

Nos. 15-3291, 15-3555

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 15-3291

STATE OF TENNESSEE,

Petitioner,

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Intervenor,

vs.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents,

ELECTRIC POWER BOARD OF CHATTANOOGA; CITY OF WILSON,

NORTH CAROLINA,

Intervenors.

No. 15-3555

STATE OF NORTH CAROLINA,

Petitioner,

INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE,

Intervenor,

vs.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents,

CITY OF WILSON, NORTH CAROLINA,

Intervenor.

On Petition for Review from Order of the
Federal Communications Commission No. 15-25

**Brief of Alabama, Arkansas, Arizona, Colorado, Florida, Idaho, Michigan,
Ohio, South Carolina, Utah, and West Virginia, as *Amici Curiae*
in Support of Petitioners**

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Interest of Amici Curiae¹

Amici curiae States Alabama, Arkansas, Arizona, Colorado, Florida, Idaho, Michigan, Ohio, South Carolina, Utah, and West Virginia want to encourage innovation and increase access to broadband. In Alabama, for example, the Governor recently issued an Executive Order creating a commission to enhance broadband deployment. Gov. Robert Bentley, Exec. Order No. 9 (Jul. 16, 2015).² But, at the same time, the *amici* States must be able to hold municipalities involved in the distribution of broadband accountable to their citizens. The FCC's broad preemption of state municipal broadband regulation eliminates States' control over their own subdivisions and frustrates state efforts to increase access to broadband. The FCC's action leaves States on the horns of a dilemma. They can either allow municipal broadband without important checks on abuse and mismanagement, or they can eliminate municipal broadband altogether. Neither option is satisfactory. The States' interests would best be served by reversing the FCC's preemption decision in this case and restoring States' freedom to regulate municipal broadband networks.

¹ States may file a brief as *amici curiae* without the consent of the parties or leave of court. Fed. R. App. P. 29(a). No party or counsel for a party authored or contributed to this brief.

² Available at <http://governor.alabama.gov/newsroom/2015/07/executive-order-number-9-2/> (last visited Aug. 27, 2015).

Summary of Argument

The FCC's preemption of state regulations of municipal broadband networks is arbitrary and counterproductive. The FCC's order prevents States from governing their own instrumentalities, broadly usurps power without authority, and opens the door for financial instability and corruption. Although the FCC believes that preventing States from regulating municipal broadband will increase access to broadband service, the FCC's order could prompt some States to ban municipal broadband entirely, frustrating the FCC's own priorities. The FCC's order should be vacated for three reasons.

First, there is no clear statement in the applicable statute that gives the FCC the right to preempt States' limited authorization of municipal broadband. The Supreme Court has held that States can ban municipal broadband. If the States can ban municipal broadband, they can also impose reasonable limitations on it. That is precisely what Tennessee and North Carolina have done. If the States cannot limit municipal broadband, then States face the choice of either allowing unregulated municipal broadband or banning it all together. The FCC's order may prevent access to broadband, not increase it.

Second, it is especially unlikely that Congress intended to give the FCC authority to preempt sunshine laws and open meetings acts as applied to municipal broadband providers. A significant potential for (and in some cases a history of)

self-dealing and financial mismanagement has often prompted state regulation and oversight of public utilities and municipal corporations. It flouts common sense to preempt open meetings laws and sunshine laws in the name of making it easier for municipalities to provide broadband.

Third, States must be allowed to impose reasonable limitations on municipal broadband providers to ensure that taxpayers are consulted before such networks are created. Municipal broadband networks are not constrained by shareholders or market forces; they are instead responsible to taxpayers. Municipal broadband networks in Utah, Vermont, Tennessee, Georgia, and California have failed and left taxpayers on the hook for their debts. Taxpayers and other members of the community must be able to oversee municipal broadband providers and hold them accountable for their actions.

The States have the right to regulate their own political subdivisions, even when they provide broadband. The Court should vacate the FCC's order.

Argument

I. The FCC’s order unlawfully preempts Tennessee and North Carolina’s reasonable limitations on municipal broadband networks.

The Supreme Court has already rejected attempts to use federal communications law to preempt States from *banning* municipal broadband networks. *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132–41 (2004). Municipalities and municipal corporations are creatures of state law, and their activities are both permitted and limited by state law. They “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.” *Id.* at 140. (quoting *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607–08 (1991)). Because municipalities and municipal corporations are creatures of state law, States may expand or contract the powers of these entities, govern them or allow them to govern themselves, or destroy their existence. *E.g.*, *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 509 (1942).

In choosing to allow municipalities to establish broadband networks, many States, like Tennessee and North Carolina, have imposed various accountability measures that prevent mismanagement and promote financial stability.³ For

³ Ala. Code § 11-50B-8; Cal. Gov’t Code §§ 53395.17, 53395.3.2; Minn. Stat. Ann. § 237.19; N.C. Gen. Stat. Ann. § 160A-340.3; Tenn. Code Ann. §§ 7-52-601,

example, many States require municipalities to allow their residents to vote on whether to establish a broadband network. Others limit the scope of municipal networks to the city limits. These limitations are part-and-parcel of the States' plenary power over their political subdivisions.

Tennessee and North Carolina have authorized municipal broadband subject to different, but equally reasonable, limitations. Tennessee permits municipalities to provide broadband services only “within [the municipality’s] service area.” Tenn. Code Ann. § 7-52-601. To be clear, the service area of a municipality may extend beyond the municipality’s boundaries: Tennessee law permits municipalities to offer such services “within the corporate or county limits of any other municipality” with that municipality’s consent. *Id.* 7-52-601(a). And Chattanooga’s service area covers 600 square miles, while the city itself covers only 137.15 square miles, indicating that its broadband capabilities and services already extend beyond municipal boundaries. F.C.C.R. 15-25 at 9; U.S. Census, Chattanooga, Tennessee Quick Facts (2010).⁴ Tennessee did not prevent the EPB from reaching customers just past the Chattanooga city limits. But even if it had, a *municipal* boundary is a reasonable place to draw the boundary line of a *municipal*

602(3)–(4); Utah Code Ann. § 10-18-202(1), (4); Va. Code Ann. § 15.2-2160(A)(v).

⁴ Available at <http://quickfacts.census.gov/qfd/states/47/4714000.html> (last visited Aug. 27, 2015).

network. That line links the network's service areas with the taxpayers and citizens responsible for the network.

For its part, North Carolina's conditions for municipal broadband authority are likewise reasonable. North Carolina allows cities to provide municipal broadband within municipal boundaries. N.C. Stat. § 160A-340.1(a)(3). It requires municipal broadband providers to comply with the same laws applicable to other broadband entities. *Id.* § 160A-340.1. And it subjects municipal broadband providers to notice restrictions and requires public hearings to ensure open government. *Id.* § 160A-340.3. North Carolina requires municipalities to give their citizens an opportunity to vote whether to issue debt service to construct a broadband system. *Id.* § 160A-340.4. And municipalities must remit to the State and county an amount equal to taxes they would pay as private broadband companies. *Id.* § 160A-340.5.

The FCC's order unlawfully sweeps aside these reasonable good-government regulations. States are "laboratories for devising solutions to difficult legal problems." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). Therefore, without a plain statement of Congressional intent to preempt state regulations, courts—and federal agencies—cannot do so. *Gregory v. Ashcroft*, 501 U.S. 452, 467–70 (1991). As the Supreme Court has explained, "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. Here, there is no such plain statement. Indeed, Congress expressly granted co-extensive authority to *both* the FCC and state commissions to encourage broadband development. 47 U.S.C. § 1302(a).

In short, Tennessee and North Carolina chose reasonable ways to increase access to broadband while ensuring public accountability and minimizing the risk of mismanagement. Without a plain statement in a federal statute, the FCC cannot preempt these perfectly reasonable limitations on how municipalities provide broadband services. *Gregory*, 501 U.S. at 467–70.

II. Open meetings laws and sunshine laws increase accountability for government and public utilities.

Open meetings laws and sunshine laws help make local governments and public utilities transparent and responsive to citizens. All 50 states, the District of Columbia, and the federal government require openness in government meetings through open meeting acts, sunshine laws, or freedom of information acts.⁵ States

⁵ Ala. Code §§ 36-25A-1 to -11; Alaska Stat. §§ 44.62.310, -312, -319; Ariz. Rev. Stat. Ann. §§ 38-431 to -431.09; Ark. Code Ann. §§ 25-19-101 to -110; Cal. Gov't Code § 54953; Colo. Rev. Stat. §§ 24-6-401 to -402; Conn. Gen. Stat. § 1-225; Del. Code Ann. tit. 29, §§ 10001 to 10007; Fla. Stat. Ann. § 286.011 to .012; Ga.

often apply these acts broadly, including to public corporations. There is no reason to believe that Congress gave the FCC the power to authorize local governments and public utilities to make closed-door decisions in the name of increasing access to broadband.

In fact, some public utilities and municipal corporations have a history of mismanagement and self-dealing that makes it particularly unlikely that Congress intended to allow the preemption of open meetings laws as applied to municipal broadband providers. The Birmingham, Alabama Water Works Board provides a good example of financial mismanagement that requires state oversight. The Board is a local corporation that provides water and sewer service in the City of

Code Ann. § 50-14-1 to -6; Haw. Rev. Stat. § 92-1 to -13; Idaho Code Ann. § 74-201 to -208; 5 Ill. Comp. Stat. Ann. 120/1 to /7.5; Ind. Code Ann. § 5-14-1.5-1 to -8; Iowa Code Ann. § 21.1 to .11; Kan. Stat. Ann. § 75-4317 to -4320c; Ky. Rev. Stat. Ann. § 61.800 to .850; La. Rev. Stat. Ann. § 42:11 to :28; 1 Me. Rev. Stat. Ann. § 400 to 414; Md. Code Ann., Gen. Provisions § 3-101 to -501; Mass. Gen. Laws Ann. ch. 30A, § 20 to 25; Mich. Comp. Laws Ann. § 15.261 to .275; Minn. Stat. § 13D.01 to .08; Miss. Code Ann. § 25-41-1 to -17; Mo. Ann. Stat. § 610.010 to .035; Mont. Code Ann. § 2-3-201 to -221; Neb. Rev. Stat. § 84-1407 to -1414; Nev. Rev. Stat. Ann. § 241.010 to .040; N.H. Rev. Stat. Ann. § 91-A:1 to :9; N.J. Stat. Ann. § 4-6 to -21; N.M. Stat. Ann. § 10-15-1 to -4; N.Y. Pub. Off. Law § 100 to 111; N.C. Gen. Stat. Ann. § 143-318.9 to .18; N.D. Cent. Code § 44-04-19 to -21.3; Ohio Rev. Code Ann. § 121.22; Okla. Stat. tit. 25, § 300 to 314; Or. Rev. Stat. § 192.610 to .695; 65 Pa. Cons. Stat. Ann. § 701 to 716; R.I. Gen. Laws § 42-46-1 to -14; S.C. Code Ann. § 30-4-10 to -110; S.D. Codified Laws § 1-25-1 to -10; Tenn. Code Ann. § 8-44-101 to -111; Tex. Gov't Code Ann. § 551.001 to .006; Utah Code Ann. § 52-4-101 to -305; Vt. Stat. Ann. tit. 1, § 310 to 314; Va. Code Ann. § 2.2-3700 to -3714; Wash. Rev. Code Ann. § 42.30.010 to .920; W. Va. Code Ann. § 6-9A-1 to 12; Wis. Stat. Ann. § 19.81 to .98; Wyo. Stat. Ann. § 401 to 408; D.C. Code § 1-207.42; 5 U.S.C. § 552b.

Birmingham and several surrounding counties. The Board has faced numerous class actions alleging unauthorized disbursement of public funds and the wrongful inflation of customers' water bills. *Ex parte Water Works & Sewer Bd. of City of Birmingham*, 738 So. 2d 783, 786 (Ala. 1998). A recent audit revealed that employees received vehicle stipends, averaging over \$6,000 per employee, regardless of miles traveled. Joseph D. Bryant, "Birmingham Water Works vehicle allowance for senior officials flagged by internal auditor, report shows," *Al.com* (Feb. 25, 2014).⁶ One supervisor was recently convicted of theft in connection with an overtime payment racket, in which he encouraged subordinates to report overtime hours they did not work and received part of their unmerited pay in return. Joseph D. Bryant, "Former Birmingham Water Works supervisor facing 2 to 20 years in prison after overtime fraud scheme conviction," *Al.com* (Jul. 30, 2014).⁷ After widespread public outcry, the Alabama Legislature increased state oversight of the Board, implemented term limits, imposed compensation caps, and made other changes to ensure transparency and stability in the operation of municipal water boards. Ala. Act No. 2015-164.⁸ But if the Birmingham Water

⁶Available at http://blog.al.com/spotnews/2014/02/water_works_vehicle_allowance.html (last visited Aug. 27, 2015).

⁷ Available at http://www.al.com/news/birmingham/index.ssf/2014/07/former_birmingham_water_works_2.html (last visited Aug. 27, 2015).

⁸ Remarkably, the Board paid lobbyists at least \$450,000 of public money in an effort to prevent the bill's passage. Joseph D. Bryant, "Birmingham Water Works reform legislation passes House, goes to governor," *Al.com* (May 5, 2015).

Works Board were selling broadband instead of water, these reforms would ostensibly be preempted by the FCC.

The Birmingham Water Works Board is not an isolated example of a local utility behaving badly. Financial mismanagement and lack of oversight are serious problems for local corporations because they are not accountable to shareholders or capital markets. *See, e.g.*, Marc Lifsher, “Amid protest, a call for a more ethical Public Utilities Commission,” *LA Times* (Feb. 12, 2015) (discussing the California Public Utilities Commission);⁹ Alex Zdan, “Allegations of theft and malfeasance at Trenton Water Works predate Mayor Tony Mack’s administration,” *NJ.com* (Dec. 11, 2013) (discussing the Trenton Water Works in New Jersey).¹⁰ The FCC’s wholesale invalidation of the public accountability portions of North Carolina’s law undermines good, honest, open government. There is no reason to believe that Congress intended such a result in the name of increasing broadband access.

III. States have an interest in maintaining fiscal accountability in municipal broadband providers.

The FCC has also preempted key provisions of state law designed to ameliorate the problem of bankrupt or financially struggling public entities.

Available at http://www.al.com/news/birmingham/index.ssf/2015/05/birmingham_water_works_reform.html (last visited Aug. 27, 2015).

⁹ Available at <http://www.latimes.com/business/la-fi-peevey-fete-20150212-story.html> (last visited Aug. 27, 2015).

¹⁰ Available at http://www.nj.com/mercer/index.ssf/2013/12/allegations_of_theft_and_malfeasance_at_trenton_water_works_predate_mayor_tony_macks_administration.html (last visited Aug. 27, 2015).

Instead of answering to shareholders and the market, municipal broadband networks are ultimately responsible to taxpayers. And when networks fail, taxpayers are left with the bill. North Carolina's fiscal accountability measures and Tennessee's geographical limitations provide assurance to taxpayers that they will be consulted before they are on the hook for a failing broadband provider. The experiences of Utah, Vermont, Tennessee, Georgia, and California reveal how taxpayers are often left to pick up the pieces when municipal broadband networks fail. *See, e.g.*, Letter from Charles M. Davidson, Director of ACLP at New York Law School, to Marlene H. Dortch, Secretary of the Federal Communications Commission (Sept. 5, 2014) (available at <http://apps.fcc.gov/ecfs/comment/view?id=6018368002>). It makes perfect sense that taxpayers should be consulted—by referenda or other means—before such networks are established.

A. Utah: UTOPIA

The Utah Telecommunication Open Infrastructure Agency (UTOPIA) is a fiber optic network run by a group of cities in Utah. Created in 2002, UTOPIA was meant to provide data, voice, and video services to citizens in sixteen Utah cities. But by 2014, the network served only 10%, and passed only 40%, of the 160,000 properties it was intended to serve. Many residents whose homes were adjacent to UTOPIA's fiber lines did not sign up for its service. UTOPIA's debt

service frequently consumed its cash flow, and one projection indicates that “the outstanding revenue bonds and associated swap contracts could consume up to \$500 million of tax pledges between 2014 and 2040.” Macquarie Capital, “UTOPIA Network PPP: Milestone One Report” at 9 (Apr. 29, 2014).¹¹

To solve these problems and move forward, the network considered a proposal for a public-private partnership with an Australian firm because Utah citizens would still owe the money even if the network were shut down or sold. This partnership would require all residents in participating cities (whether they subscribe to UTOPIA or not) to pay an \$18–20 monthly tax. Kuper Jones, “For Taxpayers, Broadband ‘UTOPIA’ Anything But,” *Forbes* (Jul. 1, 2014).¹²

But even while considering the first phase of that partnership, some cities became so dissatisfied with UTOPIA and its management that they began refusing to submit their quarterly financial contributions. Genelle Pugmire, “Orem withholds UTOPIA payment,” *Daily Herald* (Jan. 14, 2015).¹³ In January 2015, the city of Orem withheld a \$110,000 operational payment, complaining that the UTOPIA board paid no attention to the city leaders’ concerns. Since then,

¹¹ Available at <http://www.gofiberutah.org/milestone/UTOPIA%20Network%20PPP%20-%20Milestone%20One%20Report%20-%20FINAL.pdf> (last visited Aug. 28, 2015).

¹² Available at <http://www.forbes.com/sites/realspin/2014/07/01/for-taxpayers-broadband-utopia-anything-but/> (last visited Aug. 28, 2015).

¹³ Available at http://www.heraldextra.com/news/local/central/orem/orem-withholds-utopia-payment/article_e4c9ea69-616a-5799-9c19-e76974affd5.html (last visited Aug. 28, 2015).

infighting among member cities—represented on the UTOPIA board proportionally based on their population—has prevented progress, and at least five cities have opted out of the public-private partnership arrangement. Genelle Pugmire, “UTOPIA triangle strangling Orem’s options,” *Daily Herald* (Mar. 24, 2015).¹⁴ As a result, residents of the remaining cities face fees of approximately \$23 per month. And Orem continued withholding its payments from UTOPIA, to the tune of \$37,227 each month. UTOPIA has been without a CEO for nearly two years. It is unclear whether this partnership will last, and litigation seems likely as cities continue to withhold payments.

B. Vermont: Burlington Telecom

The municipal network in Burlington, Vermont, has undergone similar financial woes. Founded in 2001, Burlington’s network was publicly owned but used private financing to build its lines. By 2009, the city had lost \$17 million of its investment in the network. Citibank, its financier, filed a lawsuit seeking \$33 million from the city. Joe Gullo, “Citibank Drops Burlington Telecom Lawsuit,” *My Champlain Valley.com* (Jan. 2, 2015).¹⁵ To resolve these financial and legal problems, Burlington hired an outside firm to manage the network. Alicia Freese,

¹⁴ Available at http://www.heraldextra.com/news/local/central/orem/utopia-triangle-strangling-orem-s-options/article_ef569ae7-1f5e-5e7e-a63c-5440046c0478.html (last visited Aug. 28, 2015).

¹⁵ Available at <http://www.mychamplainvalley.com/news/vermont/citibank-drops-burlington-telecom-lawsuit> (last visited Aug. 31, 2015).

“Meet the Brit Who Turned Around Burlington Telecom,” *Seven Days* (Dec. 10, 2014).¹⁶ Burlington Telecom eventually settled the lawsuit with Citibank for \$10.5 million, \$6 million of which came from a local businessman.

To secure funding for settling Citibank’s lawsuit, city officials agreed to sell the network within a few years and split the profits with Citibank, the local businessman, and the outside firm. But this arrangement is far from a success story. It is unclear whether the network will grow beyond its 4,905 individual subscribers. It is unclear whether taxpayers will recoup any of their forced “investment” in the network. And it is unclear who will purchase the network. A local cooperative is raising funds in an effort to keep the network under local ownership, but such an arrangement could lead back to the same financial troubles that landed the network in its current straits. Erin Mansfield, “KeepBTLocal plans to buy Burlington Telecom,” *VTDigger.org* (Jun. 15, 2015).¹⁷

C. Tennessee: Memphis Network

Tennessee itself had a dystopian experience with Memphis’s municipal broadband network. Memphis Network was founded in 1999, but because of licensing problems, it did not fully launch until 2001. Chris Davis, “Network

¹⁶ Available at <http://www.sevendaysvt.com/vermont/meet-the-brit-who-turned-aroundburlington-telecom/Content?oid=2484411> (last visited Aug. 31, 2015).

¹⁷ Available at <http://vtdigger.org/2015/06/15/keepbtlocal-plans-to-buy-burlington-telecom/> (last visited Aug. 31, 2015).

Down,” *Memphis Flyer* (Jun. 21, 2007).¹⁸ Between 2001 and 2007, Memphis invested around \$30 million in Networx. Overstaffing, overvaluation, and over-budgeting contributed to its failure and ultimate sale for \$11.5 million, netting less than \$1 million for taxpayers. Andy Meek, “Memphis Networx: From Smart Money to Risky Business,” *Memphis Daily News* (Jun. 22, 2007).¹⁹ To this day, the failure of Networx and its \$28 million loss to Memphis utility ratepayers serves as context when Tennesseans discuss broadband. Dave Flessner and Mitra Malek, “Broadband battle: FCC, Legislature square off over EPB bid to expand Gig territory,” *Times Free Press* (Feb. 26, 2015).²⁰

D. Georgia: Fibernet

In 1996, Marietta, Georgia, created FiberNet at a cost of \$35 million. FiberNet was never profitable. Eight years later, it sold that network at a \$24 million loss to taxpayers. Georgians still remember FiberNet, citing it among the reasons for restrictions on municipal broadband networks in Georgia. Louie

¹⁸ Available at <http://www.memphisflyer.com/memphis/networx-down/Content?oid=1137245> (last visited Aug. 28, 2015).

¹⁹ Available at <http://www.memphisdailynews.com/editorial/Article.aspx?id=33060> (last visited Aug. 28, 2015).

²⁰ Available at <http://www.timesfreepress.com/news/local/story/2015/feb/26/broadband-battle/290349/> (last visited Aug. 28, 2015).

Hunter, “Legislature should update GON law,” *Marietta Daily Journal* (Feb. 3, 2012).²¹

E. California: LompocNet

In the early 2000s, Lompoc, California, created a citywide wireless broadband network for its 42,000 residents. The city borrowed \$2.6 million from its electric utility to begin constructing the network, estimating a total project cost of \$26.5 million, to be financed through bonds. James S. Granelli, “Impatient Cities Supply Their Own Broadband,” *Los Angeles Times*, 2005 WL 23351422 (Nov. 13, 2005). In the first few years of its existence, the network signed up only a few hundred customers, in part because its server could handle only 500 subscribers. Stephen Lawson, “Back-end Systems Could Save a City Wi-Fi Project,” *PCWorld.com* (Jul. 14, 2008).²² And today, the network’s “frequently asked questions” page indicates that the multi-million dollar network cannot be used inside buildings without special equipment.²³

* * *

²¹ Available at http://mdjonline.com/view/full_story/17382489/article-Louie-Hunter—Legislature-should-update-%E2%80%98GON%E2%80%99-law?instance=secondary_story_left_column (last visited Aug. 31, 2015).

²² Available at <http://www.pcworld.com/article/148403/article.html> (last visited Aug. 31, 2015).

²³ Available at <http://www.cityoflompoc.com/lompocnet/faq.htm> (last visited Aug. 31, 2015).

Municipal broadband can be an important tool to increase access to broadband. But, like any other public utility, municipal broadband providers must be governed through careful state regulation and oversight. States wishing to allow municipal broadband have reasonably enacted regulations to protect taxpayers. Without a clear statement to the contrary, States retain the authority to regulate not just whether, but also how and where, municipalities may have broadband networks.

Conclusion

This Court should **VACATE** the FCC's order.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)

The undersigned hereby certifies as follows:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,593 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in size 14 Times New Roman.

/s Andrew L. Brasher

Certificate of Service

I, Andrew L. Brasher, hereby certify that on September 25, 2015, the foregoing Brief of Alabama, Arkansas, Arizona, Colorado, Florida, Idaho, Michigan, Ohio, South Carolina, Utah, and West Virginia as *Amici Curiae* in Support of Petitioners 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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