

Section 706. Rather, Congress’s main purpose in enacting Section 706 was “to ensure that one of the primary objectives of the [Telecommunications Act] – to *accelerate deployment* of advanced telecommunications capability – is achieved.”⁸³ This Commission has repeatedly reiterated and elaborated on this point.

For example, in its *Cable Modem Declaratory Ruling*, the Commission stated that, “consistent with statutory mandates, the Commission’s primary policy goal [under Section 706] is to ‘encourage the ubiquitous availability of broadband to all Americans.’”⁸⁴ Similarly, in its *Sixth Broadband Deployment Report*, the Commission stated that, “We recognize that ensuring universal broadband is the great infrastructure challenge of our time and deploying broadband nationwide – particularly in the United States – is a massive undertaking.”⁸⁵ Likewise, in the National Broadband Plan, the Commission recognized that “Broadband is *the* great infrastructure challenge of the early 21st century.”⁸⁶

In sum, enabling municipalities to compete with providers of telecommunications services would have been desirable, but it was not an essential or urgent national priority. In contrast, Congress’s urgent national goal of ensuring that all Americans have reasonable and timely access to advanced telecommunications capabilities cannot be met without the active participation of municipalities and other public entities.

⁸³ *Verizon*, 740 F.2d at 639 (quoting S. Rep. No. 104-23, at 50-51) (emphasis added).

⁸⁴ *Cable Modem Declaratory Ruling*, 17 FCC Rcd. at 4801, ¶ 4, 2002 WL 407567 at *1 (quoting Section 706).

⁸⁵ *Sixth Broadband Deployment Report*, 25 FCC Rcd. 9556, 9560, ¶ 6, 2010 WL 2862584, *2 (rel. July 20, 2010).

⁸⁶ See *National Broadband Plan*, at 3 (emphasis in original), available at <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

2. The Commission's pro-active role under Section 706 is fundamentally different from its reactive role under Section 253

Another important difference between Section 253 and Section 706 is that Congress assigned the Commission very different roles in implementing these provisions. In Section 253, Congress envisioned an essentially reactive role for the Commission – *i.e.*, the Commission waits for an allegedly aggrieved entity to file a petition for preemption, and then, after giving the public an opportunity to comment, decides whether the state or local measure in question violates Section 253. In contrast, Section 706 expressly requires the Commission to act aggressively and pro-actively in rooting out and taking immediate steps to remove barriers to broadband investment and competition. This distinction, too, indicates that Congress considered the goals of Section 706 to be significantly different and more urgent than those of Section 253.

3. Congress addressed the relationship between the Commission and the States in substantially greater detail in Section 706 than it did in Section 253

Section 706 also differs significantly from Section 253 in its treatment of the relationship between the Commission and the States. According to the *Nixon Court*, the text and legislative history of Section 253 does not clearly indicate whether Congress intended the term “any entity” to apply to public entities. In contrast, in both the language and legislative history of Section 706, Congress carefully laid out the respective roles of the Commission and the States and left no room for doubt that it intended the Commission to preempt States in the circumstances present here.

In Section 706(a), Congress required both the Commission and the States to encourage the deployment of advanced telecommunications capability on a reasonable and timely basis. It also directed both the Commission and the States to use all measures and regulating methods at their

disposal to remove barriers to broadband investment and competition.⁸⁷ In Section 706(b), Congress required the Commission, and the Commission alone, to make regular studies and reports of the status of broadband deployment across the United States and to take immediate action to remove barriers to broadband investment and competition if it found that deployment was not occurring on a reasonable and timely basis.

For the purposes of both Sections 706(a) and 706(b), the Commission is responsible for defining the key terms, including “advanced telecommunications capabilities” and “reasonable and timely,” for determining what actions or conditions constitute “barriers to infrastructure investment,” and for deciding what steps are necessary and appropriate to take to remove such barriers. Furthermore, as Congress made clear in the Joint Conference Report accompanying the Telecommunications Act, the Commission had authority to preempt States that, in the Commission’s view, were not acting rapidly enough to ensure reasonable and timely deployment.⁸⁸

As the legislative history also shows, in enacting Section 706, Congress was well aware of the critical role that municipalities could play in ensuring that all Americans would have access to advanced telecommunications capabilities on a reasonable and timely basis, particularly in areas that are unserved or underserved by the private sector. For example, as discussed above, in the hearings on what was to become the Telecommunications Act of 1996, the Senate Committee on Commerce, Science and Transportation heard testimony about Glasgow, Kentucky’s provision of advanced telecommunications capabilities long before the private sector did so:

⁸⁷ 47 U.S.C. § 1302(a).

⁸⁸ H.R. Conf. Rep. No. 104-458, 104th Cong, 2d Sess., 1996 U.S.C.C.A.N. 10, 182-183, 1996 WL 46795 (Jan 31, 1996).

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.

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.⁸⁹

As indicated, later in the hearing, Senator Lott acknowledged the benefits of municipal broadband and promised to "make sure we have got the right language to accomplish what we wish accomplished here."⁹⁰ As indicated, as Senate manager of the Telecommunications Act, Senator Lott's statement is entitled to substantial weight in interpreting the Act. In Section 706, Congress did indeed develop "the right language" to ensure that municipalities would be able to contribute to bringing advanced communications capabilities to all Americans on a reasonable and timely basis, particularly in unserved and underserved areas.

4. *Gregory* does not apply here because this matter does not involve any traditional or fundamental State powers

The *Nixon* Court found that the term "any entity" in Section 253(a) should not be read to cover public entities because it did not meet the "plain statement" standard prescribed by *Gregory v. Ashcroft*:

[P]reemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, "are created as

⁸⁹ See 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) (emphasis added).

⁹⁰ See *id.* at 379, 1994 WL 232976.

convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.” *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-608, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) (internal quotation marks, citations, and alterations omitted); *Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 433, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires. What we have said already is enough to show that § 253(a) is hardly forthright enough to pass *Gregory*: “ability of any entity” is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms. The want of any “unmistakably clear” statement to that effect, 501 U.S., at 460, 111 S.Ct. 2395, would be fatal to respondents' reading.⁹¹

In *Gregory*, the Supreme Court had set forth the relevant standard for determining whether Congress intended to preempt state laws involving “traditional” or “fundamental” State functions. In such cases, the Court said, an agency or court must find that Congress made a “plain statement” to that effect. *Id.*, 501 U.S. at 467. This does not require that the legislation mention the power explicitly.⁹² Rather, the intention need only “be plain to anyone reading the Act that it covers [that issue].”⁹³

Properly analyzed, *Gregory* and *Nixon* do not apply here because preemption in this case would not affect any traditional or fundamental State power. As an initial matter, this case is similar to *City of Arlington v. Federal Communications Commission*,⁹⁴ in which the Court

⁹¹ *Id.*, at 140-41.

⁹² *Gregory*, 501 U.S. at 467.

⁹³ *Id.*

⁹⁴ *City of Arlington v. Federal Communications Commission*, 133 S. Ct. 1863; 185 L. Ed. 2d 941; 2013 U.S. LEXIS 3838.

rejected an argument that the Commission's tower siting rules improperly injected the federal government into zoning matters "of traditional and local concern." Writing for the Court, Justice Scalia stated:

[T]his case has nothing to do with federalism. Section 332(c)(7)(B)(iii) explicitly supplants state authority by *requiring* state zoning authorities to render a decision "within a reasonable period of time" and the meaning of that phrase is indisputably a question of federal law. We rejected a similar faux-federalism argument in the *Iowa Utilities Board* case [*AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999)], in terms that apply equally here: "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the Commission or the federal courts that will draw the line to which they must hew." 525 U.S., at 379, n.6.⁹⁵

Here, Section 706(a) requires both the Commission and the States to encourage the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis and to use all means at their disposal to remove barriers to broadband investment and competition. The Commission is solely responsible for defining the relevant terms and standards. Furthermore, as the legislative history of Section 706 makes clear, the Commission has authority to preempt States that it believes are acting too slowly to fulfill their duties under Section 706(a). If the Commission can preempt States failing to act forcefully enough in encouraging rapid deployment of advanced telecommunications capabilities, the Commission can surely preempt States that are actively *blocking* broadband investment and competition. Indeed, the Commission is directed to do so "immediately" under 706(b).

Second, this case does not involve "federal legislation threatening to trench on the States' arrangements for conducting their own governments," as the *Nixon* Court put it in the passage quoted above. Section 160A-340 has nothing to do with municipalities acting in a governmental

⁹⁵ 2013 U.S. LEXIS 3838, ***26.

capacity but simply seeks to impose restrictions on municipalities acting solely in a commercial, proprietary capacity. Section 160A-340 does not even do what it pretends to do – create a “level playing field” for private and public communications service providers. Rather, as shown in Section II above, it does precisely the opposite and acts as a severe barrier to public broadband investment and competition. In short, Section 160A-340 is simply an anticompetitive device whose purpose and effect is to insulate incumbent service providers from competition from municipal providers attempting to offer far superior broadband capabilities and services. This is plainly not the kind of “traditional” or “fundamental” State interest that *Gregory* sought to protect, especially at the expense of the businesses, institutions, and residents in unserved or underserved areas for whose benefit Congress enacted Section 706.

5. If *Gregory* were applied here, Section 706 would meet its “plain statement” standard

Assuming, without conceding, that *Gregory* applies here, Section 706 clearly meets its “plain statement” standard. First, in contrast to Section 253, which focuses on barriers to entry affecting individual competitive entrants – “any entity” – Section 706 on its face broadly charges the Commission with responsibility for ensuring that “all Americans” receive reasonable and timely access to advanced telecommunications capabilities. While the term “all” may have different meanings in different contexts, there can be no doubt that Congress meant Section 706 to cover each and every American. There is really no other way to read that term, and nothing elsewhere in the Telecommunications Act or its legislative history suggests that a narrower interpretation would be appropriate. For proof of this, one need only ask, “What Americans could Congress have intended to exclude?” Certainly not those Americans living in unserved or underserved rural areas like the ones just outside Wilson’s electric service territory, where

residents are clamoring for the advanced telecommunications capabilities and gigabit services that Wilson would provide them if the Commission removed the restrictions of Section 160A-340.

Second, the stated purpose of Section 706 is to ensure that all Americans have access to advanced telecommunications capabilities on a reasonable and timely basis, as determined by the Commission. As discussed above, Congress considered this to be one of the primary goals of the Telecommunications Act, and the Commission has repeatedly recognized that “universal broadband is the great infrastructure challenge of our time and deploying broadband nationwide – particularly in the United States – is a massive undertaking.”⁹⁶ As Congress must surely have understood, and as this proceeding will confirm, that challenge cannot be met without the participation of municipal entities. That is particularly so in unserved or underserved rural areas like the ones just outside of Wilson’s service area, where the private sector is not currently providing – and may never provide – advanced telecommunications capabilities that meet the Commission’s minimum standards.

Third, as also discussed above, the pro-active role that Congress assigned to the Commission in Section 706, in contrast to the largely reactive role that it prescribed in Section 253, further reinforces the conclusion that Congress intended the Commission act aggressively to identify and immediately remove *all* barriers to broadband investment and competition, wherever the Commission may find them, including barriers such as the restrictions in Section 160A-340. Congress’s grant of broad authority to define the relevant terms, standards, and remedial approaches – limited only by the constraint that the Commission act “in a manner consistent with the public interest, convenience, and necessity” – reaffirms that Congress did not intend to tie the

⁹⁶ *Sixth Broadband Deployment Report*, 25 FCC Rcd. 9556, 9560, ¶ 6, 2010 WL 2862584, *2 (rel. July 20, 2010).

Commission's hands in removing barriers to broadband investment and competition like those in Section 160A-340.

The structure of Sections 706(a) and 706(b), particularly their allocation of responsibilities between the Commission and the States, provides yet another clear indication that Congress intended to grant the Commission ample authority as well as the duty to find and immediately remove barriers to broadband investment and competition such as Section 160A-340. So does the legislative history of Section 706, especially Senator Lott's recognition of the key role that municipalities can play in meeting the goals of the Telecommunications Act and the Joint Conference Report's confirmation that the Commission has authority to preempt States that drag their feet in fostering reasonable and timely deployment of advanced telecommunications capabilities.⁹⁷

In sum, the language, purposes, structure, and legislative history of Section 706 all confirm that Congress authorized the Commission to preempt State barriers to municipal broadband investment and competition, including those restrictions in Section 160A-340.

6. The *Nixon* Court's hypotheticals are irrelevant in this matter

In *Nixon*, the Court resorted to hypotheticals only because "concentration on the writing on the page does not produce a persuasive answer."⁹⁸ Here, as shown above, the language, purposes, structure, and legislative history of Section 706 all do provide a persuasive answer – that Congress intended to authorize the Commission to preempt State barriers to municipal broadband investment and completion, such as the restrictions in Section 160A-340. Simply put,

⁹⁷ H.R. Conf. Rep. No. 104-458, 104th Cong, 2d Sess., 1996 U.S.C.C.A.N. 10, 182-183, 1996 WL 46795 (Jan 31, 1996).

⁹⁸ *Nixon*, 541 U.S., at 132.

Congress did not intend the Commission to sit idly by when faced with such a “paradigmatic barrier to infrastructure investment,” as Judge Silberman would later put it. It follows that resorting to the *Nixon* hypotheticals, or any other extraneous means of gleaning Congress’s intent in enacting Section 706, would be inappropriate here. That is all the more so because, as the Court found in *Salinas v United States*, 522 U.S. 52, 59-60 (1997), “[a] statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be ‘plain to anyone reading the Act’ that the statute encompasses the conduct at issue,” quoting *Gregory*, 501 U.S., at 467.

IV. CONCLUSION

For all of the foregoing reasons, the Commission should preempt Section 160A-340 in its entirety and declare it to be unenforceable.

Respectfully Submitted,



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VERIFICATION

I, James Baller, Senior Principal of the Baller Herbst Law Group, PC, under oath, and under penalty of perjury, declare that I have read the foregoing submission and to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose..


James Baller

July 24, 2014

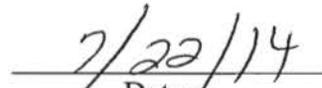
Date

VERIFICATION

I, William Aycock, General Manager of Greenlight Community Broadband for the City of Wilson, under oath, and under penalty of perjury, I declare under penalty of perjury that I have read the foregoing submission and that the facts set forth in it are true and correct to the best of my knowledge and belief.



William Aycock



Date

CERIFICATE OF SERVICE

I, James Baller, certify that on July 24, 2014, I caused a copy of the foregoing Petition to be served by registered U.S. mail, postage prepaid, on:

Roy Cooper, Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001



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ATTACHMENT A

**SECTION-BY-SECTION ANALYSIS
OF SECTION 160A-340**

- The bill applies to any “communications service” provided by a city to any “sector of the public” for a “fee,” effectively prohibiting the provision of many communications services by municipalities. It does so by:
 - Defining “communications service” as broadly as possible (including wireline and wireless services and services provided via lines or facilities leased from third-party private providers)
 - Failing to define or limit “fees” (meaning that private providers can challenge municipal cost sharing arrangements and even allocations of communications costs to city departments, claiming that such arrangements or practices constitute fees, thereby subjecting them to many prohibitions and restrictions of the bill)
 - Applying the bill’s many prohibitions and restrictions in any instance where a city provides a communications service to any “sector of the public” for a fee (see above) without in any way defining or limiting the term “sector of the public”
 - Providing only narrow and ambiguous exceptions to the bill’s sweeping coverage
- Subsection (3) fails to provide a clear exemption for internal networks. This section uses words like “sharing,” “data” and “governmental purposes” that are ambiguous terms and therefore raise questions about the legitimacy and lawfulness of common-place communications networks and services that cross jurisdictional boundaries (e.g. one-way transmission of video signals, dispatched public safety radio signals, management of SCADA networks for arguably proprietary systems like a power distribution system).
- Basic broadband Tier 1 service was defined by the FCC as 1.5Mbps in the fastest direction. Establishing such a low level hampers a City’s ability to provide service to unserved areas, which will not qualify for such unless more than 50% of households in each individual census block do not even have this meager service.
- Establishing a standard of 50% of the households per census block sets up two barriers: 1) requires the community to finance its own broadband availability study because the NTIA does not present broadband data in terms of households within census block, (NTIA allows the industry to report all the homes in a census block as “served” if it believes it can serve one home in that census block in 7-10 business days); and 2) ties exemptions to one census block at a time; forcing a potential checker board of tiny exempt areas and an impossible terrain in which to deploy with any reasonable expectation for critical mass of demand.

”§160A-340.1. City-owned communications service provider requirements.

(a) A city-owned communications service provider shall meet all of the following requirements:

(1) Comply in its provision of communications service with all local, State, and federal laws, regulations, or other requirements applicable to the provision of the communications service if provided by a private communications service provider.

- Requiring a public entity to meet all local, State, and federal requirements that a private entity would have to meet is problematic in many ways. First, this requirement is inconsistent with the stated goal of achieving a “level playing field,” because imposing all private-sector requirements on public entities without at the same time imposing all

public-sector requirements on private entities decidedly tips the playing field in favor of private entities. Second, there are many areas in which public entities have obligations that are comparable to those that private entities must meet, so that imposing all private-sector obligations on public entities would result in double burdens on the public entities. The legislation seems to recognize this, as it later has a provision requiring public entities to make "payments in lieu of taxes" (PILOT) to the local government. Third, such a vague and amorphous requirement is likely to lead to endless time-consuming and costly disputes about whether the public entity has in fact complied with it. For example, with what kinds of private entities should the public entity compare itself? Should it be a for-profit or a non-profit private entity? A dominant ILEC? A non-dominant ILEC? A CLEC? A cable company? All of these entities are subject to different rules. These examples show the difficulty the City of Wilson would be faced with if they were forced to comply with this section.

- The ambiguity of this provision creates a barrier to the municipality obtaining financing to build the network. This is because the ambiguity of the language places the municipality at a higher risk for easy legal assault by its competitor, making the municipal infrastructure less attractive for outside investment due to the inherent costs and delays of litigation.

(2) In accordance with the provisions of Chapter 159 of the General Statutes, the Local Government Finance Act, establish one or more separate enterprise funds for the provision of communications service, use the enterprise funds to separately account for revenues, expenses, property, and source of investment dollars associated with the provision of communications service, and prepare and publish an independent annual report and audit in accordance with generally accepted accounting principles that reflect the fully allocated cost of providing the communications service, including all direct and indirect costs. An annual independent audit conducted under G.S. 159-34 and submitted to the Local Government Commission satisfies the audit requirement of this subdivision.

- In a competitive market, any additional burdens or tasks required of the municipality and not of the private sector competitor, which would necessarily require additional staff time, an auditor and other costs, would have anticompetitive effects. Having to prepare an additional independent annual report and audit is an unnecessary and burdensome requirement (and one that the private entities are not required to do). The ambiguous terms of a number of these categories expose the municipality to frivolous legal assaults by its competitors and further delay, add costs, and redirect resources away from building the municipal network.

(3) Limit the provision of communications service to within the corporate limits of the city providing the communications service.

- The age-old truism applicable to corporations is that growth is necessary for survival. This legal provision imposes an artificial geographic barrier against reasonable growth on city-provided services to which its private sector competitors are not subject. It denies the public provider the larger-scale operational efficiencies that its private sector competitor enjoys, which are so critical when distributing broadband services where aggregating demand leads to lower cost per megabit. Denying these larger-scale efficiencies, such as utilizing revenues drawn from denser service areas to off-set lower revenues in less-dense, lower income areas denies regional growth and economic development opportunities not currently available.
- This provision also specifically restricts a city from providing services to the typically more rural, lower income, and underserved areas outside its municipal borders that are passed over by the incumbent providers because they are deemed not profitable.

(4) Shall not, directly or indirectly, under the powers of a city, exercise power or authority in any area, including zoning or land-use regulation, or exercise power to withhold or delay the provision of monopoly utility service, to require any person, including residents of a particular development, to use or subscribe to any communications service provided by the city-owned communications service provider.

- Existing laws already limit the ability of a city to withhold utility services.

(5) Shall provide nondiscriminatory access to private communications service providers on a first-come, first-served basis to rights-of-way, poles, or conduits owned, leased, or operated by the city unless the facilities have insufficient capacity for the access and additional capacity cannot reasonably be added to the facilities. For purposes of this subdivision, the term "nondiscriminatory access" means that, at a minimum, access shall be granted on the same terms and conditions as that given to a city-owned communications service provider.

- This provision would require that in any case where the city is leasing a pole, conduit or right-of-way from a third party, it must grant another communications provider the right to use that third party's property.
- This appears to constitute an uncompensated taking of property.
- This provision is also difficult to reconcile with existing legislation that imposes strict regulations on the fees that a municipality may charge a private communications service provider for the use of its poles and conduits (Chapter 62-350).
- This provision also basically requires "free access" to city owned or leased poles, conduit, rights-of-way etc., by defining non-discriminatory access as "the same terms and conditions as apply to the city." A city (the public) generally does not charge itself for something it owns or has already acquired. It would also require the city to allow the private providers equal priority to establish connections to poles it owns and installed itself for its own utilities.

- This provision is also an effective prohibition on a municipality engaging in the deployment of broadband network because it would force the City to act in breach of North Carolina law. The requirement to share public property with the private sector is in violation of existing NC law, which permits cities to enter into contracts with private parties only if the activity covered by the contract involves a public purpose that the city is authorized to carry out (G.S. § 160A-20.1). This provision requires that the City in essence give access to public facilities for private purposes.
- Under the bill's right of access provision, a private provider has the right to:
 - Use the city's basic communications infrastructure to build its own system regardless of the damage such use would do to municipal property or the unfairness of making the city's taxpayers subsidize a private business.
 - Use lines leased by the city from other private providers or conduit installed by a third party simply because that conduit contains a city-owned or leased line.
 - Use channels or transmission capacity on a municipal cable or broadband system to serve its own customers, often without any obligation to reimburse the city for the cost of that use.
 - Involve NCUC in micromanaging city operation and use of its communications infrastructure

(6) Shall not air advertisements or other promotions for the city-owned communications service on a public, educational, or governmental access channel if the city requires another communications service provider to carry the channel. The city shall not use city resources that are not allocated for cost accounting purposes to the city-owned communications service to promote city-owned communications service in comparison to private services or, directly or indirectly, require city employees, officers, or contractors to purchase city services.

- The prohibition on advertising and promotions over PEG channels is overkill and irrelevant to a so-called attempt to achieve a level playing field, as the incumbents advertise and promote themselves extensively over their own networks.
- It could also lead to constant disputes as to what constitutes "advertisements" or "promotions."
- This section also violates federal law which prohibits states from regulation the content of cable service channels except as expressly authorized by federal law (47. U.S.C. §544).

(7) Shall not subsidize the provision of communications service with funds from any other noncommunications service, operation, or other revenue source, including any funds or revenue generated from electric, gas, water, sewer, or garbage services.

- This prohibition on subsidies for communications services that are incorporated into other utility services like smart meters or metering would effectively preclude municipalities from providing those types of vital services.
- Enforcing these new rate regulation rules would require NCUC to micromanage basic municipal operations.
- Would bar municipalities from using federal funds and 911 fees for public safety networks because of the prohibition on the use of “other revenue source(s)” to finance the construction or operation of municipal communications networks or the provision of communications services by a municipality. This same provision also bars a municipality from entering into cost-sharing partnership arrangements with other municipalities, counties, local hospitals, and school districts to provide communications services or networks if they somehow could overcome the bill’s ban on extraterritorial operations.

(8) Shall not price any communications service below the cost of providing the service, including any direct or indirect subsidies received by the city-owned communications service provider and allocation of costs associated with any shared use of buildings, equipment, vehicles, and personnel with other city departments. The city shall, in calculating the costs of providing the communications service, impute (i) the cost of the capital component that is equivalent to the cost of capital available to private communications service providers in the same locality and (ii) an amount equal to all taxes, including property taxes, licenses, fees, and other assessments that would apply to a private communications service provider, including federal, State, and local taxes; rights-of-way, franchise, consent, or administrative fees; and pole attachment fees. In calculating the costs of the service the city may amortize the capital assets of the communications system over the useful life of the assets in accordance with generally accepted principles of governmental accounting.

- There are three main problems with this provision.
 - First, imputed-cost requirements have no purpose other than to raise prices to levels that private-sector providers would charge for similar products and services. Since the private-sector providers insist that they cannot operate at a profit in the areas that the public provider proposes to serve, the ultimate effect of such imputed-cost requirements is to ensure that the public provider will not be able to serve these areas either by operating on a cost-recovery basis or passing through cost savings.
 - Second, such requirements open the door to endless time-consuming and costly disputes. For example, with respect to the cost of capital, with what kind of private entity should a public entity compare itself? To a large established national or regional provider? To a small startup in the community? To something in between? Once it has found an appropriate comparable, how should the public entity the “equivalent” cost of capital? Should it be purely debt? Should it take into account the intra-corporate financing that major companies typically use?

- Third, this provision is most problematic when it comes to taxes. Right of way, franchise, administrative, and pole attachment fees are relatively easy to determine. But what about federal and state income taxes? Are those required? It's not clear. To estimate equivalent private-sector taxes, a public entity must first decide on an appropriate comparable private entity or entities. This poses the same problems as those discussed above. Then, the public entity must guess at the level of income that the comparable private entity or entities may have earned, which is very difficult to do in the absence of publicly-available tax information for private entities. Next, the public entity must guess at the level of tax credits, deductions, carry forwards, losses on unrelated businesses, and other tax benefits that the comparable entity or entities might have taken. In the end, the comparable entity or entities may have paid very little, if any, income taxes, particularly in the early years of developing a broadband project. Unfortunately, any conclusions that the public entity reaches will be open to substantial criticism and second-guessing.
- Retention of this provision barring below-cost pricing would effectively preclude a municipality from responding to predatory pricing or below-cost pricing by a private provider and would put them at a grossly unfair competitive disadvantage. With this limitation in place, an incumbent communications provider not subject to similar limitations could embark on a sustained predatory pricing campaign that would quickly drive the public entity out of the market. Once eliminated, the private provider could revert back to its traditional pricing due to the lack of competition.
- Apparently intended to prevent unfair competition from tax-subsidized business, the rule would actually put public networks at a disadvantage; private networks have long been able to offer "loss leader" offers and intro pricing to get people to sign up, and the large ISPs can all use profits from one area to subsidize below-cost prices in another.
- This provision creates a palpable restriction on the ability of a municipality to obtain financing to build a broadband system in areas where there is an incumbent provider, even one which provides far inferior service. No investor will finance a municipal network in a competitive market where the municipality has no price flexibility to respond to its private sector competitor's reduction in rates. This price strait-jacket exposes the community to guaranteed failure in the face of predatory pricing that large multi-state incumbent providers can easily absorb over an extensive period of time.
- These new rate regulation rules would also require extraordinary intervention by NCUC in municipal operations

(9) The city shall annually remit to the general fund of the city an amount equivalent to all taxes or fees a private communications service provider would be required to pay the city or county in which the city is located, including any applicable tax refunds received by the city-owned communications service provider because of its government status and a sum equal to the amount of property tax that would have been due if the city-owned communications service provider were a private communications service provider.

- This provision retains the unconstitutional provision requiring the city to pay the equivalent of a property tax on its communication system even though the state constitution exempts all municipal property from property tax without qualification (Article 5, Section 2 (3)).
- This provision suffers from all the problems that imputed-cost requirements pose, as discussed above.
- The provision restricts the deployment of a municipal broadband infrastructure by exposing the municipality to legal challenge when it attempts to comply with this provision, while inherently not complying because it is exempt from property taxes as a public entity that make payments in lieu of taxes, .
- While municipal governments do not have to pay a corporate income tax; they do shoulder the same expenses private sector telecom companies face for operations including capital expenditures for equipment, personnel and general operations. Local governments pay the same fees for Emergency Services and federal and state payroll taxes.
- Note that the legislation stipulates that cities would be required to pay all taxes "that would apply" to a private provider, not the actual taxes that the relevant providers pay.

(b) A city-owned communications service provider shall not be required to obtain voter approval under G.S. 160A-321 prior to the sale or discontinuance of the city's communications network.

- Allows for fire-sales of city-owned communications systems, suggesting the intention of the incumbent to buy a municipal system after it fails under the weight of H129's anticompetitive legal requirements.

"§160A-340.2. Exemptions.

(a) The provisions of G.S. 160A-340.1, 160A-340.4, 160A-340.5, and 160A-340.6 do not apply to the purchase, lease, construction, or operation of facilities by a city to provide communications service within the city's corporate limits for the city's internal governmental purposes, including the sharing of data or voice between governmental entities for internal governmental purposes, or within the corporate limits of another unit of local government that is a party with the city to an interlocal agreement under Part 1 of Article 20 of Chapter 160A of the General Statutes for the provision of internal government services.

- This provision restricts and inhibits the deployment of a municipal broadband network for simple internal purposes or by utilizing public assets in public-private partnerships, by creating ambiguous legal terms which inherently expose the municipality to easy legal assault by a competitive private provider. Such heightened legal vulnerability also

restricts the attractiveness to outside financing and restricts the potential for deployment of these public-private projects.

- By not unambiguously exempting public safety networks, this provision exposes the deployment of public safety networks to legal challenge. It fails to properly exempt internal networks by using ambiguous and limiting terms like networks used for only “governmental purposes.” “Governmental” purposes are an ambiguous term in law. Governments are engaged in many services that are proprietary (non-governmental) in nature (e.g. electrical or water services). This section also does not properly exempt cross-jurisdictional network operations by using ambiguous terms that exempt only services that involve “sharing” between governmental entities, “data “ services, and services that are just “governmental” services.
- The limitation to services provided within the city’s boundaries is problematic. As indicated elsewhere, a City can provide a number of public services and enterprises outside of its corporate boundaries. Not being able to incorporate network functions into services it provides outside of its corporate boundaries (such as a SCADA network for utility services) would effectively prevent it from utilizing such tools at all.

(b) The provisions of G.S. 160A-340.1, 160A-340.4, and 160A-340.5 do not apply to the provision of communications service in an unserved area. A city seeking to provide communications service in an unserved area shall petition the North Carolina Utilities Commission for a determination that an area is unserved. The petition shall identify with specificity the geographic area for which the designation is sought. Any private communications service provider, or any other interested party, may, within a time established by order of the Commission, which time shall be no fewer than 30 days, file with the Commission an objection to the designation on the grounds that one or more areas designated in the petition is not an unserved area or that the city is not otherwise eligible to provide the service. For purposes of this subsection, the term "unserved area" means a census block, as designated by the most recent census of the U.S. Census Bureau, in which at least fifty percent (50%) of households either have no access to high-speed Internet service or have access to high-speed Internet service only from a satellite provider. A city may petition the Commission to serve multiple contiguous unserved areas in the same proceeding.

- The bill prohibits cities from combining unserved areas with served areas to establish rational and sustainable service areas for municipal systems:
 - As a general proposition, cities need to be able to combine unserved with served areas in order for the economics of providing communications services to work
 - In many cases, unserved areas are small and sparsely populated pockets that are surrounded by served areas and in scattered locations so developing a plan that would serve just those areas would be neither technically nor financially feasible
 - Cities, when they become service providers, generally seek to offer service to all their constituents (or as many as practical), not just a select few. It would be unfair and discriminatory to deny municipal services to one group of residents while providing it to another group if it were feasible to provide the service to both group.

- This provision creates unnecessary financial and regulatory barriers to overcome as prerequisites to deploying a municipal broadband network, 1) because it must pay for its own broadband availability by household study. This is because there is no available data with which a community could even determine what would be an “unserved” area (The North Carolina Department of Commerce, (utilizing BTOP funds) does not provide broadband availability data by household, and data is prohibited from being downloaded per confidentiality agreements with private carriers); 2) Delay, even if a community was able to obtain such data, and justify after industry challenges, sufficient contiguous census blocks be exempt, that community is still subject to the onerous requirements of section §160-340.6 RFP and public hearing requirements (public-private partnerships) even though it has shown these census blocks to be unserved by the private sector. When those negotiations fail, an unserved area still is subject to burdensome public hearing requirements (§160-340.3), NCUC approval of its petition, and LGC approval.
- At least 50% of the census blocks must not have access to 1.5 mbps internet, which determination may be challenged by the private providers.
- The private provider may file an objection on the basis that the city is “not otherwise eligible to provide the service.” This is undefined and will require costly legal process and delay.
- Strictly speaking, if a grandfathered system attempts to provide service to an unserved area that is outside of its service area, it arguably loses all of its exemptions except those listed in this section (i.e., if the City of Wilson provided service outside of its service area to an “unserved area” it would be providing service outside of its service area and lose its subsection (c) exemption and then have to comply with all the requirements of S.L. 2011-84 except to the extent of the service its provides to an “unserved area,” which would be exempt from 160A-340.1, 340.4, and 340.5 pursuant to the subsection (b) exemption.
 - Even if a grandfathered city does not lose its subsection (c) exemption by providing service to an “unserved area,” it still has to comply with both 160A-340.3 (requiring public hearings) and 160A-340.6 (requiring City to solicit proposals for a public-private partnership before offering service) (just 160A-340.3 would apply if the City were to provide services to another local government for internal government services.).

(c) The provisions of G.S. 160A-340.1, 160A-340.3, 160A-340.4, 160A-340.5, and 160A-340.6 do not apply to a city or joint agency providing communications service as of January 1, 2011, provided the city or joint agency limits the provision of communications service to any one or more of the following:

- (1) Persons within the corporate limits of the city providing the communications service. For the purposes of this subsection, corporate limits shall mean the corporate limits of the city as of April 1, 2011, or as expanded through annexation.
- (2) Existing customers of the communications service as of April 1, 2011. Service to a customer outside the service area of the city or joint agency who is also a public entity must comply with the open bidding procedures of G.S. 143-129.8 upon the expiration or termination of the existing service

contract.

(3) The following service areas:

- a. For the joint agency operated by the cities of Davidson and Mooresville, the service area is the combined areas of the city of Cornelius; the town of Troutman; the town of Huntersville; the unincorporated areas of Mecklenburg County north of a line beginning at Highway 16 along the west boundary of the county, extending eastward along Highway 16, continuing east along Interstate 485, and continuing eastward to the eastern boundary of the county along Eastfield Road; and the unincorporated areas of Iredell County south of Interstate 40, excluding Statesville and the extraterritorial jurisdiction of Statesville.
- b. For the city of Salisbury, the service area is the municipalities of Salisbury, Spencer, East Spencer, Granite Quarry, Rockwell, Faith, Cleveland, China Grove, Landis and the corridors between those cities. The service area also includes the economic development sites, public safety facilities, governmental facilities, and educational schools and colleges located outside the municipalities and the corridors between the municipalities and these sites, facilities, schools, and colleges. The corridors between Salisbury and these municipalities and these sites, facilities, schools, and colleges includes only the area necessary to provide service to these municipalities and these sites, facilities, schools, and colleges and shall not be wider than 300 feet. The elected bodies of Spencer, East Spencer, Granite Quarry, Rockwell, Faith, Cleveland, China Grove, and Landis shall vote to approve the service extension into each respective municipality before Salisbury can provide service to that municipality. The Rowan County Board of County Commissioners shall vote to approve service extension to any governmental economic development site, governmental facility, school, or college owned by Rowan County. The Rowan Salisbury School Board shall also vote to approve service extension to schools.
- c. For the city of Wilson, the service area is the county limits of Wilson County, including the incorporated areas within the County.
- d. For all other cities or joint agencies offering communications service, the service area is the area designated in the map filed as part of the initial notice of franchise with the Secretary of State as of January 1, 2011.

- Subsection (2) was intended to give the impression of grandfathering customer relationships that exist as of April 1, 2011, even in cases where those customers may be outside the new service boundaries that the bill designs. It fails to actually create this grandfathering because it requires an onerous and unreasonable bidding process that is fundamentally inconsistent with standard customer relationships. Individual customers are not subject to the reference Article 8 of Chapter 143 and cannot reasonably be