No. 15-3555

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF NORTH CAROLINA,
Petitioner,

INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE,
Intervenor,

v.

FEDERAL COMMUNICATIONS COMMISION;
UNITED STATES OF AMERICA,
Respondents,

CITY OF WILSON, NORTH CAROLINA,
Intervenor.

On Petition for Review from the
Federal Communications Commission

BRIEF OF PETITIONER

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Dated: September 18, 2015

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Order of the Federal Communications Commission preempts statutory provisions enacted by the North Carolina General Assembly providing specific terms and conditions for the operation of city-owned communications systems throughout the State. The ability of North Carolina to exercise the core function of the regulation of its political subdivisions is a fundamental aspect of state sovereignty. The preemption of lawfully enacted state legislation by a federal regulatory authority involves basic principles of federalism important to states and to the United States.

North Carolina submits that oral argument may assist the Court in determining whether the preemption decision is consistent with the authority Congress has provided the Commission to encourage the deployment of broadband service to all Americans and to take action to accelerate the deployment of such capability. North Carolina maintains that Supreme Court precedent demonstrates that the Commission's asserted basis for preemption authority is erroneous.

JURISDICTIONAL STATEMENT

This proceeding involves the State of North Carolina's Petition for Review of the final Order of the Federal Communications Commission captioned "*In the Matter of City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq*." (Memorandum Opinion and Order FCC 15-25 (WC Docket No. 14-115), released March 12, 2015).

North Carolina, as a sovereign State and a party to the proceeding before the Commission, filed its petition for review pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344 on May 11, 2015, in the United States Court of Appeals for the Fourth Circuit, the appropriate venue for the petition as set forth in 28 U.S.C. § 2343.

On May 18, 2015, the Federal Communications Commission filed an Unopposed Motion to Transfer pursuant to 28 U.S.C. § 2112(a)(1) seeking the transfer of North Carolina's petition based upon the earlier filing by the State of Tennessee of a petition for review arising from the same Order. The Fourth Circuit granted the motion to transfer North Carolina's petition for review to this Court in an Order filed on May 19, 2015. This Court received the Order transferring the case from the Fourth Circuit and docketed it as case number 15-3555 on May 21, 2015.

Jurisdiction in this Court is proper under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344.

STATEMENT OF ISSUE PRESENTED

North Carolina Session Law 2011-84 delineates various terms and conditions for city-owned communications service providers which establish the municipal boundary as the territorial limit for such entities and impose requirements related to the financing and taxation of city-owned systems. The issue presented is whether this legislation is in furtherance of the core sovereign function of North Carolina's control over its political subdivisions or, instead, whether it regulates competition in the interstate communications market and is therefore subject to the asserted preemption authority of the Federal Communications Commission under Section 706 of the Telecommunications Act of 1996 [47 U.S.C. § 1302].

STATEMENT OF THE CASE

In North Carolina, cities are a political subdivision of the State, and have no power or authority beyond what the Legislature has conferred upon them by law. In Session Law 2011-84[1] the North Carolina General Assembly, in reaction to a decision by the North Carolina Court of Appeals[2] upholding a city's operation of a fiber optic network, enacted new and specific terms and conditions for city-owned communication service providers. Prior to 2011 some municipalities began providing broadband and other telecommunications services without express legislative authority. Here, the City of Wilson, North Carolina, has sought relief from that legislation in a petition filed with the Federal Communications Commission seeking preemption of the State's regulation of its broadband network.

On July 24, 2014, the City of Wilson, North Carolina, and The Electric Power Board of Chattanooga, Tennessee, filed separate petitions requesting the Commission to preempt statutory provisions that they contended constituted barriers to their

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[1] Throughout the proceedings the parties have referred to the challenged law as "H.B. 129" or "House Bill 129," reflecting the original bill designation by the North Carolina General Assembly. Because the bill became a duly-enacted law passed by both chambers of the General Assembly, it is properly referred to as Session Law 2011-84 or 2011 Session Law 84.

[2] *BellSouth Telecommunications, Inc. v. City of Laurinburg*, 168 N.C. App. 75, 606 S.E.2d 721, *cert. denied*, 359 N.C. 629, 2005 N.C. LEXIS 982 (2005).

development and operation of their broadband networks. Wilson alleged in its petition that it wanted to expand its network beyond its existing geographic territory but that its plans were precluded by the challenged legislation. (Order, P.A. 3, ¶3; Wilson Petition, P.A. 658) Wilson further asserted that it has been unable to expand its broadband service into five adjacent counties as a result of Session Law 2011-84, and alleged that the legislation was an impermissible barrier to broadband infrastructure investment and competition contrary to Section 706 of the Telecommunications Act of 1996. (Order, P.A. 22-23, ¶40; Wilson Petition, P.A. 637-38)

North Carolina Session Law 2011-84

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

In the legislation the General Assembly added new provisions to the North Carolina General Statutes including requirements that a city-owned communications service provider restrict its operation to "within the corporate limits of the city providing the communications service," N.C.G.S. § 160A-340.1(a)(3), and prohibiting the subsidization of "the provision of communications services" with funds from other revenue sources, N.C.G.S. § 160A-340.1(a)(7). The legislation additionally provides for notice and public hearings prior to the development of a new municipal communications network, N.C.G.S. § 160A-340.3, restricts various methods of financing the construction of a city-owned communications network, N.C.G.S. § 160A-340.4, and specifies the exemption or application of various taxes to city-owned communications service providers, N.C.G.S. § 160A-340.5.

The Commission's Order

In the Memorandum Opinion and Order released on March 12, 2015, the FCC preempted certain challenged provisions of Session Law 2011-84 "pursuant to Section 706 of the Telecommunications Act of 1996 because we find that they are barriers to broadband infrastructure investment and thwart competition." (Order, P.A. 2, ¶1) The Commission found that the North Carolina statutes "fall within our preemptive authority because they serve as state-law communications policy regulations as opposed to a core state function in controlling political subdivisions"

(Order, P.A. 6, ¶13), and concluded that "preemption of these restrictions will expand broadband investment and deployment, increase competition, and serve the public interest" (Order, P.A. 6, ¶15).

The Order characterizes Section 706 as a "broad delegation of authority to use all available regulatory tools" to achieve a primary Congressional objective–"to accelerate deployment of advanced telecommunications capability." (Order, P.A. 60, ¶143) It further declares that, based upon the Commission's past use of preemption as a regulatory tool, "Congress understood preemption to be among the regulatory tools that the Commission might use to act under section 706." (Order, P.A. 61, ¶144) And the Order states that the Commission's "conclusion that preemption is necessary to achieve the federal goal of encouraging broadband deployment and infrastructure investment" reflects "the Commission's expert judgment about the critical importance of broadband deployment" and therefore merits *Chevron* deference. (Order, P.A. 69-70, ¶166)

The Commission declares that the provisions of Session Law 2011-84 "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" (Order, P.A. 72, ¶171), and that while "any one of these restrictions, standing along, could conceivably be characterized as core state control of the manner of local government,

we find that in context and viewed as a whole, the regulations in fact serve to shape the competitive landscape for interstate communications" (Order, P.A. 75, ¶179)

The Commission therefore preempted specifically identified North Carolina statutory provisions because they "contravene the mandate of section 706 by erecting barriers to infrastructure investment and hampering competition in the broadband market." (Order, P.A. 75-76, ¶181) However, because not every provision of Session Law 2011-84 represents a barrier to broadband deployment or infrastructure development, the Commission did not preempt certain other statutes (Order, P.A. 76, ¶182) and therefore granted in part and otherwise denied the Petition by the City of Wilson (Order, P.A. 76, ¶184).

SUMMARY OF ARGUMENT

The FCC's preemption of North Carolina's statutes regulating city-owned communications service providers is outside the bounds of its statutory authority. The Commission's actions usurps fundamental aspects of state sovereignty concerning the core function of state regulation of its political subdivisions. North Carolina has absolute discretion over the structure and maintenance of the cities within its borders, and the powers and authorities of such cities may be enlarged, abridged, or withdrawn entirely by the General Assembly. No fair reading of the identified statutory authority of the FCC–Section 706 of the Telecommunications Act

of 1996–establishes a clear statement of Congressional intent to limit the power of States to restrict the delivery of telecommunication services by their political subdivisions.

The empowering language in Section 706 provides that the Commission "shall encourage" the deployment of broadband services "to all Americans" and directs the Commission to "take immediate action" to accelerate the deployment of such services. This is far from an explicit mandate authorizing the preemption of state statutes regulating the provision of broadband services by municipalities. No preemption authority should be implied from ambiguous or equivocal statutory language because "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Nixon v. Missouri Municipal League*, 541 U.S. 125, 141 (2004).

It is untenable to claim that preemption authority is merely one of many "regulatory tools" that the Commission can invoke unless affirmatively excluded. Authority to preempt state statutes setting out the terms and conditions for the operation of city-owned communications services must be grounded in a clear, express, and unequivocal enactment by Congress. Here, a proper analysis makes

clear that Congress intended section 706 to articulate broad policy goals rather than provide specific preemption authority.

STANDARD OF REVIEW

Questions as to whether the Federal Communications Commission has acted contrary to its authority are reviewed under the standards set out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). These standards have recently been enunciated as follows:

> In "review[ing] an agency's construction of [a] statute which it administers," the first question for the court is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter," *id.*, and both the agency and the court "must give effect to the unambiguously expressed intent of Congress," *id.* at 843. "If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* This court gives deference to the agency's interpretation so long as that interpretation is not arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 844.

In re: FCC 11-161, 753 F.3d 1015, 1040-41 (10th Cir. 2014), *cert. denied*, 191 L. Ed. 2d 955 (U.S. May 4, 2015).

Additionally, "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, **whether the agency has**

stayed within the bounds of its statutory authority." *City of Arlington, Texas v. Federal Communications Commission*, 133 S.Ct. 1863, 1868 (2013).

ARGUMENT

I. THE FCC ERRONEOUSLY PREEMPTED NORTH CAROLINA'S LEGISLATION SPECIFYING THE TERMS AND CONDITIONS FOR THE PROVISION OF COMMUNICATIONS SERVICES BY CITIES.

In Session Law 2011-84 the North Carolina General Assembly detailed the terms and conditions under which cities, as a subdivision of the State, may operate communication service networks. The new legislation was in furtherance of established policy objectives to ensure that the State does not indirectly subsidize competition with private industry through actions by cities as well as to guard against the discouragement of private investment and job creation.

The FCC, after characterizing the legislation as regulating competition in the interstate communications market rather than the State's exercise of government control over its political subdivisions, declared that the legislation was preempted because it erected "barriers to infrastructure investment an hamper[ed] competition in the broadband market" inconsistent with policy goals for the expansion of services across the United States set forth in Section 706 of the Telecommunications Act of 1996. (Order, P.A. 76, ¶181)

As shown below, the Commission's actions usurps fundamental aspects of state sovereignty involving the core function of state regulation of its political subdivisions.

A. The Order Conflicts With The Established Presumption Of State Sovereignty.

Supreme Court precedent establishes that cities are political subdivisions of the State and as such "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004) (quoting from *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991)). As a subordinate political subdivision, cities have "no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Ysursa v. Pocatello Education Association*, 555 U.S. 353, 363 (2009). Furthermore, "[p]olitical subdivisions of States–counties, cities, or whatever–never were and never have been considered as sovereign entities." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964).

These general precepts are specifically recognized in North Carolina, in the North Carolina Constitution, in controlling cases from the Supreme Court of North

Carolina, and in statutory enactments. Article VII, § 1 of the North Carolina Constitution states:

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. Const. art. VII, § 1. As such, "[m]unicipal corporations . . . are agencies created by the State and have no governmental power or authority except that which has been expressly or impliedly granted by the legislature." *Town of Emerald Isle v. State*, 320 N.C. 640, 656, 360 S.E.2d 756, 766 (1987). Furthermore, the powers and authorities of cities "may be enlarged, abridged, or withdrawn entirely at the will or pleasure of the Legislature." *Williamson v. City of High Point*, 213 N.C. 96, 106, 195 S.E. 90, 96 (1938) (quoting *Murphy v. Webb*, 156 N.C. 402, 72 S.E. 460 (1911)). And, even though the General Assembly has provided that the various powers granted to cities should be broadly construed, the authority of the municipality is always limited by what has been "conferred upon them by law" and cannot be exercised in a manner contrary "to the public policy of this State." N.C.G.S. § 160A-4.

Here, the North Carolina General Assembly has enacted legislation requiring city-owned communications service providers to limit the provision of such service

to the corporate limits of the city and to comply with various terms and conditions regarding access to and the financing of a communications network. The legislative provisions preempted by the Commission arise from the core governmental function of the relationship between the State and its political subdivisions. As such, the preemption authority under which the Commission proceeds needs to be direct and specific because

> federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires.

Nixon, 541 U.S. at 140.

As shown below, no fair reading of the statutory authority of the FCC establishes a clear statement of Congressional intent to limit the power of States to restrict the delivery of telecommunication services by their political subdivisions.

B. There Is No Express Preemption Authority In Section 706 Of The Telecommunications Act Of 1996.

Section 706(a) of the Telecommunications Act of 1996 provides that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by utilizing "measures that promote competition in the local telecommunications market, or other regulating

methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302(a) (2012) (ADD. 9). Section 706(b) directs that upon a determination that advanced telecommunications capability is not being "deployed to all Americans in a reasonable and timely fashion," the Commission "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. § 1302(b) (2012) (ADD. 9-10, 9).

The Order asserts that Section 706 "incorporates the rule common throughout communications law: the Commission may preempt state laws regarding interstate communications where they conflict with federal communications policy." (Order, P.A. 62, ¶145) The Order deflects as a "different question" whether the Commission could "preempt under section 706 a law that goes to a state's power to withhold altogether the authority to provide broadband," (Order, P.A. 62, ¶147), and then deftly tailors its statement of authority to enable the Commission's actions regarding the North Carolina statutes at issue here:

> 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, we find that such laws fall within our authority to preempt.

(Order, P.A. 62-63, ¶147)

A fair reading of the statutory provision at issue demonstrates that the Commission's conclusions do not withstand analysis. One essential prerequisite is acceptance of the Commission's assertion that the North Carolina laws at issue "effectuate communications policy as opposed to core state control of political subdivisions" (Order, P.A. 63, ¶146), the shortcomings of which are discussed both in subsection A., above, and subsection C., below. Additionally, the Commission must necessarily avoid the consequences of *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), where the Court held that the Commission did not have the authority to preempt a state statute imposing a total ban on a type of municipal telecommunication services. The Order purports to do so by declaring that *Nixon* "does not control" because:

> the correct legal question is not whether section 706 itself preempts the state laws in question, but rather whether Congress has delegated authority to act in this sphere, and whether we should exercise that authority to make a particularized decision to preempt.

(Order, P.A. 68, ¶160) And then, the ultimate conclusion that "Section 706 authorizes the Commission to preempt state laws that stand as a barrier to infrastructure investment and broadband deployment, or that inhibit competition in the telecommunications market" (Order, P.A. 59, ¶141) must be grounded in the actual language of the federal statute.

As shown above, the relevant statutory language in Section 706 provides that the Commission "shall encourage" the deployment of broadband services "to all Americans" and directs the Commission to "take immediate action" to accelerate the deployment of such services. This is plainly not an explicit mandate for the preemption of state statutes regulating the provision of broadband services by municipalities and, for reasons discussed below, no preemption authority should be implied from ambiguous or equivocal statutory language.

Furthermore, the statutory history of Section 706 demonstrates that Congress considered and rejected express language that would have directly provided the Commission with preemption authority. As detailed in the Dissenting Statement of Commissioner Ajit Pai, Congress eliminated from the final version of Section 706(b) language that would have given the Commission authority to preempt actions by State commissions that failed to ensure the timely deployment of broadband services. (Order. P.A. 107-08, Pai, Dissenting) Therefore,

> [t]he fact that Congress expressly contemplated providing the Commission with the power to preempt in section 706 but removed such language from the legislation strongly counsels against interpreting the provision to allow the Commission to preempt state law.

(Order, P.A. 108, Pai, Dissenting) Additionally, this legislative history further weakens the asserted express authority to preempt North Carolina's statutory provisions

> [f]or if Congress was unwilling to give the Commission the authority to preempt State commissions, it strains credulity to believe that it intended to empower the Commission to take the far more serious step of displacing the will of a State's democratically-elected legislators.

(Order, P.A. 108, Pai, Dissenting)

Section 706 provides the Commission with no express preemption authority. And, as shown below, there is no proper basis upon which preemption authority can be implied.

C. There Is No Implied Preemption Authority For The Commission's Order.

The Supreme Court has held that any statutory preemption provision must "point[] unequivocally to a commitment by Congress" to limit the power of States to restrict the delivery of telecommunications services by their political subdivisions. *Nixon v. Missouri Municipal League*, 541 U.S. 125, 141 (2004). This is because, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)). *Gregory* sets forth what has become known as the clear statement rule, which is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." 501 U.S. at 461.

Remarkably, the Commission declares that "*Gregory*'s clear statement rule does not apply here." (Order, P.A. 65, ¶154) The apparent rationale for this assertion is the outcome-determinative classification that the North Carolina statutes at issue constitute state regulation of interstate communications policy rather than a state's governance of its own municipalities. (Order, P.A. 65-66, ¶¶155-56) And the Commission bolsters its asserted exemption by proclaiming that "[i]n matters of interstate communications policy in particular, courts have repeatedly found that federal law preempts state communications policy without reference to the *Gregory* clear statement rule." (Order, P.A. 65-66, ¶155)[3] There is no principled basis to support the Commission's claim.

The Supreme Court directly addressed statutory preemption authority in the context of an interstate communications policy case in *Nixon*. There, in analyzing the

[3] The Order, in footnote 416, cites two cases in support of this claim*: City of New York v. FCC*, 486 U.S. 57, 64 (1988), and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984). Both cases were decided before the Supreme Court's 1991 decision in *Gregory*.

language of Section 253 of the Telecommunications Act of 1996 providing that "the Commission shall preempt the enforcement" of state statutes that "prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service," the Court expressly held that the statutory language was "hardly forthright enough to pass *Gregory*" and found "[t]he want of any 'unmistakably clear' statement" that "points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms." *Nixon*, 541 U.S. at 141. The Court had previously noted that the Commission's order rejecting preemption "adverted to the principle of *Gregory* that Congress needs to be clear before it constrains traditional state authority to order its government." *Id*. at 130 (citations omitted). And the Court's holding finding the lack of insufficiently clear Congressional intent to confer preemption authority was made in the context of a statutory provision–Section 253–that provided specific direction to the Commission to preempt certain state laws. Here, as shown above, Section 706 does not mention preemption authority in either subsection (a) or subsection (b).

Furthermore, the Commission's dodge of the clear statement rule is built upon the unsupportable characterization that the North Carolina statute does not "implicate core attributes of state sovereignty but rather interstate communications services." (Order, P.A. 66, ¶ 157) As recognized in *Nixon*, States have "absolute discretion" in

the exercise of their authority over their political subdivisions. 541 U.S. at 140. And "[t]he number, nature and duration of the powers conferred upon [municipalities] and the territory over which they shall be exercised rest[] in the absolute discretion of the state." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). Here, the State's plenary responsibility for the establishment and operation of its political subdivisions is confirmed in a provision of the North Carolina Constitution, thereby "reflect[ing] both the considered judgment of the state legislature that proposed it and that of the citizens . . . who voted for it." *Gregory*, 501 U.S. at 471.

The Order further attempts to avoid the consequences of the lack of a clear statement by declaring the existence of a "broad delegation of authority to use all available regulatory tools" in furtherance of the goal of encouraging the deployment of broadband communication services to all Americans. (Order, P.A. 60, ¶143) The Order asserts that "the best reading" of the relevant statutory provision is "that Congress understood preemption to be among the regulatory tools that the Commission might use to act under section 706." (Order, P.A. 61, ¶144) And, by turning established statutory construction concepts on their head, the Order deflects the legislative history concerning section 706 in which an explicit provision authorizing preemption was deleted before final passage, alleging that it does not

amount to "persuasive evidence that Congress affirmatively intended to exclude preemption from the regulatory tools available to the Commission to fulfill its section 706 mandate." (Order, P.A. 64, ¶152)

This convoluted reading of Section 706 is untenable. There is no presumption that Congress intended to grant the authority to preempt North Carolina's statutes; in fact, just the opposite is true, because a state has "absolute discretion" in the exercise of its authority over its political subdivisions and any statutory provision of preemption authority must come from Congress in language that is "unmistakably clear" and that "points unequivocally" to an intent to constrain traditional state authority to order its government. *Nixon*, 541 U.S. at 130.

Finally, there is one more impediment to reading any implied preemption authority into Section 706. Congress provided in Section 601(c) of the Telecommunications Act of 1996 that there should be "no implied effect" from the provisions of the Act, which included Section 706, and that the legislation should not be construed "to modify, impair, or supersede Federal, State, or local law unless expressly so provided." 47 U.S.C. § 152 note (2012) (Order, P.A. 64, ¶153 n.407). Thus, as noted by Commissioner Pai, "Section 601 (c) 'counsel[s] against any broad construction' of the 1996 Act 'that would create an implicit conflict with state []

law.'" (Order, P.A. 106, Pai, Dissenting (quoting from *Pinney v. Nokia, Inc.*, 402 F.3d 430, 458 (4th Cir. 2005))

Any claim that preemption authority is merely one of many "regulatory tools" that the Commission can invoke unless affirmatively excluded defies rational analysis. A preemption of state statutes setting out the terms and conditions for the operation of city-owned communications services must be grounded in a clear, express, and unequivocal authorization from Congress. Here, a proper analysis of "[t]he text, statutory structure, and its legislative history all make clear that Congress intended section 706 to be hortatory–not delegatory–in nature." (Order, P.A. 108, Pai, Dissenting)

CONCLUSION AND RELIEF REQUESTED

This Court should reject the Commission's preemption of the specific provisions of North Carolina Session Law 2011-84 identified in Paragraph 181 of the Order by vacating the Order, and remanding the matter to the Commission with instructions to deny the petition by the City of Wilson in its entirety.

Respectfully submitted, this the 18th day of September, 2015.

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitations,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 4581 words.

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportional spaced typeface using WordPerfect X4 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I, John Foster Maddrey, hereby certify that on September 18, 2015, the foregoing **BRIEF OF PETITIONER** was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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ADDENDUM

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.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Dale R. Folwell
Speaker Pro Tempore of the House of Representatives

This bill having been presented to the Governor for signature on the 10th day of May, 2011 and the Governor having failed to approve it within the time prescribed by law, the same is hereby declared to have become a law. This 21st day of May, 2011.

s/ Karen Jenkins
Enrolling Clerk

TITLE 47. TELECOMMUNICATIONS

CHAPTER 12. BROADBAND DATA IMPROVEMENT

47 U.S.C. § 1302 (2012)

§ 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 school" means elementary and secondary schools, as defined in section 7801of title 20.

(Pub. L. 104-104, title VII, §706, Feb. 8, 1996,110 Stat. 153; Pub. L. 107-110, title X, §1076(gg), Jan. 8, 2002, 115 Stat. 2093; Pub. L. 110-385, title I, §103(a), Oct. 10, 2008, 122 Stat. 4096.)