

WC 14-115

DOCKET FILE COPY ORIGINAL

THE BALLER HERBST LAW GROUP

A PROFESSIONAL CORPORATION
2014 P STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 833-5300
FAX: (202) 833-1180
www.baller.com

JAMES BALLER
TELEPHONE: (202) 833-1144
PORTABLE: (202) 441-3663
INTERNET: Jim@Baller.com

MINNEAPOLIS OFFICE
280N GRAIN EXCHANGE BUILDING
301 FOURTH STREET SOUTH
MINNEAPOLIS, MN 55415
(612) 339-2026

July 24, 2014

ACCEPTED/FILED

JUL 24 2014

Federal Communications Commission
Office of the Secretary

By Hand Delivery

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Petition of the City of Wilson, North Carolina, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition

Dear Ms. Dortch:

Please accept for filing the attached original and two copies of the City of Wilson, North Carolina's Petition for Removal of Barriers to Broadband Investment and Competition. Please also return a date stamped copy to the messenger.

Thanks for your assistance.

Sincerely,



Jim Baller

- cc: Chairman Tom Wheeler
- Commissioner Mignon Clyburn
- Commissioner Jessica Rosenworcel
- Commissioner Ajit Pai
- Commissioner Michael O'Reilly
- WCB Chief Julie Veach
- Hon. Roy Cooper,
- Attorney General of North Carolina

Before the
Federal Communications Commission
WASHINGTON, D.C. 20554

ACCEPTED/FILED

JUL 24 2014

Federal Communications Commission
Office of the Secretary

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

File No. _____

**PETITION PURSUANT TO SECTION 706 OF THE
TELECOMMUNICATIONS ACT OF 1996
FOR REMOVAL OF STATE BARRIERS TO BROADBAND
INVESTMENT AND COMPETITION**

Jim Baller
Sean Stokes
The Baller Herbst Law Group, P.C.
2014 P St. NW Suite 200
Washington, D.C. 20036
(202) 833-5300
(202) 833-1180 fax

James P. Cauley III
Gabriel Du Sablon
Cauley Pridgen, P.A.
2500 Nash Street N
Suite C | PO Drawer 2367
Wilson, NC 27894-2367

Counsel for the City of Wilson

July 24, 2014

PETITION

I. INTRODUCTION AND SUMMARY

Pursuant to Section 706 of the Telecommunication Act of 1996, 47 U.S.C. § 1302, the City of Wilson (“Wilson” or “the City”), a North Carolina municipal corporation, brings this petition for preemption of North Carolina General Statutes § 160A-340 *et seq.* (“Section 160A-340”), as an impermissible barrier to broadband deployment and competition.¹ The City of Wilson provides electric service in six counties in Eastern North Carolina. In one of these counties – Wilson County – the City also offers gigabit Internet access, cable television and various other services over a state-of-the-art fiber-optic communications network – the first of its kind in North Carolina. The City has received numerous requests for these services from residents, government agencies, businesses, and other organizations in the other five counties, and it stands ready, willing and eager to expand the scope of its broadband capabilities into neighboring communities. Section 160A-340 has the purpose and effect of prohibiting it from doing so.

As discussed below, Wilson requests that the Commission find that advanced telecommunications capabilities, including high-speed broadband services, are not being deployed in a reasonable and timely manner in portions of the five counties immediately adjacent to Wilson County and that the primary reason for this is a State barrier to municipal broadband deployment – Section 160A-340. The Commission should find that the purpose and effect of this provision is to thwart or unreasonably delay broadband investment and competition, and that preemption of

¹ 47 U.S.C. § 1302(b) (2010). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153, as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (BDIA), is now codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. § 1301 *et seq.*

Section 160A-340 would accelerate broadband investment and competition in these areas. The Commission should therefore take immediate action to preempt Section 160A-340 and declare it to be unenforceable.

It is essential for the Commission to deliver a strong, clear, and forceful condemnation of Section 160A-340 because it seeks to thwart Wilson and other municipalities in North Carolina from providing exactly the kind of high-capacity network and services that America needs to remain competitive in the emerging knowledge-based global economy. Wilson is *already* providing gigabit broadband connectivity in its own community – well ahead of the Commission’s proposed national goal. As shown in Section II, Wilson’s fiber system is also providing, and will increasingly provide, many other benefits to its community – including enhanced economic development and competitiveness, educational opportunity, public safety, homeland security, energy efficiency, environmental protection and sustainability, affordable modern health care, quality government services, and the many other advantages that contribute to a high quality of life. Moreover, Wilson stands poised to bring these same benefits and capabilities to neighboring communities.

II. STATEMENT OF FACTS

A. The Importance of Broadband Internet Connectivity and the Critical Role of Municipalities in Meeting the Goals of Section 706

In the Spring of 1994, as Congress was considering what was to become the Telecommunications Act of 1996, the Senate Committee on Commerce, Science and Transportation held a hearing at which representatives of investor-owned, cooperatively-owned, and municipally-owned electrical utilities testified about the contributions that electric utilities of all kinds could make to the development of a “National Information Highway.” In particular,

Billy Ray, General Manager of the Electric Plant Board of Glasgow, Kentucky, testified about the remarkable experience of that innovative rural community:

In the 1980s, Glasgow, a community of 13,000 residents, was served -- but not very well -- by a single, for-profit cable company. The citizens were unhappy with the quality and the price of their cable TV service, so they turned to their municipally owned electric system for help. This plea from the public coincided with the city utility's recognition of the need for an effective demand-side management and load shedding system to avoid huge increases in power costs driven by surges in peak power demand. The Glasgow Electric Plant Board recognized that the same coaxial cable system used to deliver television programming could also be utilized by citizens to manage their power purchases. So our municipally owned electric utility built its coaxial distribution control system which also provides a competing, consumer-owned cable TV system. This new system not only allowed consumers to purchase electricity in real time and lower their peak electrical demand, thus saving money on their electric bills, it provided twice as many television channels as the competing, for-profit cable company at not-for-profit rates -- and delivered better service to boot. Big surprise -- the private company decided to drop its rates by roughly 50 percent and improve its service, too.

But the Glasgow Electric Plant Board didn't stop there. We wired the public schools, providing a two-way, high-speed digital link to every classroom in the city. We are now offering high-speed network services for personal computers that give consumers access to the local schools' educational resources and the local libraries. Soon this service will allow banking and shopping from home, as well as access to all local government information and data bases. We are now providing digital telephone service over our system. That's right -- in Glasgow, everyone can now choose to buy their dial tone from either GTE or the Glasgow Electric Plant Board.

The people of Glasgow won't have to wait to be connected to the information superhighway. They're already enjoying the benefits of a two-way, digital, broadband communications system. And it was made possible by the municipally owned electric system.²

² Testimony of William J. Ray, Superintendent, Glasgow Electric Plant Board, Glasgow, KY, on Behalf of the American Public Power Association, Hearings on S.1822 Before the Senate Committee on Commerce, Science, and Transportation, 103d Cong., 2d Sess. at 355-56, 1994 WL 232976 (May 11, 1994) ("Hearings on S.1822").

Later in the hearing, Senator Trent Lott (R-MS), one of the most prominent leaders of Congress at the time, as well as a Senate manager of the Telecommunications Act, thanked the panel, particularly Mr. Ray. “I found it very interesting, and Mr. Ray, I was very interested in the experience you have had there in Kentucky.”³ Senator Lott then went on to say, “I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here.”⁴

By the time the Telecommunications Act became law on February 8, 1996, access to advanced telecommunications capabilities had already become important to a growing number of Americans. Although Congress could not accurately predict how fast and in what ways the need for access to advanced communications capabilities would evolve, Congress could – and did – foresee that such access would become essential for all Americans. As a result, in Section 706(a) of the Act, Congress commanded the Commission and the States to encourage the deployment of advanced telecommunications capabilities on a reasonable and timely basis to all Americans, using all regulatory methods at their disposal to remove barriers to broadband investment. In Section 706(b), Congress also required the Commission to take affirmative action to acquire information about the pace of deployment of advanced telecommunications capabilities, to decide whether such deployment was occurring on a reasonable and timely basis, and, if the Commission ever answered that question in the negative, to act immediately to remove barriers to infrastructure investment and to promote competition.

³ Hearings on S.1822, at 378.

⁴ *Id.*, at 379.

In 1999, in its first Section 706 Report,⁵ the Commission defined the term “advanced telecommunications capabilities” – which it used interchangeably with “broadband” – as “having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, “bandwidth”) in excess of 200 kilobits per second in the last mile.” This rate, the Commission explained, was “enough to provide the most popular forms of broadband -- to change web pages as fast as one can flip through the pages of a book and to transmit full-motion video.”⁶ Based on this definition, the Commission concluded,

Overall, we find that, although the consumer broadband market is in the early stages of development, it appears, at this time, that deployment of broadband capability is reasonable and timely. Nevertheless, this is an early snapshot of a fledgling market. We find that there is already a significant initial demand for broadband capability and we expect demand to grow substantially in the coming years. We are committed to ensuring that deployment of broadband capability to the consumer market remains timely and reasonable as the market for broadband develops, and that the supply of broadband meets consumer demand.⁷

During the next eight years, the Commission continued to use 200 kilobits per second as its definition of advanced telecommunications (or broadband) capabilities, and it continued to find that deployment at that level was occurring on a reasonable and timely basis. This prompted widespread criticism, including from within the Commission itself.⁸ In 2008, Congress responded

⁵ *In the Matter of 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*, 14 FCC Rcd. 2398, ¶ 20, 1999 WL 672549 (rel. Feb. 2, 1999).

⁶ *Id.*, at 2406.

⁷ *Id.*, at 2405.

⁸ See, e.g., *NPRM*, Statement of Commissioner Jonathan S. Adelstein, WC Docket No. 07-38, *In Re Development of Nationwide Broadband Data to Evaluate Reasonable and*

to this criticism by enacting the Broadband Data Improvement Act (BDIA).⁹ In Section 101 of the Act, codified in 47 U.S.C. § 1301, Congress opened with the following two findings:

(1) The deployment and adoption of broadband technology has resulted in enhanced economic development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans.

(2) Continued progress in the deployment and adoption of broadband technology is vital to ensuring that our Nation remains competitive and continues to create business and job growth.

In Sections 102-103 of the BDIA, 47 U.S.C. §§ 1302-1303, Congress reaffirmed and expanded the Commission's authority under Section 706 of the Telecommunications Act. Among other things, Congress required the Commission to issue broadband deployment reports "annually" rather than "regularly," and it required the Commission to gather detailed demographic and other information for unserved areas. Congress also required the Commission to make international comparisons and to conduct periodic surveys of broadband usage by American consumers in urban, suburban, and rural area in the large business, small business, and residential consumer markets.

Timely Deployment of Advanced Services, Docket No. 07-38 (rel. Apr. 16, 2007) ("We should start by updating our current definition of high-speed of just 200 kbps in one direction to something more akin to what consumers receive in countries with which we compete, speeds that are magnitudes higher than our current definitions. We need to set ambitious goals, shooting for real high-bandwidth broadband deployment, rather than being content to hit targets set almost eight years ago."); see also S. Derek Turner, *Broadband Reality Check*, Free Press (Aug. 2005), available at http://www.freepress.net/sites/default/files/fp-legacy/broadband_report.pdf; Karl Bode, *FCC Finally Realizes 200kbps is Not Broadband Votes to reform long-flawed broadband data collection, albeit after-the-fact*, Broadband Reports (Mar. 19, 2008), available at <http://www.dslreports.com/shownews/FCC-Finally-Realizes-200kbps-is-Not-Broadband-92792>.

⁹ Pub. L. No. 110-385, 122 Stat. 4096 (October 10, 2008).

Four months later, in February 2009, Congress acted again to accelerate deployment, adoption, and use of broadband Internet connectivity for all Americans. As part of the American Recovery and Reinvestment Act of 2009,¹⁰ Congress directed the Commission to develop a “National Broadband Plan” to ensure that “all people of the United States have access to broadband capability.”¹¹ Congress also appropriated \$7.2 billion in federal stimulus funds in furtherance of this goal. Notably, in Section 6001(e)(1) of the Recovery Act, Congress explicitly included municipalities among the entities that were eligible for a share of these funds.¹²

On March 16, 2010, the Commission issued its National Broadband Plan.¹³ The Commission not only reiterated its understanding of the critical importance of making broadband Internet access available to all Americans, but it also underscored the important role that municipalities can play in helping America achieve this goal.

Today, high-speed Internet is transforming the landscape of America more rapidly and more pervasively than earlier infrastructure networks. Like railroads and

¹⁰ *American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2), 123 Stat. 115 (Feb. 17, 2009) (“Recovery Act”).*

¹¹ *Id.*, at 516.

¹² Section 6001(e)(1)(A) states that eligible applicants shall “[b]e a *State or political subdivision thereof*, the District of Columbia, a territory or possession of the United States, an Indian tribe (as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450(b)) or native Hawaiian organization; (B) a nonprofit--(i) foundation, (ii) corporation, (iii) institution, or (iv) association; or (C) any other entity, including a broadband service or infrastructure provider, that the Assistant Secretary finds by rule to be in the public interest. In establishing such rule, the Assistant Secretary shall to the extent practicable promote the purposes of this section in a technologically neutral manner” (emphasis supplied). Codified as 47 U.S.C. § 1305(e)(1)(A).

¹³ *Connecting America: the National Broadband Plan, at 3 (adopted Mar. 15, 2010), available at <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.*

highways, broadband accelerates the velocity of commerce, reducing the costs of distance. Like electricity, it creates a platform for America's creativity to lead in developing better ways to solve old problems. Like telephony and broadcasting, it expands our ability to communicate, inform and entertain.

Broadband is *the* great infrastructure challenge of the early 21st century.

But as with electricity and telephony, ubiquitous connections are means, not ends. It is what those connections enable that matters. Broadband is a platform to create today's high-performance America—an America of universal opportunity and unceasing innovation, an America that can continue to lead the global economy, an America with world-leading, broadband-enabled health care, education, energy, job training, civic engagement, government performance and public safety.¹⁴

* * *

Municipal broadband has risks. Municipally financed service may discourage investment by private companies. Before embarking on any type of broadband buildout, whether wired or wireless, towns and cities should try to attract private sector broadband investment. But in the absence of that investment, they should have the right to move forward and build networks that serve their constituents as they deem appropriate.¹⁵

The National Broadband Plan did not just focus on ensuring that all Americans have access to minimal levels of broadband connectivity. Rather, the Plan also underscored the importance of higher-end broadband connectivity to the advancement of America's "National Purposes" in several areas, including Health Care (Chapter 10), Education (Chapter 11), Economic Development (Chapter 12), Energy and Environment, including smart transportation systems (Chapter 13), Government Performance (Chapter 14), Civic Engagement (Chapter 15), and Public Safety (Chapter 16). The Plan emphasized the need to act quickly to expand the reach and capability of the nation's broadband infrastructure:

¹⁴ *Id.*, at 3.

¹⁵ *Id.*, at 153.

It is critical that the country move now to enact the recommendations in this part of the plan in order to accelerate the transformation that broadband can bring in areas so vital to the nation's prosperity. Diffusion of new technologies can take time, but the country does not have time to spare. There are students to inspire, lives to save, resources to conserve and people to put back to work. Integrating broadband into national priorities will not only change the way things are done, but also the results that can be achieved for Americans.¹⁶

In July 2010, in its *Sixth Broadband Deployment Report*, the Commission at last discarded its obsolete definition of advanced telecommunications capability, announced a new definition – 4 megabits per second downstream and 1 megabit per second upstream – and found that, under the new definition, advanced telecommunications capabilities were not being deployed in a reasonable and timely manner:

4. In determining whether broadband is being deployed to all Americans in a reasonable and timely fashion, this Sixth Report takes the overdue step of raising the minimum speed threshold for broadband from services in “excess of 200 kilobits per second (kbps) in both directions”-- a standard adopted over a decade ago in the *1999 First Broadband Deployment Report*. As anticipated in previous broadband deployment reports, “technologies, retail offerings, and demand among consumers”-- or in other words, network capabilities, consumer applications and expectations -- have evolved in ways that demand increasing amounts of bandwidth and require us to “[raise] the minimum speed for broadband from 200 kbps to, for example, a certain number of megabits per second (Mbps).” To put 200 kbps in context, in 1999, voice-over-broadband or interconnected voice over Internet protocol (VoIP) was just beginning to emerge as a consumer application, and web pages were almost entirely text-based, with little embedded graphics or video, making 200 kbps an arguably sufficient benchmark for broadband capability at the time. Today, interconnected VoIP is subscribed to by over 21 million Americans, most web sites feature rich graphics and many embed video, and numerous web sites now exist primarily for the purpose of serving video content to broadband users. As a result, and as predicted by previous broadband deployment reports, services at 200 kbps are not now capable of “originat[ing] and receiv [ing] high-quality voice, data, graphics, and video telecommunications,” as those capabilities are delivered by today's technology and experienced and expected by today's broadband users. As a result, we find that the 200 kbps threshold is no longer the appropriate benchmark for measuring broadband deployment for the purpose of this broadband deployment report.

¹⁶ *Id.*, at 194.

5. As an alternative benchmark for this year's report, and given that this year's inquiry was conducted in conjunction with the National Broadband Plan proceeding, we find it appropriate and reasonable to adopt instead the minimum speed threshold of the national broadband availability target proposed in the National Broadband Plan. The National Broadband Plan recommends as a national broadband availability target that every household in America have access to affordable broadband service offering actual download (i.e., to the customer) speeds of at least 4 Mbps and actual upload (i.e., from the customer) speeds of at least 1 Mbps. This target was derived from analysis of user behavior, demands this usage places on the network, and recent experience in network evolution. It is the minimum speed required to stream a high-quality --even if not high-definition-- video while leaving sufficient bandwidth for basic web browsing and e-mail, a common mode of broadband usage today that comports directly with section 706's definition of advanced telecommunications capability. As the target for the broadband capability that the National Broadband Plan recommends should be available to all Americans, this speed threshold provides an appropriate benchmark for measuring whether broadband deployment to all Americans is proceeding in a reasonable and timely fashion. ...¹⁷

Significantly, even applying the very limited 4/1 Mbps standard, the Commission found that "broadband remain[ed] unavailable to approximately 14 to 24 million Americans."¹⁸

Within two years, the Commission realized that its benchmark of 4/1 Mbps might already have outlived its usefulness. In its *Eighth Broadband Deployment Report*, the Commission stated that "We are cognizant that demand changes over time. Usage trends are driving up demand for bandwidth and services, and users are attaching multiple Internet-enabled devices to a single, shared household broadband connection."¹⁹ In an accompanying Notice of Inquiry, the Commission elaborated:

¹⁷ *Sixth Broadband Deployment Report*, 25 *FCC Rcd.* 9556, 9558-60, ¶¶ 4-5, 2010 WL 2862584, *1-*2 (rel. July 20, 2010).

¹⁸ *Id.* at ¶ 5, 2010 WL 2862584, at *2.

¹⁹ *Eighth Broadband Deployment Report*, 27 *FCC Rcd* 10342, ¶ 20, 2012 WL 3612019, *11 (rel. Aug. 21, 2012).

8. As noted above, since the Commission began relying on the 4 Mbps/1 Mbps speed benchmark in 2010, broadband providers have developed and launched much higher speed networks and services. In addition, we recognize that consumers' broadband experiences are influenced by how they use broadband, and there is evidence that consumers are using faster speeds, greater total bandwidth, and more advanced applications. Furthermore, section 706 focuses on a consumer's ability to originate and receive certain specific services, including "high-quality voice, data, graphics, and video telecommunications." ...

9. With respect to video services in particular, when the Commission adopted the 4 Mbps/1 Mbps speed threshold, it determined that it adequately met consumers' needs for video over broadband at that time. Speeds of 4 Mbps/1 Mbps enable consumers to stream standard definition video in near real-time, which consumes anywhere from 1-5 Mbps depending on a variety of factors, while still using basic functions such as e-mail and Web browsing. However, there is evidence that consumers are accessing and generating video content over broadband to a greater degree than in previous years, and are increasingly using their broadband connections to view high-quality video and use advanced video applications. Cisco, in its latest report, predicts that Internet video traffic will account for 54% of all Internet data traffic by 2016, up from 51% in 2011. North American Internet video traffic is predicted to achieve 20% compound annual growth from 2011 to 2016. Higher-quality video can require additional bandwidth. High-definition video can require downstream speeds of 5-12 Mbps, commensurate with the quality of the video. ...

10. We also have observed that an increasing number of households are attaching multiple devices to a single, shared household broadband connection. The bandwidth requirements of a household can increase as the number of devices sharing a broadband connection increases, particularly if multiple users are accessing video content with that connection. How should this usage pattern affect our speed threshold analysis? The Commission in the *Household Broadband Guide* compared the minimum download speed needs for light, moderate, and high household use with one, two, three, or four devices at a time. For example, if a household simultaneously uses three devices for basic functions and one high-demand application such as streaming HD, video conferencing, or online gaming, 6 to 15 Mbps could be required. ...²⁰

The discussion above focused on the *minimum* speeds necessary for an Internet access service to meet the Commission's evolving definition of "advanced telecommunications

²⁰ *Ninth Broadband Progress Report Notice of Inquiry*, 27 FCC Rcd. 10523, ¶¶ 8-10, 2012 WL 3612021, *4 (rel. Aug. 21, 2012).

capability.” At the same time, the Commission has also emphasized the need for America to make reasonable and timely progress toward having world-class capabilities at higher levels of advanced telecommunications capabilities. For example, in the National Broadband Plan, the Commission set forth a national goal of at least 100/50 Mbps to at least 100 million households by 2020. In addition, the Commission did not stop there but called for efforts to push past 100/50 Mbps as soon as possible:

The U.S. should lead the world in ultra-high-speed broadband testbeds as fast, or faster, than anywhere in the world. In the global race to the top, this will help ensure that America has the infrastructure to host the boldest innovations that can be imagined. Google announced a one gigabit testbed initiative just a few days ago – and we need others to drive competition to invent the future.²¹

In summary, in enacting Section 706 of the Telecommunications Act of 1996, Congress foresaw that access to advanced telecommunications capabilities would become critically important to all Americans in the years ahead. Congress gave the Commission broad authority and discretion to determine when, where, and how to ensure that all Americans would have such access on a reasonable and timely basis. In charging the Commission with this responsibility, Congress was well aware of the significant contributions that municipalities could make – indeed, Congress undoubtedly understood that it would be impossible to make the benefits of broadband connectivity available to “all Americans” on a reasonable and timely basis without the participation of municipalities, particularly in areas in which the private sector found investment unattractive. Furthermore, in the nearly two decades since the enactment of Section 706, both Congress and the Commission have repeatedly acted in ways that reinforce this conclusion.

²¹ Julius Genachowski, “Broadband: Our Enduring Engine for Prosperity and Opportunity,” as prepared for delivery at NARUC Conference (Feb. 16, 2010), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-296262A1.pdf.

B. Wilson's Advanced Telecommunication Network And The Barrier To Wilson's Ability To Expand Its Network To Respond To Requests For Advanced Services

Through this petition, Wilson seeks the opportunity to be able to respond favorably to the requests for access to advanced telecommunication capabilities and services that Wilson regularly receives from citizens, businesses, and other organizations located outside Wilson County. Under recent changes to North Carolina law, municipalities cannot provide communications services to the public for a fee without complying with numerous onerous restrictions. Touted as necessary to create a "level playing field" for private and public entities, the real purpose and effect of these restrictions is to thwart, delay, and make municipal broadband initiatives prohibitively burdensome and expensive. In short, Section 160A-340 is an effective prohibition on public broadband investment and competition that Section 706 commands the Commission to remove immediately.

We begin this section with a discussion of Wilson's background and history, the award-winning gigabit services it is providing, and the many benefits that it could bring to the surrounding rural communities if it were not fenced out by Section 160A-340. We then discuss the component restrictions in Section 160A-340 and the harm that these restrictions individually and collectively cause for Wilson and the businesses, institutions, and residents that Wilson would otherwise be able to serve.

1. Background and history

Wilson is located along Interstate 95, halfway between New York and Florida. The City is 30 miles north of Interstate 40, with access to major port facilities within 100 miles. Three mainline railroads serve the city and provide north-south and east-west passenger and freight rail

service. Wilson is located approximately 45 miles east of Raleigh and 50 miles southeast of the Raleigh-Durham International Airport.

The U.S. Census Bureau estimated the 2012 population of the City of Wilson at 49,608, representing a 2.2% increase from the 2010 population estimate.²² As of 2012, 47.9% of the population was African American and 42.9% of the population was Caucasian.²³ The City of Wilson's average median income per household is \$36,469.²⁴

Wilson has a history of being at the forefront of meeting the infrastructure needs of its residents, dating back to the Nineteenth Century. Less than a decade after the introduction of electricity in some of the larger cities in the nation, Wilson residents began clamoring for it. The City's elected officials began a campaign to attract electric service to the City, but to no avail. Electric companies at the time did not find Wilson as attractive as larger, more profitable markets and therefore declined to provide electric service to the City's residents. The City officials wrestled with the difficult decision of whether to undertake installation of a City electric system or to leave the City's residents in the dark. In 1890, the community voted to issue bonds for the construction of an "Electric Light Plant."²⁵ Wilson was initially ridiculed by private power companies for even considering the possibility of building and operating such a technologically advanced system, but, according to then-Mayor George D. Green, it was by 1894 "generally

²² United States Census Bureau, *Wilson (city), North Carolina QuickFacts*, <http://goo.gl/J3P5iW> (last visited June 13, 2014).

²³ *Id.*

²⁴ *Id.*

²⁵ City of Wilson, *Electric History*, <http://goo.gl/cSVNO6> (last visited June 13, 2014).

conceded that we have one of the best lighted towns in the state....”²⁶ Demand for power continued to grow, resulting in construction of a new plant in 1915 and another expansion of that plant in 1918.²⁷ That year, Wilson also began to supply power to other towns. Wilson Energy has continued to build upon the legacy of the community’s visionary leadership, offering a reliable and robust locally owned service in support of Wilson’s growth.

2. From Tobacco Road to North Carolina’s first gigabit city

Wilson was once known as the “World’s Greatest Tobacco Market.” To meet the needs of the burgeoning tobacco industry at the end of the Nineteenth Century, Wilson built three large auction warehouses by 1893 and two more by the turn of the century, enabling it to lead North Carolina in marketing over fifteen million pounds of tobacco annually. In 1919, Wilson surpassed Danville, Virginia, as the nation’s largest market for flue-cured tobacco.

In the decades that followed, Wilson’s tobacco and agricultural economy gradually evolved into healthy mix of industries that also included manufacturing, commercial, and service businesses.²⁸ For a while, textiles were an important part of the mix, but that business has now largely moved overseas.

Throughout these ebbs and flows, one consistent factor underlying the community’s economic evolution and growth has been the City’s emphasis on self-reliance, particularly in owning and controlling the community’s vital local infrastructure. As a result, Wilson’s electric, natural gas, and water systems are all community-owned.

²⁶ *Id.*

²⁷ *Id.*

²⁸ http://en.wikipedia.org/wiki/Wilson,_North_Carolina

In 1990, in response to citizen complaints about the high cost and low quality of voice and video services available in the community, Wilson's City Council began to study the possibility of building a municipally-owned cable system. To head this off, the incumbent cable operator, Alert Cable Television of Wilson ("ACT"), a division of Cablevision Industries, promised to upgrade its system with fiber optic cabling, which, it claimed, would provide multiple benefits to the community.²⁹ ACT did not, however, follow through on its promises. As a result, for the next several years, the City continued to appropriate funds to study the feasibility of providing cable service.³⁰

In May of 2003, the City Council received a presentation that reinforced and expanded on what it had previously heard about the multiple benefits that a fiber optic system could provide. In response, the City Council requested that a full study be performed on the feasibility of a municipal fiber system. The following year, the study not only concluded that a city-owned fiber optic system would be financially viable, but it also reported on high levels of customer dissatisfaction with the services, pricing, reliability, and technological capabilities available from the current communications service providers.³¹

In 2005, to achieve huge capacity increases and cost savings for its governmental network services, the City built a fiber optic backbone connecting all City-owned facilities. Seeing this,

²⁹ Presentation from Alert Cable TV of Wilson, Inc. to the City Council of the City of Wilson (Oct. 4, 1990), <http://www.baller.com/wilson/w1.pdf> (Attached as Exhibit 1).

³⁰ For a while during this period, the City Council focused primarily on another major infrastructure project – \$50 million investment in a new dam to expand the City's water supply at Buckhorn Reservoir from a capacity of 800 million gallons to over 7 billion gallons.

³¹ Icon Broadband Technologies, Municipal Broadband Feasibility Study, prepared for the City of Wilson (Oct. 15, 2004), <http://www.baller.com/wilson/w2.pdf>.

numerous City residents, businesses, schools, colleges, medical facilities, and other organizations contacted the City and requested access to the new network, and expansion of it. They all stated that the services being offered by the current providers were inadequate and overpriced, and customer service was unsatisfactory.

Before undertaking to expand the network to serve non-governmental commercial and residential customers, the City's officials asked the incumbent communications service providers to build or partner with the City in building a Fiber-to-the Home ("FTTH") network in Wilson. Neither was willing to do so.³² After many months of careful review and research, including a second feasibility study and business plan,³³ and after conducting several public hearings with strong support from the community and the City's largest businesses,³⁴ the City Council unanimously voted in November 2006 to build a municipal FTTH network. After receiving approval from the North Carolina Local Government Commission – a division of the State Treasurer's Office charged with general oversight of local government finance – the City funded the project by issuing Certificates of Participation.³⁵

³² The City's discussions with Time Warner Cable and Embarq are summarized in Todd O'Boyle and Christopher Mitchell, *Wilson Gives Greenlight to Fast Internet*, at 5-7 (December 2012), <http://goo.gl/Pc5VwJ>. Time Warner Cable was especially disinterested. According to former Mayor Rose, "They laughed in our faces." *Id.*

³³ See Uptown Services, *Wilson, North Carolina Municipal Broadband Business Plan* (July 21, 2006), <http://www.baller.com/wilson/w3.pdf>.

³⁴ See, e.g., Leon Wilson, Letter to the Editor, *City's Infrastructure is Important to the Bank*, *Wilson Daily Times*, Oct. 6, 2006, at 6A, <http://www.baller.com/wilson/w4.pdf> (Attached as Exhibit 2); Letter, Rusty Stephens, President, Wilson Technical Cmty. Coll. to Bruce Rose, Mayor, City of Wilson, North Carolina (Oct 6, 2006), <http://www.baller.com/wilson/w5.pdf> (Attached as Exhibit 3).

³⁵ Contrary to assertions raised by its opponents, the City of Wilson Greenlight network was never financed by tax revenues, and was supported entirely by Certificates of

At the time that Wilson financed and constructed its fiber optic broadband network in 2008, it had clear authority to do so under then-existing North Carolina law. Pursuant to N.C. Gen. Stat. § 160A-311, North Carolina cities have the authority to construct, own and operate any or all of ten designated “public enterprises,”³⁶ which include “cable television systems.”³⁷ In 2005, the North Carolina Court of Appeals and Supreme Court confirmed that the authorization to operate cable television systems included the authority to operate a broadband system providing broadband Internet access service, whether or not the network was also used to provide cable television.³⁸

In May 2008, acting under the trade name “Greenlight,” the City began signing up customers for broadband services. The community responded very favorably – initial trials found that 86 percent of customers preferred Greenlight services to those previously available. The City’s credit rating was upgraded by both Moody’s and Standard and Poor’s in late 2008, shortly

Participation, which are financing instruments that are backed solely by the future revenues derived from the assets purchased. In 2008, the City of Wilson borrowed an additional \$13.3 million through COPS financing for the fiber-optic project. The supplemental financing was again approved prior to the borrowing by the LGC on August 5, 2008.

³⁶ N.C. Gen. Stat. § 160A-312 (2014).

³⁷ N.C. Gen. Stat. § 160A-311 (2014).

³⁸ *BellSouth Telecommunications, Inc. v. City of Laurinburg*, 168 N.C. App. 75, 606 S.E.2d 721, 2005 N.C. App. LEXIS 164, *review denied*, 615 S.E.2d 660, 2005 N.C. LEXIS 780 (N.C. 2005).

after the Greenlight service launched. Moody's recently reaffirmed its credit rating for the City of Wilson in 2014, noting in particular the strength of its Greenlight service.³⁹

In January 2013, the Commission issued a National Gigabit Challenge calling for at least one gigabit community in all 50 states by 2015.⁴⁰ The City of Wilson accepted this challenge and began providing Gigabit residential Internet service in July 2013, becoming North Carolina's first Gigabit City. Because the City had already deployed a communitywide FTTH network, turning up gigabit speed simply required minor upgrades to the electronics used to provide residential Internet service.

3. Community benefits of Wilson's fiber network

Wilson's fiber network has achieved 33.7% total market penetration within its service area, and it is cash flow positive.⁴¹ Providing technologically advanced triple play communication services at lower prices and with exemplary customer service to all of its residential and business subscribers, Greenlight's entry into the market has not only proven beneficial to its own subscribers, but the competition introduced by Greenlight's entry into the market has also forced the established providers to offer better services and rates to their customers.⁴²

³⁹ Press Release, City of Wilson, City Keeps Strong Bond Rating, Saves Money (June 11, 2014), <http://www.baller.com/wilson/w6.pdf> (Attached as Exhibit 4); Moody's, "Moody's affirms Aa2 on Wilson, NC's \$11.1M GO debt," <http://goo.gl/nK5c1V>.

⁴⁰ *FCC Chairman Genachowski Issues Gigabit City Challenge*, <http://goo.gl/5ggqk> (rel. January 18, 2013).

⁴¹ This is contrary to the widespread claim by the incumbent providers that municipal broadband systems are doomed to fail at the expense of the taxpayers.

⁴² See, e.g., Stephanie Creech, *Greenlight Competition Affects Rates Elsewhere*, *Wilson Daily Times*, Sept. 25, 2010, <http://goo.gl/Pbtf1W>.

Greenlight has also been good for the community in numerous other ways. For example, the fiber network is making the City's other utilities more effective and efficient, at lower cost. The network is providing the schools, libraries, and non-profit organizations access to advanced telecommunications capabilities at levels they would not otherwise be able to obtain, or perhaps even afford.⁴³ The network has enhanced the capabilities of public safety agencies by facilitating the extensive deployment and interconnection of surveillance cameras.⁴⁴

The City's fiber network has also attracted multiple Tier 1 service providers, which have now established a Point of Presence ("POP") in Wilson. Establishment of a POP in Wilson has reduced the cost of bandwidth for both businesses and residents. Each of the top seven employers in the community utilize the fiber network, assisting in retention of these critical employers. In particular, the fiber network has been leveraged to provide circuit diversity for several major large employers, thereby helping improve continuity of operations. New businesses such as Exodus FX, Regency Interactive, and WHIG TV have also chosen to locate in Wilson, in significant part because of the Greenlight fiber network.⁴⁵ New residents and small businesses are moving to

⁴³ The City of Wilson provides free broadband service, at 100 Mbps download/100 mbps upload, to the library computer center and the Wilson Housing Authority computer labs. The City also won the competitive bidding process and now provides 1 Gbps symmetrical service to all Wilson County school facilities. *See, e.g.,* Todd O'Boyle and Christopher Mitchell, *Wilson Gives Greenlight to Fast Internet*, at iii, 14, 15, (December 2012), <http://goo.gl/Pc5VwJ>.

⁴⁴ More than 30 public safety cameras have been deployed in the City of Wilson and the City of Wilson's Greenlight division works in close partnership with the City of Wilson Police Department to deploy cameras as needs change. *See also, e.g. Wilson Gives Greenlight to Fast Internet*, at 13-14, <http://goo.gl/Pc5VwJ>.

⁴⁵ *See, e.g.,* Kate Murphy, *For the Tech-Savvy With a Need for Speed, a Limited Choice of Towns with Fiber*, *New York Times*, Apr. 2, 2014, <http://goo.gl/iqdZUY>; Rochelle Moore, *Wilson's Greenlight Sees National Attention*, *Wilson Daily Times*, Apr. 4, 2014, <http://goo.gl/ykEZ04>.

Wilson on a regular basis in order to take advantage of the Greenlight fiber network, enabling them to utilize modern and bandwidth-intensive applications.⁴⁶ Greenlight also provides free Wi-Fi internet access to its entire downtown area, with coverage extending to the county courthouse, the public library, and other downtown establishments.

4. Wilson's international/national/state recognition

The City of Wilson has received extensive State, national, and international attention since deploying its community broadband fiber network. Wilson has hosted visitors interested in the network from as far away as New Zealand, and it regularly hosts municipalities from across the State and nation. Media outlets, including the News & Observer, Triangle Business Journal, and the New York Times have run several articles highlighting the network. In 2012, the City of Wilson received the SEATOA Community Broadband Advocacy award as well as the NATOA Community Broadband Network of the Year award. City representatives are routinely invited to speak at regional and national conferences focusing on broadband deployment. In March of 2014 City representatives spoke about the community network at the Commission's Rural Broadband workshop and in May of 2014 at the New America Foundation's public broadband workshop.

5. Demand for Wilson's services outside Wilson County

Wilson provides electric power service in six counties in eastern North Carolina, but because of the limitations imposed by North Carolina law, it currently offers communications services only to residents, businesses, and other entities in the City of Wilson and areas immediately adjacent to the City within Wilson County (of which the City is the county seat).

⁴⁶ See, e.g., *Being a Gig City: Incubating Small Businesses*, MuniNetworks, <http://goo.gl/f6vdRC>; *Being a Gig City: It's All About the Upload*, MuniNetworks, <http://goo.gl/OQTTOk>.

That is not so for lack of demand. Ever since Wilson launched Greenlight in 2008, it has received numerous requests for communications services from businesses and residents outside its current communications network footprint. As Figure A shows, these areas include numerous census blocks in lower-income, rural areas that lack advanced communications capabilities as the Commission currently defines that term for the purposes of Section 706 (4 Mbps downstream and 1 Mbps upstream):

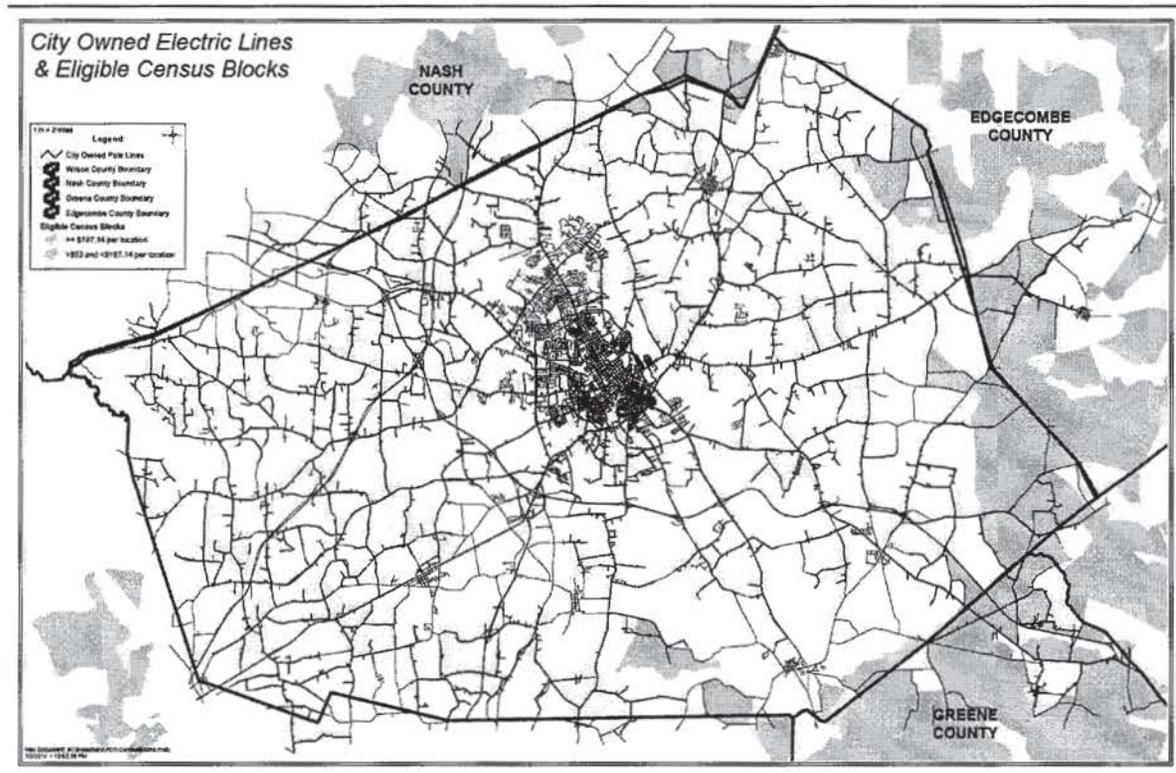


Figure A.

Source: The “eligible” census blocks are deemed as “unserved” and “high cost” or extremely high cost” under the FCC’s Connect American Fund Phase II CAM version 4.0 high cost model, WC Docket 10-90, Public Notice DA13-2414, where “unserved” constitutes an area not served by 4Mbps/1Mbps (as measured by FCC at 3 Mbps / 768 Kbps), <http://goo.gl/JPcKeq>.

For example, in 2013, Wilson was approached by a North Carolina electric cooperative regarding a possible partnership to bring fiber to the home services to their members. The cooperative had received Broadband Technologies Opportunities Program (BTOP) funding to bring service to its members but did not want to operate the network. Due to the limitations imposed by State law, Wilson was unable to take advantage of this opportunity, which would have brought FTTH services to some of the more rural parts of North Carolina and would have allowed the City to leverage its existing investment in personnel and technology for the benefit of both communities.

Similarly, in 2014, Wilson has been approached by three North Carolina municipalities that are interested in bringing FTTH services to their residents. One municipality explicitly stated it would like to partner with Wilson, but it is afraid to do so because of the State's legal barriers to entry. In the absence of these restrictions, Wilson would be eager to explore the possibility of partnering with each of these municipalities.⁴⁷

In short, if the State's legal barriers to entry were removed, Wilson would have multiple opportunities to make broadband investments and provide competitive 21st Century broadband Internet connectivity outside of Wilson County, especially to low-income, rural areas that otherwise will likely never have access to Gigabit services. Wilson would gladly take advantage of these opportunities in stages, wherever doing so makes sense. In fact, in 2013 and 2014, the City expanded into eight new areas within Wilson County and has already achieved an average market penetration of 49% in these territories. Continued expressions of demand from outside the

⁴⁷ If necessary, Wilson can also provide the Commission confidential access to records of scores of additional requests for communications services from persons in the areas at issue.