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**THE NOT SO BROAD-BAND:  
PUBLIC POLICY ARGUMENT ABOUT BROADBAND LEGISLATION  
IN NORTH CAROLINA AND TENNESSEE AND THE POTENTIAL  
NATIONAL IMPACT**

*Shayaan Raja\**

*Broadband Internet service has become a necessity in the rapidly developing world we live in today. However, not all services are created equal, and municipal-run broadband providers in North Carolina and Tennessee feel that state legislatures are only furthering this disparity by assisting other providers. With the help of the Federal Communications Commission (“FCC”), municipal-run providers hope to overcome the obstacles placed in their path in order to compete with major Internet service providers. Both sides of this issue present strong arguments in support of their positions. While we wait for the FCC to act, this Recent Development argues that these municipal broadband services may not be as hindered as it seems and examines the potential implications were the FCC to intervene.*

**I. INTRODUCTION**

North Carolina and Tennessee are two of nineteen states that have either banned or restricted municipal broadband services.<sup>1</sup> In 2011, North Carolina enacted House Bill 129,<sup>2</sup> better known as the

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<sup>1</sup> See John Murawski, *Wilson asks FCC to override NC law it says shields Time Warner, Comcast*, NEWS & OBSERVER (Aug. 27, 2014), [http://www.newsobserver.com/2014/08/27/4101819\\_wilson-asks-fcc-to-override-nc.html?rh=1](http://www.newsobserver.com/2014/08/27/4101819_wilson-asks-fcc-to-override-nc.html?rh=1) (discussing the challenge to NC broadband legislation and request for FCC intervention into that legislation).

<sup>2</sup> H.B. 129, 2011 Gen. Assemb., Sess. (NC 2011).

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“Level Playing Field” legislation.<sup>3</sup> House Bill 129 restricts the power of cities and towns to commission their own broadband networks.<sup>4</sup> Essentially, the law: (1) prohibits local governments from subsidizing municipal broadband from other funds; (2) bars pricing of the services below the costs of providing the services; (3) requires public hearings and referendums for municipal providers to borrow money; and (4) requires municipal broadband operators to make payments similar to those taxes and fees paid by their for-profit competitors.<sup>5</sup> Meanwhile, the Tennessee Code allows only municipalities that operate their own electric utilities to provide cable, two-way video, video programming, Internet access and other “like” services.<sup>6</sup> However, they can only do so upon satisfying various public disclosure, hearing, voting and other requirements that a private provider would not have to meet.<sup>7</sup> Municipalities that do not operate their own electric utilities can only provide services in “historically unserved areas,” and only through joint ventures with the private sector.<sup>8</sup>

Local municipalities, such as Wilson, North Carolina and Chattanooga, Tennessee argue that these laws prevent them from providing their own broadband services to local customers and now ask the Federal Communications Commission to override the state telecommunication laws.<sup>9</sup> The City of Wilson’s unusual legal

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<sup>3</sup> *Id.*

<sup>4</sup> See Matthew Lasar, *North Carolina Enacts Pro-ISP, Anti-Municipal Broadband Law*, WIRED (May 23, 2011, 9:54 AM), <http://www.wired.com/2011/05/nc-gov-anti-muni-broadband/> (discussing the NC legislature passing the house bill on broadband law).

<sup>5</sup> Brian Heaton, *Municipal Broadband Networks Slammed in North Carolina*, GOV. TECH. (May 25, 2011), <http://www.govtech.com/technology/Municipal-Broadband-Networks-Outlawed-North-Carolina.html>.

<sup>6</sup> FIBER TO THE HOME COUNCIL, <http://www.ftthcouncil.org/p/cm/ld/fid=155> (last visited Oct. 9, 2014).

<sup>7</sup> *Id.*

<sup>8</sup> Telecommunications Joint Venture, TENN. CODE. ANN § 7-59-316 (2011).

<sup>9</sup> See Drew Fitzgerald, *Telecom Industry Asks FCC Not to Push Municipal Broadband*, WALL ST. J. (Aug. 29 2014, 8:27 PM), <http://online.wsj.com/articles/telecom-industry-asks-fcc-not-to-push-municipal-broadband-1409358425> (discussing how the states believe legislation is hindering their ability to provide municipal-run broadband service and their desire to have the FCC intervene on their behalf and overrule the state legislation).

claim was made possible only in the past few months, after FCC Chairman Tom Wheeler announced that the federal agency would consider pre-empting local laws that stifle broadband competition.<sup>10</sup> If this issue goes to court, it is expected to have far reaching national repercussions contingent upon whether the FCC adopts a broader rule or the federal courts uphold an appeal of the FCC's decision.<sup>11</sup> The Cities of Wilson and Chattanooga rest their arguments on a one-paragraph section of the 1996 Telecommunications Act<sup>12</sup> ("Act") to make their case.<sup>13</sup> The eighteen-year-old law states that federal and state officials "shall encourage" deployment of communications networks through various means to remove barriers to competition.<sup>14</sup> However, that particular section of the Act has not been interpreted to give the FCC power over state laws.<sup>15</sup> Despite past interpretation of the Act, recent court decisions have emboldened broadband advocates.<sup>16</sup>

The cities argue that they can meet the needs of the people better and more efficiently than the Internet service providers ("ISPs") can,<sup>17</sup> but that cable-industry backed laws make the municipalities jump over numerous additional hurdles in order to be eligible to provide broadband and other services.<sup>18</sup> If the municipalities manage to overcome these hurdles, the laws then (1) prevent new municipality-networks from selling their high speed internet to neighboring areas,<sup>19</sup> (2) restrict their ability to offer low introductory prices to consumers,<sup>20</sup> and (3) require them

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<sup>10</sup> See Murawski, *supra* note 1.

<sup>11</sup> *Id.*

<sup>12</sup> Telecommunications Act of 1996, 47 U.S.C. § 1302 (1996).

<sup>13</sup> *Id.* § 1302(a).

<sup>14</sup> *Id.*

<sup>15</sup> See Murawski, *supra* note 1.

<sup>16</sup> *Id.* (referencing the 2014 decision in *Verizon v. FCC* which stated that the FCC reasonably interpreted 47 U.S.C. § 1302 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic).

<sup>17</sup> *Id.*

<sup>18</sup> TENN. CODE ANN. § 7-52-601 (2014) (requiring municipalities to satisfy various disclosure, hearing, voting, and other requirements that the private sector does not have to).

<sup>19</sup> N.C. GEN. STAT. § 160A-340.1(a)(3) (2013).

<sup>20</sup> *Id.* § 160A-340.1(a)(8).

to pay all taxes “that would apply” to a private provider.<sup>21</sup> The ISPs and the State legislatures argue that the local municipalities do not have the financial capability to expand and would have to pull their resources from other public funds in order to do so.<sup>22</sup>

This Recent Development argues that the FCC should not override North Carolina and Tennessee state laws because the laws do not prevent cities from providing competitive communication services; the laws merely establish rules for the cities if they wish to compete. Furthermore, while the cities present sound arguments, they are not persuasive enough to justify FCC intervention and a supersession of state law. Additionally, the benefits of the laws outweigh the costs, and litigating this issue would result in long-term negative effects. Section II lays out the relevant North Carolina and Tennessee legislation. Section III examines the arguments provided by both sides. Section IV provides the pros and cons of the legislation, and Section V focuses on the long-term impact of FCC intervention should this issue to go to court.

## **II. NORTH CAROLINA AND TENNESSEE SERVICE PROVIDER LEGISLATION**

North Carolina’s statute has several provisions that make it difficult for municipal-run services to compete with ISPs and also prevent existing services from expanding. Meanwhile, Tennessee’s code sets high standards for procuring a broadband service and also makes it difficult to compete and expand outside its zone of operation. This section provides a glimpse into each states’ legislation and how that hinders the service and expansion capabilities of municipal broadband providers.

### *A. North Carolina Service Provider Legislation Causing Concern*

The legislation at issue is an amendment to the North Carolina general statute governing the provisions of communications services by cities.<sup>23</sup> Section 340.1, which the City of Wilson believes hinders its service capabilities, establishes the

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<sup>21</sup> *Id.* § 160A-340.1(a)(9).

<sup>22</sup> *Id.* § 160A-340.1(a)(7).

<sup>23</sup> N.C. GEN. STAT. § 160A (2013).

requirements for city-owned communication service providers.<sup>24</sup> While not all components of § 340.1 are relevant to this particular controversy, several of the statute's subsections drew criticism from the City of Wilson. For example, § 340.1(a)(7) states that a city-owned service provider "[s]hall not subsidize the provision of communications service with funds from any other noncommunications service, operation, or other revenue source, including any funds or revenue generated from electric, gas, water, sewer, or garbage services."<sup>25</sup> Additionally, § 340.1(a)(8) mandates that the city service provider "[s]hall not price any communications service below the cost of providing the service, including any direct or indirect subsidies received by the city-owned communications service provider . . . ."<sup>26</sup> Finally, § 340.1(a)(9) states, "[t]he city shall annually remit to the general fund of the city an amount equivalent to all taxes or fees a private communications service provider would be required to pay the city or county in which the city is located . . . ."<sup>27</sup>

While the aforementioned subsections encompass the City of Wilson's primary argument, other portions of the legislation also appear to be controversial. Subsection 340.1(a)(3) prevents the service from expanding outside its corporate city limits.<sup>28</sup> This seems to hinder the service's ability to possibly increase revenue, especially if the demand exists outside of the city boundaries. While not directly argued against by the City of Wilson, this provision does appear to be another potential issue that could be raised.

#### B. *Tennessee Service Provider Legislation Causing Concern*

The legislation at issue in Tennessee is § 7-52-601 of the Tennessee Code Annotated.<sup>29</sup> This section provides authority to operate services in the state and requires any municipality wishing

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<sup>24</sup> *Id.* § 160A-340.1(a)

<sup>25</sup> *Id.* § 160A-340.1(a)(7).

<sup>26</sup> *Id.* § 160A-340.1(a)(8).

<sup>27</sup> *Id.* § 160A-340.1(a)(9).

<sup>28</sup> *Id.* § 160A-340.1(a)(3).

<sup>29</sup> TENN. CODE ANN. § 7-52-601 (2014).

to provide broadband or other services to first operate its own electric plant under § 7-52-401.<sup>30</sup> Additionally, it does not permit a municipality to have any power or authority in an area in which a private provider operates a system with fewer than 6,000 subscribers.<sup>31</sup> The Tennessee Code further prevents expansion of service outside the boundaries of the county.<sup>32</sup> This last provision is of greatest concern to the Chattanooga-run broadband service.<sup>33</sup>

The City of Wilson bases its argument for FCC intervention primarily on § 340.1(a)(7)–(9) of the North Carolina legislation. The city argues that the law hinders its ability to have municipal-run broadband services.<sup>34</sup> The City of Chattanooga primarily argues against Tennessee’s legislative subsection preventing expansion of an already active municipal service outside its boundaries.<sup>35</sup> The state legislatures and private ISPs claim that the legislation does not prevent cities from providing competitive communication services, it just establishes fair-play rules if the cities wish to compete.<sup>36</sup>

### III. THE ARGUMENTS PRESENTED BY THE CITIES AND LEGISLATURES

Both sides offer valid arguments as to why they believe municipal-run services should or should not exist. The Cities of Wilson and Chattanooga point to the success of their own services,

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<sup>30</sup> *Id.* § 7-52-401.

<sup>31</sup> *Id.* § 7-52-601(c).

<sup>32</sup> *Id.* § 7-52-601(e)(1)(A) (“Notwithstanding this section, the comptroller of the treasury shall select . . . a municipal electric system providing services in accordance with this part to provide . . . the services permitted under this section beyond its service area but not beyond the boundaries of the county in which such municipal electric system is principally located . . .”).

<sup>33</sup> See Ellis Smith, *Chattanooga’s High-Speed Broadband Brings High-Stakes Battle Over EPB Expansion*, TIMES FREE PRESS (Aug. 29, 2014), <http://www.timesfreepress.com/news/2014/aug/29/high-speed-broadband-brings-high-stakes-battle/> (discussing the City of Chattanooga’s EPB arguments for FCC intervention and the issues they have with the Tennessee legislation that prevents them from expanding outside their current service area).

<sup>34</sup> See Murawski, *supra* note 1.

<sup>35</sup> TENN. CODE ANN. § 7-52-601(e)(1)(A) (2014).

<sup>36</sup> See Murawski, *supra* note 1.

while legislatures view the failures of other programs and the costs associated with those failures as reasons to control municipal-run services. An in-depth look into the reasoning behind each side's view provides a better understanding of why each takes the position it does.

A. *The Arguments of the Cities of Wilson and Chattanooga*

The City of Wilson argues that its \$33 million broadband service, entitled Greenlight, should be fully exempt from the broadband restrictions enacted by the North Carolina Legislature.<sup>37</sup> It argues that when the State passed the legislation, Greenlight was already in the process of being built, on the financial assumption of reaching a defined geographic base of potential customers.<sup>38</sup> The geographic issue is significant because the legislation prevents cities from expanding service outside their corporate city limits.<sup>39</sup> Additionally, the city asserts that it had attained approval from the state to borrow funds to build the system.<sup>40</sup> However, the new changes to the law prevent them from doing this.<sup>41</sup> The City of Wilson believes this to be unfair.<sup>42</sup> It argues that the change in law makes it more difficult for the Greenlight program to succeed financially and consequently, more difficult to pay off the startup debt it had already accrued.<sup>43</sup> The city argues that under these restrictions, Greenlight is forced into proving the legislature's argument: that most of these municipal-run broadband services tend not to be profitable. However, the City of Wilson believes that if allowed to operate without the new restrictions, Greenlight would break that stereotype. While Greenlight initially lost money as a startup, it posted a small profit of \$723,881 in 2013.<sup>44</sup> While

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See N.C. GEN STAT. § 160A-340.1(a)(3) (2013).

<sup>40</sup> See Murawski, *supra* note 1.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



this may show promise, it must be viewed in the context of the whole project, which cost roughly \$33 million.<sup>45</sup>

The City of Chattanooga-run Electric Power Board (“EPB”) believes its Fiber Optics Network should be allowed to expand outside its current boundaries and presents valid points as to why. While opponents of these services argue that they are financially unstable, EPB seems to be breaking that mold by posting a net income of \$15.2 million during the past year.<sup>46</sup> While the service initially relied on a \$110 million taxpayer stimulus package to create its grid, it has steadily continued to pay back its debt.<sup>47</sup> This past year, EPB was able to reduce its debt by nearly \$12 million and appears to be on course to continue to pay it off at a steady rate.<sup>48</sup> It is projected that the EPB Telecom division will be debt free by the spring of 2015.<sup>49</sup> Furthermore, EPB supports nearly 60,000 homes and 5,000 businesses in its operating zone<sup>50</sup> and is recognized as one of the fastest broadband services in the western hemisphere.<sup>51</sup> EPB appears to run counter to many of the arguments

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<sup>45</sup> *Id.*

<sup>46</sup> See Gail Perry, *EPB Cuts Debt, But Facing Weather-Related Woes*, THE CHATTANOOGAN (July 18, 2014) <http://ww.chattanooga.com/2014/7/18/280647/EPB-Cuts-Debt-But-Facing.aspx> (discussing why the EPB believes it should be allowed to expand and providing background on how it was financed and how it is in the process of paying back the debt it owes while at the same time providing the date by which it believe it will be able to be debt free as well).

<sup>47</sup> See Chris Butler, *Chattanooga Plays a Part in FCC's Desire to Trump State Law on Government Internet*, WATCHDOG.ORG (Sept. 17, 2014) <http://watchdog.org/171028/fcc-tennessee-chattanooga/> (discussing the role Chattanooga is playing in potential FCC intervention and providing background on the EPB program and its funding).

<sup>48</sup> See Perry, *supra* note 46.

<sup>49</sup> *Id.*

<sup>50</sup> See *Our Company and History*, ELECTRIC POWER BOARD, <https://www.epb.net/about/our-company-and-history/> (last visited Oct. 10, 2014) (discussing the creation and history of the EPB over the years and the number of customers served).

<sup>51</sup> See Dominic Rushe, *Chattanooga's Gig: How One City's Super-Fast Internet is Driving a Tech Boom*, THE GUARDIAN, (Aug. 30, 2014, 9:30 PM), <http://www.theguardian.com/world/2014/aug/30/chattanooga-gig-high-speed-internet-tech-boom> (discussing how Chattanooga's broadband service is recognized as one of the fastest and how this is helping drive a tech boom in the city and bringing in financial capital as well).

opponents present against municipal-run broadband services, and looks to set an excellent model for other similar services.

Recently, the EPB and the City of Wilson struck back against opponents of their petitions for FCC pre-emption of state broadband laws.<sup>52</sup> They believe that pre-emption opponents “have not successfully rebutted” the municipalities’ argument that the FCC has authority under section 706 of the Telecommunications Act “to remove state barriers to community broadband initiatives.”<sup>53</sup> The Cities of Chattanooga and Wilson rejected the view that the FCC could better achieve section 706’s goals through methods other than pre-emption or that states are justified in restricting municipal broadband.<sup>54</sup> These municipalities also refuse to accept opposition arguments that the Supreme Court’s 2004 ruling would prohibit FCC pre-emption.<sup>55</sup>

Furthermore, the cities can point to a study done by the Berkman Center for Internet & Society at Harvard University for support.<sup>56</sup> The study discussed the substantial investment in municipalities and broadband across Europe.<sup>57</sup> Municipalities can look to Sweden for examples of extensive and systematic success in municipality-provided broadband services.<sup>58</sup> Over 200 of the 290 Swedish municipalities have undertaken some role in the deployment of broadband services.<sup>59</sup> Domestic cities can use this as evidence that they can undertake a similar feat and succeed.

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<sup>52</sup> Jimm Phillips, *Muni Broadband Pre-emption Opponents Haven’t Successfully Rebutted’ FCC Section 706 Authority, Petitioners Say*, WARREN COMMUNICATIONS NEWS, (Oct. 1, 2014), [www.warren-news.com](http://www.warren-news.com).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> HARVARD LAW SCHOOL, BERKMAN CTR FOR INTERNET & SOC’Y, NEXT GENERATION CONNECTIVITY 1, 232–33 (2010), *available at* [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman\\_Center\\_Broadband\\_Final\\_Report\\_15Feb2010.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman_Center_Broadband_Final_Report_15Feb2010.pdf) (discussing the municipality role in broadband services around the world).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

Additionally, there does appear to be legal precedent that supports the Cities of Wilson and Chattanooga's idea for FCC intervention.<sup>60</sup> The legislature argued against the FCC's ability to intervene but federal courts have recognized the FCC's authority to promote the availability of high-quality Internet access.<sup>61</sup> In January, the D.C. Circuit Court of Appeals recognized this authority in *Verizon v. FCC*.<sup>62</sup> The court rejected two parts of the FCC Open Internet Order 2010, determining that the FCC did not have the authority to impose the two orders without first classifying network providers as common carriers.<sup>63</sup> Because the FCC had not previously classified broadband providers as "telecommunications services," they could not be regulated under Title II of the Communications Act of 1934.<sup>64</sup> Hence, the 2010 order regulations could not be applied to the broadband providers.<sup>65</sup> However, the court did find that under section 706 of the Telecommunications Act of 1996, the FCC is vested with affirmative authority to enact measures that encourage the deployment of broadband infrastructure.<sup>66</sup> The court also agreed with the FCC that broadband providers presented a threat to Internet openness and could potentially hinder future development of broadband services without rules at least similar to those in the FCC Open Internet Order 2010.<sup>67</sup>

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<sup>60</sup> *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir, 2014) ("47 U.S.C.S. § 1302(a) vested the FCC with affirmative authority to enact measures encouraging the deployment of broadband infrastructure; . . . The FCC reasonably interpreted 47 U.S.C.S. § 1302 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic . . .").

<sup>61</sup> See Nestor Davidson & Olivier Sylvain, *An Old Tobacco Town Battles Over Smokin' Fast Broadband*, WALL ST. J. (Sept. 5 2014, 6:38 PM) <http://online.wsj.com/articles/nelson-davidson-and-olivier-sylvain-an-old-tobacco-town-battles-over-smokin-fast-broadband-1409956682> (discussing the details of Wilson's Greenlight broadband program and the details of the FCC's ability to intervene on behalf of the city).

<sup>62</sup> *Verizon*, 740 F.3d at 623.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> KEVIN MCCARTHY, OLR BACKGROUNDER: APPELLATE COURT DECISION ON NET NEUTRALITY, LEGIS. REP. No. 2014-R-0033, at 3 (Conn. 2014).

B. *The Arguments of the North Carolina and Tennessee Legislatures*

The North Carolina and Tennessee legislatures believe their respective laws do not prevent cities from providing competitive communication services. Instead, the laws merely establish fair-play rules for cities that want to compete in that market. While the Cities of Wilson and Chattanooga believe the Telecommunication Act of 1996 permits FCC power over state laws, the legislatures argue that the Act has not been traditionally interpreted in that way.<sup>68</sup> ISPs, along with the legislatures, further argue that these cities do not have the financial capability to expand their services and would have to pull resources from other public funds in order to finance their broadband service plans. As mentioned earlier, this idea is not based on a fictional scenario; rather it is based on an April decision by a credit rating agency to downgrade the City of Salisbury's credit rating, which operates a high-speed Internet service called Fibrant that launched in 2010 and now has 3,125 customers.<sup>69</sup> Moody stated that the City of Salisbury had diverted \$7.6 million from its water and sewer fund to subsidize Fibrant, "which has experienced operational and debt payment shortfalls since its inception."<sup>70</sup> Instances like this one are precisely what the law's proponents point to when they raise concerns about city-run services and the diversion of funds from other places.

Credit raters also worry because of the substantial support the City of Salisbury's water and sewage revenue provides for the city-run broadband system.<sup>71</sup> The system's \$7.6 million diversion was for non-essential, non-system-related needs from 2011–2013.<sup>72</sup> Spending revenue on this program instead of the sewage and water system's needs places immense pressure on the system's financial

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<sup>68</sup> See Murawski, *supra* note 1.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See *Fitch Downgrades Salisbury, NC's Water & Sewer Revs to 'A+'; Outlook Stable*, BUSINESSWIRE (Sept. 19, 2014, 11:50 AM), <http://www.businesswire.com/news/home/20140919005693/en/Fitch-Downgrades-Salisbury-NCs-Water-Sewer-Revs#.VDg6KxaFqZY> (discussing the downgrading of Salisbury's credit rating because of financial risk associated with the city-run Fibrant broadband service).

<sup>72</sup> *Id.*

profile.<sup>73</sup> Because of an eight month delay in completion of the project, Fibrant relied on this subsidy in order to continue to make payments on the nearly \$33 million it borrowed in private bank loans to finance the construction of the system.<sup>74</sup> The system's involvement in supporting the operations of Fibrant has added great risk to the city's credit profile. At the urging of the city council, Fibrant's leadership has taken cost cutting measures to remain profitable, but creditors still view the system as an ongoing financial risk.<sup>75</sup> The City of Salisbury's water and sewage system currently serves nearly 53,000 constituents, and were the system to subsidize Fibrant any further, these residents would likely incur the costs.<sup>76</sup>

Proponents for municipal-run services may argue that while the City of Salisbury may have struggled, it has not failed.<sup>77</sup> Opponents to these services can point to several recent failures including the Utah Telecommunications Open Infrastructure Agency ("Utopia").<sup>78</sup> Utopia is a municipal broadband project that began in 2004 and spanned roughly 11 localities.<sup>79</sup> However, it has sustained huge losses since its creation, racking up nearly \$350 million in debt and over \$146 million in negative assets as of July 2013.<sup>80</sup> A big reason for its failure was an overestimation of potential customers.<sup>81</sup> Utopia amassed only 11,000 customers, less than a quarter of the

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See Patrick Gleason, *Municipal Broadband: A Bad Deal for Taxpayers*, FORBES (Sept. 30, 2014 5:18 PM), <http://www.forbes.com/sites/patrickgleason/2014/09/30/municipal-broadband-a-bad-deal-for-taxpayers/> (discussing other municipal-run broadband services that have failed around the country and providing the financial details of those failures and future costs associated with them).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Thomas A. Schatz & Royce Van Tassell, *Municipal Broadband Is No Utopia*, WALL ST. J. (June 19, 2014, 7:31 PM), <http://online.wsj.com/articles/municipal-broadband-is-no-utopia-1403220660> (discussing the failure of the Utah Telecommunications Open Infrastructure Agency broadband service).

49,350 projected by the service.<sup>82</sup> With supporters now looking for a taxpayer bailout, locals are expected to be hit with an additional half billion dollars in taxes and nearly \$2 billion in additional debt over a 30 year span.<sup>83</sup> The country is rife with failed municipal attempts like that of Utopia. For example, Google bought a \$39 million system in Provo, Utah in 2013 for only \$1.<sup>84</sup> Additionally, Burlington, Vermont's, broadband network is nearly \$17 million in debt only eight years after launching, and Groton, Connecticut, and its residents are still paying back more than \$20 million in loans after selling their broadband network last year at a loss of more than \$30 million.<sup>85</sup>

The City of Wilson also plans to expand its service to over 7,600 residents in Wilson County and wishes to further expand to an additional 1,000 residents in other counties.<sup>86</sup> This confidence seems to arise from the profit posted this past year, but the City of Wilson may be getting ahead of itself. Greenlight has the potential to fall into the same situation as the City of Salisbury's Internet service because the program will need to obtain more funding, and the expansion will inevitably encounter initial financial difficulties, just as Greenlight did in its first phase.<sup>87</sup> The City of Salisbury, North Carolina is a prime example of what can go wrong when cities do not have the financial capability to follow through on a project and end up wasting valuable funding for other projects along the way.<sup>88</sup>

The North Carolina legislature's strongest argument is that the state is attempting to protect the taxpayers from risky government

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<sup>82</sup> *Id.*

<sup>83</sup> See Gleason, *supra* note 77.

<sup>84</sup> See Smith, *supra* note 33; see also Jane McEntegart, *Google is Buying Provo's Existing Fiber Network for a Dollar*, TOM'S HARDWARE (Apr. 19, 2013, 10:00 AM), <http://www.tomshardware.com/news/Google-Fiber-Provo-iProvo-Price-Purchase,22135.html> (reporting that Google would purchase Provo's network for \$1 and offer Provo residents Internet free of charge following a \$30 connection fee, but that Provo will continue to pay off the \$39 million loan over the coming years).

<sup>85</sup> See Smith, *supra* note 33.

<sup>86</sup> See Murawski, *supra* note 1.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

ventures like that of the Cities of Wilson and Salisbury.<sup>89</sup> The ISP industry is intensely competitive and replete with takeovers and bankruptcies.<sup>90</sup> While large providers like Time Warner Cable and Century Link can survive in that market with their vast resources, state municipalities cannot. The North Carolina broadband laws protect the state's citizens from wasting tax dollars on projects with high potential failure rates. Furthermore, "[t]he costs of building out and maintaining broadband networks are considerable."<sup>91</sup> Using taxpayer dollars to attempt to compete with existing billion dollar ISP networks may not be a sound financial practice.<sup>92</sup> Of the arguments presented by the legislature, this is its strongest.

Additionally, "[t]he inherent problem with municipal broadband is that government entities are incapable of competing fairly in the free market."<sup>93</sup> These entities are taxpayer-backed and therefore can charge less for the same service as private businesses.<sup>94</sup> Were ISP's to operate in this manner, they would likely go bankrupt.<sup>95</sup>

Furthermore, the proponents of FCC pre-emption of state law believe that opponents have not successfully rebutted FCC authority under section 706 of the Telecommunications Act.<sup>96</sup> However, pre-emption opponents and the National Association of Regulatory Utility Commissioners ("NARUC")<sup>97</sup> believe neither Congress nor the FCC "has the power under the U.S. Constitution to effectively grant power to a municipality denied by the state."<sup>98</sup> They believe that it is black-letter law that a city or municipality is

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Gleason, *supra* note 77.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See Phillips, *supra* note 52.

<sup>97</sup> About NARUC, NAT'L ASS'N OF REGULATORY UTIL. COMM'RS, <http://www.naruc.org/about.cfm> (last visited Oct. 26, 2014) ("[NARUC] is a non-profit organization dedicated to representing the State public service commissions who regulate the utilities that provide essential services such as energy, telecommunications, water, and transportation.").

<sup>98</sup> See Phillips, *supra* note 52.

a subsidiary or “creature of the state,” and therefore they have no authority to engage in activities unauthorized in their charters.<sup>99</sup>

The ISP’s arguments also appear to have precedential support. The Supreme Court in *Nixon v. Missouri Municipal League*<sup>100</sup> held that federal efforts to check state barriers to municipal competition might be unconstitutional.<sup>101</sup> In 1997, Missouri passed a law at the behest of the state’s major providers that barred local governments from providing telecommunications services.<sup>102</sup> The Missouri Municipal League asked the FCC to block the statute by issuing a federal rule, but the agency refused.<sup>103</sup> The Municipal League appealed, and an Eighth Circuit Court of Appeals panel reversed the decision.<sup>104</sup> The panel held that the words “any entity” were intentionally broad and that a proper understanding of those words would include municipal governments.<sup>105</sup> Therefore, the court ruled that the state could not regulate attempts by municipalities to provide telecommunications services.<sup>106</sup> Missouri appealed the decision, and the Supreme Court overruled the Eighth Circuit’s decision.<sup>107</sup> The City of Wilson hinges its case for FCC intervention on the Telecommunications Act of 1996, but the Supreme Court in *Nixon* determined that the Act did not authorize the FCC to intrude on state control of its local governments.<sup>108</sup> Writing the opinion, Justice Souter concluded that state and local laws expressly or effectively prohibiting the ability of any entity to provide telecommunications services authorized pre-emption.<sup>109</sup> However, “any entity,” according to the Court, did not include the

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<sup>99</sup> *Id.*

<sup>100</sup> 541 U.S. 125 (2004).

<sup>101</sup> *Id.* at 125–26 (holding that the Act allows states to prevent municipalities from providing telecommunications services and that the Act only allows federal pre-emption of state and local efforts to prevent “any private entity” from providing telecommunications services).

<sup>102</sup> See Davidson & Sylvain, *supra* note 61.

<sup>103</sup> *Id.*

<sup>104</sup> *Nixon*, 541 U.S. at 125.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*



state's own subdivisions.<sup>110</sup> The Court cited the potential for “strange and indeterminate results” if the FCC were empowered to foster municipal entrepreneurship.

While both sides have presented valid points, there are several pros and cons that need to be addressed were the FCC to intervene on the municipal-run broadband issue.

#### **IV. THE POSITIVES AND NEGATIVES OF HAVING MUNICIPAL-RUN BROADBAND**

Municipal-run services provide many positives for consumers, including faster speeds, and can help improve local economies. However, they can also incur heavy debts and divert funds from other essential services. This section provides a better look into the various positives and negatives associated with municipal-run services.

##### *A. The Positives Of Municipal-Run Broadband*

There are several pros to having a municipal-run broadband service. Municipal-run systems can offer faster Internet speeds to local consumers than ISPs may be able to. The City of Wilson believes that it can provide faster Internet speeds to local consumers than the traditional, national ISPs can.<sup>111</sup> The City of Wilson's Greenlight service surpasses the national average for traditional ISPs (10MBps), offering upwards of 1GBps<sup>112</sup> as seen in Figure 1. The service has been such a success that businesses and residents of neighboring counties want to sign up for Greenlight.<sup>113</sup> North Carolina is not the only state in which a city-run service is providing exponentially faster broadband speeds. The City of

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<sup>110</sup> *Id.*

<sup>111</sup> Rochelle Moore, *Seeking a Green Light: City Officials upon Shifting National Tide with Petition to Abolish State Law*, WILSON TIMES (Sept. 24, 2014, 11:50 PM), <http://www.wilsontimes.com/News/Feature/Story/33942391--SEEKING-A---GREEN-LIGHT>.

<sup>112</sup> See *Greenlight – Fastest Internet Speeds in NC*, WILSONNC.ORG, <https://www.wilsonnc.org/living/fiberopticnetwork/> (last visited Sept. 19, 2014) (providing details about the fast Internet speeds offered by Wilson's Greenlight broadband service).

<sup>113</sup> See Davidson & Sylvain, *supra* note 61.

Chattanooga's "Electric Power Board offers customers speeds as fast as [1GBps] a second, about 50 times faster than the U.S. average."<sup>114</sup> Chattanooga is a clear example that there is a desire for faster broadband speeds outside of large cities, and its success highlights customer willingness to pay for a faster Internet service, even if it is more expensive than that offered by private ISPs.

## WHAT YOU PAY, WHAT YOU GET

A comparison of Internet download speeds available to residential customers in the Triangle

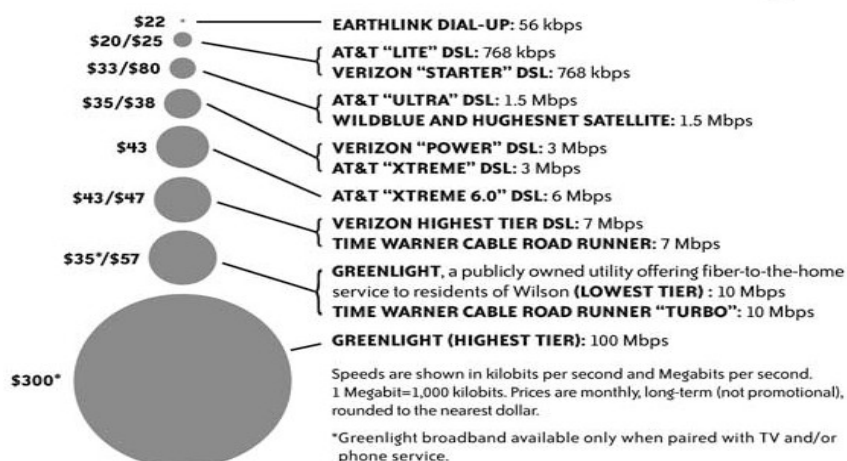


Figure 1 – What You Pay, What You Get, a comparison of Internet download speeds in North Carolina's Triangle<sup>115</sup>

<sup>114</sup> *Id.*

<sup>115</sup> Fiona Morgan, *Mighty, Mighty Broadband*, INDY WEEK, (June 18, 2008), <http://www.indyweek.com/gyrobase/Content?oid=oid%3A259848>.

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	2-4 Mbps	10-12 Mbps	25-50 Mbps	100-120 Mbps	500 Mbps	1 Gigabit
<b>Lure businesses</b>	3.6%	6.8%	13.6%	32.1%	16.3%	27.6%
<b>Local companies grow</b>	4.1%	11.8%	23.5%	32.1%	13.1%	15.4%
<b>Revive business districts</b>	7.4%	14.4%	21.4%	29.3%	11.2%	16.3%
<b>Revive communities</b>	8.4%	16.3%	24.2%	25.6%	10.2%	15.3%
<b>Boost worker training</b>	6.4%	16.0%	26.5%	26.5%	12.3%	12.3%
<b>Home businesses</b>	8.3%	15.6%	28.4%	27.1%	11.5%	9.2%
<b>Improve individuals</b>	4.2%	15.3%	25.0%	31.8%	15.3%	8.5%

Figure 2 - Economic Impact of Faster Broadband<sup>116</sup>

Additionally, the cities can better meet the needs of their local constituents because they understand those needs better than national ISPs do. Reliable high-speed Internet service has become a mainstay in modern society.<sup>117</sup> It is an indispensable service, “. . . but many major broadband service providers simply do not make infrastructure investments in rural and poor communities.”<sup>118</sup> With this lack of investment in certain areas, cities are left as the only entity that knows the local need and can supply the service. An increase in municipal-run broadband services can provide an incentive for technological companies and industries that would not typically be found in certain locales.<sup>119</sup> Cities like Chattanooga, not known for a booming tech-industry, can now become a center

<sup>116</sup> Craig Settles, *Going Beyond the Magic Broadband Bullet Theory*, GIGAOM.COM, (Oct. 27, 2012), <https://gigaom.com/2012/10/27/getting-beyond-the-magic-broadband-bullet-theory/> (discussing the economic impact of fiber and wireless internet).

<sup>117</sup> *United States of America: Internet Usage and Broadband Usage Report*, INTERNET WORLD STATS: USAGE AND POPULATION STATISTICS, <http://www.internetworldstats.com/am/us.htm> (last visited Oct. 9, 2014).

<sup>118</sup> See Davidson & Sylvain, *supra* note 61.

<sup>119</sup> See Rushe, *supra* note 51.

for the next generation of technology start-ups.<sup>120</sup> Companies like Lamp Post, one of several tech incubators located in the city, are bringing millions in investment to the mid-sized Tennessee city.<sup>121</sup> The city “. . . has gone from nearly zero venture capital in 2009 to over five organized funds with investable capital of over \$50 million in 2014.”<sup>122</sup> By offering the fastest Internet speeds available, municipal-run broadband services are providing a stable technology infrastructure for upcoming companies to develop, grow, and bring capital into those municipalities.

Also, the City of Chattanooga’s Mayor, Andy Berke, believes that services such as EPB’s are bringing more diverse individuals back to city cores and providing for the development of more middle class housing.<sup>123</sup> The United States’ economy is still recovering from the economic crisis. Allowing cities to establish municipal-run services that offer high speeds can draw in more businesses and families into cities affected by the economic crisis, as Figure 2 shows. As Mayor Berke points out, EPB has helped the city of Chattanooga draw in a diverse demographic and develop more middle class housing,<sup>124</sup> and a municipal-run service in other cities could provide the same type of economic boost. While these municipal-run services would not improve the economy on their own, they would bring in more inhabitants and businesses, such as the tech companies mentioned above, who in turn invest capital in the city. Hence, municipal services could benefit the economies of cities hit by the economic crisis.

Furthermore, in 2012, the FCC estimated that nearly 19 million Americans lacked access to basic broadband services.<sup>125</sup> Some communities, particularly in rural and less developed areas, had

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See Louie Brogdon, *Berke Heads to Boston to shine national spotlight on local efforts*, TIMES FREE PRESS (Oct. 10, 2014), <http://www.timesfreepress.com/news/2014/oct/10/video-berke-says-cities-cant-depend-federal-govern/> (discussing Chattanooga Mayor Berke’s trip to Boston to speak about the positive impact that the city’s municipal broadband infrastructure is having on the economy).

<sup>124</sup> *Id.*

<sup>125</sup> See Davidson & Sylvain, *supra* note 61.

only one or, at most, two service provider options.<sup>126</sup> The lack of competition among service providers has created concerns regarding high prices and poor service for these communities.<sup>127</sup> City-run service providers can fill these voids and provide high-quality Internet service to those either being neglected or price-gouged by the major national ISPs. They can also provide more download per dollar compared to traditional ISPs,<sup>128</sup> as illustrated in Figure 3.

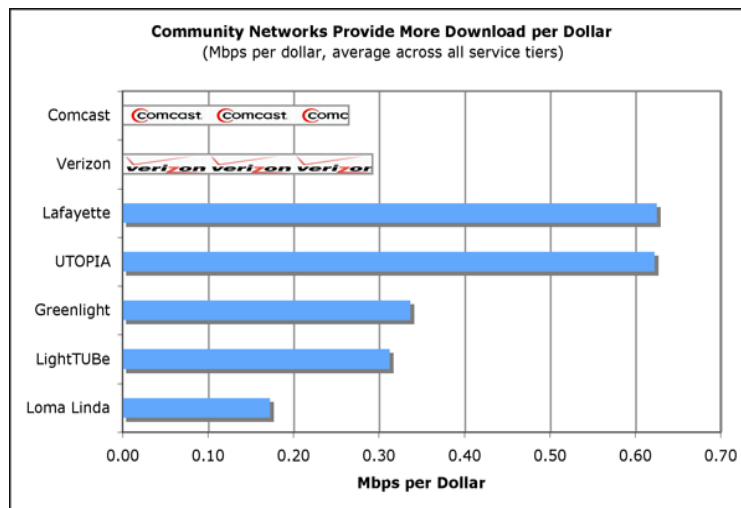


Figure 3 - Community Networks Provide More Download per Dollar<sup>129</sup>

There has been a long history of local governments providing services when the open market is not adequately meeting the needs of their citizens, and the cities in this case view the current matter as one of those instances.<sup>130</sup> Local governments, like those in the Cities of Wilson and Chattanooga, believe that investment in state-of-the-art services and networks will expand consumer

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> COMMUNITY BROADBAND NETWORKS, <http://www.muninetworks.org/sites/www.muninetworks.org/files/images/download.png> (last visited Oct. 10, 2014).

<sup>129</sup> *Id.*

<sup>130</sup> See Davidson & Sylvain, *supra* note 61.

choice, promote the creation of jobs, and foster innovation for the future.<sup>131</sup>

B. *The Negatives of Municipal-Run Broadband Internet Service*

While there are several positives to having city-run broadband services, these services do raise a number of issues. Unlike national ISPs, with their vast financial resources, cities do not have the same financial muscle. In order to establish a broadband service, the cities would likely have to reallocate funding from other service areas.<sup>132</sup> This raises a number of concerns, which are highlighted by the example set in Salisbury, North Carolina: the city diverted \$7.6 million from its water and sewer fund to subsidize its Fibrant broadband service.<sup>133</sup> With cities diverting millions from other essential public service funds, there is a risk that they will not fulfill the local needs in those other service areas.<sup>134</sup> The probability of a broadband service failing would be too great a risk for cities to take.<sup>135</sup> While broadband and Internet access is vital in modern society, it cannot be held in higher regard than necessities such as water and sewage capabilities.

History shows that city-funded broadband is not always profitable, and, given the expense that goes into creating the network, it could potentially bankrupt a city or put it in a financial predicament.<sup>136</sup> The City of Wilson tried to establish the success of its program by showing a \$723,881 profit in 2013, but this statistic can be deceptive.<sup>137</sup> Taken into the context of the overall cost of the

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<sup>131</sup> *Id.*

<sup>132</sup> *See* Murawski, *supra* note 1.

<sup>133</sup> *Id.*

<sup>134</sup> *See Fitch Downgrades Salisbury, NC's Water & Sewer Revs to 'A+'; Outlook Stable*, *supra* note 71 (discussing the downgrading of Salisbury's credit rating because of financial risk associated with the city-run Fibrant Broadband service and its financial issues).

<sup>135</sup> *Id.*

<sup>136</sup> *See* Smith, *supra* note 33 (discussing how cities in Utah, Connecticut, and Vermont have all had their municipal-run services fail and place a heavy burden on those local resident to help pay back the accumulated debt).

<sup>137</sup> *See* Murawski, *supra* note 1.

program, this figure does not show much since Greenlight has been around for a few years now and cost the city \$33 million.<sup>138</sup>

Unstable economic conditions, also present a risk, and in the face of such uncertainty, cities cannot justify such a large expenditure on a non-essential service. The city of Wilson is a much smaller locale than other cities that would potentially want to establish their own broadband service, and its service cost was \$33 million.<sup>139</sup> The potential cost of creating a service in a larger city could be exponential and given the unsound footing that the U.S. economy still sits on, it is likely not worth the risk. The risks presented by recession can be seen in the city of Wilson: in 2010, the Greenlight service disconnected 1,000 customers for nonpayment.<sup>140</sup> Given the limited number of customers the service already has, the loss of these customers leaves them at risk in the future if others do not pay their bills.<sup>141</sup> The risk of bankruptcy and placing the city in an unnecessary financial predicament in pursuit of faster Internet service just does not make financial sense.

Additionally, taxpayers would be providing both the initial funding to set up the Internet services as well as funding month-to-month as subscribers.<sup>142</sup> Furthermore, given the established risk of municipal-run broadband failure, the taxpayers' money is being used irresponsibly. In the organization's filings, the USTelecom Senior Vice President for Communications, Anne Veigle, discussed several municipal broadband failures, establishing that Salisbury's Fibrant is not the only failed broadband service.<sup>143</sup> USTelecom further argues that states are well within their rights to impose restrictions, especially given the

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See *Groups Oppose FCC Overturning State Laws Against Municipal Broadband*, COAL. FOR THE NEW ECON. (Sept. 4, 2014), <http://www.coalitionfortheneweconomy.org/blog/2014/09/groups-oppose-fcc-overturning-state-laws-against-municipal-broadband/> (discussing the allocation of taxpayer dollars for municipal projects and the failures of prior broadband services around the country).

<sup>143</sup> *Id.*

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impact on taxpayers if public projects are not planned and weighed carefully.<sup>144</sup>

If the City of Wilson were to have its way, it would essentially drive out national ISPs from the area. However, if the city systems were to shutdown, thousands would be without service. This could potentially happen if the city is not forced to comply with the legislation that requires its service to have similar pricing as private companies.<sup>145</sup> With this unfair competitive advantage, ISPs would have no reason to continue service to the cities, and if the city service fails, there would be no broadband service provider left to fulfill the service needs of thousands of local residents. Even if the service providers did not leave entirely, the lack of equal pricing would force private ISPs to lower their prices, leading them into bankruptcy. With the financing that large companies put into establishing the necessary infrastructure, it would not be financially feasible to lower their prices to compete. Hence, the regulation requiring fair and equal pricing is necessary in order to prevent unfair competitive advantage.

Finally, municipalities boast of their ability to provide Internet speeds of up to 1GBps.<sup>146</sup> However, they fail to discuss the costs associated with those Internet speeds. The City of Wilson's Greenlight service offers the 1GBps speed in its highest tier package, but that has a cost of \$300 a month.<sup>147</sup> Therefore, while they are offering high speed Internet that surpasses that offered by traditional ISPs, they are charging exponentially higher prices.<sup>148</sup> Many of their lower priced packages, which most average

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<sup>144</sup> See Anne Veigle, *FCC Has No Standing in State Broadband Laws*, USTELECOM.ORG (Aug. 29, 2014), <http://www.ustelecom.org/blog/fcc-has-no-standing-state-broadband-laws> (discussing how states are within their rights to act as they are given the taxpayer implications associated with improperly planned endeavors).

<sup>145</sup> N.C. GEN. STAT. § 160A-340.1(a)(8) (2013) (stating that city service “[s]hall not price any communications service below the cost of providing the service . . . the cost of the capital component that is equivalent to the cost of capital available to private communications service providers in the same locality . . .”).

<sup>146</sup> See Greenlight, *supra* note 110.

<sup>147</sup> See Blogdon, *supra* note 121.

<sup>148</sup> *Id.*



consumers would likely use, offer similar speeds and prices as those offered by ISPs.<sup>149</sup> The vast majority of everyday broadband users do not require 1GBps. With most people living under ISP coverage and using virtually the same speed and pricing offered by ISPs, there doesn't appear to be any reason to have municipal-run services. The taxpayers would be paying to create a service that is virtually identical to what they are already offered, and that seems to be a waste of taxpayer dollars. The above are all potential harms that a city-run broadband would cause and they tend to outweigh the positives offered by such services.

While there are pros and cons to both sides, municipal-run broadband meets a pressing need for better and faster broadband service. With nearly 19 million Americans lacking access to broadband services, and many of those in rural or underdeveloped area, the municipal broadband services would appear to be the best equipped to provide for these individuals.<sup>150</sup> It seems likely that traditional ISPs either do not operate services in these areas or have limited infrastructure in these less developed areas to meet needs. With demand and necessity growing in a tech-driven age, these people need a service, and if the ISPs are unwilling or unable to, the municipal-run services can.

With that being said, these services can exist within the legislative boundaries provided for them in each state. Were they to go unregulated, many of the above issues would develop to create an unstable and unprofitable broadband network in many cities. Chattanooga-based EPB is a prime example of a service that has operated within the boundaries of the state legislation and continued to produce net revenue, placing it on track to be debt free by 2015.<sup>151</sup> While it desires to expand outside its current boundaries, it has not been hindered to a level where it cannot compete with other ISPs operating in the area. If municipal-run services were to follow in this mold, many states could have stable and profitable local broadband services.

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<sup>149</sup> *Id.*

<sup>150</sup> See Davidson & Sylvain, *supra* note 61.

<sup>151</sup> See Perry, *supra* note 46.

## V. POTENTIAL LONG-TERM IMPACT

Regardless of whether the FCC acts and States bring a suit, or the FCC doesn't act and cities bring a suit, the courts' rulings will have far-reaching consequences.<sup>152</sup> If the FCC fails to come to the Cities' aid, the Cities would base their claim on an argument that the federal government is not watching out for their best interests and allowing the state legislature to support whoever funds their campaigns.<sup>153</sup> On the other hand, if the FCC acted to protect municipal-run broadband operations, the ISPs would argue that the federal government is over stepping its boundaries and infringing on the open market and private entities' business.

Furthermore, were the FCC to intervene on behalf of the municipalities and overrule the state law in North Carolina and Tennessee, it would establish precedent for municipalities to challenge state broadband laws across the country. It would essentially allow the overruling of 19 state laws that control city-run broadband services. To allow such broad discretion of federal intervention into state decision-making would create state and federal constitutional tension. The following will discuss the tension between allowing federal intervention and respecting state sovereignty.

### A. *Telecommunications Act of 1996 Issues*

While the City of Wilson hinges its argument on the Telecommunications Act of 1996, judicial precedent has not interpreted the Telecommunications Act of 1996 to allow the FCC to intrude on state control of its laws.<sup>154</sup> Both sides present legal precedents that support their arguments. Municipalities argue that *Verizon* provided the FCC with the discretion to intervene.<sup>155</sup> In that instance, while the D.C. Circuit overruled two provisions in the FCC's Open Internet Order 2010, it did find that the Telecommunications Act of 1996 vested in the FCC the

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<sup>152</sup> See Murawski, *supra* note 1.

<sup>153</sup> *Id.*

<sup>154</sup> Nixon v. Mo. Mun. League, 541 U.S. 125, 125 (2004).

<sup>155</sup> Verizon v. FCC, 740 F.3d 623, 623 (D.C. Cir. 2014).

affirmative authority to enact measures that would encourage the deployment of broadband infrastructure.<sup>156</sup> Were the courts to decide this after the FCC acts, and were they to rule in favor of FCC intervention, this would raise a plethora of issues. It would go in the face of the *Nixon* ruling, which ruled against allowing this sort of FCC intervention.<sup>157</sup>

If courts decide this issue, the idea of deference would come into play. While proponents of FCC intervention point to the *Verizon* case, it is important to note that while persuasive, it is not binding authority for the Supreme Court since it is a Federal Circuit Court ruling. On the other hand, legislatures can point to the fact that *Nixon* is a U.S. Supreme Court ruling in which the justices decided that the federal government was not authorized to intrude on state control of its local governments.<sup>158</sup> When giving deference, courts would likely give more weight to the *Nixon* ruling compared to the *Verizon* ruling.

There is also an argument that state legislation is not discouraging the deployment of municipal-run broadband services. While municipalities would argue that the legislation prevents them from providing broadband service, the legislature has continuously stated that it simply establishes guidelines that must be followed in order to compete in the market.<sup>159</sup> Were the FCC to act, it would have to prove in court that the legislation actually discourages the deployment of municipal service in order to justify the intervention. However, it seems a difficult task given legal precedents for nonintervention and the fact that the legislation does not appear to discourage services, but instead establishes a responsible manner in which they should be deployed.

#### B. *Differences Between Municipalities*

Municipalities that wish to operate their own broadband services range from large to small cities, and the very nature of their size can have an impact on their ability to operate a stable and

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<sup>156</sup> *Id.*

<sup>157</sup> *Nixon*, 541 U.S. at 125.

<sup>158</sup> *Id.*

<sup>159</sup> See Murawski, *supra* note 1.

economically viable service. For example, the cities of Wilson and Chattanooga differ vastly in size and population,<sup>160</sup> and while both argue for the same thing, to be able to have a municipal-run service, it may not be a viable option. While there is nothing wrong with wanting to model your system off a successful one, cities must be realistic in applying that model to their own locale. The City of Chattanooga offers services to over 60,000 households and 5,000 businesses and continues to build revenue and pay off its debt.<sup>161</sup> While other municipalities should look to the City of Chattanooga's EPB as a model, they need to reshape it to fit their budget and capabilities. The issue may be that they do not realize this need, hence the numerous failures of municipal services around the country.<sup>162</sup> Were the FCC to intervene and allow municipal-run services to operate without legislation, the potential exists for many more services to operate outside their means and create unstable financial situations for their respective municipalities.

### C. *Potential Constitutional Rights Issues*

While FCC intervention raises a number of potential issues, one major concern would be interference in state laws leading to several constitutional rights violations.

#### 1. *Potential 10<sup>th</sup> Amendment Issues That May Arise*

The Tenth Amendment of the United States Constitution grants powers not enumerated to the federal government to the states.<sup>163</sup>

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<sup>160</sup> See John Murawski, *Wilson asks FCC to override NC law it says shields Time Warner, Comcast*, NEWS & OBSERVER (Aug. 27, 2014), [http://www.newsobserver.com/2014/08/27/4101819\\_wilson-asks-fcc-to-override-nc.html?rh=1](http://www.newsobserver.com/2014/08/27/4101819_wilson-asks-fcc-to-override-nc.html?rh=1) (stating that Wilson's Greenlight had around 7,000 customers); see also *Our Company and History*, ELECTRIC POWER BD., <https://www.epb.net/about/our-company-and-history/> (last visited Oct. 10, 2014) (discussing the creation and history of the EPB over the years and the number of customers served).

<sup>161</sup> *Id.*

<sup>162</sup> See Smith, *supra* note 33 (discussing how cities in Utah, Connecticut, and Vermont have all had their municipal-run services fail and place a heavy burden on those local resident to help pay back the accumulated debt).

<sup>163</sup> U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

The number of enumerated powers given to the federal government in the Constitution is limited. The vast majority of regulation is left to the states to control within their boundaries. It appears difficult to see how the federal government could try to intervene in state regulation on the matter of broadband services because it does not appear to be an area that delegates power to the federal government. There would be state rights issues with the federal government intruding on state sovereignty were the FCC to overrule the state broadband laws. Were the courts to uphold such action, it would potentially create a domino effect of the FCC going from state to state, overriding state broadband legislation.

## 2. *Potential Commerce Clause Arguments*

The federal government could make an Article I constitutional argument under the Commerce Clause to counter the state sovereignty argument presented by the state legislatures.<sup>164</sup> The Commerce Clause allows the federal government to regulate commerce among the several states.<sup>165</sup> However, establishing that city-run broadband services enter interstate commerce would be difficult, making the Commerce Clause argument a bit of a stretch were the federal government to center its case around it. States are generally permitted to regulate intrastate issues and it would appear difficult to interpret municipal-run services as falling outside that sphere of control given that they only provide to residents within the state.

However, the government may provide a rational basis for its intervention on intrastate activities by showing that they could affect interstate commerce. *Wickard v. Filburn*<sup>166</sup> was the seminal case that established that the power to regulate has been extended to activities that, though local, “affect” commerce outside of the state.<sup>167</sup> In *Wickard*, the Supreme Court sustained federal regulation

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<sup>164</sup> U.S. CONST. art. I, § 8 (“To regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . .”).

<sup>165</sup> *Id.*

<sup>166</sup> 317 U.S. 111 (1942).

<sup>167</sup> *Id.* at 125 (holding that congress can regulate local, interstate activities that have an aggregate effect on interstate commerce though the Commerce Clause, no matter if the effect is indirect).

of wheat grown on a farm and intended for home consumption.<sup>168</sup> The premise was that if the wheat was never marketed, it supplied a need otherwise to be satisfied only in the market, and if prices rose it might be induced onto the market.<sup>169</sup> The Federal government could apply a similar analysis to municipal-run broadband services. For example, while the services are intended for local constituents, municipalities have expressed their desire to expand outside their present boundaries. Were such a service near another state line, they could potentially provide service to that state's citizens in the future if the need arose for broadband in that locale. If a situation like this arose, the federal government, applying the *Wickard* standard, could possibly justify its intervention in a service that appears to only affect intrastate commerce.

D. *Additional Issues That Could Arise*

Furthermore, were the courts to rule against FCC intervention, the cities would further argue that the decision creates even stronger support for a virtual monopoly for the national ISP conglomerates. Companies such as Comcast, Verizon, Time Warner, and others control the vast majority of the broadband service market. With a merger set to take place between Comcast and Time Warner, they will collectively control 65% of the United States' market.<sup>170</sup> However, were the courts to rule against FCC intervention, that decision would merely reinforce the idea that the law does not prevent cities from providing competitive communication services; rather, it just establishes rules if the cities want to compete in that market.<sup>171</sup> Overall, the long-term effects would be much more negative than positive were the FCC to intervene and overrule the state legislation in city-run broadband services.

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<sup>168</sup> *Id.* at 111–12.

<sup>169</sup> *Id.*

<sup>170</sup> Josh Stearns, *Four Infographics Reveal Why the Comcast Merger is Bad for You*, FREEPRESS, <http://www.freepress.net/blog/2014/03/26/four-infographics-reveal-why-comcast-merger-bad-you> (last visited Oct. 10, 2014).

<sup>171</sup> See Murawski, *supra* note 1.

## VI. CONCLUSION

While the Cities of Wilson and Chattanooga make a valid case for wanting to have municipal-run broadband, state legislatures have not barred the existence of municipality-run broadband, but they have disincentivized it to some extent in order to even the playing field between cities and ISPs. The North Carolina and Tennessee legislation only establish guidelines that cities must follow in order to create and sustain their municipal-run broadband services.<sup>172</sup> To this point, the FCC should not override state law because it does not prevent cities from providing competitive communication services, it just establishes rules if the cities wish to compete.<sup>173</sup> Furthermore, while the cities present some sound arguments, they are not strong enough to justify FCC intervention and an overriding of the state law. Finally, the pros of the law outweigh the cons and there are negative long-term effects of potential litigation over this issue. In the end, the economic risk is too high with such services and other states have similar laws and few other states have had cities challenge their legislation.<sup>174</sup>

In this modern age, there is no doubt that broadband service is a highly desired commodity. However, municipalities must be conscience of how they are spending the taxpayers' money and for what services. Many basic human needs still need to be met before funding can be funneled into services like broadband. State legislatures are not trying to prevent or hinder municipal-run services. Legislatures just want to make sure they are implemented in a fiscally responsible manner,<sup>175</sup> and they are entitled to do so. Municipalities claim that this creates an unfair market advantage for ISPs but no one has ever claimed that the global market is fair to everyone, and while efforts must be made to level the playing field, broadband service is not the best vehicle for pushing this need at this time.

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See *Groups Oppose FCC Overturning State Laws Against Municipal Broadband*, *supra* note 142 and accompanying text.

<sup>175</sup> See Murawski, *supra* note 1.

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Ultimately, until the FCC decides to act, many of these issues remain dormant. We continue to play a game of “what if” with numerous hypotheticals being discussed, but the truth of the matter is, we do not really know the outcome at this time. In all likelihood, this will end up in the federal courts and established precedent and judicial interpretation will resolve whether the FCC can truly intervene in state municipal service laws. Until that time, we are stuck playing the waiting game