

**ORAL ARGUMENT NOT YET SCHEDULED**

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**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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**Nos. 15-3291, 15-3555**

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**STATE OF TENNESSEE,**  
*Petitioner,*

**v.**

**FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA,**  
*Respondents.*

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**STATE OF NORTH CAROLINA,**  
*Petitioner,*

**v.**

**FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,**  
*Respondents.*

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

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**BRIEF OF INTERNET ASSOCIATION AS *AMICUS CURIAE*  
IN SUPPORT OF RESPONDENT FEDERAL  
COMMUNICATIONS COMMISSION**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* in support of Respondent the Federal Communications Commission submit the following corporate disclosure statement:

The Internet Association is a national trade association representing leading Internet companies including Airbnb, Amazon, Auction.com, Coinbase, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Gilt, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Sidecar, Snapchat, SurveyMonkey, TripAdvisor, Twitter, Uber Technologies, Inc., Yahoo!, Yelp, Zenefits, and Zynga. The Internet Association is a not-for-profit corporation and has not issued shares or debt securities to the public. The Internet Association does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	ii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF IDENTITY AND SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	4
I. THE CURRENT STATE OF BROADBAND DEPLOYMENT IS INADEQUATE AND HAS CREATED A DIGITAL DIVIDE .....	4
A. Most Consumers Have Access to One, or Only One Alternative, Provider of Broadband Services.....	5
B. Without Robust Competition, Broadband Providers Lack Incentives to Deliver High-Speed, High-Quality Services .....	7
C. The Lack of Robust Competition Has Created a Digital Divide .....	10
II. THE INADEQUATE STATE OF COMPETITION EXISTS AT THE VERY TIME THAT DEMAND FOR BROADBAND IS AT NEW HEIGHTS .....	11
A. Effects of Broadband Access at the National Level .....	12
B. Effects of Broadband Access at the Local Level .....	16
III. THE FCC’S STATUTORY MANDATE TO PROMOTE BROADBAND DEPLOYMENT AND AVAILABILITY HAS BEEN AFFIRMED BY THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT .....	19
CONCLUSION .....	22
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC</i> , 746 F.2d 1492 (D.C. Cir. 1984).....	21
<i>Verizon v. FCC</i> , 740 F.3d 623 (D.C. Cir. 2014).....	19, 20, 21
<b>AGENCY PROCEEDINGS</b>	
<i>City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, Memorandum Opinion and Order</i> , 30 FCC Rcd. 2408 (2015).....	2, 7, 9, 20, 21
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## STATEMENT OF IDENTITY AND SUMMARY OF ARGUMENT

In a span of only a few years, access to broadband Internet services has transformed our economy, unleashed innovation, created jobs, improved access to education and health care, and changed the way we work, learn, and play. In short, access to broadband Internet services has become an indispensable tool in our daily lives. Unfortunately, for too many Americans, this essential tool is unavailable. According to the Federal Communications Commission's Broadband Progress Report, today approximately 55 million Americans lack access to broadband Internet services.<sup>1</sup>

Given the critical importance of the Internet in our global economy, policymakers have determined that the United States should not settle for less than abundant, ubiquitous access to broadband services for all Americans. Access to the Internet is today the modern equivalent to access to railroads, electricity, highways, and telephony in previous eras. And just as the federal government recognized and executed its role in encouraging, promoting, and facilitating

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<sup>1</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Deployment Act, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, 30 FCC Rcd. 1375, 1378 ¶ 4 (2015) (“Broadband Progress Report”).

universal access to those services, the federal government today similarly recognizes its role in promoting and facilitating access to broadband services.

Congress affirmed the role the federal government must play in connecting Americans to one another and to a global community when it passed the last major update to our nation's communications laws. At the dawn of the commercial Internet, Congress passed the Telecommunications Act of 1996, where it directed the Commission to "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 . . . removing barriers to infrastructure investment . . . ." <sup>2</sup> If the Commission finds that deployment to all Americans is not happening in such a manner, Congress directed the Commission to "take immediate action to accelerate deployment of such capability . . . ." <sup>3</sup>

It is not surprising, therefore, that the Commission decided to grant the petitions of the Electric Power Board of Chattanooga ("EPB"), Tennessee, in whole, and the City of Wilson, North Carolina, in part. <sup>4</sup> Those decisions represent

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<sup>2</sup> Section 706(a) of the Telecommunications Act of 1996 (codified at 47 U.S.C. §1302(a)).

<sup>3</sup> *Id.* §1302(b).

<sup>4</sup> *City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code*

a step toward broadband abundance. In urging this Court to reverse the Commission's decision, Petitioners and their amici ask the Court to take a step in the opposite direction, toward retrenchment, even in the face of the startling evidence regarding the state of broadband deployment and competition in America. We urge the Court to deny the petitions.

The Internet Association represents a broad array of America's leading Internet companies and their community of users.<sup>5</sup> From small start-ups to industry leaders, the Internet Association's members have changed the way people live, travel, entertain, shop, and communicate with each other. While these members span a wide variety of business models that compete over a broad spectrum of markets—sometimes against each other—they stand together to foster innovation and economic growth.

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*Annotated Section 7-52-601, Memorandum Opinion and Order*, 30 FCC Rcd. 2408, 2409-10 ¶ 1 (2015) (“*Order*”).

<sup>5</sup> This brief was not authored in whole or in part by a counsel to a party in this case. No party or their counsel contributed money with the intention of funding the preparation or submission of the brief. No party—other than the amicus and its members—contributed money that was intended to fund the brief's preparation or submission.

## ARGUMENT

### I. THE CURRENT STATE OF BROADBAND DEPLOYMENT IS INADEQUATE AND HAS CREATED A DIGITAL DIVIDE

Broadband deployment in the United States has failed to keep pace with today's Internet offerings of advanced, high-quality voice, data, graphics and video offerings.<sup>6</sup> The Commission's 2015 Broadband Progress Report found that 55 million Americans, a full 17 percent of the population in the United States, lack access to broadband services.<sup>7</sup>

This failure is especially acute in rural communities, where over 50 percent of Americans lack access to broadband services.<sup>8</sup> On tribal lands and U.S. territories, nearly two-thirds of residents lack broadband services.<sup>9</sup> And about 35 percent of schools in the country lack access to broadband services.<sup>10</sup>

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<sup>6</sup> The Commission has determined that the benchmark speed for residential connections to fixed broadband Internet access services—*i.e.*, the minimum speed necessary to provide households with advanced telecommunications services Congress has identified—is 25 (downstream)/3 (upstream) Mbps. *Broadband Progress Report*, 30 FCC Rcd. at 1403-08 ¶¶ 45-55. Accordingly, references to broadband Internet access in this brief are to residential access to 25/3 Mbps fixed broadband connections, unless otherwise noted.

<sup>7</sup> *Id.*, 30 FCC Rcd. at 1378 ¶ 4.

<sup>8</sup> *Id.* at 1418 ¶ 79, Table 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1454 ¶ 138.

Not surprisingly, in the face of these statistics, Commission Chairman Tom Wheeler announced, “meaningful competition for high-speed wired broadband is lacking and Americans need more competitive choices for faster and better Internet connections, both to take advantage of today’s new services, and to incentivize the development of tomorrow’s innovations.”<sup>11</sup>

**A. Most Consumers Have Access to One, or Only One Alternative, Provider of Broadband Services**

Nearly one in five Americans does not have the option of accessing broadband services.<sup>12</sup> A full 45 percent of Americans have access to only one provider of broadband services.<sup>13</sup> This means that the majority of the population in the United States either lacks access, or has access to only one provider of broadband services.

In reviewing that data, the Commission found that while significant progress in broadband deployment has been made, the “advances are not occurring broadly enough or quickly enough.”<sup>14</sup> The Commission also found that both private and

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<sup>11</sup> Tom Wheeler, Chairman, FCC, Remarks at 1776 Headquarters, Washington, DC: The Facts and Future of Broadband Competition 1 (Sept. 4, 2014), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-329161A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.pdf) (“Wheeler Remarks”).

<sup>12</sup> *Broadband Progress Report*, 30 FCC Rcd. at 1421-22 ¶¶ 83-84, Chart 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1378 ¶ 4.

public sectors must work harder to expand access to broadband services to all Americans in a timely fashion.<sup>15</sup>

Even at speeds below the 25/3 Mbps baseline the Commission has determined is necessary for advanced telecommunications service, the data are not meaningfully better. Notably, for services at less than half of these speeds, five percent of Americans (about 20 million individuals) still have no access, 21 percent have access to only one provider, and only 36 percent have access to two providers.<sup>16</sup> In short, the state of broadband competition is inadequate even at the lower speeds that the Commission has determined are insufficient to serve the needs of an average American household.

Likewise, residents in Petitioners' States have few options for broadband access. Almost one fifth of Tennesseans lack an option for accessing the Internet at broadband speeds, more than 65 percent have access only to one option, and 17 percent have access to two providers.<sup>17</sup> The Tennessee counties that neighbor the EPB's service area fare even worse: almost one third of residents have no provider offering broadband services, nearly two thirds have access only to one provider,

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1421-22 ¶¶ 83-84, Chart 2; *id.* at 1475, Appendix G.

<sup>17</sup> *Connected Tennessee Final Grant Report, Broadband Access in Tennessee* 12 (updated Jan. 28, 2015), [http://www.connectedtn.org/sites/default/files/connected-nation/tnfgr\\_broadband\\_access\\_in\\_tn.pdf](http://www.connectedtn.org/sites/default/files/connected-nation/tnfgr_broadband_access_in_tn.pdf).

and only five percent have access to two providers.<sup>18</sup> The statistics in North Carolina's counties that neighbor Greenlight's service area are similar: one third of residents have no provider offering broadband speeds, two thirds have access to only one provider, and only three percent of residents have access to two providers.<sup>19</sup>

**B. Without Robust Competition, Broadband Providers Lack Incentives to Deliver High-Speed, High-Quality Services**

Without robust competition among rival suppliers, broadband providers lack the incentives to deliver high-speed, high-quality broadband access to communities, because their customers have no meaningful alternative. The beneficial effects of competition often manifest swiftly in areas where a new broadband provider threatens incumbent broadband providers' market share.

The market reaction in local communities where Google has announced an interest in offering high-speed Internet access service illustrates the point. Within weeks of Google Fiber's announcement that it had selected Austin, Texas as one of its next targets for expansion, AT&T proposed dramatic service improvements

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<sup>18</sup> *Order* ¶ 31.

<sup>19</sup> *Id.* ¶ 39. While state-wide statistics on the state of North Carolina's broadband competition are unavailable, 14 percent of North Carolina residents lack an option for accessing broadband speeds. *Broadband Progress Report*, 30 FCC Rcd. at 1471-72, Appendix D.

aimed at preventing customer defections—notably, tripling its broadband speeds.<sup>20</sup> Time Warner Cable (“TWC”) announced similar improvements a few months later—increasing downstream speeds 600% and initiating programs to bring more free Wi-Fi service to the community.<sup>21</sup> In short, a single competitive threat spurred AT&T and TWC to increase broadband speed offerings by over 300% and 600%, respectively.<sup>22</sup> Google Fiber has spurred similar responses in the two other local areas (Kansas City and Provo) where it provides service.<sup>23</sup>

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<sup>20</sup> *Google Fiber’s Next Stop: Austin, Texas*, GOOGLE FIBER OFFICIAL BLOG (Apr. 9, 2013), [http://googlefiberblog.blogspot.com/2013/04/google-fibers-next-stop-austin-texas\\_9.html](http://googlefiberblog.blogspot.com/2013/04/google-fibers-next-stop-austin-texas_9.html); Press Release, AT&T Announces Intent to Build 1 Gigabit Fiber Network in Austin, AT&T (Apr. 9, 2013), <http://www.att.com/gen/pressroom?pid=24032&cdvn=news&newsarticleid=36275&mapcode=>; Press Release, AT&T to Deliver the First All Fiber 1 Gigabit Broadband Network to Austin, AT&T (Oct. 1, 2013), <http://www.att.com/gen/press-room?pid=24841&cdvn=news&newsarticleid=37036&mapcode=>.

<sup>21</sup> Press Release, Time Warner Cable Bringing Incredibly Fast Internet Plans Across Its Entire Austin Service Area, TIME WARNER CABLE (Feb. 20, 2014), <https://www.timewarnercable.com/content/twc/en/about-us/press/twc-bringing-incredibly-fast-internet-to-austin.html>.

<sup>22</sup> The benefits of broadband access competition to Austin, Texas did not end there: despite the announcements of the “heavyweight” companies, the first company to provide gigabit access—*i.e.*, about forty times faster than broadband access—to the city was Grande—a small San Marcos, Texas-based broadband provider. Nathan Mattise, *And the winner of Austin, TX’s gigabit service arms race is... Grande?*, ARSTECHNICA (Feb. 10, 2014), <http://arstechnica.com/information-technology/2014/02/and-the-winner-of-austin-txs-gigabit-service-arms-race-is-grande/>.

<sup>23</sup> Several articles have examined the positive “Google Fiber Effect” on broadband competition, which could occur with any new entrant to the broadband access ecosystem. *See, e.g.*, Jacob Davidson, *Google Fiber Has Internet Providers*



Petitioners' States provide further examples of the benefits of competition. In Tennessee, EPB's entry into the broadband ecosystem caused Comcast—the incumbent—to stabilize its prices, improve its services, and offer other incentives to consumers in EPB's service area.<sup>24</sup> The City of Wilson's Greenlight system had prompted similar results from TWC—the area's incumbent broadband provider—which stabilized prices, offered better services, and improved Internet access speeds.<sup>25</sup>

Removing barriers to providing broadband access allows more competition in the broadband access ecosystem. Competition in turn increases consumer options, incentivizes existing providers to improve their offerings, and improves the inadequate state of broadband access.

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<sup>24</sup> *Order* ¶¶ 50-51.

<sup>25</sup> *Id.* ¶¶ 52-54.

### C. The Lack of Robust Competition Has Created a Digital Divide

The inadequate state of broadband competition has had a measurable impact on both an economic and societal level in the United States, and has created a gaping digital divide. Essentially, it has wrought a nation of two Internet access speeds: the fast lane—where many Americans living in dense populations areas enjoy fast access to the Internet—and the slow lane or even no lane—where Americans lack similar abilities to access the undisputable benefits that broadband provides.

As the President has stated, such digital divide “is concentrated among older, less educated, and less affluent populations, as well as in rural parts of the country that tend to have fewer choices and slower connections.”<sup>26</sup> Recent data illustrate a strong positive correlation between median income and Internet use—*i.e.*, higher income leads to more Internet use.<sup>27</sup> Race is another factor: “[b]lack and Hispanic households are . . . 16 and 11 percentage points less likely to have an Internet connection than white households, respectively, while Native American households trail white ones by 19 percentage points.”<sup>28</sup> Finally, geography also

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<sup>26</sup> The White House, Council of Economic Advisers Issue Brief, *Mapping the Digital Divide* 1 (July 2015), [https://www.whitehouse.gov/sites/default/files/wh\\_digital\\_divide\\_issue\\_brief.pdf](https://www.whitehouse.gov/sites/default/files/wh_digital_divide_issue_brief.pdf) (“Digital Divide Brief”).

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.*

plays a role: a “substantial gap” exists between urban and rural communities for broadband access.<sup>29</sup>

The solution to that measurable digital divide is a multi-faceted effort to enable broadband access and broadband competition. The FCC’s *Order* is one component of that effort.

## **II. THE INADEQUATE STATE OF COMPETITION EXISTS AT THE VERY TIME THAT DEMAND FOR BROADBAND IS AT NEW HEIGHTS**

Americans today increasingly turn to the Internet for telehealth, education, and work. Broadband Internet access is a prerequisite to access these services in their entirety and fully enjoy these opportunities.<sup>30</sup> The demand for online distance education courses, for example, has grown rapidly in the past few years.<sup>31</sup>

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<sup>29</sup> *Id.* at 7.

<sup>30</sup> See *Broadband Progress Report*, 30 FCC Rcd. at 1377 ¶ 2 (“Today, Americans turn to broadband Internet access service for every facet of daily life, from finding a job to finding a doctor, from connecting with family to making new friends, from becoming educated to being entertained. The availability of sufficient broadband capability can erase the distance to high-quality health care and education, bring the world into homes and schools, drive American economic growth, and improve the nation’s global competitiveness. New technologies and services such as real-time distance learning, telemedicine, and higher quality video services are being offered in the market today and are pushing demand for higher broadband speeds.”).

<sup>31</sup> Issie Lapowsky, *Why Free Online Classes Are Still the Future of Education*, WIRED (Sept. 26, 2014), <http://www.wired.com/2014/09/free-online-classes-still-future-education/>.

Telemedicine has also enjoyed similar growth.<sup>32</sup> And the Internet has created tens of millions of U.S. jobs.<sup>33</sup> These benefits are evident at the national and local levels.

#### **A. Effects of Broadband Access at the National Level**

The ability of the Internet to affect our nation's economy is unprecedented and undisputed. Retail e-commerce revenue is projected to double in size from 2012 to 2018.<sup>34</sup> The Internet economy has also been a major driver of overall U.S.

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<sup>32</sup> *Shaping your Telehealth Strategy*, ERNST & YOUNG, [http://www.ey.com/Publication/vwLUAssets/EY-shaping-your-telehealth-strategy/\\$FILE/EY-shaping-your-telehealth-strategy.pdf](http://www.ey.com/Publication/vwLUAssets/EY-shaping-your-telehealth-strategy/$FILE/EY-shaping-your-telehealth-strategy.pdf) (“US telehealth market will grow from \$240 million in revenue in 2013 to \$1.9 billion in 2018 — an annual growth rate of more than 50%.”); *VA Touts Growth of Telehealth Program*, FEDERAL SOUP (Oct. 14, 2014), <http://federalsoup.com/articles/2014/10/14/va-touts-growth-of-telehealth-program.aspx#>; see also *Health Fact Sheet*, PEW RESEARCH INTERNET PROJECT, <http://www.pewinternet.org/fact-sheets/health-fact-sheet/>.

<sup>33</sup> *Jobs*, USTELECOM, <https://www.ustelecom.org/broadband-industry/broadband-industry-stats/jobs> (last visited Nov. 11, 2015) (finding that, by mid-2010, broadband had created 10.8 million jobs).

<sup>34</sup> *U.S. Retail E-Commerce Sales from 2010 to 2018 (In Billion U.S. dollars)*, THE STATISTICS PORTAL, <http://www.statista.com/statistics/272391/us-retail-e-commerce-sales-forecast/> (last visited Nov. 11, 2015).

GDP growth.<sup>35</sup> It accounts for over \$6 trillion of U.S. manufacturers', merchants', retailers', and service providers' sales.<sup>36</sup>

The Internet connects Americans with the global economy—from individuals to small and large businesses. As the President has stated, “Internet users have vast amounts of information literally at their fingertips, and an Internet connection allows individuals to communicate, collaborate, and transact on a global scale in ways that were unimaginable only a few years ago.”<sup>37</sup> The U.S. Small Business Administration advises that “[s]etting up your business on the Internet can be a lucrative way to attract customers, expand your market and increase sales,”<sup>38</sup> and that “[s]elling your products online allows for immediate entry into the global marketplace.”<sup>39</sup> And a recent study suggests that getting more

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<sup>35</sup> McKinsey Global Institute, *Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity* 16 (May 2011), [http://www.mckinsey.com/~media/mckinsey/dotcom/homepage/2011%20june%20internet%20economy/mgi\\_internet\\_matters\\_full\\_report.ashx](http://www.mckinsey.com/~media/mckinsey/dotcom/homepage/2011%20june%20internet%20economy/mgi_internet_matters_full_report.ashx).

<sup>36</sup> *E-Stats 2013: Measuring the Electronic Economy*, U.S. CENSUS BUREAU (May 28, 2015), <http://www.census.gov/econ/estats/e13-estats.pdf>.

<sup>37</sup> Digital Divide Brief at 9.

<sup>38</sup> *Setting Up an Online Business*, U.S. SMALL BUSINESS ADMINISTRATION, <https://www.sba.gov/content/setting-online-business> (last visited Nov. 11, 2015).

<sup>39</sup> *International Online Sales*, U.S. SMALL BUSINESS ADMINISTRATION, <https://www.sba.gov/content/international-online-sales> (last visited Nov. 11, 2015).

U.S. small and medium businesses connected could increase revenues by about \$ 360 billion, and add more than 2 million jobs to the U.S. economy.<sup>40</sup>

The Internet Association's member companies illustrate the potential benefits of Internet-connected small businesses. eBay, for instance, was founded in 1995 by one man in a living room with a vision—and a software code—to connect people through e-commerce. Today, eBay has nearly 32,000 employees and more than \$14 billion in annual revenue.<sup>41</sup> Etsy was founded in 2005 in an apartment in Brooklyn by three friends aiming to empower artists and creators to share their works with the world—they designed a site, wrote the code, and assembled the servers to launch their company. Etsy has since grown to over 20 million users from nearly every country in the world, and annual gross merchandise sales totaled nearly \$2 billion in 2014.<sup>42</sup>

As Internet usage continues to grow, so does consumers' demand for faster speeds. Americans are signing up for gigabit Internet access at a growth rate of

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<sup>40</sup> David C. Michael *et al.*, *Lessons on Technology and Growth from Small-Business Leaders*, BCG.PERSPECTIVES (Oct. 5, 2013), [https://www.bcgperspectives.com/content/articles/technology\\_software\\_globalization\\_ahead\\_curve\\_lessons\\_technology\\_growth\\_small\\_business\\_leaders/?chapter=4#chapter4](https://www.bcgperspectives.com/content/articles/technology_software_globalization_ahead_curve_lessons_technology_growth_small_business_leaders/?chapter=4#chapter4).

<sup>41</sup> Pierre Omidyar, *How Pierre Omidyar Turned an Idealistic Notion into Billions of Dollars*, INC.COM (Dec. 2013), <http://www.inc.com/magazine/201312/pierre-omidyar/ebay-inspiration-more-effective-than-delegation.html>.

<sup>42</sup> *About*, ETSY, <https://www.etsy.com/about/> (last visited Nov. 11, 2015) (noting 1.5 million active sellers and 22.6 million buyers).

480 percent each year.<sup>43</sup> The market for Internet-connected devices also has exploded over the last few years, and consumers with broadband Internet access are increasingly using multiple devices to access different services at the same time—*e.g.*, streaming video onto a television while surfing the Web or checking email.

The services that Americans use are increasingly media-rich, requiring significantly greater bandwidth than in the past. These technologies include the deployment of 4K video, advanced gaming systems, and high-definition video conferencing services. Streaming video and audio, for example, accounts for 67% of downstream bytes during peak periods.<sup>44</sup> And a recent report projected that by 2018, “digital TV and online video will be the two most highly penetrated [online] services, 86 percent and 78 percent respectively.”<sup>45</sup>

Broadband deployment is an integral part of meeting that demand. In the words of FCC Chairman Wheeler: “[H]igh-speed connections are crucial not only

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<sup>43</sup> Steven Max Patterson, *Gigabit Internet Access Grows out of its Niche*, CIO (July 23, 2015), <http://www.cio.com/article/2951966/consumer-technology/gigabit-internet-access-grows-out-of-its-niche.html>. This further illustrates that U.S. broadband deployment is not keeping up with demand—in places where gigabit access is an option, Americans are adopting it at a remarkable rate.

<sup>44</sup> *Broadband Progress Report*, 30 FCC Rcd. at 1395 ¶ 30.

<sup>45</sup> *Cisco VNI Service Adoption Forecast 2013–2018 White Paper* 11, CISCO (2014), [http://www.cisco.com/c/en/us/solutions/collateral/service-provider/vni-service-adoption-forecast/Cisco\\_VNI\\_SA\\_Forecast\\_WP.pdf](http://www.cisco.com/c/en/us/solutions/collateral/service-provider/vni-service-adoption-forecast/Cisco_VNI_SA_Forecast_WP.pdf).

for the kind of innovation that will educate our children and deliver quality health care, but also improve energy efficiency, fill the employment ranks, and maintain the United States as the world's innovation leader for the 21<sup>st</sup> Century.”<sup>46</sup>

### **B. Effects of Broadband Access at the Local Level**

Communities in the United States are realizing the critical importance of broadband access. Faced with what they recognize to be inadequate broadband competition within their borders, some communities have taken it upon themselves to bring broadband Internet access to their residents and businesses—over 450 communities have invested in broadband networks.<sup>47</sup>

These communities' efforts are an integral part of improving the state of U.S. broadband competition. As the President has acknowledged, “[w]ithout strong competition, providers can (and do) raise prices, delay investments, and provide sub-par quality of service. . . . In these situations, the role of good public policy can and should be to foster competition and increase consumer choice,” and “local governments . . . have an important role to play” in that context.<sup>48</sup> Notably,

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<sup>46</sup> Wheeler Remarks at 2.

<sup>47</sup> *Community Network Map*, COMMUNITY BROADBAND NETWORKS, <http://www.muninetworks.org/communitymap> (last visited Nov. 11, 2015).

<sup>48</sup> The White House, The Executive Office of the President, *Community-Based Broadband Solutions*, at 3-4 (Jan. 2015), [https://www.whitehouse.gov/sites/default/files/docs/community-based\\_broadband\\_report\\_by\\_executive\\_office\\_of\\_the\\_president.pdf](https://www.whitehouse.gov/sites/default/files/docs/community-based_broadband_report_by_executive_office_of_the_president.pdf).



over the past few years, “municipal networks have emerged as a critical tool for increasing access, encouraging competition, fostering consumer choice, and driving local and regional economic development. Local investments have also spurred the private sector to compete for customers, improving services, increasing broadband adoption, and providing more choice for consumers.”<sup>49</sup> These effects already have materialized in communities in Texas, Tennessee, North Carolina,<sup>50</sup> and elsewhere.<sup>51</sup>

Investments by communities in broadband access networks also provide economic and social benefits: creating jobs and keeping critical jobs; attracting

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<sup>49</sup> *Id.* at 4.

<sup>50</sup> *See supra* Section I.B.

<sup>51</sup> *See, e.g.,* Wiley Hayes, *Westminster, Md., Partners with Private Sector to Broaden Fiber-Optic Network*, GOVTECH.COM (Oct. 26, 2015), <http://www.govtech.com/dc/articles/Westminster-Md-Partners-with-Private-Sector-to-Broaden-Fiber-Optic-Network.html> (stating that “fiber Internet is just like electricity, to some extent,” and that “[i]t’s an essential utility that homes and businesses rely on. We get that it needs to be a great service that’s both quick and reliable.”); Kathryn Trogdon, *Holly Springs to Get Ultra High-Speed Internet through Ting Internet*, THE NEWS&OBSERVER (Oct. 22, 2015), <http://www.newsobserver.com/news/local/community/southwest-wake-news/article40803345.html> (stating that the town’s own fiber network “was built to serve town facilities and to attract new business and industry.”); *A Small Island in North Carolina Exercises Local Internet Choice*, COALITION FOR LOCAL INTERNET CHOICE (Oct. 13, 2015), <http://www.localnetchoice.org/connections/a-small-island-in-north-carolina-exercises-local-internet-choice/> (“The Village of Bald Head Island is exercising local internet choice with the goal to ensure that its businesses and residents can fully engage in the global economy, even while vacationing on a remote and beautiful island.”).

new businesses and incubating start-ups; and, saving money and increasing home values.<sup>52</sup>

In addition, each community is uniquely situated to understand its residents and businesses' needs, seek partners that will accommodate those needs, and build a broadband access network to the community's specifications. Communities' broadband access investments reveal that local choice is important to come up with a model that fits the community's needs. The City of Westminster, Maryland, for example, has issued bonds to expand its network.<sup>53</sup> The Village of Bald Head Island, North Carolina, issued a Request for Proposals in search of a partner with creative approaches for bringing broadband network to the island.<sup>54</sup>

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<sup>52</sup> See, generally, *Municipal Networks and Economic Development*, COMMUNITY BROADBAND NETWORKS <http://muninetworks.org/content/municipal-networks-and-economic-development> (last visited Nov. 11, 2015) (providing examples of the benefits of communities investing in broadband access).

<sup>53</sup> Wiley Hayes, *Westminster, Md., Partners with Private Sector to Broaden Fiber-Optic Network*, GOVTECH.COM (Oct. 26, 2015), <http://www.govtech.com/dc/articles/Westminster-Md-Partners-with-Private-Sector-to-Broaden-Fiber-Optic-Network.html>. In addition, residents and businesses that are interested in getting access to the City's broadband network must sign an access agreement that permits the City to run the physical access lines to their property first. Signing that agreement, however, does not obligate them to sign up for the City's service, which entails a separate agreement. *Id.* That model allows the City to build out its network regardless of who wants access after the City completes the network construction.

<sup>54</sup> *A Small Island in North Carolina Exercises Local Internet Choice*, COALITION FOR LOCAL INTERNET CHOICE (Oct. 13, 2015), <http://www.localnetchoice.org/connections/a-small-island-in-north-carolina-exercises-local-internet-choice/>.

Communities' efforts increase the rate of broadband access nationwide, as they offer broadband access in previously unserved areas, expand consumers' options for broadband access providers in previously underserved areas, and lower prices for residents and businesses. And they do so at a time the very time that demand for broadband has reached new heights.

### **III. THE FCC'S STATUTORY MANDATE TO PROMOTE BROADBAND DEPLOYMENT AND AVAILABILITY HAS BEEN AFFIRMED BY THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT**

The U.S. Court of Appeals for the District of Columbia Circuit has concluded that Section 706 of the Telecommunications Act of 1996 provides the Commission an affirmative grant of statutory authority to promote broadband deployment and competition.<sup>55</sup>

Section 706 states that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."<sup>56</sup> Section 706 also requires the Commission to monitor broadband deployment and ensure it occurs "in a reasonable and timely fashion."<sup>57</sup> If the Commission determines that such deployment is not taking place in a reasonable and timely fashion, the statute directs the Commission to "take immediate action to

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<sup>55</sup> *Verizon v. FCC*, 740 F.3d 623, 642-49 (D.C. Cir. 2014).

<sup>56</sup> 47 U.S.C. §1302(a).

<sup>57</sup> *Id.* §1302(b).

accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>58</sup>

Following the D.C. Circuit’s holding in *Verizon*,<sup>59</sup> the Commission determined that it is required to take immediate and necessary steps to promote broadband deployment and competition. *Verizon* held that Section 706 vests the Commission “with affirmative authority to enact measures encouraging the deployment of broadband infrastructure.”<sup>60</sup> It also held that Section 706 empowers the Commission to “take steps to accelerate broadband deployment if and when it determines that such deployment is not ‘reasonable and timely.’”<sup>61</sup> Following *Verizon*’s reasoning, the Commission found that “[p]reemption constitutes one such ‘immediate action’ available to [it] under [Section 706’s] independent grant of authority to ‘fulfill Congress’s broadband deployment objectives.’”<sup>62</sup>

The Commission has identified limits to its authority under Section 706.<sup>63</sup> Indeed, in *Verizon* the court held that the FCC’s Section 706 authority “must be read in conjunction with other provisions of the Communications Act, including,

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<sup>58</sup> *Id.*

<sup>59</sup> *Verizon*, 740 F.3d at 628.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 641.

<sup>62</sup> *Order* ¶ 137.

<sup>63</sup> *Id.* ¶ 138.

most importantly, those limiting the Commission’s subject matter jurisdiction to ‘interstate and foreign communication by wire and radio.’”<sup>64</sup> Nevertheless, “[s]ince almost all telecommunications facilities are physically intrastate . . . Congress did not intend to allow inconsistent state regulations [to] frustrate [its] goal of developing a ‘unified national communications service.’”<sup>65</sup>

In this case, preemption of specific laws that restrict broadband competition furthers the Commission’s statutory mandate to promote broadband deployment nationwide.<sup>66</sup> According to the Commission, the EPB and City of Wilson petitions raised the issue of whether “the states may dictate the manner in which interstate commerce is conducted and the nature of competition that should exist for interstate communications.”<sup>67</sup> *Verizon* provides that the Commission has the authority to take steps to accelerate broadband deployment that is not reasonable and timely. Applying the *Verizon* court’s holding, it was reasonable for the Commission to determine that its *Order* was an appropriate exercise of its Section 706 authority.

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<sup>64</sup> *Verizon*, 740 F.3d at 640 (citation omitted).

<sup>65</sup> *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984) (alterations in original) (citations omitted).

<sup>66</sup> *Order* ¶¶ 146-50.

<sup>67</sup> *Id.* ¶ 12.

## CONCLUSION

For the foregoing reasons, the Internet Association respectfully urges this Court to uphold the FCC's *Order*.

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF  
APPELLATE PROCEDURE 32(a)(5)-(7)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman. Exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii) this brief contains 4,442 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief (Microsoft Word 2010).

/s/Markham C. Erickson  
Markham C. Erickson

November 12, 2015

## CERTIFICATE OF SERVICE

I hereby certify that on this 12th of November 2015, I caused true and correct copies of the foregoing Internet Association *Amicus Curiae* to be filed electronically with the Clerk of the Court using the Case Management and Electronic Case Files (“CM/ECF”) system for the Sixth Circuit. Participants in the case will be served by the CM/ECF system or by U.S. Mail.

Sincerely,

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