Case Nos. 15-3291 & 15-3555

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE STATE OF TENNESSEE,
Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
Respondents

THE STATE OF NORTH CAROLINA,
Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
Respondents

On Petition for Review of an Order of the
Federal Communications Commission

Brief of Intervenor in Support of Respondents City of Wilson, North Carolina

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James Baller*
Sean A. Stokes
Ashley Stelfox
Baller Herbst Stokes & Lide, PC
2014 P Street, NW
Washington, DC 20036
(202) 833-1144 (phone)
Jim@Baller.com
*Lead Counsel

James P. Cauley III
Gabriel Du Sablon
Cauley Pridgen, P.A.
2500 Nash Street N
Suite C
Wilson, NC 27894-2367

Counsel for the City of
Wilson, North Carolina

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations And Financial Interest

Sixth Circuit
Case Numbers: 15-3291 & 15-3555

Case Names: State of Tennessee v. FCC
State of North Carolina v. FCC

Name of counsel: James Baller

Pursuant to Sixth Circuit Rule 26.1, the Intervenor, the City of Wilson, North Carolina, makes the following disclosure:

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

NO.

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

NO.

CERTIFICATE OF SERVICE

I certify that on November 6, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/James Baller
Baller Herbst Stokes & Lide, PC
2014 P Street, NW
Suite 200
Washington, DC 20036
(202) 833-1144

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Given the novel and complex issues raised in this case, the City of Wilson, as one of the two entities that brought the underlying Section 706 petitions for preemption to the Commission, respectfully requests oral argument pursuant to 6 Cir. R. 34(a), to respond to any questions that the Court may have.

STATEMENT OF THE ISSUES

1. Does Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, empower and require the Federal Communication Commission ("the Commission") to preempt a restrictive State law that effectively prohibits municipalities from providing advanced telecommunications services and capabilities, where the Commission has found that the State has previously given its municipalities authority to provide such services and capabilities, that the main purpose and effect of the restrictive State law is to protect private-sector service providers from competition from municipalities, that the law is preventing Americans from acquiring reasonable and timely access to advanced telecommunications services and capabilities, and that the law is a barrier to broadband investment and competition?

2. Given the Commission's findings, as summarized in the previous paragraph, did the Commission correctly conclude that the "plain statement" standard announced in *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991), and followed in *Nixon v. Missouri Municipal League*, 525 U.S. 125 (2004), does not apply to this case?

3. In the alternative, does Section 706, mandating that the Commission remove barriers to broadband investment and competition, meet the "plain statement" standard of *Gregory*?

COUNTER STATEMENT OF THE CASE

Overview

The States of Tennessee and North Carolina and their supporting intervenors and *amici* would have this Court believe that this case involves a gross usurpation of "fundamental aspects of state sovereignty concerning the core function of state regulation of its political subdivisions." See, e.g., *North Carolina Brief* at 8. That is simply incorrect. As the Commission concluded in its *Order*, after painstakingly analyzing the factual and legal points and authorities in the massive record in this case, including the filings of hundreds of commenters, this case has nothing to do with traditional or core governmental functions. Rather, it simply involves removal of a "thicket" of purely commercial measures that seek to protect private communications service providers from competition from municipalities that the State previously empowered to provide such services. *Order*, ¶93. These restrictions were enacted in 2011 through Session Law 2011-84 and are codified in Section 160A-340 *et seq*.

The Petitioners and their supporters offer highly abstract arguments about the broad powers of States to manage the affairs of their political subdivisions, and they all but ignore the Commission's extensive, detailed findings about the anticompetitive purposes of Session Law 2011-84 and about the harm that it causes

North Carolina's municipalities, businesses, and residents. (*Order*, ¶¶ 81-113)(P.A. 40-51)

Equally striking is the lack of any real substantive discussion by the Petitioners or their supporters of the underlying purposes and broad policies goals behind Section 706 that clearly and forcefully direct the Commission to sweep away barriers to broadband investment and competition, such as those embodied in Session Law 2011-84.

Communities across the Nation, including Wilson, have increasingly come to view high-capacity fiber networks as platforms and drivers of simultaneous advances in just about everything they consider important, including economic development and global competitiveness, educational opportunity, modern health care, public safety, energy efficiency, environmental protection, smart transportation, cost-effective government service, democratic engagement, and much more. That is why so many of communities across America are using a variety of strategies to acquire access to such networks. At bottom, this case is about a State law that would remove the ability of North Carolina's municipalities to take matters into their own hands when their incumbent providers are unwilling or unable to meet community needs. As the Attorney General of North Carolina has recently acknowledged, Session Law 2011-84 is a "bad law," and he has challenged the

Commission's preemption of it only because "it is the job of the attorney general to defend state laws." [1]

STATEMENT OF THE FACTS

I. THE IMPORTANCE OF BROADBAND INTERNET CONNECTIVITY AND THE CRITICAL ROLE OF MUNICIPALITIES IN MEETING THE GOALS OF SECTION 706

In the Spring of 1994, as Congress was considering the bills that would eventually become the Telecommunications Act of 1996, the Senate Committee on Commerce, Science and Transportation held a hearing at which representatives of investor-owned, cooperatively-owned, and municipally-owned electrical utilities testified about the contributions that electric utilities of all kinds could make to the development of a "National Information Highway." In particular, Billy Ray, General Manager of the Electric Plant Board of Glasgow, Kentucky, testified about the remarkable experience of his innovative, rural community, which was years ahead of the private sector in offering high-speed broadband communications to its residents and businesses:

> The people of Glasgow won't have to wait to be connected to the information superhighway. They're already enjoying the benefits of a two-way, digital, broadband communications system. And it was made possible by the municipally owned electric system.

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[1] Janet Connor-Knox, "Cooper Reaches Out to Wilson Residents," *The Wilson Times*, November 1, 2015, http://goo.gl/e4D2Qg.

Testimony of William J. Ray, Superintendent, Glasgow Electric Plant Board, Glasgow, KY, on Behalf of the American Public Power Association, Hearings on S.1822 Before the Senate Committee on Commerce, Science, and Transportation, 103d Cong., 2d Sess. at 355-56, 1994 WL 232976 (May 11, 1994) ("Hearings on S.1822").

Later in the hearing, Senator Trent Lott (R-MS), one of the most prominent leaders of Congress at the time, as well as a Senate manager of the Telecommunications Act, thanked the panel, particularly Mr. Ray. "I found it very interesting, and Mr. Ray, I was very interested in the experience you have had there in Kentucky." Hearings on S.1822, at 378. Senator Lott then went on to say, "I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here." *Id.*, at 379.

By the time the Telecommunications Act became law on February 8, 1996, Congress had come to realize that advanced telecommunications capabilities were going to become increasingly important to America's future and global competitiveness. Congress could not accurately predict how fast and in what ways the need for access to advanced communications capabilities would evolve, but it foresaw that such access would become essential for all Americans. As a result, in

Section 706(a) of the Act, Congress commanded the Commission and the States to encourage the deployment of advanced telecommunications capabilities on a reasonable and timely basis to all Americans, using all regulatory methods at their disposal to remove barriers to broadband investment. In Section 706(b), Congress also required the Commission to take affirmative action to acquire information about the pace of deployment of advanced telecommunications capabilities, to decide whether such deployment was occurring on a reasonable and timely basis, and, if the Commission ever answered that question in the negative, to act immediately to remove barriers to infrastructure investment and to promote competition. As the Commission observed in its *Order*,

> 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 to all Americans in a reasonable and timely fashion. Both sections, in targeting broadband deployment to "all Americans," also reflect Congress's concern with unserved and underserved areas.

Order, ¶135 (P.A. 57)

In the initial years after the adoption of the Act, the Commission utilized a relatively modest definition of broadband – the capacity to carry information at a speed of at least 200 kilobits per second – that reflected the fact that broadband was still in its early stages of development and was not yet viewed as an essential service

platform. Under this modest definition, the Commission repeatedly found that broadband deployment was occurring on a reasonable and timely basis.

By 2008, however, access to more robust broadband capabilities had become a national priority and Congress responded by enacting the Broadband Data Improvement Act (BDIA). Pub. L. No. 110-385, 122 Stat. 4096 (October 10, 2008). In Section 101 of the Act, codified in 47 U.S.C. § 1301, Congress opened with the following findings:

> (1) The deployment and adoption of broadband technology 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.
>
> (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.

In Sections 102-103 of the BDIA, 47 U.S.C. §§ 1302-1303, Congress reaffirmed and expanded the Commission's authority under Section 706 of the Telecommunications Act. Congress required the Commission to issue broadband deployment reports "annually" rather than "regularly" and to take various other steps to foster faster deployment of broadband.

Four months later, in February 2009, Congress acted again to accelerate deployment, adoption, and use of broadband. As part of the American Recovery and Reinvestment Act of 2009, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2), 123 Stat. 115 (Feb. 17, 2009) ("Recovery Act").

Congress directed the Commission to develop a "National Broadband Plan" to ensure that "all people of the United States have access to broadband capability." *Id*., at 516. Congress also appropriated $7.2 billion in federal stimulus funds in furtherance of this goal. Notably, in Section 6001(e)(1) of the Recovery Act, Congress explicitly included municipalities among the entities that were eligible for a share of these funds. Section 6001(e)(1)(A), codified as 47 U.S.C. § 1305(e)(1)(A).

On March 16, 2010, the Commission issued its National Broadband Plan in which the Commission reiterated its understanding of the critical importance of making broadband Internet access available to all Americans.

> Today, high-speed Internet is transforming the landscape of America more rapidly and more pervasively than earlier infrastructure networks. Like railroads and highways, broadband accelerates the velocity of commerce, reducing the costs of distance. Like electricity, it creates a platform for America's creativity to lead in developing better ways to solve old problems. Like telephony and broadcasting, it expands our ability to communicate, inform and entertain.
>
> Broadband is *the* great infrastructure challenge of the early 21st century.

Connecting America: the National Broadband Plan, at 153 (adopted Mar. 15, 2010), available at http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

The National Broadband Plan did not just focus on ensuring that all Americans have access to minimal levels of broadband connectivity. Rather, the Plan also underscored the importance of higher-end broadband connectivity to the

advancement of America's "National Purposes" in several areas, including chapters on health care, education, economic development, energy and environment, smart transportation, government performance, civic engagement, and public safety. The Plan emphasized the need to act quickly to expand the reach and capability of the nation's broadband infrastructure:

> It is critical that the country move now to enact the recommendations in this part of the plan in order to accelerate the transformation that broadband can bring in areas so vital to the nation's prosperity. Diffusion of new technologies can take time, but the country does not have time to spare. There are students to inspire, lives to save, resources to conserve and people to put back to work. Integrating broadband into national priorities will not only change the way things are done, but also the results that can be achieved for Americans.

Id., at 194.

In 2010, in its *Sixth Broadband Deployment Report*, the Commission discarded its obsolete definition of advanced telecommunications capability, announced a new definition – 4 megabits per second downstream and 1 megabit per second upstream – and found that, under the new definition, advanced telecommunications capabilities were not being deployed in a reasonable and timely manner. *Sixth Broadband Deployment Report*, 25 FCC Rcd. 9556, 9558-60, ¶¶ 4-5, 2010 WL 2862584, *1-*2 (rel. July 20, 2010). Within a couple of years, the Commission recognized that its benchmark of 4/1 Mbps had already outlived its usefulness, and in 2015 adopted a new benchmark definition for broadband of 25 Mbps downstream and 3 Mbps upstream. Under this new, more robust definition

of broadband the Commission found that an even higher percentage of Americans were not obtaining reasonable and timely access to broadband. *2015 Broadband Progress Report and Notice of Inquiry*, FCC 15-10 (rel. Feb. 4, 2015) (*2105 Progress Report*).

In summary, as Wilson detailed in its petition (P.A. 638-648), in enacting Section 706 of the Telecommunications Act of 1996, Congress foresaw that access to advanced telecommunications capabilities would become critically important to all Americans in the years ahead. Congress gave the Commission broad authority and discretion to determine when, where, and how to ensure that all Americans would have such access on a reasonable and timely basis. In charging the Commission with this responsibility, Congress was well aware of the significant contributions that municipalities could make – indeed, Congress undoubtedly understood that it would be impossible to make the benefits of broadband connectivity available to "all Americans" on a reasonable and timely basis without the participation of municipalities, particularly in areas in which the private sector found investment unattractive. Furthermore, in the nearly two decades since the enactment of Section 706, as access to broadband capabilities have become more critical as the enabling platform for nearly every facet of the information economy, both Congress and the Commission have repeatedly acted in ways that reinforce the

conclusion that broadband deployment is a national priority and that barriers to broadband infrastructure investment and competition are contrary to public policy.

II. WILSON'S BROADBAND NETWORK

A. Background and History

Wilson is a small North Carolina community of 50,000 residents, located approximately 45 miles east of Raleigh. Wilson has historically been an agricultural community and at the turn of the Nineteenth Century was a leading tobacco market.

In the decades that followed, Wilson's tobacco and agricultural economy gradually evolved into a healthy mix of industries that also included manufacturing, commercial, and service businesses. For a while, textiles were also an important part of the mix. By the mid-2000s, however, both the tobacco and textile industries were in deep decline.

In 2005, to meet the projected increase in broadband capacity requirements and to achieve cost savings for its governmental network services, the City built a fiber optic backbone connecting all City-owned facilities. Seeing this, numerous City residents, businesses, schools, colleges, medical facilities, and other organizations contacted the City and requested access to the new network, and expansion of it. They all stated that the services being offered by the current providers were inadequate and overpriced, and customer service was unsatisfactory.

Before undertaking to expand the network to serve non-governmental commercial and residential customers, the City's officials asked the incumbent communications service providers to build or partner with the City in building a Fiber-to-the Home ("FTTH") network in Wilson. Neither was willing to do so.[2]

After many months of careful review and research, including a detailed feasibility study and business plan, and after conducting several public hearings with strong support from the community and the City's largest businesses (Wilson petition, Exhibits 2 and 3)(P.A. 724-728), the City Council unanimously voted in November 2006 to build a municipal FTTH network. After receiving approval from the North Carolina Local Government Commission – a division of the State Treasurer's Office charged with general oversight of local government finance – the City funded the project by issuing Certificates of Participation, which are financing instruments that are backed solely by the future revenues derived from the assets purchased.[3]

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[2] The City's discussions with Time Warner Cable and Embarq are summarized in Todd O'Boyle and Christopher Mitchell, *Wilson Gives Greenlight to Fast Internet*, at 5-7 (December 2012), http://goo.gl/Pc5VwJ. Time Warner Cable was especially disinterested. According to Mayor Rose, "They laughed in our faces." *Id*.

[3] Contrary to assertions by several *amici* supporting the Petitioners, Wilson's network was never financed by tax revenues, but was supported entirely by Certificates of Participation.

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. Wilson Petition (P.A. 654). Pursuant to N.C.G.S. §§160A-311 and 160A-312, North Carolina cities have the authority to construct, own and operate any or all of ten designated "public enterprises," including "cable television systems," both within and outside their corporate limits.[4]

B. Community Benefits of Wilson's Fiber Network

In May 2008, acting under the trade name "Greenlight," the City began signing up customers for broadband services. The community responded enthusiastically – initial trials found that 86 percent of customers preferred Greenlight services to those previously available. Wilson's petition detailed many of the benefits of its broadband network, including that the fiber network has achieved 33.7% total market penetration and it is cash flow positive.[5] Both Moody's and Standard and Poor's upgraded Wilson's credit rating in late 2008, shortly after

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[4] In 2005, the North Carolina Court of Appeals and Supreme Court confirmed that the right to operate a cable television system included the authority to operate a broadband system providing broadband Internet access service, whether or not the network provided cable television. *BellSouth Telecommunications, Inc. v. City of Laurinburg*, 168 N.C. App. 75, 606 S.E.2d 721, 2005 N.C. App. LEXIS 164), *review denied*, 615 S.E.2d 660, 2005 N.C. LEXIS 780 (N.C. 2005).

[5] This is contrary to the assertions by *amici* such NGA, CEI and ALEC that municipal broadband systems are doomed to fail at the expense of the taxpayers.

the Greenlight service launched. Moody's reaffirmed its credit rating in 2014, noting in particular the strength of its Greenlight service. Wilson Petition Exhibit 4 (P.A. 729).

Providing technologically advanced triple play communication services at lower prices and with exemplary customer service to all of its residential and business subscribers, Greenlight's entry into the market has not only proven beneficial to its own subscribers, but the competition introduced by Greenlight's entry into the market has also spurred the established providers to offer better services and rates to their customers.[6]

Greenlight has also been good for the community in numerous other ways. The network is making the City's other utilities more effective and efficient, at lower cost. It is providing schools, libraries, and non-profit organizations access to advanced telecommunications capabilities at levels they would not otherwise be able to obtain, or perhaps even afford.[7] The network has enhanced the capabilities of

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6 *See, e.g.*, Stephanie Creech, *Greenlight Competition Affects Rates Elsewhere*, *Wilson Daily Times*, Sept. 25, 2010, http://goo.gl/Pbtf1W.

7 Wilson provides free broadband service, at 100 Mbps download/100 mbps upload, to the library computer center and the Wilson Housing Authority computer labs. It also provides 1 Gbps symmetrical service to all Wilson County school facilities. *See, e.g.*, Todd O'Boyle and Christopher Mitchell, *Wilson Gives Greenlight to Fast Internet*, at iii, 14, 15, (December 2012), http://goo.gl/Pc5VwJ.

public safety agencies by facilitating the extensive deployment and interconnection of surveillance cameras.[8]

The City's fiber network has also attracted multiple Tier 1 service providers, which have now established a Point of Presence ("POP") in Wilson. This has reduced the cost of bandwidth for both businesses and residents. Each of the top seven employers in the community utilize the fiber network, assisting in retention of these critical employers. New businesses such as Exodus FX, Regency Interactive, and WHIG TV have also chosen to locate in Wilson, in significant part because of the fiber network.[9] New residents and small businesses are moving to Wilson on a regular basis in order to take advantage of the Greenlight fiber network, enabling them to utilize modern and bandwidth-intensive applications.[10] Greenlight also provides free Wi-Fi Internet access to its entire downtown area, with coverage extending to the county courthouse, the public library, and other downtown establishments. (P.A. 657).

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8 *See, e.g. Wilson Gives Greenlight to Fast Internet*, at 13-14, http://goo.gl/Pc5VwJ.

9 *See, e.g.*, Kate Murphy, *For the Tech-Savvy With a Need for Speed, a Limited Choice of Towns with Fiber*, New York Times, Apr. 2, 2014, http://goo.gl/iqdzUY; Rochelle Moore, *Wilson's Greenlight Sees National Attention*, Wilson Daily Times, Apr. 4, 2014, http://goo.gl/ykEZ04.

10 *See, e.g., Being a Gig City: Incubating Small Businesses*, MuniNetworks, http://goo.gl/f6vdRC; *Being a Gig City: It's All About the Upload*, MuniNetworks, http://goo.gl/OQTTQk.

C. Demand for Wilson's Services Outside Wilson County

Wilson provides electric power service in six counties in eastern North Carolina, but because of the limitations imposed by Session Law 2011-84, it currently provides communications services only in the City of Wilson and areas immediately adjacent to the City within Wilson County. That is not for lack of demand. Ever since Wilson launched Greenlight in 2008, it has received numerous requests for communications services from businesses and residents outside its current communications network footprint. These areas include numerous census blocks in lower-income, rural areas that lack advanced communications capabilities as the Commission currently defines that term.

For example, in 2013, Wilson was approached by a North Carolina electric cooperative regarding a possible partnership to bring fiber to the home services to their members. (P.A. 659). The cooperative had received a Broadband Technologies Opportunities Program (BTOP) grant under the Recovery Act to bring service to its members but did not want to operate the network. Due to Session Law 2011-84, Wilson was unable to take advantage of this opportunity, which would have brought FTTH services to some of the more rural parts of North Carolina and would have allowed the City to leverage its existing investment in personnel and technology for the benefit of both communities.

In July 2013, Wilson became North Carolina's first "Gigabit City," with Greenlight making access to the Internet at 1000 megabits per second available throughout an entire city. (Wilson Petition at 20, P.A. 655). In 2014, it was approached by three North Carolina municipalities interested in bringing similar services to their residents. One municipality explicitly stated it would like to partner with Wilson, but it was afraid to do so because of the State's legal barriers to entry. In the absence of these restrictions, Wilson would be eager to explore the possibility of partnering with each of these municipalities.

In short, absent the barriers imposed by Session Law 2011-84, Wilson would make significant broadband investments and provide competitive 21st Century broadband Internet connectivity outside of Wilson County, including to low-income, rural areas that otherwise will likely never have access to Gigabit services.

III. BARRIERS IMPOSED BY SESSION LAW 2011-84

A. Overview

The legislative effort to prevent Wilson and other municipalities in North Carolina from making broadband investments and providing their communities competitive services began in 2007, with the introduction of House Bill 1587. That bill failed, as did similar bills in 2009 and 2010. Each yearly iteration of the anti-municipal legislation would have imposed severe impediments on the ability of municipalities to provide communications services to the public. Finally, in 2011,

the legislature enacted the measure that is at issue in the Commission's *Order* – Session Law 2011-84. That law included a limited "grandfathering" exemption that allowed Wilson to continue to provide communications services in Wilson County without having to comply with the bill's onerous requirements, but it prevented Wilson from providing communications services in the five other counties in which Wilson was already providing electric service. The bill also effectively barred almost all other communities in North Carolina from investing in broadband infrastructure and providing competitive communications services.[11] Since its enactment, no North Carolina municipal has started a new communications network. *Order* ¶ 94 (P.A. 44).

B. Session Law 2011-84 Was Promoted By and Intended to Insulate Incumbent Private-Sector Service Providers from Competition from Municipalities

There is no question that Session Law 2011-84 was enacted in response to municipalities, such as Wilson, using their authority under Section 160A-311 to enter into the broadband market, and the intent of the new law was to hinder or prevent such competitive entry in order to protect the private incumbent broadband providers from competition. North Carolina's brief, at 12, flatly confirms this,

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[11] The city of Salisbury and MI-Connection (a joint agency operated by and serving the towns of Davidson, Mooresville, and Cornelius) also received specific, limited geographic exemptions.

> Session Law 2011-84, entitled "An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business," became law on May 21, 2011, following its ratification by the North Carolina General Assembly. The enactment includes a Preamble setting out various reasons for the legislation, including the entry of certain cities into competition with private providers of communications services as a result "of a decision of the North Carolina Court of Appeals" and the desire to ensure that where there is such competition "it exists under a framework that does not discourage private investment and job creation." (Session Law 2011-84, Preamble, Addendum "ADD." 1-8, 1).

Nor is there any doubt that the law was written as a protectionist measure by and for incumbent private carriers. Indeed, one of the chief sponsors of the nearly identical precursor to the legislation openly admitted that not only was he acting at the behest of cable and telecommunications companies, but that they were in fact the principal drafters of the law.

> When the I-Team asked him if the cable industry drew up the bill, Senator [David] Hoyle responded, Yes, along with my help.
>
> When asked about criticism that he was carrying water for the cable companies, Hoyle replied, I've carried more water than Gunga Din for the business community - the people who pay the taxes.[12]

Moreover, Section 160A-340 is based in large part on model anti-municipal broadband legislation developed by the American Legislative Exchange Council

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[12] WCNC Staff, "Salisbury to test fiber-optic system," *WCNC*, August 24, 2010, http://goo.gl/LwWH0e. For a more extensive analysis of the industry's dominant role in the enactment of Section 160A-340, see Amadou Diallo, "When it comes to broadband, industry and lawmakers work hand in hand," Aljazeera America, March 15, 2010, http://goo.gl/0vINjP.

("ALEC"), an industry-sponsored organization that supports conservative state legislators.[13] As ALEC's brief acknowledges, a core principal of ALEC and its model legislation is that municipal entities should never be allowed to compete with private providers and should only be able to provide services where service by the private sector is not viable.

> ALEC's overall public policy position concerning local government-owned broadband networks is also summarized as part of ALEC's statement of *Six Principles for Communications and Technology*:
>
> > *Local government entry into the provision of wholesale or retail Internet or broadband services in an attempt to create competition should be permissible only in unserved areas and only where no business case for private service exists*, upon a vote by local citizens, and subject to protections against cross-subsidies through taxes or other local government service revenues.
>
> This policy reflects a strong preference for keeping separate the roles of government and private market providers.
> …
>
> *The Tennessee and North Carolina laws at issue in the FCC's Order are consistent with the policy principles held by ALEC and summarized above*.

ALEC's Brief at 11-12 (*emphasis* added) (internal citations omitted).

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[13] For a point-by-point comparison of the ALEC model and Session Law 2011-84, see Allan Holmes, "ALEC-based restriction on city-run Internet at risk after FCC decision," *Center for Public Integrity*, April 29, 2015, http://goo.gl/tH0DjH.

C. Barriers Posed by Section 160A-340

As part of its petition, Wilson provided a section-by-section analysis of how Section 160A-340 et seq. actually works in practice. (P.A. 698-718). As Wilson's analysis shows, just about every section imposes some kind of barrier. An insidious aspect of the ALEC model, as adopted by North Carolina, is that many of the provisions sound superficially innocuous, and it is only when one examines them carefully, as the Commission has done, that their actual prohibitive effects come into focus.

As the Commission found, the various provisions of Section 160A-340 et seq. could loosely be grouped into three categories based on the functions that they serve: measures that raise economic costs, measures that purportedly "level the playing field," and measures that impose significant delays. The Commission noted that some of the provisions may fit comfortably into more than one category. Order, ¶ 81 (P.A. 40).

In defending Session Law 2011-84 as a reasonable exercise of the State's sovereign authority over a core governmental function, neither North Carolina nor its supporters provide any substantive analysis of what the law actually says and does. Given the importance of understanding how the law operates in practice, we summarize its main features below.

1. Compliance with all legal requirements that apply to private providers

Touted by supporters as being necessary to protect incumbent service providers from unfair competition from municipalities, Section 160A-340.1(a)(1) requires municipalities to comply with "all local, State, and federal laws, regulations, or other requirements applicable to the provision of communications service if provided by a private communications provider." Municipalities would have no objection to complying with all federal, State, or other legal requirements that apply to them, including all applicable communications laws, but an obligation to comply as well with all legal requirements that apply to private entities creates multiple problems for municipalities.

At the outset, it is important to recognize that it is absurd for incumbent service providers to claim that they need "level playing field" laws to protect them from entry by municipalities. As even conservative economists Tom Hazlett and George Ford have found, subjecting new entrants to the same rules as incumbents inevitably favors the incumbents, which have many significant advantages that new entrants lack.[14] Likewise, courts have also recognized that incumbents have huge advantages that put them far ahead of new entrants. *See, e.g., Insight*

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[14] Thomas W. Hazlett and George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the 'Level Playing Field' in Cable TV Franchising Statutes* (2001), http://goo.gl/tWIlef.

Communications Co. v. City of Louisville, Dkt. No. 2002-CA-000701-MR, at 12 (Ky. App., June 17, 2003), http://goo.gl/gQUiea ("There will never be an apple-to-apple comparison for Insight and other franchisee[s] simply because Insight is the incumbent which in its own right and through its predecessors has been the exclusive provider of cable television services in the City of Louisville for almost thirty years. No new cable television franchisee can ever be in the same position as a thirty-year veteran.").

Another problem with Section 160A-340.1(a)(1) is that subjecting municipalities to all legal requirements applicable to private providers does not in fact create a level playing field. Rather, it takes a field that is already tilted in favor of the incumbent private providers and makes it even steeper in their favor. A genuine effort to create a level playing field would also require subjecting private providers to the legal requirements that apply to public entities, including open records requirements, civil service rules, Buy American provisions, and much more. Section 160A-340 both illustrates and exacerbates this imbalance.

For example, Section 160A-340.3 requires municipalities wishing to provide 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 …." Private providers are not subject to any comparable requirements. Indeed, if

the State of North Carolina sought to impose similar requirements on them, they would vigorously protest such an intrusion into their proprietary business secrets. *Order*, ¶ 115 (P.A. 51).

As Wilson noted in its petition, a particularly severe problem with Section 160A-340.1(a)(1) is that it is vague and ambiguous, which invites disputes and costly litigation. For example, with which private service providers should municipalities compare themselves? Large incumbent providers or smaller independents? Mature companies or startups? For-profits or non-profits? Urban companies or rural companies? These are only some of the possibilities. Next, with which private-sector legal obligations must a municipality comply? Communications laws? Tax laws? Corporate laws? Securities laws? The statute does not say. Even if it were interpreted to apply only to communications laws, it would still present significant problems, because cable systems, telecommunications carriers, and Internet service providers are subject to different rules in different circumstances. *Order*, ¶ 109 (P.A. 50).

To minimize the risk of being drawn into protracted and costly litigation, a municipality would have to make the most conservative possible decisions on every issue. In the end, it would have to develop and comply with a composite of restrictions that was more onerous than the requirements that apply to any active private service provider. Even that might not be sufficient to stay out of court. This,

in turn, discourages municipalities and potential funding sources from making broadband investments and bringing the benefits of competition to all Americans.

2. Enterprise funds

Section 160A-340.1(a)(2) requires municipalities "to 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." Again, this provision is discriminatory, as private carriers are under no such restriction. It also poses several other serious problems.

For example, Section 160A-340.1(a)(2) does not make clear whether a municipality must establish one enterprise fund for all of its communications services, or a separate enterprise fund for each separate communications service – as the phrase "one or more enterprise funds" may imply. Assuming the latter, requiring municipalities to set up and maintain separate enterprise funds for each individual communications service would be tremendously time-consuming, burdensome, and costly from an administrative and competitive standpoint. It would result in endless legal disputes over whether municipalities had allocated costs

correctly among the various enterprise funds. It would effectively disable municipalities from protecting themselves from predatory pricing by temporarily charging prices below cost to meet a competitor's prices. It would also prevent municipalities from engaging in common marketing practices, such as offering bundled services that are profitable collectively but do not at all times recover costs on each service individually. (P.A. 669)

3. Geographic limitations

Section 160A-340.1(a)(3) generally restricts a municipality's communications service area to the geographic area within the municipality's corporate limits. In other words, a municipality generally cannot provide communications services outside its corporate limits, even by (somehow) complying with all of the other onerous requirements discussed in Wilson's petition and Attachment A thereto (P.A. 698-718).

Section 160A.340.2(c) provides Wilson a special exemption under which it need not comply with some of the statute's restrictions, but only as long as it confines its provision of communications services to within Wilson County. If Wilson provided communications services to even a single customer outside of Wilson County, it would then have "30 days from the date of notice or discovery to cease providing service to the customer without loss of the exemption." Section 160A-340.2(e). Failure to stop providing the service within 30 days would result in the

loss of the exemption, thereby not only preventing Wilson from providing service in the portions of Wilson County outside the City of Wilson, but also subjecting it to all of the restrictions in the statute in order to continue to provide service even within the City of Wilson. As Wilson observed in its petition, these draconian geographic limitations impede growth, which, in the communications industry, is often necessary for long term success. Indeed, as the Commission noted, the North Carolina Department of State Treasurer Local Government Commission itself recognized in the legislative history of H.B. 129 that "the boundaries set forth" in the statute "weaken the financial viability" of municipal broadband systems. *Order*, ¶ 98 (P.A. 45).

The geographic restrictions also preclude municipalities from achieving efficiencies, contributing to regional economic development, public safety, and other benefits that depend on serving areas outside their immediate service areas. Furthermore, in Wilson's case, the geographic limitations in the statute prevent it from meeting demand in both unserved and underserved areas in which Wilson is already providing electric service. For all of these reasons, the Commission found the geographic limitations per se unlawful. *Order*, ¶ 178 (P.A. 74-75).

4. Imputation of phantom costs

Among the most egregious provisions in the North Carolina law is Section 160A-340.1(8), which prohibits below-cost pricing and requires municipalities, "in

calculating the costs of providing the communications service, to 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."

This provision suffers from four main deficiencies. First, incumbents defend imputed-cost requirements as being necessary to raise municipal prices to levels that private-sector providers would have to charge for similar services. At the same time, the incumbents insist that, at these prices, they cannot operate at a profit in the very areas that the municipal provider proposes to serve. So, the ultimate purpose and effect of the imputed-cost requirement is to ensure that the municipal provider will also be unable to serve these areas, either by operating on an actual-cost-recovery basis or passing through cost savings.

Second, to the extent that an incumbent is able to provide at least some service in the area that a municipality proposes to serve, the effect of the imputed-cost requirement is to raise the municipality's rates and reduce pressure on the incumbent to lower its rates. If two private entities entered into such an arrangement, it would amount to price fixing, a *per se* violation of the antitrust laws. The only difference

here is that the incumbents have persuaded the State to participate in the price fixing scheme by forcing municipalities to raise their rates to levels at which they cannot afford to enter the market or compete successfully.[15] It is important to note here that the impact of imputing such costs is not only to make it more difficult for the municipal broadband provider, but also to raise costs for the consumers of those services – the residents and businesses of North Carolina.

Third, imputed-cost requirements also open yet another door to endless time-consuming and costly legal disputes. For example, with respect to the cost of capital, with what kind of private entity should a municipality compare itself? To a large established national or regional provider? To a small startup in the same community? To a provider that serves an entire community or to one that cherry-picks areas such as business parks? The possibilities are endless. Once the municipality has decided upon an appropriate comparable, how should it determine the "equivalent" cost of capital? Should it be purely debt or also include some equity? Should it take intra-corporate financing into account, including the many

[15] The imputed costs requirement illustrates a fundamental error in NARUC's long and tortured analogy between a State imposing requirements on its municipalities and a private corporation imposing similar restrictions on its affiliates. No corporation would require its affiliates to impute costs to themselves in order to raise their prices to those of their competitors, both as a business matter and because it would be illegal under antitrust laws.

ways that corporations use company-wide assets to collateralize borrowings for their subsidiaries? See also *Order*, ¶ 175 (P.A. 74).

Fourth, the imputed-cost provision is most problematic when it comes to income taxes. Fees that private providers pay for use of rights of way, poles, conduits, and other facilities are relatively easy to determine. So are property taxes. But how should a municipality estimate and charge itself the equivalent of private-sector federal and state income taxes? As before, a municipality would first have to decide on an appropriate comparable private entity or entities. This not only poses the same problems discussed above, but it adds several more. One such problem is that detailed tax information is not generally available for private entities, particularly for those whose shares are not traded publicly. Where such tax information is available, it is generally for the company as a whole, not for particular products or geographic areas. Thus, it would be very difficult, if not impossible, for a municipality to identify the taxes that a comparable private entity is paying on those of its activities that are comparable to the municipality's. The municipality would also have to make essentially blind guesses about the tax credits, deductions, carry forwards, losses on unrelated businesses, or other tax benefits that the comparable entity or entities might have taken. In the end, each and every decision that a municipality makes will be subject to second-guessing, challenges, and litigation.

5. Restrictions on financing

Section 160A-340.4 imposes severe restrictions on a municipality's ability to raise funds to make investments in broadband infrastructure. Specifically, this provision states that a municipality "shall not incur debt for the purpose of constructing a communications system without first holding a special election under N.C.G.S. § 163-287 on the question of whether the city may provide communications service." This is a serious restriction and yet another supposed "level playing field" requirement that does not apply to the private sector. Special elections embed long delays and add significant costs to the process. They also enable well-financed and unrestricted incumbents to spend vastly more on media campaigns than municipalities can spend (if anything at all). Cable incumbents have a particularly huge advantage in being able to control the messages (and misinformation) that their existing subscribers get about the proposed municipal network.

Furthermore, as the Commission found, the legislative history of Section 160A-340.4 indicates that the provision was intended to "[e]liminate the practice of using certificates of participation to finance the construction of a system." *Order*, ¶ 117, (P.A. 193), citing Legislative Fiscal Note at 3. This had the effect of depriving municipalities of a popular financing mechanism in North Carolina that enabled

them to insulate taxpayers from the risk of project failure, as debt was secured only by project revenues and assets. *Id*.

6. The worthless "unserved area" exception

Certain restrictions in the law do not apply to the provision of communications service in an "unserved area." In reality, this exemption is little more than a mirage. 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." It then 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."

Wilson would have to show, *by census block*, that the statutory criteria for determining "unserved" areas are met. That 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. As the Commission found, Wilson would essentially have to do its own household-by-household polling, which would be prohibitively time-consuming and expensive. *Order*, ¶ 104 (P.A. 47).

Next, suppose that Wilson could show that at least some census blocks were unserved by the statute's standards. That would not necessarily mean that Wilson could serve these areas. If the eligible census blocks were not contiguous – i.e., if

there was a Swiss cheese pattern of served and underserved areas – it would not be economically feasible for Wilson to serve only the unserved holes in this pattern. *Order*, ¶ 104 (P.A. 47).

7. Cumulative delays

In its petition Wilson detailed how the interrelated provisions of Section 160A-340 act in concert with one another to impose myriad delays on municipal broadband projects, the cumulative effect of which is a delay of approximately 27 months or more to launch a system. The Commission found that such delays not only add significantly to the complexity of business planning as conditions in the financial market and the broadband landscape change in the interim period, but that such delay "harms communities by substantially delaying the availability of additional broadband options." *Order*, ¶ 118 (P.A. 57).

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In short, as the Commission found, the restrictions in Session Law 2011-84 collectively pose an insurmountable barrier to broadband investment and competition. Wilson filed its petition because it simply could not prudently risk the catastrophic loss of its exemption. Most other North Carolina municipalities do not even have that choice. Because of Section 160A-340, Wilson and other North Carolina municipalities have been unable to make much needed broadband investments in unserved and underserved areas. They have also been unable to take

advantage of numerous synergistic opportunities and cooperative arrangements with each other and with regional industries in providing for regional administrative resources, backbone connections, and intra- and inter-governmental, commercial, and retail communications services of various degrees and in various forms for the benefit of their respective communities, their citizens, and America as a whole. *Order*, ¶_103-105 (P.A. 51-52).

IV. THE COMMISSION CORRECTLY FOUND SESSION LAW 2011-84 TO BE A BARRIER TO BROADBAND INVESTMENT AND COMPETITION

After undertaking a detailed analysis of the various provisions of Section 160A-340, the Commission agreed with Wilson, that individually and cumulatively the provisions of Section 160A-340 act as a barrier to broadband infrastructure investment and competition. As the Commission succinctly stated,

> We conclude that [Session Law 2011-84] 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 [Session Law 2011-84], but that all were discontinued because of [Session Law 2011-84] and that "no known community-owned residential fiber networks [have been] built [in North Carolina] since the passage of [Session Law 2011-84]."

Order, ¶¶ 93-94 (P.A. 44).

SUMMARY OF THE ARGUMENT

The language, purposes, structure, and legislative history of Section 706 all evidence a clear congressional mandate that the Commission take immediate action

to remove barriers to broadband infrastructure investment and competition so as to ensure that all Americans will have access to advanced telecommunications capabilities on a reasonable and timely basis.

The Commission has found, and the D.C. Circuit and the Tenth Circuit have affirmed, that included within that congressional mandate is a grant of broad authority to the Commission to remove barriers to broadband infrastructure and competition. As the D.C. Circuit noted in *Verizon Corp. v. Federal Communications Commission*, 740 F.3d 623 (D.C. Cir. 2014), Congress's directive to the Commission in Section 706(b) to "take immediate action" provides the Commission "express authority" to take steps to accelerate broadband deployment if and when it determines that such deployment is not occurring in a "reasonable and timely" manner. *Verizon*, at 638; *see also In re FCC 11-161*, 753 F.3d 1015, 1054 (10th Cir. 2014).

Contrary to North Carolina's arguments, the "plain statement" standard of *Gregory* for determining whether Congress intended to preempt state laws involving "traditional" or "fundamental" State functions is not applicable here because Session Law 2011-84 does not implicate "traditional" or "fundamental" state functions and has nothing to do with governmental organization or functioning. It is simply an anticompetitive measure that violates federal competition law and policy because it has the purpose and effect of insulating private incumbent service providers from

competition by municipal providers attempting to offer superior broadband capabilities and services. Having authorized municipalities to compete in a commercial arena that is subject to federal regulation, the State cannot undermine their ability to do so successfully. As a result preemption of the North Carolina law is not be subject to any higher standard of scrutiny than any other commercial measure.

Further, while the Commission correctly concluded that it is unnecessary to determine whether the Section 706 meets the *Gregory* "plain statement" standard because, as we have explained, the North Carolina statute does not implicate core attributes of state sovereignty, Wilson submits that Section 706 does, in fact, meet the "plain statement" standard, and the Supreme Court's holding in *Nixon* in applicable to the current case.

The *Nixon* decision addressed a separate section of the Telecommunications Act that differs from Section 706 in several fundamental ways both as to the policy goals and the role of the Commission that are highly relevant here. The most critical of which being that in enacting Section 706 Congress not only empowers, but affirmatively requires, the Commission to take a series of proactive steps to meet the national policy goal of ensuring that all Americans have reasonable and time access to broadband. At each step, the Commission, as the expert agency in the field, is entitled to *Chevron* deference in interpreting and applying the operative language

and goals of Section 706. These steps led the Commission to find that the provisions of North Carolina law at issue that are acting as barriers to broadband infrastructure investment and competition in violation of Section 706.

Having found that Session Law 2011-84 is clearly contrary to federal broadband law and policy, the issue under a *Gregory* analysis is whether the operative language of Section 706 is a sufficiently plain statement of Congress's intent to empower the Commission to preempt the North Carolina law. Section 706 requires the Commission to ensure that "all Americans" will have reasonable and timely access to advanced telecommunications capabilities. Unlike the term "any entity" at issue in *Nixon*, the statutory term "all Americans" does not lend itself to multiple interpretations, and it certainly applies to the businesses and residents in the geographic areas that Wilson seeks to serve, thus there can be no doubt that Congress meant Section 706 to cover each and every American, and therefore Commission preemption satisfies Gregory.

ARGUMENT

I. THE COMMISSION HAS THE AUTHORITY AND THE DUTY UNDER SECTION 706 TO REMOVE BARRIERS TO PUBLIC BROADBAND INVESTMENT AND TO PROMOTE COMPETITION

In its *Order*, the Commission found that the language, purposes, structure, and legislative history of Section 706 all evidence a clear congressional mandate that the Commission take immediate action to remove barriers to broadband infrastructure

investment and competition so as to provide advanced telecommunications capabilities to all Americans on a reasonable and timely basis. *Order*, ¶ 134 (P.A. 57).

North Carolina and Tennessee contend that the Commission lacks authority under Section 706 to preempt State laws. In the following sections, we set forth and respond in turn to each of the opponents' main arguments against the existence of such authority.

A. Removing the Restrictions of Section 160A-340 Would Not Violate the Constitution of the United States

As the Commission noted in its *Order*, some commenters had argued that preemption of the North Carolina and Tennessee laws at issue would violate the Tenth Amendment of the Constitution of the United States, as the Commission would effectively "commandeer" North Carolina and Tennessee into compliance with federal communications policy. *See New York v. United States*, 488 U.S. 1041 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). The Commission correctly rejected these claims.

For one thing, the concept of "commandeering" does not come into play here. By preempting the laws in question, the Commission is not forcing any municipality or anyone else to provide any communications service. That is a matter of local choice. The Commission is merely removing state obstacles that limit this choice by violating national laws and policies.

Second, the Supremacy Clause of the Constitution, Article VI, Clause 2, provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In *Altria Group, Inc. v. Stephanie Good*, 555 U.S. 70. 76 (2008), the Supreme Court summarized the relevant considerations as follows:

> Article VI, cl. 2, of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Consistent with that command, we have long recognized that state laws that conflict with federal law are "without effect."
>
> Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose. If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains. Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law.
>
> When addressing questions of express or implied pre-emption, we begin our analysis "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States. Thus, when the text of a pre-

> emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption."

Id., (citations omitted).

In this case, Congress delegated to the Commission its authority to regulate interstate commerce under Article I, Section 8. Congress did so originally in Section 1 of the Communications Act and more recently and specifically for present purposes in Section 706. As the Commission has found, the language, purposes, structure, and legislative history of Section 706 all reflect Congress's intent to authorize – indeed, compel – the Commission to remove the barriers at issue in this case. In short, there is no constitutional impediment to the Commission's removal of these barriers.

B. Sections 706(a) and 706(b) Provide Independent Sources of Authority for the Commission to Remove Barriers to Broadband Investment and Competition

The next line of argument is that Sections 706(a) and 706(b) do not provide the Commission independent authority to remove barriers to investment and competition in appropriate circumstance. For example, both Tennessee and NGA maintain that Section 706 is not an independent grant of authority and insist that the Commission must find such authority in other provisions of the Communications Act. The Commission has, however, ruled otherwise, and both the D.C. Circuit and the Tenth Circuit have affirmed the Commission's rulings.

As the D.C. Circuit held in *Verizon Corp. v. Federal Communications Commission*, 740 F.3d 623 (D.C. Cir. 2014), Section 706(a) is an independent congressional mandate to the Commission and the States to encourage reasonable and timely deployment of advanced telecommunications capabilities to all Americans, using all available "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Federal preemption is one of these measures or methods. See authorities cited in *Order*, ¶144 and n.392 (P.A. 61).

Furthermore, as Judge Laurence Silberman noted in his separate opinion in the *Verizon* case:

> An example of a paradigmatic barrier to infrastructure investment would be state laws that prohibit municipalities from creating their own broadband infrastructure to compete against private companies. *See* Klint Finley, *Why Your City Should Compete With Google's Super-Speed Internet*, WIRED, May 28, 2013, http://www.wired.com/wiredenterprise/2013/05/community-fiber/.

Verizon, 740 F.3d, at 661 n.2.

Similarly, both the *Verizon* court and the Tenth Circuit have upheld the Commission's determination that Section 706(b) provides the Commission another source of independent authority to strike down barriers to broadband investment or competition. According to the *Verizon* court, Congress's directive to the Commission in Section 706(b) to "take immediate action" provides the Commission "express authority" to take steps to accelerate broadband deployment if and when it

determines that such deployment is not occurring in a "reasonable and timely" manner. *Verizon*, at 638. Likewise, the Tenth Circuit ruled that,

> In contrast [to Section 706(a)], section 706(b) requires the Commission to perform two related tasks. First, the Commission must conduct an annual inquiry to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." Second, and most importantly for purposes of this appeal, if the Commission's annual "determination is negative," it is required to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Unlike section 706(a), section 706(b) does not specify how the Commission is to accomplish this latter task, or otherwise refer to forms of regulatory authority that are afforded to the Commission in other parts of the Act. As the Commission concluded in the Order, section 706(b) thus appears to operate as an independent grant of authority to the Commission "to take steps necessary to fulfill Congress's broadband deployment objectives," and "it is hard to see what additional work section 706(b) does if it is not an independent source of authority."

In re FCC 11-161, 753 F.3d 1015, 1054 (10th Cir. 2014).

In contrast to the positions of the Petitioners, AT&T and Time Warner Cable, two of the largest incumbent service providers in North Carolina and major beneficiaries of Session Law 2011-84, have forcefully argued to the Commission in other contexts that Section 706 is indeed an independent grant of broad regulatory authority to the Commission. For example, in the Commission's *Open Internet* proceeding, AT&T argued that the *Verizon* decision "makes clear that section 706 provides meaningful substantive authority – a conclusion recently confirmed by the

Tenth Circuit."[16] Similarly, in opposing common carrier regulation of broadband services, Time Warner argued that the Commission need not reclassify broadband services but instead should rely on its existing authority over broadband services under Section 706, stating the "Commission should adopt new rules pursuant to its broad authority under Section 706 of the Telecommunications Act of 1996."[17]

North Carolina and NGA argue that the terms "preempt" or "preemption" do not appear anywhere in Section 706 and that Congress in fact deleted preemption language from a prior version of Section 706. According to this line of reasoning, the fact that Congress did not specifically provide the Commission with preemption authority under Section 706, is evidence that the Commission lacks such authority. These arguments are without merit.

First, Congress was not required to use any particular "magic words" in authorizing the Commission to remove the barriers at issue in this case. As the Supreme Court made clear in *Gregory v. Ashcroft*, explicit statements are not required even in cases in which a "plain statement" standard is the relevant rule of

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16 Reply Comments of AT&T, *In the Matter of Protecting and Promoting the Open Internet,* Federal Communications Commission GN Docket No. 14-28, filed September 14, 2014, at 12.

17 Comments of Time Warner, *In the Matter of Protecting and Promoting the Open Internet,* Federal Communications Commission GN Docket No. 14-28, filed July 15, 2014, at 4.

statutory construction. *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) ("This does not mean that the Act must mention judges explicitly, though it does not. Rather, it must be plain to anyone reading the Act that it covers judges" (citation omitted). See also the authorities cited in the Commission's *Order*, ¶145 and n.396 (P.A. 61-62).

Second, the fact that Congress did not use the terms "preempt" or "preemption" in Section 706 is immaterial given that Congress clearly and unambiguously authorized the Commission to do exactly what Wilson is asking it to do here. Specifically, Section 706(a) provides that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications to all Americans … by utilizing … measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Section 706(b) states even more emphatically that the Commission, upon finding that advanced telecommunications capabilities are not being deployed in a reasonable and timely manner, "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Congress gave the Commission broad discretion in determining whether broadband deployment is occurring in a reasonable and timely manner, and, if not, in removing any barriers to broadband investment and competition that it might find. Congress also required the Commission to be aggressively pro-active in rooting out such

barriers, and it commanded the Commission to take immediate action to remove them. Congress was crystal clear about all of this.

Third, Congress also unequivocally expressed its intent in Section 706 that the Commission ensure that "all Americans," without exception, have reasonable and timely access to advanced telecommunications capabilities. To be sure, Congress gave the Commission wide latitude in fashioning different solutions for differently-situated Americans. But it gave the Commission no flexibility in leaving any American behind.

Fourth, it also is of no significance that Congress deleted express preemption language from a prior version of Section 706. As the Commission observed in the *Order*, "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." *Order*, ¶145 (P.A. 61-62), citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699-700 (1984); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984).

C. The Commission's Order Does Not Implicate Traditional or Core State Functions Requiring a "Plain Statement" Standard of Review

North Carolina's primary argument in urging the Court to reject the Commission's *Order* is that any authority that the Commission may have under

Section 706 does not extend to preempting State laws "concerning the core function of state regulation of its political subdivisions" absent a clear statement of statutory authority. *North Carolina Brief* at 14. In support of this argument, North Carolina relies heavily upon *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004). North Carolina's reliance on these cases is misplaced.

In *Gregory*, the Supreme Court set forth the relevant standard for determining whether Congress intended to preempt state laws involving "traditional" or "fundamental" State functions. In such cases, the Court said, an agency or court must find that Congress made a "plain statement" to that effect. *Id*., 501 U.S. at 467. This does not require that the legislation mention the power explicitly. Rather, the intention need only "be plain to anyone reading the Act that it covers [that issue]." *Gregory*, at 467.

In *Nixon*, applying the Gregory "plain standard" test, the Supreme Court found that the term "any entity" in Section 253(a) of the Communications Act, 47 U.S.C. § 253, was not sufficiently clear to enable the Court to conclude that Congress intended the Commission to preempt State barriers to municipal telecommunications services.

Properly analyzed, *Gregory* and *Nixon* do not apply here because, as the Commission correctly found, preemption in this case would not affect any traditional

or fundamental State power. First, Section 706(a) requires both the Commission and the States to encourage the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis and to use all means at their disposal to remove barriers to broadband investment and competition. Section 706(b) requires the Commission to pro-actively keep abreast of developments in broadband deployment and, if it finds that broadband is not being deployed to all Americans in a reasonable and timely manner, to take immediate action to remove barriers to broadband investment and competition. Under both Sections 706(a) and (b), the Commission is solely responsible for defining all of the relevant terms and standards. In this sense, this case is similar to *City of Arlington v. Federal Communications Commission*, 33 S.Ct. 1863, No. 11-1545 (2013), in which the Court rejected an argument that the Commission's wireless tower siting rules improperly injected the federal government into zoning matters "of traditional and local concern." Writing for the Court, Justice Scalia stated:

> [T]his case has nothing to do with federalism. Section 332(c)(7)(B)(iii) explicitly supplants state authority by *requiring* state zoning authorities to render a decision "within a reasonable period of time" and the meaning of that phrase is indisputably a question of federal law. We rejected a similar faux-federalism argument in the *Iowa Utilities Board* case [*AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999)], in terms that apply equally here: "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the Commission or the federal courts that will draw the line to which they must hew." 525 U.S., at 379, n.6.

City of Arlington, at 14.

Second, this case does not involve "federal legislation threatening to trench on the States' arrangements for conducting their own governments," as the *Nixon* Court put it. *Nixon*, 541 U.S. at 140. Session Law 2011-84 has nothing to do with governmental organization or functioning but simply seeks to hamper the ability of municipalities to be successful in carrying out the commercial activities in which the State previously authorized them to engage. Session Law 2011-84 does not even do what it pretends to do – create a "level playing field" for private and public communications service providers. Rather, as shown above, it does precisely the opposite and acts as a severe barrier to public broadband investment and competition. In short, as the Commission rightly concluded, Session Law 2011-84 is simply an anticompetitive device that has the sole purpose and effect of insulating private incumbent service providers from competition by municipal providers attempting to offer far superior broadband capabilities and services. This is plainly not the kind of "traditional" or "fundamental" State interest that *Gregory* sought to protect, especially at the expense of the businesses, institutions, and residents in unserved or underserved areas for whose benefit Congress enacted Section 706.

The petitioners and their supporters would have the Court believe that any law that a State adopts concerning the authority of its political subdivisions is inviolate under principals of federalism, or is at least subject to the *Gregory* plain statement standard before it can be preempted. This is simply not accurate, as states are not

free to ignore federal competition law and policy when their municipalities are acting in a commercial capacity.

A quick example illuminates this fact. Suppose that North Carolina enacted a statute identical to Session Law 2011-84, except that it applied only to private entities. In such a case, the Commission's would have unquestionable authority to preempt that law under Section 706, as a measure aimed at regulating competition in a manner inconsistent with federal law and policy.[18] That Session Law 2011-84 applies only to municipalities does not change its essential nature as a State measure to regulate competition in a way that cannot be reconciled with federal law and policy.

Third, as the Supreme Court has explained, "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." *United States v. Locke*, 529 U.S. 89, 107–08 (2000). This principle applies with special force here, as the North Carolina

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[18] Indeed, that is essentially what occurred in *AVR, L.P., d/b/a Hyperion of Tennessee*, 14 FCC Rcd 11064 (1999), where the Commission, relying on Section 253 of the Communications Act, preempted a Tennessee law that barred competitive local exchange carriers from competing with incumbent telephone carriers with fewer than 100,000 lines. The Attorney General of Tennessee subsequently agreed that the Commission was acting within its authority to do this. See discussion in Section II.B of Chattanooga EPB's brief in support of the Commission.

Utilities Commission has itself invoked federal regulation as justification for declining to regulate broadband Internet access:

> Because of provisions in federal and/or state law, the Commission does not regulate either wireless service, cable television, long distance service, or broadband service, reflecting a movement toward greater reliance on market forces.

2013 Report to the Joint Legislative Commission on Governmental Operations Regarding the Status of Telecommunications Service in a Changing Competitive Environment, North Carolina Utilities Commission, at 1.

Consistent with this line of reasoning the Commission correctly found that *Gregory* and *Nixon* do not apply to the preemption contemplated under Wilson's petition. *Order*, at ¶ ¶ 146-147 (footnotes omitted) (P.A. 62-63).

Fourth, North Carolina has made no substantive argument or provided any explanation of how exactly Session Law 2011-84 implicates a core or traditional state function. Rather, it simply declares that this is so. North Carolina has, however, acknowledged that the central purpose of the statute is to protect private industry from competition from municipalities, and the evidence demonstrates that the law was written by and for private industry to achieve that goal. *See infra* pp. 19-20 (discussing Senator Hoyle comment about carrying more water than Gunga Din). As a result, the Court should have no hesitation to reject North Carolina's unsupported and unexplained claim that core or traditional state powers are at issue here.

Finally, it is hornbook law that competition law is intended to protect competition, not competitors. *See. e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294 at 320 (1962). Here, Session Law 2011-84 has turned this principle on its head, protecting incumbent service providers from competition at the expense of the residents and businesses in North Carolina that need better, more competitive broadband choices.

For all of the foregoing reasons, the Court should find that Session Law 2011-84 is a purely commercial measure rather than a measure affecting core or traditional state powers and does not merit application of Gregory's "plain statement" standard.

D. Section 706 Meets the "Plain Statement" Standard of *Gregory*

The Commission found it unnecessary to determine whether the Section 706 would meet the *Gregory* "plain statement" standard, as applied in *Nixon*, "because, as we have explained, the North Carolina statute does not implicate core attributes of state sovereignty but rather regulate interstate communications services that are at the heart of the Commission's jurisdiction." *Order*, ¶157. Wilson agrees with the Commission but submits that Section 706 does, in fact, meet the "plain statement" standard.

1. *Nixon* is inapplicable here

Contrary to North Carolina's position, the *Nixon* decision provides no impediment to a finding that Section 706 meets the plain statement standard of *Gregory*. Indeed, the *Nixon* decision is distinguishable from this case in several significant ways.

First, in enacting Sections 253 and 706 of the Telecommunications Act, Congress was attempting to achieve fundamentally different purposes. By 1996, telecommunications services had long been ubiquitously available in the United States – in many places for more than a century. As a result, in enacting the Telecommunications Act, Congress had no need to ensure that all Americans would have reasonable and timely access to such services. Rather, in addressing telecommunications services in Section 253 and elsewhere in the Telecommunications Act, Congress focused on a different goal – spurring competition among providers of these services.

While Congress also sought to stimulate competition among providers of advanced telecommunications capabilities, that was not its primary goal in enacting Section 706. Rather, as shown above, Congress's main purpose was "to ensure that one of the primary objectives of the [Telecommunications Act] – to *accelerate deployment* of advanced telecommunications capability – is achieved." *Verizon*, 740 F.2d at 639 (quoting S. Rep. No. 104-23, at 50-51) (*emphasis* added). As discussed

above in Section I of the Statement of Facts, Congress understood that advanced telecommunications capabilities were going to be critically important to our Nation's future as well as to all Americans individually, but it did know how or when this would occur. It therefore crafted the language and structure of Section 706 to ensure that the Commission would act pro-actively and forcefully to ensure that all Americans would have reasonable and timely access to advanced telecommunications capabilities. The Commission has repeatedly reiterated and elaborated on these points.

For example, in its *Cable Modem Declaratory Ruling*, the Commission stated that, "consistent with statutory mandates, the Commission's primary policy goal [under Section 706] is to 'encourage the ubiquitous availability of broadband to all Americans.'" *Cable Modem Declaratory Ruling, 17 FCC Rcd. at 4801, ¶ 4, 2002 WL 407567 at *1 (quoting Section 706).* Similarly, in its *Sixth Broadband Deployment Report*, the Commission stated that, "We recognize that ensuring universal broadband is the great infrastructure challenge of our time and deploying broadband nationwide – particularly in the United States – is a massive undertaking." *Sixth Broadband Deployment Report*, 25 FCC Rcd. 9556, 9560, ¶ 6, 2010 WL 2862584, *2 (rel. July 20, 2010). Likewise, in the National Broadband Plan, the Commission recognized that "Broadband is *the* great infrastructure challenge of the early 21st century." *See National Broadband Plan*, at 3 (emphasis

in original). In 2010 and again in 2015, the Commission raised its definition of broadband, and at each step it challenged broadband service providers to meet its higher standards. *Sixth Broadband Deployment Report*, *and 2015 Progress Report respectively*.

In sum, while the Section 253 issue addressed in *Nixon* of enabling municipalities to compete with providers of telecommunications services may have been desirable, it was not an essential or urgent national priority. In contrast, Congress's urgent national goal of ensuring that *all Americans* have reasonable and timely access to advanced telecommunications capabilities cannot be met without the active participation of all potential infrastructure providers – including municipal entities.

Second, another important difference between Section 253 and Section 706 is that Congress assigned the Commission very different roles in implementing these provisions. In Section 253, Congress envisioned an essentially reactive role for the Commission – *i.e.*, the Commission was to wait for an allegedly aggrieved entity to file a petition for preemption, and then, after giving the public an opportunity to comment, decide whether the state or local measure in question violates Section 253. In contrast, Section 706 expressly requires the Commission to act aggressively and pro-actively in rooting out and taking immediate steps to remove barriers to broadband investment and competition. This distinction, too, indicates that

Congress considered the goals of Section 706 to be significantly different and more urgent than those of Section 253.

Third, Section 706 also differs significantly from Section 253 in its treatment of the relationship between the Commission and the States. According to the Nixon *Court*, the text and legislative history of Section 253 does not clearly indicate whether Congress intended the term "any entity" to apply to public entities. In contrast, in Section 706, Congress carefully laid out the respective roles of the Commission and the States and made clear that it intended the Commission to preempt States in the circumstances present here.

In Section 706(a), Congress required both the Commission and the States to encourage the deployment of advanced telecommunications capability on a reasonable and timely basis. It also directed both the Commission and the States to use all measures and regulating methods at their disposal to remove barriers to broadband investment and competition. 47 U.S.C. § 1302(a). In Section 706(b), Congress required the Commission alone to make regular studies and reports of the status of broadband deployment across the United States and to take immediate action to remove barriers to broadband investment and competition if it found that deployment was not occurring on a reasonable and timely basis.

As discussed below, for the purposes of both Sections 706(a) and 706(b), the Commission is responsible for defining the key terms, including "advanced

telecommunications capabilities" and "reasonable and timely," for determining what actions or conditions constitute "barriers to infrastructure investment," and for deciding what steps are necessary and appropriate to take to remove such barriers.

2. Section 706 satisfies *Gregory*

Section 706 does not on its face explicitly preempt state barriers to municipal broadband initiatives. As the Supreme Court noted in *Gregory*, however, explicit statements are unnecessary: "[The 'plain statement' standard does not require that the legislation mention [the power in question] explicitly …. Rather, the intention need only be plain to anyone reading the Act that it covers [that issue]." *Gregory*, 501 U.S. at 467. Furthermore, "[a] statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be 'plain to anyone reading the Act' that the statute encompasses the conduct at issue," *Gregory*, 501 U.S., at 467, quoting *Salinas v United States*, 522 U.S. 52, 59-60 (1997).

Here, Section 706 not only empowers, but affirmatively requires, the Commission to take a series of steps. At each step, the Commission, as the expert agency in the field, is entitled to *Chevron* deference in interpreting and applying the operative language and goals of Section 706. In the end, these steps led the Commission to find that it had no choice but to preempt the North Carolina law at and straightforward.

More specifically, Section 706(a) requires the Commission to "encourage" the rapid deployment and to use all means at its disposal to remove barriers to the reasonable and timely deployment of broadband to all Americans. Here, the Commission did everything required by Section 706(a).

Second, Section 706(b) requires the Commission to conduct at least an annual study to determine whether broadband is being deployed to all Americans in a reasonable and timely manner. This, in turn, requires the Commission to define the relevant terms, including "broadband," "reasonable," and "timely." The Commission did all of these things as well.

Third, Section 706(b) requires the Commission, upon finding that broadband is not being deployed to all Americans in a reasonable and timely manner, to determine the cause(s) of this problem. In response to petitions by Wilson and Chattanooga, the Commission launched an intensive public process – to which no party has raised any objections – that yielded a massive public record containing hundreds of submissions from a wide range of interested commenters. This process furnished the Commission compelling evidence that Session Law 2011-84 was preventing Wilson from making the broadband investments and providing competition to residents and businesses outside Wilson County that were clamoring for Wilson's services.

Fourth, once the Commission understood how Session Law 2011-84 was thwarting Wilson from providing advanced telecommunications capabilities in the counties surrounding Wilson County in a reasonable and timely manner, Section 706(b) required the Commission to take immediate action to develop effective remedies to this situation. The Commission did that as well.

In taking this last step, the Commission recognized two important things. First, it recognized that preemption was a well-established regulating method that the Commission had used in the past, a practice with which Congress must have been well aware when it enacted Section 706:

> [T]he Commission has in the past used preemption as a regulatory tool where state regulation conflicts with federal communications policy. 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.

Order, ¶144 (footnote omitted) (P.A. 61).

Second, the Commission recognized that the term "all Americans" does not lend itself to multiple interpretations, and it certainly applied to the businesses and residents in the geographic areas that Wilson sought to serve. This is yet another distinction between *Nixon* and this case. In *Nixon* the key question was whether the term "any entity" covered public as well private entities. That was not certain because one could plausibly argue that municipalities are not separate and independent of their states but are creatures of them. In contrast, Section 706

requires the Commission to ensure that "all Americans" will have reasonable and timely access to advanced telecommunications capabilities. While the term "all" may have different meanings in different contexts, there can be no doubt that Congress meant Section 706 to cover each and every American.

Moreover, the legislative history demonstrates that in enacting Section 706, Congress was well aware of the critical role that municipalities could play in ensuring that all Americans would have access to advanced telecommunications capabilities on a reasonable and timely basis, particularly in areas that are unserved or underserved by the private sector. For example, as discussed above, in the hearings on what was to become the Telecommunications Act of 1996, the Senate Committee on Commerce, Science and Transportation heard testimony about Glasgow, Kentucky's provision of advanced telecommunications capabilities long before the private sector did so.

Later in the hearing, Senator Lott acknowledged the benefits of municipal broadband and promised to "make sure we have got the right language to accomplish what we wish accomplished here." As Senate manager of the Telecommunications Act, Senator Lott's statement is entitled to substantial weight in interpreting the Act. In Section 706, Congress did indeed develop "the right language" to ensure that municipalities together with all other potential broadband infrastructure providers would be able to contribute to bringing advanced communications capabilities to all

Americans on a reasonable and timely basis, particularly in unserved and underserved areas.

Putting all this together, at the end of the journey that Section 706 required it to take, with *Chevron* deference owed to it at each step, the Commission had no choice but to preempt the laws at issue. While preemption might not be required in all cases, it is an outcome that Congress plainly contemplated and authorized the Commission to employ when it believed necessary.

E. Consideration of Hypotheticals Would Be Inappropriate Here

The *Nixon* Court began its analysis by noting that "concentration on the writing on the page does not produce a persuasive answer here," because the term "any entity" can have different meanings in different context. *Id.*, at 132. So, the Court considered three hypotheticals to get "a broader frame of reference" as to what Congress might have been thinking when it enacted Section 253(a). *Id.*

Here, as shown above, the language, purposes, structure, and legislative history of Section 706 all do provide a persuasive answer – that Congress intended to authorize the Commission to preempt State barriers to broadband investment and competition, including restrictions such as Section 160A-340 that are directed at municipalities. It follows that resorting to the *Nixon* hypotheticals, or any other extraneous means of gleaning Congress's intent in enacting Section 706, would be inappropriate in this case.

In CSX Transport v. Alabama Department of Revenue, 562 U.S. 277 (2011), the Supreme Court held that when a statute is clear, it must be applied as written, even if the choices Congress made are imperfect and even if Congress's rationale for the distinctions it draws "eludes" the court.

> In any event, and more importantly, the choice is not ours to make. *Congress wrote the statute it wrote*, and that statute draws a sharp line between property taxes and other taxes. Congress drafted §§ 11501(b)(1)-(3) to exclude tax exemptions from the sphere of prohibited property tax discrimination. But it drafted § 11501(b)(4) more broadly, without any of the prior subsections' limitations, to proscribe other "tax[es] that discriminat[e]," including through the use of exemptions. *That congressional election settles this case.* Alabama's preference for symmetry cannot trump an asymmetrical statute. And its preference for the greatest possible latitude to levy taxes cannot trump Congress's decision to restrict discriminatory taxation of rail carriers.

CSX Transport, 562 U.S. at 295 (emphasis added). The clarity of Section 706 should also settle the matter here, without further speculation as to what Congress might have said differently.

CONCLUSION

For all of the foregoing reasons, the Court should affirm and uphold the Commission's *Order* in its entirety.

Respectfully Submitted,

Jim Baller
Sean Stokes
Ashley Stelfox
Baller Herbst Stokes & Lide, P.C.
2014 P St. NW Suite 200
Washington, D.C. 20036
(202) 833-5300
(202) 833-1180 fax

James P. Cauley III
Gabriel Du Sablon
Cauley Pridgen, P.A.
2500 Nash Street N
Suite C | PO Drawer 2367
Wilson, NC 27894-2367

Counsel for the City of Wilson, NC

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned hereby certifies as follows:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C) because this brief contains 13,912 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

/s/ James Baller
Counsel for the City of Wilson, NC

CERTIFICATE OF SERVICE

I certify that on November 6, 2015, I caused a copy of the foregoing Brief of the City of Wilson, North Carolina, to be served upon the parties listed through the Court's electronic filing system. Pursuant to Sixth Circuit FRAP 25(f) a copy of the Motion has been sent this same day by U.S. Mail, postage paid, to the following party not represented by counsel.

/s/ James Baller
Counsel for the City of Wilson, NC

William J. Kirsch
Apt 211
1211 S. Eads St.
Arlington, VA 22202