Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of
City of Wilson, North Carolina
Petition for Preemption of
North Carolina General Statutes
§ 160A-340 et seq.

The Electric Power Board of
Chattanooga, Tennessee

Petition for Preemption of a Portion of
Section 7-52-601 of the Tennessee Code
Annotated

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COMMENTS OF THE FIBER TO THE HOME COUNCIL AMERICAS IN SUPPORT
OF ELECTRIC POWER BOARD AND CITY OF WILSON PETITIONS, PURSUANT
TO SECTION 706 OF THE TELECOMMUNICATIONS ACT OF 1996, SEEKING
PREEMPTION OF STATE LAWS RESTRICTING THE DEPLOYMENT OF CERTAIN
BROADBAND NETWORKS

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION AND SUMMARY</td>
<td>1</td>
</tr>
<tr>
<td>I. MUNICIPAL UTILITIES HAVE AN IMPORTANT ROLE TO PLAY WHERE PRIVATE PROVIDERS HAVE NOT DEPLOYED</td>
<td>3</td>
</tr>
<tr>
<td>ADEQUATE ADVANCED TELECOMMUNICATIONS CAPABILITY IN A REASONABLE AND TIMELY FASHION</td>
<td></td>
</tr>
<tr>
<td>II. STATE LAWS AND RULES THAT BAR DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY BY</td>
<td>9</td>
</tr>
<tr>
<td>MUNICIPAL UTILITIES IN AREAS WHERE PRIVATE PROVIDERS HAVE NOT DEPLOYED ADEQUATE ADVANCED</td>
<td></td>
</tr>
<tr>
<td>TELECOMMUNICATIONS CAPABILITY IN A REASONABLE AND TIMELY FASHION ARE REPUGNANT TO THE</td>
<td></td>
</tr>
<tr>
<td>OBJECTIVES OF SECTION 706</td>
<td></td>
</tr>
<tr>
<td>III. THE COMMISSION HAS THE LEGAL AUTHORITY TO GRANT THE PETITIONS AND PREEMPT THE STATE LAWS</td>
<td>12</td>
</tr>
<tr>
<td>IN QUESTION</td>
<td></td>
</tr>
<tr>
<td>A. Section 706 Authorizes Preemption As a Means for the Commission to Remove Barriers to</td>
<td>13</td>
</tr>
<tr>
<td>Infrastructure Investment in Advanced Telecommunications Capability</td>
<td></td>
</tr>
<tr>
<td>B. The Commission May Use Preemption to Remove the Barriers to Broadband Deployment</td>
<td>17</td>
</tr>
<tr>
<td>Represented by the Tennessee and North Carolina Laws</td>
<td></td>
</tr>
</tbody>
</table>
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In the Matter of

City of Wilson, North Carolina

Petition for Preemption of
North Carolina General Statutes
§ 160A-340 et seq. WC Docket No. 14-115

The Electric Power Board of
Chattanooga, Tennessee

Petition for Preemption of a Portion of
Section 7-52-601 of the Tennessee Code
Annotated WC Docket No. 14-116

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COMMENTS OF THE FIBER TO THE HOME COUNCIL AMERICAS IN SUPPORT OF ELECTRIC POWER BOARD AND CITY OF WILSON PETITIONS, PURSUANT TO SECTION 706 OF THE TELECOMMUNICATIONS ACT OF 1996, SEEKING PREEMPTION OF STATE LAWS RESTRICTING THE DEPLOYMENT OF CERTAIN BROADBAND NETWORKS

INTRODUCTION AND SUMMARY

The Fiber to the Home Council Americas ("FTTH Council" or the "Council")\(^1\)

respectfully submits these comments on the petitions in the above-captioned dockets of the City

\(^1\) The FTTH Council is a not-for-profit entity whose mission is to accelerate deployment of all-fiber access networks by demonstrating how fiber-enabled applications and solutions create value for service providers and their customers, promote economic development, and enhance quality of life. The FTTH Council’s over 300 members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities. As such, the FTTH Council and its members have a substantial interest in the outcome of this proceeding.
of Wilson, North Carolina (“Wilson”) and the Electric Power Board of Chattanooga, Tennessee (“EPB”) (collectively, “Petitions” and “Petitioners”) to remove certain statutory barriers to broadband investment and deployment by municipal utility broadband providers pursuant to Section 706 of the Telecommunications Act of 1996 (“the 1996 Act”). As explained herein, municipal utilities play an important role in investing in broadband infrastructure to communities where deployment of advanced telecommunications capability has been unreasonable and untimely. Moreover, municipal utility and other municipal network providers tend to build all-fiber (or fiber to the home (“FTTH’’)) networks, and, for more than a decade, they have had (and they continue to have) a disproportionate effect in spurring such deployments across the nation, resulting in substantial and well-documented economic and social benefits in the communities they serve. Therefore, where, as described in the Petitions, State laws serve as de jure or de

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3 In referring to all-fiber infrastructure in these Comments, the Council does not mean to argue here that if such infrastructure does not currently exist, the Commission should find pursuant to Section 706 that advanced telecommunications capability is not being deployed in a reasonable and timely fashion – although the Council reserves the right to make that argument in the appropriate proceeding. In referring to all-fiber infrastructure, the Council’s only intention is to demonstrate that municipal utilities, when they enter a market, generally build this type of highly beneficial infrastructure, which provides future-proof broadband capabilities.
facto barriers to advanced telecommunications deployments by municipal utilities in areas where adequate broadband service is not provided in a reasonable and timely fashion, the Commission should use its Section 706 authority and act to remove those barriers. Accordingly, the Petitions of EPB and Wilson should each be granted.

I. MUNICIPAL UTILITIES HAVE AN IMPORTANT ROLE TO PLAY WHERE PRIVATE PROVIDERS HAVE NOT DEPLOYED ADEQUATE ADVANCED TELECOMMUNICATIONS CAPABILITY IN A REASONABLE AND TIMELY FASHION

Where private broadband providers have not deployed adequate advanced telecommunications capability in an area, municipal utilities have demonstrated they can play an

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4 For purposes of determining whether advanced telecommunications capability is being deployed in a reasonable and timely fashion, the Commission has established benchmarks in its Section 706 Broadband Reports. In 2010, the Commission established a threshold for this capability at a broadband speed of 4/1 Mbps. See 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 Data Improvement Act et al., GN Docket No. 09-137 et al., Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9558, ¶ 4 (rel. July 20, 2010) (“Sixth Broadband Deployment Report”). In the recent Tenth Broadband Progress Notice of Inquiry and in updating the public interest obligations in the Connect America Fund, the Commission notes that broadband speeds are likely to evolve substantially and inquires about increasing this speed benchmark now to 10 Mbps and possibly higher. See 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 Data Improvement Act, GN Docket No. 14-126, Tenth Broadband Progress Notice of Inquiry, FCC 14-113, ¶¶ 14-15 (rel. Aug. 5, 2014) (“Tenth Broadband NOI”); Connect America Fund et al., WC Docket 10-90 et al., Report and Order et al., 29 FCC Rcd 7051, 7054, 7106, ¶¶ 10, 157 (rel. June 10, 2014) (“CAF Order”). Accordingly, the Commission should find, for Section 706 purposes, that deployment of advanced telecommunications capability is not reasonable and timely in an area if broadband service at speeds of 4/1 Mbps is not available to most locations in that area (a so-called unserved area). Moreover, should the Commission increase its benchmark to 10 Mbps or some higher speed before it rules in these proceedings, it should apply it in determining whether the Section 706 requirements are met.

5 The State laws at issue in the Petitions stand in contrast to reasonable requirements of general applicability, which, for instance, may ensure municipalities are generally accountable for their actions.
important role, including by bringing robust, scalable connectivity to their communities and spurring national all-fiber network deployment. Municipal utilities have been at the forefront of deploying all-fiber networks. Some 15 years ago, when all-fiber deployments were just beginning, municipal utilities were among the first providers. Today, they are leaders in building gigabit networks.

One example of a municipal utility bringing robust broadband to a community lacking adequate service is that of the BVU Authority – formerly Bristol Virginia Utilities (“BVU”) – and its broadband service, OptiNet. BVU originally intended to deploy its all-fiber connectivity to commercial and public entities, but after a survey demonstrated that the incumbents (Charter and Sprint) had poor reputations in the community and that consumers were interested in

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6 See International Comparison and Survey Requirements in the Broadband Data Improvement Act, A National Broadband Plan for Our Future, 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 Data Improvement Act, GN Docket Nos. 09-47, 09-51, 09-137, Comments of the Fiber-to-the-Home Council NBP Public Notice #7, 2-5 (Nov. 6, 2009). The Commission recognized the important, limited role of municipal networks in the National Broadband Plan, when it explained that in the absence of private sector broadband investment, municipalities “should have the right to move forward and build networks that serve their constituents as they deem appropriate.” See Federal Communications Commission, Connecting America: The National Broadband Plan, 153 (2010).


receiving service from BVU, it expanded its network to meet the demand.\textsuperscript{10} Today, the BVU Authority all-fiber network serves approximately 11,500 customers in southwest Virginia.\textsuperscript{11}

The Electric Power Board of Russellville, Kentucky, which in 2010 built an all-fiber network, EPB SmartNet, to a rural community of 7,000, is another example of a municipal electric utility entering where incumbents failed to deploy adequate broadband and video service to the community.\textsuperscript{12} The all-fiber network offers gigabit service to each home and business in its service area, and within two years of deployment the utility obtained a take-rate of nearly one third of the community.\textsuperscript{13}

The Jackson Energy Authority ("JEA"), a municipal utility in Jackson, Tennessee, along with business and consumer leaders in the community, concluded that private sector telecommunications and cable entities were not acting swiftly enough to offer advanced services and that this was causing Jackson to lose business opportunities to other communities and preventing consumers from having access to advanced data and video services.\textsuperscript{14} So, JEA began construction in early 2004 on an all-fiber network and first offered service later that year. JEA has since greatly expanded its network, which is readily scalable to provide gigabit speed

\begin{itemize}
\item \textsuperscript{10} See id.; see also Broadband At the Speed of Light at 4.
\item \textsuperscript{12} See Lisa Gonzalez, High Speed in the Blue Grass State: Russellville’s Gig, Community Broadband Networks (Jan. 23, 2014), available at http://muninetworks.org/content/high-speed-blue-grass-state-russellvilles-gig ("Russellville’s Gig Article") (describing how the community only had access to DSL service, sparse satellite service, and no HD video prior to the municipal utility’s all-fiber deployment).
\item \textsuperscript{13} See id.
\end{itemize}
services. As of 2010, its network passed more than 30,000 homes and 5,000 businesses and connected more than 16,000 and 1,200 residential and business customers, respectively.\textsuperscript{15}

EPB and Wilson provide further examples. As described in the Petitions, because adequate advanced telecommunications service was not available, each of these municipal utilities deployed all-fiber infrastructure to provide broadband service within their services territories, or at least a part of them.\textsuperscript{16} The Petitioners now each seeks to bring that service to additional territories where deployment of advanced telecommunications capability by others has proven unreasonable and untimely.\textsuperscript{17}

While municipal utilities have filled gaps in the market and have been leaders in all-fiber and gigabit deployment, they do not enter indiscriminately and have been selective in where and when they choose to deploy. In general, municipal utilities will deploy only where the private sector is unwilling to deploy a network that meets community needs, and municipalities routinely will ask private providers to deploy before supporting a build by a municipal utility.\textsuperscript{18} (In some cases, private providers have answered the call from a municipality to deploy a network, causing the municipality to abandon its efforts.\textsuperscript{19}) Indeed, this selectivity helps to explain why the subscriber bases of municipal utility and other municipal all-fiber networks are less than five

\begin{itemize}
\item For greater detail on the JEA network, see http://www.bbpmag.com/snapshot/snap1008.php and http://www.muninetworks.org/tags-115.
\item See Wilson Petition at 16-20; EPB Petition at 19-20.
\item See Wilson Petition at 22-25; EPB Petition at 34-35.
\item See, e.g., Russellville’s Gig Article (quoting the General Manager of the Russellville, Kentucky municipal network, who stated: “We support [our] residents having the best product. If that means us offering the product, that’s fine. If it means the private sector will step up to the plate and serve the areas we can’t serve . . . that’s fine as well. We want our residents to be served, whether by us or an incumbent.”).
\item See Municipal Fiber White Paper at 3 (describing how the City of Fort Wayne, Indiana worked with Verizon so it could build its FiOS network rather than build a municipally owned and operated system).
\end{itemize}
percent of all total all-fiber connections in the country. Yet, the limited scope of these all-fiber deployments does not diminish their importance to the communities that have them or to other communities that may want all-fiber networks.

Local leaders recognize that all-fiber networks are vital to economic growth and social interaction. For example, the BVU all-fiber network has drawn large corporations like Northrop Grumman, DirecTV, and CGI (and hundreds of jobs) to the area to take advantage of the network. Similarly, the EPB all-fiber network in Chattanooga has attracted Alstom, Amazon, and Volkswagen to the city, creating over 7,000 jobs and attracting billions of dollars in capital investment. Municipal utility all-fiber networks also provide important social benefits, connecting community anchor institutions and improving education, health care, and the delivery of government services.

In addition, the vast majority of municipal utility all-fiber networks are operating successfully with substantial customer take-rates and satisfaction. Because these deployments occur in areas evidencing insufficient existing private sector broadband and strong consumer demand, municipal utility all-fiber networks tend to have take-rates equal to or greater than those

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23 See Five Common Myths at 27.
of comparable private providers.\textsuperscript{24} Further, evidence suggests that customers generally have a positive view of municipal utilities.\textsuperscript{25} This is partly attributable to the fact that municipal utilities have sophisticated customer service and maintenance operations and can rapidly respond to customer needs. To be sure, there have been financial issues with some municipal deployments, but these have been the exception. For most municipal utility builds, the success rate suggests that these networks are an important and sensible investment where adequate broadband otherwise is not available.

Moreover, municipal utility all-fiber systems have spurred competition and additional network builds. First, as a general matter, States that do not restrict public involvement in broadband and telecommunications service have higher overall all-fiber and broadband penetration than States with such prohibitions.\textsuperscript{26} Second, incumbent providers have responded to municipal interest and deployments by upgrading their systems or offering faster speeds to consumers. For example, in Lafayette, Louisiana, in response to the deployment of an all-fiber network by the municipal utility, Lafayette Utilities System, the cable incumbent upgraded its system to DOCSIS 3.0 technology.\textsuperscript{27} In Chattanooga, Comcast also began offering faster speeds in response to EPB’s network.\textsuperscript{28} Similarly, since the deployment of JEA’s all-fiber network, Charter has increased competitive pressure in the area.\textsuperscript{29} Third, the existence of and potential for

\textsuperscript{24} See Municipal Fiber White Paper at 3, 5.
\textsuperscript{25} See Broadband At the Speed of Light at 48.
\textsuperscript{26} See Municipal Fiber White Paper at 4-5.
\textsuperscript{27} See Carol Wilson, FTTH deployments face predatory cable pricing, Connected Planet (Sept. 28, 2009), available at http://connectedplanetonline.com/independent/news/ftth-deployments-face-pricing-0928/.
\textsuperscript{29} See Gary Gray, Cable Wars: As JEA gets into telecommunications, Charter is drawing up battle plans to fight for customers, The Jackson Sun, available at
municipal utility all-fiber networks, together with all-fiber deployments from other new entrants, has catalyzed incumbents to explore or deploy all-fiber networks in over one hundred cities around the country. AT&T recently announced an initiative to explore all-fiber gigabit deployments in 100 cities, and CenturyLink has announced similar plans to deploy all-fiber gigabit networks in 16 cities.\(^3\) Together, these upgrades demonstrate that municipal utility all-fiber deployments, beyond serving the immediate needs of the community especially where private sector deployments are inadequate, also promote broadband competition and additional all-fiber deployments.

II. STATE LAWS AND RULES THAT BAR DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY BY MUNICIPAL UTILITIES IN AREAS WHERE PRIVATE PROVIDERS HAVE NOT DEPLOYED ADEQUATE ADVANCED TELECOMMUNICATIONS CAPABILITY IN A REASONABLE AND TIMELY FASHION ARE REPUGNANT TO THE OBJECTIVES OF SECTION 706

The FTTH Council submits that while States have a legitimate interest in ensuring municipal actions are generally reasonable and responsible, they may not act contrary to the explicit directives of Section 706 and impose *de jure* or *de facto* prohibitions on municipal utility broadband investments in areas where advanced telecommunications capability is not deployed in a reasonable and timely fashion. This is especially the case where, as with EPB and Wilson,

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the municipal utility provides broadband services in locations adjacent to the unserved areas and can rapidly bring advanced telecommunications capability to these stranded consumers.

The Petitions challenge a number of State law provisions that impose impermissible barriers to deployment in unserved areas. In its Petition, EPB challenges Section 7-52-601 of the Tennessee Code, which prevents EPB from deploying broadband networks outside of EPB’s electric service territory, despite the fact that “large areas surrounding EPB are in a digital desert.” Consequently, although EPB is already a broadband provider and has the capability to address this pressing need, the State legislature has prohibited it from doing so. This clearly is contrary to the goals and directives of Section 706.

Similarly, in its Petition, Wilson challenges Section 160A-340 of the North Carolina General Statutes. Among other provisions of Section 160A-340 challenged in the Petition, Section 160A-340.1(a)(3) prohibits a “city-owned communications service provider” from deploying broadband outside of its city borders (or, in the case of Wilson, outside of its county borders), except to unserved areas, but as defined in the State statute rather than by the Commission. However, as the Wilson Petition explains, an area is “unserved” under the North Carolina law only if broadband connectivity falls below 1.5 Mbps, a speed less than half of the Commission’s existing 4 Mbps / 1 Mbps speed threshold set forth in the 2010 Sixth Broadband Deployment Report. Since the law extends broadly to bar deployment in areas that the Commission would consider “unserved” and where advanced telecommunications deployment is

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31 See EPB Petition at 1, 33-34; see also Tenn. Code Ann. § 7-52-601.
34 See Wilson Petition at 28-31, 35-36. See also Sixth Broadband Deployment Report, ¶ 4. As noted supra. n.4, the Commission is now inquiring about increasing this speed benchmark to 10 Mbps, further serving to highlight the offensiveness of the North Carolina statute’s use of a long outdated measure for served areas. See also Tenth Broadband NOI, ¶¶ 14-15; CAF Order, ¶ 10.
unreasonable and untimely, the law imposes a *de facto* barrier in violation of Section 706, and the Commission can and should remedy this situation by removing the barrier created by the State restriction.\textsuperscript{35}

In sum, as discussed above, there is an important role for municipal utilities to play in deploying broadband networks where private providers are not providing adequate broadband service to a community. As discussed above, these municipal utility networks generally have been successful and have resulted in significant economic and community benefits. Moreover, municipal utility builds – and even the potential for such builds – act as an impetus for private providers to build and upgrade broadband networks, stimulating competition. However, as with the statutes cited in the Petitions, certain State laws constitute barriers to deployment of advanced telecommunications capability in unserved areas where private providers have not stepped up and municipal utilities stand ready to deploy. These laws are contrary to the objectives Congress established in Section 706.

For the foregoing reasons, the Commission should use its Section 706 authority to preempt State laws that impose either *de jure* or *de facto* prohibitions on municipal utility broadband infrastructure investments in areas where advanced telecommunications capability is not being deployed in a reasonable and timely fashion. As explained in the next section, Congress has given the Commission the authority, and the directive, to preempt the Tennessee and North Carolina laws in question.

\textsuperscript{35} By focusing on the geographic restrictions described herein, the FTTH Council does not mean to suggest that the Commission should not preempt all provisions challenged in the Petitions that constitute a barrier to reasonable and timely deployment of advanced telecommunications capability.
III. THE COMMISSION HAS THE LEGAL AUTHORITY TO GRANT THE PETITIONS AND PREEMPT THE STATE LAWS IN QUESTION

The Petitions demonstrate that there are geographic areas within or adjacent to the electric utility operating territories of EPB and Wilson that are currently unserved by broadband Internet access at levels equal to or in excess of the Commission’s threshold broadband speeds of 4 Mbps downstream and 1 Mbps upstream. The Petitions explain that EPB and Wilson already provide broadband services within all or some portions of their operating territories and wish to bring broadband to these unserved areas, and that they would do so but for State-imposed statutory restrictions targeting municipal utilities. In other words, these State statutes erect discriminatory geographic restrictions on existing broadband service providers that act as barriers to reasonable and timely infrastructure deployment of advanced telecommunications capability – broadband at the Commission’s currently articulated minimum speeds – in areas where it does not exist.

The Commission has the legal authority to grant the relief sought by the EPB and Wilson Petitions. Specifically, under Section 706 of the Telecommunications Act of 1996, the Commission has the authority to preempt State restrictions on the deployment of broadband services by municipal utilities, at a minimum, in locations where the Commission finds that advanced telecommunications capability is not being deployed in a reasonable and timely fashion, and especially where the State has otherwise enabled a municipal utility to provide broadband service. In these circumstances, the Commission is required to take immediate action

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36 See EPB Petition at 15-38; Wilson Petition at 14-43.
to remedy the situation by removing barriers to infrastructure investment in those locations and promoting competition in the telecommunications market.\textsuperscript{38}

The means at the Commission’s disposal to accomplish these objectives, as explicitly recognized by Congress, are broad and include those methods within the scope of the Commission’s regulatory authority. It is well established that the Commission may, under certain circumstances, issue orders and adopt regulations that preempt State actions. For example, the Commission has preempted State regulations in the context of Internet telephony requiring a broadband connection, i.e. interconnected Voice over Internet Protocol.\textsuperscript{39} Whether the Commission will confirm its ability, indeed its Congressional mandate, to preempt State regulation in the present circumstances raised in the Petitions is the crux of the matter in these cases. Here, the Commission has the authority and the obligation to preempt the particular statutory provisions identified in the Petitions that act as geographic barriers to further advanced telecommunications capability investment by EPB and Wilson, providers that the States of Tennessee and North Carolina, respectively, have already authorized to provide broadband services.\textsuperscript{40}

\textbf{A. Section 706 Authorizes Preemption As a Means for the Commission to Remove Barriers to Infrastructure Investment in Advanced Telecommunications Capability}

In the 1996 Act, Congress enacted Section 706, directing the Commission and States to encourage and the Commission, if necessary, to accelerate the deployment of advanced telecommunications capability by removing barriers to infrastructure investment and by

\textsuperscript{38} See 47 U.S.C. § 1302(b) (Section 706(b) of the Telecommunications Act of 1996).
\textsuperscript{39} See Minn. Pub. Utils. Comm’n v. FCC, 483 F.3d 570, 581 (8th Cir. 2007).
\textsuperscript{40} The Commission should, in its preemption analysis, limit its inquiry to whether it can preempt in the specific circumstances presented to it by the Petitions consistent with the scope of Section 706(b), which directs the Commission to focus on geographic specific findings when removing barriers to investment in advanced telecommunications capability.
promoting competition in local markets. Section 706(a) delineates the means by which Congress envisions that the Commission and the States can remove barriers to infrastructure investment, which include not only “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market,” but also, and of principal relevance for the Petitions, “other regulating methods.” To facilitate the Section 706(a) mandate, Section 706(b) requires the Commission annually to inquire “whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion,” and, if not, the Commission is charged to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”

Accordingly, the questions presented by the Petitions are two-fold: first, can the Commission use preemption as one of its regulating methods to achieve the federal objectives

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41 In full, Section 706(a) of the 1996 Telecommunications Act states: “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.” 47 U.S.C. § 1302(a).

42 47 U.S.C. § 1302(b) (as amended by the Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4096). In full, Section 706(b) of the 1996 Telecommunications Act states: “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.” 47 U.S.C. § 1302(b).
laid out in Section 706; second, if it can, is there any obstacle to using that method in the circumstances presented in the Petitions, namely to preempt the State statutes that prevent two broadband service providers, EPB and Wilson, from deploying broadband capability in geographic areas where advanced telecommunications capability is not being deployed in a reasonable and timely fashion. This section addresses the first question and answers it in the affirmative. The following section addresses the second question and, likewise, answers in the affirmative.

The threshold question, then, is whether one of the “regulating methods” the Commission can use to remove barriers to infrastructure investment is preemption. This question is readily answered. The Commission has at its disposal, as general matter, the ability to preempt State law and regulation provided that it is consistent with the principles of federal preemption.43 Under the Supremacy Clause of the Constitution, State and local laws that conflict with federal law are “without effect.”44 In general, three types of preemption exist: (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, “where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law”; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives.45 It is the third type of preemption, where State law is an obstacle to the achievement of federal objectives, that is relevant here.

43 See, e.g., N.Y. SMSA Ltd. P’ship v. Town of Clarkstown, 612 F.3d 97 (2d Cir. 2010).
In Section 706, the federal objective of ensuring deployment of advanced telecommunications capability to all Americans is unmistakably clear. The means for achieving this are also plainly laid out: the Commission and State commissions are obligated to encourage this deployment by “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 46 But Section 706 goes beyond simply mandating that the Commission and State commissions encourage the deployment of advanced telecommunications capability in furtherance of the federal objective. The Commission is directed, in those locations where it finds, as the result of an annual inquiry, 47 that advanced telecommunications capability is not being deployed in a reasonable and timely fashion, to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” 48 Thus, Section 706 lays out both an

46 47 U.S.C. §1302(a). Section 706(a) constitutes Congressional authority for the Commission to take regulatory action to encourage reasonable and timely deployment of advanced telecommunications capability to all Americans. See Verizon Corp. v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014) (“Verizon”). Section 706(a) is equally a mandate to both the Commission and State commissions. As the Verizon court noted, referring to Section 706(a): “Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here.” Id. at 638. The Tenth Circuit Court of Appeals recently concluded, in upholding the Commission’s November 2011 order establishing the Connect America Fund and transforming intercarrier compensation, that “section 706(b) thus appears to operate as an independent grant of authority to the FCC ‘to take steps necessary to fulfill Congress’s broadband deployment objectives,’ and ‘it is hard to see what additional work section 706(b) does if it is not an independent source of authority.’” See Direct Commc’ns Cedar Valley, LLC v. FCC, 753 F.3d 1015, 1053-54 (10th Cir. 2014).

47 While the Petitions were filed outside of the annual inquiry process, the Commission should, at a minimum, treat them as part and parcel of its annual inquiry and take immediate action to remove the barriers the Tennessee and North Carolina statutes represent.

express Congressional objective\textsuperscript{49} and leaves no doubt that the Commission has the means and authority to achieve that objective. The Commission has the authority under that section, as a general matter, to preempt – and hence to “remove” – State laws that are a barrier to deployment of advanced telecommunications capability in geographic areas that are unserved with broadband capability (as defined by the Commission). As the Supreme Court has made clear, federal administrative agencies, including the Commission, when acting within the scope of their congressionally delegated authority, have the ability to preempt State law.\textsuperscript{50} And, indeed, Congress itself, when passing Section 706, stated in the Conference Report that “[t]he Commission may preempt State commissions if they fail to act to ensure reasonable and timely access.”\textsuperscript{51}

B. The Commission May Use Preemption to Remove the Barriers to Broadband Deployment Represented by the Tennessee and North Carolina Laws

Not only does the Commission have the general authority to preempt State law where it impedes a federal objective, such as removing the barriers to broadband deployment as articulated in Section 706, but there is no impediment to doing so in the cases presented by the

\textsuperscript{49} The Supreme Court has made clear that the key to the preemption inquiry is the intent of Congress. See \textit{Altria}, 555 U.S. at 76; \textit{Medtronic, Inc. v. Lohr}, 518 U.S. 470, 485 (1996) (”’[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case”) (quoting \textit{Retail Clerks v. Schermerhorn}, 375 U.S. 96, 103 (1963)). Notably, even if the federal law contains an express preemption provision, a court may still need to consider implied preemption when addressing “the question of the substance and scope of Congress’ displacement of state law.” See \textit{Altria}, 555 U.S. at 76.

\textsuperscript{50} See, e.g., \textit{La. Pub. Serv. Comm’n v. FCC}, 476 U.S. 355, 369 (1986) (“Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”). It is well-settled that “[f]ederal regulations have no less pre-emptive effect than federal statutes.” \textit{Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta}, 458 U.S. 141, 153 (1982).

Petitions. The Commission can and should remove the State law barriers that prevent the broadband service providers EPB and Wilson from extending the geographic locations in which they provide broadband today, and thereby accelerate the deployment of advanced telecommunications capability in furtherance of federal goals articulated by Congress in Section 706.

Traditionally, while there has been a presumption in favor of State actions in areas where States have historically exercised their police powers, that presumption is applicable in limited circumstances. A local government’s legislative exercise of “historic police powers of the State” is not to be superseded by a federal statute unless it was “the clear and manifest purpose of Congress” to do so. But, importantly, and of central significance in this case, the presumption generally has not been available when a State or local government regulates in an area “where there has been a history of significant federal presence.” Section 706 clearly identifies such an area: removing barriers to infrastructure investment where deployment of advanced telecommunications capability is unreasonable or untimely. Here, Congress, beginning almost two decades ago, intended the Commission to have a significant presence to ensure advanced telecommunications capability is being made available in a reasonable and timely fashion to all Americans and requires that the Commission take affirmative action where that is not the case. There is an express federal presence established by Section 706, whereby the Commission has

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52 The FTTH Council does not mean to suggest that the Petitions present the only, or circumscribe the, circumstances in which the Commission under Section 706 can preempt State-erected barriers to broadband deployment by municipal utilities. When granting the Petitions, the Commission should make clear that it has acted on the specific requests placed before it and that there may be, or are even likely to be, other circumstances in which preemption would be warranted.


both the authority to examine broadband deployment and then, affirmatively, the obligation to
take immediate action to remove barriers to infrastructure investment in locations where
deployment is unreasonable and untimely and “accelerate” the availability of broadband. The
Commission has, as noted earlier, preempted State action imposing entry requirements on
Internet telephony providers that required a broadband connection. As added recognition of the
primary role that Congress intended the Commission to play, it charged the Commission, not the
States, with developing a national broadband plan.

Notably, in Section 706, there is no exemption for barriers that are erected by State laws
affecting broadband providers that are also municipal utilities. All barriers to the timely and
reasonable deployment of advanced telecommunications capability, by the plain language of
Section 706(b), are potentially the focus of Commission scrutiny and action. This is not a
situation where the term “barrier” has a different meaning depending upon the setting, as was the
case regarding a completely different provision of the Communications Act in Nixon v. Missouri
Municipal League. In that case, where the Supreme Court struck down Commission
preemption under Section 253 of the Communications Act of State regulation that precluded
municipalities and State government subdivisions from providing telecommunications service
anywhere in the state, a key element of the case was the term “ability of any entity” to provide
telecommunications. The Supreme Court found, after a review of case law, that “there is no
convention of omitting the modifiers ‘public and private’ when both are meant to be covered.”
Hence, the Commission ruled that the “ability of any entity” referred only to the ability of private

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58 Id. at 133.
entities, not public ones. The same sort of analysis is inapplicable with respect to the term “barrier,” a broad and not historically limited term, as applied to infrastructure investment.

Indeed, it is clear from the structure of Section 706 that the specific sorts of barriers to such investment that a State can impose (or remove) were contemplated as being within the scope of the Commission’s preemption authority. Section 706(a) obligates States as well as the Commission to encourage the deployment of advanced telecommunications capability to all Americans by, among other things, removing barriers to broadband deployment. Thus, when Congress enabled the Commission alone in Section 706(b) to remove such barriers in those locations where the Commission finds such deployment is unreasonable and untimely, Congress expressly contemplated that the scope of the Commission’s preemption authority under Section 706(b) was as broad as the authority of States to remove such barriers under Section 706(a). This sequential structure of Section 706 makes abundantly clear that Congress did not wish to withhold from the Commission the authority to remove barriers to deployment of advanced telecommunications capability in any of those scenarios where States had such authority to do so pursuant to their obligation to encourage deployment of advanced telecommunications capability under Section 706(a). There is no doubt that Tennessee and North Carolina have the ability to remove the barriers to broadband deployment that are the subject of the Petitions. Their failure to do so paves the way for Commission action.

As such, there is in Section 706 a “clear statement” in support of Commission preemption authority, even if imposing or retaining barriers to broadband deployment by municipal utilities was somehow within the scope of State authority over traditional governmental functions, which it is not. 59 When municipal utilities provide broadband service, they do so as a commercial or

nongovernmental, proprietary actor. Thus, State actions that restrain or bar the provision of such service are not asserting jurisdiction over traditional governmental functions, police powers, or the political process, but over the distinct commercial or proprietary functions of municipal utilities. Moreover, regulation over broadband providers is something that many States, including Tennessee and North Carolina, have declined to impose, recognizing federal preemption.\(^\text{60}\)

It is also worth mentioning that the sort of geographic-specific barriers to deployment raise a type of specific concern to Congress in Section 706. Since the federal objective, as codified in Section 706, is to bring advanced telecommunications capability to all Americans, it is not surprising that Commission action in Section 706(b) is to be focused on those “locations” where it finds that broadband deployment and other advanced telecommunications capability is not being provided on a reasonable and timely due to barriers to investment. As set forth in the Petitions, both EPB and Wilson have authority to provide broadband service, but the locations in which they are able to do so are limited. Some of the areas in which they provide or may provide telecommunications service, they cannot provide broadband service. Thus, for example, EPB may provide telecommunications service throughout the State, but broadband service may not be provided outside its electric utility service area. Such location-specific barriers are of a

\(^{60}\) See Tenn. Code Ann. § 65-5-203 (“In order to ensure that Tennessee provides an attractive environment for investment in broadband technology by establishing certainty regarding the regulatory treatment of that technology, consistent with the decisions of the Federal Communications Commission to preempt certain state actions that are not in accordance with the policies developed by the Federal Communications Commission, the Tennessee regulatory authority shall not exercise jurisdiction of any type over or relating to broadband services, regardless of the entity providing the service, except as provided in § 65-5-202(a),” which does not address municipal utilities.). In North Carolina, the State statutes provide generally that broadband service provided by public utilities is not to be regulated by the North Carolina Utilities Commission. See N.C. Gen. Stat. § 62-2(b1).
type about which Congress was especially concerned when it enacted Section 706, as made clear by the plain language of the statute, which focuses on “locations” that are unserved. This merely reinforces the clear intent of Congress to have the Commission preempt any State barriers that preclude a location from enjoying the benefits of broadband deployment on a reasonable and timely basis.

In conclusion, the framework Congress established through Section 706 unequivocally establishes a national federal objective to accelerate deployment of advanced telecommunications capability, including broadband services of the type EPB and Wilson, which already provide broadband services today in some areas, wish to provide in areas where they are not providing broadband services currently. Congress specifically contemplated in Section 706 that the Commission would have the authority it needed to remove barriers of any type to broadband deployment where deployment of advanced telecommunications capability was unreasonable or untimely, including the Tennessee and North Carolina statutes identified in the Petitions that put limits on the locations where these service providers may offer broadband services. Broadband services is an area in which the States of Tennessee and North Carolina have largely otherwise not sought to regulate but in which the Commission has been given a specific mandate to act when and where deployment of advanced telecommunications capability is untimely. The Commission has the legal authority to strike down the geographic restrictions at issue.

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For the foregoing reasons, the Commission should grant the relief sought through the Petitions.

Respectfully Submitted,

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