DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.,* WC Docket No. 14-115, *The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601,* WC Docket No. 14-116.

This order highlights the unprecedented lengths that the Commission is willing to go in undermining the free market system, the Federal statute, the U.S. Constitution, and common sense in order to try to dictate when, where, and how broadband is provided in this country. The Commission is just about to vote to re-write the Communications Act to assume vast new regulatory authority over broadband providers in the next item, and here the Commission has the arrogance to try to re-write state laws as well. The order is both legally infirm and bad public policy. I cannot support it.

Let me start by expressing my profound opposition to the offering of broadband or any communications service by a government entity, in this case a municipality. Some people like to talk about the principles of network compacts, but this issue goes to the core of more important principles: the foundations of the U.S. economy and free enterprise. For historians, you will remember how government involvement was debated and dismissed long ago in many other sectors, such as banking. While other countries, like Cuba, China, Russia and Venezuela, have effectively nationalized private companies, the bedrock of American capitalism is private enterprise free from government manipulation as a market entrant. If there is market need, an individual with a dream and a propensity for risk will enter to provide service. It is not the government's role to offer services instead of or in competition with private actors.

Separately, I would like to clarify any misperception that I am against preemption as a general matter. While I support the basic premise of Federalism, I embrace the realities and benefits of a communications marketplace that does not recognize the political borders of yesterday. For instance, I have no difficulties preempting state and local restrictions on wireless tower and antenna siting. I have also worked extensively in my career to preempt state and local burdens on the offering of Internet applications, such as VoIP. So it shouldn't come to anyone's surprise that I firmly believe that Internet access is an interstate service. But making a finding under section 1 of the Communications Act that a service is interstate is not sufficient, particularly when preemption would "trench on the States' arrangements for conducting their own governments."[1] The missing ingredient that is essential to trigger preemption is clear Congressional direction via the statute. If Congress enacts specific legislation to preempt state law to further municipal broadband, then I will implement it post-haste.

That key ingredient is not present here. The order relies on an illogical and tortured reading of section 706 of the Telecommunications Act to assert authority. I have previously expressed my views on this topic and they haven't changed. To reiterate just one portion of my concerns, the FCC *claims* that its authority under section 706 is "not unbounded" because it may act only within the "limits" of its ever broadening subject matter jurisdiction and its actions must be designed "to achieve a particular purpose: to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[2] But as Judge Silberman commented on that very phrase, "This is an almost meaningless limitation…any regulation that, in the FCC's judgment might arguably make the Internet 'better,' could increase demand. I do not see how this 'limitation' prevents [section] 706 from being carte

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[1] *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004).

[2] *Supra* para. 138.

blanche to issue any regulation that the Commission might believe to be in the public interest."[3] In this item, we see that prediction come true. Indeed, anything that may "incent the use of the Internet" is apparently now fair game for FCC regulation.

Yet even if I believed that section 706 provided some general authority, which I do not and nor does section 1 of the Communications Act, it certainly does not contain the clear statement that the Supreme Court has said is a prerequisite for preempting a state's control of its municipalities.[4] On the contrary, section 706 expressly contemplates a joint federal-state role in broadband deployment.[5]

We are told, however, that the Supreme Court decisions don't apply here for two reasons: (1) this is an area where there has been a history of significant federal presence; and (2) the laws at issue here do not constitute flat bans on the provision of municipal broadband. Both arguments are unavailing and, therefore, the presumption against preemption must apply here.

First, the order broadly defines the area of significant federal presence as interstate communications policy. However, the petitions are primarily focused on the narrower question of *where* service may be provided, and that is a core function of the states. As the State of Tennessee noted, "While the Commission may regulate the provision of a telecommunication service that a local governmental unit is authorized by state law to provide, the Commission cannot expand the territorial jurisdiction of a local governmental unit since any such action would exceed the powers of a federal agency and manifestly infringe on the sovereignty of a state."[6] In other words, the Commission cannot mandate that a state authorize a municipality to offer broadband. It's just that simple.

Furthermore, the types of restrictions under scrutiny are not necessarily specific to communications policy. For example, states may require referenda on a variety of spending or other matters. The fact that a state may require one for municipal broadband does not necessarily mean that it is being imposed "to affect the state's communications policy preferences." Indeed, public hearings and referenda have a long and well-regarded history in the American political tradition.

Moreover, even restrictions that seem specific to communications policy do not necessarily conflict with the Commission's role in regulating interstate communications. For example, restrictions truly designed to prevent cross-subsidization can be consistent with existing communications policy. And requirements for business planning and feasibility studies are similar to FCC rules that ensure that its own funding recipients are technically and financially qualified. Are we really striking down a requirement that a municipality have a cogent business plan?

Second, the order turns precedent on its head to conclude that the Commission has the authority to preempt any restriction that falls short of an outright ban. Finding that the state provisions at issue here are not flat bans, the order tosses the relevant Tennessee provision and proceeds line by line through the North Carolina statute to eliminate what it sees fit. In doing so, the order ignores how both the City of

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[3] *Verizon v. FCC,* 740 F.3d 623, 662 (D.C. Cir. 2014) (Silberman, J., concurring in part and dissenting in part).

[4] *See Nixon*, 541 U.S. at 140, 141 (("interposing federal authority between a State and its municipal subdivisions" cannot be done without an "'unmistakably clear' statement to that effect") (quoting *Gregory v Ashcroft*, 501 U.S. 452, 460 (1991)).

[5] 47 U.S.C § 1302(a)(directing the Commission and each State Commission with jurisdiction to encourage the deployment of advanced telecommunications capability).

[6] Letter from Herbert H. Slattery III, Attorney General, State of Tennessee to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-116 (filed Feb. 5, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001027109.

Wilson and the State of North Carolina interpret their own statute and the relief petitioners actually sought. In essence, the overly broad extension of this item would overrule certain sound restrictions justified by the use of taxpayer funding, such as public hearings and voting requirements even though, when I met with the City of Wilson, they said that they could live with them.

Moreover, the order is downright hostile to the states, accusing them of passing laws that "allegedly" but do not actually protect taxpayers from risk. It seems that no protection enacted by a state, no matter how beneficial to taxpayers, could survive the FCC's unvarnished skepticism. In fact, the only restriction that may survive under the Commission's reading of section 706 is a state law imposing a flat ban, which seems short-sighted and counterproductive. That is, the order may encourage states that are concerned about the risks of municipal broadband to prohibit it altogether rather than permit it under carefully tailored conditions that ensure such projects will be successful and not burden taxpayers.

I am also deeply troubled by the policy implications of this order. Municipal broadband networks have a history of overpromising and under-delivering, leaving taxpayers at risk. We've seen examples where municipal broadband projects that failed did so due to competition, poor planning, or unethical practices. That's the very scenario and conduct that states are trying to remedy by requiring a right of first refusal to private sector broadband providers, business plans, feasibility studies, public hearings, and referenda.

Finally, I have to wonder if all of this is for naught. Municipal broadband providers, like all other ISPs, will now be subject to Title II regulations. Notably, dozens of these providers opposed reclassification because, in their own words, it "will undermine the business model that supports our network, raises our costs and hinders our ability to further deploy broadband."[7] It is an odd result indeed to preempt a number of state rules in the name of "removing barriers" to broadband deployment only to impose extensive new barriers in their place.

In sum, I find it appalling that we would override democratically-enacted, common-sense protections for consumers, especially in the absence of clear direction from Congress. I must dissent.

[7] Letter from 43 Municipal Broadband Providers to Tom Wheeler, Chairman, FCC, GN Docket Nos. 14-28 & 10-127 (filed Feb. 10, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001028442.