently permitted to serve are not satisfied with private sector broadband offerings, where available, and that there are additional opportunities for EPB and Wilson to provide service at prices and speeds not currently available.<sup>136</sup>

45. EPB, which deployed its existing broadband service in conjunction with the electric system smart grid, provides a clear example of a municipal utility deploying broadband where the opportunity to take advantage of synergies with existing municipal services was a significant factor in its deployment decision.<sup>137</sup> Although some commenters argue that Chattanooga was well-served by private

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<sup>131</sup> See *supra* paras. 30-31, 39; see also EPB Petition at 1 n.3, 34, Exh. 1 (stating that large areas neighboring its electric service territory are unserved or underserved by broadband as shown on the Connected Tennessee map in Exhibit 1); Wilson Petition at 23, Exh. A, 36, 45-46 (noting the demand in both unserved and underserved areas in which Wilson is already providing electric service but not broadband service).

<sup>132</sup> Wilson Petition at 17.

<sup>133</sup> *Id.* at 18.

<sup>134</sup> See *id.* at 18 & n.32; Wilson, North Carolina, *Greenlight History*, <https://www.wilsonnc.org/living/fiberopticnetwork/greenlighthistory/> (last visited Jan. 29, 2015). According to city leaders, Time Warner "slammed the door in our face, would not talk, period," and "laughed in our faces." Carolina's Connected Community at 6. While negotiations with Embarq were more productive, the parties were unable to come to a final agreement. See Carolina's Connected Community at 6.

<sup>135</sup> Wilson Petition at 19. This is consistent with patterns in other areas. See, e.g., Institute for Local Self-Reliance, Common Cause, Center for Media Justice, Media Mobilizing Project, National Hispanic Media Coalition, Public Knowledge, Writers Guild of America West, Benton Foundation, The Utility Reform Network (TURN), Hon. Tommy Wells, and Hon. David Grosso Comments, WC Docket Nos. 14-115 and 14-116, at 4-6 (filed Aug. 29, 2014) (Common Cause, et al. Comments); National League of Cities, National Association of Counties, U.S. Conference of Mayors, and National Association of Telecommunications Officers and Advisors Comments, WC Docket Nos. 14-115 and 14-116, at 4-6 (filed Aug. 28, 2014) (National League of Cities, et al. Comments); City of Fayetteville Comments, WC Docket Nos. 14-115 and 14-116, at 2 (filed Aug. 29, 2014) (City of Fayetteville Comments).

<sup>136</sup> EPB Petition at 2, 15-16, 35; Wilson Petition at 2, 14, 22-25, 45-46.

<sup>137</sup> See EPB Petition at 19-23, 28.

sector providers prior to EPB's deployment of broadband services,<sup>138</sup> a significant factor in Chattanooga's decision was likely anticipated cost savings and improved opportunities to serve the public from joint deployment of broadband with its smart grid. Chattanooga complied with the applicable laws and its network has been a resounding success, delivering substantial benefits to its community.<sup>139</sup> Likewise, Wilson's initial deployment of fiber between municipal buildings was made in part to save money through self-provisioning.<sup>140</sup>

46. The decisions by EPB and Wilson to invest in broadband were driven by, among many factors, a desire to improve service beyond levels of investment in the same communities by private sector entities. The investment and deployment that has already occurred in these areas, combined with the additional investment and deployment that would occur if not for the state laws at issue, exemplifies why preemption removes barriers to overall broadband infrastructure investment and promotes overall broadband competition in Tennessee and North Carolina. While private providers necessarily focus on the "bottom line," municipalities can consider a wide range of community benefits discussed above in their decision-making process. EPB and Wilson exemplify this pattern, as their petitions make clear that community benefits were significant considerations in their decisions to deploy initially and in their current desire to expand their broadband offerings.<sup>141</sup> Numerous commenters agree that municipalities deploy broadband service where private providers find doing so uneconomical precisely because of the community benefits that broadband provides.<sup>142</sup> This suggests that these community benefits that EPB, Wilson, and other municipal broadband providers in Tennessee and North Carolina unlock may come from (1) reducing market failure, either due to a lack of competition and/or from capturing positive externalities of broadband that the market is unable to, and/or (2) achieving community public policy goals, including promoting broadband deployment and infrastructure investment (goals that Congress has identified and charged the Commission with implementing).<sup>143</sup> The differing characteristics of municipalities and private entities explain why EPB, Wilson, and other similarly situated broadband providers in Tennessee and North Carolina can invest in broadband beyond levels of investment in the same communities by private sector entities.

47. In markets where there is little to no existing competition, as appears to be the case in a number of areas outside of the current service territories of EPB and Wilson, municipally provided service may correct market failures, thereby ensuring that the municipality's citizens have better

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<sup>138</sup> See, e.g., Digital Liberty Comments, WC Docket Nos. 14-115 and 14-116, at 3-4 (filed Aug. 29, 2014) (Digital Liberty Comments); Taxpayers Protection Alliance Reply at 5. *But see* Letter from James Baller to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 14-115 and 14-116, at 1 (filed Jan. 21, 2015) ("Before embarking on developing [its] own fiber network[], . . . Chattanooga asked [the] incumbent communications service providers to upgrade their facilities to meet the community's needs. None of the incumbents was willing to do so."); *id.* at 1-2 (stating that "Chattanooga had widespread, bipartisan local support for developing [its] fiber network[], including broad support from major businesses").

<sup>139</sup> We note that EPB vastly increased the broadband speeds available to those within its service territory while generating revenue from its broadband service without cross-subsidization from its electrical service, indicating that there was substantial unmet demand. See *infra* Section II.B. (discussing the positive competitive response to municipal broadband in Chattanooga and elsewhere).

<sup>140</sup> Wilson Petition at 17.

<sup>141</sup> See, e.g., EPB Reply at 5; Wilson Reply at 5.

<sup>142</sup> See, e.g., American Public Power Association Comments, WC Docket Nos. 14-115 and 14-116, at 9 (filed Aug. 29, 2014) (APPA Comments); TMEPA Comments at 2; Town of Holly Springs, North Carolina Comments, WC Docket Nos. 14-115 and 14-116, at 4 (filed Aug. 27, 2014).

<sup>143</sup> See 47 U.S.C. § 1302.

broadband choices.<sup>144</sup> In other cases, even in the absence of market failure, communities may find that meeting additional unmet demand for broadband serves important policy priorities. For instance, the municipal provider may have both the incentive and means to serve those broadband needs that are so widely dispersed in the community they would not show up on the balance sheet of any private firm.

48. In sum, community broadband solutions in Tennessee and North Carolina such as EPB and Wilson have played and will continue to play a critical role by providing service where market failures are occurring or policy goals related to broadband deployment are not being met and where private providers may have little incentive to invest. This enhances overall broadband deployment and competition in Tennessee and North Carolina.

### **B. The Private Sector in Wilson and Chattanooga Improved Services and Reduced Rates or Halted Rate Increases in Response to Municipal Entry**

49. The experience of Wilson and EPB also suggests that the threat of entry or actual entry of a municipal provider spurs positive responses by the incumbent broadband provider. This virtuous cycle of competition further demonstrates that preemption in Tennessee and North Carolina serves the goals of section 706.<sup>145</sup>

50. *EPB*. Comcast stabilized its rates in response to EPB's entry into the market. EPB states that between 1993 and December 2008, Comcast raised its cable television rates annually, increasing its cable television rates by about 154 percent over that period.<sup>146</sup> In December 2008, as EPB neared completion of its fiber network, Comcast halted its annual rate increases and subsequently reduced its rates.<sup>147</sup> In addition, in 2013, "Comcast restructured its services into two tiers, lowering the price of an

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<sup>144</sup> Some commenters state that Americans currently have access to broadband Internet via multiple platforms and devices, including from wireless and satellite providers. *See, e.g.*, Digital Liberty Comments at 2. However, the extent to which these are viable alternatives for broadband services for consumers is unclear. The Commission has noted the inadequacies of mobile data and insufficiency of satellite data for analysis of deployment of mobile and satellite advanced telecommunications services. *See 2015 Broadband Progress Report* at paras. 9, 74-76.

<sup>145</sup> An article by Joseph Fuhr claims that, because "almost all" municipal providers are losing money, "they are pricing below cost, which results in predatory pricing." Joseph P. Fuhr Jr., Coalition for the New Economy, *The Hidden Problems with Government-Owned Networks*, at 4, 6 (2012), <http://www.coalitionfortheneweconomy.org/wp-content/uploads/2012/01/1-6-12-Coalition-for-a-New-Economy-White-Paper.pdf> (Fuhr Article); *see also* ITTA Comments, WC Docket Nos. 14-115 and 14-116, at 6 n.20 (filed Aug. 29, 2014) (citing Fuhr Article); American Consumer Institute Comments, WC Docket Nos. 14-115 and 14-116, at 9 n. 16 (filed Aug. 28, 2014) (American Consumer Institute Comments) (same). This argument is not compelling or relevant. Fuhr fails to establish that "almost all" municipal providers are losing money, and his claim that almost all municipal providers use predatory pricing is unsupported.

<sup>146</sup> EPB Petition at 27.

<sup>147</sup> *Id.* at 27, Exhs. 5, 11. At least one commenter argues that the reduced cost of broadband service from private providers in localities that have deployed municipal broadband networks is misleading because the reduced costs do not reflect the higher costs imposed on consumers outside the service area at issue. *See* Information Technology and Innovation Foundation Comments, WC Docket Nos. 14-115 and 14-116, at 6-8 (filed Aug. 29, 2014) (ITIF Comments); *see also* ITIF Comments at 8 ("By cherry picking, either within their city, or by investing only in the city itself, municipal broadband providers have an advantage over larger private sector providers of lower costs and higher revenues. To the extent they take market share away from these providers exurban and rural customers will face higher costs. This sort of cherry-picking imposes negative externalities and will leave those outside population-dense areas worse off."). The relevance of this argument to our evaluation under section 706 is not clear. Moreover, EPB's and Wilson's desire to expand outside their borders — and willingness to go to the trouble of petitioning the Commission for the right to do so — strongly belie the claim of cherry-picking. Further, ITIF fails to provide any specific evidence of cherry-picking. Another commenter objects to allowing Wilson to extend Greenlight service beyond Wilson County "until/unless they have serviced all the citizens of Wilson [C]ounty before doing so." D.G. Whitley *Ex Parte* Comments, WC Docket No. 14-115, at 1 (filed Jan. 20, 2015). We reject this argument. It is not necessary under section 706 for us to ensure that providers expand broadband services in a

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80-channel tier, while increasing the price of a new, 160-channel tier.”<sup>148</sup> Comcast recently has offered low-cost introductory rates and gift cards to consumers in EPB’s service territory to attract new subscribers.<sup>149</sup>

51. EPB’s entry into the market has also led Comcast to improve its own service. For example, in 2009, Comcast responded to the threat of EPB by investing \$15 million in the area to launch the Xfinity service.<sup>150</sup> Comcast increased its top tier download speed following EPB’s initiation of residential service, from 8 Mbps in 2008 to 105 Mbps in 2013.<sup>151</sup> BellSouth has also improved its available top speed of 6 Mbps download in 2006 compared to today’s offering by AT&T (which acquired BellSouth) with a top speed of 45 Mbps download.<sup>152</sup>

52. *Wilson.* The launch of Wilson’s municipal broadband services led incumbent providers to provide better rates and improve services.<sup>153</sup> From 2007 to 2009, Time Warner Cable raised rates for almost all of its services, but held them steady in Wilson.<sup>154</sup> Yet, in 2009, the year following Wilson’s launch of broadband service to the public, Time Warner Cable held rates in Wilson steady even though it raised rates in areas around Wilson without a comparable competitive offering.<sup>155</sup> Time Warner Cable’s rates in Wilson thereafter remained nearly flat even as they increased, sometimes significantly, in surrounding areas and other North Carolina communities.<sup>156</sup>

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certain order; it is enough that the laws are barriers and that removal is reasonably likely to lead to increased broadband deployment or promote competition. Our decision does not mandate any deployment, nor is such an issue before us.

<sup>148</sup> EPB Petition at 27.

<sup>149</sup> Dominic Rushe, *Chattanooga’s Gig: How One City’s Super-Fast Internet is Driving a Tech Boom*, The Guardian Aug. 30, 2014, <http://www.theguardian.com/world/2014/aug/30/chattanooga-gig-high-speed-internet-tech-boom>.

<sup>150</sup> Benton Foundation Comments, WC Docket Nos. 14-115 and 14-116 (filed Aug. 29, 2014), Attach., Christopher Mitchell, Institute for Local Self-Reliance & Benton Foundation, *Broadband at the Speed of Light: How Three Communities Built Next-Generation Networks at 37* (Apr. 2012), <http://ilsr.org/wp-content/uploads/2012/04/muni-bb-speed-light.pdf> (Benton Foundation Report) (citing *Fiber Takes On Cable*, Chattanooga Times Free Press, Sept. 16, 2009, <http://www.timesfreepress.com/news/2009/sep/16/fiber-takes-cable/>). This report states that Comcast offered the Xfinity service in Chattanooga before it was available in other areas, like Atlanta, GA. *Id.* at 37.

<sup>151</sup> See EPB Petition at 28; Netflix Comments at 6-7.

<sup>152</sup> See 2006 Hamilton County Study at 43; AT&T, *Chattanooga, Tennessee*, <http://www.att.com/local/tennessee/chattanooga/> (last visited Jan. 29, 2015).

<sup>153</sup> See Cogent Communications Group, Inc. Reply, WC Docket Nos. 14-115 and 14-116, at 2 (filed Sept. 29, 2014); Netflix Comments at 6-7; New America Foundation Comments at 3; Wilson Petition at 20.

<sup>154</sup> Carolina’s Connected Community at 9-11.

<sup>155</sup> *Id.*; see also Catharine Rice, Action Audits, LLC, Presentation to the North Carolina House Select Committee on High Speed Internet Access in Rural and Urban Areas (Dec. 14, 2009), <http://www.ncleg.net/documentsites/committees/HSCHSIARUA/12-14-2009/Catherine%20Rice%27s%20presentation.pdf> (stating, in a December 2009 presentation for the North Carolina House Select Committee on High Speed Internet Access in Rural and Urban Areas, that Time Warner Cable stabilized its rates in Wilson’s area while it raised rates in other non-competitive areas away from Wilson).

<sup>156</sup> See Stephanie Creech, *Greenlight Competition Affects Rates Elsewhere*, Wilson Daily Times, Sept. 25, 2010, <http://www.wilsonsouth.com/greenlight/Story/Greenlight-competition-affects-rates-elsewhere> (reporting that a consultant found that Time Warner was charging customers outside the city of Wilson up to 40 percent higher rates and that another source stated that Time Warner customers outside the City of Wilson saw increases in 2010 of anywhere from 15 to 30 percent depending on what services they receive while there were no such increases in Wilson). This article does state that Time Warner’s 2010 rates for basic cable in Wilson, which includes broadcast

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53. According to a consultant, Wilson’s Greenlight system saved residents more than one million dollars each year compared to Time Warner Cable customers in other geographic areas.<sup>157</sup> Wilson also states that its fiber network has attracted multiple Tier 1 service providers, which have now established a point of presence in Wilson and reduced the cost of bandwidth for both businesses and residents.<sup>158</sup>

54. Increased competition from Wilson’s entry into the market also led Time Warner Cable to improve its top speed. When Wilson entered the market, Time Warner Cable offered residential service at speeds no higher than 10 Mbps at \$57 per month.<sup>159</sup> In response to Wilson charging \$35 per month for the same speed of service, Time Warner Cable increased its top-tier speed.<sup>160</sup> A spokesperson specifically identified this change as occurring “because of the competitive environment.”<sup>161</sup>

55. We agree with commenters that “[f]irms are far more likely to invest when they fear competition than when they do not” and that EPB and Wilson provide an important source of competitive pressure on private firms.<sup>162</sup> This pattern of positive competitive responses further demonstrates that preemption will encourage the deployment of advanced telecommunications capability, promote competition in the local telecommunications market, remove barriers to infrastructure investment, and serve the public interest.

### C. Objections Raised in the Record Fail to Support a Different Outcome

56. Notwithstanding the benefits for Tennessee and North Carolina of additional broadband investment by EPB and Wilson some commenters raise a number of generalized objections to preemption purporting to show shortcomings of municipal broadband. Many of these arguments are irrelevant to the

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cable and cable programming tier, increased \$2.10 per month from \$49.85 per month to \$51.95 but that Time Warner’s rates in Wilson are still less than other areas in North Carolina, such as the \$59.95 rate in Raleigh. *Id.*

<sup>157</sup> *Id.* At least one commenter asserts that while consumers in Wilson may enjoy reduced broadband prices, those cost savings to consumers are at least in part off-set by increased utility prices for other services. *See* American Consumer Institute Comments at 11-12 (asserting that when Wilson began losing money on its broadband services, it began shifting those costs to its electricity customers and that “[a]ccording to its financial statements, Wilson has taken more than \$11 million from its electric and gas funds to subsidize its competitive foray into the cable business” so that “[n]o wonder Wilson’s electric rates are 50 percent higher than that of Progress Energy and its natural gas rates are 30 percent more than PSNC Energy rates” (quoting Ed McMahan, *Our Experiment With Municipal Broadband Has Failed*, Carolina Journal, Mar. 24, 2011, [http://www.carolinajournal.com/opinions/display\\_story.html?id=7562](http://www.carolinajournal.com/opinions/display_story.html?id=7562))); *see also* American Consumer Institute Comments at 2-3. However, this fails to show that preemption would not serve the goals of section 706 or that Wilson’s system has proven economically harmful for consumers.

<sup>158</sup> Wilson Petition at 21.

<sup>159</sup> Brandon Hill, *Time Warner, AT&T Win Big, N.C. Gov Won’t Veto Anti-Municipal Internet Bill*, DailyTech, May 22, 2011, <http://www.dailytech.com/Time+Warner+ATT+Win+Big+NC+Gov+Wont+Veto+AntiMunicipal+Internet+Bill/article21696.htm>.

<sup>160</sup> *Id.*; *see also* Mighty, Mighty Broadband.

<sup>161</sup> Mighty, Mighty Broadband.

<sup>162</sup> Common Cause, et al. Comments at 4; *see also* Advisory Recommendation 2014-3 of the Intergovernmental Advisory Committee, WC Docket Nos. 14-115 and 14-116, at 2 (filed Feb. 2, 2015) (“The economy and public benefit from competitive markets.”). In at least one case, in response to a community simply conducting a feasibility study, the incumbent service provider accelerated “improvements budgeted for later years” and “installed a significantly enhanced circuit to reach this remote community, enabling broadband speeds of 10 Mbps . . . [and] also began the expansion of broadband service to parts of the [c]ounty that previously were unserved.” Coalition for Local Internet Choice Comments, WC Docket Nos. 14-115 and 14-116, at 16 (filed Aug. 29, 2014) (Coalition for Local Internet Choice Comments).



present inquiry, which concerns two specific petitions and not the general question as to whether municipal broadband is good policy. Thus, we consider these arguments only insofar as they defend the state laws at issue here by attempting to show that these laws actually protect and promote broadband competition and deployment by restraining various purportedly harmful effects of municipal broadband in these two states. However, we find these assertions unconvincing and unsupported by the record.

**1. So-Called “Level Playing Field” and “Crowding Out” Arguments Do Not Justify Denying the Petitions**

57. Commenters opposing preemption argue that municipal entry into the broadband market discourages or “crowds out” private sector investment; which is presented as a criticism in and of itself and as a source of inefficiency because the public sector has advantages that the private sector does not have.<sup>163</sup> Commenters also argue that competition from municipalities is “unfair” to private sector rivals, contending that because the public sector has advantages that the private sector does not, competition is not on “a level playing field.”<sup>164</sup> Because many of these arguments are not addressed to the standards established by section 706 or the particular state laws or petitioners at issue, they simply are not relevant to our analysis. To the extent that these arguments are or can be framed as contentions that preemption would lead to reduced broadband investment and competition in Tennessee and North Carolina, however, we do not find these arguments convincing because they show only that municipalities such as Chattanooga and Wilson are different from private market participants, not that these differences are problematic. In fact, the very factors that distinguish municipalities such as Chattanooga and Wilson — including focus on policy objectives rather than short-term profitability, access to capital, and in some

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<sup>163</sup> See, e.g., AT&T Comments, WC Docket Nos. 14-115 and 14-116, at 2 (filed Aug. 29, 2014) (AT&T Comments) (“[Government-owned networks] can nonetheless discourage private sector investment because of understandable concerns by private sector entities of a non-level playing field”); American Consumer Institute Comments at 1-4 (arguing that municipal provision of broadband services often leads to “barriers to entry which displace and crowd out private investment,” discourages private competition, raises consumer costs, and is not in the public interest); Americans for Prosperity Comments at 1; CenturyLink Reply, WC Docket Nos. 14-115 and 14-116, at 2-3 (filed Sept. 29, 2014) (CenturyLink Reply) (asserting that preempting state municipal entry laws will not have a positive impact on broadband deployment or competition, but instead, would stifle private investment due to preferences and other benefits municipalities can confer upon themselves which render private investment uneconomic as a result of a skewed competitive playing field); NetCompetition Comments, WC Docket Nos. 14-115 and 14-116, at 1-2 (filed Aug. 29, 2014) (NetCompetition Comments); Digital Liberty Comments at 3 (Governments “can charge less than what is necessary to recoup investment, because they can always go back to the taxpayer pot and ‘apply’ for more grants.”); Letter from Melissa E. Newman, Senior Vice President, Federal Policy and Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 14-115 and 14-116, at 1-2 (Feb. 13, 2015); TechFreedom & International Center for Law and Economics Reply, WC Docket Nos. 14-115 and 14-116, at 9, 13 (filed Sept. 30, 2014) (TechFreedom & ICLE Reply). Some commenters appear to use the term “crowding out” without explaining what it means. See, e.g., American Consumer Institute Comments at 1-4; United States Telecom Association Comments, WC Docket Nos. 14-115 and 14-116, at 8 (filed Aug. 29, 2014) (USTelecom Comments); American Legislative Exchange Council Reply, WC Docket Nos. 14-115 and 14-116, at 5 (filed Sept. 29, 2014) (ALEC Reply). Where commenters use crowding out to mean any displacement of private sector investment by public sector investment, we believe for the reasons discussed *infra* that the benefits of implementing section 706 goals through the preemption granted in this Order are substantial and outweigh any concerns identified by commenters that may arise from such “crowding out” in the circumstances before us.

<sup>164</sup> See, e.g., Americans for Prosperity Comments at 1; North Carolina Representative Marilyn Avila Comments, WC Docket No. 14-115, at 2 (filed Aug. 29, 2014) (N.C. Rep. Marilyn Avila Comments) (“With regards to fair competition, the constraints placed on the cities [by the North Carolina law] were intended to protect against inappropriate use by the government of its inherent advantages as a governmental body – for example, control and pricing of rights-of-way, exemption from laws and regulations applicable to private industry, and exemption from the payment of taxes.”).

cases preexisting electrical plant infrastructure — are what enable them to invest where private entities have not, thereby serving Congress’s goal of increasing broadband investment and competition.<sup>165</sup>

58. For example, the intent of the Tennessee and North Carolina statutes appears to be to protect private competitors from “unfair” competition. Indeed, the preamble to the North Carolina statute makes clear that its purpose is to protect private-sector providers from competition by public-sector providers. Some commenters cast the arguments above expressly in terms of fairness, suggesting that municipal competition is unfair to the private sector.<sup>166</sup> But as to broadband Internet access — an interstate service within the core of section 706 — the Commission has the final say regarding competition policy based on our statutory mandate, and our mandate under section 706 is to expand broadband and investment as well as increase competition. As discussed above, the efforts by EPB and Wilson to deploy broadband networks are consistent with our congressional directive under section 706. We therefore must take action to enhance this important source of investment and competition in Tennessee and North Carolina.<sup>167</sup> Finally, as an example of how markets remain competitive after municipal entry, Wilson reports a total market penetration of only 33.7% (and penetration of less than half in eight new areas within Wilson County into which it expanded in 2013 and 2014), suggesting that it plays a significant role but that “fair” opportunity exists for other providers.<sup>168</sup>

59. Similarly, some commenters suggest that municipal deployment is economically inefficient.<sup>169</sup> This general argument is outside the scope of our inquiry here. Nonetheless, we are not persuaded that public provision of broadband services is inefficient in markets such as those at issue in this proceeding. Indeed, in the cases of EPB and Wilson, municipal entry has compelled incumbents to respond as one would expect any firm would respond when faced with new competition: by expanding output and choice, and reducing quality-adjusted prices.<sup>170</sup> In general, the assertion is made that, by

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<sup>165</sup> Some commenters argue that the factors that distinguish governments from private sector entities mean that governments do not really “compete.” See, e.g., Digital Liberty Comments at 3; NetCompetition Comments at 1-2. However, EPB and Wilson compete in the marketplace for broadband customers. Contrary to arguments raised by some commenters, we read section 706 to encompass “competition” from both public and private providers. See, e.g., NetCompetition Comments at 2. Any other reading would have the curious result of forcing us to ignore the competitive effect of other providers authorized to operate in the market even in states with no restrictions whatsoever. Further, as discussed below, commenters have been unable to identify any compelling evidence that municipal broadband providers are using their authority as a regulator anti-competitively. See *infra* para. 60.

<sup>166</sup> See, e.g., Americans for Prosperity Comments at 1 (“The [North Carolina] law . . . aims to prevent municipal broadband networks from having an unfair advantage over private sector providers.”). Similarly, USTelecom claims public entities enjoy access to funding sources unavailable to private firms and cites an article by Kathryn Tongue as evidence that such funding enables municipalities to unfairly undercut competition from private firms. See USTelecom Comments at 8-9 n.15. This argument is not relevant to the section 706 standards. Further, Tongue makes no attempt to show that, in the unserved and underserved markets municipal providers tend to enter, such entry fails to increase consumer welfare or fails to increase broadband deployment. Instead, Tongue treats fairness to private providers as an end goal. See Kathryn A. Tongue, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers*, 95 NW Univ. L.Rev. 1099, 1099-1139 (2001).

<sup>167</sup> See *infra* Section II.C.1.

<sup>168</sup> Wilson Petition at 20, 24.

<sup>169</sup> See, e.g., ITIF Comments at 5 (stating that restrictive state laws are needed to “to prevent inefficient waste of public resources”).

<sup>170</sup> Considerable empirical literature on the public provision of water and electric utilities also indicates that public provision of these utilities can be as efficient as private provision. See, e.g., Thomas Bruggink, *Public Versus Regulated Private Enterprise in the Municipal Water Industry: A Comparison of Operating Costs*, Q. Rev. Econ. & Bus., 1982, at 122; James Foreman-Peck & Michael Waterson, *The Comparative Efficiency of Public and Private Enterprise in Britain: Electricity Generation Between the World Wars*, Econ. J., 1985, at 83-95; P. Byrnes et al., *Efficiency and Ownership: Further Evidence*, Rev. Econ. & Stat., 1986, at 337-341; William J. Hausman & John L.

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entering into highly competitive markets, municipal broadband providers could “crowd out” private investment. There is simply no evidence that this has happened in either Chattanooga or Wilson.<sup>171</sup>

60. Some commenters argue that municipal entry distorts the marketplace because the municipality functions as both regulator and competitor and could use its authority anti-competitively.<sup>172</sup> This argument fails because these commenters are unable to identify any compelling evidence that this is an actual problem in Tennessee or North Carolina (or elsewhere).

## **2. Claims That There Is a High Rate of Municipal Broadband Failure Are Misplaced**

61. A number of commenters contend that municipal broadband systems have a high rate of failure and that municipalities do not have the expertise or resources necessary to succeed.<sup>173</sup> These commenters assert that the North Carolina and Tennessee statutory provisions and similar laws in other states protect taxpayers from local governments’ rash decisions and that states should be free to protect taxpayers from the adverse consequences of such allegedly troubled projects.<sup>174</sup> We find no basis to believe that either Chattanooga or Wilson would be highly likely to fail in their expansion efforts, given their substantial track records.

62. These arguments are misplaced. We do not read section 706 to require us to find that any particular municipal system is certain to succeed if barriers are removed; only that the law is a barrier and that removal is reasonably likely to lead to increased broadband deployment or promote competition. Based on the record before us in this proceeding, we find that both EPB and Wilson are financially sound and would likely continue investing in and deploying broadband if the artificial barriers erected by these state laws are removed. However, even if we focus on taxpayer protection, as some request, the evidence before us suggests that the Tennessee and North Carolina laws before us actually increase the likelihood of failure because of the barriers that they erect to the successful deployment of broadband infrastructure

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Neufeld, *Property Rights Versus Public Spirit: Ownership and Efficiency of U.S. Electric Utilities Prior to Rate-of-Return Regulation*, Rev. Econ. & Stat., 1991, at 414-423; Steven Renzetti & Diane Dupont, *Ownership and Performance of Water Utilities*, Greener Mgmt. Int’l, 2003, at 9-19.

<sup>171</sup> See *supra* Section II.B (discussing the positive competitive response to EPB’s and Wilson’s entry into the broadband market); *infra* Attach. A-B (illustrating the comparatively high amount of competition at 25/3 Mbps within EPB’s and Wilson’s service territories versus surrounding territories).

<sup>172</sup> See ALEC Reply at 4; NetCompetition Comments at 2.

<sup>173</sup> See, e.g., American Consumer Institute Comments at 7 (arguing that the failures of government provision of broadband services “continue to be commonplace”); Citizens Against Government Waste Comments at 3 (asserting that municipal broadband “success stories are few and far between”); National Conference of State Legislatures Comments, WC Docket Nos. 14-115 and 14-116, at 5 (NCSL Comments); CenturyLink Reply at 2, 5; Speaker of the North Carolina House of Representative Thom R. Tillis Comments, WC Docket No. 14-115, at 2 (filed Aug. 29, 2014) (N.C. Speaker Thom R. Tillis Comments); Letter from Melissa E. Newman, Senior Vice President, Federal Policy and Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 14-115 and 14-116, at 1-2 (Feb. 13, 2015) (stating that “the history of municipal overbuilding . . . is mostly about costly business failures” and that “[c]onsequently, many of the laws adopted were to protect citizens from projects that could very likely increase their taxes” including “[f]or example, the North Carolina statute”); see also Digital Liberty Comments at 2.

<sup>174</sup> See, e.g., ALEC Comments at 1-2 (stating that municipalities are not used to regularly upgrading as necessary and therefore underestimate cost); see also N.C. Speaker Thom R. Tillis Comments at 2.

by these entities.<sup>175</sup> Moreover, even if such arguments were relevant, opponents of preemption have not demonstrated convincingly a pattern of failure<sup>176</sup> in Tennessee or North Carolina.<sup>177</sup>

63. *EPB*. The weight of the evidence indicates that EPB's broadband system is financially sound,<sup>178</sup> despite some commenters' arguments to the contrary.<sup>179</sup> The record includes no credible evidence that EPB's system has failed or is likely to fail, and there is no evidence that EPB will fail to pay off its debt and recover the cost of its investment. Indeed, as mentioned above, in 2012 Standard and Poor's upgraded EPB's bond rating to AA+.<sup>180</sup> EPB's communications division had a net income of more than \$8.6 million in fiscal year 2013.<sup>181</sup>

64. Contrary to some arguments, the facts that EPB has debt and has used federal grant money do not by themselves demonstrate failure.<sup>182</sup> Standard and Poor's AA+ bond rating indicates that EPB's debt is not a problem that is likely to lead to failure. Although some commenters argue that that

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<sup>175</sup> See *infra* Sections III, IV.E, and IV.F.

<sup>176</sup> In the context of section 706, "failure" must be something more than using taxpayer funds: private broadband providers also use public funds to preserve and advance universal service, and doing so is consistent with Congress's policy goals. See generally 47 U.S.C. § 254. Further, since municipal deployment of broadband where existing service does not meet community needs serves the goals of section 706, the concept of "failure" here must encompass whether a municipal broadband network is meeting the goals of the community and not merely whether it produces a profit or whether its profitability timeline meets private sector standards for return on investment. To conclude otherwise would be inconsistent with longstanding efforts to provide explicit governmental support to ensure universal service in areas where there is no private sector business case.

<sup>177</sup> Although we decide only issues concerning the laws of Tennessee and North Carolina, we note that the record simply does not support the assertion that "almost all government-owned networks are losing money and that virtually all of them have a negative net present value" or other similar assertions. ITTA Comments at 6 (citing Fuhr Article); see also, e.g., CenturyLink Reply at 4 & n.14. Although we do not reach a judgment on municipal broadband success or failure rates as a whole, at best for opponents of preemption the record is inconclusive. Preemption opponents do not cite any academic study that comprehensively analyzes all government-owned broadband networks. Instead, they give isolated examples of failures, many of which appear to be exaggerated. For example, AT&T cites a report that it claims "comprehensively analyzes" the ability of municipalities to maintain broadband networks. AT&T Comments at 2, n.3 (citing ACLP Report at xiii); see also ITIF Comments at 9-10 (stating that the ACLP Report provides "an extensive review of government-owned broadband networks"). In fact, the ACLP Report provides detailed "case studies" for only 10 municipal providers, does not claim that they are all failures, and fails to offer a rigorous economic analysis of the relative efficiency or sustainability of municipal providers as a whole. See AT&T Comments at 2 n.3; ACLP Report. In contrast, other commenters cite numerous examples of systems that they state are successful. See FTTH Comments at 7; EPB Reply at 22 (citing Common Cause, et al. Comments at 3-6; Coalition for Local Internet Choice Comments at 5-15, 17-18; New America Foundation Comments at 7-16; BVU Authority Comments, WC Docket Nos. 14-115 and 14-116, at 5-11 (filed Aug. 29, 2014); National League of Cities et al. Comments at 4-6; FTTH Comments at 4-7); Institute for Local Self-Reliance Reply at 8.

<sup>178</sup> See EPB Reply at 4, 21-23.

<sup>179</sup> See, e.g., American Consumer Institute Comments at 11; Americans for Prosperity Comments at 1-2; Citizens Against Government Waste Comments at 3; ITTA Comments at 10; Taxpayers Protection Alliance Reply at 1-2, 4-5.

<sup>180</sup> EPB Petition at 23; S&P EPB Report.

<sup>181</sup> EPB Petition at 23.

<sup>182</sup> Institute for Local Self-Reliance Reply at 15 ("[T]he mere presence of debt does not show that Chattanooga's EPB is a failure."); Benton Foundation Report at 10.

EPB's electric system customers are paying the price for debt incurred by EPB's broadband system,<sup>183</sup> in fact that is not the case. EPB's broadband operations are not subsidized by its electric operations. EPB states that it does not, and would not, use revenues from EPB's electric system to subsidize EPB's communications services.<sup>184</sup> EPB operates its communications services through a separate division from its electric system operations and, consistent with Tennessee law and its wholesale power contract with the Tennessee Valley Authority, EPB allocates the cost of shared facilities and expenses between its electric system division and its communications division.<sup>185</sup> Therefore, commenter assertions that EPB's communications operation has paid nothing to build the fiber used by its broadband network are incorrect.<sup>186</sup> EPB's communications operations pay for the use of the fiber network and EPB states that its electric system customers benefit from "tens of millions of dollars in communications services revenue," payments for use of facilities that would be fully funded by the electric operations in the absence of EPB's communications operations.<sup>187</sup> For instance, in the fiscal year ending June 30, 2013, the electric system received nearly \$20 million in access fees and allocation payments from EPB's communications operations.<sup>188</sup> Finally, EPB asserts that the cost of offering broadband services in areas outside its electric service territory "will be covered by service revenue, contributions in aid of construction, or other capital or operating support."<sup>189</sup>

65. *Other Systems in Tennessee.* Eight additional municipal broadband systems are operating in Tennessee.<sup>190</sup> The Tennessee Municipal Electric Power Association (TMEPA) states that these eight municipal broadband systems have been providing broadband services "competitively and with great success for several years," and that other municipalities are considering deploying similar broadband systems.<sup>191</sup> TMEPA further states that six of the eight systems it identifies offer 1 Gbps broadband connections, and all of the eight systems offer faster broadband speeds and better service than was available in their communities prior to operation of the municipal broadband systems.<sup>192</sup> As in private industry, not every effort is an unqualified success. The American Consumer Institute cites an article that concludes that municipal electric utilities in Tennessee have incurred deficits of approximately \$176 million for these communications ventures.<sup>193</sup> However, mere financial loss and/or existence of debt by

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<sup>183</sup> See Taxpayers Protection Alliance Reply at 1-5; see also Americans for Prosperity Comments at 2 (stating that, "[i]f EPB is unable to pay off its debt, creditors have the right to collect money via electric pay rates and can also increase rates on all electric customers throughout the city if necessary").

<sup>184</sup> EPB Petition at 2.

<sup>185</sup> *Id.* at 22-23 n.36 (citing Tenn. Code Ann. § 7-52-402 (prohibiting electric system subsidies of telecommunications operations); Tenn. Code Ann. § 7-52-603(a)(1)(A) (prohibiting subsidies and requiring creation of a separate division for operation of Internet and video services)).

<sup>186</sup> See Taxpayers Protection Alliance Reply at 1, 5 (stating that EPB's fiber services had to pay nothing to build its business).

<sup>187</sup> EPB Petition at 22.

<sup>188</sup> *Id.* at 22-23.

<sup>189</sup> *Id.* at 2.

<sup>190</sup> *Id.* at 15, n.31; American Consumer Institute Comments at 11.

<sup>191</sup> TMEPA Comments at 1-2; see also Letter from Joseph S. Wigington, PE, General Manager/CEO, Morristown Utility Systems, to Federal Communications Commission, WC Docket Nos. 14-115 and 14-116, at 1 (filed Nov. 12, 2014) (stating that the Morristown, Tennessee municipal fiber to the home broadband network "has significantly improved quality of life and made businesses more efficient" and that "our community is much better off having local control of its broadband needs").

<sup>192</sup> *Id.* at 1.

<sup>193</sup> American Consumer Institute Comments at 11 n.24 (citing R.J. Rizzuto, *Financial Performance of Tennessee's Municipal Cable and Internet Overbuilds* (March 21, 2011)).



itself does not demonstrate that municipal deployment is inconsistent with the goals of section 706. Another commenter argues that government-owned Memphis Networx failed due to mismanagement and “looseness with taxpayer funds,” asserting that it grossly overpaid for overhead and paid “exorbitant salaries.”<sup>194</sup> The fact that one municipal broadband provider in Tennessee struggled does not demonstrate that failure is likely, nor does it negate a finding that Tennessee law is a barrier to investment and competition under section 706.

66. *Wilson.* Municipal broadband in Wilson has been a success and the weight of the evidence indicates that Wilson’s municipal broadband system is financially sound. Wilson’s credit rating was upgraded by both Moody’s and Standard and Poor’s in late 2008, shortly after its broadband services were launched, and Moody’s reaffirmed its A1 credit rating for the city’s \$56.2 million outstanding Certificates of Participation in 2014, noting in particular the strength of Wilson’s Greenlight broadband service.<sup>195</sup> There is no credible evidence that the Wilson municipal broadband system is failing or likely to fail. Some commenters assert that, to the extent that the City of Wilson cannot recover the cost of its investment, taxpayers will bear the cost of failure.<sup>196</sup> There is no evidence that this has happened or is going to happen. Wilson financed Greenlight through Certificates of Participation and bank loans.<sup>197</sup> Certificates of Participation are financing instruments secured by the project revenues and/or the facilities purchased with the proceeds of the financing.<sup>198</sup> The bank loans were issued pursuant to installment contracts, were secured solely by the equipment purchased thereby, and the debt from these loans will be paid in full “within a few months.”<sup>199</sup> Wilson used financing options that did not involve taxpayer financing and did not put the local or state government at risk in the event of project failure; any risk of default or other financial risk caused by a failure of the Greenlight network to perform as expected would fall solely on the investors who purchased the Certificates of Participation and/or the installment debt issued by Wells Fargo.<sup>200</sup> Further, debt alone does not demonstrate failure, particularly when Wilson is able to pay off that debt.<sup>201</sup>

67. *Other Systems in North Carolina.* Some commenters specifically identify the following North Carolina systems as unsuccessful: MI-Connection in Mooresville and Davidson, North Carolina; the CoMPAS system in Morganton, North Carolina; and the Fibrant system in Salisbury, North Carolina.<sup>202</sup> However, we find that their factual claims are not dispositive under section 706 as to whether laws present barriers. Even if they were, we do not find their arguments persuasive.

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<sup>194</sup> Digital Liberty Comments at 3 (citing Andy Meek, *Memphis Networx: From Smart Money to Risky Business*, Memphis Daily News (Jun. 22, 2007), <http://www.memphisdailynews.com/editorial/Article.aspx?id=33060>).

<sup>195</sup> See Wilson Petition at 19-20; *id.*, Exh. 4, Press Release, City of Wilson, City Keeps Strong Bond Rating, Saves Money (Jun. 11, 2014) (Wilson Bond Press Release). This press release also notes that Moody’s affirmed the Aa2 rating on the City of Wilson’s \$11.1 million General Obligations bonds which are secured by the city’s unlimited ad valorem tax pledge. Wilson Bond Press Release. As noted in this paragraph, Wilson did not use General Obligations bonds to finance its municipal broadband system.

<sup>196</sup> See, e.g., NCSL Comments at 5.

<sup>197</sup> See Letter from James Baller to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 14-115 and 14-116, at 10-11 (filed Dec. 15, 2014) (Petitioners’ Dec. 15, 2014 *Ex Parte*).

<sup>198</sup> *Id.* at 10.

<sup>199</sup> *Id.* at 11.

<sup>200</sup> *Id.*

<sup>201</sup> See, e.g., Institute for Local Self-Reliance Reply at 8-11, 15-16, 31.

<sup>202</sup> See, e.g., American Commitment Comments, WC Docket Nos. 14-115 and 14-116, at 3 (filed Aug. 29, 2014) (American Commitment Comments); American Consumer Institute Comments at 8-11; The Free State Foundation Comments, WC Docket Nos. 14-115 and 14-116, at 7-8 (filed Aug. 29, 2014) (Free State Comments); ITTA



68. *Mooresville and Davidson, North Carolina.* American Commitment claims the municipal provider in these two cities, MI-Connection, has had a “disastrous performance” and failed based on a 2012 public policy report that found that MI-Connection had not made a profit in its first four years of operation.<sup>203</sup> The “disastrous performance” began in 2002 when Adelphia Communications went bankrupt after disclosing \$2.3 billion in off-balance-sheet debt and misleading investors.<sup>204</sup> The communities of Mooresville and Davidson subsequently decided to acquire the Adelphia assets out of bankruptcy in their area, operate it as MI-Connection, and upgrade it to provide video on demand and Internet-based telephone service.<sup>205</sup> Although MI-Connection did struggle,<sup>206</sup> we note that it takes time for some companies to become profitable.<sup>207</sup> And although MI-Connection “is not yet out of the woods,” its status has improved.<sup>208</sup> Notably, Google’s 2014 Video Quality Report rated MI-Connection’s Internet speeds well ahead of those of its competitors because it is the only system able to maintain a consistent video stream at least 90 percent of the time.<sup>209</sup>

69. *Morganton and Salisbury, North Carolina.* The John Locke Foundation (JLF) describes the cities of Morganton and Salisbury as examples of municipal broadband that “delivers harm, not help, to the competitive environment” in North Carolina.<sup>210</sup> With respect to the “CoMPAS” (City of Morganton Public Antenna System) system in Morganton, JLF asserts that such harm to the community is evident in two actions by the city council. The first harmful action, JLF claims, was the council’s decision to allow CoMPAS to borrow funds from two municipal funds.<sup>211</sup> The same report on which JLF relies also states, however, that CoMPAS no longer operates at a loss and its loan repayments to those

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Comments at 10 n.36; John Locke Foundation Comments, WC Docket Nos. 14-115 and 14-116, at 3-5 (John Locke Foundation Comments).

<sup>203</sup> American Commitment Comments at 2-3; *see also* ITTA Comments at 6 n.20 (citing Fuhr Article at 4). ITTA also claims MI-Connection has failed because “the towns of Mooresville and Davidson, NC, on the verge of default a few years ago, still owe \$78 million of the more than \$92 million they borrowed to buy and upgrade their jointly-owned municipal broadband network in 2007.” *See* Letter from Micah M. Caldwell, Vice President, Regulatory Affairs, ITTA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 14-115, 14-116, at 2 (filed Oct. 6, 2014) (“ITTA Oct. 6 *Ex Parte*”).

<sup>204</sup> *See* Sallie Hofmeister, *Adelphia Submits Bankruptcy Filing*, Los Angeles Times (Jun. 26, 2002), <http://articles.latimes.com/2002/jun/26/business/fi-adelphia26>.

<sup>205</sup> American Commitment Comments at 2; John Locke Foundation Comments at 4-5.

<sup>206</sup> For example, the ACLP Report states that Davidson had to use city revenue and other funds to support MI-Connection, that at one time the subsidy amounted to 20 percent of the Davidson budget, and that Davison had to cut programs, cut staff, reorganize, and charge residents a solid waste fee that equaled a four cent property tax increase. *See* ACLP Report at 151.

<sup>207</sup> *See, e.g.*, Drew Hendricks, *5 Companies That Didn’t Make a Dollar for 5 Years* (Jul. 7, 2014), <http://www.inc.com/drew-hendricks/5-successful-companies-that-didn-8217-t-make-a-dollar-for-5-years.html> (explaining that FedEx, Amazon, Turner Broadcasting System, ESPN, and Tesla Motors took almost five years or more to turn a profit).

<sup>208</sup> ACLP Report at 153. Moreover, in 2013, a Mooresville Commissioner said, “[n]o longer is MI-Connection the political albatross that it has been perceived to be -- but it is gaining acceptance as a local tool for community engagement. Its projected success was always long term -- just far longer to realizing its true value than originally projected.” Dale Gowing, *Herring: MI-Connection ‘No Longer a Political Albatross’ Here* (Nov. 6, 2013), [http://www.mooresvilletribune.com/news/herring-mi-connection-no-longer-a-political-albatross-here/article\\_0dad7e28-468c-11e3-9cf1-0019bb30f31a.html](http://www.mooresvilletribune.com/news/herring-mi-connection-no-longer-a-political-albatross-here/article_0dad7e28-468c-11e3-9cf1-0019bb30f31a.html).

<sup>209</sup> *See* David Boraks, *Google Rates MI-Connection Net Speeds ahead of Competitors*, DavidsonNews.net(Jul. 2, 2014), <http://davidsonnews.net/blog/2014/07/02/google-rates-mi-connection-net-speeds-ahead-of-competitors/>.

<sup>210</sup> John Locke Foundation Comments at 2-5.

<sup>211</sup> *Id.* at 5.

two funds will be complete in fiscal year 2014.<sup>212</sup> Based on all the information in the report, there does not appear to be any evidence of harm to the community from the municipality's decision to temporarily borrow money from two of its own reserve funds. JLF's second example of purported harm is the alleged cross-subsidization of CoMPAS cable rates by increases in taxes and electricity rates.<sup>213</sup> Significantly, the news report cited by JLF does not claim that any cross-subsidization actually occurred. On the contrary, it reports that Morganton's City Manager (a certified public accountant) said it had not occurred.<sup>214</sup>

70. With respect to Salisbury, JLF refers to a 2009 JLF public policy paper making the unsubstantiated claim that the Fibrant system would fail, a year and a half before Fibrant started offering service in November 2010.<sup>215</sup> The only other evidence cited by JLF is a July 2014 local news report stating that Moody's had downgraded Salisbury's general obligation bond rating to A3 from Aa2, and its certificates of participation rating to Baa3 from A1, noting that "A" rated cities are judged to be subject to low credit risk, and a "Baa" rating is judged to be subject to moderate credit risk.<sup>216</sup> JLF fails to explain why ratings of "low credit risk," and "moderate credit risk" indicate failure for a fiber system that has been operating for only three years. Moreover, that same news report states that the city clerk identifies that Fibrant is operating profitably for the 2013-14 fiscal year and anticipates doing so for the 2014-15 fiscal year as well.<sup>217</sup>

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<sup>212</sup> See *id.* (citing City of Morganton, Manager's 2013-2014 Budget Message, <http://www.ci.morganton.nc.us/index.php/departments/administration/1078-manager-s-2013-2014-budget-message> (Morganton Budget Message), which states that the loan repayments to the Electric Fund (\$147,953) and the General Fund (\$35,713) will be complete in fiscal year 2014 and that the final payment of \$71,425 to the Capital Reserve Fund will be made in 2015). Additionally, Wilson submitted information showing that CoMPAS operated at a net profit during the 2010 fiscal year, Morganton made its final Certificate of Participation payment in December 2010, and it expected to generate roughly one million dollars of annual net income in future years. See Letter from James Baller to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-115 (Feb. 3, 2015) (Feb. 3 Wilson Letter); Feb. 3 Wilson Letter, Attach., General Assembly of North Carolina Session 2011 Legislative Fiscal Note to House Bill 129 (Fourth Edition), at 4 (Legislative Fiscal Note).

<sup>213</sup> John Locke Foundation Comments at 5.

<sup>214</sup> See Brian Graves, *Morganton Council Hikes Tax Rate over Residents' Objections*, The News Herald (Morganton, N.C.) (Jul. 30, 2013), [http://www.morganton.com/news/morganton-council-hikes-tax-rate-over-residents-objections/article\\_80387513-1cf2-55e2-b7fc-aef40e1fbb2b.html](http://www.morganton.com/news/morganton-council-hikes-tax-rate-over-residents-objections/article_80387513-1cf2-55e2-b7fc-aef40e1fbb2b.html).

<sup>215</sup> See Michael Sanera & Katie Bethune, *Salisbury's Fiber-Optic Cable System: Another Corporate Welfare Project* at 5, John Locke Foundation Regional Brief (May 2009), <http://www.johnlocke.org/acrobat/policyReports/rb74-salisburycable.pdf>.

<sup>216</sup> See Barry Smith, *Salisbury Sewer Fees Prop Up Broadband* at 1, Carolina Journal Online, (Jul. 7, 2014), [http://www.carolinajournal.com/exclusives/display\\_exclusive.html?id=11193](http://www.carolinajournal.com/exclusives/display_exclusive.html?id=11193) (Salisbury Article). Likewise, CenturyLink claims Salisbury's investment in Fibrant is "precarious" because "Fitch Ratings downgraded the City of Salisbury's bonds on the water and sewer system . . . due to '[its] substantial support of the city-run broadband enterprise system (Fibrant) from fiscal years 2011 to 2013.'" See CenturyLink Reply at 5 & n.17 (quoting *Fitch Downgrades Salisbury, NC's Water & Sewer Revs to 'A+'; Outlook Stable*, Business Wire (Sept. 19, 2014), <http://www.businesswire.com/news/home/20140919005693/en/Fitch-Downgrades-Salisbury-NCs-Water-Sewer-Revs#.VMf0bVfzhLo> (Fitch Salisbury Article)). Significantly, *Business Wire* reports that this downgrade was just a single step, from a Fitch rating of "AA-" to "A+." See Fitch Salisbury Article. Contrary to CenturyLink's claim, nothing in this rating implies that the investment is "precarious" in any way.

<sup>217</sup> See Salisbury Article. Similarly, ITTA claims Salisbury's Fibrant system is a failure because "the city of Salisbury, NC has diverted \$7.6 million from its water and sewer fund to subsidize its municipal broadband network, which has experienced operational and debt payment shortfalls since its inception in 2010." See ITTA Oct. 6 *Ex Parte* at 2. But it is not clear why a community's decision to borrow from one of its own reserve funds to serve community needs during the first three years of operating its own fiber network in an effort to serve community needs is proof of that network's failure.

### 3. Other Objections

71. *Loss to Other Municipal Priorities.* Some argue that by increasing the likelihood of spending on municipal broadband, preemption harms other municipal priorities in Tennessee and North Carolina.<sup>218</sup> However, section 706 directs us specifically to focus on measures to enhance broadband deployment, and our decision enhances local choice in Tennessee and North Carolina without compelling any particular choice.

72. *Assertions that Commission Should Address Broadband Deployment Through Other Means.* Arguments that we should address broadband deployment solely through means other than granting the petitions mistakenly assume that these options are mutually exclusive.<sup>219</sup>

73. *Claims that the Commission Should Address Local Administrative Obstacles.* A number of parties argue that the Commission should address local government administrative obstacles to broadband deployment instead of preempting the state laws at issue here.<sup>220</sup> Parties that believe that state and local regulatory requirements are delaying broadband deployment can supplement the record in relevant proceedings or file a separate request for relief.<sup>221</sup>

74. *Claims That Municipal Competition Raises Prices Where There Is Diversity In Consumer Preferences.* The Information Technology and Innovation Foundation (ITIF) claims that a municipal provider's overbuilding of private broadband networks imposes higher prices on consumers outside the municipality's jurisdiction, thus justifying state restrictions.<sup>222</sup> ITIF fails to identify any evidence supporting this claim and we reject the argument because it fails to demonstrate that preemption would reduce overall broadband competition and investment in Tennessee or North Carolina.<sup>223</sup>

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<sup>218</sup> See, e.g., Institute for Policy Innovation Comments, WC Docket Nos. 14-115 and 14-116 at 2 (filed Aug. 29, 2014) (Institute for Policy Innovation Comments); National Governors Association Comments, WC Docket Nos. 14-115 and 14-116, at 3 (filed Aug. 29, 2014) (National Governors Association Comments).

<sup>219</sup> See, e.g., Institute for Policy Innovation Comments at 5 (stating that "better options" to preemption exist such as the "state, county, town, or even federal government could incentivize the private sector in particular geographic areas at lower costs and certainly with less exposure to taxpayer liability"); ITIF Comments at 10 (stating that while the Commission should not encourage municipally owned or operated networks, "this doesn't mean that there aren't other ways to reduce costs of deploying new networks or upgrading existing infrastructure through city and federal policy, making it easier for private actors to operate in these high fixed-cost fields").

<sup>220</sup> See, e.g., USTelecom Comments at 5-6 ("Focusing on the elimination of barriers to the deployment of private broadband imposed at the local level would be a substantially more productive use of the Commission's time."); ITIF Comments at 10 (stating the Commission should focus on working with private actors on policies to promote "[a]ccess to city assets such as rights of ways, including pole access and fees, conduit access, and city building access").

<sup>221</sup> The Commission sought comment on potential local, state, and federal government obstacles to broadband deployment in the *2011 Broadband Acceleration NOI. Accelerating Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, Notice of Inquiry, 26 FCC Rcd 5384 (Apr. 7, 2011) (*2011 Broadband Acceleration NOI*). The Commission also adopted a Notice of Inquiry in conjunction with the *2015 Broadband Progress Report* that seeks comment on possible ways to remove barriers to infrastructure investment while simultaneously promoting competition. *2015 Broadband Progress Report* at paras. 153-163.

<sup>222</sup> See ITIF Comments at 6-7.

<sup>223</sup> ITIF cites a single study that arrives at a far different conclusion, *id.* at n.8: "[T]he presence of a DSL provider in competition with a cable modem provider may or may not lower the cable provider's price, depending crucially on consumer preference diversity." Yongmin Chen & Scott Savage, *The Effects of Competition on the Price for Cable Modem Internet Access*, 93(1) Rev. Econ. & Stat. 201, 217 (Feb. 2011) (Chen-Savage Study). This modest conclusion says nothing about the effect of municipal providers on prices charged by private broadband suppliers in North Carolina and Tennessee.

### III. THE TENNESSEE AND NORTH CAROLINA STATUTORY PROVISIONS ARE BARRIERS TO BROADBAND INVESTMENT AND COMPETITION FOR EPB AND WILSON

75. In this section, we address the specific impact of the challenged Tennessee and North Carolina statutory provisions on the provision of broadband service by EPB and Wilson.<sup>224</sup> First, we determine whether these statutory provisions are “barriers” to additional broadband investment and competition for the purposes of section 706. As discussed above, both sections 706(a) and 706(b) direct the Commission to “remove barriers to infrastructure investment.”<sup>225</sup> Under section 706(b), the Commission is also required to assess broadband deployment each year and, in the event the Commission determines that advanced telecommunications capability is not being deployed in a “reasonable and timely fashion,” section 706(b) compels the Commission to take “immediate action” and “[remove] barriers to infrastructure investment and ... [promote] competition.”<sup>226</sup> Based on the record in this proceeding, we conclude that both the territorial restriction in section 601 and H.B.129 are barriers to broadband infrastructure investment and competition. With regard to Tennessee, we conclude that the language “within its service area” contained in section 601 prohibiting a municipal electric system from expanding beyond its electric service footprint is, on its face, an explicit barrier that runs counter to the policies established in section 706. With regard to North Carolina, we conclude that the provisions contained in H.B.129 identified below constitute barriers to broadband infrastructure investment and that preemption will promote competition in the telecommunications market by removing statutory barriers to such competition, so that preemption under section 706 is therefore justified.

76. Second, we consider whether preemption of H.B. 129 and the territorial restriction in section 601 would likely result in increased infrastructure investment and competition by EPB and Wilson. Specifically, we consider the demand for EPB and Wilson to expand their networks and analyze whether, in the absence of the challenged provisions, EPB and Wilson would be likely to expand to serve neighboring communities. We review both the technical and financial capabilities of EPB and Wilson and conclude that, but for the challenged statutory provisions, EPB and Wilson would likely expand their broadband services into neighboring communities and meet existing demand for service in those communities.

#### A. The Tennessee Statutory Provision, Section 7-52-601

##### 1. The Territorial Restriction in Section 601 is a Barrier to Broadband Investment and Competition

77. *The Territorial Restriction in Section 601 is an Explicit Prohibition on the Provision of Advanced Telecommunications Capabilities.* We find that the language “within its service area” contained in section 601 is an explicit barrier to broadband infrastructure investment and competition under section 706. The effect of the territorial restriction in section 601 is very clear. The fact that municipal electric systems in Tennessee can provide service within their service areas does not change section 601’s barrier to municipal electric systems providing advanced telecommunications capabilities elsewhere. We find further that section 601’s provision allowing for the possibility of expansion through pilot projects does not provide meaningful relief from the territorial restriction in section 601 because the services offered through these pilot programs are themselves subject to territorial restrictions.<sup>227</sup>

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<sup>224</sup> Included as Attachment C is Tenn. Code Ann. § 7-52-601. Included as Attachment D is H.B. 129 and other relevant North Carolina statutory provisions discussed in this Order.

<sup>225</sup> 47 U.S.C. § 1302(a).

<sup>226</sup> 47 U.S.C. § 1302(b).

<sup>227</sup> See *supra* note 68.



78. *The Territorial Restriction in Section 601 Also Is a Barrier to Broadband Investment and Competition Because It Prohibits the Provision of Video Service Outside a Municipality's Electric Footprint.* Consumers increasingly demand triple play services from their communications providers.<sup>228</sup> The territorial restriction in section 601 prohibits municipal electric service providers from providing “cable service, two-way video, [and] video programming” in addition to “Internet services” outside their electric service footprint.<sup>229</sup>

79. The Commission has recognized the nexus between providing advanced communications capability and the importance of providing “triple play” packages that include other services such as video programming, acknowledging that “a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”<sup>230</sup> And the Commission has recognized the role that offering video services can play in recovering deployment costs.<sup>231</sup> We recognize that providers may not always have a business case for building a network unless they can optimize revenue by bundling multiple services.<sup>232</sup> This bundling therefore promotes broadband deployment. Accordingly, we find persuasive EPB’s argument asserting that the inability to offer video services as part of a triple play package places the economic feasibility of investing in broadband infrastructure at risk and may preclude municipal electric providers from competing effectively for business from consumers preferring “bundled packages” combining broadband, video programming, and telecommunications services.<sup>233</sup> We therefore conclude that an absolute bar on the provision of “cable services, two-way video, and video

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<sup>228</sup> For example SNL Kagan estimates that, at the end of 2013, 43.4 percent of cable subscribers purchased the triple-play bundle. See SNL Kagan, *Cable TV Investor: Deals & Finance*, at 8 (Apr. 30, 2014).

<sup>229</sup> Tenn. Code Ann. § 7-52-601(a).

<sup>230</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, para. 62 (2006); see also *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, 25 FCC Rcd 746, 772 n. 141 (2010) (*Terrestrial Order*); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 et al.*, MB Docket No. 07-29 et al., Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17860-61, para. 116 (2007). The Commission has also noted the benefit to competition that comes from a direct competitor to an incumbent’s triple play offerings, stating that “combinations of video, voice, and data services similar to those that incumbent cable operators offer to customers (the “triple play”), thus posing a greater competitive threat than [direct broadcast satellite] to cable.” *Terrestrial Order*, 25 FCC Rcd at 765, para. 29. And the Commission also has noted the importance of offering triple play services “to the business strategies” of providers, and it has stated that triple play packages “shift the focus of competition from standalone delivered video services to bundles of video, Internet access, and telephone services.” *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10538, para. 19 (2013). In the video distribution market, the Commission has stated that “Some MVPDs [multichannel video programming distributors] differentiate their services by highlighting bundles of video, Internet access, and telephone services . . . . The major cable and telephone MVPDs focus their marketing on bundles.” *Id.* at 10538, para. 93.

<sup>231</sup> See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Notice of Proposed Rulemaking, 20 FCC Rcd 18581, 18581, para. 1 n.4 (2005) (stating that “[t]he construction of modern telecommunications facilities requires substantial capital investment” and “[a]s a consequence, the ability to offer video offers the promise of an additional revenue stream from which deployment costs can be recovered”).

<sup>232</sup> See *supra* notes 228, 230, & 231.

<sup>233</sup> EPB Petition at 4. We note that EPB has made the investment necessary to provide video services over its fiber network so it can offer triple play service packages within its existing service area. See *supra* para.22.



programming” along with “Internet services,” as a practical matter, is a barrier to providing advanced telecommunications capability in this case.<sup>234</sup>

## 2. EPB Would Deploy Additional Facilities and Expand Competitive Entry Absent the Territorial Restriction in Section 601

80. The record demonstrates that EPB would likely meet the substantial customer demand in surrounding areas absent Section 601’s territorial restriction.<sup>235</sup> As the SBI Data-based chart and map illustrate, numerous communities surrounding EPB’s service territory have few or no options for advanced telecommunications capability and would benefit from EPB expansion.<sup>236</sup> EPB states that it “seeks the opportunity to respond to requests for access to provide advanced telecommunication services that EPB regularly receives from citizens and businesses located outside EPB’s electric service territory.”<sup>237</sup> EPB also has submitted evidence to demonstrate that it has the financial resources and technical expertise to serve surrounding areas. For example, as of October 2012, Standard & Poor’s Rating Services *raised* EPB’s revenue bond rating from AA to AA+, citing revenue from EPB’s fiber network as one reason for the upgrade.<sup>238</sup> In 2012, EPB’s communications division also obtained commercial financing to replace the remaining balance of the interdivision loan provided by the electric system.<sup>239</sup> Significantly, EPB has *already* proven that, within its footprint, it can successfully deploy and manage a fiber network offering 1 Gbps service to all customers and is actually serving 63,000 subscribers.<sup>240</sup>

### B. North Carolina Statutory Provisions

#### 1. Background

81. H.B. 129 consists of six principal provisions codified together as Article 16A in Chapter 160A of the North Carolina General Statutes, and four amendments to other provisions of the General Statutes.<sup>241</sup> In this subsection, we describe the substantive provisions of H.B. 129. In subsection (2) below, we analyze whether they are barriers to broadband deployment and infrastructure investment. While there are a number of separate provisions, they can generally be grouped into three categories based on the functions that they serve: measures to raise economic costs, measures apparently aimed to “level the playing field,” and measures to impose delay. Some provisions fit comfortably in more than one category. The categorization is for convenience only, and our analysis does not hinge on into which group a provision is classified.

##### a. Measures to Raise Economic Costs

82. A number of the provisions of H.B. 129 directly increase either the retail prices a city-owned communications service provider (CSP) may charge, or its costs of providing service. Section 340.1(a)(8) prohibits a city-owned CSP from pricing “any communications service below the cost of

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<sup>234</sup> We note that in order to provide video services, EPB will need to obtain a franchise if it does not already have one. See Tenn. Code Ann. § 7-59-304(a)(1); Tenn. Code Ann. § 7-59-102(i).

<sup>235</sup> See *supra* paras. 29-32.

<sup>236</sup> See *supra* paras 30-31; see also *infra* Attach. A (EPB/Tennessee Map). Further, as noted above, the record contains many comments filed by individual commenters who are dissatisfied with existing broadband service in Tennessee. See *supra* note 72.

<sup>237</sup> EPB Petition at 2.

<sup>238</sup> EPB Timeline at 5; S&P EPB Report at 2.

<sup>239</sup> EPB Timeline at 5.

<sup>240</sup> See *supra* note 44 and accompanying text.

<sup>241</sup> H.B. 129, 2011 N.C. Sess. Laws at 84.

providing the service, including any direct or indirect subsidies received by the city-owned [CSP] and allocation of costs associated with any shared use of building, equipment, vehicles, and personnel with other city departments.” It further requires a city-owned CSP to impute costs when calculating the cost of providing service, including “the cost of the capital component that is equivalent to the cost of capital available to private communications service providers in the same locality” and “an amount equal to all taxes, including property taxes, licenses, fees, and other assessments that would apply to a private communications service provider, including federal, State, and local taxes; rights-of-way, franchise, consent, or administrative fees; and pole attachment fees.”<sup>242</sup> The combined effect is to raise the retail price that municipal providers may charge.

83. Several provisions also require city-owned providers to make payments in lieu of taxes to state, county, or local governments equivalent to the amounts that private-sector providers might be required to pay in taxes or fees. Under section 340.1(a)(9), a city with a city-owned CSP must annually “remit to the general fund of the city an amount equivalent to all taxes or fees a private communications service provider would be required to pay the city or county in which the city is located . . . .” This amount must include any applicable tax refunds the city-owned CSP received “because of its government status,” and “a sum equal to the amount of property tax that would have been due if the city-owned [CSP] were a private communications service provider.”<sup>243</sup> Section 340.5 provides that city-owned CSPs “shall be exempt from property taxes,” but then requires them to make payments in lieu of taxes (PILOT) to the county for property taxes, and to the State for “State income, franchise, vehicle, motor fuel, and other similar taxes.”<sup>244</sup> The statute also provides that city-owned CSPs will not be eligible for sales or use tax refunds on purchases of tangible personal property unless a private-sector CSP would be entitled to such a refund.

84. Section 340.1(a)(3) limits a city-owned CSP to providing communications service only “within the corporate limits of the city providing the communications service.”<sup>245</sup> As described below, this territorial restriction functions to impose additional economic costs on entering or competing in the market by restricting the number of customers over which fixed costs may be spread.

#### **b. “Level Playing Field” Obligations**

85. Section 340.1(a)(1) requires a city-owned provider to comply “in its provision of communications service with all local, State and federal laws, regulations, or other requirements” that would apply to the service if provided by a private sector provider.<sup>246</sup> Section 340.1(a)(6) prohibits a city-owned provider from airing advertisements “or other promotions” for itself on a public, education, or governmental access (PEG) channel if the city requires another communications service provider to carry the channel. The city is further prohibited from using “city resources that are not allocated for cost accounting purposes to the city-owned communication service to promote city-owned communications service in comparison to private services” and may not require, directly or indirectly, city employees, officers, or contractors to purchase city services.<sup>247</sup> In turn, section 340.1(a)(7) bars a city-owned CSP from “subsidiz[ing] the provision of communications service with funds from any other non-communications service, operation, or other revenue source, including any funds or revenue generated from electric, gas, water, sewer, or garbage services.”<sup>248</sup>

<sup>242</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(8).

<sup>243</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(9).

<sup>244</sup> N.C. Gen. Stat. Ann. § 160A-340.5(a)-(b).

<sup>245</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(3).

<sup>246</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(1).

<sup>247</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(6).

<sup>248</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(7).

86. Section 340.1(a)(5) requires that the city-owned CSP must also provide “nondiscriminatory access to private communications service providers on a first-come, first-served basis to rights-of-way, poles, or conduits, owned, leased, or operated by the city” unless the facilities lack sufficient access and none can reasonably be added.<sup>249</sup> The statute defines “nondiscriminatory access” to mean “that, at a minimum, access shall be granted on the same terms and conditions as that given” to a city-owned CSP.<sup>250</sup>

87. H.B. 129 also amended the definition of “public utility” in North Carolina General Statutes section 62-3 to include a city or joint agency that is “[c]onveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation.”<sup>251</sup>

### c. Measures to Impose Delay

88. A number of the provisions of H.B. 129 directly or indirectly impose delay on city-owned CSPs seeking to provide or expand service. Section 340.3 sets forth a series of public notice and hearing requirements that a “city or joint agency that proposes to provide communications service” must meet “for the purpose of gathering information and comment.”<sup>252</sup> The city must make available “any feasibility study, business plan, or public survey conducted or prepared [...] in connection with the proposed communications service project.”<sup>253</sup> Specifically, a city “shall hold not fewer than two public hearings,” “not less than 30 days apart.”<sup>254</sup> Notice “shall be published at least once a week for four consecutive weeks in the predominant newspaper of general circulation in the area in which the city is located.” The city must also provide notice to the North Carolina Utilities Commission. At least 45 days prior to the hearing subject to the notice, the city must provide written notice by U.S. mail to all companies that have requested service of such notices from the city clerk. Section 340.3 provides that private communications service providers may “participate fully in the public hearings by presenting testimony and documentation relevant to their service offerings and the city’s plans.”<sup>255</sup> The statute “does not apply to the repair, rebuilding, replacement, or improvement of an existing communications network,” but does not unambiguously exempt geographic expansions of existing systems.<sup>256</sup> The notice and public hearing obligations apparently apply to all municipal systems, even those that are exempted from other provisions of the statute.<sup>257</sup>

89. Section 340.4, discussed in more detail below, requires a city or joint agency to hold a special election “on the question of whether the city may provide communications service” before incurring debt relating to communications service facilities.<sup>258</sup> Under North Carolina law, a special election must be held at the same time as a regularly scheduled general election, meaning either

<sup>249</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(5).

<sup>250</sup> *Id.*

<sup>251</sup> See § 2.(a), H.B. 129, 2011 N.C. Sess. Laws at 84, *codified at* N.C. Gen. Stat. Ann. § 62-3(23)(l).

<sup>252</sup> N.C. Gen. Stat. Ann. § 160A-340.3.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> See, e.g., N.C. Gen. Stat. Ann. § 160A-340.2 (setting out exemptions from certain provisions of H.B. 129, but not notice and public hearing provisions).

<sup>258</sup> N.C. Gen. Stat. Ann. § 160A-340.4(a)-(b).

November or May.<sup>259</sup> We note that this could also be considered a “level playing field” restriction because opponents of community broadband often discuss a city’s ability to issue low-cost debt as an unfair competitive advantage, and these restrictions serve to constrain a city’s ability to obtain capital.

90. Section 340.6 requires a city to “first solicit proposals from private business” before it “construct[s] a communications network” to provide communications service.<sup>260</sup> The subsections of section 340.6 provide specific requirements regarding how the city’s request for proposals should be structured, the information it must contain and solicit, the methods and timing by which it must provide notice of its request for proposals. Additionally, section 340.6 imposes specific requirements on how the city may negotiate with private business that respond to its request for proposal, and the time period it must allot to attempts to negotiate with respondents. If the city is unable to negotiate a contract with either the most responsive or second-most responsive respondent within 60 days of the opening of the proposals, the statute provides that it may proceed to provide communications service.<sup>261</sup>

91. Section 3 of H.B. 129 added a new article to North Carolina’s Fiscal Control Act. This new section, titled “Borrowing by Cities for Competitive Purposes,” imposed “additional requirements to an application for financing by a city or a joint agency . . . for the construction, operation, expansion, or repair of a communication system.”<sup>262</sup> This new article requires a city to first complete the notice and public hearing process in section 340.3,<sup>263</sup> and then submit an application for financing to the North Carolina Utilities Commission.<sup>264</sup> Under the new article, the state Commission must accept written and oral comments from “competitive private communications service providers in connection with any hearing or other review of the application,” and must “make written findings on the reasonableness of the city or joint agency’s revenue projections in light of the current and projected competitive environment . . . .”<sup>265</sup> The city or joint agency bears the burden of persuasion, even with respect to comments from a private sector provider.<sup>266</sup>

92. H.B. 129 also includes limited exemptions for certain services or pre-existing systems. Section 340.2(a) exempts “the purchase, lease, construction, or operation of facilities by a city to provide communications service within the city’s corporate limits for the city’s internal governmental purposes” from many of the statutes restrictions.<sup>267</sup> Section 340.2(b) exempts “the provision of communications service in an unserved area” from those restrictions, subject to a determination from the North Carolina Utilities Commission that the area is “unserved,” as described in the statute.<sup>268</sup> In section 340.2(c), pre-existing systems as of January 1, 2011 are exempted from many of the statute’s restrictions, provided they limit the provision of service to specified customers or geographic areas described in the statute.<sup>269</sup> In the

<sup>259</sup> N.C. Gen. Stat. Ann. § 163-287(a) (“The special election may be held only . . . [a]t the same time as any other State, county general election . . . [or a]t the same time as the primary election in any even-numbered year . . . [or a]t the same time as any other election requiring all the precincts in the county to be open . . . [or a]t the same time as a municipal general election, if the special election is within the jurisdiction of the municipality only.”); *see also* N.C. Gen. Stat. Ann. § 163-1(b), (c) (primaries held on the first Monday in May and general elections held in November).

<sup>260</sup> N.C. Gen. Stat. Ann. § 160A-340.6(a).

<sup>261</sup> N.C. Gen. Stat. Ann. § 160A-340.6(f).

<sup>262</sup> *See* § 3, H.B. 129, 2011 N.C. Sess. Laws at 84, *codified at* N.C. Gen. Stat. Ann. § 159-175.10.

<sup>263</sup> N.C. Gen. Stat. Ann. § 159-175.10(1).

<sup>264</sup> N.C. Gen. Stat. Ann. § 175.10(2).

<sup>265</sup> N.C. Gen. Stat. Ann. § 175.10(3), (4).

<sup>266</sup> N.C. Gen. Stat. Ann. § 175.10(5).

<sup>267</sup> N.C. Gen. Stat. Ann. § 160A-340.2(a).

<sup>268</sup> N.C. Gen. Stat. Ann. § 340.2(b); *see also infra* paras. 102-104.

<sup>269</sup> N.C. Gen. Stat. Ann. § 160A-340.3.

event a city covered by subsection (c) provides service “to a customer outside the limits set forth in that subsection,” the city will lose the exemption if it does not cease providing service within 30 days of “notice or discovery.”<sup>270</sup> Section 340.2(d) provides that none of the exemptions serve to “exempt a city or joint agency from laws and rules of general applicability to governmental services . . . .”<sup>271</sup> None of the provisions in section 340.2 exempt any service or system from the notice and public hearing requirements of section 340.3.

## 2. The North Carolina General Statute, H.B. 129, is a Barrier to Broadband Investment and Competition

93. Because the entirety of H.B. 129, as described by its title, serves the unified purpose of “Regulating Local Government Competition with Private Business,” we analyze its operation holistically, cognizant of the interrelation of its several parts. This is so even though any single regulatory provision of the statute, if considered independently, might not appear to impose a significant barrier. Such a myopic focus can be deceptive, however. The cumulative effect of a series of interrelating provisions can become a barrier. The petition asks us to consider whether the cumulative effect of the provisions in the North Carolina law does just that. We are not deciding whether a state law imposing a single one or even a subset of these provisions would be a barrier. Imagine a statute that contained 100 provisions, each imposing a regulatory requirement on a public-sector broadband provider with a compliance cost of \$1,000. Considered on its own, each provision might seem of minimal concern: although the \$1,000 cost constituted an increased expense, it is unlikely that, standing alone, it would be a barrier to infrastructure investment. Considered as a whole, however, we see that the effect of the statute is to impose a cost of \$100,000 on one category of competitor only. In other words, a thicket may constitute a barrier.

94. We conclude that H.B.129 considered holistically is a barrier to broadband infrastructure investment and competition in North Carolina. The record shows that “[n]umerous plans . . . were in the works” to develop and deploy municipal broadband networks in the period prior to the passage of HB. 129, but that all were discontinued because of H.B.129 and that “no known community-owned residential fiber networks [have been] built [in North Carolina] since the passage of H129.”<sup>272</sup> In 2014, Wilson states that three North Carolina municipalities considered deploying services to residents outside Wilson County but decided not to because of H.B.129.<sup>273</sup> Wilson states that it has been unable to capitalize on “opportunities to make broadband investments and provide competitive 21st Century broadband Internet connectivity outside of Wilson County, especially to low-income, rural areas that otherwise will likely never have access to Gigabit services.”<sup>274</sup>

95. To illustrate more specifically how H.B. 129 functions as a barrier to broadband infrastructure investment and competition, we analyze categories of provisions that constitute barriers to broadband infrastructure investment and serve as barriers that thwart competition.

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<sup>270</sup> N.C. Gen. Stat. Ann. § 340.2(e).

<sup>271</sup> N.C. Gen. Stat. Ann. § 340.2(d).

<sup>272</sup> SEATO Comments at 3; *see also* City of Fayetteville Comments at 2 (“[T]he law had the collateral effect of suppressing the desire of numerous communities to even creatively engage in public-private partnerships for fear of exposing themselves to a legal challenge by any incumbent hungry to suppress potential local broadband options, and finding ample provisions under which to do so using the numerous ambiguities in their law.”).

<sup>273</sup> Wilson Petition at 24. Wilson is permitted to provide service within Wilson County. *See* N.C. Gen. Stat. Ann. § 160A-340.2(c).

<sup>274</sup> Wilson Petition at 24; *see also* North Carolina League of Municipalities Comments, WC Docket Nos. 14-115 and 14-116, at 3-4 (filed Aug. 29, 2014) (North Carolina League of Municipalities Comments); SEATO Comments at 3 (stating that “at least five communities stopped their plans to bring fiber to their local residents and businesses as a result of H129” and “[t]here were five community-owned cable-broadband systems in 2011, and there are the same number today”); Petitioners’ Dec. 15, 2014 *Ex Parte* at 2 (“In fact, since [H.B.129] became law in 2011, not a single North Carolina community has been able to enter the field.”).



**a. Measures to Raise Economic Costs**

96. We begin by examining representative examples of provisions that have the effect of raising economic costs for municipal providers, through limitations on a provider's ability to achieve efficiencies and economies of scale, cost imputation requirements, or pricing restrictions.

97. *H.B.129's Territorial Restriction Prohibiting Expansion.* Subject to three exemptions discussed below, section 160A-340.1 (3) limits municipalities to the "the provision[ing] of communications service within the corporate limits of the city providing the communications service."<sup>275</sup> On its face, there is no doubt that the territorial restriction contained in section 160A-340.1(3) is a barrier to deployment and competition.<sup>276</sup>

98. In addition, H.B.129 is a barrier to broadband deployment because Wilson otherwise has authority to provide communications services "within reasonable limitations."<sup>277</sup> Specifically, North Carolina law allows municipalities to own and operate a "public enterprise outside its corporate limits, within reasonable limitations . . . ."<sup>278</sup> The term "public enterprise" is defined as including, among other things, "[c]able television systems."<sup>279</sup> A North Carolina court has construed "cable television system" to include a fiber optic network.<sup>280</sup> Thus, in the absence of H.B.129's territorial restriction, Wilson and other North Carolina municipalities would therefore be able to invest in broadband networks outside a city's corporate limits "within reasonable limitations." The effect of the territorial restriction is to artificially limit Wilson's and other North Carolina municipalities' abilities to achieve the economic efficiencies that would come with deploying across a broader service territory. Indeed, the North Carolina Department of State Treasurer Local Government Commission recognized this in the legislative history of H.B. 129 when it noted that "the boundaries set forth in the PCS weaken the financial viability of [the Greenlight and Fibrant] broadband systems."<sup>281</sup>

99. H.B.129 provides for three limited exemptions to its territorial restriction — the "grandfathering" "interlocal," and "unserved" exemptions. As discussed in detail below, we find that these exemptions do not provide a meaningful way for municipalities to expand broadband deployment beyond their current geographical reach.

100. First, we conclude that the "grandfathering" exemption in section 160A-340.2(c) does not provide a meaningful way for Wilson to expand its current reach. The "grandfathering" provision exempts a qualifying municipality from most of H.B.129's requirements and allows the municipality to provide service beyond its corporate limits if it has already been providing service as of January 1, 2011,

<sup>275</sup> N.C. Gen. Stat. Ann. § 160A-340.1 (3).

<sup>276</sup> We also conclude that municipal broadband increases overall broadband deployment. *See supra* paras. 42-74. .

<sup>277</sup> N.C. Gen. Stat. Ann. § 160A-312(a). In the context of municipal electric providers, the North Carolina Supreme Court "has developed a list of factors to consider in determining the reasonableness of a city's proposed extension of electric service. These factors include: the level of current service in the territory in question, the readiness, willingness, and ability of each competitor to provide electric service, the location of the territory in relation to the city limits, and the existence of any annexation plans by the City." *Duke Power Co. v. City of High Point, N.C.*, 317 S.E.2d 701, 707 (N.C. Ct. App. 1984) (citing *State ex rel. Utilities Comm. v. Virginia Elec. and Power Co.*, 311 S.E.2d 586 (N.C. 1984); *Lumbee River Electric Corp. v. City of Fayetteville*, 309 S.E.2d 209 (N.C. 1983); *Electric Service v. City of Rocky Mount*, 203 S.E.2d 838 (N.C. 1974)).

<sup>278</sup> N.C. Gen. Stat. Ann. § 160A-312(a).

<sup>279</sup> N.C. Gen. Stat. Ann. § 160A-311(7).

<sup>280</sup> *City of Laurinburg*, 606 S.E.2d at 726-28.

<sup>281</sup> Legislative Fiscal Note at 4.

shortly before H.B.129 became law.<sup>282</sup> Wilson was not providing service outside Wilson County as of January 1, 2011. Wilson, however, is allowed to provide service outside its corporate limits to the boundary of Wilson County because H.B.129 specifies that “the service area is the county limits of Wilson County, including the incorporated areas within the County.”<sup>283</sup> Wilson is therefore prohibited from expanding beyond its *current* service area, Wilson County, unless it qualifies for another exemption.

101. Second, we find that the “interlocal” exemption found in section 160A-340.2(a) does not provide meaningful relief. This provision allows municipalities to provide service “within the corporate limits of another unit of local government that is a party with the city to an interlocal agreement . . . .”<sup>284</sup> However, any agreement between the municipalities must be limited to the purpose of providing “internal government services.”<sup>285</sup> Since this exemption does not allow a municipality to expand broadband deployment to residences and businesses, it does not provide a meaningful way for municipalities to expand broadband deployment to the public.

102. Finally, we conclude that the exemption for “unserved” areas in section 160A-340.2(b) does not provide a meaningful way for municipalities to overcome the territorial restriction contained in H.B.129. This is due to both the inadequacy of the speed thresholds to determine when an area is “unserved” under H.B.129, and the real-world effects of the statute on the economic feasibility of providing service to so-called “unserved” areas.<sup>286</sup> H.B.129 adopts speed thresholds that are much slower than the benchmarks adopted by the Commission in the *2015 Broadband Progress Report*. In particular, section 160A-340.2(b) provides that “a city seeking to provide communications service in an unserved area shall petition the North Carolina Utilities Commission for a determination that an area is unserved.” That provision defines “unserved area” as “a census block . . . in which at least fifty percent (50%) of households either have no access to high-speed Internet service or have access to high-speed Internet service only from a satellite provider.”<sup>287</sup> “High-speed Internet service” is defined in Section 160A-340(4) as “Internet access service with transmission speeds that are equal to or greater than the requirements for basic broadband tier 1 service as defined by the Federal Communications Commission for broadband data gathering and reporting.”<sup>288</sup> This definition incorporates an old 2008 Commission definition of “basic broadband tier 1 service,” which the Commission used in a limited context for reporting purposes to mean “services [with speeds] equal to or greater than 768 kbps but less than 1.5 mbps in the faster direction.”<sup>289</sup>

<sup>282</sup> N.C. Gen. Stat. Ann. § 160A-340.2(c). Municipalities under this exemption are limited to providing communications service to any one or more of the “persons within the corporate limits of the city [as those limits existed as of April 1, 2011] providing the communications service,” and “[e]xisting customers of the communications service as of April 1, 2011.” N.C. Gen. Stat. Ann. § 160A-340.2(c)(1)-(2).

<sup>283</sup> N.C. Gen. Stat. Ann. § 160A-340.2(c)(3)(c).

<sup>284</sup> N.C. Gen. Stat. Ann. § 160A-340.2(a).

<sup>285</sup> *Id.*

<sup>286</sup> *See, e.g.*, SEATO Comments at 3.

<sup>287</sup> N.C. Gen. Stat. Ann. § 160A-340.2(b).

<sup>288</sup> N.C. Gen. Stat. Ann. § 160A-340(4).

<sup>289</sup> *See Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriber Data*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, 9715, para. 20 n.66 (2008) (*2008 Broadband Data Item*). We also noted that “[s]ubsequent tiers will be labeled ‘broadband tier 2’ through ‘broadband tier 7.’ These terms are evolving definitions that could change over time based on advances in technology.” *Id.* At the time, the Commission collected data about broadband subscriptions using specific speed tiers. The Commission has since amended its reporting requirements and abandoned the use of speed tiers for collecting subscription data. The Commission also began collecting deployment data, also not using speed tiers. *Modernizing the FCC Form 477*

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103. We therefore find that the exemption for “unserved” areas contained in 160A-340.2(b), is not consistent with our analysis of marketplace realities—both with respect to when H.B.129 was enacted, and especially with respect to our recent findings in the *2015 Broadband Progress Report* reflecting evolving technology and consumer expectations.<sup>290</sup> Under H.B.129, an area qualifies as “unserved” if at least 50 percent of the households do not have access to service at download speeds of at least 768 kbps while, in sharp contrast, under the Commission’s current benchmark companies receiving Connect America funding for fixed broadband must serve consumers with speeds of at least 10 Mbps for downloads and 1 Mbps for uploads;<sup>291</sup> and areas are “unserved” by advanced telecommunications capability if they do not have access to service with speeds of at least 25 Mbps / 3 Mbps.<sup>292</sup> As a result of the significantly lower speed thresholds adopted in H.B.129 compared to any of the above standards, very few areas in North Carolina will qualify as “unserved” despite the fact that many areas do not meet the standards articulated above.<sup>293</sup> Given that Congress has directed us to carefully evaluate broadband deployment in our role as the regulator of interstate communications by wire, we find that our speed thresholds are the appropriate metric by which to evaluate whether an area is “unserved,” not the standard contained in H.B.129.

104. Additionally, the real-world application of H.B.129 could make providing service to “unserved” areas economically infeasible.<sup>294</sup> In order to qualify for the “unserved” exemption under H.B.129, a municipality must show, “by census block,” that the statutory criteria are met. This is an example of a burden that exceeds the burden on private-sector providers. Based on our evaluation of record evidence, the granularity and nature of the data required by the statute presents challenges in establishing an area’s eligibility for the exemption. As Wilson states, “[accumulating this data] would be a very difficult burden to meet, if not an impossible one, as the kind of information that Section 160A-340.2(b) requires is not readily available from any source. Wilson would essentially have to do its own household-by-household polling, which would be prohibitively time-consuming and expensive.”<sup>295</sup> In addition, practical implementation problems could arise if the eligible census blocks are not contiguous, or as Wilson puts it, “if there [is] a Swiss cheese pattern of served and underserved areas.”<sup>296</sup> If “unserved” areas are not contiguous, a municipal provider seeking to expand service to additional areas could be forced to deploy facilities in an inefficient manner raising its costs.<sup>297</sup> This requirement could deter municipalities from seeking to provide communications services in “unserved” areas.

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*Data Program*, WC Docket No. 11-10, Report and Order, 28 FCC Rcd 9887, 9888, 9897, paras. 2-3, 20 (2013).

Thus, while the Commission has not altered the meaning of the term “basic broadband tier 1,” the term is no longer used by the Commission.

<sup>290</sup> *2015 Broadband Progress Report* at paras. 3-6.

<sup>291</sup> See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, 29 FCC Rcd 15644, 15645-46, para. 4 (2014).

<sup>292</sup> *2015 Broadband Progress Report* at para. 3.

<sup>293</sup> See FTTH Comments at 11 (“Since the law extends broadly to bar deployment in areas that the Commission would consider ‘unserved’ and where advanced telecommunications deployment is unreasonable and untimely, the law imposes a de facto barrier in violation of Section 706 . . .”).

<sup>294</sup> See Wilson Petition at 42. Municipalities are required to obtain permission from the North Carolina Utility Commission to serve “unserved” areas under the process set forth in Section 160A-340.2(b).

<sup>295</sup> Wilson Petition at 41.

<sup>296</sup> *Id.* at 42.

<sup>297</sup> See North Carolina League of Municipalities Comments at 4 (“In North Carolina, there are large areas that do not provide sufficient return on investment necessary to encourage deployment of private broadband infrastructure. Residents and businesses of those communities need access to internet just the same as the rest of the state’s residents.”). In the context of the Connect America Fund, we allowed bidders to combine high-cost and extremely

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105. As we have shown above, none of the exemptions to the territorial restriction provide a meaningful way for Wilson to expand broadband deployment to its neighboring communities. As Wilson puts it, “there is no way that Wilson can responsibly invest in broadband infrastructure and provide competitive service outside Wilson County as long as [H.B.129] remains in effect.”<sup>298</sup> The territorial restriction has the effect of raising Wilson’s economic costs by preventing it from achieving efficiencies from deploying over a broader territory while not similarly restricting other types of providers. We therefore conclude that the territorial restriction contained in H.B.129 is a barrier to municipal broadband infrastructure investment and competition.

106. *Payments in Lieu of Taxes.* Sections 340.1(a)(9) and 340.5 require municipalities to make payments in lieu of taxes in amounts equivalent to what a private-sector provider would have paid in taxes and fees.<sup>299</sup> On their face these provisions raise the economic costs of service.

107. *Imputation of Costs of Private Communications Providers.* Section 160A-340.1(8) prohibits municipalities from pricing below “cost,” and that theoretical cost requires the imputation of phantom private sector costs that the municipal provider does not actually carry. We find that this provision is a barrier to broadband investment and competition. Specifically, municipalities are required to impute to the costs of a municipal broadband network:

- (i) the cost of the capital component that is equivalent to the cost of capital available to private communications service providers in the same locality and (ii) an amount equal to all taxes, including property taxes, licenses, fees, and other assessments that would apply to a private communications service provider, including federal, State, and local taxes; rights-of-way, franchise, consent, or administrative fees; and pole attachment fees.<sup>300</sup>

When determining the “cost” of its service, a municipality therefore is required to include not only the actual cost of its own service, but also the cost of an actual or hypothetical private-sector competitor’s service. Private sector providers face no such obligation. Because the statute states that municipalities “[s]hall not price any communications service below the cost of providing the service,” including this

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high-cost areas together because “extremely high-cost areas are actually interspersed among high-cost areas.” See *Connect America Fund et al.*, WC Docket No 10-90 et al., Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 7051, 7060, para. 30 (2014). We held that “including both high-cost and extremely high-cost areas in the competitive bidding process will enable parties to build integrated networks that span both types of areas in adjacent census blocks as appropriate. [Footnote omitted.] In other words, this approach allows potential providers to decide how best to upgrade or extend networks to serve these areas rather than having the Commission artificially pre-determining which areas should be served through one mechanism and which should be served through a separate mechanism.” *Id.*

<sup>298</sup> Wilson Petition at 41.

<sup>299</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(9) (“The city shall annually remit to the general fund of the city an amount equivalent to all taxes or fees a private communications service provider would be required to pay the city or county in which the city is located, including any applicable tax refunds received by the city-owned communications service provider because of its government status and a sum equal to the amount of property tax that would have been due if the city-owned communications service provider were a private communications service provider.”); N.C. Gen. Stat. Ann. § 160A-340.5(a) (“[E]ach city possessing an ownership share of a communications network and a joint agency owning a communications network shall, in lieu of property taxes, pay to any county authorized to levy property taxes the amount which would be assessed as taxes on real and personal property if the communications network were otherwise subject to valuation and assessment.”); N.C. Gen. Stat. Ann. § 160A-340.5(b) (“A city-owned communications service provider shall pay to the State, on an annual basis, an amount in lieu of taxes that would otherwise be due the State if the communications service was provided by a private communications service provider, including State income, franchise, vehicle, motor fuel, and other similar taxes.”).

<sup>300</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(8).

imputed cost,<sup>301</sup> this provision hampers a municipality's ability to compete against its private counterparts.<sup>302</sup> Whereas private sector firms are free to offer introductory or other discounts to compete for customers, municipal providers cannot do so because of this imputation requirement.<sup>303</sup> The bar on below-"cost" pricing potentially raises the municipality's rates, sharply restricts the municipality's ability to offer discounts, and limits the competitive pressure on the incumbents to lower their rates.

**b. "Level Playing Field" Obligations**

108. H.B. 129 also includes multiple provisions apparently aimed to "level the playing field" between public-sector and private-sector providers.<sup>304</sup> Some of these provisions also raise the provider's economic costs. As described below, the effect of these provisions is to impose an asymmetric burden on one category of providers but not others.

109. *Municipalities Must Comply with Private Regulations as well as Additional Requirements that do Not Apply to Private Providers.* In practice the provisions of H.B. 129 actually serve to impose an asymmetrical burden on city providers. H.B. 129 purports to equalize legal treatment of municipal and private broadband providers. In fact, it puts municipalities in the uniquely challenging position of being subject simultaneously to all the requirements applicable to private entities for communications services, but does not impose a corresponding obligation on private sector providers to abide by requirements applicable to public sector entities. 160A-340.1(a)(1) requires municipalities to comply with "all local, State, and federal laws, regulations, or other requirements" that would apply to a private-sector provider,<sup>305</sup> but does not relieve the municipal provider of any requirements that apply to all municipal operations, such as "open records requirements, civil service rules, Buy American provisions, and much more."<sup>306</sup> Section 340.1(a)(1) also fails to identify which among the various types – digital services line provider, cable Internet service provider, wireless Internet service provider – of private-sector provider a city-owned CSP should compare itself to, thereby apparently requiring a city-owned CSP to comply with the obligations applicable to any private-sector provider. The result is a double burden for municipal providers.

110. Likewise, section 340.1(a)(5) regulates access to rights-of-way, poles, and conduits. Instead of addressing a municipality's authority to provide service, this provision imposes specific pricing for infrastructure access, the effects of which fall asymmetrically on city-owned providers.<sup>307</sup> This provision is much broader in scope than section 224 of the Communications Act, which is limited to poles

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<sup>301</sup> *Id.*

<sup>302</sup> Municipalities in North Carolina generally are permitted to set rates charged by public enterprises. *See* N.C. Gen. Stat. Ann. § 160A-314; *Smith Chapel Baptist Church v. City of Durham*, 517 S.E.2d 874, 881 (N.C. 1999) (quoting *Town of Spring Hope v. Bissette*, 280 S.E.2d 490, 492 (N.C. Ct. App. 1981) (stating that the grant of authority to set public enterprise rates under the authorizing statute is "broad" and "unfettered")).

<sup>303</sup> This imputation requirement differs from other imputation requirements found in the Communications Act, such as that in section 272(e)(3), 47 U.S.C. § 272(e)(3). Such provisions generally require that a service provider with substantial market power impute to itself the rate that it charges for a service that it provides to itself and to competing third parties in order to reduce the potential for a price squeeze. Here, a new market entrant without market power is being required to impute competitors' costs to itself.

<sup>304</sup> *See, e.g.*, TechFreedom & ICLE Reply at 8-9; Institute for Policy Innovation Comments at 5-6; N.C. Speaker Thom Tillis Comments at 14 (referring to H.B. 129 as "The Level Playing Field Law"); AT&T Comments at 4-5.

<sup>305</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(1).

<sup>306</sup> Wilson Petition at 32; *see also* Wilson Petition, Attach. A, Section-by-Section Analysis of Section 160A-340 (Wilson Section-by-Section Analysis) (stating that "there are many areas in which public entities have obligations that are comparable to those that private entities must meet, so that imposing all private-sector obligations on public entities would result in double burdens on the public entities").

<sup>307</sup> N.C. Gen. Stat. § 160A-340.1(a)(5).



“owned or controlled by” a utility, and requires that rates be “just and reasonable,” while allowing for cost recovery. Indeed, section 340.1(a)(5) appears to mandate that a city-owned CSP make available to private-sector providers infrastructure or facilities that the city is leasing from a third party; and its “nondiscriminatory access” provision would require a city to make available city-owned facilities to private-sector providers at no charge if the city, which owns the facilities, would not itself pay for using them.<sup>308</sup>

111. Section 2.(a) amends the definition of “public utility” to include city-owned communication service providers. Its effect is to place communications services provided by a city or joint agency under the North Carolina Utilities Commission’s (NCUC’s) regulation, oversight, and rate regulation. Read in conjunction with the definitions in section 340, this provision would also encompass public-private partnerships between a city and a private-sector provider. H.B. 129 provided, however, that this amendment “shall not be construed to change the regulatory nature of or requirements applicable to any particular service currently regulated by the Commission” under applicable law.<sup>309</sup> North Carolina law previously exempted broadband services from NCUC regulation, and private-sector providers apparently continue to enjoy that exemption under H.B. 129, providing another asymmetry between the regulatory treatment of public-sector and private-sector providers under the law.

112. Likewise subsection (a)(7), which purports to prohibit municipalities from “subsidiz[ing] the provision of communications service with funds from any other non-communications service, operation, or other revenue source, including any funds or revenue generated from electric, gas, water, sewer, or garbage services,” could prevent city-owned CSPs from efficiently sharing costs across a range of municipal services (for example, the costs of conduit or poles shared between broadband and electricity provision).<sup>310</sup> For example, a pole or conduit used to carry one of an electrical, telephone, broadband, or cable service can generally also be used to carry any or all of the other four listed services. Thus, all the services that use the pole would share the underlying cost of the pole. A supplier of multiple services that share certain costs would have an entry or entries for those shared costs in its accounts, allocating those costs to certain activities, typically, to (at least some) of the services sharing the costs. Without a formal definition of what constitutes a subsidy, any allocation could be found to be problematic, that is, could be found to involve a subsidy. For example, if a pole carried a fiber cable for broadband and an insulated copper cable for electricity, to avoid a subsidy, should the cost of the pole be split 50:50, or be split according to the margins earned on each service, or be fully allocated to the first (e.g., electricity) service to be hung on the pole, perhaps because the pole was built and paid for before the second service (e.g., broadband) was ever even thought of, or according to the ratio of the respective weight of the cabling, or should some other rule be used?<sup>311</sup> The statute imposes no parallel limitation on private-sector providers,

<sup>308</sup> Even the exemptions from requirements create asymmetrical burdens. For example, under H.B.129, an area qualifies for the “unserved” exemption if at least 50 percent of the households do not have access to service at download speeds of at least 768 kbps. *See supra* para. 102. The effect of this exemption is to restrict city-owned providers, but not private-sector providers, from providing service to unserved areas.

<sup>309</sup> *See* § 2.(b), H.B. 129, 2011 N.C. Sess. Laws at 84.

<sup>310</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(7).

<sup>311</sup> To illustrate with a simple example, consider broadband and electrical cabling that share \$100 in certain costs. Assume the incremental cost of broadband (such as the broadband fiber and equipment) is \$10, the incremental cost of the electric cabling is \$30, and the municipality earns in broadband revenues \$40, and in electricity revenues \$100. In this example, the municipality earns zero economic profit, and each service makes a contribution toward shared costs (so in the language of economists neither service cross-subsidizes the other. *See, e.g.,* Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises* 65(5) *Am. Econ. Rev.*, 966, 966-977 (1975), [http://www.jstor.org/stable/1806633?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/1806633?seq=1#page_scan_tab_contents); Gerald R. Faulhaber, *Cross-Subsidy Analysis More Than Two Services*, 1(3) *J. Competition L. & Econ.* 441, 441-448 (2005). However, without a definition of subsidy, arguments could be presented for a cost allocation scheme that would imply electricity was subsidizing broadband. For example, it could be argued that broadband should contribute 50% of the shared cost and so was being subsidized by electricity to the tune of \$20. Given that there are a very wide number of possible cost

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which often have multiple lines of business. As with other provisions, if anything, the restriction makes the city's service more risky by limiting the city's ability to compete for customers.

113. Taken together, these purported "level playing field" provisions single out communications services for asymmetric regulatory burdens that function as barriers to and have the effect of increasing the expense of and causing delay in broadband deployment and infrastructure investment.

**c. Measures to Impose Delay**

114. The provisions of H.B. 129 also include measures to impose delay on providers. These include multiple requirements for a municipality to provide notice and public hearings before it may begin to build or operate its network.

115. Many of the numerous delay-creating obligations in H.B. 129 have no private sector analogue. For example, H.B.129's Notice and Public Hearings provision, contained in Section 160A-340.3, requires municipalities to participate in a 75-day public hearing process when proposing to provide communications services.<sup>312</sup> Section 340.3 offers an example of a provision that, were it standing alone, might not constitute a barrier. However, the interrelationship between it and other provisions of H.B. 129, including the requirements for a special election and prior approval of a municipality's financing application, illustrate how a thicket may become a barrier.<sup>313</sup> More specifically, this provision requires municipalities considering providing communications services to hold at least two public hearings and to disclose in advance "[a]ny feasibility study, business plan, or public survey conducted or prepared by the city in connection with the proposed communications service project."<sup>314</sup> Wilson asserts this raises issues of improper competitive advantage because disclosure of business records allows competitors to target Wilson's plans. Our rules and decisions recognize that early disclosure of confidential business plans can cause competitive harm.<sup>315</sup> We agree that in this case subjecting municipalities to these requirements may give private communications providers a competitive advantage such as access to sensitive business information that could be used to undercut municipal broadband networks.

116. A municipality intending to finance a communications system must, under section 340.4, first hold a special election "on the question of whether the city may provide communications service." North Carolina law requires municipalities to apply for approval to the Local Government Committee when seeking to finance certain activities. Section 3 adds an additional set of requirements for review of

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allocation rules, the lack of a clear standard in the statute presents a problem here. *See, e.g.,* Ronald R. Braeutigam, *An Analysis of Fully Distributed Cost Pricing in Regulated Industries*, 11(1) *Bell J. Econ.* 182, 182-196 (1980), [http://www.jstor.org/stable/3003407?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/3003407?seq=1#page_scan_tab_contents).

<sup>312</sup> N.C. Gen. Stat. Ann. § 160A-340.3.

<sup>313</sup> Additionally, North Carolina law does not appear to impose such requirements on other municipally provided services, such as electric or water service, the effect being to single out communications services for particular regulation. *See, e.g.,* N.C. Gen. Stat. Ann. §§ 160A-311-13 (authorizing municipalities to finance and provide public enterprises, including electric, water, and wastewater treatment services, without imposing public hearing requirements).

<sup>314</sup> N.C. Gen. Stat. Ann. § 160A-340.3.

<sup>315</sup> *See, e.g.,* 5 U.S.C. § 552(b)(4) (exempting from Freedom of Information Act disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential"); 47 C.F.R. § 0.457(d)(2) (stating that if an adequate showing is made, "privileged or confidential commercial, financial or technical data" will "not be made routinely available for inspection"); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20750, para. 37 (1996) (concluding that "in the interstate, domestic, interexchange market, requiring nondominant interexchange carriers to file tariffs . . . may harm consumers by impeding the development of vigorous competition, which could lead to higher rates" and will "deter price coordination").

city applications to finance communications service, including notice, public hearings, and an opportunity for written and oral comments from competitive private sector communications service providers, but requires that a municipal applicant first complete the public hearing requirements of section 340.3. Section 340.6 requires municipalities to solicit proposals from private-sector providers interested in pursuing a public-private partnership before a municipality may begin constructing a network.<sup>316</sup>

117. Supporters of H.B. 129 defend these provisions as a general matter on the ground that they provide State oversight of city decisions regarding financing for communications services, and protect taxpayers.<sup>317</sup> We find these general statements unpersuasive. In contrast to such assertions, legislative history indicates that the North Carolina General Assembly intended to require municipal broadband companies to “[e]liminate the practice of using certificates of participation to finance the construction of a system.”<sup>318</sup> This has the effect of restricting municipalities’ financing options, limiting the ability of municipalities to determine the best risk allocation, and potentially exposing citizens to a higher level of risk.<sup>319</sup> Existing provisions in the North Carolina Fiscal Control Act provided for the Local Government Commission to review a city’s plans to use debt to finance services.<sup>320</sup> Under the new requirements,<sup>321</sup> the LGC must receive and evaluate written and oral comments from private-sector providers and “consider and make written findings on the reasonableness of the city or joint agency’s revenue projections in light of the current and projected competitive environment for the services to be provided, taking into consideration the potential impact of technological innovation and change on the proposed service offerings and the level of demonstrated community support for the project.”<sup>322</sup> The Fiscal Control Act, which otherwise applies to city financing, generally requires the Local Government Commission to evaluate a city’s proposal to issue notes in order to finance its activities, including “the reasonableness of the budget estimates of the taxes or other revenues in anticipation of which the tax or revenue anticipation notes are to be issued.”<sup>323</sup> H.B. 129 imposes requirements in addition to those in the Fiscal Control Act, requiring the LGC to evaluate the reasonableness of the “competitive environment,” “potential impact of technological innovation and change on the proposed service offerings” or the “level of demonstrated community support for the project.”<sup>324</sup> Those requirements apply only to communications services and only to those provided by a public-sector provider.

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<sup>316</sup> N.C. Gen. Stat. Ann. § 160A-340.6.

<sup>317</sup> See, e.g., N.C. Sen. Tom Apodaca Comments, WC Docket Nos. 14-115 and 14-116, at 1-2 (filed Aug. 29, 2014) (Sen. Tom Apodaca Comments); N.C. Rep. Marilyn Avila Comments at 2; CenturyLink Comments, WC Docket Nos. 14-115 and 14-116, at 9-10 (filed Aug. 29, 2014) (CenturyLink Comments); Free State Foundation Comments at 5-9; ITTA Comments at 8-9; N.C. Speaker Thom R. Tillis Comments at 2; ALEC Reply at 5; TechFreedom & ICLE Reply at 17-18. Commenters offer little to no support for specific provisions on H.B. 129, providing broad policy justifications for the statute as a whole instead.

<sup>318</sup> Legislative Fiscal Note at 3.

<sup>319</sup> For example, this may drive communities to choose financing through general obligation bonds which could put taxpayers at risk, as they involve a pledge of the full faith and credit of the municipality. See Feb. 3 Wilson Letter at 1-2 (stating that N.C. Gen. Stat. Ann. § 160A-340.4 restricts financing in this way); Petitioners’ Dec. 15, 2014 *Ex Parte* at 9 (same); see also *supra* note 197 and accompanying text.

<sup>320</sup> See N.C. Gen. Stat. Ann. § 159-148(a).

<sup>321</sup> Wilson expresses concern about additional risks of delay, noting that the LGC is a part-time body composed of nine members and drawing on the staff of the Department of the State Treasurer. Wilson Section-by-Section Analysis at 19; see also N.C. Gen. Stat. Ann. § 159-3 (establishing the Local Government Commission).

<sup>322</sup> N.C. Gen. Stat. Ann. § 159-175.10(4).

<sup>323</sup> N.C. Gen. Stat. Ann. § 159-172(b).

<sup>324</sup> N.C. Gen. Stat. Ann. § 159-175.10(4).

118. In practice, these interrelated provisions lead to significant delay. Wilson calculated that the time period required by all of these requirements could be approximately 27 months before a municipality can even launch a municipal broadband project.<sup>325</sup> Such a delay adds significantly to the complexity of business planning as conditions in the financial market and the broadband landscape on which municipalities base their projections will likely change in the interim period. Further, such delay harms communities by substantially delaying the availability of additional broadband options. We therefore find that these provisions constitute a barrier to timely deployment of broadband and infrastructure investment.

119. *The Restrictions in H.B. 129 Are Also a Barrier to Broadband Investment and Competition Because They Restrict the Provision of Video and Telecommunications Services.* The restrictions in H.B. 129 apply to communications services, which are defined to include “[t]he provision of cable, video programming, telecommunications, broadband, or high-speed Internet access service to the public, or any sector of the public . . . .”<sup>326</sup> Prior to Greenlight’s launch, an article in *Wilson Daily* observed that “[t]he only way to pay for” a fiber to the premises network for Wilson “would be to sell cable television, Internet and phone services - called the ‘triple play’ in [fiber to the premises] communities.”<sup>327</sup> The provisions in H.B. 129 restrict voice and video services, thereby limiting competition in the local telecommunications market and harming deployment of advanced telecommunications capability.<sup>328</sup> As discussed above with reference to EPB and Tennessee, the restrictions on the provision of bundled services undermines a provider’s ability to provide broadband successfully due to the strong customer preference for bundled offerings.<sup>329</sup> For the same reasons, we find that application of these restrictions to Wilson’s provision of video and telecommunications services such as voice telephony functions as a barrier to Wilson’s provision of broadband service

### **3. Wilson Would Deploy Additional Facilities and Expand Competitive Entry Absent H.B.129**

120. Wilson states that it “stands ready, willing and eager to expand the scope of its broadband capabilities into neighboring communities.”<sup>330</sup> As the SBI Data-based charts and map illustrate, numerous communities within the five counties into which Wilson seeks authority to expand have few or

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<sup>325</sup> Petitioners’ Dec. 15, 2014 *Ex Parte*, Exh. A at 14 (Communications Network Project Timetable).

<sup>326</sup> N.C. Gen. Stat. Ann. § 160A-340(3) (definitions).

<sup>327</sup> See Wilson Petition at 109, Exh. 5, Matthew Shaw, *At the Speed of Light*, *Wilson Daily Times*, Oct. 6, 2006; see also Wilson Petition at 17 (stating that Wilson began to study the possibility of building a municipally-owned cable system “in response to citizen complaints about the high cost and low quality of voice and video services”).

<sup>328</sup> 47 U.S.C. § 1302.

<sup>329</sup> See *supra* para. 79; see also, e.g., Applications filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control, WC Docket No. 10-110, Memorandum Opinion and Order, 26 FCC Rcd 4194, 4212, paras. 38-39 (2011) (stating that “Applicants assert that the transaction will . . . position post-merger CenturyLink to be a stronger competitor to cable companies for the provision of multichannel video services and the triple play of voice, video, and Internet services” and that “we agree that an increased ability to provide voice, data, and video packages is likely to make the merged company a stronger company overall”); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 578, 661, paras. 70, 252 (2007) (stating that “Cox maintains that bundling multiple services has increased the number of new subscribers and reduced the loss of existing subscribers” and that “APPA . . . stat[es] that many of today’s new broadband networks are being constructed based on a triple-play business model, i.e., the sale of voice, video, and data services as a package”).

<sup>330</sup> Wilson Petition at 2.

no options for advanced telecommunications capability and would benefit from expansion.<sup>331</sup> In addition, the record further demonstrates that demand exists for Wilson to provide communications services outside of Wilson County.<sup>332</sup> Wilson's 1 Gbps service has received extensive media attention and, within its service area, its fiber network has achieved 33.7% total market penetration.<sup>333</sup> Wilson has received "numerous requests for these services from residents, government agencies, businesses, and other organizations in the other five counties" where it provides electric service.<sup>334</sup> The percentage of new subscribers in new service areas within Wilson County also demonstrate the attractiveness of Wilson's broadband service and the demand for it to expand outside of Wilson County.<sup>335</sup> For example, Wilson states it has expanded into eight new areas within Wilson County in 2013 and 2014, achieving an average market penetration of 49% in these territories.<sup>336</sup> The record also demonstrates the demand for Wilson's services in lower-income or rural areas outside of Wilson County. Figure A, in the Wilson Petition, shows many areas outside of Wilson County that include numerous census blocks in lower-income, rural areas that lack advanced communications capabilities.<sup>337</sup>

121. As we discussed more fully in Sections I and II, municipally owned broadband networks can generate numerous community benefits such as economic growth, and improvements in education, health care, and public safety.<sup>338</sup> As one commenter notes, "[m]any of the firms that have moved to Wilson since Greenlight was launched would not have moved there without the network. In short, the problem is classic chicken and egg; without a 'supply' of broadband, it is hard to create 'demand.'"<sup>339</sup> In the absence of H.B.129, we believe areas outside of Wilson County will seek expansion of Wilson's Greenlight network so that they can obtain the community benefits that high-speed broadband has brought to Wilson County.

122. Wilson appears qualified both technologically and financially to provide such service outside of Wilson County. Wilson is cash-flow positive.<sup>340</sup> "The City's credit rating was upgraded by both Moody's and Standard and Poor's in late 2008, shortly after the Greenlight service launched. Moody's recently reaffirmed its credit rating for the City of Wilson in 2014, noting in particular the strength of its Greenlight service."<sup>341</sup> Moreover, Wilson has *already* proven it can successfully deploy and manage a broadband network providing 1 Gigabit service to its customers, within Wilson County.<sup>342</sup> We believe these facts establish that, but for H.B.129, Wilson would deploy communications services beyond Wilson County.

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<sup>331</sup> See *supra* para. 39; *infra* Attach. B (Wilson/North Carolina Map). Further, as noted above, the record contains many comments filed by individual commenters who are dissatisfied with existing broadband service in North Carolina. See *supra* note 124.

<sup>332</sup> While we discuss demand to demonstrate that our preemption will produce practical consumer benefits, we do not view a showing of demand for these services as necessary to our decision to preempt.

<sup>333</sup> See Wilson Petition at 20.

<sup>334</sup> *Id.* at 2; see also *id.* at 22.

<sup>335</sup> *Id.* at 20-25.

<sup>336</sup> See *id.*

<sup>337</sup> See *id.* at 23, Fig. A; see also paras. 102-104.

<sup>338</sup> See *supra* paras. 23-26, 34-36, and 45-46.

<sup>339</sup> Institute for Local Self-Reliance Reply at 20 (reference to footnote omitted)

<sup>340</sup> Wilson Petition at 19.

<sup>341</sup> *Id.*

<sup>342</sup> See *id.* at 20.



#### 4. Statutory Provisions That Do Not Constitute Barriers

123. We do not determine that every provision of H.B. 129 represents a barrier to infrastructure investment or broadband deployment such that we are compelled to preempt it. At the outset, we identify those provisions that we read as not rising to the level of constituting a barrier to broadband deployment or infrastructure investment that fall within our jurisdiction over communications regulation. Specifically, we do not preempt sections 160A-340(1), (2), (3), (4), (5) and (6); 340.1(a)(2) and (4); 340.1(b), 340.2; and H.B. 129 sections 1.(c), 2.(b), 4, 6, 7, and 8.

124. Section 340 sets out the definitions applicable in H.B. 129. Sections 340(1), (2), (5), and (6) define a city-owned communications service provider, communications network, interlocal agreement between units of local government, and joint agency, respectively. Written broadly, they encompass both wired and wireless networks and reach directly, indirectly, and jointly owned communications networks. Section 340(3) defines “communications service” to encompass “cable, video programming, telecommunications, broadband, or high-speed Internet access service to the public, or any sector of the public, for a fee, regardless of the technology used to deliver the service.”<sup>343</sup> Section 340(4) defines “High-speed Internet access service” to be “Internet access service with transmission speeds that are equal to or greater than the requirements for basic broadband tier 1 service as defined by the Federal Communications Commission for broadband data gathering and reporting.”<sup>344</sup> We note that this definition is independent of the Commission’s standard for “broadband” in its *2015 Broadband Progress Report*, and was only ever intended for “gather[ing] more detailed and therefore useful information about subscription to broadband services . . . .”<sup>345</sup> By way of clarification, the Commission defined “basic broadband Tier 1 service” as service capable of providing between 768 kbps and 1.5 Mbps speed in at least one direction, either download or upload.<sup>346</sup> At the time North Carolina enacted the law, the Commission defined advanced telecommunications capability to mean speeds of at least 4 Mbps download and 1 Mbps upload.<sup>347</sup> In January 2015, the Commission revised its benchmark for advanced telecommunications capability to speeds of at least 25 Mbps download and 3 Mbps upload.<sup>348</sup>

125. Section 160A-340.1(a)(2) requires municipalities to establish an enterprise fund to separately account for “revenues, expenses, property, and source of investment dollars associated with the provision of communications service . . . .”<sup>349</sup> This provision also requires municipalities to prepare and publish an independent annual report. We interpret this to be simply an accounting statute and not a barrier to investment or restriction on competition.

126. Section 340.1(a)(4) prohibits a city-owned communications service provider from exercising the powers or authority of a city in any area, either directly or indirectly, to require any person to use or subscribe to any communications service provided by the city-owned CSP.<sup>350</sup>

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<sup>343</sup> N.C. Gen. Stat. Ann. § 160A-340(3).

<sup>344</sup> N.C. Gen. Stat. Ann. § 160A-340(4).

<sup>345</sup> *2008 Broadband Data Item*, 23 FCC Rcd at 9700-01, para. 20.

<sup>346</sup> *2008 Broadband Data Item*, 23 FCC Rcd at 9700-01, para. 20 (“We will use the terms ‘first generation data’ to refer to those services with information transfer rates greater than 200 kbps but less than 768 kbps in the faster direction, and ‘basic broadband tier 1’ to refer to services equal to or greater than 768 kbps but less than 1.5 mbps in the faster directions.”).

<sup>347</sup> *Sixth Broadband Progress Report*, 25 FCC Rcd at 9558, para. 4.

<sup>348</sup> *2015 Broadband Progress Report* at para. 3.

<sup>349</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(2).

<sup>350</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a)(4).

127. Section 340.1(b) provides that a city-owned communications service provider may sell or discontinue the city's communications network without voter approval.<sup>351</sup>

128. Section 340.2 sets out exemptions from the substantive restrictions of the statute, including the limited "grandfathering" for pre-existing systems, "interlocal," and "unserved" exemptions described above. It also provides that "[t]he exemptions provided in [Section 340] do not exempt a city or joint agency from laws and rules of general applicability to governmental services, including nondiscriminatory obligations."<sup>352</sup>

129. Section 1.(c) of H.B. 129 sets an effective date for a provision regarding eligibility for certain tax refunds. Section 2.(b) provides that H.B. 129's amendment of North Carolina's definition of "public utility" "shall not be construed to change the regulatory nature of or requirements applicable to any particular service currently regulated" by the North Carolina Utilities Commission.<sup>353</sup> Section 4 adds "cable television systems" to the list of services that a city may finance through revenue bonds, Section 6 says that any city designated as a public utility under Chapter 62 (Public Utilities) of North Carolina's General Statutes when H.B. 129 took effect is not subject to H.B. 129's provisions for operations authorized by Chapter 62, and Section 8 provides the effective date for H.B. 129. We do not understand these provisions to restrict competition or function as barriers to broadband deployment, especially in light of our determinations with respect to the other provisions of H.B. 129.

#### IV. COMMISSION AUTHORITY TO PREEMPT THESE LAWS

130. In this section we consider whether the Commission has authority to preempt the laws at issue in these petitions. We first examine whether section 706 gives us authority to preempt any state laws that target providers that are political subdivisions of the state. Finding that section 706 gives us authority to preempt certain—though not all—such laws, we examine whether the laws at issue fall within the scope of our authority to preempt. We conclude that they do.

##### A. The Mandate of Section 706

131. Encouraging broadband deployment is central to federal communications policy. Congress, exercising its plenary power over interstate commerce, created the Commission "so as to make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."<sup>354</sup> Section 2 of the Communications Act grants the Commission jurisdiction over "all interstate and foreign communication by wire or radio,"<sup>355</sup> and broadband Internet access "falls comfortably within the Commission's jurisdiction" under section 2, and has historically been supervised by the Commission.<sup>356</sup>

<sup>351</sup> N.C. Gen. Stat. Ann. § 160A-340.1(a). A "city-owned communications service provider" includes cities providing communications service through a communications network directly, indirectly, or through an interlocal agreement or a joint agency. N.C. Gen. Stat. Ann. § 160A-340.1(b).

<sup>352</sup> N.C. Gen. Stat. Ann. § 160A-340.2(d). The exemptions specifically exclude from their scope the section 340.3 requirements for notice and public hearing. *Id.* § 340.2.

<sup>353</sup> We note that section 62-3(23)a.6 of the North Carolina General Statutes is construed to cover broadband, N.C. Gen. Stat. Ann. § 62-3(23)a.6, and that 62-2(b1) provides that broadband "is sufficiently competitive and shall not be regulated by the [state] Commission." N.C. Gen. Stat. Ann. § 62-2(b1).

<sup>354</sup> 47 U.S.C. § 151.

<sup>355</sup> *Id.* § 152(a).

<sup>356</sup> *Verizon v. FCC*, 740 F.3d 623, 629-630 (D.C. Cir. 2014) (discussing the historical progression of our regulation of Internet access) (citing *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, Final Decision, 77 F.C.C.2d 384, 387, paras. 5-7 (1980) (*Computer II*)); see also *Comcast*, 600 F.3d at 646-47; and 47 U.S.C. § 230(b) (announcing "the policy of the United States" concerning the Internet, which is to

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132. Within the bounds of these jurisdictional grants, Congress has empowered the Commission with broad authority to “make the major policy decisions and select the mix of regulatory and deregulatory tools the Commission deems most appropriate in the public interest to facilitate broadband deployment and competition.”<sup>357</sup> As the central characteristic of the communications field is the “rapid pace of its unfolding,” Congress has granted the Commission sufficiently “broad” authority to address new issues that arise with respect to “fluid and dynamic” communications technologies.<sup>358</sup>

133. The 1996 Act repeatedly emphasizes the importance of robust competition to this aim. The Act’s preamble states that it was designed to “promote competition . . . and encourage the rapid deployment of new telecommunications technologies,”<sup>359</sup> and the Senate Report emphasized that it aimed “to foster the further development of the Nation’s telecommunications infrastructure through competition and deregulation.”<sup>360</sup>

134. Through section 706 of the Act, Congress specifically mandated that the Commission promote competition and infrastructure investment in broadband,<sup>361</sup> instructing the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”<sup>362</sup> To do so, Congress empowered the Commission in section 706(a) to utilize “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.”<sup>363</sup> Similarly, section 706(b) requires that the Commission “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market,” if it finds after inquiry that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion.<sup>364</sup>

135. Section 706 shows a unique level of Congressional concern with broadband deployment. Both sections 706(a) and (b) direct that the Commission “shall” take action to promote broadband deployment. Section 706(b), moreover, is unique in requiring the Commission to study broadband deployment and requiring it to take action if the Commission finds that broadband is not being deployed

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“promote the continued development of the Internet” and to “preserve the vibrant and competitive free market that presently exists for the Internet.”).

<sup>357</sup> *Ad Hoc Telecomm. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009).

<sup>358</sup> *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 219-220 (1943) (explaining the broad authority of the Commission in the radio context to respond to changing technology). The Court added that “[i]n the context of the developing problems to which it was directed, the Act gave the Commission . . . expansive powers . . . [and] a comprehensive mandate.” *Id.*; see also *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137, 138 (1940) (the FCC’s statutory responsibilities and authority amount to “a unified and comprehensive regulatory system” for the communications industry that allows a single agency to “maintain, through appropriate administrative control, a grip on the dynamic aspects” of that ever-changing industry).

<sup>359</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (Introductory Statement) (1996).

<sup>360</sup> S. Rep. No. 104-23, at 1 (1996).

<sup>361</sup> 47 U.S.C. § 1302. The statute defines “advanced telecommunications capability” 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.” 47 U.S.C. § 1302(d)(1). For the purposes of this Order, we use “advanced telecommunications capability” and “broadband” interchangeably. See also *supra* para. 21.

<sup>362</sup> 47 U.S.C. § 1302(a).

<sup>363</sup> *Id.*

<sup>364</sup> 47 U.S.C. § 1302(b).

to all Americans in a reasonable and timely fashion.<sup>365</sup> Both sections, in targeting broadband deployment to “all Americans,” also reflect Congress’s concern with unserved and underserved areas.

136. We have read section 706 as an affirmative grant of authority, as opposed to a mere exhortation.<sup>366</sup> As the D.C. Circuit has held, section 706 vests the Commission with “affirmative authority to enact measures encouraging the deployment of broadband infrastructure.”<sup>367</sup> Specifically, the *Verizon* court acknowledged that section 706(a) grants the Commission authority to “encourage the deployment of . . . advanced telecommunications capability”<sup>368</sup> and that section 706(b) empowers the Commission to “take steps to accelerate broadband deployment if and when it determines that such deployment is not ‘reasonable and timely.’”<sup>369</sup> This affirmation of the Commission’s authority under section 706 builds on previous holdings by the D.C. Circuit that “the general and generous phrasing of § 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.”<sup>370</sup> The Tenth Circuit has similarly found that section 706(b) “operate[s] as an independent grant of authority to the Commission to ‘take steps necessary to fulfill Congress’s broadband deployment objectives.’”<sup>371</sup>

137. We have found, as discussed above,<sup>372</sup> in our *2015 Broadband Progress Report*, adopted on January 29, 2015, that broadband has not been deployed in a reasonable and timely fashion to all Americans.<sup>373</sup> In light of this negative finding, section 706(b) commands that we “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>374</sup> Preemption constitutes one such “immediate action” available to us under this independent grant of authority to “fulfill Congress’s broadband deployment objectives.”

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<sup>365</sup> *Id.*

<sup>366</sup> *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17970, para. 121 (2010) (*aff’d Verizon*, 740 F.3d at 637).

<sup>367</sup> *Verizon*, 740 F.3d at 628.

<sup>368</sup> *Id.* at 637.

<sup>369</sup> *Id.* at 641; *see also id.* at 661, n.5 (Silberman, J., concurring in part) (stating that in directing the Commission to act in section 706, “Congress necessarily invested the Commission with the statutory authority to carry out those acts”).

<sup>370</sup> *Ad Hoc Telecomm. Users Comm. v. FCC*, 572 F.3d 903, 906–07 (D.C. Cir. 2009).

<sup>371</sup> *In re: FCC 11-161*, 753 F.3d at 1053 (citing *USF/ICC Transformation Order*, 26 FCC Rcd at 17689, para. 70).

<sup>372</sup> *See supra* Section I.B.1.

<sup>373</sup> *2015 Broadband Progress Report* at para. 4.

<sup>374</sup> 47 U.S.C. § 1302(b). Contrary to a dissenting statement, *see* Dissenting Statement of Commissioner Ajit Pai at 107, Commission actions adopted pursuant to a negative section 706(b) determination would not simply be swept away by a future positive section 706(b) finding. The Commission takes such measures precisely to achieve section 706(b)’s goal of accelerating deployment. That they may succeed in achieving that goal so as to contribute to a positive section 706(b) finding does not subsequently render them unnecessary or unauthorized without any further Commission process. Throwing away such measures because they are working would be like “throwing away your umbrella in a rainstorm because you are not getting wet.” *Shelby v. Holder*, 133 S. Ct. 2612, 2650 (2013) (Ginsburg, J., dissenting). Even if that were not the case, independent section 706(a) authority would remain. We mention, however, two legal requirements that appear relevant. First, section 408 of the Act mandates that “all” FCC orders (other than orders for the payment of money) “shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order.” 47 U.S.C. § 408. Second, the Commission has a “continuing obligation to practice reasoned decisionmaking” that includes revisiting prior decisions to the extent warranted. *Aeronautical Radio v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991). We are aware of no reason why these requirements would not apply in this context.

138. We recognize that this authority is not unbounded.<sup>375</sup> Our authority must be read “in conjunction with other provisions of the Communications Act, including, most importantly, those limiting<sup>376</sup> our subject matter jurisdiction to “all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio.”<sup>377</sup> Further, any actions we take under section 706(a) must also be “designed to achieve a particular purpose: to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’”<sup>378</sup> Section 706(b) is likewise limited “empower[ing the Commission] to take steps to accelerate broadband deployment if and when it determines that such deployment is not ‘reasonable and timely.’”<sup>379</sup>

139. In sum, Congress has granted us broad jurisdiction over broadband in the United States, and has specifically mandated that we promote broadband deployment, in section 706. We now turn to whether section 706 provides authority to preempt state law.

### B. General Authority to Preempt under Section 706

140. Under established law, a federal agency acting within the scope of its authority may preempt state law.<sup>380</sup> Moreover, Congress need not explicitly delegate to the agency the authority to preempt. “[I]n a situation where state law is claimed to be pre-empted by federal regulation, a ‘narrow focus on Congress’ intent to supersede state law [is] misdirected,’ for ‘[a] pre-emptive regulation’s force does not depend on express congressional authorization to displace state law.’”<sup>381</sup> Instead, the question is whether Congress has delegated the authority to act in a sphere, and whether the agency has exercised that authority in a manner that preempts state law.<sup>382</sup>

141. We find that where broadband has not been deployed “in a reasonable and timely fashion,” section 706 authorizes the Commission to preempt state laws that stand as a barrier to infrastructure investment and broadband deployment, or that inhibit competition in the telecommunications market.<sup>383</sup> Before addressing whether section 706 authorizes preemptions of laws regulating municipalities as broadband providers, we first address whether it authorizes preemption under any circumstances; for example, whether it would reach state laws that regulate broadband provision by purely private entities. Take, as an illustration, a hypothetical state law that prohibited cable-based

<sup>375</sup> See, e.g., *Verizon*, 740 F.3d at 639-40 (stating that “the scope of authority granted to the Commission by section 706(a) is not so boundless as to compel the conclusion that Congress could never have intended the provision to set forth anything other than a general statement of policy” and affirming the limiting principles the Commission identified in the *Open Internet Order*) (citations omitted).

<sup>376</sup> *Verizon*, 740 F.3d at 640.

<sup>377</sup> 47 U.S.C. § 152(a); see also 47 U.S.C. § 151 (purpose of Communications Act is to “regulat[e] interstate and foreign commerce in communication by wire and radio”).

<sup>378</sup> *Verizon*, 740 F.3d at 640.

<sup>379</sup> *Id.* at 641.

<sup>380</sup> *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986).

<sup>381</sup> *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (quoting *Fidelity Fed. Savings & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 154 (1982)).

<sup>382</sup> *Id.*; see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699–700 (1984).

<sup>383</sup> Congress amended section 706 of the 1996 Act in 2008 finding that broadband “has resulted in enhanced economic development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans.” 47 U.S.C. § 1301(1); see also, e.g., 47 U.S.C. § 1301(2) (“Continued progress in the deployment and adoption of broadband technology is vital to ensuring that our Nation remains competitive and continues to create business and job growth.”); 47 U.S.C. § 1305(k)(2) (directing the Commission to develop a National Broadband Plan that would “seek to ensure that all people of the United States have access to broadband capability”).



broadband providers from offering broadband capacity greater than that offered by wireless broadband providers. We think that the answer in that instance would be clear. Such a law would prevent cable-based broadband providers from competing based on superior bandwidth, which in turn could cause such providers to conclude that they could not make an economic case for increasing the capacity of their network in certain communities. The law would therefore constitute a barrier to infrastructure investment because one class of providers would be unable or unwilling to invest in further deployment. It also would constitute a limit on competition because it would restrict the ability of providers to compete with each other based on bandwidth. As explained below, we find section 706 allows the Commission to preempt a state law such as this.

142. In light of Congress’s delegation of authority to the Commission to “encourage” and “accelerate” the deployment of broadband to all Americans, we interpret Sections 706(a) and (b) to give us authority to preempt state laws that stand as barriers to broadband infrastructure investment or as barriers to competition.<sup>384</sup> Again, under *City of New York* and *Crisp*,<sup>385</sup> the relevant inquiry when an agency acts to preempt state law is whether Congress delegated the authority to act in this sphere. In both of those cases, the Supreme Court found “that the Commission’s authority” over cable video programming “extends to all regulatory actions ‘necessary to ensure the achievement of the Commission’s statutory responsibilities,’” including the preemption of otherwise valid state laws.<sup>386</sup> Indeed in *Crisp* the Court reached this conclusion before Congress had specifically authorized the regulation of cable, based on the agency’s general Title I authority over interstate communications by wire and radio.<sup>387</sup>

143. In the case of section 706, Congress was far more specific in its mandate to the Commission and used “general and generous phrasing,” delegating “significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.”<sup>388</sup> Section 706(a) explicitly mandates that the Commission “shall” use all available regulatory tools to “encourage” the timely deployment of broadband “to all Americans”<sup>389</sup> And section 706(b) uses at least equally urgent language, requiring us to continually reappraise deployment, and mandating that we “shall take immediate action” when necessary by “removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>390</sup> Both the Senate Report and the D.C. Circuit have described section 706 as a “necessary fail-safe” “intended to ensure that one of the primary objectives of the [Act]—to accelerate deployment of advanced telecommunications capability—is achieved.”<sup>391</sup> Taken separately or together, sections 706(a) and (b) show a broad delegation of authority to use all available regulatory tools to address what Congress recognized would be one of the most critical infrastructure challenges in the 21st Century.

<sup>384</sup> See, e.g., *City of New York*, 486 U.S. at 69 (preemption of state law regarding the quality of cable television signals); *Crisp*, 467 U.S. at 708 (preemption of state advertising law); *De La Cuesta*, 458 U.S. at 162-63. (preemption of state banking law).

<sup>385</sup> *City of New York*, 486 U.S. at 64 (“[T]he correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action.”); *Crisp*, 467 U.S. at 699-700 (“The power delegated to the FCC plainly comprises authority to regulate the signals carried by cable television stations . . . . Therefore, if the FCC has resolved to pre-empt an area of cable television regulation and if this determination ‘represents a reasonable accommodation of conflicting policies’ that are within the agency’s domain, we must conclude that all conflicting state regulations have been precluded.”) (citation omitted).

<sup>386</sup> *Crisp*, 467 U.S. at 700 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979)).

<sup>387</sup> *Id.* (citing 47 U.S.C. § 152(a)).

<sup>388</sup> *Ad Hoc Telecomm. Users Comm. v. FCC*, 572 F.3d at 906–07.

<sup>389</sup> 47 U.S.C. § 1302(a).

<sup>390</sup> 47 U.S.C. § 1302(b).

<sup>391</sup> *Verizon*, 740 F.3d at 639 (quoting S.Rep. No. 104-23 at 50-51).

144. Our preemption authority falls within the “measures to promote competition in the local telecommunications market” and “other regulating methods” of section 706(a) that Congress directed the Commission to use to remove barriers to infrastructure investment. It likewise falls within the available “action[s] to accelerate deployment” we may take in order to “remove barriers to infrastructure investment” and to “promote competition” described in section 706(b). As Congress would have been aware in passing the 1996 Act, the Commission has in the past used preemption as a regulatory tool where state regulation conflicts with federal communications policy.<sup>392</sup> Given this history against which Congress legislated, the best reading of section 706 is therefore that Congress understood preemption to be among the regulatory tools that the Commission might use to act under section 706.

145. Some commenters have noted that Congress did not include the word “preemption” in the language of the statute.<sup>393</sup> Some commenters also have argued that because Congress referred to preemption in previous drafts of the bill only with respect to State commissions, the Commission lacks preemption authority under section 706.<sup>394</sup> We disagree. The law is clear that Congress need not “explicitly delegate” the authority to preempt.<sup>395</sup> In fact, Congress’s decision not to specifically identify preemption is to be expected where, as here, the Commission had previously preempted state law even where the relevant statutes contained no express discussion of preemption.<sup>396</sup> Consistent with that practice, Congress drafted section 706 in broad terms, directing the Commission to use “measures that promote competition” and to do so in “a manner consistent with the public interest, convenience, and necessity.”<sup>397</sup> That Congress provided a small number of specific examples in section 706(a), such as price cap regulation and regulatory forbearance, does not exclude other measures within the Commission’s authority. Indeed, the language of section 706(a) supports this understanding, directing the Commission and State commissions to use “measures that promote competition in the local telecommunications market” or “other regulating methods that remove barriers to infrastructure investment.” Such methods would of course include those listed, but would also include additional methods, including preemption, rulemaking, or other appropriate methods. In sum, we find that section

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<sup>392</sup> *Computer & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) (“Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission’s jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme.”); *see also, e.g., Minnesota Pub. Utilities Comm’n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (“Competition and deregulation are valid federal interests the FCC may protect through preemption of state regulation.”); *Pub. Util. Comm’n of Texas v. FCC*, 886 F.2d 1325, 1334 (D.C. Cir. 1989); *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1114 (D.C. Cir. 1984).

<sup>393</sup> *See, e.g.,* Wireless Internet Service Providers Association (WISPA) Comments, WC Docket Nos. 14-115 and 14-116, at 6 (filed Aug. 29, 2014) (WISPA Comments) (“[W]hile all other aspects of the initial Senate provision were adopted into the final statutory language of Section 706, the language on preemption was not.”); NTCA Comments at 18 (“As the Joint Conference Report notes, Section 706 adopted the Senate bill ‘with a modification.’ The modification specifically *deleted* language that would have authorized the FCC to preempt State commissions.”); Letter from Jonathan Banks, Senior Vice President, USTelecom, and Mike Romano, Senior Vice President, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 14-115 and 14-116, Attach. at 3 (filed Feb. 5, 2015) (USTelecom-NTCA *Ex Parte* Letter) (“[N]othing in section 706 expressly permits the FCC to preempt state laws . . .”).

<sup>394</sup> *See id.*; *see also* CenturyLink Comments at 16; National Conference of State Legislatures Comments at 2–3; National Governors Association Comments at 3; State of North Carolina Comments, WC Docket No. 14-115, at 5 (filed Aug. 29, 2014) (State of North Carolina Comments).

<sup>395</sup> *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 369.

<sup>396</sup> *See, e.g., Crisp*, 467 U.S. at 699; *Nat’l Ass’n of Regulatory Util. Commrs v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984).

<sup>397</sup> 47 U.S.C. § 1302(a).

706 incorporates the rule common throughout communications law: the Commission may preempt state laws regarding interstate communications where they conflict with federal communications policy.

### C. Authority to Preempt Certain State Regulations of Community Broadband Providers

146. Given that we find section 706 provides authority to preempt state law in some cases, we now address whether it may at least sometimes provide authority to preempt state laws that regulate the provision of broadband by a state's political subdivisions. We find that sections 706(a) and (b) both do give us that authority in certain circumstances. Two different views support our authority. *First*, the Commission has concluded that broadband services are jurisdictionally interstate for regulatory purposes.<sup>398</sup> Congress has delegated authority to the Commission to regulate interstate services.<sup>399</sup> *Second*, even if that were not sufficient, section 706 makes clear that Congress has mandated that the Commission remove "barriers" to broadband deployment and infrastructure investment and promote competition in the local telecommunications market. Whether something constitutes a barrier or promotes competition is a question of the kind that Congress intended the Commission, as the Nation's expert agency of communications, to answer and to govern. For these reasons, we find that where a state law regulating the provision of broadband by a political subdivision serves to effectuate communications policy as opposed to core state control of political subdivisions, and where that law stands as a barrier to broadband infrastructure investment or an impediment to competition, such laws conflict with our authority to ensure the deployment of broadband to all Americans on a reasonable and timely basis and so may be preempted. To put it plainly, section 706 authorizes the Commission to displace state laws that effectuate choices about the substance of communications policy that conflict with federal communications policy designed to ensure "reasonable and timely" deployment of broadband.

147. It is well established that while states and the federal government share jurisdiction over the regulation of communications, state laws may be preempted where they conflict with the Commission's prerogative to regulate interstate communications.<sup>400</sup> We do not understand this bedrock principle to vanish simply because the state's communications laws target a provider that is also a political subdivision of a state. To be sure, as explained below, a different question would be presented if we were asked to preempt under section 706 a law that goes to a state's power to withhold altogether the authority to provide broadband. But where a state has authorized municipalities to provide broadband, and then chooses to impose regulations on that municipal provider in order to effectuate the state's

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<sup>398</sup> *National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, WC Docket No. 09-193, Memorandum Opinion and Order, 25 FCC Rcd 5051, 5054, para. 8 n.24 (2010) (*NARUC Broadband Data Order*) (citing *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22475, para. 16 (1998), *recon. denied*, 17 FCC Rcd 27409 (1999); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4832, para. 59 (2002) (*Cable Modem Order and NPRM*), *aff'd*, *NCTA v. Brand X*, 545 U.S. 967 (2005); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5911, para. 28 (2007) (*Wireless Broadband Classification Order*); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13288, para. 11 (2006)).

<sup>399</sup> 47 U.S.C. § 152.

<sup>400</sup> *See, e.g., City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1873 (2013); *Crisp*, 467 U.S. at 699; *see also, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984) ("Congress did not intend to allow inconsistent state regulations [to] frustrate [its] goal of developing a unified national communications service." (alterations in original, quotation marks and citations omitted)).

preferred communications policy objectives, we find that such laws fall within our authority to preempt. To take an example, where a state allows political subdivisions to provide broadband, but then imposes regulations to “level the playing field” by creating obligations apparently intended to mirror those borne by private providers, it does so in order to further its own policy goals about optimal competitive and investment conditions in the broadband marketplace. The states here are deciding that incumbent broadband providers require protection from what they regard as unfair competition and regulating to restrict that competition. This steps into the federal role in regulating interstate communications. Where those laws conflict with federal communications policy and regulation, they may be preempted. We thus interpret sections 706(a) and 706(b) to give us authority to preempt state laws that regulate the provision of broadband by political subdivisions, provided that the law in question serves to effect communications policy and would frustrate broadband deployment “on a reasonable and timely basis . . . to all Americans.”

148. We find that section 706 provides the authority to preempt these laws because this is the area in which federal law preempts state law when there is a conflict. Put differently, as the *Verizon* court noted, section 706 is cabined by our subject matter jurisdiction over “interstate . . . communication by wire and radio.”<sup>401</sup> It is thus only the state restrictions that target this subject matter that fall within our authority to preempt. For example, a state law that allowed municipalities to provide broadband, but that prohibited the municipal provider from offering service with a bandwidth higher than any private provider in the state could fall within our authority under section 706 to preempt, if we determined that it acted as a barrier to infrastructure investment or competition. Such a law is focused solely on policy preferences, and not core state control of political subdivisions. In short, a state law that effectuates a policy preference regarding the provision of broadband is not shielded from all scrutiny simply because it is cast in terms that affect only municipal providers.

149. Conversely, we do not read this preemptive authority under section 706 to reach all state laws that may have an effect, however indirect, on the provision of broadband by municipalities. Although a law could have an indirect effect of restricting the class of entities that may provide broadband in the state, it may not rise to the level of a restriction on competition or barrier to broadband deployment or infrastructure investment within our section 706 authority to preempt.

150. We have before us specific petitions to preempt specific laws. Below, we address whether those specific laws fall within our authority to preempt and whether they must be preempted under section 706. We do not decide here that any other class of laws falls within or without our authority to preempt. We offer these examples only to help illustrate our reading of section 706 and the general point that our authority to preempt is limited to laws that serve to effect state policy regarding the provision of broadband, as opposed to laws that have an indirect effect on the provision of broadband, such as those that serve the traditional state function of granting or withholding authority to political subdivisions.

## **D. Counterarguments**

### **1. Arguments Based on the Act**

151. Our conclusion is consistent with the fact that section 706(a) directs both the Commission and “each State commission with regulatory jurisdiction” to encourage the deployment of broadband. A few commenters have argued that because section 706(a) addresses state commissions as well as the Commission, it cannot be read to grant authority to preempt state laws that restrict municipal broadband, because Congress should not be read to have granted a State commission the power to preempt state laws.<sup>402</sup> We do not find this argument persuasive. We find it more reasonable to interpret the phrase

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<sup>401</sup> 47 U.S.C. § 152(a).

<sup>402</sup> See, e.g., State of North Carolina Comments at 5 (“It would be illogical to construe Section 706(a) as a grant or preemptive power when the Congress directed the Commission and the State commission to accomplish

(continued...)

“other regulatory methods” to apply differently to the Commission and state commissions. Each is likely to have different regulatory tools, and the statute directs each to use the tools it has available to encourage the deployment of broadband. In the case of the Commission, the available regulatory tools include preemption. Moreover, the D.C. Circuit has already rejected a similar line of argument in *Verizon*.<sup>403</sup> Finally, even if section 706(a) were so limited, this would not limit 706(b), which we find also independently furnishes the authority to preempt certain state restrictions that conflict with federal broadband policy as “barriers to infrastructure investment” or that stifle competition in the broadband market.

152. Separately, some have argued that the legislative history of section 706 demonstrates that Congress did not intend to grant authority to preempt state laws that restrict broadband.<sup>404</sup> This argument relies on the fact that the final law did not include a provision from a previous Senate draft of the bill stating that “The Commission may preempt State commissions if they fail to act to ensure reasonable and timely access.”<sup>405</sup> Some commenters have argued that this change indicates Congress could not have intended for the Commission to have the authority to preempt state laws under section 706. We do not find this argument persuasive. The language that was deleted referred only to preemption of state commissions that were not fulfilling their mandate under section 706, which is very different from the preemption at issue here. Moreover, the language of statutes may change for many reasons. It may be that the drafters of the Senate bill thought it necessary to clarify that federal preemption authority applies even when Congress grants express authority to State commissions, and that Congress later disagreed that this was necessary. Whatever the reason, Congress eventually chose to remain silent on the issue. Especially in light of the history of preemption against which Congress legislated, we do not find this change to the statute to be persuasive evidence that Congress affirmatively intended to exclude preemption from the regulatory tools available to the Commission to fulfill its section 706 mandate.

153. We also reject arguments that section 601(c) of the 1996 Act restricts our authority to preempt here.<sup>406</sup> That section states, “NO IMPLIED EFFECT—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.”<sup>407</sup> By its terms, section 601(c) prevents “implied” preemption. Thus, it would prevent a reading that section 706, or other section of the 1996 Act, itself preempts state laws by implication. That is not contrary to our reading of section 706 because we do not read section 706 to itself preempt state laws. Instead, we read section 706 to give the Commission authority to take any regulatory action within its general authority to address barriers to infrastructure investment.<sup>408</sup> Where we find that a state communications law is such a barrier, section 706 gives us the authority to preempt.

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Congressional intent); National Conference of State Legislatures Comments at 2; CenturyLink Comments at 16; Free State Foundation Comments at 12.

<sup>403</sup> *Verizon v. FCC*, 740 F.3d at 638.

<sup>404</sup> See, e.g., NTCA Comments at 18 (“The modification specifically *deleted* language that would have authorized the FCC to preempt State Commissions. From this deletion, one can only logically conclude that Congress intended that FCC actions pursuant to Section 706 not include state preemption.”); NTCA Reply at 7; US Telecom Comments at 21, n.56; CenturyLink Comments at 17; ITTA Comments at 4.

<sup>405</sup> H.R. Rep. No. 104-458, at 210 (1996) (Conf. Rep.).

<sup>406</sup> See, e.g., State of North Carolina Comments at 3; CenturyLink Reply at 7.

<sup>407</sup> 1996 Act § 601(c)(1), *codified at* 47 U.S.C. § 152 note.

<sup>408</sup> See *In re: FCC 11-161*, 753 F.3d at 1120 (stating that section “601(c)(1) does not limit Congress’s actual delegation of authority to the FCC”); *Qwest Corp. v. Minnesota Pub. Utilities Comm’n*, 684 F.3d 721, 730-31 (8th Cir. 2012). Courts have properly read section 601(c)(1) narrowly, because “it is a general rule in preemption analysis that a savings provision does not ‘bar the ordinary working of conflict preemption principles’ ... lest [it]

(continued...)



## 2. *Gregory v. Ashcroft*

154. Some commenters have argued that section 706 cannot authorize preemption because of the “clear statement rule” from *Gregory v. Ashcroft*.<sup>409</sup> We find that *Gregory*’s clear statement rule does not apply here. “Where it applies,” the presumption requires that courts “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>410</sup> The rule, even where it applies, does not require express language in the statute, but only that “Congress should make its intention ‘clear and manifest.’”<sup>411</sup> As the Supreme Court’s cases make clear, however, the presumption does not apply to every instance of preemption. Rather, it applies when a court must decide if a statute should be read to “upset the usual constitutional balance of federal and state powers,” such as the purported preemption in *Gregory* itself of laws regarding qualifications for a state’s “constitutional officers”—a provision of state law that “goes beyond an area traditionally regulated by the States” to reach a “a decision of the most fundamental sort for a sovereign entity.”<sup>412</sup> Because interference with a state’s ability to define its constitutional officers “would upset the usual constitutional balance of federal and state powers,” the *Gregory* Court emphasized that it was “‘incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ this balance.”<sup>413</sup>

155. However, in areas beyond these “historic police powers of the States,” the *Gregory* presumption against preemption has no place. Specifically, the Supreme Court has explained that “an ‘assumption’ of nonpre-emption [*sic*] is not triggered when the State regulates in an area where there has been a history of significant federal presence.”<sup>414</sup> Because the intent of Congress is always the touchstone in preemption analysis, it makes little sense to presume Congress meant to permit conflicting state regulations in an area of traditional federal regulation.<sup>415</sup> In matters of interstate communications policy in particular, courts have repeatedly found that federal law preempts state communications policy without

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‘permit [a] law to defeat its own objectives, or potentially ... to destroy itself.’” *Farina, v. Nokia Inc.*, 625 F.3d 97, 131 (3d Cir. 2010) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869, 872 (2000)); *accord Qwest Corp.*, 684 F.3d at 731; *see also Farina*, 625 F.3d at 131 (stating that section 601(c)(1) is “not a statement of intent to permit actual conflicts between state and federal law”).

<sup>409</sup> 501 U.S. 452 (1991); *see also, e.g.*, Letter from Herbert H. Slatery III, Attorney General and Reporter, State of Tennessee, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-116, at 2 (filed Feb. 5, 2015) (TN AG Slatery *Ex Parte* Letter); Letter from Alan Wilson, Attorney General, State of South Carolina, to Tom Wheeler, Chairman, FCC, WC Docket Nos. 14-115 and 14-116, at 2 (filed Feb. 5, 2015); USTelecom-NTCA *Ex Parte* Letter Attach. at 2.

<sup>410</sup> *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2256 (2013) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>411</sup> *Gregory*, 501 U.S. at 461 (quoting *Rice*, 331 U.S. at 230).

<sup>412</sup> *Id.* at 460; *see also id.* at 461 (clear statement required for “traditionally sensitive areas” (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))). Indeed, the Missouri statute concerning how the state’s judicial branch would be composed at issue in *Gregory* implicated “the very essence of state sovereignty and political determination.” As a result, “the *Gregory* plain statement preemption rule is limited to federal laws impacting a state’s self-identification as a sovereignty.” *U.S. v. Lot 5, Fox Grove, Alachua County, Florida*, 23 F.3d 359, 362 (11th Cir. 1994) (*citing Reich v. New York*, 3 F.3d 581, 589–90 (2d Cir. 1993) (refusing to interpret *Gregory* to resurrect undue deference to State’s political decisions); *cert. denied*, 510 U.S. 1163 (1994); *EEOC v. Massachusetts*, 987 F.2d 64, 69 (1st Cir. 1993) (stating that *Gregory* made “unequivocally clear . . . the narrowness of its holding”).

<sup>413</sup> *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985)).

<sup>414</sup> *United States v. Locke*, 529 U.S. 89, 107–08 (2000); *see also, e.g., Inter Tribal Council of Arizona*, 133 S. Ct. at 2256; *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 534 (2009) (analyzing, in response to dissent, whether bank regulation was traditional area of state authority).

<sup>415</sup> *Cf.* National Conference of State Legislatures Comments at 2-3.

reference to the *Gregory* clear statement rule.<sup>416</sup> Because we read section 706 to give preemptive authority for state laws that target the regulation of broadband once a state has permitted cities to provide service, as opposed to laws that go to the “historic police powers of the States,” the *Gregory* clear statement rule does not apply in this context.

156. *Nixon v. Missouri Municipal League* is not to the contrary.<sup>417</sup> Below we explain why that court’s holding construing section 253 of the Act does not predetermine the preemptive scope of section 706 as applied to the petitions before us. Here, we explain why it does not require that we apply the *Gregory* clear statement rule. To be sure, *Nixon* referred to the *Gregory* clear statement rule in the context of federal preemption of state bans on municipal communications providers under section 253. However, that case centered on a state’s flat ban on political subdivisions entering the market at all. Because in that case, the state withheld a power altogether, preemption would have interfered with “States’ arrangements for conducting their own governments” which the Court held necessarily implicated *Gregory*.<sup>418</sup> That is different from a situation in which a state has permitted a political subdivision to enter the market as a broadband provider, but also seeks to impose regulations on the municipal provider in order to effect separate communications policy goals. In the latter case, the state has crossed from a “decision of the most fundamental sort for a sovereign entity”<sup>419</sup> into a matter in which conflicting federal law is presumed to preempt under the Commerce Clause.

157. For the same reason, our own previous decisions construing section 253 are not to the contrary. The Commission has held, and the Supreme Court has affirmed, in preemption cases under section 253 that state statutes banning municipalities from entering local telecommunications markets implicate core state sovereignty concerns and are subject to the plain statement rule enunciated in *Gregory*.<sup>420</sup> In the *Texas Preemption Order*, for example, we found that *Gregory* applied to the “fundamental issue” of Texas’s decision “that it will not permit its municipalities to compete in the provision of certain telecommunications services.”<sup>421</sup> We contrasted this with “the question of whether federal standards may be applied to an arm of a Texas municipality that is engaged in the provision of a service in competition with private entities,”<sup>422</sup> where the *Gregory* presumption is inappropriate. We need not and do not revisit that holding or perform a *Gregory* analysis in this proceeding, however, because, as we have explained, the Tennessee and North Carolina statutes do not implicate core attributes of state sovereignty but rather regulate interstate communications services that are at the heart of the Commission’s jurisdiction.

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<sup>416</sup> See, e.g., *City of New York*, 486 U.S. at 64; *Crisp*, 467 U.S. at 700.

<sup>417</sup> *Nixon*, 541 U.S. at 125.

<sup>418</sup> *Id.* at 140.

<sup>419</sup> *Gregory*, 501 U.S. at 460.

<sup>420</sup> See *Public Utility Commission of Texas, The Competition Policy Institute, Intelcom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc., Teleport Communications Group, Inc., and City of Abilene, Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CC Docket Nos. 96-13, 96-14, 96-16, and 96-19, Memorandum Opinion & Order, 13 FCC Rcd 3460 (1997) (*Texas Preemption Order*), *aff’d City of Abilene v. FCC*, 164 F.3d 49, 51-52 (D.C. Cir. 1999); *Missouri Municipal League; the Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri*, CC Docket No. 98-122, Memorandum Opinion and Order, 16 FCC Rcd 1157 (2001) (*Missouri Municipal League*), *rev’d Missouri Mun. League v. FCC*, 299 F.3d 949 (8th Cir. 2002), *rev’d sub nom. Nixon*, 541 U.S. 125.

<sup>421</sup> *Texas Preemption Order*, 13 FCC Rcd at 3546, para. 183.

<sup>422</sup> *Id.*; see also *Missouri Municipal League*, 16 FCC Rcd at 1166, para. 15 (distinguishing between instance where a municipality “lacked legal authority” from instance in which a municipality can act and then is presumptively subject to federal regulations).

158. The context in which Congress enacted section 706 also illustrates why *Gregory* is no barrier here. Congress was legislating in 1996 against a backdrop in which it understood interstate communications services to be distinct from intrastate services. Indeed, sections 1 and 2 of the Act are clear that the Commission, not the states, is intended to have comprehensive, if not exclusive, jurisdiction over interstate services.<sup>423</sup> Moreover, the Commission has held broadband services such as those at issue here to be interstate.<sup>424</sup> That federal jurisdiction over interstate services moreover has been found—and upheld—to include preemption authority.<sup>425</sup> In this context, where Congress understood federal authority to be paramount over interstate services and against the backdrop of the Commission using that authority to in fact preempt state law, the language of section 706, in conjunction with sections 1 and 2, is more than clear enough to satisfy the purpose of *Gregory*. It cannot be the case that *Gregory* requires pervasive schemes of federal regulation that have long been understood to include powers of federal preemption to be reconfigured to exclude that power.

### 3. *Nixon v. Missouri Municipal League*

159. A number of commenters have argued that the Commission cannot have the power to preempt state barriers to municipal broadband because of the Supreme Court’s decision in *Nixon v. Missouri Municipal League*.<sup>426</sup> In that case, the Court upheld a Commission ruling that section 253(a) of the Act did not preempt a state-law flat ban on municipal telecommunications, i.e., phone service. Section 253(a) declares that no state law “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>427</sup> Missouri had passed a flat ban under which no political subdivision of the state could provide telecommunications service.<sup>428</sup> Certain Missouri cities, organizations, and city-owned utilities petitioned the Commission to find that the Missouri ban was preempted under section 253(a). The Commission found that section 253 did not preempt the Missouri law because section 253 was not sufficiently clear that Congress intended to preempt the decision of a state to withhold from its political subdivisions the power to provide telecommunications.<sup>429</sup> The Eighth Circuit reversed the agency decision,<sup>430</sup> creating a circuit split with the D.C. Circuit, which had upheld a similar Commission ruling regarding a Texas ban.<sup>431</sup> In *Nixon*, the Supreme Court then reversed the Eighth Circuit, agreeing that section 253 did not reach a state’s flat ban on municipal entry to the telecommunications market.

160. We find that *Nixon* does not control here or foreclose the possibility of preemption under section 706 of laws like those before us in these petitions. First, we note that the posture of the cases, and

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<sup>423</sup> Section 1 states that the Commission was created “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio . . . .” 47 U.S.C. § 151. Section 2 states that “[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire and radio and all interstate and foreign transmission of energy by radio.” 47 U.S.C. § 152.

<sup>424</sup> See *supra* note 398.

<sup>425</sup> See, e.g., *Locke*, 529 U.S. at 107-08; see also, e.g., *Inter Tribal Council of Arizona*, 133 S. Ct. at 2256; *Cuomo*, 557 U.S. at 534.

<sup>426</sup> See CenturyLink Comments at 16-20, 22-23; ITTA Comments at 4; National Conference of State Legislatures Comments at 4-5; State of North Carolina Comments at 3; NTCA Comments at 4-6, 13; State of North Carolina Comments at 3-5; TN AG Slatery *Ex Parte* Letter at 3; USTelecom Comments at 11-12, 16-17, 19-21; USTelecom-NTCA *Ex Parte* Letter Attach. at 1-3; WISPA Comments at 4-5.

<sup>427</sup> 47 U.S.C. § 253(a).

<sup>428</sup> *Nixon*, 541 U.S. at 129.

<sup>429</sup> *Missouri Municipal League*, 16 FCC Rcd at 1169, para. 19.

<sup>430</sup> See *Missouri Mun. League*, 299 F.3d 949.

<sup>431</sup> *City of Abilene, Texas v. FCC*, 164 F.3d 49, 51-52 (D.C. Cir. 1999).

therefore the legal inquiry, differs. In *Nixon*, appellants were required to demonstrate that the language of section 253 itself showed a clear congressional intention to preempt the state law in question. For example, when the petitions to preempt the Missouri and Texas laws were originally before us, the question we decided was whether the laws in question fell within the sphere of section 253(a) itself.<sup>432</sup> Here, as we have explained, the correct legal question is not whether section 706 itself preempts the state laws in question, but rather whether Congress has delegated authority to act in this sphere, and whether we should exercise that authority to make a particularized decision to preempt.<sup>433</sup>

161. More fundamentally, these petitions present a different, narrower question than did *Nixon*, as a comparison to the *Nixon* Court’s reasoning makes clear. That Court explained, “To get at Congress’s understanding, what is needed is a broader frame of reference, and in this litigation it helps if we ask how Congress could have envisioned the preemption clause actually working if” the Missouri law were preempted.<sup>434</sup> We follow that approach here on a different set of facts with a different set of state restrictions, and we reach a different result than that in *Nixon* and our underlying orders. Where the *Nixon* Court found that preemption of flat bans on municipal telecommunications would produce “strange and indeterminate results,”<sup>435</sup> we find that the preemption of state communications regulation on municipal broadband providers—where the state has given an underlying authorization<sup>436</sup>—will have the effect of promoting competition and infrastructure investment and is consistent with the state’s grant of authority to municipalities, as we have explained above.<sup>437</sup>

162. The primary concern of the *Nixon* Court was that, if Missouri’s flat ban on municipal telecommunications were preempted, “[t]he 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.”<sup>438</sup> Moreover, this would produce a “national crazy quilt” under which municipalities in some states could provide service because of underlying background state law, but others could not without further affirmative authorizing legislation. However, neither concern is at issue here.<sup>439</sup> Again, here we contemplate preemption under section 706 where a state has allowed municipalities to enter the broadband market but has also imposed regulations to affect the state’s communications policy preferences. Where we preempt those state regulations that apply to municipal

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<sup>432</sup> See *Missouri Municipal League*, 16 FCC Rcd at 1158, para. 1 (stating that petitioners asserted Missouri ban “violate[d] section 253(a) of the Communications Act of 1934”); *Texas Preemption Order*, 13 FCC Rcd at 3544, para. 179 (holding that cities are not “any entity” within meaning of Section 253(a)).

<sup>433</sup> See *supra* para. 140.

<sup>434</sup> *Nixon*, 541 U.S. at 133.

<sup>435</sup> *Id.*

<sup>436</sup> We find unpersuasive NARUC’s argument that the strict rule of construction known as Dillon’s rule precludes preemption. Dillon’s rule generally provides that a municipality has only the authority expressly granted to it by the state. In contrast, home rule provides that a municipality has authority except where expressly superseded by state law. In the two states at issue in these petitions, the state has granted authority to the municipal entity, thereby obviating the issue of Dillon’s rule or home rule status. See National Association of Regulatory Utility Commissioners (NARUC) Reply, WC Docket Nos. 14-115 and 14-116, at 2, 7 (filed Sept. 29, 2014); Letter from James Bradford Ramsey, General Counsel, NARUC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 14-115 and 14-116, at 2 (filed Dec. 4, 2014).

<sup>437</sup> See *supra* Section III.

<sup>438</sup> *Nixon*, 541 U.S. at 135.

<sup>439</sup> We find unpersuasive commenters’ assertion that preemption of provisions of the Tennessee and North Carolina laws would lead to the kind of “strange and indeterminate” results the *Nixon* court described for the reasons described here. See, e.g., CenturyLink Comments at 22-23; USTelecom Comments at 12, 16-17; see also Free State Foundation Comments at 15-16 (expressing concerns about a “one-way ratchet”); National Conference of State Legislatures Comments at 4-5 (expressing concerns about “strange and indeterminate” results).

providers, the municipal providers are still authorized under the separate delegation of authority. Unlike in *Nixon*, the municipality is not “powerless to enter the . . . business.”<sup>440</sup>

163. In the case of North Carolina, before H.B. 129 was enacted, a municipality already had the right to provide cable service, which the North Carolina Court of Appeals had interpreted to include broadband service.<sup>441</sup> In passing the bill, the North Carolina legislature reaffirmed existing law, and then applied a number of additional regulations that applied only to municipal providers. It is therefore our understanding that if North Carolina’s statute is preempted, the existing background law will provide authority for cities to provide broadband, as well as mechanisms to finance those operations.<sup>442</sup> In the case of Tennessee, the preemption of only the geographic restriction in Tennessee’s Section 601 would leave a municipal electric provider with the authority to operate under the rest of that authorizing statute. In sum, while “freedom is not authority,”<sup>443</sup> in the cases before us, we have reason to believe that preemption of the type petitioners seek will leave a status quo under which additional municipalities will be able to provide service.

164. The *Nixon* Court also expressed concern that preemption in that case would act as a “one-way ratchet” under which a state could permit municipalities to enter the market, but then could never withdraw that authority.<sup>444</sup> But that would not follow under our reading of section 706 here. Again, consistent with our previous holdings, we do not read section 706 to give us the power to preempt state laws regarding the fundamental question of whether political subdivisions may enter the broadband market at all. The concern about an anomalous “one-way ratchet” at issue in *Nixon* is thus inapplicable here.<sup>445</sup>

165. Our conclusion would remain the same regardless of whether broadband Internet access service were classified as an information service or as a telecommunications service, which was also the regulatory classification of service at issue in *Nixon*. This is so both because we act under a different statute—section 706 as opposed to section 253—and because the class of state law is different from those at issue in *Nixon*. Again, these petitions concern state competition regulation as opposed to flat bans on the exercise of authority. We also note that although section 253 addresses preemption of telecommunications laws, we are not compelled to act under section 253 or to eschew section 706 in this instance. We find that section 706 is an alternate, often complementary source of authority. Because section 706 specifically addresses barriers to *advanced* telecommunications, which are the services at issue in these petitions, whereas section 253 addresses state anticompetitive laws regarding all telecommunications generally, we conclude that section 706 is available as a source of authority, regardless of whether section 253 would or would not also apply here.<sup>446</sup>

166. Finally, we note that in *Nixon*, the Court was affirming the Commission’s view. In this case, however, the Commission has reached the conclusion that preemption is necessary to achieve the federal goal of encouraging broadband deployment and infrastructure investment. To the extent that this

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<sup>440</sup> CenturyLink Comments at 21.

<sup>441</sup> *BellSouth Telecomm., Inc. v. City of Laurinburg*, 606 S.E.2d 721 (N.C. Ct. App. 2005) *appeal denied* by 615 S.E.2d 660 (N.C. 2005); *see supra* paras. 37-38.

<sup>442</sup> *See* Wilson Dec. 15 *Ex Parte* Letter at 7-9; *see also Nixon*, 541 U.S. at 135.

<sup>443</sup> *Nixon*, 541 U.S. at 135.

<sup>444</sup> 541 U.S. at 137; *see also* Free State Foundation Comments at 14–16.

<sup>445</sup> *See, e.g.*, USTelecom Comments at 17.

<sup>446</sup> We do not decide whether section 253 could, consistent with *Nixon*, be interpreted to preempt state laws that empower municipalities to provide telecommunications—advanced or otherwise—but then place regulatory burdens on those municipal providers in order to effect the state’s preferences regarding competition in the telecommunications marketplace.



reflects the Commission’s expert judgment about the critical importance of broadband deployment and the Congress’s concern about that goal as expressed in section 706, it would merit deference.<sup>447</sup>

#### 4. The 10<sup>th</sup> Amendment

167. Some commenters have argued that the Commission is prohibited from preempting the statutes at issue here by the Constitution’s 10<sup>th</sup> Amendment,<sup>448</sup> which reserves “to the states respectively, or to the people” “those powers not delegated to the United States by the Constitution.”<sup>449</sup> We do not find this argument persuasive. To be sure, municipal subdivisions “are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.”<sup>450</sup> Again, however, we do not understand our power to preempt under section 706 as applied in this order to include interference with a state’s prerogative to grant or withhold the “government power[]” to offer broadband communications. Once the state has granted that power, however, we do not believe a state is free to advance its own policy objectives when they run counter to federal policy regarding interstate communications. Put more generally, a state cannot shelter its policy regulations from all scrutiny, simply because they regulate only political subdivisions.<sup>451</sup> Precedent such as *United States v. Printz*,<sup>452</sup> cited by commenters,<sup>453</sup> is also inapposite. This is not an instance in which “the Federal Government” would seek to “compel the States to implement, by legislation or executive action, [a] federal regulatory program.”<sup>454</sup> Indeed, we would not compel any entity to take any action. Instead, we seek to remove barriers so that local governments are in a position to either build infrastructure or not, as they determine best meets the needs of their communities.<sup>455</sup>

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<sup>447</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>448</sup> U.S. Const. amend. X.

<sup>449</sup> See, e.g., NTCA Comments at 6-7; ALEC Comments at 2-3; Institute for Policy Innovation Comments at 1-3; NARUC Reply at 2; TN AG Slatery *Ex Parte* Letter at 2.

<sup>450</sup> *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 433 (2002).

<sup>451</sup> For example, the Supreme Court held that when a federal statute directed that localities could spend federal payments in lieu of local property taxes for “any local government purpose,” a state legislature could not dictate how those funds would be spent, even though such a power to order local taxing and spending is ordinarily a state’s prerogative. *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 268 (1985); see also *City of Columbus*, 536 U.S. at 448 (Scalia, J., dissenting) (“[I]t should not be thought that the States’ power to control the relationship between themselves and their political subdivisions—their ‘traditional prerogative . . . to delegate’ (or to refuse to delegate) ‘their authority to their constituent parts’ . . . -has hitherto been regarded as sacrosanct. To the contrary.” (citation omitted)).

<sup>452</sup> 521 U.S. 898 (1997).

<sup>453</sup> See, e.g., Institute for Policy Innovation Comments at 1; ALEC Comments at 2; NTCA Comments at 7; Free State Foundation Comments at 4, 16; Madery Bridge Comments, WC Docket No. 14-115, at 2 (filed Aug. 28, 2014); USTelecom-NTCA *Ex Parte* Letter Attach. at 5.

<sup>454</sup> 521 U.S. at 925.

<sup>455</sup> We also find that the First Amendment does not prohibit us from preempting the laws in question. See Professor Enrique Armijo, Elon University School of Law, Comments, WC Docket Nos. 14-115 and 14-116 (filed Aug. 29, 2014). Professor Armijo argues that the terms of service of some municipal providers infringe on subscribers’ constitutionally protected speech rights. *Id.* at 1-3. Even if that is so—an issue we do not reach—we are not “ratifying” such infringement by preempting restrictions on municipal broadband, *id.* at 4-5, because we take no position here on the terms of service that municipal provider should or may offer.

### E. Application to Tennessee's Section 601

168. Above, we found that the territorial restriction in Tennessee Code section 601 is a barrier to broadband deployment and infrastructure investment and limits competition.<sup>456</sup> We also find that it falls within our power to preempt under section 706 because it serves as a state law communications policy regulation, as opposed to a core state function in controlling its political subdivisions. We reach this conclusion for a number of reasons. First, the service territory of a communications provider has long been considered a core area of communications regulation. Many provisions of the 1996 Act grant and delimit the authority of communications regulators—both state and federal—to determine the territorial extent of communications services. Federal communications policy has historically regulated critical service inputs that determine the geographical scope of communications services—including limits on local zoning authorities over wireless tower placement<sup>457</sup> and the jurisdiction of local franchising authorities over access to local rights of way.<sup>458</sup> Each of these provisions is central to the determination of service territories for the communications providers in these respective industries, and together they illustrate Congress's focus on service territories as a fundamental issue of communications regulation.

169. Even more importantly, in this specific instance, the territorial restriction serves only to effectuate state communications policy regarding the competitive landscape for broadband—no commenter has explained how it might protect the public fisc or serve another purpose. As EPB points out, under Tennessee law, EPB is actually free under present law to build a *statewide* fiber network under its authority as a telecommunications provider—it simply cannot use that network to provide broadband outside its electric service area because of the territorial restriction.<sup>459</sup> Section 401 of the Tennessee Code governs the provision of telecommunications by municipal electrical utilities, while section 601 governs the provision of broadband and video by the same entities. The language of the provisions is almost identical, except that section 601 restricts the provision of broadband and video to “within [a municipal electric provider's electric] service area.”<sup>460</sup> The undisputed effect of this difference is that EPB may build a network throughout the state in order to provide telecommunications service, but may not utilize that already constructed network to provide broadband.<sup>461</sup> Such a statutory scheme does not further any core state function of ordering its political subdivisions, such as limiting the expenditures of a city, or preventing one community from building a network in another community. It serves exclusively to effectuate state communications policy preferences—in this case, presumably the state would prefer that incumbent broadband providers did not face competition from public providers from neighboring areas. But we have found that in this instance that policy stands as a barrier to broadband deployment and infrastructure investment and section 706 therefor commands that we utilize the regulatory tool of preemption to remove that barrier. To be clear, we do not assert that state policy preferences about the

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<sup>456</sup> See *supra* Section III.A. Today, we reclassify broadband Internet access as a telecommunications service pursuant to our section 706 authority. In both that decision and this, we find that our action removes barriers to infrastructure investment and promotes competition. It might be argued that because Tennessee's section 401 authorizes municipal providers such as EPB to provide “telecommunications” statewide without a territorial restriction, our reclassification has essentially brought broadband service within the scope of section 401, thus freeing entities such as EPB from the territorial restriction in section 601. This seems to depend on the extent to which Tennessee's section 401 incorporates the federal definition of “telecommunications.” We do not opine on this issue. If it is later clarified by the state of Tennessee or its courts that section 601 does not still restrict EPB, then our preemption may become a nullity, and we would expect EPB (or a representative of Tennessee) to bring this to our attention.

<sup>457</sup> 47 U.S.C. § 332(c)(7)(B).

<sup>458</sup> 47 U.S.C. § 541.

<sup>459</sup> EPB Petition at 52-53; see FTTH Comments at 12.

<sup>460</sup> Tenn. Code Ann. § 7-52-601.

<sup>461</sup> EPB Petition at 52-53.

competitive landscape for broadband are necessarily illegitimate. We find only that where they conflict with the federal policy set out in section 706 because they act as barriers to broadband infrastructure investment or thwart competition, they must be preempted. We have made that finding here, and so preempt the territorial restriction in section 601.

#### F. Application to North Carolina’s H.B. 129

170. Above, we found that North Carolina’s H.B. 129 functions as a barrier to advanced telecommunications infrastructure investment and competition. Here we find that this statute falls within our authority to preempt under section 706 because it functions as regulation of interstate communications. H.B. 129 does not prohibit service by municipal entities—indeed, it explicitly acknowledges that municipalities are authorized to provide communications services.<sup>462</sup> Instead, as explained below, the requirements in the provisions of the statute, especially when taken together and viewed in context, serve to regulate the operation and competitive offerings of municipally-owned broadband providers as a means to protect incumbent private-sector ISPs.<sup>463</sup> Their effect is to impose asymmetric burdens on one category of providers—municipal providers—but not on others, and to place municipal providers at a competitive disadvantage. The formal title of the statute underscores this. H.B. 129 is titled “An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business.” The preamble of the statute further elaborates, providing that the statute serves “to protect jobs and promote investment . . . to ensure that the State does not indirectly subsidize competition with private industry.”<sup>464</sup>

171. Analysis of the statutory restrictions confirms this focus on regulating competition in the interstate communications marketplace. Although putatively cast in terms of state limitations on municipal authority, the restrictions are actually sector-specific regulatory limitations. Each of the restrictions singles out a specific service—interstate communications—and imposes limitations, obligations, and requirements on the service and on one category of provider of such services. Unlike the Missouri statute regarding qualifications for the state’s “constitutional officers” at issue in *Gregory* or the flat ban on municipal authority in *Nixon*, the provisions on H.B. 129 regulate not issues of state sovereignty and political determination, but rather the mechanics of how a city may provide a service it is authorized to provide. The clear effect of H.B. 129 is to protect private competitors from competition. In enacting this law, North Carolina seeks to protect incumbent ISPs from what it apparently regards as “unfair” competition. But this policy steps precisely into the role reserved to the Commission in regulating interstate communications. The question of whether competition in broadband Internet

<sup>462</sup> As discussed *supra* in Sections I.B.3 and III.B.1, municipalities in North Carolina had authority to provide broadband services at the time H.B. 129 was enacted. The preamble to H.B. 129 acknowledges this, stating “[w]hereas, certain cities in the State have chosen to compete with private providers of communications services; and . . . these cities have been permitted to enter into competition with private providers as a result of a decision of the North Carolina Court of Appeals [interpreting North Carolina Gen. Stat. §§ 160A-312; 160A-311(7)].” Preamble, 2011 N.C. Sess. Laws at 84; *see also* N.C. Gen. Stat. Ann. §§ 160A-312, 311(7). The ALEC model legislation, which H.B. 129 resembles, does not seek to prohibit municipal provision of broadband, but rather to impose a series of asymmetric regulatory burdens on municipal providers.

<sup>463</sup> Throughout the floor debates on H.B. 129, Rep. Marilyn Avila (R-Wake), one of the bill’s primary sponsors, reiterated that the bill does not prohibit the provision of broadband service by municipalities, but instead creates “rules that will govern cities who decide to get into competition against private [broadband providers].” Transcript of Third Reading of H.B. 129 at 20:45, N. C. House of Rep. (Mar. 28, 2011).

<sup>464</sup> Preamble, H.B. 129, 2011 N.C. Sess. Laws at 84. While the preamble also states that “it is against the public policy of this State for any unit, department, or agency of the State . . . to engage directly or indirectly in the sale of goods, ware, or merchandise in competition with citizens of the State,” the bill does not actually withhold authority. Instead, it places numerous restrictions on the operation of public entities in order to effect the state’s preferences regarding communications competition.

access—an interstate communications service within the core of section 706—will or will not serve the public interest is one quintessentially reserved to the Commission.

172. As detailed above,<sup>465</sup> H.B. 129 consists of six principal provisions codified together as Article 16A in Chapter 160A of the North Carolina General Statutes, and four amendments to other provisions of the General Statutes.<sup>466</sup> Again, while there are a number of separate provisions, they can be grouped into three categories based on the functions that they serve: “level playing field” obligations, measures that raise economic costs, and measures that impose delay. Below, we analyze these groups of provisions to show how they function as regulation of interstate communications, and thus fall within our authority under section 706.

### 1. “Level Playing Field” Obligations

173. Above, we describe the set of statutory provisions that serve to effectuate what supporters and incumbents call “leveling the playing field.” As explained, we find that these provisions do not “level” the playing field, but instead impose restrictions on one category of providers—city-owned providers—that are not imposed on other categories of providers. We find that these laws fall within our authority to preempt because, by their terms, these “level playing field” requirements serve to regulate competition between public and private providers. Again, the title of H.B. 129 confirms that the law was intended to “Regulat[e] Local Government Competition with Private Business,”<sup>467</sup> and commenters in support of H.B. 129 have repeatedly emphasized the objective of creating a “level playing field” between public and private business.<sup>468</sup> Because these requirements serve the purpose of regulating competition in interstate communications, they are subject to preemption under section 706 to the extent they constitute restrictions on competition in and barriers to broadband deployment and infrastructure investment.

174. Although characterized under disparate section headings, the restrictions are actually competition-specific regulatory limitations. Their effect is to constrain a city-owned provider’s ability to compete in the broadband market while not similarly constraining any other category of provider. Although any particular obligation might be permissible, were it adopted in isolation, it is the collective impact of the obligations that conflicts with federal policy. The result, as Wilson has described,<sup>469</sup> has been to slow or completely prevent additional broadband deployment and infrastructure investment.<sup>470</sup> To be clear, we do not take any position on the general question of whether and on what terms public entities can and should compete with private enterprise. In this specific context, however, Congress has mandated that we find and remove barriers to infrastructure investment, and we have found that restrictions on municipal broadband in H.B. 129 have the net effect of hampering investment in broadband infrastructure and inhibiting competition. Section 706 therefore requires that we preempt these laws.

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<sup>465</sup> See *supra* para. 81.

<sup>466</sup> H.B. 129, 2011 N.C. Sess. Laws at 84.

<sup>467</sup> Title, H.B. 129, 2011 N.C. Sess. Laws at 84.

<sup>468</sup> See, e.g., TechFreedom & ICLE Reply at 8-9 (“The nature of North Carolina’s bill ought to be apparent from the short name of the bill that became the law at issue: ‘Level Playing Field/Local Gov’t Competition.’”); Institute for Policy Innovation Comments at 5-6 (“The law does not create an outright ban, which might be preferable, but rather imposes certain requirements intended to provide a level playing field with any competing private sector participant . . . .”); N.C. Rep. Marilyn Avila Comments, Attach. at 1-2; N.C. Speaker Thom R. Tillis Comments at 14 (referring to H.B. 129 as “The Level playing Field Law”); N.C. Sen. Tom Apodaca Comments at 1-2 (same); AT&T Comments at 4-5.

<sup>469</sup> Wilson Petition at 20-25, 36-38, 45-46.

<sup>470</sup> See City of Fayetteville Comments at 2 (passage of H.B. 129 led to end of plans in multiple North Carolina communities to build fiber networks, including planned public-private partnership in Fayetteville).

## 2. Measures to Raise Economic Costs

175. Above, we describe a number of H.B. 129's provisions that serve to directly raise the economic costs of municipal providers. Through these measures, H.B. 129 has the effect of increasing both the cost to the city and the price charged to customers for broadband services. For example, section 340.1(a)(8) prevents a public provider from charging below a theoretical cost of service, with phantom costs imputed to mirror those born by a private provider. We find that this provision, like the others we have included in this grouping, are designed to, and do, function as communications regulation by regulating the prices, terms, and conditions on which these providers may offer service. These provisions do not restrict the authority to provide service, nor do they protect a city's taxpayers—if anything, they make municipal provision more risky by hampering the public provider's ability to compete based on price. The apparent purpose of H.B. 129, as reflected in its preamble, is to protect private competitors from competition. As such, it falls within our jurisdiction under section 706 to preempt state laws that regulate competition in interstate communications.

176. Similarly, the PILOT provisions require city-owned providers to make payments they would otherwise not be obligated to make; they indisputably raise the cost of providing broadband service.<sup>471</sup> Supporters of these PILOT provisions concede that they are intended to “level the playing field” between public-sector and private-sector communications providers by eliminating the advantage a city-owned CSP may have from tax exemptions—a goal that is clearly one of regulating interstate communications competition.<sup>472</sup> Without opining on whether a state may decide, as a policy matter, to alter its framework for taxation of municipalities and services provided by municipalities, the effect of section 340.5 is to single out communications service among all municipally provided services for additional regulation. North Carolina law imposes payment in lieu of property tax requirements on joint agencies that provide electric power, but on no other city-provided service and in lieu of no other type of tax or fee.<sup>473</sup> This is not to say that any form of broadband-sector-specific regulations, including additional procedural safeguards, would fall within our jurisdiction to preempt under section 706. But in an absence of any indication of a need to target interstate communications with particular state procedural safeguards, and in the context of a statute that explicitly seeks to “Regulat[e] local Government Competition with Private Business,” we can only conclude that the procedural burdens in H.B. 129 function to do exactly that—regulate the competitive landscape in interstate communications.

177. Other provisions support this view. Section (a)(3) imposes an explicit geographic limitation on a city-owned CSP's network and services, serving to artificially limit the market for a public-sector provider's services and restraining its ability to compete. This limitation singles out a particular service—communications service—for greater restriction than other municipally provided enterprises, including electric service,<sup>474</sup> and does so, as the preamble tells us, for the purpose of regulating competition in communications services. This restriction hampers a city-owned CSP's ability to achieve efficiencies in scale or operations, and prevents it, but not a private-sector provider, from serving more rural areas outside its boundaries, which are often under- or unserved by any provider, even if it already provides electric service or other service to those areas.

178. Again, these requirements serve only to effectuate the state's protection of private-sector ISPs. In their effort to do this, they restrict the competitive options and raise the costs of one market

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<sup>471</sup> See *supra* para. 83.

<sup>472</sup> See, e.g., N.C. Rep. Marilyn Avila Comments at 2.

<sup>473</sup> N.C. Gen. Stat. Ann. § 159B-27(a) (payment in lieu of property taxes requirement imposed on an jointly owned projects or projects owned by a joint agency for providing electric power and energy services).

<sup>474</sup> Wilson provides electric service in six counties in eastern North Carolina but H.B. 129 limits its ability to provide broadband service to the City of Wilson and areas immediately adjacent to the City within Wilson County. Wilson Petition at 22-23.



participant but not the other. Reading the provisions together, it is apparent that North Carolina has singled out communications services supplied by municipalities for more restrictive treatment and has done so specifically in order to promote its preferred competitive arrangement in the interstate communications market. In doing so, the state has moved beyond granting authority to a political subdivision to provide or not to provide a particular service, and has entered the realm of regulating communications services that Congress has directed the Commission to oversee. While reasonable parties may debate the wisdom of that approach, there can be little doubt it is a matter of communications policy. We therefore view these restrictions as within our authority to preempt.

### 3. Measures to Impose Delay

179. There can be little question that the provisions of H.B. 129, considered together, mandate delay—sometimes extensive delay<sup>475</sup>—and additional expense on the part of cities, which in turn increases the cost to the city of an attempt to begin providing service or to expand an existing service. The effect of the notice and hearing provisions, along with the RFP process requirement, is to compel cities to expend resources and time sending notices, holding hearings, preparing an RFP, reviewing any responses, and negotiating with any respondents. Each of these delays imposes costs—economic and staff—on a city, increasing its cost of entering the market, investing in infrastructure, or deploying broadband. Although any one of these restrictions, standing alone, could conceivably be characterized as core state control of the manner of local government, we find that in context and viewed as a whole, the regulations in fact serve to shape the competitive landscape for interstate communications. Again, we note that the title and preamble of H.B. 129 refer explicitly to these goals.<sup>476</sup> By contrast, nothing in the title or preamble refers to fiscal responsibility, transparency, or the like. H.B. 129 sets out additional regulatory burdens that apply only to broadband. Although at least one commenter describes a need to “protect citizens and taxpayers from poor local government financial decision making,”<sup>477</sup> nowhere in the record is there any indication that the existing controls were inadequate or that there was any need for additional procedural safeguards.<sup>478</sup> As we have noted, we do not find that any form of broadband-sector-specific regulations would fall within our jurisdiction to preempt under section 706. But on this record and in this context, we can therefore only conclude that the procedural burdens in H.B. 129 function to do exactly what the title of the bill states—regulate the competitive landscape in interstate communications.

180. The effect these provisions in H.B. 129 is to single out communications services among all city-provided services for additional regulatory obligations that increase expense, impose delay, and ultimately raise the cost to the city of providing service. As such, they conflict with Congress’s mandate to encourage the deployment of broadband and infrastructure investment. The Commission must, as directed by Congress, take action to remove these barriers.

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181. As we have discussed above, we preempt sections 340.1(a)(1), (3) and (5)-(9), 340.3, 340.4, 340.5, 340.6, and H.B. 129 sections 1.(a) and (b), 2.(a), 3, and 5. Because the restrictions in H.B. 129 serve as state regulation of competition in the interstate communications market, as opposed to core government control of political subdivisions, they fall within our subject matter jurisdiction and within our power to preempt under Section 706. These provisions contravene the mandate of section 706 by

<sup>475</sup> Wilson has estimated that the total time required to comply with the provisions of H.B. 129 is over two years. *See* Petitioners’ Dec. 15, 2014 Ex Parte at Exh. A (Communications Network Project Timetable).

<sup>476</sup> *See supra* at note 467 and accompanying text.

<sup>477</sup> N.C. Speaker Thom R. Tillis Comments at 2.

<sup>478</sup> Indeed, as described above, H.B. 129 appears to have the effect of restricting a municipality’s ability to make decisions about risk allocation and exposing citizens to a higher degree of risk. *See supra* Section III.B.2.c.

erecting barriers to infrastructure investment and hampering competition in the broadband market.<sup>479</sup> We therefore preempt them.

#### 4. Not Preempted.

182. As explained above, we do not determine that every provision of H.B. 129 represents a barrier to infrastructure investment or thwart competition such that we are compelled to preempt it. Because the following provisions do not rise to the level of a barrier to broadband deployment or infrastructure investment falling within our jurisdiction over communications regulation, we do not preempt sections 160A-340(1), (2), (3), (4), (5) and (6), 340.1(a)(2) and (4), 340.1(b), 340.2, and H.B. 129 sections 1.(c), 2.(b); 4, 6, 7 and 8.

#### V. ORDERING CLAUSES

183. Accordingly, IT IS ORDERED that, pursuant to sections 1 and 2 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 151, 152, and 1302, the EPB Petition IS GRANTED.

184. IT IS FURTHER ORDERED that, pursuant to sections 1 and 2 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 151, 152, and 1302, the Wilson Petition IS GRANTED IN PART to the extent discussed herein, and IS OTHERWISE DENIED.

185. IT IS FURTHER ORDERED that, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), this Memorandum Opinion and Order SHALL BECOME EFFECTIVE upon release.

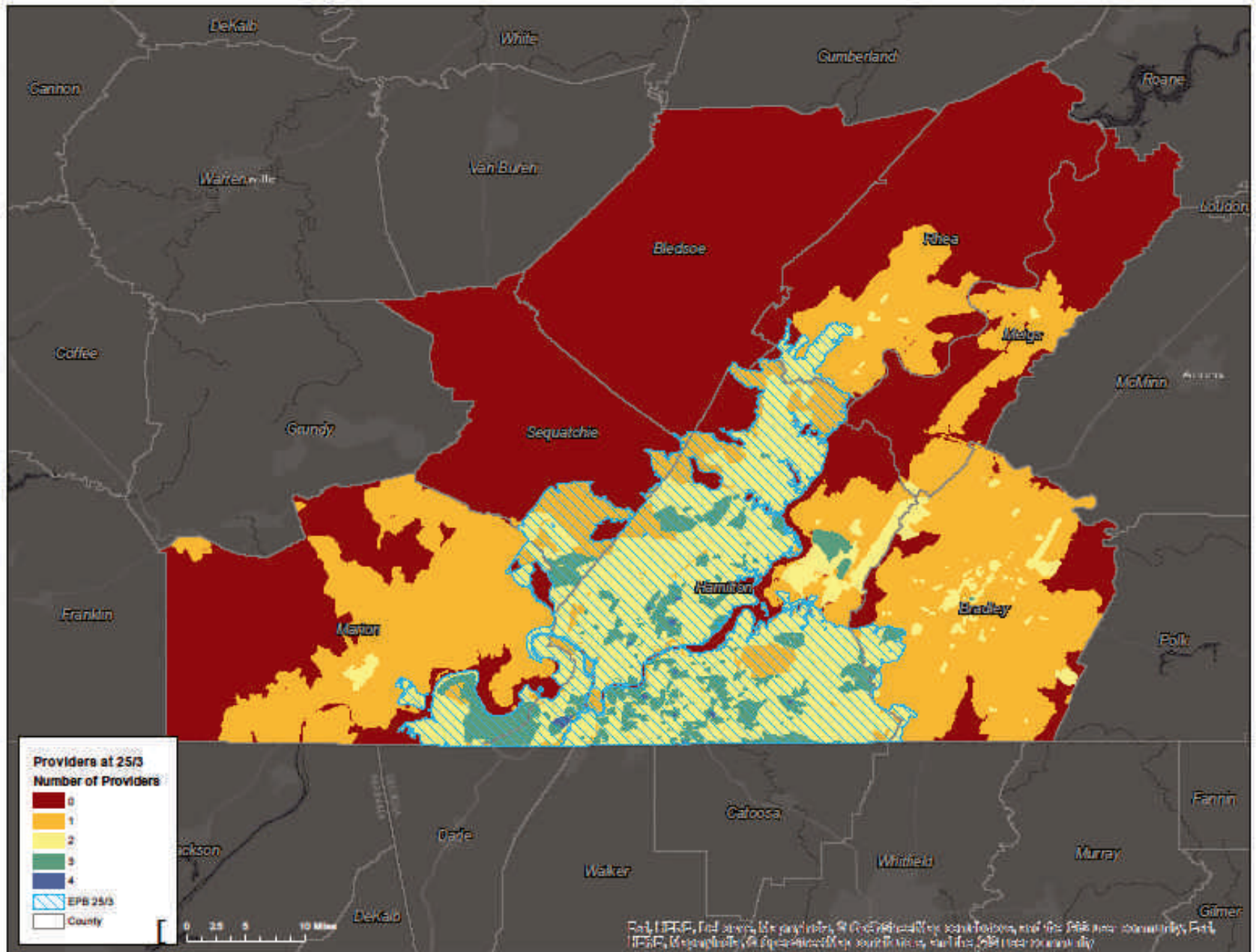
FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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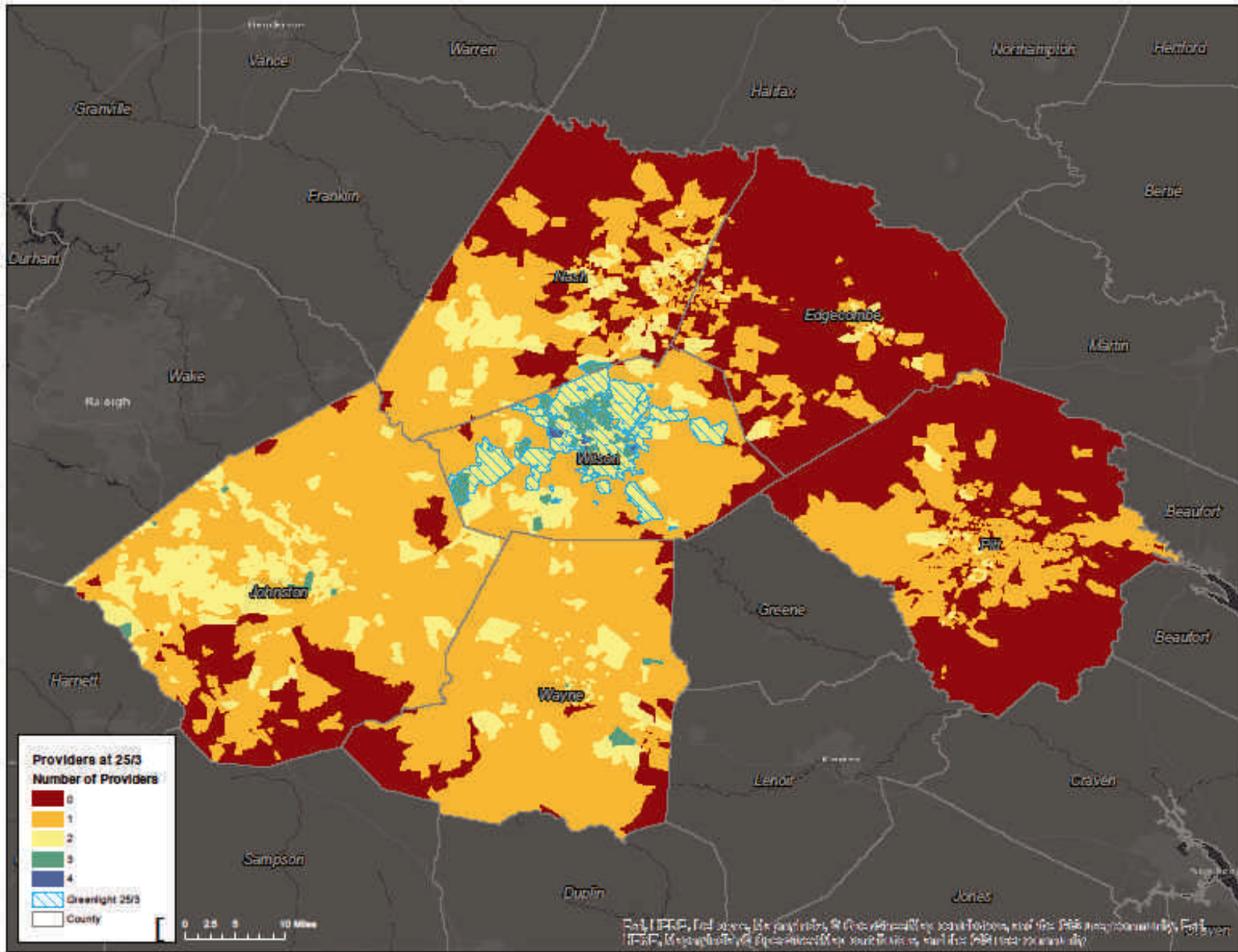
<sup>479</sup> See *supra* Section III.

**ATTACHMENT A:  
EPB / TENNESSEE MAP**



**ATTACHMENT B:  
WILSON / NORTH CAROLINA MAP**





**ATTACHMENT C:  
TENNESSEE LAW SUBJECT TO  
PETITION**

Title 7: Consolidated Governments and Local Governmental Functions and Entities  
Local Government Functions  
Chapter 52: Municipal Electric Plants  
Part 6: Cable Television, Internet and Related Services

Tenn. Code Ann. § 7-52-601 (2014)

**7-52-601. Authority to operate services.**

(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).

**ATTACHMENT D:  
NORTH CAROLINA LAW SUBJECT  
TO PETITION**



**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2011**

**SESSION LAW 2011-84  
HOUSE BILL 129**

BUSINESS AND COMMERCE--RULES AND REGULATIONS--LOCAL GOVERNMENT

AN ACT TO PROTECT JOBS AND INVESTMENT BY REGULATING LOCAL GOVERNMENT  
COMPETITION WITH PRIVATE BUSINESS.

Whereas, certain cities in the State have chosen to compete with private providers of communications services; and

Whereas, these cities have been permitted to enter into competition with private providers as a result of a decision of the North Carolina Court of Appeals rather than legislation enacted by the General Assembly; and

Whereas, the communications industry is an industry of economic growth and job creation; and

Whereas, as expressed in G.S. 66-58, known as the Umstead Act, it is against the public policy of this State for any unit, department, or agency of the State, or any division or subdivision of a unit, department, or agency of the State, to engage directly or indirectly in the sale of goods, wares, or merchandise in competition with citizens of the State; and

Whereas, to protect jobs and to promote investment, it is necessary to ensure that the State does not indirectly subsidize competition with private industry through actions by cities and to ensure that where there is competition between the private sector and the State, directly or through its subdivisions, it exists under a framework that does not discourage private investment and job creation; Now, therefore,

The General Assembly of North Carolina enacts:

**SECTION 1.(a)** Chapter 160A of the General Statutes is amended by adding a new Article to read as follows:

Article 16A.

Provision of Communications Service by Cities.

**§ 160A-340. Definitions.**

The following definitions apply in this Article:

- (1) City-owned communications service provider. - A city that provides communications service using a communications network, whether directly, indirectly, or through an interlocal agreement or a joint agency.
- (2) Communications network. - A wired or wireless network for the provision of communications service.

- (3) Communications service. - The provision of cable, video programming, telecommunications, broadband, or high-speed Internet access service to the public, or any sector of the public, for a fee, regardless of the technology used to deliver the service. The terms "cable service," "telecommunications service," and "video programming service" have the same meanings as in G.S. 105-164.3. The following is not considered the provision of communications service:
- a. The sharing of data or voice between governmental entities for internal governmental purposes.
  - b. The remote reading or polling of data from utility or parking meters, or the provisioning of energy demand reduction or smart grid services for an electric, water, or sewer system.
  - c. The provision of free services to the public or a subset thereof.
- (4) High-speed Internet access service. - Internet access service with transmission speeds that are equal to or greater than the requirements for basic broadband tier 1 service as defined by the Federal Communications Commission for broadband data gathering and reporting.
- (5) Interlocal agreement. - An agreement between units of local government as authorized by Part 1 of Article 20 of Chapter 160A of the General Statutes.
- (6) Joint agency. - A joint agency created under Part 1 of Article 20 of Chapter 160A of the General Statutes.

**§ 160A-340.1. City-owned communications service provider requirements.**

- (a) A city-owned communications service provider shall meet all of the following requirements:
- (1) Comply in its provision of communications service with all local, State, and federal laws, regulations, or other requirements applicable to the provision of the communications service if provided by a private communications service provider.
  - (2) In accordance with the provisions of Chapter 159 of the General Statutes, the Local Government Finance Act, establish one or more separate enterprise funds for the provision of communications service, use the enterprise funds to separately account for revenues, expenses, property, and source of investment dollars associated with the provision of communications service, and prepare and publish an independent annual report and audit in accordance with generally accepted accounting principles that reflect the fully allocated cost of providing the communications service, including all direct and indirect costs. An annual independent audit conducted under G.S. 159-34 and submitted to the Local Government Commission satisfies the audit requirement of this subdivision.
  - (3) Limit the provision of communications service to within the corporate limits of the city providing the communications service.

- (4) Shall not, directly or indirectly, under the powers of a city, exercise power or authority in any area, including zoning or land-use regulation, or exercise power to withhold or delay the provision of monopoly utility service, to require any person, including residents of a particular development, to use or subscribe to any communications service provided by the city-owned communications service provider.
- (5) Shall provide nondiscriminatory access to private communications service providers on a first-come, first-served basis to rights-of-way, poles, or conduits owned, leased, or operated by the city unless the facilities have insufficient capacity for the access and additional capacity cannot reasonably be added to the facilities. For purposes of this subdivision, the term "nondiscriminatory access" means that, at a minimum, access shall be granted on the same terms and conditions as that given to a city-owned communications service provider.
- (6) Shall not air advertisements or other promotions for the city-owned communications service on a public, educational, or governmental access channel if the city requires another communications service provider to carry the channel. The city shall not use city resources that are not allocated for cost accounting purposes to the city-owned communications service to promote city-owned communications service in comparison to private services or, directly or indirectly, require city employees, officers, or contractors to purchase city services.
- (7) Shall not subsidize the provision of communications service with funds from any other noncommunications service, operation, or other revenue source, including any funds or revenue generated from electric, gas, water, sewer, or garbage services.
- (8) Shall not price any communications service below the cost of providing the service, including any direct or indirect subsidies received by the city-owned communications service provider and allocation of costs associated with any shared use of buildings, equipment, vehicles, and personnel with other city departments. The city shall, in calculating the costs of providing the communications service, impute (i) the cost of the capital component that is equivalent to the cost of capital available to private communications service providers in the same locality and (ii) an amount equal to all taxes, including property taxes, licenses, fees, and other assessments that would apply to a private communications service provider, including federal, State, and local taxes; rights-of-way, franchise, consent, or administrative fees; and pole attachment fees. In calculating the costs of the service the city may amortize the capital assets of the communications system over the useful life of the assets in accordance with generally accepted principles of governmental accounting.
- (9) The city shall annually remit to the general fund of the city an amount equivalent to all taxes or fees a private communications service provider would be required to pay the city or county in which the city is located, including any applicable tax refunds received by the city-owned communications service provider because of its government status and a sum equal to the amount of property tax that would

have been due if the city-owned communications service provider were a private communications service provider.

(b) A city-owned communications service provider shall not be required to obtain voter approval under G.S. 160A-321 prior to the sale or discontinuance of the city's communications network.

**§ 160A-340.2. Exemptions.**

(a) The provisions of G.S. 160A-340.1, 160A-340.4, 160A-340.5, and 160A-340.6 do not apply to the purchase, lease, construction, or operation of facilities by a city to provide communications service within the city's corporate limits for the city's internal governmental purposes, including the sharing of data or voice between governmental entities for internal governmental purposes, or within the corporate limits of another unit of local government that is a party with the city to an interlocal agreement under Part 1 of Article 20 of Chapter 160A of the General Statutes for the provision of internal government services.

(b) The provisions of G.S. 160A-340.1, 160A-340.4, and 160A-340.5 do not apply to the provision of communications service in an unserved area. A city seeking to provide communications service in an unserved area shall petition the North Carolina Utilities Commission for a determination that an area is unserved. The petition shall identify with specificity the geographic area for which the designation is sought. Any private communications service provider, or any other interested party, may, within a time established by order of the Commission, which time shall be no fewer than 30 days, file with the Commission an objection to the designation on the grounds that one or more areas designated in the petition is not an unserved area or that the city is not otherwise eligible to provide the service. For purposes of this subsection, the term "unserved area" means a census block, as designated by the most recent census of the U.S. Census Bureau, in which at least fifty percent (50%) of households either have no access to high-speed Internet service or have access to high-speed Internet service only from a satellite provider. A city may petition the Commission to serve multiple contiguous unserved areas in the same proceeding.

(c) The provisions of G.S. 160A-340.1, 160A-340.3, 160A-340.4, 160A-340.5, and 160A-340.6 do not apply to a city or joint agency providing communications service as of January 1, 2011, provided the city or joint agency limits the provision of communications service to any one or more of the following:

- (1) Persons within the corporate limits of the city providing the communications service. For the purposes of this subsection, corporate limits shall mean the corporate limits of the city as of April 1, 2011, or as expanded through annexation.
- (2) Existing customers of the communications service as of April 1, 2011. Service to a customer outside the service area of the city or joint agency who is also a public entity must comply with the open bidding procedures of G.S. 143-129.8 upon the expiration or termination of the existing service contract.
- (3) The following service areas:
  - a. For the joint agency operated by the cities of Davidson and Mooresville, the service area is the combined areas of the city of Cornelius; the town of Troutman; the town of Huntersville; the unincorporated areas of Mecklenburg County north of a line beginning at Highway 16 along the

west boundary of the county, extending eastward along Highway 16, continuing east along Interstate 485, and continuing eastward to the eastern boundary of the county along Eastfield Road; and the unincorporated areas of Iredell County south of Interstate 40, excluding Statesville and the extraterritorial jurisdiction of Statesville.

- b. For the city of Salisbury, the service area is the municipalities of Salisbury, Spencer, East Spencer, Granite Quarry, Rockwell, Faith, Cleveland, China Grove, Landis and the corridors between those cities. The service area also includes the economic development sites, public safety facilities, governmental facilities, and educational schools and colleges located outside the municipalities and the corridors between the municipalities and these sites, facilities, schools, and colleges. The corridors between Salisbury and these municipalities and these sites, facilities, schools, and colleges includes only the area necessary to provide service to these municipalities and these sites, facilities, schools, and colleges and shall not be wider than 300 feet. The elected bodies of Spencer, East Spencer, Granite Quarry, Rockwell, Faith, Cleveland, China Grove, and Landis shall vote to approve the service extension into each respective municipality before Salisbury can provide service to that municipality. The Rowan County Board of County Commissioners shall vote to approve service extension to any governmental economic development site, governmental facility, school, or college owned by Rowan County. The Rowan Salisbury School Board shall also vote to approve service extension to schools.
- c. For the city of Wilson, the service area is the county limits of Wilson County, including the incorporated areas within the County.
- d. For all other cities or joint agencies offering communications service, the service area is the area designated in the map filed as part of the initial notice of franchise with the Secretary of State as of January 1, 2011.

(d) The exemptions provided in this section do not exempt a city or joint agency from laws and rules of general applicability to governmental services, including nondiscriminatory obligations.

(e) In the event a city subject to the exemption set forth in subsection (c) of this section provides communications service to a customer outside the limits set forth in that subsection, the city shall have 30 days from the date of notice or discovery to cease providing service to the customer without loss of the exemption.

**§ 160A-340.3. Notice; public hearing.**

A city or joint agency that proposes to provide communications service shall hold not fewer than two public hearings, which shall be held not less than 30 days apart, for the purpose of gathering information and comment. Notice of the hearings shall be published at least once a week for four consecutive weeks in the predominant newspaper of general circulation in the area in which the city is located. The notice shall also be provided to the North Carolina Utilities Commission, which shall post the notice on its Web site, and to all companies that have requested service of the notices from the city clerk. The city shall



deposit the notice in the U.S. mail to companies that have requested notice at least 45 days prior to the hearing subject to the notice. Private communications service providers shall be permitted to participate fully in the public hearings by presenting testimony and documentation relevant to their service offerings and the city's plans. Any feasibility study, business plan, or public survey conducted or prepared by the city in connection with the proposed communications service project is a public record as defined by G.S. 132-1 and shall be made available to the public prior to the public hearings required by this section. This section does not apply to the repair, rebuilding, replacement, or improvement of an existing communications network, or equipment relating thereto.

#### **§ 160A-340.4. Financing.**

(a) A city or joint agency subject to the provisions of G.S. 160A-340.1 shall not enter into a contract under G.S. 160A-19 or G.S. 160A-20 to purchase or to finance the purchase of property for use in a communications network or to finance the construction of fixtures or improvements for use in a communications network unless it complies with subsection (b) of this section. The provisions of this section shall not apply to the repair, rebuilding, replacement, or improvement of an existing communications network, or equipment relating thereto.

(b) A city shall not incur debt for the purpose of constructing a communications system without first holding a special election under G.S. 163-287 on the question of whether the city may provide communications service. If a majority of the votes cast in the special election are for the city providing communications service, the city may incur the debt for the service. If a majority of the votes cast in the special election are against the city providing communications service, the city shall not incur the debt. However, nothing in this section shall prohibit a city from revising its plan to offer communications service and calling another special election on the question prior to providing or offering to provide the service. A special election required under Chapter 159 of the General Statutes as a condition to the issuance of bonds shall satisfy the requirements of this section.

#### **§ 160A-340.5. Taxes; payments in lieu of taxes.**

(a) A communications network owned or operated by a city or joint agency shall be exempt from property taxes. However, each city possessing an ownership share of a communications network and a joint agency owning a communications network shall, in lieu of property taxes, pay to any county authorized to levy property taxes the amount which would be assessed as taxes on real and personal property if the communications network were otherwise subject to valuation and assessment. Any payments in lieu of taxes shall be due and shall bear interest, if unpaid, as in the case of taxes on other property.

(b) A city-owned communications service provider shall pay to the State, on an annual basis, an amount in lieu of taxes that would otherwise be due the State if the communications service was provided by a private communications service provider, including State income, franchise, vehicle, motor fuel, and other similar taxes. The amount of the payment in lieu of taxes shall be set annually by the Department of Revenue and shall approximate the taxes that would be due if the communications service was undertaken by a private communications service provider. A city-owned communications service provider must provide information requested by the Secretary of Revenue necessary for calculation of the assessment. The Department must inform each city-owned communications service provider of the amount of the assessment by January 1 of each year. The assessment is due by March 15 of each year. If the assessment is unpaid, the State may withhold the amount due, including interest on late payments, from distributions otherwise due the city under G.S. 105-164.44I.

(c) A city-owned communications service provider or a joint agency that provides communications service shall not be eligible for a refund under G.S. 105-164.14(c) for sales and use taxes paid on purchases of tangible personal property and services related to the provision of communications service, except to the extent a private communications service provider would be exempt from taxation.

**§ 160A-340.6. Public-private partnerships for communications service.**

(a) Prior to undertaking to construct a communications network for the provision of communications service, a city shall first solicit proposals from private business in accordance with the procedures of this section.

(b) The city shall issue requests for proposals that specify the nature and scope of the requested communications service, the area in which it is to be provided, any specifications and performance standards, and information as to the city's proposed participation in providing equipment, infrastructure, or other aspects of the service. The city may prescribe the form and content of proposals and may require that proposals contain sufficiently detailed information to allow for an objective evaluation of proposals using the factors stated in subsection (d) of this section. Each proposal shall at minimum contain all of the following:

- (1) Information regarding the proposer's experience and qualifications to perform the requirements of the proposal.
- (2) Information demonstrating the proposer's ability to secure financing needed to perform the requirements of the proposal.
- (3) Information demonstrating the proposer's ability to provide staffing, implement work tasks, and carry out all other responsibilities necessary to perform the requirements of the proposal.
- (4) Information clearly identifying and specifying all elements of cost of the proposal for the term of the proposed contract, including the cost of the purchase or lease of equipment and supplies, design, installation, operation, management, and maintenance of any system, and any proposed services.
- (5) Any other information the city determines has a material bearing on its ability to evaluate the proposal.

(c) The city shall provide notice that it is requesting proposals in accordance with this subsection. The notice shall state the time and place where plans and specifications for the proposed service may be obtained and the time and place for opening proposals. Any notice given under this subsection shall reserve to the city the right to reject any or all proposals. Notice of request for proposals shall be given by all of the following methods:

- (1) By mailing a notice of request for proposals to each firm that has obtained a license or permit to use the public rights-of-way in the city to provide a communications service within the city by depositing such notices in the U.S. mail at least 30 days prior to the date specified for the opening of proposals. In identifying firms, the city may rely upon lists provided by the Office of the Secretary of State and the North Carolina Utilities Commission.

- (2) By posting a notice of request for proposals on the city's Web site at least 30 days before the time specified for the opening of proposals.
- (3) By publishing a notice of request for proposals in a newspaper of general circulation in the county in which the city is predominantly located at least 30 days before the time specified for the opening of proposals.

(d) In evaluating proposals, the city may consider any relevant factors, including system design, system reliability, operational experience, operational costs, compatibility with existing systems and equipment, and emerging technology. The city may negotiate aspects of any proposal with any responsible proposer with regard to these factors to determine which proposal is the most responsive. A determination of most responsive proposer by the city shall be final.

(e) The city may negotiate a contract with the most responsive proposer for the performance of communications service specified in the request for proposals. All contracts entered into pursuant to this section shall be approved and awarded by the governing body of the city.

(f) If the city is unable to successfully negotiate the terms of a contract with the most responsive proposer within 60 days of the opening of the proposals, the city may proceed to negotiate with the firm determined to be the next most responsive proposer if such a proposer exists. If the city is unable to successfully negotiate the terms of a contract with the next most responsive proposer within 60 days, it may proceed under this Article to provide communications service.

(g) All proposals shall be sealed and shall be opened in public. Provided, that trade secrets shall remain confidential as provided under G.S. 132-1.2."

**SECTION 1.(b)** G.S. 105-164.14 is amended by adding a new subsection to read:

(d2) A city subject to the provisions of G.S. 160A-340.5 is not allowed a refund of sales and use taxes paid by it under this Article for purchases related to the provision of communications service as defined in Article 16A of Chapter 160A of the General Statutes.

**SECTION 1.(c)** Subsection (b) of this section is effective when it becomes law and applies to sales made on or after that date.

**SECTION 2.(a)** G.S. 62-3(23) is amended by adding the following new sub-subdivision to read:

1. The term "public utility" shall include a city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes that provides service as defined in G.S. 62-3(23)a.6. and is subject to the provisions of G.S. 160A-340.1.

**SECTION 2.(b)** This section shall not be construed to change the regulatory nature of or requirements applicable to any particular service currently regulated by the Commission under Chapter 62 of the General Statutes.

**SECTION 3.** Subchapter IV of Chapter 159 of the General Statutes is amended by adding a new Article to read as follows:

Article 9A.Borrowing by Cities for Competitive Purposes.**§ 159-175.10. Additional requirements for review of city financing application; communications service.**

The Commission shall apply additional requirements to an application for financing by a city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes for the construction, operation, expansion, or repair of a communications system or other infrastructure for the purpose of offering communications service, as that term is defined in G.S. 160A-340(2), that is or will be competitive with communications service offered by a private communications service provider. This section does not apply to the repair, rebuilding, replacement, or improvement of an existing communications network, or equipment relating thereto, but does apply to the expansion of such existing network. The additional requirements are the following:

- (1) Prior to submitting an application to the Commission, a city or joint agency shall comply with the provisions of G.S. 160A-340.3 requiring at least two public hearings on the proposed communications service project and notice of the hearings to private communications service providers who have requested notice.
- (2) At the same time the application is submitted to the Commission, the city or joint agency shall serve a copy of the application on each person that provides competitive communications service within the city's jurisdictional boundaries or in areas adjacent to the city. No hearing on the application shall be heard by the Commission until at least 60 days after the application is submitted to the Commission.
- (3) Upon the request of a communications service provider, the Commission shall accept written and oral comments from competitive private communications service providers in connection with any hearing or other review of the application.
- (4) In considering the probable net revenues of the proposed communications service project, the Commission shall consider and make written findings on the reasonableness of the city or joint agency's revenue projections in light of the current and projected competitive environment for the services to be provided, taking into consideration the potential impact of technological innovation and change on the proposed service offerings and the level of demonstrated community support for the project.
- (5) The city or joint agency making the application to the Commission shall bear the burden of persuasion with respect to subdivisions (1) through (4) of this section."

**SECTION 4.** G.S. 159-81(3) is amended by adding a new sub-subdivision to read:

q. Cable television systems.

**SECTION 5.** Sections 2, 3, and 4 of this act do not apply to a city or joint agency providing communications service as of January 1, 2011, provided the city or joint agency limits the provision of communications service as provided in G.S. 160A-340.2(c). In the event a city subject to the exemption set forth in this section provides communications service to a customer outside the limits set forth in

G.S. 160A-340(c), the city shall have 30 days from the date of notice or discovery to cease providing service to the customer without loss of the exemption.

**SECTION 6.** Any city that is designated as a public utility under Chapter 62 of the General Statutes when this act becomes law shall not be subject to the provisions of this act with respect to any of its operations that are authorized by that Chapter.

**SECTION 7.** If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

**SECTION 8.** Except as otherwise provided, this act is effective when it becomes law and applies to the provision of communications service by a city or joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes on and after that date.

In the General Assembly read three times and ratified this the 9<sup>th</sup> day of May, 2011.



**STATEMENT OF  
CHAIRMAN TOM WHEELER**

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

Mayor Gary Fuller of Opelika, Alabama recently authored an op-ed in which he asked a very simple, but important, question: “How does Opelika, a city of fewer than 30,000 people, offer Internet speeds 100 times faster than the national average?” The answer, he concluded, was “hard work and the right for a city to determine its own path.” Today, there are simply too many communities across this nation that cannot determine their own path. There are too many community leaders whose hands are tied by what Mayor Fuller calls “state-level red tape” designed to limit competition.

Today, we take an important step to rid these communities of that red tape. Specifically, we act on petitions filed by the leaders of Chattanooga, Tennessee and Wilson, North Carolina asking the FCC to preempt laws enacted by state legislatures that prohibit them from expanding their successful community-owned broadband networks. The issue is simple: these communities want to determine their own path. Their elected local officials want to be able to take action to meet their communities’ needs for high-speed broadband. But the laws at issue today raise barriers to the deployment of and investment in new broadband networks and infrastructure. That is why I support granting these petitions.

Communities across the nation, including these two petitioners, understand that access to fast, fair, and open broadband networks is key to their economic future – and the future of their citizens. But as the Commission’s 2015 Broadband Progress Report makes clear, broadband deployment – especially in rural areas – is not occurring broadly or quickly enough to meet the increasing bandwidth demands of consumers.

Accordingly, many communities across the nation are taking action. They have concluded that existing broadband offerings are not meeting their needs, and the only solution is to become directly involved in broadband deployment.

Many communities work with existing private sector providers to facilitate improved broadband service. But when that doesn’t work, they seek alternatives, including various forms of public-private partnerships and, in some cases, deploying broadband networks themselves.

These efforts are reaping dividends, enabling new economic opportunities and improvements in education, health care, and public safety for the communities that take these steps, a pattern exemplified by the communities of Chattanooga and Wilson. In Chattanooga, large companies like Amazon and Volkswagen have invested in new facilities, citing the city’s world-leading network as a reason why. And Chattanooga is emerging as an incubator for tech start-ups. In Wilson, the area’s top employers all rely on the community broadband network, new companies have located in Wilson because of its network, and residents and businesses in five surrounding counties are all pleading for access to this gigabit-speed connectivity.

However, as their petitions make clear, the leaders of Chattanooga and Wilson are being prevented from expanding their broadband networks to surrounding areas and making their own decisions about their broadband future. In Tennessee and North Carolina, and in 17 other states, community broadband efforts have been blocked or severely curtailed by restrictive state laws – laws often passed due to heavy lobbying support by incumbent broadband providers.

When local leaders have their hands tied, local business and residents endure the consequences.

Jeff Wilson from Holly Springs, North Carolina, can tell you about the healthcare technology company in his city that relocated services to another area because of inadequate access to broadband to do their business. They were simply unwilling to lose business because they were stuck in a digital slow lane.

Matt Shuler from Highlands, North Carolina, can tell you about how local leaders saw the Internet as a way to bring economic opportunity to their isolated town of 1,000 residents. But the red tape of the state law stopped them from doing so.

Richard Thornton can detail the frustration of living only three-quarters of a mile from Chattanooga's gigabit network but still being in the Internet Dark Age. He has to pay \$316 per month for a collage of services that include two mobile hot spots (that require careful monitoring for data usage), satellite TV, and phone service. Yet, less than a mile away gigabit service is available with TV and phone for only \$133. Furthermore, that provider would like to extend its service, but is prohibited from doing so by Tennessee's bureaucratic barriers.

Eva VanHook from Bradley County, Tennessee can explain how she has to drive her son to their church to watch online materials assigned by his biology teacher because state rules keep her from getting the faster – and cheaper – Internet service that Chattanooga EPB wants to deliver to her.

The Commission respects the important role of state governments in our federal system, and we do not take the step of preempting state laws lightly. But it is a well-established principle that state laws that directly conflict with federal laws and policy may be subject to preemption in appropriate circumstances.

Congress instructed the FCC to encourage the expansion of broadband throughout the nation. Consistent with this statutory mandate, the Commission acts today to preempt two restrictive state laws hampering investment and deployment of broadband networks in areas where consumers would benefit from greater levels of broadband service.

This Order reflects our continued commitment to the goals of Section 706 and represents a significant step forward in giving local communities a full range of options for meeting their broadband needs. While the direct effect of our decision today is limited to the two states involved, it sends a clear message: communities should be able to determine their own paths to meet their constituents' needs.

**STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

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

For those in this room and to others live-streaming it may be hard to imagine just how many people lack the capacity to access the Internet. Millions are trapped in digital darkness, robbed of the opportunity to telecommute in the wake of this winter's weather madness or keep up with classroom studies due to the ever mounting number of snow days and delayed start times. For scores of Americans the choice of one, let alone multiple broadband networks, is a dream deferred and the promise of universal access remains un-kept.

Today's vote seeks to draw a line in the sand once and for all by removing barriers to deployment and fostering competition consistent with the FCC's core mission and values. What has been regrettably lost in the thunderous debate over whether constructing municipal broadband networks is a good idea or if one system or another is considered a "success," is the only question that really matters: Are these laws barriers to broadband infrastructure investment and competition?

The Tennessee and North Carolina petitions present this compound question to the Commission and today we conclude that the answer is yes.

There are provisions that limit service by municipalities to specific areas but not others even if the local governmental entity has a pre-existing telecommunications network in that region. And just what has been the result? Certain communities have the capacity to achieve limitless outcomes, while others a few yards from town are stuck in a digital desert deprived of the means to close persistent opportunity gaps.

Duly elected officials armed with the desire to address these concerns should not be denied the ability to respond to the infrastructure needs of their communities particularly when the private sector has opted not to do so. When a community is so desperate that it literally begs private companies to come in and serve, but is turned down in a cavalier and dismissive fashion by enterprises seemingly best suited to provide broadband to their citizens, then the option for that municipality to act on its own should not be foreclosed.

Sadly, opportunities are being foreclosed far too often leaving citizens without broadband and local leaders with few meaningful ways to address their needs.

Fortunately, we are poised to adopt an item that grants relief from barriers erected in the provisions of the laws of two states and we retain the means to address any concerns that may come before us on a case-by-case basis.

And we are not alone.

Members of Congress, led by Senator Cory Booker, and co-sponsored by Senators Claire McCaskill, Ed Markey, Angus King, and Ron Wyden, introduced The Community Broadband Act of 2015, which seeks to remove state barriers for constructing municipal broadband networks.

It is unfortunate, however, that this issue has become a partisan one as of late because it was not always that way. Indeed, in 2005, an effort lead by Senators John McCain, Lindsey Graham, Norm Coleman, John Kerry, Russ Feingold, and the late Frank Lautenberg sought to block states from restricting local governments' ability to provide Internet service through The Community Broadband Act of 2005. When the bill was reintroduced in 2007, the late Senators Ted Stevens, Olympia Snowe, and Gordon Smith joined as co-sponsors. And across the hall, a House version of the bill was co-sponsored by Representatives Fred Upton and Rick Boucher.

What is striking, is that the language in all of these bills is nearly identical. The only thing that has changed is the lack of bipartisan support.

I am hopeful, however, that in time we will once again unite across party lines to endorse measures that will break down barriers to infrastructure investment, so that no American, no matter where they live, no matter their economic status, will be perpetually stuck in digital darkness.

I want to thank the Wireline Competition Bureau for their work on this item, and the Chairman for his leadership on this issue.

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL**

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

American enterprise and self-sufficiency are the stuff of legend. But when we really thrive is when we find common cause and come together to get things done.

For our forebears, this meant everything from holding barn raisings to building bridges to setting up cooperatives to bring electricity to our nation's farms. But infrastructure challenges like these are not limited to the past. We have communities that face them today—with broadband.

Broadband, after all, is more than a technology—it's a platform for opportunity. In urban areas, rural areas, and everything in between, high-speed service is now necessary to attract and sustain businesses, expand civic services, and secure a viable future. Without it, no community has a fair shot in the digital age.

I learned this first hand last year when I visited Lafayette, Louisiana. Deep in the heart of Acadiana where Zydeco was born, I got the chance to sit down—over some awfully good gumbo—with Lafayette City-Parish President Joey Durel and learn about the struggle to bring high-speed service to his community. It took time and tenacity; this was not an effort for the faint of heart. But eventually Lafayette did it—and brought lightning-fast broadband service to town through its municipal utility.

The story in Lafayette is similar to the one in Chattanooga, Tennessee and Wilson, North Carolina. They did something that was fundamentally American. When existing providers failed to meet their needs, they came together as a community and built it themselves. As a result, the Electric Power Board of the City of Chattanooga now offers Gigabit service to all of its customers and the residents of Wilson County have access to a municipal network that also supports Gigabit speed. Now both municipal providers want to extend their broadband offerings to other consumers nearby, in communities where the speeds are slower and the competitive choice more limited. So today we tear down barriers that prevent them from expanding their broadband service and offering more consumers more competitive choice. I am pleased to offer my support.



**DISSENTING STATEMENT OF  
COMMISSIONER AJIT PAI**

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

In 1999, the State of Tennessee authorized municipal electric systems to provide Internet service within the boundaries of their service areas.<sup>1</sup> The legislation enjoyed widespread support among Tennessee's elected representatives. It passed the Tennessee General Assembly and the Tennessee Senate unanimously, each of which was under the control of the Democratic Party. The votes were 96-0 and 32-0, respectively.<sup>2</sup> The Republican Governor of Tennessee then signed the bill into law.<sup>3</sup>

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

This decision, along with the decision to preempt a similar North Carolina law,<sup>4</sup> does not make any sense. Even more importantly, it is unlawful. Supreme Court precedent makes evident that the FCC simply does not have the power to do what it claims to be doing. In taking this step, the FCC usurps fundamental aspects of state sovereignty. And it disrupts the balance of power between the federal government and state governments that lies at the core of our constitutional system of government. Whatever the merits of any particular municipal broadband project—and to be clear, on this question I take no position, deferring to voters and elected officials—I do not believe this agency has the power to preempt. I therefore dissent.

**I.**

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

Our Constitution establishes a system of dual sovereignty between the States and the federal government, such that sovereignty rests concurrently with both the federal government and the States.<sup>5</sup> Specifically, the Tenth Amendment reserves all powers not specifically delegated to the federal government by the Constitution to the States or to the people.<sup>6</sup> Thus, States are not creations of the

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<sup>1</sup> Tenn. Code Ann. § 7-52-601.

<sup>2</sup> HB 1032, TENN. GEN. ASSEMBLY, <http://go.usa.gov/3cQfH> (last visited Feb. 24, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> N.C. Gen. Stat. §§ 160a-340 through 160a-340.6.

<sup>5</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

<sup>6</sup> See U.S. CONST. Amdt. 10.

central government. They are separate sovereigns. This distribution of sovereignty, otherwise known as federalism, is the defining feature of the relationship between the federal and state governments.

The relationship between a State and its political subdivisions (counties and cities), however, is an entirely different animal. Legally speaking, municipalities exist as arms of the State. As the Supreme Court has explained, municipalities are “created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . in [its] absolute discretion.”<sup>7</sup> Because a municipality is merely a department of the state, the state may withhold, grant or withdraw powers and privileges to a municipality as it sees fit. That is to say, cities and counties are not sovereign.<sup>8</sup> A municipality has “no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.”<sup>9</sup>

What does all of this mean for purposes of today’s *Order*? *First*, as a result of our system of dual sovereignty, the Supreme Court has advised that any “federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism.”<sup>10</sup> Specifically, in *Gregory v. Ashcroft*, the Court held that if Congress wishes to allow the federal government to preempt the States’ historic powers, it must make its intent “unmistakably clear.”<sup>11</sup> This has come to be known as the clear statement rule.

And *second*, because localities are merely creations of the State, any attempt by the federal government to interfere with a State’s governance of its own municipalities necessarily “constrains traditional state authority to order its government.”<sup>12</sup> Indeed, the D.C. Circuit has held that “interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty.”<sup>13</sup>

Each of these points applies to this *Order*. It should come as no surprise that any attempt by the Commission to preempt a state statute prohibiting municipalities from offering broadband service would trigger the clear statement rule. The Supreme Court case of *Nixon v. Missouri Municipal League* is squarely on point. In that case, the Court confronted the question of whether the FCC could use section 253 of the Communications Act to preempt a Missouri law that prohibited municipalities from providing telecommunications services. The Court concluded that Missouri’s ability to determine whether its municipalities could provide such services was part and parcel of the “traditional state authority to order its government.”<sup>14</sup> It therefore decided that the clear statement rule from *Gregory* applied.<sup>15</sup>

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<sup>7</sup> *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991) (alteration in original) (internal quotation marks and citations omitted) (quoting *Sailors v. Board of Ed. of Kent Cty.*, 387 U.S. 105, 108 (1967)).

<sup>8</sup> *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (“Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities”). Indeed, nothing in the U.S. Constitution prevents a State from abolishing municipalities altogether.

<sup>9</sup> *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 362 (2009) (citing *Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933)).

<sup>10</sup> *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004).

<sup>11</sup> *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

<sup>12</sup> *Nixon*, 541 U.S. at 130.

<sup>13</sup> *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999).

<sup>14</sup> *Nixon*, 541 U.S. at 130.

<sup>15</sup> *Id.* Of course, the fact that this *Order* deals with broadband services while *Nixon* addressed telecommunications services is of no constitutional moment. The federalism implications are exactly the same. In any event, today the Commission in another item reclassifies broadband service as a telecommunications service. *Protecting and*

(continued...)

It is also apparent that any attempt by the Commission to preempt state prohibitions on municipalities offering broadband service would not satisfy the clear statement rule. The Court’s decision in *Nixon* is again instructive. There, Missouri municipalities argued that section 253 of the Communications Act gave the Commission the authority to preempt the Missouri statute at issue.<sup>16</sup> Here is what section 253 had to say in relevant part:

(a) In general

No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

...

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, *the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.*<sup>17</sup>

But despite the fact that section 253(a) *specifically contemplates the preemption of state laws* and section 253(d) *specifically directs the Commission to preempt state laws* that have the effect of prohibiting the offering of telecommunications services, the Supreme Court *still* concluded that section 253 did not contain the requisite clear statement necessary for the Commission to preempt. As Justice Souter explained in his opinion for the Court, it was ambiguous whether Congress intended the phrase “any entity” in section 253(a) to include state and municipal entities. The Court thus held that section 253 was insufficiently clear to satisfy *Gregory*’s clear statement rule.<sup>18</sup>

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

For starters, while section 253 at least expressly mentions preemption, the text of section 706 makes no reference to it whatsoever. Section 706(a) urges the Commission to encourage broadband deployment using an enumerated list of tools that includes “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to entry.”<sup>19</sup> Preemption is nowhere discussed. Similarly, section 706(b) tasks the Commission with evaluating the current state of broadband deployment and, if necessary, “tak[ing] immediate action to accelerate deployment of such capability by removing barriers to infrastructure

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*Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-XXX (2015) (reclassifying broadband Internet access service as a telecommunications service).

<sup>16</sup> *Nixon*, 541 U.S. at 128.

<sup>17</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 253, 110 Stat. 56 (codified at 47 U.S.C. § 253)) (emphasis added).

<sup>18</sup> *Nixon*, 541 U.S. at 140–41.

<sup>19</sup> Telecommunications Act § 706(a) (codified at 47 U.S.C. § 1302(a)).

investment and by promoting competition in the telecommunications market.”<sup>20</sup> Again, there’s no mention of preemption.<sup>21</sup>

In short, section 706 does not “point unequivocally to a commitment by Congress”<sup>22</sup> to permit the FCC to preempt state laws governing their own municipalities. Section 706 therefore does not satisfy the clear statement rule and does not permit the Commission to preempt state prohibitions on municipal broadband projects. Indeed, it’s far from certain that section 706 even gives the Commission the ability to preempt state laws regulating *private actors*—but more on that later.<sup>23</sup>

## II.

Notwithstanding all of this, the Commission nonetheless maintains that it can preempt the Tennessee and North Carolina laws at issue here. Why? According to the *Order*, the clear statement rule does not apply because Tennessee and North Carolina have not prohibited municipalities from offering broadband service altogether. They have only imposed restrictions on their ability to do so.<sup>24</sup>

The *Order* claims that the relevant Tennessee and North Carolina laws do not implicate “core attributes of state sovereignty.”<sup>25</sup> Instead, it asserts that when States impose restrictions on municipal broadband less onerous than a flat-out ban, such restrictions are magically transformed into an effectuation of a “state’s preferred communications policy objectives”—and therefore subject to federal preemption if they conflict with federal policy objectives.<sup>26</sup>

What difference does any of this make? A state is not stripped of its core sovereign power to govern its political subdivisions, which are arms of the state, merely because it grants them certain powers. Rather, “[t]he number, nature, and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rest[] in the absolute discretion of the state.”<sup>27</sup> And a state does not relinquish that “absolute discretion” simply by affording a municipality some, rather than plenary, authority to offer broadband service. Unfortunately for the Commission, all the lipstick in the world cannot disguise this pig.

## A.

Take, for example, the geographic restrictions set forth in the Tennessee and North Carolina laws at issue here. In Tennessee, a municipal electric system is authorized to offer broadband service within its

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<sup>20</sup> *Id.* § 706(b) (codified at 47 U.S.C. § 1302(b)).

<sup>21</sup> For purposes of Sections I, II, and III of this statement, I will assume *arguendo* that section 706 provides the Commission with some measure of independent authority. However, in Section IV, I will explain why I do not believe that section 706 delegates to the Commission *any* additional authority.

<sup>22</sup> *Nixon*, 541 U.S. at 141.

<sup>23</sup> *See infra* Section III.

<sup>24</sup> *Order* at para. 162.

<sup>25</sup> *Id.* at para. 157.

<sup>26</sup> *Id.* at para. 147.

<sup>27</sup> *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (emphasis added) (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)).

service area, but not outside of those boundaries.<sup>28</sup> In North Carolina, a city may only provide broadband services within its city limits.<sup>29</sup>

These geographic restrictions go to the heart of a state’s “traditional [] authority to order its government.”<sup>30</sup> Indeed, the Commission’s claim to the contrary is absurd. A critical component of a state’s ability to order its government is the ability to organize its own municipal subdivisions. And a critical component of organizing municipalities is the power to define each subdivision’s geographic reach. For inherent in the concept of a *subdivision* is the idea that a locality will exercise authority over a limited geographic area within a State. For example, the definition of a “city” under North Carolina law is “a municipal corporation organized under the laws of this State for the better government *of the people within its jurisdiction*.”<sup>31</sup> Indeed, if a State could not confine a municipality’s activities to a specified geographic area, then there would be little point in maintaining local governments at all; it would be more efficient to do everything at the state level.

This is why the U.S. Supreme Court has made clear: “[T]he territory over which [a municipality’s powers] shall be exercised rests in the absolute discretion of the state.”<sup>32</sup> Thus, when the Commission tries to preempt provisions of Tennessee and North Carolina law that impose geographic restrictions on municipalities’ activities with respect to broadband, it is directly interfering with a core aspect of state sovereignty—namely the ability of Tennessee and North Carolina to make “arrangements for conducting their own governments”<sup>33</sup> and to determine “the territory over which [their municipalities’ powers] shall be exercised.”<sup>34</sup>

The implausibility of the Commission’s claim to the contrary is perhaps best illustrated by a couple of hypotheticals. Suppose, for example, that the federal government attempted to tell Tennessee that it could not limit the City of Chattanooga’s Police Department to enforcing the law in Chattanooga. Instead, once the State of Tennessee authorized the City of Chattanooga to have a police department, it was required to let Chattanooga’s police officers have free rein to patrol from Memphis to Knoxville. Would anyone seriously contend that such an edict from the federal government wouldn’t interfere with Tennessee’s ability to order its political subdivisions? Of course not.

Or suppose that the federal government tried to forbid North Carolina from limiting the City of Wilson’s Parks and Recreation Department to operating parks only within Wilson. Instead, if North Carolina wanted to allow Wilson to have a Parks and Recreation Department, it would have to permit the Department to operate parks from Asheville to the Outer Banks. Again, such a mandate from the federal government would obviously interfere with North Carolina’s ability to order its political subdivisions as it sees fit.

## B.

There are other problems with the Commission’s contention that it can preempt state restrictions on municipal broadband projects. To begin with, such a claim leads to an exceptionally strange result. While a state would be free to ban municipal broadband projects outright, it would be forbidden from

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<sup>28</sup> Tenn. Code Ann. § 7-52-601.

<sup>29</sup> N.C. Gen. Stat. §§ 160a-340.1(a)(3).

<sup>30</sup> *Nixon*, 541 U.S. at 130.

<sup>31</sup> N.C. Gen. Stat. § 160A-1(3).

<sup>32</sup> *Holt Civic Club*, 439 U.S. at 71.

<sup>33</sup> *Nixon*, 541 U.S. at 140.

<sup>34</sup> *Holt Civic Club*, 439 U.S. at 71.



imposing more modest restrictions on such projects. Or, in other words, the most severe state law restrictions on municipal broadband projects (prohibitions) *could not* be preempted, whereas less stringent restrictions (those that purportedly do not amount to prohibitions) *could* be preempted.

I highly doubt that Congress adopted, much less intended, such a convoluted framework when it enacted the Telecommunications Act of 1996, in part because this would lead to perverse consequences. For example, if a state is denied the power to authorize municipalities to offer broadband service with conditions, it will be less likely to authorize them to do so at all. And if, as the Commission suggests, municipal broadband projects truly advance section 706's aim of enhancing broadband deployment and competition, it would seem odd to interpret the statute in a manner that would push states toward prohibiting municipal broadband projects altogether.<sup>35</sup>

### C.

Moreover, the line the Commission draws between state prohibitions of municipal broadband projects (which it claims present “a different question”<sup>36</sup>) and state restrictions on such projects is artificial and thus untenable. This is because all conditions on the provision of services are effectively prohibitions when those specified conditions are not satisfied.

Consider, for example, a state law stating that a municipality may not offer broadband service so long as at least one private broadband provider is offering service to all residents of that municipality. The Commission likely would claim that such a law would be a restriction on municipal broadband projects subject to preemption under section 706 because it does not forbid a municipality from providing broadband service in all circumstances. But in reality, the state law functions as a prohibition as applied to any municipality where all residents are being offered broadband service by a private provider.

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

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

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<sup>35</sup> Indeed, it is worth noting that in 1997, the Commission explicitly encouraged states to impose restrictions on municipal entry into the telecommunications market that would fall short of a total prohibition.

[W]e encourage states to avoid enacting absolute prohibitions on municipal entry into telecommunications . . . . Municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services. At the same time, we recognize that entry by municipalities into telecommunications may raise issues regarding taxpayer protection from the economic risks of entry, as well as questions concerning possible regulatory bias when separate arms of a municipality act as both a regulator and a competitor. We believe, however, that these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition.

*Pub. Util. Comm'n of Tex. et al.*, CCB Pols. 96-13, 96-14, 96-16, 96-19, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3549, para. 190 (1997).

<sup>36</sup> *Order* at para. 147.

Such action would interfere with “States’ arrangements for conducting their own governments”<sup>37</sup> because it would be inconsistent with the fundamental principle that a State has “absolute discretion” to determine the “number, nature, and duration” of the powers it wishes to entrust to its municipalities.<sup>38</sup> As a result, there must be a clear statement that Congress intended to give the Commission the authority to infringe upon the sovereignty of Tennessee and North Carolina in this manner—a clear statement that is nowhere found in section 706.

### III.

But it even gets worse for the Commission’s position. For not only does section 706 lack any clear statement necessary to preempt “States’ arrangements for conducting their own governments,” I also very much doubt that it even gives the Commission the authority to preempt *any* state laws, even those governing private actors.

For example, section 601(c)(1) of the Telecommunications Act of 1996 states: “NO IMPLIED EFFECT- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.”<sup>39</sup> The Commission acknowledges that “[b]y its terms, section 601(c) prevents ‘implied’ preemption”<sup>40</sup> and nowhere claims that section 706 expressly refers to the preemption or impairment of state law.

Nonetheless, the Commission tries to circumvent this prohibition by claiming that section 601(c) only prevents the Act itself from being read to preempt state law by implication. Section 601(c), according to the Commission, does not prevent the Act from being read to implicitly give such preemptive powers to the Commission.<sup>41</sup> Nowhere does the *Order* contain any explanation for why Congress would have intended such an odd result. It is difficult to believe that Congress would have been concerned about implicitly superseding state law in the text of the Act yet would implicitly give the Commission the authority to do the exact same thing. No, section 601(c) “counsel[s] against any broad construction” of the 1996 Act “that would create an implicit conflict with state [] law.”<sup>42</sup> Here, that principle suggests not reading section 706 of the Telecommunications Act so broadly as to give the Commission the power to manufacture conflicts with state law. Hence, it counsels against interpreting section 706 to give the Commission the power to preempt state law.

There’s an additional problem with the Commission’s approach: Section 706(a) extends beyond the FCC. Remember that the text of that subsection gives the FCC “and each State commission with regulatory jurisdiction over telecommunications services” the *same direction*: to “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.”<sup>43</sup>

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<sup>37</sup> *Nixon*, 541 U.S. at 140.

<sup>38</sup> *Wisconsin Pub. Intervenor*, 501 U.S. at 607–08 (citations omitted); *Holt Civic Club*, 439 U.S. at 71 (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)).

<sup>39</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c), 110 Stat. 56 (codified at 47 U.S.C. § 152).

<sup>40</sup> *Order* at para. 153.

<sup>41</sup> *Id.*

<sup>42</sup> *Pinney v. Nokia, Inc.*, 402 F.3d 430, 458 (4th Cir. 2005).

<sup>43</sup> Telecommunications Act of 1996 § 706(a) (codified at 47 U.S.C. § 1302(a)).

Therefore, if section 706(a) authorizes the FCC to preempt state law, it would appear to empower State commissions to do the same. Recognizing the absurdity of this result (and perhaps how problematic it is from a federalism standpoint), the *Order* contends that the phrase “other regulating methods” in section 706(a) means one thing when applied to the FCC and another when applied to State commissions.<sup>44</sup> But nothing in the text of the statute supports that argument. Only by rewriting section 706(a), rather than interpreting it, can the Commission reach this result.<sup>45</sup>

As support for its position, the *Order* looks to the D.C. Circuit’s decision in *Verizon v. FCC*.<sup>46</sup> But there, the D.C. Circuit simply said that it was not implausible to believe that Congress would have granted authority to State commissions in section 706(a). The court nowhere stated that a single phrase in section 706(a)—“other regulating methods”—could mean two different things in the same provision.

Turning to section 706(b), the case for interpreting the statute to permit the Commission to preempt state law is similarly unavailing. Under the Commission’s own interpretation of section 706(b), the provision only gives the Commission authority when the FCC determines that advanced telecommunications capability is *not* being deployed to all Americans in a reasonable and timely fashion. And the Commission asserts that it currently possesses the power to use section 706(b) to preempt state laws because it has made such a negative determination.<sup>47</sup> But that argument presents a pickle: What happens if the Commission finds at a later date that broadband *is* being deployed to all Americans in a reasonable and timely fashion? Once the Commission’s supposed section 706(b) authority evaporates, would any state laws that were preempted under section 706(b) cease to be preempted? That would seem to be the case since the Commission’s authority to preempt such laws would no longer exist. But this would be an odd result to say the least (notice the recurring theme here). Indeed, I am unaware of any similar statutory scheme involving preemption, which again suggests that Congress did not intend to give the Commission the power to preempt state law under section 706(b).<sup>48</sup>

Furthermore, the statutory history underlying section 706(b) also points in the same direction. When the Senate in 1995 passed the bill that became the Telecommunications Act of 1996, that legislation contained a precursor to section 706(b) that authorized the FCC, if it determined that broadband was not being deployed in a reasonable and timely fashion, to “preempt State commissions that fail to act to ensure [the] availability [of advanced telecommunications capability to all Americans].”<sup>49</sup> But Congress ultimately decided not to grant this preemptory power to the Commission and *eliminated that language from the final version of the bill*.

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<sup>44</sup> *Order* at para. 151.

<sup>45</sup> *Cf. Clark v. Martinez*, 543 U.S. 371, 378 (2005) (“To give these same words a different meaning for each category would be to invent a statute rather than interpret one.”).

<sup>46</sup> *Id.* (citing *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014)).

<sup>47</sup> *Order* at para. 137.

<sup>48</sup> Relying on a statement contained in a *dissenting* opinion by a U.S. Supreme Court Justice, the *Order* speculates that “Commission actions adopted pursuant to a negative section 706(b) determination would not simply be swept away by a future positive section 706(b) finding.” *Order* at note 374. But what authority would the Commission have to maintain the preemption of state law under section 706(b) without section 706(b) authority? Indeed, if Congress gave the Federal Emergency Management Agency (FEMA) authority to preempt state law during a hurricane, would anyone think that FEMA could continue to preempt that state law once the storm had passed, sunny skies had returned, and recovery efforts were over? Of course not. So too here. But more to the point, even asking this question is sure to trap the agency in the labyrinth of section 706(b)’s on-off authority; the only way to escape is not to enter in the first place. Here, that means not interpreting section 706 to provide the Commission with the authority to preempt state law.

<sup>49</sup> See S. 652 § 304(b) (104<sup>th</sup> Cong. 1995) (contained in “Title III—An End to Regulation”).

The fact that Congress expressly contemplated providing the Commission with the power to preempt in section 706 but removed such language from the legislation strongly counsels against interpreting the provision to allow the Commission to preempt state law. As the Supreme Court explained in a similar case involving a Conference Committee removing language from a House bill, Congress's "action strongly militates against a judgment that Congress intended a result that it expressly declined to enact."<sup>50</sup> Accordingly, there can be no doubt that neither the text of the statute nor its legislative history provides support for the argument that section 706(b) gives the Commission the power to preempt state law.

One more point regarding the statutory history merits mention. The discussion of preemption in both the Senate's version of the Act only involved Commission authority to preempt *State commissions*. This *Order*, however, involves the preemption of statutes passed by the Tennessee and North Carolina *State legislatures*. Although the *Order* claims that this is helpful to the Commission's case,<sup>51</sup> it actually cuts the other way. For if Congress was unwilling to give the Commission the authority to preempt State commissions, it strains credulity to believe that it intended to empower the Commission to take the far more serious step of displacing the will of a State's democratically-elected legislators.

Finally, at the very least, section 601(c) and the text and statutory history of section 706 add substantial weight to the argument that section 706 does not give the Commission the authority to preempt state restrictions on municipal broadband. That is because they make it even more obvious that section 706 does not contain the "unmistakably clear" statement required by *Gregory*. Any interpretation that suggests otherwise requires one to grasp at statutory straws.

#### IV.

There is one last reason why section 706 doesn't give the Commission authority to preempt Tennessee or North Carolina laws pertaining to municipal broadband projects. Up until this point, I have accepted for the sake of argument the premise that section 706 gives the FCC some measure of independent authority. But it doesn't. The text, statutory structure, and its legislative history all make clear that Congress intended section 706 to be hortatory—not delegatory—in nature.

Although each of its subsections suggests a call to action ("shall encourage," "shall take immediate action"), neither reads like nor is a delegation of authority. *For one*, neither subsection expressly authorizes the FCC to engage in rulemaking. Congress knows how to confer such authority on the FCC and has done so repeatedly: It has delegated rulemaking authority to the FCC over both specific provisions of the Communications Act (e.g., "[t]he Commission shall prescribe regulations to implement the requirements of this subsection"<sup>52</sup> or "the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section"<sup>53</sup>), and it has done so more generally (e.g., "[t]he Commission[] may prescribe such rules and regulations as may be necessary in the public

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<sup>50</sup> *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974). See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)); *International Broth. of Elec. Workers v. NLRB*, 814 F.2d 697, 711 (D.C. Cir. 1987) ("Congress, however, decided against the modification of section 9 proposed by Senator Taft. This fact alone, we believe, 'strongly militates against a judgment that Congress intended a result that it expressly declined to enact.'") (quoting *Gulf Oil Corp.*, 419 U.S. at 200).

<sup>51</sup> *Order* at para. 152.

<sup>52</sup> Communications Act of 1934, as amended, § 227(b)(2).

<sup>53</sup> Communications Act of 1934, as amended, § 251(d)(1).

interest to carry out the provisions of th[e Communications] Act”<sup>54</sup>). Congress did not do either in section 706.

*For another*, neither subsection expressly authorizes the FCC to prescribe or proscribe the conduct of any party. Again, Congress knows how to empower the Commission to prescribe conduct (e.g., “the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge”<sup>55</sup>) and to proscribe conduct (e.g., “the Commission is authorized and empowered . . . to make an order that the carrier or carriers shall cease and desist”<sup>56</sup>). And again, Congress has repeatedly empowered the FCC to direct the conduct of particular parties (e.g., “[t]he Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier,”<sup>57</sup> or “the Commission shall have the power to require by subpoena the attendance and testimony of witnesses”<sup>58</sup>). Congress did not do any of this in section 706.

*For yet another*, neither subsection expressly authorizes the FCC to enforce compliance by ordering payment for noncompliance. Where Congress has authorized the Commission to impose liability it has always done so clearly: For forfeitures, the Communications Act directs that “[a]ny person who is determined by the Commission . . . shall be liable to the United States for a forfeiture penalty”<sup>59</sup> and “[t]he amount of such forfeiture penalty shall be assessed by the Commission . . . by written notice.”<sup>60</sup> And for other liabilities, the Communications Act directs that “the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled.”<sup>61</sup>

The lack of express authority to issue rules, order conduct, or enforce compliance should be unsurprising, however, since section 706’s subsections lay out precisely *how* Congress expected the FCC to “encourage . . . deployment” and “take action”: Congress expected the FCC to use the authority it had given the agency elsewhere. The FCC already had the authority to adopt “price cap regulation” since it had started converting carriers from rate-of-return regulation to price-cap regulation in the early 1990s.<sup>62</sup> The Telecommunications Act established the FCC’s “regulatory forbearance” authority.<sup>63</sup> The Telecommunications Act also authorized the FCC to “remove barriers to infrastructure investment,”

<sup>54</sup> Communications Act of 1934, as amended, § 201(b) (“The Commissioner [*sic*] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”); *see also* Communications Act of 1934, as amended, § 303(r) (“Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall— . . . [m]ake such rules and regulations and prescribe such restrictions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . .”).

<sup>55</sup> Communications Act of 1934, as amended, § 205(a).

<sup>56</sup> Communications Act of 1934, as amended, § 205(a).

<sup>57</sup> Communications Act of 1934, as amended, § 213(b).

<sup>58</sup> Communications Act of 1934, as amended, § 409(e).

<sup>59</sup> Communications Act of 1934, as amended, § 503(b)(1).

<sup>60</sup> Communications Act of 1934, as amended, § 503(b)(2)(E).

<sup>61</sup> Communications Act of 1934, as amended, § 209.

<sup>62</sup> *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990).

<sup>63</sup> Communications Act of 1934, as amended, § 10 (“[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . .”).



specifically barriers to entry created by state or local laws,<sup>64</sup> and instructed it to identify and eliminate market entry barriers.<sup>65</sup> And as for “promoting competition in the telecommunications market,” the Telecommunications Act added a whole second part to Title II of the Communications Act, titling it “Development of Competitive Markets.”<sup>66</sup> In other words, Congress did in fact “invest[] the Commission with the statutory authority to carry out those acts” described in section 706<sup>67</sup>—it just did so through provisions other than section 706.

The structure of federal law confirms this reading. Although Congress directed that many provisions of the Telecommunications Act be inserted into the Communications Act,<sup>68</sup> section 706 was not one of them. Instead, it was left as a freestanding provision of federal law.<sup>69</sup> As such, the provisions of the Communications Act that grant rulemaking authority “under this Act” (like section 201(b)), that grant prescription-and-proscription authority “[f]or purposes of this Act” (like section 409(e)), and that grant enforcement authority for violations of “this Act” (like section 503) simply do not apply to section 706 of the Telecommunications Act. Indeed, the so-called subject-matter jurisdiction of the FCC under section 2 applies, by its own terms, only to “provisions of this Act”<sup>70</sup>—and so the “most important[]” limit the D.C. Circuit in *Verizon* thought applied to section 706 does not in fact exist.<sup>71</sup> In other words, the statutory superstructure that normally undergirds Commission action just does not exist for section 706 of the Telecommunications Act.

What is more, reading section 706 as a grant of authority outside the bounds of the Communications Act yields absurd results. As the Commission recognized in the *Advanced Services Order* with respect to “regulatory forbearance,” reading section 706 as an “independent grant of authority . . . would allow us to forbear from applying” certain provisions in the Act even when section 10 would not let us do so.<sup>72</sup> That same logic applies to every “regulating method” specified in section 706. If Congress had intended to grant the FCC almost limitless authority for “price cap regulation,” “removing barriers,” or “promoting competition,” what was the point of specifying limited authority in the Telecommunications Act’s actual amendments to the Communications Act?<sup>73</sup>

<sup>64</sup> Communications Act of 1934, as amended, § 253.

<sup>65</sup> Communications Act of 1934, as amended, § 257.

<sup>66</sup> Communications Act of 1934, as amended, Title II, Part II, §§ 251–60.

<sup>67</sup> *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014) (quoting *Open Internet Order*, 25 FCC Rcd at 17969 ¶ 120).

<sup>68</sup> Telecommunications Act of 1996, as amended, § 1(b) (“[W]henver in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.)”); see also Telecommunications Act of 1996, as amended, § 101 (“Establishment of Part II of Title II. (a) Amendment.—Title II is amended by inserting after section 229 (47 U.S.C. 229) the following new part: . . .”). Notably, all of the provisions at issue in *AT&T v. Iowa Utils. Bd.* were in fact inserted into the Communications Act, and thus the Court could plausibly claim that “Congress expressly directed that the 1996 Act . . . be inserted into the Communications Act.” 525 U.S. 366, 377 (1999).

<sup>69</sup> For other examples, see Telecommunications Act of 1996, as amended, §§ 202(h), 704(c).

<sup>70</sup> Communications Act of 1934, as amended, § 2(a).

<sup>71</sup> *Verizon v. FCC*, 740 F.3d 623, 640 (D.C. Cir. 2014).

<sup>72</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24046, para. 73 (1998) (*Advanced Services Order*).

<sup>73</sup> The *Verizon* court asked the wrong question when it noted that it “might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting

(continued...)

Lastly, the history of section 706 confirms its hortatory nature. For years after 1998’s *Advanced Services Order*, the Commission consistently interpreted the section to direct the agency to “use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services.”<sup>74</sup> And so the Commission has consulted section 706 in resolving one forbearance petition<sup>75</sup> after another<sup>76</sup> after another.<sup>77</sup> And the Commission has looked to section 706 when employing its authorities under the Communications Act to promote local competition<sup>78</sup> and to remove barriers to infrastructure investment (such as the Commission’s authority over pole attachments).<sup>79</sup> In other words, our own history shows that we can meet section 706’s goals without relying on it as an independent grant of authority.

And the actual legislative history clinches the point. Recall that the *Verizon* court looked to the Senate Report’s description of section 706 as a “necessary fail-safe to ensure that the bill achieves its intended infrastructure objective.”<sup>80</sup> That was a mistake because the provision described in the Senate Report was *not* the section 706 that Congress enacted. As reviewed above, when the Senate passed in 1995 the bill that became the Telecommunications Act of 1996, that legislation contained a precursor to section 706(b) that authorized the FCC to “preempt State commissions that fail to act to ensure [the] availability [of advanced telecommunications capability to all Americans].”<sup>81</sup> In other words, the Senate

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principle.” *Verizon*, 740 F.3d at 639. But the question is not whether section 706 of the Telecommunications Act contains some “intelligible principle” and thus does not violate the non-delegation doctrine, *see Whitman v. American Trucking Associations*, 531 U.S. 457, 472 (2001). Instead, the question is one of congressional intent: Did Congress really intend to put specific limits on the Commission’s forbearance authority in one place (section 10 of the Communications Act) only to largely eliminate them in another (section 706 of the Telecommunications Act)? Such an interpretation doesn’t make sense.

<sup>74</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24047, para. 77 (1998) (*Advanced Services Order*).

<sup>75</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19469, para. 107 (2005), *aff’d by Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

<sup>76</sup> *Petition of ACS of Anchorage*, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16356, para. 118 (2007).

<sup>77</sup> *Petition of the Embarq Local Operating Companies For Forbearance et al.*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19503–04, para. 46 (2007), *aff’d by Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

<sup>78</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3840, para. 317 (1999) (“Our overriding objective, consistent with the congressional directive in section 706, is to ensure that advanced services are deployed on a timely basis to all Americans so that consumers across America have the full benefits of the ‘Information Age.’”); *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22426–27, paras. 36–37 (2004).

<sup>79</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5317, 5330, paras. 173, 208 (2011); *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, 20209, para. 36 (2007).

<sup>80</sup> S. Rep. No. 104-23 at 50–51 (1995); *see Verizon*, 740 F.3d at 639.

<sup>81</sup> *See* S. 652 § 304(b) (104th Cong. 1995) (contained in “Title III—An End to Regulation”).

version would have let the FCC step into the shoes of the state commissions and exercise their authority under federal law if they failed to act. That's a "fail-safe." But the enacted version contained, as the Conference Report dryly put it, "a modification" to that section: This preemptory language was excised.<sup>82</sup> In other words, Congress contemplated giving the FCC fail-safe authority in section 706, but then expressly decided not to do so.

In short, whether one looks at the statute's text, structure, or history, only one conclusion is possible: Congress did not delegate substantive authority to the FCC in section 706 of the Telecommunications Act.

But even if one agrees with the D.C. Circuit's *Verizon* decision to the contrary, the court's reasoning bolsters the argument that section 706 does not contain the "unmistakably clear" statement required by *Gregory*. Under *Chevron*, an agency's reasonable interpretation of a statute is entitled to deference "if the statutory language does not reveal the 'unambiguously expressed intent of Congress.'"<sup>83</sup> In its *Verizon* brief, the Commission argued that its interpretation of section 706 was entitled to such deference.<sup>84</sup> The court ultimately agreed, concluding that the Commission's asserted authority under section 706 was a "reasonable interpretation of an ambiguous statute."<sup>85</sup> The D.C. Circuit contended that "Congress ha[d] not 'directly spoken' to the question of whether section 706(a) is a grant of regulatory authority" *at all*<sup>86</sup>—much less whether it grants the Commission authority to preempt state laws. Accepting, for the sake of argument, the Commission's and court's arguments as true, I find it difficult to see how section 706 could be at the same time both "ambiguous" as to whether it gives the FCC any authority at all and "unmistakably clear" as to Congress' intent to allow the FCC to preempt state restrictions on municipal broadband projects.<sup>87</sup>

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

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

During the Clinton Administration, the City of Abilene asked the FCC to preempt a Texas law prohibiting Abilene and other Texas municipalities from entering the telecommunications business. The FCC described the city's request as follows: "Abilene asked the FCC to take the extraordinary step of

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<sup>82</sup> S. Rep. No. 104-230 at 210 (1996).

<sup>83</sup> Brief for Appellee/Respondents at 23, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (11-1355) (citing *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984)).

<sup>84</sup> *Id.* at 25–30.

<sup>85</sup> *Verizon*, 740 F.3d at 637.

<sup>86</sup> *Id.* at 638.

<sup>87</sup> US Telecom notes that "[i]f the underlying grant of authority in Section 706 is 'ambiguous,' the statute by definition does not contain a 'plain statement' of Congressional intent." Comments of US Telecom at 15, WC Docket No. 14-115 (filed Aug. 29, 2014).

preempting a State’s sovereign power to regulate its own municipalities.”<sup>88</sup> In 1997, the Commission stayed within its legal bounds and refused to take that “extraordinary step.” Unfortunately, the agency does not exhibit the same restraint today.

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

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<sup>88</sup> Brief for Respondents at 11, *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (97-1633, 97-1634).

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

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

This order highlights the unprecedented lengths that the Commission is willing to go in undermining the free market system, the Federal statute, the U.S. Constitution, and common sense in order to try to dictate when, where, and how broadband is provided in this country. The Commission is just about to vote to re-write the Communications Act to assume vast new regulatory authority over broadband providers in the next item, and here the Commission has the arrogance to try to re-write state laws as well. The order is both legally infirm and bad public policy. I cannot support it.

Let me start by expressing my profound opposition to the offering of broadband or any communications service by a government entity, in this case a municipality. Some people like to talk about the principles of network compacts, but this issue goes to the core of more important principles: the foundations of the U.S. economy and free enterprise. For historians, you will remember how government involvement was debated and dismissed long ago in many other sectors, such as banking. While other countries, like Cuba, China, Russia and Venezuela, have effectively nationalized private companies, the bedrock of American capitalism is private enterprise free from government manipulation as a market entrant. If there is market need, an individual with a dream and a propensity for risk will enter to provide service. It is not the government's role to offer services instead of or in competition with private actors.

Separately, I would like to clarify any misperception that I am against preemption as a general matter. While I support the basic premise of Federalism, I embrace the realities and benefits of a communications marketplace that does not recognize the political borders of yesterday. For instance, I have no difficulties preempting state and local restrictions on wireless tower and antenna siting. I have also worked extensively in my career to preempt state and local burdens on the offering of Internet applications, such as VoIP. So it shouldn't come to anyone's surprise that I firmly believe that Internet access is an interstate service. But making a finding under section 1 of the Communications Act that a service is interstate is not sufficient, particularly when preemption would "trench on the States' arrangements for conducting their own governments."<sup>1</sup> The missing ingredient that is essential to trigger preemption is clear Congressional direction via the statute. If Congress enacts specific legislation to preempt state law to further municipal broadband, then I will implement it post-haste.

That key ingredient is not present here. The order relies on an illogical and tortured reading of section 706 of the Telecommunications Act to assert authority. I have previously expressed my views on this topic and they haven't changed. To reiterate just one portion of my concerns, the FCC *claims* that its authority under section 706 is "not unbounded" because it may act only within the "limits" of its ever broadening subject matter jurisdiction and its actions must be designed "to achieve a particular purpose: to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."<sup>2</sup> But as Judge Silberman commented on that very phrase, "This is an almost meaningless limitation...any regulation that, in the FCC's judgment might arguably make the Internet 'better,' could increase demand. I do not see how this 'limitation' prevents [section] 706 from being carte

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<sup>1</sup> *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004).

<sup>2</sup> *Supra* para. 138.



blanche to issue any regulation that the Commission might believe to be in the public interest.”<sup>3</sup> In this item, we see that prediction come true. Indeed, anything that may “incent the use of the Internet” is apparently now fair game for FCC regulation.

Yet even if I believed that section 706 provided some general authority, which I do not and nor does section 1 of the Communications Act, it certainly does not contain the clear statement that the Supreme Court has said is a prerequisite for preempting a state’s control of its municipalities.<sup>4</sup> On the contrary, section 706 expressly contemplates a joint federal-state role in broadband deployment.<sup>5</sup>

We are told, however, that the Supreme Court decisions don’t apply here for two reasons: (1) this is an area where there has been a history of significant federal presence; and (2) the laws at issue here do not constitute flat bans on the provision of municipal broadband. Both arguments are unavailing and, therefore, the presumption against preemption must apply here.

First, the order broadly defines the area of significant federal presence as interstate communications policy. However, the petitions are primarily focused on the narrower question of *where* service may be provided, and that is a core function of the states. As the State of Tennessee noted, “While the Commission may regulate the provision of a telecommunication service that a local governmental unit is authorized by state law to provide, the Commission cannot expand the territorial jurisdiction of a local governmental unit since any such action would exceed the powers of a federal agency and manifestly infringe on the sovereignty of a state.”<sup>6</sup> In other words, the Commission cannot mandate that a state authorize a municipality to offer broadband. It’s just that simple.

Furthermore, the types of restrictions under scrutiny are not necessarily specific to communications policy. For example, states may require referenda on a variety of spending or other matters. The fact that a state may require one for municipal broadband does not necessarily mean that it is being imposed “to affect the state’s communications policy preferences.” Indeed, public hearings and referenda have a long and well-regarded history in the American political tradition.

Moreover, even restrictions that seem specific to communications policy do not necessarily conflict with the Commission’s role in regulating interstate communications. For example, restrictions truly designed to prevent cross-subsidization can be consistent with existing communications policy. And requirements for business planning and feasibility studies are similar to FCC rules that ensure that its own funding recipients are technically and financially qualified. Are we really striking down a requirement that a municipality have a cogent business plan?

Second, the order turns precedent on its head to conclude that the Commission has the authority to preempt any restriction that falls short of an outright ban. Finding that the state provisions at issue here are not flat bans, the order tosses the relevant Tennessee provision and proceeds line by line through the

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<sup>3</sup> *Verizon v. FCC*, 740 F.3d 623, 662 (D.C. Cir. 2014) (Silberman, J., concurring in part and dissenting in part).

<sup>4</sup> See *Nixon*, 541 U.S. at 140, 141 (“interposing federal authority between a State and its municipal subdivisions” cannot be done without an “‘unmistakably clear’ statement to that effect”) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

<sup>5</sup> 47 U.S.C § 1302(a)(directing the Commission and each State Commission with jurisdiction to encourage the deployment of advanced telecommunications capability).

<sup>6</sup> Letter from Herbert H. Slattery III, Attorney General, State of Tennessee to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-116 (filed Feb. 5, 2015), [http://apps.fcc.gov/ecfs/document/view?id=60001027109\\_](http://apps.fcc.gov/ecfs/document/view?id=60001027109_)

North Carolina statute to eliminate what it sees fit. In doing so, the order ignores how both the City of Wilson and the State of North Carolina interpret their own statute and the relief petitioners actually sought. In essence, the overly broad extension of this item would overrule certain sound restrictions justified by the use of taxpayer funding, such as public hearings and voting requirements even though, when I met with the City of Wilson, they said that they could live with them.

Moreover, the order is downright hostile to the states, accusing them of passing laws that “allegedly” but do not actually protect taxpayers from risk. It seems that no protection enacted by a state, no matter how beneficial to taxpayers, could survive the FCC’s unvarnished skepticism. In fact, the only restriction that may survive under the Commission’s reading of section 706 is a state law imposing a flat ban, which seems short-sighted and counterproductive. That is, the order may encourage states that are concerned about the risks of municipal broadband to prohibit it altogether rather than permit it under carefully tailored conditions that ensure such projects will be successful and not burden taxpayers.

I am also deeply troubled by the policy implications of this order. Municipal broadband networks have a history of overpromising and under-delivering, leaving taxpayers at risk. We’ve seen examples where municipal broadband projects that failed did so due to competition, poor planning, or unethical practices. That’s the very scenario and conduct that states are trying to remedy by requiring a right of first refusal to private sector broadband providers, business plans, feasibility studies, public hearings, and referenda.

Finally, I have to wonder if all of this is for naught. Municipal broadband providers, like all other ISPs, will now be subject to Title II regulations. Notably, dozens of these providers opposed reclassification because, in their own words, it “will undermine the business model that supports our network, raises our costs and hinders our ability to further deploy broadband.”<sup>7</sup> It is an odd result indeed to preempt a number of state rules in the name of “removing barriers” to broadband deployment only to impose extensive new barriers in their place.

In sum, I find it appalling that we would override democratically-enacted, common-sense protections for consumers, especially in the absence of clear direction from Congress. I must dissent.

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<sup>7</sup> Letter from 43 Municipal Broadband Providers to Tom Wheeler, Chairman, FCC, GN Docket Nos. 14-28 & 10-127 (filed Feb. 10, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001028442>.