IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOS. 15-3291 & 15-3555

THE STATE OF TENNESSEE,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION,

RESPONDENTS.

THE STATE OF NORTH CAROLINA,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF AN
ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

RESPONDENT'S APPENDIX

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

MATTHEW J. DUNNE
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

Table of Contents

Office of the Speaker
North Carolina House of Representatives
Raleigh, North Carolina 27601-1096

THOM TILLIS
Speaker

August 28, 2014

The Honorable Tom Wheeler
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

VIA ELECTRONIC SUBMISSION

Re: **City of Wilson Preemption Petition**
Docket No. 14-115

Dear Chairman Wheeler:

I am writing in response to the City of Wilson, North Carolina's petition that N.C. Gen. Stat. § 160A-340, *et seq.* be deemed to be preempted pursuant to the Telecommunications Act of 1996.

By now, you are more than familiar with the key components of North Carolina's "Level Playing Field Law." Critically, this law does not prohibit cities from competing with private business in offering broadband or other communication services. It does, however, contain multiple provisions that protect the residents of North Carolina municipalities – the very individuals who are ultimately on the hook for the costs of maintaining municipal communications systems. For example, it makes it unlawful for a municipality to subsidize the provision of communications services with funds from non-communications services which also happen to be offered by the municipality. This provision is aimed squarely at ensuring that the costs of the communications services are not borne by a broader class of citizens than those that actually benefit from or participate in the offering of those services. The law also provides that a municipality cannot price a communications service below the actual cost of providing that service. This serves several purposes, not the least of which is promoting sound business practice for any entity that plans to operate for more than a very brief period of time.

As a legislator, I supported the Level Playing Field Law because I sensed the need to protect citizens and taxpayers from poor local government financial decision making. The legislation enjoyed broad, bipartisan support and was extensively debated in the General Assembly before adoption. Notably, both I and my colleagues were all too familiar with some of our municipalities' experimentation with speculative proprietary endeavors. As representatives of the people, we felt bound to act to curb the ever growing list of examples where precarious investments ultimately left innocent taxpayers holding the bag.

The Level Playing Field Law reflects North Carolina's strong public policy of disfavoring local (and state) government competition with private industry. This express public policy is particularly strong in cases such as this one, where a single municipality's short term objectives may actually prove to be counterproductive to the state's interests as a whole. In my view, this is precisely the scenario that calls for statewide regulation.

Perhaps the most astounding result that would obtain from preemption of the Level Playing Field Law is that municipalities here – creatures of state statutes enacted by the General Assembly – would somehow be deemed to derive independent authority from the federal government to engage in inherently risky and politically controversial endeavors which threaten greater job creation and economic development across our state. To rule that the North Carolina General Assembly is powerless to prevent such a result brings Chief Justice John Roberts' warnings regarding the "growing power of the administrative state" to mind. What would be left of the well-established limits on local fiscal affairs that have been in our state's laws for decades?

I certainly recognize the value of ensuring that broadband services are widely available across North Carolina. I respectfully request, however, that decisions regarding how best to do that be left to North Carolina's elected officials, and that you reject the request to preempt North Carolina's laws.

Sincerely,

/s/ Thom R. Tillis

Thom R. Tillis
Speaker of the House

North Carolina General Assembly
House of Representatives
State Legislative Building
Raleigh, NC 27601-1096

REPRESENTATIVE MARILYN AVILA
40TH DISTRICT

August 29, 2014

Honorable Thomas E. Wheeler
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: FCC WCB Docket No. 14-115

Dear Chairman Wheeler:

As the prime sponsor of North Carolina's "Level Playing Field" law (House Bill 129, Session Law 2011-84), I am writing to voice my strong objection to any preemption by your commission of this law as requested by the City of Wilson.

North Carolina cities are creations of the state and, as such, their accountability is to the state. With this request for preemption for the City of Wilson, the issue has moved far beyond the policy question of municipal provision of broadband services to the governing question of who has the ultimate responsibility for the oversight of local governments.

As creatures of the legislature, cities in North Carolina only have authority that has been granted to them by statute. The assumed authority for municipal broadband came as a result of a 2005 North Carolina Court of Appeals decision in *Bell v. City of Laurinburg*, 168 N.C. App.75, 606 S.E.2d721 (2005) which ruled that a 1971 statute permitting cities to construct "cable television systems" could also be construed to authorize cities to build and operate basically any kind of wired system for any purpose.

Between 1971 and 2005 the world of cable had undergone tremendous technological advances and following the court's decision, the floodgates were opened for cities to provide telephone and broadband services, in addition to traditional video programming. Without a framework of legislative regulation, cities were free to compete against private industry without any rules to ensure fair competition with industry or, even more critical, to guarantee protections for taxpayers. It was with these issues in mind that the "Level Playing Field" bill was drafted.

With regards to fair competition, the constraints placed on the cities were intended to protect against inappropriate use by the government of its inherent advantages as a governmental body – for example, control and pricing of rights-of-way, exemption from laws and regulations applicable to private industry, and exemption from the payment of taxes.

The key protection for taxpayers was to require their vote before any debt could be issued by a city for construction of a communications system for the purpose of entering into competition with private entities. This requirement is consistent with state constitution's prohibition of the pledge of a city's faith and credit without a vote of the people, a requirement cities had purposefully avoided by issuing Certificates of Participation.

The "Level Playing Field" legislation was by no means punitive in that a number of allowances were made in addressing various issues. For example, all of the existing systems (including Wilson's) were grandfathered to exempt the cities from complying with the new provisions. In addition, the restrictions did not apply to cities with unserved areas (i.e., areas where 50% of the households do not have access to broadband) nor did they apply to a city's operation of a communication network for its own internal governmental purposes, including police, fire, rescue, smart grid services, and a city's provision of free services such as free wireless. The bill that became law was carefully negotiated, thoroughly discussed and debated over a number of years, and ultimately passed by wide bipartisan margins.

At its core, the law was a response to what members were seeing and hearing from their constituents and it reflected the members' desire to promote an environment in our state that promoted jobs and investment. Attached is an article ("North Carolina's Broadband Battle") that I prepared in 2011 that gives additional background on why the law was necessary what it does.

As a designated entity with delegated powers to serve the public in the state's stead, it is well within the scope of the state's authority to legislate how and under what conditions a city meets the needs of the citizens. In this regard, Wilson's petition raises numerous important questions about the extent of our state's legislative authority in relation to the federal government: is it the appropriate role of the Federal Communications Commission to sit in judgment of a state's exercise of regulatory authority over divisions of state government; what other statutes would the cities be able to challenge if they are dissatisfied with the enactments of the state legislature; who would regulate North Carolina cities if North Carolina's General Assembly cannot; if a state does not have sovereignty over its own internal governance what authority remains for states?

I urge you to keep these considerations in mind as you consider the City of Wilson's request.

Sincerely,

Marilyn W. Avila

Marilyn Avila
Member, N.C. House of Representatives

Case: 15-3291 Document: 57 Filed: 11/05/2015 Page: 7

North Carolina's Broadband Battle

BY REP. MARILYN AVILA (NC)

"I am not a Luddite."[1]

So began my opening remarks at a marathon negotiation session with stakeholders representing a number of North Carolina cities and members of the telecommunications industry to develop state policy regarding municipal broadband.

What had brought all of these interested parties to the table?

Court Decision Opens the Door to Governmental Competition

North Carolina has a law call the *Umstead Act* that prevents the state from going into competition with private business, but that law does not apply to cities. Nonetheless, cities in our state are creatures of the legislature—they only have the authority granted to them by statute. So, in theory, at least, they would not be permitted to compete unless the statutes permitted that.

The statutes permit cities to construct "cable television systems". This provision was enacted by the legislature in 1971, at a time when there was no confusion as to what that term meant. In 2005, however, the North Carolina Court of Appeals issued a decision finding that the provision allowing cities to construct "cable television systems" should be construed to also authorize cities to build and operate basically any kind of wired system for any purpose - *BellSouth v. City of Laurinburg*, 168 N.C.App. 75, 606 S.E.2d 721 (2005). In a digital world where virtually any service can be provided using IP technology, this opened the floodgates for cities to provide telephone and broadband services, in addition to traditional video programming services. It also potentially opened the door to a wide range of other services, such as security and home monitoring services and private line telecommunications services.

The obvious problem this decision created was that, because competition was unleashed by the courts and not the legislature, cities were freed to compete against private industry without any rules ensuring fair competition with industry or with protections for taxpayers. For example, why would a city continue to be entitled to exemption from sales and other taxes with respect to a competitive, proprietary activity? Should cities be permitted to cross-subsidize their competitive activity with monopoly utility ratepayer funds? Should the taxpayers be a part of the decision to incur debt?

Various cities, urged on by broadband consultants, rushed to take advantage of the void—resulting in the construction of fiber-to-the-home systems in the City of Wilson ("Greenlight") and the City of Salisbury ("Fibrant"), as well as the acquisition of a defunct cable system by the Towns of Mooresville and Davidson ("MI-Connection"). In the case of Wilson and Salisbury, these cities were already being served by cable companies (Time Warner Cable) and incumbent telephone companies (CenturyLink and AT&T). These cities were hardly "unserved" or even broadband backwaters—instead they were being served by multiple providers over facilities comparable to those in the larger cities. These cities made the judgment that they would be better served by construction of fiber-to-the-home systems and since private industry was not willing to, in essence, overbuild themselves, the cities determined they should build the systems themselves and go into competition.

This issue was not confined to a handful of cities. In 2009, the League of Municipalities told a House Select Committee on High-Speed Internet that some 35 cities were in the process of evaluating whether to get into the business.

The Track Record of North Carolina Cities that are in Competition with Private Business

Municipal broadband proponents are fond of saying to their citizens that the broadband system with "pay for itself" and that no city funds would be used to build or operate that system. In North Carolina, we had real-time, real-world information with which to evaluate such claims.

The facts were not pretty.

MI-Connection was formed in 2007 when Davidson and Mooresville agreed to issue some $92 million in Certificates of Participation—a financing vehicle that allowed them to bypass going to the voters—to purchase a cable system that had been in bankruptcy. The system was (and is) losing money, and its citizens were being asked to fund these losses when they had been promised that the system would "pay for itself". These cities were forced to make up the deficit by raiding surplus monies, laying off employees, and imposing new taxes. Citizens in these communities were asking why they were in this business in the first place, and the leaders that had approved the purchase were left to say, "We owe the citizens an apology".

The City of Salisbury made similar statements to its citizens that the Fibrant network would pay for itself. In the original presentation on Fibrant, the city affirmatively stated that "No city funds would be used as working capital for system startup or any time". Yet as recently as September 6, 2011, the local newspaper reported on the city's plans to close Fibrant's operating deficit by taking a $1.2 million loan from the city's water and sewer capital reserve fund.

The leaders of these cities are good people who undoubtedly have been making decisions out of the earnest belief they were

[1] any opponent of industrial change or innovation

R.A.1022

advancing the interests of their citizens. They ultimately will be accountable to their citizens for their decisions (and, if fact, the leaders responsible for the MI-Connection decision were voted out of office). But, as an elected state official, I have concerns about the implications of their decisions for the state and for the citizens.

What's at Stake?

There are a variety of issues at stake in this debate relating to the State's finances and resources.

First, there is the issue of the financial stability of the cities who wish to compete. These cities need to be assured that they operate in an environment in which they can succeed and pay back the debt they have incurred.

Second, there is a risk that governmental competition, if allowed to go unchecked and without rules, will deter private investment and initiative as scarce investment dollars are spent where the prospect of earning a fair return is not diminished by competing with the government.

Third, it was important to me that the taxpayers have a say in their leader's decisions to incur debt for the purposes of entering into competitive enterprises.

Our Legislative Approach

The bill that was filed in North Carolina was titled the "Level Playing Field Bill" (HB 129). As its title suggests, the approach of the bill was not to prohibit cities from entering into the business, but rather to adopt rules to make them enter more or less as a market participant should they decide to compete with services already being provided by private business. Cities that wish to provide phone, cable TV, or broadband services in competition with private providers may do so, but only on terms that are roughly equivalent to those applicable to a private provider. These include requirements to:

1. Comply with laws and regulations applicable to private providers;
2. Not cross-subsidize their competitive activity using taxpayer or other public monies;
3. Not price below cost, after imputing costs that would be incurred by a private provider.
4. Not discriminate against private providers in access to rights-of-way.
5. Pay fees in lieu of taxes that are roughly equivalent to those paid by private business.

In addition to these "level playing field" requirements, the bill also required cities to submit the issue to a vote of the people. Also, the bill requires cities to explore the feasibility of entering into public-private partnerships before making the decision to "go it alone."

The bill expressly exempted those cities already competing from the new provisions.

The bill's competitive restrictions do not apply to the provision of services in unserved areas (i.e., areas where 50% of the households do not have access to broadband).

The bill also made clear that it does not apply to a city's operation of a communications network for its own internal governmental purposes such as police, fire, rescue, water, etc. (including smart grid services) or to a city's provision of free services such as free wireless.

Common Ground and Lessons Learned

Having been through the broadband wars, I would observe that there are a number of issues on which there is common ground.

- *Broadband is good; we need more of it.* Proponents of municipal broadband talk about the need to get broadband out to people who do not have access to it. This is an important issue of public policy, but it is a multi-dimensional problem, involving both supply (whether service is available) and demand (the financial ability and resources of citizens to subscribe) components—and it is an issue that is a different issue from whether there should be rules around local governments that want to enter into competition with private enterprise.
- *Voters should have a say.* These projects are, by any measure risky. They are expensive; they involve governmental involvement in a technology-based, rapidly changing arena; and they involve the government engaging as a competitor, not as a supplier of monopoly service.
- *Private industry should have the first opportunity to provide service.* After fighting any attempt to establish rules in this area for seven years, when finally forced to the table, the cities lobbying association suddenly favored a "right of first refusal" approach—i.e., an approach that ensures that private industry has the first opportunity to provide services that are desired by a community. This was a concept that, in the end, was endorsed by all the stakeholders to the bill.

Make no mistake, the opposition will be well organized and fierce. In North Carolina, the lead opponent was the League of Municipalities. Although unaffected, county governments voiced opposition as did some companies who are suppliers to municipalities. Former cable consultants also lobbied against the bill while creating a massive amount of misinformation through anti-cable/telecom bloggers not only from North Carolina but across the US.

If this policy is needed in your state, I recommend doing your homework and be prepared to stand strong.

MARILYN AVILA represents House District 40 in the North Carolina General Assembly and is a member of ALEC's Telecommunications & Information Technology Task Force.

CERTIFICATE OF COMPLIANCE

Pursuant to 6 Cir. R. 30(b)(4)(E), I hereby certify that the documents in the appendix are properly part of the record.

/s/ Matthew J. Dunne

Matthew J. Dunne
Counsel
Federal Communications Commission
Washington, D.C. 20554
(2020 418-1755

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE STATE OF TENNESSEE, Petitioner,	)	
v.	)	No. 15-3291 (and consolidated cases)
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, Respondents.	)	

CERTIFICATE OF SERVICE

I, Matthew J. Dunne, hereby certify that on November 5, 2015, I electronically filed the foregoing **Respondent's Appendix** with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. If they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

Joshua S. Turner
Megan L. Brown
Wiley Rein, LLP
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for: State of TN

Tom Greenholtz
Frederick Hitchcock
Chambliss Bahner & Stophel
605 Chestnut Street
Suite 1700
Chattanooga, TN 37450
Counsel for: Electric Power Bd. Of Chattanooga

Scott A. Westrich
Kristen C. Limarzi
Robert B. Nicholson
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W.
Room 3224
Washington, D.C. 20530
Counsel for: USA

James Bradford Ramsay
National Ass'n of Regulatory Utility Commissioners
1101 Vermont Ave., N.W.
Suite 200
Washington, D.C. 20005
Counsel for: NARUC

James Baller
Baller Hebst
2014 P Street, N.W.
Suite 202
Washington, D.C. 20036
Counsel for: City of Wilson, NC

Genevieve Morelli
1101 Vermont Avenue, NW
Suite 501
Washington, DC 2005
Counsel for: Independent Telephone & Telecommunications Alliance

/s/ Matthew J. Dunne

Matthew J. Dunne
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1755