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July 24, 2014

By Hand Delivery

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

Re: Petition of the Electric Power Board of Chattanooga, Tennessee, 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 Chattanooga EPB'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. Robert E. Cooper, Jr.,
Attorney General of Tennessee

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
The Electric Power Board of Chattanooga, Tennessee	)	File No. _____
	)	
Petition for Preemption of a Portion of Section 7-52-601 of the Tennessee Code Annotated	)	
	)	

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

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July 24, 2014

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PETITION

I. INTRODUCTION AND SUMMARY

Pursuant to Section 706 of the Telecommunication Act of 1996, 47 U.S.C. § 1302, the Electric Power Board of Chattanooga ("EPB"), an independent board of the City of Chattanooga, Tennessee, brings this petition for removal of the barrier to deployment of advanced telecommunications capability posed by the territorial restriction contained in Tenn. Code Ann. § 7-52-601 ("Section 601"), which prevents EPB from offering in Tennessee Internet and video programming services outside of EPB's electric service territory. As shown below, the territorial restriction is an impermissible barrier to broadband deployment that Congress requires the Commission to remove.[1]

EPB offers ultra-high-speed Internet access, video programming, and voice services over a fiber-optic communications network that permits delivery of these services to every one of its 170,000 residential and commercial customers throughout its 600 square mile electric service area.[2] EPB is, however, surrounded by a digital desert in which businesses and residents are unable to access broadband Internet service or must make do with very limited speeds.[3]

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[1] 47 U.S.C. § 1302(b) (2010). Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), 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.*

[2] About 63,000 of EPB's electric service customers subscribe to EPB's fiber services. All of EPB's residential Internet customers are provided at least 100 Mbps symmetrical service. They may choose to upgrade, for $12.00 extra a month, to 1 Gbps symmetrical service. Rates are even lower if customers also choose to purchase bundled packages including video programming and voice services.

[3] *See* http://www.timesfreepress.com/news/2014/apr/20/the-digital-dividejust-an-hour-from-gig-city/. The map provided as Exhibit 1 shows large areas neighboring EPB's electric service territory that are unserved or underserved by broadband. All exhibits to this Petition are available online at https://www.epb.net/FCCPetitionExhibits/.

In this petition, EPB seeks the opportunity to respond to requests for access to provide advanced telecommunication services that EPB regularly receives from citizens and businesses located outside EPB's electric service territory. Under current Tennessee law, Tennessee municipal electric systems, including EPB,[4] are authorized to provide telecommunications services anywhere in the state.[5] Even though the high-speed fiber optics system that EPB would use to deliver such telecommunications services[6] would also permit it to easily provide advanced telecommunications capabilities and services – including Internet access and Internet Protocol Television – the territorial restriction contained in Section 601 prohibits EPB from using the same fiber for delivery of advanced telecommunications services outside its electric service territory.

Apart from the territorial restriction, EPB is complying, and would continue to comply, with the other requirements in Tenn. Code Ann. §§ 401 and 601. In particular, EPB does not, and would not, use revenues from EPB's electric system to subsidize EPB's communications services. Nor would EPB provide Internet access and video programming services in any city or county that does not wish it to do so.

EPB seeks the authority to offer advanced telecommunications services in areas outside its electric service territory where the cost of the services will be covered by service revenue, contributions in aid of construction, or other capital or operating support. EPB recognizes that

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[4] There are 61 municipal electric systems in Tennessee. Nine of these systems currently provide telecommunication and advanced telecommunication services.

[5] *See* Tenn. Code Ann. § 7-52-401, *et seq.*, and discussion at [Section III, *infra.*]. Tenn. Code Ann. § 7-52-403(b) contains a restriction prohibiting a municipal electric system from providing telecommunications service in the service territory of one rural telephone cooperative. That restriction is not significant to EPB.

[6] EPB, like many other telecommunications companies, provides telecommunication services over a fiber optic network using voice over Internet protocol ("VOIP"). The eight other Tennessee municipal electric systems that also provide telecommunications services also do so using fiber and VOIP technology.

advanced telecommunications services cannot be viably provided to some rural areas without governmental support, such as support from the Universal Service Fund.

EPB petitions the Commission to find that advanced telecommunications capabilities, including high-speed broadband services, are not being deployed on a reasonable and timely basis in communities near EPB's electric service area because of the territorial restriction in Section 601 that limits EPB's deployment of Internet and video programming to its electric service area. The Commission should find that, absent Section 601's electric service area limitation, broadband investment would occur on a reasonable and timely basis in the areas surrounding EPB's current footprint. The Commission should therefore take immediate action to remove the barrier created by the territorial restriction contained in Section 601 and declare it to be unenforceable.

The territorial restriction contained in Section 601 frustrates the Congressional goal that all Americans should have access to broadband capability, by prohibiting municipal electric utilities in Tennessee, including EPB, from providing broadband services and video programming outside of their electric service footprint, despite the fact that such entities are otherwise authorized to provide telecommunications services throughout the state of Tennessee. The explicit barrier created by Section 601's territorial restriction is precisely the type of legal barrier that Congress directed the Commission to sweep away in Section 706 of the Telecommunications Act of 1996.

EPB delivers high quality video programming services over its fiber network using Internet Protocol technology, providing a competitive alternative to traditional cable television. In order for it to be financially feasible for Tennessee municipal electric systems, including EPB, to extend their broadband networks into nearby communities, they must be freed from the electric service area limitation of Section 601 not only for Internet access, but also for services delivered

over the broadband networks, such as video programming services. EPB must be able to provide all communications services, including video programming services, that its potential customers desire for it to be economically feasible for EPB to expand its broadband network into adjacent areas. The Commission has repeatedly recognized the important link between the ability to provide broadband services and the ability to provide video programming using broadband. For example, in its *Terrestrial Order*,[7] the Commission observed:

> [B]y impeding the ability of [multichannel video programming distributors] to provide video service, unfair acts involving [video service] can also impede the ability of MVPDs to provide broadband services. Allowing unfair acts involving [video service] to continue where they have this effect would undermine the goal of promoting the deployment of advanced services that Congress established as a priority for the Commission. This secondary effect heightens the urgency for Commission action.[8]

The same principle applies in this case.

The territorial restriction contained in Section 601 is a barrier to broadband infrastructure investment that impedes the reasonable and timely availability of broadband in portions of Tennessee, and the Commission has clear and explicit authority under Section 706 to remove this barrier in order to carry out the Congressional objective of advancing the widespread availability of broadband capabilities in a reasonable and timely manner.

II. THE MANDATE OF CONGRESS THAT THE COMMISSION IDENTIFY AND REMOVE BARRIERS TO THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS SERVICES

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,

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[7] *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746, 2010 WL 236800 (rel. Jan. 20, 2010) (footnotes omitted).

[8] *Id.* at 25 FCC Rcd. at 772, ¶ 36, 2010 WL 236800 at *14.

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.[9]

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[9] *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).

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."[10] 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."[11]

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 found that it was not, to act immediately to remove barriers to infrastructure investment and to promote competition.

In 1999, in its first Section 706 Report, the Commission defined the term "advanced telecommunications capabilities" – which it used interchangeably with "broadband" – as "having

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10 *Id.* at 378.

11 *Id.* at 379.

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."[12] 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."[13] 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.[14]

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.[15] In 2008, Congress responded to this criticism by enacting the Broadband

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[12] *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).

[13] *Id.* at 2406, ¶ 20, 1999 WL 672549.

[14] *Id.* at 2405, ¶ 16, 1999 WL 672549.

[15] *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 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

Data Improvement Act ("BDIA").[16] 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,[17] 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.

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,[18] Congress directed the Commission to develop a "National Broadband Plan" to ensure that "all people of the United States have access to

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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.

[16] Pub. L. No. 110-385, 122 Stat. 4096 (Oct. 10, 2008).

[17] Codified as 47 U.S.C. §§ 1302-1303.

[18] *American Recovery and Reinvestment Act of 2009*, Pub. L. No. 111-5, § 6001(k)(2), 123 Stat. 115 (Feb. 17, 2009) ("*Recovery Act*").

broadband capability."[19] 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.[20]

On March 16, 2010, the Commission issued its National Broadband Plan.[21] 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 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.
>
> . . .
>
> 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

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19 *Id.* at 516.

20 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).

21 *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.

> 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.[22]

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:

> 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.[23]

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 megabits per second upstream -- and found that, under the new definition, advanced telecommunications capabilities were not being deployed in a reasonable and timely manner.[24]

> 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

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22 *Id.* at 3.

23 *Id.* at 194.

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

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.

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....[25]

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[25] *Id.* at ¶¶ 4-5 WL 2862584 at *2.

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."[26]

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."[27] In an accompanying Notice of Inquiry, the Commission elaborated:

> 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. . . .

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[26] *Id.* at ¶ 5, 2010 WL 2862584 at *2.

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

> 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. . . .[28]

The discussion above focused on the *minimum* speeds necessary for an Internet access service to meet the Commission's evolving definition of "advanced telecommunications 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 100 Megabits to 100 Million households by 2020. In addition, the Commission called for efforts to push past 100 Megabits as early 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.[29]

Two months after the Commission issued its challenge, Chattanooga's EPB made 1 Gigabit symmetrical service available to every one of its 170,000 residential and commercial customers. Chattanooga and the other communities within EPB's electric service territory became the first communities in the United States to fulfill the Commission's challenge by

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

[29] 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.

deploying the fastest Internet service in the nation. Then-Chairman Julius Genachowski highlighted Chattanooga's achievement when the Commission issued its Gigabit Cities Challenge in January 2013 to encourage providers and local and state governments to bring at least one ultra-fast Gigabit Internet community to every state in United States by 2015:

> American economic history teaches a clear lesson about infrastructure. If we build it, innovation will come. The U.S. needs a critical mass of gigabit communities nationwide so that innovators can develop next-generation applications and services that will drive economic growth and global competitiveness."
>
> Speeds of one gigabit per second are approximately 100 times faster than the average fixed high-speed Internet connection. At gigabit speeds, connections can handle multiple streams of large-format, high-definition content like online video calls, movies, and immersive educational experiences. Networks cease to be hurdles to applications, so it no longer matters whether medical data, high-definition video, or online services are in the same building or miles away across the state.
>
> Gigabit communities spur innovators to create new businesses and industries, spark connectivity among citizens and services, and incentivize investment in high-tech industries. . . .
>
> . . . .
>
> Communities across the country are already taking action to seize the opportunities of gigabit broadband for their local economies and bring superfast broadband to homes. In Chattanooga, Tennessee, a local utility deployed a fiber network to 170,000 homes. Thanks to the city's investment in broadband infrastructure, companies like Volkswagen and Amazon have created more than 3,700 new jobs over the past three years in Chattanooga. . . .[30]

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

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[30] FCC Announcement: FCC Chairman Julius Genachowski Issues Gigabit City Challenge to Providers, Local, and State Governments to Bring at Least One Ultra-Fast Gigabit Internet Community to Every State In U.S. By 2015 (Jan. 18, 2013), *available at* http://www.fcc.gov/document/fcc-chairman-genachowski-issues-gigabit-city-challenge.

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.

III. EPB'S ADVANCED TELECOMMUNICATION NETWORK AND THE BARRIER TO EPB'S ABILITY TO RESPOND TO REQUESTS FOR ITS EXPANSION

In this petition, EPB seeks the opportunity to respond to requests, which EPB regularly receives from citizens and businesses located outside EPB's electric service territory, for access to advanced telecommunication capabilities and services. Under current Tennessee law, Tennessee municipal electric systems, including EPB,[31] are authorized to provide telecommunications services using high-speed fiber anywhere in the state.[32] Tennessee municipal electric systems are

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[31] Nine of the 61 municipal electric systems in Tennessee, including EPB, currently provide telecommunication and advanced telecommunications capabilities and services.

[32] Tenn. Code Ann. § 7-52-401, *et seq.*, contains no territorial restriction, but, at the time of its passage, required a municipal electric system to obtain authority from the Tennessee Regulatory Authority ("TRA"), in the form of a certificate of convenience and necessity ("CCN"), to offer telecommunication services within an approved territory. So long as local approval was granted, the only territorial limitation was that which was imposed by the CCN granted by the TRA. In 2007, EPB obtained a statewide CCN, save for the service areas of existing telephone cooperatives with fewer than 100,000 total lines. The Tennessee General Assembly has since removed the authority of the TRA to govern the territories of previously-certificated telecommunications utilities, including municipal electric systems providing telecommunication services. *See* Tenn. Code Ann. § 65-5-109; *see also In Re: Application of Bristol Tennessee Essential Services for Expanded Certificate of Public Convenience and Necessity to Provide Competing Telecommunications Services Statewide*, Docket No. 12-00060, Final Order at 10 (Oct. 16, 2013) ("[a certificated municipal electric system] is no longer required to seek TRA approval to expand its territory . . . ."), *available at* http://www.tn.gov/tra/orders/2012/1200060bh.pdf. EPB is not affected by the territorial

also authorized, by Tenn. Code Ann. § 7-52-601, *et seq.*, to provide advanced telecommunications services and capabilities. However, because of four (4) additional words in Section 601, Tennessee municipal electric systems, including EPB, are prohibited from providing those services outside their electric service territories. EPB asks the Commission to remove the barrier created by these four (4) words – "within its service area" – that appear in Section 601. This barrier has created a wall preventing EPB from responding to regular requests that it provide advanced telecommunications services in surrounding areas to promote economic development and to provide Internet access to consumers who are still relying upon dial-up modems or other very limited Internet service options.

A. EPB's Background and History

The Electric Power Board of Chattanooga is an independent Board of the City of Chattanooga, Tennessee, a municipal corporation. EPB is a distributor of Tennessee Valley Authority ("TVA") power, providing electric service to more than 170,000 customers in a 600 square mile service area. EPB's electric service area includes all of the City of Chattanooga, most of Hamilton County in which Chattanooga lies, and portions of five (5) other counties in Tennessee and three (3) counties in North Georgia. EPB's electric service area is shown in the following map, an electronic copy of which is provided as Exhibit 2.

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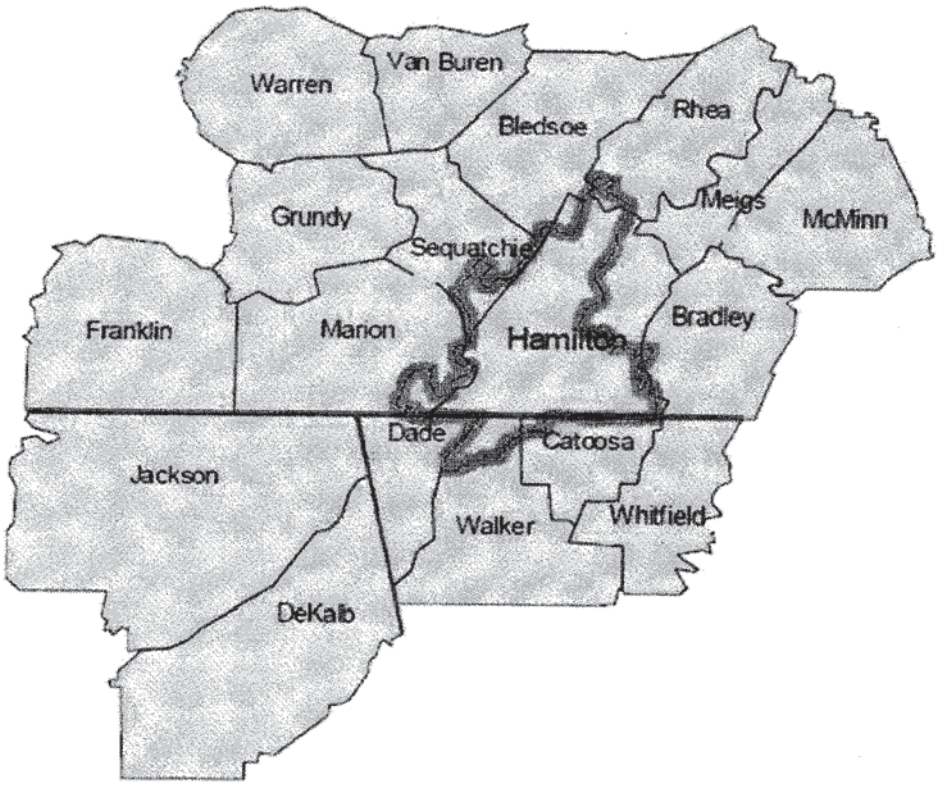
restriction for existing telephone cooperatives, and is not seeking Commission action with respect to this provision.

EPB Electric Service Territory



Chattanooga traces its modern history to 1816, when a trading post known as Ross's Landing was established at a bend in the Tennessee River, just upriver from the point at which the River winds its way through the mountains that comprise the southernmost part of the Appalachian range. Chattanooga was incorporated in 1839. By 1850, the first railroads arrived and Chattanooga became an important regional transportation center. Chattanooga's economy grew as a center of heavy manufacturing, with foundries making the implements of agriculture and commerce, using coal and iron from surrounding mountains, and moving raw materials and finished products by rail and water.

Chattanooga's heavy industry not only had profound effects upon Chattanooga's economy, it also had a profound effect upon the environment. In 1969, Walter Cronkite announced that Chattanooga had the dirtiest air of any American city. To address the nation's worst air pollution, the community chose a course of local cooperation rather than regulatory confrontation, and organized a local air pollution control bureau to find solutions – a year before EPA came into existence. Within three years, the newly formed federal agency recognized Chattanooga as a national model for dramatically improving air quality and grandfathered the city's locally-formed air pollution control bureau into the network of air control authorities that was being established across the country.

Along with many manufacturing communities, Chattanooga's economy suffered during the 1970's and 1980's. As part of a broad effort to address these ills, the community established *Chattanooga Venture*, a non-profit organization charged with "turning talk into action." Venture solicited – and received – ideas for making Chattanooga a better place by the turn of the Century. Dubbed "Vision 2000", the series of public meetings drew thousands of people who welcomed the chance to dream together about the future rather than sit alone and grouse about the past. Citizens identified 41 separate objectives, ranging from improving human rights to recruiting amateur athletics, and each objective became a to-do for some group or organization. Notable among the successful initiatives was the Tennessee River Park, featuring a river walk that stretches nearly 20 miles along the banks of the Tennessee River, and the Tennessee Aquarium, the largest fresh water aquarium in the world.

Vision 2000 was the first of a continuing series of community engagement efforts that addressed redevelopment of areas of the City, efforts to improve recreational opportunities, and improvements to local education. The formula for engagement and cooperative action became

known as "the Chattanooga Way," and cities from all over the world sent delegations to learn how Chattanooga conducted its public process, which seeks to accomplish much through the participation of many. Beginning with EPB's evaluation of entry into the communications business, EPB has applied the "Chattanooga Way" to its development and operation of its advanced telecommunications network and services.

B. EPB's Path to Gigabit Fiber

EPB receives power from TVA at fourteen (14) delivery points and distributes it throughout its service area using a network of 119 substations and some 3,900 miles of electrical transmission and distribution lines. EPB's substations house switching equipment and large transformers. Distribution lines radiate out from each substation to transformers that reduce voltages further to levels useful for business and residential ratepayers. Meters at each residence or business measure each customer's use.

Traditionally, most of the elements of EPB's electric distribution network operated independently: Breakers would open in response to a local condition and would be manually reset; problems on the system would be called in by customers or found by EPB employees dispatched to patrol lines in areas suffering an outage; most switches were operated manually; customer meters were read manually each month. Some system conditions could be remotely monitored by EPB's system operators, but the monitoring depended upon radio systems and shared telephone lines with limited capacity and poor reliability.

By the mid-90's, EPB recognized the need to enhance its electric system by the addition of high-capacity, dedicated communications network. In 1996, EPB's Board adopted a resolution that set forth a series of findings concerning the need for EPB to begin developing a communications network with substantial excess capacity, so that it could meet future EPB

electric system needs and could be used to offer additional services to its customers.[33] The Resolution identified high-capacity fiber optic communications systems as the technology of choice for the EPB's communications infrastructure, approved an initial expenditure of $150,000 to evaluate options for the network development, and authorized management to evaluate possible partnerships with private communications companies. On the same day, EPB's Board adopted a second resolution that authorized the expenditure of an additional $350,000 for development of EPB's first fiber network segment, linking EPB distribution facilities in the downtown Chattanooga area.[34]

In September, 2009, fiber-based communications services were available to residential customers. In September, 2010, EPB became the first in the nation to offer Gigabit Internet service to all of its customers. By March, 2012, the Smart Grid was complete. Today, more than 60,000 EPB electric customers subscribe to EPB's voice, video programming, and Internet services. A detailed timeline for EPB's development and deployment of its gigabit fiber network is provided in Exhibit 5.[35]

C. Demonstrated Benefits of High Speed Internet

1. Electric System Customer Benefits

EPB's fiber network provides very large system reliability and financial benefits to EPB's electric system customers.

The Smart Grid that the fiber network made possible was projected to reduce electric power outages by 40%. During the two years since the final intelligent switches were installed on the Smart Grid in the spring of 2014, the reduction in power outages has approached 60%. Using

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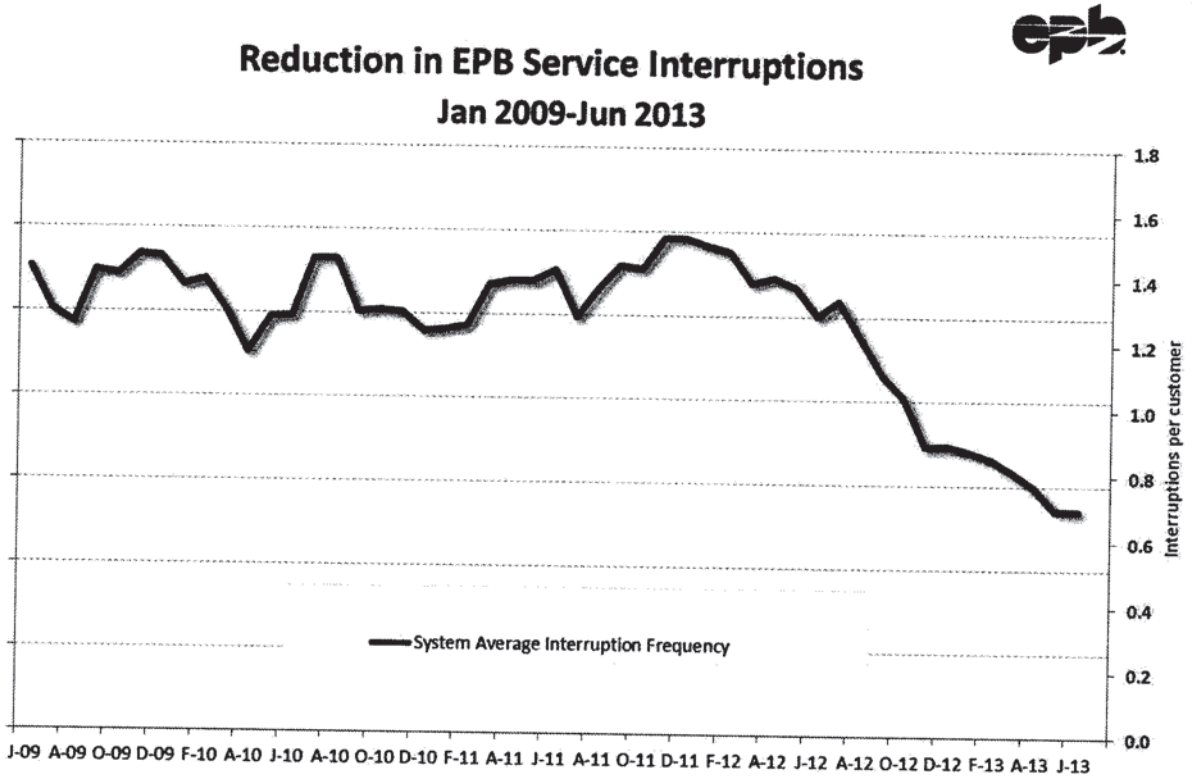
33 *See* EPB Board Resolution 96-08 (Apr. 29, 1996), provided as Exhibit 3.

34 *See* EPB Board Resolution 96-09 (Apr. 29, 1996), provided as Exhibit 4.

35 Timeline of EPB's Development and Deployment of Gigabit Fiber Network.

analytical methods established by DOE, EPB estimates that power interruptions historically have cost its customers $100 Million each year. Based upon this estimate, the Smart Grid is producing savings to EPB customers and to the community of nearly $60 Million per year.



EPB's Smart Grid had its first major test in July, 2012, when windstorms caused a major power interruption. Without EPB's Smart Grid, some 77,000 homes and businesses – nearly half of EPB's customers – would have lost power. Instead, dozens of automated switches – "IntelliRupters" – communicated with one another and isolated problems, automatically restoring power to more than 41,000 customers. The automatic restoration of power avoided 58 Million customer outage minutes and reduced restoration costs by $1.4 Million.

With EPB's Smart Grid in place, smaller-scale problems often result in nothing more than a flicker, as the Grid's intelligent switches instantly reroute power around the problem. That was the case for most of the customers affected by an outage in January, 2013 caused by a large tree

that fell across a high-voltage line. At 6:51:09 p.m., 11,258 customers lost power. The Smart Grid automatically opened and closed switches to reroute power, and by 6:51:37, 28 seconds later, it had restored service to 10,000 of the customers. By 6:51:52 p.m., 15 seconds after that, service had been automatically restored to another 800 customers. A dispatcher who had been alerted to the outage by the Smart Grid then was able to use the Grid to remotely operate equipment to restore the remaining customers. At 6:55:04 p.m., service was restored to an additional 289 customers. At 6:57:47, the dispatcher remotely operated switching equipment to restore service to all remaining customers. In slightly more than six (6) minutes, the problem had been isolated, and service had been restored to 11,258 customers.

The Smart Grid's almost instantaneous response would not be possible without the extremely low-latency fiber network interconnecting all of the Smart Grid's components.

Prior to the Smart Grid, manufacturing customers often spent large sums for backup power generation or the design and installation of an alternate power feed from another substation. The expense of these systems was justified because even a short outage could cost thousands of dollars in lost production and the time and effort required to reset and recalibrate machines. The Smart Grid provides all customers, manufacturing, commercial, and residential, with alternate power feeds at no additional cost.

Electric system customers are also benefitting from tens of millions of dollars in communications services revenue. EPB's communications operations pay for the use of the fiber network under allocation formulas approved by TVA.[36] In the fiscal year ending June 30, 2013,

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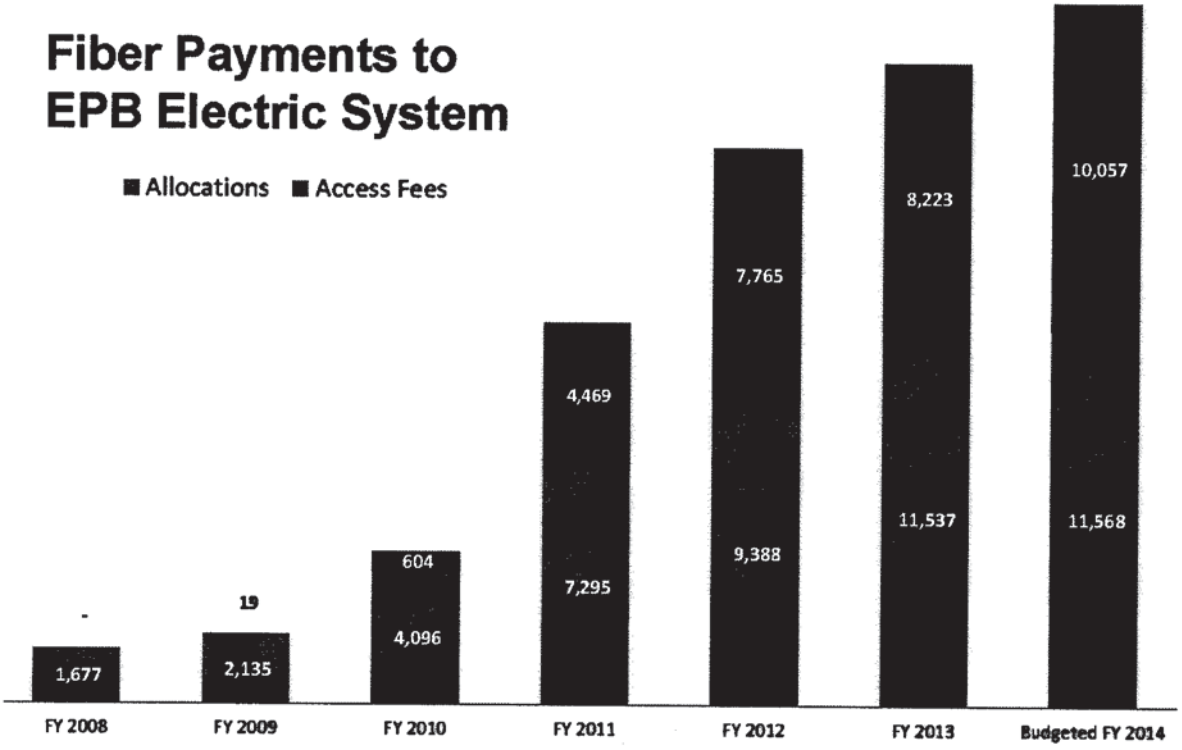
[36] EPB operates its communications services through a separate division from its electric system operations. *See* Tenn. Code Ann. § 7-52-402 (prohibiting electric system subsidies of telecommunications operations); Tenn. Code Ann. § 7-52-603(a)(1)(A) (prohibiting subsidies and requiring creation of a separate division for operation of Internet and video services). Consistent with both its wholesale power contract with TVA and Tennessee law, EPB

the electric system received nearly $20 Million in access fees and allocation payments from EPB's communications operations.



In addition to the payments that it made to EPB's electric system for access fees and allocated expenses, EPB's communications division had net income of more than $8.6 Million in fiscal year 2013. The access and allocation payments and the increasing net income have permitted EPB to avoid electric rate increases. Indeed, the economic benefits of EPB's fiber communications services were among the factors that led Standard and Poor's in 2012 to upgrade EPB's bond rating to AA+.[37]

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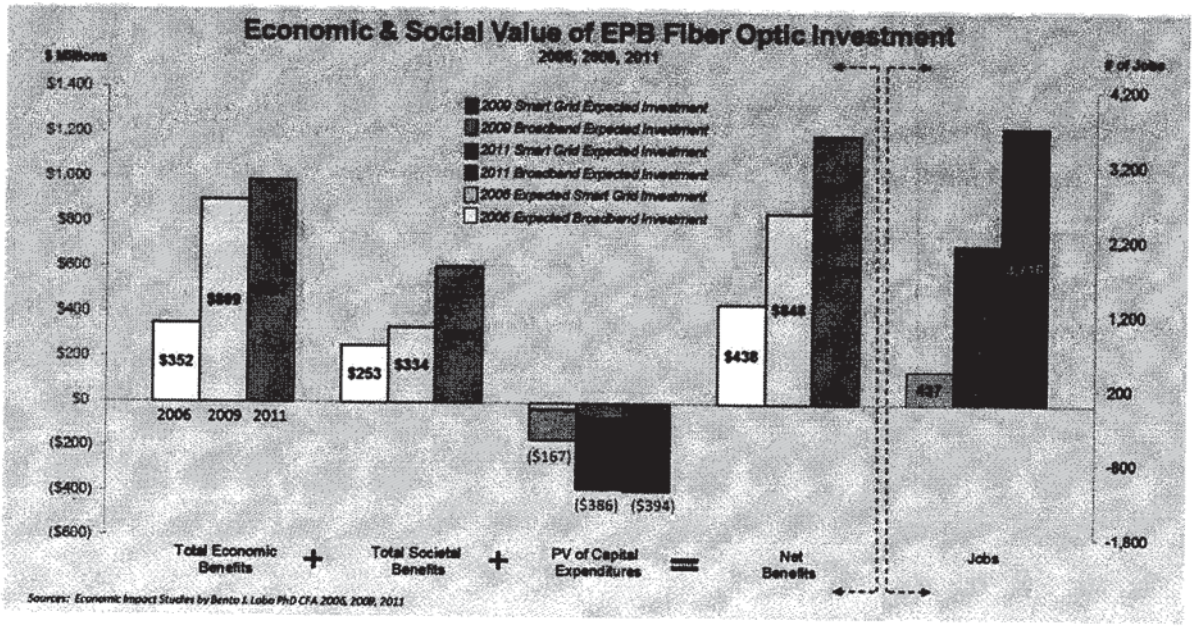
allocates the cost of shared facilities and expenses between its electric system division and its communications division. TVA has approved the allocation formula.

[37] October 10, 2012 Standard and Poor's Ratings Upgrade, provided as Exhibit 6.

2. Community Benefits

EPB has commissioned three (3) economic analyses of the impact of Smart Grid and broadband deployment in the EPB electric service area. Each of these studies, completed in 2006, 2009, and 2011, has projected the economic, social, and job-creation benefits over ten years from the Smart Grid and communications uses of EPB's fiber network.[38] Each of these studies has projected increased benefits as reflected in the graph below.[39]



Although decisions to relocate or expand businesses are never made based upon a single factor, the availability of Internet and other advanced communications capabilities are consistently ranked among the top five (5) issues considered by companies considering relocation or expansion to another community. This has certainly been the case is Chattanooga, where the

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38 *See* Lobo, Novobilski & Ghosh "The Impact of Broadband in Hamilton County, TN" (Mar. 20, 2006), provided as Exhibit 7; Lobo and Ghosh, "The Impact of Smart Grid Deployment in Hamilton County, Tennessee" (July 30, 2009), provided as Exhibit 8; Lobo, "The Economic and Social Value of EPB's Fiber Optic Infrastructure in Hamilton County" (Oct. 20, 2011), provided as Exhibit 9.

39 A larger scale copy of the graph is provided as Exhibit 10.

availability of the EPB fiber network, supporting the nation's fastest Internet and the Smart Grid, has been identified as a factor in the relocation and expansion of businesses to the Chattanooga area.

Chattanooga's Chamber of Commerce has identified more than 1,000 new jobs created since 2010 that have a direct connection to EPB's Gigabit fiber network and the entrepreneurial culture that has been catalyzed by the network.

CoLab, Chattanooga's non-profit entrepreneurial accelerator, is now in the midst of its third "GigTank" summer accelerator program. Each of the programs has focused on businesses that will use and benefit from extremely high-speed, low-latency fiber. This year eight startup companies are working in three areas: Additive Manufacturing/3D Printing; Healthcare; and Smart Grid.[40] CoLab offers two other multi-week accelerator programs each year and other programs ranging from early-stage entrepreneur training through its CoStarters program to multiple 48-Hour launch events each year. Other entrepreneurial initiatives include:

- The Chattanooga Renaissance Fund, which has raised more than $10 Million in two successful rounds to support innovators at all stages;
- The Lamp Post Group, which is investing in, supporting, and growing multiple startups in 31,000 square feet of shared office space;
- Blank Slate Ventures, which invests in early stage startups;
- Spartan Systems, a software and web development company based in Maryland, which is rolling out startups in Chattanooga;
- The JumpFund, a women-owned venture fund that focuses its investments on women-owned or managed companies;

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[40] For a description of the companies participating in this year's GigTank, see http://www.thegigcity.com/fullpanel/uploads/files/gigtank-2014-startup-teams-00003.pdf.

- SwiftWing Ventures, a new venture capital firm that will provide investments, space, and technology support for more advanced startups.
- The INCubator, run by the Chamber of Commerce, which houses more than 70 businesses with 300 employees;
- The non-profit Enterprise Center, which is focusing on leveraging the Gigabit fiber infrastructure for economic development, creating a formally-designated innovation district, and improving digital inclusion;
- The Mozilla Foundation, which is focusing upon Gigabit applications in Chattanooga and Kansas City. Mozilla has just announced its second round of funding for applications to be deployed and demonstrated in the two cities.

Chattanooga's Public Library has emerged as a center for technology education, experimentation, and engagement. The Public Library's "4th Floor" is a 14,000 square foot maker space containing computers, 3-D printers, and workspaces with Gigabit connections. While students learn coding and how to control robots, entrepreneurs refine their ideas, and patrons use 3-D printers to create objects they have designed at home or on one of the Library's workstations. The Mozilla Foundation just awarded The Public Library a grant for creation of an enhanced Gigabit Lab on the 4th Floor. The Public Library's innovations have drawn the attention of cities and libraries from around the world. The New York Public Library recently announced that it is looking to Chattanooga's Public Library as a model for renovation of its library facilities with high-tech, collaborative spaces.[41]

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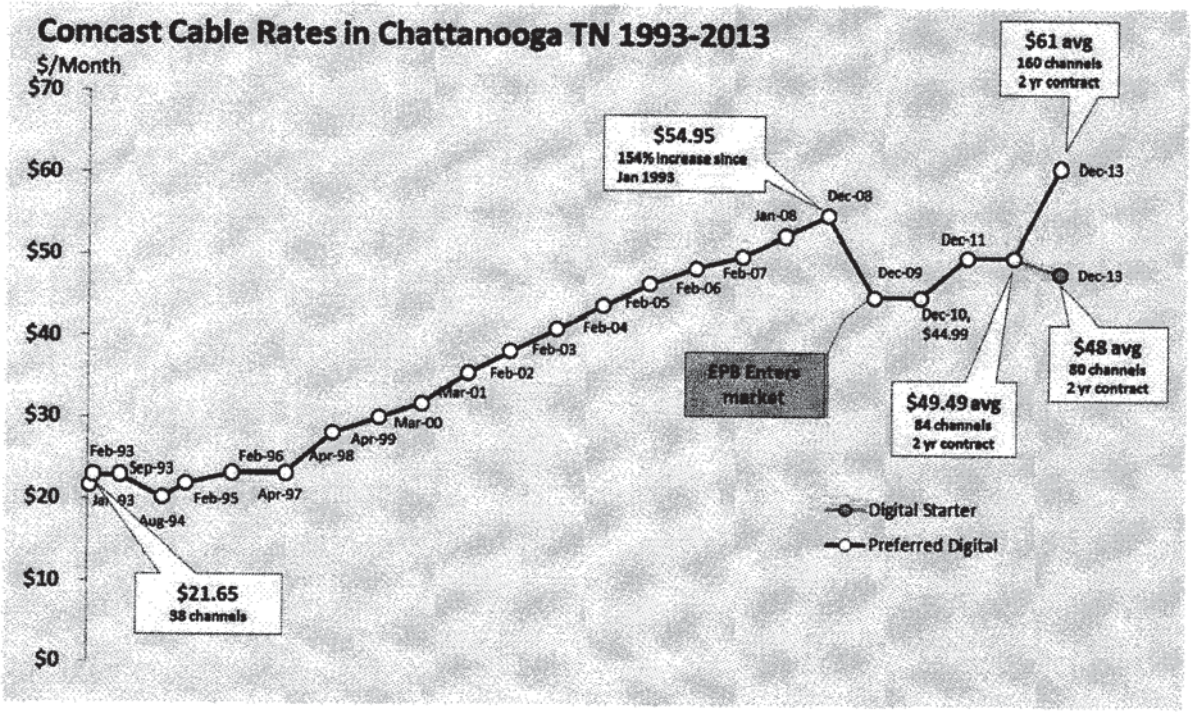
[41] *See* Jennifer Maloney, *New York Public Library Looks at Innovative Models for Renovation*, Wall St. J., June 29, 2014, http://online.wsj.com/news/article_email/new-york-public-library-looks-at-innovative-models-for-renovation-1404090627-lMyQjAxMTA0MDEwMDExNDAyWj?cb=logged0.6632026234758179 .

3. Internet and Video Customer Benefit

Customers of both EPB and Comcast, the incumbent cable operator, have benefitted from EPB's introduction of competition into the Internet and video programming market. Comcast regularly raised its cable TV rates every year until EPB entered the market, increasing its cable TV rates by 154% between 1993 and December, 2008. After EPB entered the market, Comcast halted its annual rate increases, and actually reduced its rates. In 2013, Comcast restructured its services into two tiers, lowering the price of an 80-channel tier, while increasing the price of a new, 160-channel tier. The following graph tracks the impact of EPB's competition on Comcast cable TV rates:[42]



In spite of Comcast's pricing strategies and aggressive marketing, EPB has continued to increase its market share and now serves more than 60,000 video customers.

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42 A larger scale copy of this graph is provided as Exhibit 11.

The competition also has extended to Internet speeds. In 2008, Comcast offered residential Internet download speed tiers of 0.77 Mbps, 6 Mbps, and 8 Mbps.[43] When EPB entered the market in 2009 with symmetrical speeds of 15 to 100 Mbps, Comcast increased its speeds in the top two tiers to download speeds of 12 Mbps and 22 Mbps, respectively. By 2013, Comcast had increased its download speed offerings to 3 Mbps, 25 Mbps, and 105 Mbps. In the meantime, EPB increased its minimum symmetrical speeds first to 30 Mbps, then to 50 Mbps, and then to 100 Mbps.[44] EPB's currently offers residential customers a choice between 100 Mbps or, for $12.00 a month more, 1,000 Mbps.

Key advantages of EPB's fiber network are its symmetrical capacity, its low latency, and its consistent reliability. EPB does not limit its Internet customers through design or through the application of operational caps or limits. EPB's open, symmetrical network has provided the opportunity to observe how consumers react to Internet without limits. Incumbents have argued that upload speeds are unimportant because there is supposedly little demand for upload traffic. To the contrary, EPB has observed that when users have access to an open, symmetrical, and practically unlimited Internet, uploaded traffic averages about 45% of download traffic. The following graphs show inbound and outbound traffic over a recent one-week period.[45]

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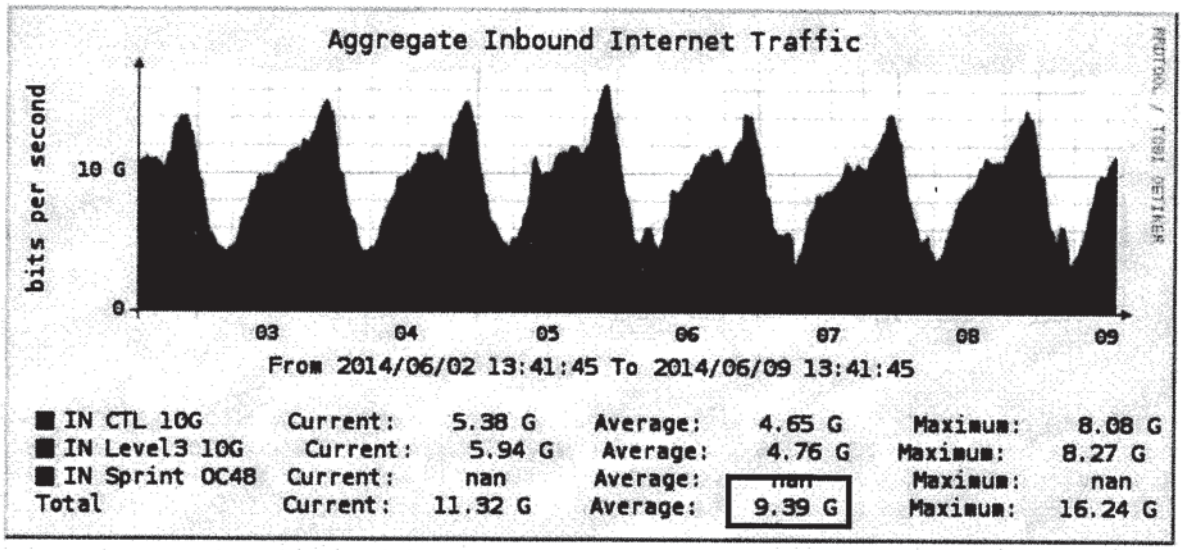
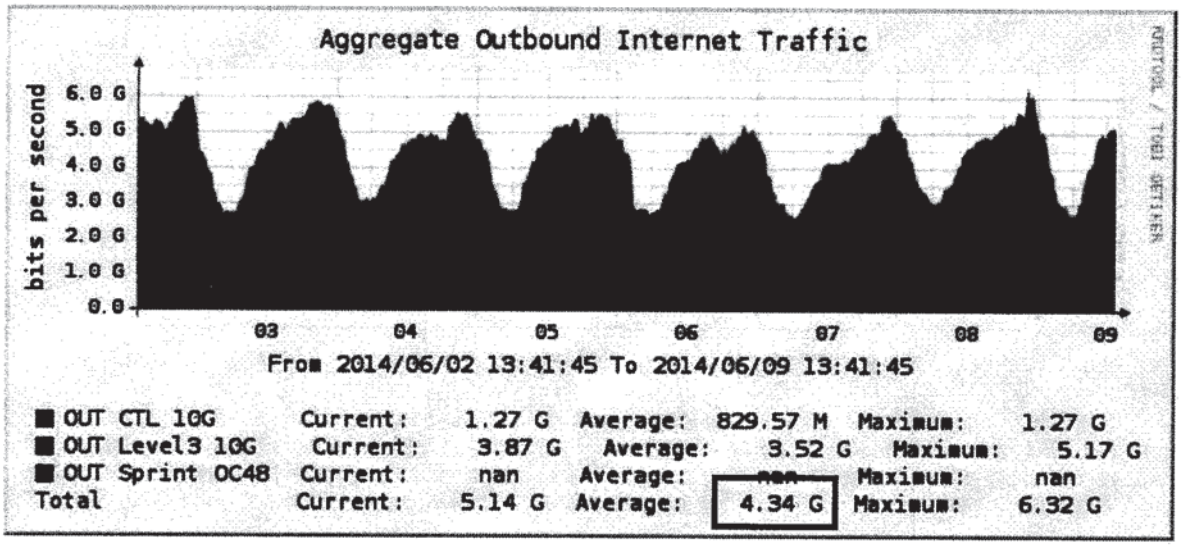
[43] Comcast's service is asymmetrical, with slower upload speeds.

[44] Each of the increases by EPB in its minimum Internet speed, from 15 Mbps to 30 Mbps, from 30 Mbps to 50 Mbps, and from 50 Mbps to 100 Mbps was made without any increase in price.

[45] A larger scale copy of the Internet traffic graphs is attached as Exhibit 12.





D. Organization of EPB

The City of Chattanooga is a chartered municipal corporation. After the City adopted municipal home rule in 1972, the General Assembly could no longer pass local legislation

affecting Chattanooga, but can only act with respect to the City by laws that are general in terms and effect.[46]

The Electric Power Board of Chattanooga, EPB, was created as an independent board of the City of Chattanooga in 1935 by a private act of the Tennessee General Assembly that amended Chattanooga's charter. *See* 1935 Tenn. Priv. Acts, ch. 455 (the "Enabling Act").[47] EPB has responsibility for acquiring and operating electric plant facilities and for selling electric current, both within and without the City limits, to be used for light, heat, power or any other purpose.[48]

The same year that the Tennessee legislature enacted the Enabling Act, it also enacted the Municipal Electric Plant Law of 1935, now codified as amended over the years at Tenn. Code Ann. §§ 7-52-101, *et seq*. The Electric Plant Law provided an optional method for establishing municipal electric systems for municipalities that were not authorized to do so by private act. The Electric Plant Law also addresses the powers and authority of municipal electric systems, many of which are the same regardless of whether a municipal electric system was organized under the Municipal Electric Plant Law or under a private act.[49] Among these generally applicable powers

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[46] The election of municipal home rule is authorized by Article XI, § 9 of the Tennessee Constitution. Chattanooga voters approved the adoption of home rule in November, 1972. *See* note to Title 1 of the Chattanooga City Charter, *available at* http://www.chattanooga.gov/city-council-files/CityCharter/Title%2001.pdf.

[47] The 1935 Private Act, as subsequently amended by private act and the home rule referendum, is codified in Title 10 of the Chattanooga City Charter. A copy of Title 10 is provided as Exhibit 13, and it is available at http://www.chattanooga.gov/city-council-files/CityCharter/Title%2010.pdf.

[48] *See* 1935 Tenn. Priv. Acts, ch. 455, §§ 2, 7, 11-12; Chattanooga City Charter §§ 10.1, 10.22, 10.30, 10.31, *available at* http://www.chattanooga.gov/city-council-files/CityCharter/Title%2010.pdf.

[49] *See Nashville Elec. Serv. v. Luna*, 204 S.W.2d 529, 532-33 (Tenn. 1947) (holding that Tenn. Code Ann. §§ 7-52-101, *et seq.*, provides an optional statutory scheme for the

are the grants of authority for all municipal electric systems, however organized, to provide telecommunications, Internet, and video services.[50] The General Assembly specified that the grants of authority contained in Tenn. Code Ann. §§ 7-52-401, *et seq.*, to provide telecommunication services, and in §§ 7-52-601, *et seq.*, to provide Internet and video services, supersede any conflicting provisions of general law, private acts, or municipal charters.[51]

EPB is governed by a five-person board, the members of which serve staggered five-year terms. The City of Chattanooga appoints the members of the Electric Power Board and must approve issuance of bonds, but it otherwise has limited authority over the operations of EPB.[52] Tenn. Code Ann. § 7-52-602 provides a notable exception, requiring approval by a two-thirds majority vote of the municipality's legislative body before a municipal electric system can provide Internet and video services. In contrast, no such super-majority vote of the municipal legislative body is required before a municipal electric system can seek authority from the Tennessee Regulatory Authority to offer telecommunications services.[53]

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operation of municipal electric plants, and recognizing that many municipalities operate electric plants under special or private acts).

[50] Tenn. Code Ann. § 7-52-401, *et seq.* (granting telecommunications authority and referring to every municipality operating an electric plant, "whether pursuant to this chapter, any other public or private act or the provisions of the charter"); § 7-52-601, *et seq.* (granting Internet and video authority and cross referencing the description of authorized municipalities found in § 7-52-401).

[51] *See* Tenn. Code Ann. §§ 7-52-407; 7-52-608.

[52] The City of Chattanooga is a party, along with EPB, to the wholesale power contract with the Tennessee Valley Authority, under which EPB purchases all of its electric power requirements. The TVA wholesale power contract imposes certain restrictions on EPB and the City, including the requirement that electric system revenue be used only for electric system purposes and limiting payments by EPB to the City to tax equivalent payments calculated under specified formulas.

[53] Tenn. Code Ann. § 7-52-401.

E. Scope of EPB's authority to provide telecommunications, Internet, and video services and the geographic restrictions in Section 601

The authority for Tennessee municipal electric systems, including EPB, to own and operate telecommunications systems is found in Chapter 531, Public Acts of 1997, codified as Tenn. Code Ann. §§ 7-52-401, *et seq.* The basic authority granted by that Chapter is described in the first sentence of Section 401, key language of which is highlighted:

> ***Every municipality operating an electric plant***, whether pursuant to this chapter, any other public or private act or the provisions of the charter of the municipality, county or metropolitan government, ***has the power and is authorized, on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant,*** to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant or equipment ***for the provision of telephone, telegraph, telecommunications services,*** or any other like system, plant, or equipment ***within or without the corporate or county limits of such municipality, and, with the consent of such other municipality, within the corporate or county limits of any other municipality, in compliance with title 65, chapters 4 and 5, and all other applicable state and federal laws, rules and regulations.***[54]

Section 401 does not grant municipal electric systems authority to own and operate systems to provide Internet access or video services.[55] Authority for municipal electric systems to provide Internet and video services is provided in the later-enacted Tenn. Code Ann. § 7-52-601,

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[54] Pursuant to Section 401, EPB has a Certificate of Convenience and Necessity (CCN) from the Tennessee Regulatory Authority to provide telecommunications services statewide. *See* Exhibit 14. EPB also operates in three counties in Georgia and has obtained a CCN for its telecommunications operations in its electric service area within Georgia. *See* Exhibit 15. EPB has not sought a statewide CCN for telecommunications services in Georgia.

[55] As introduced, Tennessee House Bill 1427 and Senate Bill 1064, the bills that became Section 401, granted authority to provide "voice, data, and video transmissions; surveillance; CATV; Internet services, loan[sic] control; meter reading; appliance monitoring; power exchange; securing[sic] monitoring; alarm and other monitoring services; billing and financial services; or any other telecommunications service(s) that may be provided, including servicing and repairing related equipment." Later amendments narrowed the authority granted by Section 401 to "telephone, telegraph, telecommunications services or any other like system, plant or equipment . . . ."

et seq.[56] Although the language and structure of Section 601 is similar to Section 401, Section 601 contains a territorial limitation that is not present in Section 401:

> Each municipality operating an electric plant described in § 7-52-401 ***has the power and is authorized within its service area, under this part and on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant***, sometimes referred to as "governing board" in this part, to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant, or equipment for the provision of ***cable service, two-way video transmission, video programming, Internet services***, or any other like system, plant, or equipment ***within or without the corporate or county limits of such municipality, and, with the consent of such other municipality, within the corporate or county limits of any other municipality.***[57]

The effect of the four words "within its service area" is to bar municipal electric systems from offering Internet and video services in Tennessee beyond the areas of their respective electric service territories.[58] The General Assembly has only permitted municipal electric systems to offer Internet and video services beyond their electric service territories in connection with two (2) "pilot projects" authorized by Section 601(e).[59] Even in the "pilot projects", the services were not permitted beyond the county in which the electric system was principally located. Predictably, "pilot projects" were not an effective way to evaluate capital intensive communications services.

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[56] Enacted as 1999 Tenn. Pub. Acts, ch. 481.

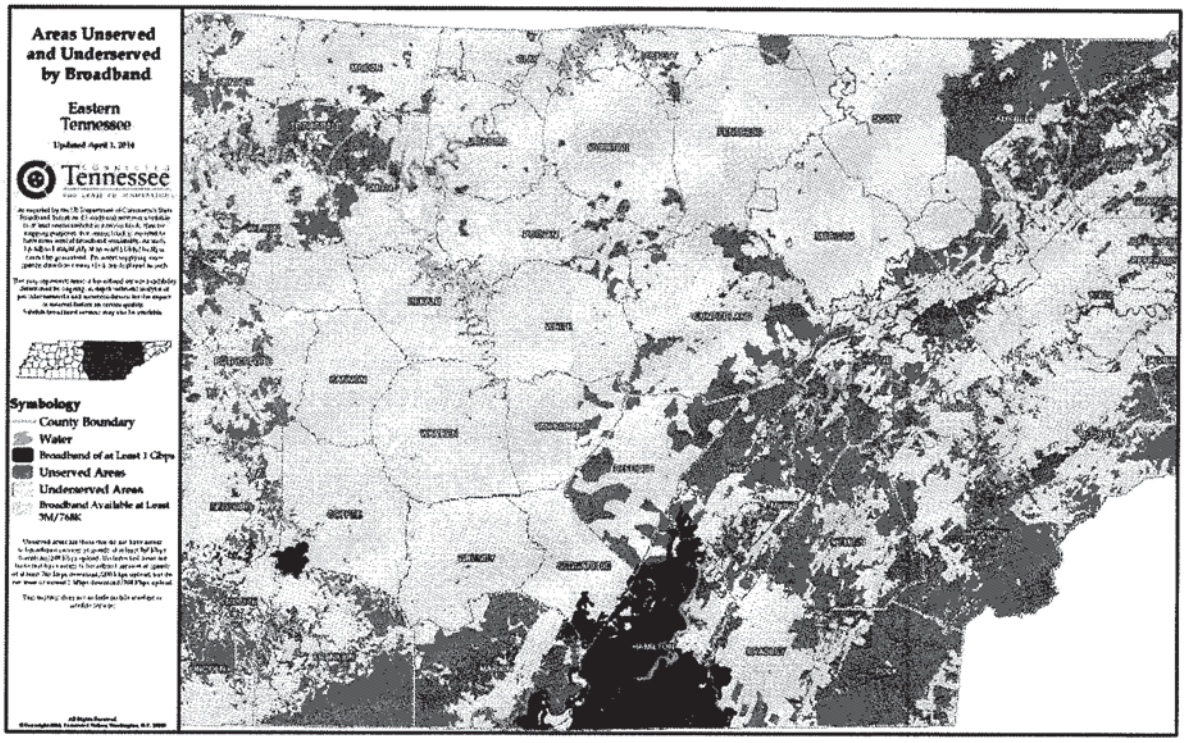
[57] Tenn. Code Ann. § 7-52-601 (first sentence) (emphasis supplied).

[58] Section 601 also contains two other restrictions on the authority of a municipal electric system to provide Internet and video services. First, Section 601(c) prevents a municipal system from providing Internet and video services in an area served by a private cable television operator with 6,000 or fewer subscribers. Second, while Section 601(d) prevents a municipal system from providing such service in an area in which a telephone cooperative has been providing cable service for not less than 10 years "under the authority of the federal communications commission." Tenn. Code Ann. § 7-52-601(c) and (d). EPB is not affected by these restrictions and is not seeking Commission action with respect to these provisions.

[59] Tenn. Code Ann. § 7-52-601(e). Originally, this section permitted only a single "pilot project," but it was amended in 2004 to permit a second one.

Since 1999, several bills have been introduced to modify territorial or other limitations applicable to municipal electric systems that provide Internet and video services. None of the bills has been enacted.[60]

Although residents in EPB's electric service area enjoy access to the fastest Internet service in the nation, many of their neighbors do not. Connected Tennessee confirms that large areas surrounding EPB are in a digital desert, as reflected in a map that Connected Tennessee created to show unserved and underserved areas surrounding EPB's electric service territory.[61]



[60] See Exhibit 16. Their procedural history also may be viewed at http://www.capitol.tn.gov/legislation/archives.html. The Tennessee General Assembly, did, however, enact a temporary moratorium on new municipal Internet and video business plans in 2005. Under 2005 Tenn. Pub. Acts, ch. 362, the General Assembly placed a moratorium on further authorization by the Comptroller of additional municipal video and Internet systems until February 1, 2006, pending the release of a report from the Comptroller's office evaluating the existing municipal Internet and video operations.

[61] An larger version of this map is provided as Exhibit 1.

On this map, EPB's service area is shown in the bottom center in black, and residents of this area have access to Internet speeds of 1 Gigabit for both downloads and uploads. Residents of "Unserved" areas (in orange) do not have access to Internet speeds of at least 768 Kbps down and 200 Kbps up. Residents of "Underserved" areas (in yellow) have access to Internet speeds from 768 Kbps downstream/200 Kbps upstream to, but not including, 3 Mbps downstream/768 Kbps upstream. Thus, neither "Unserved" nor "Underserved" areas have access to the Internet at minimum speeds the Commission considers to be "broadband" for the purposes of Section 706.[62] In the areas (in tan) the available download speeds are generally less than 10 Mbps.

Recognizing the quality and value of the Internet and video programming services that EPB provides, neighboring communities, residents, and businesses located outside of EPB's electric service territory have asked EPB many times to extend Internet and video services to serve them. One recent example illustrates the harm to consumers located in the digital desert created by the territorial restrictions contained in Section 601: A large, Chattanooga-based non-profit has multiple locations both inside and outside EPB's electric service territory. When this non-profit decided to upgrade its phone facilities, it chose a system from EPB using voice over Internet protocol ("VOIP"). Inside its electric service territory EPB is providing the non-profit Internet capacity, for voice-only use, of 30 Mbps to 50 Mbps, depending upon the number of lines at each location, for a charge of $500 per month.[63] To provide VOIP connections to four locations outside EPB's electric service territory, EPB had to buy Internet transport from a competitor with a speed of 4 Mbps at a cost of $7,000 per month. The competitor is able to

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

[63] EPB also provides the non-profit, at its locations within the EPB electric service territory, Internet service at 100 Mbps.

charge such high prices for such limited service because it faces no competition due to the territorial restrictions imposed upon EPB.

EPB is authorized to provide telecommunications services anywhere in the state. Accordingly, it would have been *technically* possible for EPB to extend fiber to each of the non-profit's four locations outside EPB's electric service territory and to use the fiber to provide Internet access for the limited purpose of delivering telecommunications services to the four locations. Such a course would, however, be *economically* infeasible since EPB could not also use the same fiber as part of a network for delivery of Internet and video services to others within those communities.

F. Efforts of Incumbents and Other Market Participants to Block Competition

Incumbent and other competitive providers and their trade organizations have repeatedly sought to block competition by EPB in the delivery of Internet and video services. Tenn. Code Ann. § 7-52-602 requires municipal utilities seeking to offer Internet and video services to go through an extensive, multi-step process of approvals. EPB complied with each required step, and at each step, EPB was met with resistance and intense lobbying from incumbents to halt the competition that EPB's fiber system would offer. After years of extensive study of the communications market and available technologies, EPB wrote a business plan to provide video and Internet services. The plan was approved by EPB's board of directors on August 17, 2007. EPB submitted its business plan to the State Comptroller for a feasibility review. After the Comptroller provided a written analysis of the feasibility of EPB's business plan, EPB then conducted public hearings. In September, 2007, Chattanooga's City Council unanimously approved EPB's plan to begin offering video and Internet services.

On September 21, 2007, as EPB was preparing to issue the $220 Million in revenue bonds called for in its business plan to finance the fiber network to be used for EPB's Smart Grid and for its communication services, the Tennessee Cable and Telecommunications Association ("TCTA")[64] sued EPB in Nashville seeking to enjoin it from proceeding with financing and construction of its fiber network.[65] The suit was dismissed on April 14, 2008. The dismissal was subsequently affirmed by the Tennessee Court of Appeals.[66]

Eight (8) days after the Nashville TCTA lawsuit was dismissed and one (1) day before the underwriters issued their final offering statement for the EPB revenue bonds, Comcast filed a second suit in Chattanooga. In spite of the efforts of Comcast and its trade association to interfere, EPB successfully completed its planned bond offering. The Comcast complaint was dismissed on July 11, 2008. The dismissal was subsequently affirmed by the Tennessee Court of Appeals.[67] EPB's successful defense of both lawsuits cost it nearly half a million dollars in legal fees.

The TCTA and Comcast lawsuits followed earlier efforts to block entry by EPB into the telecommunications market. On October 21, 1997, EPB filed its petition with the Tennessee Regulatory Authority ("TRA") seeking a certificate of convenience and necessity ("CCN") permitting it to provide telecommunication services as a competitive local exchange company ("CLEC") in six (6) counties in which it supplied electric service. EPB's petition was opposed by

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[64] As reported in the complaint, Comcast was a member of TCTA who would allegedly be harmed by EPB's competitive offer of Internet and video programming.

[65] *Tennessee Cable Telecomms. Assoc. v. Electric Power Bd.*, No. 07-2145-III (Davidson County Chancery Ct. 2007). Exhibit 17 is a copy of the TCTA complaint.

[66] *Tennessee Cable Telecomms. Assoc. v. Electric Power Bd.*, No. M2008-01692-COA-R3-CV, 2009 WL 2632760 (Tenn. Ct. App. Aug. 26, 2009).

[67] *Comcast of the South v. Electric Power Bd.*, No. E2008-01788-COA-R3-CV, 2009 WL 1328336 (Tenn. Ct. App. May 13, 2009).

the TCTA, representing incumbent cable TV companies, and by nearly a half-dozen incumbent and competitive local exchange carriers.[68] The TRA did not grant EPB the requested authority until May, 1999, nearly two years later. Even then, EPB was forced to negotiate and accept a broad range of conditions that placed further restrictions on EPB – restrictions that have not been applied to privately-owned telecommunications providers.[69]

The special conditions to the TRA's grant of EPB's CCN served as the basis for a remarkable effort by a competing telecommunications supplier to prohibit EPB *from using its own name* in connection with its telecommunications services. US LEC contended that EPB had built a very good reputation and that EPB's telecommunications operation was being subsidized by the use of EPB's own name. US LEC argued that the EPB Telecom should be required to change its name to something that would not connect it to EPB. Both the TRA and the Tennessee Court of Appeals rejected US LEC's position in litigation that extended for nearly four (4) years.[70]

IV. LEGAL ARGUMENTS

A. The Commission Has the Authority to Remove Barriers to Public Broadband Investment and to Promote Competition in Local Broadband Markets

Under Section 706 of the Telecommunications Act of 1996, the Commission has a broad mandate from Congress to encourage the deployment of advanced telecommunications

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[68] *See In Re: Application of Electric Power Board of Chattanooga For a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Service*, Tenn. Reg. Auth. Docket No. 97-7488. Filings in the Docket are available at http://www.state.tn.us/tra/dockets/9707488.htm.

[69] *See* May 10, 199 Order at note 2, Tenn. Reg. Auth. Docket No. 97-07488, *available at* http://www.state.tn.us/tra/orders/1999/9707488am.pdf. Similar conditions were subsequently required for other municipal electric systems that sought authority to enter the telecommunications market.

[70] *See US LEC of Tenn., Inc. v. Tennessee Reg. Auth.*, 2006 WL 1005134 (Tenn. Ct. App. 2006).

capabilities by removing barriers to infrastructure investment and by promoting competition in local markets.

In fact, Congress has vested the Commission with the responsibility to make an annual inquiry into "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion."[71] If the Commission determines that these capabilities are not being so deployed, then Congress has mandated that that the Commission "*shall take immediate action* to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[72]

In Section 706(a), Congress granted the Commission specific authorities to accomplish these objectives, including "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[73] As the Commission has previously recognized, through this statutory language, "Congress necessarily invested the Commission with the statutory authority to carry out those acts" necessary to "encourage the deployment on a reasonable and

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[71] 47 U.S.C. § 1302(b) (as amended by the Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4096).

[72] *See id.* (emphasis added); *see also Verizon Corp. v. Federal Communications Commission,* 740 F.3d 623 (D.C. Cir. 2014) (holding that Section 706(a) is an independent congressional mandate to the Commission to encourage reasonable and timely deployment of advanced telecommunications capabilities to all Americans, using all available "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.").

[73] *See* 47 U.S.C. § 1302(a). In full, Section 706(a) states: "In general. The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

timely basis of advanced telecommunications capability to all Americans."[74] Moreover, the Commission has found that Section 706(b) is a separate and independent grant of authority to take immediate action to strike down barriers to broadband investment or competition.[75] Both the Tenth and D.C. Circuits have recently affirmed these Commission findings.[76]

Significantly, one of the "methods" that the Commission can use to remove barriers to infrastructure investment is preemption. As an initial matter, it is well-settled that "[f]ederal regulations have no less pre-emptive effect than federal statutes."[77] As such, federal administrative agencies, including the Commission, can preempt state law when acting within the scope of their congressionally delegated authority.[78]

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[74] *See In the Matter of Preserving the Open Internet Broadband Indus. Practices*, 25 FCC Rcd. 17905, 17969, 2010 WL 5281676, *34 (rel. Dec. 23, 2010).

[75] In full, Section 706(b) states: "Inquiry. The Commission shall, within 30 months after the date of enactment of this Act, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

[76] *See Direct Commc'ns Cedar Valley, LLC v. Federal Communications Commission*, 2014 WL 2142106, *20 (10th Cir. May 23, 2014) ("As the FCC concluded in the Order, section 706(b) thus appears to operate as an independent grant of authority to the FCC 'to take steps necessary to fulfill Congress's broadband deployment objectives,' and 'it is hard to see what additional work section 706(b) does if it is not an independent source of authority.'"); *Verizon*, 740 F.3d at 640 (discussing Section 706(a)) and 641 (discussing Section 706(b)).

[77] *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

[78] *See, e.g., Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 369 (1986) ("Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.").

The "critical question" in a preemption analysis is "whether Congress intended that federal regulation supersede state law."[79] In this case, congressional intent that Section 706 supersede state action is evidenced in three respects. First, Congress's use of broad statutory language in Section 706(a) permitting the FCC to use "other regulating methods that remove barriers to infrastructure investment"[80] clearly expresses its intent that federal regulation supersede any contrary regulation – indeed, the only limitation on this authority is that the Commission's actions be "consistent with the public interest, convenience, and necessity."[81] The preemptive language in Section 706(b) is even more emphatic and sweeping, directing the Commission to "take immediate action" to remove barriers to broadband deployment and to promote competition if and when it determines that such deployment is not occurring in a "reasonable and timely" manner.

Second, Congress did not convey these broad powers in the abstract. Rather, it did so as part of a mandate to the Commission to take affirmative steps to regularly investigate, identify, and remove barriers to infrastructure investment and competition.[82] This mandate is not merely aspirational to be accomplished at some generalized point in the future. Instead, Congress intended that the Commission's mandate be accomplished "immediately." Given this immediacy, Congress would not have intended that implicit limitations be read into the broad statutory language chosen. As the Tenth Circuit recently recognized, Section 706(b) "appears to operate as an independent grant of authority to the FCC 'to take steps necessary to fulfill Congress's

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79 *See id.* at 369.

80 *See* 47 U.S.C. § 1302(a).

81 *See id.*

82 *See* 47 U.S.C. § 1302(b) (providing that "the Commission "*shall take immediate action* to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." (emphasis added)).

broadband deployment objectives.'" In fact, the Court agreed with the Commission that "it is hard to see what additional work section 706(b) does if it is not an independent source of authority.[83]

Finally, if any question existed as to Congressional intent to confer preemptive authority, the Commission would need look no further than the House Conference Report accompanying the Telecommunications Act of 1996. In this Report, Congress *expressly* stated that the Commission has the authority to preempt state actions that, in the Commission's view, were not "ensur[ing] reasonable and timely access" to advanced telecommunications capability.[84]

Accordingly, the Commission has ample authority to remove barriers to public broadband investment and to promote competition in local broadband markets. As shown in the following sections, the Commission should exercise that authority here to remove the barrier to investment and competition present in Tenn. Code Ann. § 7-52-601.

B. The Commission Should Take Immediate Action to Remove the Barrier to Broadband Investment and Competition Posed By the Territorial Restriction in Tenn. Code Ann. § 7-52-601

The territorial restriction in Tenn. Code Ann. § 7-52-601 has the purpose and effect of precluding EPB from investing in broadband infrastructure and providing competition outside of its current electric service area. No doubt exists that this type of restriction is one that falls within the "barriers" to investment and competition that Congress has charged the Commission with

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[83] *Direct Communications Cedar Valley, LLC v. Federal Communications Commission*, 2014 WL 2142106, *20 (10th Cir. May 23, 2014).

[84] H.R. Conf. Rep. No. 104-458, 104th Cong, 2d Sess., 1996 U.S.C.C.A.N. 10, 224-225, 1996 WL 46795 (Jan. 31, 1996) ("Measures to be used include: price cap regulation, regulatory forbearance, and other methods that remove barriers and provide the proper incentives for infrastructure investment. The Commission may preempt State commissions if they fail to act to ensure reasonable and timely access.").

removing. For example, as Judge Laurence Silberman noted in his separate opinion in the *Verizon* case,

> An example of a paradigmatic barrier to infrastructure investment would be state laws that prohibit municipalities from creating their own broadband infrastructure to compete against private companies. *See* Klint Finley, *Why Your City Should Compete With Google's Super-Speed Internet*, WIRED, May 28, 2013, http://www.wired.com/wiredenterprise/2013/05/community-fiber/.[85]

In the absence of Section 601's restrictive language, EPB would have ample authority under Tennessee law to make such investments, where feasible, to respond to requests of surrounding communities to provide service in at least some areas that are unserved today, and to provide robust competition in other areas that are currently underserved. Based on EPB's experience in its current service area, its entry into new markets is likely to bring multiple significant benefits to the businesses, institutions, and residents of these areas. As discussed at length in Sections II and III above, these benefits include far better services, lower prices, and support for economic development, education, health care, energy efficiency, public safety and homeland security, environmental protection, and much more. For all of these reasons, the Commission should act to remove the barrier to investment and competition by preempting the restrictive language at issue.

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[85] *Verizon*, 740 F.3d at 660 & n.2 (Silberman, J., concurring in part, dissenting in part). Notably, the article that Judge Silberman cited praised EPB's fiber network "as a great example of what community broadband can do. The city rolled out its gigabit internet service to customers in 2010. But it didn't stop at the city limits. The service is available to the city's entire electrical footprint, which extends to some part of Georgia. They weren't just interested in serving the wealthy neighborhoods." *See* Klint Finley, *Why Your City Should Compete With Google's Super-Speed Internet*, WIRED (May 28, 2013) (quoting Christopher Mitchell, of the Institute for Local Self Reliance).

C. The Supreme Court's Decision in *Nixon v. Missouri Municipal League* Does Not Affect the Commission's Authority in this Matter

The Supreme Court's decision in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), provides no impediment to the Commission's exercise of authority under Section 706 to remove the barrier to broadband investment and competition posed by the territorial restriction in Tenn. Code Ann. § 7-52-601. The *Nixon* decision addressed the preemptive effect of 47 U.S.C. § 253 ("Section 253"),[86] which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." The issue before the Court was whether the phrase "any entity" covered "the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of such services."[87]

The *Nixon* Court ultimately affirmed the Commission's own finding that the phrase "any entity" did not include subdivisions of a state, and, consequently, did not give authority to the Commission to preempt state laws prohibiting municipalities from providing telecommunications services.

The Court's holding in *Nixon* does not, however, affect the Commission's authority to remove barriers to investment and competition under Section 706. As shown below, the *Nixon* decision addressed a separate section of the Telecommunications Act that differs from Section 706 in several fundamental ways that are highly relevant here. As a result, the Commission should find that *Nixon* does not govern this matter.

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86 Section 253 is part of Section 101(a) of the Telecommunications Act of 1996.

87 *Nixon*, 541 U.S. at 128-29.

The *Nixon* Court began its analysis by noting that "concentration on the writing on the page does not produce a persuasive answer here," because the term "any entity" can have different meanings in different context.[88] So, the Court continued,

> To get at Congress's understanding, what is needed is a broader frame of reference, and in this litigation it helps if we ask how Congress could have envisioned the preemption clause actually working if the Commission applied it at the municipal respondents' urging. We think that the strange and indeterminate results of using federal preemption to free public entities from state or local limitations is the key to understanding that Congress used "any entity" with a limited reference to any private entity when it cast the preemption net.[89]

The Court then posed three "hypotheticals" from which it concluded that federal preemption of state barriers to municipal provision of telecommunications services would, in fact, have such "strange and indeterminate results." At the end of its opinion, the Court discussed "a complementary principle [that] would bring us to the same conclusion" – that Section 253(a) did not provide the "clear statement" required by *Gregory v. Ashcroft*, 501 U.S. 452 (1991).[90] As shown below, the *Nixon* Court's analysis does not apply here.

1. The issues addressed in Section 706 differ fundamentally from those addressed in Section 253 such that the holding in *Nixon* does not apply here.

The Supreme Court's holding in *Nixon* is in applicable here for several reasons. As an initial matter, Section 253 applies solely to "telecommunication service," whereas Section 706 applies to advanced telecommunications capabilities necessary to support broadband access to the Internet. For more than a decade, the Commission and the Supreme Court have treated "telecommunications service" and broadband Internet access service (an "information service") as

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88 *Id.* at 132.

89 *Id.* at 132-33 (citation omitted).

90 *Id.* at 140-41.

completely separate and distinct services.[91] For this reason alone, the Commission could rule that *Nixon* does not govern this matter. More important, Congress was attempting to achieve fundamentally different purposes in enacting Sections 253 and 706.

By 1996, telecommunications services had long been ubiquitously available in the United States – in many places for more than a century. As a result, in enacting the Telecommunications Act, Congress had no need to ensure that all Americans would have reasonable and timely access to such services. Rather, in addressing telecommunications services in Section 253 and elsewhere in the Telecommunications Act, Congress focused on a different goal – spurring competition among providers of these services.[92]

While Congress also sought to stimulate competition among providers of broadband Internet access service, that was not its only goal, or even its most important one, in enacting 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

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[91] *See In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, 2002 WL 407567 (rel. Mar. 15, 2002) ("*Cable Modem Declaratory Ruling*"), *aff'd, Nat'l Cable & Telecom. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). For this reason alone, the *Nixon* decision is not binding on the Commission in this case.

[92] *See, e.g., First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd. 15499, 15506, ¶ 4, 1996 WL 452885, *2, ¶ 4 (rel. Aug. 8, 1996) ("[U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications – the local exchange and exchange access markets – to competition is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets. The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.").

telecommunications capability – is achieved."[93] The 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.'"[94] 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."[95] Likewise, in the National Broadband Plan, the Commission recognized that "Broadband is *the* great infrastructure challenge of the early 21st century."[96]

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.

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,

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

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

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

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

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.[97] 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

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[97] 47 U.S.C. § 1302(a).

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.[98]

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:

> 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,

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[98] 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).

> broadband communications system. And it was made possible by the municipally owned electric system.[99]

Later in the hearing, Senator Lott acknowledged the benefits of Glasgow's broadband communication system and promised to "make sure we have got the right language to accomplish what we wish accomplished here."[100] As Senate manager of the Telecommunications Act, Senator Lott's statement is entitled to substantial weight in interpreting the Act."[101] 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*. The *Nixon* Court found that Congress had not clearly intended to allow preemption under Section 253 for the benefit of municipal utilities, as "neither statutory structure nor

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99 *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).

100 *See id.* at 379, 1994 WL 232976.

101 *Lewis v. United States*, 445 U.S. 55, 63 (1980) ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight."); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute"); *Schwegmann Bros. v. Calvert Distillers Corp.*, 3441 U.S. 384, 394-95 (1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms."[102]

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.[103] This does not require that the legislation mention the power explicitly.[104] Rather, the intention need only "be plain to anyone reading the Act that it covers [that issue]."[105]

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 very similar to *City of Arlington v. Federal Communications Commission.*[106] In that case, federal law required states to act upon requests for permission to site wireless facilities "within a reasonable period of time after the request is duly filed." After the Commission interpreted this phrase to mean within 90 days or 150 days, depending on the type of request, some of the petitioners for review argued that the Commission had improperly injected itself into matters that were of "traditional state and local concern." The Supreme Court rejected this argument, holding that the case "ha[d] nothing to do with federalism." Rather, the Court found that Congress had already

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102 *Nixon*, 541 U.S. at 140-41.

103 *Gregory v. Ashcroft*, 501 U.S. 542, 467 (1991).

104 *See id.*

105 *See id.*

106 *City of Arlington v. Federal Communications Comm'n*, 133 S. Ct. 1863 (2013).

supplanted state authority on such issues and that the Commission's interpretation of the law was nothing more than "draw[ing] the line to which [the States] must hew."[107]

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 Section 706(b).

Second, this case does not involve "federal legislation threatening to trench on the States' arrangements for conducting their own governments."[108] Through its enactment of Tenn. Code Ann. §§ 7-52-401 and 7-52-601, the Tennessee General Assembly has allowed municipal utilities to provide the full range of communications services, including telecommunications services, broadband Internet access, video programming, and other advanced services. While the territorial restriction in Section 601 prohibits municipal utilities from providing broadband Internet access and video programming service outside their electric service territories, Section 401 allows municipal utilities to provide *telecommunications* services *anywhere in the state*.

This distinction is important, because the territorial restriction in Section 601 cannot be justified as necessary to prevent municipal utilities from burdening surrounding areas with their

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107 *See id.* at 1873.

108 *Nixon*, 541 U.S. at 140.

infrastructure, to protect municipal utilities from exceeding their areas of expertise, or even to protect the interests of taxpayers or utility customers. In fact, the facilities that would be used to provide broadband Internet access and video programming service outside a municipal utility's electric service area would be *the very same facilities* that they would use to provide authorized telecommunications services.

In short, the territorial restriction in Section 601 has nothing to do with "traditional" or "fundamental" State powers or, as the *Nixon* Court put it, with any State "arrangements for conducting their own governments." Rather, the restriction is a purely commercial measure intended to protect certain established providers of communications services from competition, even in extremely rural areas in which they are not currently providing – and may never provide – advanced telecommunications capabilities that meet the Commission's minimum standards. This is certainly not the government interest that *Gregory* and *Nixon* sought to protect, especially at the expense of the businesses, institutions, and residents in the unserved or underserved areas at issue 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 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 EPB's electric service territory, where residents are clamoring for the advanced telecommunications capabilities and gigabit services that EPB would provide them if the Commission removes the territorial restriction of Section 601.

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."[109] 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 EPB'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 territorial restriction in Section 601. Congress's grant of broad authority to define the relevant terms, standards, and remedial

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

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 Commission's hands in removing barriers to broadband investment and competition like the territorial restriction in Section 601.

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 601. 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.[110]

In sum, the language, purposes, structure, and legislative of Section 706 all confirm that Congress authorized the Commission to preempt State barriers to municipal broadband investment and competition, including the territorial restriction in Section 601.

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."[111] 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

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[110] 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).

[111] *Nixon*, 541 U.S. at 132.

broadband investment and competition, such as the territorial restriction in Section 601. Simply put, 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. If follows that resort 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 (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.'"[112]

V. CONCLUSION

For all of the foregoing reasons, the Commission should preempt and declare unenforceable the words "within its service area" in Tenn. Code Ann. § 7-52-601.

Respectfully Submitted,

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112 *Salinas*, 522 U.S. at 59-60 (quoting *Gregory*, 501 U.S. at 467).

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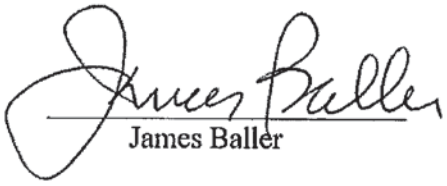
VERIFICATION

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, Harold DePriest, President and Chief Executive Officer of the Electric Power Board of Chattanooga, Tennessee, declare under penalty of perjury that the facts set forth in the foregoing petition are true and correct to the best of my knowledge and belief.

Executed this 22nd day of July, 2014.

Harold DePriest