

**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 <i>et seq.</i>	)	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
	)	
_____	)	

**REPLY 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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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”) respectfully submits these reply comments responding to certain of the initial commenters opposing the petitions in the above-captioned dockets of the City of Wilson, North Carolina (“Wilson”) and the Electric Power Board of Chattanooga, Tennessee (“EPB”) (collectively, “Petitions” and “Petitioners”).<sup>1</sup> The Petitions ask the Federal Communications Commission

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<sup>1</sup> See *Pleading Cycle Established for Comments on 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*

(“Commission”), pursuant to Section 706 of the Telecommunications Act of 1996 (“the 1996 Act”),<sup>2</sup> to remove certain statutory barriers to broadband investment and deployment by the Petitioners, which are already authorized telecommunications service and broadband providers.

In its initial comments,<sup>3</sup> the FTTH Council argued that, where, as in Tennessee and North Carolina, State laws serve as *de jure* or *de facto* barriers to deployment of advanced telecommunications capability by municipal utilities in areas where adequate broadband service has not been provided in a reasonable and timely fashion,<sup>4</sup> the Commission should use its Section 706 authority and act to remove those barriers. The FTTH Council explained that the

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*Networks*, WC Docket Nos. 14-115, 14-116, Public Notice, DA 14-1072 (July 28, 2014); *In the Matter of 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, Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition, filed by the Electric Power Board of Chattanooga, Tennessee (July 24, 2014) (“EPB Petition”); *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, Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition, filed by City of Wilson, North Carolina (July 24, 2014) (“Wilson Petition”) (collectively, the EPB Petition and the Wilson Petition will be referred to herein as the “Petitions”).

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

<sup>3</sup> See *In the Matter of City of Wilson, North Carolina, Petition for Preemption of North Carolina General Statutes § 160A-340 et seq.*, *In the Matter of 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 Nos. 14-115, 14-116, 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 (Aug. 29, 2014) (“FTTH Council Comments”).

<sup>4</sup> Footnote 4 of the FTTH Council Comments discusses the benchmarks used by the Commission to determine whether advanced telecommunications capability has been deployed in a reasonable and timely fashion. See FTTH Council Comments at 3 n.4. Currently, where broadband service has not been made available at speeds of 4/1 Mbps to most locations in that area, advanced telecommunications capability has not been made available in a reasonable or a timely fashion.

Commission has the legal authority to preempt State law under Section 706, and that it can and should use that authority to preempt the particular State laws in question identified by the Petitions. Initial comments filed in opposition to the Petitions generally contend that Section 706 does not confer the legal authority claimed by the Petitioners, and that existing precedent stands as an absolute barrier to the Commission preempting any aspect of how the States choose to allow or prohibit the offering of broadband services by municipally-owned utilities within their borders. However, as explained herein, States do not have such unbridled authority to establish the conditions under which municipal utilities will provide telecommunications or broadband services. Rather, State directives to municipal entities to which the States have given authority to provide telecommunications or broadband services in these areas remain subject to federal law, and specifically to the achievement of the important national objectives set forth in Section 706. For this reason, at least in the two particular cases presented by the Petitions where municipal entities have been authorized to provide broadband services but may not do so in all areas where they are authorized to provide telecommunications services, State law is subject to preemption.

The Commission need not determine the full scope of its preemptive authority in all potential scenarios in the course of reaching a decision on the Petitions. Nor should it. Rather, the Commission should focus on the two cases specifically presented by the Petitions and decide them based upon their specific facts.

**I. THE ISSUES BEFORE THE COMMISSION ARE NARROW AND ITS DECISION SHOULD BE LIMITED TO THE SCOPE OF THOSE ISSUES**

The Council recognizes that States have a legitimate interest in ensuring that municipalities, even when they act in a proprietary or business fashion – as opposed to a governmental or regulatory fashion through the exercise of their police powers – behave in a generally reasonable and responsible fashion. Municipalities and municipal utilities must be accountable to the residents and taxpayers. However, in ensuring that municipal utilities carry out this responsibility, States may not – in those areas where advanced telecommunications capability is not deployed in a reasonable and timely fashion – act contrary to the explicit directives of Section 706 and impose *de jure* or *de facto* prohibitions on municipal utility broadband investments.

In considering the comments and oppositions, the Council urges the Commission to focus on the two Petitions and the specific statutes discussed therein. This is not a proceeding of general applicability. Thus, for example, the issue is not whether, as a general matter and without any other context, a State legislature may preclude municipal utilities from providing broadband services. That issue is not presented by the Petitions. Rather, the Petitions raise the question of whether, in specific locations within Tennessee and North Carolina where the Commission finds deployment of advanced telecommunications capability has not been reasonable or timely,<sup>5</sup> barriers in the laws of those two States to deployment of broadband capability by EPB and the City of Wilson are legal, considering the operating authority already provided to these municipal utilities. It is this narrow, fact-specific question that, with respect to

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<sup>5</sup> Provisions in 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.

each of the two Petitions, must be decided.<sup>6</sup> The laws of any other State, which may or may not act as barriers to the deployment of advanced telecommunications capability as applied to other municipal entities, are not before the Commission. Consequently, the scope of any decision taken by the Commission in this proceeding should be limited to the facts presented by each Petition, leaving it an open issue whether the Commission should preempt a State-erected barrier in another location in another State subject to a different State law.

## **II. IT HAS BEEN WELL ESTABLISHED THAT SECTION 706 IS AN AFFIRMATIVE GRANT OF AUTHORITY TO REMOVE BARRIERS TO BROADBAND DEPLOYMENT**

The two United States Courts of Appeals that have examined the issue of whether Section 706 is an affirmative grant of authority to the Commission have already decided that it is.<sup>7</sup> Several of the opponents to the Petitions criticize the courts for their decisions, and question whether the decisions were proper.<sup>8</sup> However, even the US Telecom Association (“US

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<sup>6</sup> Accordingly, the Petitions do not present the issue whether, “[e]ven if the FCC had the power to preempt restrictions on municipal broadband, this is . . . the same thing as having the power to *grant* authorization where the state has chosen to withhold it.” *See In the Matter of City of Wilson, North Carolina, Petition for Preemption of North Carolina General Statutes § 160A-340 et seq., In the Matter of 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 Nos. 14-115, 14-116, Comments of the United States Telecom Association, at 17 (Aug. 29, 2014) (“Comments of US Telecom”). Rather, the Tennessee and North Carolina legislatures are limiting the operating authority they have granted EPB and Wilson. By removing the restrictions, as the Petitions request, the underlying authority would give the municipal utilities the green light to enter the broadband market. Accordingly, no affirmative grant of authority from the FCC has been requested by the Petitioners. It is specious to suggest otherwise.

<sup>7</sup> *See Verizon Corp. v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014); *Direct Commc’ns Cedar Valley, LLC v. FCC*, 753 F.3d 1015, 1053-54 (10th Cir. 2014) *discussed in* FTTH Council Comments at 16 n.46.

<sup>8</sup> *See, e.g., In the Matter of City of Wilson, North Carolina, Petition for Preemption of North Carolina General Statutes § 160A-340 et seq., In the Matter of The Electric Power Board of Chattanooga, Tennessee, Petition for Preemption of a Portion of Section 7-52-*

Telecom”), generally an opponent of the Petitions, acknowledges “the FCC possesses preemptive authority to remove barriers to entry.”<sup>9</sup> It is too late to turn back the clock.<sup>10</sup>

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*601 of the Tennessee Code Annotated*, WC Docket Nos. 14-115, 14-116, Comments of CenturyLink, at 12 (Aug. 29, 2014) (“Comments of CenturyLink”) (“CenturyLink respectfully disagrees with these assertions and with the conclusions of the D.C. Circuit in *Verizon* that Section 706 contains any independent grant of authority that can support adoption of affirmative regulatory obligations.”). In any event, the issue in this case is not, as CenturyLink contends, the “adoption of affirmative regulatory obligations.” *Id.* The Petitions do not ask the Commission to impose any affirmative obligations on any State, municipality, or municipal utility. Rather, the Petitions ask the Commission solely to do what Section 706(b) says the Commission shall do, which is to remove barriers to broadband deployment when the Commission finds certain conditions are present. The Petitions do not seek to have the Commission affirmatively require any municipal entity to deploy broadband facilities or provide such service. For this reason, CenturyLink’s objection that “preemption would make no difference to anyone if the State regulator were left with control over funding needed for any utility operation and declined to pay for it” is simply beside the point. *See id.* at 21 (internal citations omitted). In any event, in the two Petitions presented to the Commission, which is all the Commission need decide at this time, preemption would pave the way, subject to reasonable State requirements, for EPB and Wilson to provide broadband services in unserved areas as they have requested.

<sup>9</sup> *See* Comments of US Telecom, at 11. US Telecom maintains that the power to preempt is not without limits. *See id.* The Council agrees that the Commission’s power to preempt is not without limits, but that power does exist where there are clear barriers to deployment of broadband capability by municipal utilities in areas that are unserved, i.e., where advanced telecommunications capability deployment has been neither reasonable nor timely. Barriers subject to preemption, as explained herein and in the Council’s initial comments, do not include reasonable safeguards designed to make municipal utilities accountable and responsible to the taxpayers. The preemption of such safeguards are not what the Council advocates for herein and in its initial Comments.

<sup>10</sup> It is not relevant, as CenturyLink argues, that Section 706 does not expressly use the term “preemption.” *See* Comments of CenturyLink at 13. The Commission has on numerous occasions preempted State law where the statutory source of its authority did not utilize the terms “preempt” or “preemption.” *See, e.g., In the Matter of Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm’n*, WC Docket No. 03-211, Memorandum Opinion and Order 19 FCC Rcd. 22404, 22424, at ¶ 32 (2004), *aff’d*, *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 581 (8th Cir. 2007) (preemption based on the Commission acting within its congressionally-provided regulatory authority and the impossibility exception rather than specific grant of preemption authority). While the use of the term “preemption” in a statutory provision

Several of the commenters contend that, when it comes to regulating whether and how municipalities and municipal utilities enter the telecommunications or broadband marketplace, the discretion of State legislatures is unlimited absent an express statement by Congress that the authority is limited by federal law.<sup>11</sup> These commenters point, for example, to explicit statements regarding preemption in Section 253(d) and Section 332(c) of the Communications Act of 1934, as amended.<sup>12</sup> While such statements of preemption may exist in these provisions, that does not mean that the Commission’s preemptive authority is limited to instances where federal communications statutes meet this particular model. In other words, the issue is not whether the cases meet the model represented by Section 253 or 332, but whether the Commission’s basis for preemption is sufficient. Section 706(b), on which the Petitions rely, authorizes the Commission to “remove barriers” to infrastructure deployment in advanced telecommunications capability. Where those barriers are State or municipal laws, removal necessarily implicates preemption. Is there any serious question, if there were a State law or local ordinance prohibiting any non-municipal entity from additional deployment of infrastructure to deploy broadband services or from the use of existing telecommunications infrastructure to provide broadband services, that the Commission could not preempt that law or ordinance?

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giving the Commission authority to act in a given area might, in some cases, be present, it is not a necessary prerequisite to the Commission taking action with preemptive effect.

<sup>11</sup> CenturyLink, for example, states that “[State] discretion encompasses the powers States delegated to their instrumentalities to engage or not engage in various enterprises – including telecommunications or broadband service provision – and on what terms and conditions those instrumentalities may do so.” Comments of CenturyLink at 24.

<sup>12</sup> *See, e.g.*, Comments of US Telecom at 21; Comments of CenturyLink at 14. *See also* 47 U.S.C. §§ 253(d) and 332(c).

Several other examples involving municipal utility providers of communications services demonstrate that State law provisions regarding whether and how municipalities and municipal utilities enter the telecommunications or broadband marketplace are not independent of preemptive federal law and regulation. If a State allowed a municipal utility to act as a telecommunications carrier providing local exchange, and intrastate and interstate services, for example, that entity must abide by applicable regulation. The State could not impose advantages on the municipal utility as a condition of its providing service, for example. Consider as an illustration where a State has not certified to the Commission that it regulated pole attachment rates and access, meaning that the Commission's pole attachment rate formula and other attachment regulations apply. The State in that case could not limit the attachment rates municipal utilities are permitted to pay incumbent local exchange carriers or investor owned utilities to something less than what these pole owners could charge other, non-municipal attachers.

As a second illustration, States could not pass a statute authorizing municipal utilities to provide telecommunications services that gave those utilities the authority to enter into exclusionary agreements with owners or managers of multitenant environments, whereas other telecommunications carriers would be precluded from doing so under federal law.<sup>13</sup> In both this example and that in the previous paragraph, there is little doubt that the State laws conferring the advantages on municipal utilities as part of their operating authority could be preempted as being in conflict with federal laws and the achievement of national objectives.

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<sup>13</sup> See., e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, First Report and Order, 15 FCC Rcd. 22983, 22996-97, at ¶ 27 (2000) (FCC “prohibit[s] carriers, in commercial settings, from entering into contracts that effectively restrict premises owners or their agents from permitting access to other telecommunications service providers.”).

By the same token, State laws that allow municipal entities to enter telecommunications or broadband markets might include unreasonable obligations imposed upon such utilities. For example, a State might impose the requirements – which the Commission has found unreasonable and unenforceable in other circumstances<sup>14</sup> – that the municipal utility build out to all locations within a municipal utility’s service territory. The Council submits that such build out requirements imposed upon a municipal utility provider are no less unlawful than if imposed on a private entity.

The FTTH Council provides the foregoing illustrations not to suggest that the Commission need or should opine on them in its decision in response to the Petitions, but merely to illustrate that the claimed unbridled discretion in State legislatures when passing laws that govern the authority of municipally provided telecommunications service and broadband advanced by some opponents to the Petitions is not a position that has unqualified merit. There are limits to State authority, even with respect to municipal utilities providing telecommunications service or broadband, and, depending on the facts and circumstances, the Commission has the ability to enforce those limits. More specifically, the Commission has the authority – and obligation – under Section 706, to remove such limits where they act as barriers to infrastructure investment in locations where deployment of advanced telecommunications capability has not been reasonable or timely. Were a State government to impose the foregoing build out requirement on municipal utilities as a condition of their having the authority to provide broadband service in locations where deployment otherwise has been unreasonable or

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<sup>14</sup> See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, 5118 (Mar. 5, 2007) (imposition of build out requirements on new cable entrants frustrate competition and are unlawful).

untimely, for example, the Commission would be within the scope of its Section 706 authority to find this as a barrier to the deployment of advanced telecommunications capability and to remove that barrier.

Similarly, where a municipality or a municipal utility has deployed infrastructure that supports both telecommunications service and broadband capability, it should have the flexibility to use that infrastructure to provide not only telecommunications service but broadband as well.<sup>15</sup> If a State law were to restrict that entity from providing broadband services on existing infrastructure it uses or could deploy to provide telecommunications services, and this restriction resulted in the deployment of broadband capability in the affected areas falling below the FCC's established standards for unserved areas,<sup>16</sup> then that State law would be a restriction to the

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<sup>15</sup> The Commission has recognized that providers should be able to leverage their networks to provide additional services in a number of contexts without giving up their rights, including unbundled network elements and pole attachments. *See Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd. 2533, 2549 ¶ 29 & n.83 (2005) *subsequent history omitted* (reaffirming the Commission's rules that "a carrier obtaining access to a UNE [unbundled network element] for the provision of a telecommunications service for which UNEs are available may use that UNE to provide other services as well."); *Nat'l Cable & Telecomm's. Assoc., Inc., v. Gulf Power Co.*, 534 U.S. 327, 338 (2002) (affirming the FCC's determination that cable operators can use their pole attachments to provide Internet access services as well, noting that "if a cable company attempts to innovate at all and provide anything other than pure television, [and] it [were to lose] the protection of the Pole Attachments Act and subjects itself to monopoly pricing," the result "would defeat Congress's general instruction to the FCC to 'encourage the deployment' of broadband Internet capability and, if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment.'").

<sup>16</sup> The FCC's broadband speed benchmark currently is set at 4 Mbps downstream and 1 Mbps upstream. *See supra* note 4.

deployment of broadband capability, i.e., advanced telecommunications capability. The Commission has the authority and obligation under Section 706 to remove that barrier.<sup>17</sup>

### **III. THE COMMISSION SHOULD ONLY DECIDE THE NARROW QUESTIONS PRESENTED BY THE PETITIONS**

In the Petitions, the Commission is presented with specific requests concerning specific geographic areas in which EPB and Wilson would like to deploy broadband capability. Although the Petitioners have received authority to provide telecommunications service and broadband, there are specific State statutory provisions that the Petitioners contend preclude them from offering broadband to areas in which the deployment of advanced telecommunications capability has been unreasonable and untimely, i.e., areas designated by the Commission as “unserved.” While commenters in opposition seek to have the Commission refrain from asserting its preemption authority unless it is clear that the Commission could exercise that authority in basically any circumstance involving State regulation of a municipal utility, the Commission

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<sup>17</sup> The broad obligations imposed on the Commission in Sections 706(a) and (b) do, indeed, make Section 706 materially different than Section 253 for preemption analysis purposes. Section 253 does not impose any affirmative obligation on the Commission to preempt. As US Telecom notes in its comments, Section 253 “by its plain terms . . . actively prohibits a broad range of activity by the states, and requires no action by the Commission to do so.” Comments of US Telecom at 21. For this reason, *Nixon v. Missouri Municipal League*, 541 U.S. 124 (2004), was only secondarily about the scope of the Commission’s grant of preemption authority and primarily about the scope of the statute’s applicability. This explains why the Court in *Nixon* focused on the scope of the term “any entity” in Section 253(a), which dominated the majority’s opinion in that case. In Section 706(b), by contrast, the Congress gave the Commission the mandate and the authority to remove all barriers to deployment of advanced telecommunications capability, including broadband capability, an authority at least as broad as that imposed on the States. Compare 47 U.S.C. § 253(a) with 47 U.S.C. § 1302(b); see also Comments of FTTH Council at 20. By definition, supported by the comments of the opponents of the Petitions, the State authority to remove barriers extends to barriers impacting municipalities and municipal utilities.

need not consider all such scenarios.<sup>18</sup> It should only consider the particular scenarios presented by the Petitions.

In the case of EPB, the Tennessee statutes allow municipal utilities to provide telecommunications service throughout the State of Tennessee using high-speed fiber.<sup>19</sup> However, while EPB is authorized to provide broadband services as well, there is an exception that constrains that authority to those areas where EPB is providing electric utility services.<sup>20</sup> In short, the statute presents a case where authority to deploy broadband-capable infrastructure – high-speed fiber – is present, but the permission to utilize that infrastructure to offer broadband service is withheld. Instead, EPB is limited to using that infrastructure to offer broadband service only in locations where it is authorized to use its electric distribution network, which for

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<sup>18</sup> CenturyLink, for example, contends that “the [*Nixon*] Court acknowledged that broad preemption could create the anomalous situation where ‘a State that once chose to provide broad municipal authority could not reverse course.’ Private counterparts could come and go at will but governmental providers could never exit ‘for the law expressing the government’s decision to get out would be preempted.’” Comments of CenturyLink at 22; *see also* Comments of US Telecom at 17 (“Preemption of the North Carolina statute limiting that preexisting authority has the practical effect of telling states that once they authorize a particular activity, they can never de-authorize—or even limit—that activity.”). A municipal entity’s departure from the broadband market is not an issue raised by the Petitions and, thus, need not be decided now. CenturyLink’s contention to the contrary is a red herring. Moreover, this was not an issue before the Supreme Court in *Nixon*, and the opinion’s discussion of it, upon which CenturyLink relies, was merely *dicta*. The Commission need not consider today whether a State could pull back completely, once it allows a municipal entity to enter the broadband market. Instead, the Commission should focus on what sort of restrictions States can place on the municipal provider, in particular, whether Tennessee and North Carolina can impose the sorts of restrictions the statutes in question impose on EPB and Wilson, which already are providing services today. Finally, in any event, the removal of limitations and barriers when the States have already granted authority, but have chosen to limit it, does not necessarily imply that the States cannot subsequently remove that authority altogether. But again, that is an issue for another day.

<sup>19</sup> *See* Tenn. Code Ann. § 7-52-401.

<sup>20</sup> *See* Tenn. Code Ann. § 7-52-601.

all intents and purposes is completely separate from its high-speed fiber network. The State has handcuffed EPB from utilizing the high-speed fiber network it has deployed. The State's rationale is inexplicable, since the provision of telecommunications service combined with broadband, rather than just telecommunications service alone, is both an attractive option to customers and enables a provider to more rapidly recover their network investment. While the reasons for Tennessee imposing such a limitation are not clearly known and would appear, from the economics of it, counter-intuitive – not to mention contrary to the State's obligations in Section 706(a) to remove such barriers – there can be no doubt that the limitation, by its nature, is a barrier to the deployment of broadband capability.<sup>21</sup> The Commission can and should preempt the provisions in Section 7-52-601 which limit the provision of broadband to EPB's operating territory in those locations where the Commission finds that deployment of advanced telecommunications capability has not been reasonable or timely.

For similar reasons, at least certain portions of Section 160A-340 of the North Carolina General Statutes, which are the focus of the Wilson Petition, should also be preempted.<sup>22</sup> While

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<sup>21</sup> US Telecom argues “[t]hat the state statutes at issue in *Nixon* regulated *precisely the same* activity as those at issue [in the Petitions] is fatal to Petitioners’ legal theory.” Comments of US Telecom at 14. But the same activity, at least precisely the same activity, is not at issue as in the *Nixon* case, which dealt with the provision of telecommunications services under Section 253. The Petitions deal with the provision of broadband service, which is at least related in that it likely would be provided over the same network facilities as the voice telecommunications service. If the same activity were at issue, then EPB, for example, should be able to provide broadband throughout Tennessee, since it has the authority to provide telecommunications services throughout the State. Equally significant, US Telecom appears to be agreeing with the Council that provision of broadband and telecommunications services represent sufficiently similar activities that the State should not preclude the former when they have permitted the latter. Under the particular facts of the EPB Petition, the issue is squarely presented whether that municipal utility should be able to provide broadband where it is authorized and able to provide telecommunications services over the same network facilities.

<sup>22</sup> See N.C. Gen. Stat. § 160A.340.

the Petition examines a number of different subsections that the City of Wilson finds inhibit its deployment of broadband infrastructure, the FTTH Council wishes to focus the Commission’s attention on certain provisions of that statute.<sup>23</sup> In particular, Section 160A-340.1(a)(3) permits the City of Wilson, a licensed telecommunications carrier and broadband provider, to deploy broadband outside the boundaries of Wilson County, but only to “unserved areas,” as defined in the State statute, and only upon petition to the State commission.<sup>24</sup> Under the North Carolina statute, an area is considered served if there is a provider offering broadband at downstream speeds of 1.5 Mbps, a speed less than half of the Commission’s existing 4 Mbps threshold first set forth in 2010.<sup>25</sup> As such, the law, while purporting to promote the deployment of advanced telecommunications capability where such deployment has not been reasonable or timely in so-called “unserved areas,” serves as a *de facto* barrier in violation of Section 706 to deployment in “unserved areas,” as the Commission defines the term. Again, the Commission can and should remedy this situation by removing the barrier created by the State restriction coupled with the North Carolina definition of “unserved,” now rendered obsolete by federal Commission standards which establish the national objectives for broadband deployment.<sup>26</sup>

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<sup>23</sup> The Council takes no position on the propriety of preempting the other provisions discussed in the Wilson Petition. *See generally*, Wilson Petition, at 27-39.

<sup>24</sup> *See* N.C. Gen. Stat. § 160A.340.1(a)(3); *see also* N.C. Gen. Stat. §§ 160A.340(4), 340.2(b).

<sup>25</sup> *See Wilson Petition* at 28-31, 35-36; *see also 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).

<sup>26</sup> The Wilson Petition explains that a petition must be submitted to the State commission to determine whether an area is “unserved” and potentially subject to service provided by a municipal utility. *See* Wilson Petition at 30. Provided the State commission petition

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For the foregoing reasons and those set forth in the Council's initial Comments, the Commission should grant the relief sought through the Petitions as set forth herein.

Respectfully Submitted,

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process is not overly burdensome or subject to delays, the Council does not have a specific objection to such a permit process. However, because this Commission publishes what areas, under the Commission's current standards, are "unserved," the petition process should be rather straightforward and streamlined.