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July 24, 2014

By Hand Delivery

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Petition of the City of Wilson, North Carolina, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition

Dear Ms. Dortch:

Please accept for filing the attached original and two copies of the City of Wilson, North Carolina's Petition for Removal of Barriers to Broadband Investment and Competition. Please also return a date stamped copy to the messenger.

Thanks for your assistance.

Sincerely,

Jim Baller

cc: Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Reilly
WCB Chief Julie Veach
Hon. Roy Cooper,
Attorney General of North Carolina

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

In the Matter of	)	
	)	
City of Wilson, North Carolina	)	
	)	File No. _____
Petition for Preemption of	)	
North Carolina General Statutes	)	
§ 160A-340 *et seq*.	)	
	)	

PETITION PURSUANT TO SECTION 706 OF THE TELECOMMUNICATIONS ACT OF 1996 FOR REMOVAL OF STATE BARRIERS TO BROADBAND INVESTMENT AND COMPETITION

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July 24, 2014

PETITION

I. INTRODUCTION AND SUMMARY

Pursuant to Section 706 of the Telecommunication Act of 1996, 47 U.S.C. § 1302, the City of Wilson ("Wilson" or "the City"), a North Carolina municipal corporation, brings this petition for preemption of North Carolina General Statutes § 160A-340 *et seq*. ("Section 160A-340"), as an impermissible barrier to broadband deployment and competition.[1] The City of Wilson provides electric service in six counties in Eastern North Carolina. In one of these counties – Wilson County – the City also offers gigabit Internet access, cable television and various other services over a state-of-the-art fiber-optic communications network – the first of its kind in North Carolina. The City has received numerous requests for these services from residents, government agencies, businesses, and other organizations in the other five counties, and it stands ready, willing and eager to expand the scope of its broadband capabilities into neighboring communities. Section 160A-340 has the purpose and effect of prohibiting it from doing so.

As discussed below, Wilson requests that the Commission find that advanced telecommunications capabilities, including high-speed broadband services, are not being deployed in a reasonable and timely manner in portions of the five counties immediately adjacent to Wilson County and that the primary reason for this is a State barrier to municipal broadband deployment – Section 160A-340. The Commission should find that the purpose and effect of this provision is to thwart or unreasonably delay broadband investment and competition, and that preemption of

[1] 47 U.S.C. § 1302(b) (2010). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153, as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (BDIA), is now codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. § 1301 *et seq*.

Section 160A-340 would accelerate broadband investment and competition in these areas. The Commission should therefore take immediate action to preempt Section 160A-340 and declare it to be unenforceable.

It essential for the Commission to deliver a strong, clear, and forceful condemnation of Section 160A-340 because it seeks to thwart Wilson and other municipalities in North Carolina from providing exactly the kind of high-capacity network and services that America needs to remain competitive in the emerging knowledge-based global economy. Wilson is *already* providing gigabit broadband connectivity in its own community – well ahead of the Commission's proposed national goal. As shown in Section II, Wilson's fiber system is also providing, and will increasingly provide, many other benefits to its community – including enhanced economic development and competitiveness, educational opportunity, public safety, homeland security, energy efficiency, environmental protection and sustainability, affordable modern health care, quality government services, and the many other advantages that contribute to a high quality of life. Moreover, Wilson stands poised to bring these same benefits and capabilities to neighboring communities.

II. STATEMENT OF FACTS

A. 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 what was to 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 that innovative rural community:

> In the 1980s, Glasgow, a community of 13,000 residents, was served -- but not very well -- by a single, for-profit cable company. The citizens were unhappy with the quality and the price of their cable TV service, so they turned to their municipally owned electric system for help. This plea from the public coincided with the city utility's recognition of the need for an effective demand-side management and load shedding system to avoid huge increases in power costs driven by surges in peak power demand. The Glasgow Electric Plant Board recognized that the same coaxial cable system used to deliver television programming could also be utilized by citizens to manage their power purchases. So our municipally owned electric utility built its coaxial distribution control system which also provides a competing, consumer-owned cable TV system. This new system not only allowed consumers to purchase electricity in real time and lower their peak electrical demand, thus saving money on their electric bills, it provided twice as many television channels as the competing, for-profit cable company at not-for-profit rates – and delivered better service to boot. Big surprise -- the private company decided to drop its rates by roughly 50 percent and improve its service, too.
>
> But the Glasgow Electric Plant Board didn't stop there. We wired the public schools, providing a two-way, high-speed digital link to every classroom in the city. We are now offering high-speed network services for personal computers that give consumers access to the local schools' educational resources and the local libraries. Soon this service will allow banking and shopping from home, as well as access to all local government information and data bases. We are now providing digital telephone service over our system. That's right -- in Glasgow, everyone can now choose to buy their dial tone from either GTE or the Glasgow Electric Plant Board.
>
> 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.[2]

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[2] 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."[3] 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."[4]

By the time the Telecommunications Act became law on February 8, 1996, access to advanced telecommunications capabilities had already become important to a growing number of Americans. Although Congress could not accurately predict how fast and in what ways the need for access to advanced communications capabilities would evolve, Congress could – and did – foresee 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.

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[3] Hearings on S.1822, at 378.

[4] *Id.*, at 379.

In 1999, in its first Section 706 Report,[5] the Commission defined the term "advanced telecommunications capabilities" – which it used interchangeably with "broadband" – as "having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, "bandwidth") in excess of 200 kilobits per second in the last mile." This rate, the Commission explained, was "enough to provide the most popular forms of broadband -- to change web pages as fast as one can flip through the pages of a book and to transmit full-motion video."[6] Based on this definition, the Commission concluded,

> Overall, we find that, although the consumer broadband market is in the early stages of development, it appears, at this time, that deployment of broadband capability is reasonable and timely. Nevertheless, this is an early snapshot of a fledgling market. We find that there is already a significant initial demand for broadband capability and we expect demand to grow substantially in the coming years. We are committed to ensuring that deployment of broadband capability to the consumer market remains timely and reasonable as the market for broadband develops, and that the supply of broadband meets consumer demand.[7]

During the next eight years, the Commission continued to use 200 kilobits per second as its definition of advanced telecommunications (or broadband) capabilities, and it continued to find that deployment at that level was occurring on a reasonable and timely basis. This prompted widespread criticism, including from within the Commission itself.[8] In 2008, Congress responded

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5 *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* 14 FCC Rcd. 2398, ¶ 20, 1999 WL 672549 (rel. Feb. 2, 1999).

6 *Id.*, at 2406.

7 *Id.*, at 2405.

8 *See, e.g.*, *NPRM*, Statement of Commissioner Jonathan S. Adelstein, WC Docket No. 07-38, *In Re Development of Nationwide Broadband Data to Evaluate Reasonable and*

to this criticism by enacting the Broadband Data Improvement Act (BDIA).[9] In Section 101 of the Act, codified in 47 U.S.C. § 1301, Congress opened with the following two 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. Among other things, Congress required the Commission to issue broadband deployment reports "annually" rather than "regularly," and it required the Commission to gather detailed demographic and other information for unserved areas. Congress also required the Commission to make international comparisons and to conduct periodic surveys of broadband usage by American consumers in urban, suburban, and rural area in the large business, small business, and residential consumer markets.

Timely Deployment of Advanced Services, Docket No. 07-38 (rel. Apr. 16, 2007) ("We should start by updating our current definition of high-speed of just 200 kbps in one direction to something more akin to what consumers receive in countries with which we compete, speeds that are magnitudes higher than our current definitions. We need to set ambitious goals, shooting for real high-bandwidth broadband deployment, rather than being content to hit targets set almost eight years ago."); *see also* S. Derek Turner, *Broadband Reality Check*, Free Press (Aug. 2005), *available at* http://www.freepress.net/sites/default/files/fp-legacy/broadband_report.pdf; Karl Bode, *FCC Finally Realizes 200kbps is Not Broadband Votes to reform long-flawed broadband data collection, albeit after-the-fact*, Broadband Reports (Mar. 19, 2008), *available at* http://www.dslreports.com/shownews/FCC-Finally-Realizes-200kbps-is-Not-Broadband-92792.

[9] Pub. L. No. 110-385, 122 Stat. 4096 (October 10, 2008).

Four months later, in February 2009, Congress acted again to accelerate deployment, adoption, and use of broadband Internet connectivity for all Americans. As part of the American Recovery and Reinvestment Act of 2009,[10] Congress directed the Commission to develop a "National Broadband Plan" to ensure that "all people of the United States have access to broadband capability."[11] 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.[12]

On March 16, 2010, the Commission issued its National Broadband Plan.[13] The Commission not only reiterated its understanding of the critical importance of making broadband Internet access available to all Americans, but it also underscored the important role that municipalities can play in helping America achieve this goal.

> Today, high-speed Internet is transforming the landscape of America more rapidly and more pervasively than earlier infrastructure networks. Like railroads and

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10 *American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2), 123 Stat. 115 (Feb. 17, 2009) ("Recovery Act").*

11 *Id*., at 516.

12 Section 6001(e)(1)(A) states that eligible applicants shall "[b]e a *State or political subdivision thereof*, the District of Columbia, a territory or possession of the United States, an Indian tribe (as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450(b)) or native Hawaiian organization; (B) a nonprofit--(i) foundation, (ii) corporation, (iii) institution, or (iv) association; or (C) any other entity, including a broadband service or infrastructure provider, that the Assistant Secretary finds by rule to be in the public interest. In establishing such rule, the Assistant Secretary shall to the extent practicable promote the purposes of this section in a technologically neutral manner . . . ." (emphasis supplied). Codified as 47 U.S.C. § 1305(e)(1)(A).

13 *Connecting America: the National Broadband Plan, at 3 (adopted Mar. 15, 2010), available at http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf*.

> 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.
>
> But as with electricity and telephony, ubiquitous connections are means, not ends. It is what those connections enable that matters. Broadband is a platform to create today's high-performance America—an America of universal opportunity and unceasing innovation, an America that can continue to lead the global economy, an America with world-leading, broadband-enabled health care, education, energy, job training, civic engagement, government performance and public safety.[14]
>
> * * *
>
> Municipal broadband has risks. Municipally financed service may discourage investment by private companies. Before embarking on any type of broadband buildout, whether wired or wireless, towns and cities should try to attract private sector broadband investment. But in the absence of that investment, they should have the right to move forward and build networks that serve their constituents as they deem appropriate.[15]

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 Health Care (Chapter 10), Education (Chapter 11), Economic Development (Chapter 12), Energy and Environment, including smart transportation systems (Chapter 13), Government Performance (Chapter 14), Civic Engagement (Chapter 15), and Public Safety (Chapter 16). The Plan emphasized the need to act quickly to expand the reach and capability of the nation's broadband infrastructure:

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[14] *Id.*, at 3.

[15] *Id.*, at 153.

> 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.[16]

In July 2010, in its *Sixth Broadband Deployment Report*, the Commission at last 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:

> 4. In determining whether broadband is being deployed to all Americans in a reasonable and timely fashion, this Sixth Report takes the overdue step of raising the minimum speed threshold for broadband from services in "excess of 200 kilobits per second (kbps) in both directions"-- a standard adopted over a decade ago in the *1999 First Broadband Deployment Report*. As anticipated in previous broadband deployment reports, "technologies, retail offerings, and demand among consumers"-- or in other words, network capabilities, consumer applications and expectations -- have evolved in ways that demand increasing amounts of bandwidth and require us to "[raise] the minimum speed for broadband from 200 kbps to, for example, a certain number of megabits per second (Mbps)." To put 200 kbps in context, in 1999, voice-over-broadband or interconnected voice over Internet protocol (VoIP) was just beginning to emerge as a consumer application, and web pages were almost entirely text-based, with little embedded graphics or video, making 200 kbps an arguably sufficient benchmark for broadband capability at the time. Today, interconnected VoIP is subscribed to by over 21 million Americans, most web sites feature rich graphics and many embed video, and numerous web sites now exist primarily for the purpose of serving video content to broadband users. As a result, and as predicted by previous broadband deployment reports, services at 200 kbps are not now capable of "originat[ing] and receiv [ing] high-quality voice, data, graphics, and video telecommunications," as those capabilities are delivered by today's technology and experienced and expected by today's broadband users. As a result, we find that the 200 kbps threshold is no longer the appropriate benchmark for measuring broadband deployment for the purpose of this broadband deployment report.

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16 *Id*., at 194.

> 5. As an alternative benchmark for this year's report, and given that this year's inquiry was conducted in conjunction with the National Broadband Plan proceeding, we find it appropriate and reasonable to adopt instead the minimum speed threshold of the national broadband availability target proposed in the National Broadband Plan. The National Broadband Plan recommends as a national broadband availability target that every household in America have access to affordable broadband service offering actual download (i.e., to the customer) speeds of at least 4 Mbps and actual upload (i.e., from the customer) speeds of at least 1 Mbps. This target was derived from analysis of user behavior, demands this usage places on the network, and recent experience in network evolution. It is the minimum speed required to stream a high-quality --even if not high-definition-- video while leaving sufficient bandwidth for basic web browsing and e-mail, a common mode of broadband usage today that comports directly with section 706's definition of advanced telecommunications capability. As the target for the broadband capability that the National Broadband Plan recommends should be available to all Americans, this speed threshold provides an appropriate benchmark for measuring whether broadband deployment to all Americans is proceeding in a reasonable and timely fashion. …[17]

Significantly, even applying the very limited 4/1 Mbps standard, the Commission found that "broadband remain[ed] unavailable to approximately 14 to 24 million Americans."[18]

Within two years, the Commission realized that its benchmark of 4/1 Mbps might already have outlived its usefulness. In its *Eighth Broadband Deployment Report*, the Commission stated that "We are cognizant that demand changes over time. Usage trends are driving up demand for bandwidth and services, and users are attaching multiple Internet-enabled devices to a single, shared household broadband connection."[19] In an accompanying Notice of Inquiry, the Commission elaborated:

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17 *Sixth Broadband Deployment Report, 25 FCC Rcd. 9556, 9558-60, ¶¶ 4-5, 2010 WL 2862584, *1-*2 (rel. July 20, 2010).*

18 *Id.* at ¶ 5, 2010 WL 2862584, at *2.

19 *Eighth Broadband Deployment Report, 27 FCC Rcd 10342, ¶ 20, 2012 WL 3612019, *11* (rel. Aug. 21, 2012).

> 8. As noted above, since the Commission began relying on the 4 Mbps/1 Mbps speed benchmark in 2010, broadband providers have developed and launched much higher speed networks and services. In addition, we recognize that consumers' broadband experiences are influenced by how they use broadband, and there is evidence that consumers are using faster speeds, greater total bandwidth, and more advanced applications. Furthermore, section 706 focuses on a consumer's ability to originate and receive certain specific services, including "high-quality voice, data, graphics, and video telecommunications." …
>
> 9. With respect to video services in particular, when the Commission adopted the 4 Mbps/1 Mbps speed threshold, it determined that it adequately met consumers' needs for video over broadband at that time. Speeds of 4 Mbps/1 Mbps enable consumers to stream standard definition video in near real-time, which consumes anywhere from 1-5 Mbps depending on a variety of factors, while still using basic functions such as e-mail and Web browsing. However, there is evidence that consumers are accessing and generating video content over broadband to a greater degree than in previous years, and are increasingly using their broadband connections to view high-quality video and use advanced video applications. Cisco, in its latest report, predicts that Internet video traffic will account for 54% of all Internet data traffic by 2016, up from 51% in 2011. North American Internet video traffic is predicted to achieve 20% compound annual growth from 2011 to 2016. Higher-quality video can require additional bandwidth. High-definition video can require downstream speeds of 5-12 Mbps, commensurate with the quality of the video. …
>
> 10. We also have observed that an increasing number of households are attaching multiple devices to a single, shared household broadband connection. The bandwidth requirements of a household can increase as the number of devices sharing a broadband connection increases, particularly if multiple users are accessing video content with that connection. How should this usage pattern affect our speed threshold analysis? The Commission in the *Household Broadband Guide* compared the minimum download speed needs for light, moderate, and high household use with one, two, three, or four devices at a time. For example, if a household simultaneously uses three devices for basic functions and one high-demand application such as streaming HD, video conferencing, or online gaming, 6 to 15 Mbps could be required. …[20]

The discussion above focused on the *minimum* speeds necessary for an Internet access service to meet the Commission's evolving definition of "advanced telecommunications

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[20] *Ninth Broadband Progress Report Notice of Inquiry*, 27 FCC Rcd. 10523, ¶¶ 8-10, 2012 WL 3612021, *4 (rel. Aug. 21, 2012).

capability." At the same time, the Commission has also emphasized the need for America to make reasonable and timely progress toward having world-class capabilities at higher levels of advanced telecommunications capabilities. For example, in the National Broadband Plan, the Commission set forth a national goal of at least 100/50 Mbps to at least 100 million households by 2020. In addition, the Commission did not stop there but called for efforts to push past 100/50 Mbps as soon as possible:

> The U.S. should lead the world in ultra-high-speed broadband testbeds as fast, or faster, than anywhere in the world. In the global race to the top, this will help ensure that America has the infrastructure to host the boldest innovations that can be imagined. Google announced a one gigabit testbed initiative just a few days ago – and we need others to drive competition to invent the future.[21]

In summary, 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, both Congress and the Commission have repeatedly acted in ways that reinforce this conclusion.

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[21] Julius Genachowski, "Broadband: Our Enduring Engine for Prosperity and Opportunity," as prepared for delivery at NARUC Conference (Feb. 16, 2010), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-296262A1.pdf.

B. Wilson's Advanced Telecommunication Network And The Barrier To Wilson's Ability To Expand Its Network To Respond To Requests For Advanced Services

Through this petition, Wilson seeks the opportunity to be able to respond favorably to the requests for access to advanced telecommunication capabilities and services that Wilson regularly receives from citizens, businesses, and other organizations located outside Wilson County. Under recent changes to North Carolina law, municipalities cannot provide communications services to the public for a fee without complying with numerous onerous restrictions. Touted as necessary to create a "level playing field" for private and public entities, the real purpose and effect of these restrictions is to thwart, delay, and make municipal broadband initiatives prohibitively burdensome and expensive. In short, Section 160A-340 is an effective prohibition on public broadband investment and competition that Section 706 commands the Commission to remove immediately.

We begin this section with a discussion of Wilson's background and history, the award-winning gigabit services it is providing, and the many benefits that it could bring to the surrounding rural communities if it were not fenced out by Section 160A-340. We then discuss the component restrictions in Section 160A-340 and the harm that these restrictions individually and collectively cause for Wilson and the businesses, institutions, and residents that Wilson would otherwise be able to serve.

1. Background and history

Wilson is located along Interstate 95, halfway between New York and Florida. The City is 30 miles north of Interstate 40, with access to major port facilities within 100 miles. Three mainline railroads serve the city and provide north-south and east-west passenger and freight rail

service. Wilson is located approximately 45 miles east of Raleigh and 50 miles southeast of the Raleigh-Durham International Airport.

The U.S. Census Bureau estimated the 2012 population of the City of Wilson at 49,608, representing a 2.2% increase from the 2010 population estimate.[22] As of 2012, 47.9% of the population was African American and 42.9% of the population was Caucasian.[23] The City of Wilson's average median income per household is $36,469.[24]

Wilson has a history of being at the forefront of meeting the infrastructure needs of its residents, dating back to the Nineteenth Century. Less than a decade after the introduction of electricity in some of the larger cities in the nation, Wilson residents began clamoring for it. The City's elected officials began a campaign to attract electric service to the City, but to no avail. Electric companies at the time did not find Wilson as attractive as larger, more profitable markets and therefore declined to provide electric service to the City's residents. The City officials wrestled with the difficult decision of whether to undertake installation of a City electric system or to leave the City's residents in the dark. In 1890, the community voted to issue bonds for the construction of an "Electric Light Plant."[25] Wilson was initially ridiculed by private power companies for even considering the possibility of building and operating such a technologically advanced system, but, according to then-Mayor George D. Green, it was by 1894 "generally

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22 United States Census Bureau, *Wilson (city), North Carolina QuickFacts*, http://goo.gl/J3P5iW (last visited June 13, 2014).

23 *Id.*

24 *Id.*

25 City of Wilson, *Electric History*, http://goo.gl/cSVNO6 (last visited June 13, 2014).

conceded that we have one of the best lighted towns in the state...."[26] Demand for power continued to grow, resulting in construction of a new plant in 1915 and another expansion of that plant in 1918.[27] That year, Wilson also began to supply power to other towns. Wilson Energy has continued to build upon the legacy of the community's visionary leadership, offering a reliable and robust locally owned service in support of Wilson's growth.

2. From Tobacco Road to North Carolina's first gigabit city

Wilson was once known as the "World's Greatest Tobacco Market." To meet the needs of the burgeoning tobacco industry at the end of the Nineteenth Century, Wilson built three large auction warehouses by 1893 and two more by the turn of the century, enabling it to lead North Carolina in marketing over fifteen million pounds of tobacco annually. In 1919, Wilson surpassed Danville, Virginia, as the nation's largest market for flue-cured tobacco.

In the decades that followed, Wilson's tobacco and agricultural economy gradually evolved into healthy mix of industries that also included manufacturing, commercial, and service businesses.[28] For a while, textiles were an important part of the mix, but that business has now largely moved overseas.

Throughout these ebbs and flows, one consistent factor underlying the community's economic evolution and growth has been the City's emphasis on self-reliance, particularly in owning and controlling the community's vital local infrastructure. As a result, Wilson's electric, natural gas, and water systems are all community-owned.

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26 *Id.*

27 *Id.*

28 http://en.wikipedia.org/wiki/Wilson,_North_Carolina

In 1990, in response to citizen complaints about the high cost and low quality of voice and video services available in the community, Wilson's City Council began to study the possibility of building a municipally-owned cable system. To head this off, the incumbent cable operator, Alert Cable Television of Wilson ("ACT"), a division of Cablevision Industries, promised to upgrade its system with fiber optic cabling, which, it claimed, would provide multiple benefits to the community.[29] ACT did not, however, follow through on its promises. As a result, for the next several years, the City continued to appropriate funds to study the feasibility of providing cable service.[30]

In May of 2003, the City Council received a presentation that reinforced and expanded on what it had previously heard about the multiple benefits that a fiber optic system could provide. In response, the City Council requested that a full study be performed on the feasibility of a municipal fiber system. The following year, the study not only concluded that a city-owned fiber optic system would be financially viable, but it also reported on high levels of customer dissatisfaction with the services, pricing, reliability, and technological capabilities available from the current communications service providers.[31]

In 2005, to achieve huge capacity increases and cost savings for its governmental network services, the City built a fiber optic backbone connecting all City-owned facilities. Seeing this,

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29 Presentation from Alert Cable TV of Wilson, Inc. to the City Council of the City of Wilson (Oct. 4, 1990), http://www.baller.com/wilson/w1.pdf (Attached as Exhibit 1).

30 For a while during this period, the City Council focused primarily on another major infrastructure project – $50 million investment in a new dam to expand the City's water supply at Buckhorn Reservoir from a capacity of 800 million gallons to over 7 billion gallons.

31 Icon Broadband Technologies, Municipal Broadband Feasibility Study, prepared for the City of Wilson (Oct. 15, 2004), http://www.baller.com/wilson/w2.pdf.

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.[32] After many months of careful review and research, including a second feasibility study and business plan,[33] and after conducting several public hearings with strong support from the community and the City's largest businesses,[34] 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.[35]

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[32] 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 former Mayor Rose, "They laughed in our faces." *Id*.

[33] *See* Uptown Services, Wilson, North Carolina Municipal Broadband Business Plan (July 21, 2006), http://www.baller.com/wilson/w3.pdf.

[34] *See, e.g.*, Leon Wilson, Letter to the Editor, *City's Infrastructure is Important to the Bank*, Wilson Daily Times, Oct. 6, 2006, at 6A, http://www.baller.com/wilson/w4.pdf (Attached as Exhibit 2).; Letter, Rusty Stephens, President, Wilson Technical Cmty. Coll. to Bruce Rose, Mayor, City of Wilson, North Carolina (Oct 6, 2006), http://www.baller.com/wilson/w5.pdf (Attached as Exhibit 3).

[35] Contrary to assertions raised by its opponents, the City of Wilson Greenlight network was never financed by tax revenues, and was supported entirely by Certificates of

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. Pursuant to N.C. Gen. Stat. § 160A-311, North Carolina cities have the authority to construct, own and operate any or all of ten designated "public enterprises,"[36] which include "cable television systems."[37] In 2005, the North Carolina Court of Appeals and Supreme Court confirmed that the authorization to operate cable television systems included the authority to operate a broadband system providing broadband Internet access service, whether or not the network was also used to provide cable television.[38]

In May 2008, acting under the trade name "Greenlight," the City began signing up customers for broadband services. The community responded very favorably – initial trials found that 86 percent of customers preferred Greenlight services to those previously available. The City's credit rating was upgraded by both Moody's and Standard and Poor's in late 2008, shortly

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Participation, which are financing instruments that are backed solely by the future revenues derived from the assets purchased. In 2008, the City of Wilson borrowed an additional $13.3 million through COPS financing for the fiber-optic project. The supplemental financing was again approved prior to the borrowing by the LGC on August 5, 2008.

36 N.C. Gen. Stat. § 160A-312 (2014).

37 N.C. Gen. Stat. § 160A-311 (2014).

38 *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).

after the Greenlight service launched. Moody's recently reaffirmed its credit rating for the City of Wilson in 2014, noting in particular the strength of its Greenlight service.[39]

In January 2013, the Commission issued a National Gigabit Challenge calling for at least one gigabit community in all 50 states by 2015.[40] The City of Wilson accepted this challenge and began providing Gigabit residential Internet service in July 2013, becoming North Carolina's first Gigabit City. Because the City had already deployed a communitywide FTTH network, turning up gigabit speed simply required minor upgrades to the electronics used to provide residential Internet service.

3. Community benefits of Wilson's fiber network

Wilson's fiber network has achieved 33.7% total market penetration within its service area, and it is cash flow positive.[41] 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 forced the established providers to offer better services and rates to their customers.[42]

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39 Press Release, City of Wilson, City Keeps Strong Bond Rating, Saves Money (June 11, 2014), http://www.baller.com/wilson/w6.pdf (Attached as Exhibit 4); Moody's, "Moody's affirms Aa2 on Wilson, NC's $11.1M GO debt," http://goo.gl/nK5c1V.

40 *FCC Chairman Genachowski Issues Gigabit City Challenge*, http://goo.gl/5ggqk (rel. January 18, 2013).

41 This is contrary to the widespread claim by the incumbent providers that municipal broadband systems are doomed to fail at the expense of the taxpayers.

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

Greenlight has also been good for the community in numerous other ways. For example, the fiber network is making the City's other utilities more effective and efficient, at lower cost. The network is providing the 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.[43] The network has enhanced the capabilities of public safety agencies by facilitating the extensive deployment and interconnection of surveillance cameras.[44]

The City's fiber network has also attracted multiple Tier 1 service providers, which have now established a Point of Presence ("POP") in Wilson. Establishment of a POP in Wilson 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. In particular, the fiber network has been leveraged to provide circuit diversity for several major large employers, thereby helping improve continuity of operations. New businesses such as Exodus FX, Regency Interactive, and WHIG TV have also chosen to locate in Wilson, in significant part because of the Greenlight fiber network.[45] New residents and small businesses are moving to

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[43] The City of Wilson provides free broadband service, at 100 Mbps download/100 mbps upload, to the library computer center and the Wilson Housing Authority computer labs. The City also won the competitive bidding process and now provides 1 Gbps symmetrical service to all Wilson County school facilities. *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.

[44] More than 30 public safety cameras have been deployed in the City of Wilson and the City of Wilson's Greenlight division works in close partnership with the City of Wilson Police Department to deploy cameras as needs change. *See also, e.g. Wilson Gives Greenlight to Fast Internet*, at 13-14, http://goo.gl/Pc5VwJ.

[45] *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.

Wilson on a regular basis in order to take advantage of the Greenlight fiber network, enabling them to utilize modern and bandwidth-intensive applications.[46] 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.

4. Wilson's international/national/state recognition

The City of Wilson has received extensive State, national, and international attention since deploying its community broadband fiber network. Wilson has hosted visitors interested in the network from as far away as New Zealand, and it regularly hosts municipalities from across the State and nation. Media outlets, including the News & Observer, Triangle Business Journal, and the New York Times have run several articles highlighting the network. In 2012, the City of Wilson received the SEATOA Community Broadband Advocacy award as well as the NATOA Community Broadband Network of the Year award. City representatives are routinely invited to speak at regional and national conferences focusing on broadband deployment. In March of 2014 City representatives spoke about the community network at the Commission's Rural Broadband workshop and in May of 2014 at the New America Foundation's public broadband workshop.

5. 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 North Carolina law, it currently offers communications services only to residents, businesses, and other entities in the City of Wilson and areas immediately adjacent to the City within Wilson County (of which the City is the county seat).

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[46] *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.

That is not so 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. As Figure A shows, these areas include numerous census blocks in lower-income, rural areas that lack advanced communications capabilities as the Commission currently defines that term for the purposes of Section 706 (4 Mbps downstream and 1 Mbps upstream):

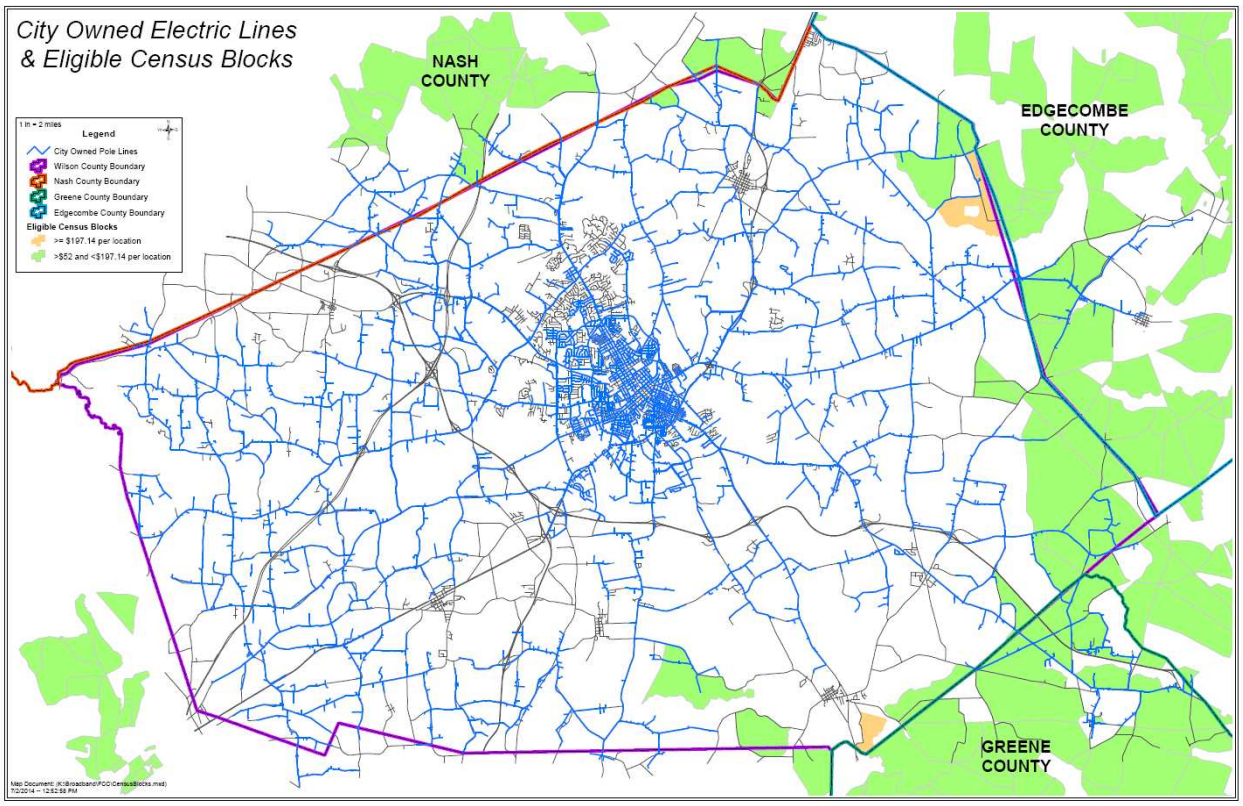

Figure A.

Source: The "eligible" census blocks are deemed as "unserved" and "high cost" or extremely high cost" under the FCC's Connect American Fund Phase II CAM version 4.0 high cost model, WC Docket 10-90, Public Notice DA13-2414, where "unserved" constitutes an area not served by 4Mbps/1Mpbs (as measured by FCC at 3 Mbps / 768 Kbps), http://goo.gl/JPcKeq.

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. The cooperative had received Broadband Technologies Opportunities Program (BTOP) funding to bring service to its members but did not want to operate the network. Due to the limitations imposed by State law, 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.

Similarly, in 2014, Wilson has been approached by three North Carolina municipalities that are interested in bringing FTTH services to their residents. One municipality explicitly stated it would like to partner with Wilson, but it is 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.[47]

In short, if the State's legal barriers to entry were removed, Wilson would have multiple opportunities to make broadband investments and provide competitive 21st Century broadband Internet connectivity outside of Wilson County, especially to low-income, rural areas that otherwise will likely never have access to Gigabit services. Wilson would gladly take advantage of these opportunities in stages, wherever doing so makes sense. In fact, in 2013 and 2014, the City expanded into eight new areas within Wilson County and has already achieved an average market penetration of 49% in these territories. Continued expressions of demand from outside the

[47] If necessary, Wilson can also provide the Commission confidential access to records of scores of additional requests for communications services from persons in the areas at issue.

allowable network footprint, coupled with high take rates in newly opened neighborhoods, clearly indicate the areas outside Wilson County provide attractive opportunities for Wilson to help meet the twin goals of Section 706 – increased investment in broadband infrastructure and increased competition.

C. North Carolina Barriers to Broadband Investment and Competition

1. Overview

In 2006, shortly after Wilson announced its intention to provide fiber-enabled communications services to commercial, residential, and other customers, several incumbent cable and telecommunications companies in North Carolina responded with a torrent of endless opposition that still continues today. Their first step was to mount a massive campaign of misinformation.[48] When that did not work, they inundated Wilson with abusive public records requests and engaged in various other anti-competitive practices.[49] After these tactics also failed, the incumbents turned to the State legislature, where they have considerable influence.[50]

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48 The incumbents falsely claimed that the City of Wilson would be in violation of then-existing state law, that the fiber optic network would not offer subscribers anything new, and that municipally-owned networks were doomed to fail. *See, e.g.*, Matthew Shaw, Editorial, *At the Speed of Light*, Wilson Daily Times, Oct. 6, 2006, http://www.baller.com/wilson/w7.pdf (Attached as Exhibit 5); Press Release, City of Wilson, City of Wilson Defends Research of Fiber Optic Potential (Oct. 9, 2006), http://www.baller.com/wilson/w8.pdf (Attached as Exhibit 6).

49 Representatives of Time Warner Cable and the state telecommunications trade association, the North Carolina Cable Telecommunications Association ("NCCTA") submitted no less than seven separate public records requests to the City of Wilson over the course of approximately 3 years seeking the City of Wilson's fiber optic network business plans, contracts with suppliers and providers, grant applications, and network maps among other documents, with the admitted purpose of gaining a competitive edge (an example of such a request is attached as Exhibit 7). When the City of Wilson refused to comply with one of the requests on the ground that it sought sensitive security information, NCCTA sued the City of Wilson. *See, e.g.*, Letter from Mark J. Prak, Attorney, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., to Grant W. Goings, City Manager, City of

The legislative effort to prevent Wilson and other local governments from making broadband investments and providing their communities competitive services began in 2007, with the introduction of House Bill 1587.[51] That bill failed, as did similar bills in 2009[52] and 2010.[53] 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. [54] Finally, in

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Wilson, North Carolina (Nov. 3, 2006), http://www.baller.com/wilson/w9.pdf; *see also An Unlevel Playing Field: Wilson Forced to Disclose Network Information to Competitors*, MuniNetworks, http://goo.gl/bEl5HE; and Presentation from Catharine Rice, Action Audits, L.L.C., to the North Carolina House Select Committee on High Speed Internet Access in Rural and Urban Areas (Dec. 14, 2009) (detailing the possibly predatory pricing, which included prices up to 40% below prices for the identical service in other nearby major markets), http://goo.gl/b4fky3.

50 For an overview of the legislative battles waged in North Carolina over community broadband, s*ee* Todd O'Boyle & Christopher Mitchell, *The Empire Lobbies Back: How National Cable and DSL* Companies *Banned the Competition in North Carolina* (2013), http://goo.gl/BupE8.

51 H.B. 1587, 2007-2008 Leg. Sess. (N.C. 2007) (First Edition), http://goo.gl/KEtZhg.

52 H.B. 1252, 2009-2010 Leg. Sess. (N.C. 2009) (First Edition), http://goo.gl/q0Ui7X; S.B. 1004, 2009-2010 Leg. Sess. (N.C. 2009) (First Edition), http://goo.gl/AIsM0u.

53 S.B. 1209, 2009-2010 Leg. Sess. (N.C. 2009) (Third Edition), http://goo.gl/TZ3dGd.

54 For example, the bills would have required municipalities to be profitable within 4 years, would have restricted financing methods, would have required referenda before even making routine repairs, and much more. Throughout the legislative process, the City of Wilson and its public and private allies had to contend with massive campaigns of misinformation conducted by the cable and telecommunications companies in support of bills sponsored by legislators who openly admitted that they were acting at the behest of the cable and telecommunications companies. *See, e.g.*, Stuart Watson, Salisbury to Test Fiber-Optic Cable System, News Channel 36 (Aug. 24, 2010) (Senator Hoyle proclaiming he carried more water for the industry than "Gunga Din"), http://goo.gl/XhJwHd; and Broadband Properties, Greenlight for the New Knowledge Economy, 28 Broadband Properties 11, 67-68 (Dec. 2008).

2011, the legislature enacted the measure that is at issue in this proceeding – H.B.129.[55] H.B.129 included a limited exemption that allowed Wilson to provide communications services in Wilson County without having to comply with 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.[56]

H.B.129 bore the short title "Level Playing Field/Local Gov't Competition,"[57] but it was a "level playing field" and "fair competition" measure in name only. If a municipality in North Carolina wishes to provide its community advanced telecommunications capabilities and competitive communications services, Section 160A-340 requires the municipality to run a gauntlet of barriers that have no purpose other than to make it as difficult as possible for the municipality to meet these goals. Should the municipality somehow survive this regulatory minefield, Section 160A-340 then imposes limitations on its day-to-day activities that make successful operations all but impossible to achieve.

2. Barriers posed by Section 160A-340

Attachment A provides a section-by-section analysis of how Section 160A-340 actually works in practice. As this analysis shows, just about every section of Section 160A-340 imposes

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55 Act of May 21, 2011, 2011 N.C. Sess. Laws 84, http://goo.gl/b3o25U.

56 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.

57 H.B.129 was enacted by State Law 2011-84 and codified as N.C.G.S. § 160A-340 *et seq*., http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H129v7.pdf.

some kind of barrier. A representative sample of these barriers is summarized in the remainder of this section.

As the Commission reviews Attachment A and the discussion below, we urge it to consider an overarching problem that Section 160A-340 creates for municipalities – its negative impact derives not just from what it says explicitly but also from many vague and ambiguous provisions. These uncertainties, coupled with the threat of protracted litigation, have a severe chilling effect on local governments, lending institutions, private sector partners, vendors, potential customers, and other stakeholders in a community's investment in broadband infrastructure and competition.

a. definitions of "high-speed Internet access service" and "unserved area"

Sections 160A-340.1, 160A-340.3, 160A-340.4, 160A-340.5, and 160A-340.6 impose various onerous restrictions on municipalities that wish to provide "communications service" to their businesses and residents, including "High-speed Internet access service." That term is defined in Section 160A-340(4) as "Internet access service with transmission speeds that are equal to or greater than the requirements for basic broadband tier 1 service as defined by the Federal Communications Commission for broadband data gathering and reporting." This definition is a good place to start in understanding the true purposes and effects of Section 160A-340.

The Commission coined the term "basic broadband tier 1 service" in an order issued in 2008 that established various tiers for federal data gathering and reporting purposes:

> We will use the terms "first generation data" to refer to those services with information transfer rates greater than 200 kbps but less than 768 kbps in the faster direction, and "basic broadband tier 1" to refer to services equal to or greater than 768 kbps but less than 1.5 mbps in the faster direction. Subsequent tiers will be

> labeled "broadband tier 2" through "broadband tier 7". These terms are evolving definitions that could change over time based on advances in technology. [58]

In importing the Commission's definition of "basic broadband tier 1 service" for data collection and reporting purposes into Section 160A-340.1(4), the North Carolina legislature was aware that it did not represent the Commission's view of the minimum transmission speeds that consumers needed to have a meaningful Internet experience. More specifically, the legislature disregarded the Commission's determination in its *Sixth Broadband Deployment Report*, issued *a year before* the legislature passed H.B.129 into law, that speeds of at least 4 mbps downstream and 1 mbps upstream comport "directly with section 706's definition of advanced telecommunications capability" and provide the "appropriate benchmark for measuring whether broadband deployment to all Americans is proceeding in a reasonable and timely fashion."[59] As the Commission had further explained,

> The National Broadband Plan recommends as a national broadband availability target that every household in America have access to affordable broadband service offering actual download (i.e., to the customer) speeds of at least 4 Mbps and actual upload (i.e., from the customer) speeds of at least 1 Mbps. This target was derived from analysis of user behavior, demands this usage places on the network, and recent experience in network evolution. It is the minimum speed required to stream a high-quality – even if not high-definition – video while leaving sufficient bandwidth for basic web browsing and e-mail, a common mode of broadband usage today that comports directly with section 706's definition of advanced telecommunications capability. As the target for the broadband capability that the National Broadband Plan recommends should be available to all Americans, this speed threshold provides an appropriate benchmark for measuring

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58 *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, 23 FCC Rcd 9691; 2008 FCC LEXIS 4823 (rel. June 12, 2008).

59 *Sixth Section 706 Report*, at ¶ 4.

> whether broadband deployment to all Americans is proceeding in a reasonable and timely fashion.[60]

In embracing the Commission's definition of "basic broadband tier 1 service" for data gathering and reporting purposes, the North Carolina legislature thus ignored the limited purposes of that definition, disregarded the Commission's findings about the actual broadband Internet access needs of American consumers, and instead chose a definition of "High-speed internet access service" that served only to insulate the incumbent providers in North Carolina from meeting minimal national broadband standards and potential competition.

The inadequate definition of "High-speed Internet access service" in Section 160A-340(4) takes on special significance when read in conjunction with Section 160A-340.2(b), which exempts "unserved" areas from some (but not all) of the burdensome requirements of the statute. 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." "For the purpose of this subsection," it 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."

Taken together, the definitions of "High-speed Internet access service" and "unserved area" in Sections 160A-340(4) and 160A-340.2(b), respectively, have the effect of requiring municipalities to comply with the onerous requirements of the State law (discussed below) even in areas that are unserved with "advanced telecommunications capabilities," as the Commission defined that term for the purposes of Section 706, a year before North Carolina enacted Section 160A-340. They would also entirely prohibit a municipality from providing service to an

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60 *Id.*, at ¶ 5.

unserved area that would otherwise qualify as unserved under the Commission's definition of advanced telecommunications capabilities at the time that Section 160A-340 was passed into North Carolina law.

b. compliance with all legal requirements that apply to private providers

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, but an obligation to comply as well with all legal requirements that apply to private entities creates multiple problems for municipalities.

At the outset, as conservative economists Tom Hazlett and George Ford have shown, subjecting new entrants to the same rules as incumbents inevitably favors the incumbents, which have many significant advantages that new entrants lack.[61] Similarly, Robert Pepper, former Chief of the Commission's Office of Planning and Policy, once provided the following trenchant assessment of the fundamental flaw in "level playing field" arguments:

> [W]e hear all the time, the argument by incumbents, that ... "Well, we are regulated, but these new entrants, providing new services, are not regulated, and we need to have a level playing field. We need to make sure that everybody is treated the same." This is the argument about asymmetric regulation. There are two kinds of asymmetric regulation. One is where you have firms that are similarly situated and treated differently. That is a bad thing; it leads to all kinds of distortions. Likewise, if you have two firms that are not similarly situated and

[61] 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.

> are radically different in their circumstances, but you treat them the same, that also leads to all kinds of distortions.[62]

Likewise, the courts have also recognized that incumbents have huge advantages that put them far ahead of new entrants. *See, e.g.*, *Insight Communications Co. v. City of Louisville*, Dkt. No. 2002-CA-000701-MR, (Ky. App., June 17, 2003), http://goo.gl/r1lMWe ("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 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

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[62] Robert Pepper, *Policy Changes Necessary to Meet Internet Development*, 2001 L. Rev. M.S.U.-D.C.L. 255, 257 (2001).

requirements on them, they would surely protest loudly about such an intrusion into their proprietary business secrets.

A particularly severe problem with Section 160A-340.1(a)(1) is that it is vague and ambiguous. For example, with which private service providers must 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.

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 avoid disputes and protracted litigation.

In short, the seemingly innocuous requirement that municipalities comply with the same legal requirements that private providers must meet not only tips the playing field more steeply in favor of the incumbents, but its ambiguities create fertile ground for disputes and litigation. This, in turn, discourages municipalities and potential funding sources from making broadband investments and bringing competition to unserved and underserved markets.

c. enterprise funds for each communications service

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, and it poses several 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.

d. geographic limitations

Section 160A-340.1(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 this Petition and Attachment A.

Because Wilson was providing communications services on January 1, 2011, Section 160A.340.2(c) provides it a special exemption under which it need not comply with the statute's many 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 Wilson's ability to provide service in the portions of Wilson County outside the City of Wilson, and it also would have to comply with all of the restrictions in the statute in order to continue to provide service even within the City of Wilson.

These draconian geographic limitations impede growth, which, in the communications industry is often necessary for long term success.[63] They 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

[63] Even Comcast and AT&T insist that they need to grow to remain competitive. Haley Sweetland Edwards, "Comcast, AT&T Say They're Not Big Enough Yet," Time, July 14, 2014, http://goo.gl/RtaJth.

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.

e. imputation of phantom costs

Among the most egregious provisions in the North Carolina law – aside from the geographic limitations – 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. As 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 a 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.

Third, imputed-cost requirements also open the 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 ways that corporations use company-wide assets to collateralize borrowings for their subsidiaries?

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.

f. 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 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.

While it is clear that the special election requirement applies to new construction, it is not clear whether the requirement applies to network expansions. There is an exception to the special election requirement for repairing, rebuilding or improving an "existing" communications network, but this exception could well be construed as not exempting system expansions or extensions. Yet again, important ambiguities such as these create severe problems for municipalities and ultimately discourage broadband investment and competition.

Section 160A-340.4 also forbids the financing or leasing of real property (which could include rights-of-way for a communication network or tower sites) under NCGS §§ 160A-19 and

160A-20. A municipality's ability to build new public safety telecommunications towers, or relocate them, would be adversely affected. Finally, the legislation applies these restrictions to interlocal agreements. Although exempting facilities that are "within the city's jurisdictional boundaries for the city's internal governmental purposes," it is not always clear what a purely "internal governmental purpose" is, and whether a municipality that partners with a county or other local government would be subject to these restrictions. The damaging and restrictive impact on the deployment of public safety communication infrastructure is obvious, because it is commonplace for a municipality to have critical public safety telecommunications towers outside of its jurisdictional boundaries.

3. Impact of Section 160A-340 on Wilson and other municipalities in North Carolina

Section 160A-340.2(c)(3)c sets forth a limited geographic exemption for Wilson.[64] Under this exemption, Wilson need not comply with the restrictions running throughout Section 160A-340, including those summarized above, as long as it does not provide communications services beyond the borders of Wilson County. Wilson cannot provide service outside of Wilson County, even if it were to comply with all of the other restrictions in the statute. The only exception to the geographical limitations imposed on municipalities[65] is for services provided in "unserved" areas outside Wilson County, as defined in Section 160A-340(4). To provide service

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64 The bill as introduced did not contain any form of exemption for Wilson, which would have been subject to all of the restrictions in the bill. *See* H.B. 129, 2011-2012 Leg. Sess. (N.C. 2011) (First Edition).

65 For any municipality other than those specifically listed in in Section 160A-340.2(c), the geographic limitation is the city's corporate limits, as set forth in Section 160A-340(a)(3). For the City of Wilson, the geographical limitation is Wilson County as set forth in Section 160A-340.2(c).

in such areas, Wilson would first have to obtain permission from the North Carolina Utility Commission ("NCUC") under the cumbersome process set forth in Section 160A-340.2(b).[66] In all other cases, if Wilson provided service to even a single customer outside Wilson County, it would have to stop doing so within 30 days of notice or discovery, or it would lose its exemption under Section 160A.340.2(c)(3)c. Without that exception, Wilson would have to stop providing service outside the City of Wilson altogether, and it would have to comply with the other restrictions in the statute just to be able to continue to provide service within the city limits of Wilson.[67]

In reality, the exemption for "unserved" areas is little more than a mirage. As previously discussed, Section 160A-340(4) defines "High speed Internet access service" as "Internet access service with transmission speeds that are equal to or greater than the requirements for basic broadband tier 1 service as defined by the Federal Communications Commission for broadband data gathering and reporting." At most, this translates to transmission speeds of 768 kpbs to 1.5 Mbps in the faster direction. In either case, these speeds are far below the minimum speeds that the Commission currently considers to be "broadband" – 4 Mbps downstream and 1 Mbps upstream.

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66 Even if it managed to qualify for the unserved exemption, before providing service, the City would still have to comply with both Sections 160A-340.3 (requiring public hearings) and 160A-340.6 (requiring the City to solicit proposals for a public-private partnership before offering service).

67 In the unlikely event that Wilson could somehow successfully argue (notwithstanding Section 160A-340.1(a)(3)) that it can expand beyond Wilson County if it complies with the balance of the level playing field provisions, the cumulative effect of the level playing field provisions would, for the reasons stated above, deter and effectively prohibit Wilson from doing so.

But that is only part of the problem. 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." "For the purpose of this subsection," it 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."

In sum, there is no way that Wilson can responsibly invest in broadband infrastructure and provide competitive service outside Wilson County as long as Section 160A-340 remains in effect. As an initial matter, it is not clear which comes first – going to the NCUC pursuant to Section 160A-340.2(b) for permission to extend service in "unserved" areas or conducting the public hearings (and disclosing its confidential proprietary information) that Section 160A-340(3) requires even for "unserved" areas. This ambiguity alone would open the door for disputes that could last for months.

Assuming that Wilson could eventually appear before the NCUC, it 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.[68] Wilson would essentially have to do its own household-by-household polling, which would be prohibitively time-consuming and expensive.

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

[68] For example, the Commission's Form 477 collects data by census tract and does not break down the data by households in the way that the North Carolina law requires.

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.

Finally, given the endless ways of making a critical "error" – including inadequate data, changing household availability patterns, incumbent mischief using information obtained under Section 160A-340.3, and the many opportunities for incumbent providers to challenge a municipality's decisions – it would be imprudent for Wilson and other municipalities to provide services even in areas that are seemingly "unserved." After all, providing service even to a single customer outside Wilson County could cost Wilson its exemption, with the draconian consequences described above. What's more, Wilson might not even have an opportunity to correct such an error, as Section 160A-340.2(3) states that a municipality will lose its exemption if it provides service to even a single customer outside its service area "more than 30 days from the date of notice *or discovery*" – whatever that may mean.

In short, the restrictions in Section 160A-340 pose an insurmountable barrier to broadband investment and competition. In Wilson's case, it simply cannot 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.

"[A]t the end of the day local governments, accountable to local citizens understand their own needs and should have the freedom to find local solutions to local problems. We should not require citizens to beg big corporations to deploy systems when these citizens have the power to take matters into their own hands."[69] Section 160A-340 thoroughly undermines these principles.

III. LEGAL ARGUMENT

A. The Commission has the Authority to Remove Barriers to Public Broadband Investment and to Promote Competition in Local Telecommunications Markets

Section 706, as amended by the Broadband Data Improvement Act of 2008, provides, in pertinent part as follows (with our emphasis added):

> **Section 706. Advanced telecommunications incentives**
>
> (a) **In general.** The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) *by utilizing, in a manner consistent with the public interest, convenience, and necessity*, price cap regulation, regulatory forbearance, *measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment*.
>
> (b) **Inquiry**. The Commission shall, within 30 months after the date of enactment of this Act, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, *the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure*

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69 *See generally* Harold Feld, Gregory Rose, Mark Cooper and Ben Scott, *Connecting the Public: The Truth About Municipal Broadband*, at 2 (2005), http://goo.gl/dHlNsp.

> *investment* and by promoting competition in the telecommunications market.[70]

As the D.C. Circuit recently 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. In fact, in the Joint Conference Report on the Telecommunications Act, Congress *expressly* stated that the Commission could preempt states that, in the Commission's view, were not fulfilling their responsibilities under Section 706(a) fast enough.[71] 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/.[72]

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

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70 47 U.S.C. § 1302. Section (d)(1) defines the term "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."

71 House Conference Report 104-458, 104th Cong, 2d Sess. 182-183 (January 31, 1996) ("The Commission may preempt State commissions if they fail to act to ensure reasonable and timely access.").

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

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.[73] 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."[74]

B. The Commission Should Take Immediate Action to Remove the Barrier to Broadband Investment and Competition Posed By Section 160A-340

As shown in Part II above, Section 160A-340 has the purpose and effect of precluding Wilson from investing in broadband infrastructure and providing competition outside of Wilson County, where residents, government agencies, businesses, and other organizations are clamoring for its broadband investment and its gigabit broadband Internet access and other advanced

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73 *Verizon*, at 638.

74 *Direct Communications Cedar Valley, LLC, et al. v. Federal Communications Commission*, 2014 U.S. App. Lexis U.S. 9637 (10 Cir. 2014), at *76-77.

services. In the absence of Section 160A-340, Wilson would have ample authority under North Carolina law to make such investments where feasible, to respond to the requests of surrounding communities to provide service in at least some areas that are unserved or underserved today, and to provide robust new competition in other areas that are currently underserved. Based on Wilson's experience in its current service area, its entry into new markets is likely to bring multiple significant benefits to the businesses, institutions, and residents of these areas. These include far superior services, lower prices, and support for economic development, education, health care, energy efficiency, public safety and homeland security, environmental protection, and much more. Because the various restrictions in Section 160A-340 operate in tandem to achieve their adverse effects, the Commission can and should preempt Section 160A-340 in its entirety.

As discussed above, in enacting the Telecommunications Act of 1996, Congress was well aware of the critical role that municipalities could play in bringing high-quality communications services and competition to their communities, particularly in unserved and underserved areas. As Senator Lott put it, municipalities can make a "real contribution" in this area, and it is "important that we make sure we have got the right language to accomplish what we wish accomplished here." Coming from a Senate manager of the Telecommunications Act, Senator Lott's words are entitled to substantial weight.[75] In Section 706, Congress did get the language right, and it is now up to the Commission to apply that language.

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[75] *Lewis v. United States*, 445 U.S. 55, 63 (1980) ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight."); *Federal Energy Administration v. Algonquin SNG, Inc*., 426 U.S. 548, 564 (1976) ("Senator Millikin himself stated without contradiction that the Amendment authorized the President... As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute"); *Schwegmann Bros. v. Calvert Distillers Corp.*, 3441 U.S. 384, 394-95 (1951) ("The fears and doubts of the opposition

C. The Supreme Court's decision in *Nixon v. Missouri Municipal League* Does Not Affect the Commission's Authority in this Matter

The Supreme Court's decision in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), provides no impediment to the Commission's exercise of authority under Section 706 to remove the barriers to broadband investment and competition posed by North Carolina General Statute § 160A-340. The *Nixon* decision addressed the preemptive effect of 47 U.S.C. § 253 ("Section 253"),[76] which provides in Section 253(a) that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." The issue before the Court was whether the term "any entity" in this provision covered "the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of such services."[77]

The *Nixon* Court ultimately affirmed the Commission's own finding that the phrase "any entity" did not include subdivisions of a state, and, consequently, did not give authority to the Commission to preempt state laws prohibiting municipalities from providing telecommunications services.

The Court's holding in *Nixon* does not, however, affect the Commission's authority under Section 706 to remove barriers to investment and competition. As shown below, the *Nixon* decision addressed a separate section of the Telecommunications Act that differs from Section

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are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

[76] Section 253 is part of Section 101(a) of the Telecommunications Act of 1996.

[77] *Nixon*, 541 U.S. at 128-29.

706 in several fundamental ways that are highly relevant here. As a result, the Commission should find that *Nixon* does not govern this matter.

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.[78] So, the Court continued,

> To get at Congress's understanding, what is needed is a broader frame of reference, and in this litigation it helps if we ask how Congress could have envisioned the preemption clause actually working if the Commission applied it at the municipal respondents' urging. We think that the strange and indeterminate results of using federal preemption to free public entities from state or local limitations is the key to understanding that Congress used "any entity" with a limited reference to any private entity when it cast the preemption net.[79]

The Court then posed three "hypotheticals" from which it concluded that federal preemption of state barriers to municipal provision of telecommunications services would, in fact, have such "strange and indeterminate results." At the end of its opinion, the Court discussed "a complementary principle [that] would bring us to the same conclusion" – that Section 253(a) did not provide the "clear statement" required by *Gregory v. Ashcroft*, 501 U.S. 452 (1991).[80] As shown below, the *Nixon* Court's analysis does not apply here.

1. The issues addressed in Section 706 differ fundamentally from those addressed in Section 253

The Supreme Court's holding in *Nixon* does not apply here for several reasons. As an initial matter, Section 253 applies solely to "telecommunication service," whereas Section 706 applies to advanced telecommunications capabilities necessary to support broadband access to the

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78 *Id.*, at 132.

79 *Id.* at 132-33 (citation omitted).

80 *Id.*, at 140-41.

Internet. For more than a decade, the Commission and the Supreme Court have treated "telecommunications service" and broadband Internet access service (an "information service") as completely separate and distinct services.[81] For this reason alone, the Commission could rule that *Nixon* does not govern this matter. More important, Congress was attempting to achieve fundamentally different purposes in enacting Sections 253 and 706.

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.[82]

While Congress also sought to stimulate competition among providers of broadband Internet access service, that was not its only goal, or even its most important one, in enacting

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81 *See In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, 2002 WL 407567 (rel. Mar. 15, 2002) ("*Cable Modem Declaratory Ruling*"), *aff'd, Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005). For this reason alone, the *Nixon* decision is not binding on the Commission in this case.

82 *See, e.g., First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd. 15499, 15506, ¶ 4, 1996 WL 452885, *2, ¶ 4 (rel. Aug. 8, 1996) ("[U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications – the local exchange and exchange access markets – to competition is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets. The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.").

Section 706. Rather, Congress's main purpose in enacting Section 706 was "to ensure that one of the primary objectives of the [Telecommunications Act] – to *accelerate deployment* of advanced telecommunications capability – is achieved."[83] This Commission has repeatedly reiterated and elaborated on this point.

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.'"[84] 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."[85] Likewise, in the National Broadband Plan, the Commission recognized that "Broadband is *the* great infrastructure challenge of the early 21st century."[86]

In sum, enabling municipalities to compete with providers of telecommunications services would have been desirable, but 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 municipalities and other public entities.

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83 *Verizon*, 740 F.2d at 639 (quoting S. Rep. No. 104-23, at 50-51) (emphasis added).

84 *Cable Modem Declaratory Ruling*, 17 FCC Rcd. at 4801, ¶ 4, 2002 WL 407567 at *1 (quoting Section 706).

85 *Sixth Broadband Deployment Report*, 25 FCC Rcd. 9556, 9560, ¶ 6, 2010 WL 2862584, *2 (rel. July 20, 2010).

86 *See National Broadband Plan*, at 3 (emphasis in original), available at http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

2. The Commission's pro-active role under Section 706 is fundamentally different from its reactive role under Section 253

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 waits for an allegedly aggrieved entity to file a petition for preemption, and then, after giving the public an opportunity to comment, decides 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.

3. Congress addressed the relationship between the Commission and the States in substantially greater detail in Section 706 than it did in Section 253

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 both the language and legislative history of Section 706, Congress carefully laid out the respective roles of the Commission and the States and left no room for doubt 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.[87] In Section 706(b), Congress required the Commission, and 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.

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. Furthermore, as Congress made clear in the Joint Conference Report accompanying the Telecommunications Act, the Commission had authority to preempt States that, in the Commission's view, were not acting rapidly enough to ensure reasonable and timely deployment.[88]

As the legislative history also shows, 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:

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87 47 U.S.C. § 1302(a).

88 H.R. Conf. Rep. No. 104-458, 104th Cong, 2d Sess., 1996 U.S.C.C.A.N. 10, 182-183, 1996 WL 46795 (Jan 31, 1996).

> We wired the public schools, providing a two-way, high-speed digital link to every classroom in the city. We are now offering high-speed network services for personal computers that give consumers access to the local schools' educational resources and the local libraries. Soon this service will allow banking and shopping from home, as well as access to all local government information and data bases. We are now providing digital telephone service over our system. ….
>
> 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.[89]

As indicated, 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."[90] As indicated, 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 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.

4. *Gregory* does not apply here because this matter does not involve any traditional or fundamental State powers

The *Nixon* Court found that the term "any entity" in Section 253(a) should not be read to cover public entities because it did not meet the "plain statement" standard prescribed by *Gregory v. Ashcroft:*

> [P]reemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, "are created as

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89 *See* 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) (emphasis added).

90 *See id.* at 379, 1994 WL 232976.

> convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 607-608, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) (internal quotation marks, citations, and alterations omitted); *Columbus v. Ours Garage & Wrecker Service, Inc.,* 536 U.S. 424, 433, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires. What we have said already is enough to show that § 253(a) is hardly forthright enough to pass *Gregory:* "ability of any entity" is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms. The want of any "unmistakably clear" statement to that effect, 501 U.S., at 460, 111 S.Ct. 2395, would be fatal to respondents' reading.[91]

In *Gregory*, the Supreme Court had 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.[92] Rather, the intention need only "be plain to anyone reading the Act that it covers [that issue]."[93]

Properly analyzed, *Gregory* and *Nixon* do not apply here because preemption in this case would not affect any traditional or fundamental State power. As an initial matter, this case is similar to *City of Arlington v. Federal Communications Commission*,[94] in which the Court

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91 *Id*., at 140-41.

92 *Gregory*, 501 U.S. at 467.

93 *Id.*

94 *City of Arlington v. Federal Communications Commission*, 133 S. Ct. 1863; 185 L. Ed. 2d 941; 2013 U.S. LEXIS 3838.

rejected an argument that the Commission's 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.[95]

Here, 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. The Commission is solely responsible for defining the relevant terms and standards. Furthermore, as the legislative history of Section 706 makes clear, the Commission has authority to preempt States that it believes are acting too slowly to fulfill their duties under Section 706(a). If the Commission can preempt States failing to act forcefully enough in encouraging rapid deployment of advanced telecommunications capabilities, the Commission can surely preempt States that are actively *blocking* broadband investment and competition. Indeed, the Commission is directed to do so "immediately" under 706(b).

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 in the passage quoted above. Section 160A-340 has nothing to do with municipalities acting in a governmental

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95 2013 U.S. LEXIS 3838, ***26.

capacity but simply seeks to impose restrictions on municipalities acting solely in a commercial, proprietary capacity. Section 160A-340 does not even do what it pretends to do – create a "level playing field" for private and public communications service providers. Rather, as shown in Section II above, it does precisely the opposite and acts as a severe barrier to public broadband investment and competition. In short, Section 160A-340 is simply an anticompetitive device whose purpose and effect is to insulate incumbent service providers from competition from 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.

5. If *Gregory* were applied here, Section 706 would meet its "plain statement" standard

Assuming, without conceding, that *Gregory* applies here, Section 706 clearly meets its "plain statement" standard. First, in contrast to Section 253, which focuses on barriers to entry affecting individual competitive entrants – "any entity" – Section 706 on its face broadly charges the Commission with responsibility for ensuring that "all Americans" receive 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. There is really no other way to read that term, and nothing elsewhere in the Telecommunications Act or its legislative history suggests that a narrower interpretation would be appropriate. For proof of this, one need only ask, "What Americans could Congress have intended to exclude?" Certainly not those Americans living in unserved or underserved rural areas like the ones just outside Wilson's electric service territory, where

residents are clamoring for the advanced telecommunications capabilities and gigabit services that Wilson would provide them if the Commission removed the restrictions of Section 160A-340.

Second, the stated purpose of Section 706 is to ensure that all Americans have access to advanced telecommunications capabilities on a reasonable and timely basis, as determined by the Commission. As discussed above, Congress considered this to be one of the primary goals of the Telecommunications Act, and the Commission has repeatedly recognized that "universal broadband is the great infrastructure challenge of our time and deploying broadband nationwide – particularly in the United States – is a massive undertaking."[96] As Congress must surely have understood, and as this proceeding will confirm, that challenge cannot be met without the participation of municipal entities. That is particularly so in unserved or underserved rural areas like the ones just outside of Wilson's service area, where the private sector is not currently providing – and may never provide – advanced telecommunications capabilities that meet the Commission's minimum standards.

Third, as also discussed above, the pro-active role that Congress assigned to the Commission in Section 706, in contrast to the largely reactive role that it prescribed in Section 253, further reinforces the conclusion that Congress intended the Commission act aggressively to identify and immediately remove *all* barriers to broadband investment and competition, wherever the Commission may find them, including barriers such as the restrictions in Section 160A-340. Congress's grant of broad authority to define the relevant terms, standards, and remedial approaches – limited only by the constraint that the Commission act "in a manner consistent with the public interest, convenience, and necessity" – reaffirms that Congress did not intend to tie the

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96 *Sixth Broadband Deployment Report*, 25 FCC Rcd. 9556, 9560, ¶ 6, 2010 WL 2862584, *2 (rel. July 20, 2010).

Commission's hands in removing barriers to broadband investment and competition like those in Section 160A-340.

The structure of Sections 706(a) and 706(b), particularly their allocation of responsibilities between the Commission and the States, provides yet another clear indication that Congress intended to grant the Commission ample authority as well as the duty to find and immediately remove barriers to broadband investment and competition such as Section 160A-340. So does the legislative history of Section 706, especially Senator Lott's recognition of the key role that municipalities can play in meeting the goals of the Telecommunications Act and the Joint Conference Report's confirmation that the Commission has authority to preempt States that drag their feet in fostering reasonable and timely deployment of advanced telecommunications capabilities.[97]

In sum, the language, purposes, structure, and legislative history of Section 706 all confirm that Congress authorized the Commission to preempt State barriers to municipal broadband investment and competition, including those restrictions in Section 160A-340.

6. The *Nixon* Court's hypotheticals are irrelevant in this matter

In *Nixon*, the Court resorted to hypotheticals only because "concentration on the writing on the page does not produce a persuasive answer."[98] 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 municipal broadband investment and completion, such as the restrictions in Section 160A-340. Simply put,

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97 H.R. Conf. Rep. No. 104-458, 104th Cong, 2d Sess., 1996 U.S.C.C.A.N. 10, 182-183, 1996 WL 46795 (Jan 31, 1996).

98 *Nixon*, 541 U.S., at 132.

Congress did not intend the Commission to sit idly by when faced with such a "paradigmatic barrier to infrastructure investment," as Judge Silberman would later put it. 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 here. That is all the more so because, as the Court found in *Salinas v United States*, 522 U.S. 52, 59-60 (1997), "[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,'" quoting *Gregory*, 501 U.S., at 467.

IV. CONCLUSION

For all of the foregoing reasons, the Commission should preempt Section 160A-340 in its entirety and declare it to be unenforceable.

Respectfully Submitted,

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Wilson, NC 27894-2367

Counsel for the City of Wilson

VERIFICATION

I, William Aycock, General Manager of Greenlight Community Broadband for the City of Wilson, under oath, and under penalty of perjury, I declare under penalty of perjury that I have read the foregoing submission and that the facts set forth in it are true and correct to the best of my knowledge and belief.

William Aycock

7/22/14
Date

VERIFICATION

I, James Baller, Senior Principal of the Baller Herbst Law Group, PC, under oath, and under penalty of perjury, declare that I have read the foregoing submission and to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose..

James Baller

July 24, 2014
Date

CERIFICATE OF SERVICE

I, James Baller, certify that on July 24, 2014, I caused a copy of the foregoing Petition to be served by registered U.S. mail, postage prepaid, on:

Roy Cooper, Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

James Baller

ATTACHMENT A

SECTION-BY-SECTION ANALYSIS OF SECTION 160A-340

SECTION-BY-SECTION ANALYSIS OF SECTION 160A-340

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

SESSION LAW 2011-84
HOUSE BILL 129

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

"Article 16A.
"Provision of Communications Service by Cities.

"**§ 160A-340. Definitions.**

The following definitions apply in this Article:

(1) City-owned communications service provider. – A city that provides communications service using a communications network, whether directly, indirectly, or through an interlocal agreement or a joint agency.

(2) Communications network. – A wired or wireless network for the provision of communications service.

(3) Communications service. – The provision of cable, video programming, telecommunications, broadband, or high-speed Internet access service to the public, or any sector of the public, for a fee, regardless of the technology used to deliver the service. The terms "cable service," "telecommunications service," and "video programming service" have the same meanings as in G.S. 105-164.3. The following is not considered the provision of communications service:

a. The sharing of data or voice between governmental entities for internal governmental purposes.

b. The remote reading or polling of data from utility or parking meters, or the provisioning of energy demand reduction or smart grid services for an electric, water, or sewer system.

c. The provision of free services to the public or a subset thereof.

(4) High-speed Internet access service. – Internet access service with transmission speeds that are equal to or greater than the requirements for

basic broadband tier 1 service as defined by the Federal Communications Commission for broadband data gathering and reporting.

(5) Interlocal agreement. – An agreement between units of local government as authorized by Part 1 of Article 20 of Chapter 160A of the General Statutes.

(6) Joint agency. – A joint agency created under Part 1 of Article 20 of Chapter 160A of the General Statutes.

WILSON EXHIBIT 1

Alert Cable Television – Rebuild Proposal

ALERT CABLE TV OF WILSON, INC.

PRESENTATION SUMMARY
FOR THE CITY OF WILSON
OCTOBER 4, 1990

WILSON REBUILD - PROJECT DESCRIPTION

Alert Cable TV of Wilson and its parent company, Cablevision Industries, are prepared to meet their franchise commitment to rebuild the Wilson cable system to 60-channel capacity.

Although the Company's initial plan was to utilize conventional methods for the system rebuild, those plans were scrapped earlier this year in favor of the newest technology -- fiber optics.

Optical fiber cable has less signal loss than conventional coaxial cable, by a factor of 50 to 100. This means that fewer pieces of electronic equipment are needed between the signal origination point (the system's headend) and the customer's TV set.

The resulting benefits are:

Significantly better system reliability
(fewer service interruptions) and

Higher quality signal reception.

Optical fiber cable also has a bandwidth, or information conveying capacity, that is 50 times greater than the best premium coaxial cable available today. Use of fiber optics will position the Wilson system with a greater capacity for future services.

The Wilson system will use fiber optics to transmit optical signals from the system headend to six remote optical receivers, then distribute electronic signals to customers via coaxial cable and conventional electronics.

The full, turnkey fiber optic system will be provided by Sumitomo Electric Fiber Optics Corp. of Research Triangle Park. Sumitomo has extensive experience in fiber optics and Cable TV. Optical fibers and cables used in the Wilson project will be manufactured at Sumitomo's North Carolina facility in Research Triangle Park.

MINIMIZING SERVICE DISRUPTIONS DURING CONSTRUCTION

The construction stages beginning later this month will, in some cases, involve bringing all or part of the cable system "down" -- turning it off. Customers can expect some disruption of service when we begin the process, and throughout, in different phases. Virtually all customers will be affected during the early stage, with trunk construction on the "E" node. After that, the number of customers affected will taper off, affecting smaller numbers (by neighborhood or by streets) as we work through distribution construction and transfer of subscriber connections ("drops").

The Company will take specific steps to conduct its work with as little disruption as possible, including the following measures:

1. When it is necessary to turn the entire system off, construction work will be scheduled between the hours of midnight and 6:00 a.m. Every effort will be made to restore service throughout affected areas by 7:00 a.m.

2. Late-night work will be limited to Sunday through Thursday nights, to avoid interrupting weekend viewing.

3. During daytime construction there may be service interruptions of up to three hours for some customers; however, construction work will be completed each day by 4:00 p.m., so service can be restored by 6:00 p.m.

4. No construction work will be conducted between the hours of 6:00 p.m. and midnight.

5. Door hangers will be distributed in affected areas prior to beginning work that might lead to service interruptions.

6. Where crews will be conducting underground construction, residents will be advised by letter.

7. Construction supervisors will communicate regularly with the City Police Department, advising them of the work schedule and specific streets where night work will be conducted. The Police Department will be given telephone numbers of key supervisory personnel.

8. Supervisors will be on-site during periods of construction.

COMMUNICATING WITH OUR CUSTOMERS

We have developed a customer relations campaign to be used throughout the rebuild project, designed to inform our customers of the project's status.

The campaign theme, **"Picture the Best for Wilson,"** will be used to explain the benefits of the project and up-date customers on our progress.

Elements of the campaign are:

1. Regular inserts in the Wilson Daily Times, including a map showing progress and areas under construction.

2. Print ads in the Wilson Daily Times, introducing the project and the campaign.

3. Advertisements on various cable system channels.

4. Announcements on the cable system's bulletin board channel.

5. Door hangers to be distributed prior to commencement of construction in affected areas.

6. Printed material available at the Customer Service counter in our business office.

IMPROVING CUSTOMER SERVICE

We have evaluated our customer service and taken the following steps toward improvement:

1. Consolidated phone lines to provide six lines for billing, service and sales.

2. Moved the converter exchange area to the first floor, for greater customer ease.

3. Begun renovations of the Customer Service Department to provide a more pleasant environment for our customers.

4. Plans are in place to redesign our Customer Service Counter to accommodate an additional Service Representative, to better serve our customers who choose to do business in person.

5. Increased our Customer Service staff, to a total of six Customer Service Representatives.

6. Currently searching for an answering service to replace our after-hours answering machine, to provide more efficient handling of night-time service calls.

We will continue our efforts to improve service and provide the Quality Customer Care our subscribers deserve.

Alert Cable TV of Wilson and Cablevision Industries are committed to bringing the finest cable television system and service to the residents of Wilson.

WILSON EXHIBIT 2

Letter to the Editor,
City's Infrastructure Important to the Bank

OPINION

Letter to the Editor

City's infrastructure is important to bank

BB&T was founded by Alpheus Branch in 1872, right here in Wilson, North Carolina. Both the bank and the community have seen a lot of change over the years, but one thing has held constant: What is good for Wilson is good for BB&T.

Great things are happening in Wilson. Announcements of industries locating and expanding here, the economic study ranking the city of Wilson as the number one micropolitan area in our state, and rapid retail, commercial and residential growth are all indicators of the positives momentum our community I experiencing.

Our success would not be possible without infrastructure. There is no doubt than an abundant water supply, strong utility systems, and good roads and highways and rail service have helped create an environment in which businesses can succeed and prosper. As businesses grow, more jobs are created, and the people of Wilson enjoy a higher quality of life.

The city of Wilson is considering a bold investment in new infrastructure, by expanding the city's fiber optic network and making it available to businesses, industries and homes throughout our city. The banking industry, like many others, is becoming increasingly reliant on the ability to transfer information and communicate with incredible speed through secure, dependable infrastructure.

The project under consideration by City Council will take communications to a new level and should provide Wilson a strategic advantage that will go unnoticed by business world.

The infrastructure of tomorrow will look quite different from the infrastructure of the past, and our nation's economy rewards leaders in new technology. The city of Wilson has a proven track record of sound infrastructure investments, and BB&T supports the City Council as they consider this new initiative.

Leon Wilson
Kingswood Road

THE WRITER *is senior executive vice president and operations division manager at BB&T.*

Letters solicited

The Daily Times welcomes opinions from readers on topics of public interest. Because of space considerations, letters should be no more than 400 words in length. Letters that promote a commercial product, those thanking individuals for personal assistance, those containing libelous material or personal attacks on individuals, those containing comments in bad taste and those addressed to a third party will not be published.

Letters must be signed and should contain the writer's address. A telephone number, which will not be published, should be included for verification purposes.

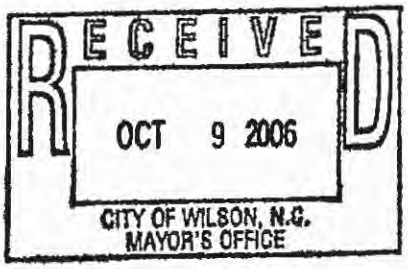
Letters may be mailed to P.O. Box 2447, Wilson, N.C. 27894, faxed to 252-243-7501 or e-mailed to letters@wilsondaily.com.

WILSON EXHIBIT 3

Letter from President
Wilson Technical Community College

Wilson Technical Community College

902 Herring Avenue (27893-3310) • P.O. Box 4305 • Wilson, NC 27893-0305 • (252) 291-1195 • FAX: (252) 243-7148



October 6, 2006

The Honorable C. Bruce Rose
Mayor, City of Wilson
P. O. Box 10
Wilson, NC 27894

Dear Mayor Rose:

Wilson Technical Community College (WTCC) is enthusiastic about the possibility of becoming a partner with the City and having access to the new fiber-optics initiative. This innovative and visionary infrastructure arrives at a fortuitous time to support many of the activities either underway or planned as WTCC expands its digital services to students and the community.

WTCC is a leader among community colleges in the state in the number of students and variety of courses that employ the new technology of distance learning. Online services soon to be added include registration, fee and tuition payment, career counseling, transcript origination, and online access to the College store.

In order to complete the suite of services available to the online student, Wilson Technical Community College will need greatly enhanced bandwidth. Within this context, the College plans a progressively expanded, signal-rich wireless footprint to cover the entire campus and significant portions of the area around the College. Our demographic studies show the great majority of our students, who reside in the county, live within a seven-mile radius of the campus. As we move to the time when a major point of entry for any campus activity or service will be the Web, it will be important that we expand both the Web as an infrastructure and the services it conveys. The wireless domain that can be supported by the proposed fiber optics system will dramatically enhance the availability of these services.

Lastly and most importantly, WTCC has clear evidence that the digital divide is very much a factor in Wilson. A significant number of the people in our community and a proportionate number of the students at the College simply do not have access to the digital communications infrastructure and are, therefore by definition, denied the content of the World Wide Web. We must find a way to enfranchise those in our community who find themselves without the enabling infrastructure that would permit them to bridge the digital divide and to access not only the web based learning and service programs of the College but also the larger aspects of a society that will increasingly have primary access to its essential functions residing on the Web.

We look forward to opportunities to join and support this initiative and deem its fruition as nothing less than requisite to the long-term development of our community.

I thank you, the City Council, and Mr. Goings and his team for the farsighted leadership that is bringing this critical infrastructure to the people of Wilson.

Warmest regards,

Rusty Stephens, Ed.D.
President
(252) 246-1223

RS/db

cc: Grant W. Goings, City Manager
Jerry Dorsey, Chair, WTCC Board of Trustees

WILSON EXHIBIT 4

City Keeps Strong Bond Rating

News

City keeps strong bond rating, saves money

Wednesday, June 11, 2014

One of the nation's top credit rating agencies announced this week that it will maintain the City of Wilson's strong bond rating.

The ruling by Moody's Investors Service means it believes the city to be in great financial shape and easily able to pay its debts. A good bond rating ultimately saves the city money because it allows it to borrow money at lower interest rates.

Moody's announced two decisions Tuesday.

- It had affirmed the Aa2 rating on the City of Wilson's (NC) $11.1 million General Obligation (GO) bonds. The bonds are secured by the city's unlimited ad valorem tax pledge.
- It has affirmed the A1 rating on the city's $56.2 million outstanding rated Certificate of Participation (COPs), Series 2007 and Series 2008.

Both ratings fall in Moody's "high quality" scale. That means the city has "very strong credit worthiness" when compared to other municipal or tax-exempt bond issuers.

"This is great news, but I expected no less from our staff," Mayor Bruce Rose said Wednesday. "We have an outstanding city manager, and the finance department has been extremely strong and detail-oriented the whole time I have been mayor."

City Manager Grant Goings paid tribute to Finance Director Kim Hands and her staff. "A lot of hard work went into this effort to uphold our rating," he said Wednesday.

Moody's recently completed an extensive review of the city's financial conditions. Its findings suggest the city's tax base has been growing by an average of 4.2 percent over the past five years, and that growth is likely to continue.

The evaluators were also impressed with how the city had moved from a primarily agriculture and tobacco-based economy to one that's more diverse. Targeted economic development programs have attracted industries such as pharmaceuticals and automotive parts. Moody's foresees continued growth as long as the city has available land and resources to sustain the growth.

Wilson was credited with continuously exercising conservative budgeting practice. The city's fiscal performance will likely remain solid given this history of prudent budgeting practice.

The City was also recognized for their broadband network, Greenlight, which supports nearly 7,000 external customers, representing a total market penetration of 33.7 percent. Greenlight has grown at an average annual rate of 3.8 percent since 2009. The reliability and efficiency of services provided has driven customer growth and has resulted in steady revenue increase since the system launched in 2009.

Moody's is one of the Big Three crediting rating agencies, along with Standard & Poor's and Fitch Group, that evaluate the creditworthiness of public and commercial borrowers. Each agency issues ratings on a 10-point scale, although the names of the grades vary.

WILSON EXHIBIT 5

Editorial, At the Speed of Light,
Wilson Daily Times

Friday, Oct. 6, 2006

At the speed of light

By Matthew Shaw

Daily Times Staff Writer

Could little glass strands change Wilson?

City officials believe fiberoptic lines could be nearly as important to Wilson's future as water, sewer and other infrastructure. That's why the City Council is considering spending nearly $28 million on a Fiber to the Premises network.

Wilson would be the first city in North Carolina to run fiberoptic lines throughout its municipal limits. The city would pay for those lines by selling Internet, cable television and phone service to city residents and businesses.

The network could help the city attract new businesses and jobs, change how students are educated here, and open a world of information to Wilson's residents and businesses, City Manager Grant Goings said this week.

But those lines could lead somewhere else — into court or a battle at the N.C. General Assembly.

A spokesman for Embarq, which sells local telephone and Internet services, says what the city is considering is illegal. It could also be more expensive than what the city expects, he said.

"We would love the opportunity to talk with the City Council about what services are already available," Tom Matthews said Friday. "If you don't know the whole story, it's easy to get swept up in the momentum."

The City Council will hold a work session later this month to consider a business plan for the construction of the fiberoptic network. Council was briefed on the plan last month but hasn't discussed it yet.

UNLIMITED POTENTIAL

Uptown Services LLC, the city's consulting firm, talked primarily at the Sept. 21 meeting about the potential of selling cable, Internet and telephone services.

But those are only scratching the surface of how FTTP would change Wilson, Goings said this week. "We are just beginning to see the possibilities."

Goings met this week with the leaders of the county school system, Barton College, Wilson Technical Community College and Wilson Medical Center to brainstorm on how their organizations might benefit from broadband connections.

Imagine your doctor having a direct link to East Carolina University's medical school, allowing live consultation on your medical history and condition.

Wilson students could attend classes being taught anywhere in the world, ask questions and get answers, without stepping outside the city limits.

The world's libraries, film and video collections could all be searched, materials downloaded in seconds or minutes.

These are benefits that city residents would realize almost immediately, officials say. What lies beyond, no one can say.

Dathan Shows, the city's director of technical services, said, "Think about when the city electrified. This will almost be that radical a change."

He added, "If you had asked Joe Citizen in 1890, 'What are you going to do with electricity?,' he would have had no idea. But the uses come along pretty fast and who can live without electricity these days?"

ECONOMIC DEVELOPMENT TOOL

Businesses and industries already understand the importance of fiber connections, Shows said.

They know that they could have dedicated strands that would provide direct links between offices, invulnerable to Internet hackers, he said.

A fiber network has redundancy designed into it, which means that should a line break, all traffic would be almost instantly rerouted. "Being connected 95 percent of the time does them no good; they want to be assured they'll be up 100 percent," he said.

Fiberoptic systems have boosted economic development efforts elsewhere.

A 2005 study by researchers at Carnegie Mellon University and Massachusetts Institute of Technology found:

* Communities that were mass-marketing broadband services in 1999 had added more jobs by 2002 than had other communities. Broadband seemed to add about 1 percent to these areas' annual job growth rate.

* Broadband communities saw larger increases in their total number of businesses, particularly technology-intensive businesses, than had others.

* Property values increased as much as 6 percent in a year after broadband services were introduced.

The study could not determine any effect on wages in those communities.

CHALLENGES AHEAD

A FTTP network wouldn't be easy or cheap to build, officials said. And a political fight would be likely once the N.C. General Assembly convenes in early 2007.

The city has already strung more than 30 miles of fiberoptic lines that link city offices and utility outposts, such as electrical substations. It also owns the utility poles, bucket trucks, a billing system that already goes to every city address and other necessities.

But a true FTTP network would run fiberoptic lines down every city street, hundreds of miles of fiber. The city would have to build a network operations center, plus wiring and other equipment to connect to individual homes or businesses.

A business plan, developed by Uptown Services LLC., projects that Wilson would need more than $27,700,000 to build the system out to the city limits.

The only way to pay for that would be to sell cable television, Internet and phone services — called the "triple play" in FTTP communities. City officials believe they could offer those at a discount on what local residents pay now and even greater savings if they buy all three.

Wilson would be the first N.C. city to build a FTTP network, according to the N.C. League of Municipalities. Salisbury is also investigating the possibility, but it has more logistical problems to overcome than Wilson, according to Michael Crowell, Salisbury's technical services director.

Nationally, however, more than 665 cities and towns sell some form of broadband services, according to the American Public Power Association.

And in nearly every state, private telecommunication firms have fought them every step of the way. Some have sued the municipalities directly, but others have gone to the state legislatures and sought legislation to prohibit or limit these municipal networks.

Fourteen states have enacted laws that make it tough, if not impossible, for cities to market broadband services. The association tracks such legislation on its website, www.APPAnet.org.

POTENTIAL ROADBLOCKS

In fact, North Carolina's Umstead Act prohibits the state government or its agencies from competing with private companies, said Matthews, the Embarq spokesman. "That's going to be Wilson's biggest challenge, the state law barring them from getting into the business."

Wilson could seek an exception from the N.C. General Assembly, Matthews said.

City officials say that the N.C. Supreme Court has already upheld the city of Laurinburg's right to sell fiberoptic services to a private company after it was sued by BellSouth. "That set a precedent," Goings said.

Also, in 2005 the General Assembly approved statewide franchising for cable television providers. That is a sign that the state wants to encourage more competition, not less, which is what Wilson might provide, Shows said.

But Matthews questioned if it would be worthwhile, given the availability of high-speed Internet throughout the county. Embarq has more than 7,300 miles worth of fiber in Wilson County, about $84 million of infrastructure, he said.

The company can provide DSL service up to 5 mbps to 90 percent of the addresses in the city and 77 percent in the county. The company also has customers here who have 10 mbps service, 100 mbps, even a gigabit service, he said.

"It doesn't make economic sense for us to run fiber to consumer premises in most cases," he said, adding, "It could be a real stretch for them (the City Council) to have to install the necessary infrastructure without some significant debt that would be on taxpayers' backs."

Brad Phillips, vice president for public affairs for Time Warner, said Friday that he has reviewed the city's business plan.

"I really don't see anything in the plan that's not already being offered by Time Warner right now," Phillips said. "We have a cable system with 400 channels, high speed Internet, digital phone service, all with great quality and reliability and at a great price.

"I don't see why they would want to spend all that money if they wouldn't be getting anything new."

mshaw@wilsondaily.com | 265-7878

WILSON EXHIBIT 6

City of Wilson Defends Research of Fiber Optic Potential

News Release ***News Release*** ***News Release***

FOR IMMEDIATE RELEASE
CONTACT: Brian Bowman
(252) 296.3341
October 9, 2006

City of Wilson Defends Research of Fiber Optic Network Potential

WILSON, NC – The City of Wilson announced today, it will continue to research the potential of the city's fiber optic network. The move comes in an effort to improve the city's infrastructure, education potential and economic development competitiveness as was reported in a Wilson Daily News article on October 7, 2006.

Wilson City Manager, Grant Goings, says that despite public criticism from two private vendors in that same article, the overwhelming response has been very positive. Goings goes on to defend the city's exploration of its fiber network by stating; "As city officials, it is our responsibility to address issues relevant to the well-being and future of our community. We want to make sure we have the best infrastructure, which includes the technology to compete in a global society. This is about the city's future growth."

Also in the article, one vendor accused the city of violating the Umstead Act. "Not so," says Wilson City Attorney, Jim Cauley, "Nothing in the Umstead Act, the law cited by the spokesman for Embarq, prevents the City of Wilson from directly supplying cable and internet to its citizens. In fact, cities and counties are specifically excluded from the provisions of the Umstead Act."

Dathan Shows, City of Wilson Director of Technical Services says it's naïve to think an existing vendor can provide the quality of services capable of being provided through a fiber optic network; "The reason the city decided to explore this potential is because there was, and is, no private vendor offering the quality, reliability and coverage area that the city's fiber optic network could provide."

The Wilson City Council will hold a work session later this month to consider a business plan for construction of the expanded construction of the fiber optic network.

More information on the City of Wilson and its services is available at the city's website: www.wilsonnc.org or call Brian Bowman at 252-296-3341.

- Nothing in the Umstead Act, the law cited by the spokesman for Embarq, prevents the City of Wilson from directly supplying cable and internet to its citizens. In fact, cities and counties are specifically excluded from the provisions of the Umstead Act.

- Cities have express legal authority to operate ceratin public enterprises, including cable television systems.

- The Telecoms have argued unsuccessfully at every level of our State courts that municipalities do not have the authority to operate fiber optic systems. In 2005, the courts said clearly that the City of Laurinburg was acting within its municipal authority to operate a fiber optic network.

- The Telecoms' mantra in the General Assembly last summer was that increased competition is a good thing that will drive down the cost of telecommunication services. Now faced with the possibility of a competing provider offereing a service four times faster, less expensive, and to all citizens, the response from the private companies is to mislead the public by citing a law that does not apply to municipalities to say that the City cannot compete with them.

- The City of Wilson has been providing it citizens with services that the private sector would not or could not adequately supply for more than a century. The Council is now considering a service that could be as important for Wilson in the next century as electricity was 100 years ago.

WILSON EXHIBIT 7

Time Warner Public Records Request

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FOUNDED 1897

AUBREY L BROOKS (1872-1958)
W H HOLDERNESS (1904-1985)
L P McLENDON (1890-1968)
KENNETH M BRIM (1888-1974)
C T LEONARD, JR (1928-1983)
CLAUDE C PIERCE (1913-1988)
THORNTON H BROOKS (1912-1988)
O NEIL DANIELS (1911-1997)
HUBERT HUMPHREY (1926-2003)

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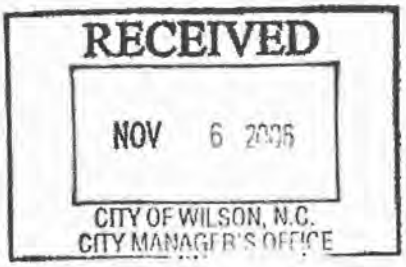
WRITER'S DIRECT DIAL

November 3, 2006



Mr. Grant W. Goings
Wilson City Manager
Post Office Box 10
Wilson, NC 27894-0010

Dear Mr. Goings:

I write on behalf of our client, Time Warner Cable ("TWC"), to request that the City of Wilson (the "City") provide TWC with copies of certain public records pursuant to N.C. GEN. STAT. § 132-6 (custodian of public records "shall permit any record in the custodian's custody to be inspected and examined ... by any person."). These public records are possessed or maintained by the City and concern financial information relating to the City's potential construction of a fiber to the premises ("FTTP") network (the "FTTP Network").

Specifically, TWC requests that you send it or allow it to inspect and copy the following documents or categories of documents:

(1) All reports, correspondence, and documentation relating to the business plan titled the "Wilson, North Carolina Municipal Broadband Business Plan – Presentation of Findings," (the "Plan") by Uptown Services, LLC ("Uptown"), including, without limitation, copies of all reports, correspondence, and documentation supporting, discussing, or underlying purchase intent bench marking, sample product plans, broadband video and telephone services, business case

assumptions, capital expenditure assumptions, financial assumptions, business case results, and findings in the Plan.

(2) Any contract the City has or has had with Uptown, along with related documentation, including without limitation invoices, correspondence, estimates, and information pertaining to third party service providers.

(3) Minutes of any meeting, whether closed or open, in which the City Council or any committee thereof discussed the FTTP Network, and any documentation concerning the FTTP Network reviewed or considered by any City Council members in relation to such meeting(s).

(4) Documents evidencing or discussing how the City would pay for or otherwise finance construction or acquisition of the FTTP Network, including without limitation, documents evidencing or discussing any proposed loan(s) from city funds to construct or support the FTTP Network, or any other financial subsidization of the FTTP Network (either directly or indirectly) by the City.

(5) Documents evidencing or discussing whether expenses are projected to exceed revenues with respect to the FTTP Network in FY 2006-2007 or at any time thereafter.

(6) Documents evidencing or discussing how the City paid for or otherwise financed construction or acquisition of its current fiber optic network (the "Current Network"), including without limitation, documents relating to the City's accounting treatment of the acquisition and operating expenses associated with the Current Network, and documents prepared by the City's accountants or auditors (whether external or internal) and relating to the Current Network, whether audited or unaudited, interim or final.

(7) Any debt or other financing or budgets approved by the City Council, used to acquire, operate, or upgrade the Current Network, including, without limitation, documents relating to payments made upon any such debt(s) and the City's accounting treatment of those payments.

(8) Documents evidencing or describing the City's annual budget, annual revenues, and annual expenses with relation to the Current Network from the time the Current Network was acquired to the present.

TWC requests the opportunity to inspect these documents as soon as possible.

As you know, public records compiled or maintained by the agencies or subdivisions of North Carolina—including cities and their departments—"are the property of the people." N.C. GEN. STAT. § 132-1(b). Access to those public records is governed generally by the Public Records Act, codified as Chapter 132 of the North Carolina General Statutes. Chapter 132 provides for liberal access to public records. *See News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992). Absent "clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *Id.*, 330 N.C. at 486, 412 S.E.2d at 19. The term "public records," as used in G.S. § 132-1, includes all documents and papers made or received by a government entity in the course of conducting its public business. N.C. GEN. STAT. § 132-1(a). A custodian of such "public records" has no discretion to prevent public inspection and copying of such records. N.C. GEN. STAT. § 132-6.

If you contend that the City has any documents falling within the categories listed above that you believe are exempt from disclosure under any provision of North Carolina law, please inform me immediately. With respect to any such documents, TWC requests that you identify each specific document withheld and, with respect to each such document, that you explain your basis for withholding the document.

If you have any questions regarding this matter, please do not hesitate to contact me. Otherwise, we look forward to your prompt response to this request.

Sincerely,

Mark J. Prak

cc: Mr. Tom Adams

- The bill applies to any "communications service" provided by a city to any "sector of the public" for a "fee," effectively prohibiting the provision of many communications services by municipalities. It does so by:
    - Defining "communications service" as broadly as possible (including wireline and wireless services and services provided via lines or facilities leased from third-party private providers)
    - Failing to define or limit "fees" (meaning that private providers can challenge municipal cost sharing arrangements and even allocations of communications costs to city departments, claiming that such arrangements or practices constitute fees, thereby subjecting them to many prohibitions and restrictions of the bill)
    - Applying the bill's many prohibitions and restrictions in any instance where a city provides a communications service to any "sector of the public" for a fee (see above) without in any way defining or limiting the term "sector of the public"
    - Providing only narrow and ambiguous exceptions to the bill's sweeping coverage
- Subsection (3) fails to provide a clear exemption for internal networks. This section uses words like "sharing," "data" and "governmental purposes" that are ambiguous terms and therefore raise questions about the legitimacy and lawfulness of common-place communications networks and services that cross jurisdictional boundaries (*e.g,* one-way transmission of video signals, dispatched public safety radio signals, management of SCADA networks for arguably proprietary systems like a power distribution system).
- Basic broadband Tier 1 service was defined by the FCC as 1.5Mbps in the fastest direction. Establishing such a low level hampers a City's ability to provide service to unserved areas, which will not qualify for such unless more than 50% of households in each individual census block do not even have this meager service.
- Establishing a standard of 50% of the households per census block sets up two barriers: 1) requires the community to finance its own broadband availability study because the NTIA does not present broadband data in terms of households within census block, (NTIA allows the industry to report all the homes in a census block as "served" if it believes it can serve one home in that census block in 7-10 business days); and 2) ties exemptions to one census block at a time; forcing a potential checker board of tiny exempt areas and an impossible terrain in which to deploy with any reasonable expectation for critical mass of demand.

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

(a) A city-owned communications service provider shall meet all of the following requirements:

(1) Comply in its provision of communications service with all local, State, and federal laws, regulations, or other requirements applicable to the provision of the communications service if provided by a private communications service provider.

- Requiring a public entity to meet all local, State, and federal requirements that a private entity would have to meet is problematic in many ways. First, this requirement is inconsistent with the stated goal of achieving a "level playing field," because imposing all private-sector requirements on public entities without at the same time imposing all

public-sector requirements on private entities decidedly tips the playing field in favor of private entities. Second, there are many areas in which public entities have obligations that are comparable to those that private entities must meet, so that imposing all private-sector obligations on public entities would result in double burdens on the public entities. The legislation seems to recognize this, as it later has a provision requiring public entities to make "payments in lieu of taxes" (PILOT) to the local government. Third, such a vague and amorphous requirement is likely to lead to endless time-consuming and costly disputes about whether the public entity has in fact complied with it. For example, with what kinds of private entities should the public entity compare itself? Should it be a for-profit or a non-profit private entity? A dominant ILEC? A non-dominant ILEC? A CLEC? A cable company? All of these entities are subject to different rules. These examples show the difficulty the City of Wilson would be faced with if they were forced to comply with this section.

- The ambiguity of this provision creates a barrier to the municipality obtaining financing to build the network. This is because the ambiguity of the language places the municipality at a higher risk for easy legal assault by its competitor, making the municipal infrastructure less attractive for outside investment due to the inherent costs and delays of litigation.

(2) In accordance with the provisions of Chapter 159 of the General Statutes, the Local Government Finance Act, establish one or more separate enterprise funds for the provision of communications service, use the enterprise funds to separately account for revenues, expenses, property, and source of investment dollars associated with the provision of communications service, and prepare and publish an independent annual report and audit in accordance with generally accepted accounting principles that reflect the fully allocated cost of providing the communications service, including all direct and indirect costs. An annual independent audit conducted under G.S. 159-34 and submitted to the Local Government Commission satisfies the audit requirement of this subdivision.

- In a competitive market, any additional burdens or tasks required of the municipality and not of the private sector competitor, which would necessarily require additional staff time, an auditor and other costs, would have anticompetitive effects. Having to prepare an additional independent annual report and audit is an unnecessary and burdensome requirement (and one that the private entities are not required to do). The ambiguous terms of a number of these categories expose the municipality to frivolous legal assaults by its competitors and further delay, add costs, and redirect resources away from building the municipal network.

(3) Limit the provision of communications service to within the corporate limits of the city providing the communications service.

- The age-old truism applicable to corporations is that growth is necessary for survival. This legal provision imposes an artificial geographic barrier against reasonable growth on city-provided services to which its private sector competitors are not subject. It denies the public provider the larger-scale operational efficiencies that its private sector competitor enjoys, which are so critical when distributing broadband services where aggregating demand leads to lower cost per megabit. Denying these larger-scale efficiencies, such as utilizing revenues drawn from denser service areas to off-set lower revenues in less-dense, lower income areas denies regional growth and economic development opportunities not currently available.
- This provision also specifically restricts a city from providing services to the typically more rural, lower income, and underserved areas outside its municipal borders that are passed over by the incumbent providers because they are deemed not profitable.

(4) Shall not, directly or indirectly, under the powers of a city, exercise power or authority in any area, including zoning or land-use regulation, or exercise power to withhold or delay the provision of monopoly utility service, to require any person, including residents of a particular development, to use or subscribe to any communications service provided by the city-owned communications service provider.

- Existing laws already limit the ability of a city to withhold utility services.

(5) Shall provide nondiscriminatory access to private communications service providers on a first-come, first-served basis to rights-of-way, poles, or conduits owned, leased, or operated by the city unless the facilities have insufficient capacity for the access and additional capacity cannot reasonably be added to the facilities. For purposes of this subdivision, the term "nondiscriminatory access" means that, at a minimum, access shall be granted on the same terms and conditions as that given to a city-owned communications service provider.

- This provision would require that in any case where the city is leasing a pole, conduit or right-of-way from a third party, it must grant another communications provider the right to use that third party's property.
- This appears to constitute an uncompensated taking of property.
- This provision is also difficult to reconcile with existing legislation that imposes strict regulations on the fees that a municipality may charge a private communications service provider for the use of its poles and conduits (Chapter 62-350).
- This provision also basically requires "free access" to city owned or leased poles, conduit, rights-of-way etc., by defining non-discriminatory access as "the same terms and conditions as apply to the city." A city (the public) generally does not charge itself for something it owns or has already acquired. It would also require the city to allow the private providers equal priority to establish connections to poles it owns and installed itself for its own utilities.

- This provision is also an effective prohibition on a municipality engaging in the deployment of broadband network because it would force the City to act in breach of North Carolina law. The requirement to share public property with the private sector is in violation of existing NC law, which permits cities to enter into contracts with private parties only if the activity covered by the contract involves a public purpose that the city is authorized to carry out (G.S. § 160A-20.1). This provision requires that the City in essence give access to public facilities for private purposes.
- Under the bill's right of access provision, a private provider has the right to:
    - Use the city's basic communications infrastructure to build its own system regardless of the damage such use would do to municipal property or the unfairness of making the city's taxpayers subsidize a private business.
    - Use lines leased by the city from other private providers or conduit installed by a third party simply because that conduit contains a city-owned or leased line.
    - Use channels or transmission capacity on a municipal cable or broadband system to serve its own customers, often without any obligation to reimburse the city for the cost of that use.
    - Involve NCUC in micromanaging city operation and use of its communications infrastructure

(6) Shall not air advertisements or other promotions for the city-owned communications service on a public, educational, or governmental access channel if the city requires another communications service provider to carry the channel. The city shall not use city resources that are not allocated for cost accounting purposes to the city-owned communications service to promote city-owned communications service in comparison to private services or, directly or indirectly, require city employees, officers, or contractors to purchase city services.

- The prohibition on advertising and promotions over PEG channels is overkill and irrelevant to a so-called attempt to achieve a level playing field, as the incumbents advertise and promote themselves extensively over their own networks.
- It could also lead to constant disputes as to what constitutes "advertisements" or "promotions."
- This section also violates federal law which prohibits states from regulation the content of cable service channels except as expressly authorized by federal law (47. U.S.C. §544).

(7) Shall not subsidize the provision of communications service with funds from any other noncommunications service, operation, or other revenue source, including any funds or revenue generated from electric, gas, water, sewer, or garbage services.

- This prohibition on subsidies for communications services that are incorporated into other utility services like smart meters or metering would effectively preclude municipalities from providing those types of vital services.
- Enforcing these new rate regulation rules would require NCUC to micromanage basic municipal operations.
- Would bar municipalities from using federal funds and 911 fees for public safety networks because of the prohibition on the use of "other revenue source(s)" to finance the construction or operation of municipal communications networks or the provision of communications services by a municipality. This same provision also bars a municipality from entering into cost-sharing partnership arrangements with other municipalities, counties, local hospitals, and school districts to provide communications services or networks if they somehow could overcome the bill's ban on extraterritorial operations.

> (8) Shall not price any communications service below the cost of providing the service, including any direct or indirect subsidies received by the city-owned communications service provider and allocation of costs associated with any shared use of buildings, equipment, vehicles, and personnel with other city departments. The city shall, in calculating the costs of providing the communications service, impute (i) the cost of the capital component that is equivalent to the cost of capital available to private communications service providers in the same locality and (ii) an amount equal to all taxes, including property taxes, licenses, fees, and other assessments that would apply to a private communications service provider, including federal, State, and local taxes; rights-of-way, franchise, consent, or administrative fees; and pole attachment fees. In calculating the costs of the service the city may amortize the capital assets of the communications system over the useful life of the assets in accordance with generally accepted principles of governmental accounting.

- There are three main problems with this provision.
    - First, imputed-cost requirements have no purpose other than to raise prices to levels that private-sector providers would charge for similar products and services. Since the private-sector providers insist that they cannot operate at a profit in the areas that the public provider proposes to serve, the ultimate effect of such imputed-cost requirements is to ensure that the public provider will not be able to serve these areas either by operating on a cost-recovery basis or passing through cost savings.
    - Second, such requirements open the door to endless time-consuming and costly disputes. For example, with respect to the cost of capital, with what kind of private entity should a public entity compare itself? To a large established national or regional provider? To a small startup in the community? To something in between? Once it has found an appropriate comparable, how should the public entity the "equivalent" cost of capital? Should it be purely debt? Should it take into account the intra-corporate financing that major companies typically use?

- Third, this provision is most problematic when it comes to taxes. Right of way, franchise, administrative, and pole attachment fees are relatively easy to determine. But what about federal and state income taxes? Are those required? It's not clear. To estimate equivalent private-sector taxes, a public entity must first decide on an appropriate comparable private entity or entities. This poses the same problems as those discussed above. Then, the public entity must guess at the level of income that the comparable private entity or entities may have earned, which is very difficult to do in the absence of publicly-available tax information for private entities. Next, the public entity must guess at the level of tax credits, deductions, carry forwards, losses on unrelated businesses, and other tax benefits that the comparable entity or entities might have taken. In the end, the comparable entity or entities may have paid very little, if any, income taxes, particularly in the early years of developing a broadband project. Unfortunately, any conclusions that the public entity reaches will be open to substantial criticism and second-guessing.

- Retention of this provision barring below-cost pricing would effectively preclude a municipality from responding to predatory pricing or below-cost pricing by a private provider and would put them at a grossly unfair competitive disadvantage. With this limitation in place, an incumbent communications provider not subject to similar limitations could embark on a sustained predatory pricing campaign that would quickly drive the public entity out of the market. Once eliminated, the private provider could revert back to its traditional pricing due to the lack of competition.
- Apparently intended to prevent unfair competition from tax-subsidized business, the rule would actually put public networks at a disadvantage; private networks have long been able to offer "loss leader" offers and intro pricing to get people to sign up, and the large ISPs can all use profits from one area to subsidize below-cost prices in another.

- This provision creates a palpable restriction on the ability of a municipality to obtain financing to build a broadband system in areas where there is an incumbent provider, even one which provides far inferior service. No investor will finance a municipal network in a competitive market where the municipality has no price flexibility to respond to its private sector competitor's reduction in rates. This price strait-jacket exposes the community to guaranteed failure in the face of predatory pricing that large multi-state incumbent providers can easily absorb over an extensive period of time.
- These new rate regulation rules would also require extraordinary intervention by NCUC in municipal operations

(9) The city shall annually remit to the general fund of the city an amount equivalent to all taxes or fees a private communications service provider would be required to pay the city or county in which the city is located, including any applicable tax refunds received by the city-owned communications service provider because of its government status and a sum equal to the amount of property tax that would have been due if the city-owned communications service provider were a private communications service provider.

- This provision retains the unconstitutional provision requiring the city to pay the equivalent of a property tax on its communication system even though the state constitution exempts all municipal property from property tax without qualification (Article 5, Section 2 (3)).
- This provision suffers from all the problems that imputed-cost requirements pose, as discussed above.
- The provision restricts the deployment of a municipal broadband infrastructure by exposing the municipality to legal challenge when it attempts to comply with this provision, while inherently not complying because it is exempt from property taxes as a public entity that make payments in lieu of taxes, .
- While municipal governments do not have to pay a corporate income tax; they do shoulder the same expenses private sector telecom companies face for operations including capital expenditures for equipment, personnel and general operations. Local governments pay the same fees for Emergency Services and federal and state payroll taxes.
- Note that the legislation stipulates that cities would be required to pay all taxes "that would apply" to a private provider, not the actual taxes that the relevant providers pay.

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

- Allows for fire-sales of city-owned communications systems, suggesting the intention of the incumbent to buy a municipal system after it fails under the weight of H129's anticompetitive legal requirements.

"**§160A-340.2. Exemptions.**

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

- This provision restricts and inhibits the deployment of a municipal broadband network for simple internal purposes or by utilizing public assets in public-private partnerships, by creating ambiguous legal terms which inherently expose the municipality to easy legal assault by a competitive private provider. Such heightened legal vulnerability also

restricts the attractiveness to outside financing and restricts the potential for deployment of these public-private projects.

- By not unambiguously exempting public safety networks, this provision exposes the deployment of public safety networks to legal challenge. It fails to properly exempt internal networks by using ambiguous and limiting terms like networks used for only "governmental purposes." "Governmental" purposes are an ambiguous term in law. Governments are engaged in many services that are proprietary (non-governmental) in nature (e.g. electrical or water services). This section also does not properly exempt cross-jurisdictional network operations by using ambiguous terms that exempt only services that involve "sharing" between governmental entities, "data " services, and services that are just "governmental" services.
- The limitation to services provided within the city's boundaries is problematic. As indicated elsewhere, a City can provide a number of public services and enterprises outside of its corporate boundaries. Not being able to incorporate network functions into services it provides outside of its corporate boundaries (such as a SCADA network for utility services) would effectively prevent it from utilizing such tools at all.

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

- The bill prohibits cities from combining unserved areas with served areas to establish rational and sustainable service areas for municipal systems:
    - As a general proposition, cities need to be able to combine unserved with served areas in order for the economics of providing communications services to work
    - In many cases, unserved areas are small and sparsely populated pockets that are surrounded by served areas and in scattered locations so developing a plan that would serve just those areas would be neither technically nor financially feasible
    - Cities, when they become service providers, generally seek to offer service to all their constituents (or as many as practical), not just a select few. It would be unfair and discriminatory to deny municipal services to one group of residents while providing it to another group if it were feasible to provide the service to both group.

- This provision creates unnecessary financial and regulatory barriers to overcome as pre-requisites to deploying a municipal broadband network, 1) because it must pay for its own broadband availability by household study. This is because there is no available data with which a community could even determine what would be an "unserved" area (The North Carolina Department of Commerce, (utilizing BTOP funds) does not provide broadband availability data by household, and data is prohibited from being downloaded per confidentiality agreements with private carriers); 2) Delay, even if a community was able to obtain such data, and justify after industry challenges, sufficient contiguous census blocks be exempt, that community is still subject to the onerous requirements of section §160-340.6 RFP and public hearing requirements (public-private partnerships) even though it has shown these census blocks to be unserved by the private sector. When those negotiations fail, an unserved area still is subject to burdensome public hearing requirements (§160-340.3), NCUC approval of its petition, and LGC approval.
- At least 50% of the census blocks must not have access to 1.5 mbps internet, which determination may be challenged by the private providers.
- The private provider may file an objection on the basis that the city is "not otherwise eligible to provide the service." This is undefined and will require costly legal process and delay.
- Strictly speaking, if a grandfathered system attempts to provide service to an unserved area that is outside of its service area, it arguably loses all of its exemptions except those listed in this section (i.e., if the City of Wilson provided service outside of its service area to an "unserved area" it would be providing service outside of its service area and lose its subsection (c) exemption and then have to comply with all the requirements of S.L. 2011-84 except to the extent of the service its provides to an "unserved area," which would be exempt from 160A-340.1, 340.4, and 340.5 pursuant to the subsection (b) exemption.
    - Even if a grandfathered city does not lose its subsection (c) exemption by providing service to an "unserved area," it still has to comply with both 160A-340.3 (requiring public hearings) and 160A-340.6 (requiring City to solicit proposals for a public-private partnership before offering service) (just 160A-340.3 would apply if the City were to provide services to another local government for internal government services.).

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

(1) Persons within the corporate limits of the city providing the communications service. For the purposes of this subsection, corporate limits shall mean the corporate limits of the city as of April 1, 2011, or as expanded through annexation.

(2) Existing customers of the communications service as of April 1, 2011. Service to a customer outside the service area of the city or joint agency who is also a public entity must comply with the open bidding procedures of G.S. 143-129.8 upon the expiration or termination of the existing service

contract.

(3) The following service areas:

a. For the joint agency operated by the cities of Davidson and Mooresville, the service area is the combined areas of the city of Cornelius; the town of Troutman; the town of Huntersville; the unincorporated areas of Mecklenburg County north of a line beginning at Highway 16 along the west boundary of the county, extending eastward along Highway 16, continuing east along Interstate 485, and continuing eastward to the eastern boundary of the county along Eastfield Road; and the unincorporated areas of Iredell County south of Interstate 40, excluding Statesville and the extraterritorial jurisdiction of Statesville.

b. For the city of Salisbury, the service area is the municipalities of Salisbury, Spencer, East Spencer, Granite Quarry, Rockwell, Faith, Cleveland, China Grove, Landis and the corridors between those cities. The service area also includes the economic development sites, public safety facilities, governmental facilities, and educational schools and colleges located outside the municipalities and the corridors between the municipalities and these sites, facilities, schools, and colleges. The corridors between Salisbury and these municipalities and these sites, facilities, schools, and colleges includes only the area necessary to provide service to these municipalities and these sites, facilities, schools, and colleges and shall not be wider than 300 feet. The elected bodies of Spencer, East Spencer, Granite Quarry, Rockwell, Faith, Cleveland, China Grove, and Landis shall vote to approve the service extension into each respective municipality before Salisbury can provide service to that municipality. The Rowan County Board of County Commissioners shall vote to approve service extension to any governmental economic development site, governmental facility, school, or college owned by Rowan County. The Rowan Salisbury School Board shall also vote to approve service extension to schools.

c. For the city of Wilson, the service area is the county limits of Wilson County, including the incorporated areas within the County.

d. For all other cities or joint agencies offering communications service, the service area is the area designated in the map filed as part of the initial notice of franchise with the Secretary of State as of January 1, 2011.

- Subsection (2) was intended to give the impression of grandfathering customer relationships that exist as of April 1, 2011, even in cases where those customers may be outside the new service boundaries that the bill designs. It fails to actually create this grandfathering because it requires an onerous and unreasonable bidding process that is fundamentally inconsistent with standard customer relationships. Individual customers are not subject to the reference Article 8 of Chapter 143 and cannot reasonably be

expected to be engaged in a bidding process to buy services from a city or any other provider.

- The limited grandfathering applies only to communications services provided as of January 1, 2011, and therefore would not encompass any new service offerings and possibly might not even cover the provision of grandfathered services to new customers.
- Subsection (3) is patently discriminatory against municipalities in that it locks them into a particular limited service area even though municipal boundaries and communities can change and grow, while private providers retain the right to expand or adjust their service boundaries as they deem necessary in response to changes in local market conditions in communities.
- There is also an argument that this provision, to the extent it applies to the provision of cable service by municipalities, would be preempted by Title 47, Chapter 5, Subchapter V-A of the U.S. Code (a portion of the Telecommunications Act of 1996), because it imposes a de facto service area on municipalities and restricts their ability to enter into and obtain franchises for new competitive areas (and in particular, because in North Carolina the State is the franchising authority) (See sections 541, 544, 556, and 557).

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

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

- Subsection (e) implies that a City will lose its subsection (c) exemption if it provides service outside of its service area and does not cease providing service after notice or discovery. Loss of the exemption would cause the City's service area to shrink even further, pursuant to 160A-340.1(a)(3), and the City would have to shed all of its customers in the County. How other provisions—such as those requiring public hearings, etc.—would apply to the City if it lost its subsection (c) exemption remains uncertain. Suffice it to say, loss of its exemption would force the City of Wilson to abandon its Greenlight service and cause it to strand substantial investment.

"**§160A-340.3. Notice; public hearing.**

A city or joint agency that proposes to provide communications service shall hold not fewer than two public hearings, which shall be held not less than 30 days apart, for the purpose of gathering information and comment. Notice of the hearings shall be published at least once a week for four consecutive weeks in the predominant newspaper of general circulation in the area in which the city is located. The notice shall also be provided to the North Carolina Utilities Commission, which shall post the notice on its Web site, and to all companies that have requested service of the notices from the city clerk. The city shall deposit the notice in the U.S. mail to companies that have requested notice at least 45 days prior to the hearing subject to the notice. Private communications service providers shall be permitted to participate fully in the public hearings by presenting testimony and documentation relevant to their service

offerings and the city's plans. Any feasibility study, business plan, or public survey conducted or prepared by the city in connection with the proposed communications service project is a public record as defined by G.S. 132-1 and shall be made available to the public prior to the public hearings required by this section. This section does not apply to the repair, rebuilding, replacement, or improvement of an existing communications network, or equipment relating thereto.

- This provision embeds long delays into the planning of a community broadband network (whether served or unserved by a private provider) by requiring a 75 day public hearing process and extraordinary notice publication requirements. The provision fails to exempt public safety networks. It will interfere with the ability of cities to perform basic governmental services. This section also purports to exempt from the public hearing requirement repair or improvement of an existing communications network but then obliterates that exception by requiring a public hearing if any "expansion" is involved in the existing network. (See new 159-175.10). Since expansion is an ambiguous term which would likely include extending lines and upgrading an existing network to expand its technical capabilities, a city could easily be subject to a lawsuit if it fails to comply with the onerous public hearing requirements for modest improvements in the existing network. Again, this makes quick improvements to public safety networks difficult and threatens the safety of the public.
- The public hearing requirement would add to a public entity's costs and burdens. Also potentially problematic is the failure to define what a "business plan" means, and which could be broadly read to include confidential and proprietary information. In the absence of a definition, NC's existing public disclosure laws in G.S. 132-1 would appear to apply.
- Disclosure of business records allows review by competitors who effectively undercut the city's prices by charging higher rates in cities that don't have municipal fiber systems, and to undertake other measures targeted directly at the City's plans—such as plans for expansion areas, targeted marketing, etc.
- These cumbersome hearing requirements apply even to communications services to be provided only within the city's boundaries and only for "internal governmental purposes."

"**§160A-340.4. Financing.**

(a) A city or joint agency subject to the provisions of G.S. 160A-340.1 shall not enter into a contract under G.S. 160A-19 or G.S. 160A-20 to purchase or to finance the purchase of property for use in a communications network or to finance the construction of fixtures or improvements for use in a communications network unless it complies with subsection (b) of this section. The provisions of this section shall not apply to the repair, rebuilding, replacement, or improvement of an existing communications network, or equipment relating thereto.

- This is a serious restriction, as it would eliminate Certificate of Participation financing methods that are commonly used in North Carolina and elsewhere.
- This provision would subject a prudent city that wants to avoid litigation to a special election requirement to finance any communications system or facilities, even for simple

repairs, embedding long delays and significant expense into the process of repairing or improving a system and rendering them near impossible. While there is an exception to the special election requirement for repairing, rebuilding or improving an "existing" communications network, these are ambiguous terms, and this provision is likely to be construed as not exempting any system "expansion" (network extensions or improving technical capabilities), which would then trigger special election requirements.

- The restrictions also forbid the financing or leasing of real property (which could be rights-of- ways for a communication network or tower sites) per NCGS 160A-19 and 160A-20. A city's ability to build new public safety telecommunications towers, or relocate them, would be affected. Finally, the legislation applies these restrictions to interlocal agreements. Although exempting facilities that are "within the city's jurisdictional boundaries for the city's internal governmental purposes," it is not always clear-cut what an "internal governmental purpose" is, and whether a city that partners with a county or other local government would be subject to these restrictions. It is also commonplace for a City to have critical public safety telecommunications towers outside of the City's jurisdictional boundaries.

(b) A city shall not incur debt for the purpose of constructing a communications system without first holding a special election under G.S. 163-287 on the question of whether the city may provide communications service. If a majority of the votes cast in the special election are for the city providing communications service, the city may incur the debt for the service. If a majority of the votes cast in the special election are against the city providing communications service, the city shall not incur the debt. However, nothing in this section shall prohibit a city from revising its plan to offer communications service and calling another special election on the question prior to providing or offering to provide the service. A special election required under Chapter 159 of the General Statutes as a condition to the issuance of bonds shall satisfy the requirements of this section.

- This provision would basically shut down any existing municipal communications system (including convention center communications services or public safety networks) or prohibit the development of a new municipal communications system, as it imposes enormous unfunded costs by requiring a special election prior to the funding of any communications service offered by a municipality and a minimum 45 day delay (inherent in G.S. 163-287) even to fund any expansion or, per §160-340.4(a) described above, system repair or improvement. In essence, it makes carrying out any system repair or improvement impossible. The added burden of subjecting a public-private partnership deployment to a special election will also seriously discourage any interest on the part of either party to engage in such a public-private deployment.
- This provision also allows incumbent providers to mount misinformation campaigns and advertising blitzes designed to cause the election to fail. Municipalities cannot advocate a position in special elections, whereas private companies can hire (and have hired) front groups and pour millions into defeating a referendum.

"**§160A-340.5. Taxes: payments in lieu of taxes.**

(a) A communications network owned or operated by a city or joint agency shall be exempt from property taxes. However, each city possessing an ownership share of a communications network and a joint agency owning a communications network shall, in lieu of property taxes, pay to any county authorized to levy property taxes the amount which would be assessed as taxes on real and personal property if the communications network were otherwise subject to valuation and assessment. Any payments in lieu of taxes shall be due and shall bear interest, if unpaid, as in the case of taxes on other property.

- This provision retains the unconstitutional provision requiring the city to pay the equivalent of a property tax on its communication system even though the state constitution exempts all municipal property from property tax without qualification (Article 5, Section 2 (3)).

(b) A city-owned communications service provider shall pay to the State, on an annual basis, an amount in lieu of taxes that would otherwise be due the State if the communications service was provided by a private communications service provider, including State income, franchise, vehicle, motor fuel, and other similar taxes. The amount of the payment in lieu of taxes shall be set annually by the Department of Revenue and shall approximate the taxes that would be due if the communications service was undertaken by a private communications service provider. A city-owned communications service provider must provide information requested by the Secretary of Revenue necessary for calculation of the assessment. The Department must inform each city-owned communications service provider of the amount of the assessment by January 1 of each year. The assessment is due by March 15 of each year. If the assessment is unpaid, the State may withhold the amount due, including interest on late payments, from distributions otherwise due the city under G.S. 105-164.44I.

(c) A city-owned communications service provider or a joint agency that provides communications service shall not be eligible for a refund under G.S. 105-164.14(c) for sales and use taxes paid on purchases of tangible personal property and services related to the provision of communications service, except to the extent a private communications service provider would be exempt from taxation.

- This provision triggers the same difficulties with calculation of taxes as mentioned earlier, except that it requires payment of said taxes to the State.

"**§160A-340.6. Public-private partnerships for communications service.**

(a) Prior to undertaking to construct a communications network for the provision of communications service, a city shall first solicit proposals from private business in accordance with the procedures of this section.

(b) The city shall issue requests for proposals that specify the nature and scope of the requested communications service, the area in which it is to be provided, any specifications and performance standards, and information as to the city's proposed participation in providing equipment, infrastructure, or other aspects of the service. The city may prescribe the form and content of proposals and may require that proposals contain sufficiently detailed information to allow for an objective evaluation of proposals using the factors stated in subsection (d) of this section. Each proposal shall at minimum contain all of the following:

(1) Information regarding the proposer's experience and qualifications to perform the requirements of the proposal.

(2) Information demonstrating the proposer's ability to secure financing needed to perform the requirements of the proposal.

(3) Information demonstrating the proposer's ability to provide staffing, implement work tasks, and carry out all other responsibilities necessary to perform the requirements of the proposal.

(4) Information clearly identifying and specifying all elements of cost of the proposal for the term of the proposed contract, including the cost of the purchase or lease of equipment and supplies, design, installation, operation, management, and maintenance of any system, and any proposed services.

(5) Any other information the city determines has a material bearing on its ability to evaluate the proposal.

- This section was meant to be an alternative to the bill's provisions controlling the deployment of new municipal communications services. Now, by being inserted into the original provisions of the bill, it imposes yet another layer of procedural burdens that obliterate most of the exceptions to the bill's restrictions. For example, if a municipality were seeking to expand a current network, it would first be required to go through extensive negotiations with a private provider, and if these negotiations failed, it would then be subject to the eight-pages of regulations embedded in the bill. It would also appear that if a municipality is successful in forming a public-private partnership, it would still be required to comply with the special election requirement (§160-340.4(b)) if it needed to raise money to contribute to its portion of the cost.
- This section further delays development by requiring municipalities to seek private sector partners for ownership and operation of the system. Such a partner is unlikely to develop due to financing restrictions (e.g. special elections for system repair or expansion) and exposure to lawsuits.

(c) The city shall provide notice that it is requesting proposals in accordance with this subsection. The notice shall state the time and place where plans and specifications for the proposed service may be obtained and the time and place for opening proposals. Any notice given under this subsection shall reserve to the city the right to reject any or all proposals.

Notice of request for proposals shall be given by all of the following methods:

(1) By mailing a notice of request for proposals to each firm that has obtained a

license or permit to use the public rights-of-way in the city to provide a communications service within the city by depositing such notices in the U.S. mail at least 30 days prior to the date specified for the opening of proposals. In identifying firms, the city may rely upon lists provided by the Office of the Secretary of State and the North Carolina Utilities Commission.

(2) By posting a notice of request for proposals on the city's Web site at least 30 days before the time specified for the opening of proposals.

(3) By publishing a notice of request for proposals in a newspaper of general circulation in the county in which the city is predominantly located at least 30 days before the time specified for the opening of proposals.

(d) In evaluating proposals, the city may consider any relevant factors, including system design, system reliability, operational experience, operational costs, compatibility with existing systems and equipment, and emerging technology. The city may negotiate aspects of any proposal with any responsible proposer with regard to these factors to determine which proposal is the most responsive. A determination of most responsive proposer by the city shall be final.

(e) The city may negotiate a contract with the most responsive proposer for the performance of communications service specified in the request for proposals. All contracts entered into pursuant to this section shall be approved and awarded by the governing body of the city.

(f) If the city is unable to successfully negotiate the terms of a contract with the most responsive proposer within 60 days of the opening of the proposals, the city may proceed to negotiate with the firm determined to be the next most responsive proposer if such a proposer exists. If the city is unable to successfully negotiate the terms of a contract with the next most responsive proposer within 60 days, it may proceed under this Article to provide communications service.

(g) All proposals shall be sealed and shall be opened in public. Provided, that trade secrets shall remain confidential as provided under G.S. 132-1.2."

- This section adds additional delays in the process, gives private providers a window into the City's negotiations, and allows the private provider the opportunity to spread additional misinformation about the City, particularly with regard to negotiation efforts and the City's willingness to enter into a cooperative arrangement.

SECTION 2.(a) G.S. 62-3(23) is amended by adding the following new sub-subdivision to read:

"l. The term "public utility" shall include a city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes that provides service as defined in G.S. 62-3(23)a.6. and is subject to the provisions of G.S. 160A-340.1."

- This provision newly subjects any municipality which offers communications service (voice, video and data) for a fee, (including convention centers and public safety

networks) to NCUC oversight and regulation, creating extensive opportunities for all their operations to be challenged by any competitor or member of the public and exposing these cities to expensive defense costs.

- In violation of Federal prohibition of state utility regulation of cable systems (47 USC § 541(c)).
- NCUC oversight is properly reserved for the large private corporations who are not locally accountable. It ought not apply to a local government that is already accountable and responsive to local needs and criticisms.
- It imposes a regulatory burden on cities, which does not apply to other cable providers
- It places cities at a competitive disadvantage by providing their business plans, rate structure and other information to private providers to use to undermine the city system—for the private providers, this type of information is protected by law as trade secrets.

SECTION 3. Subchapter IV of Chapter 159 of the General Statutes is amended by adding a new Article to read as follows:

"Article 9A.

"Borrowing by Cities for Competitive Purposes.

"**§ 159-175.10. Additional requirements for review of city financing application; communications service.**

The Commission shall apply additional requirements to an application for financing by a city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes for the construction, operation, expansion, or repair of a communications system or other infrastructure for the purpose of offering communications service, as that term is defined in G.S. 160A-340(2), that is or will be competitive with communications service offered by a private communications service provider. This section does not apply to the repair, rebuilding, replacement, or improvement of an existing communications network, or equipment relating thereto, but does apply to the expansion of such existing network. The additional requirements are the following:

(1) Prior to submitting an application to the Commission, a city or joint agency shall comply with the provisions of G.S. 160A-340.3 requiring at least two public hearings on the proposed communications service project and notice of the hearings to private communications service providers who have requested notice.

(2) At the same time the application is submitted to the Commission, the city or joint agency shall serve a copy of the application on each person that provides competitive communications service within the city's jurisdictional boundaries or in areas adjacent to the city. No hearing on the application shall be heard by the Commission until at least 60 days after the application is submitted to the Commission.

- The LGC is barred from even holding a hearing on an application until at least 135 days have passed since the city provided its first notice to private providers of its plans:

- A city is barred from submitting an application to the LGC until it completes the new requirement for two local public hearings (this process will take at least 75 days—see above.
- Once the application is submitted to the LGC, it is required to wait an additional 60 days, making for a delay in the governmental decision-making process of at least 135 days.

- A city is required to provide a copy of its LGC application for approval of financing to all providers of communications service that provide service in the city or in "adjacent" areas. Since the bill defines "communications service" as broadly as possible and imposes no limits on the definition of communications service provider, this provision means that cities apparently are required to notify all wireless carriers, cable TV operators, television broadcasters, long-distance carriers, ISPs, satellite carriers, and telephone companies that provide service anywhere within the general vicinity of a city and assume the cost of serving each such entity and the risk associated with failing to identify a provider entitled to notice under the new provision. No similar notice obligations apply to applications for approval of financing for any of the many other municipal activities for which LGC review and approval are required.

(3) Upon the request of a communications service provider, the Commission shall accept written and oral comments from competitive private communications service providers in connection with any hearing or other review of the application.

(4) In considering the probable net revenues of the proposed communications service project, the Commission shall consider and make written findings on the reasonableness of the city or joint agency's revenue projections in light of the current and projected competitive environment for the services to be provided, taking into consideration the potential impact of technological innovation and change on the proposed service offerings and the level of demonstrated community support for the project.

(5) The city or joint agency making the application to the Commission shall bear the burden of persuasion with respect to subdivisions (1) through (4) of this section."

- The Local Government Commission (LGC) is required to give greater weight to the interest of private providers than it is the broad interest of the public in considering financing applications. Further, the bill transforms the LGC's existing non-adversarial review process into a legalistic and adversarial process, with the potential for tying up financing questions in endless litigation.
- The bill imposes new obligations on the LGC and fundamentally alters its role. The LGC, as presently constituted, is a part-time nine-member organization consisting of four ex officio members (the state auditor, the state treasurer, the secretary of state, and the secretary of revenue—G.S. § 159-3) that relies heavily on the staff of the

Department of the State Treasurer to fulfill its responsibilities, with no expertise in the communications industry. Further, the LGC already follows clear-cut statutory criteria in determining the soundness of a proposed municipal project and its proposed financing (G.C. § 159-151).

- This undoubtedly opens the door to multi-year litigation by the incumbent providers challenging any determination by the LGC that the provision of service by a city is reasonable taking into consideration the foregoing factors. Community support is an especially arbitrary and subjective consideration that it would certainly be characterized as weighing against a finding of reasonableness.