IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 15-3291 & 15-3555

THE STATE OF TENNESSEE,
PETITIONER,
V.
FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS.

THE STATE OF NORTH CAROLINA,
PETITIONER,
V.
FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS.

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

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REQUEST FOR ORAL ARGUMENT

The FCC respectfully request oral argument, pursuant to 6th Cir. R. 34(a), to elucidate the issues of constitutional, statutory, and administrative law raised by the petitions.

JURISDICTION

Both petitioners timely petitioned for review of *City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, 30 FCC Rcd 2408 (2015) ("*Order"*) (PA 1-116). The *Order* was effective on release, Match 12, 2015. *Order* ¶ 185 (PA 76).

Tennessee timely filed a petition for review in this Court on March 20, 2015. North Carolina timely filed a petition for review in the Fourth Circuit on May 11, 2015, and the Fourth Circuit transferred that case to this Court on May 19, 2015. This Court has jurisdiction over both petitions under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344.

INTRODUCTORY STATEMENT AND QUESTIONS PRESENTED

This case concerns two state statutes that regulate interstate broadband Internet competition in a manner that conflicts with federal communications policy.

The Internet is the dominant communications medium of our time, as well as an infrastructure vital for the success of both urban and rural communities. The Internet is also a channel of interstate commerce. In

Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, Congress directed the Federal Communications Commission to ensure that "all" Americans have access to broadband Internet communications by removing barriers to broadband infrastructure investment and competition.

Frustrated that private communications vendors either would not or could not provide them adequate broadband communications services, Wilson, North Carolina and Chattanooga, Tennessee established and operate high-speed broadband communications networks for the benefit of their residents and businesses. This service is consistent with the law in both states. This municipally-provided broadband proved a boon to both cities, and nearby communities—many with one or no broadband providers—expressed interest in receiving the service. But the cities could not meet this pent-up demand because their respective state legislatures had enacted statutes that blocked (or effectively blocked) the cities' ability to extend their service into neighboring geographic areas. This denied service to new customers who wanted it and effectively shielded from competition the private providers who provided inferior service to these communities.

Wilson and Chattanooga each asked the FCC to preempt these state-law restrictions as counter to federal policy. Based on a close reading of the laws in question, relevant precedent, and extensive public comment, the FCC

determined that the two statutes in question served to implement state preferences regarding the competitive market in broadband—an area in which federal policy may preempt state law—rather than acting as traditional state control over political subdivisions. For example, the North Carolina law requires municipal providers to set prices based on phantom imputed costs intended to mirror those borne by private providers. The agency found that such a provision does not protect taxpayers or manage relations between adjacent communities, but serves only to limit competition among broadband providers. The FCC accordingly preempted selected provisions of each statute, thus freeing Wilson and Chattanooga to meet the surging demand for their broadband service.

North Carolina and Tennessee petition this Court to review the FCC's *Order*. Their petitions raise the following issues:

1. May the FCC preempt under Section 706 of the Telecommunications Act of 1996 state laws that regulate the provision of broadband by political subdivisions, where those laws serve to effectuate state policy regarding competition in the interstate broadband market and stand as barriers to the timely deployment of broadband to all Americans?
2. Are the North Carolina and Tennessee laws at issue best characterized as effectuating state policy regarding competition in the interstate

broadband market, as opposed to being examples of traditional state control over political subdivisions?

COUNTERSTATEMENT

A. Section 706

Congress created the FCC in 1934 "to make available … to all the people of the United States … a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," and granted the agency jurisdiction over "all interstate and foreign communication by wire or radio." 47 U.S.C. §§ 151-152. States, by contrast, have jurisdiction over wholly intrastate communications—*i.e.*, communications that begin and end within a state's borders. 47 U.S.C. § 152(b).

The Commission and courts have long held that the Internet, which connects users across the nation and around the world, "is properly classified as interstate" commerce. *Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, 17 FCC Rcd 4798, 4832 ¶ 59 (2002); *see Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005); *Verizon v. FCC*, 740 F.3d 623, 629 (D.C. Cir. 2014).

In the Telecommunications Act of 1996, Congress made a number of revisions aimed "to promote competition" and "encourage the rapid

deployment of new telecommunications technologies." Pub. L. No. 104–104, introductory statement (Feb. 8, 1996), 110 Stat 56. Section 706 of the Act embodies this focus. Although the Internet was nascent in 1996, Congress mandated that the Commission "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Section 706(a).[1] To that end, Congress empowered the Commission in Section 706(a) to utilize "in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." *Id.*

Section 706(b) further requires the FCC to study regularly "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." Section 706(b). If the Commission determines that it is not, the Act orders that the agency "shall take immediate action to accelerate deployment of such capability by removing barriers to

[1] Section 706 is codified as amended at 47 U.S.C. § 1302. We refer to it as "Section 706" to be consistent with the *Order*. "[A]dvanced telecommunications capability" is defined "as highspeed, switched, broadband telecommunications capability." Section 706(a) & 706(c). In short, it means broadband Internet.

infrastructure investment and by promoting competition in the telecommunications market." *Id.*

The Commission has regularly studied the deployment of broadband as required by Section 706(b), and since 2010, has concluded that broadband is not being deployed to all Americans in a reasonable and timely manner. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable & Timely Fashion*, 30 FCC Rcd 1375, 1382 ¶ 14 (2015). In the most recent report, the agency noted that, despite considerable private investment in many markets, "[a] digital divide persists between urban and non-urban parts of the country." *Id.* ¶ 5. For example, service meeting the Commission's definition of high-speed broadband is unavailable to 53 percent of Americans living in rural areas, compared to just 8 percent of Americans living in urban areas. *Id.* ¶ 6. The FCC further found that the "data … show that the problem is one of supply, not demand," and that, given the chance, "[c]onsumers in rural America adopt broadband at the same rates as consumers in urban areas." *Id.* ¶ 5.

As required by Section 706(b), the FCC has responded to inadequate deployment of broadband. For example, in 2010, the agency issued Open Internet rules (commonly known as "net neutrality" rules) under its Section 706 authority. *See Preserving the Open Internet*, 25 FCC Rcd 17905, 17968

¶¶ 117-123 (2010). On review, the D.C. Circuit rejected arguments that Section 706 is merely hortatory and agreed with the FCC that the provision "vests [the FCC] with affirmative authority to enact measures encouraging the deployment of broadband infrastructure," though the court struck down two of the three rules as contrary to other statutory restrictions. *Verizon*, 740 F.3d at 628. The Commission also relied on this authority when it acted to modernize subsidies for telecommunications carriers in rural areas to incentivize investment in broadband infrastructure. *Connect America Fund: A Nat'l Broadband Plan for Our Future*, 26 FCC Rcd 17663, 17687 ¶¶ 66-73 (2011). There too, the Tenth Circuit agreed that Section 706(b) is "an independent grant of authority to the FCC 'to take steps necessary to fulfill Congress's broadband deployment objectives.'" *In re FCC 11-161*, 753 F.3d 1015, 1053 (10th Cir. 2014) (quoting *Connect America Fund* ¶ 70), *cert. denied*, 135 S. Ct. 2072 (2015).

B. North Carolina

1. Wilson's service

The city of Wilson, North Carolina provides very-high-speed Internet access and cable services over its fiber-optic communications network within Wilson County, in eastern North Carolina. *Order* ¶ 33 (PA 16). Wilson built this network after the incumbent cable provider "failed to follow through" on

its promise to upgrade its system with high-speed fiber, and a feasibility study showed "high levels of customer dissatisfaction with the services, pricing, reliability, and technological capabilities" of the incumbent provider. *Id.* Wilson began offering service in 2008, and offers a "triple-play" of Internet, video, and voice service at prices lower than competitors, while maintaining a positive cash flow. *Id.* This has also spurred a competitive response from incumbents: Time Warner Cable has held its rates in Wilson "nearly flat even as they increased, sometimes significantly, in surrounding areas," *Order* ¶ 52 (PA 27), and has also increased the top speed of its Internet service in Wilson "because of the competitive environment," in the words of a Time Warner spokesperson, *id*. ¶ 54 (PA 28). Neither Time Warner nor any other competitor has alleged that these competitive responses have forced them to offer service without profit or below cost.

The network infrastructure has also been a boon to the community's economic development. Wilson has seen many new residents and businesses relocating to the area to take advantage of its very-high-speed network, and the top seven employers in the community all use the network. *Id.* ¶ 34 & nn.98-100 (PA 17). Wilson has also seen other benefits, such as low cost access for schools and libraries and improved service requested by health care providers. *Id.* ¶¶ 35-36 (PA 18).

2. State law barriers to growth

As explained in more detail below, H.B. 129[2] restricts municipal Internet providers in many ways. Wilson's network was already under development when the law was passed in 2011, and Wilson was grandfathered to provide service in Wilson County. It may not, however, expand to surrounding areas— even the five other counties in which it already provides electrical service—without complying with the many restrictions in the law.

The record below showed that H.B. 129 "was largely sponsored and lobbied for by incumbent providers." *See Order* ¶ 37 & n.108 (PA 18) (summarizing comments and articles from many sources). According to the record, the sponsors of this and similar previous bills "openly admitted that they were acting at the behest of the cable and telecommunications companies." *Id.* ¶ 37 n.108 (PA 18) (record indicated incumbents "spent over $1 million over a period of five years to push through" H.B. 129). North Carolina is not unique in this regard. The record showed that starting in

[2] H.B. 129 consists of six principal provisions codified together as Article 16A in Chapter 160A of the North Carolina General Statutes, and four amendments to other provisions of the General Statutes. *See* H.B. 129; *Order* ¶ 81 (PA 40). In its brief, North Carolina refers to the law as Session Law 2011-84. We use "H.B. 129" to be consistent with the *Order*.

approximately 2004, several states passed very similar laws "under pressure from national cable companies, telephone companies, and the American Legislative Exchange Council (ALEC)." *Id.* The record showed that ALEC members have included Time Warner Cable, AT&T, corporate executives, and over 2,000 state legislators who "sit side-by-side and collaborate to draft 'model' bills." *Id.* In this proceeding, amicus ALEC (supporting petitioners) cites to its model policy act and explains that it believes "[l]ocal government entry into the provision of … broadband services … should be permissible only in unserved areas and only where no business case for private service exists." ALEC Br. 3-4.

As a result of these restrictions in H.B. 129, areas immediately bordering Wilson have markedly worse broadband service than both Wilson and the national average. *See Order* Attachment B (PA 80) (map of broadband coverage); *id.* ¶ 39 (PA 22). Most of these areas have no, or only one, provider of high-speed Internet. *Id.* The record shows that Wilson has received "numerous requests" from these surrounding areas to provide service, but Wilson cannot do so without complying with the obligations of H.B. 129. *Id.* ¶ 40 (PA 22); see also *id.* n.124 (PA 22) (collecting sample comments from users in surrounding areas).

Wilson petitioned the FCC to preempt the restrictions of H.B. 129. *See Wilson Petition* (PA 635).

C. Tennessee

1. EPB's service

In 1996, the Electric Power Board of Chattanooga (EPB)—an independent board of the City of Chattanooga, Tennessee, chartered to provide power from the Tennessee Valley Authority—began developing a high-capacity fiber optic communications system to improve its electrical grid. *Order* ¶ 22 (PA 9); *EPB Petition* 16-20 (PA 415-19). In 2009, it began to use this network to offer voice, video, and high speed broadband to its customers. *Order* ¶ 22 (PA 9). EPB customers enjoy lower prices and better service than before, and established providers have likewise responded to EPB's competitive offering with "improved … services and stabilized rates." *Id.* ¶ 24 (PA 11). For example, Comcast raised its rates in the region every year from 1993 to 2008. As EPB began offering service, Comcast reduced rates and diversified its service package offerings. *Id.* ¶ 50 (PA 26). Comcast also invested in its network, raising its top residential download speed from 8 Mbps in 2008 to 105 Mbps in 2013. *Id.* Here too, Comcast has not alleged that its improved service and pricing deprive it of profit.

EPB has also been able to provide very-high-speed service to Chattanooga's schools and libraries, *id.* ¶ 25 (PA 11), and its very-high-capacity network has attracted businesses such as Amazon and Volkswagen to Chattanooga, as well as numerous tech-focused startup companies and investors. *Id.* ¶ 23 (PA 10). Standard and Poor's upgraded EPB's bond rating in 2012 to AA+ based on the service's "sustainable" "strong credit metrics." *Id.* ¶ 24 (PA 11).

2. State law barriers to growth

Under Tennessee law, municipal electric systems like EPB are authorized to provide telecommunications services—such as voice telephone service—almost anywhere in the state. *Order* ¶ 27 (PA 12).[3] Under a separate statutory provision, a provider like EPB can also offer Internet services and cable services (including video programming), but only "within its service area"—which the parties agree allows service only within a system's *electric* service area. *Id.* This restriction therefore prohibits a municipal electric system from providing Internet service in surrounding areas to which it does not provide electric service.

[3] Municipalities cannot provide telecommunications in an area already served by a cooperative with fewer than 100,000 customers. Tenn. Code. § 7-52-403(b).

As maps in the *Order* show, this has had a marked effect. *See Order* Attachment A (PA 77). Many areas surrounding EPB's service area have no—or just one—provider of Internet service meeting the Commission's definition of broadband. *See also Order* ¶ 32 (PA 16) (comparing service to national average). EPB receives "regular requests" for Internet service from residents of these neighboring communities, asking EPB to "provide service in at least some areas that are unserved today, and to provide robust competition in other areas that are currently underserved." *Order* ¶ 29 (PA 12). Many comments in the record from individuals in surrounding areas also state that existing broadband service is inadequate to meet their needs. *Id.* n.72 (PA 13).

EPB petitioned the FCC to preempt Tennessee's territorial restriction so that it could provide service to these "digital deserts." *Id.* ¶ 29.

D. The *Order*

1. Finding of barriers to broadband investment and competition

In the *Order*, the FCC preempted the territorial restriction in Tennessee and the majority of the restrictions in North Carolina's H.B. 129. *Order* ¶ 1 (PA 2). It first found that these laws are "barriers to broadband infrastructure investment" and competition within the meaning of Section 706, because, but for these provisions, "EPB and Wilson would likely expand their broadband

services into neighboring communities" to "meet existing demand" for those services. *Order* ¶¶ 75-76 (PA 38).

The FCC found that the territorial restriction in Tennessee was a barrier because it explicitly prohibited the provision of broadband outside of a utility's electric service area. *Order* ¶¶ 77-79 (PA 38-39). The agency's analysis of the North Carolina law's many provisions was necessarily more extensive. First, the agency noted that the purpose of the many provisions of H.B. 129, as described by its title, is "Regulating Local Government Competition with Private Business." *Order* ¶ 93 (PA 44). The agency therefore analyzed the operation of the statute "holistically, cognizant of the interrelation of its several parts." *Id.* The FCC clarified that "any single regulatory provision of the statute, if considered independently, might not appear to impose a significant barrier," but "the cumulative effect of a series of interrelating provisions can become a barrier." *Id.* Some of the provisions directly raised costs, such as requiring a municipal provider, in pricing its service, to impute theoretical private sector "costs" that the municipal provider does not actually incur. *Id.* ¶¶ 96-107 (PA 45-48). Other provisions imposed asymmetrical regulatory burdens on municipal providers, *id.* ¶¶ 108-113 (PA 49-51), or imposed delay, *id.* ¶¶ 114-119 (PA 51-53)—the record showed that it would take approximately 27 months before a municipal

provider could actually launch a project, during which time incumbent competitors would have access to the complete business plan of a municipal service and could respond accordingly. After extensive analysis, the *Order* found that the cumulative effect of these obligations was to act as a barrier to infrastructure investment and competition by effectively preventing municipal providers like Wilson from offering or expanding their services. *Id.* ¶¶ 93-94 (PA 44). In fact, while "'numerous plans … were in the works' to develop … municipal broadband networks in the period prior to the passage of H.B. 129, … all were discontinued because of H.B. 129," and none has been built since. *Id.*

The agency did not find that every provision of the North Carolina law is a barrier to infrastructure investment. *Order* ¶¶ 123-129 (PA 55-56). For example, the law requires municipal providers to keep a separate set of accounts for broadband service and to have published an independent annual report. *Id.* ¶ 125 (PA 55). Because this serves as "simply an accounting statute," it is not a barrier to broadband infrastructure and investment. *Id.*

2. Analysis of authority

The FCC next concluded that Section 706 authorized the agency to preempt the state laws in question as barriers to broadband infrastructure investment and competition. *Order* ¶ 130 (PA 56). It first ruled, as it had

before and as the D.C. and Tenth Circuits had agreed, that Section 706 is an affirmative source of authority, rather than merely an exhortation. *Id.* ¶ 136 (PA 58) (citing *Verizon*, 740 F.3d at 628; *In re: FCC 11-161*, 753 F.3d at 1053). The agency next held that Section 706 grants it the power to preempt in at least some instances—for example, where a state law addresses only private entities. *Id.* ¶¶ 140-145 (PA 59-62). As Congress would have been aware in passing the 1996 statute, the agency had often preempted state laws that thwarted federal communications policy. *Id.* ¶ 144 (PA 61). The agency therefore concluded that the power to preempt fell within the "measures to promote competition in the local telecommunications market" and "other regulating methods" specified by section 706(a), as well as the available "action[s] to accelerate [broadband] deployment" in section 706(b). *Id.*

The FCC next concluded that Section 706 granted the authority to "preempt state laws that regulate the provision of broadband by a state's political subdivisions," but only when those laws serve "to effectuate communications policy as opposed to core state control of political subdivisions." *Order* ¶146 (PA 62). The agency clarified that "a different question would be presented" by "a law that goes to a state's power to withhold altogether the authority to provide broadband." *Id.* ¶ 147 (PA 63). The agency drew this line because "as the *Verizon* court noted, section 706 is

cabined by our subject matter jurisdiction over 'interstate . . . communication by wire and radio.' It is thus only the state restrictions that target this subject matter that fall within our authority to preempt." *Id.* ¶ 148 (PA 63) (quoting 47 U.S.C. § 152(a)).

3. Application to specific laws

Finally, the agency found that the laws in question served to effectuate state communications policy goals and so could be preempted under Section 706. Regarding the territorial restriction in Tennessee, the FCC noted that "under Tennessee law, EPB is actually free … to build a statewide fiber network under its authority as a telecommunications provider [through a separate statutory provision]—it simply cannot use that network to provide broadband outside its electric service area." *Order* ¶ 169 (PA 71). The agency concluded that this "statutory scheme does not further any core state function of ordering its political subdivisions, such as limiting the expenditures of a city, or preventing one community from building a network in another community." Rather, "[i]t serves exclusively to effectuate state communications policy preferences," "presumably" to protect "incumbent broadband providers [from] competition [with] public providers from neighboring areas." *Id.* Because the law targeted interstate communications policy, it fell within the scope of Section 706's preemption. *Id.*

The FCC next found that North Carolina's H.B. 129 likewise targeted competition policy. For example, the Commission noted, the Act's title is "An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business," and the preamble of the statute explains that the law serves "to protect jobs and promote investment . . . to ensure that the State does not indirectly subsidize competition with private industry." *Order* ¶ 170 (PA 72). Commenters in support of H.B. 129 likewise continually emphasized that the goal of the law was to create a "level playing field" of competition in the broadband market. *Id.* n.468 (PA 73).

The agency closely examined the individual provisions of the law, which it concluded collectively "regulate not issues of state sovereignty and political determination, but rather the mechanics of how a city may provide a service it is authorized to provide." *Id.* ¶ 171 (PA 72). The agency highlighted, for example, the requirement that a municipal provider impute theoretical "costs," and similarly emphasized another set of "level playing field obligations" that required municipalities to obey all laws that might apply to private providers (while not relieving the municipality of the many obligations that do not apply to private companies). *Id.* ¶¶ 173-180 (PA 73-75). Because this set of obligations, especially when considered together, aimed to "protect incumbent ISPs from what [the state] apparently regards as

'unfair' competition," the agency found that the law "steps precisely into the role reserved to the Commission in regulating interstate communications," and so fell within the scope of Section 706's preemption. *Id.* ¶ 171 (PA 72).

The agency therefore preempted both the territorial restriction in Tennessee and the provisions of the North Carolina law that it had identified as barriers.

SUMMARY OF ARGUMENT

This case tests whether states can restrict competition and broadband deployment in interstate communications markets—directly counter to federal policy—by enabling their cities to provide service, but then burdening the manner of that provision in order to protect private, incumbent providers (even in areas where those providers have chosen not to provide broadband). Before the agency, one of the sponsors of the North Carolina statute filed a comment "respectfully request[ing] … that decisions regarding how best to" ensure broadband deployment in North Carolina "be left to North Carolina's elected officials." *See* Tillis Comments at 2 (RA 1019). But that plea is correctly addressed to Congress, not the Commission. The nation's broadband infrastructure is a matter of interstate commerce, squarely in the purview of the federal government and governed by the Communications Act. Congress and the FCC have repeatedly emphasized the importance of

increased broadband deployment, and in Section 706, Congress directed that the Commission "shall" remove barriers to broadband deployment. In the *Order*, the Commission made extensive findings, uncontested here, that the two state laws are such barriers. Indeed, Judge Silberman of the D.C. Circuit previously described such laws as "paradigmatic barrier[s] to infrastructure investment" within the meaning of Section 706. *Verizon*, 740 F.3d at 660 n.2 (Silberman, J., concurring in part and dissenting in part).

Then, based on a careful examination of the specific laws at issue, the Commission determined that these two laws served to regulate interstate competition in the broadband market, as opposed to exercising traditional state control over political subdivisions. State and federal policy on interstate competition were thus in direct conflict. Under the Commerce and Supremacy Clauses, state policy must give way. Since at least 1824, when the Supreme Court upheld federal preemption of a state-granted shipping monopoly as counter to federal policy in interstate markets, courts have recognized that when federal and state regulation of interstate commerce conflict, federal law "is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824) (Marshall, C.J.).

Petitioners' arguments against this preemption are unavailing. Tennessee seeks to revive the discredited argument that Section 706 is only an exhortation and not an affirmative source of authority. But the Commission has repeatedly found to the contrary, and both federal courts to review the issue have agreed that, in mandating that the agency "shall" encourage the deployment of broadband, the agency reasonably determined that "Congress … necessarily invested the Commission with the statutory authority to carry out those acts." *Verizon*, 740 F.3d at 638. This Court should reject Tennessee's arguments to the contrary.

The Commission was equally reasonable to conclude that Section 706 allows preemption here. First, the Commission found that the statute authorizes preemption in general, for example, of a state law that addresses only private providers. Section 706 sets out a broad and urgent mandate, requiring that the FCC "shall" use "measures," "methods," and "action[s]" to accelerate broadband deployment and promote competition. Congress drafted this broad language against the backdrop of decades of FCC actions preempting state laws that run counter to federal communications policy, and it is reasonable to conclude that Congress intended preemption to be among the tools the agency would use to "remove" a state-law "barrier" to these federal goals.

Petitioners argue that the agency's preemption determination here is different in kind because these laws regulate municipal broadband providers. But the Commission drew a careful line between laws that go to a state's core sovereign control of its political subdivisions, and those that instead effectuate a state's policy preferences regarding interstate competition in the field of communications. It is only the latter that the FCC found authority to preempt, thus avoiding intrusion into a state's sovereign prerogatives. And although petitioners' briefs describe their laws in the most abstract and cursory terms, on closer inspection, there can be little dispute that the laws serve to regulate broadband competition. Indeed, North Carolina concedes as much (NC Br. 11), and the operation of the law certainly bears this out, such as the requirement that municipal providers impute phantom costs aimed to mirror costs borne by private providers. Similarly, in Tennessee, a municipal electric company may fund and build a fiber network throughout almost all of the state and use that network to provide phone service; it simply cannot use that very same network to provide broadband in competition with private providers. Such laws do not protect taxpayers or manage relations between neighboring towns. They serve only to regulate interstate competition, deny broadband Internet service to people who want and need it, and protect

incumbent providers. Contrary to petitioners' claims, this sort of regulation of competition is not a core sovereign function.

Tennessee urges that any federal interference with a state's control of its political subdivisions is unconstitutional. That is not the law, as explained below, and the *Nixon* Court—in reviewing whether Congress had intended to preempt even an outright state ban on the municipal provision of telecommunications—never indicated that it would be unconstitutional for Congress to do so, if that statute were clear. *See Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004). Tennessee's constitutional argument also proves too much. By its logic, a state could establish municipal broadband providers that were unconstrained by *any* federal law, including those of general applicability to all private providers such as limitation on a radio licensee's broadcast frequency and strength, because any federal limit on city providers would intrude on the state's "inviolate" sovereignty. That would allow states to use the shield of state sovereignty as a sword to defeat federal policy in interstate commerce.

In light of the FCC's exclusive focus on laws related to interstate competition, *Gregory v. Ashcroft* has no bearing here. 501 U.S. 452 (1991). That case centered on the qualifications for a state's constitutional officers, "a decision of the most fundamental sort for a sovereign entity," *id.* at 460, not

on state policy regarding interstate commerce in an area that has long been regulated by the FCC. *Nixon* is likewise inapposite. There, the Court, endorsing the FCC's legal construction, worried about "strange and indeterminate results" when a city was freed from a flat ban on providing telecommunications service but had no affirmative authorization to provide such service. 541 U.S. at 133. As the city Intervenors' briefs make clear, that is not the case here because cities in Tennessee and North Carolina have authority to provide service under state law after the Commission's preemption determination—the preempted laws served as restraints only.

To be sure, some state laws could present close questions under the line the agency has drawn. But that does not mean that the FCC is powerless to fulfill its mandate to promote broadband in all cases. The cases before this Court involve two adjudications of specific state laws, and the record shows that *these* laws serve communications competition policy goals that are in direct conflict with federal law. The laws must give way.

STANDARD OF REVIEW

Petitioners challenge the Commission's interpretation of the scope of Section 706, a statute that the agency administers. As North Carolina concedes (NC Br. 10), this court should review that interpretation under the familiar two-step framework of *Chevron, U.S.A., Inc. v. Natural Resources*

Defense Council, Inc., 467 U.S. 837 (1984). "First, always, is the question whether Congress has directly spoken to the precise question at issue." *Metro. Hosp. v. U.S. Dep't of Health & Human Servs.*, 712 F.3d 248, 254 (6th Cir. 2013) (quoting *Chevron*, 467 U.S. at 842–43). If not, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (quoting *Chevron*, 467 U.S. at 843). This rule is "rooted in a background presumption" that Congress "knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013). Moreover, this same rule applies in questions going to the scope of an agency's powers. "[N]o 'exception exists to the normal [deferential] standard of review' for 'jurisdictional or legal question[s] concerning the coverage' of an Act." *Id.* at 1871 (quoting *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830, n.7 (1984) (alterations in original)). Contrary to Tennessee's assertion that "no deference is owed" to an agency interpretation where preemption is at issue (Br. 9), the Supreme Court has "deferred to the FCC's assertion that its broad regulatory authority extends to pre-empting conflicting state rules." *Id.* at 1871 (citing *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984)).

Intervenor NARUC also argues that the FCC was arbitrary and capricious. This "standard of review is a narrow one." *Citizens Coal Council v. EPA*, 447 F.3d 879, 890 (6th Cir. 2006). "An agency rule is 'arbitrary or capricious' if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (quoting *Motor Vehicle Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The constitutional challenge to the *Order* "is subject to *de novo* review." *Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1179 (D.C. Cir. 2014). The presence of a constitutional claim, however, does not affect the standard of review for non-constitutional issues. *See Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 709 (D.C. Cir. 2011) (courts do not "abandon *Chevron* deference at the mere mention of a possible constitutional problem") (internal quotation marks omitted).

ARGUMENT

I. SECTION 706 EMPOWERS THE FCC TO PREEMPT STATE LAWS THAT REGULATE INTERSTATE COMMUNICATIONS COMPETITION POLICY, EVEN WHEN THOSE LAWS FOCUS ON MUNICIPAL PROVIDERS.

A. The agency reasonably concluded that Section 706 authorizes preemption.

1. Section 706 is an affirmative source of authority.

Congress has given the "Commission … expansive powers … [and] a comprehensive mandate" to address issues in the "fluid and dynamic" field of communications. *Nat'l Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 219-20 (1943). The FCC's responsibilities and authority amount to "a unified and comprehensive regulatory system" for the communications industry that allows a single agency to "maintain, through appropriate administrative control, a grip on the dynamic aspects" of this industry. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940).

Encouraging broadband deployment is central to the FCC's mandate. Broadband Internet "falls comfortably within the Commission's jurisdiction" over "all interstate and foreign communication by wire or radio," *Verizon*, 740 F.3d at 629-30, and through Section 706, Congress has shown a unique level of concern. Both Sections 706(a) and (b) direct that the Commission "shall" take action to promote broadband deployment. Section 706(b),

moreover, is unique in requiring the Commission to study broadband deployment regularly and requiring the Commission to act if it finds that broadband is not being deployed to "all" Americans in a reasonable and timely manner. And more generally, Congress has repeatedly recognized the increasing importance of encouraging the deployment of a robust broadband infrastructure. For example, in 2008, Congress amended Section 706(b) to require that the Commission issue its broadband report annually, rather than "regularly," and to require that the report include "[d]emographic information for unserved areas" and an international comparison. *See* Broadband Data Improvement Act, Pub. L. No. 110–385, §103, 122 Stat 4096 (2008). And in 2009, Congress set aside $7.2 billion in grants to spur broadband infrastructure investment for "unserved" and "underserved" communities, and further tasked the FCC with developing a national broadband plan to "ensure that all people of the United States have access to broadband." American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 6001(a), (k), 123 Stat. 115 (2009); 123 Stat. at 128, 128 (appropriating $4.7 billion and $2.5 billion for broadband development by the FCC and Department of Agriculture, respectively).

Tennessee's rehash of arguments that Section 706 is nevertheless a mere exhortation is unavailing. *See* TN Br. 49-57. The FCC has repeatedly

concluded that Section 706 grants affirmative regulatory authority, a statutory interpretation to which courts must defer.[4] *See Verizon*, 740 F.3d at 635 ("*Chevron* deference is warranted even if the Commission has interpreted a statutory provision that could be said to delineate the scope of the agency's jurisdiction." (citing *City of Arlington*, 133 S. Ct. at 1874)). It was eminently reasonable for the Commission to conclude that, in mandating that the agency "shall" "encourage the deployment ... of advanced telecommunications capability" and "remove barriers to infrastructure investment," Section 706(a), "Congress … necessarily invested the Commission with the statutory authority to carry out those acts." *Verizon*, 740 F.3d at 638 (citations and quotation marks omitted). Both the D.C. and Tenth Circuits have expressly endorsed that agency interpretation of Section 706.[5] *See id.*; *In re FCC 11-161*, 753 F.3d at 1053 (Section 706(b) "operate[s] as an independent grant of authority to the Commission to take steps necessary to fulfill Congress's

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[4] Although the agency originally interpreted Section 706 as exhortatory rather than an affirmative source of authority, it has long since changed its reading and described its reasons for the new interpretation. *Verizon*, 740 F.3d at 637. Nothing more is required. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[5] Because the D.C. Circuit upheld one of the rules under review in that case, *Verizon*, 740 F.3d at 659, its lengthy analysis and holding that Section 706 is a source of authority was necessary to its decision, not dicta as Tennessee argues (Br. 50).

broadband deployment objectives." (citation and internal quotation marks omitted)); *see also Verizon*, 740 F.3d at 661 n.5 (Silberman, J., concurring in part and dissenting in part) ("Congress necessarily invested the Commission with the statutory authority to carry out those acts").

Indeed, the Senate Report on the 1996 Act describes Section 706 as a "necessary fail-safe" "intended to ensure that one of the primary objectives of the [Act]—to accelerate deployment of advanced telecommunications capability—is achieved." S. Rep. No. 104–23 at 50–51. "[I]t would be odd ... to characterize Section 706(a) as a 'fail-safe' that 'ensures' the Commission's ability to promote advanced services if it conferred no actual authority." *Verizon*, 740 F.3d at 639 (citations and internal quotation marks omitted).

This affirmative authority is not boundless, of course. *Order* ¶138 (PA 59). "First, the section must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the Commission's subject matter jurisdiction to 'interstate and foreign communication by wire and radio.'" *Verizon*, 740 F.3d at 640 (citing 47 U.S.C. § 152(a)). "Second, any regulations must be designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.'" *Id.* (citing Section 706(a)). Thus, the Section "gives the Commission authority to

promulgate only those regulations that it establishes will fulfill this specific statutory goal." *Id.*; *see also id.* at 660 (Silberman, J., concurring in part and dissenting in part) ("The key words obviously are 'measures that promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment.'").

2. Section 706 authorizes preemption.

The FCC was likewise reasonable in concluding that this grant of affirmative authority includes the power to preempt state laws that conflict with federal policy. Before addressing the preemption of the state laws before it, the agency first analyzed "whether [Section 706] authorizes preemption under any circumstances; for example, whether it would reach state laws that regulate broadband provision by purely private entities." *Order* ¶ 141 (PA 59).

As the Supreme Court has explained, "in a situation where state law is claimed to be pre-empted by federal regulation," rather than directly by statute, "a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'" *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (quoting *Fidelity Fed. Savings & Loan Ass'n v De la Cuesta*, 458 U.S. 141, 154 (1982)). Thus, contrary to petitioners'

claims (*see* NC Br. 17), it is no obstacle that a statute does not use the word "preemption." Instead, the question is whether Congress has delegated the authority to act in a sphere, and whether the agency has exercised that authority in a manner that preempts state law. *City of New York*, 486 U.S. at 64; *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699–700 (1984). Those elements are present here. Congress delegated authority to the FCC to regulate interstate communications generally and to promote broadband deployment and competition specifically, and the FCC clearly exercised this regulatory power to preempt.

Courts have often applied this framework to uphold FCC preemption. For example, when the agency preempted state regulation of the cable industry that ran counter to FCC policy, the Supreme Court found "that the Commission's authority" over cable video programming "extends to all regulatory actions 'necessary to ensure the achievement of the Commission's statutory responsibilities,'" including the preemption of otherwise valid state laws. *Crisp*, 467 U.S. at 700 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979)); s*ee City of New York*, 486 U.S. at 69-70. Indeed the Court first did so before Congress had explicitly authorized regulation of the then-emerging cable market, based on the agency's general Title I authority over

interstate communications by wire and radio. *Crisp*, 467 U.S. at 700 (citing 47 U.S.C. § 152(a)).

Congress passed Section 706 in 1996 against this background of FCC preemption. *See also, e.g.*, *Pub. Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1334 (D.C. Cir. 1989) (upholding preemption of state restriction on interconnection with the public switched telephone network); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1114 (D.C. Cir. 1984) (upholding preemption of certain state accounting regulations for telecommunications carriers). It is therefore reasonable to conclude that preemption falls within the "measures to promote competition in the local telecommunications market" and "other regulating methods" that Section 706(a) directs the Commission to use to "to remove barriers to infrastructure investment," as well as the "action[s] to accelerate deployment" under Section 706(b) likewise used to "remove barriers to infrastructure investment." *Order* ¶ 144 (PA 61). For example, if a state, after intense lobbying from the wireless broadband industry, passed a law that prohibited private cable-based broadband providers from offering faster broadband service than that offered by wireless broadband providers, such a law would stand as an obstacle to the federal policy of robust broadband infrastructure and competition. The FCC reasonably read Section 706 as granting it the

authority to preempt that state law in order to "remove barriers to infrastructure" and "promote competition in the local telecommunications market." *Order* ¶ 141 (PA 59).

Tennessee points out that Congress deleted from a previous version of Section 706 a provision that declared the FCC could preempt state commissions that failed to carry out their own duty under Section 706 to promote broadband deployment. TN Br. 46. (Again, Section 706 requires both the FCC and state commissions to promote broadband.) Tennessee infers from this deletion that Congress intended *sub silentio* to withdraw from the Commission the power to preempt any form of state law under the provision. But "'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent." *United States v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003) (quoting *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989)); *see Order* ¶ 152 (PA 64). Moreover, the deleted language dealt with arbitrating potentially conflicting duties of state and federal regulators created by Section 706 itself. That is far afield from the Commission's acknowledged power under the Supremacy and Commerce Clauses to preempt state laws that conflict with federal policy in interstate communications.

3. The FCC reasonably concluded that Section 706 reaches state laws that regulate interstate communications competition, even where those laws affect only municipal providers.

The agency was equally reasonable in concluding that its preemptive authority under Section 706 reaches at least some laws that regulate municipal providers. *Order* ¶¶ 146-150 (PA 62-63). Here, the agency drew a careful line, making clear it was not reading Section 706 to grant the authority to preempt "a law that goes to a state's power to withhold altogether the authority to provide broadband." *Id.* ¶ 147 (PA 62). Instead, the agency concluded, Section 706 reaches those cases where "a state has authorized municipalities to provide broadband, and then chooses to impose regulations on that municipal provider in order to effectuate the state's preferred communications policy objectives." *Id.* That is, Section 706 grants the agency jurisdiction to preempt "where a state law regulating the provision of broadband by a political subdivision serves to effectuate communications policy as opposed to core state control of political subdivisions." *Id.* ¶ 146 (PA 62).

This dividing line stems from the agency's jurisdiction over interstate communications; where a state law serves to regulate interstate commerce, it is subject to preemption. To take an example, if a state law allowed municipalities to provide broadband, but then prohibited the municipal

provider from offering service with a bandwidth higher than any private provider, such a law would be focused solely on communications and competition policy preferences, and not core state control of political subdivisions. *Id.* ¶ 148 (PA 63). It serves no purpose other than shaping the competitive landscape for broadband services by protecting private providers. By the same token, "where a state allows political subdivisions to provide broadband, but then imposes regulations to 'level the playing field' by creating obligations apparently intended to mirror those borne by private providers, it does so in order to further its own policy goals about optimal competitive and investment conditions in the broadband marketplace." *Id.* ¶ 147 (PA 63).

In regulating the competitive landscape for interstate communications in this way, a state "steps precisely into the role reserved to the Commission in regulating interstate communications." *Order* ¶ 171 (PA 72). Where the state law frustrates that federal prerogative, it is subject to preemption, like any other state communications law. *See generally Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984) ("Congress did not intend to allow inconsistent state regulations [to] frustrate [its] goal of developing a unified national communications service." (alterations in original, quotation marks and citations omitted)).

To be sure, this dividing line between laws that "serve to effectuate communications policy" and those that constitute "core state control of political subdivisions" requires the agency to closely examine the specific state law at issue (as it did here). And some laws may present difficult questions—although as explained below, the two laws at issue here do not. But that does not mean that "a state law that effectuates a policy preference regarding the provision of broadband is … shielded from all scrutiny simply because it is cast in terms that affect only municipal providers." *Order* ¶ 148 (PA 63). Congress has mandated that the FCC "shall" remove barriers to infrastructure investment, and the FCC is therefore required to carefully examine whether a particular law constitutes communications regulation that imposes such a barrier or is otherwise repugnant to federal policy.

Tennessee argues at length that any preemption of a law that regulates municipal providers is in all cases an unconstitutional assault on state sovereignty. TN Br. 9-14. That argument overreaches. As the *Order* pointed out, federal intercession into state control of municipalities, while uncommon, is not unheard of. *Order* ¶ 167 & n.451 (PA 70); *see generally* Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich. L. Rev. 1201 (1999). For example, the Ninth Circuit held that a license issued by the

Federal Power Commission to the city of Tacoma to build a dam on a Washington river preempted a Washington state law that barred the city from constructing the same dam. *See Washington Dept. of Game v. Federal Power Comm'n*, 207 F.2d 391, 396 (9th Cir. 1953).[6] The court reasoned that requiring compliance with state law would have prevented the development of the dam, which the federal agency had concluded was "'best adapted to a comprehensive plan' for the development of" a navigable water, an area in which "[t]he Federal Government's power … is superior to that of the state." *Id.* There, as here, objectors contended that "Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws," but the court pointed out that private corporations, no less than municipal ones, are creatures of state law, and it was settled law that a federal license to build a dam preempted a state restriction on private corporations. *Id.*; *see also* Hills at 1210 ("Rhetoric about municipalities being 'creatures of the state' is especially unhelpful given that the federal government frequently authorizes private corporations to administer federal law, even though such private organizations are creatures of state law.").

[6] When the Washington Supreme Court reached a different conclusion, the U.S. Supreme Court reversed that state law decision on the ground that it was precluded by the Ninth Circuit's earlier decision. *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340 (1958).

Similarly, the Supreme Court held that when a federal statute directed that localities could spend federal payments in lieu of local property taxes for "any local government purpose," a state legislature could not dictate how those funds would be spent, even though such a power to order local taxing and spending is ordinarily a state's prerogative. *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 268 (1985). While that case involved the federal government's spending power, the effect of the Court's decision, as here, was to empower a local community to take action otherwise prohibited under state law, and indeed two justices dissented on that ground. *See id.* at 270 (Rehnquist, C.J., dissenting). If a state's right to control municipalities, regardless of federal prerogatives, was as "inviolable" as petitioners argue, TN. Br. 10, it is difficult to understand how federal intervention, whether under the spending clause or otherwise, would ever be permissible.

Commandeering cases relied on by Tennessee (Br. 13-14) such as *United States v. Printz*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144, 176 (1992), are inapposite. Here, "the Federal Government" does not seek to "compel the States to implement, by legislation or executive action, [a] federal regulatory program." *Printz*, 521 U.S. at 925. As the agency explained, it was not compelling "any entity to take any action" but

rather was removing a barrier so that local governments could "either build infrastructure or not, as they determine best meets the needs of their communities." *Order* ¶ 167 (PA 70). The remaining cases relied on by Tennessee to show a right of inviolable state sovereignty (Br. 13-14) are equally inapposite. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 428 (2002), for example, centered on whether a state could delegate to cities its power under a statute to establish safety regulations free from preemption. There was no dispute there that Congress had permitted states to establish such regulations directly, or that Congress could have denied states the ability to delegate the power to cities, if Congress clearly so chose. *See id.* at 429 (so ruling "[a]bsent a clear statement to the contrary"). This is far afield from a state using its control of cities to defeat federal policy in interstate commerce.

Indeed, if Tennessee were correct that a state's control of its subdivisions is inviolate under the Constitution regardless of federal law, it is difficult to understand why the *Nixon* court, *see below* at part I.B.2, discussed the *Gregory* rule or the elaborate policy implications of preemption of a state's flat ban on municipal telecommunications. If it would have been unconstitutional, regardless of Congress's intent, the Court presumably would have said so—even the canon of constitutional avoidance ordinarily

contemplates that a court at least note the existence of a potential constitutional issue.

Ultimately, Tennessee's argument that it exercises "inviolable" control over municipal providers proves too much. It implies a state could establish a municipal provider, and then forbid that provider from complying with even the most basic federal regulation to which all private communications providers are subject. For example, a state could create a municipal television or radio broadcaster and then forbid that broadcaster from complying with federal regulation of the frequency or strength of a broadcast, or indecency requirements, or indeed non-communications regulations such as OSHA workplace safety standards. In short, a state could stymie federal policy simply by establishing a municipal provider and using its "inviolable" control of that provider to direct action contrary to federal law. States have very wide latitude in controlling municipal subdivisions, but where states choose to step into regulation of interstate communications markets, they are subject to federal limits.

B. *Gregory* and *Nixon* are not contrary to the Commission's reading of Section 706.

1. Gregory

Petitioners argue that *Gregory v. Ashcroft*, 501 U.S. 452 (1991), requires a heightened, clear statement of authority to preempt. TN Br. 28-35;

NC Br. 18-21. As the *Order* explained, *Order* ¶¶154-158 (PA 65-67), *Gregory* does not apply here. "Where it applies," the presumption requires that courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2256 (2013) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). However, the presumption does not apply to every instance of preemption. Rather, it applies when a court must decide if a statute should be read to "upset the usual constitutional balance of federal and state powers," such as the purported preemption in *Gregory* itself of laws regarding qualifications for a state's "constitutional officers"—a provision of state law that went "beyond an area traditionally regulated by the States" to reach "a decision of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. Because interference with a state's ability to define its constitutional officers "would upset the usual constitutional balance of federal and state powers," the *Gregory* Court emphasized that it was "'incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985)).

However, in areas beyond these historic police powers of the States, the *Gregory* presumption against preemption has no place. *See, e.g.*, *EEOC v. Massachusetts*, 987 F.2d 64, 68 (1st Cir. 1993) (*Gregory* made "unequivocally clear . . . the narrowness of its holding"). Specifically, the Supreme Court has explained that "an 'assumption' of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 107–08 (2000); *see also, e.g.*, *Inter Tribal Council of Arizona*, 133 S. Ct. at 2256; *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 534 (2009) (analyzing, in response to dissent, whether bank regulation was traditional area of state authority). This division stems naturally from the purpose of the *Gregory* rule, which, like all preemption inquiries, serves to elucidate "Congress' intent." *Gregory*, 501 U.S. at 460 (quoting *Atascadero*, 473 U.S. at 243). A court should be certain before concluding that Congress intended to intrude into areas that have previously been exclusive to the states. That assumption is unwarranted in areas that Congress and the Commission have long occupied.

For decades before the 1996 Act, Congress and the FCC had preempted state regulation of interstate communications. *City of New York*, 486 U.S. at 69-70 (1988); *Crisp*, 467 U.S. at 700 (1984); *United States v.*

Midwest Video Corp., 406 U.S. 649, 669-70 (1972); *North Carolina Util. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976) (upholding FCC assertion of preemption regarding customer equipment attached to phone lines). Because interstate communications has long been understood to be within the jurisdiction of the federal government, these cases do not look for a separate, "clear statement" of legislative intent.[7]

Here, the FCC has explicitly distinguished between state laws that constitute communications regulation and those that go to core state control over political subdivisions. It follows that, as with other examples of FCC preemption in interstate communications, no special higher burden is required under *Gregory*. To be sure, petitioners disagree with the Commission's conclusion that the laws in question do not implicate their sovereign control of political subdivisions, but that is a separate question addressed below. That dispute does not alter the conclusion that *Gregory* has no place where the FCC has found preemptive authority only for a class of laws that constitute interstate competition regulation.

[7] While *Gregory* itself was issued after these decisions, it is premised on older authority rather than creating a new requirement. *See Gregory*, 501 U.S. at 461 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

2. Nixon

Nor is the *Order* foreclosed by *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), as petitioners argue. TN Br. 35; NC Br. 16. In *Nixon*, the Supreme Court upheld a Commission ruling that Section 253(a) of the Communications Act did not preempt a state-law flat ban on municipal telecommunications, *i.e.*, phone service. Section 253(a) declares that no state law "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Missouri had passed a flat ban under which no political subdivision of the state could provide telecommunications service. *Nixon*, 541 U.S. at 129. Certain Missouri cities and utilities petitioned the Commission to find that the Missouri ban was preempted under Section 253(a). A majority of the Commission made clear its view that the state law was bad policy, and that allowing municipalities to provide phone service would "further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential." *Id.* at 131-32. However, the agency found that the term "any entity" in Section 253 did not make sufficiently clear Congress's intention to preempt the decision of a state

to withhold from its political subdivisions the power to provide telecommunications.

In *Nixon*, the Supreme Court upheld the agency's decision based on two rationales, neither of which is applicable here. As one ground, the Court found that Section 253(a) was not "forthright enough to pass *Gregory*" because the statute was ambiguous as to whether it applied to public as well as private entities, "and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms." *Nixon*, 541 U.S. at 140. As explained above, the analysis is quite different in this case. The *Order* specifically distinguished instances in which, as in *Nixon*, a party urged preemption "under section 706 of a law that goes to a state's power to withhold altogether the authority to provide broadband." *Order* ¶ 147 (PA 62). *Nixon* makes clear that the decision whether municipalities may provide telecommunications goes to "States' arrangements for conducting their own governments," which implicates *Gregory*. *Nixon*, 541 U.S. at 140. Again, that is different from a situation like this case in which a state has permitted a political subdivision to enter the market as a broadband provider, but also seeks to impose regulations on the municipal provider in order to effectuate separate communications policy goals. *Order* ¶ 156 (PA 66). The latter is

distinct and outside *Nixon*'s purview. Indeed, when the FCC previously found that *Gregory* applied to the "fundamental issue" of a state's decision "that it will not permit its municipalities to compete in the provision of certain telecommunications services," the agency contrasted this with "the question of whether federal standards may be applied to an arm of a Texas municipality that is engaged in the provision of a service in competition with private entities," where the *Gregory* presumption would be inappropriate. *Pub. Util. Comm'n of Texas*, 13 FCC Rcd 3460, 3546 ¶ 183 (1997).

Separately, *Nixon* also described at some length the "strange and indeterminate results" that could follow from preempting Missouri's flat ban, and found it "farfetched that Congress meant § 253 to start down such a road in the absence of any clearer signal than the phrase 'ability of any entity.'" 541 U.S. 125 at 133-38. That rationale is equally inapplicable here. The primary concern of the *Nixon* Court was that, even if Missouri's flat ban on municipal telecommunications were preempted, the city would still lack a source of affirmative state authority and "would still be powerless to enter the telecommunications business." 541 U.S. at 135. Here, that is not the case. *Order* ¶ 163 (PA 69). As supporting Intervenors explain, both Wilson and Chattanooga have existing authority absent the preempted laws, which served only to impose restrictions rather than provide otherwise-lacking authority.

Indeed, *Nixon* specifically noted that the "indeterminate results" would not arise in states that allow home rule, as opposed to Dillon's rule states where cities only have the authority explicitly granted by states. *See Nixon*, 541 U.S. at 135 n.3. Chattanooga is a home rule city, and Wilson was already authorized under existing state law to provide broadband services before H.B. 129 was passed. *See* Chattanooga Br. part I.A & B; Wilson Br. Statement of Facts part B.

Finally, the *Nixon* Court also feared a "national crazy quilt" in which some cities could provide service, but others could not, resulting from federal preemption. *Nixon*, 541 U.S. at 136. Here, however, any such variation stems from the decisions of states on the fundamental issue of whether cities can provide broadband. *Order* ¶ 162 (PA 68). For the same reason, there can be no concern about a "one-way ratchet," in which states can authorize broadband, but never withdraw that authorization. *Nixon*, 541 U.S. at 136-37. The ultimate decision on authorization stays with states under the FCC's interpretation of its interpretive authority. *Order* ¶ 164 (PA 69).

II. THESE LAWS FALL WITHIN THE SCOPE OF THE FCC'S POWER TO PREEMPT UNDER SECTION 706 AS REGULATION OF COMPETITION IN THE INTERSTATE COMMUNICATIONS MARKET.

In addition to demonstrating that it had the authority to preempt state laws aimed at regulating communications policy, even if those laws affect

only municipal providers, the FCC also firmly established that the laws in Tennessee and North Carolina are in fact structured to shape communications competition policy.

1. Tennessee

The record established that, under Tennessee's territorial restriction, a municipal electrical provider may only provide broadband service within its electrical service area, but may provide "telecommunications" services statewide under a separate statutory authorization. *Order* ¶ 169 (PA 71); *compare* Tenn. Code. § 7-52-401 and § 7-52-601. In modern communications networks, a fiber network may be used for a variety of communications services, including voice, video, and broadband, but Tennessee law only permits the electrical utility to use that network for "telecommunications" services outside its service area—which here would prohibit video and broadband. *Order* ¶ 169 (PA 71). The undisputed effect is that "under Tennessee law, EPB is actually free … to build a *statewide* fiber network under its authority as a telecommunications provider— it simply cannot use that network to provide broadband outside its electric service area because of the territorial restriction." *Id*. (emphasis in original).

In theory, a territorial restriction could serve a variety of purposes, such as controlling expenditures or preventing one municipality from constructing

a network within the bounds of another subdivision. Because EPB could still construct a statewide network, however, no such purpose could be served here. *Id.* Instead, a city is simply prevented from capturing economies of scale by putting that network to use by providing broadband. The sole effect is to shape the competitive landscape (and shield incumbent providers) by preventing the entry of one provider, EPB, into the broadband markets immediately surrounding it. No commenter explained another purpose in the proceeding below, and Tennessee has not explained one here.

2. North Carolina

North Carolina's H.B. 129 is likewise intended solely to shape the competitive landscape for broadband. As North Carolina forthrightly states in its brief, "The new legislation was in furtherance of established policy objectives to ensure that the State does not directly subsidize competition with private industry through actions by cities, as well as to guard against the discouragement of private investment and job creation." NC Br. 11. Indeed, the law is titled "An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business." H.B. 129. The law's preamble likewise clarifies that the law was intended to ensure that competition between public and private entities "'exists under a framework that does not discourage private investment and job creation.'" H.B. 129,

Preamble. As the FCC explained, the title and preamble of the law make clear that "[i]n enacting this law, North Carolina seeks to protect incumbent ISPs from what it apparently regards as 'unfair' competition." *Order* ¶ 171 (PA 72). Comments in this proceeding by the law's sponsors likewise confirmed that, "[a]s its title suggests, the approach of the bill was not to prohibit cities from entering into the business, but rather to adopt rules to make them enter more or less as a market participant, should they decide to compete with … private business." N.C. Rep. Marilyn Avila Comments at 2 (RA 1023).

The FCC did not find that such a goal is necessarily illegitimate. But it is clearly a goal aimed at shaping the competitive markets in interstate communications. Where state and federal policy on that issue come into conflict, the state policy must give way. This "bedrock principle" does not "vanish simply because the state's communications laws target a provider that is also a political subdivision of a state." *Order* ¶ 147 (PA 62).

The FCC divided its analysis of the individual provisions of the North Carolina law into three categories, based on function: measures apparently aimed to "level the competitive playing field," measures that raise economic

costs, and measures that impose delay.[8] *See Order* ¶¶ 82-92 (PA 40-44) (describing provisions); *id.* ¶¶ 96-119 (PA 45-53) (finding that provisions constitute barrier to broadband deployment); *id.* ¶¶ 173-180 (PA 73-75) (finding that provisions fall within the scope of the agency's preemptive authority).

The "level playing field" provisions include a bar on cross-subsidies from other city lines of business, such as electrical service, a requirement that the municipal provider make available all rights-of-way on the same terms the municipal provider obtains, and the requirement that cities comply with all local, state, and federal laws that would apply to a private provider. *See* N.C. Gen. Stat. §§ 160A-340.1(a)(1), (5), & (7); *Order* ¶¶ 85-87 (PA 41-42). In fact, as the FCC explained, these provisions create asymmetrical burdens on municipal providers. *Id.* ¶¶ 108-113 (PA 49-51). For example, private companies may cross-subsidize between lines of business, and are not required to share rights-of-way on such generous terms. *Id.* But in any case, a law purportedly aimed to "level the playing field" between public and private

[8] As the FCC explained, many provisions could fit in more than one of these categories. *Order* ¶ 81 (PA 40). Indeed, all of the provisions seem aimed, to some extent, at "leveling the playing field" between public and private providers. The agency's analysis did not hinge on this categorization. *Id.*

business is plainly designed to regulate competition in interstate communications, as opposed to exercising control over political subdivisions in order to, say, safeguard taxpayers or regulate interactions between subdivisions. *Order* ¶ 174 (PA 73).

The measures that serve to raise economic costs likewise "are designed to, and do, function[] as communications regulation by regulating the prices, terms, and conditions on which [municipal] providers may offer service." *Order* ¶ 175 (PA 74). For example, one provision prevents a public provider from charging below a theoretical "cost" of service, where the computation of that "cost" must include "phantom costs imputed to mirror those borne by a private provider." *Order* ¶ 175 (PA 74); *see* N.C. Gen. Stat. § 160A-340.1(a)(8). There is no similar provision for other municipal services that may face private competition, such as electric service. *See* N.C. Gen. Stat. Ann. § 159B-17 (electric rates must be sufficient to pay entity's actual costs); *see also id.* § 160A-314 (cities may set rates for other public enterprises with no provision for cost imputation). Other provisions require that municipal broadband providers make payments in-lieu-of-taxes to state, county, and local governments, even though, with a narrow exception, they do not impose that obligation for other city-owned services. *See* N.C. Gen. Stat. §§ 160A-340.1(a)(9), 340.5; *Order* ¶ 176 (PA 74). One of the law's state sponsors

explained in comments that this provision serves to "level the playing field" between public and private entities. *Order* ¶ 176 (PA 74); N.C. Rep. Marilyn Avila Comments at 2 (RA 1023).

As the agency explained, these provisions "do not restrict the authority to provide service, nor do they protect a city's taxpayers—if anything, they make municipal provision more risky by hampering the public provider's ability to compete based on price." *Order* ¶ 175 (PA 74). Instead, their purpose, as reflected in the law's title and preamble, is to shape the competitive market for interstate communications.

Finally, the law contains a number of provisions that add considerable delay—estimated at up to 27 months—to the deployment of a municipal broadband network. *Order* ¶ 118 (PA 53). These include a requirement that the city hold public hearings and a special election. *Id.* ¶¶ 114-119 (PA 51-53). As the agency explained, taken alone such requirements might not constitute a barrier to infrastructure deployment, or serve to regulate the competitive landscape. *Id.* ¶¶ 115, 179 (PA 51, 75). On closer examination, however, it becomes clear that the requirements do exactly what the title of the bill states—regulate broadband competition. For example, the law requires that the city provide notice of the public hearing 45 days in advance to "companies that have requested service," that private communications

companies be permitted to participate fully in the hearing, and that the city make available its full business plan in advance. *See* N.C. Gen. Stat. § 160A-340.3. Although many municipal services, such as electric and water service, may require substantial expenditures, these specific provisions are unique to the provision of broadband service. *Order* ¶ 115 & n.313 (PA 51). Similarly, existing protections already required that cities obtain approval from a Local Government Committee that reviews plans for substantial endeavors. *Order* ¶ 117 (PA 52). H.B. 129 requires that, for broadband only, the Committee must hear and consider oral and written comments from private providers arguing against the proposal. *Id.*

The law also contains financing restrictions, which the legislative history explained were aimed to "eliminate the practice of using certificates of participation" to finance the project—which, like stock in a private company, exposes only those who choose to invest—and instead require cities to use general obligation bonds, which perversely puts the faith and credit of the city at risk. *Order* ¶ 117 & n.319. Far from protecting taxpayers,

this puts them at more risk, in service of aiming to level the playing field by eliminating sources of municipal financing regarded as more advantageous.[9]

In sum, H.B. 129 contains a host of requirements, any one of which, standing alone, might constitute a reasonable exercise of core state control of political subdivisions. *Order* ¶¶ 93, 170-171 (PA 44, 72-73). But, viewed more closely, especially taken together, the provisions of the law do not serve to protect taxpayers or promote community participation—indeed, they expose municipalities to more risk and promote private provider participation in government decision-making. These laws do precisely what the law's title and preamble state—"Regulat[e] Local Government Competition with Private Business." As a regulation of interstate commerce, they are subject to preemption, and fall within the FCC's jurisdiction.

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[9] Allegations (TN Br. 18) that states pass these laws to safeguard taxpayers from the threat of failure are thus misplaced. *See* TN Br. 18; NARUC Br. 33-35; *see also, e.g.*, ALEC Br. 25; Alabama, et al. Br. 10. *See also Order* ¶ 98 (PA 45) (The North Carolina Department of State Treasurer explained that the territorial restrictions in North Carolina's law "weaken the financial viability of [municipal] broadband systems."). Moreover, the Commission found that claims of a high failure rate among municipal broadband systems are not supported by the record. *Order* ¶¶ 61-70 (PA 31-36). In Tennessee, for example, the record showed that the eight existing municipal providers have been offering broadband "competitively and with great success for several years." *Id.* ¶ 65 (PA 33). The agency also found that many allegations of failure from opponents of municipal broadband were not supported by the record. *See, e.g.*, *id.* n.177 (PA 32).

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

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November 5, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE STATE OF TENNESSEE, PETITIONER, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NOS. 15-3291 & 15-3555

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying brief for the Federal Communications Commission in the captioned case contains 12,115 words.

Pursuant to the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6), I hereby certify that the accompanying brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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November 5, 2015

Statutory Addendum

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47 U.S.C.A. § 1302

§ 1302. 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 February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

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

(1) the population;
(2) the population density; and
(3) the average per capita income.

(d) Definitions
For purposes of this subsection:

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

(2) Elementary and secondary schools
The term “elementary and secondary schools” means elementary and secondary schools, as defined in section 7801 of Title 20.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

SESSION LAW 2011-84
HOUSE BILL 129

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

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

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

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

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

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

The General Assembly of North Carolina enacts:

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

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

§ 160A-340. Definitions.

The following definitions apply in this Article:

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

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

(3) Communications service. – The provision of cable, video programming, telecommunications, broadband, or high-speed Internet access service to the public, or any sector of the public, for a fee, regardless of the technology used to deliver the service. The terms "cable service," "telecommunications service,"

and "video programming service" have the same meanings as in G.S. 105-164.3. The following is not considered the provision of communications service:

a. The sharing of data or voice between governmental entities for internal governmental purposes.
b. The remote reading or polling of data from utility or parking meters, or the provisioning of energy demand reduction or smart grid services for an electric, water, or sewer system.
c. The provision of free services to the public or a subset thereof.

(4) High-speed Internet access service. – Internet access service with transmission speeds that are equal to or greater than the requirements for basic broadband tier 1 service as defined by the Federal Communications Commission for broadband data gathering and reporting.

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

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

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

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

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

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

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

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

(5) Shall provide nondiscriminatory access to private communications service providers on a first-come, first-served basis to rights-of-way, poles, or conduits

owned, leased, or operated by the city unless the facilities have insufficient capacity for the access and additional capacity cannot reasonably be added to the facilities. For purposes of this subdivision, the term "nondiscriminatory access" means that, at a minimum, access shall be granted on the same terms and conditions as that given to a city-owned communications service provider.

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

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

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

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

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

§ 160A-340.2. Exemptions.

(a) The provisions of G.S. 160A-340.1, 160A-340.4, 160A-340.5, and 160A-340.6 do not apply to the purchase, lease, construction, or operation of facilities by a city to provide communications service within the city's corporate limits for the city's internal governmental

purposes, including the sharing of data or voice between governmental entities for internal governmental purposes, or within the corporate limits of another unit of local government that is a party with the city to an interlocal agreement under Part 1 of Article 20 of Chapter 160A of the General Statutes for the provision of internal government services.

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

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

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

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

(3) The following service areas:

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

b. For the city of Salisbury, the service area is the municipalities of Salisbury, Spencer, East Spencer, Granite Quarry, Rockwell, Faith, Cleveland, China Grove, Landis and the corridors between those cities. The service area also includes the economic development sites, public safety facilities, governmental facilities, and educational schools and colleges located outside the municipalities and the corridors between the municipalities and these sites, facilities, schools, and colleges. The

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

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

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

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

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

§ 160A-340.3. Notice; public hearing.

A city or joint agency that proposes to provide communications service shall hold not fewer than two public hearings, which shall be held not less than 30 days apart, for the purpose of gathering information and comment. Notice of the hearings shall be published at least once a week for four consecutive weeks in the predominant newspaper of general circulation in the area in which the city is located. The notice shall also be provided to the North Carolina Utilities Commission, which shall post the notice on its Web site, and to all companies that have requested service of the notices from the city clerk. The city shall deposit the notice in the U.S. mail to companies that have requested notice at least 45 days prior to the hearing subject to the notice. Private communications service providers shall be permitted to participate fully in the public hearings by presenting testimony and documentation relevant to their service offerings and the city's plans. Any feasibility study, business plan, or public survey conducted or prepared by the city in connection with the proposed communications service project is a public record as defined by G.S. 132-1 and shall be made available to the public prior to the public hearings required by this section. This section does not apply to the repair, rebuilding, replacement, or improvement of an existing communications network, or equipment relating thereto.

§ 160A-340.4. Financing.

(a) A city or joint agency subject to the provisions of G.S. 160A-340.1 shall not enter into a contract under G.S. 160A-19 or G.S. 160A-20 to purchase or to finance the purchase of property

for use in a communications network or to finance the construction of fixtures or improvements for use in a communications network unless it complies with subsection (b) of this section. The provisions of this section shall not apply to the repair, rebuilding, replacement, or improvement of an existing communications network, or equipment relating thereto.

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

§ 160A-340.5. Taxes; payments in lieu of taxes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 1.(b) G.S. 105-164.14 is amended by adding a new subsection to read:

"(d2) A city subject to the provisions of G.S. 160A-340.5 is not allowed a refund of sales and use taxes paid by it under this Article for purchases related to the provision of communications service as defined in Article 16A of Chapter 160A of the General Statutes."

SECTION 1.(c) Subsection (b) of this section is effective when it becomes law and applies to sales made on or after that date.

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

"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."

SECTION 2.(b) This section shall not be construed to change the regulatory nature of or requirements applicable to any particular service currently regulated by the Commission under Chapter 62 of the General Statutes.

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

"Article 9A.

"Borrowing by Cities for Competitive Purposes."

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

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

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

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

the Commission until at least 60 days after the application is submitted to the Commission.

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

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

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

SECTION 4. G.S. 159-81(3) is amended by adding a new sub-subdivision to read:

"q. Cable television systems."

SECTION 5. Sections 2, 3, and 4 of this act do not apply to a city or joint agency providing communications service as of January 1, 2011, provided the city or joint agency limits the provision of communications service as provided in G.S. 160A-340.2(c). In the event a city subject to the exemption set forth in this section provides communications service to a customer outside the limits set forth in G.S. 160A-340(c), the city shall have 30 days from the date of notice or discovery to cease providing service to the customer without loss of the exemption.

SECTION 6. Any city that is designated as a public utility under Chapter 62 of the General Statutes when this act becomes law shall not be subject to the provisions of this act with respect to any of its operations that are authorized by that Chapter.

SECTION 7. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 8. Except as otherwise provided, this act is effective when it becomes law and applies to the provision of communications service by a city or joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes on and after that date.

In the General Assembly read three times and ratified this the 9th day of May, 2011.

T. C. A. § 7-52-401

§ 7-52-401. Authorization to act for the provision of telephone, telegraph, or telecommunications services

Effective: June 19, 1997

Every municipality operating an electric plant, whether pursuant to this chapter, any other public or private act or the provisions of the charter of the municipality, county or metropolitan government, has the power and is authorized, on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant, to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant or equipment for the provision of telephone, telegraph, telecommunications services, or any other like system, plant, or equipment within or without the corporate or county limits of such municipality, and, with the consent of such other municipality, within the corporate or county limits of any other municipality, in compliance with title 65, chapters 4 and 5, and all other applicable state and federal laws, rules and regulations. A municipality shall only be authorized to provide telephone, telegraph or telecommunications services through its board or supervisory body having responsibility for the municipality's electric plant. A municipality providing any of the services authorized by this section may not dispose of all or substantially all of the system, plant and equipment used to provide such services except upon compliance with the procedures set forth in § 7-52-132. Notwithstanding § 65-4-101(6)(B) or any other provision of this code or of any private act, to the extent that any municipality provides any of the services authorized by this section, such municipality shall be subject to regulation by the Tennessee regulatory authority in the same manner and to the same extent as other certificated providers of telecommunications services, including, but not limited to, rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility, as defined in § 65-4-101, but only to the extent necessary to effect such regulation and only with respect to such municipality's provision of telephone, telegraph and communication services.

T. C. A. § 7-52-601

§ 7-52-601. Authority to offer cable and internet services

Effective: May 3, 2011

(a) Each municipality operating an electric plant described in § 7-52-401 has the power and is authorized within its service area, under this part and on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant, sometimes referred to as "governing board" in this part, to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant, or equipment for the provision of cable service, two-way video transmission, video programming, Internet services, or any other like system, plant, or equipment within or without the corporate or county limits of such municipality, and, with the consent of such other municipality, within the corporate or county limits of any other municipality. A municipality may only provide cable service, two-way video transmission, video programming, Internet services or other like service through its board or supervisory body having responsibility for the municipality's electric plant. A municipality providing any of the services authorized by this section may not dispose of all or substantially all of the system, plant, and equipment used to provide such services, except upon compliance with the procedures set forth in § 7-52-132.

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

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

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

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

> (A) The municipal electric system receives a resolution from the legislative body of the county regarding service in unincorporated areas of the county, or any other municipality within such county regarding service within such municipality, requesting the municipal electric system to provide such services to its residents; and

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

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

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

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE STATE OF TENNESSEE, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, Respondents.	))))))))	No. 15-3291 (and consolidated cases)

CERTIFICATE OF SERVICE

I, Matthew J. Dunne, hereby certify that on November 5, 2015, I electronically filed the foregoing **Brief for the Federal Communications Commission** with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. If they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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