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FISCAL IMPACT REPORT

SPONSOR HBEC ORIGINAL DATE 03/10/15
LAST UPDATED _____ HB 442/HBECS
SHORT TITLE Telecommunications Safeguard Act SB _____
ANALYST Sanogo

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files
Federal Communications Commission (FCC)
NM Public Regulation Commission (PRC)
Attorney General's Office (AGO)
NM Municipal League (NMML)

SUMMARY

The HBEC substitute for HB 442 prohibits municipalities from providing telecommunication, video, or broadband services except in "unserved areas", defined as regions within the boundaries of a municipality that lack access to telecommunication services according to certain criteria.

For any municipality that provides such services, HB 442 would rescind antitrust protections described in Section 57-1-16 NMSA 1978; the bill also places restrictions on the exercise of eminent domain. HB 442 contains a severability and emergency clause.

FISCAL IMPLICATIONS

No fiscal impacts. See, "significant issues."

SIGNIFICANT ISSUES

CS/HB 442 is substantially similar to a North Carolina law that was recently found to be in violation of federal regulations (See, "**Attachment A**"). On February 26, 2015 the Federal Communications Commission (FCC) determined that certain state laws restricting municipal broadband services conflicted with the Telecommunications Act of 1996, Section 706.

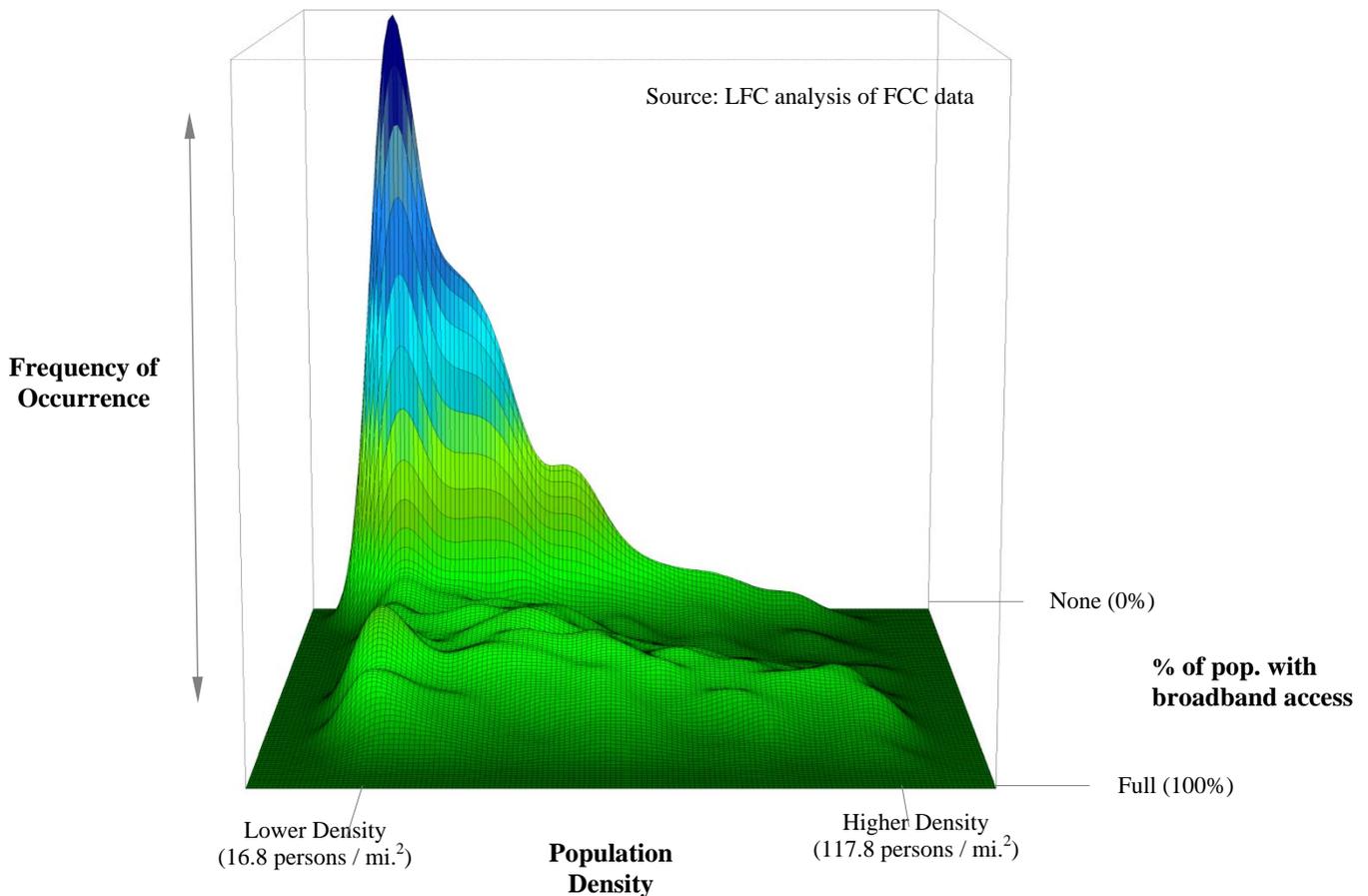
Referencing the supremacy clause of the Constitution of the United States, the FCC asserted the

preemption of federal regulations over the conflicting state laws. In its order, the federal agency argued that the state laws created barriers to additional competition and investment in broadband networks.

Published on the same day, a *Wall Street Journal* article notes that the FCC order does not affect other states' laws; it does, however, "set a precedent for consideration of similar petitions in the future." (See, attachments) The order is also expected to face legal challenge.

According to the FCC, the deployment of broadband services has failed to keep pace with the increase in internet-based data, arguing that "advances are not occurring broadly enough or quickly enough." Access to broadband services is especially lacking in rural areas (see figure 1, below). CS/HB 442 proposes to allow municipalities to offer services in these "unserved areas." However, the proposed standard does not meet the FCC benchmark. CS/HB 442 defines a "minimum broadband transmission speed" of 7 mbps / 1 mbps upload—significantly below the FCC-defined 25 mbps / 3 mbps upload speed. Thus, part of the definition of unserved area is less inclusive than the federal standard, potentially inviting regulatory action if challenged.

Figure 1: Broadband access in the 3,143 counties of the United States
The likelihood of no access decreases in areas of higher population density



ATTACHMENT A

CS/ HB 442 is substantially similar to a North Carolina law that was recently found to be in violation of federal regulation. The Federal Communications Commission (FCC) made its ruling on February 26, 2015 (See "Attachment B")

Highlighted sections indicate where the proposed NM legislation (CS/ HB 449) relates to the NC law (HB 129).

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011**

H **D**
HOUSE DRH70039-LM-18B* (02/01)

Short Title: Level Playing Field/Local Gov't Competition. (Public)

Sponsors: Representative Avila.

Referred to:

A BILL TO BE ENTITLED
AN ACT TO PROTECT JOBS AND INVESTMENT BY REGULATING LOCAL
GOVERNMENT COMPETITION WITH PRIVATE BUSINESS.

...

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 160A of the General Statutes is amended by adding a new Article to read as follows:

"Article 16A. Provision of Communications Service by Cities.

"§ 160A-340. Definitions.

The following definitions apply in this Article:

- (1) City-owned communications service provider. - A city that provides communications service using a communications network, whether directly, indirectly, or through an interlocal agreement or a joint agency.
- (2) Communications network. - A wired or wireless network for the provision of communications service.
- (3) Communications service. - The provision of cable, video programming, telecommunications, broadband, or high-speed Internet access service to the public, or any sector of the public, for a fee, regardless of the technology used to deliver the service. The terms "cable service," "telecommunications service," and "video programming service" have the same meanings as in G.S. 105-164.3.

Compares to page 2,
lines 1-5 and 9-11, of
CS/ HB 442.

(4) High-speed Internet access service. - Internet access service with transmission speeds that are consistent with requirements for basic broadband service as defined by the Federal Communications Commission.

(5) Interlocal agreement. - An agreement between units of local government as authorized by Part 1 of Article 20 of Chapter 160A of the General Statutes.

(6) Joint agency. - A joint agency created under Part 1 of Article 20 of Chapter 160A of the General Statutes.

"§ 160A-340.1. City-owned communications service provider requirements.

(a) A city-owned communications service provider shall meet all of the following requirements:

(1) Comply with all local, State, and federal laws, regulations, or other requirements that would apply to the communications service if provided by a private communications service provider.

(2) In accordance with the provisions of the Local Government Finance Act, being Chapter 159 of the General Statutes, establish one or more separate enterprise funds for the provision of communications service, use the enterprise funds to separately account for revenues, expenses, property, and source of investment dollars associated with the provision of communications service, and prepare and publish an independent annual report and audit in accordance with generally accepted accounting principles that reflect the fully allocated cost of providing the communications service, including all direct and indirect costs.

(3) Provide communications service only within the jurisdictional boundaries of the city providing the communications service.

(4) Shall not, directly or indirectly, under the powers of a city, exercise power or authority in any area, including zoning or land-use regulation, or exercise power to withhold or delay the provision of monopoly utility service, to require any person, including residents of a particular development, to use or subscribe to any communications service provided by the city-owned communications service provider.

(5) Shall provide nondiscriminatory access to private communications service providers on a first-come, first-served basis to rights-of-way, poles, conduits, or other permanent distribution facilities owned, leased, or operated by the city unless the facilities have insufficient capacity for the access and additional capacity cannot reasonably be added to the facilities. For purposes of this subdivision, the term "nondiscriminatory access" means that, at a minimum, access shall be granted on the same terms and conditions as that given to a city-owned communications service provider.

(6) Shall not air advertisements or other promotions for the city-owned communications service on the city's public, educational, or governmental access channel, use city resources that are not allocated for cost accounting purposes to the city-owned communications service to promote city services in comparison to private services or, directly or indirectly, require city employees, officers, or contractors to purchase city services.

(7) Shall 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.

Page 3, lines 8-11 of CS/ HB 442.

Page 3, lines 12-14 of CS/ HB 442.

Page 4, lines 12-17 of CS/ HB 442.

Page 3, lines 15-24 of CS/ HB 442.

Page 4, lines 23-23, through page 5, line 5

Page 5, lines 5-9 of CS/ HB 442.

Page 5, lines 10-15 of
CS/ HB 442.

(8) Shall 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 and allocation of costs associated with any shared use of buildings, equipment, vehicles, and personnel with other city departments. The city shall, in calculating the costs of providing the communications service, impute (i) the cost of the capital component that is equivalent to the cost of capital available to private communications service providers in the same locality and (ii) an amount equal to all taxes, including property taxes, licenses, fees, and other assessments that would apply to a private communications service provider including federal, State, and local taxes; rights-of-way, franchise, consent, or administrative fees; and pole attachment fees.

Page 3, line 25,
through page 4, line 9

(9) The 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, including any applicable tax refunds received by the city-owned communications service provider because of its government status and a sum equal to the amount of property tax that would have been due if the city-owned communications service provider were a private communications service provider.

(b) A city-owned communications service provider shall not be required to obtain voter approval under G.S. 160A-321 prior to the sale or discontinuance of the city's communications network.

(c) G.S. 160A-340.1(a)(7) through (9) shall not apply to communications service provided by a city on or before January 1, 2011.

"§ 160A-340.2. Exemptions.

(a) The provisions of G.S. 160A-340.1, 160A-340.4, and 160A-340.5 do not apply to the purchase, lease, construction, or operation of facilities by a city to provide communications service within the city's jurisdictional boundaries for the city's internal governmental purposes.

Page 7, lines 1-3 and
page 5, lines 18-19

(b) The provisions of G.S. 160A-340.1, 160A-340.4, and 160A-340.5 do not apply to the provision of communications service in an unserved area. A city seeking to provide communications service in an unserved area shall petition the North Carolina Utilities Commission for a determination that an area is unserved. The petition shall identify with specificity the geographic area for which the designation is sought. Any private communications service provider, or any other interested party, may, within a time established by order of the Commission, which time shall be no fewer than 30 days, file with the Commission an objection to the designation on the grounds that one or more areas designated in the petition is not an unserved area or that the city is not otherwise eligible to provide the service. For purposes of this subsection, the term "unserved area" means a geographical area in which at least ninety percent (90%) of households either have no access to high-speed Internet service or have access to high-speed Internet service only from a satellite provider.

Page 2, lines 17-24 of
CS/ HB 442.

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NEWS

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action.
See MCI v. FCC, 515 F 2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE:
February 26, 2015

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FCC GRANTS PETITIONS TO PREEMPT STATE LAWS RESTRICTING COMMUNITY BROADBAND IN NORTH CAROLINA, TENNESSEE

Washington, D.C. – The Federal Communications Commission today opened the door for two community broadband providers to expand service, preempting state laws in Tennessee and North Carolina that prevented these and similar broadband providers in the two states from meeting local demand for broadband service.

A Memorandum Opinion and Order adopted by the Commission finds that provisions of the laws in North Carolina and Tennessee are barriers to broadband deployment, investment and competition, and conflict with the FCC's mandate to promote these goals. The state laws had effectively prevented the cities from expanding broadband service outside their current footprints despite numerous requests from neighboring unserved and underserved communities.

The petitions were filed last July by the Electric Power Board (EPB), a community broadband provider in Chattanooga, Tennessee, and the City of Wilson, North Carolina. In addition to providing electric service, both operate broadband networks providing Gigabit-per-second broadband, voice, and video service. The networks in both areas have attracted major employers, including Amazon and Volkswagen in Chattanooga, and Exodus FX, Regency Interactive, and WHIG TV in Wilson. Wilson's system also provides free Wi-Fi downtown.

Tennessee law allows municipal electric systems like EPB to provide telecommunications services anywhere in the state, but limits provision of Internet and cable services to the electrical system footprint. In North Carolina, a 2011 law imposed numerous conditions that effectively precluded Wilson from expanding broadband into neighboring counties, even if requested. One condition, for example, restricted expansion into areas where the private sector delivers service at speeds as slow as 768 kbps in the faster direction – an archaic standard that fails to support modern needs and is a fraction of the FCC's 25/3 Mbps benchmark.

Comments filed regarding Wilson's petition suggest that the law was largely sponsored and lobbied for by incumbent providers and competitors to Wilson.

Under federal law, a federal agency may preempt state laws that conflict with its regulations or policies so long as it is acting within the scope of its authority. There is a clear conflict, the Order finds, between Section 706 of the Telecommunications Act of 1996, which directs the FCC to take action to remove barriers to broadband investment and competition, and provisions of the Tennessee and North Carolina

law that erect barriers to expansion of service into surrounding communities, including unserved and underserved areas.

The Order concludes that preemption will speed broadband investment, increase competition, and serve the public interest.

Action by the Commission February 26, 2015, by Memorandum Opinion and Order (FCC 15-25). Chairman Wheeler, Commissioners Clyburn and Rosenworcel with Commissioners Pai and O’Rielly dissenting. Chairman Wheeler, Commissioners Clyburn, Rosenworcel, Pai and O’Rielly issuing statements.