

Nos. 15-3291, 15-3555

**In the United States Court of Appeals
for the Sixth Circuit**

**STATE OF TENNESSEE,
Petitioner,
NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS,
Intervenor,
vs.
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA,
Respondents,
ELECTRIC POWER BOARD OF CHATTANOOGA; CITY OF WILSON,
NORTH CAROLINA,
Intervenors.**

**STATE OF NORTH CAROLINA,
Petitioner,
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE,
Intervenor,
vs.
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA,
Respondents,
CITY OF WILSON, NORTH CAROLINA,
Intervenor.**

**On Petition for Review from Order of the
Federal Communications Commission No. 15-25**

**Brief of the National Association of Telecommunications Officers and
Advisors as Amicus Curiae in Support of the Respondents**

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FRAP 26.1 DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, *amicus*, the National Association of Telecommunications Officers and Advisors, makes the following disclosure:

1. Is *amicus* a subsidiary or affiliate of a publicly owned corporation? No.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No publicly owned corporation or other publicly held entity has a direct financial interest in the outcome of this litigation due to the participation of the *amicus*.

/s/ Lani L. Williams

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INTEREST OF THE AMICUS CURIAE¹

As a national trade association based in Alexandria, Virginia, the National Association of Telecommunications Officers and Advisors (“NATOA”) represents a variety of local government jurisdictions, entities, and consortiums, as well as elected and appointed officials, and staff responsible for telecommunications issues in their respective communities. NATOA promotes community interests in communications before the federal and state courts, Congress, and governmental agencies such as the Federal Communications Commission. NATOA provides its members with information, education, training, and advocacy with respect to national and regional communications issues.

NATOA has a particular interest in preserving and highlighting the importance of local government entities’ ability to deploy broadband services, including high-speed internet. With a stated policy supporting the rapid deployment of broadband services by public and private entities, NATOA is uniquely qualified to address the importance of broadband deployment in creating the communities of tomorrow.

NATOA has long advocated that broadband is a very powerful economic development, educational, and societal tool. Through the experiences of our

¹ In accordance with FRAP 29(c)(5), amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus and its counsel has made a monetary contribution to the submission of this brief. All parties have consented to the filing of this brief.

members and communities nationwide, NATOA has seen first-hand the effect of accessible broadband, and continues working to see its benefits reach communities yet to be served by broadband. In 2008, NATOA developed suggestions, principles, and related materials addressing the need for a national broadband strategy. NATOA's ten Broadband Principles were and are designed to help the United States achieve the broadband capacity and access it needs for the future. These Broadband Principles outlined the critical need for widespread deployment of next-generation broadband networks and necessary steps to achieve this goal.

In particular, NATOA called for fiber to the premises as the preferred broadband option, and noted that high capacity broadband connectivity must be affordable and widely accessible. Further, NATOA's Broadband Principles require that local governments be intimately involved in development and deployment and be allowed to build and operate broadband networks to ensure that local needs and interests are met. NATOA's Broadband Principles are available on the NATOA website at

<http://www.natoa.org/Documents/BroadbandPreamble%26Principles.pdf> (last accessed November 5, 2015).

SUMMARY OF THE ARGUMENT

Economic development increasingly depends on the advanced communications infrastructure known as broadband. The utility of broadband is about more than watching television, surfing the Web, and making phone calls. It is about new forms of communication and mass collaboration through the virtually unlimited potential for sharing information, storage capacity, processing power, and software made possible through high-capacity bandwidth connections. This collaboration will generate new ideas, accelerate economic development, and lead to opportunities for wealth creation, social development, and personal expression. *See*, NATOA's Broadband Principles at 1.

Local governments should have the right to deploy advanced communications infrastructure to their citizens directly or to enter into public-private partnerships or to simply let market forces shape their advanced communications infrastructure. The broadband projects of America's communities should be considered akin to water and electric utilities or other public conveniences, such as roads and highways. Just as infrastructure projects like water and power utilities and roads and highways were the innovations which led to American success generations ago, today's broadband deployment brings important benefits to citizens of communities throughout the United States. Strong

policy reasons support promoting and allowing local choice in deployment methods.

Municipalities and counties ought to be able to provide their constituents with affordable broadband services – services which are as vital as fire and police protection in today’s increasingly globally competitive world. In addition, let us not lose sight of the fact that hardworking American families ought not to be held hostage, unable to access broadband services that could be provided by local government, because a handful of corporations *might* see a reduction in their earnings reports or because some state legislatures are not confident that the citizens of individual communities can govern themselves effectively.

ARGUMENT

Broadband access is like telephone, electric, and transportation services in that it allows the improved mobility and success of citizens and communities for business, education, and entertainment purposes, much as those earlier services did before the advent of broadband services. Access to broadband capabilities, especially high-speed internet services, is an essential service in light of its growing importance for facilitating sustainable economic and educational growth, for developing healthcare delivery systems, and for improving the ability of public safety networks respond to a variety of natural and manmade challenges. Because of importance of broadband access for continued economic, educational, medical,

political, and social development, no method of deployment should be forestalled. This includes allowing local governments to deploy broadband infrastructure and allowing them to provide services when it is in the best interests of a particular community, as determined by that community.

Continued lack of access harms local communities with respect to education, healthcare, economic development, standard of living, and the level and quality of civic discourse. Throughout too much of the United States, the technological and innovative fate of communities has been left in the hands of providers who are charged with maximizing profits for shareholders. This is not a criticism of private business, but rather a recognition that private interests simply cannot meet all needs because of their obligations to shareholders. Unfortunately, in those areas where profits may be small or not realized in the short term, private enterprise is less likely to develop broadband infrastructure. While profit motives often foster innovation, with respect to broadband deployment and access, many community needs are simply unmet. There must be a vehicle which will allow those who live in communities which are currently un- or underserved to have the same opportunity and access as those who live in areas which are more profitable and therefore of interest to private companies. And there must be a way to foster competition so that communities do not find themselves subject to monopolies. The vehicle for gaining access and fostering competition may well be either the

public provision of broadband or a combination of public/private ventures. Without the involvement of local governments to fill the gaps as necessary, broadband deployment in the United States will continue be driven solely by profit motives, leaving subpar broadband services the norm for many communities, especially in rural America.

I. Municipal Broadband Deployment Mirrors Earlier Infrastructure Developments

The United States has long been a world leader in economic development. It has a long history of deploying electric, telephone, transportation, and other infrastructure for use by all its citizens. Investments in physical infrastructure have been critical to supporting economic progress, whether in the form railroad systems, the early electric and telephone networks, or the post-World War II construction of airports and the interstate highway system.

Local governments in particular have played an important and essential role in ensuring that the benefits of infrastructure, especially communications infrastructure, become available to all. By doing so, they assumed what is now a traditional role of providing essential services to citizens when competitive markets fail to do so. *See*, Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 Rutgers Computer and Tech. L. J. 1, 23-27(1999). Publicly owned electric utilities arose because local governments were concerned about ensuring the availability of the

service, were dissatisfied with private providers, and desired economic benefits and increased quality of life that come with service being available. These interests spur the deployment of broadband just as they motivated the deployment of electricity.

Because local governments traditionally occupied a vital role in deploying necessary infrastructure, localities must be part of the solution to the national broadband deficit. Just as local governments built municipal power systems as part of the efforts to electrify America in the first part of the 20th Century, and just as local governments today administer public transportation networks, water and sewage networks; so too must local governments be allowed to provide broadband infrastructure and services. As broadband becomes a necessary utility for things such as commerce, education, and healthcare, local government entities across the country have taken up their traditional role of providing this needed service to residents and local businesses by building and providing broadband networks and services, especially in those areas where private development is slow or lacking entirely.

Municipal deployment efforts are sometimes met with resistance from private entities who have lobbied for legislation to stifle municipal deployments or sought judicial intervention by arguing that local governments do not have the authority to be market participants in what the private entities believe to be a

wholly private economic enterprise. Private entities portray local government infrastructure developments as inefficient government monopolies unfairly competing with a plethora of competitive private sector offerings. These arguments suggest 1) that local governments are incompetent and their tax payers must be protected from this incompetence and inefficiency, and 2) that local governments are super-efficient and market savvy, unfairly using public resources to undercut private industry. These arguments are put forth despite the fact that the elected officials responsible for the decision to deploy a government network were elected by the very people private industry claims are in need of protection.

These arguments ignore many realities. They ignore the long history of local government involvement in deploying critical infrastructure. They ignore the fact that local governments are more directly accountable to their constituents than either federal or state legislators, and that the day to day lives of citizens throughout the United States are most effected by decisions made at the local level. They ignore the fact that, because of their close contact with their citizens, elected officials of communities (who also live in the very communities which they have been selected to govern) are necessarily and rightly more responsive to constituent concerns than state and federal legislators. These arguments also ignore the very real consequences of communities not having access to affordable broadband.

In addition, while local government provision of broadband services might in some instance compete with private company provision of services, these arguments ignore that competition to the detriment of private interests is not always the case. In fact, local government provision of services often promotes and fosters private business. For instance, a local government might hire a private company to build out the necessary infrastructure or partner with a private company to provide broadband based services such as television.

The experience of Sandy, Oregon showcases these principles and why local governments ought to be able provide broadband services should they determine it is in the best interests of their citizens. SandyNet is an internet service provider in Sandy, Oregon, owned by the people of Sandy, and operated as a public service by the City. *See*, City of Sandy, Oregon Website, <http://www.ci.sandy.or.us/SandyNet/> (last accessed November 11, 2015). The City began offering internet services in the early 2000s because it was unable to obtain service from private companies despite being located less than 30 miles from Portland, Oregon. *See*, Jon Brodtkin, *Where broadband is a utility, 100Mbps costs just \$40 a month*, Ars Technica, August 4, 2015, available at <http://arstechnica.com/business/2015/08/how-a-small-city-offers-60-gigabit-fiber-with-no-taxpayer-subsidies/> (last accessed November 11, 2015).

Due to the lack of available services, government officials looked for a solution to meet the needs of the government itself, as well as the needs of its residents. This led to the creation of SandyNet. SandyNet operates on a break-even basis, and passes savings on to the customers. Despite not being subsidized by taxpayer dollars, prices to consumers are low and there are no contracts or data caps. *Id.*

In 2014, the City realized it needed to upgrade its services and deploy fiber throughout the community. The City Council authorized the City Manager to sign a contract with OFS, a private corporation based in Norcross, Georgia, for the creation of a Fiber to the Premise (FTTP) network in the City. This network utilizes the latest technologies in fiber optic networking to bring the citizens of Sandy ultra-fast internet at an affordable price. In addition, SandyNet is partnering with a company called *yondoo* to provide TV service over the fiber wires. *Id.*

The fiber network has brought advantages beyond fast, cheap internet service for its citizens. For example, because of SandyNet, the Oregon Department of Transportation is able to monitor and control its traffic lights remotely. Sandy's experience shows that local government provision of broadband services fills gaps in services to the governments themselves; creates partnerships with private businesses in a variety of ways such as the construction of the networks or the provision of other services, and gives citizens access to affordable broadband.

The history of distribution technologies, such as the roadways, railroad, telegraph, and telephone repeatedly demonstrates the importance of public involvement to ensure full access to broadband at reasonable prices. Broadband connectivity has changed and continues to change communities on a daily basis. It is vital for our economy that local government be allowed to deploy broadband networks.

II. Removing Local Government Deployment as a Method of Addressing Accessibility and Affordability Gaps Damages Future Generations

The vital nature of broadband access and affordability is demonstrated by a recent report reviewing technological infrastructure in America's schools. The report released by the Consortium of School Networking ("CoSN"), in conjunction with the AASA (The School Superintendents Association) and MDR, highlights the significant broadband-specific needs of today's education system. CoSN's *2015 Annual E-Rate and Infrastructure Survey*, available at <http://cosn.org/Infrastructure2015#sthash.651DLaOR.dpuf> (last visited November 5, 2015), notes technological infrastructure issues have improved for American schools. However, too many schools, and the students they support, are still woefully underserved when it comes to broadband access and affordability.

For the third consecutive year, nearly half of the 530 school districts surveyed identified the cost of ongoing recurring expenses as their biggest barrier

to robust connectivity, while more than one-third of the districts noted that capital or upfront expenses present challenges to increasing robust internet connectivity. School districts also face significant challenges with respect to improving network speed and capacity, and experience insufficient competition in the provision of broadband services which would reduce costs. In addition, digital equity is a growing issue, particularly in terms of access to technology outside of the classroom. *See, 2015 E-Rate and Infrastructure Survey* at 4-6.

Nearly 25% of school districts surveyed said that NONE of their schools currently meet the Federal Communications Commission's short-term broadband goal of at least 100 megabits-per-second for every 1,000 users, and fewer than 1 in 10 respondents said that all of their schools meet the FCC's long-term connectivity goal of 1 gigabit-per-second for every 1,000 users. *Id.* at 10. With respect to costs, almost 20% of responding school systems are paying \$50/Mbps, or more, per month for their internet connection. *Id.* at 8.

The school districts also shared information about their students' ability to access broadband services away from school. Eighty-eight percent stated that affordability is the most common reason families lack internet access at home. *Id.* at 5, 18. The next highest reason students did not have broadband service was that broadband was simply not available at their location. *Id.*

The survey also highlights that a lack of competition among broadband providers is a primary reason that broadband is not affordable. *Id.* at 6. Fifty-four percent of respondents from rural districts reported that there is only one internet provider in their area while overall; while forty-six percent of urban, suburban, and rural schools reported that only one internet provider serviced their area. *Id.* at 6, 14, 20. In addition, thirty-eight percent of rural districts noted that they received only one or no qualified bid for E-rate services. *Id.* This lack of robust competition among internet providers serving school systems adversely affects affordability and decreases the ability for education leaders to plan for redundancy in their systems.

Education is going digital and will become more so in the years to come. Yet school systems face many challenges related to cost, inadequate speeds and capacity, network reliability, and lack of competition. We are disadvantaging schools and the children they serve today and we will feel the negative effects of this tomorrow.

America's future status in a global economy and workplace, depends on broadband access of our schools and students. These students will be our business and political leaders. We should give them the best tools possible, regardless of whether the tools are provided by their local government or by a national telecommunications provider. We should foster accessibility and affordability by

universally allowing local governments to provide broadband infrastructure and services.

CONCLUSION

The importance of broadband services to the political, economic, educational, and social progress of the United States shows good policy requires that local governments be allowed to deploy broadband capabilities pursuant to the wishes of their electorate. To deny a local government the ability to provide service on the theory that local government unfairly competes with private business necessarily requires that a local government sacrifice the hard earned money of its citizens in favor of private corporate profits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

The undersigned hereby certifies as follows:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,844 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in size 14 Times New Roman.

/s/ Lani L. Williams

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Curiae Brief was served on all parties or their counsel of record through the CM/ECF system to their electronic addresses of record on this 12th day of November, 2015 if they are registered users or, if they are not, by placing a true and correct copy in the United States mail to their address of record.

/s/ Lani L. Williams