

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

In the Matter of)	
)	
Petitions Pursuant to Section 706 of the)	WC Docket No. 14-115 (Wilson)
Telecommunications Act of 1996 for Removal)	WC Docket No. 14-116 (Chattanooga)
of State Barriers to Broadband Investment and)	
Competition)	

COMMENTS OF NETFLIX, INC.

I. INTRODUCTION

The important thing for the Commission to keep in mind in this proceeding is this: neither the Tennessee nor the North Carolina law at issue moves the country any closer to a policy of bandwidth abundance. Both represent retrenchment and a move away from a pro-consumer policy of limitless bandwidth. For these reasons, Netflix, Inc. (“Netflix”) supports the petitions seeking preemption filed by the City of Wilson, North Carolina,¹ and the Electric Power Board of Chattanooga, Tennessee² (collectively, “Petitioners”). Congress has instructed the Federal Communications Commission to promote investment in and deployment of broadband infrastructure and service to all Americans.³ Consistent with this goal, Petitioners seek to bring gigabit broadband speeds to surrounding areas that are either unserved or underserved by existing broadband providers. Unfortunately,

¹ Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition, filed by City of Wilson, North Carolina, WC Docket No. 14-115 (filed July 24, 2014) (“Wilson Petition”).

² Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition, filed by Electric Power Board, Chattanooga, Tennessee, WC Docket No. 14-116 (filed July 24, 2014) (“EPB Petition”).

³ See 47 U.S.C. § 157.

they find their objectives impeded by state barriers to broadband investment and deployment.

Netflix agrees with Chairman Wheeler that the Commission has the authority to preempt state laws that ban competition from community broadband, and in appropriate circumstances, should wield that authority.⁴ Petitioners have done the hard work of deploying fiber networks that allow Internet traffic to travel at speeds one hundred times faster than that made available by private sector broadband providers in their areas. Their goal is to extend that service to areas that are unserved or underserved by any broadband provider. The Commission's "competition, competition, competition" mantra would be well-served by granting these petitions. The gigabit fiber networks at issue in these petitions further federal policies while also fulfilling unmet local needs.

The Commission should encourage precisely the type of experimentation in which the communities in North Carolina and Tennessee have engaged. In the cases of Wilson and Chattanooga, they have succeeded in laying infrastructure that can deliver faster speeds than private sector providers and, unlike those providers, are concerned about significant broadband dead zones. They should not be hamstrung by state laws enacted at the urging of incumbent broadband providers seeking to maintain market dominance.

As Netflix CEO Reed Hastings recently noted, "[a] single fiber-optic strand the diameter of a human hair can carry 101.7 terabits of data per second, enough to support nearly every Netflix subscriber watching content in HD at the same time."⁵ When

⁴ Chairman Tom Wheeler, Removing Barriers to Competitive Community Broadband, Official FCC Blog (June 10, 2014), *available at* <http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband>.

⁵ Reed Hastings, *How to Save the Net: Don't Give in to Big ISPs*, Wired, Aug. 2014, at 96, 97 (Attached as Exhibit 1).

municipalities harness that technology to extend new opportunities to new communities, federal and state laws should encourage that initiative, or at the very least, get out of the way. The Commission can and should take a hard look at state laws that facilitate the efforts of incumbents to artificially constrain broadband availability and capacity.

“[B]roadband is not a finite resource.”⁶ No statute—state or federal—should make it one.

II. PETITIONERS HAVE DEMONSTRATED THAT MUNICIPAL BROADBAND CAN PERPETUATE THE VIRTUOUS CIRCLE, PROMOTE BROADBAND ADOPTION, AND ENCOURAGE COMPETITION

The Commission’s National Broadband Plan correctly identified broadband as “*the* great infrastructure challenge of the early 21st century.”⁷ Petitioners met that challenge head on, and as a result, their communities became two of the first in the country to enjoy gigabit broadband service.⁸ Wilson took this step only after incumbent communications service providers refused to build or partner with the city to build out a fiber-to-the-home network and the incumbent cable operator failed to deliver on a promise to upgrade its system with fiber-optic cabling.⁹

The petitions demonstrate the many benefits that accrue to communities that have access to truly high-speed broadband. Both Wilson and Chattanooga attracted new

⁶ *Id.*

⁷ Federal Communications Commission, Connecting America: The National Broadband Plan, at 3 (2010), *available at* <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

⁸ EPB Petition at 13-14.

⁹ Wilson Petition at 17-18.

businesses after deploying gigabit fiber broadband networks.¹⁰ Those networks also created new opportunities for public institutions like schools and libraries.¹¹ Further, the presence of a fiber network in Wilson has encouraged other providers to make corresponding improvements in their infrastructure.¹²

By launching fiber networks, both cities are participating in the “virtuous circle of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses.”¹³ Content providers like Netflix are constantly innovating and improving their services for members who in turn demand faster broadband speeds to take advantage of those services. As the Commission recently recognized in its *Tenth Broadband Progress Notice of Inquiry*, however, current benchmark speeds for broadband service may be insufficient to account for ways that consumers engage with content and services on the Internet.¹⁴ For example, Netflix now offers streaming video in Ultra HD 4K but recommends a broadband

¹⁰ Wilson Petition at 21; EPB Petition at 25-26.

¹¹ Wilson Petition at 21; EPB Petition at 26.

¹² See Wilson Petition at 21 (noting that multiple Tier 1 networks established points of presence in the city following Wilson’s broadband deployment).

¹³ Preserving the Open Internet, *Report and Order*, 25 FCC Rcd. 17905, 17910-11 ¶14 (2010).

¹⁴ See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act, *Tenth Broadband Progress Notice of Inquiry*, GN Docket No. 14-126, ¶ 6 (rel. Aug. 5, 2014) (“Given the demand for video services and the introduction and use of new services on the market, the Commission may find that the 4 Mbps/1 Mbps speed benchmark no longer allows consumers the ability to ‘originate and receive’ the broadband services identified in section 706.”).

connection of 20 Mbps, five times faster than the Commission's current benchmark speed.¹⁵ The approximately 21,119 Netflix members in Chattanooga and the approximately 1,805 Netflix members in Wilson have access to broadband service more than capable of delivering reliable 4K video and other rich media content. That content may encourage consumers to adopt high-speed broadband service, which in turn will encourage other edge providers to invest in innovative content and services. This is precisely the dynamic that Congress and the Commission sought to encourage and municipal broadband is an integral part of that dynamic.¹⁶

Petitioners now seek to bring gigabit broadband speeds to surrounding areas that are either unserved or underserved by existing broadband providers.¹⁷ The Commission's *Eighth Broadband Progress Report* determined that as many as 19 million Americans do not have access to fixed broadband speeds meeting the existing 4 Mbps downstream/1 Mbps upstream benchmark.¹⁸ Petitioners would reduce that figure, bringing to unserved and underserved communities gigabit broadband speeds as well as the host of social and economic benefits that accompany high-speed broadband availability.

¹⁵ See Netflix Now Streaming in Ultra HD 4K, Netflix US & Canada Blog (May 2, 2014), available at <http://blog.netflix.com/2014/05/netflix-now-streaming-in-ultra-hd-4k.html>.

¹⁶ As Petitioners note, Congress expressly made municipal broadband eligible for broadband deployment funds in the American Recovery and Reinvestment Act's Broadband Technology Opportunity Program. EPB Petition at 8.

¹⁷ See EPB Petition at 34 (showing unserved and underserved areas surround EPB's service areas).

¹⁸ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act, *Eighth Broadband Progress Report*, 27 FCC Rcd. 10342, 10370 ¶ 46 (2012).

Allowing Petitioners to extend their offerings outside their existing service areas is the surest way to accomplish significant federal telecommunications policy objectives.

Petitioners clearly demonstrate the benefit of introducing new alternatives in the broadband market, where high fixed costs and barriers to entry may severely limit facilities-based competition. Nearly half of all Americans have access to, at most, two broadband providers offering broadband speeds greater than 6 Mbps downstream.¹⁹ As Petitioners show, the introduction of a new provider brings about dramatic and substantial benefits for consumers. Prior to the launch of EPB's gigabit broadband service, Comcast raised its cable TV rates every year, leading to a 154 percent increase in rates between 1993 and 2008.²⁰ After EPB entered the field, the annual rate increases halted and Comcast eventually offered two tiers of service.²¹ The presence of a fiber-based competitor also incentivized Comcast to improve its broadband speeds, with the fastest advertised speed going from 8 Mbps in 2008 to 105 Mbps in 2013.²² The launch of Greenlight in Wilson similarly led to private sector broadband providers offering "better services and rates to their customers."²³

¹⁹ Internet Access Services: Status as of June 2013, Federal Communications Commission: Industry Analysis and Technology Division, Wireline Competition Bureau at 9 (Jun. 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327829A1.pdf.

²⁰ EPB Petition at 27. Prior to the launch of its broadband service, EPB offered telecommunications service as a competitive local exchange carrier in its service area, but that service did not compete with Comcast's video and broadband packages. *Id.* at 37-38.

²¹ *Id.*

²² *Id.* at 28.

²³ Wilson Petition at 20.

This competitive dynamic is precisely what federal telecommunications policy seeks to encourage. Municipal broadband can succeed only if community broadband networks are allowed to achieve a sustainable subscriber base. In other proceedings, private broadband providers have urged that achieving economies of scale is necessary to compete effectively against other providers and therefore justifies mergers that otherwise would be unthinkable.²⁴ While Netflix believes there are limits to that premise, it is instructive that the same broadband providers making those arguments also expend considerable effort, directly or through organizations that represent the providers, to promote state laws that keep municipal broadband networks from expanding even into areas that private providers have no intention of reaching. State laws motivated by a concern that municipal broadband networks might fail should not ensure that they do.

III. FEDERAL PREEMPTION IS APPROPRIATE WHEN STATE LAWS UNDULY INTERFERE WITH MUNICIPAL BROADBAND

North Carolina, Tennessee, and the 18 other states that either prohibit or stymie municipalities' efforts to deliver fiber broadband service do a disservice to their local communities and also undermine long-standing federal policies that seek to encourage broadband deployment, adoption, and competition. Importantly, the Internet is a communications platform that transcends state lines and even national boundaries. It is the ultimate example of interstate commerce. And the continued evolution of the Internet depends on the creation of new networks and the expansion of existing ones. There is an appropriate and essential role for states to play in that growth and evolution, but state laws that prevent municipalities from providing their citizens faster, cheaper broadband

²⁴ Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, MB Docket No. 14-57, at 5-6, 20-24 (filed Apr. 8, 2014).

service—or prevent the extension of that service to citizens in unserved or underserved areas—harm the entire Internet along with those citizens.

Even critics of the Chairman’s position on municipal broadband have acknowledged in other contexts that federal preemption may be appropriate where state laws impact advanced communications.²⁵ Here, where municipalities have chosen to self-provide or extend to unserved areas high-speed broadband that no private actor is willing to offer, preemption of state laws prohibiting those opportunities is appropriate. As Chairman Wheeler has stated: “Removing restrictions on community broadband can expand high-speed Internet access in underserved areas, spurring economic growth and improvements in government services, while enhancing competition.”²⁶ Petitioners have proven that municipal broadband can create opportunities for communities that private sector broadband providers have deemed not worth the effort. When state laws prevent those opportunities, the role and authority of the Commission are clear.

IV. GOVERNMENTS ROUTINELY INVEST IN ESSENTIAL SERVICES

A local government that decides it is in its community’s interest to invest in an essential service such as high-speed broadband Internet access should not be considered any more unusual than a government investing in providing an electric utility service, public transportation, or any essential service that benefits a community. There are over

²⁵ See, e.g., H.R. 1468, the “Secure IT Act,” Section 505, 113th Cong., 1st Session (preempting state data breach notification laws).

²⁶ Chairman Tom Wheeler, Removing Barriers to Competitive Community Broadband, Official FCC Blog (June 10, 2014), *available at* <http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband>.

2,000 publicly owned electric utilities,²⁷ approximately 150,000 water systems,²⁸ and hundreds of other publicly owned utilities serving community transportation, natural gas, and communications needs.²⁹ For example, New York and Boston have offered public transportation via railroads, trolleys, and subways for over 100 years. Today, the Massachusetts Bay Transportation Authority has an annual ridership of over 1.3 million³⁰ and the Metropolitan Transportation authority in New York has an annual ridership of over 2 billion.³¹ New York's system alone drives the local state economy by providing four out of five New Yorkers with transportation to work, and by employing over 65,000 people.³²

Frequently, public infrastructure investments exist alongside privately funded services. For example, the Dulles Greenway Toll Road is a privately owned 14-mile toll road that connects Washington Dulles Airport to Leesburg, Virginia. It runs adjacent to Virginia State Routes 7 and 28, and offers a traffic signal-free, high-speed alternative to

²⁷ American Public Power Association, 2014-15 Annual Directory & Statistical Report: U.S. Electric Utility Industry Statistics 26 (2014), available at <http://www.publicpower.org/files/PDFs/USElectricUtilityIndustryStatistics.pdf>.

²⁸ United States Census Bureau, The 2012 Statistical Abstract: Energy & Utilities, Water and Sewage Systems: 959 Public Drinking Water Systems, <http://www.census.gov/compendia/statab/2012/tables/12s0960.pdf>.

²⁹ See NASDAQ, Public Utility Companies, <http://www.nasdaq.com/screening/companies-by-industry.aspx?industry=Public+Utilities> (last visited Aug. 14, 2014).

³⁰ Massachusetts Bay Transportation Authority, About the MBTA: MBTA ScoreCard, http://www.mbtta.com/about_the_mbtta/scorecard/ (last visited Aug. 14, 2014).

³¹ MTA, The MTA Network: Public Transportation for the New York Region, <http://web.mta.info/mta/network.htm> (last visited Aug. 14, 2014).

³² *Id.*

the traffic-heavy public highways.³³ Other privately owned facilities like taxi cabs and private limousine services exist despite the availability of buses and other public transportation services. Public broadcast stations exist alongside private ones, offering programming that both supplements and competes with private programming. All these examples demonstrate that the public and private sectors can offer equivalent services and infrastructure in a way that better serves the needs of communities without harming competition. There is no reason to conclude that a community's decision to provide its citizens with high-speed broadband Internet access should be any more controversial than any of these examples.

IV. CONCLUSION

The petitions should be granted.

/s/
Markham C. Erickson
Erik Stallman
Steptoe & Johnson LLP
1330 Connecticut Ave. NW
Washington, DC 20036
202-429-3000
Counsel for Netflix, Inc.

Respectfully submitted,

/s/
Christopher Libertelli
Corie Wright
Netflix, Inc.
1455 Pennsylvania Ave. NW
Suite 650
Washington, DC 20004
(202) 464-3322
Netflix, Inc.

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³³ Dulles Greenway, About Us, <http://www.dullesgreenway.com/about> (last visited Aug. 14, 2014).

Exhibit 1

Reed Hastings, *How to Save the Net: Don't Give in to Big ISPs*,
Wired, Aug. 2014, at 96.

How to save the net

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THE SNOWDEN REVELATIONS WERE JUST THE BEGINNING. THE INTERNET IS FACING AN ARRAY OF THREATS, ANY ONE OF WHICH COULD END THE NET AS WE KNOW IT. SIX EXPERTS EXPLAIN WHAT COULD GO WRONG—AND HOW TO BRING US BACK FROM THE BRINK.

Don't Give In to Big ISPs

REED HASTINGS
CEO, Netflix

The Internet has already changed how we live and work, and we're only just getting started. Who'd have thought even five years ago that people would be streaming Ultra HD 4K video over their home Internet connections?

Technological advances are driving this evolution and will continue to do so only if we make sure the companies controlling consumers' access to the Internet don't adopt business practices that stifle its revolutionary nature. The next Netflix won't stand a chance if the largest US Internet service providers are allowed to merge or demand extra fees from content companies trying to reach their subscribers.

This year we reluctantly agreed to pay AT&T, Comcast, and Verizon for access to our mutual subscribers, who were seeing a rapid decline in their Netflix viewing experience because of congestion at the connection point where we transfer content to the ISP. The ISPs argue that our data-rich ser-

vices take up limited capacity on their networks. But broadband is not a finite resource. Network limitations are largely the result of business decisions to not keep pace with subscriber demand in a world where the Internet increasingly is the main vehicle for all kinds of entertainment, from gaming to movies to video chats with loved ones.

Consider this: A single fiber-optic strand the diameter of a human hair can carry 101.7 terabits of data per second, enough to support nearly every Netflix subscriber watching content in HD at the same time. And while technology has improved and capacity has increased, costs have continued to decline. A few more shelves of equipment might be needed in the buildings that house interconnection points, but broadband itself is as limitless as its uses.

We'll never realize broadband's potential if large ISPs erect a pay-to-play system that charges both the sender and receiver for the same content. That's why we at Netflix are so vocal about the need for strong net neutrality, which for us means ISPs should enable equal access to content without favoring, impeding, or charging particular content providers. Those practices would stunt innovation and competition and hold back the broader development of the Internet and the economic benefits it brings.

Customers pay companies like AT&T, Comcast, and Verizon a monthly fee, and some are even financially penalized if they exceed usage caps. Charging us a separate fee ultimately means consumers pay twice—first for their broadband connection and second through higher-cost or lower-quality Internet services.

It's worth noting that Netflix connects directly with hundreds of ISPs globally, and 99 percent of those agreements don't involve access fees. It is only a handful of the largest US ISPs, which control the majority of consumer connections, demanding this toll. Why would more profitable, larger companies charge for connections and capacity that smaller companies provide for free? Because they can.

This is the reason we have opposed Comcast's proposed acquisition of Time Warner Cable. Comcast has already shown the ability to use its market position to require access fees, as evidenced by the Netflix congestion that cleared up as soon as we reached an agreement with them. A combined company that controls over half of US residential Internet connections would have even greater incentive to wield this power.

The Federal Communications Commission has historically focused only on last-mile connections—the final leg of the Internet that connects individual homes to the World Wide Web. Today's problem spots are further upstream, at the choke point where companies like Netflix pass our traffic off to the ISPs. If the FCC doesn't expand its purview to include these transactions, it would be better to have no rules than the ones being proposed—which simply legalize discrimination on the Internet.
