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UTILITY LAW—ALL HANDS ON DECK: BRINGING BROADBAND HOME TO RURAL ARKANSAS

I. INTRODUCTION

“Over the past two decades, [the internet] has transformed nearly every aspect of our lives, from profound actions like choosing a leader, building a career, and falling in love to more quotidian ones like hailing a cab and watching a movie.”¹ Today, the internet is no longer a luxury, but a necessity.² Former Presidents Obama and Bush advocated for the availability of broadband technology to all Americans because of its role in developing the economy and the quality of life of those who access it.³ Despite these acknowledgements of the internet’s value, 10% of Americans lack access to the adequate speed that is the benchmark for broadband upload for fixed services.⁴ When looking at the twenty-three million rural Americans, 39% lack access to broadband.⁵ Conversely, only 4% of urban Americans lack access.⁶

Lagging far behind the rest of the country, Arkansas ranks 48th in connectedness; only 79.6% of the state has access to a broadband connection.⁷ Rural Arkansans are being left behind, a symptom of something called the “digital divide.”⁸ The digital divide is “the gap between those with access to new technologies and those without, and is now one of America’s leading economic and civil rights issues.”⁹

1. U.S. Telecomm. Ass’n v. Fed. Comm’n Comm’n, 825 F.3d 674, 698 (D.C. 2016) (upholding Open Internet Order).

2. Office of the Press Sec’y, *Remarks by the President on Promoting Community Broadband*, WHITE HOUSE BRIEFING ROOM (Jan. 14, 2015, 2:35 PM), <https://www.whitehouse.gov/the-press-office/2015/01/14/remarks-president-promoting-community-broadband>.

3. *Id.*; Nat’l Telecomm. & Info. Admin., *A Nation Online: Entering the Broadband Age*, U.S. DEP’T COM. (2004), https://www.ntia.doc.gov/files/ntia/editor_uploads/NationOnlineBroadband04_files/NationOnlineBroadband04.pdf.

4. FED. COMM’N COMM’N, 2016 BROADBAND PROGRESS REPORT (2016) (Establishing the benchmark for broadband upload for fixed services is 25 Mbps/3 Mbps service).

5. *Id.*

6. *Id.*

7. *Broadband in Arkansas*, BROADBAND NOW, <http://broadbandnow.com/Arkansas> (last visited Feb. 18, 2017).

8. Larry Irving, *Falling Through the Net: Defining the Digital Divide, A Report on the Telecommunications and Information Technology Gap in America*, NAT’L TELECOMM. & INFO. ADMIN., U.S. DEP’T COM. xiii (1999), <http://www.ntia.doc.gov/ntiahome/ftn99/FTTN.pdf>.

9. *Id.*

Broadband access is important for more than just streaming Netflix—broadband access serves a critical role in education, healthcare, economic development, and even public safety.¹⁰ Lack of access to high-speed internet has a grave effect on minority and low-income households.¹¹ Rural America is often the hardest to reach for educational initiatives; as more universities are offering degree plans online, the unfortunate truth is that the populations these advancements are geared toward are not able to access them.¹² Health care professionals can now provide telehealth¹³ to provide remote diagnosis, treatment, monitoring, and consultations with specialists for patients in remote areas, but not without broadband.¹⁴ The internet can provide rural Americans with public alert system access, emergency messages, and warnings about inclement weather, but not without broadband.¹⁵ A recent study showed that 69% of Americans believe that not having high-speed internet access is a major disadvantage to finding a job, getting health information, and even learning about or accessing government assistance.¹⁶ Rural areas across America face homogenous characteristics that make broadband deployment difficult.¹⁷ Specifically, topographical barriers, greater geographical distances, and low population density are often cited as barriers to broadband deployment.¹⁸

10. John B. Horrigan & Maeve Duggan, *Home Broadband 2015*, PEW RES. CTR. (Dec. 21, 2015), <http://www.pewinternet.org/2015/12/21/home-broadband-2015/> (providing research and data showing the divide).

11. See Edward J. Sholinsky, Note, *Blocking Access to the Information Superhighway: Regulating the Internet Out of the Reach of Low-Income Americans*, 38 RUTGERS L.J. 321, 323 (2006) (“If the digital divide grows, many of the less privileged will continue to fall behind economically, educationally, and socially.”).

12. See Ben Dryden, *Rural Broadband Access Vital to the Future Success of Students*, DRYDEN WIRE (Dec. 19, 2016), <http://drydenwire.com/articles/rural-broadband-access-vital-to-the-future-success-of-students/>.

13. Center for Rural Health, *2012 Annual Report*, U. ARK. FOR MED. SCI. 32, <http://regionalprograms.uams.edu/wp-content/uploads/2015/06/Rural-Health-Annual-report-for-web.pdf> (Telehealth is “the use of real-time, interactive video that connects patients and their healthcare providers to distant specialists for assessment, consultation, treatment, follow-up, and education.”).

14. See *id.*

15. See *Broadband Revolution: Roadmap for Safety and Security Mobile Communication Services*, CISCO (2012), https://www.cisco.com/c/dam/en_us/solutions/industries/docs/gov/premium-mobile-broadband-for-public-safety-wp.pdf.

16. Horrigan & Duggan, *supra* note 10.

17. *Broadband in Rural Areas*, FED. COMM’N COMM’N, http://www.broadband.gov/rural_areas.html (last visited Mar. 3 2017).

18. *Id.* See generally Brian Witkowski, *Bridging the Digital Divide: Improving Broadband Access for Rural Americans*, 13 PUB. INT. L. REP. 170, 174 (2008).

Rural broadband deployment is critical to closing the digital divide and moving rural societies forward.¹⁹ Comprehensive legislative action, in combination with the empowerment of rural communities to bring broadband home, is critical to deployment in rural Arkansas. Part II of this article offers a look at the state of rural Arkansas,²⁰ provides a background of regulatory classification of broadband by the Federal Communications Commission (FCC),²¹ and gives a brief overview of different methods employed to close the digital divide and the effects of these methods.²² Part III advocates for a mixed-methods solution that provides rural Arkansans with affordable broadband access by empowering communities,²³ specifically municipalities and rural electric cooperatives,²⁴ through comprehensive legislative reform.²⁵

II. BACKGROUND

This section will first demonstrate the complex need for additional access to opportunities in rural Arkansas, and then will provide a regulatory background of broadband. Finally, this section will provide an overview of methods employed to date to close the digital divide.

A. What's Going on in Rural Arkansas?

Arkansas is a rural state—42% of Arkansans live in a rural area, compared to the national average of 15% rural citizens.²⁶ The spread of Arkansans in rural areas presents unique barriers to broadband access.²⁷ Rural communities have been experiencing a massive out-migration of educated youth for decades,²⁸ a phenomenon deemed the “rural brain drain”

19. See Curt Stamp, *Left Behind: The Lack of Advanced Telecommunication Services in Rural America and Its Strain on Rural Communities—Policy Options for Closing the Digital Divide*, 7 *DRAKE J. AGRIC. L.* 645, 652 (2002).

20. See *infra* Part II.A.

21. See *infra* Part II.B.

22. See *infra* Part II.C.

23. See *infra* Part III.

24. See *infra* Part III.A.

25. See *infra* Part III.B.

26. Wayne P. Miller & Zola K. Moon, *Rural Profile of Arkansas 2017*, U. ARK. DIVISION AGRIC. RES. & EXTENSION 1, 7 (2017), <http://www.uaex.edu/publications/pdf/MP541.pdf>.

27. See Witkowski, *supra* note 18, at 174.

28. Diane K. McLaughlin, Carla M. Shoff, & Mary Ann Demi, *Influence of Perceptions of Current and Future Community on Residential Aspirations of Rural Youth*, 79 *RURAL SOC.* 453, 453–54 (2014), <http://onlinelibrary.wiley.com/doi/10.1111/ruso.12044/full>.

by researchers.²⁹ In recent years in Arkansas, most rural counties saw a population loss.³⁰ In determining whether to stay in rural communities or move to an urban area, researchers suggest that students consider the following themes: the prevalence of high paying jobs, community values, access to high speed internet, and the availability of high quality schools.³¹ Rural youth perceptions of educational and job opportunities available locally heavily impact the decision to stay or leave a local community.³² Young adults have limited career opportunities in rural communities³³ where the rural economy is under stress.³⁴ All rural regions in the state had a net loss of jobs between the years of 2007 and 2015, including 34,000 manufacturing jobs lost.³⁵ Average job earnings in rural Arkansas still remain below the highest job earning levels in 2004, and remain at approximately 85% of the urban average.³⁶ Access to broadband can enable rural communities to offer high quality educational and professional opportunities to residents in order for these communities to thrive.³⁷

In rural Arkansas, one in five people are living below the poverty line.³⁸ That statistic gets worse when looking at children; child poverty rates have recently increased from 21.9% to 27.7%.³⁹ Even among those who are serviced by broadband providers, 33% of non-adopters cite cost as the major reason.⁴⁰ Unfortunately, price sensitivity is greatest among those who are most likely to see advantages of broadband access at home.⁴¹ Only 16% of low-income families have access to high-speed internet, while more than 75% of households with yearly incomes above \$50,000 have access.⁴²

29. Georgeanne M. Artz & Li Yu, *How Ya Gonna Keep 'em Down on the Farm: Which Land Grant Graduates Live in Rural Areas?* 4 (IOWA ST. U. DEP'T ECON. Working Paper No. 09016, 2009).

30. Miller & Moon, *supra* note 26, at 6, 10.

31. McLaughlin, *supra* note 28, at 462.

32. *Id.* at 453.

33. Kristina L. Bautista, Donald M. Johnson, Catherine W. Shoulders, & Leslie D. Edgar, *How Are You Going to Keep Them on the Farm? Identifying Which College Majors Return the Most Graduates to Rural Areas*, AM. ASS'N OF AGRIC. EDUC., POSTER SESSION PROC. 106–09 (2016), [http://aaaonline.org/resources/Documents/Southern %20Region/2016%20Poster%20Session%20Proceedings.pdf](http://aaaonline.org/resources/Documents/Southern%20Region/2016%20Poster%20Session%20Proceedings.pdf).

34. Miller & Moon, *supra* note 26, at 16–17.

35. *Id.* at 4 (“The state lost 17.5% of its manufacturing employment over this time period.”).

36. *See id.* at 23.

37. McLaughlin, *supra* note 28, at 453–54; *see generally* Artz & Yu, *supra* note 29.

38. Miller & Moon, *supra* note 26, at 7, 24–26.

39. *Id.*; *Rural America at a Glance*, U.S. DEP'T AGRIC. ECON. RES. SERVS. 6 (2016), <http://www.ers.usda.gov/webdocs/publications/eib162/eib-162.pdf>.

40. Horrigan & Duggan, *supra* note 10.

41. *Id.*

42. Sholinsky, *supra* note 11, at 326.

Healthcare remains a pivotal policy issue for rural Arkansas.⁴³ When looking at the access to primary care physicians, many Arkansas counties struggle to maintain physicians.⁴⁴ Rural areas have an older population than urban areas and higher dependency ratios,⁴⁵ because elderly people over sixty-five make up 18.8% of rural population in Arkansas, rural areas face unique challenges “where health services are already strained in some counties.”⁴⁶ Telehealth and telemedicine technologies can address the shortage of physicians while saving rural residents a considerable amount of time and travel expense.⁴⁷ In fact, Arkansas leads the country in being wired for telemedicine.⁴⁸ However, without broadband, there is no telemedicine.⁴⁹ With increased broadband deployment to homes in rural communities, it is not difficult to imagine a radically different picture of future rural health.

When looking at the percentage of adults with an education in 2010, Arkansas ranked 44th in the nation for the percentage of adults with high school diplomas and 49th in the nation with the percentage of the population with a college degree.⁵⁰ With broadband connectivity, both students and adults can benefit from online education and access to online learning resources.⁵¹

Increased broadband access can create opportunities for talented young professionals to work in rural communities, enable increased economic growth and employment, and provide increased access to education and health care.⁵² If rural areas are expected to compete with urban areas socially and economically by remaining a viable option to live and work, broadband access is critical.⁵³

43. Miller & Moon, *supra* note 26, at 32–34.

44. *Id.*

45. *Id.* at 8, 13.

46. *Id.* at 6 (“Rural Arkansas averaged just 69 primary care physicians per 100,000 people compared to 166 in urban Arkansas.”).

47. See Center for Rural Health, *supra* note 13, at 32.

48. UAMS College of Medicine Series, *Showcase of Medical Discoveries: A Focus on Telemedicine*, U. ARK. FOR MED. SCI. 2 (2014), http://research.uams.edu/files/2014/06/Showcase-Telehealth_Program.pdf.

49. Kara L. Lofton, *Lack of Broadband Hinders Telemedicine in Rural Areas*, WV PUB. BROADCASTING (Nov. 23, 2016), <http://wvpublic.org/post/lack-broadband-hinders-telemedicine-rural-areas#stream/0>.

50. Miller & Moon, *supra* note 26, at 6.

51. Nina Rees, *Things That Should Be Done to Help Rural Schools*, U.S. NEWS & WORLD REP. (Feb. 10, 2014, 3:30 PM), <https://www.usnews.com/opinion/blogs/nina-rees/2014/02/10/3-ways-to-help-rural-schools>.

52. McLaughlin, *supra* note 28, at 453–54; Sholinsky, *supra* note 11; see generally Center for Rural Health, *supra* note 13.

53. Stamp, *supra* note 19.

B. What's the Government Got to Do with It?

1. *What is Broadband, Anyway?*

An internet service is “broadband,” as defined by the FCC, if it transmits at a speed of at least 25 megabits/second (Mbps) when downloading, and at least 3 Mbps when uploading.⁵⁴ While basic functions, such as using the internet to send emails or to access a basic website, can be done with an internet connection too slow to qualify for broadband, tasks such as video conferencing or accessing telemedicine technology require more than 20 Mbps.⁵⁵

Broadband is provided in a multitude of forms: digital subscriber line (DSL), cable modem, wireless, satellite, and fiber.⁵⁶ Satellite and wireless internet can be helpful for rural areas, but do not offer the long-term promise of fiber.⁵⁷ Fiber-optic technology is the only technology expected to be able to grow and adapt “to provide customers with larger, better and faster service offerings as demand grows.”⁵⁸

2. *Who's the Boss?*

Continued policy directives from Congress demonstrate the significance of the need for rural broadband deployment.⁵⁹ The purpose of the Telecommunications Act of 1996 was to “promote competition and reduce regulation in order to secure lower prices and higher quality services” and “encourage the rapid deployment of new telecommunications technologies.”⁶⁰ This act enabled local competition to develop,⁶¹ creating the FCC to aid in achieving this purpose.⁶²

54. DEP'T OF INFO. SERVS., ARK. STATE BROADBAND MANAGER'S REPORT, PERIOD ENDING JUNE 30, 2017, 1, http://www.arkansas.gov/dis/newsroom/index.php?do:newsDetail=1&news_id=229 (last visited Sept. 23, 2018) (hereinafter ARK. STATE BROADBAND MANAGER'S REPORT 2017); *see also* FED. COMM'N COMM'N, *supra* note 4.

55. ARK. STATE BROADBAND MANAGER'S REPORT 2017, *supra* note 54, at 3.

56. *Id.* at 2.

57. Broadband Strategy Guide, City of Hot Springs, Ark. 8 (on file with author).

58. *Id.* at 9.

59. In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, Notice of Proposed Rulemaking, 17 FCC Rcd. 3019, 3020–31 (F.C.C.) (2002) (“The widespread deployment of broadband infrastructure has become the central communications policy objective of the day.”).

60. Telecomm.'s Act of 1996, Pub. L. No. 104-104, § 1-710, 110 Stat. 56 (1996) (in description of Act).

61. Stamp, *supra* note 19, at 648.

62. Telecomm.'s Act of 1996 § 1-710.

A strategic goal of the FCC is to encourage availability of broadband to all Americans.⁶³ Indeed, Congress has explicitly charged the FCC to encourage the deployment on a reasonable and timely basis and has given the FCC the authority to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment” if necessary.⁶⁴

The FCC regulates two categories of entities: (1) telecommunications carriers and (2) information-service providers.⁶⁵ Telecommunications services are subject to mandatory common-carrier regulation under Title II of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.⁶⁶ The FCC exempted broadband from common carrier responsibilities in 2000 when it interpreted the Telecommunications Act of 1996 to exclude broadband as a telecommunications service;⁶⁷ rather, the FCC argued, broadband was an information service.⁶⁸ Common carrier responsibilities lower the cost of services and make the service more widely available, requiring providers to open transmissions lines to other cable internet providers and allowing for greater access and fairness to consumers.⁶⁹

In a controversial decision, the United States Supreme Court upheld the FCC’s classification of cable-based internet as an information service, reversing the United States Court of Appeals for the Ninth Circuit’s decision that cable internet was a telecommunications service and therefore subject to

63. See Sholinsky, *supra* note 11, at 324 n. 10 (citing *Strategic Goals: Broadband*, FED. COMM’N COMM’N, <http://www.fcc.gov/broadband>).

64. In re FCC Finds U.S. Broadband Deployment Not Keeping Pace, 30 FCC Rcd. 1375 (2015). As an example of one such action, the FCC established Universal Service Fund in 1997 in compliance with Telecomm.’s Act, which serves as a system of telecommunications subsidies; today, the fund provides subsidies for telecommunications providers (including broadband) through the Connect America Fund (FCC, *Universal Service*, <https://www.fcc.gov/general/universal-service> (last visited Mar. 16, 2017)).

65. Nat’l Cable & Telecomm.’s Ass’n v. Brand X Internet Serv.’s, 545 U.S. 967, 975 (2005) (upholding the FCC’s classification of cable-based Internet as an information service; reversed Ninth Circuit decision that cable Internet was telecommunications service subject to common carrier responsibilities).

66. *Id.*

67. Telecomm.’s Act of 1996 § 1-710; *Brand X Internet Serv.’s*, 545 U.S. at 977 (defining a telecommunications service as “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used” and defining information service as “the offering of capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications”). See also Justin C. Mankin, *A Call for Competitive Broadband Reform in Arkansas*, 68 ARK. L. REV. 829, 848 (2015) (discussing the distinction between telecommunications service and information service as “based on the functions of the service offered, rather than the facilities used to provide the service”).

68. *Brand X Internet Serv.’s*, 545 U.S. at 977.

69. Sholinsky, *supra* note 11, at 331.

common carrier responsibilities.⁷⁰ Justices Scalia, Souter, and Ginsberg dissented.⁷¹

In March of 2015, the FCC reclassified the internet as a telecommunications service subject to common carrier standards in the Obama Administration's Open Internet Order.⁷² Broadband service providers immediately sued and petitioned the D.C. Circuit Court of Appeals for a review of the FCC's order.⁷³ The D.C. Court of Appeals upheld the order.⁷⁴

3. *The Fate of Net Neutrality Under the Trump Administration*

The open internet (also referred to as net neutrality) prevents broadband providers from blocking, impairing, or establishing fast or slow lanes for certain lawful content.⁷⁵ Under the 2015 Open Internet Order,⁷⁶ internet providers were required to treat all content on the internet equally and were not allowed to block or favor any content.⁷⁷

The Open Internet's days were numbered after the election of President Donald J. Trump in 2016, who spoke unfavorably of President Obama's position on net neutrality.⁷⁸ The President's appointee for the Chairman of the FCC, Ajit Pai, argued against the classification of broadband as a utility, as directed under the Obama Administration's 2015 Open Internet Order.⁷⁹

70. *Brand X Internet Serv. 's*, 545 U.S. at 977.

71. *Id.* at 972.

72. In re FCC Releases Open Internet R&O, Declaratory Ruling, & Order, 30 FCC Rcd. 5601, 10 (2015) (hereinafter FCC Releases R&O). *See also FCC Releases Open Internet Order*, FED. COMM'N COMM'N (Mar. 12, 2015), <https://www.fcc.gov/document/fcc-releases-open-internet-order>.

73. *U.S. Telecomm. Ass'n v. Fed. Commc'n Comm'n*, 825 F.3d 674, 698 (D.C. 2016) (upholding Open Internet Order).

74. *Id.* at 768 (upholding of the order prevents broadband providers from creating fast and slow lanes for consumers, which would unfairly limit consumer access, and decrease the affordability of services; equitable treatment of all providers ultimately promotes competition and makes broadband services available to more of the population).

75. FCC Releases R&O, *supra* note 72, at 7.

76. *Id.* at 21.

77. *What is Net Neutrality and Why Does It Matter?*, BROADBAND NOW (Aug. 15, 2016), <http://broadbandnow.com/report/net-neutrality-matter/>.

78. Jon Brodtkin, *Hillary Clinton vs. Donald Trump on Broadband: She Has a Plan, He Doesn't*, ARS TECHNICA, (Oct. 10, 2016, 7:30 AM), <http://arstechnica.com/tech-policy/2016/10/hillary-clinton-vs-donald-trump-on-broadband-she-has-a-plan-he-doesnt/> (President Trump calling the Open Internet Order an "attack on the internet," "another top down power grab;" also characterizing net neutrality as "the Fairness Doctrine" and alleging Open Internet Order would "target conservative media").

79. Nelson Granados, *The FCC Hints at the Future of Net Neutrality Under Trump*, FORBES (Feb. 1, 2017, 8:00 AM), <http://www.forbes.com/sites/nelsongranados/2017/02/01/the-fcc-hints-at-the-future-of-net-neutrality-under-trump/#779bb3914036>.

The FCC's past support of net neutrality was more favorable to alternative broadband networks (such as municipal networks) than to traditional telecommunications networks.⁸⁰ The FCC, led by Chairman Pai, released its plan to repeal net neutrality in November of 2017, under which broadband providers are able to block access, slow down, or speed up service as long as customers are notified.⁸¹ The final rule was published in the Federal Register on February 22, 2018.⁸²

Corporate America is sharply divided on the fall of net neutrality. Telecom leaders like AT&T have touted the repeal of net neutrality as a return "to a regulatory regime that emphasizes private investment and innovation over lumbering government intervention," while companies like Google and Facebook emphasize that the repeal will allow telecom companies to play favorites by charging customers for accessing some sites or slowing down speeds to others.⁸³ Smaller companies have expressed fear that the repeal will hurt innovation, as they could be forced to pay more for faster connections.⁸⁴

So far, twenty-two states and the District of Columbia, representing more than half the United States population, have asked a U.S. Appeals Court to reinstate the 2015 Open Internet Order and strike down the FCC's efforts to preempt states from imposing their own open internet rules.⁸⁵ These states contend that the FCC's actions could harm public safety, arguing that the absence of open internet rules jeopardizes the regulation of the electric grid.⁸⁶ Several internet companies have filed separate legal challenges to overturn the agency's action, including Mozilla, Vimeo, and Etsy.⁸⁷ Individual states have begun to enact their own net neutrality legislation, though some scholars argue that these efforts will not survive challenges in federal court.⁸⁸

80. *See id.*

81. Cecilia Kang, *F.C.C. Plans Net Neutrality Repeal in a Victory for Telecoms*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/technology/fcc-net-neutrality.html>.

82. Restoring Internet Freedom, 83 Fed. Reg. 7852 (Feb. 22, 2018) (to be codified at 47 CFR Parts 1, 8, and 20) (returning to *Brand X's* definition of broadband as an "information service").

83. Kang, *supra* note 81.

84. *Id.*

85. New York v. Fed. Comm'n Comm'n, No. 18-1013 (D.C. Cir. filed Jan. 16, 2018); Aaron P. Bernstein, *Twenty-two states ask US appeals court to reinstate 'net neutrality' rules*, REUTERS (Aug. 20, 2018), <https://www.cnn.com/2018/08/21/twenty-two-states-ask-us-appeals-court-to-reinstate-net-neutrality-rules.html>.

86. Fred Campbell, *State Net Neutrality Regulations Are an Exercise In Futility*, FORBES (Aug. 13, 2018), <https://www.forbes.com/sites/fredcampbell/2018/08/13/state-net-neutrality-regulations-are-an-exercise-in-futility/#1da3adce4742>.

87. *Id.*

88. Campbell, *supra* note 86.

The repeal of net neutrality marks a reversal of broadband's status as a public utility and underscores the minimization of its importance to the public.⁸⁹ Rural development advocates have stressed that rural communities with little internet access could be vulnerable to the pay prioritization governing a cash-driven internet.⁹⁰ Broadband service prices are already higher where monopolies exist; in the absence of net neutrality, rural small businesses paying more to access the same services as more cash-infused businesses are at a competitive disadvantage.⁹¹ Additionally, local, independent internet service providers could be priced out of competition.⁹²

Like other symptoms of the digital divide, the cost will likely be greatest for the rural consumer. For example, an internet service provider could inform a provider of business communication solutions that unless it pays a premium, its video-conferencing service will be slowed in rural areas lacking infrastructure.⁹³ In response, the provider would likely choose one or more of the following options: pass extra costs on to rural customers, offer a less viable service, or cease offering services in certain areas. Any of these actions would hurt rural businesses, and industries vital to rural communities, such as agricultural businesses, telehealth, and online education providers.⁹⁴

C. Hasn't Someone Fixed This Yet?

1. Federal Efforts to Close the Divide

Despite Presidential calls for action,⁹⁵ executive efforts have been mostly ineffective.⁹⁶ The United States Department of Agriculture (USDA) has led efforts to expand broadband to rural areas.⁹⁷ The Rural Development Broadband Loan and Loan Guarantee Program was established by the

89. See Kang, *supra* note 81.

90. Jim Galloway, *The End of Net Neutrality Could Make Rural Broadband a Heavier Lift*, POLITICALLY GEORGIA (Jan. 9, 2018), <http://www.phi.org/news-events/1370/the-end-of-net-neutrality-could-make-rural-broadband-a-heavier-lift>.

91. See Matt Dunne, *Eliminating Net Neutrality Would Hurt Rural America*, THE HILL (Dec. 12, 2017, 11:00 AM), <http://thehill.com/opinion/technology/364417-eliminating-net-neutrality-would-hurt-rural-america>.

92. See *id.*

93. *Id.*

94. *Id.*

95. Exec. Order 13,821, 83 Fed. Reg. 1507 (Jan. 8, 2018) (intended to “streamline the installation process by requiring agencies to use standardized forms and contracts for installing antennas on federal buildings, thus improving process efficiency”); see Office of the Press Sec’y, *supra* note 2; see Nat’l Telecomm. & Info. Admin., *supra* note 3.

96. Witkowski, *supra* note 18, at 172.

97. *Id.*

USDA in 2000.⁹⁸ This program provided loans to small communities in rural areas for broadband deployment projects.⁹⁹ The Rural Development Broadband Program succeeded this program in 2002 and continues to provide such loans as authorized by the 2014 Farm Bill.¹⁰⁰ These programs have been criticized as ineffective and have even been accused of prioritizing resources to urban communities over rural communities to strengthen broadband access and speeds.¹⁰¹ Most recently, the Trump administration's Agriculture and Rural Prosperity Task Force released its report declaring that e-connectivity is not simply an amenity for rural America, but essential.¹⁰² Though the report stressed the importance of broadband for rural development, it did little to suggest strategies for increasing connectivity outside of decreasing regulatory burdens and incentivizing private capital investment.¹⁰³

Legislation is regularly introduced to address the lack of broadband access, but effective comprehensive legislation has not passed through Congress. The Rural Broadband Improvement Act of 2007 was introduced to amend the Rural Electrification Act of 1936 to require that only truly underserved rural areas receive federal funds for broadband deployment; however, the act did not pass.¹⁰⁴ Possibly the most extensive legislation proposed was the Rural Broadband Initiative Act.¹⁰⁵ This Act would have amended the Rural Electrification Act to establish an Office of Rural Broadband Initiatives within the Department of Agriculture.¹⁰⁶ It would also have established an Undersecretary for Rural Broadband Initiatives appointed by the President to lead the Office. The Undersecretary would have been responsible for the following: (1) administering rural broadband

98. *Id.*

99. *Id.*

100. *Id.*; See also *Rural Broadband Access Loan and Loan Guarantee Program 101*, U.S. DEP'T AGRIC. RURAL DEV., <https://www.rd.usda.gov/programs-services/rural-broadband-access-loan-and-loan-guarantee>.

101. *Id.*

102. U.S. DEP'T OF AGRIC., REPORT TO THE PRESIDENT OF THE UNITED STATES FROM THE TASK FORCE ON AGRICULTURE AND RURAL PROSPERITY (2017).

103. *See id.*

104. Rural Broadband Improvement Act, H.R. 2035, 110th Cong., 1st Sess. (2007) (bill was introduced and then died in committee).

105. See Rural Broadband Initiative Act, H.R. 3152, 114th Cong., 1st Sess. (2015) (bill was introduced and then died in committee).

106. *Id.*; This bill is substantively similar to the Rural Broadband Initiative Act of 2007, S. Res. 1032, 110th Cong. (2007), introduced by then Senator Hillary Rodham Clinton—a proponent of rural broadband deployment. It included a comprehensive deployment plan which would have been implemented in the first 100 days after inauguration if she had been elected President (See David McCabe, *Clinton Pledges Broadband Access for All Households by 2020*, THE HILL (Jun. 28, 2016, 9:37 AM), <http://thehill.com/policy/technology/285132-clinton-pledges-broadband-access-for-all-households-by-2020>).

grant and loan programs previously handled by the Administrator of the Rural Utilities Service; (2) conducting nationwide outreach to rural areas; (3) fostering the development of comprehensive rural broadband strategic vision; (4) planning the coordination of federal resources for state, regional, and local governments to assist rural areas; (5) submitting to the President and Congress comprehensive rural broadband strategy; (6) submitting to Congress a plan for a Rural Broadband Advisory Panel; and (7) revising rules and qualification criteria for loan programming.¹⁰⁷ If passed, this congressional effort would have been a significant step toward the bipartisan effort to provide broadband access to all Americans.

Some would argue that incremental progress has been made. A widely cited barrier to broadband legislation has been the lack of reliable and consistent data showing where, and how severe, the digital divide is.¹⁰⁸ The Broadband Census of America Act of 2007 was passed and has successfully facilitated the production of more comprehensive data so that programs addressing the digital divide know the areas needing the most aid.¹⁰⁹

Senator John Boozman, a U.S. Senator for the state of Arkansas, is a co-chair of the Senate Broadband Caucus and has been an advocate for rural America receiving broadband access.¹¹⁰ Senator Boozman, along with fifty-two other senators, demonstrated a strong bi-partisan commitment to rural broadband infrastructure by sending a letter to President Trump that urged him to prioritize policies that “reduce barriers to investment in communications infrastructure and streamline the deployment process” for rural Americans.¹¹¹

Though Arkansas may have its advocates in Congress, the digital divide in America cannot be solved with any “one size fits all” approach. With great political noise in Washington D.C., Arkansans should not expect a solution from Congress—they should, and can, do it themselves.¹¹²

107. H.R. 3152.

108. FED. COMM’N COMM’N, NATIONAL BROADBAND PLAN (2010), <https://www.fcc.gov/general/national-broadband-plan>.

109. *Id.*

110. *Boozman Leads Efforts to Strengthen Broadband in Arkansas*, JOHN BOOZMAN, U.S. SENATOR FOR ARK., (Jul. 12, 2016), <https://www.boozman.senate.gov/public/index.cfm/press-releases?ID=47F6CE81-36C7-49EF-B159-E06482E162B4>.

111. *Boozman Urges President to Include Broadband in any Infrastructure Initiative*, JOHN BOOZMAN, U.S. SENATOR FOR ARK. (Jan. 31, 2017), <https://www.boozman.senate.gov/public/index.cfm/press-releases?ID=E9603650-2ADE-4BFE-BFC1-FF6A859883CD>.

112. *See generally* Mankin, *supra* note 67, at 852 n. 158 (2015) (discussing hundreds of millions of dollars spent by telecommunications firms lobbying Congress in the past decade; “AT&T, for example, has spent approximately \$180 million since 2005”); Stamp, *supra* note 19, at 648 (“[T]he correct solution for each community and state will vary based on the needs of that community, the political climate in the state and community, and the service providers involved . . . [I]t will be impossible to craft one solution that will solve the problem nationwide.”).

2. *Private Industry Collaboration — or the Lack Thereof — Through Pole Attachments*

Recent failed attempts of collaboration between the investor-owned industry and non-profit electric cooperatives in Arkansas have encouraged rural Arkansans to begin organizing broadband networks for themselves.¹¹³ Large telecommunications companies argue that the topography of Arkansas coupled with its low population density makes broadband infrastructure deployment too burdensome.¹¹⁴ Historically, these companies have found it easier to lease space for cables on utility poles to run a wire into the home of subscribers in lieu of providing service via underground cables, a method called “Broadband over Power Line.”¹¹⁵ The greatest cost in deployment to rural areas is infrastructure, so providers argue that attachments to existing poles and infrastructure increase deployment rates.¹¹⁶

Because for-profit utility companies have had the opportunity to charge monopoly rental fees, Congress enacted the Pole Attachments Act, which allows the FCC to regulate rental rates for pole attachments.¹¹⁷ “Pole Attachment” is defined as including “any attachment by a cable television system or provider of telecommunications service to a [utility] pole, duct, conduit, or right-of-way.”¹¹⁸ The FCC has interpreted the Pole Attachment Act to apply to broadband services as well as cable services, and the Supreme Court has affirmed this interpretation.¹¹⁹

Investor-owned providers argue that pole attachment rates have a major impact on broadband deployment.¹²⁰ The FCC’s National Broadband Plan recommends that attachment rates be as low and uniform as possible, setting the objective as the FCC’s cable formula.¹²¹ Pole attachment regulation by

113. *See infra* III.A.2.

114. *See* Makin, *supra* note 67, at 831; Second Reply Comments of Ark. Elec. Coop. Corp. at 7, *In re* Ark. Pub. Serv. Comm’n Pole Attachment Amendment Rules, No. 15-019-R (Aug. 18, 2015) (hereinafter Second Reply Comments).

115. Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co., 534 U.S. 327, 330 (2002) (finding that the Pole Attachments Act applied to attachments made by cable television systems and wireless carriers). *See* Witkowski, *supra* note 18, at 174.

116. Second Reply Comments, *supra* note 114, at 8-9.

117. The Pole Attachments Act, 92 Stat. 35 (codified as amended at 47 U.S.C. § 224 (1994)); *Gulf Power Co.*, 534 U.S. at 327.

118. *Gulf Power Co.*, 534 U.S. at 331 (quoting 47 U.S.C. § 224(a)(4)).

119. *Id.*

120. FED. COMM’N COMM’N, *supra* note 108.

121. *In the Matter of a Rulemaking Proc. to Consider Changes to the Arkansas Pub. Serv. Commissions Pole Attachment R.*, 15019R, 2016 WL 3549107, (Ark. Pub. Serv. Comm’n, June 24, 2016) (Commission adopted proposed modifications to Pole Attachment Rules) (reh’g granted in part by *In the Matter of a Rulemaking Proceeding to Consider Changes to the Ark. Pub. Serv. Comm’n Pole Attachment Rules*, Ark. Pub. Serv. Comm’n. (Aug. 19, 2016)) (hereinafter Ark. Pub. Serv. Comm’n).

the FCC was originally designed and tailored to cure problems and bad-faith practices with investor-owned utilities monopolizing pole attachment rates.¹²² Non-profit utility companies have historically been excluded from these subsidized rates because profit incentives were not present.¹²³ Congress expressly excluded Electric Cooperatives from the Pole Attachment Act, primarily because the cooperative business model is unique in that the organization is owned by and accountable to its members and, therefore, advantageous business practices are unlikely.¹²⁴

This distinction has been controversial in Arkansas. Arkansas House Bill 1798 was introduced in the 90th Arkansas General Assembly, with the intention of allow the legislature to set pole attachment rates to benefit the telecommunications lobby.¹²⁵ Following public concern of rural Arkansans, sponsors of the bill, the Speaker of the House, and Electric Cooperative representatives reached an agreement to address the issue through a proceeding at the Arkansas Public Service Commission.¹²⁶

The proceeding's purpose was to establish a uniform pole attachment rate that was just and reasonable.¹²⁷ Prior to this litigation, Arkansas had no uniform pole attachment rate formula and a lack of guidance, leading to varying attachment rates and an increased volume of pole attachment complaints.¹²⁸ The Public Service Commission determined an alternative rate formula¹²⁹ and implemented standard guidelines for utility companies and attaching entities to follow.¹³⁰

Uniform pole attachment rates for for-profit utilities will provide equal treatment for attaching broadband providers. Additionally, continuing to exempt non-profit utilities from FCC Pole Attachment Regulation will allow these organizations to continue to serve their members at operating cost. Still, the unfolding of events here leaves reason for alarm and demonstrates the weight of the telecommunications lobby in Arkansas. When

122. S. REP. NO. 95-580, at 18 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 126, (“Because the pole rates charged by municipally owned and cooperative utilities are already subject to a decision-making process based upon constituent needs and interests, S. 1547, as reported, exempts these utilities from FCC regulation. Presently cooperative utilities charge the lowest pole rates to CATV pole users;” “Cooperatively owned utilities, by and large, are located in rural areas where often over-the-air television service is poor. Thus, the customers of these utilities have added incentive to foster the growth of cable television in their areas.”).

123. Second Reply Comments, *supra* note 114, at 3–4.

124. *Id.*; S. REP. NO. 95-580, *supra* note 122, at 18.

125. H.R. 1798, 90th Gen. Assemb. (Ark. 2015).

126. *Arkansas House Bill 1798*, ELECTRIC COOPERATIVES OF ARK. (2018), <http://www.aecc.com/government-affairs/legislative-issues> (last visited Feb. 19, 2017).

127. Ark. Pub. Serv. Comm’n., *supra* note 121, at 1.

128. *Id.* at 2.

129. *Id.* at 93–94.

130. *Id.*

telecommunications companies characterized pole attachment rates as the barrier to rural broadband deployment, the cooperatives offered free attachment in exchange for the attaching entities' commitment to broadband service deployment in cooperative territories by 2020, but the entities refused.¹³¹ The cooperatives argued that customer density, not attachment rates, is the primary determinant of whether rural areas have broadband access.¹³² While this particular battle may be over, the underlying conflict of failed cooperation still remains, leading some cooperatives to take matters into their own hands.¹³³

III. THOSE WHO CAN SHOULD—IT'S UP TO THE ARKANSAS LEGISLATURE TO MAKE SURE THEY CAN

Arkansas communities are entitled to make their own decisions on how to best bring broadband home,¹³⁴ whether this is a function of an electric cooperative already serving a rural community¹³⁵ or a small municipality.¹³⁶ Further, the Arkansas General Assembly should prioritize the underserved by enacting comprehensive broadband reform.¹³⁷

A. Community-Based Efforts

After failed attempts to work with established telecommunications carriers to meet the needs of the local community, local entities sometimes decide to offer services themselves.¹³⁸ This response is not unlike that of communities in the early 20th century, when urban communities were electrified and rural communities waited in the dark for investor-owned utilities to bring electricity.¹³⁹ Eventually, communities created cooperatives or publicly owned utilities to fill this void, and these community-based efforts still serve members today.¹⁴⁰ It was only after community efforts that

131. Second Reply Comments, *supra* note 114, at 8; Kirkley Thomas, *Your Voice Made a Difference*, ARK. LIVING MAG. 12–14 (May 2015), <http://onlinedigitalpubs.com/publication/?i=254705>.

132. Second Reply Comments, *supra* note 114, at 9 n. 21 (pointing to investor-owned utilities in Arkansas with the FCC attachment rate, but no improved broadband access in territory).

133. *See infra* Part III.A.2.

134. *See infra* Part III.A.

135. *See infra* Part III.A.2.

136. *See infra* Part III.A.1.

137. *See infra* Part III.B.

138. FED. COMM'N COMM'N, *supra* note 108, Chapter 8.

139. *Id.*

140. *Id.* at 153. (“More than 2,800 public and co-op operators still provide electricity to 27% of Americans today.”).

rural residents were able to enjoy the “luxuries” associated with electricity—an electric water pump, the reliable ability to preserve food, and a single light bulb.¹⁴¹

The deprivation of broadband in these same communities is not just unfortunate—it is on the path to becoming a human rights issue.¹⁴² Underserved communities can no longer be ignored, waiting for the private industry to turn on the lights or plug in the computer; “they should have the right to move forward and build networks that serve their constituents as they deem appropriate.”¹⁴³

1. *Empowering Local Government*

The Telecommunications Act of 1996 established that “no state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹⁴⁴ However, when Missouri barred political subdivisions from providing telecommunications services,¹⁴⁵ the Supreme Court interpreted “any entity” to exclude cities and counties; this decision gave states the authority to preempt local broadband networks.¹⁴⁶

Community-based wireless initiatives are a contentious method of bringing high-speed internet to the underserved.¹⁴⁷ Currently, nineteen states

141. Fiona O. Sloan, Emily L. Smith, Josh D. Snyder, Amie K. Alexander, & Paxton A. Richardson, *(Em)Powered: Residual Effects of Rural Electrification in Arkansas*, U. ARK. CLINTON SCHOOL PUB. SERV. (manuscript at 9–10) (on file with authors).

142. See Max Eternity, *Net Neutrality and Broadband Access: A Civil Rights Issue*, TRUTHOUT (Oct. 31, 2010), <http://truth-out.org/archive/component/k2/item/92566:net-neutrality-and-broadband-access--a-civil-rights-issue> (When speaking about the digital divide, Nelson Mandela said “the capacity to communicate will almost certainly be a key human right.”); Christopher Mitchell, *Comcast: Internet Access is Temporarily a Civil Right*, COMMUNITY NETWORKS (Aug. 8, 2011), <https://muninetworks.org/content/comcast-internet-access-temporarily-civil-right> (Comcast Executive VP calling access to internet a civil rights issue); Alisa Valentin, *Broadband Connectivity: A Pathway to Peace, Prosperity, and Progress*, ASPEN INST. (Nov. 17, 2016), <https://www.aspeninstitute.org/blog-posts/broadband-connectivity-pathway-peace-prosperity-progress/> (Communication rights imperative for all people).

143. FED. COMM’N COMM’N, *supra* note 108, Chapter 8.

144. Telecomm.’s Act of 1996, 47 U.S.C. § 253(a) (1996).

145. MO. REV. STAT. § 392.410(7) (1996) (“No political subdivision of this state shall provide or offer for sale . . . a telecommunications service.”).

146. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 129 (2004).

147. See generally Krishnadev Calamur, *Broadband a ‘Necessity,’ Obama Says, as He Pushes FCC to Expand Access*, NPR (Jan. 14, 2015, 2:16 PM), <http://www.npr.org/sections/thetwo-way/2015/01/14/377230778/obama-pushes-fcc-to-expand-broadband-access>.

have laws restricting municipalities from building broadband networks.¹⁴⁸ Former President Barack Obama asked the FCC to address state laws preventing cities from building their own community internet services.¹⁴⁹ Accordingly, the FCC advised that “Congress should make clear that state, regional and local governments can build broadband networks.”¹⁵⁰

Arkansas is one of the nineteen states restricting municipalities from providing broadband services, and maintains one of the most restrictive bans.¹⁵¹ A government entity in Arkansas may not provide basic exchange services.¹⁵² Act 1050, passed in 2011, further prohibits Arkansas municipalities from offering high-speed internet services to non-public entities.¹⁵³ The law does allow already-existing municipal electric and cable services to continue to provide broadband; however, this leaves only three municipal providers in the state.¹⁵⁴

Municipalities have a unique advantage to provide community broadband services in areas that are traditionally ignored by investor-owned providers because of their ability to finance infrastructure deployment by

148. *Id.* But see Jason Koebler, *The 21 Laws States Use to Crush Broadband Competition*, MOTHERBOARD (Jan. 14, 2015, 5:16 PM), https://motherboard.vice.com/en_us/article/the-21-laws-states-use-to-crush-broadband-competition (arguing there are actually 21 states restricting municipal broadband access, not 19).

149. Koebler, *supra* note 148.

150. FED. COMM’N COMM’N, *supra* note 108, Recommendation 8.19.

151. ARK. CODE ANN. § 23-17-409(b) (West, Westlaw through 2018) (“a government entity may not provide, directly or indirectly, basic local exchange, voice, data, broadband, video, or wireless telecommunication service”); *Explaining Arkansas’ Changed Barriers to Community Broadband*, COMMUNITY NETWORKS (March 26, 2012), <https://muninetworks.org/content/explaining-arkansas-changed-barriers-community-broadband>; see ALA. CODE § 11-50B-3 (West, Westlaw through 2018); COLO. REV. STAT. ANN. § 29-27-103 (West, Westlaw through 2018); MINN. STAT. ANN. § 237.19 (West, Westlaw through 2018); MONT. CODE ANN. § 2-17-603 (West, Westlaw through 2018); MO. ANN. STAT. § 392.410 (West, Westlaw through 2018); NEB. REV. STAT. ANN. § 86-594 (West, Westlaw through 2018); NEV. REV. STAT. ANN. § 268.086 (West, Westlaw through 2018); NEV. REV. STAT. ANN. § 710.147 (West, Westlaw through 2018); N.C. GEN. STAT. ANN. § 160A-340.1 (West, Westlaw through 2018); 66 PA. STAT. ANN. § 3014 (West, Westlaw through 2018); S.C. CODE ANN. § 58-9-2620 (West, Westlaw through 2018); TENN. CODE ANN. § 7-52-601 (West, Westlaw through 2018); TEX. UTIL. CODE ANN. § 54.201 to 202 (West, Westlaw through 2018); UTAH CODE ANN. § 10-18-201 (West, Westlaw through 2018); VA. CODE ANN. § 15.2-2108.6 (West, Westlaw through 2018); VA. CODE ANN. § 56-265.4:1 (West 2018); WASH. REV. CODE ANN. § 54.16.330 (West, Westlaw through 2018); WIS. STAT. ANN. § 66.0422 (West, Westlaw through 2018).

152. ARK. CODE ANN. § 23-17-409(b)(1) (West, Westlaw through 2018).

153. 2011 Ark. Acts, Act 1050 (codified as amended at ARK. CODE ANN. § 23-17-409(b)) (2011).

154. *Id.*; see Mankin, *supra* note 67, at 853 (Paragould, Conway, and Lockesburg are the only three cities in Arkansas operating publicly owned broadband networks.).

issuing bonds.¹⁵⁵ Arkansas lawmakers should repeal Act 1050 and empower communities to serve their own citizens.¹⁵⁶

Even so, in the absence of state action, communities can still work to attract private investment through public-private partnerships.¹⁵⁷ Advocates in Louisville, Kentucky, drove consumer demand by launching a simple web-based tool that collected consumer's addresses who were eager for broadband.¹⁵⁸ The result provided a heat-map of demand for policy-makers and potential vendors.¹⁵⁹ Similarly, when municipalities in North Carolina and Connecticut organized regionally and submitted requests for proposals, private industry bids to provide broadband to the areas followed.¹⁶⁰ By working together, Arkansas municipalities can form coalitions with existing industry and capital while driving consumer demand for broadband services.¹⁶¹

2. *Electric Cooperatives Have Done This Before, and They Will Do It Again*

While local government municipalities may be able to attract private dollars to deploy adequate and affordable broadband in more urban areas, this will likely not provide a solution for rural Arkansans living outside of city limits.¹⁶² In 2016, the FCC spent over \$29 billion for telecommunications companies to work to deliver only 10 Mbps service in rural America.¹⁶³ One of these companies, AT&T, received funds from the

155. Mankin, *supra* note 67, at 853. This ban also discourages financial investors who may be interested in investing in such bonds to finance public broadband infrastructure for tax incentives.

156. Although rumored that Senator Bill Sample would introduce a bill to repeal Act 1050 in the 91st General Assembly, this was not the case—instead, Senator Sample requested an interim study on the effects of the municipal broadband ban (Interview with Kirkley Thomas, Vice President of Government Relations, Ark. Elec. Coop. Corp. (Mar. 9, 2017)).

157. Broadband Strategy Guide, *supra* note 57, at 30; Joanne Hovis et. al., *The Emerging World of Broadband Public-Private Partnerships: A Business Strategy and Legal Guide*, COALITION FOR LOCAL INTERNET CHOICE (2017), <https://www.benton.org/sites/default/files/partnerships.pdf>; Patrick Lucey & Christopher Mitchell, *Successful Strategies for Broadband Public-Private Partnerships*, INST. FOR LOCAL SELF-RELIANCE (2016), <https://ilsr.org/wp-content/uploads/downloads/2016/08/PPP-Report-2016-1.pdf>; see S. Res. 651, 91st Gen. Assemb. (Ark. 2017).

158. Broadband Strategy Guide, *supra* note 57, at 30.

159. *Id.*

160. *Id.* at 131.

161. *Id.* at 130–31.

162. H.R. Trostle & Christopher Mitchell, *North Carolina Connectivity: The Good, the Bad, and the Ugly*, INST. FOR LOCAL SELF-RELIANCE 14–16 (2016), https://ilsr.org/wp-content/uploads/2016/10/NC-Broadband-Report_10_2016-1.pdf.

163. Jonathan Chambers, *End Telephone Welfare*, CONEXON: BLOG (July 1, 2016), <http://www.conexon.us/1/end-telephone-welfare/>.

Connect America Fund to extend broadband services in rural areas in Arkansas.¹⁶⁴ AT&T published that it has invested more than \$550 million to strengthen local networks in this state since 2013.¹⁶⁵ AT&T also plans to launch a wireless broadband program in Arkansas, expanding broadband access to over 50,000 units that do not currently have access.¹⁶⁶ Still, Arkansas remains the 48th most connected state; rural Arkansans need an advocate other than the for-profit telecommunications industry.¹⁶⁷

In its 2010 National Broadband Plan, the FCC provided its first goal: 100 Mbps service supplied to 100 million households.¹⁶⁸ For the other 17 million households in America, the FCC determined a mere 4 Mbps would be enough, later adjusting that goal to 10 Mbps.¹⁶⁹ In Arkansas, the current median broadband speed is 4.8 Mbps—not even qualifying as broadband under the FCC’s current definition.¹⁷⁰ These misguided goals are based on decisions that fail to take into consideration the already existing infrastructure serving rural America: its electric cooperatives.¹⁷¹ When cooperatives are deploying broadband infrastructure more efficiently than for-profit telecommunications companies and with little to no government

164. *AT&T Invests More Than \$550 Million over 3-Year Period to Enhance Local Networks in Arkansas*, PR NEWswire (May 12, 2016, 9:30 AM), <http://www.prnewswire.com/news-releases/att-invests-more-than-550-million-over-3-year-period-to-enhance-local-networks-in-arkansas-300267451.html>.

165. *Id.*

166. Sarah Campbell-Miller, *AT&T Plans New Broadband Product, Touts \$1B Investment Since 2012*, ARK. BUS. (May 13, 2016, 11:31 AM), <http://www.arkansasbusiness.com/article/111143/att-plans-launch-of-new-product-touts-115-billion-investment-since-2012>; *but see* Jonathan Chambers, *Waiting for Harry Potter*, CONEXON: BLOG (Sept. 6, 2016), <http://www.conexon.us/1/waiting-for-harry-potter/> (AT&T’s plan for fixed wireless comes at the cost of significantly lackluster speeds of 10 Mbps that do not show promise for improvement over time; rural Arkansans deserve better.).

167. *Broadband in Arkansas*, *supra* note 7. Private investment is important, and is considered the gold standard in a capitalist economy. However, for-profit businesses are necessarily driven by profit, and where there is little population density, for-profit businesses often do not survive without government intervention. Rural areas with low population density are better served by local and alternative business solutions.

168. Jonathan Chambers, *FCC to Rural America: Drop Dead*, CONEXON: BLOG (Nov. 9, 2010), <http://www.conexon.us/1/fcc-to-rural-america-drop-dead/> (hereinafter *FCC to Rural America*); *see* FED. COMM’N COMM’N, *supra* note 108, at 9.

169. *FCC to Rural America*, *supra* note 168; Jonathan Chambers, *The FCC Protects Legacy Networks. Let Rural Consumers Choose Their Future with Portable Subsidies*, CONEXON (Jan. 10, 2017), <http://www.conexon.us/1/the-fcc-protects-legacy-networks-let-rural-consumers-choose-their-future-with-portable-subsidies/> (“In a single year, the FCC committed over \$30 billion to telephone companies for 10 Mbps service—simultaneously squandering the public’s money and condemning rural America to digital poverty.”) (hereinafter *FCC Protects*).

170. ARK. STATE BROADBAND MANAGER’S REPORT 2017, *supra* note 54, at 3.

171. *See FCC Protects*, *supra* note 169.

assistance,¹⁷² why are we still solely financing those who say adequate broadband to every home in rural America is impossible?¹⁷³

This tale is a familiar one. In the early 1930's, around 90% of urban residents had electricity; only 10% of rural residents had the luxury.¹⁷⁴ Investor-owned electric utilities rarely provided electricity to rural areas because it was not economically advantageous.¹⁷⁵ Because rural areas were less dense with potential customers, the profit margins were not profitable.¹⁷⁶ As a part of his New Deal program, President Franklin D. Roosevelt signed into law the Rural Electrification Act (REA), which created the Rural Electrification Administration and provided funding to farmer-owned cooperatives that applied for loans through the REA program.¹⁷⁷ This legislative action finally led to the electrification of rural America by empowering rural communities to solve the problem themselves.¹⁷⁸

The program electrified rural communities through the unique business structure of the cooperatives.¹⁷⁹ Community members came together to form the cooperatives to be eligible for REA loans.¹⁸⁰ These community members also provided the physical and social capital to erect the infrastructure needed to turn the lights on in rural Arkansas.¹⁸¹

An electric utility company in Arkansas may “own, construct, maintain, and operate a broadband system and provide broadband services on an electric utility’s electric delivery system.”¹⁸² The FCC began giving experimental broadband grants in 2014 to alternative carriers, like electric companies.¹⁸³ Continued funding is necessary on the federal level, but legislative action from the Arkansas General Assembly must include the

172. See Chambers, *supra* note 163 (commenting that Ozarks and North Arkansas Electric Cooperatives “are building gigabit fiber-to-the-home networks in rural areas *with little or no government support.*”); see *supra* text accompanying notes 164–69, 184.

173. See Chambers, *supra* note 163.

174. Rob Roedel, *Rural Electrification in Arkansas*, ELECTRIC COOPERATIVES OF ARK., 2013.

175. Elgin G. Enabnit, Jr., *Electrifying Rural America*, 40.9 TRANSMISSION & DISTRIBUTION 74, <https://searchproquestcom.ualrlawlibrary.idm.oclc.org/docview/211135753?accountid=147014>.

176. See *generally id.*; Roedel, *supra* note 174.

177. Roedel, *supra* note 174.

178. See *generally id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. ARK. CODE ANN. § 23-18-803 (West, Westlaw through 2018).

183. Cecilia Kang, *How to Give Rural America Broadband? Look to the Early 1900s*, N.Y. TIMES (Aug. 7, 2016), <http://www.nytimes.com/2016/08/08/technology/how-to-give-rural-america-broadband-look-to-the-early-1900s.html>.

same financial incentives for rural electric cooperatives that are currently available to for-profit providers.¹⁸⁴

Nationally, around forty electric cooperatives offer broadband or are in the beginning stages of building networks to provide broadband internet service across the country.¹⁸⁵ An electric cooperative in Central Missouri, CoMo Electric Cooperative, serves a population of members in Missouri where only 15% of the population previously had broadband access.¹⁸⁶ This cooperative became the first in the nation to privately fund a cooperative fiber to home project to provide access for every member.¹⁸⁷ In 2014, CoMo Electric Cooperative launched the first gigabit residential service in rural America.¹⁸⁸ The architect of this project, Randy Klindt,¹⁸⁹ founded the organization Conexon, LLC to assist other rural electric cooperatives.¹⁹⁰

One electric cooperative in Arkansas has already begun offering broadband services, and at least three other Arkansas cooperatives are following suit.¹⁹¹ Ozarks Electric Cooperative announced the creation of a telecommunications subsidiary, OzarksGo, in April of 2016 that will offer gigabit-level high-speed internet in its cooperative territory.¹⁹² Ouachita Electric Cooperative (OEC) and South Arkansas Telephone (SATCO) announced on June 14, 2016, that they have partnered to form a new company, ARIS, to bring gigabit internet access to homes and businesses in South Arkansas.¹⁹³ ARIS has a goal of reaching 9,500 homes and businesses that are members of OEC with fiber optic network services.¹⁹⁴ Finally,

184. See *FCC to Rural America*, *supra* note 168 (“Electric cooperatives are demonstrating that fiber optic networks can be built in rural areas with population densities of 5-10 homes per mile. Below 5 homes per mile, public funding can be essential, but at far lower levels than the FCC’s calculations.”).

185. *Id.*

186. *About Us*, CONEXON, <http://www.conexon.us/about-us/>.

187. *Id.*

188. *Id.*

189. Randy Klindt currently works for Ozark Electric Cooperative Corporation, leading the OzarksGo initiative. See *infra* text accompanying note 191.

190. See *infra* text accompanying note 191.

191. See *OzarksGo Announces Details for Phase One Locations and Internet Service Offering June 29, 2016*, Ozarks Go, LLC, <https://www.ozarksgo.net/news#34> (last visited Sept. 23, 2018) (hereinafter *OzarksGo*); Wesley Brown, *South Arkansas electric company, telecom partner to offer high-speed broadband service*, TALK BUS. & POL., (June 14, 2016, 2:18 PM), <http://talkbusiness.net/2016/06/south-arkansas-electric-company-telecom-partner-to-offer-high-speed-broadband-service/>; *NEXT, Powered by NAEC*, NORTH ARK. ELECTRIC COOPERATIVE, <https://www.naeci.com/next> (last visited Sept. 23, 2018) (hereinafter *NEXT*).

192. *South Arkansas electric company, telecom partner to offer high-speed broadband service*, ELECTRIC COOPERATIVES OF ARK. (June 14, 2016), <http://www.wearearkansas.com/electric-cooperatives-of-arkansas/news/?item=7286> (hereinafter ELECTRIC COOPERATIVES OF ARK.). See *OzarksGo*, *supra* note 191.

193. ELECTRIC COOPERATIVES OF ARK., *supra* note 192.

194. *Id.*

North Arkansas Electric Cooperative is in the beginning stages of offering broadband internet under its NEXT program.¹⁹⁵

While Arkansas does not restrict cooperatives from providing broadband,¹⁹⁶ this must not be taken for granted. In neighboring Tennessee, electric cooperatives were banned from providing broadband until 2017.¹⁹⁷ Less than a year after the law changed to allow cooperatives to provide broadband services, six electric cooperatives are currently constructing infrastructure or already providing services, and twelve others are in the beginning processes of securing funding for projects.¹⁹⁸ The \$2.7 million in state grant money that Tennessee Electric Cooperatives have received is resulting in \$98 million in private cooperative investment.¹⁹⁹ The state legislature must avoid the temptation to side with out-of-state telecommunications companies in these battles and give in to political backlash.²⁰⁰ Instead, the Arkansas State Legislature must take a realistic look at the needs of constituents and consider who is in the best place to provide these essential services.

195. See *NEXT*, *supra* note 191.

196. ARK. CODE ANN. § 23-18-803 (West, Westlaw through 2018); See Trostle & Mitchell, *supra* note 162 (noting that electric cooperatives face barriers when seeking federal financing for fiber projects; state legislation limits cooperative access to telecommunications capital and limits local government participation in community internet networks); but see *Georgia Committee's Report Affirms the Role of Community Networks*, COMMUNITY NETWORKS (Jan. 5, 2017), <https://muninetworks.org/tags/tags/rural-electric-coop> (Georgia Joint House and Senate Study Committee on High Speed Broadband Communications Access for All Georgians recommended state legislature “enable municipal networks and empower rural electric cooperatives;” recommended Georgia legislature “amend existing law to provide Georgia’s Electric Membership Corporations statutory clarity to provide telecommunication and broadband services.”).

197. Authority of Elec. Coop. to Provide Broadband Internet Serv., Op. Att’y Gen. No. 14-33 (Tenn. 2014) (citing TENN. CODE ANN. § 65-25-204(a)); Andy Sher, *Tennessee’s Rural Electric Cooperatives can offer Video Services Under Amended Broadband Bill*, TIMES FREE PRESS (Mar. 9, 2017), <http://www.timesfreepress.com/news/business/aroundregion/story/2017/mar/09/coops-coffer-video-services-under-amended-bro/416712/>; see *Closing Tennessee’s Digital Divide*, TENN. ELECTRIC COOPERATIVE ASS’N, <https://www.tnelectric.org/broadband/> (last visited Aug. 25, 2018) (hereinafter *Digital Divide*).

198. *Digital Divide*, *supra* note 197.

199. *Id.*

200. CTC Technology & Energy, *Community Fiber Planning Guidebook: Guide to Fiber Planning for Communities and Utilities*, (May 8, 2015), <http://kentuckywired.ky.gov/Resinfo/Documents/KentuckyWired%20Community%20Fiber%20Planning%20Guidebook%2020150508.pdf> (warning communities considering deploying broadband of probable opposition from established providers; also warning of political opposition from legislators influenced by private telecommunications lobby: “legislative risk refers to potential changes in law that can ripple a public broadband project.”).

B. Arkansas Legislative Efforts

1. *Legislative Background*

The General Assembly passed the Connect Arkansas Broadband Act in 2007, a significant step to improving broadband access for Arkansans.²⁰¹ Connect Arkansas, a non-profit corporation, was formed from this legislation to “facilitate the availability of broadband service to every home and business in Arkansas” and “promote broadband-based development in Arkansas.”²⁰² This corporation was the recipient of a \$293 million grant from the National Telecommunications and Information Administration’s (NTIA) State Broadband Initiative.²⁰³ The majority of this funding was used to map broadband adoption in Arkansas and support research to determine barriers to broadband adoption in Arkansas,²⁰⁴ which was used to update the National Broadband Map.²⁰⁵ Additional funding was requested from Congress by the FCC to continue efforts to update the National Broadband Map, but funding was not approved.²⁰⁶ With funding cut off, Connect Arkansas dissolved in 2015.²⁰⁷

The state of Arkansas has centralized broadband policy into the Public School Computer Network (ASPCN) initiative.²⁰⁸ Governor Asa Hutchinson, the Arkansas Department of Education, and the Arkansas Department of Information Systems have prioritized Arkansas’s K-12 public schools’ access to adequate broadband services.²⁰⁹ Fifty-eight percent of Arkansas school districts were meeting the FCC’s target of 100 Kbps/student²¹⁰ in early 2015.²¹¹ Governor Hutchinson, the Arkansas Department of Education, and the Arkansas Department of Information Systems have now set a goal for 100% of Arkansas school districts to reach

201. 2007 Ark. Acts 604 (codified at ARK. CODE ANN. § 4-113-101 (Repl. 2011)), *repealed by* 2017 Ark. Acts 426 (repealed after federal funding for Connect Arkansas ran out).

202. ARK. CODE ANN. § 4-113-103(a) (Repl. 2011), *repealed by* 2017 Ark. Acts 426; *see also* ARK. STATE BROADBAND MANAGER’S REPORT, PERIOD ENDING JUNE 30, 2016, 5, <http://www.stc.arkansas.gov/Documents/Broadband%20Manager’s%20Activities-Operations%20Report.pdf> (although the 2017 report is cited above, the 2016 report contains data specifically collected in anticipation of the 91st General Assembly discussed below) (hereinafter ARK. STATE BROADBAND MANAGER’S REPORT 2016).

203. ARK. STATE BROADBAND MANAGER’S REPORT 2016, *supra* note 202, at 5.

204. *Id.*

205. *Id.* at 5–6.

206. *Id.* at 6.

207. *Id.*

208. *See id.* at 11.

209. ARK. STATE BROADBAND MANAGER’S REPORT 2016, *supra* note 202, at 10.

210. Kilobytes per student.

211. ARK. STATE BROADBAND MANAGER’S REPORT 2016, *supra* note 202, at 11.

200 Kbps/student of state funded high speed broadband capability.²¹² As of January 2016, 79% of Arkansas schools either met or exceeded the FCC's target for internet access.²¹³ Arkansas now ranks twenty-first in the U.S. for broadband connectivity in education.²¹⁴

While impressive gains have been made with school districts in Arkansas, the fact is that even if students have internet access at school, the lack of access at home still leaves them severely disadvantaged.²¹⁵ In an evolving technological era of school-issued technology such as iPads and Chromebooks, students cannot use this equipment to its full educational potential without home broadband access.²¹⁶ The 91st General Assembly approved a new plan for school districts to use virtual learning as an alternative instruction plan to make up missed school days.²¹⁷ This opportunity would be of great benefit to rural school districts that may have to close more often for inclement weather when compared to urban school districts with well-traveled roads—as long as these students have broadband access at home to complete assignments.²¹⁸

An ambitious plan, the legislature codified its intent to provide every Arkansan access to broadband for their homes and businesses by the end of 2012.²¹⁹ Six years later, Arkansas is still the 48th most connected state.²²⁰ Though the statute has since been repealed, the increasing need for broadband access cannot be so easily erased.

2. *Connect Arkansas 2.0*

The Arkansas Legislature announced in October of 2015 that a plan would be prepared to connect every home and business in Arkansas to broadband for presentation in the 91st General Assembly in early 2017.²²¹ Members of the Joint Committee for Advanced Communications and

212. *Id.*

213. *Id.* at 11. See EDUCATION SUPERHIGHWAY, <http://stateofthestates.education.superhighway.org/> (last visited Mar. 3, 2017).

214. ARK. STATE BROADBAND MANAGER'S REPORT 2016, *supra* note 202, at 10; see EDUCATION SUPERHIGHWAY, *supra* note 213.

215. See generally Joan G. McClane & Tim Omarzu, *Lack of Home Internet Access Hinders Students with School-Provided iPads*, ESCHOOL NEWS: DAILY TECH NEWS & INNOVATION (Jan. 12, 2015), <http://www.eschoolnews.com/2015/01/12/schools-students-access-783/>.

216. *Id.*

217. 2017 Ark. Acts 862 (codified at ARK. CODE ANN. § 6-10-127) (West, Westlaw through 2018).

218. See generally *id.*

219. ARK. CODE ANN. § 4-113-103(a)(3)(B) (2007) *repealed by* 2017 Ark. Acts 426; see generally Mankin, *supra* note 67, at 833.

220. *Broadband in Arkansas*, *supra* note 7.

221. ARK. STATE BROADBAND MANAGER'S REPORT 2016, *supra* note 202, at 13.

Information Technology visited rural communities to learn more about the challenges rural Arkansans face to broadband access.²²² The committee traveled to rural locations in Arkansas and talked with community members and broadband providers about barriers to broadband access in these communities.²²³ Barriers identified are displayed in the table below.

Available Meeting Minutes of Joint Committee for Advanced Communications and Information Technology²²⁴	
Meeting Location	Challenges Identified
University of Arkansas-Hope- Texarkana	<ul style="list-style-type: none"> • Expense of the cost to install and maintain fiber in rural communities • Increase in pole attachment fees charged by smaller electric cooperative companies²²⁵ • Lack of homes/potential customers located on rural roads and highways • Increasing reliance of rural residents upon wireless technology
Southeast Arkansas Education Service Cooperative, Monticello	<ul style="list-style-type: none"> • Low population/potential customer base • Accessibility to towers and affordable equipment • Finding a direct path to small communities and getting data to the information highway

Noting these barriers, stakeholders predicted the committee would present a comprehensive, mixed-methods approach to overhaul state broadband policy.²²⁶ Legislators reported this comprehensive plan would consist of an auction process that ensures investment in underserved areas.²²⁷ This would take place by a value-based grant program application process,

222. *Id.*

223. *Id.*

224. Table content attributable to *id.*; construction of table by author.

225. *See supra* Part II.C.2.

226. Interview with Speaker of the House Jeremy Gillam, Ark. House of Representatives (Feb. 16, 2017).

227. *Id.* (Similar to a reverse bidding process—consisting of state funds (funded from Connecting America Fund Phase II funds) and requiring a matched investment from the winning bidder).

valuing certain factors²²⁸ over others and directing more funding for a higher-scoring community.²²⁹

Other parts of this legislation were reported to focus on modernizing financial infrastructure, such as the High Cost Fund, which would allow alternative broadband providers in rural service areas to receive a portion of this funding that residents were already contributing to.²³⁰ This arrangement would ensure that consumers' funds are supporting services that will be serving them in the end, and not funding broadband deployment to an area that would not benefit the consumer.²³¹ Critics of opening up the high-cost fund to other providers said that this action would be too controversial and attract too much attention from investor-owned telecommunications lobbyists to ever be passed into law.

Legislators failed to introduce comprehensive broadband reform. On the bill filing deadline, legislators filed six shell bills that appeared to be associated with this plan, but all substance for this "comprehensive reform" quietly died behind closed doors.²³² H.B. 1410 served to prohibit telecommunications providers from restricting residential internet data usage, which may have impacted the affordability of internet services, but died in committee.²³³ H.B. 2097 would have created an income tax credit for 1% of total costs to provide infrastructure to bring broadband internet access service to the underserved or unserved, but again, died in committee.²³⁴

At the time of filing, it seemed that hope for comprehensive broadband reform moving rural Arkansas forward could have rested on H.B. 1926, described as "an act to create The Wireless Communications and Broadband Infrastructure Deployment Act."²³⁵ Unfortunately, this bill was yet another thinly veiled attempt to maximize profits for investor-owned utilities by branding lower pole attachment rates as a means of achieving broadband deployment.²³⁶ It, too, died in committee.²³⁷

228. For example, likely factors used will be statistics such as customer density, percentage of consumers who are underserved or unserved, cost of deployment, existing infrastructure, etc.

229. Interview with Speaker Gillam, *supra* note 226.

230. *Id.*

231. *Id.*

232. H.R. 1410, 91st Gen. Assemb. (Ark. 2017); H.R. 1926, 91st Gen. Assemb. (Ark. 2017); H.R. 2097, 91st Gen. Assemb. (Ark. 2017); H.R. 2099; Ark. S. Res. 651; S. Res. 732, 91st Gen. Assemb. (Ark. 2017).

233. *See* H.R. 1410.

234. *See* H.R. 2097.

235. *See* H.B. 1926 (The title of this bill reflects the overarching trend of the investor-owned telecommunications industry blaming poor broadband deployment rates on expensive pole attachments, instead of the reality that servicing areas with low customer density is not profitable for the business); *see supra* Part II.C.2.

236. *See* H.B. 1926.

237. H.B. 1926.

After legislators touted a comprehensive, revolutionary plan to bring broadband home to rural Arkansas that would be public by October of 2016,²³⁸ no revolutionary plan was ever made public. Little, if any, progress was made in the 91st General Assembly. To make a difference for Arkansans, the 92nd General Assembly must go beyond the “one hand on deck” approach of simply relying on private industry; Arkansas needs all hands on deck, once and for all.²³⁹

IV. CONCLUSION

Efforts to close the digital divide have fallen short in rural Arkansas. The lack of access to broadband disparately affects low-income households, minorities, and the less-educated population.²⁴⁰ Populations in the greatest need of access to advanced healthcare, education, and government services have the hardest time accessing these services.²⁴¹ Arkansas communities are facing challenges to community and economic development and are combatting an out-migration of young, educated residents; broadband access is needed for rural communities to survive in Arkansas.²⁴²

In American society, success and quality of life are rooted in connections. In the same way that electricity, roads, vehicles, telephones, and mail have created connectedness from one community, region, or country to another, there is still connectedness yet to be achieved. Broadband access is about connectedness—connecting children to education, the sick to healthcare, small businesses to customers, and these businesses to a growing world economy.

Broadband access in rural Arkansas can only be achieved if rural communities are empowered to solve this problem for themselves, a feat that will be accomplished by cooperatives and communities who have fought this fight before and need no profit to provide services. The General Assembly need not help rural Arkansans help themselves; it must only allow it. The government must stop simply subsidizing the telecommunications industry in hopes it will take care of rural America on its own; rural communities must be enabled to hold their own fate. Rural Arkansans turned on their own lights. So too, rural communities will bring broadband home.

238. See ARK. STATE BROADBAND MANAGER’S REPORT 2016, *supra* note 202, at 13.

239. See generally Trostle & Mitchell, *supra* note 162, at 5.

240. See *supra* Part I.

241. See *supra* Part I.

242. See *supra* Part II.A.

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