

North Carolina Broadband Internet Policy: The Preemption of Municipal Broadband

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Executive Summary

This report seeks to explore broadband internet policies in North Carolina relating to municipal broadband services. Current North Carolina policies severely restrict community-owned/municipal broadband as well as broadband partnerships between public and private partners. This paper also makes a case for changing these policies to allow, and potentially encourage, municipal broadband as well as public-private partnerships in order to achieve adequate broadband access for all North Carolinians.

The Level Playing Field Act was passed by NC legislators in 2011. This act established harsh requirements that municipal broadband providers would need to meet before they could operate. These requirements include, but are not limited to, requirements around the funding, promotion, and pricing, as well as restrictions on the boundaries in which a municipal broadband service would be allowed to operate (Level Playing Field/Local Gov't Competition Act, 2011). This act has been continually upheld by North Carolina legislators since, with the addition of guidelines and restrictions for public-private partnerships (Provision of Communications Service by Cities, 2022).

At least 1.1 million households in North Carolina are without access to high-speed broadband internet (North Carolina Department of Information Technology [NCDIT], 2021). This digital divide is severely impacting the economy, education, agriculture, and many more areas of life for NC citizens. These issues especially effect rural communities, where the lack of broadband is most common.

Changing the current policies to allow community-owned broadband would be a major step towards bridging this digital divide in North Carolina. It would allow municipalities to step in and provide broadband when and where private companies are not doing so. Implementing policies that would not only allow but also encourage these municipal services would be even more effective in bridging these gaps. Even allowing and/or encouraging public-private partnerships would go a long way in communities where broadband access is lacking. Additionally, these proposed policy changes could potentially increase market competition with private internet service providers (ISPs).

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Background and Current Policy

Background

In many rural communities, there are often very limited options for internet service providers (ISPs). When options are available, they are often very slow and/or too expensive, making them inadequate for the people in those areas. Many ISPs are not eager to expand their services to these areas. This is because it would be expensive for the ISPs to do so since there is typically a lack of broadband infrastructure in these rural areas. Additionally, because there is a smaller customer base, ISPs don't believe they would see a beneficial return on their investments for installing this infrastructure (Read & Wert, 2022).

After negotiating with ISPs for years over expanding broadband access and infrastructure in Wilson, North Carolina, the city of Wilson decided to take broadband into their own hands. In 2008, the community-owned broadband network, Greenlight, was established. Greenlight was able to provide faster speeds and wider access to broadband to people in the city and its rural surrounding areas. The network was very successful and began making a profit as early as 2010. By 2012, they had already accumulated over 6,000 subscribers (Marcattilio-McCracken & Mitchell, 2020).

With the realization that Greenlight was becoming successful in its mission to provide broadband, ISPs began lobbying legislators to put an end to it. The ISPs were successful, since the Level Playing Field Act was passed and enacted in NC in 2011, which established stringent restrictions on municipal broadband networks. The decision to pass this legislation may have been monetarily driven rather than policy driven, given that "Three-quarters of North Carolina's 2011 legislature (131 of 170 legislators) received money from the [telecommunications] company PACs [(Political Action Committees)] in 2010–2011: 87 of 120 representatives; 44 of 50 senators." (Barber, 2012).

In 2015, the Federal Communications Commission (FCC) voted to prevent laws such as the ones in NC that would prevent municipal broadband providers, citing that these laws were barriers to investment in broadband infrastructure, and they obstruct competition in the broadband market (Federal Communications Commission, 2015). However, the state of North Carolina, as well as Tennessee, whose laws were also blocked by this decision, sued the FCC, claiming that this decision violated state autonomy. The US Court of Appeals for the Sixth

Circuit overturned the FCC decision, ruling in favor of the states, allowing the NC laws to remain in place (Schwarze, 2018).

Current Policy

Since the introduction of the 2011 Level Playing Field Act, policies regarding municipal broadband in North Carolina have not changed considerably. There have been a few additions since, mainly regarding guidelines and restrictions for public-private partnerships. No restrictions have been removed. The current legislation, NC General Statutes 160A article 16A, continues to place restrictions so harsh that no municipalities or initiatives have met them (NCDIT Division of Broadband and Digital Equity, 2023), though a few, such as Greenlight, were partially grandfathered in, and allowed to continue operating in some capacity. Some of the most notable restrictions, though certainly not all, placed by the NC General Statutes will be discussed here.

One of the restrictions placed by the NC General Statutes 160A article 16A is that cities seeking to provide municipal communication services (i.e., broadband) must solicit proposals from private companies and negotiate with them to provide the necessary services before the city is allowed to establish municipal communication services. The problem with this is highlighted by O’Boyle and Mitchell (2012) when they discuss how, before establishing Greenlight, Wilson city officials negotiated with telecommunications providers for the better part of a decade, from 2001 until 2007, yet the ISPs were not interested in expanding their services to the area. O’Boyle and Mitchell also note how the companies did not take the negotiations seriously, and how prominent ISP Time Warner Cable laughed at the idea of a public-private partnership with Wilson. This goes to show that negotiations with these companies can take quite a long time and still be ultimately unproductive.

NC General Statutes 160A article 16A also mandates that municipal broadband providers “shall not price any communications service below the cost of providing the service” (Provision of Communications Service by Cities, 2022). This restricts the capability of the municipality to lower their prices. If a municipal broadband provider wanted to use their profits to offer cheaper service rates to public housing or affordable housing communities, they would be very limited in their ability to do so. Private ISPs, however, are not held to this standard. This means that they are allowed to use profits they make in the more profitable communities in order to give cheaper services in other communities, including pricing that is below the cost of providing the service.

This tactic has been used by ISPs, such as Time Warner Cable, to try and financially weaken municipal broadband providers, such as Greenlight (Marcattilio-McCracken & Mitchell, 2020).

There are also restrictions placed on how municipal broadband providers are allowed to promote their service. They are prohibited from promoting their services on a public, educational, or government access channel if other ISPs are required to carry the channel.

Restrictions are placed on how the city or municipality is allowed to fund these broadband services. One of these says that “A city shall not incur debt for the purpose of constructing a communications system without first holding a special election under G.S. 163-297 on the question of whether the city may provide communications service.” (Provision of Communications Service by Cities, 2022).

Additionally, this legislation prevents any municipal providers who were grandfathered in, such as Greenlight, from expanding their networks past county lines, even if the neighboring counties are in need and the municipal broadband provider has the resources and ability to expand the network.

Comparative Policies in the United States

This kind of legislation and restrictions are not unique to North Carolina. Fifteen other states have policies prohibiting or severely restricting municipal broadband providers. Besides North Carolina and these fifteen states, three other states have legislation that discourages municipal broadband but does not restrict it to such a harsh degree as NC, or the fifteen others, does (Cooper, 2023b).

Outside of the nineteen states discussed that restrict municipal broadband, no other states in the U.S. have notable restrictions on the issue. Of these, three states previously had barriers to municipal broadband in place but have removed these in recent years, with Arkansas and Washington both passing their respective new legislations in 2021 and Colorado in 2023. Two of these non-restrictive states, Maine and New York, have passed legislation that encourages municipal broadband as well as public-private partnerships (Cooper, 2021, 2023b). This paper argues that North Carolina should adopt a policy such as these to effectively fight the lack of broadband access in the state.

Policy Importance and Relevance

Internet access is a necessity for almost all aspects of life. The COVID-19 pandemic highlighted just how important this need for broadband internet is. The pandemic also highlighted the disparities between people and communities who have that access and those who do not. In North Carolina, there are at least 1.1 million households without access to high-speed broadband internet (NCDIT, 2021). Many of these are in rural areas.

This lack of broadband internet access has major consequences on the lives of residents in rural areas. There are severe economic impacts from the lack of broadband. Businesses need internet access in order to be successful in today's economy. In areas with inadequate broadband access, businesses are inhibited from moving to or starting in these regions. This in turn harms the economy of the area, including limiting job opportunities for residents. Many rural communities are often heavily involved in farming and the agriculture industry. In fact, agriculture is North Carolina's biggest economic driver. Despite this, many farmers struggle to get sufficient broadband service, which impacts their business greatly. For example, it reduces their ability to communicate with customers and their ability to analyze and use data to make decisions (NCDIT, 2020).

There are also notable impacts of broadband inequalities on education, especially since the start of the COVID pandemic. With schools being forced to move online, attending school became much more difficult for low-income students and students in rural areas who did not have access to high-speed broadband. According to the NCDIT, 19% of households in NC with children do not have high-speed internet (2021). Without internet access, these children will either not be able to complete or have a lot of difficulty completing online homework assignments or completing virtual learning, which will negatively affect their educational success.

When rural communities do have access to broadband providers, there is often only one option. Because there is only one option for ISPs and no market competition in the area, the ISP can charge higher prices. A study done by Consumer Reports found that internet prices were higher, on average, in zip codes where bills were received from only one ISP. In contrast, in zip codes where they received bills for multiple ISPs, prices were generally lower (Schwantes, 2022). Additionally, Broadbandnow, a research company focusing on broadband access and

pricing, found that internet pricing is, on average, around 15% lower for consumers in an area with at least three ISP options (Cooper, 2023a).

Additionally, there is a new relevance to laws around municipal broadband, which has to do with the Broadband, Equity, Access, and Deployment (BEAD) program. The BEAD program is a federal funding program to expand broadband access across the United States. It gives grants to states to distribute however they see fit, though each state does have to submit a plan for how they plan to use the funds. The Infrastructure Investment Jobs Act (IIJA), which enabled the BEAD program, specifically states that state plans must ensure the participation of non-traditional broadband providers, such as municipalities. The National Telecommunications and Information Administration (NTIA) has encouraged states to waive their preemption laws around municipal broadband, but the NTIA will not withhold funds from states that do not remove these restrictions (Gonsalves, 2023). The North Carolina BEAD five-year plan specifically cites the current legislation on municipal broadband as a barrier to the implementation of the plan. It also discusses the “chilling effect” that the legislation has had on municipalities seeking alternative options for expanding broadband access who are reluctant to seek out and use these methods “for fear of violating the statute” (NCDIT Division of Broadband and Digital Equity, 2023).

Solutions and Policy Changes

The most basic solution to this issue would be to remove the harsh restrictions on municipal broadband that are currently in place. This proposal is not inconceivable since, as previously mentioned, several states around the country have recently done this or are currently trying to do this to help reduce the digital divide in their states. Washington is a good example of a state that used to have explicit restrictions on municipal broadband but passed legislation that completely removed them in 2021 (Cooper, 2021). Removing the regulations implemented in 2011 with the Level Playing Field Act would revert our policies back to those that allowed municipalities such as Wilson to step in and successfully meet the broadband needs of the community. As the world has become more and more centralized online, broadband needs have grown and the divide between those with and those without access has widened since 2011. Therefore, it makes sense to change the broadband policies put in place over a decade ago.

Along with removing restrictions on municipal broadband providers, this paper argues that North Carolina should also remove restrictions on public-private broadband partnerships.

Municipal broadband providers like Greenlight are not always realistic, due to various barriers such as geography, population, or cost (Cost, 2022). Public-private partnerships could be a more suitable option to combat digital inequities for those communities. Currently, these partnerships are difficult, if not impossible, due to the restrictions in place, as well as private ISP's hesitancy to participate.

To more seriously combat digital inequities in North Carolina, NC legislators should implement policies that not only allow municipal broadband providers and public-private partnerships but encourage them as well. Two states, Maine and New York, have already implemented policies that encourage municipal broadband. In 2022, Maine passed an act that incentivizes municipal broadband infrastructure and public-private broadband partnerships through a grant program to “address the need in the state for access to broadband infrastructure” (An Act To Support Municipal Broadband Infrastructure through Incentives and Competition, 2022). This not only allows public-private partnerships but incentivizes private ISPs to want to enter these partnerships. Also in 2022, New York passed legislation that allows the state to enter into an agreement with municipalities to make use of their excess broadband capacity to provide broadband to unserved and underserved communities in the state (New York State Senate Bill S-8008C Part FFF, 2022). This legislation encourages municipalities to build and maintain broadband infrastructure. These two pieces of legislation should serve as an example to NC legislators of how they can address the digital divide in the state.

Benefits to Policy Changes

The most obvious, and arguably the most important, benefit of policy changes such as the ones discussed here is providing high-speed broadband access to communities, especially rural communities, that are currently lacking it. This broadband access carries many benefits for these communities. One of these would be economic benefits. When a town or community has good broadband access, businesses are more encouraged to move to these areas. For example, after Greenlight was established in Wilson, NC, businesses were motivated to move there. There are also benefits to education. Teachers and students alike require high-speed internet in their homes. When they are without it, the students' education suffers. When the COVID-19 pandemic began and schools were moved online, Greenlight prioritized making sure that students and teachers were connected (Kaplan & Messenger, 2021).

These policy changes also have the potential to increase market competition with private ISPs. If municipal providers are offering lower prices, private ISPs would likely also be encouraged to offer lower prices in order to compete. Private ISPs might also be encouraged to expand their networks to new areas, especially if there is a public-private partnership in place.

Addressing Arguments Against Proposed Solutions

Funding is one issue that arises with the subject of municipal broadband providers. While the service would bring in money from customers paying their bill every month, the issue is the initial set-up of the service and the installation of the infrastructure for it. People don't want their taxes to be raised in order to pay for this installation. People also become worried that if the municipality takes on debt to fund the initiative, then they will be paying additional taxes to pay off that debt (Trathen, 2011). The example of Salisbury, North Carolina's 'failed' municipal broadband service called Fibrant is relevant to the discussion of this issue. Fibrant, established in 2010, put Salisbury into large amounts of debt, and the service wasn't bringing in enough money to pay it off. However, in 2018, the city of Salisbury began a partnership with the private company Hotwire in which Salisbury would be leasing their fiber optic network to the company to pay off the city's debts (Boraks, 2018). Fibrant, since it was established, was successful in providing the people of Salisbury with high-speed broadband. Therefore, Fibrant is not so much an example against the proposed policy changes, rather it is an example of why public-private partnerships are important as well as an example of how municipal broadband isn't right for every community, but it should be an option.

Opponents of municipal broadband also often argue that municipalities shouldn't be competing with private businesses. They argue that municipalities have unfair advantages because of "their ability to, among other things, obtain tax-free financing, regulate private sector competitors, and take advantage of lower costs due to exemptions from fees and taxes." (Millonzi, 2011). However, municipalities would not need to 'compete' with private businesses if the private ISPs were providing adequate broadband access, both physically and financially, to all communities. Municipalities are not trying to take over the broadband market, they are simply trying to meet the needs of their citizens.

Conclusion

A majority, 70%, of the public thinks that local governments should be able to establish their own broadband networks if private internet service providers are not meeting the community's needs (Anderson & Horrigan, 2017). Despite this, North Carolina policies continue to effectively prohibit municipal broadband and public-private broadband partnerships through the upholding of excessively restrictive requirements implemented in 2011. This state, and the world around it, has changed significantly in the over a decade since then, especially when it comes to digital needs. Many rural areas of North Carolina still lack physical and/or financial access to broadband internet through private ISP's. The only people benefitting from the policies on municipal broadband currently in place are the private telecommunications companies. The digital divide is not going to fix itself but changing these policies would help speed up the process of bridging this divide and have positive impacts on the many North Carolinians who are currently without adequate broadband access.

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